2009

David Engel and "The Oven Bird's Song" (Edited Interview)

David M. Engel

University at Buffalo School of Law, dmengel@buffalo.edu

Follow this and additional works at: https://digitalcommons.law.buffalo.edu/book_sections

Part of the Law and Society Commons

Recommended Citation

David M. Engel, David Engel and "The Oven Bird's Song" (Edited Interview), in Conducting Law and Society Research: Reflections on Methods and Practice 83 (Simon Halliday & Patrick Schmidt, eds., Cambridge

This Book is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Contributions to Books by an authorized administrator of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.
CHAPTER 8

DAVID ENGEL AND "THE OVEN BIRD’S SONG"*

Understanding litigiousness involves many perspectives on how societies generate, shape, and process disputes. Whereas some may begin the study of disputing with the law and the formal institutions charged with implementing it, or what happens "in court," a long tradition of Law and Society scholarship has emphasized the importance of seeing how cultural practices give life and meaning to the law. Though some of this scholarship has come from anthropology, much of it has been produced by scholars from other disciplinary backgrounds who have been attracted to ethnographic methods and the promise of understanding legality through the eyes of "regular" people—not lawyers or judges but the ordinary people who experience "law."

Like other scholars in this collection, such as Carol Greenhouse (Chapter 10), Sally Engle Merry (Chapter 12), and the team of Patty Ewick and Susan Silbey (Chapter 19), David Engel sought to explore legal consciousness as it existed in the narratives and lives of such people. As he describes it, the route of this intellectual approach stems from a personal journey, one that helped open his eyes to his own country. Unlike some ethnographic studies, however, he conducted his research without full-time immersion in the community he was studying. This interview explores some of the substitutions and strategies Engel made to seek his desired depth of understanding, and some of the challenges that inhere to the approach. Both in the substance of the article and in the research process itself, we find the temporal dimension—for the latter, the time that Engel spent in the field and in mulling over the data. The product of that gestation was a memorable article with a memorable title.

Methodological Keywords: ethnographic interviews, community observers, docket study, participant observation

CONDUCTING LAW AND SOCIETY RESEARCH

Question: Could you say something about the intellectual history of the project behind "The Oven Bird's Song"?

Engel: I had been in the Peace Corps in Thailand for three years. I came back to law school and felt a bit like a fish out of water in my own culture and in the strange setting of legal academia. I was dissatisfied with the narrowness of legal scholarship and teaching, so I took a joint degree in South East Asian studies and read quite a bit of anthropology and history. After graduating from law school I went back to Thailand and spent two more years doing research on Thai courts and legal culture. I found my own feet as a researcher somewhere in the intersection of ethnography and legal studies. The only non-Thai scholars who, to me, really seemed to capture what was going on in contemporary Thai society were the anthropologists, so I gravitated toward the methods of legal ethnography in a book I wrote about a Thai court and community.

In 1976 I came back to the United States and got a position at the American Bar Foundation. I began to think about what sort of research I would like to do. Although it wasn’t clear to me at the time, it seems quite clear to me now that the study of Sander County, which led to the “Oven Bird’s Song” article, was kind of a replication of the work I had done in Thailand. It was an attempt to look at law in my own cultural setting and to view it from a distanced perspective that I might not have had if I hadn’t been in Thailand previously. My Thai research had raised a set of questions about how local trial courts related to the cultural setting in which they operated. So the challenge was to find a place in American society where I could conduct a study like that.

My experience in devising the project reflected a particular period in Law and Society research. I wasn’t the only one who had returned to the United States from having lived in a quite different society. So there was a shared interest in trying to research the undiscovered regions of our own society. It was part of the political ethos of the time too. There was some tension over what was “Middle America” and who were the “silent majority” – all of those politically fraught terms that Richard Nixon had used to justify his socially conservative agenda. At that time the paradigm that spoke most powerfully to people who wanted to do comparative sociolegal research was dispute processing. So I went into the study with that very much in my mind – I initially thought that I would use dispute processing as a way of understanding what was going
on in the community. I anticipated that researching disputes in the community and disputes in the court would produce a sort of map of a small-scale community in the United States - where the disputes came from, where they went, how they were handled, and so forth. But my ideas about the value of the dispute paradigm changed considerably in the course of my work.

Question: As you were developing the project, were you getting any feedback from colleagues or co-workers?

Engel: I was very lucky to have been at the American Bar Foundation. It was a great environment for me. I spent quite a bit of time working on the design of this study. When I reached a point where I had stalled or where I needed more input, I created an ad hoc advisory group. I just asked three or four colleagues if they would spend an afternoon talking with me about the work that I was doing and they were very happy to do that. I did it on a couple of occasions and those meetings really helped me to formulate a research design that I think worked well. The fieldwork didn't depart very much from the original design. It went pretty much according to plan.

Question: How did you go about finding a setting for the research? What kind of criteria guided the search?

Engel: At that time there hadn't been many sociolegal studies of an entire community in North America or Europe. In order to keep things manageable, I wanted to make sure that the court's jurisdiction covered the same social entity that I was trying to understand - that it corresponded to some sort of coherent cultural unit. But practicalities were also important. I looked for a setting that was sufficiently small in scale, somewhere that didn't have two or three urban centers. Also I was living just north of Chicago at the time and I wanted to be able to drive to and from the site in a day. So that limited my choice of locales. I looked around for small counties within reach of the city and I found Sander County.

Question: In your work in Sander County, as well as looking at records, you were engaged with quite a wide variety of people. Can you say a little bit about the process of gaining access?

Engel: There were three parts to the study and each part posed its own access issues. The court study depended on the permission of the clerk. Part of my education as a researcher was learning that, even
though records are in theory open and accessible to any researcher, the clerk of the court can effectively say “no.” They can’t deny access to any of the files but they can deny you access to a chair or a work table or a willingness to retrieve a number of files each day for you to read. That was what had happened with my first choice. Sander County was actually my second choice of a setting. So that was the first problem of access – to find a court official who was willing to facilitate the study.

Then, after reading a number of cases, I tried to contact the parties to set up interviews. That was quite difficult, probably the most difficult part of the study. Many of the defendants, in particular, had made it a practice to be not easily reachable. Some of them simply didn’t pick up their phones. So I found myself going from door to door. I found people’s addresses, rang their doorbells, persuaded them I wasn’t selling insurance or encyclopedias or trying to collect debts. That turned out to be really interesting because it made me think more about what it was that a researcher tries to extract from people, in some ways not too different from what a door-to-door salesperson does. It helped me to understand the people involved in litigation, the lives that they led and why being difficult to reach was important to them. But I also found that, once they allowed me into their house and talked with me, it was quite gratifying for them because the process of litigation had usually left them without a sense of closure. The cases often ended without their knowledge. They had expected a full trial where the judge would pronounce a verdict and instead things just sort of dissipated into nothingness. So they welcomed the chance to talk about it and try to think their way through what had happened.

The third phase of the study involved what I called “community observers.” That was quite fun. It was an attempt to think about who would be situated in such a way that they would have an understanding of, and a perspective on, what went on in the community. The community observers ranged from beauticians and barbers to ministers and funeral parlor operators; from lawyers, police officers, and government officials to insurance adjusters and tavern keepers; from well-known and long-established residents such as farmers to some of the newcomers who were factory workers and union officials. Most of these people were quite happy to talk to me, and there wasn’t much of a problem of access. Beauticians were among the best informants, actually, as were the tavern keepers. The funeral parlor operator also was quite insightful.
Question: Why beauticians?

Engel: They talk to everybody. There weren’t that many in the county so probably most of the women who lived in the county came to them. While there, they shared information. So beauticians just knew a lot. People also told me it was important to understand the bowling leagues, but I don’t think I ever interviewed any people from those organizations.

Question: How did you determine who was a community observer? Did you have a sense of that before you went into the field?

Engel: I had many entry points that I thought would be obviously good choices. The ministers and the beauticians were among them. And then I used a snowball technique. One contact would lead to another. After every interview I asked them who they knew in the community who was particularly insightful or who would have access to experiences that might be different from the ones they had. I made sure they weren’t always identifying their friends. Sometimes they mentioned people that they had been at loggerheads with for many years. That was how I got to some of the old-time farmers, in fact. Some of the people who viewed themselves as more progressive elements in the community pointed me to some of the older farmers who still had very conservative values or were still involved in traditional ways.

Question: What did you say to your informants when you asked to interview them? How would you describe what you were doing?

Engel: I told them I was doing a study of the county and trying to understand how different groups in the county handled their affairs, and what they did about disputes when they developed. To make the connection between the court study and the community observer study I used four skeletonized cases that I had taken from the dockets. They involved different areas of law and I had simplified them. They were just short paragraphs really. I described these cases to the community observers and asked them if they had ever seen similar issues or had had experiences like that. It gave me a sense of how those same problems that had been litigated were handled outside the court.

Question: Did you have an easier rapport with some informants than others, in ways that might affect your perspective?

Engel: Some interviews were more productive than others. I would probably have a more coherent philosophy now about how to conduct
interviews, but at that point I was learning as I was going along. I certainly tried to put people at their ease. I made it clear that I was there to be educated by them and to listen respectfully. I followed an interview outline, starting with the most open-ended questions and gradually becoming more specific. But there's an important point here. As a researcher, your own degree of comfort or discomfort during an interview is not an indication of how valuable that interview is. Sometimes the most uncomfortable interviews turn out to be the most revealing, especially when we try to understand the reason for our discomfort. I remember I was interviewing an evangelical Christian minister, and in the middle of the interview he asked me if I was ready to get down on my knees and let Jesus into my heart. I found that intensely uncomfortable but the interview turned out to be one of the most informative and useful. So rapport is helpful but it can be overrated.

Question: That must have been quite an unexpected and unsettling moment. How did you respond?

Engel: It was a great moment, actually, because it really challenged my sense of insulation and distance as a researcher. From my point of view he was a subject of my study. But from his point of view, I was a potential convert and a new member of his congregation. So now I relish my discomfort because it really made me understand his intentions and his view of the world. All souls who walked through his door, whether or not they viewed themselves as having some sort of immunity, were people that he needed to minister to. I'm not sure exactly what I said. I probably stumbled around for a little. I did not get down on my knees and let Jesus into my heart! I think when he asked me if I was ready to do it I just told him that I was not. He took it in stride. I think from his point of view it was a case of "well, if not today, then maybe later."

Question: How did you record your interview data?

Engel: I tape-recorded all the interviews and after each interview I would drive to some secluded place and take notes for about an hour. I think that's very important to do. I've found that if you sit down immediately after the interview, even if it has been tape-recorded, you can almost transcribe the entire conversation by memory. But your memory decays very quickly, so it's important to take notes immediately on what the interviewees looked like, how they were dressed, what their body language was like, what the room was like, and also anything that
made a strong impression. Even if you don’t understand why, if you make a note of it then maybe later you can figure out the reason.

Question: You mention in the article that in addition to conducting interviews and examining court records you immersed yourself in the community. Could you say something about how you did that?

Engel: I didn’t do it to the extent that an anthropologist would where he or she might live in a community for years. I just spent full days there, probably three days per week on average, over a two-year period. I talked to people. I attended a few community functions. I went to a Rotary luncheon, and so on. It was a modest attempt to hang out in the community. But the research centered more on the interviews.

Question: How did you decide when you had completed enough fieldwork to finish?

Engel: You reach the saturation point. When people begin to tell you stories that you’ve already heard, when you feel the learning curve has almost completely flattened, I think that’s the point where you can feel confident about leaving. I tell my students that there are two really difficult decisions involved in fieldwork. The first is to get yourself into the field to get started, and the second is to get yourself out. Both come with some degree of anxiety. Getting in is anxious because you don’t want to make a false step. You want to be sure you’re beginning at the right place and doing it in a way that’s going to lead to success. Leaving the field is anxious because you’re afraid that there may be something there that you haven’t yet discovered. But you can’t do it for the rest of your life. You need some point where the research ends and the analysis takes over.

Question: Your fieldwork was quite long and involved. You had a range of encounters and experiences. I’m curious about the extent to which there was an emotional dimension to the project for you.

Engel: I had been out of the country for so long, and had been so deeply immersed in a different culture, that I had a real fascination with what my own culture was and what it had become. I remember turning on the TV when I first came back from upcountry Thailand and just watching people with a sense of strangeness. So this research was really a voyage of rediscovery in some ways. There was a kind of fascination. Regaining contact with people in “Middle America” was emotionally satisfying. I felt perhaps more curious and open to people in different walks of life.
and to my own society because I felt that my position in that society was more indeterminate than it had been before I left the country.

Question: How did you organize and manage the data for analysis?

Engel: I didn’t have a good system. There were no software programs at that time and I’m not sure I would have trusted them if they had been available. There were some quantitative data from the court records and that was easier to manage because there were routines for doing that. The interview materials and my notes on them all had to be transcribed. I had to check the transcriptions for accuracy and that was a way to review what I had found and to try to make sense of it. So there was a whole secondary process of note taking and analysis that occurred at that stage. I organized them mostly around the themes of the four cases that I presented to the community observers.

Question: At what stage in the project did you see your thesis emerging?

Engel: The “Oven Bird’s Song” article was not one that I had anticipated as a product of the research when starting it. In thinking about it afterwards there was a shift in my own understanding of how I wanted to frame my scholarship. This was at a time when interpretive techniques had become more important for sociolegal researchers. Clifford Geertz’s The Interpretation of Cultures had just recently been published.¹ The notion of “thick description” was really very powerful, although it was later overused. It had a galvanizing effect on my own thought. Instead of just mapping discrete binary conflicts that crop up and go places in society, it seemed much more important to explore questions of meaning – not only what people did but how they explained and thought about what they did.

So in this article I felt I was shifting to a different level of analysis from the one I had started with. The article really changed over time. I think more than anything I’ve written this article developed in layers. The first draft would be almost unrecognizable now because I added layer after layer as I understood my own materials better and better. This little article took a long time to write, probably over two years. I eventually ended up with a conclusion that was much more about the role of memory and the sense of time and history that caused people to interpret their experiences in a way that didn’t conform to the realities of how injury cases were actually handled in their society.

There was great concern in Sander County over a problem that, objectively speaking, wasn't even there. Ultimately I realized that the challenge of the article was to explain this anxiety about law in the context of social and cultural change.

All of this became much more apparent to me as I was going over the data. Fieldwork and analysis were quite different stages in the process. We design our fieldwork to be as complete and coherent and intellectually well founded as possible. Yet it always leads to something that's different from what you expected. As a colleague likes to say, if we end up intellectually exactly where we started, there's probably something wrong with our research.

Question: What are your feelings about how the article has been received and used in subsequent literature?

Engel: I am gratified that it has received some attention among Law and Society scholars and has been useful to some legal scholars who do not do sociolegal research themselves. Some of them have explored the distinction I observed between two forms of individualism based on rights and on self-sufficiency. My own feeling is that ethnographic research deserves a place in the legal academy, and it is a shame that so few legal scholars attempt it. On the whole, I think that legal academia is not interested in qualitative empirical research. So that part of it is a bit frustrating: the way legal academics continue to think about research and do research. With respect to my article, though, I've been pleased that it was read and assigned to students even in law school courses.

I think there have been some misconceptions about the article. It is sometimes understood to say that the legal culture of a small town is different from that of a big city, as if Sander County was meant to be a contrast to Cook County. I really didn't intend that at all. There's actually a point in the article where I write that the concerns about social change and about newcomers versus old-timers can take different forms in different social settings. I think in urban settings you might find the same sort of lament for an imagined ideal society. You may find those ideas expressed in different ways outside a small rural community like Sander County, but they may amount to the same thing.

Question: "The Oven Bird's Song" is only one of the published outputs from this research project. After this piece you went on to publish with Carol Greenhouse and Barbara Yngvesson. How did that collaboration come about?
Engel: It was through the Law and Society Association meetings. Some of us began to discover each other. We found ourselves on the same panels. In particular, Carol Greenhouse and Barbara Yngvesson and I realized that our three studies were quite similar though we hadn't intended that to be the case. In fact we didn't even know each other when we conducted our fieldwork. But we ended up writing a book together, comparing courts and communities in three different regions of the country. So it was a fortunate moment for us in the history of the Law and Society field. I was lucky to connect with these two gifted scholars and to form a lasting friendship. I had thought that the end result of my research would be a book which presented the global view of my project. Instead, it became the joint publication with Barbara and Carol. I would never have anticipated that that would happen but it was a really satisfying way for the three of us to explore issues of locality and universalism in our work.

Question: In retrospect, is there anything you might have done differently in this project?

Engel: When I started the project I didn't realize the temporal dimension would be so important. Knowing what I know now, I would have structured the interviews more around that: asking people to narrate their life stories beginning with early childhood memories and going forward. If I had built in more of a temporal perspective within each interview I think that might have told me even more about the changes that the community was undergoing. The disputing paradigm is sort of ahistorical. That's one of its weaknesses. It is temporally shallow because it tends to focus on relatively brief but memorable eruptions as opposed to the evolution of relationships, norms, and practices in the community over generations. So going back now, I would have tried to construct interviews that would have tapped into that in greater depth.

Question: The title of your article, taken from the Robert Frost poem, really sticks in people's minds. Can you tell us how you came to that?

Engel: I had always loved the poem and, as I said earlier, the article went through different layers of understanding. The final layer was the one where I understood that these interviews conveyed a kind of post-lapsarian view of the world. The poem expresses exactly that, talking about "that other fall we name the fall." The oven bird's song came
from the sense of a diminished world. So for me the light bulb went on when I realized that the discourse of opposition to law and of concern about personal injury litigation was itself comparable to the song that the bird was singing: a lament for the past and a question of “what to make of a diminished thing.”