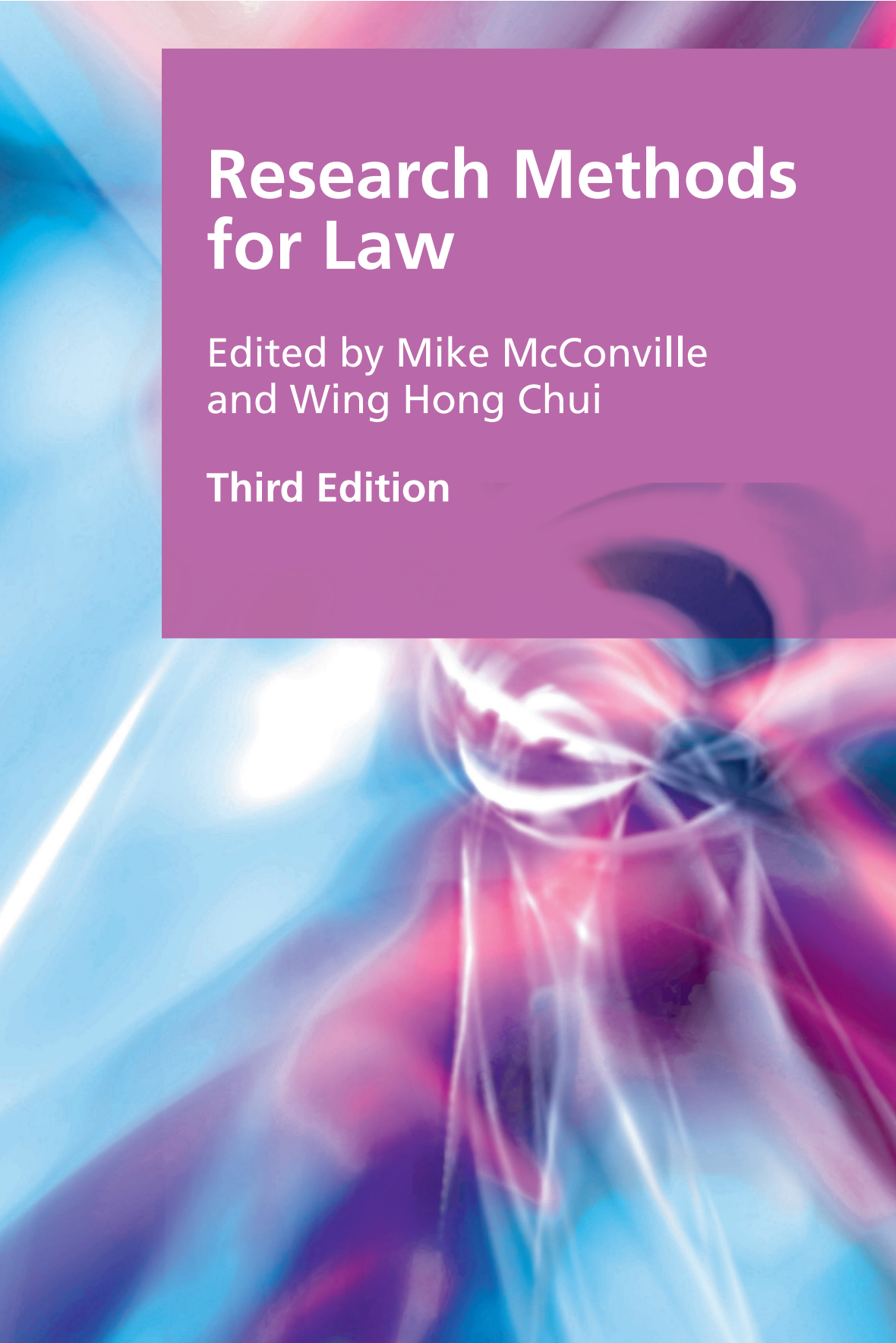

Research Methods for Law

Edited by Mike McConville and Wing Hong Chui

Third Edition

Research Methods for Law

Third Edition

Edited by Mike McConville and Wing Hong Chui

EDINBURGH
University Press

Edinburgh University Press is one of the leading university presses in the UK. We publish academic books and journals in our selected subject areas across the humanities and social sciences, combining cutting-edge scholarship with high editorial and production values to produce academic works of lasting importance. For more information visit our website: edinburghuniversitypress.com

Cover design: riverdesignbooks.com

Edinburgh University Press Ltd
13 Infirmary Street
Edinburgh EH1 1LT

First edition published in 2007

Typeset in 11/13 Ehrhardt by
Deanta Global Publishing Services, Chennai, India,
and printed and bound in Great Britain by
CPI Group (UK) Ltd, Croydon CR0 4YY

A CIP record for this book is available from the British Library

ISBN 978 1 3995 1507 8 (hardback)
ISBN 978 1 3995 1508 5 (paperback)
ISBN 978 1 3995 1509 2 (webready PDF)
ISBN 978 1 3995 1510 8 (epub)

Contents

CHAPTER 10

Researching Law in a Virtual World

Rebecca K. Helm and Emily R. Spearing

INTRODUCTION: GOALS AND CHALLENGES IN A VIRTUAL WORLD

In a progressively more tech-driven world, legal scholarship is increasingly required to grapple with how to regulate and utilise complex virtual innovation. In this context, the pace and extent of change have created challenges for legal researchers as well as policy-makers. For example, many governments have been slow to respond to challenges posed by artificial intelligence (AI) despite increasingly urgent calls for regulation in the area (for further discussion of research relating to AI, see Chapter 12 of this volume).[1] A key consideration for policy-makers and legal researchers is how to promote innovation, which can have significant benefits for society, and protect existing rights such as freedom of expression, while still protecting against potential harms that virtual innovation can cause, many of which are unknown. On the one hand, the importance of promoting innovation encourages a hands-off approach to regulating innovation and a pro-active approach towards its utilisation. On the other hand, potential harms and potentially unknown effects of innovation necessitate both a robust approach to regulation and a cautious approach to utilisation. Designing appropriate law and legal procedure to achieve effective regulation and utilisation that appropriately balance these aims is challenging

[1] See Jon Truby, Rafael D Brown, Imad A Ibrahim and Oriol C Parellada, 'A Sandbox Approach to Regulating High-Risk Artificial Intelligence Applications' (2022) 13 European Journal of Risk Regulation 270.

for a number of reasons, each of which necessitates the use of rigorous and appropriate methodology in legal research. Broadly, at least three key considerations are important when engaging in research relating to virtual innovation.

First, research should be problem-based rather than discipline-based. Innovation in virtual environments and technologies is breaking boundaries and reaching new frontiers at an increasingly fast pace, raising novel questions.[2] The time that it takes to develop and implement new law and policy creates a risk that virtual innovation extends faster than appropriate legislation needed to regulate it, and that harm might result. The potential for harm to result from innovation, combined with the range of complex effects that innovation may have, requires researchers to engage in and draw on work that allows causal inferences to be drawn. Put simply we need to know the impact that new innovation is likely to have in practice, and how the innovation will have that impact, prior to observing its effects in the real world. It is also important for researchers to have good technical knowledge of innovation in order to tailor research appropriately to potential benefits and harms. Both of these considerations require researchers to engage with other disciplines including public health, psychology, social welfare and digital communication. In addition, issues raised are often complex and require a range of regulatory approaches to tackle them. In this context, it is important for researchers to think outside-the-box to develop novel ways, and combinations of ways, in which existing laws might be applied to prevent or ameliorate potential harms of virtual innovation. In order to maximise the ability of the law to respond effectively to virtual innovation and the range of new issues that it can raise, interventions from across traditional legal disciplines – including, for example, criminal law, intellectual property law, tort law and human rights law – should be drawn on. It is also necessary (particularly given jurisdictional challenges noted below) for researchers to consider both individual liability and liability of media platforms and content creators for content or behaviour emanating from their platforms or creations.

Second, research should be evidence-based rather than purely theoretical. Due to the complex and pioneering nature of much emerging innovation, it is difficult to predict the effects that new innovation may have. Importantly, interventions developed to regulate virtual innovation are often still based primarily on common-sense reasoning gained through existing experience. When considering the regulation of virtual innovation, work seeks to balance

[2] Azeem Ahar, *Exponential: How Accelerating Technology Is Leaving Us Behind and What to Do about It* (Random House Business, 2021).

requiring sufficient restrictions to protect society from harm with the risk of stifling innovation through over-regulation. However, questions about how to develop appropriate legislation to strike that balance (which may be seen as a fundamentally empirical question) are still often answered through the utilisation of common-sense reasoning, and legal theory, rather than with data. Unfortunately, common-sense reasoning is often inappropriate when developing regulation to target such novel technology. Human intuition (which underlies common-sense reasoning) develops as a result of experience, for example through learning which things tend to be connected to one another (for example, the circumstances under which crimes typically occur). This learning can be extremely effective when applied to areas in which we have experience, but is limited and precarious when extrapolated to novel environments. Because virtual innovation is novel and can operate in ways outside of our existing experience, what existing experience can tell us about how such innovations will operate and how such innovations will respond to regulation is restricted. A more scientific approach to designing and applying regulation than is typically utilised in traditional legal research is therefore important.

Third, research should span multiple jurisdictions. Virtual innovation can have impacts that cross traditional jurisdictional boundaries. For example, internet content created in one state can easily be viewed and cause harm in another. These harms may not be captured easily by territory-based legislation. Although states may assert jurisdiction over internet activities producing significant effects in their territories, enforcement may be challenging. Partly as a result, there is an increasing amount of international law regulating virtual environments (for example, European Union regulation such as the Digital Services Act, 2022 and Digital Markets Act, 2022). Research relating to the regulation of virtual innovation must therefore often engage with a range of regimes and sources of law and regulation. In addition, given the novelty of virtual innovation, a range of different regulatory regimes have arisen in different jurisdictions, making comparative work to understand effective and ineffective approaches fruitful.

In this chapter, we illustrate how and why research should adopt an approach in line with these three principles through two case studies, one focused on the regulation of virtual innovation specifically in the area of virtual misinformation and the other focused on the utilisation of virtual innovation, specifically in the area of 'virtual courts'. In each case study we give a broad overview of relevant methodologies that can be utilised to meet the three criteria outlined above, and highlight the promise of innovative and evidence-based research in further extending knowledge and improving policy in these areas.