Chapter 4

Theory and Methodology of Therapeutic Jurisprudence

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Introduction

In recent decades, the nature of legal research has been heavily debated all over the world (Smits 2012; Vranken 2012; Stolker 2014; Van Gestel, Micklitz & Rubin 2017). Two main issues play a key role in the debate. The first issue concerns the theoretical contribution of legal research. In many research projects, it is unclear whether and how legal researchers contribute to theory and how the word "theory" is understood (Van Hoecke 2011; Van Gestel, Micklitz & Poiares Maduro 2012). The second issue concerns the methods and methodology of legal research (Smits 2017). What methods do legal researchers use in their research projects and can these methods be characterized as scientific? Scholars from inside and outside the legal discipline have argued that legal researchers are often too implicit, vague and tacit about the methods they use (Hutchinson & Duncan 2012; Smits 2012). Some have stressed the need to incorporate research methods from the social sciences to make legal research a true scientific discipline (De Geest 2004). Others have argued that legal researchers should be prouder of their own distinct research methodology, but should be more explicit about the methods used in legal research (Smits 2012, 2017; Stolker 2014).

This debate about the nature of legal research has serious consequences for legal research practice. First, it results in difficulties in interdisciplinary research projects. Because of the lack of clarity concerning the meaning of the word theory in legal research and the under-developed or under-articulated methodology, problems arise in conversations and collaborations with

researchers outside legal academia. Legal researchers often encounter problems "explain[ing] their research in terminology that demonstrates its credentials to those outside law's community of practice" (Hutchinson & Duncan 2012: 93. See also Siems 2008). Moreover, the type of legal research that has been conducted for centuries in law faculties and schools all over the world — known as doctrinal legal research or black letter legal research — nowadays receives less funding than other types of research (see Van Hoecke 2011; Vranken 2012; Stolker 2014). Interdisciplinary panels assess research proposals and often doubt the theoretical contribution of legal proposals and/or consider the description of the methodological approach insufficient (Hutchinson & Duncan 2012; Vranken 2012; Stolker 2014).

In this chapter, I maintain that therapeutic jurisprudence (TJ) can be used to overcome these difficulties. The purpose of this chapter is twofold. The first objective is a broad one: the chapter aims to bring some clarity to the meaning of theory and methodology in legal research in general by assessing the theoretical and methodological nature of TJ in particular. The second objective is more concrete: the chapter aims to develop some methodological guidelines that researchers interested in TJ may take into account while conducting their research.

In short, TJ can be seen as a school of thought and research that characterizes the law "as a social force than can produce therapeutic or anti-therapeutic consequences" (Winick & Wexler 2003: 7). Researchers interested in TJ define the law as legal rules, legal procedures and the roles and behaviors of legal actors, such as lawyers and judges, and focus on the law's impact on the mental and physical wellbeing of the persons involved (Winick & Wexler 2003). Often, scholars conducting TJ-related research also recommend changing the law to make its application and outcomes more beneficial for a person's psychological or physical wellbeing, without ignoring the need to fully respect other fundamental values, such as justice and due process (Slobogin 1995; Winick 1997; Mackay 2013; Wexler 2014).

There are a number of reasons to choose TJ as a tool in the search for a better understanding of the meaning of theory and methodology in legal research. First, there is a large and growing body of research on TJ available (Freckleton 2008; King 2009; Wexler *et al.* 2016). This research literature is not restricted to one jurisdiction: TJ-related research is conducted in nearly all continents.[10] Furthermore, although some of the research can be

10. See University of Arizona, 2018, International Network on Therapeutic Jurisprudence Bibliography, accessed January 15, 2018, https://law2.arizona.edu/depts/upr-intj/bibliography/bibio_searchform.cfm.

characterized as monodisciplinary (see Stobbs 2011), other projects have a more interdisciplinary nature (see Winick 2003; Birgden & Ward 2003; Wiener & Brank 2013). Lastly, some researchers have already explicitly touched upon issues concerning theory, methods and methodology in legal and non-legal TJ-related research (Braithwaite 2002; Stobbs 2011; Mackay 2013).

The rest of this chapter is structured as follows. The second section explores the meaning of the word theory in (legal) research. Furthermore, it assesses whether TJ can be seen as a theory. The third section analyzes whether there are such things as TJ methodology and methods. The last section contains some concluding remarks.

Different meanings of theory

Theory can be seen as a key concept of science in general and in legal scholarship as an academic discipline as well. Yet, the precise meaning of the word "theory" is often unclear. Friedman, for example, observed:

> In legal scholarship, "theory" is king. But people who talk about legal "theory" have a strange idea of what "theory" means. In most fields a theory has to be testable; it is a hypothesis, a prediction and therefore subject to proof. When legal scholars use the word "theory," they seem to mean (most of the time) something they consider deep, original and completely untestable (1998: 668).

A non-exhaustive review of literature from within and outside the legal discipline reveals that several researchers have tried to unravel the meaning of "theory" (see Sutton & Staw 1995). Lempert, for example, states that a scientific theory always aims to "make sense of the world out there" (2010: 880). It is often concluded that the concept of theory does not have one fixed meaning. Patterson, for instance, refers to the "variety of theories" (2010: 4). Epstein and Martin argue that the concept refers to "different things depending on the discipline and the project" (2014: 31). In this section, I will assess the different meanings of theory and then analyze whether TJ can be seen as a theory.

A number of researchers have explored the different meanings of the word theory. Maxwell maintains that theory should not be seen as "an arcane and mysterious entity that at some point in your training you learn to understand and master" (2012: 49). For him, theory refers to "a set of concepts and ideas and the proposed relationships among these, a structure that is intended to capture or model something about the world" (2012: 48). Creswell discusses three possible meanings of theory. The first meaning of the word theory is "an interrelated set of constructs (or variables) formed into propositions, or

hypotheses, that specify the relationship among variables (typically in terms of magnitude or direction)" (2014: 54). The second meaning refers to "an overall orienting lens for the study of questions of gender, class and race (or other issues of marginalized groups)" (2014: 64). This lens can be seen as a "transformative perspective that shapes the types of questions asked, informs how data are collected and analyzed and provides a call for action or change" (2014: 64). The third meaning sees theory as the end-point of an "inductive process of building from the data to broad themes to a generalized model or theory" (2014: 65).

Another researcher speaks of a "polysemy of theory" and describes even more meanings of the word theory (Abend 2008: 174). According to Abend, theory can refer to a general proposition that establishes a relationship between two or more variables. It may also be an explanation of a social phenomenon identifying factors or conditions, "which individually should pass some sort of counterfactual test for causal relevance and whose interaction effects should be somehow be taken into account" (Abend 2008: 178). The word theory may also refer to a hermeneutical tool that can be used to make sense of empirical data. In some disciplines, theory can also refer to study of the meaning of works of writers such as Marx, Habermas or Bourdieu. Furthermore, some scholars use the word theory to refer to overall perspectives from which to interpret the world. Examples include feminist theory, rational choice theory and queer theory. Often, researchers using this meaning also refer to theory as a theoretical framework, perspective or approach. Yet, theory may also refer to "accounts that have a fundamental normative component," such as critical theory and postcolonial theory (Abend 2008: 180).

Given the literature cited above, it is safe to conclude that the word theory does not have one fixed meaning in all academic disciplines. This chapter argues that at least four different meanings of the word theory should be distinguished in legal research: 1) doctrinal theory; 2) micro-level theory; 3) macro-level theories, such as grand and middle-range theories; and 4) normative theories.

Theory within its first meaning refers to doctrinal theory, which is the result of doctrinal legal research (see Van Hoecke 2011). This type of legal research "provides a systematic exposition of the rules governing a particular legal category, analyzes the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments" (Hutchinson & Duncan 2012: 101). Doctrinal legal research can refer to the description of laws, practical problem-solving, adding interpretative comments to legislation and case law, but also "innovative theory building (systematization) with the more simple versions of that research being the necessary building blocks for the more

sophisticated ones" (Van Hoecke 2011: vi). The results of doctrinal legal research can be characterized as a descriptive, doctrinal theory (see Van Gestel, Micklitz & Poiares Maduro 2012; Van Gestel 2017). For example, Patterson maintains that, for a very long time, "treatise writers were regarded as the most concrete of legal theorists," especially in the United Kingdom and the USA (2010: 4). Lempert states that doctrinal analysis of the law concerns "culling statutes, cases, historical records and other sources to advance a general theory of what cases and statutes mean and/or how the law should be changed or amended" (2010: 879).

Theory within the second meaning refers to micro-level theories which are "a reasoned and precise speculation about the answer to a research question" (Epstein & Martin 2014: 31). Micro-level theories play an important role in empirical legal research, which aims to obtain a better understanding of how legal actors, institutions, rules and procedures operate and the effects they have. Empirical legal research sees the law as an "instrument that can be tested in an empirical way" (Smits 2012: 28). Micro-level theories (or "intervention theories") are provisional answers to a question, waiting for an empirical test (De Leeuw & Schmeets 2016: 55). They concern the testing of hypotheses and are closely tied to narrow studies (Lempert 2010: 884). As a result, these theories are characterized as micro (or theories with a small "t"). Some of these the micro-level theories focus on hypotheses implied by larger theories; others aim to advance new theories to explain well-defined phenomena (Lempert 2010).

Theory within the third meaning refers to macro- and meso-level theories (or theories with a capital "T"), which are "grander in scope, seeking to provide insight into a wide range of phenomena" (Epstein & Martin 2014: 32). Examples include Weberian theory, Marxist theory or World Systems Theory. These macro-level theories cover nearly "all aspects of social life, in which they focus on structural social transformations" and sometimes examine the role of law within these changes (Arnoldussen, Knegt & Schwitters 2016). Theories within this meaning are general broad frameworks that claim to speak about nearly everything (De Leeuw & Schmeets 2016). Middle-range or meso-level theories such as labelling theory or actor-network theory concern a smaller part of social life (see Lempert 2010; Creswell 2014). Similar to grand theories, they often lack precision and, as a result, operationalization and empirical testing are difficult (Lempert 2010). Still, they offer a richer explanatory framework compared to micro-level theories (Arnoldussen, Knegt & Schwitters 2016). Some scholars refer to macro- or meso-level theories as a lens, which guides researchers to what issues and data are important to analyze (see Maxwell 2012; Creswell 2014).

Theory within the fourth meaning refers to normative theory. Patterson distinguishes evaluative normative theories from ideal normative theories.

Evaluative normative theory seeks to explain the law as it is and aims to provide "methodological and normative recommendations for decisions in future cases" (2010: 5). Ideal normative theories, by contrast, "recast the problem in a way that does not depend on the law as we find it" (2010: 5). Several scholars have stressed the dominance of normative theory in legal research (Singer 2009; Smits 2009; Mackor 2012, 2017; Stolker 2014). For example, Smits holds that "legal academics deal with the normative question of how the law should read. It is quite common to find in an article or a book both descriptions and judgments, together, about how the law ought to read" (2012: 9).

Of course, it is possible that researchers combine two or more meanings of the word theory. Van Gestel, for example, holds that many legal researchers combine doctrinal theories and normative theories in their projects, but often mix them up as well. Some researchers, for example, "present their arguments and analysis as purely descriptive, while they are actually making normative propositions about which legal solutions are considered desirable" (Van Gestel 2017: 394). On the other hand, it might be the case that legal research does not relate to theory much at all. Lempert (2010), for example, notes that some papers primarily contribute to the body of knowledge through data collection, organization and description. Still, he acknowledges that these papers often "conclude with a bow to theory and an attempt to explain or theorize what has been found" (2010: 879). Moreover, he states that all empirical legal scholarship is theoretically informed, "at least in the weak sense that problem selection, model construction and even the information captured in qualitative research reflect expectations about what matters. These expectations are the products of theories" (2010: 886).

TJ theory or theories

Now that we have gained a deeper insight into the meaning of the word theory, the next step is to analyze the theoretical nature of TJ. Can TJ be seen as a theory and, if so, why? Do all researchers use the same meaning of the word theory when they refer to TJ as a theory? A literature review reveals that at least five types of responses to these answers can be distinguished.

The first response does not address the issue whether TJ can be seen as theory, but basically characterizes TJ as something else. A large number of scholars seem to avoid referring to TJ as a theory (see Freckelton 2008). TJ has been, for instance, considered as "a logical model for understanding and assessing the impact on the public and professionals of various aspects of the legal system" (Diesen & Koch 2016: 14). Others refer to TJ as a "tool for gaining a new and distinct perspective on questions regarding the law and its

applications" (Hora, Schma & Rosenthal 1999: 445). Besides that, there is such a sizable group of scholars that refer to TJ as a "lens" that Stobbs concludes that "it is virtually canon" to frame TJ as such (2011: 140).

The second response does not really answer the question, but characterizes TJ as the underlying idea of something else. For example, a number of scholars have framed TJ as the theoretical foundation of problem-solving courts (see Verberk 2011). Winick and others characterizes TJ as the theoretical grounding for the judicial movement of problem-solving courts (Winick 2003; Berman & Feinblatt 2005; Nolan 2009; Berman 2014). Hora, Schma and Rosenthal (1999) label TJ as the jurisprudential foundation of the drug treatment court movement. Although this response seems to indicate that TJ is *used* as a theory, it should be noted that it is rather unclear whether being a theoretical grounding or jurisprudential foundation is the same as actually *being* a theory. Furthermore, this response does not say anything about what TJ as theory actually means.

Whereas the first two responses basically dodge the question whether TJ can be seen as a theory, the third response is clearer. Some have argued that TJ cannot be seen as a theory (see Schopp 1999; King 2009; Donoghue 2014). A closer look at their reasoning reveals however that there are various types of deniers. One type of deniers note that TJ is not a theory, without stating what the word theory exactly means for them. For example, Wexler maintains that TJ "is not and has never pretended to be a full-blown theory" (2011: 33). Although he acknowledges that TJ works with schemes, conceptual frameworks or heuristics that can organize and guide researchers' thoughts, he concludes that these cannot be characterized as a "true theory" (2011: 33). However, the meaning of the concept "true theory" remains unclear.

Others hold that TJ cannot be seen as a theory as well, but give some more insight into their definition of the word theory. An example of this type of reasoning can be found in a paper written by Roderick and Krumholz (2006). They maintain that theories need to provide descriptive, predictive and explanatory states of the correlation between events. Theories should not contain statements of what ought to be or what are the correct, proper or desirable values in a legal system. As a result, they argue that TJ cannot be seen as a theory. The meaning of the concepts therapeutic and anti-therapeutic are not specific and precise enough to be used in a theory that can be tested. Roderick and Krumholz hold that "without specifically and precisely defining and conceptualizing therapeutic jurisprudence, social scientists cannot study the validity (accuracy) and reliability (consistency) of its theoretical constructs" (2006: 209). Because of the vague meaning of TJ's key concepts, they maintain that the concepts are "essentially ideologically and not conceptually or theoretically based" (2006: 209. See also Birgden 2009).

The fourth response is the opposite of the last one. Some authors explicitly state that TJ is a theory. Sometimes, these authors just state that TJ is a theory without giving further insight in the meaning of the word theory (see Hora et al. 1999). Daicoff, for instance, asks whether TJ can be seen as the theory for all kinds of comprehensive law "lenses" to analyze the law (2000: 489). Sicafuse and Bornstein state that TJ is "ultimately rooted in theory and scholarship" and has a "solid theoretical foundation" (2013: 21). Other researchers are clearer about the definitions they use. Nolan sees TJ as an idea "about justice theorized within the academic world" (2009: 32). According to him, TJ as a theory is not only an analytical framework, but also has a normative dimension. In her dissertation, Verberk characterizes TJ as a theory too. She defines theory as a framework of concepts and propositions regarding a part of reality, which are used to explain and better understand social phenomena (2011: 41). Birgden and Ward see TJ as "a legal theory that utilizes 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" (2003: 336). Another example is Slobogin, who sees TJ as a "prescriptive jurisprudence" which shares characteristics with other normative theories, such as critical legal studies and feminist jurisprudence (1995: 198-199). Others that see TJ as a normative theory include Winick, according to whom TJ "is empirically based but also normative in its orientation" (1997: 191).

The fifth and most nuanced response explicitly acknowledges the existence of the polysemy of theory and accepts that different people and different disciplines can give different meanings to the word theory. Given this proposition, the answer to the question whether TJ is a theory is twofold. First, a pluralistic definition of the word theory is adopted and, subsequently, it is explained why TJ fits in one or more meanings of the word theory. An example of such a response is the work of Mackay (2013). She maintains that the debate concerning the theoretical aspects of TJ is mainly the result of "different conversations about what is meant by the term theory" (2013: 49). Within legal scholarship, a theory "can describe the effects of the law and can state how the law should be and still be a theory" (2013: 49-50). As a result, TJ is a theory with descriptive and normative components. The first component is the observation that the law has an effect on the wellbeing of people. The latter component is TJ's prescriptive agenda as to how the legal system should be designed and applied. Another example of this response can be found in the work of Braithwate (2002). He holds that there are explanatory and normative theories. The first refers to "an ordered set of propositions about the way the world is" and the second to "an ordered set of propositions about the way the

world ought to be" (2002: 257). According to him, TJ is "interested in integrating normative and explanatory theory" (2002: 257).

In this chapter, I follow the line of reasoning of the fifth response. As stated above, I hold that, in legal research, at least four meanings of the word theory can be distinguished. TJ can be linked to all of these meanings of the word theory. For instance, TJ in itself can be seen as an umbrella term for a collection of various micro-level theories, which can be tested empirically (see Wiener *et al.* 2010; Jones 2011; Wexler 2014; Edgely 2014). An example of a TJ-related micro-theory is the testable proposition that a paternalistic way of judging will produce anxiety and other psychological distress that will make it harder for offenders to deal with denial of underlying problems connected to their criminal/problematic behavior (Winick 2003). Another example of such a TJ-related micro-level theory is the thesis that legal pressure will result in internalizing offenders' desires to commit to transformational change (Edgely 2013). A last example concerns the idea that the use of behavioral contracting techniques by courts will increase the compliance and satisfaction of people involved in a court procedure (Winick 2003; 2013).

Although it is hard to define TJ as a macro-level (grand) theory that explains all aspects of the world, TJ can be seen as a meso-level or middle-range theory that help us understand the law and its impact on human beings. In this respect, TJ as a theory helps researchers to make sense "in a narrative way, of particular behaviors or reals of social action" (Lempert 2010: 883). TJ as a meso-level theory functions as an overall perspective (or lens or framework) that is used to observe and interpret the world. This perspective shapes the kind of questions that are relevant and determines which data should be gathered and analyzed. For some, the perspective may also provide a call for law reform (Creswell 2014; Yamada 2018). This last aspect is closely connected to the normative element of TJ. The literature discussed in the previous paragraphs demonstrates that some scholars use TJ as a normative theory as well (Birgden & Ward 2003). Mackay (2013), for example, qualifies the normative component of TJ as a theory as evaluative and not ideal, because it takes into account a number of boundaries, stating that non-therapeutic interests should sometimes, though not always, trump therapeutic interests.

Lastly, TJ is also related to doctrinal theory. Although TJ in itself cannot be seen as doctrinal theory, many publications concerning TJ refer to or produce doctrinal theory. That is also the way it should be. As discussed in the next section on methodology, methods and TJ, it is essential to know how the law actually reads to conduct successful TJ-related research.

Methodology, methods and TJ

This section explores methodology and methods in TJ-related research. The word methods refers to the techniques, tools or processes that are used in the research. Examples are conducting interviews or the textual analysis of case law. The word methodology refers to the principles that guide the research and justify the use of particular research methods in a research project.

There has been no handbook on methods or methodology in TJ-related research yet; indeed, part of the purpose of this collection is to develop thinking on this issue. This chapter aims to develop some step-by-step guidelines that can be of use while conducting such research. Nevertheless, in this chapter, the word methodology is not treated as prescriptive but rather reflective. It is not argued that there is one ideal method or methodology for TJ-related research, but that there are multiple paths leading to good TJ-related research. Still, the section contains a number of suggestions that other researchers may take into account when conducting such research (see also Schopp 1999).

Before the methodological guidelines are presented, it is important to acknowledge that TJ-related research is quite diverse. At least two types of TJ-related research need to be distinguished. The first type can be characterized as predominantly "fundamental." This type of research usually sees TJ as a middle-range theory and uses it as a lens (also referred to as a heuristic or narrative) to analyze legal systems and legal concepts. It compares and juxtaposes TJ as a theory and its main concepts with other (macro- or meso-level) theories that are used to analyze the law. These other theories are, for example, adversarial justice (Stobbs 2011), restorative justice (Braithwaite 2002; King 2009; Nolan 2009), procedural justice (Kaiser & Holtfreter 2016; Wexler 2016), responsive law (Verberk 2011) or theories used in other scientific disciplines, such as positive criminology (Gal & Wexler 2015) and pragmatic psychology (Birgden & Ward 2003). This type of meta-TJ research usually does not use extensive empirical data, such as court observations, interview transcripts or case law, but mainly focuses on the conceptual and philosophical similarities and differences between TJ and other theories. Its focus on acquiring a deeper understanding of the different fundaments of theories is the reason why this type of TJ-related research is characterized as fundamental.

The second type of TJ-related research can be characterized as predominantly empirical or applied. In this context, the word empirical is given a broad meaning. Traditionally, qualitative data such as court observations, as well as quantitative data such as responses to questionnaires, are seen as empirical data. Yet, a traditional type of legal data such as court judgments can also be seen as empirical data. Lempert, for instance, argues that "the most traditional lawyers work with empirical data all the time — case

texts. Texts are out there as part of the real world and from the point of view of empirical scholarship have some substantial virtues" (2010: 879. See also Epstein & King 2002).

The latter type of TJ-related research is quite diverse. For example, a considerable body of literature exists on the working of problem-solving courts such as drug treatment courts in the United States of America (Hora *et al.* 1999; Verberk 2011; Donoghue 2014; Zettler 2017). Other research focuses on mainstream law and courts (Jones 2011; Spencer 2014; Wexler 2014). Researchers assess whether and how legal actors (e.g., judges, lawyers, social workers) apply techniques inspired by TJ in their daily work (Lens *et al.* 2016). Furthermore, various TJ-related research projects suggest how insights stemming from TJ can be used to improve the outcomes of a legal procedure (Vols 2014; Gal & Schilli-Jerichower 2017). Most of the TJ-related research has focused on criminal law, but other fields of law, such as disability law (Perlin 2017) and administrative or private law have been analyzed in TJ-related research as well (Cramer & Vols 2016; Diesen & Koch 2016).

The methodological guidelines below mainly relate to empirical or applied TJ-related research. They consist of four steps that can be taken into account in TJ-related research projects. First, a researcher should establish what the relevant law is by conducting a doctrinal legal analysis. If the design of the law is clear, the researcher then may explore the possible therapeutic and anti-therapeutic possibilities and consequences the law may have. Second, the researcher should analyze how the law is applied in real life. By reviewing socio-legal research on the workings of the legal system in practice and/or by collecting and analyzing empirical data, such as interview reports or court observations, the researcher can determine whether the legal system under review produces therapeutic or anti-therapeutic consequences in real life. Third, the researcher could use the empirical-normative methods to determine how the law under review deals with different conflicting arguments and interests. How does the law balance therapeutic interests and other interests, such as the need for community safety and fair process and for what reasons? Fourth, based on the TJ-related research, the researcher could use TJ as a normative theory, adopt a prescriptive stance and recommend changes to the law or how the law is applied.

Analysis of the (therapeutic) design of the law

To be able to assess the therapeutic and anti-therapeutic consequences of the law, it is essential to understand what the law is. Therefore, I maintain that good TJ-related research should first give a clear overview how the law under review actually reads. Vranken, for example, has stressed that doctrinal analysis

is required to conduct multidisciplinary and empirical legal research. The latter type of research is "impossible without a thorough (comparative) knowledge of one's own legal system and requires that the literature and the debate on that legal system be of a sufficiently high level" (2012: 57).

As a result, researchers interested in TJ should conduct a doctrinal analysis of the law or include references to such an analysis in their work (Wexler 1993). As stated above, doctrinal analysis refers to the research method that presents the law "in a certain field (such as contract law or administrative law) in a way that is as neutral and consistent as possible in order to inform the reader how it actually reads" (Smits 2012: 13). It concerns "locating the sources of the law and then interpreting and analyzing the text" (Hutchinson & Duncan 2012: 110). Wexler (2014; 2015) developed a number of metaphors that can function as a lens in a TJ-oriented doctrinal analysis of legal rules and procedures. He refers to legal rules and procedures as the legal landscape, legal structure, hardware or bottles. Furthermore, he characterizes the roles, behaviors, practices and techniques used by legal actors, such as judges, lawyers and therapists, as software, liquid or wine.

After conducting a doctrinal analysis and possibly reviewing relevant medical and social science literature, a researcher may speculate what the therapeutic and anti-therapeutic consequences of the discovered legal landscape, structure, hardware or bottles might be (Slobogin 1995; Gal & Schilli-Jerichower 2017). Furthermore, based on the doctrinal analysis, a researcher can speculate how receptive these rules and procedures are to an application of a more therapeutic nature (Wexler 2015). Using Wexler's metaphors, the question is which software could be used with the hardware found. Or, in other words, which wine or liquid could poured in the bottle revealed by the doctrinal analysis? Answering these questions relates to the "hypothesis-generating role" of TJ, because the answers call for further empirical research (Wexler 1993: 21).

Analysis of the (therapeutic) application of the law

The next step is to assess how the legal rules and procedures are applied in real life and measure their therapeutic and anti-therapeutic consequences (Slobogin 1995; Winick 1997). This research goes a step further than analyzing the design of the law by conducting a doctrinal analysis and investigates the workings of, for example, a court in real life. Besides doctrinal empirical data such as legislation and case law, other types of empirical qualitative and quantitative data, such as interview reports, observations and answers to questionnaires, need to be analyzed. This type of research on the actual application of the law has a more inter- and multidisciplinary nature, which

combines research methods used in legal scholarship and social sciences such as criminology and psychology. Besides that, TJ-related micro-level theories often play an important role in this type of research. Usually, researchers first summarize the relevant micro-level theories and rehearse the evidence for or against them. Then they set out one or more hypotheses implied by these theories and describe their methods and data. In the final part of the research project, the researchers generally report the results of the analysis and describe whether the hypotheses are confirmed (see Lempert 2010).

A considerable amount of TJ-related research literature can be characterized as this type of research on the application to the law in practice, with studies focusing in particular on the use of TJ professional practices and techniques by problem-solving courts, such as mental health courts and drug treatment courts (see Hora *et al.* 1999; Wexler 2014). For example, Edgely (2013) gives an overview of studies on the effectiveness of solution-focused court programs based on the principles of TJ. Another example concerns Lens *et al.'s* (2016) ethnographic study of proceedings in a mainstream American family court. Their research assesses interactions between judges and child welfare caseworkers in child maltreatment cases. After observations of courtroom interactions, it was found that judges differed in how much, if at all, they incorporated techniques derived from TJ-related research. Some judges tried to smooth exchanges between them and caseworkers and stimulated collaboration, while other judges invited conflict.

Unravelling the weight given to different interests

After it is made clear how the law actually reads, how it is applied and whether it produces therapeutic and anti-therapeutic consequences, the researcher can apply what Smits has characterized as the empirical-normative method. This method considers jurisdictions "as providing empirical material on how to deal with conflicting arguments" (2012: 76). As a result, the empirical normative method brings "these arguments into the open and discuss[es] the consequences of choosing one argument over others" (2012: 76). Using this method, the researcher considers case law and legislation no longer as "authoritative statements about what is law within a certain jurisdiction but, rather, a source of information about the power of a particular normative argument" (2012: 76). In other words, jurisdictions are seen as "laboratories for dealing with conflicting normative positions" (2012: 76-77). As a result, Smits argues that the empirical-normative method is comparative in nature. He believes that "comparison with other jurisdictions and even with other

normative systems (such as ethics and social norms), shows how solutions adopted elsewhere function" (2012: 77. See also Winick 1997; Smits 2009).

With regard to TJ-related research, a number of sub-steps can be distinguished, which Slobogin (1995) has referred to as internal and external balancing. First, based on the doctrinal analysis and empirical legal research, the researcher should analyze whether therapeutic interests play a role in the law under review and why these interests are taken into account (Winick 1997). Second, the researcher should assess what weight is given to these therapeutic interests. Are they considered as key interests or do they play a minor role? Third, the researcher needs to investigate which other interests of the individual involved (e.g., the offender's autonomy) and others (e.g., community safety) are taken into account in the law under review. Fourth, the research should establish what weight is given to these other considerations. Fifth, based on this overview of the weighing of interests, the researcher should be able to reveal the power of the TJ's main normative argument that therapeutic interests should be taken into account in the law and its application.

The next step should be to discuss the consequences of choosing one type of interest (therapeutic or otherwise) over any other interest. The researcher may then choose to analyze the weighing of therapeutic and other considerations in similar cases in other jurisdictions and compare the power of the therapeutic argument. An example of such a comparative empirical-normative TJ analysis concerns Cramer and Vols' (2016) research on the legal system's response to persons suffering from hoarding disorder. They assess how South African and Dutch law deal with problems caused by people with hoarding disorder and how the laws of both jurisdictions take into account various (therapeutic) interests of the hoarder, as well as the interests of landlords, neighbors and the community as a whole. They found that the laws of both jurisdictions do not explicitly take into account the therapeutic interests of hoarders and heavily rely on drastic measures, such as eviction, to address problems caused by the hoarding disorder. In other words, the interests of property owners (i.e., protection of property rights) and the community (i.e., safety) mostly trump the power of the therapeutic argument. Still, it was found that administrative and rental housing laws give property owners and local authorities flexible and discretionary powers, which can be used in a more therapeutic way.

Research-informed law reform

After doctrinal analysis, empirical legal research and empirical-normative (comparative) inquiry have made clear how therapeutic interests and other

considerations are balanced by the law under review, the researcher may go a step further and recommend changes to the law and how it is applied. This last step can be characterized as reform-oriented TJ-related research. Yamada (2010) has characterized this as intellectual activism: using scholarly work as a base for engaging in social change or law reform activities.

However, before any suggestions for law reform can be given, the researcher needs to make clear *why* the legal rules, procedures or their application should be changed. In other words, why do therapeutic considerations legitimate the law being changed? Slobogin characterizes this as the balancing dilemma: "How much weight should be given to showing that a legal rule or practice is therapeutic in the light of countervailing considerations?" (1995: 210). Yet, findings from a doctrinal or empirical analysis of the law and its applications as such cannot determine the correct choice, so the researcher should be clear about his/her normative stance (see Schopp 1993).

TJ can be used by researchers to develop this normative position. It prescribes that, "other things being equal, positive therapeutic effects are desirable and should generally be a proper aim of law and that antitherapeutic effects are undesirable and should be avoided or minimized" (Winick 1997: 188). In the same way as Winick, Spencer (2014) maintains that although TJ respects other legal values, TJ holds that the therapeutic effects of the law need to be maximized and the law's anti-therapeutic effects minimized as far as possible. Because of this normative standpoint, Schopp argues that TJ generates instrumental prescriptions that identify "effective methods for pursuing independently established values or goals" (1999: 601).

Still, it should be noted that TJ does not provide clear dichotomous answers to normative questions (see Schopp 1993; 1999). In other words, TJ does not dictate that therapeutic interests or considerations should always trump other interests. It could even be the other way around. Hora, Schma and Rosenthal, for example, maintain that "in many situations, other societal values should override therapeutic ones" (1999: 445). According to Winick, "there are many instances in which a particular law or legal practice may produce anti-therapeutic effects, but nonetheless may be justified by considerations of justice or by the desire to achieve various constitutional, economic, environmental, or other normative goals" (1997: 191). Kress holds that TJ should not make "substantial commitments to particular moral or political theories" (1999: 556). Instead, he maintains that "individual advocates of therapeutic jurisprudence will and should argue for law reform on the basis of therapeutic jurisprudential analyses, bolstered by their own normative visions. It would be naive to suppose that there would be consensus respecting

such analyses. Rather, as in all normative enterprises, debate among the proponents' differing conclusions will result in a deeper understanding of both the applicable therapeutic jurisprudential analyses and the underlying normative theories" (1999: 556).

Therefore, a researcher should at this stage of the research project present as clearly as possible his/her concrete normative argument *why* therapeutic interests in the specific situation under review should lead to reform to enable other academics and practitioners to discuss the validity and tenability of that normative claim (see Singer 2009). After the normative reason to change something is made explicit, the researcher should also make clear *what* should be changed and *how*. In this respect, it can be useful to use Wexler's (2014) wine and bottle metaphor or Wexler's (2015) discussion of the "therapeutic design of the law" (TDL) and "therapeutic application of the law" (TAL) metaphors. Sometimes, the TJ-related research will reveal that the legal rules and procedures need to be changed in other to achieve a more therapeutic outcome. In other words, if the TDL does not "permit much use of TJ, then the question of the propriety of actual law reform would come to the fore" (Wexler 2015: 2). Spencer argues that law reform may be required, because "if the bottle cannot hold any (or a lot of) TJ wine then the bottle may need to be changed" (2014: 222).

It may also be the case that the research reveals another interpretation of the legal rules and procedures with which more therapeutic outcomes can be achieved. For example, if a legal rule gives the judge some discretionary power, it might be that the design of the law may be suitable for a therapeutic application. Wexler notes that "from a TJ perspective, some of the most interesting bottles are cloudy in the sense that, on initial reading, they may appear to be rather TJ-unfriendly, but, on closer analysis, they may be susceptible to a practical interpretation consistent with desirable TJ practice" (2015: 5). TJ-related research can reveal that a bottle has the potential to hold a considerable amount of TJ wine and that the main question is how to pour more of that wine in the bottle (Spencer 2014: 222). Wexler states that if a legal rule or procedure is "found to be TJ-friendly in the sense that, in theory, many TJ practices would be permitted, then the next step would be to see if the legal actors are in fact using the permitted TJ techniques" (2015: 4). If a rule or procedure is not TJ-friendly, "then some sort of educational or training program might be instituted to teach the TJ techniques to those actors" (2015: 4). Furthermore, the research may suggest that the TJ wine that is poured into the bottles should be adapted, because not all techniques may work as planned (Wexler 2015).

Conclusion

One of the main aims of this chapter was to analyze the theoretical nature of TJ to deepen our understanding of "theory," "methods" and "methodology" in legal research in general. As a result, a key objective of this chapter was to develop methodological guidelines that researchers can take into account when they want to conduct TJ-related research. In the sections above, four steps have been described that will guide researchers during their research. Given these methodological guidelines, it is important to keep in mind that a good TJ-related research project should not start at, for example, the third or fourth step. For instance, a researcher should not recommend law reform (Step 4) if s/he has not revealed how the law actually reads, what the possible therapeutic and anti-therapeutic consequences could possibly be (Step 1), how the law is applied and whether this has therapeutic and anti-therapeutic consequences (Step 2) and how and why therapeutic and other interests are balanced in the jurisdiction under review (Step 3). Yet, a TJ-related research project does not have to follow all four steps to qualify as decent research. Depending on the research question that needs to be answered, it may be sufficient to only conduct a doctrinal analysis of the law. In other words, not all TJ-related research needs to include a law reform component.

Another key finding is that there is no fixed meaning of the word "theory." We should acknowledge that the word theory has different meanings to different people and in different disciplines. It was found that at least four meanings of the word theory can be distinguished: doctrinal theory, micro-level theory, macro-level theory and normative theory. TJ can be linked to all four meanings. That is one of the main reasons why TJ functions as an interdisciplinary bridge between scholars and practitioners working in different disciplines. Still, we need to acknowledge that TJ as a theory can mean something completely different for a psychologist or criminologist than for a legal researcher who analyzes doctrinal legal data with the help of normative propositions. To advance the development of TJ, it is advised that each time scholars purport to use TJ as a theory or debate its theoretical nature, they make clear what they mean by theory and why TJ qualifies as such a theory. Rather than claiming that a paper is theoretical or undertheorized, an author or reviewer should indicate what he/she means by theory and how that relates to specific TJ-related research (see Abend 2008). Some might fear that seeing TJ as a theory will make it less usable, accessible and attractive for practitioners and policy-makers (see Mackay 2013; Van Gestel 2017). Although researchers should not make a lot of fuss about theory, I maintain that clear and crisp TJ

theories will enable practitioners to deepen their understanding of what they are doing and what can be improved. Moreover, if we want TJ to be used in rigorous academic research, researchers should also continue to address questions concerning TJ's theoretical nature.

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