THERAPEUTIC JURISPRUDENCE: A POSSIBLE PRESCRIPTION FOR A HYPERTENSIVE CRIMINAL JUSTICE SYSTEM

A Thesis Submitted by

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ABSTRACT

Introduction: The current, or traditional, justice system in Australia is deteriorating, with overcrowded prisons and rising recidivism rates. Therapeutic jurisprudence and restorative justice have both shown promise as alternatives to the retributive nature of traditional justice. Restorative justice provides interventions that seek offender accountability and reparation, victim participation and restoration to survivor, and community involvement and healing; the methods have borrowed from Indigenous models. Therapeutic jurisprudence has the ability to handle diverse crimes more effectively than the traditional approach. It takes a problem-solving, therapeutic stance, based on wellbeing as its core tenet, and making use of evidence-based psychological theories such as pragmatic psychology to operate effectively through existing legal structures to utilise its resources to bring about a much-needed transformation to an ailing judicial system.

Purpose: The purpose of this thesis is to make a comparison of the three judicial approaches—traditional justice, restorative justice, and therapeutic jurisprudence—to explore the current model of Australia's judicial system, and thereby develop a proposed model for long-overdue change.

Aim: The overarching aim of this thesis is to examine the current judicial system and provide a greater understanding of alternative approaches to traditional justice system retribution and a system based on the wellbeing of participants.

Significance: Despite a wealth of articles on restorative justice and therapeutic jurisprudence, few decisive statements have been made for a fundamental change in the judicial system. This thesis addresses this gap by proposing a conceptual model with therapeutic justice and restorative justice as its key drivers.

Proposition: The overall value of therapeutic jurisprudence and restorative justice lead to greater wellbeing, higher rehabilitation, and lower levels of recidivism than traditional justice does.

Methods: This thesis applied a qualitative approach to research based on a Constructivist philosophy and making use of thematic analysis in its design. This design is suitable for identifying perceptions and scenarios that the literature suggests to obtain key themes. An

inductive method was used to derive the core thematic codes. This thesis has developed a conceptual model from the literature, based on codes and themes derived from the literature and thematic analysis. This process is at the core of this thesis' unique contribution to knowledge.

Results: The findings revealed eight codes and eleven themes. Codes are (A) failure of the system; (B) social and cultural barriers; (C) community as restorative; (D) reoffending youths; (E) therapeutic jurisprudence is earning recognition in its own right; (F) offender wellbeing; (G) amalgamation of justice systems; and (H) victim participation and offender autonomy. The eleven themes are (1) Retribution underpins traditional justice, causing harm to offenders; (2) Victim protection and involvement are compromised; (3) Recidivism is a core concern; (4) Rates of recidivism increases for certain demographics; (5) Offenders can repair the harm done while being supported; (6) Offering conference over court is beneficial and prevents reoffending; (7) Traditional and therapeutic systems cannot be judged together using normal standards of measurement; (8) Therapeutic jurisprudence is an effective way to reduce recidivism rates; (9) Court law integration with therapeutic jurisprudence is beneficial; (10) Therapeutic jurisprudence can be used as a framework for restorative justice; and (11) Incorporating both therapeutic and restorative methods ensures victim autonomy and offender participation. Two core findings were that traditional justice is failing and that therapeutic jurisprudence is well-placed to take its place. This led to a new model being derived.

Conclusion: The overall value of therapeutic jurisprudence, and to a lesser degree, restorative justice, leads to greater wellbeing, higher rehabilitation, and lower recidivism than traditional justice does. The new proposed model is a unique contribution to the legal field.

Keywords: Australian judicial system, retribution, recidivism, rehabilitation, therapeutic jurisprudence, restorative justice

CERTIFICATION OF THESIS

This Thesis is the work of Scott Furlong except where otherwise acknowledged. The work is original and has not previously been submitted for any other award, except where acknowledged.

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Student and supervisors' signatures of endorsement are held at the University.

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ABBREVIATIONS

ACT	Australian Capital Territory
COMMIT	Compliance Management or Incarceration Northern Territory
DNA	Deoxyribonucleic acid
FBI	Federal Bureau of Investigation
HOPE	Hope Opportunity Probation with Enforcement
IFCE	International Framework for Court Excellence
ITT	Intention to Treat
MPSR	Master of Professional Studies [Research]
NJC	Neighbourhood Justice Centre
PTSD	Post-Traumatic Stress Disorder
PTSS	Post-Traumatic Stress Symptoms
RISE	Reintegrative Shaming Experiments
RJ	Restorative Justice
RJC	Restorative Justice Conference
SAJJ	South Australian Juvenile Justice
TJ	Therapeutic Jurisprudence
UK	United Kingdom
US	United States
USA	United States of America
VOM	Victim-Offender Mediation
WBL	Work-Based Learning

1.0 CHAPTER ONE: INTRODUCTION

The purpose of this chapter is to do a comparative analysis of the traditional judicial system with two alternative approaches that have been gaining in popularity and awareness in Australia: therapeutic jurisprudence and restorative justice.

1.1 Overview

This section examines and provides a brief overview of the three approaches to the justice system in the literature.

1.1.1 Traditional Justice

The traditional justice system in Australia, as in many other countries, has as its focus the punishment of crime (McCold & Wachtel, 2003; Gavison, 1991; Walen, 2014; Okimoto, Wenzel & Feather, 2011). There are a significant number of problems with the current adversarial system, including: its emphasis on retribution (Meyer, 2014; Yeager, 2019); the high rate of recidivism (Knaus, 2017; Carcach & Leverett, 1999; Broadhurst, Maller, Maller & Duffecy, 1988; Henshaw, Bartels & Hopkins); overcrowded prisons (Knaus, 2017; Yeager, 2019); having the potential to cause harm rather than wellbeing to participants (Birgden & Ward, 2003; Ness, 2005; Birgden, 2002); excluding victims except as state witnesses (Patterson & Gover, 2020; Laufer, Adler, Mueller & Mueller, 2017); not accounting for differences in culture (Hewitt, 2016); inconsistences across States or Territories (Crime and Justice: The Criminal Justice System, 2020); rising maximum sentences (Knaus, 2017); large numbers held on remand for extended periods (Knaus, 2017), 2009); social exclusion (Macfarlane, 2010); difficulty in obtaining protection orders (Johnsen & Robertson, 2016); and more stringent bail restrictions (Knaus, 2017).

Despite its difficulties, the traditional system has invested in programs to reduce crime (Criminal Justice, 2020). Imprisonment has several negative outcomes: its criminogenic nature increases reoffending; isolation from family and friends; loss of employment opportunities; overcrowding undermines rehabilitative efforts and programs, and more

incidents of mental health issues and violent events traumatise offenders (Knaus, 2017). On the other hand, rehabilitation instead of imprisonment decreases costs and negative outcomes (Yeager, 2019).

1.1.2 Restorative Justice

Two interventions that are being employed as alternatives to the traditional justice system are restorative justice and therapeutic jurisprudence. Restorative justice aims to reduce and redress crime (Johnstone, 2011). It includes three primary participants: the offender; the victim; and the community (McCold & Wachtel, 2003; Umbreit & Zehr, 1996), as well as secondary stakeholders such as the officials and members of groups whose areas of operation are involved (McCold &Wachtel, 2003).

Restorative justice follows a restorative approach characterised by high control and high support so that it deals with the wrongdoing and expects the offenders to take responsibility, but also shows respect to them and aims to restore them to their communities (McCold & Wachtel, 2003). The intervention offers a shorter processing time, lowered recidivism (Hewitt, 2016); Bouffard, Cooper & Bergseth, 2016), victim-offender mediation (McCold & Wachtel, 2003), greater offender accountability, a higher rate of apologies than traditional courts, and less distressed victims who are less likely to be afraid of revictimisation (Poulson, 2003).

Restorative justice may reduce reoffending by 15-20% (Hayes, 2005). It reduces emotions such as fear, anxiety, and anger in victims and there is greater compliance with agreed reparations; however, certain concerns are noted, such as that offenders have a higher level of satisfaction than victims; finally, it works best paired with rehabilitation (O'Connell, 2017). Restorative justice shares the punishment and rehabilitation aspects with traditional justice (Daly, 2005).

McCold and Wachtel (2003) proffer the theory of restorative justice as a theoretical framework for restorative justice. In the UK, key findings for restorative justice were high participation of victims when offenders were young, indirect mediation was preferred by victims but they still participated in the intervention if direct mediation was the only

option; offenders, victims, and community had approximately equal speaking time, and although emotions were vented, aggression was minimal (Ho, 2018). Ho (2018) also found less recidivism in the two years after the sessions, zero criminogenic effects occurred, the degree of awareness of the harm offenders caused was significantly related to reduced recidivism. Cost-effectiveness produced mixed results. Schemes claiming to be practicing restorative justice received funding in England while not being what they stated (Miers et al., 2020).

By contrast, Gavrielides (2014) discovered practitioners in prisons in the UK carrying out restorative justice interventions not knowing that this is what they were doing. Limitations of restorative justice apply to incorrect application, limited reparation, poor victim involvement, not engaging the community, officials being entrenched in the traditional justice culture (Hoyle & Rosenblatt, 2015), and the length of interventions do not improve on delays in traditional courts (O'Connell, 2017).

There have been no tests of restorative justice in handling homicide, violent crimes, and sexual crimes (O'Connell, 2017); it has mostly been used with juveniles who committed minor offenses and is only applied at the sentencing stage, and there are statistical errors of reporting (Poulson, 2003). According to Bruce and Bolitho (2019), restorative justice programs have been undertaken with criminals convicted of sexual violence, armed robbery, manslaughter, and murder but all these interventions took place with the offenders behind bars involving exchanges of letters or family conferences. These were carried out by the Victim Support Unit in New South Wales (Bruce & Bolitho, 2019).

1.1.3 Therapeutic Jurisprudence

The other intervention, therapeutic jurisprudence, secures ways to improve the psychological wellbeing of persons coming into contact with the law and to minimise the harm that is experienced (Birgden & Ward). Therapeutic jurisprudence offers the means to transform the current legal system (Stobbs, 2013; Henshaw, Bartels & Hopkins, 2019). Its goal is rehabilitation (Arstein-Kerslake & Black, 2020). The "Good Lives" psychological theory parallels the wellbeing component that is core to therapeutic

jurisprudence (Birgden, 2002). This intervention has a broad range of applications: environmental crimes, drug problems, mental health, and domestic violence (Boyd, 2008).

In contrast to restorative justice, therapeutic jurisprudence works through the judicial system, makes use of judges, and does not compromise due process (Boyd, 2008). Unlike restorative justice, therapeutic jurisprudence shows better administration, reduced caseload, lower costs than traditional justice while also reducing recidivism (Boyd, 2008). It is also able to intervene at any stage in the judicial process and to handle environmental crime, domestic violence, drugs, children's courts (Boyd, 2008), anger, and risk management (Goldberg, 2011). Precisely, Therapeutic aims to achieve therapeutic and anti-therapeutic impacts of legitimate forms and processes for individuals' wellbeing, particularly directing toward rehabilitating the offenders. Wexler and Winick articulated Therapeutic Jurisprudence in 1980 as a law meant to impact people's lives (Wexler, 2000). Their perceptions followed from previous law structure and legal system that individuals were not benefiting from the reforms employed to behavioural changes and problem-solving in various settings. Therapeutic Jurisprudence looks at specific types of rehabilitative programs and contexts and is mainly centred on cognitive variety (Wexler, 2000).

The rise of the concept of Therapeutic Jurisprudence overtime has seen an evolution in its application. King, Freiberg, Batagol and Hyams (2014), highlight, scholars along with legal and health practitioners soon began to explore the concept of Therapeutic Jurisprudence and how it applied to their work. Judges too began to explore how to incorporate Therapeutic Jurisprudence in their courtrooms. This has led to the emergence of therapeutic court programs such as Drug Courts (King, et al. 2014). Therapeutic justice Nunga and Koori Courts have also reduced crime rates for Aboriginals (King & Auty, 2005; King, 2008).

A structural framework that has been recommended for legal reform, the *International Framework for Court Excellence* is complementary with therapeutic jurisprudence (Richardson, Spencer & Wexler, 2016). In fact, therapeutic jurisprudence may provide a framework for restorative justice (Schopp, 1998). Therapeutic jurisprudence seeks to treat

the underlying causes of crime (Hueston & Hutchins, 2018) and takes a humanistic, client-centred approach (Imiera, 2018) with facilitated hearings to protect victims and speak on their behalf and seek healing solutions (Johnsen & Robertson, 2016). Both restorative justice and therapeutic jurisprudence are practical, therapeutic, problem-solving, and make use of the traditional judicial basis; differences are that restorative justice has process-oriented values and therapeutic jurisprudence does not support shaming (Johnsen & Robertson, 2016).

1.2 Significance of the Research

The thesis is significant to all those involved in the judicial process, from police officers to probation officers. It provided a comprehensive analysis of the traditional justice system and the reasons why it is not meeting the objectives of reducing recidivism and decreasing the numbers of inmates in prisons. It also identified those aspects of the law, which are not conducive to the wellbeing of offenders, victims, or the community. A comparison was made between the traditional justice system and restorative justice and therapeutic jurisprudence and a new model was proposed.

1.3 Aims and Objectives

The overall aim of this thesis was to contribute to a greater understanding of therapeutic jurisprudence as the key approach to a failing traditional justice approach, based on retribution and detention of offenders. Traditional justice does not support the wellbeing of the participants who come into contact with the law as a result of a crime committed. Prisons are overflowing in Australia and recidivism rates are high. Restorative justice has had some success too. This thesis proposed greater inclusion and synergy of therapeutic jurisprudence and restorative justice within the current judicial system.

1.3.1 Specific Objectives

Specific objectives were to:

- Compare traditional justice, restorative justice, and therapeutic jurisprudence under:

    - Approaches to justice;
    - Retribution, recidivism, and rehabilitation; and
    - Research studies;
- Analyse approaches and determine the most effective judicial system for Australia;
- Propose a new model; and
- Recommend implementation of the proposed model.

1.4 Rationale

Despite plentiful articles on therapeutic jurisprudence and the problems in the current model of the judicial system, as well as on restorative justice, none of the articles has proposed a transformational and key role in the justice system for therapeutic jurisprudence. Considering the numbers of offenders and victims that will still be exposed to harmful processes and outcomes related to the existing justice system, it is clear that much swifter transformative and visionary change is needed. This research analyses the literature on justice systems and conducted a comparative analysis of the three approaches to the justice system, which indicated the need for transformative change in the existing justice system.

1.5 Motivation for Research

The researcher was an operational police officer for 20 years and has participated in restorative and therapeutic practices. The researcher observed restorative justice and therapeutic jurisprudence have a valuable role in addressing and changing offending behavior whilst providing greater support for victims of crime; proving a victim-centric judicial system that is centered on the wellness of victims, offenders, and the community. To understand if this observation was valid and had some merit, the researcher took up this task of conducting a thorough analysis of the three approaches to justice to determine if processes could be adapted to allow therapeutic jurisprudence and restorative justice to play a greater role in the Australian judicial system to reduce recidivism and increase wellness for all participants. This resulted in a new model of the judicial system, which is the unique contribution of this research.

2.0 CHAPTER TWO: LITERATURE REVIEW

In 2007, the Deputy Prime Minister[1] of Australia stated that "Too many individuals and communities [in Australia] remain caught in a spiral of low school attainment, high unemployment and underemployment, poor health, high imprisonment rates, and child abuse…. Tragically, Indigenous Australians are highly likely to be socially excluded. Australians can also be at risk of social exclusion when living in suburbs which lack services and a sense of community" (Gillard, 2007; p. 1).

The concept of social inclusion has gained credibility in Australia. Spearheaded by Gillard, it has been integrated across disciplines into public policy. Gillard's statement has outlined the criteria for social exclusion from ethical citizenship (Macfarlane, 2010). To be included, one must complete schooling, be fruitfully employed, maintain their health, and not be an offender or abuser. Citing Foucault (1980), Macfarlane stated that such cataloging can be both empowering and disabling. On the one hand, with its diversity, Australia welcomes all its citizens to share in these societal benefits. It can even be viewed as a reasonable requirement of any responsible citizen who has the right to the advantages the country offers. On the other hand, it likewise excludes those who have fallen short of the mark or been unable to achieve it through some incapacity or weakness or circumstances beyond their control. This failure gives the person the appearance of behaving unreasonably as defined by society. Such individuals and their families find future success ever elusive and themselves subjugated to increasing institutional control. Thus, the chance for diversity to flourish and be appreciated is lost (Macfarlane, 2010).

This chapter explored the traditional justice system currently in practice and two alternative approaches: restorative justice and therapeutic jurisprudence. The chapter analyses the three approaches as follows: Section 1 describes the background, overview, theoretical models, and perspectives on retribution, rehabilitation, and recidivism, and case studies conducted by each approach to justice. A comparison of the three approaches is provided in Section 2. Section 3 includes a short discussion on police officers' attitudes,

[1] Julia Gillard

policies, and procedures towards restorative justice and therapeutic jurisprudence. The research proposition, research question and variables are discussed in Section 4; Finally, Section 5 concludes with an overview of the current model, which this thesis claims should be re-conceptualised. This research posits that the traditional justice system is hypertensive and that therapeutic jurisprudence and restorative justice, offer viable alternatives to ensure that the need for justice is met while prioritising the wellbeing of both victims and offenders and reducing prison sentences and recidivism effectively.

This research demonstrated that high imprisonment rates was a real problem in Australia which was not being adequately addressed by approaches applied by the traditional approach. A harsher approach to offending has not sought out the reasons for it occurring and has failed to achieve any success in crime reduction or decreasing recidivism (Knaus, 2017). Both restorative justice and therapeutic jurisprudence provide alternatives to the current adversarial criminal justice system (i.e., the traditional justice system).

2.1 Traditional Justice

2.1.1 Background

The Australian legal system is based on the criminal justice system that was in place in England when Australia was colonised (Crime and Justice: The Criminal Justice System, 2020). Interpretation, application, and development of the law by Australian judges over time and parliamentary legislation have resulted in the justice system in place in Australia today. The Australian legal system owes much to the former Justice of the High Court of Australia from 1903 to 1919, Sir Samuel Griffith, who produced the *Criminal Code*. This document has been influential in Queensland, Western Australia, Tasmania, and some former British colonies (Findlay, Odgers & Yeo, 2009). However, other states and Territories did not take it on board, thus lack the legislation to categorise instances and the overlaying principles that enhance conceptual approaches to the law. All this results in a non-standardised legal system nationally (Findlay, Odgers & Yeo, 2009).

There are seven legal systems in Australia; one is federal and the other six are State or Territory systems. Each of the State or Territory systems has its own criminal justice

structure so that inconsistencies have crept in. Differences occur in penalties and corrections, laws, and administration of justice (Crime and Justice: The Criminal Justice System, 2020). Alignment of the various sub-systems to overcome these inconsistencies is a focus of the overall Australian legal system.

According to Biles (2001), the following are regarded as offences against the Commonwealth: drug importation and social security law violations (these are also the most commonly prosecuted) and offences against person and property that take place on Commonwealth property. The Australian Constitution provides for the Commonwealth to make laws as specified in the Constitution; this includes taxation, defence, foreign affairs, and trade and commerce. Everything else is under the independent legislative power of the States and Territories (Crime and Justice: The Criminal Justice System, 2020). Tasmania, Queensland, and Western Australia are referred to as 'code' States, having codified the extent of the law. By contrast, 'common-law' States have not done so; these are Victoria, New South Wales, and South Australia (Biles, 2001). Criminal law development is thus the domain of the States and Territories. The Australian Capital Territory and the Northern Territory are independent Territories (Biles, 2001). Each of the State and Territory systems are dependent on the constitution as a guide in exercising power in the course of operation hence each state is a subject of jurisdiction of federal government (Crime and Justice: The Criminal Justice System. 2020).

Criminal Justice (2020) describes the various initiatives undertaken by the Australian Government to reduce crime. Over two rounds in 2014 and 2015, respectively, the Minister for Justice made $19 million and $29.4 million available for the Safer Streets Program. In 2014, 81 projects received funding and a further 53 were funded in 2015. The focus of the program was for areas acknowledged as crime hot spots or prone to anti-social behaviour. In round one, the attention was on initiatives in troubled retail, commercial and entertainment locales in each precinct. The second round concentrated on at-risk youth engagement activity projects, Bluelight Organisations, and Police and Citizen Youth Clubs. Additional funding went to Neighbourhood Watch Australasia for 'Youth off the Streets' and community-based crime prevention (Criminal Justice, 2020). Such initiatives aim to catch youth before they commit crimes and get involved in the judicial processes

or to help them turn their lives around after minor offenses so that they do not re-offend. However, once the youth has committed the crime and been arrested, they move through the criminal justice system.

There are three stages to the criminal justice system. The first involves the investigation of the crime or offence. This is handled by State and Federal police and other law enforcement bodies such as the Australian Criminal Intelligence Agency and Queensland's Crime and Corruption Commission. Secondly, adjudication occurs via the courts. Lastly, the correctional aspect involves the penal system and correctional authorities (Crime and Justice: The Criminal Justice System, 2020). These stages are pivots for making changes in the justice system.

2.1.2 Statistics and Status Quo

Knaus (2017), notes that a prison sentence is intended as a last resort. The Magistrates are used to dealing with most offences with judicial disposition of fines, bonds and imprisonment of offenders. The most used disposition is fines. The high fines imposed by the Australia Justice System taken as the basis of reforming individuals as adverse to individual psychological and social alignments (Larsen, & Milnes, 2011). Rising numbers of maximum sentences and the tightening of bail restrictions have led to a burgeoning rate of imprisonment. In 2017, 13,182 inmates were not sentenced and were being held on remand. This group accounted for a third of the prison population in Australia, and court delays extended their time incarcerated before sentencing (Knaus, 2017). The rate of un-sentenced Torres Strait Islanders rose from 568.5 per 100,000 of the total population in 2014 to 773 prisoners per 100,000 in 2017. On average, there were 187.2 inmates for every 100,000 Australian adults. These un-sentenced prisoners may be housed with sentenced criminals due to overcrowding (Knaus, 2017). Such conditions do not permit basic care, much less rehabilitation. Delays in the courts are also problematic as cases may be rushed, leaving no time for finding holistic solutions.

The Guardian ran an article with the headline "Prisons at breaking point but Australia is still addicted to incarceration" (Knaus, 2017). The author of the article states that the

incarceration rate jumped by 40% within a period of five years between 2012 and the third quarter of 2017. Further, in 2015/16 occupancy of New South Wales (NSW) prisons went up from 112% to 122% within one year. To handle overpopulation, the response was to reopen the Berrima facility which caters for 75 prisoners, and $3.8bn was allocated to expand existing prisons and build new ones, including the Clarence Correctional Centre in Grafton, NSW that is to be the largest correctional facility in Australia. This expenditure provided a total of 3,000 additional beds. These funds could have been used for early remediation instead, to divert youths and young adults from a life of crime, and rehabilitation of existing inmates (Knaus, 2017). Instead of focusing on fixing the shortcomings in the justice system approach, prison overpopulation was met with the construction of additional correctional facilities (Knaus, 2017). Clearly, the focus on punitive measures, notably imprisonment, was not solving the problem of crime.

2.1.3 Definitions

The concepts of retribution, rehabilitation, and recidivism are important in the context of the criminal justice system. Retribution plays a prominent role in the traditional justice system approach to justice yet has been ineffectual in discouraging offenders from committing crimes as evidenced by the crime and recidivism rates. Society in general, and victims, are affected by crime which can affect economic productivity when victims miss time at work and cause property values to decline while resulting in personal trauma and loss and the fear of revictimisation. Rehabilitation aims to address the causes of crime so that the crime rate is reduced, and the chances of recidivism are lowered. The meanings of the terms are unpacked below:

Retribution

According to *Encyclopaedia Britannica*, retribution is a "…response to criminal behaviour that focuses on the punishment of lawbreakers and the compensation of victims. In general, the severity of the punishment is proportionate to the seriousness of the crime (Meyer, 2014; para.1).

Rehabilitation

The National Institute of Justice states that rehabilitation “refers to the extent to which a program is implicated in the reduction of crime by "repairing" the individual in some way by addressing his or her needs or deficits” ("Recidivism", 2020; para. 3).

“…essentially the process of helping inmates grow and change, allowing them to separate themselves from the environmental factors that made them commit a crime in the first place” (Madison, n.d.; para. 5).

Nature versus nurture is the classic argument. Nurture posits that individuals are not born criminal but that influences in the environment (alcohol and drugs, poverty, bad or absent parenting, mental illness, and lack of education) teach them to make bad choices (Madison, n.d.).

Recidivism

“Recidivism is measured by criminal acts that resulted in rearrest, reconviction or return to prison with or without a new sentence during a three-year period following the prisoner's release”, as noted by the National Institute of Justice ("Recidivism", 2020; para. 1).

Desistance

“a process ‘by which people cease and refrain from offending” (Henshaw, Bartels and Hopkins, 2019 citing McNeil, 2009; p. 1416).

2.1.4 Problems in the Current System

Criminals and offenders have been imprisoned for crimes they have committed, dating back centuries. The main aim of this is to prevent further wrongdoing and to bring closure to the victims and the families of the victims. There are many issues that come from this form of punishment. Often, the offenders will repeat the crime, maintaining prisons and prisoners is costly, and in many cases the incarceration of innocent people has happened,

to name a few. Instead of rehabilitating and reshaping the wellbeing of individuals, the legal process applied tends to disempower offenders subjected in the court system because there is no opportunity to express themselves and their position. To retrench their offensive behavior, the court system repudiates the defendant's chance to explain their appropriateness in changing their despicable behavior. Some expert such as Dr. Andrew Cannon term the current Australia legal adversarial system as "traditional paternalistic model" that fail to recognise and acknowledge offender's self-expression (Larsen, & Milnes, 2011). Both scholars and law experts have explored other ways to augment the way the law operates in dealing with crime and punishment and have motioned for a move towards a complete alternative to the current judicial system (Moss et al., 2019).

The adversarial legal system in Australia constantly purports to damage the offender's psychological base and mental wellbeing. The legal process used in the adversarial legal system dominates the adverse effects of mental, emotional, and community-based disorders from the applied imprisonment and offending norms, thus promoting Indigenous over-utilisation in the judicial systems (Larsen & Milnes, 2011).

Australia continues with its long history of punishment despite the failure of imprisonment to reduce criminal offences and reoffending behavior (Knaus, 2017). Billions of Australian dollars feed this obsession at a cost to the taxpayer. One of the specialists stated that governments such as Australia and the UK operate on the notion that this is what their constituents want in order to feel safe (Knaus, 2017).

Each jurisdiction has governing guidelines when it comes to the sentencing of offenders. For example, in Queensland Section 9 Penalties and Sentences Act 1992, provides criteria as a justification for imposing sentences. These are to punish the offender in the most just way, to provide conditions in a court order the court feels will help the offender's rehabilitation, deterrence, denunciation of the offending conduct and to protect the community. Although the crime rate has decreased there has been no reduction in the prison population (Knaus, 2017). On the contrary, massive overcrowding characterises Australia's correctional facilities. *'Penal Reform International*,' an organisation dealing with the reformation of the justice system, makes provision for the supply of basic needs

(adequate accommodation, food, and healthcare). With overcrowded prisons, it is imperative that Australia takes a serious look at its criminal justice system (Knaus, 2017). A comparison of different countries undertaken by Yeager (2019) showed that in 120 countries the official capacity in prisons was exceeded by the number of inmates. This rate is increasing to the point that legal systems cannot cope. Results are lowered efficacy, safety, and standards in correctional facilities.

Findlay et al. (2009), argues Australia already transgresses human rights laws in several ways: (1) unspecified and protracted detention of illegal immigrants requesting to be classified as refugees; (2) using generalised criteria of threats to community safety to indefinitely detain prisoners whose term has ended, thus denying legal doctrine; (3) undermining of the accusatorial system and the right to silence by the use of new technology for police; and (4) reducing the rights of e.g. members of motorcycle clubs, thus subjecting individuals to deprivation by virtue of association and not wrongdoing (Findlay, Odgers & Yeo, 2009). All these undermine faith in the law as fair and impartial.

There is a downfall in the traditional criminal justice system clearly shown through reoffence. This illustrates the concern that the system cannot fully meet the requirements to lower crime (Henshaw et al., 2019).

2.1.5 Punishment

According to Gavison (1991) punishment is "the monopolised and deliberate infliction of suffering on the punished individual, after he was convicted of an offence, by the State" (p. 351). Retributivists believe that punitive acts must contain four elements: (1) it must enforce a privation or withdraw an advantage from the offender; (2) the punisher must exact punishment as a deliberate act and not coincidentally in pursuit of another goal; (3) punishment is a response to a wrongful act or omission; and (4) punishment must communicate censure in response to a wrongful act or omission (Walen, 2014). Walen (2014) puts forth three principles by which the notion of retributive justice can be grasped: (1) that there is a moral imperative to administer punishment in proportion to the crime; (2) that a legitimate administrator of punishment apply justice has inherent moral goodness; and (3) that it is wrongful to inflict punishment on the innocent or more than

just desserts on offenders.

'An eye for an eye', just desserts, payback, a debt owed to society that reinstates the *status quo ante* that existed before the wrongful act, do not explain why the offender loses the right to not be punished (Walen, 2014). Punishment is not revenge, which invokes pleasure at inflicting suffering, is personal and has an affective aspect. Retribution has a reason for punishment, even if no revenge motive exists. Retributive justice may also be a way to transfer the duty of punishment from individuals to the state to prevent vigilantism, thus positing a utilitarian rationalisation of punishment (Walen, 2014). The right to be held accountable for wrongdoing, the desert principle involves desert subject (the offender), the desert object (what is deserved), the desert basis (why it is deserved), and the desert agent (the person tasked to administer punishment). To some, this is seen as the offender having the right to be punished, which Walen (2014) interprets as the right to be held accountable and punished and not as a dangerous or mad animal that needs to be confined.

The right to punish vested in the state has been questioned when it encourages social injustices or does not address them or overlooks the political and civil rights of the socially disadvantaged; others demand that such inequalities be remediated with mitigated sentencing (Walen, 2014). The offender could conceivably exercise self-punishment and experience remorse but, citing Duff (2001), (Walen, 2014) notes that the offender would still be required to experience formal punishment and public censure. As Walen (2014) states, punishment is still required but this must not be suffering but the suffering of punishment, and further, that this should be objective, not subjective hardship. Retributivism is agent-centered whereas revenge is victim-centered. This deontological view matches punishment to crime and not the outcomes the crime caused; citing Robinson (2008), Lee (2011) notes that 'deontological deserts' arise from moral philosophy. 'Vengeful deserts' are based on retribution for the harm to the victim. 'Empirical deserts' are arrived at through assessing blameworthiness[2]. Deontological versus vengeful perspectives balance on notions of what penance is warranted. Plea

[2] Lee has some arguments with these notions.

bargaining deviates from just deserts (Walen, 2014). The criminal law understanding of deontological is that even if greater punishment benefits society it should not be more than what the offender deserves (Lee, 2011).

Every individual has a justice orientation, either retributive or restorative (Okimoto, Wenzel & Feather, 2011). A retributive outlook is based on the "*unilateral imposition of just deserts against the offender"* while a restorative orientation sees justice realising *"a renewed consensus about the shared values violated by the offense"* (p. 255). Results of three studies assessed by Okimoto, Wenzel & Feather (2011) validated these two discrete perspectives, which they noted clarified different inclinations towards justice outcomes. Strelan and van Prooijen (2013) posited that rather than punishment and forgiveness being opposed, forgiveness by victims is probably positively correlated with prior punishment being meted out to their offender. Results of their first study were that friends would be pardoned more frequently for carelessness after participants were geared up for punishment, than by being incapacitated from exacting just desserts. The just desserts motive also operated in the second study, where participants were more sympathetic to an offender a judge had punished than to one who 'got away with it'. Study three illustrated an indirect link between just deserts and forgiveness and no correlation to a desire for vengeance in the setting of continued interpersonal interaction. The conclusion that Strelan and van Prooijen (2013) reached is that forgiveness is made possible after punishment has reestablished the notion of justice.

One difference between retributive and utilitarian models is that the latter is forward-looking to the restorative benefit of punishment, while the former is retrospective, bringing punitive measures after the wrongful act (Walen, 2014). Utilitarian models consider the usefulness of punishment to bringing about a change in the offender. It is considered rational in traditional justice to hold the threat of punishment over citizens and to implement it if an offender transgresses the law. This implies that offenders are obliged to tolerate punishment.

There is a need for justice. But the current costs of instituting and sustaining all the structures of the penal system are staggering. In the US, $38 billion was spent in 2001

(Walen, 2014). There are errors such as convictions of innocent people, over-zealous laws that over-criminalise, and collateral damage to families of the accused (Walen, 2014). It has already been shown that despite the Australian expenditure, prisons are overcrowded and the current traditional justice approach to dealing with offenders is ineffective. Recidivism is high. Walen warns against tyrannical control and abuses of power for political or other purposes, enacted through the judicial system. He states that only a matching gain in crime prevention can justify the expense incurred by the need to punish. Declaring that nearly 11 million people are incarcerated globally, Yeager (2019) calls it an 'epidemic'. The incarceration rate is one of the key variables in assessing any country's criminal justice system

From the 1960s there has been a tendency for harsher responses to crime as the public expressed its dissatisfaction over climbing crime rates. This increased the chance for false accusations and disproportionate punishment. Numerous victims' rights groups have emerged since then. Amongst the demands was the restitution of medical costs, income lost while away from work, and damage to property. Other rights are a speedy trial, involvement in judicial processes, and protection from revictimisation (Patterson & Gover, 2020). In the search for alternatives, victim individualisation could form the basis for penological policy and legal reform. For example, characteristics and attributes of the victimisation process could be used to aggravate adjudication and sentencing (Laufer, Adler, Mueller & Mueller, 2017).

Whether censure and exacting stringent punishment are merited, even if retributivism can rationalise just deserts is questionable (Walen, 2014) as it removes an individual's right not to be punished. Censure can be accepted as respecting the offender and the victim, but is harsh castigation necessary and deserved? Retribution is an intuitive belief that wrongs must be balanced with proportional punishment, even if that is the sole gain. The embedded nature of vengeance – an emotive response – and its moral unreliability, and the lack of free will of an individual, and the need to empathise with offenders as products of their mental and environmental arena are noted (Walen, 2014).

Herbert Morris (1968) cited by Walen (2014) provided a theoretical basis for retributivism

– fairness. The concept states that society conveys mutual benefits over living in isolation. At the same time, it imposes restrictions. An offender has assumed a right that others have chosen to forego for the privilege of being a citizen. This conveys an unfair advantage on the offender, which must be canceled out by him/her paying his/her debt to society. There is a utility value to intimidating people with the threat of punishment for wrongful acts. It is possible to avoid punishment by not committing wrongful acts. Those who are guilty of an offence should be punished according to prescribed and institutionalised guidelines. Potential offenders should only be under the threat of proportionate punishment; this tenet is core in retributivism; this is their moral just desert, which as a positive desert claim states the exact amount of punishment and that it must not be exceeded. The negative desert claim avers that only a certain amount of punishment can be meted out. This fine distinction has the positive aspect of respecting the offender (Walen, 2014).

2.1.6 Recidivism

2.1.6.1 General Recidivism Statistics

Australia's recidivism rate went up from 39.5% over the period 2011 to 2012 to 44.6% for the time period 2015 to 2016 (Productivity Commission, 2020). On average these prisoners re-offend within two years of being released (Knaus, 2017). During the period 2016–17 46.4% of prisoners in Australia returned to prison within two years, during 2018–19 (Released Prisoners Returning to Prison, 2020). Figure 1 illustrates the statistics for states and territories. Table 1 shows the total percentages of those who returned to corrective services inclusive of those who returned to prison. In Figure 1 it can be seen that recidivism was highest in the Northern Territory, followed by New South Wales, and lowest in South Australia. Table 2 indicates those returning to prison and those returning to correctional services overall.

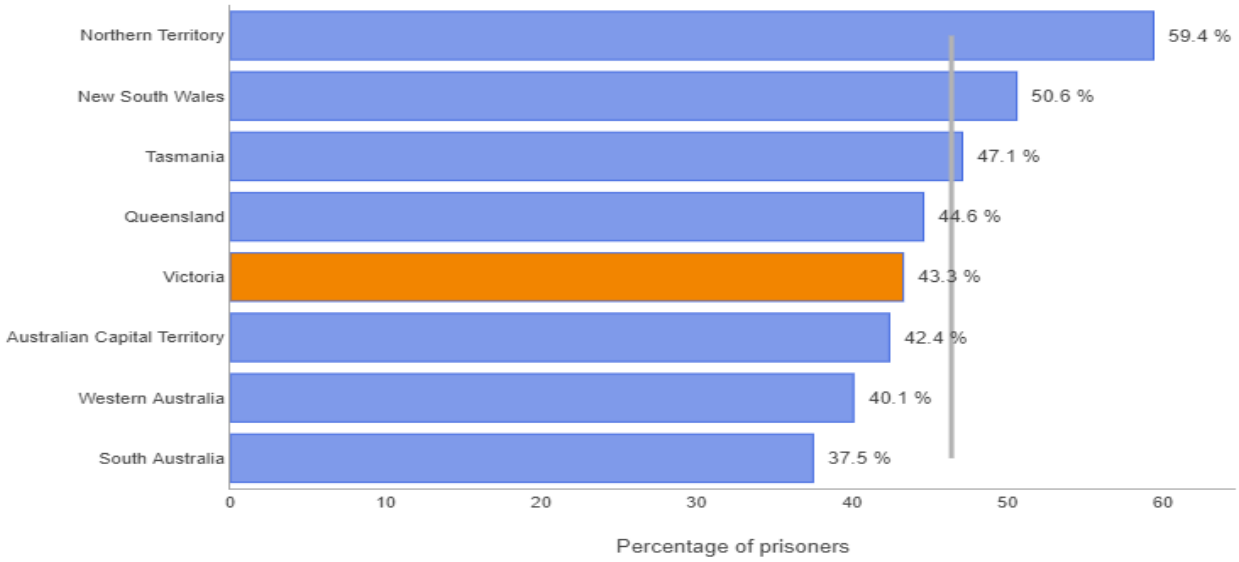

Figure 1: Percentage of prisoners released during 2016–17 who returned to prison within two years ("Released Prisoners Returning to Prison", 2020)

Table 1: Percentage of Prisoners returning to Corrective Services ("Released Prisoners Returning to Prison", 2020)

Jurisdiction	**Percentage of prisoners returning to prison**	**Percentage of prisoners returning to corrective services**
Northern Territory	59.4%	63.1%
New South Wales	50.6%	54.2%
Tasmania	47.1%	56.0%
Queensland	44.6%	56.2%
Victoria	43.3%	57.0%
Australian Capital Territory	42.4%	71.3%
Western Australia	40.1%	48.2%
South Australia	37.5%	44.9%
Australia	46.4%	54.9%

The criminal system sentencing is characterised by punishment, primarily, prevention through restraint, and protection of autonomous decision-making (Birgden, 2002; p.180). Birgden notes that while it incorporates rehabilitation, this is from a risk perspective. It does not take the needs of offenders into account, isolating them from support structures, meaningful employment and even engenders a reduced sense of identity.

There were only four criminal convictions for every hundred attempted or actual cases of breaking and entering, robbery, vehicle theft, and assault in 1996 in New South Wales; furthermore, fifty-three percent of crimes are not reported and only two-thirds of those proceed as cases; this results in inaccurate recidivism statistics (Carcach & Leverett, 1999). According to Carcach and Leverett (1999), a gap exists between actual and recorded cases of crime, which makes it difficult to calculate recidivism rates. For example, court data would underestimate rates and inflate time before reoffending.

Recidivism only refers to re-imprisonment and not to other sanctions. Analysis of all released offenders from Western Australian correctional facilities for the period July 1975 to June 1984 (a total of ten years) was undertaken using failure rate analysis to measure recidivism. Failure rate analysis measures more in-depth aspects than simply the recidivism rate, such as how other variables affect rates. The total population was 11,262. It excluded offenders in police lock-up or remanded into custody as well as those sentenced before July 1975 (Broadhurst, Maller, Maller & Duffecy, 1988). Variables measured, other than the recidivism rate, included race, age, gender, and type of offense, along with marital status, educational qualifications, actual time served, and employment status. Together these ratified the classic failure profile of 80% male aboriginal versus 48% non-aboriginal male's likelihood of recidivism. The median time to fail was 11 months for aboriginal males and 18 months for non-aboriginal males. Aboriginal females had 75% recidivism and took 16 months to fail whereas non-aboriginal female's mean recidivism time was 19 months and only 29% failed (Broadhurst, Maller, Maller & Duffecy, 1988). The value of imprisonment comes under scrutiny when aboriginal prisoners contribute large numbers to the high imprisonment figures and recidivism in Western Australia. Time to re-offend, on all dimensions, was swifter for aboriginal versus non-aboriginal prisoners. Broadhurst, Maller, Maller and Duffecy (1988) recorded that non-aboriginal inmates who had lengthier sentences for offences of greater severity displayed less recidivism. Work release and financial help on discharge were also linked to lower rates of recidivism.

The South Australian Juvenile Justice project in Australia (SAJJ) reconfirmed the variables that predicted recidivism. These included age, race, gender, and previous

reoffending (Hayes, 2005). It also illustrated that remorse and mutually agreed outcomes (reparation) were predictive of a lower risk of reoffending. Queensland also validated the usual factors but found no aspects of restorative justice conferences that were likely to reduce recidivism. Studies in New Zealand, Canada, and the USA also produced mixed results (Hayes, 2005).

2.1.6.2 Juvenile Recidivism Statistics

Data on juveniles have to be considered when looking at recidivism rates. Juveniles might fall under adult courts (from 18 years in NSW) during the period of a research study of five years[3] and thus no longer fall with the rest of the participants who are still juveniles and handled through juvenile court when an offence occurs; this will affect the number of juveniles being measured for recidivism. The time between offending and court appearances is subject to a time lag that also impacts recidivism rates. As the crimes committed by juveniles tend to be of low severity, they are not held on remand pending trial and could re-offend unobserved; this also affects recidivism statistics. See Appendix A for detailed statistics.

In brief, Carcach and Leverett's (2020) five-year Australian study showed that 37.3% of juvenile offenders had a subsequent court appearance. The majority (75%) of participants ranged in age from 15 to 17. Males accounted for 86% of the sample, had higher recidivism rates and shorter periods between reoffending. 45% of the participants were repeat offenders. 85.3% were given an order (supervised or unsupervised) or a fine; community service and supervised orders related to higher recidivism than other penalties. Those with custodial sentences would be habitual offenders and exhibited lower times between offences. The spread of offences was property offences (63.2%), violent offences (16.2%), and drug offences (6%) but no statistically significant differences in time to re-offend. Property and violent crimes were linked with higher recidivism rates. Participants whose cases were heard in specialist children's courts showed higher recidivism than those heard in other courts. These offenders also have a shorter time before reoffending. The overall average time between reoffending for all participants was 17.9 months. From

[3] This causes a problem known as censoring when undertaking duration analysis.

1992 to 1997, in New South Wales 71,560 cases were dealt with of which 35,947 were juveniles (Carcach and Leverett, 2020). In Western Australia 22% of juveniles tried in Children's Court for the period 1991 to 1992 were appearing for the fifth or higher time. These recidivists become career criminals. Over 30% had at least one previous appearance (Carcach & Leverett, 1999). These figures indicate that the existing criminal justice system is not preventing youths from committing crimes or reoffending.

The Australian Institute of Health and Welfare (2020) provides the following latest Australian statistics (these are all supervised sentences, whether detention or community service):

- Juveniles sentenced to detention were 51% more likely to re-offend than the 40% of those sentenced to community service;
- Shorter initial sentences were correlated with a return to offending compared to juveniles with longer first sentences regardless if they were detained or given community work;
- Indigenous juvenile offenders were 1.6 times more likely to be resentenced (55%) before they turned 18 years of age than non-Indigenous juvenile first offenders (34%);
- 40% of juveniles aged 10 to 16, who served community service, were resentenced within 6 months and 57% within 12 months;
- 61% of juveniles aged 10 to 16, who were detained, were resentenced within 6 months and 80% within 12 months.

The statistical information is as follows:

- Between the period of 2000/01 to 2018/19, a total of 37,891 juveniles received a supervised sentence.
- Of these, 4% had an initial sentence of detention.
    - 49% had one sentence only;
    - 51% reoffended before age 18.
- The remaining 96% (36,424) had an initial community-based sentence.

- 60% had one sentence only;
- 40% reoffended.

The statistics indicate that community service is more successful in preventing recidivism than detention, but that longer initial sentences are more effective than shorter ones to achieve the same aim. Indigenous juvenile offenders were more likely to re-offend sooner. However, community service alone is not an effective means of preventing recidivism. A new approach altogether is needed.

2.1.7 Rehabilitation

Probation supervision, i.e., the supervision of offenders who are on probation-by-probation officers, can have a focus on community safety (surveillance model) or rehabilitation (treatment model) (Skeem & Manchak, 2008). The hybrid model postulated by Klockars' theory that combines both has a greater impact on behavior change than either of the models alone (Skeem & Manchak, 2008).

Knaus (2007) notes several effects of imprisonment with negative outcomes for rehabilitation: (a) the criminogenic nature of imprisonment exposes first-time incarcerated offenders to hardened criminals, putting them at greater risk of reoffending; (b) being sequestrated from family and friends; (c) employment prospects cease; (d) finally, overcrowding undermines the efficacy of rehabilitation, disrupts occupational and educational programs, and has higher incidences of mental health cases and violent events (Knaus, 2017). Furthermore, accomplished criminals might teach first offenders' new criminal techniques and encourage them to acquire a tougher attitude that is harder to break through. Being cut off from the community leaves these individuals without a support group. Losing opportunities for legitimate work may make them more prone to re-offend in order to make a living. Families are also negatively affected by the loss of income from the offender and the person's role as father/mother/child (Knaus, 2007).

Such negative effects on the community can be mitigated by focusing on rehabilitation rather than imprisonment (Yeager, 2019). Rehabilitation makes use of techniques like counseling that can avert or reduce long sentences. Research indicates greater public

safety outcomes and subsequent financial savings through rehabilitation as compared to incarceration. Imprisonment has been shown to increase crime and is costly to the taxpayer. It also deprives the family of the offender's income (Yeager, 2019). Not all the costs have a monetary value. For instance, bonds between the offender and their family and community are threatened. Offenders are ostracised, making it difficult for them to re-enter society, find work and become contributing citizens after release. When levels of imprisonment are high, informal social control mechanisms are absent which disturbs child-rearing, family formation, social networks, and cohesiveness (Yeager, 2019).

Ward and Brown (2004) examined the applicability of the Good Lives Model in offender rehabilitation. Whilst ensuring the offender is able to internalise the concept of the program to subsequently alter their behavior, three principles are applied; risk principle, need principle and responsivity principle. The good approach to take is problem-focused as it aims to suppress or minimise emotional or behavioural difficulties on offensive habits. However, the essential approach to take is the Good Lives Model of offender rehabilitation.

Emotional, social and luxury problems arise when Good Lives Models as disorientated therefore it is hard to achieve the wellbeing if Good Lives Models are reduced. Therefore, Good Lives Model problems of an offender are considered in formulating a treatment plan that will conceptualise good lives and wellbeing on them. To ensure rehabilitation, Offender's strength, preferences, primary goods and suitable grounds are taken into account while implementing a treatment plan designing a rehabilitation strategy (Ward, and Brown, 2004).

A study on the comparison of incarceration in different countries showed that in 120 countries the official capacity exceeded the number of inmates (Yeager, 2019). This increasing rate impacts the legal systems capacity to cope, and lowered efficacy, safety, and standards in correctional facilities. This implies that incarceration is not being used for its original, intended purpose, to rehabilitate offenders (Yeager, 2019).

The costs of rehabilitation programs may be a prohibitive factor in driving change in some countries for example in South Africa, the costs of rehabilitation over imprisonment

showed on average a 16% increase per annum including the criminal justice budget. These went up from R5.9 billion to R28.5 billion in one decade (Yeager, 2019), On the other hand, Australia implemented a policy called justice reinvestment that reduced the costs of justice by using evidence-based interventions. Such savings were plowed back into more projects (Yeager, 2019).

2.1.8 Complexity of Issues

Issues surrounding parole, recidivism, and desistance are linked to public safety, retribution, and rehabilitation as two cases of parolees cited in a study were involved a rape and murder (Henshaw, Bartels & Hopkins, 2019). These incidents are a reminder that the traditional justice system is not working. The statistics provided in the *Report on Government Services* for 2017/18 published by the Productivity Commission (Australian Bureau of Statistics, 2020) shows that the imprisonment rate was 66 per 100,000 in 1985; it reached 219.6 per 100,000 with 43,306 people incarcerated in 2019. Parolees were also at an all-time high in 2019, numbering 17,744. Recidivism increased from 40.3% in 2013 to 45.6% in 2018. Nearly half of all released prisoners reoffended and returned to prison within two years, for $4.4 billion in 2017/18, which was 7.8% more than the previous year (Henshaw, Bartels & Hopkins, 2019).

2. 1.9 Environmental crimes

Due to a large number of cases of environmental law violations, many countries accepted the Stockholm Agreement at the United Nations World Congress on the Human Environment and did so again two years later with the Rio Declaration. However, no country developed laws dealing with international environmental crimes. Environmental crimes may require new strategies that can be offered by problem-solving courts and restorative justice (Boyd, 2008), but even more so, therapeutic jurisprudence. Voluntary compliance goes a long way in viewing a case in a more positive light. Three types of voluntary compliance are self-policing, voluntary disclosure, and imposing proactive pre-emptive steps internally (Boyd, 2008). In the USA, the Environmental Protection Agency (EPA) and the Federal Bureau of Investigation (FBI) worked in partnership to increase investigations and reduce environmental crime: environmental law violations cases

increased from 25 in the seventies to 236, and the EPA handed down fines amounting to $122 million in 2000 (Boyd, 2008).

In the USA, Tort law makes the employer responsible for environmental law violations of staff, regardless of whether the employer was at fault; this is called 'respondeat superior' (Boyd, 2008; "Respondeat superior," n.d.). There is a tendency to impose more federal sentences, in addition to fines as a deterrent. More individuals (257,441) than corporations (1,149) have received federal sentencing (Boyd, 2008). This research suggests that therapeutic jurisprudence and restorative justice bring specific advantages to reducing environmental violations. These include quicker turnaround time, better self-reporting, improved monitoring, offender accountability, greater community involvement, and reduced recidivism. The advantages of alternatives to fines and prison sentences include retaining the employment of the individual as a unit of labour, lower taxes, educational opportunity, and achieving deterrent objectives.

2.2 Restorative Justice

The previous section covered traditional justice, or retributive justice, best defined by the punishment of crime. Punishing lawbreakers and relegating victims to the back burner does not repair the damage done by crime (McCold & Wachtel, 2003). The focus of restorative justice is dual, in that it aims to reduce crime as well as the injury it has caused (Johnstone, 2011). McCold and Wachtel (2003) posit restorative justice as meeting the emotional and relational needs of the participants and the community thus leading to societal wellbeing. Restorative justice emerged in the 1970s. Originally focused on mediation between victim and offender, its scope increased in the 1990s to include the broader community (McCold and Wachtel, 2003). Johnstone (2011) notes the positive effects of the offender's community encouraging remorse, redress, and acceptance of responsibility. Restorative Justice views crime as not only against the state but against individuals and communities, thus raising the importance of these. Criminals are held to account by their victims, and reparations are required. There is a recognition that victims are also clients of the judicial system and are entitled to be involved in its processes (Umbreit and Zehr, 1996).

Willis (2020) noted that researchers have assembled a list of ideologies that form the basis of restorative justice, namely, equality, participation, empowerment, responsibility, dialogue, agreement, non-domination, and healing rather than harming. Willis (2020) explained that equality can be difficult as there is more than one way to interpret the concept. One view is having the equal opportunity to speak, defend and relay messages accordingly. What can be equal for one can make it unequal for the other. If there is a language barrier for one party that requires them more time to converse, then the other party will lose that time removing equality. This brings about the need for experts to figure out which are crucial in the balance and fairness of restorative justice. Willis (2020) stated that the situation or its uniqueness needs to take preference over the traditional emphasis on time. There is a need for a translator or someone who can offer support to aid those with speech impairments or language barriers. Someone who knows their culture and background can also be beneficial. This may also have a positive effect on equality.

It is vital that to maintain the meaning of restorative justice one must understand the effect of and importance of equality such as that of fair communication. When the system is unable to allow for fair communication to take place, especially for those of an underprivileged upbringing, this leaves the person feeling as if they cannot communicate properly, and a feeling of unfairness arises. This can also lead to those listening misunderstanding or misinterpreting what they are trying to say and give the impression that the disadvantaged person lacks empathy or has a bad attitude, which can lead to unfair or unjust outcomes of a case (Willis, 2020). This is where the restorative idea of harm avoidance takes place.

The further negative aspect to restorative justice as explained by Willis (2020) is where there is a far greater chance of success for those with a strong vocabulary and better understating of the language where questions that are asked are understood and therefore a better chance to answer is attained. Restorative justice focuses on the individual to speak on their behalf and not rely on a language assistant to speak in their place or at least assist with communication between two parties. This can cause many issues even with the most basic of questions such as: Where were you? In what order did events occur? Or questions that involve a certain level of feelings, such as: How did that make you feel? Someone

who has a higher language and communication ability has a higher possibility of expressing themselves and obtaining a more positive result than their counterpart (Willis., 2020). One aspect of restorative justice that needs to be researched to avoid harm is equality in the communication process and the negative impact its absence has on those from disadvantaged backgrounds. Communication fairness needs to be resolved for restorative justice to succeed and be truly effective (Willis, 2020).

Restorative justice umbrellas a vast range of justice forms. It has been used in ancient times to resolve different forms of issues be it between two parties or between judges and accused (Drahos, 2017). Different ways have evolved since 1970 in the USA mainly due to outcries against the justice system at the time. Certain programs had been implemented that involve both criminal and victim alongside traditional justice (Drahos, 2017). For centuries in Europe, according to Drahos (2017), criminal hearing procedures were often undertaken without a court, where the victim and offender would agree on the appropriate course of action. There would normally be a middle person who would facilitate the agreement and, through speaking to each person alone, attempt to resolve the matter on a mutually agreeable basis.

Due to the history and multiple forms of restorative justice, there is confusion as to its true definition (Drahos, 2017). It can be understood by using the way it operates, such as providing a way to use restorative means to have a restorative conclusion (Drahos, 2017). This can be facilitated by the victim and their families meeting with the offender to find a way to resolve the effects of the crime, guided by a negotiator. Drahos (2017) noted that the other way to define restorative justice is to focus on its meaning. It is designed to bring proper healing to the victim and victims' families and provides a medium in which they have a chance to confront the offender and communicate the pain, fear, and other damages the crime has caused (Drahos, 2017). This also gives the offender the chance to communicate and reach a level of remorse and guilt. The aim of this is to help the family heal and prevent the crime or crimes from being committed again.

Meléndez (2020) explains that therapeutic involvements can have excellent benefits for offenders by being able to properly deal with personal issues which are the root causes

that lead them to commit the crime. They are more able, through restorative justice, to express themselves and allowing a focus on issues such as drug abuse, anti-social issues, the ability to think through situations, and to have self-accountability. Restorative interventions as noted by Meléndez (2020), proved effective, both from the offender's and the court's view, by respecting each other allowing an open passage to the best solution for the victims, community, and offender.

Meléndez (2020) stated that even though a trial can be an emotional event, real feelings and emotions are not always expressed properly or honestly. Restorative justice allows, through unswerving, upfront contact with the victims, the ability for the offender to express real guilt and remorse and the chance for the offender to express sincere regret, leading to positive transformation (Meléndez, 2020). Seeing their victims can give them the experience of pain caused leading the offender to want to change as a person. A selection of authors feels that emotion is a crucial aspect of the restorative process (Meléndez, 2020). They feel that if the offender can feel shame through speaking on topics such as their past and substance abuse, they will be on the right path to transformation. They believe that feeling shame is the first step to positive reformation (Meléndez, 2020). However, other authors have stated that to bring about true transformation, remorse and empathy play a far more crucial impact than shame. Empathy allows the offender to acknowledge what they have done to the victim and how that has impacted their lives. This can bring about repentance and hopefully the desire to want to be part of the victims' healing process. This process may prevent the victims from having thoughts of retribution and other forms of violent acts (Meléndez, 2020).

As described by Moss et al. (2019), an unbiased facilitator with vast knowledge in restorative justice will organise a gathering whereby the offender, the victim, and often members of their family and friends, and community will discuss the crime that took place and share among themselves the damage and impacts it caused. They can then discuss and find a way to deal with the offence. This is then concluded by a mutual signing of an agreement. Studies have proved that this method has not only lowered crimes from being recommitted but has also assisted with the victims' healing process. There are two unified outcomes that restorative justice aims to achieve as explained by Moss et al. (2019), the

one being that the victims and their families and community can find closure through the understanding of the impact the crime had on them, and secondly to give the guilty party the chance to show remorse and fully understand the damaging effects they caused. They can once again reenter society as reformed individuals, thus, protecting the public and preventing recidivism.

However, restorative justice operates successfully in a hybrid system in that there are a variety of favourable disposition such as dismissal, good behaviour bonds, fines, community correction orders, suspended sentences and imprisonment that are used against the offenders in dealing with offences, thus offenders and victims may have a choice from them. The victim might choose not to meet with the offender especially soon after the crime has been committed. If this is not resolved and the public refuses to accept restorative justice (as many studies have already indicated) the restorative justice may not be implemented to its full ability and may only be used in cases of lesser offences. For restorative justice to be truly successful, the community and victim's involvement and willingness to partake is crucial (Moss et al., 2019).

The current approach to justice includes a method where the government can decide on a suitable punishment and this punishment will be carried out employing institutionalisation where the offender will be managed and spend time paying back their debt to society. Where traditional justice views the offence as being against the state, restorative justice focuses on the infringement of the victim's rights. Pfander (2020) noted that restorative justice is an intervention in which both the offender and those affected by the crime come together to find an appropriate solution to resolve the suffering caused to the victim to allow the victim to find healing. Restorative justice's purpose is to rebuild and fix the damage and pain that the victim has received. This is done by a holistic means of considering all parties including not only the victim and the perpetrator but also the victim's families and the community to understand the impact and to decide on the best form of healing (Pfander, 2019).

Pfander (2020) pointed out that the foundation of resolving the issues caused by an offence is to begin by restoring the damage done through self-acknowledgment of the wrong that

was done. This can be done by giving the victims the chance to express their feelings, the offenders to take responsibility for their actions, and for an agreement to be formulated for a restorative solution. Healing can occur with the right support for both the victim and the offender. The next step to restorative justice is where there is a chance for shaming to take place between offender and victim. Shame is a crucial process in which the offender can have true remorse and real transformation can begin. This also opens up a door for the healing of the victim or victim's family to express their feeling and to get to better understand the offender. This can lead to a reduction in the fear caused by the crime and for both sides to understand each other with the hope of forgiveness. Shame has been shown through several studies as a critical part of the rehabilitation of the offender (Pfander, 2019). Through shame and empathy, transformation, and repentance can be achieved. This can all lead to lower cases of reoffending crimes (Pfander, 2019).

The criminal justice system and a lot of the public are now turning towards a mode of restorative programs due to the increasing concern regarding overpopulation in prisons, re-offences, and unresolved issues between the victim and sufferer (Pfander, 2019). The costs involved to manage prisons are exorbitant and the costs mount with recidivism. Restorative justice can tackle these issues by preventing re-offences, restoring the victims from the harm they have experienced, and reducing the prison population through the restorative process. Restorative and traditional justice can coexist and lead to transformation (Pfander, 2019).

Restorative justice conferences are court hearings based on the restorative justice approach and include offenders, victims, and communities. Research shows that restorative justice conferences still contain elements of retributive justice (censure) and rehabilitative justice (attempts to prevent reoffending) (Daly, 2005). Research suggests that censure should take place first with shaming of the offender; thereafter reparation must be addressed. The offender may see both as punishment. Holding the offenders accountable is essential to reintegrating them back into the community. Therefore, the concepts of retribution and punishment must be uncoupled (Daly, 2005).

There are three world views about the conceptual notion of restorative justice concerning

punishment (Gavrielides, 2014). The first view believes that restorative justice can never be punitive and is constructive. According to the second view, restorative justice is not an alternative to punishment so much as an alternative punishment. A third view, termed restorative punishment, is described as: "Punishment comes from the Greek word '*poene'*, meaning pain, and examples of restorative justice practices illustrate the restorative pain that offenders undergo when entering into a voluntary dialogue of personal transformation and community healing" (Gavrielides, 2014; p. 14). This third view states that retribution is not part of restorative justice as retribution and restorative justice both have an element of censoring the crime.

In the 1970s demands for restitution began to play a role in justice, followed by the advent of support and rights groups for victims (Ness, 2005). The retributive system came under criticism by social justice supporters such as the prison abolishment movement that decried the harshness and destructiveness of imprisonment on its sufferers and called for more suitable sanctions. Collectively, these factors highlighted the inadequacies of the traditional justice system, whose sole purpose was to determine guilt and apply punishment (Ness, 2005). Values of harmony and truth are sought within the bounds of justice in place of a conceptual foundation of control and punishment. The values posited by Ness (2005) for restorative justice are illustrated in Table 2.

Table 2: Restorative Justice Values (Ness, 2005)

Normative Values of Restorative Justice	Operational Values of Restorative Justice
Active Responsibility – taking the initiative to help preserve and promote restorative values and to make amends for behaviour that harms other people **Peaceful Social Life** - responding to crime in ways that build harmony, contentment, security, and community well-being **Respect** – regarding and treating all parties to a crime as persons with dignity and worth **Solidarity** – fostering agreement, support, and connectedness, even amid significant disagreement or dissimilarity	**Amends:** those responsible for the harm resulting from the offence are also responsible for the repairing it to the extent possible. **Assistance:** affected parties are helped as needed in becoming contributing members of their communities in the aftermath of the offence **Collaboration:** affected parties are invited to find solutions through mutual, consensual decision-making in the aftermath of the offence **Empowerment:** affected parties have a genuine opportunity to participate in and effectively influence the response to the offence **Encounter:** affected parties are given the opportunity to meet the other parties in a safe environment to discuss the offence, harms and the appropriate responses **Inclusion:** affected parties are invited directly shape and engage in restorative processes **Moral Education:** community standards are reinforced as values and norms are considered in determining how to respond to particular offences **Protection:** the parties' physical and emotional safety is primary **Resolution:** the issues surrounding the offence and its aftermath are addressed, and the people affected are supported, as completely as possible

Restorative justice can be used in schools instead of the current use of punitive methods and can be far more beneficial not only to resolve the many disciplinary issues in school but also has the opportunity to lessen crimes committed in the adult life of the student (Pope, 2018). Some context ascertains that restorative justice can be adopted as a practice in the informal and formal places such as school and in the communities to maintain integrity (King, 2008). With the punitive approach proved to be unsuccessful in behavioural change, restorative justice is ideal in modern development that fits modern

needs, social and government form. For instance, in school, is ideal in maintaining integrity and behavioural change. The lack of a positive result of the current forms of discipline as explained by Pope (2018), such as a punitive approach ranging from suspension and expulsion to actual arrest means that the student now has lost the chance of learning or completing their schooling.

The zero-tolerance method as explained by Pope (2018) implores stringent, swift punishments with severe outcomes when certain rules that are regarded as high risk are broken, such as the United States Gun-Free School Zones Act 1990. This act covers any weapon such as a gun or tool that can be used or perceived as a weapon. When a rule like this is broken it carries the punishment of removal of the student from school for one year. The purpose of this act was to keep schools safe and deal swiftly and make an example of students involved in crimes and other vicious conduct. The impact of the zero-tolerance act has raised a few concerns (Pope, 2018). At the beginning of the implementation of the act, there was a noted climb in violence, and not substance abuse cases in schools; the pupils who were suspended often repeated their bad behaviour which led to another suspension and often expulsion, and overall, there was a decreased amount of pass rates and exam results were lowered.

Just like the adult legal system where restorative justice is implemented and has shown to have many positive benefits, this same impact can be applied to students (Pope, 2018). Restorative justice, a method using communication, aims to get to what the underlying issues are that cause behavioural issues and to achieve not only respectable students but also resolving the issue and preventing repeated bad behaviour. The way to achieve this is by using an approach that is respectful and relies on empathy.

Schools that implement a form of restorative justice, even in conjunction with the current system, allow not only for the chance of proper rehabilitation and behaviour modification in the students, but for the public to also experience the positive impact (Pope, 2018). This is possible by offering the right support from a younger age to prevent further, advanced crimes committed by students and well into their adult lives. Often criminal behaviour stems from the upbringing of the offender (Pope, 2018). School, seen through restorative

justice as a smaller aspect of society, promises that its effectiveness as a disciplinary method will be just as vital as it is in greater society.

As explained by Ryan (2015) the standard form of discipline when dealing with a misbehaving student is to match the penalty to the crime, making them liable for the offence and administrating an appropriate punishment. This is often suspension or expulsion. This approach prevents the student from completely understanding the impact that they have caused or feeling any true remorse towards those affected by their crime (Ryan, 2015). Restorative justice considers the offender, victim, and community and focuses on restoring the damages caused by the crime and giving the wrongdoer the chance to heal from the root of what has caused this kind of behaviour (Ryan, 2015). The main difference between restorative justice and punitive punishment is that punitive methods aim to eliminate the issues by complete removal of the student offender (Ryan, 2015). This approach does not resolve or prevent further issues such as crime. By not allowing the student to properly understand the crime that was committed and not giving the victim the chance to express their pain, there is an extremely limited probability of true reform, whereas restorative justice enables the victim to heal from the crime and the offender is given the chance to work through their issues and thus be able to fully integrate as a good citizen, back into society or school (Ryan, 2015).

2.2.2 Communities of Care

Restorative justice has the capacity to promote social cohesion and does this by bringing in ‘communities of care’ as a concept to include families, friends, and colleagues of the offender and the victim (McCold & Wachtel, 2003). A society traditionally makes use of punishment to address wrongdoing, from parents dealing with their children to courts administering justice. Figure 2 illustrates the ‘Social Discipline Window’ which has two continuums or dimensions, low to high support on the x-axis and low to high control on the y or vertical axis. This provides four approaches to justice: (1) punitive/retributive – high control, low support; it does things TO offenders with no engagement (2) permissive/rehabilitative – low control, high support; it does things FOR offenders, with little or no requirement for anything in return; (3) neglectful – low control, low support;

and (4) restorative – high control, high support – deals with the wrongdoing but validates the offender, enabling them to be returned to the community (McCold & Wachtel, 2003).

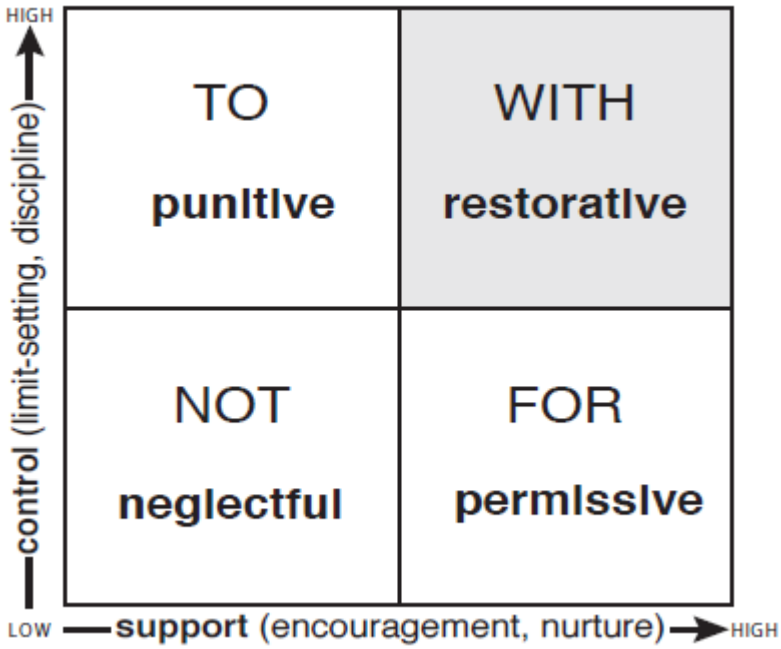

Figure 2: Social Discipline Window (McCold & Wachtel, 2003; p, 2)

The outcomes of McCold and Wachtel's (2003) model of restorative justice in Figure 3 indicates that the interaction of the victim, offender, and care communities of both parties is considered fully restorative when the victim achieves reparation, the offender takes responsibility for the crime and the communities reach reconciliation. When only two of the three are engaged in the process, such as victim-offender mediation, the results are mostly restorative. But if only one party is engaged, for example, victim reparation is achieved, then the process is only partly restorative. This is indicated by the shaded areas on the previous diagram (Figure 2).

Figure 3: Restorative Practices Typology (McCold & Wachtel, 2003; p. 4)

This support group is instrumental to the reintegration of offenders back into their communities and the empowerment of the victim. Together, the victim, offender, and communities of care are the primary stakeholders in McCold and Wachtel's theory of restorative justice. Secondary stakeholders include neighbours, organisations whose area of operation has been touched by the crime, and various officials. This group has an impersonal relationship to the crime and their primary role is to nurture the discourse between the primary stakeholders so that the outcomes for reparation and healing are maximised. The importance of the ongoing support provided by the informal communities of care ensures that their support is available to the victim and the offender (Hoyle & Rosenblatt, 2015).

2.2.3 Indigenous Communities

Indigenous people in Australia have a disproportionate number of offenders versus the

rest of the Australian population (Hewitt, 2016). Similar problems are witnessed in Canada, where high numbers of Aboriginals appear in court. The diversion system permits people to be moved out of the traditional courts and into programs that require them to undertake community work as reparation. However, the numbers of Indigenous offenders have remained high, despite diversion and restorative justice (Hewitt, 2016).

The investigation by Hewitt (2016) revealed the difficulty of making accurate measurements of governmental expenditure on restorative justice. Budgets are grouped in categories so that many interventions are reported as a total rather than separate initiatives or types. Although separate statistics for restorative justice are not readily available, the costs are minimal compared to the costs associated with imprisonment. The biggest concern with promoting these programs in Canada has been the lengthy time the process takes (Hewitt, 2016).

Community healing is present in both restorative justice and interventions based on Indigenous healing systems of justice. One of these called Biidaaban, "is a model of restorative justice created by the First Nation for the First Nation, founded on the premise that restorative justice requires holistic healing. As such, the program takes time for each of the participants who have harmed and those who have been harmed to come to a place of wellness" (Hewitt, 2016; p. 317). Biidaaban, had a recidivism rate of less than 5% compared to the national average of 27% (with higher rates in men) for traditional retributive justice systems. Diversionary programs that move offenders swiftly e.g., into community work and which more quickly reduce recidivism numbers are the favoured method of government as they have a swifter turnaround time in processing cases than restorative justice, hence restorative justice is no longer funded. The Indigenous system has a focus on restoration and community healing; the practice requires the full participation of the victim and offender (Hewitt, 2016).

Restorative justice has been developed in part from Indigenous cultural justice processes. These include conferences borrowed from New Zealand Maori, circles adapted from Indigenous practices in North America, Bangladesh, and the Philippines' non-state systems of justice. The philosophy of this Bantu proverb underpins these programs, "We

brought the needle to sew the torn social fabric, not the knife to cut it" (Ness, 2005; p. 1).

2.2.4 Case Studies

There is a lot of support for restorative justice in Australia and around the globe, as offenders and victims reported better outcomes. However, various studies showed mixed results on its efficacy (Hayes, 2005). It is necessary to grasp some of the problems that occurred in different studies on restorative justice.

The Reintegrative Shaming Experiments (RISE) is the largest criminological field study in Australia (Sherman et al., 1998). Four types of crime were studied: alcohol content over the legal limit, property offences, shoplifting, and violent crimes for offenders under thirty years of age. Diversionary conferences were held with the offender and his/her support group, the victim, a police officer and a community officer. Lasting ninety minutes compared to the average ten minutes of a court case, the proceedings were emotionally expressive. The process touched on the harm the offender did and how it could have been worse and concluded with a written agreement outlining how the offender would make reparation. Findings were that offenders and victims perceived diversion as fairer than court proceedings, recidivism was lower, and costs were equal or less than court (Sherman et al., 1998). Braithwaite (1990) emphasises the importance of shame as a crime deterrent when it is used by society to communicate its censure. An example is the condemnation of society (even those themselves incarcerated) towards pedophiles.

Restorative justice has been evaluated in the Australian Capital Territory (ACT), Queensland and South Australia. Although not conclusive, the results indicate that conferences, face-to-face meetings between victims and offenders where victims express how the crime affected them, have the ability to decrease crime. Findings in the ACT show that restorative justice is effective in violent crimes by juveniles versus their counterparts who went through the court system. However, driving under the influence of alcohol and property offences were not significantly different in conference and court groups. Thousands of first-time offenders were studied after conference interventions in New South Wales. Results indicated a 15% to 20% reduction in reoffending (Hayes, 2005).

O'Connell (2007), the ex-Commissioner for Victims' Rights, South Australia noted the benefits of restorative justice to victims, such as not fearing revictimisation by the same offender, not being afraid of crime in general, and a reduction in anxiety and anger. He also noted certain shortcomings in the reporting of results. For example, positive outcomes were noted for victim satisfaction, but this improvement did not highlight that offenders were more satisfied than victims. There was higher compliance after restorative justice. Five percent of victims stated that they were dismayed by the utterances of the offender and his supporters. The results that offenders were aware of the harm they caused their victim did not give the assurance that this would be the case with other potential victims was well. Finally, restorative justice more effectively reduced recidivism in conjunction with rehabilitation (O'Connell, 2017).

2.2.4.1 Field Experiment Research

The field experiment research design is robust. The use of control groups and controlling for key variables related to recidivism means that any differences in the results are attributable to the intervention (Hayes, 2005). Controlled variables such as gender, race, and age have been shown to have a link with recidivism, and previous offending. The sample for experimental studies was randomly selected. However, police and officials practiced selective assignment in deciding who to put forward for these programs which caused selection bias. The assigned candidates who did not appear for the interventions were excluded from the findings (Hayes, 2005). Another area that undermined the study's accuracy was that confession was a prerequisite for inclusion, whether or not the individual was assigned to court or conference; this implied taking responsibility, which differentiated both the experimental and control groups from individuals following the normal route to court as the latter need not confess first, or at all (Hayes, 2005). Such issues provide some explanation for poor results.

2. 2.4.2 Restorative Justice Conferences

Studying the differences between restorative justice conferences involves measuring criteria not normally associated with recidivism but it is predictive of reoffending or not

reoffending (Hayes, 2005). Factors that have a strong connection to recidivism (gender, race, age, and previous offending) can be matched to make it possible to ascribe any differences in offending when comparing or assessing interventions. The objective is to uncover how restorative justice actually reduces recidivism (Hayes, 2005). The theory of restorative justice by McCold and Wachtel (2003) is a model that could be applied as the basis for a research design (see Figures 2 and 3) as it illustrates the numerous interventions possible under restorative justice and their relationship to the victim, offender, or community. Wachtel (2013) notes that restorative justice is reactive, while restorative practices are proactive, as they act ahead of crime to reduce violence and build strong societies that improve how people behave and encourage effective leadership while restoring relationships and repairing damage done by crime. Some of the effective practices include, restorative conferences, circles, and family group conferences / family group decision-making (Wachtel, 2013).

The findings regards how victims and offenders experienced restorative justice were: (1) the majority of participants did not regret meeting face-to-face; (2) satisfaction with the restorative justice intervention was scored very or quite satisfied by 80% of offenders and 85% of victims; (3) 20% of victims said the conference had helped while over 50% stated that it gave them a sense of closure; (4) almost 80% of offenders felt it would prevent them reoffending; (5) under 4% of offenders and almost 3% of victims were dissatisfied; (6) this dissatisfaction was largely an inability to communicate and disagreement over the offence; (7) participants undergoing restorative justice were significantly more satisfied than those in the control group who underwent traditional court justice; and (8) 74% of offenders and 78% of victims would probably or definitely recommend restorative justice to others (Ho, 2018).

2.2.3 Restorative Justice Outcomes

Restorative justice conferences have been explored in various countries. Some of these studies are discussed here.

2.2.3.1 Studies in the UK

The Crime Reduction Program using restorative justice in the UK in 2001 was supported by the Home Office, although there was insufficient data on the effectiveness of restorative justice (Miers et. al., 2020). Miers et al. carried out a fifteen-month research study into seven schemes practicing restorative justice in England. This study collected data on the numbers and types of offences, referred offenders, number of victims, completed interventions, and conducted interviews with members of the schemes. Findings were that not all the initiatives were actually restorative justice yet were being funded under this umbrella. Some did show a positive effect on reduction in recidivism and cost-benefit. Others that did not practice restorative justice and those with incomplete records either had a negative outcome or insufficient data for analysis (Miers et al., 2020).

In another study in the UK, the key findings of restorative justice in practice were : (1) when the offenders were young, victim participation in conferences was extremely high; (2) victims preferred indirect mediation when given an option, however, not having any option other than direct mediation did not lessen participation; (3) proportion of speaking time was roughly equal for all main participants in conferences; and (4) there was seldom any aggression during conferences, although emotions were expressed (Ho, 2018).

Strang et al. (2013) investigated ten face-to-face restorative justice conferences which made use of randomised controlled trials where the victim and the offender agreed to meet before being randomly assigned to the control or test groups and explored the effects of Intention to Treat (ITT). The analysis covered 1879 offenders and also interviewed 734 of the victims. There was a positive correlation between conferencing and no arrests or convictions. Seven of the experiments showed “up to 14 times as much benefit in costs of the crimes prevented (in London), and 8 times overall, as the cost of delivering RJCs” (Strang et al., 2013; p. 4-5).

These results indicate that a lot more research is needed into restorative justice schemes to ensure that they fully meet the requirements of restorative justice; more quantitative studies are needed on restorative justice interventions and these results must be separated

from the work of schemes that do not correctly fall under restorative justice. Restorative justice can provide a saving in reducing crime and on the cost of interventions as compared to traditional justice.

2.2.3.2 Studies in Italy, Netherlands, and New Zealand

The outcome of a two-year restorative justice program in Italy indicated that restorative justice cannot work in the penal system where offenders are already in a punitive institution (Gavrielides, 2014). In such cases the question arises whether restorative justice is punitive as it is difficult to distinguish between restorative justice and retributive and rehabilitative justice. Despite these concerns, restorative justice in prisons is becoming commonplace globally (Gavrielides, 2014).

Victim-Offender Mediation (VOM) is one of the practices of restorative justice (Wexler & Winick, 2008). The process is restructured such that the problems and issues are identified, the plan of the preparation of offender and victims known, and the expectation of mediator scheduled (Wexler & Winick, 2008). Ideally, that implies the skill of mediation is vital in a dialogue between the offender and victims though considering the emotional and other needs of the parties (Wexler & Winick, 2008). Zebel, Schreurs & Ufkes (2017), explored the link between agreement to participate in restorative justice conferences and the seriousness of the crime in a study of 199 cases in the Netherlands. It was found that willingness to participate in victim-offender mediation increased over time in serious cases and decreased in less harmful crimes over time. The results showed a greater decrease in recidivism in violent cases as compared to property offences (Zebel, Schreurs & Ufkes, 2017).

Similarly, New Zealand has been offering restorative justice interventions to serious crimes like burglaries, aggravated assaults, and threats of murder for adults and using it to treat juveniles who persistently offend (Zebel, Schreurs & Ufkes, 2017).

Restorative justice can achieve worthwhile outcomes, such as reduced recidivism, when Victim-Offender Mediation takes place, especially with regard to more serious crimes. The role of restorative justice programs in prison are ambiguous and results in this context

are uncertain.

2. 2.3.3 Studies in Australia

A qualitative study of restorative justice was conducted in prisons where experts in prisons such as academics, policy makers, prison governors and restorative justice practitioners were interviewed. One of the findings was that restorative justice was often practiced in prisons without the practitioner being aware that they were implementing it (Gavrielides, 2014) The offenders were extremely afraid of meeting and facing their victims. The participants felt that a sense of hope was critical to restorative justice practices being effective in the prison setting. A concern was that funding was provided for restorative justice initiatives without knowing whether the project complied with its principles (Gavrielides, 2014).

Kuo, Longmire and Cuvelier (2010) undertook an empirical investigation of secondary data from the Reintegrative Shaming Experiments (RISE) in Australia, 1995-1999 to test the model devised by Presser and Van Voorhis (2002). The three activities, dialogue, relationship building, and communication of moral values are central to this model of restorative justice. The findings were that (1) healing dialogue should encourage participants to speak freely. There should be no dominance of one party over another, and both offender and victim should be treated equally; (2) only in this climate will the victim feel heard and the offender reach a state of repentance; (3) an important aspect of relationship building is for the victim to relive the experience of the crime and not only reparation; (4) also necessary is healing ties to the community; and (5) the communication of moral values need not be overt, but it is critical that the offender recognise the harm that they have done if their own natural conscience is to be triggered and prevent reoffending behaviour (Kuo, Longmire & Cuvelier, 2010). The Presser and Van Voorhis (2002) model is thus slightly different in that it emphasises the environment but still retains the general concept of restorative justice which is centred on victims, offenders, and communities of care (McCold & Wachtel, 2003).

Miers et al (2020) conducted a fifteen-month study on seven restorative justice schemes.

Activities ranged from complete family sessions, direct meetings between offenders and victims, victim awareness sessions to the writing of a letter of apology. Some findings that emerged were: (1) victims made up their minds within a day whether to attend sessions or not; (2) direct mediation seldom happened in practice; (3) the offender was humanised for the victim when given information about him/her; (4) the longer the session the better the outcome; (5) victims appreciated letters of apology; (5) mediation was valued when it took place in good time, included victims sharing and was conducted with clear outcomes.

Angel et al. (2014.a) examined post-traumatic stress symptoms (PTSS) in victims of burglary and robbery in Australia after attending restorative justice sessions. The results showed that victims who underwent restorative justice interventions had 49% less cases of a clinical diagnosis of PTSS and PTSD and 30% of victims of traumatic events never recovered. The symptoms were intrusion, hyperarousal and avoidance following an event where potential death or injury of self or someone close was experienced.

A study with 232 juvenile offenders was conducted in Australia to compare different types of restorative justice interventions, i.e., direct mediation, indirect mediation without direct contact between victim and offender, or community panel. Participants had an initial meeting in which offenders were informed that participation was dependent on willingness to make amends. Where juvenile offenders and victims were willing to participate in face-to-face interaction, the juvenile was assigned to direct mediation. In cases of driving under the influence where no victim was involved, cases were allotted to community panels. The members of the panels involved school or police officials and community volunteers. Findings were that all the restorative justice interventions had a lower risk of recidivism as compared to the juvenile court (Bouffard, Cooper & Bergseth, 2016).

Seven studies (not confined to Australia alone) investigated the psychological effects of restorative justice. Studies were from Bethlehem, Canberra (Australia), US (several cities and states including Brooklyn and Minnesota), Canada and England. One of the key findings was that restorative justice outperformed courts in terms of offender accountability (Poulson, 2003)

An Australian study found that there was a rising trend to make restorative justice available to adult offenders, especially offenders guilty of more serious crimes, such as family and sexual violence and murder (Poulson, 2003). Offenders who experienced restorative justice were 6.9 times likelier to apologise to victims than those who went through court proceedings. Victims were half as likely to remain distressed after restorative justice interventions as after court cases. They were also one third as likely to fear becoming victims again. The conclusion was that restorative justice performed better than court did (Poulson, 2003).

The results from all the studies discussed consistently indicate that restorative justice was more effective than court proceedings.

2.2.4 Limitations of Restorative Justice

The limitations of restorative justice that are caused by incorrect application proliferate in practice (Hoyle & Rosenblatt, 2015). These are discussed under limits to reparation, poor victim involvement, failure to truly engage the community, and lack of a culture shift in officials.

The core aim of restorative justice is for the offender to make some form of reparation albeit financial, material, or symbolic directly to the victim, or indirectly through avenues such as community work (Hoyle & Rosenblatt, 2015). Reparation to the community can also be agreed to. What is important is the process the offender undergoes where they come to understand the suffering that they have caused the victim and feel internally obligated to compensate the victim and otherwise make amends. This seldom works in practice. For example, reparation most commonly takes the form of a symbolic gesture such as a letter of apology. In some cases, the victim is not apprised and pre-warned that they will receive a letter from the offender, something that may be undesirable to them, especially as they are not informed prior to its arrival (Hoyle & Rosenblatt, 2015).

Restorative justice must take place in a secure environment in which the victim feels safe and protected. The reparation agreed upon must be derived by the main participants, the victim, the offender, and the communities of care. These are the primary stakeholders with

high control and high support (McCold & Wachtel, 2003), When support is high but control low, this is a permissive approach that does not hold the offender accountable, hence does not serve the needs of justice.

When the offender does pay but only a portion, the victim feels cheated. A letter of apology is seldom sufficient to meet the victim's needs. Despite this, facilitators often deem the extraction of an apology a necessary measure of success and could become coercive in obtaining it, which makes the apology seem insincere (Hoyle & Rosenblatt, 2015). Victims are often not asked what reparation they seek. In some instances, cases are concluded without any reparation being agreed to. Community work could be hand-picked from a list which ignores victim input to reparation. Thus, the restorative effect is lost. At times, rehabilitative aims take precedence over reparation in restorative justice so that the welfare of the offender is the exclusive focus (Hoyle & Rosenblatt, 2015).

In the Thames Valley Police Cautioning initiative in the 2000s in the UK, victims were only present in 14% of interventions; in others the officer conveyed the victim's perspective. By contrast, South Australia over the same time period had about 50% victim attendance at conferences (Hoyle & Rosenblatt, 2015). In the UK examples, victims were ill-informed of what they stood to gain from attendance and what the process entailed; this resulted in a high incidence of non-participation. When the victim or any other primary stakeholder is absent, this undermines the possibility of a fully restorative outcome (McCold & Wachtel, 2003). Police in the UK were also not willing to find a time that victims were able to attend. Victim attendance dropped from 13% in 2002 to 9% in 2005 (Hoyle and Rosenblatt, 2015). The facilitators were not adequately trained in the UK to prepare victims or had their plates full with caseloads, meeting attendance, court attendances and database updating.

It is difficult for an offender to experience empathy towards the victim when they are not present and the use of an empty chair to represent the victim is inadequate to raise conscience naturally. Secondhand attempts to convey the victims' experiences fails to arouse the necessary sense of guilt and compassion that a live interaction provides (Hoyle & Rosenblatt, 2015). An alternative to victim presence is for the victim to prepare a

statement to be read or for the offender to attend victim awareness sessions. However, these remain poor substitutes and there is no evidence to support greater victim awareness from the sessions (Hoyle & Rosenblatt, 2015).

The communities of care are the third pillar in the triangle with victim and offender that must be present during the exercising of restorative justice (Hoyle & Rosenblatt, 2015). Communities of care consist of those who can have a positive effect on the offender, for example a teacher or coach, along with family and friends. Failing to engage the community does not give the offender the opportunity to experience shame and the beneficial effects of social inclusion after repentance. In 83% of panel meeting cases witnessed, the offender attended alone (29%) or with one person (54%). The panel meetings differ from conferences in that the former do not include community of care. Panel meetings and similar fall under hybrid models of restorative justice (Hoyle & Rosenblatt, 2015).

In practice, the adult support chosen is usually from a different geographic location to maintain distance and contact with the offender is not permitted outside of the intervention. This deprives the offender of the necessary ongoing support and role modelling to prevent relapse into crime. One of the aims of restorative justice is to bring the offender back into the community fold, supported by the community of care and by the broader community. The practice of restorative justice only makes provision for the community person to act as a liaison so that real relationships and change are not fostered (Hoyle & Rosenblatt, 2015). There are several other limitations.

Firstly, most of the cases dealt with by restorative justice involve juvenile offenders and more minor offences (theft, vandalism). Violent crimes have been successfully tested with restorative justice, specifically on circle practices. For instance, Community Holistic Circle Healing was developed in Maitoba, the Hollow Water Community, to address sexual assaults and incest issues in that society. The meeting entails meeting with victims and offenders to prepare them for circle restorative practices. After preparation, series of circles process is used that commences from victim circles and offender circles before going ahead to wide circles that bring victim and offender together followed by judgement

circles and end up with review and cleansing circle (McCold, 2001). The application of restorative justice to sex offence cases has not really been tested in practice. The tendency, internationally, is to exclude such cases from these programs (O'Connell, 2017). In Australia, the Victoria Law Reform Commission Inquiry on Alternative Dispute Resolution (2009) excluded these cases from a restorative justice project for serious offences. Some concerns raised were that the informality of the intervention could expose victims to further violence, offender behaviour may not truly change, and that victims might still be forced into accepting unsatisfactory outcomes. Adult victims of childhood sexual abuse in New Zealand stated that restorative justice would make them unwilling to report the crime (O'Connell, 2017).

Secondly, as all interventions only occur after an offender has confessed and is probably remorseful, restorative justice is only applied at the sentencing stage. This meets the requirement in restorative justice that the offender take responsibility for their crime. Theoretically, this could happen twenty years after sentencing (Poulson, 2003).

A third limitation is that if the researcher who assigned offenders to participation in either court or restorative justice conferences does not stick to the assignment of participants (either restorative justice or court) but moves them to the other approach, the results continue to report on the first assignment and not on the final treatment exercised (Poulson, 2003). Another limitation mentioned by O'Connell (2017) is that the length of time an intervention takes makes restorative justice a time-consuming process.

Australian victim advocacy workers in Queensland and South Australia outlined the limitations of restorative justice for gender violence. These included a perception that this is an easy option compared to court, which it is not, power inequalities exist between men and women and these are difficult to manage, and there is a danger of revictimisation. On the whole, Aboriginal women were more open to restorative justice than their non-Aboriginal counterparts, although both groups highlighted women's safety and access to resources so that decisions are based on knowledge (O'Connell, 2017).

Despite its disadvantages, a move from retributive to restorative justice has several benefits. The first is that it better addresses victim's needs. Though more grueling than

court, it offers an alternative to imprisonment and its stigma and allows offenders to reestablish respect from the community. Benefits to the community are lower recidivism and improved community safety, lower fiscal burden on the judicial system that can be utilised to address crime more effectively, and finally, the community acquires the art of being citizens with a spillover to other areas as well through fostering a community spirit (Johnstone, 2011). Further benefits outlined include: (1) improved perceptions of procedural fairness, overall satisfaction, being heard and being taken into account; (2) more victim and community involvement; (3) better offender compliance; and (4) reduced recidivism. The offence is labelled, not the offender, and reintegration to connections in the community is enhanced (Bouffard, Cooper & Bergseth, 2016).

Presser and Van Voorhis (2002) list the difficulties in obtaining measurements of restorative justice outcomes due to its exceptional values. These are: (1) each intervention has many levels of action; (2) both therapeutic and disciplinary actions are involved; (3) they may be headed by laypersons; (4) participants experience interventional aspects differently; (5) measurement is made more complex by the diverse outcomes that extend to communities as well.

Various limitations have been discussed and include limits to reparation, poor victim involvement, failure to truly engage the community, and lack of a culture shift in officials. Reparation is often an apology letter that does not address what the victim has lost. Victims are often left out of the loop and may be surprised and/or displeased to receive a letter of apology that they had not anticipated. Often, victims are excluded from interventions. Officials who coerce an offender to apologise have not made the necessary culture shift. Sincere apology is needed if it is to be transformative. At the same time, officials should not simply assign community work but ensure that it is relevant to reparation. Community involvement can only be successful when members of the offender's community of care attend so that the offender can experience remorse and reacceptance back into the community. Other limitations are that violent crimes have not been tested with restorative justice, that it is only applied at the sentencing stage, that not all studies take care in the assignment of offenders to test and control groups, and finally, that the intervention itself is lengthy.

2.3 Therapeutic Jurisprudence

In essence, therapeutic jurisprudence is a legal theory that utilises psychological and other social science knowledge to determine ways in which the law can enhance the psychological well-being of individuals who experience the law (Birgden & Ward, 2003; p. 336). Therapeutic jurisprudence has a strong complementary relationship with pragmatic psychology, which can be used as a resource to achieve the minimisation of psychological distress and promote wellbeing and beneficial results for all role players. Pragmatic psychology can be used as a conceptual framework for therapeutic jurisprudence, with its problem-solving nature and ability to provide guidance on creating and implementing laws, its storehouse of systematic case studies, and the wideness of its contexts (Birgden & Ward, 2003).

Therapeutic jurisprudence aims to explore, address, and heal the psychological damage done to a victim by the crime and by the judicial process (Imiera, 2018). There are three levels, micro, mezzo, and macro of healing for victims (Imiera, 2018); this includes inner, personal healing, healing within the community, and being able to resume the societal role in the broader society without fear of revictimisation. Therapeutic jurisprudence is a victim-centered approach that puts the victim's need for safety, wellbeing, and preferred outcomes first.

This facilitated hearing ensures protection and seeks healing solutions, such as a partner agreeing to counselling (Johnsen & Robertson, 2016). As the offender is also a client, this requires managing the balancing of needs, but these differ from what the judge wants to achieve. If the victim is frustrated by the outcome, then healing cannot be realised. Where the victim is in an unequal power relationship and in need of protection from domestic abuse, she/he is not able to speak for their rights or bargain effectively. In this case, the offender's apology may be accepted reluctantly and fails to be healing (Imiera, 2018).

As explained by Gaven et al. (2020), agents of the court are viewed in terms of therapeutic jurisprudence as therapists to the offenders who appear in court, with the aim of providing the most suitable solution to dealing with the offence. Gavin et al, (2020) stated that

therapeutic jurisprudence's main concept should be from the point of analysing the psychological aspects that will require expert advice from specialists in psychoanalysis, legal agents, and judges, who will all play a role in helping the offender to realise the need for rehabilitation, accountability and successful treatment. Socially just, emotionally intelligent, and compassionate responses should be at the forefront of therapeutic jurisprudence.

Applying therapeutic jurisprudence sets the offender on course to take responsibility, receive the proper treatment relating to addictions and prevent reoffences. Therapeutic agents such as judges will evince a more motivating approach that indicates that while still accentuating their level of authority, they no longer need to brandish intimidating punishments. It is crucial that the defendant has one assigned judge as opposed to having to go through the system of rotating judges. This assists the judge to have the proper focus and time to get to know more about the offender's past, their current life and to correctly manage the process in therapy style court (Gaven et al., 2019). A rewards-and-punishment focus is used in line with observing and deliberation as means to ascertain what is effective and what does not work for the offender.

Being able to determine the most successful approach relies on the court's ability to have a full focus on therapy and future remedies to bring about complete healing of the offender (Gaven et al., 2020). Gaven et al. (2020) emphasised the reason therapeutic jurisprudence is successful is the manner in which dialogue between the judge and offender happens. Therapeutic Jurisprudence is successful because the judge is concerned with promoting compliance with the law. To achieve the goal of law compliance, behavioural change is accompanied. Therefore, the values of deterrence and rehabilitation dictated by Therapeutic Jurisprudence are considered in sentencing (Wexler and Winick, 2008). This allows for true commitment and higher success rates and lower re-offences to occur. Therapeutic jurisprudence adhered to by the legal agents will bring about curative outcomes and success. This will also prevent prejudice, give the defendant a feeling of being heard, and open dialogue to allow for therapeutic agents to achieve their goals (Wexler and Winick, 2008).

As noted by Van Golde et al. (2019), the idea of therapeutic jurisprudence transforming the judicial system arises due to the failure of the criminal justice system in not being able to truly deal with the root of the offence and often adding to the cause of reoffending. Yet, therapeutic jurisprudence brings about the possibility within the justice system for the offender to have a true understanding of their culpability and achieve a greater form of rehabilitation. The aim of therapeutic jurisprudence is to deal with and modify the offender's ongoing behavior through accountability and rehabilitation to prevent re-offences as opposed to punishment.

An example of a case handled by therapeutic jurisprudence told of a woman of 50 years of age who had a gambling problem and was fighting a heroin addiction. She also had a past which was clouded by a criminal record of minor offences such as shoplifting and had grown up in an abusive environment. The magistrate put the woman through an intervention program, that once completed resolved her gambling addiction. This case was able to demonstrate the important effect that therapeutic jurisprudence had on this person to heal her from a sordid past that possibly led her to her addiction and to prevent further crimes being committed, thus having a positive impact on both her and the community. This example illustrated a gambling addiction but can clearly point out the benefits of therapeutic jurisprudence throughout the legal system (Van Golde et al., 2019).

As pointed out by Van Golde et al. (2019), the legal system will have to take an emerging, transitional approach. A pilot program should be implemented to establish levels of offences and to prevent offenders taking advantage of the system by justifying serious crimes attributed to addictions. Therapeutic Jurisprudence aims to resolve the root cause of crime and criminal behavior. However, for it to be successful those working in the legal field need to be far more open minded and aware of culture differences and use a nonbiased approach to gender. This is applicable to therapeutic jurisprudence and its holistic approach (Van Golde et al., 2019). Van Golde et al. (2019), stated that there is a much bigger aspect to therapeutic jurisprudence and a definite need to justify further research of the costs involved in crimes. Supporting the offender though therapy and accountability to prevent further crimes being committed will ultimately end the associated costs.

Frailing et al (2020) noted that therapeutic jurisprudence was first used in mental health law. Since then, it has progressed to other aspect of law and the justice system. It has become well known and is now being used in specialty court. Research has shown the great benefit it has on substance abuse, psychological disorders and re-offences. This has brought about an opportunity to move into traditional court. There have been discussions on legal employees and officers of the court who can learn the methods and use a more compassionate approach towards defendants and being able to communicate directly with the person which was often overlooked (Frailing et al., 2020). This has had a positive impact on hearings. The staff team at court worked in a team effort to assist the individual to remove the things that caused or led the defendant to commit a crime. Therapeutic jurisprudence focuses not only on commitment from the offender but to discourage repeated offences (Wexler & Winick, 1991). This is done best when the judge participates in proper, direct communication with the offender, motivating them to achieve sobriety, for example. With the help from counsel and other participants the offender will take true responsibility and accountability for their actions. Thus, the individual will take on the responsibility in court (Frailing, 2020).

Therapeutic jurisprudence aims to find a solution whereby crime rates can be lowered, and proper rehabilitation can prevent criminals from repeating their offences (Henshaw et al., 2019). As noted by Henshaw et al. (2019) therapeutic jurisprudence can change the way the law deals with outcomes by offenders to avoid reoffences by a more effective therapy during parole. Henshaw et al. (2019) explained that therapeutic jurisprudence analyses both therapy and non-therapy approaches and the effects it has on the legal system to properly manage and control further crimes and to demonstrate the differing impacts each method has on offenders in terms of reform.

Therapeutic jurisprudence is a collaborative, client-centered and humanistic approach (Imiera, 2018). It is a problem-solving approach that aims for maximum therapeutic outcomes and limits the law's non-beneficial aspects while keeping due process and legal principles intact (Goldberg, 2011). "Originating within the field of mental health law, therapeutic jurisprudence has extended into a wide range of legal contexts in an attempt

to infuse legal practices with insights from psychological and social sciences" (O'Brien, 2018; p. 1).

2.3.1 Theoretical Frameworks

Two theoretical frameworks are applicable to therapeutic jurisprudence: pragmatic psychology and 'Good Lives Model' theory.

2.3.1.2 Pragmatic Psychology and Psycholegal Soft Spots

Pragmatic psychology uses a case study methodology and qualitative analysis which is useful to therapeutic jurisprudence in certain cases, known as psycholegal soft spots (Birgden & Ward, 2003). These are context dependent cases where the wellbeing of offenders and others is at risk or psychological damage is caused by the application of the law. Soft spots can be grasped in the context of preventative lawyering, a proactive approach to protect against future legal disputes. For example, making sure a clause in a will cannot be overturned. Solutions to psycholegal soft spots need to address factual, practical and value problems applicable to the particular case (Birgden & Ward, 2003).

Pragmatic psychology holds the view that what has worked beneficially in the past should be recognised truth at the decision-making juncture. Another commonality is the absence of moral judgments in therapeutic jurisprudence, except of beneficence. Hence therapeutic jurisprudence and preventative lawyering have partnered, both to forestall latent legal soft spots, and to anticipate antitherapeutic harm and act to avert it. The pragmatic psychology model operates in areas of difficulties such as psycholegal soft spots and lawyering (Birgden & Ward, 2003).

Krebs and Denton (2005) recommend the pragmatic approach because, "[p]eople make moral judgments and engage in moral behaviors to induce themselves and others to uphold systems of cooperative exchange that help them achieve their goals and advance their interests" (p. 629). Two psycholegal problems that therapeutic jurisprudence and pragmatic psychology can address jointly, that affect the well-being of participants, are mental retardation and parole for sex offenders (Birgden &Ward, 2003).

2.3.2.2 'Good Lives Model' Theory

Wellbeing, as the criterion in therapeutic jurisprudence, fits well with the psychological "Good Lives" theory. Together they form a framework for rehabilitation. Wellbeing requires the meeting of physiological, social (family, work, leisure, and social support) and self (autonomy, relatedness, and competence) needs, as rehabilitation is personalised to the individual (Birgden, 2002).

Boyd (2008) describes therapeutic jurisprudence as a "potentially all-encompassing concept" which aims to reduce the negative impact of interaction with the law without compromising due process or judicial values (p. 501). Problem-solving courts have been used for drug problems, mental health and domestic violence using a therapeutic approach. These courts still attach to the traditional system and may provide dedicated judges to oversee cases and interventions. The ethos is immediate intervention, a non-adversarial process and active participation by judges (Boyd, 2008). These courts have resulted in better case-load administration, lowered costs for the judicial system and decreased recidivism. It has been recommended to extend them to cover environmental lawbreaking which is a specialised type of crime (Boyd, 2008).

Therapeutic jurisprudence could also be applied with offenders and employers facing the community and reaching consensus on reparation (Boyd, 2008). In most criminal cases, if the rehabilitation-based sentencing view is used, the court force the offender to take part in the program recommended by an expert or court for the offender's best interest instead of involving the offender in structuring the rehabilitation plan. Therapeutic jurisprudence formals have stressed on challenges that coercive and paternalistic practices have in motivating behavioural change. According to Winick (1992), people generally don't react well when asked to unless they see the advantages and outcomes of achieving a specific goal. If they are obliged to do so, they will respond half-heartedly. Involving people in the decision-making process can motivate individuals intrinsically. Intrinsically motivated individuals choose self-esteemed and self-reinforcing to promote the achievement of a goal (Winick, 1992). Based on this context, therapeutic jurisprudence asserts that enabling personal choice has therapeutic effects and results in an injustice system in some circumstances In addition to being able to deal with domestic violence and drugs,

therapeutic jurisprudence is being implemented in children's courts (Richards et al., 2017).

Therapeutic jurisprudence scholars urge different justice system to apply the principles of self-determination; for example, a criminal defendant is involved in the formulation of rehabilitation plans in the context of defense preparation and sentencing process (Wexler, 2005), facilitating the choice for people with a mental health condition to seek treatment and engaging client in the development of trial procedures (Winick, 2000). Moreover, police, prosecutors, and courts can be doctrine in assisting the integration of coercive aspects for victims injustice system and expound their experience in procedural justice through listening, acknowledging their expression, involving victim expression in decision making in reasoning, and respecting the victim dignity (Wexler, and, 2008).

The *International Framework for Court Excellence* (IFCE) outlined the requirements for legal reform that are complementary to therapeutic jurisprudence and focused on the law as therapeutic agent (Richardson, Spencer & Wexler, 2016). Wexler, (1995) states that the IFCE and therapeutic jurisprudence both aim to enhance the quality of law. In fact, therapeutic jurisprudence may provide a framework for restorative justice (Schopp, 1998). This is an important contribution that this thesis makes to the legal field. Therapeutic jurisprudence has shown itself suitable to provide such a framework for the judicial system in Australia. It has also been shown that restorative justice has not been tested on serious crimes and should, therefore, be placed under the authority of therapeutic jurisprudence as the core legal basis.

2.3.2 Mental Health, Disability and Autonomy

The therapeutic jurisprudence approach was first utilised in the mental health law arena during the 1980s. It has since been applied to contract and disability law, health care and other aspects (Boyd, 2008). Its core focus is whether the legal system adds to or detracts from healing. A practical example of this is the Neighbourhood Justice Centre (NJC) which was founded in 2007 in Victoria, Australia. It arose in response to negativity towards the traditional justice system's structures and procedures and at a time that non-

adversarial approaches were gaining in prominence (Arstein-Kerslake & Black, 2020). As this is an integrated approach it involves a multidisciplinary team: an NJC officer with staff from social services and local community services. These services work behind the scenes with the defendant and offer counselling, substance abuse services, health care, and financial and employment counselling. Once pleas have been entered, sentencing may be delayed, allowing the offender time to access these services; therefore, rehabilitation is the goal of therapeutic jurisprudence (Arstein-Kerslake & Black, 2020), highlighting Therapeutic Jurisprudence can occur at any stage of the criminal justice continuum.

The principle of Autonomy is widely influential as it influences both public law and privacy laws. For instance, individual Autonomy has a robust entanglement in the way it is reflected in history and structuring of the law of contracts. Further, contract freedom principle is tied to the egalitarian goal, meaning it is expressed prominently meant to identify people possessing power to acquire personal powers incident by ensuring genuine acceptable promises (Winick, 1992). The law of property and trusts is dependent on Individual Autonomy. In these sections of rules, an individual has substantial control to use and enjoy property they have and choose what next steps to their property during their life domain.

Critical disability theory states that a disabled person is whole, albeit being in possession of a mental or physical deformity; they do not need to be cured, as is the goal with therapy. The critics assign the disabled person the role of decision-making, as far as the aims of therapy are concerned (Arstein-Kerslake & Black, 2020). While the focus of critical disability theory has always been on the healthcare arena, its spotlight has been brought to bear on the legal field as well. A lot of disabled people have dealings with the judicial system, and even more are being handled via therapeutic jurisprudence interventions, due to multiple run-ins with the law arising from their mental health disability (Arstein-Kerslake & Black, 2020). Seeing the mentally disabled as a marginalised group, therapeutic jurisprudence needs to be viewed from the critical disability theory perspective. Therapeutic jurisprudence resources can be placed at the disposal, and under the control of the individual who is disabled of body or mind (Arstein-Kerslake & Black, 2020).

Despite the criticism, mental health issues have been effectively addressed by therapeutic jurisprudence. Parole management is another area where this approach has been used.

2.3.3 Parole Management

"Parole is a form of conditional release of offenders sentenced to a term of imprisonment, which allows an offender to serve the whole or part of their sentence in the community, subject to conditions" (Freiberg, 2018; p.192). Procedural justice is a key facet of therapeutic justice in parole management as it is an important aspect of therapeutic jurisprudence under four categories: voice (being listened to), validation (being taken seriously), respect (tone, body language, word choice) and self-determination (to participate instead of having justice applied) (Henshaw, Bartels & Hopkins, 2019).

Self-determination and having control of ones' fate breed motivation for transformation and is of importance to Indigenous people (Henshaw, Bartels & Hopkins, 2019). The Compliance Management or Incarceration in the Territory ('COMMIT') program, which was initiated in the Northern Territory, is focussed on therapeutic jurisprudences principles for reform. The Hawaii's Opportunity Probation with Enforcement HOPE program demonstrates therapeutic values such as fairness and proportionality (Henshaw, Bartels & Hopkins, 2019). COMMIT is based on the HOPE program; both are a shift towards parole management reform (Henshaw, Bartels & Hopkins, 2009). Henshaw et al. (2019) explain that COMMIT includes immediate and certain implications when an offender does not adhere to the rules of parole. In cases like this, the parolee will have 72 hours to go to court where they will have the possibility of a short prison sentence. This sentence or consequence will have been predetermined by the system known as sanctions management which aligns with different types of parole violations.

Hope Opportunity Probation with Enforcement (HOPE) is a programme with many differences to the usual programmes such as random drug testing: brief jails sentence that are immediately applied for skipping or failing drug tests; a hearing for first time participants to hear the rules and resources they will need and jail sentences for continued violations (Frailing, 2020). Since its initiation it has become popular in America. HOPE

has shown no significant benefit when compared to traditional programmes especially when focused on repetition of crime and falling back into drugs (Frailing, 2020). It can be noted that the failure of HOPE can be due to the differences in the programme and its implementations and commitments to it. There is not enough information on the daily running's of the programme and even less on the those involved in the programme. Majority of the information has been focused on the justice outcome and not on the manoeuvres that lead to the outcome. The need for a better understanding and breakdown on the programme will be more beneficial in understanding the outcome for those involved in the HOPE programme and to compare these findings to therapeutic jurisprudence (Frailing, 2020).

These programs have been shown to have some limitations. Therefore, more research is needed into how therapeutic jurisprudence principles can best be applied to parole management. Henshaw et al., (2019) described compliance management, or certain requirements that fall under parole agreements that include sticking to the curfew given; living at the accepted address; not committing any crime; getting employment; avoiding drugs and certain types of people, and reporting to the supervising officer (Henshaw et al., 2019). Not adhering to these conditions can lead to returning to incarceration. Often the main aim of parole is to assist the parolee, under supervision, for re-entry into society. The problematic approach pointed out by Henshaw et al. (2019) is that there is a stronger focus in dealing with a perilous individual through control of their actions than to aim for rehabilitation.

Therapeutic jurisprudence has the vision to transform the law regarding parole compliance. Both therapeutic and anti-therapeutic effects of application of the law to individuals must be considered, so that "solution-focussed outcomes" are gained to "break the cycle of recidivism in Australia" (Henshaw, Bartels & Hopkins, 2019; p. 1413).

In Canada, Aboriginal communities have argued for a judicial system that takes the complexity of their socioeconomic and cultural issues into account and incorporates wellness into the method of sentencing (Goldberg, 2011). Judges have also favoured a problem-solving approach that would enable them to deal more effectively with factors

such as “mental health issues, addiction, limited anger and risk-management skills, poverty, and social marginalization” which are at the root of criminal activity (Goldberg, 2011; p. vi). For instance, mental health courts can provide therapeutic assistance and steer offenders to the right resources. This relies on the courts establishing relationships with various facilities for referral (Zafirakis, 2011).

2.3.4 Drug Courts

Drug Courts arose in Australia and the US in response to over 40% of detainees being on cannabis at the time they committed the crime; other drugs found in many of these individuals were opiates (higher in Australia) and cocaine (higher in US) (King, 2012). A better response was needed than incarceration as it was not solving the underlying problem. In particular, collaboration was found to be one of the core strengths of these courts, involving professionals from diverse disciplines (King, 2012).

The first Drug Court commenced in New South Wales in 1999 (Kornhauser, R., 2018). A study of the effectiveness of the New South Wales Drug Court program conducted in 2012, has showed a 12% decrease in adult recidivism rates (Weatherburn, Yeong, Poynton, Jones, & Farrell, 2020). Drug courts have achieved their success by seeking out the underlying causes that lead to offending and provide support services and treatment and provide an opportunity for judges to practice caring and compassion (Hueston & Hutchins, 2018). Compassion and therapeutic actions taken by the judges include: The drug court judges learn the background, strengths, and challenges of each offender and develop “*a relationship of trust during frequent review hearings through the course of the program; the judge plays a critical role in therapeutically motivating and encouraging participant improvement and sobriety, and in removing barriers to achievement of goals while demanding behavioural accountability of each offender through intense supervision*” (Hueston & Hutchins, 2018; p. 97).

Therapeutic jurisprudence approach enabled judges to see the offenders in a more encompassing and compassionate way, which added to their job satisfaction and helped reduce recidivism (Goldberg, 2011). The differences between traditional justice and

problem-solving courts that take a therapeutic jurisprudence approach are compared in Appendix B.

The judges, therefore, play an important role in setting the tone for therapeutic jurisprudence proceedings, ensuring that all parties are treated respectfully and may even delegate certain functions to counsel, e.g., agreeing to keep *voire dire* to an agreed time (Jones, 2012). The therapeutic effect of the court team (police, magistrate etc.) is visible when therapeutic objectives are employed (King, 2003).

2.3.5 Indigenous Courts

In the huge movement away from adversarial and limited approaches to justice, various therapeutic options have risen including therapeutic jurisprudence, problem-solving courts, indigenous courts, and restorative justice (King, 2008). In Victoria, three Koori Courts changed the face of the legal system. The first steps were the appointment of an Aboriginal Liaison Officer and the training of 23 Aboriginal Bail Justices. Elders are paid a sitting fee to assist and are seated next to the magistrates. Other senior members of the community may choose to attend and then their inputs are included. Offending rates dropped drastically as a result of these special courts (King, 2005).

In all the above court examples that exercised therapeutic options, emotion, communication skills, emotional intelligence and empathy were accorded a position of prominence. The main mode of healing was expression of emotions, discussion of the crime and reparations. Facilitation is not a crutch for the offender but a helping hand along the way; the offender is the one who must change (King, 2009).

In the next section, traditional justice, restorative justice, and therapeutic jurisprudence are compared.

2.4 Comparison of the three Approaches

The data gathered around the three approaches, traditional justice, restorative justice, and therapeutic jurisprudence are summarised and compared below.

2.4.1 Approaches to Justice

Justice, according to the traditional system, has three phases or areas of operation, each handled by different bodies. The first is crime investigation and arrest, which is handled by the police (including law enforcement agency/regulatory body). In the second phase, the courts take over and if the offender is found guilty or pleads guilty sentencing occurs. Lastly, the offender is passed over to the correctional authorities (Criminal Justice System, 2020). Therapeutic jurisprudence and restorative justice interventions can take place in any of these phases. These phases, therefore, offer pivotal possibilities for transformation of the existing judicial system.

The traditional justice approach is primarily punitive, rehabilitative and aims to reduce recidivism. That it is not succeeding is readily apparent from the data provided in the preceding sections. Prisons are overcrowded and almost 50% of offenders reoffend within two years (Henshaw, Bartels & Hopkins, 2019). The emphasis on punishment is a serious drawback to the approach – the wellbeing of offenders is negatively impacted by contact with the law (Boyd, 2008). First time incarcerated offenders are exposed to hardened criminals and are thus affected by the crimogenic nature of the prison environment (Knaus, 2007). Employment prospects cease, taking away dignity and the ability to provide for family. Isolation from family, friends and community exacerbates suffering and reduces the chances of receiving positive influences. Unsentenced prisoners are often housed for long periods with sentenced criminals, thus already punishing them without a trial (Knaus, 2007). Lengthy delays frustrate everyone. Rehabilitative efforts are not provided in a conducive environment to breed positive results. The community remains unsettled until the case is resolved. There is no effort to strengthen bonds with loved ones and the community or offer support to offenders once they have been arrested (Birgden, 2002; Knaus, 2007; Yeager, 2019). Victims are especially vulnerable as no measures are taken to include them in court hearings, except as state witnesses (Hoyle & Rosenblatt, 2015). Aside from the financial losses they endure, victims deal with difficult emotions and need more than the current system offers them. In such a system, the necessity of, or right to punish, remain contentious issues.

While traditional justice provides high control and low support, restorative justice provides high control and high support. Therapeutic jurisprudence has as its core aim the maximisation of wellbeing through the judicial process and the minimisation of factors leading to harm. It follows due process of the traditional system but not its narrowness. It has some of its roots in Indigenous cultural justice processes, such as Biidaaban, which showed a recidivism rate of less than 5% compared to the national average of 27% (Hewitt, 2016). Unlike traditional justice, it is non-adversarial, creating new roles for all role-players (Birgden & Ward, 2003). Restorative justice has two aims, to reduce crime and to repair the damage it has done.

Restorative justice claims to meet the emotional and relational needs of the participants (offender and victim) and the community thus leading to societal wellbeing (McCold & Wachtel, 2003). This leads to societal wellbeing. In doing so, the relational and emotional needs of key participants are met, i.e., victim, offender, and community (McCold & Wachtel, 2003). Communities of care redress the isolation of modern society, providing a sense of community that the offender can be restored to, thus encouraging transformation of the individual, again by answering emotional and relational needs. Likewise, the victim receives support and can be empowered to make the leap to survivor (McCold & Wachtel, 2003).

Another aim of restorative justice is to reduce crime as well as the injury it has caused (Johnstone, 2011). The inclusion of the community in sessions may result in remorse, reparation and taking of responsibility for the offence and the harm it caused. Communities of care help with the offender's reintegration back into the society and with the victim's healing to survivor (Wachtel, 2013).

Because it encourages remorse, this could lead to a reduction in first-time offenders reoffending as well as lowered recidivism rates for all offender participants.

The final outcome of restorative justice is reparation for the victim and reconciliation of the communities. The offender takes accountability along with remorse with the intention not to return to crime (McCold & Wachtel, 2003). A drawback of restorative justice is the length of time it takes that does not give it an advantage over traditional justice, for

example a restorative justice conference may last considerably longer than a traditional justice hearing for the same type of crime (Hewitt, 2016).

While restorative justice focuses on offender remorse, victim reparation and community involvement to restore the offender to the society, therapeutic jurisprudence addresses the individual with all the support and legal resources backing it to enable wellbeing to be achieved.

Having similarities with pragmatic psychology, therapeutic jurisprudence is problem-solving, and solution focused. Community safety is balanced against offender needs and caution is exercised not to cause psychological dysfunction. Psycholegal soft spots are proactively dealt with, examples are mental retardation and parole for sex offenders (Birgden & Ward, 2003). Its only moral imperatives are beneficence and reducing harm, thus it is free from moral judgment. It is a multidisciplinary approach that offers the services offenders need to desist. The outcome therapeutic jurisprudence seeks is rehabilitation.

Applying a pragmatic psychology theory to therapeutic jurisprudence capitalises on the problem-solving and wellbeing promotion of both the victim and offender (Birgden & Ward, 2003). The outcomes that it can achieve include both bringing about wellbeing and reducing the harmful effects of traditional justice within the context of the law. This is achieved through a non-adversarial approach, balancing needs of offender, victim, and community. It practices values such as fairness and proportionality and maintains procedural justice (Henshaw, Bartels & Hopkins, 2019). Offenders are validated and steered towards self-determination in reaching a resolution and deciding reparation. Taking control of one's destiny is valued by Indigenous groups, and as they have the highest percentage of offenders, this strategy is effective and enlists community support (Broadhurst, Maller, Maller &Duffecy, 1988).

Therapeutic jurisprudence can be applied to a wide range of crimes and offenders, giving it an advantage over restorative justice. It can deal with psycholegal soft spots such as mental retardation and parole for sex offenders (Birgden & Ward, 2003). Like traditional justice, it makes use of a wide range of support services towards rehabilitation. However,

this is done in a supportive, not punitive environment, therefore does not lead to harm and does lead to wellbeing. Rehabilitation is its key achievable. Therapeutic jurisprudence could be used to restructure the legal system without abolishing it.

2.4.2 Retribution, Rehabilitation and Recidivism

This section looks at Retribution, Rehabilitation and Recidivism in the context of the three justice systems discussed above. Rehabilitation occurs when the offender does not reoffend again within two years, and recidivism is when the offender does reoffend again within the same period. These two variables are therefore inversely proportional – as recidivism decreases, rehabilitation increases, and vice versa. Retribution on the other hand does not contribute to wellbeing. In fact, retribution is not rehabilitative, and has shown little success in reducing recidivism or acting as a deterrent to first-time offenders (Knaus, 2017). Traditional justice follows a retributive approach, thus cannot be rehabilitative; it has also failed to reduce recidivism. Restorative justice and therapeutic jurisprudence both have rehabilitation as their aim.

Governments in countries such as Australia act on the belief that citizens want a punitive justice system and to remove offenders from society. However, this policy has not worked. Rather, it has led to overcrowding of prisons and high recidivism (Knaus, 2017).

A further compounding feature is that Australia has fallen short of human rights laws in several areas, such as the illegal detainment of refugees and not releasing prisoners when their sentence has ended. These indicate a lack of fairness and impartiality. Imprisonment has been shown to result in an increase in crime (Knaus, 2017). While provision is made to see to the basic needs of prisoners, overpopulation prevents this happening in reality, leading to a definite decrease in wellbeing. It is highly probable that first-time offenders in this environment will lose a sense of themselves, be exposed continuously to negative examples and abuse, and be psychologically harmed as a result of these experiences. More research is needed to examine the effects of prison lifestyle on recidivism.

One of the justifications for punishment is that members of society choose the benefits of community in exchange for giving up a portion of their freedom. Based on the theoretical

concept of fairness, retribution is defended. Punishment has been defined as the infliction of suffering on the individual being punished (Gavison, 1991). There is a distinction between the right to be held accountable for ones' actions and the right to be punished. Both restorative justice and therapeutic jurisprudence hold the offender accountable and accept the need for justice while intrinsically discerning between the offender taking accountability and meting out punishment. Reparation is not punishment but redressing the damages and losses that the victim incurred and is part of taking accountability.

Vengeance is embedded in the human psyche and plays a role in the punitive nature of traditional justice, giving the public the satisfaction of the offender getting his just desserts. Therapeutic jurisprudence and restorative justice argue against the necessity of harsh punishment that exacts suffering as this is contrary to wellbeing, while agreeing with the necessity of justice.

The running costs of traditional justice system are confounding. Restorative justice can also incur high costs, but it reduces recidivism more effectively than traditional justice. Therapeutic jurisprudence on the other hand, is less lengthy than the other two approaches (Hewitt, 2016). It can function within the existing infrastructure and resources and reduces recidivism (Henshaw, Bartels & Hopkins, 2019). It would, therefore, result in savings and other efficiencies.

Recidivism rates for traditional justice are underreported for various reasons. Firstly, most crimes are not reported and some of these reported cases never make it to court; this may be victims deciding not to press charges, insufficient evidence to proceed, or procedural errors causing the case to be struck out (Carcach & Leverett, 1999). Secondly it is difficult to know if those reported are first-time offenders or recidivists ("Recidivism", 2020). Thirdly the statistics are based on research studies which could skew the results. For example, a number of participants in a study of juvenile offenders become adults over the course of a longitudinal study, so if they reoffend, they are not measured as recidivists because of their transition from juvenile to adult offenders. Fourthly, there is a delay between the date of offending and that of the court appearance due to lags in the traditional justice approach. Fifthly, offenders in police lockup are excluded from the statistics.

Finally, where low severity crimes of juveniles are committed, the offenders are not placed on remand, thus any reoffending would contribute to the inaccurate recidivism figures.

Rehabilitation mitigates the negative effects of imprisonment on the community which include: loss of a productively employed citizen and adding to unemployment rates upon release, poverty in the community that contributes to crime, crimogenic influences that cause first-time offenders to become hardened criminals, children that grow up without a parent that leads to troubled youth and more crime, and potentially longer sentences that exacerbate all of the issues that cause crime rates to remain high and the negative influences to be cyclic across generations (Birgden, 2002; Knaus, 2017; Yeager, 2019). Overcrowding in prisons also undermines rehabilitative interventions and detracts from dignity, as does sub-standard provision of basic needs and exposure to violence, which may lead to inferior health, increased infections, and mental problems (Knaus, 2017).

Policy makers and politicians can sway the public toward problematic opinions. For instance, Gillard's statement of inclusion may be seen as empowering, but only for those who meet the inclusion criteria *(*Gillard, 2007). It immediately places a lot of people into an excluded category (Macfarlane, 2010). It in fact, is disabling as it can contribute to those excluded giving up on attempts to better their lives (Macfarlane, 2010).

Evaluation of restorative justice shows that its conferences lead to a reduction in recidivism (Hayes, 2005; Henshaw, Bartels & Hopkins, 2019). Restorative justice has had success with juvenile offenders who committed violent crimes but did not achieve a reduction in minor offences (Hayes, 2005). Rehabilitation is viewed as an important aspect of restorative justice and is more effective in reducing recidivism as compared to a retributive approach (Hayes, 2005). More research is needed to see if rehabilitation is sustained. Although the element of retributive justice or censure is present in both restorative justice conferences and therapeutic jurisprudence, these approaches aim for wellness of all parties exposed to the law, which is absent in the traditional justice approach.

Offenders and victims participating in restorative justice meet face-to-face; the conference gives them a sense of closure and prevents them from reoffending. Participants

undergoing restorative justice are more satisfied than those who undergo traditional court justice. Offenders and victims have recommended restorative justice as a better option than traditional justice (Ho, 2018).

Studies on restorative justice intervention show that two years after a restorative justice intervention, significantly less offenders reoffended, there was reduced recidivism, there were no crimogenic effects and the conference made the offenders see the harm of their crime (Ho, 2018). Restorative justice interventions have a lower risk of recidivism (Bouffard, Cooper & Bergseth, 2016) and it out performs traditional courts in terms of offender accountability (Poulson, 2003). These results indicate clearly how restorative justice practice not only reduces the propensity to reoffend, it also reduces recidivism

Similarly, therapeutic jurisprudence has the ability to reduce recidivism. It has transformed the law on parole compliance in Australia (Henshaw, Bartels & Hopkins, 2019). A useful framework for therapeutic jurisprudence is psychological 'Good Lives' theory (Birgden, 2002). Both have wellbeing as their central aim (Arstein-Kerslake &Black, 2020), and are the drivers towards rehabilitation (Birgden, 2002). Therapeutic jurisprudence and restorative justice have wellbeing with rehabilitation (negative recidivism) as the goal; traditional justice would like reduced recidivism (though it is unable to achieve it) but is not concerned with wellbeing, and have caused harm to many exposed to the law (Gavrielides, 2014), restorative punishment includes the process of transformation that occurs when the offender experiences remorse (Daly, 2005).

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2.4.3 Research Studies

This section examines case studies undertaken on the three approaches.

The proliferation of environmental crimes indicates that traditional justice is not handling this area of crimes well (Boyd, 2008). Australia has also not taken measures to implement laws dealing with international environmental crimes (Boyd, 2008). It has been proposed that therapeutic jurisprudence, and to some extent restorative justice, would provide new strategies for handling and reducing these crimes (Boyd, 2008). Therapeutic jurisprudence and restorative justice bring specific advantages to the justice system such as: quicker turnaround time, better self-reporting, improved monitoring, offender accountability, greater community involvement and reduced recidivism, compared to traditional justice (Knaus, 2017; Johnstone, 2011; Hoyle & Rosenblatt, 2015; Hewitt, 2016; Sherman et al., 1998; Hayes, 2005; O'Connell, 2017; Wachtel, 2013; Miers et al., 2020; Ho, 2018; Zebel, Schreurs and Ufkes, 2017; Strang et al., 2013, Bradshaw and Roseborough, 2005; Bouffard, Cooper & Bergseth, 2016; Poulson, 2003; Johnstone, 2011; Henshaw, Bartels & Hopkins, 2009; Goldberg, 2011; King & Auty, 2005; Sherman et al., 1998). Protection orders are another area where traditional justice fails to achieve the safety of family members in domestic abuse cases (Johnsen and Robertson, 2016).

While overall restorative justice reports positive outcomes, there are mixed results from research on its efficacy (Hoyle & Rosenblatt, 2015). It indicates that police are aware of the intervention and supportive of it and possibly do not take a retributive approach but are sympathetic towards restorative justice values and potential outcomes. It is discouraging for officers to see poor court outcomes when they have arrested the offender as officers would like to see offenders rehabilitated.

Certain factors are strongly linked to recidivism, such as gender, race, age, and previous offending (Henshaw, Bartels & Hopkins, 2019; Hewitt, 2016; Hayes, 2005; Australian

Institute of Health and Welfare, 2020). By knowing that race, for example, is an indicator, interventions can take shape around Indigenous methods of justice, thus combining restorative justice objectives with them (King & Auty, 2005) have a community focus ((Hewitt, 2016) and thus lead to more positive outcomes (rehabilitation and wellbeing) for all concerned (King, 2005; McCold & Wachtel, 2003).

UK findings on restorative justice are suitable for comparison due to the shared history of the two justice systems (Miers et al., 2020; Ho, 2018). The findings show that both victims and offenders expressed satisfaction with the intervention, but offenders are more satisfied than victims (Hoyle & Rosenblatt, 2015). This finding could indicate that there is still a perception by victims that the offender must suffer retribution, whereas offenders are relieved because they get off more lightly than if they had been tried under traditional justice. Perhaps the catharsis of transformation increases their satisfaction, but are the victims adequately empowered so that they have the catharsis of survival? Such questions open up other avenues of research.

Nevertheless, across studies, restorative justice was found to be more effective than traditional justice (Miers et al., 2020; Strang et al., 2013; Bouffard, Cooper & Bergseth, 2016). Offenders were more likely to apologise; victims were less likely to remain distressed or fear revictimisation (Angel et al., 2014a; Poulson, 2003). In some studies, sample sizes were too small to accurately measure the effects (Poulson, 2003). Restorative justice has started to be applied to adults, not only juveniles, and for more serious offences (Zebel, Schreurs & Ufkes, 2017), including family and sexual violence and murder threats in New Zealand.

Some of the limitations found in the case studies were boundaries of reparation, poor victim involvement, failure to truly engage the community, and lack of a culture shift in officials (Hoyle & Rosenblatt, 2015). Reparation may not amount to more than an apology, leaving victims feeling cheated (Hoyle & Rosenblatt, 2015). At times, the offender was the only focus and the victim was relegated to the sidelines, similar to traditional justice (Hoyle & Rosenblatt, 2015). Sometimes victims were not even present due to lack of interest in arranging times that they could attend (Hoyle & Rosenblatt,

2015). Victims were also not adequately prepared on what to expect (Hoyle & Rosenblatt, 2015). Using an empty chair for an absent victim did not elicit the same response (Hoyle & Rosenblatt, 2015). Thus, the role of victims is essential to the proper conducting of restorative justice (McCold & Wachtel, 2003; Hoyle & Rosenblatt, 2015), and any courts that do not meet this requirement should not be considered restorative justice. The failure to fully involve the community has occurred (McCold & Wachtel, 2003; Hoyle & Rosenblatt, 2015). Only when restorative justice is properly carried out can it contribute to meaningful research on its suitability as an intervention to challenge the traditional justice system. Community support also needs to be continuous outside of the intervention if rehabilitation is to be achieved – a substitute for the real community cannot provide the same outcome (McCold & Wachtel, 2003).

Confession is also a pre-condition in restorative justice initiatives and another limitation (Poulson, 2003). Unlike therapeutic jurisprudence, it is a critic that restorative justice can only be applied at the sentencing stage (Poulson, 2003) implying it is limited. However, this is not the case everywhere, for example in Australia some jurisdictions utilise restorative justice to divert young offenders and some adults from the Criminal Justice System (King, 2008). Another area where restorative justice has fallen short is in cases of sexual abuse, where victims indicated that they would not report the crime if restorative justice was the option (O'Connell, 2017). This may be due to fears of safety, not believing an offender can change, and the perceived informality of the setting in contrast to traditional justice and therapeutic jurisprudence.

In relation to concerns over restorative justice not following due process or delivering proof, a parallel is drawn with plea-bargaining (Boyd, 2008). In the US Department of Justice 80% of crimes resulted in plea-bargaining. It is proposed that offenders need to be given the opportunity to refuse a restorative justice judgment and opt for traditional sentencing and some substantive punishment needs to be imposed to avoid offenders continuing to find new ways to outwit the law. Restorative justice should run adjacent to the traditional system rather than usurping its role (Boyd, 2008).

Some strengths of restorative justice are that it improves perceptions of procedural

fairness, overall satisfaction, being heard and being taken into account. It produces more victim and community involvement and better offender compliance; and finally, it reduces recidivism (Bouffard, Cooper & Bergseth, 2016).

The greatest strength of therapeutic jurisprudence is its ability to run concurrent with traditional justice as it does not compromise judicial values (Boyd, 2008). Further, every case is unique, and solutions are tailored to participants to maximise wellbeing (Birgden & Ward, 2003). Working via the structures of justice in traditional courtrooms and dedicated judges, therapeutic jurisprudence has the potential to replace the way traditional justice is carried out (Boyd, 2008). In cases of therapeutic jurisprudence courts for drug problems, mental health and domestic violence, the case-load administration is better, costs for the judicial system are lower and decrease recidivism (Boyd, 2008). Other areas where it can be effective is environmental crimes, anger management and children's courts, as well as areas where it has not been tested yet, (Richards et al., 2017). Using micro, mezzo and macro strategies for victims, therapeutic jurisprudence addresses the victim's need for safety, wellbeing, and preferred outcomes (Imiera, 2018). Healing can only be realised when the victim has a sense of fairness in the outcome (Imiera, 2018).

Therapeutic jurisprudence operates across the full spectrum, is not narrowly defined, whereas the traditional approach operates according to previous precedents until these are changed in a new case, i.e., *stare decisi*. In common with psychology, the law delivers normative data – social, moral and legal judgments (Birgden & Ward, 2003; Stobbs, 2013). Thus, the law has a narrow scope of operation, directed towards retribution (Walen, 2014). Therapeutic jurisprudence is non-adversarial, in comparison to the traditional justice system but it does not consider the abolishment of the traditional system; in other words, it aims to work within the system and play a far greater role (Stobbs, 2013). For instance, Wexler's framework for therapeutic jurisprudence combined with psychological knowledge examines if the law (1) makes the most of what is therapeutic and curtails what is not; (2) balances individuals' needs against those of the community's safety by adopting therapeutic aims; (3) leads to psychological dysfunction; and (4) has a therapeutic or anti-therapeutic outcome via its role players (Birgden & Ward, 2003). Therapeutic jurisprudence thus positions itself as a critic of the current justice system as well as a

partner-leader in its vision for the future (Birgden & Ward, 2003). It can potentially transform the legal system if its principles are adopted.

Therapeutic jurisprudence has the vision to transform the law regarding parole compliance (Henshaw, Bartels & Hopkins). Two psycholegal problems that therapeutic jurisprudence and pragmatic psychology can address jointly, that affects the well-being of participants, are mental retardation and parole for sex offenders (Birgden &Ward, 2003; Henshaw, Bartels & Hopkins, 2009). Therapeutic jurisprudence addresses crime that results from mental health problems, addiction, poor anger management skills, low risk management skills, poverty and social ostracisation (Boyd, 2008; Goldberg, 2011). This is done in conjunction with established and new social and other support services to sustain rehabilitation (Arstein-Kerslake & Black, 2020). By seeking out the cause of criminal behaviour, therapeutic jurisprudence aims to overcome barriers to rehabilitation (Arstein-Kerslake and Black, 2020). Mental health courts can steer offenders to support services (Zafirakis, 2011).

There are many commonalties between therapeutic jurisprudence and restorative justice. For instance, they are practical, focus on empathy and wellbeing, are problem-solving, are not punitive (Johnstone, 2011; McCold & Wachtel, 2003; Ness, 2005; Strang et al., 2013; Hoyle & Rosenblatt, 2015; Johnstone, 2011; Bouffard, Cooper and Bergseth, 2016; Birgden & Ward, 2003; Krebs & Denton, 2005; Birgden, 2002; Boyd, 2008; Richardson, Spencer and Wexler, 2016; Imiera, 2018). Other commonalities between restorative justice and therapeutic jurisprudence are: (1) practical, not only analytical; (2) focus on empathy and wellbeing; (3) problem-solving rather than punitive; and (4) use the traditional judicial basis. However, there are differences, such as therapeutic jurisprudence does not support shaming and restorative justice follows process-oriented values (Johnsen and Robertson, 2016). Unlike restorative justice (Kuo, Longmire & Cuvelier, 2010), therapeutic jurisprudence does not agree with shaming the offender, (Sherman et al., 1998); and does not follow process-oriented ideals, preferring a unique approach to each case (Birgden & Ward, 2003). Therapeutic jurisprudence has also made large strides in combining its approach with Nunga Courts; outcomes were reduction in breaches of bail and non-compliance with orders, as well as reduced recidivism (King, 2005).

Therapeutic Jurisprudence terms enabling application of reasoning and rehabilitation programs in court anticipates behavioral self-charge as part and re-package sentencing process. For instance, Therapeutic Jurisprudence in Australia requires affective modification at each phase of the legal process. The assistance of a philosophical approach, workloads, structures and roles of the judges and parole board are subject to change (Larsen & Milnes, 2011).

Restorative justice is a type of *"informal justice"* which permits greater community and role-player involvement and input into dispute resolution (Daly & Marchetti, 2011; p. 2). When conducted by judges in problem-solving courts it, "seeks to maximize the law's therapeutic values and minimize its anti-therapeutic consequences, without sacrificing due process or other judicial and legal values" (Goldberg, 2011; p. 2). Therapeutic jurisprudence is able to provide the framework for restorative justice interventions that can increase their effectiveness, ensure better measurement in studies, and comply with judicial proceedings (Schopp, 1998). See Figure 4 for a comparison of the adversarial and therapeutic paradigms.

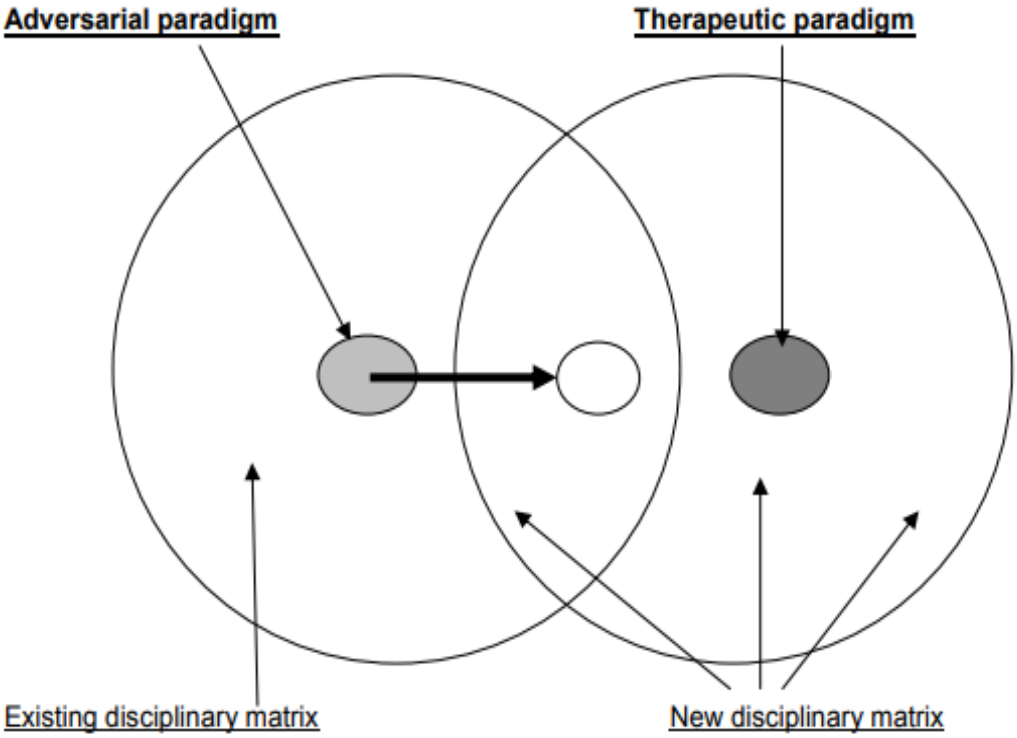

Figure 4: Comparison of Traditional Justice system and Therapeutic Jurisprudence (Stobbs, 2013)

2.5 Police Attitudes and Practical Issues

Police are used to being in a position of authority and it requires a culture shift to act as a facilitator instead. For example, arresting someone is a normal duty, whereas to ensure all participants in a restorative justice intervention are given equal time to express themselves requires new skills. Thus, understanding police attitudes towards restorative justice and therapeutic jurisprudence is useful.

For instance, the main reason for the failure of 23 cautioning cases to meet the requirements of restorative justice was the entrenched police culture where community of support members were sidelined and the officials dominated, rather than facilitated, the intervention. Even worse, offenders were interrogated about the offence and treated as if they were already lifetime criminals, and in some cases, obtaining criminal intelligence

seemed to be the main purpose of the session (Hoyle, 2007 in Hoyle & Rosenblatt, 2015). In these cases, the question raised was whether the police should play the facilitator role or the community as, "community involvement is often thought of as an enabler to the informalising and deprofessionalising aspirations of restorative justice-inspired initiatives" (Hoyle & Rosenblatt, 2015; p. 21).

Police attitudes affect the outcomes of restorative justice conferences when officers are required to act as facilitators; for example, it was found that some officers treat the offender as a lifetime criminal instead of helping the offender to accept responsibility for their crimes, or officers fail to include the community role, which is an integral part of restorative justice conferences.

Certain procedural aspects constitute practical issues and need to be considered. With regards to processing offender requirements, police officers may encounter difficulties with an unsanctioned intervention when requiring an admission of guilt before proceeding. In instances where it is a problem to obtain an admission of guilt in advance, a form of protected admission scheme is proposed. Failure to resolve issues around admission of guilt procedures would hamper police acting effectively. Other concerns are obtaining the offender's fingerprints, DNA and a photograph without commencing the formal processing required by law. Australia has two forms of Aboriginal Courts, the Nunga Courts, which are not sanctioned yet operate anyway, and the Koori courts which have been sanctioned and operate from the Magistrate's Court (King, 2003).

2.6 Research Proposition

In Australia, as well as other countries, the judicial system is travelling in two different directions. On the one hand, there is an increasing call for greater punishment of offenders. On the other, there is a growing trend towards models seeking transformation of the traditional judicial system. Daly and Marchetti (2011) attribute this to policies of inclusion and of exclusion and note that restorative justice, therapeutic jurisprudence, and current models of Indigenous judicial systems have benefitted from social movements towards a more humane approach to both victims and offenders.

It is worth noting that wellness is viewed as the all-inclusive purpose of therapeutic jurisprudence: "The construct driving rehabilitation in corrections should be good lives or wellbeing, not risk management or relapse prevention" (Birgden, 2002; p. 181). This elevates wellness to the status of dependent variable, and the intervention that is applied, i.e., traditional justice, restorative justice, or therapeutic jurisprudence as the independent variable. Birgden (2002), states that if the basic needs are not met, the lack of autonomy, relatedness and competence will ultimately lead to criminal behaviour. This process of offending behaviour related to needs is illustrated in Figure 5. When the needs for autonomy, relatedness and competence are not met, it leads to distress, psychological problems and social maladjustment and consequently to offending behaviour (Birgden, 2002). This model fits in with the nature/nurture argument and argues for wellness of the offender, as provided by therapeutic jurisprudence and restorative justice.

For the purpose of this study, the judicial systems (the traditional system, restorative justice, and therapeutic jurisprudence) could be viewed as the independent variables – any or all of them can be applied to criminal offences and rehabilitation and recidivism as the dependent variables. It is assumed that a successful intervention should reduce recidivism, or in other words, result in rehabilitation of the offender. This logic leads to the research proposition for this study:

> ***The overall value of therapeutic jurisprudence, and restorative justice, leads to greater wellbeing, higher rehabilitation, and lower recidivism than traditional justice does.***

It is further assumed in this study that rehabilitation and recidivism are negatively correlated. When one decreases the other increase, or vice versa. Contributing variables are those factors that affect the outcome of these. They are likely to be aspects of the interventions that enhance or detract from the outcome. For example, victims can show varied reactions to restorative justice when the offender apologised. If an apology tendered is welcomed it could lead to greater wellness but if it makes the victim uncomfortable it is less likely to lead to a successful outcome for the victim. This example refers to the victim's wellbeing, but it is the offender whose wellness is assumed to lead to a reduction

in recidivism and an increase in rehabilitation, indicating an inverse relationship. However, wellness cannot be said to be achieved by an intervention if it ignores the wellness of the victim, despite a reduction in recidivism.

This research proposition, therefore, focuses on (1) wellbeing (the core tenet of therapeutic jurisprudence); (2) rehabilitation; (3) reduced recidivism; (4) therapeutic jurisprudence as the desired model and framework for restorative justice. This proposition will be assessed using thematic analysis of the literature on traditional justice, restorative justice, and therapeutic jurisprudence.

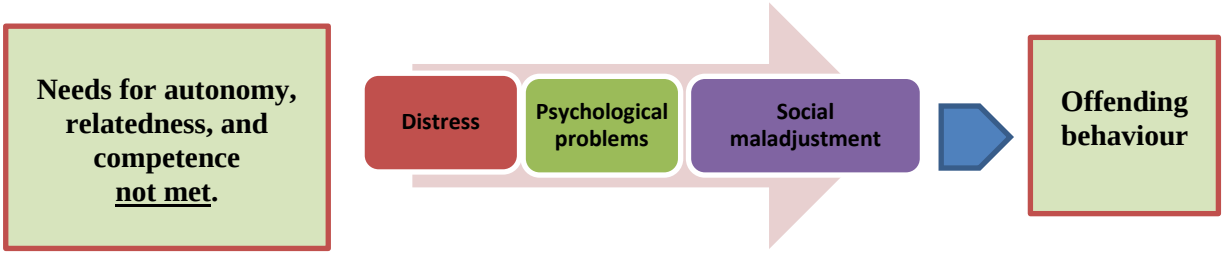

Figure 5: "Good Lives" Theory [Created from information in Birgden, 2002]

The overall aim of this thesis is to contribute to greater understanding of therapeutic jurisprudence as the key approach to a modifying traditional justice approach, based on retribution and detention of offenders. Traditional justice does support wellbeing of the participants who come into contact with the law as a result of the crime committed. Traditional justice in the perspective of achieving wellbeing of offender in Australia, it has incorporated victims support services in courts, and other programs in Victoria such as Victoria Integrated Services Program (Duffy, 2011). Prisons are overflowing in Australia and recidivism rates are high. Restorative justice has had some success too. This thesis intends to examine how a holistic synergistic approach that views the justice system as therapeutic tool, particularly applying therapeutic jurisprudence within the current judicial system decreases offending behaviour.

2.7 The Current Judicial Model

Traditional justice is the main approach that is currently accepted as 'how justice is done.' The current judicial model is represented in Figure 6. In this model the big circle indicates

the existing justice system which is based on traditional justice as the main judicial system the general assumption and evidence from research indicates that traditional justice is characterised by high recidivism, low rehabilitation, overcrowded prisons, and high case load and cost; it is retribution-centric and offers low support to offenders, victims, and communities. The smaller circles represent the two justice systems, therapeutic jurisprudence and restorative justice that are victim- and offender-centric, offer high support to victims and offenders, and result in reduced recidivism but are rarely applied. These operate through justice mechanisms other than traditional justice i.e., that they are mostly applied through funding and research studies but are not fully incorporated in the justice system that is predominantly traditional in nature. Also, there is no synergy between therapeutic jurisprudence and restorative justice; each operates alone although there may be some overlap between their areas of operation.

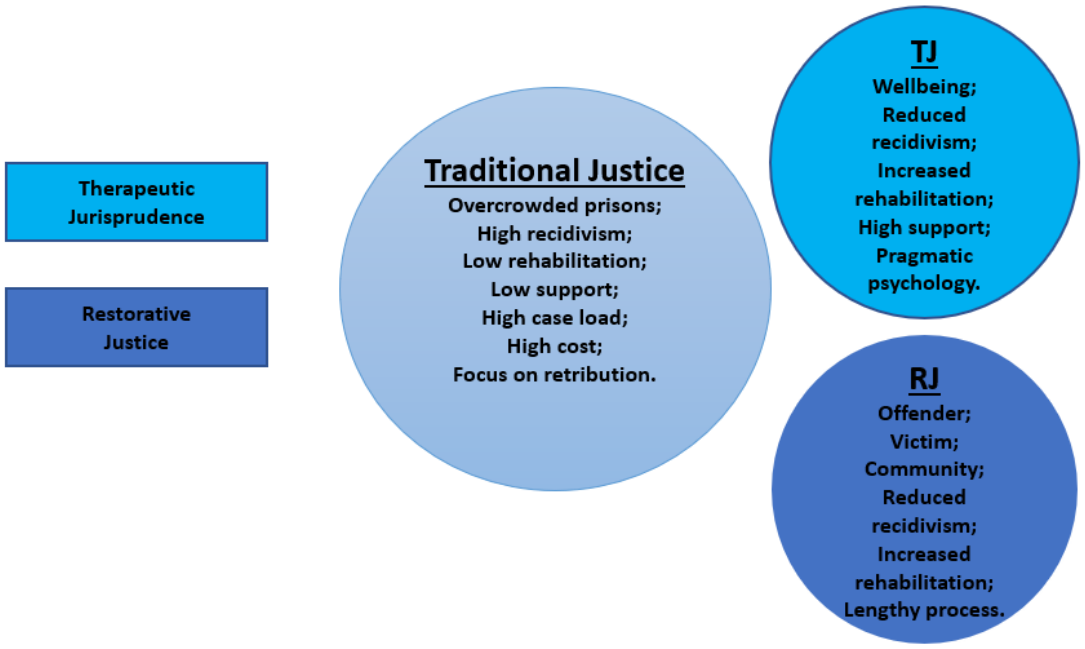

Figure 6: Comparison of Traditional Justice to Therapeutic Jurisprudence and Restorative Justice

As illustrated by the image, restorative justice and therapeutic jurisprudence only make up a small proportion of the total spread of cases versus those that go through the courts.

This insight is based on experience of all three systems as a police officer. Arguably, the traditional system is **the** justice system that operates in Australia**.**

The restorative justice and therapeutic jurisprudence have been critiqued, because of insufficient evidence to support them as equal to traditional justice (Braithwaite, 1990). Previous research has described therapeutic justice as a *"lens"* for restorative justice (Braithwaite, 1990; p. 244) and restorative justice potential to utilise therapeutic jurisprudence as a framework (Schopp, 1998). Therapeutic jurisprudence provides a complete model that incorporates evidence-based theory such as pragmatic psychology and is thus able to act as the core judicial system.

Restorative justice and therapeutic jurisprudence have been shown to reduce recidivism and ensure successful rehabilitation. By contrast, the traditional justice approach has not been able to decrease recidivism rates. This research established key links and relationships between recidivism, rehabilitation, and the approach to justice to determine the most effective model. It further builds in Chapter Four through a thematic analysis a robust case for greater incorporation of restorative justice and therapeutic jurisprudence into the legal system that transforms the traditional model approach.

3.0 CHAPTER THREE: METHODOLOGY AND RESEARCH DESIGN

3.1 Introduction

This chapter starts with an overview of the philosophical approach that matches the research proposition, 'The rehabilitation value of therapeutic jurisprudence, and to a lesser degree, restorative justice, lead to greater wellbeing than traditional justice does.' The **research question** that follows from the proposition is 'What is the current state of judicial practice in Australian and what might the future of it be if we factor in restorative justice and therapeutic jurisprudence?' The output is a conceptual model of the future of jurisprudence in Australia. The next section of the chapter outlines the research design or procedures followed by the detailed explanation of the data collection methods, data analysis, and how the findings were interpreted (Cresswell & Cresswell, 2008). The last section deals with issues of reliability and validity, ethical considerations, and limitations of the research. The process is shown in Figure 7.

Figure 7: Methodology – the process (Yin, 1984).

The overall value of an intervention is measured by a reduction in recidivism and increased victim, offender, and community satisfaction. This proposition allowed for a far richer thematic analysis of the data. If rehabilitation is improved but the victim is dissatisfied, for example, it could be said that the overall value of an intervention has led to an increase in wellbeing for the offender, thus decreasing recidivism; nevertheless, the victim's wellbeing has not improved and the intervention may need to be refined in certain respects in order to achieve this.

The thesis posited that therapeutic jurisprudence is the desired and most effective legal intervention for achieving wellness and reducing recidivism. It also conducted thematic analysis of the existing research to show that therapeutic jurisprudence is a suitable framework for restorative justice, indicating the need for restructuring of restorative justice.

Axiology determines the intrinsic worth of something, and this varies from person to person. For example, wellbeing is defined as good, worth striving for. This research study has taken the position that therapeutic jurisprudence aims for wellbeing, this being a worthy outcome of this intervention. The study examined through literature review if therapeutic jurisprudence and restorative justice increased wellbeing among the victims and reduced recidivism among the offenders.

3.2 Research Approach

The four philosophical approaches that are most considered are post-positivism, constructivism, transformative and pragmatism.

Constructivism is generally paired with a qualitative approach. Social constructivism is based on the meanings of experiences, sought by individuals on a subjective level, and focusses on participants' perspectives. Constructivism encompasses complexity rather than categorisation. Instead of a theory as the starting point of research, this is engendered through inductively assessing "a pattern of meaning" (Cresswell & Cresswell, 2008; p. 8). This research study is based on constructivism **because** it studied how the complex relationship between therapeutic jurisprudence and restorative justice could increase wellbeing among the victims and remorse among the offenders. This complex phenomenon required an in-depth analysis of its themes and the underlying meanings. This research used a qualitative approach to probe the data and mine the richness from it.

3.3 Research Design

The research design is the plan, strategy, or blueprint selected to answer the research

question; it brings together all the aspects of the study together coherently. The decision that must be made under ‘Research Design’ is whether the study is qualitative, quantitative, or employs mixed methods, i.e., a mix of qualitative and quantitative. Once this choice is made, it leads to procedures for research design (Cresswell and Cresswell, 2008).

Vaus (2020) emphasised the necessity of acquiring clarity in the data to answer the research question before conducting a study. In doing so, the research problem can be fully answered, with strong, persuasive conclusions and a valid research study. Vaus listed five steps (1) identification and rationale of the research problem; (2) review and synthesis of the literature; (3) explication of research hypotheses; (4) description of data required and the method of collection; and (5) description of data analysis method. The data analysis process is illustrated in figure 8.

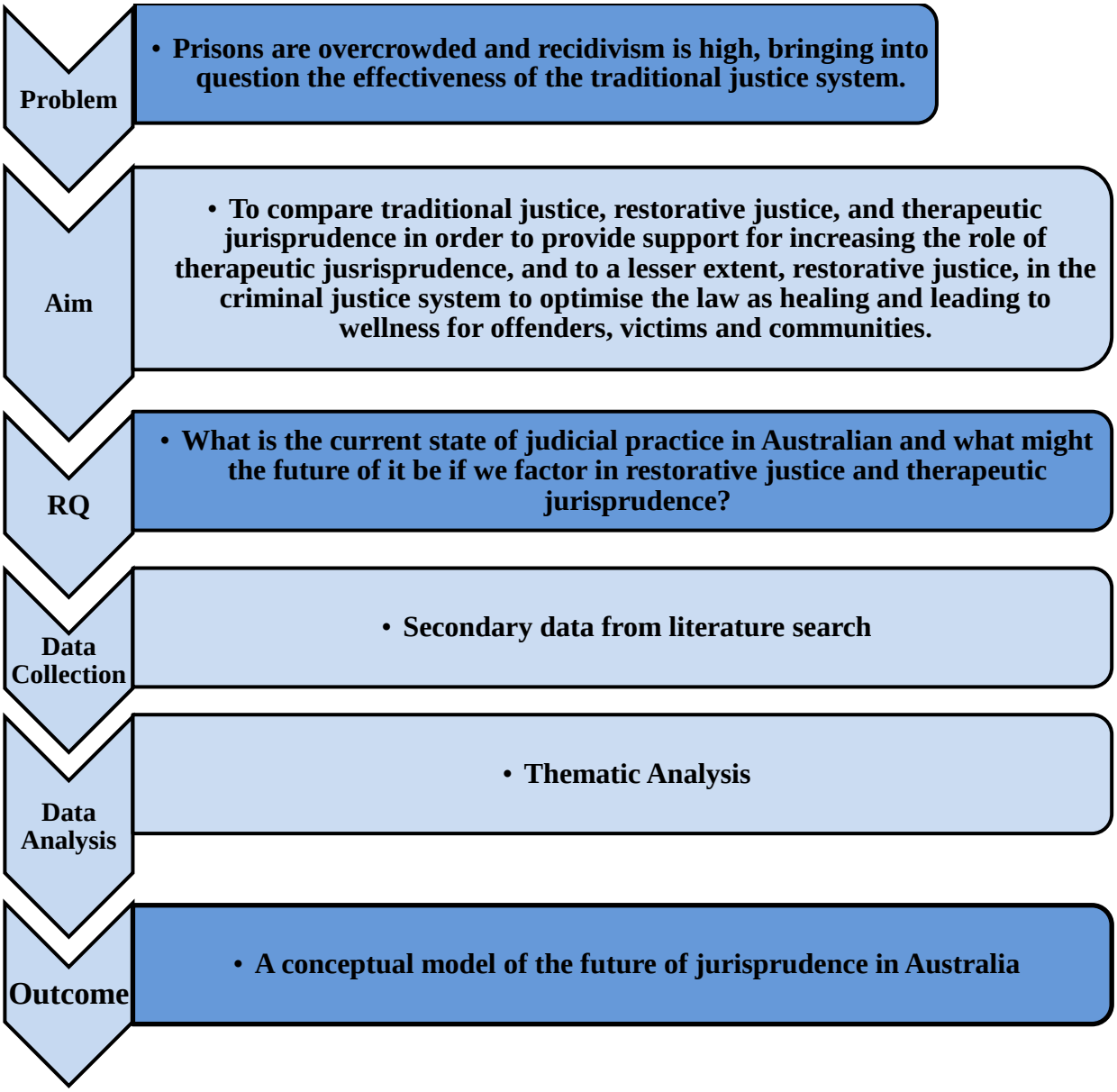

Figure 8: Data Analysis Plan

3.3.1 Types of Design

Content Analysis: This design has three possible methods for extracting meaning from text data content. The methods are conventional, directed, and summative. Directed content analysis uses a theory or findings to generate initial codes. The summative approach counts keywords and makes comparisons and then interprets meaning (Hsieh &

Shannon, 2005). This thesis applied thematic content analysis which is comparable to the conventional approach where text supplies the coding.

These are analysed according to prior determined inclusion and exclusion criteria – these are strictly followed. This ensures the reliability of the conclusions. Unlike a literature review, this is the actual research project itself and requires a synthesis of all relevant sources to present the latest findings on the area of interest and to propose new areas of research (Research Guides: Organizing Your Social Sciences Research Paper: Types of Research Designs, 2020).

Systematic review is a time-consuming approach as it requires an exhaustive review of all literature on the topic, which usually requires the assistance of a qualified librarian to cover all possible sources. One limitation of this research was that due to time limitations, it did not undertake a systematic review as it did not record and report its literature sourcing according to a stringent process. Therefore, it cannot claim that the sources obtained were exhaustive. However, the content analysis of the literature used extensive sources on traditional justice system, restorative justice, and therapeutic jurisprudence. The thematic content analysis based on secondary sources of data assisted in the development of the conceptual framework on criminal justice system.

3.4 Research Method

Research methods indicate the process the researcher has followed from deriving a problem statement to analysing the findings (Sileyew, 2020), which allows other researchers to follow the methodology to get similar results provided conditions remain the same. This section contains the methodology relating to research preparation, data collection, and data analysis and interpretation.

3.4.1 Research Preparation

“A thorough, sophisticated literature review is the foundation and inspiration for substantial, useful research” (Boote & Beile, 2005; p. 3). The research was based on

extensive search of the literature and writing up the findings from the literature. Based on these secondary data comparisons were made between traditional justice, restorative justice, and therapeutic jurisprudence. The comparisons were (1) approaches to justice, (2) retribution, rehabilitation, and recidivism, and (3) research studies. A proposition and research question were developed. The proposition was, 'The overall value of therapeutic jurisprudence, and restorative justice, leads to greater wellbeing, higher rehabilitation and lower recidivism than traditional justice does.' The research question was 'What is the current state of judicial practice in Australian and what might the future of it be if we factor in restorative justice and therapeutic jurisprudence?' The aim of the proposition, research question and literature review were to derive a new conceptual model. This was achieved by following the steps outlined in the rest of the sub-sections.

3.4.2 Data Collection

Data collection methods, whether quantitative or qualitative, must follow rigorous protocol to ensure data integrity (Kabir, 2016). Qualitative research has a main purpose of gaining an in-depth understanding of the research question. The collection of data techniques includes e.g., interviews, observation, focus groups and case studies. In this thesis, data collection was done by the completion of the literature review and restructuring it to make comparisons.

Since this research project used secondary data, it did not make use of a research instrument. This study instead, analysed and recorded information from scholarly articles, peer reviews, and case studies that have been published. The literature search was conducted by an exhaustive review and selection of sources. The analysis of the data is treated in the next sub-section.

3.4.3 Data Analysis Plan

As content analysis and thematic analysis are similar, Figure 9 below illustrates the key differences and expresses why the two were merged in this research. The differences between the two are subtle and generally confused (Vaismoradi, Turunen & Bondas, 2013). It was important to explore and analyse the data, most of which was qualitative and

therefore somewhat difficult to quantify. Nevertheless, statistics from secondary sources were provided and considered thematically, as supportive of the proposition.

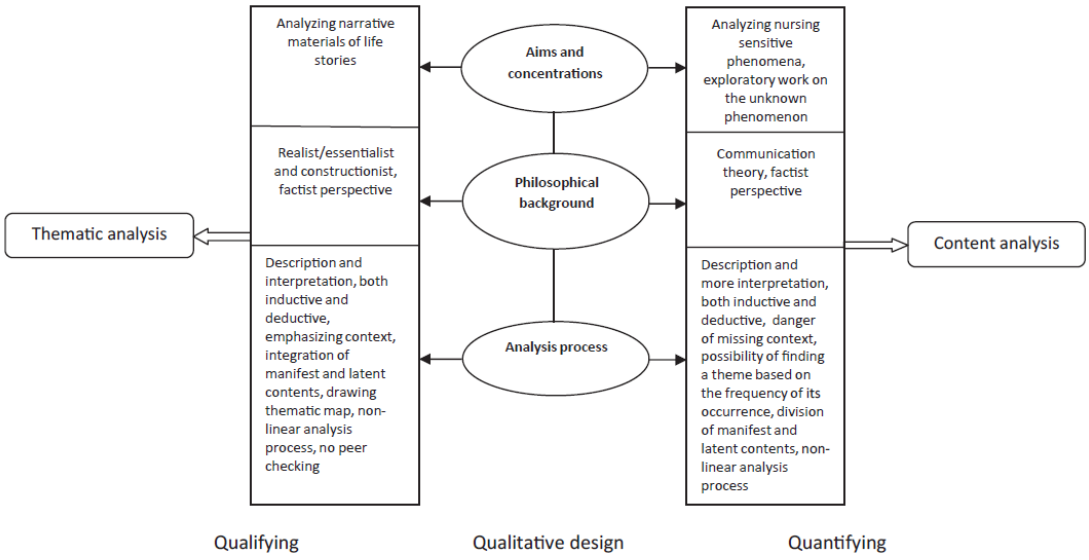

Figure 9: Difference between Thematic Analysis and Content Analysis [Derived from (Vaismoradi, Turunen and Bondas, 2013].

Table 3 outlines the stages of thematic content analysis.

Table 3: Establishing Trustworthiness during Each Phase of Thematic Content Analysis (Adapted from Nowell et al., 2017)

Phases of Thematic Analysis	**Means of Establishing Trustworthiness**
Phase 1: Familiarising yourself with your data	• Prolong engagement with data • Document theoretical and reflective thoughts • Document thoughts about potential codes/themes
Phase 2: Generating initial codes	• Reflexive journaling • Use of a coding framework
Phase 3: Searching for themes	• Diagramming to make sense of theme connections • Keep detailed notes about development and hierarchies of concepts and themes
Phase 4: Reviewing themes	• Themes and subthemes reviewed • Test for referential adequacy by returning to raw data
Phase 5: Defining and naming themes	• Decision on themes • Documentation of theme naming
Phase 6: Producing the report	• Member checking • Describing process of coding and analysis in sufficient details • Thick descriptions of context • Report on reasons for theoretical, methodological, and analytical choices throughout the entire study

The aim of thematic content analysis was to isolate the themes from each of the three justice systems individually. This method allowed for critical argument to occur on overlapping notions and whether there were any supporting claims between them. Codes were determined by evaluating the themes and finding an overarching term that expressed, collectively, what was identified under each theme. This was done following the steps in Table 2. Step one involved reading through the data on hard copy numerous times, highlighting sections in the literature review that stood out, making notes, and repeating the process until motifs started to emerge. In step two, a coding framework was established by adding notes to capture possible codes concisely. Step three involved searching for themes; separate notes and diagrams were used to link themes and codes. In step four, the themes were revised against the raw data for integrity. Codes and themes were captured

in step five. No member checking was done in step six as the researcher worked alone; however, details of the process and findings were recorded in Chapter four.

3.5 Reliability and Validity

3.5.1 Reliability

Reliability is concerned with how consistent a measure is. As the researcher conducted the thematic content analysis in isolation and not as part of a team, it was necessary to check and recheck the raw data and to stringently follow the guidelines in Table 2. This involved reading and re-reading the material and making copious notes, finding similarities and documenting everything, drawing diagrams, and showing links, rechecking everything against the raw data, to arrive at the final result.

3.5.2 Validity

There are four measures of validity which measures that scores reflect items being measured. In this dissertation there were no scores of constructs, but themes and codes were the product. Content Validity describes the extent to which the measuring tool covers particular constructs (Di Zio et al., 2016). The core constructs are comparisons of the three judicial systems in terms of recidivism and rehabilitation, and the results support this. Face Validity is where the test measures the construct it claims to measure (Di Zio et al., 2016), for example recidivism. This was also supported by the results. Criterion Validity is when negative or positive correlations between linked variables occurs (Di Zio et al., 2016); a negative correlation was found between rehabilitation and recidivism. Discriminant Validity occurs when items are not erroneously correlated (Di Zio et al., 2016). For example, rehabilitation should not be positively correlated with retribution; one would expect a negative relationship between the two variables.

3.6 Ethical Considerations

The data analysis was done systematically to reduce the chance of errors and ensure the integrity of the results. As this research proposes a radical new model and calls for decisions from various specialists and/or disciplines, the findings must be trustworthy.

Future research may be based on the findings; therefore, they must be valid, reliable, and trustworthy,

As there were no participants it was not necessary to obtain informed consent, protect data, ensure confidentiality and privacy, and comply with the maxim of no harm.

3.7 Conclusion

Chapter Three outlined the methodology that was used. In Chapter Four, the findings according to the methods described was followed. Chapter five concluded the dissertation with a discussion of the findings and recommendations for future research.

4.0 CHAPTER FOUR: FUTURE CRIMINAL JUSTICE MODEL AND RECOMMENDATIONS

The research findings elicited the following key information on the three approaches to the Australian judicial system:

4.1 Overview of Thematic Analysis Conducted

As Chapter Two discussed under traditional justice, punishment for crime is the core focus of Australia's judicial system; however, there are many adverse factors that are causing harm to those participating in retribution and recidivism programs. The results of the literature (McCold & Wachtel, 2003; Gavison, 1991; Walen, 2014; Okimoto, Wenzel & Feather, 2011) under traditional justice indicated specific keywords and terms that were isolated through thematic analysis conducted in this chapter. The same method of analysis was applied to restorative justice and therapeutic jurisprudence to provide a thematic coded table of the three approaches (see *Tables 3 to 6)*. In addition, given the qualitative nature of the study, an inductive coding approach assisted in eliciting the codes from the information that was collected from the published articles and journals. Due to the large volume of literature, the identified codes were categorised against each theme that emerged, and were listed based on which justice system they related to.

An inductive coding approach was applied to originate the codes from the collected literature and allowed for specific motifs to be brought to the surface, instead of the study predefining the themes based on the literature. This approach allowed for the identification of perceptions and scenarios that the literature expressed and enabled the researcher to narrow in on the key codes that led to the identification of their respective themes. To gain a more qualitative understanding of the thesis, research findings in the context of the three acknowledged justice systems, locating words such as punishment or rehabilitation, and identifying the words surrounding them, illuminated the relationships that existed between each of these three categories. Coding was used to find relationships between traditional justice, restorative justice and therapeutic jurisprudence and the themes that were highlighted in the literature regarding these concepts. The themes that surrounded each category were analysed to gain a broader scope of the thesis topic that was not limited to

certain words or phrases. The thematic analysis coding table 4 illustrates how the codes were formulated, by (1) defining the source and platform of literature; (2) summarising the context of the reviewed literature; (3) describing the theme in its relation to one of the three justice systems; and (4) allocating themes specific to titles of code.

4.2 Key Themes and Codes

The thematic analysis extracted the key observations findings from published literature that the authors discussed, and addressed each of the three justice systems individually. This method allowed for critical argument to occur on overlapping notions and factors that affected these systems and whether there were any supporting claims between them. The final naming of codes was determined by evaluating the themes and finding an overarching term that expressed collectively, what was identified under each.

The inductive analysis elicited the following eight key codes on the three approaches to the Australian judicial system: (A) failure of the system; (B) social and cultural barriers; (C) community as restorative; (D) reoffending youths; (E) therapeutic jurisprudence is earning recognition in its own right; (F) offender wellbeing; (G) amalgamation of justice systems; and (H) victim participation and offender autonomy.

The eleven themes that emerged were: (1) Retribution underpins traditional justice, causing harm to offenders; (2) Victim protection and involvement are compromised; (3) Recidivism is a core concern; (4) Rates of recidivism increases for certain demographics; (5) Offenders can repair the harm done while being supported; (6) Offering conference over court is beneficial and prevents reoffending; (7) Traditional and therapeutic systems cannot be judged together using normal standards of measurement; (8) Therapeutic jurisprudence is an effective way to reduce recidivism rates; (9) Court law integration with therapeutic jurisprudence is beneficial; (10) Therapeutic jurisprudence can be used as a framework for restorative justice; and (11) Incorporating both therapeutic and restorative ensures victim autonomy and offender participation. A shortened, composite summary of all the themes and codes under each judicial approach is provided in Table 4, showing how they fit together. Details are provided in Tables 4, 5, and 6.

Table 4: Themes and Codes

Approach	Theme	Code
Traditional Justice	1. Retribution underpins traditional justice, causing harm to offenders.	**A. Failure of the system**
	2. Victim protection and involvement are compromised.	
	3. Recidivism is a core concern.	**B. Social and cultural barriers**
	4. Rates of recidivism increases for certain demographics.	
Restorative Justice	5. Offenders can repair the harm done while being supported	**C. Community as restorative**
	6. Offering conference over court is beneficial and prevents reoffending.	**D. Reoffending youths**
Therapeutic Jurisprudence	7. Traditional and therapeutic systems cannot be judged together using normal standards of measurement.	**E. Therapeutic jurisprudence is earning recognition in its own right**
	8. Therapeutic jurisprudence is an effective way to reduce recidivism rates.	**F. Offender wellbeing**
	9. Court law integration with therapeutic jurisprudence is beneficial	
	10. Therapeutic jurisprudence can be used as a framework for restorative justice	**G. Amalgamation of justice systems**
	11. Therapeutic and restorative approaches ensure victim participation and offender autonomy	**H. Victim participation and offender autonomy**

Table -5: Thematic Analysis of the Reviewed Literature – Traditional Justice

Approach	Source of Literature	Summary	Theme	Code
Traditional Justice	Walen (2014)	Notions as to what constitutes a "normative" status of suffering is not well understood and often disagreed on by authorities.	Retribution underpins traditional justice, causing harm to offenders	**A. Failure of the system**
	Yeager (2019)	Gaps in society of addressing incarceration rates and conditions are disturbing.		
	Moss et al (2019)	Calls for a move towards a complete alternative to the current judicial system		
	Henshaw et al. (2019)	The system cannot reduce crime.		
	Boyd (2008)	Environmental crimes need new strategies		
	Johnsen & Robertson (2016)	Protection orders are seldom granted, failing to protect families		
	Birgden (2002)	Offenders suffer isolation from support structures, employment opportunities, and reduces their sense of identity		
	Johnsen & Robertson (2016)	Protection orders are difficult to obtain, leaving victims unprotected.	Victim protection and involvement are compromised.	
	O'Connell (2017)	Victims fear revictimisation and are mostly excluded from proceedings.		
	Carcach & Leverett (2020)	Repeat offenders are linked to shorter terms of recidivism	Recidivism is a core concern.	**B. Social and cultural barriers**
	Broadhurst et al. (1988)	An analysis of the rate of failure for recidivism programs for offenders by gender, race, offence, and age		
	Patterson & Gover (2020)	Discrimination within the justice system that impose on rights of offenders	Rates of recidivism increases for certain demographics.	
	Crime and Justice: The Criminal Justice System (2020)	A detailed look into the way the justice system individualises offenders and the consequences of these actions		
	Bradshaw & Roseborough (2005)	Alternative to traditional justice that suggests repentance for harm done		

Table 6: Thematic Analysis of the Reviewed Literature – Restorative Justice

Approach	Source of Literature	Summary	Theme	Code
Restorative Justice	McCold & Wachtel (2003)	Restorative justice is needed, not deserved. It is supposed to address emotional needs of people affected by a criminal offense	Offenders can repair the harm done while being supported	**C. Community as restorative**
	Umbreit & Zehr (1996)	Introducing restorative justice through family consultation and conferencing		
	Hewitt (2016)	Resolving disputes in the criminal justice system through restorative justice initiatives		
	Pfander (2019)	Shaming is a necessary stage		
	Drahos (2017)	Remorse and guilt on the part of the offender helps the victim and community heal		
	Meléndez (2020)	Issues that lead to crime are addressed		
	Pfander (2020)	Restorative justice focuses on the victim's rights and healing for both parties		
	Moss et al. (2019)	Offenders can grasp the damage done and give victims closure		
	Bouffard, J., Cooper, M. and Bergseth (2016)	Variations of restorative justice for juveniles requires direct mediation in terms of victim trust and damages sustained being addressed		
	Meléndez (2020)	Shame, remorse, and empathy are key emotions for offender transformation.		
	Poulson (2003)	Study on the evaluation of restorative justice in the context of fairness and accountability for offenders	Offering conference over court is beneficial and prevents reoffending	**D. Reoffending youths**
	Hayes (2005)	Restorative justice is studied in the context of reoffending youths		
	Hewitt (2016)	Studies on implementing restorative justice		
	Moss et al. (2019)	This method has lowered crime and provided healing for victims.		
	Miers et al. (2020)	Effectiveness of restorative justice with adult offenders compared to juveniles		

Table 7: Thematic Analysis of the Reviewed Literature – Therapeutic Jurisprudence

Approach	Source of Literature	Summary	Theme	Code
Therapeutic Jurisprudence	Stobbs (2013)	Therapeutic jurisprudence and problem-solving skills are becoming a popular choice of justice compared to traditional justice	Traditional and therapeutic systems cannot be judged together using normal standards of measurement	**E. Therapeutic jurisprudence is earning recognition in its own right**
	Henshaw, Bartels & Hopkins (2019)	Aspects of therapeutic jurisprudence that can provide a change in legal process regarding parole compliance		
	Frailing et al (2020)	Wide uses for therapeutic jurisprudence		
	Van Golde et al. (2019)	Transforming the judicial system		
	Goldberg (2011)	Problem-solving approaches to therapeutic process compared to an adversarial method	Therapeutic jurisprudence is an effective way to reduce recidivism rates.	**F. Offender wellbeing**
	Richardson Spencer & Wexler (2016)	A look into the need to improve offender wellbeing in the justice system		
	Hueston & Hutchins (n.d.)	Exploration of compassion techniques used in court by a judge	Court law integration with therapeutic jurisprudence is beneficial	
		Cognitive understanding that through compassion, techniques can enhance a judge's sentencing decisions		
	Henshaw et al. (2019)	More effective therapy during parole and compliance management		
	Gaven et al. (2019)	Psychological and therapy role of courts		
	Boyd (2008)	Evaluating environmental crimes with therapeutic jurisprudence	Therapeutic jurisprudence can be used as a framework for restorative justice	**G. Amalgamation of justice systems**
	Birgden & Ward (2003)	Promotion of an improved judicial system using behavioral science		
	Johnsen & Robertson (2016)	Comprehensive understanding of survivor emotion and suffering is core to both therapeutic and restorative justice		
	Arstein-Kerslake & Black (2020)	Essay that describes case studies that have been negatively affected by traditional justice	Therapeutic and restorative approaches ensure victim participation and offender autonomy	**H. Victim participation and offender autonomy**

4.3: Discussion of the Findings

Table 4 presents the codes and themes under each of the three approaches, traditional justice, restorative justice, and therapeutic jurisprudence, respectively. The findings are discussed under the core codes that were identified. Themes fall within codes.

4.3.1 Code A: Failure of the system

One of the major themes identified was that the traditional justice system has several problems with its current adversarial approach: its emphasis on retribution (Meyer, 2014; Yeager, 2019), the high rate of recidivism (Knaus, 2017; Carcach and Leverett, 1999; Broadhurst, Maller, Maller and Duffecy, 1988; Henshaw et al., 2019), overcrowded prisons (Knaus, 2017; Yeager, 2019), having the potential to cause harm rather than wellbeing to participants (Birgden and Ward, 2003; Ness, 2005; Birgden, 2002), excluding victims excepts as state witnesses (Patterson and Gover, 2020; Laufer, Adler, Mueller and Mueller, 2017), and not accounting for differences in culture (Hewitt, 2016). These factors once held a place in the judicial system, however as the code points to, adversarial justice is no longer operating effectively, if it ever was. Many social and cultural barriers such as socioeconomic circumstances, low educational level, unemployment, and isolation exist, and authors have suggested that the traditional justice system has higher crime and imprisonment of certain individuals based on their race and gender. Traditional justice was intended to reach the youth at an early enough age that they could be reformed before they could perform any serious crimes that would see them imprisoned. The system failed because it did not take account of the barriers mentioned, failed to respect the person of the offenders, and to address underlying causes that caused them to go astray, and housed first time offenders with career criminals where they became entrenched in a lifestyle of crime (Knaus, 2017).

Despite its difficulties, the traditional system invested in programs to reduce crime (Criminal Justice, 2020). Imprisonment was seen to have several negative outcomes: its crimogenic nature increased reoffending; isolation from family and friends; loss of employment opportunities; overcrowding undermined rehabilitative efforts and programs, and more incidents of mental health issues and violent events traumatised offenders

(Knaus, 2017). On the contrary, rehabilitation decreased costs and negative outcomes (Yeager, 2019). As themes emerged it was clear that these programs were not as efficient as they once were, and many called for more restorative or therapeutic justice systems to be implemented. Particularly, fear of imprisonment and other corrective procedures was not assisting to decrease the rates of crime, nor the rate of recidivism. To mitigate these extenuating circumstances, retributive justice was considered for higher penalties to be imposed on high-risk offenders, to learn to obey the law. Under this code it was also noted that offenders who repeated offences were statistically more likely to revert to crime and participate in shorter lengths of recidivism.

One major factor emphasised was to gain the perspectives from the victims, following a crime to determine the emotional and psychological affects crimes caused. For victims, retributive justice was seen as a strong method of settling the score, as it is based on punishment that fits the crime and comes with the basic framework of correcting harm done through punishment (Walen, 2014). On the one spectrum criminals should be punished to a certain degree dependent on the crime, however on the far side, there were also call from the public that all people should be treated the same way, regardless of their behavior (Broadhurst et al., 1988; Patterson & Gover, 2020). Victims and the community also needed their safety to be assured (Johnsen & Robertson, 2016).

The findings indicated that although there was a need for justice and for wrongdoing to be addressed and its harm to be repaired, the traditional punitive nature of the entire judicial system and its underlying retributive philosophy needed to be changed for two reasons: (1) the approach appeared harmful to the wellbeing of all participants (including judges, as has been shown) (Birgden, 2002); and (2) it did not seem effective because it was failing to reduce recidivism (Henshaw et al., 2019). Moss et al (2019) called for a move towards a complete alternative to the traditional judicial system.

This alternative judicial system was the core motif of the thesis and its most dominant finding.

4.3.2 Code B: Social and Cultural Barriers

Justice systems are supposed to be unbiased towards a person's gender, race, religion and sexual orientation (Patterson & Gover, 2020; Crime and Justice: The Criminal Justice System, 2020; Broadhurst et al., 1988), however the literature indicated numerous times, that the traditional justice system was not in line with civil justice because it removed the offender from society and resulted in harm in terms of separation from family, loss of income and employment failure to contribute to society meaningfully, and is excommunication from the community (Birgden, 2002). It was noted throughout the thematic analysis that severity of punishment, term of sentence and access to a fair trial was not standardised among all offenders. Apart from the obvious stereotypes that existed, many poorer communities chose not to approach the legal system for fear that they would not be given the same attention as those with the financial resources would benefit from. This was a large factor extenuating these barriers, because there was a shared viewpoint that those less fortunate will be treated unfairly. These concerns increase the likelihood that a victim will not place trust in the justice system, and therefore some crimes may even go unreported. Furthermore, Indigenous justice systems shared much in common with therapeutic jurisprudence and restorative justice that were seen as fairer than the traditional justice system and as transforming the law into a healing agent.

4.3.3 Code C: Community as Restorative

The notion of implementing restorative justice policy into community development initiatives was viewed as a highly viable option. However, the findings of the literature suggested that little study had been done on the practicality of running such a program. For many communities, feeling safe and secure was often a big implication of restoring the community. The only real benefit was implied if both victims and offenders felt that the justice system would reduce crime and reestablish a safe community. One interesting finding was that the option to make use of restorative justice was not available to every offender. The offenders had to admit to their crimes and accept having to make reparation. Some victims could reject this offer to the offender if they felt the offender showed no empathy towards the crime and only confessed so the offender could be judged less harshly. The community development was considered to provide victims and offenders

with an improved and centralised system that facilitated community engagement after a crime had been committed.

4.3.4 Code D: Reoffending Youths

This code was discussed in publications that compared juvenile crimes in relation to those committed by adults, to understand if younger people could be reached before they were cemented into a life of crime. The studies conducted supported the notion of utilising restorative justice to steer teenagers away from more violent crimes. Additionally, offering conference between victims and young offenders decreased the chances of them committing the same or similar crimes. Findings of the thematic analysis also indicated that when placed head on with the victim, offenders, were forced to see how their actions brought them to the current situation. Oftentimes hearing the story from the victim's perspective was enough to stimulate feelings of remorse and guilt on the offender's side and restitutive efforts could be initiated. The effectiveness of restorative justice was largely dependent on the offender, their personality, and their reaction to being caught for the crime. Whether they were resentful of themselves for the crime committed or they were merely playing the system, there was cause for concern that need be researched in the broader context. Shame (Pfander, 2019; Meléndez, 2020), remorse, and empathy w necessary ingredients for transformation (Meléndez, 2020).

4.3.5 Code E: Therapeutic Jurisprudence is Earning Recognition in Its Own Right

Studying the differences between therapeutic jurisprudence approaches involves measuring criteria not normally associated with recidivism to seek new variables that are predictive of reoffending or not reoffending (Hayes, 2005). Findings suggested that factors that had a strong connection to recidivism (gender, race, age, and previous offending) could be matched so that a control group could be compared to the experimental group. Then it would be possible to ascribe any differences in offending to the particular intervention and to rate one type of intervention over another. This was typically done in field experiment research but not when comparing or assessing interventions. Majority of the literature spoke about the need for the traditional justice

system to change and that it was contributing to the continuously high crime rates. Therapeutic justice was seen to be fast becoming a more popular choice and traditional methods were no longer seen as effective in overcoming social and cultural barriers. An important finding was that therapeutic approaches were linked to reduced rates of recidivism and played a major role in the calls for justice system reforms. As much of the practical aspects of justice systems cannot be measured using the same tools, the literature spoke in length about joining retributive and therapeutic justice systems into an amalgamation that incorporated all benefits of each system. Once again, there was major support for implementing different justice systems based on how society was changing (Henshaw, Bartels & Hopkins, 2019; Van Golde et al., 2019).

4.3.6 Code F: Offender Wellbeing

The core tenet of therapeutic jurisprudence was the wellbeing of participants (offenders and victims) (Hueston & Hutchins, 2018). This approach allowed judges to be compassionate in the court room. It was clear in the findings that as society changes, improved cognitive understanding becomes more important in court. In most cases personal barriers were the reason offenders committed crime. Therapeutic jurisprudence was considered to be concerned with the wellbeing of all participants, not only offenders. Like restorative justice, it included the victim and ensured reparation through court mechanisms but was also able to handle protection orders and domestic abuse effectively. The findings indicated that therapeutic jurisprudence could be applied to crimes where restorative justice could not be applied. Therapeutic jurisprudence was viewed to address the elements of the crime through practical applications of relevant psychological frameworks. It was thus posited as the lens for traditional justice and restorative justice interventions. This is discussed in more detail in the conclusion chapter.

4.3.7 Code G: Amalgamation of Justice Systems

The findings show that therapeutic jurisprudence can be used as a framework for restorative justice. It is proactive - Birgden and Ward (2003) note that it can be used for psycholegal soft spots and combined with pragmatic psychology, allowing the solution to be adapted in each individual case. Therapeutic jurisprudence has been used in children's

courts, drug courts, and parole hearings; it can also be utilised in dealing with environmental crimes (Boyd, 2008; Richards et al., 2017; Henshaw, Bartels & Hopkins, 2019; Goldberg, 2011; Zafirakis, 2011;). It has been useful in providing access to services where mental health issues are involved (Arstein-Kerslake & Black, 2020; Hueston & Hutchins, 2018; King, 2012; O'Brien, 2018). The *International Framework for Court Excellence* (IFCE) outlines the requirements for legal reform and therapeutic jurisprudence and the framework are viewed as complementary as it focuses on the law as therapeutic agent (Richardson, Spencer & Wexler, 2016). In fact, therapeutic jurisprudence was seen to provide a framework for restorative justice and the IFCE and therapeutic jurisprudence were considered to enhance the quality of law. (Schopp, 1998; Wexler, 1995).

Along with the failure of the traditional system, the second key finding was that therapeutic jurisprudence was called both a framework for justice and a lens for restorative justice. The vision of its proponents was the amalgamation of the three systems, i.e., transformation of the legal system by therapeutic jurisprudence. While the traditional system cannot continue unchanged, therapeutic jurisprudence is posited as the cure. This code is closely tied to *Code E: Therapeutic jurisprudence is earning recognition in its own right*. The two codes are discussed more fully in the Conclusion chapter.

4.3.8 Code H: Victim Participation and Offender Autonomy

The findings indicate that victim participation was lacking in the traditional justice system and was mostly confined to giving witness, when requested. Further, including victims in the judicial process overcame feelings of powerlessness and enabled the victims to express how the offence impacted them. It was viewed that with the inclusion of the victim, closure could be obtained by witnessing the offender take accountability and by receiving a genuine apology. Fear of revictimisation could also be reduced. The traditional approach did not adequately address reparation; restorative justice was found to not achieve much more than an apology in many cases. Therapeutic jurisprudence was viewed to ensure compliance with restitution and ensure its sufficiency by facilitating the hearing and applying practical solutions, which it could monitor.

The criminal system was characterised by castigation and prevention through restraint. It was seen as vital to preserve the offender's right to decision-making and reaching for accountability through partnership and respect for the offender to ensure a successful outcome. Both therapeutic jurisprudence and restorative justice were seen to ensure and dignify offender participation. The literature proposed a complete shift from retributive to restorative justice as such a shift could better addresses victim's needs (Johnstone, 2011). Though regarded more demanding than court, it was contemplated to offer an alternative to incarceration and its disgrace and permitted offenders to restore themselves to the community. The results also indicate that both therapeutic jurisprudence and restorative justice ensure and dignify offender participation.

4.4 Proposed Integrated Criminal Justice System Model

The current judicial model, illustrated in Figure 6 in Chapter Two, illustrated the lack of synergy between the three approaches and the small role given to restorative justice and therapeutic jurisprudence. This research distinguished between therapeutic justice, i.e., a legal system in which the aim is to heal individuals, families, and communities, both on the victim's and the offender's sides, and retributive justice, in which the goal is punishment, as the starting point to understand how a merger of the three systems could take place to reduce recidivism and incarceration in the traditional justice system.

The model proposed amalgamates the three justice systems where therapeutic justice is implemented on a much larger scale as the core justice system and restorative justice handles certain types of cases that it is suited to. These two forms the operational court system, while traditional justice plays a support role and continues to provide the judicial roles of trials and committals and determining matters not suitable for therapeutic or the restorative pathways. Figure 10 and 11 are a proposed model of this amalgamation of justice systems within the court. It illustrates that the infrastructures of traditional justice should be retained and allocates the following functions to it: The right of persons to be tried by a jury of their peers, Summary Trials, Committal Hearings, Structure, Processing, Admin, and Facilitation of Support Services. For example, under Processing, the intake of cases would be allocated according to case type for either therapeutic jurisprudence

(e.g., an environmental breach or a homicide) or restorative justice (e.g., minor offences by juveniles, property offences). Structure and admin would take care of logistics such as judge allocation and record-keeping. Facilitation of Support Services would ensure that offenders can be assigned to support services, such as drug rehabilitation programmes.

The aim is to remove traditional retributive aspect of justice from the courtroom while making use of its infrastructure, for example, judges, court rooms, equipment etc. Figure 11 further illustrates a new role for restorative justice, which currently is only involved in trials and ad-hoc hearings; now it would become established in the daily justice system hearing certain types of cases: Juvenile Courts, Property Offences, and Driving under the Influence, etc.; in other words, minor crimes and juvenile offenders. The therapeutic jurisprudence division would oversee the justice system, setting the tone of Wellness and Pragmatism, and dealing with Adult Courts, Environmental Crimes, Parole Hearings, Family court etc., as shown in Figure 11. In addition, therapeutic jurisprudence would handle a consistently bigger number of cases, as for example, the entire family court. Its scope would also be bigger, i.e., all the types of crimes mentioned above would be dealt with exclusively according to therapeutic jurisprudence principles and actions. There will no longer be any cases dealt with according to the traditional justice paradigm of retribution but fully in accordance with wellness principles as espoused by therapeutic jurisprudence. In a sense brining a therapeutic aim to the traditional approach – replacing retribution with the therapeutic wellness philosophy.

Figures 10 and 11 are based on the suggestion to amalgamate the justice systems, particularly to establish a larger share of cases for restorative justice and to establish therapeutic jurisprudence as the framework for a judicial system based on wellbeing and aligned to proven psychological models. The pyramid shows the new structure while the circles reflect the themes and codes that were established in the thematic analysis and are numbered or lettered accordingly. The traditional system therefore provides the infrastructure (judges, court rooms, etc.) but the entire focus of the law is underpinned by the wellness philosophy of therapeutic jurisprudence and the use of a pragmatic psychology approach. The blocks that are superimposed on a pyramid indicate that therapeutic jurisprudence is the base on which the whole legal system rests. Therapeutic

jurisprudence handles the bulk of caseloads, such as children's courts, parole hearings and deals with adult offences, and in providing the tone is the owner of the judicial process, thus is the biggest of the three systems, as demonstrated by the area of the circles. Restorative justice operates on a smaller scale with few case types. The split of cases is shown in the blocks on the pyramid in Figure 11. The facilities and infrastructure are shared, such as courtrooms, judges, buildings, equipment and admin resources and the traditional justice system is only retained in that this infrastructure is used, thus ameliorating all the negative aspects reflected by the themes and codes in Figure 10.

This new model provides a platform for a whole-of-government shift towards a therapeutic-centric justice system. For example, a therapeutic model would allow for police to divert appropriate offences via a diversion notice, for example to a Therapeutic Justice Centre, where all stakeholders gather to facilitate therapeutic and restorative practices and address offending behaviour, victim and community healing.

The thematic analysis concluded that restorative justice is unable to work effectively in penal systems where offenders have already been placed into a rehabilitation facility of some sort. This is a specific example of a case type that therapeutic jurisprudence would handle. Case types are not fixed, and the model is a proposal of a starting point for transforming the system. Restorative justice is allocated certain functions, such a juvenile court, thus plays a sound role in carrying out its interventions in the allocated areas. Currently, its involvement in the legal system is sporadic. The areas selected for restorative justice are those within which interventions have been successful. As more case types are tested with restorative justice interventions, this role can be enlarged. This proposal does not do away with traditional justice; it retains its structure and resources but fundamentally changes the basis of justice from retributive to fully rehabilitative, making use of evidence-based findings to direct the judicial process. This thesis does not provide a detailed conceptualisation of the functioning of the new system but rather provides a framework for further research and a basis for how a better system can be implemented.

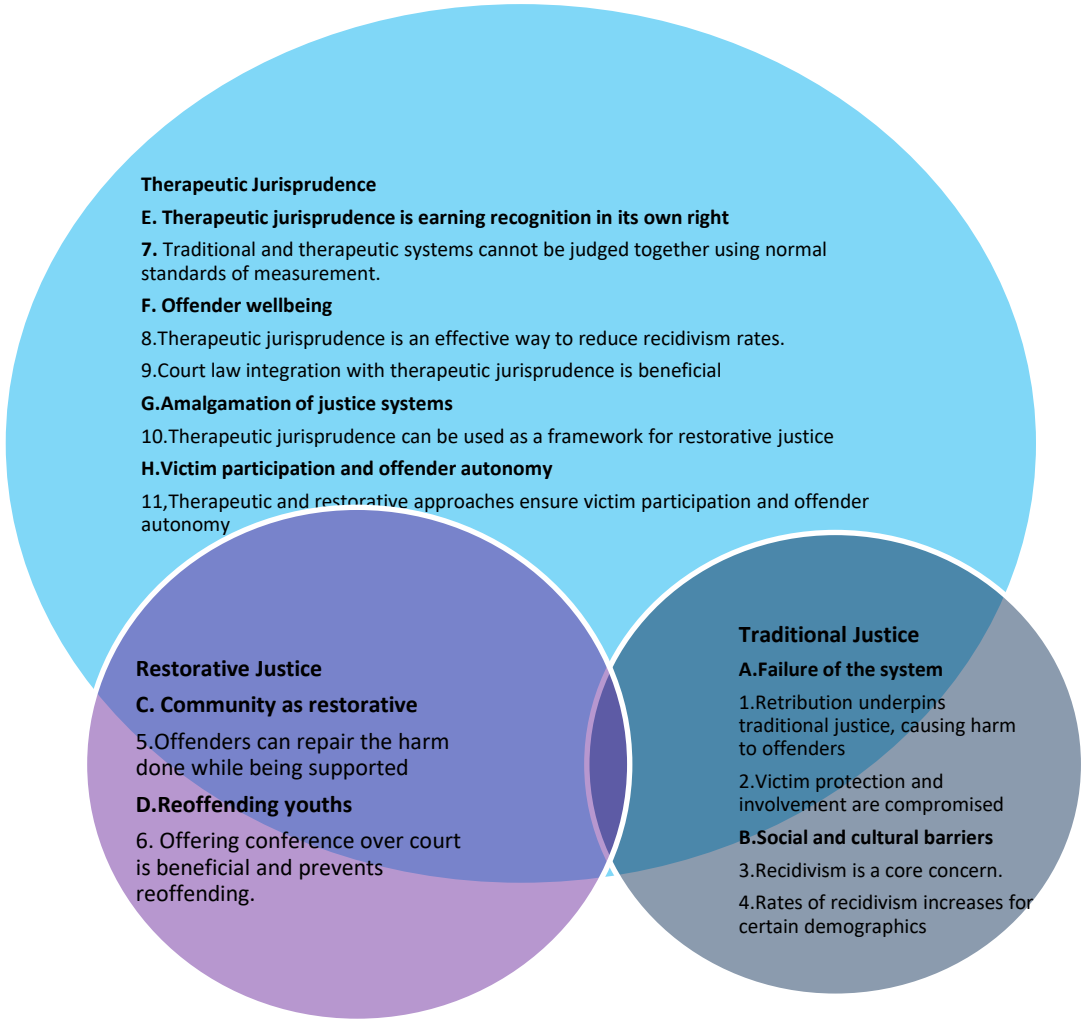

Figure 10: Proposed Integrated Criminal Justice System Model. (Part One)

Figure 11: Proposed Integrated Criminal Justice System Model. (Part Two)

4.5 Conclusion

The proposed model links the research question to the thematic analysis and its resultant codes and themes. The research question is ‘What is the current state of judicial practice in Australia and what might the future of it be if we factor in restorative justice and therapeutic jurisprudence?’ The model illustrates what the new system could look like. The following chapter provides a discussion and conclusion of the thesis. It sums up the findings against the research question and expands on recommendations and limitations of the study.

5.0 CHAPTER FIVE: DISCUSSION AND CONCLUSION

This final chapter starts with a short review of the three approaches to criminal justice. This is followed by a discussion of the major findings and the results are assessed against the research question. The proposed model is placed in context and the chapter concludes with limitations of the study and recommendations for further research.

5.1 Professional Studies and Personal Learning Objectives

The Master of Professional Studies (Research) program is a self-directed, action-learning, work-based program which provides the professional with the competency of self-directed learning. This consists of work-based learning (WBL) and work-based research. A core aspect of this program is the development of reflective practice skills which empower the student with actual learning skill and grasping that the student is at the centre of their own learning (Fergusson, van der Laan, & Baker, 2019).

Fergusson, van der Laan, and Baker (2019) noted that work needs a wider definition, which they stated as "that innate human expression of effort, activity, and energy given to tasks that contribute to the overall social and economic welfare of communities and environments from which personal meaning and benefit are derived" (p. 201). As a former police officer, I have had experience of the law and its three systems, *viz.* traditional justice, restorative justice, and therapeutic jurisprudence. My personal experiences have informed my work-based research.

Figure 12 illustrates the cycle of reflective practice in four iterative stages. The stages start with (1) a lived experience, (2) a process of reflection on the lived experience in order to learn from it, (3) 110 conceptualisation and abstraction, and (4) experiment with something new using what has been learnt (Fergusson, van der Laan, & Baker, 2019). The micro-reflective cycle can be overlaid on the cycle of reflective practice as learning takes place in the personal sphere of the individual and their learning. By 110 conceptualisation the reflective practice (keeping it student-centred) the second part of Figure 12 shows the intimate nature of this learning. Thus, the stages incorporate the personal element: (1)

personal lived experiences in the work sphere, (2) self-reflection on personal work experiences, (3) 111 conceptualisation and work learning, and (4) us learning as a foundation for new learning and experimentation to succeed at work. This leads back to step one, where new personal experiences occur on a higher level. This cycle is distinct from routine work practices, enhances learning outcomes, and contributes to continual learning (Fergusson, van der Laan, & Baker, 2019). This can be implemented on a longer cycle, with the four phases covering a project, as follows: (1) work engagement, (2) have the ability "to scope and plan a work-based project", leading to (3) project implementation and data collection, further leading to (4) data analysis of findings, and returning back to (1) increased work learning (Fergusson, van der Laan, & Baker, 2019; p. 293). "Reflective practice, at its best, builds a bridge between those closely associated with an action or decision and those stakeholders slightly removed from it" (Fergusson, van der Laan, & Baker, 2019; p. 293). This is what this thesis has aimed to do. Micro-reflection is also a form of research into oneself (Fergusson, van der Laan, & Baker, 2019).

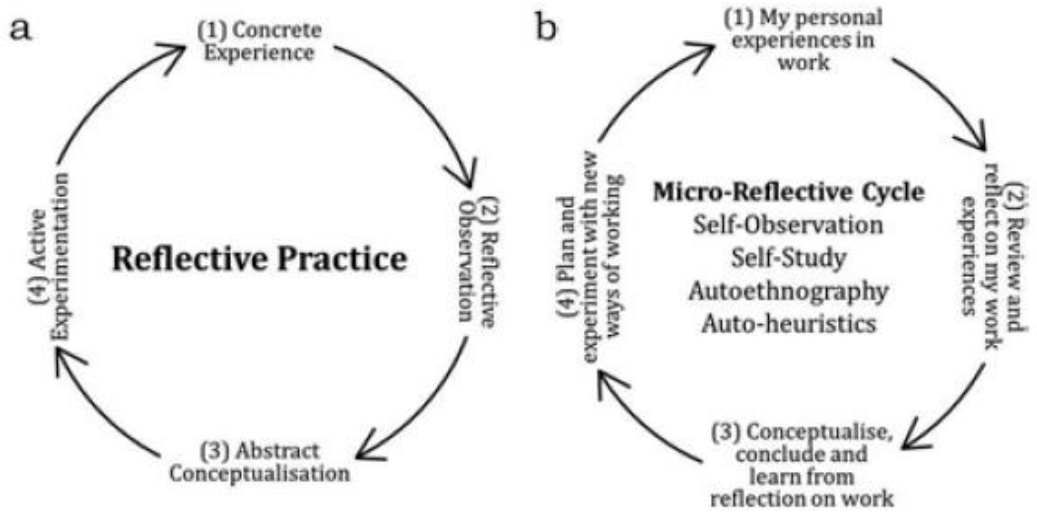

Figure 12: (a) Reflective practice, and (b) the micro-reflective cycle when applied to one's personal experience at work (Fergusson, van der Laan, & Baker, 2019)

In the context of the Professional Studies program, reflective practice considers a problem in the work domain and includes reflective practice at macroscopic levels to produce a work-based project through applied research (Fergusson, van der Laan, & Baker, 2019).

The four stages are: (I) determine learning objectives, (II) compile a research proposal, (III) complete a research and work-based project, and (IV) write up the findings. Learning objectives derived from self-study are the foundation of the research proposal. Micro-reflective practices produce higher-order thinking required for the macro-reflective phases Fergusson, van der Laan, & Baker, 2019).

My learning objectives, identified at the beginning of the program, were to (a) conduct research in a WBL context; (b) to complete a work-based research project; and (c) to develop as a reflective practitioner.

These objectives have been met because I completed the research project in a WBL context, developed my professional reflective skills and finalised this thesis.

Often driven by altruism, work-based research as implemented in the Professional Studies program results in a so-called 'triple dividend', designed to benefit the individual researcher. Work environment, and community of practice. As a result, this research has delivered the following triple dividend (Fergusson, Allred, & Dux, 2018), a key feature of the MPSR program: for the researcher completion of a thesis, for the domain of practice - judicial practice, and for society – a new judicial system model that incorporates wellbeing as its core tenet, i.e., the aim to practice the law in a way that is beneficial to all who come into contact with it.

5.2 Brief Review of the Three Approaches

The traditional justice system dominates the judicial field despite many shortcomings. Firstly, the focus on retribution is at the core of the approach and has been criticised for its lack of compassion and the philosophical premises on which punishment is based. Secondly, although traditional justice has implemented numerous initiatives, especially in hot spots, this has not succeeded in keeping youth from crime, nor offenders from reoffending. Thirdly, prisons are overcrowded and conditions appalling. Finally, the process and its outcomes are harmful to the wellbeing of offenders, victims, and communities.

“In essence, therapeutic jurisprudence is a legal theory that utilises psychological and other social science knowledge to determine ways in which the law can enhance the psychological well-being of individuals who experience the law” (Birgden & Ward, 2003; p. 336). This statement eloquently and succinctly describes the nature of therapeutic jurisprudence; the elements it contains capture the core aspects of this approach. Primarily, this is an evidence-based approach, which borrows richly from verifiable psychological case studies. Its methods are practical and tried and tested. Of equal importance is its key tenet – psychological wellbeing – for all participants. This emphasis on its therapeutic nature underscores that therapeutic jurisprudence can act as a sound theoretical framework for the legal system, which can then make use of other interventions, such as restorative justice and Indigenous court settings.

Therapeutic jurisprudence has the goal of reducing the harmful aspects of the law while upholding due process and judicial values. Thus, it can work effectively within the existing legal framework. The added value of therapeutic jurisprudence is its proactive ability to undertake preventative lawyering and obtain evidence-based solutions to psycholegal soft spots. Aspects covered by this are the capacity to address cases involving mental retardation and dealing with parole for sex offenders. Another area where the approach could be efficaciously applied is environmental crime. Therapeutic jurisprudence has been suggested as capable of ending recidivism in Australia, with its focus on rehabilitation. It has the ability to reform parole management and to include Indigenous justice values. It has been used successfully to reduce recidivism in numerous settings such as drug courts. Simultaneously, it is a victim-centered approach. Judges have also been empowered and freed to bring more compassion into the courtroom. One criticism is that therapeutic jurisprudence needs to close the gap in viewing the mentally disabled as whole and to respect their right to legal capacity. The view of the author is that it may be necessary for a psychological assessment to evaluate the ability for legal capacity on a case-by-case basis.

Restorative justice aims to rehabilitate the offender and to restore the harm done by the crime. A key tenet is offender accountability. This is a limitation of the approach in that it can only be used when the offender has confessed to the crime. Restorative justice is

based on high control to address the offence and high support that respects the offender and seeks to restore the individual to their communities. The approach is also victim-centered, letting the victim speak out about the crime and obtain reparation for the harm and losses caused by the crime. Communities of care provide support to the victim and offender, assisting the victim to achieve survivor status and repairing the rift between offender and community. Restorative justice has borrowed from Indigenous cultural justice processes.

Restorative justice conferences are usually an hour and a half long compared to ten minutes for a traditional justice court case; costs are equal or less. Mostly minor crimes are handled, such as alcohol content over the legal limit, property offences, and shoplifting, as well as violent crimes for offenders under thirty years of age. Both Australia and New Zealand are starting to deal with more cases such as burglaries, aggravated assaults, threats of murder by adults, and crimes by youth who reoffend. Statistics on its effectiveness vary, but it has shown a fifteen to twenty percent reduction in recidivism for first time offenders and mostly positive outcomes and satisfaction for victims. It effectively reduces recidivism when combined with rehabilitation and has outperformed the courts in terms of offender accountability.

5.3 Discussion of the Results

The thematic analysis revealed eleven themes and eight codes.

Two codes fall under traditional justice.

Two themes made up Code A failure of the system: (1) Retribution underpins traditional justice, causing harm to offenders; and (2) Victim protection and involvement are compromised. The topic of retribution is hotly debated. Proponents of alternative approaches find the law, in its current state, to be harmful to those who have contact with the system. Suffering is not viewed as necessary in order to achieve the ends of justice. Imprisonment is harmful to offenders and their families who are deprived of their income. Lack of support, isolation and a diminishing self-identity are not conducive to rehabilitation, while conditions in prisons are appalling and overcrowding compromises

the provision of basic necessities. Victim participation is usually limited to giving statements and there is no opportunity for victims to express their trauma or overcome fears of revictimisation. Along with these glaring failures, and as a result of the social demand for retribution, the system is unable to achieve a reduction in recidivism. The failure of the traditional justice system is the first of two core findings. It indicates that the current approach to justice is not working and transformation of the judicial system is needed. This code provides the answer to the first half of the research question, 'What is the current state of judicial practice in Australia?' The proposed new model offers a solution to this.

Two themes contribute to Code B social and cultural barriers: (3) Recidivism is a core concern; and (4) Rates of recidivism increase for certain demographics. The cycle of recidivism grows shorter between offences; this means that the problem of overcrowded prisons is being exacerbated by the inability of the system to combat reoffending behaviour. Unless recidivism can be successfully reduced, the system will continue to deteriorate. There is bias in the system towards certain demographics. Additionally, recidivism statistics show that males and Indigenous populations have a higher rate of recidivism. Social and cultural barriers prevent traditional justice interventions from succeeding. There is a need for justice to borrow more readily from Indigenous judicial practices in order to decrease recidivism.

Two codes are found under restorative justice.

There is one theme in Code C community as restorative: 5) Offenders can repair the harm done while being supported. The offender, in the traditional justice system, has an experience with the law that is anti-restorative and does not restore the offender to the community nor redress the losses the victim has experienced. Restorative justice is not carried out because the offender is deserving, and it is not done to avoid accountability. It seeks to bring the offender to a state of accepting responsibility for the effects of the crime and to make redress. Communities of care are supportive and help the offender to reach this understanding while reaffirming the individual's value to the community. Restorative justice is a flexible approach that can vary its methods to suit the circumstances of each case. The approach is victim-centered so that victims gain closure, overcome their fears,

and are genuinely able to forgive the offender.

There is one theme in Code D reoffending youths: (6) Offering conference over court is beneficial and prevents reoffending. Juvenile offenders have been shown to reoffend less after restorative justice conferences, at least in the short term. Youth have not yet been exposed to the crimogenic influence of incarceration as first offenders. Every effort should be made to catch this group early and prevent them being added to the numbers currently overcrowding Australian prisons.

There are four codes under therapeutic jurisprudence.

There is one theme under Code E therapeutic jurisprudence is earning recognition in its own right: (7) Traditional and therapeutic systems cannot be judged together using normal standards of measurement. Therapeutic jurisprudence and problem-solving skills are becoming a popular choice of justice compared to traditional justice. This may indicate a change in public thinking is underway as more people realise that the system needs to change. As therapeutic jurisprudence becomes better known, it is easier to offer this as an alternative to traditional justice.

There are two themes under Code F offender wellbeing: (8) Therapeutic jurisprudence is an effective way to reduce recidivism rates; (9) Court law integration with therapeutic jurisprudence is beneficial. There is a dire need to include wellbeing in the judicial system. Offenders are being punished beyond their crimes, acquiring a life-long stigma that prevents them reestablishing an equal life to other citizens once they have ‘paid their dues’, battling to find employment, losing contact with society and close ones, and at risk of becoming hard and lacking in a self-identity that will uplift them from a continued life of crime. Compassion does not mean giving up the pursuit of justice. However, with therapeutic jurisprudence the system can address the causes of crime in a therapeutic manner that enhances the wellbeing of offenders. This requires the law to answer a higher calling.

5.4 The Results and the Research Question

The research question was ‘What is the current state of judicial practice in Australia and what might the future of it be if we factor in restorative justice and therapeutic jurisprudence?’.

It has been shown that therapeutic jurisprudence and restorative justice do indeed increase the wellbeing of participants, that rehabilitation is more successful, and that recidivism rates are lowered. Thus, these interventions are more successful than traditional justice in handling crime effectively. The failure of the traditional system was effectively demonstrated too, and the need for its replacement. All the codes and themes relating to traditional justice indicated negative aspects; in other words, the literature review and thematic analysis did not find any redeeming aspects that support the continuation of justice in its current form. On the contrary, therapeutic jurisprudence was allocated codes and themes that provide support for it being suitable to transform the judicial system for the better. The research evidenced that the current state of the judicial system in Australia is ailing and in need of transformation. The proposed model fills that gap by turning the law into an evidence-based therapeutic tool that serves the needs of justice and participant wellbeing, from judges, to offenders, victims and communities and all cultures and groups. It can effectively reduce youth crime, and potentially transform the lives of juveniles to be fully functional, law-abiding, contributing members of society.

5.5 The Model in Context

The model proposed is based on the understanding that the traditional system is not able to continue in its current state. It posits that therapeutic jurisprudence has the core principles, proven experience in multiple crime categories, a solid evidence-based philosophy that translates into a practical approach, and the ability to utilise court resources to achieve a much-needed transformation to the justice system in Australia. Such a shift requires a broad-based change in public thinking and policies. However, by allocating a greater share of cases to therapeutic jurisprudence and restorative justice and continuing research, this can be achieved gradually. This change in the justice system can consequently add to steady gains in reduced recidivism.

5.6 Limitations and Recommendations for Further Research

All research has limitations, which have the advantage of suggesting avenues for further research.

An investigation of the reasons for society's demands for retribution, and more importantly, recommendations to overcome an attitude that is fostering crime and failing to reduce recidivism is needed but was outside the scope of this thesis. Another aspect that was beyond the reaches of this research, but which is needed, is a qualitative investigation into the causes and remedies related to demographic differences in recidivism for individuals. This would add depth to the current research and enable the participants to be seen as individuals, potentially increasing compassion, and the desire to see the law transformed.

More research is also needed into the capacities of therapeutic jurisprudence in handling crimes it has not currently been tested on; this should include longitudinal studies on all crime categories, to measure changes in recidivism rates per time period. As more cases are handled by therapeutic jurisprudence, case studies will reveal new aspects requiring quantitative research and will have the benefit of building a vast collection of usable data on the approach.

There are as yet insufficient quantitative studies per crime category and group of offenders to fully validate all restorative justice interventions. There is also a risk of certain initiatives gaining funding yet not falling under the strict methodology and aims of the approach. By ensuring that all restorative justice interventions are legitimate they must be court-allocated and monitored. Preferably, therapeutic jurisprudence should determine this. Longitudinal quantitative studies are needed to see to what degree restorative justice prevents first-time offenders becoming recidivists. A limitation in overall research on criminal justice is that most studies examined juveniles. More research is needed on the usefulness of interventions reducing recidivism of adult offenders. It is envisioned that far more therapeutic strategies would be required for this group of offenders than for juveniles; this needs to be tested qualitatively and quantitatively to delineate areas of research and obtain empirical evidence of the efficacy of approaches for adult recidivists.

5.7 Conclusion

The focus of the thesis was a comparative analysis of the traditional judicial system with therapeutic jurisprudence and restorative justice. This revealed that recidivism is high and rehabilitation low in the traditional system. Further, prisons are overcrowded and the focus on retribution is not resolving the problem of crime. The traditional justice system has the potential to cause harm rather than wellbeing to participants.

By contrast, therapeutic jurisprudence secures ways to improve the psychological wellbeing of persons coming into contact with the law and to minimise the harm that is experienced. Therapeutic jurisprudence offers the means to transform the current legal system. In contrast to restorative justice, therapeutic jurisprudence works through the judicial system, makes use of magistrates and judges, and does not compromise due process. Unlike restorative justice, therapeutic jurisprudence shows better administration, reduced caseload, lower costs than traditional justice while also reducing recidivism.

Restorative justice follows a restorative approach characterised by high control and high support so that it deals with the wrongdoing and expects the offenders to take responsibility, but also shows respect to them and aims to restore them to their communities. The intervention offers a shorter processing time, lowered recidivism, victim-offender mediation, greater offender accountability, a higher rate of apologies than traditional courts, and less distressed victims who are less likely to be afraid of revictimisation.

The thesis is significant to all those involved in the judicial process, from police officers to probation officers. It provided a comprehensive analysis of the traditional justice system and the reasons why it is not meeting the objectives of reducing recidivism and decreasing the numbers of inmates in prisons. It also identified those aspects of the law, which are not conducive to the wellbeing of offenders, victims, or the community. A comparison was made between the traditional justice system and restorative justice and therapeutic jurisprudence and a new model was proposed, a unique combination to the field.

This thesis has been driven by a desire to see the judicial system is Australia transformed

into a therapeutic agent that aims at the wellbeing for all who come into contact with the law. It is hoped that this research, along with that of other researchers, will fill the gap in calling for legal reform that addresses the shortcomings identified in the traditional justice system.

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Appendix A: Juvenile Recidivism Data

[Borrowed from Carcach and Leverett, 1999]

Table 1: Juvenile Offenders Recording Proven Court Appearances before New South Wales Children's Courts 1 July 1992 – 30 June 1993: Percentage Distribution, Percentage Reappearing in Court and Time to Reappearance During the Period 1 July 1992 – 30 June 1997 by Selected Characteristics

	Percentage of Cohort	Percentage Recording a Reappearance	Average Time to Reappearance (Months)
Age at First Proven Court Appearance			
10	0.1	42.9	8.0
11	0.5	66.7	22.2
12	1.4	56.4	15.9
13	4.0	51.6	23.6
14	9.8	55.1	23.5
15	16.3	51.1	20.8
16	25.7	44.2	17.6
17	33.0	24.1	11.8
18	9.0	7.8	7.4
Gender			
Male	85.8	38.1	17.2
Female	14.2	30.8	22.4
Number of Previous Proven Court Appearances at the Time of the First Proven Court Appearance			
0	55.0	30.3	24.6
1	18.4	41.9	19.6
2	9.0	42.3	15.6
3	5.6	47.1	9.9
More than 3	11.9	52.3	8.7
Offence Type at First Proven Court Appearance			
Violent Offences	16.7	37.1	17.9
Property Offences	63.2	39.4	17.2
Drug Offences	6.0	24.6	18.4
Other Offences	14.2	31.5	17.9
Type of Penalty at First Proven Court Appearance			
Nominal Penalties	3.4	18.2	13.3
Unsupervised Orders	41.1	34.3	19.6
Fines	21.4	28.8	14.6
Supervised Orders	21.2	43.5	17.1
Community Service Order	7.5	48.5	11.0
Custodial Order	5.2	47.5	11.4
Area of Residence			
Eastern Sydney	15.8	39.0	16.1
Western Sydney	16.0	36.0	18.1
Southern Sydney	16.2	36.9	18.3
Hunter	10.6	40.4	15.8
Northern NSW	10.8	37.3	18.4
Western NSW	9.5	39.4	17.7
Southern NSW	13.9	35.2	19.8
Interstate/Unknown	7.0	30.7	19.7
Court Type at the Time of First Proven Court Appearance			
Specialist Children's Court	51.0	38.2	16.8
Other Court	49.0	36.9	19.2
Total	100.0	37.8	17.8

Appendix B: Comparison of Traditional Justice and

Problem-Solving courts using a Therapeutic Jurisprudence Approach

[Borrowed from Goldberg, 2011; p. 4]

TRADITIONAL AND PROBLEM SOLVING APPROACHES: A COMPARISON[7]

Traditional approach	Problem-solving approach
The goal is the resolution of the dispute	The goal is the resolution of the underlying problem
The focus is on a legal outcome	The focus is on a therapeutic outcome
Uses an adversarial process	Uses a collaborative process
Claim- or case-oriented	People-oriented
Rights-based	Interest- or needs-based
Emphasizes adjudication	Emphasizes post-adjudication, alternative dispute resolution
Interpretation and application of law	Interpretation and application of social science
Judge acts as an arbiter	Judge acts as a coach
Backward-looking	Forward-looking
Precedent-based	Planning-based
Few participants and stakeholders	Many participants and stakeholders
Individualistic	Interdependent
Legalistic	Commonsensical
Formal	Informal
Efficient	Effective
Success is measured by compliance	Success is measured by remediation of underlying problem