Beyond Methods - Law & Society in Action

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Abstract

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Keywords: research methods; law and society; empirical research.

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Introduction

One might be forgiven for wondering what is to be gained from another book on research methods. There is certainly no shortage of research methods texts, especially when one includes in the counting the volumes written for the separate disciplinary traditions that comprise Law and Society. Yet for scholars about to conduct empirical work for the first time, or about to attempt a very different approach, there is more to be said about the social realities of conducting research than is found in most of these texts. A proper grasp of the philosophical underpinnings of various research methods, and an adequate understanding of the practical prescriptions about the mechanics of research are clearly essential aspects of one's training. However, the art of cooking is more than the following of recipes. Just as reading recipes in a cookbook does not sufficiently prepare you for your first foray into the kitchen (and certainly does not make you a good cook), most research methods books can only take you so far in preparing you for fieldwork. Orthodox methodological texts have two important limitations in this respect.

First, they do not generally convey a sense of what it *feels* like to be out in the field, particularly when things go wrong or become difficult (which is almost always the case). As the interviews contained in this book suggest, research projects are usually longer and their narratives more complex than the researcher would have imagined at the outset. Although this has to be experienced firsthand to be fully appreciated, the retrospective tales told in this volume work particularly well as a window onto the lived reality of research. They demonstrate powerfully that one of the major skill sets required of a fieldworker is not so much the preparation of the project, though this is very important, but the ability to respond to the unexpected, to serendipitous opportunities and, almost inevitably, to a certain level of disappointment. It is a rare research methods textbook that prepares students for the emotional dimensions of research and academia and helps them set expectations about what constitutes "success" in research and publication.

Second, research methods texts, and the presentation of research findings more generally, often remain quiet about the imperfect path of the research process. Although transparency about research design and data collection is a basic principle of good social science, it takes a brave soul to give a genuinely "warts and all" account of the mistakes that are made along the way, or of other infelicities in the research process. There is much to inhibit us from such complete candor. Having made mistakes or missed opportunities, scholars learn to paper over those problems with a dispassionate voice and a cool recollection of the methodological steps. The "whole truth" of how research work actually gets done tends to remain unspoken except perhaps to one's students, who hear these tales as reassurance when their own projects are mired in ambiguity and struggle. It is difficult, in research as in any area of life, to share one's insecurities.

Yet, particularly for Law and Society scholars, there is surely both credit to be taken and comfort to be given in being a little more candid. We might usefully think about research methods as embodying the "laws" of the research process. Prescriptions about the mechanics of data collection and analysis are, in important ways, the rules and regulations of the social

sciences—a self-regulatory system controlled through a mix of community and competition. And just as early socio-legal scholars exposed the gap between law in the books and law in action, so we might, as a scholarly community, consider the gap which inevitably exists between research methods and the realities of research. Although normatively important, we should not expect the prescriptions of research methods found in the textbooks to be perfectly mirrored in the research process.

Methodological Anxiety Syndrome

Responding to these limitations is more than an intellectual exercise. They have a practical impact on researchers, particularly those new to the enterprise. Many students and scholars experience what we would dub "MAS," or Methodological Anxiety Syndrome. MAS is a pervasive and sometimes debilitating doubt about whether one has the necessary methodological skills to embark on empirical socio-legal work in the first place. It is important to recognize that not all the disciplines which contribute to the Law and Society field engage in the same kind of methodological training. In particular, those coming from law schools may have received no training whatsoever in social science research methods. Yet, socio-legal research has a particular appeal for lawyers who have become frustrated and/or bored with the limits of doctrinal scholarship, as a number of the contributors to this book can testify (see, for example, chapter 5 with Lawrence Friedman, chapter 8 with David Engel, chapter 9 with Keith Hawkins, and chapter 15 with Gerald Rosenberg.)[1] It is easy, we suggest, for legal scholars asking socio-legal questions to be intimidated by the apparent mystery of research methods, and to be held back from conducting empirical work because of their lack of formal training. Piercing criticism from social scientists of scholarship by lawyers—attacked as insufficiently attentive to the "rules" of empirical research methodology—can all too easily be read as only discouraging exploration or raising barriers to participation in the interdisciplinary dialogue.[2]

However, as a number of the chapters in this book demonstrate, formal training, although invaluable, is not always a pre-requisite to the conduct of high quality socio-legal research (see, for example, chapter 2 with Stewart Macaulay, chapter 7 with Alan Paterson, and chapter 16 with Michael McCann). We do not suggest that training in research methods is unimportant – far from it. There is no immunity from the obligation to be as complete and transparent as possible in describing one's steps in empirical research, and training can provide both the vocabulary and imagination necessary for conceptualizing and communicating good scholarship. Yet, we suggest that an awareness of methodological issues and the requisite sensitivity to methodological questions can still be gained where formal training has not been available. In the world of computer programming, software developers openly speak of the "naïve implementation" of a solution - the first, simplest, and often "textbook" way to get a piece of software up and running. But they cannot end there, if they are to be successful. Software may even be released to the

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[1] For other personal accounts of the draw of socio-legal studies for lawyers, see Bradney, A (1998) "Law as a Parasitic Discipline *Journal of Law and Society*, vol. 25, no. 1, pp. 71 – 84; Cotterrell, R. (2002) "Subverting Orthodoxy, Making Law Central: A View of Sociolegal Studies" *Journal of Law & Society*, vol. 29, no, 4, pp. 632-44

[2] Lee Epstein and Gary King, "The Rules of Inference," *University of Chicago Law Review, vol. 69, no. 1* (2002), pp.1-133. See also, Robert Spitzer, Saving the Constitution From Lawyers (New York: Cambridge University Press, 2008), pp. 1-55.

public in "Beta" form, with many problems yet to be identified and new versions to be released. Law and Society research typically proceeds on a similar basis: beginning with a naïve design, but informed and evolved through experiences in the field and engagement with the data. Only, we have not done so well at naming and accepting the importance of "naïve fieldwork" in the research process. In this understanding, then, being methodologically *thoughtful*—that is, possessing the capacity to move from the naïve understanding of one's project to the more sophisticated, and to discover the questions, theoretical potential, and epistemological problems latent in your engagement with the world as you see it—is ultimately much more important that being methodologically trained. Some of the interviews in this volume should give considerable encouragement in this regard, as examples of how to enter the field even when formal training is lacking, while developing one's capacity for empirical research in the process.

MAS, of course, is not restricted to those without formal methods training. It also refers to debilitating doubts about the extent to which one's research projects has met the methodological standards of the field and so may constitute acceptable scholarship. Many scholars, us included, know the feeling of things having "gone wrong" or having realized well after the fact that a step taken was less than ideal, or worse. Such doubts about methods holds some people back from seeking publication in the best journals of the field. The sentiment that "this can't possibly be good enough to publish in the *Law and Society Review*" is a self-fulfilling prophecy when one never submits it. Since we began this project, many people have told us of graduate students—those in different careers today—who went out into the field, sometimes to foreign countries, to begin their research. Finding "the real world" so different from their theoretical expectations and the approach they had designed for it, they became frustrated, lost in the ambiguity, and never completed their degrees.

Most forbidding of all, doubt and anxiety generate a collective silence that no one person can break. We suggest that research methods need to be demystified and understood as social practices, just as surely as socio-legal scholars believe that law's claim to autonomy and superiority must be laid bare. The collection of interviews in this volume makes an important step towards that goal.
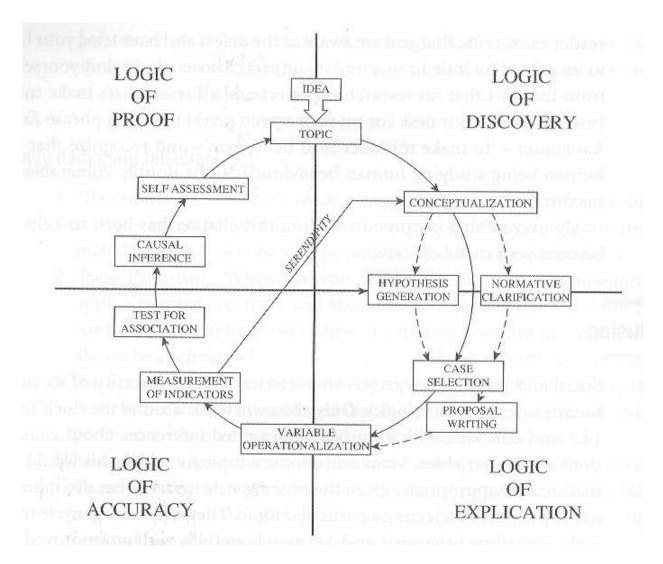
Serendipity and Bad Fortune

W. H. Auden suggested that "a poet will always have a sneaking regard for luck because he knows the role which it plays in poetic composition."[3] Before embarking on this project we sensed that, just as in the arts, serendipity played a significant role in the production of social science. Of course, others have pointed to serendipity. Consider an example from a recent, excellent collection of methodological essays (see Figure 1).[4]

Figure 1: Serendipity in Methodology – One Formulation

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[3] W. H. Auden, *The Dyer's Hand and other essays* (London: Faber and Faber, 1963), p.47

[4] Philippe Schmitter, "The Design of Social and Political Research", in Approaches and Methodologies in the Social Sciences, Donatella Della Porta and Michael Keating, eds. (Cambridge, UK: Cambridge University Press, 2008), p. 294, Figure 14.3.

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Source: Schmitter (2008), Figure 14.3.

Amid the grand unified theory represented in the figure, incorporating all of the logics of enquiry and analysis, a thin line labeled "serendipity" cuts across and intervenes. It seems out of place, a sharp juxtaposition between the concreteness of the process and the "black box" that happens at some point in good research. But how can this mysterious dimension be explored and communicated to others? Is serendipity more than insight, or even genius that cannot be acquired, only possessed? Serendipitous experiences may be too idiosyncratic and context-dependent to articulate in a systematic way, but that is not to say we shouldn't attempt an investigation into the craft that occurs at this level of specificity.

Of course, amid the chance developments and insightful realizations that help to refine a research project, the research process throws up bad fortune as well as good. Our second instinctive hypothesis was that ambiguity and difficulty were the rule rather than the exception in empirical research. We suspected that behind most research projects—right up to the most insightful socio-legal projects, the ones we teach and turn to for our own inspiration—were stories that would settle the nerves of every aspiring researcher. By reaching out to leading

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scholars in the field, and asking for their reflections on their projects, we appreciated that we were putting people into an academic confessional. We knew we would hear of challenges and how many of these hurdles were overcome (or else these works would not exist as well-read and much-discussed contributions to the field), but we would also draw attention to mistakes and the limitations of these studies. Our approach is not to meet candor with criticism. While there are unquestionably norms and best practices for research methods, analysis, and interpretation, we maintain a less normative stance, one that views ambiguity and difficulty as *essential* elements of the research process. For research to be at the cutting-edge, the researcher needs to be discovering new areas of study, finding new communities or subjects of research, or testing new analytical frames. The ambition to discover something new about the world brings the research into engagement with the world. A judge may believe that his or her task is to find the most closely matched precedent to answer the case at hand (however discretionary we know that task to be); a researcher who is not simply replicating existing research does not have that comfort. Every research project is, in some way, a project of "first impression", a *de novo* attempt to find the world through a new slice or with a new lens. Uncertainty and doubt will be the researcher's faithful companion.

This collection of interviews, if it adequately captures the way research methodology works "in action", does not free anyone of the need to be thoughtful, intentional, and reflective about methods. What it might do, however, is relieve many of the worries that plague students and scholars.

Law and Society in the Confident Age

Though not a guiding purpose of this volume, in the course of conducting the interviews we came to appreciate the collection as having a secondary value, functioning as an oral history, of sorts, of well known and well regarded Law and Society research projects. Law and Society as an academic field and an organization are now firmly established, and the findings of affiliated scholars have found their way into curricula and policymaking around the globe. Yet, fortunately, the field is young enough that many of its founders are around to tell their tales. The organizational history of Law and Society has been told in other places.[5] Also, the stories of many research projects, including some of those in this book, have been re-told at conference panels or lectures to students, and occasionally published as individual pieces. Still, while our primary emphasis has been on understanding how projects took shape and overcame challenges, we have appreciated our position of hearing these stories and believe that others will too. Both for those with long-standing familiarity with the projects in this volume, and for those coming to these analyses anew, there is an intrinsic interest in hearing the research stories which underpin them, one that requires no justification.

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[5] See, for example, Felice J. Levine, "Goose Bumps and 'The Search for Intelligent Life' in Sociolegal Studies: After Twenty-Five Years" *Law & Society Review* vol. 24(1):7-33 (1990); and Bryant Garth and Joyce Sterling, "From Legal Realism to Law and Society: Reshaping Law for the Last Stages of the Activist State," *Law & Society Review* 32:409-71 (1998). For accounts of the development of socio-legal studies in the UK, see Philip A. Thomas, 'Socio-Legal Studies: The Case of Disappearing Fleas and Bustards' in Thomas, ed., *Socio-Legal Studies* (Aldershot, Dartmouth, 1997); and William Twining, "Remembering 1972: The Oxford Centre in the Context of Developments in Higher Education and the Discipline of Law" *Journal of Law and Society*, vol. 22:35-49 (1995). See, generally, Encyclopedia of Law & Society: American and Global Perspectives, David S. Clark, ed., (Los Angeles, CA: Sage Publications, 2007).

Of course, there are many limitations to this volume if approached as history. Having focused on the social realities of research, our dialogues with authors leave unexplored—or edited out due to limitations of space—many features an historian might think to ask or include. Perhaps more significantly, the interviewees, while representing a diverse group of scholars and projects, were not sampled with a broader historical record in mind. Having initially toyed with the notion of constructing a collection of the "classic" works in the field, we quickly retreated from that frame for somewhat obvious good reasons. To attempt to capture a group of studies which represented "the classics" would be an almost impossible task and necessitate a controversial claim, especially in a field as diverse as Law and Society.[6] Further, it would have restricted our focus to the earlier period of the Law and Society movement. This would have undermined our primary goal of creating a useful resource for junior researchers of various intellectual interests and methodological approaches. In our collaborative discussions about the plan of the book, we frequently pointed to more recent works that we thought presented wonderful models of field research but that may not yet have attained the iconic status possessed by older works. We also wanted to focus on projects which turned their attention to important new domains or have applied exciting new analytical frames. The interviews with Yves Dezalay and Bryant Garth (chapter 20), John Braithwaite and Peter Drahos (chapter 21), and John Hagan (chapter 22), each focusing in their own way on globalization, are cases in point.

Even if not a rigorous history in any meaningful sense, it is difficult not to be impressed by the interplay of forces that have helped to generate many major research projects in the field. Rather than reducing research to an individual enterprise, the interviews in this book repeatedly pay a debt to mentors, such as J. Willard Hurst, or the concentrations of colleagues found at key institutions in the development of the field, such as the American Bar Foundation, the University of Wisconsin, Yale University, the Oxford Centre for Socio-Legal Studies, or yet others. Though merely scratching the surface, by tracing out the common intellectual and institutional roots of these empirical, socio-legal projects, these interviews contribute a deeper appreciation of the emergence of Law and Society as a field confident in its ability to contribute to the understanding of law in action.

Methods and Approach

In our conversations with the scholars in this volume and with interested colleagues, we could not avoid the recursive suggestion that the interviews we were conducting might be put to use in a sociological study of the sociology of law. Our actual ambitions were much more modest, but we nevertheless recognized that it would be supremely ironic if we did not, in a collection such as this, turn the spotlight on ourselves long enough to speak in detail, and with candor, to the methods and approaches we adopted in producing this book.

The idea for the project was floated over beers at The Brewer's Art, an upscale brewpub in Baltimore, where the Law and Society Association annual meeting was held in 2006. We were already friends, having worked as Research Fellows at Oxford University's Centre for Socio-Legal Studies. Having previously enjoyed the experience of editing together a collection of

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[6] But see, Carroll Seron, ed., <u>The Law and Society Canon</u> (Aldershot, Ashgate, 2006); and Seron, C. and Susan S. Silbey, "Profession, Science and Culture: An Emergent Canon of Law and Society Research," in <u>The Blackwell Companion to Law and Society</u>, Austin Sarat, ed., (Oxford: Blackwell, 2004) pp. 30-59.

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essays,[7] we set our minds to the conception of another project which would allow us to work together again. Our own memories of having completed doctoral research in the Law and Society tradition were sufficiently recent, perhaps even a little raw, that we could see the value of a volume such as this. In particular, for each of us—in one case a little known, and now fairly old, volume of reflective essays[8] and in the other a review essay based on a close examination of an empirical project[9]—had been of such inspiration and comfort to us, respectively, that we were confident of the pedagogical pay-off of research narratives over and above the methods textbooks. Unusually, perhaps, for projects conceived in a brewpub the night before, we pitched the idea the next morning to John Berger at Cambridge University Press—making it seem like it was a well-formed idea, of course—and his distinct enthusiasm launched our efforts.

One of our first decisions was to choose particular projects, rather than authors with an outstanding corpus of work. That meant excluding many luminaries and some of our favorite authors when their individual projects duplicated the approaches and themes already selected for inclusion. Our concern for the representativeness of various methodologies, approaches and subjects meant that many fine examples of empirical scholarship, particularly given the depth of excellent ethnographic fieldwork in Law and Society, could not be included. Our emphasis on empirical research projects naturally led us to reject numerous classic pieces that were based on keen insight into the empirical world but that did not tell the story of a discrete project.[10] Our process of selection led us to produce a diverse list of works across a wide time span. However, the selection was complicated by not knowing what the response to our invitations would be. We proceeded in waves, prepared to extend different invitations depending on the responses. As it happened, the response rate to our invitations was 100%, so we never drew from our contingent list of possibilities.

We chose an interview format for the main chapters, rather than seeking authored essays. We did this for two reasons. First, for entirely practical reasons, we believed that potential contributors from a wider range of approaches (and frequently we had specific scholars in mind) would be more willing to agree to an interview than to authoring an essay. Second, and more substantively, we were keen to capture a more immediate and conversational tone to the pieces. We instinctively felt that this format would make the book more accessible and easier to use for readers, creating pieces that can be paired with the primary texts as a form of commentary and reflection on the works. We were keen to establish a contrast to the more prosaic, and at times drier, style of methods textbooks. We also believed that capturing something of the spoken voice of the authors would enliven the narratives and somehow bring them closer to the reader. It would help convey the essential humanity of research, an underlying aim of the volume as a whole. Last, while some useful collections have provided scholars with narratives about the methodological practices used in the field,[11] we knew from more isolated examples and our own experience with interview methods that interviewing would allow us to ask authors to "unpack"

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[7] *Human Rights Brought Home: Socio-Legal Perspectives on Human Rights in the National Context* (Oxford: Hart Publishing, 2004).

[8] Robin Luckham, ed., *Law and Social Enquiry: Case Studies of Research* (Uppsala: Scandinavian Institute of African Studies, 1981).

[9] Herbert M. Kritzer, " 'Data, Data, Data, Drowning in Data': Crafting The Hollow Core", *Law and Social Inquiry*, 21:761-804 (1996).

[10] A prime example is Marc Galanter's, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," *Law & Society Review* 9:95-160 (1974).

[11] June Starr and Mark Goodale, eds., Practicing Ethnography in Law: New Dialogues, Enduring Methods (New York, NY: Palgrave Macmillan, 2002).

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the emotional dimensions of their projects or go deeper into various aspects of their experiences. Interviews simply allow one to access more spontaneous and candid answers than an editor giving written comments to a draft of a chapter.

Most of the interviews for the book were conducted at the Law and Society Association Meeting in Berlin the following year, 2007. This was a cost-effective and efficient way of carrying out the work. It was also exhausting. Before Berlin we had 'piloted' the interview approach with two contributors from Oxford University whom we knew, Keith Hawkins and Doreen McBarnet. Other interviews, for pragmatic reasons, were conducted after Berlin (John Braithwaite and Peter Drahos, John Heinz & Edward Lauman, John Hagan, John Conley and William O'Barr, and Alan Paterson). The interview with John Conley and William O'Barr was conducted by telephone conference call, as was the interview with Patty Ewick, though Susan Silbey had been interviewed in person in Berlin. Although Bill Felstiner had been interviewed in Berlin, Austin Sarat contributed answers in writing to an edited text of the Felstiner interview.

We prepared a set of universal questions which were asked of all participants and were sent to them in advance of the interviews. These questions covered issues such as the intellectual background of the projects, the setting up of projects, how projects were first intended or designed, the acts of analyzing and writing up fieldwork, the emotional demands of the research, and the authors' reactions to the reception of their work in the scholarly community. Additionally, we asked numerous questions specific to the projects being discussed. Interviews lasted between one and three hours, with an average of approximately 90 minutes, producing transcripts of between approximately 10,000 words and 30,000 words. Our biggest challenge was to edit those transcripts down to chapters of around 4,000 to 5,000 words. It should go without saying then, that, without fail, interviews were far richer than this book could accommodate, and so we grew in appreciation of the choices that we were making. Each interview received a two-stage process of editing, with one of us doing an initial cut and the other reviewing the edit against the original, and frequently making considerable changes, both cutting further and saving some material from the cutting-room floor. Some interviews suggested a dominant narrative quite readily, while others were more chimeric. We chose not to ensure uniformity of issues addressed across the chapters, but rather to retain what we felt were the most interesting and useful aspects of each interview. Having said that, and as the concluding chapter by Bert Kritzer highlights, there is still considerable overlap between chapters in terms of the subjects discussed and themes which emerge. It also took us much longer to edit the transcripts than we had originally anticipated – something, of course, that we should have foreseen on the basis of the research narratives we had listened to!

The authors were promised that we would send the edited transcripts for their approval. We invited them to amend the text where they wished, including our introduction to their chapter, and to suggest methodological keywords to be included in their chapters. Every author made some changes to their texts. Most amendments were minimal. It took considerable nerve for some contributors to see their words on the page—what had been said in the comfortable and relaxed atmosphere of Berlin—and to not shrink from our call to allow their doubts, mistakes, and reflects to go forward to press. We thank them for their fortitude.

The one exception to our decision to conduct interviews is the concluding chapter authored by Bert Kritzer, which pulls together the insights from the interviews in aggregate and reflects on the state of law and society research. Bert Kritzer struck us as, perhaps without peer, the scholar most qualified to reflect on the reflections. The editor of *Law & Society Review* from 2003 to 2007, and co-editor (with Peter Cane) of the *Oxford Handbook of Empirical Legal*

Studies, for the past three decades he has been one of the leading producers and consumers of empirical Law & Society research. In particular, he has long taken a reflexive interest in the research process, and has written much about how empirical research projects have come to pass.

The last matter to be decided in the production of the book was how to title it. One of us is more demanding than the other (in a good way, it is hoped) regarding titles, asking that they be catchy and memorable.[12] In these interviews, we frequently asked authors how their books and articles got their titles, and some of those answers made it through the editing (see, e.g., Feeley, Chapter 4; Engel, Chapter 8; and Rosenberg, Chapter 15;). We struggled to title this book, having so many concepts and themes seemingly at play. One of our colleagues early on gave us the promising suggestion of "Law and Society in Action," a clever twist on an old theme, and we ran with it for months. "Beyond Methods" was also considered, later in the process. Both fell afoul of the judgment of our editor at Cambridge, who sensibly advised us that a plain and descriptive title sells more books by giving readers and libraries a better sense of why they need the book. The title and subtitle of this chapter, like gravestones for dead ideas, memorializes our journey through the difficult job of naming one's projects.

Organization of the Book

This book is not designed to be read cover-to-cover, and so in some respects the order of the material may be irrelevant. In our formal proposal to Cambridge University Press we had suggested organizing the book into sections reflecting the various research techniques used and the traditional subject foci of the Law and Society field. This would have mirrored the approaches taken to research methods textbooks and to various Law and Society Readers. Several attempts in this vein left us frustrated that this approach might obscure more than it revealed for a volume such as this. Particularly where single projects have used multiple methods, separating chapters out according to individual techniques would be problematic. Further, in a developing field where research questions and analytical constructs build on and re-frame prior work, and where path-breaking work embraces and extends a range of traditional themes, it seems counter-productive to reduce projects to one, or even a dominant, research concern. So serendipity intervened, just as Figure 1 suggests it should—when attempting to place one's data alongside the conceptual framework—and we devised a new, more satisfying order of the chapters. The interviews, accordingly, follow a chronological sequence according to the date of publication of the main research publication being discussed.[13] In the end, the chronological frame helped us see the interviews in a way that confirms an initial hypothesis: that uncertainty and ambiguity are not products of a particular age of a field, when it is new, but are ever-present. Hopefully these interviews will help lessen the anxieties that attend this condition.

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[12]The other, having once been told by a colleague that he had conjured up the "second-worst titled book in academia", has long-since abandoned pride in the titling process.

[13] A number of authors produced additional outputs from the same projects. Details of these are given at the beginning of the chapters.