Interviewing Legal Elites

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Legal elites are those at the top of their fields who hold offices (or jobs) that wield the power of law and often draw on specialized legal expertise and training to do so. They range from ministers of justice, attorneys general, or lord chancellors and judges, which, in some states in the United States, campaign and run for partisan political office, or, as in the case of U.S. Supreme Court justices or those in the United Kingdom who head public inquiries, are well-known public figures. Others may be less visible prosecutors, prison wardens or sheriffs of jails, chiefs of police, trial lawyers, litigators of public interest groups who may be “repeat players” in high courts, legislators and civil servants who recruit, select, or approve judges, those who make criminal justice policy, public defenders or defense lawyers, administrative law judges or military justice officers, probation officers, officers in legal associations, and law professors and legal academics.

Feminists and other progressive scholars are committed to social research methods that take seriously the experiences of those most directly affected by laws and policies and see those people as distinctly if not exclusively qualified knowers. Understanding “law in action” (as opposed to “law on the books”) benefits from talking with those one is seeking to understand. Even if one is conducting large-N studies of data, legal elites can be a source of generating hypotheses, learning where to look for additional data, explaining why they think your understanding is misguided, silly, and wrongheaded or for securing interesting quotations about why they are either unconscious of or expressly denying scholarly conclusions. One need not be an ethnographer to benefit from getting a feel for courts, prisons, or law firms by observing them directly and spending time in them.

This entry explores many facets of interviewing legal elites, beginning with looking at where interviewing fits on the continuum of research methods, and how the interview approach can vary depending on the research method. Other topics examined include institutional review boards, consent of interview subjects, and preparation, sequencing, and flexibility of the interview.

**Where Interviewing Fits on the Continuum of Research Methods**

Interviewing as a research method can be either used on its own or as part of a combination of other methods. It exists on a continuum with gathering independent data about court dockets and outcomes, for example, survey research, where researchers ask sufficient numbers of respondents identical questions to determine whether potential variables have sufficient statistical significance to explain variations in results. Interviews can vary in length, formality, and consistency across subjects and number of times per interview subject. An oral history is one kind of interview whose purpose is to gather the legal life story; in the case of a judge, for example, his or her biographical background, path to the bench, key life experiences, judicial philosophy and strategies, most important judicial opinions, experiences of legal organizations, and observations about political life could all be areas of inquiry. Oral histories are most often conducted at the end of a legal career to
capture the knowledge and perspective of the subject, are usually taped, transcribed, and carefully archived, are often conducted by a scholar or well-trained leader in the field, and often take many hours to conduct. Such records can shed light on other documentary evidence, such as opinions, legal briefs, docket books, judicial conference and oral argument notes, or prison ledgers; they may capture the role of individual agents in shaping historical events or confirm or contradict other pieces of evidence.

Interviews differ from participant observation (although both may be used together) in that the interview calls upon the subject to reflect on legal phenomenon and puzzle through contradictions rather than having the researcher learn what it is like to be a part of the organization doing a particular kind of work himself or herself by doing and observing the work in progress. Interviews differ from ethnographies, which require the researcher to be even more deeply imbedded within the legal organization as well as draw on key informants—preferably the most thoughtful, analytical, critical, and deeply reflective member of the group. Benjamin Read (2018) offers a helpful account of when to conduct multiple interviews.

Social scientists distinguish themselves from journalists because they seek to generalize and understand rather than simply describe—to test hypotheses rather than simply get the story. Elite journalists resemble scholars in their singular focus on a particular beat over a long period of time, in the depth of their knowledge, in their attempt to analyze and understand rather than merely describe, and their freedom to construct or frame the story rather than merely unselfconsciously accept media tropes or parrot other elites or press releases. These journalists, like ethnographers, are often embedded in social circles with legal elites—perhaps more so than scholars—and may spend more time observing the machinations of legal organizations. They also rely on key informants as sources for verification and context. Many rely on a consistent stable of social scientists for commentary and analysis. Like participant observers, they may spend significant time in courtrooms, police waiting rooms, or bars and cafes frequented by those they cover. Their frame of the story may resemble a general hypothesis rather than merely a description of events. Regardless of their training, many of these journalists acquire legal expertise themselves in addition to conferring with a vast network of experts, both practitioners and scholars. Their work can be deeply analytical and insightful. Researchers should think of the journalists of the top news outlets who consistently cover courts or legal affairs as their beat as legal elites worth interviewing, learning from, and cultivating as colleagues.

**Studying Up, Studying Across**

Interviewing legal elites is a subset of research of what social scientists call studying up. As Laura Nader observed (1972), anthropologists tend to focus on the poor and marginalized, but their same techniques could illuminate the powerful. She noted that anthropologists value studying what they like and prefer the underdog and non-Western cultures. Yet understanding legal elites could serve the underdog, for example, by demonstrating that upper class people commit crimes too, changing our general theories of crime and criminality. Legal elites frame issues, set agendas, and determine the rules for others.

In embracing both an anthropological and a comparative approach to study courts, political scientist Martin
Shapiro (1981) urged scholars to avoid an exclusive focus on the highest appellate courts in general and the U.S. Supreme Court in particular. Lisa Hilbink (2007), studying the role of the courts in Chile during authoritarian rule, Kathryn Sikkink (2011), studying the role of human rights activists, and Alan Paterson (1982), studying who appellate judges in England imagine their audience for their opinions to be, all demonstrated the value of interviewing legal elites beyond the U.S. Supreme Court.

The Approach Depends on the Research Question

As with any scholarly pursuit, the method one chooses depends on the question one wants to answer. Certain scholarly questions tend to cluster into disciplines, but one can find all of these methods used across political science, sociology, history, and anthropology, even if some members of a given discipline may suffer from methodological monism, believing that truth, knowledge, and scientific rigor can only be achieved by one method.

How one goes about interviewing legal elites and the ethics and procedures for doing so depends on the question one wants to ask. Is this a question that the interview subject also wants to find an answer to? For example, how can we make sentencing fairer? How can we be more strategic about making public interest litigation more impactful? How can we ensure that lower courts will understand the rulings of higher courts? Or is the question something the researcher hopes to uncover that the interviewer may not want others to know, or not know himself or herself? For example, do judges sentence Black girls more readily to juvenile detention than White girls? Do justices have a single academic or judicial procurer who gives them a pipeline of clerks?

Institutional Review Boards and Consent

Whether or not funders or institutions require it, and even though institutions may conclude that public officials being interviewed in their official capacities may be exempt, researchers may wish to go through their institutional review boards (IRBs) to protect themselves and their institutions and to get helpful advice. Many IRBs hold that only it, not the researcher, can decide whether research is exempt. Some university IRBs do not permit the snowball method (where interviewers ask subjects if they know the names of others who might have relevant information), which is the primary method of research on social movements.

Interviewers should obtain signed, written consent forms before commencing any interview. The consent form should say whether or not the subject will be named and quoted by name. The consent form should state the purpose of the research, who at the institution a subject could complain to or obtain further information from, and state that the interviewee may end the interview at any time.
Whenever possible, the interviewer should record the interview. Recording ensures that the quotations are accurate; it allows the interviewer to assume a more conversational style (rather than scribbling notes verbatim) and allows the interviewer to listen to the interview more than once, catching nuances or asides that he or she might have missed at the time as important. Interviewers should also interrogate the silences—press for questions not answered and explore what is not said. Some subjects may not take the interviewer seriously if he or she is not recording the interview. If the subject balks at a recording, the interviewer should still press for attribution by name; if the subject refuses, one can still ask to quote the interviewee without attribution. The researcher should start with the assumption of recording, quoting, and attributing everything and only accede to confidentiality if the researcher cannot conduct the interview without granting it. Allowing the subject to review how scholars use quotations should only be done in the most extreme circumstances. When Sally Kenney (2005) was conducting interviews about a legal dispute involving a domestic violence incident, the county prosecutor said she could see the case file if she were willing to give him veto power over what she wrote. She refused, thinking she could get the information elsewhere without compromising the integrity of being able to write frankly about her findings. She did, however, find her draft improved by letting key respondents (including the prosecutor), read her drafts, and identify factual inaccuracies, although she was not obliged by their arrangements from the interview to do so. She was willing to note, however, which factual matters were in dispute.

Interviewers would be well advised to think through all of the permissions that may be necessary to obtain to do interviews, particularly if one is traveling great distances to do them or has to schedule them with very busy people well in advance. Kenney (2000a) discovered, unfortunately, that though she had secured the permission of the press office, her official point of contact as an outsider, the press office had not secured the permission of the office of the President of the European Court of Justice to distribute a survey to all référendaires. Institutions may have multiple power centers and gatekeepers, all of which can prevent interviews. Legal elites are not as elusive as financial elites (Souleles, 2018), but it may be helpful to connect with them at legal conferences, bar association meetings, or events at law schools rather than making a cold call to an assistant.

Ethics

Universities and research funding agencies developed IRBs because in the past researchers had coerced or harmed research subjects. Interviewing someone is not equivalent to denying penicillin to those with syphilis or administering electric shocks; nevertheless, research findings can harm subjects and institutions, even if the harm is to their reputations, relationships, and organizations. Individuals also experience harm simply by being misunderstood, rejected, or by having their time wasted.

Journalists Bob Woodward and Scott Armstrong’s blockbuster book The Brethren (1979), former clerk Edward Lazarus’s Closed Chambers (1998), and more recently, journalist Jeffrey Toobin’s The Nine (2007) all gave a “behind the curtain” account of the inner workings of the U.S. Supreme Court. These accounts reveal
the justices to be human, sometimes acting on personal grudges or pursuing petty rivalries. It also revealed partisan and ideological rifts and questioned some of the justices’ fitness to serve, suggesting they relied too heavily on clerks for petitions for *certiorari* as well as opinion writing. Justices guard their individual and institutional reputations closely and most prefer to speak through their written opinions. Each book resulted in increasing strictures on clerks and other “palace insiders” ability to speak with journalists and researchers or write about their experiences. Kenney (2000a) suspected that the fact that the European Court of Justice’s library prominently displayed *The Brethren* as a new acquisition did not help the members of the Court feel comfortable with her inquiries into the role of référendaires (law clerks).

Elite journalists, however, more so than academics, need continuous access to their sources and may have stronger ethical standards of what is “off the record.” Because legal elites may not have an ongoing relationship with a particular scholar, trust and rapport may be harder to build. Legal elites want to ensure that scholars are accurate, to be sure, but they also want to be portrayed as competent and ethical. Their natural wariness may be offset by the fact that they are less often studied than legislators or other politicians and so less experienced about being circumspect and more flattered by scholarly attention. Scholars perform considerable emotional labor, sometimes bordering on deception, in order to secure access and gain information. In some cases, researchers may not want to reveal their research question. Kenney found, for example, that the first woman judge on the European Court of Justice refused her request for an interview because she revealed she was interested in gender.

**Preparation, Sequencing, and Flexibility**

As Jennifer Hochschild (2005) states, “a central purpose of elite interviews is to acquire information and context that only that person can provide about some event or process” (p. 124). Interviewers must be as prepared as they possibly can before doing the interview. The interview should not be a first step or a fishing expedition to point the scholar to written sources he or she could have found by more thorough preparation. Interviewees will quickly size up the interviewer and engage at that level. An interviewer will also fail to secure a repeat interview if he or she wastes the interviewee’s time. If the interviewer is not well informed, he or she is unlikely to hear confidences or in-depth information. The interview is a time to listen, not display one’s acumen, but including specific information in the questions can demonstrate that one already has inside information from other sources.

Many legal elites have an academic background or teach, so the relationship may mimic that of a dissertation adviser (Stephens, 2007); judges are also used to working closely with clerks who are usually recent law graduates. Doing online biographical research and reading the person’s published works (scholarly articles or legal opinions) goes a long way toward facilitating rapport and inviting confidences. It is imperative that one know as much about the institutional history, organizational culture, and relevant case law as possible. Although she studied Nobel Prize-winning scientists, not legal elites, Harriet Zuckerman’s (1977) appendix relaying her interview preparation and the continuous testing interviewees did of her scientific knowledge is
Reflexivity

Interviewing, like any conversation, is relational. Which identity characteristics matter the most depends on the context. It behooves interviewers to think about how their identity characteristics might matter to the interviewee and behave accordingly. Identity positions are always both an advantage and a disadvantage. For new scholars, the most important difference may be age. But if the interviewer prepares well and asks good questions, legal elites may see them as nonthreatening and seek to explain more fully and openly than they might to a peer. The biggest impediment may be simply sharing that one is not a lawyer; many lawyers (and especially legal academics) believe that political scientists, or anyone who has not formally studied law, cannot understand doctrine or courts as organizations. Similarly, being a different nationality can either make it more difficult or more beneficial to connect with interviewees—many legal elites worldwide have studied in the United States or studied facets of the U.S. legal system. Alternatively, legal elites may feel more comfortable confiding in outsiders. Outsiders may also problematize understandings insiders take for granted and probe more deeply.

While some legal elite interview subjects may presume women or minority men incompetent and test their knowledge, most appreciate legal acumen, preparation, and a passion for their shared subject. Asking a novice question may lead to revelations; sharing an outsider-within identity may lead others to be more helpful than they might have been and facilitate knowledge acquisition (Oakley, 1981, 2016).

Further Readings


References


