TEACHING NOTE

Teaching Evidence: Inference, Proof and Diversity

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INTRODUCTION

When issues of diversity are raised in a law topic, they often appear — or will be regarded by the students — as not central to the substantive legal or doctrinal aspects of the topic. Thus, a preliminary teaching question which arises is the specialisation/mainstream debate: should such material be presented in a separate segment of the topic (ie: specialisation) in order to give it some overt visibility, or should it be "mainstreamed" by including references to it throughout the topic? Either approach can lead to marginalisation, as we see students putting down their pens or not attending class where such material is going to be covered.

The approach I have attempted to take in teaching evidence[1] is to show how such issues of diversity are not marginal, but central, by:

- considering diversity from the very beginning, as embedded in the fundamental evidentiary questions of relevance and the logic of proof;
- referring to race and gender issues in a range of evidentiary contexts;
- having at least one specialist section which focuses intensively on diversity; and
- including consideration of race and gender in assessment.

REASONING FROM FACTS: WHAT EVIDENCE LAW IS ABOUT

Evidence is the law of facts. It regulates the use and production of information at the common law adversary trial and the reasoning available from such information.[2] Evidence law determines the information which can be received by a court, the form(s) in which that information may/must be presented, and the use(s) to which that information can be put.

The objectives stated in the topic guide reflect this emphasis on facts:

By the completion of the course, students should be able to:

- identify information which is and is not relevant to a material fact in issue;
- describe the specific use for which information is tendered;
- articulate the chain of reasoning which makes information relevant (or not);
- select and apply appropriate exclusionary rules;
- choose, analyse and apply the correct cases and statutes to a particular evidentiary issue; and
- recognise the impact of personal characteristics and social attitudes on evidentiary issues.

These objectives reflect what Andrew Palmer calls a "fact-sensitive" rather than a "rule-sensitive" approach. As he quite sensibly points out, evidence rules about what cannot be done with facts and inferences make no sense to students unless they first know how to use facts and to draw inferences from them.[3]

This approach to evidence law requires teacher and student alike to investigate how we think and why we think a certain way, and to expose unacknowledged assumptions, beliefs and ideas. Analysing the intuitiveness of reasoning about facts orients us towards understanding people, ourselves and others, and it is an infinitely generalisable ability. Understanding this reasoning about facts for the purpose of evidence law creates insights which will assist students every day in their future personal and professional lives.

Although this is not an advocacy-centred approach, it still allows consideration of the adversary trial as the primary context in which evidence rules operate, thus creating opportunities for varied teaching and learning activities. Trials are the public drama of the

law which we see in film, television and books, and so they have some inherent appeal to students.

Another consequence of this approach is to allow room for the social, philosophical and theoretical inquiries which are such an important part of modern evidence scholarship.[4] One aspect of power in society is the ability to determine what amounts to knowledge.[5] The law of evidence is a manifestation of that epistemological power in the legal system.[6] By formally determining who can speak within a legal setting and what they can say, the law of evidence reflects and constructs the social and cultural context in which it functions. The law of evidence, like law generally, has a constitutive function — it tells us who we are, and by telling us, helps to make us so.[7]

ASSUMPTIONS OF THE LAW OF EVIDENCE

"Natural" Rules of Fact Discovery

Ligertwood states:

> [T]he fundamental principle behind the law of evidence is the effective employment of *natural rules of fact discovery* to determine the occurrence of those facts upon which claims depend. The common law assumes that this effective employment can be best achieved through the … adversary trial …[8]

The course begins by asking what it means to call this reasoning process "natural"? Certainly, drawing inferences from observations or information is a kind of reasoning or thinking we all do all the time, and this very "naturalness" can make it hard to identify. However, in another sense, this process is not "natural" at all, as it often depends on personal and cultural assumptions and beliefs which are not the same for everyone — what is a natural inference for you may not be so natural for me. My approach is to focus on and challenge these so-called natural processes, to make visible what we assume, to articulate what we accept as natural, inherent or given.

In its deployment of these so-called "natural" process of fact discovery, the law of evidence makes a number of explicit and implicit assumptions about human behaviour and reasoning processes.

Rationality [9]

Evidence law assumes that fact finding is and should be entirely "rational" in the sense that it is governed by principles of logic.[10] "True" facts are ascertained by drawing logical/rational inferences, based on consideration of all relevant information, and excluding that which might distract from rational assessment, perhaps because it is unreliable or encourages an emotional reaction, such as lurid photographs of a crime victim. The assumption is that evidence can be evaluated solely as an objective, logical exercise.

Correspondence Theory of Truth[11]

An implication of this rationalist approach is the correspondence theory of truth: events occur and exist independent of human observations, and true statements correspond with these facts. Such objectively true facts are revealed through direct sensory observation. If the event is not experienced directly, it is revealed by logical inference from another's direct experiences as described in testimony. This assumption is reflected in evidence law by the importance placed on direct observation by a witness and the exclusion of opinion or hearsay evidence.

Universal Cognitive Competence[12]

A further assumption of the law of evidence is what Marilyn McCrimmon has called "universal cognitive competence": the assumption that normal, ordinary and unbiased people are able to assess information presented and come to much the same conclusion.[13] The underlying assumption is that common experience gives rise to universally accepted generalisations about human behaviour that are available to all triers of fact. These generalisations then become the basis of inferences and conclusions of fact.

CHALLENGES TO THE ASSUMPTIONS OF EVIDENCE LAW

Modern commentators have shown that these assumptions about objectivity, rationality and universal cognitive competence are profoundly flawed.[14]

Diverse Perspectives

First, there is the recognition that "[e]ach of us carries along our own set of beliefs, values, standards, sense of acceptable behaviours and customs".[15] These perspectives arise from a number of sources, for example: family, ethnic background, class, education, gender socialisation, physical and mental abilities, age, sexuality and other factors. This perspective may be shared with few or many other people, but it is not universal. There are diverse "natural" perspectives which are derived from our varied experiences and different locations within social structures.

However, "much of our cultural perspective is not obvious to us".[16] In part, this is because those we regularly spend time with, at work and socially, tend to share our values. Thus, we may assume our own perspective is universal and mistakenly treat specifics derived from our own perspective as widely shared or universal. One example of this is journals from the northern hemisphere which label their issues as "Spring" or "Winter" as though the seasons necessarily indicated the same months of the year throughout the world.

We may become aware that others have a set of cultural practices, when those practices or beliefs differ from our own. However, we may continue to regard our own perspective as normal or neutral or better, and that other perspective as different or even wrong. The editors of the journal mentioned previously may be aware that seasons differ in the southern hemisphere, but may assume that the northern hemisphere is the "normal" pattern and that those elsewhere in the world will be aware of and translate the season into the "correct" northern hemisphere months. Similarly, speakers of English, in its various forms, sometimes regard their own speech as without accent, whereas someone who speaks another form of English has an accent. As a small child in the south of the United States of America, I was well aware of those who spoke with "Yankee" accents, but had no strong sense of my own "Southern" accent, until I became older. Even when I moved to Australia, I was certainly aware of all the Australian accents around me, but did not immediately realise just how "American" I sounded.

Perspectivity and Evidence

Because we inevitably "see a world … through a lens shaped by our … experiences",[17] we tend to fit new information into personal or culturally derived "schemas" or narrative structures, rather than to interpret information in a way which challenges these structures.[18] These "schemas" organise and interpret information for us and fill gaps in information.[19] Recognising the importance of pre-existing narrative structures challenges the rationalist assumption of objective knowledge and "normal" inferences based on a "universally" available stock of knowledge about the common course of events.

The impact of diverse perspectives has been considered in the context of investigations, which depend on initial assessments of credibility and plausibility.

> The more consistent a particular allegation is with our experience, the more plausibility we are likely to accord it. … [W]e have little or no difficulty empathising with the person telling us the story. Our own experiences, values and attitudes "fit" with those of the person making the allegation. …[W]here there is considerable cultural or experiential disparity, the absence of such a stock of shared experiences is likely to negatively influence a story's plausibility. The cultural resources for circumstantial corroboration of the allegation are just not present. Empathy and understanding under these conditions are much more difficult.[20]

Thus, when we evaluate another's words or actions against our own "universal" or "normal" standard, that person's statement or behaviour may be labelled as not credible or wrong, simply because it differs from our own perspective.

The influence of this unexpressed or unacknowledged perspective is not neutral or random, but will inevitably be influenced by beliefs about race, gender and age and, worse still, by negative racial or gender stereotypes. United States research suggests that a person who is bumped by another person in a crowd is more likely to interpret the bump as clumsy or accidental if the person doing the bumping is white.[21] If the person doing the bumping is black, it is much more likely to be interpreted as hostile. Age and gender are factors as well, with young black men being perceived as most hostile in such an interaction.

Thus, our assumptions and inferences about what words and conduct mean, when measured intuitively against our own personal perspective or that of the cultures in which we participate, can be

seriously inaccurate. Worse, they can be biased against those whose personal or cultural characteristics differ from our own, or to whom negative stereotypes can be attributed. When such allegedly "universal" or "natural" judgements are made by those who exert power in the legal system, as police or lawyers or judges or jurors, systematic injustice to those who are "different" can result. Since we cannot be sure that "common sense" assumptions are universal, reliable or fair, we need to scrutinise evidence principles, and their applications that are supposedly based on such "common sense", as they may in fact reflect stereotypical assumptions and discriminatory generalisations about certain kinds of people.[22]

In spite of the diversity of "natural" perspectives, so-called "common" understandings are regularly used in law.[23] "Common sense" and untested or unstated generalisations inform decisions on whether particular pieces of evidence are relevant;[24] when determining whether to accept certain facts as proven; or in choosing what inferences to draw from proven facts. Such "common sense" is also crucial in credibility judgements of our own clients or potential witnesses, as well as in formal hearings. The law may assume that rape victims will complain promptly, or that children are less reliable witnesses. Judges may make these assumptions explicit. In a highly publicised rape case in Victoria, a judge remarked "… in the common experience … 'no' often subsequently means 'yes'".[25] More recently, a three-judge panel in Italy is reported as having similarly emphasised common or universal experience regarding the impossibility of jeans being removed from a woman without the consent of the wearer.[26]

Yet, as we all know, much experience is not "common". Behaviour, reactions and perspectives are all governed, to some extent, by sexual difference[27] — as well as differences based on age, race, ethnicity, class, sexuality and other qualities. Hence —

> not all triers of fact will accept the same generalisation. For example, from evidence that a witness has made a prior inconsistent statement, one trier of fact may infer that the witness is uncertain and thus not credible, while another may infer that the witness is thoughtful and flexible, and therefore more credible.[28]

"Common sense" knowledge, as used in law, does not acknowledge these specificities, but substitutes the knowledge, experience and perspective of the group which has dominated legal and public life, that is, older, white, educated, heterosexual males.

The experiences and perceptions of this group are defined as normal and common and universal. Other experiences or perceptions are regarded as unreasonable or aberrational. In contrast, "[w]hat 'everyone knows' when they live life as a person of colour, a woman or a person in poverty, turns out to be surprisingly hard to prove under conventional rules of evidence".[29]

In the United States there have been instances where a black judge or a woman judge was asked to disqualify themselves from hearing employment discrimination cases on the basis that they would not be neutral.[30] This request assumes that the white males who are usually judges have no experiences or point of view at all, or that their experiences and point of view, however uniquely determined by their own experiences as a white male person, represent neutrality and do not constitute a distinct perspective at all. These "ordinary" judges see through a "clear pane of glass", when others are "tinted". The assumption underlying these cases is that only blacks have a race (which gives them a point of view); only women have a gender; only the poor or uneducated have features determined by class; and only "ethnics" have a language and a culture or an accent.[31] The reality is that every one of us is part of a race, a gender, an age group, a class, and a culture, which profoundly affect our own values and perspectives and the ways that others respond to us.

The very automatic and inarticulate nature of these thinking and emotional processes makes it difficult for us to see and examine them, but it is essential to an understanding of evidence law that we do so.

DEVELOPING AWARENESS OF ONE'S OWN CULTURAL/SOCIAL ASSUMPTIONS

Thus, part of the project for my evidence class is one of self-analysis: getting the students to look inside themselves and to see that they are equipped with a whole set of personal and cultural beliefs they may not be aware of, but which profoundly influence the way they think about the world around them and the people in it, and to see that others have beliefs which may be very different, but seem just as completely "natural" and self evident to them.

Two exercises are used in lectures to illustrate the use of culturally specific knowledge to draw inferences and to raise

awareness of assumptions.

Exercise 1: the Birthday Party[32]

Billy went to Johnny's birthday party. When all the other guests were there, Johnny opened his presents. Later they sang "Happy Birthday" and Johnny blew out the candles. Was there a cake at the party?

Is the only valid answer "don't know?", or is "yes" a reasonable inference, based on Australian cultural practices about children's birthday parties? What are the various basic facts and intermediate generalisations used to draw a "yes" conclusion? Examples might include the names: these are names usually used for younger, rather than older people, and they are widely used among people from a background where children's birthdays are celebrated a certain way.

Exercise 2: the Surgeon[33]

The second example is used to raise some awareness of how these assumptions may depend on stereotypes of gender, race or age.

A father and his son were out for a day's drive. As they returned home, their car was hit by on oncoming car. The father is killed outright and his son is seriously injured. The boy is rushed to the hospital for emergency treatment. The hospital's top orthopaedic surgeon is prepared and waiting, in the operating theatre. As the boy is wheeled in, the surgeon turns, sees the boy's face says "oh no, it's my son". Who is the surgeon? [Assume there are no step or adoptive relationships in the story.]

EXAMPLES USED IN OTHER PARTS OF THE TOPIC

Having used the earlier classes to introduce students to the "natural" process of evidence reasoning as an everyday process, and also to raise their awareness of the diversity of such "natural" processes, I then attempt to reinforce these insights with other examples throughout the semester.

One such approach is to play excerpts from popular songs. "Lipstick on Your Collar" is an excellent example of drawing

inferences from circumstantial evidence, with the middle steps in reasoning supplied by general cultural knowledge/beliefs, especially about gender and heterosexual dating/mating conduct. "I Heard It on the Grapevine" illustrates many concerns about hearsay evidence, as the singer points out "you could have to-o-old me yourself" as the preferred alternative for presenting the information.

Another approach is to choose examples which raise issues of difference as part of teaching a particular doctrine of evidence. For example, the material from Graycar and Morgan, *Work and Violence: Including Gender in the Core Law Curriculum*[34] is helpful on a number of topics, such as judicial notice, and is readily available on the internet. Similarly, the Queensland Criminal Justice Commission Report, *Aboriginal Witnesses in Queensland's Criminal Courts*[35] provides extremely valuable information about the experiences of Aboriginal people, with some attention paid to Aboriginal women.

Appellate decisions taught in the evidence course are partly determined by the need to ensure that the leading cases are included, but where cases are used essentially for their illustrative purposes, it is possible to choose cases that can also generate discussion and insight on issues of diversity. For example, *R v Plevac*[36] illustrates the res gestae principle vividly and in a particularly horrific context, which allows and, indeed, requires addressing issues about women, men and violence. A similar choice is possible when developing the facts in tutorial, workshop or assessment problems.

Oral Evidence, Demeanour and Credibility

The requirement that evidence at trial be given orally by a witness who is physically present rests, in part, on the belief that observation of demeanour is essential to assessing the credibility of the witness.[37] This belief is well entrenched in Western culture. Examples include the recent consideration by the United States Senate of whether to call live witnesses in the impeachment trial of President Clinton, and the popularity of the Eagles song "Lying Eyes" (which was played to the class). This leads to a detailed consideration of demeanour, speech and credibility judgements in light of diverse perspectives, as a way of challenging evidence law's assumptions about truth, credibility and oral testimony.

Readings and lectures include social science research in interpretations of demeanour and speech patterns as well as an in-class demonstration of a particular example of gender and speech. This information is linked back to the ideas about diversity of perspectives from the beginning of the course. Considerable research has established that signals sent by demeanour or non-verbal behaviour are not interpreted in the same way by different cultural groups. Further,

> [t]here is no body motion or gesture that can be regarded as a universal symbol. [Researchers] have been unable to discover any single facial expression, stance, or body position which conveys an identical meaning in all societies.[38]

For example, silence can be quite ambiguous or carry many different meanings in different social and cultural contexts. Among many Aboriginal people, " … silence is a common and positively valued part of conversation" which can show thought, discomfort, lack of understanding, lack of cultural authority to speak on the topic (because of age, gender, kinship factors) or disagreement. However, in court silence can be "misinterpreted as agreement, … insolence, or guilt".[39]

Similarly, many of the behaviours most commonly thought to indicate deception, such as avoidance of gaze, postural shifts or head movements, actually occur less often in those consciously attempting to deceive, while qualities such as tone of voice, which are harder for most of us to control, can be more helpful in identifying deception.[40] Research suggests that "few people do better than chance in judging whether someone is lying or truthful … and most people think they are making accurate judgments even though they are not".[41]

The assumptions about the naturalness of one's own perspective described above contribute to erroneous judgements of credibility. Research indicates that if an observer assumes the speaker is telling the truth, the observer will focus on the face and other less reliable visual cues, which may simply reinforce the pre-existing assumption of truthfulness.[42] If the initial assumption of truthfulness and the expectations about appropriate behaviour are based on assumed similarities to the observer's personal and cultural perspectives, or if an initial concern about reliability is based on a negative stereotype, interpretations of demeanour can lead to mistaken evaluations of credibility. When the experiences

and socialisation of a decision maker are different from those being evaluated, and if those making decisions are not sufficiently aware of their own cultural beliefs and expectations, serious injustice can occur. Because the law has the power to label its perceptions as truth, all of us who are involved in the legal system have an obligation to ensure that our judgements about credibility are as accurate and as fair as possible.

Speech Patterns and Credibility

Misperceptions of demeanour and erroneous judgments of credibility are not mere misunderstandings, nor are they simply random errors which any system will inevitably have. These differences reflect and reinforce systematic social disadvantage and distinctions imposed by our society upon men and women. A particular example which I explore in some detail is the nature and effect of different speech patterns,[43] to illustrate how difficult it can be to perceive the distinctions in our world and to show the harm which can be caused by not being aware of these distinctions. The discussion emphasises gender. Much, though not all, of what is said about women and the sources of their disadvantage may be applicable to other individuals or members of outsider or subordinated groups who suffer from social disadvantage, such as poor people, migrants, young people or those subject to racial discrimination. Note that these categories are not necessarily mutually exclusive. Women are more likely to be poor and Aboriginal women suffer distinct disadvantages. Also, any discussion of gender or disadvantage in generalities needs to be undertaken with care. Not every woman all the time is disadvantaged as against all men in all situations. Nonetheless, there are characteristically gendered patterns of disadvantage in our society, and speech patterns provide one example of how difference can become disadvantage.

Assessing the credibility of a particular speaker is affected by social expectations about how a credible speaker is supposed to sound. Research has identified some of the qualities which are associated with more powerful or more credible speech.[44] Examples of language features associated with powerlessness include: superlatives (“the greatest”), intensifiers (“so”, “such”), fillers (“um”, “you know”), qualifiers (“maybe”, “perhaps”), empty

adjectives, tag questions with rising intonation (even with an accurate assertion, for example, "Tasmania is part of Australia, isn't it?"), hedges ("sort of"), and politeness markers.[45]

Other research suggests that women and men are expected to and do display some differences in speech. It appears that the speech qualities associated with power and credibility are more likely to be displayed by a male speaker, whereas the qualities more likely to be used by, and socially appropriate for, women are those associated with powerless and lessened credibility. This is not to assert that all women speak a certain way, and that all men speak a certain other way. What differences exist may be slight; there are large areas where speech patterns are common, and class, age, education and context, including the particular power relationship between the speakers are all significant factors. Indeed, in many contexts, these other factors will be more important than gender.[46] Nonetheless, certain qualities or behaviours are more often or more likely to be displayed by men or women, in part because of different social expectations about appropriate masculine and feminine behaviour or different social experiences of men and women. These differences, when they occur, can have negative consequences for the evaluation of women's credibility and are part of a pattern of disadvantage.

When I give lectures or speak at conferences or in professional legal or academic settings, I use speech styles associated with powerful (for example, masculine) speakers. If I were to speak in a characteristic (socially appropriate) female style ("um, y'know, like this"), and in a softer, higher pitched voice with a rising, questioning intonation at the end of statements or, worse, in the accent of my native American South, listeners would take what I say much less seriously. A brief demonstration of the different styles usually makes the point.

The link between speech and cultural power is clear:

> We would suggest that the tendency for more women to speak powerless language and for men to speak less of it is due, at least in part, to the greater tendency of women to occupy relatively powerless social positions … [F]or men, a greater tendency to use the more powerful variant … may be linked to the fact that men much more often tend to occupy relatively powerful positions in society.[47]

The cumulative effect of these patterns makes it much harder for a woman (or any person lacking social power) to be perceived

as an effective speaker and will cause her to be regarded as less credible, even when she is accurate and honest. Denial of credibility in this way is not aberrant or unusual behaviour; it is but one instance of an overall social context in which some are powerful and others are subordinate, a hierarchy that is accepted as natural. It is also self-perpetuating: "[p]owerless language may be a reflection of a powerless social situation, but it also would seem to reinforce such inferior status".[48] However "natural" these assessments of credibility may seem, it is still a form of bias which effectively denies equality in society generally, and specifically in law. This denial of equality is reinforced by the rules of evidence law which insist on oral evidence from a witness physically present in the courtroom.

CLASSES SPECIFICALLY ON GENDER/RACE/EVIDENCE

I have been discussing ways in which I attempt to embed issues of difference into the basic concepts of the evidence course and the fundamental nature of reasoning about facts. There is also a lecture and a workshop specifically on gender and race, which also consider some aspects of sexuality and class.

For many of us, issues of race/sex are difficult to think about, to speak about and to teach about. It requires exposure of aspects of life regarded as private and exploration of attitudes and experiences that may be painful. Nonetheless, it must be directly taught, because beliefs/views/experiences about race/gender constantly impact on the law generally and evidence law specifically, both within the practical operation of the adversary trial and at the levels of doctrine and theory. This impact does not occur only in the law relating to sexual assault, though that is perhaps the most visible area, and is the focus of the lecture and the workshop.

The classes are explicitly linked back to the earlier exploration of the ways social and cultural perspectives impact on reasoning about facts, as in the birthday party story and the surgeon story. They are also linked to readings from Graycar and Morgan,[49] McRae,[50] the Queensland Criminal Justice Commission[51] and Pia van de Zandt.[52] The readings describe the reality of court room experience for some Aboriginal people and for witnesses testifying about sexual assault, with particular recognition of the specific barriers facing Aboriginal women. The lecture clearly

acknowledges that others suffer from the indignities of the legal system, and that there are many sources of social disadvantage. The choice to concentrate on gender/race and its intersection is explained on the basis of my own experiences and perspective and the relative availability of a range of materials to be used for teaching. The particular doctrinal areas addressed are "prompt" complaint, cross-examination — especially about prior sexual history — and corroboration issues. The basis for these lectures is largely drawn from a work edited by Easteal,[53] which reviews recent changes to rape law and associated evidence rules. A few of the main points are set out below.

Prompt Complaint

The exceptional nature of some of the evidentiary rules in sexual assault cases are pointed out. In general, prior consistent statements are not admissible in the examination-in-chief of a witness.[54] One exception to this is a "prompt" complaint from a victim of sex assault (adult or child), where the complaint is used to support the credibility of the complainant.[55]

What is the logical relevance of a prompt complaint to support credibility? Drawing an inference of enhanced credibility depends on the assumption that a person who has been sexually assaulted will behave in a certain way — complain immediately. Therefore, a person who acts in that way is more credible, and conversely, a person who does not act that way is less credible.[56]

As an assumption of fact regarding typical victim behaviour, this is clearly wrong.[57] There are many barriers which prevent victims of sexual assault, whether man, woman or child, from speaking to anyone. In the lecture, I ask the class to reflect on and discuss what some obstacles might be, and what additional barriers might be faced by Aboriginal women, or members of other marginalised social groups.

Cross-examination

Wigmore's characterisation of cross-examination as "the greatest legal engine ever invented for the discovery of truth"[58] continues to haunt the adversary system and assumes particularly damaging importance in sexual assault cases. In general, the cross-examiner may ask any question relevant to an issue, such as the

victim's consent, the accused's belief in the consent, the sexual contact alleged, or any questions relevant to the witness's credit. The importance of cross examination is a key factor in the law's emphasis on oral testimony from a witness who is physically present in the court.

Heroines of Fortitude describes in some detail the nature and extent of cross examination facing women who testify about sexual assault.[59] The complainant must repeatedly describe the smallest details of sex acts, endure repeated suggestions that she is lying, even if corroboration and/or injuries are present, as well as defend her allegedly sexually provocative behaviour and clothing, such as wearing a swimsuit. Research suggests that jurors are clearly influenced by information about drinking, drug use, sex outside marriage and prior social acquaintance between the defendant and victim, and will deem the victim at least partly to blame, whether the defence is claiming there was consent or that there was no sexual intercourse.[60]

Often, such questions attempt to reinforce certain stereotypes of women: as liars;[61] that she asked for it; that she has an ulterior motive, a grievance, or has been scorned by her alleged attacker; (if the accused is wealthy) that she is a golddigger; and that she is an exaggerator, a fantasiser or is simply delusional.[62] "[B]ecause women lie" she becomes the wrongdoer, and "it is really men who need protection".[63]

The experience of such cross examination is very distressing to the witness. In 65 per cent of trials studied in *Heroines*, breaks were needed to assist witnesses in distress. The experience is especially difficult for Aboriginal women, because of language differences, such as unfamiliarity with the English terms for sexual acts or parts of the body, and a cultural reluctance to discuss some sexual matters in the presence of men.[64]

One especially distressing feature is questioning about sexual experience and prior sexual acts. At common law, sexual reputation and sexual experience were regarded as relevant to credibility and to the issue of consent.[65] The alleged "logic" was that, in a woman, a bad character for chastity equalled a bad character for truth and might also show a propensity to engage in sex. Now, most jurisdictions have enacted a so called "rape shield" law, to limit cross-examination about prior sexual conduct which could be the basis for these clearly unfounded inferences. However, the impact

of rape shield laws has been less than reformers hoped, and it appears that judges are readier than one might think to find relevance in questions about prior sexual conduct.[66] Research suggests that evidence of prior sexual acts was raised without applying for leave in 30-40 per cent of trials.[67]

In this area, evidence law assumes and constructs a particular pattern of heterosexual sexual relations in which voluntary sex is presumed to be repeated, making it difficult for sex to be credibly refused — a particularly damaging construction, as most rapes occur between acquaintances.[68]

Corroboration

There is an inherent obligation on a trial judge in a criminal case in Australia to warn the jury in relation to certain kinds of evidence thought by law to be inherently unreliable and/or especially likely to appear more reliable to a jury than it really is. At common law, there was no fixed legal requirement of corroboration of the testimony of a complainant in a sexual assault case, though judges were expected to warn that it would be unsafe to convict without corroboration.[69] The usual form of warning given in Australian courts was derived from the English case of *R v Henry*[70] in which Salmon LJ said:

> … in cases of alleged sexual offences, it is really dangerous to convict on the evidence of the woman or girl alone … because human experience has shown that in these courts girls and women do sometimes tell an entirely false story which is very easy to fabricate but extremely difficult to refute. Such stories are fabricated for all sorts of reasons, which I need not now enumerate, and sometimes for no reason at all.[71]

This requirement for corroboration has been formally abolished in most jurisdictions,[72] based on a clear recognition that such generalisations have no basis in fact.[73] Thus, Australian law no longer officially supports the worst myths about women as subtle malicious liars in sexual matters.[74] However, judicial interpretation of the legislation abolishing corroboration warnings emphasises the inherent power of courts to give guidance in relation to such evidence.[75] This has meant that continued warnings are the norm, not the exception, in trials. The current practice appears to be for judges to direct juries that they should be careful of a complainant's testimony and evaluate it in the light of human experience, or that they should scrutinise it with care, though they may act on it even

without corroboration if they are satisfied.[76] If there is no corroboration, judges continue to warn juries that it would be dangerous to convict on the woman's testimony alone.

Thus, judges still cast unwarranted doubt on women testifying about sexual assault in ways that construct and maintain a particularly negative image of women as lacking the capacity for speaking truthfully about sex and being particularly adept at concealing their falsehoods.[77]

Casablanca

To lighten up what can become a very intense and negative message, at the end of the lecture I show a short excerpt from the film *Casablanca*. In the clip, we see Rick (Humphrey Bogart) and Ilsa (Ingrid Bergman) together in Rick's apartment in Casablanca during World War II. She begs him for documents needed to allow her husband to leave safely, then draws a gun and threatens to kill him when he refuses. He steps closer to her and urges her to go ahead and shoot, whereupon she begins crying and recalls how much she loved him in Paris, when they became separated by the war. They embrace and the film cuts away to show a lighthouse with a blinking light, then returns to the apartment where Rick, still in white dinner jacket and tie, is smoking a cigarette and looking out the window, and Ilsa is sitting on the couch explaining how she came to leave Paris.

The students are asked whether Rick and Ilsa have had sexual intercourse.[78] The ensuing discussion raises a number of the cultural assumptions about heterosexual intercourse (as well as film-making conventions) and views can be sharply divided, though not necessarily along gender lines.

The Workshop

The problem set for the workshop is technically and emotionally challenging. It is set in a university and involves a sexual assault allegedly perpetrated on a first year female student by a group of final year male students. The students are asked to respond in the role of defence counsel. I consulted widely when preparing the problem, to avoid reinforcing stereotypes or creating particular and inappropriate discomfort for students. In 1998, the problem involved an Aboriginal student as complainant and a

wealthy white student as the accused. In 1999, no racial or class characteristics were given, and one of the discussion questions asked students what characteristics they had attributed to the participants. In the lecture, I explain the reasons for setting the problem, including the importance of learning to discuss difficult issues in a professional setting and the need to practice doing so in a relatively protected space before being confronted with such a challenge in a more demanding setting. I also make clear that, although workshop contributions are usually assessed, any student who did not wish to be assessed for this workshop should simply indicate as such to myself or the tutor, and they could choose to attend or not. I found that students did attend and the discussion was generally quite thoughtful and respectful, and conducted in a generally distant, professional voice, rather than a more personal one, as other classes sometimes were.

ASSESSMENT

The fourth step in the treatment of issues of race and gender in the evidence class is to ensure that these ideas are assessed, as that, realistically, will drive student learning.[79] The assessment in 1998 consisted of class participation and an end of year examination, which included a problem worth two-thirds of the examination mark and an essay worth one-third. In 1999, a written assignment, which required problem analysis and consideration of assumptions about human behaviour, was added.

The assessment problems are drafted with care, to avoid raising personal emotional difficulties for students. Issues which might be distressing, such as those relating to sexual assault, are raised only in the essay question, where students have a choice. Issues of gender, race, diversity and cultural assumptions will arise in the problem, usually as part of initial determinations of relevance, as well as in an essay. Students who are able to discern and test unreliable generalisations as part of their reasoning about facts will see more issues and will receive a better mark. This is made clear to them in classes when discussing what is expected in the examination.

Student evaluations of the course were generally favourable. There was very strong agreement that the subject was challenging [6.5 on a 7 point scale], and there was also strong agreement that

the subject was difficult [5.4], with a fairly heavy workload [5.2] and was presented at a fast pace [5.7]. At the same time, there was substantial agreement that the assessment was fair [5.7], that they understood the subject matter [5.8], and that they had a positive attitude to the subject [5.8]. There was a strong view that the aims of the topic were implemented [6.0], which suggests that the basic focus on facts and reasoning from facts was accepted. Taking these findings together suggests that the students were willing to accept and even be enthusiastic about a subject which is both doctrinally difficult and which deals in a serious way with issues of diversity.

CONCLUSION

Because issues of race, gender and diversity are considered to be central to the fundamental evidentiary concepts of relevance and proof, they are raised from the very beginning of the evidence course and are re-emphasised in different ways throughout the semester. In this way, the issues are not marginalised and do not take time away from aspects of doctrine which we must cover. Inevitably, fewer exclusionary rules, or fewer exceptions to them, are covered, but it appears that the approach used enables students to recognise, understand and apply those variations when they come across them.

We live in a world where personal characteristics and social attitudes have an impact on everything we do. By formulating objectives largely in terms of student ability to work with facts by identifying relevance, use and the chain of reasoning employed, I hope to enable students to reason better about information, and the conclusions which can be drawn from it, in any context.

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 (2000) 11 *Legal Educ Rev* 57.

1 In 1998, Evidence was taught as one semester of the full year 9 unit topic Litigation. In 1999, Evidence became a separate 3 unit one semester topic. It is taken by final and penultimate year students.

2 A Palmer, *Principles of Evidence* (Sydney: Cavendish Australia, 1998) 1.

3 A Palmer, comments at the Second National Evidence Teachers Conference, 19–20 February 1999, Sydney.

4 J Jackson, Analysing the New Evidence Scholarship: Towards a New Conception of the Law of Evidence (1996) 16 *Oxford Journal of Legal Studies*

309.

[5] M Davies, *Asking the Law Question* (Sydney: Law Book Company, 1994) 175–176.

[6] *Id* at 226.

[7] A Taslitz, What Feminism Has to Offer Evidence Law (1999) 28 *Southwestern University Law Review* 171.

[8] A Ligertwood, *Australian Evidence* 3rd ed (Sydney: Butterworths, 1998) 42 (emphasis added).

[9] M Aronson and J Hunter, *Litigation: Evidence and Procedure* (Sydney: Butterworths, 1998) 670; Ligertwood, *supra* note 8, at 50; Jackson, *supra* note 4, at 314–315.

[10] For example, s 55 of the *Evidence Act* 1995 (Cth) states that "The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding."

[11] Jackson, *supra* note 4, at 314; Ligertwood, *supra* note 8, at 6.

[12] M McCrimmon, The Social Construction of Reality and the Rules of Evidence (1991) 25 *University of British Columbia Law Review* 36, at 37. See also J Cohen, Freedom of Proof, in W Twining and A Stein eds *Evidence and Proof* (Aldershot: Dartmouth, 1992).

[13] See examples in discussion of "Perspectivity and Evidence", below.

[14] Jackson, *supra* note 4.

[15] B Fraser, New Diversity in the American Workplace: A Challenge to Arbitration (1992) 47(1) *Arbitration Journal* 9. See also: R Delgado and J Stefancic, Norms and Narratives: Can Judges Avoid Serious Moral Error? (1991) 68 *Texas Law Review* 1929; and the comment "We are all situated actors, whose selves, imaginations, and range of possibilities are constructed by our social setting and experience", as cited in L Sarmas, Storytelling and the Law: A Case Study of *Louth v Diprose* (1994) 19 *Melbourne University Law Review* 701, at 725.

[16] Fraser, *supra* note 15, at 10.

[17] Jackson, *supra* note 4, at 319.

[18] *Id*, citing A Tversky and D Kahneman, Causal Schemas in Judgements under Uncertainty, in D Kahneman, P Slovic and A Tversky eds, *Judgements under Uncertainty: Heuristics and Biases* (Cambridge: CUP, 1982) 117.

[19] Jackson, *supra* note 4, at 319.

[20] A Goldsmith, What's Wrong with Complaint Investigations? Dealing with Difference Differently in Complaints against Police (1996) 15 *Criminal Justice Ethics* 36, at 45–46, citing D Binder and P Bergman, *Fact Investigation: From Hypothesis to Proof* (St Paul: West, 1984).

[21] J Armour, Colour-Consciousness in the Courtroom (1999) 28 *Southwestern University Law Review* 281.

[22] Jackson, *supra* note 4, at 325.

[23] McCrimmon, *supra* note 12; R Graycar, The Gender of Judgments: An Introduction, in M Thornton ed, *Public and Private: Feminist Legal Debates* (Melbourne: OUP, 1995).

[24] A Althouse, The Lying Woman, The Devious Prostitute, and Other Stories From the Evidence Casebook (1994) 88 *Northwestern University Law Review* 914, at 924; K Kinports, Evidence Engendered (1991) *University of Illinois Law Review* 413, at 431. See also Sarmas, *supra* note 15, at 726, discussion at n 157.

[25] Senate Standing Committee on Legal and Constitutional Affairs, *Gender Bias and the Judiciary* (Canberra: AGPS, 1994) 8–9.

[26] Jeans on Trial in Rape Case, *The Weekend Australian*, 13–14 February 1999, at 17.

[27] McCrimmon, *supra* note 12, at 39.

[28] D Binder and P Bergman, *Fact Investigation: From Hypothesis to Proof* (1984) 135, as quoted in Goldsmith, *supra* note 20, at 45.

[29] K Scheppele, Manners of Imagining the Real (1994) 19 *Law and Social Inquiry* 995, at 997.

[30] M Minow, Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors (1992) 33 *William and Mary Law Review* 1201, at 1207.

[31] *Id*.

[32] N Pennington and R Hastie, A Cognitive Theory of Juror Decision Making: The Story Model (1991–92) 13(2) *Cardozo Law Review* 519, at 523.

[33] C Maughan and J Webb, *Lawyering Skills and the Legal Process* (London: Butterworths, 1995).

[34] (DEET, 1996); http://www.anu.edu.au/law/pub/teaching_materials/genderissues/

[35] Queensland Criminal Justice Commission, *Aboriginal Witnesses in Queensland's Criminal Courts* (Toowong, Qld: Criminal Justice Commission, 1996).

[36] (1995) 84 A Crim R 570.

[37] L Re, Oral v Written Evidence: The Myth of the "Impressive Witness" (1983) 57 *Australian Law Journal* 679; J Hunter and K Cronin, *Evidence, Advocacy and Ethical Practice: A Criminal Trial Commentary* (Sydney: Butterworths, 1995) 326–31.

[38] R Birdwhistell, *Kinesics and Context: Essays on Body Motion Communication* (Philadelphia: Uni Pennsylvania Press, 1970) as cited in Fraser, *supra* note 15.

[39] Queensland Criminal Justice Commission, *supra* note 35, at xii, 23–24, 27.

[40] J Blumenthal, A Wipe of the Hands, a Lick of the Lips: The Validity of Demeanour Evidence in Assessing Witness Evidence (1993) 72 *Nebraska Law Review* 1157.

[41] P Ekman, *Telling Lies* (1985) 13, cited in Fraser, *supra* note 15, at 5–15.

[42] Blumenthal, *supra* note 40, at 1200.

[43] The information about speech patterns described here has been included in previous research which considered its implications for women's testimony about sexual assault and for alternative dispute resolution. See K Mack, Continuing Barriers to Women's Credibility: A Feminist Perspective on the Proof Process (1993) 4 *Criminal Law Forum* 327, at 330–31 and K Mack, Alternative Dispute Resolution and Access to Justice for Women (1995) 17 *Adelaide Law Review* 123, at 130–32.

[44] J Conley, W O'Barr and E Lind, The Power of Language: Presentational Styles in the Courtroom (1978) *Duke Law Journal* 1375.

[45] S Ross, Proving Sexual Harassment: the Hurdles (1992) 65 *Southern California Law Review* 1451, at 1455, citing Conley, O'Barr and Lind, *supra* note 44, 1380–81, 1386; C Morrill and P Facciola, The Power of Language in Adjudication and Mediation: Institutional Context as Predictors of Social Evaluation (1992) 17 *Law and Social Inquiry* 191, at 193.

[46] Morrill and Facciola, *supra* note 45; C Epstein, *Deceptive Distinctions: Sex, Gender and the Social Order* (1988), ch 10; B Preisler, *Linguistic Sex Roles in Conversation : Social Variation in the Expression of Tentativeness in English* (Berlin, NY: Mouton de Gruyter, 1986) ch 8, discusses hedges and tag questions, chs 9 and 10 discuss age. Some criticism of this research is contained in D Spender, *Man Made Language* 2nd ed (London: Routledge and Kegal Paul, 1985) ch 1, and in S Mills, Discourse Competence: Or How to Theorise Strong Women Speakers (1992) 7 *Hypatia* 4. See also C Morrill, M Johnson, and T Harrison, Voice and Context in Simulated Everyday Legal Discourse: The Influence of Sex Difference and Social Ties (1998) 32 *Law and Society Review* 639.

[47] W O'Barr and B Atkins, "Women's Language" or "Powerless Language" in S

McConnell-Ginet, R Borker and N Furman eds, *Woman and Language in Literature and Society* (New York: Praeger, 1980) 104.

[48] *Id* at 110.

[49] "Evidence, Fact, Truth", "Fact finding", "Judicial Notice", "Credibility" in Graycar and Morgan, *supra* note 34.

[50] "Court Testimony", in H McRae, G Nettheim and L Beacroft, *Indigenous Legal Issues: Commentary and Materials* 2nd ed (North Ryde, NSW: LBC, 1997) 366–71.

[51] "Executive Summary", "Aboriginal Women" and "Proposed Directions to Jury", in Queensland Criminal Justice Commission, *supra* note 35.

[52] P Van de Zandt, Heroines of Fortitude, in P Easteal ed, *Balancing the Scales: Rape, Law Reform and Australian Culture* (Leichhardt, NSW: Federation Press, 1998).

[53] Esteal, *supra* note 52.

[54] Ligertwood, *supra* note 8, at 480–81.

[55] *Id* at 482.

[56] *M v R* (1994) 181 CLR 487, 513 per Gaudron J in dissent.

[57] S Bronitt, The Rules of Recent Complaint: Rape Myths and the Construction of the "Reasonable" Rape Victim, in Easteal, *supra* note 52, at 41–58.

[58] Ligertwood, *supra* note 8, at 503.

[59] Sexual Reputation and Sexual Experience, in NSW Department for Women, *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault* (Woolloomooloo, NSW: NSW Department for Women, 1996) 223–52.

[60] GD LaFree, *Rape and Criminal Justice: The Social Construction of Sexual Assault* (Belmont: Wadsworth, 1989) 226–28.

[61] AD Ronner, The Cassandra Curse: The Stereotype of the Female Liar Resurfaces in *Jones v Clinton* (1997) 31 *UC Davis Law Review* 123.

[62] *Id*.

[63] *Id* at 140.

[64] Queensland Criminal Justice Commission, *supra* note 35.

[65] Ligertwood, *supra* note 8, at 164–70; T Henning and S Bronitt, Regulating the Use and Abuse of Sexual History Evidence, in Easteal, *supra* note 52, at 77–80.

[66] Henning and Bronitt, *supra* note 65.

[67] *Id* at 90.

[68] Easteal, *supra* note 52.

[69] Law Reform Commission of Victoria, *Rape and Allied Offences: Procedure and Evidence*, Report No 13 (Melbourne: Law Reform Commission of Victoria, 1988) 39; Ligertwood, *supra* note 8, at 203.

[70] (1968) 53 Cr App R 150.

[71] *Id* at 153.

[72] *Evidence Act* 1929 (SA) s 34I(5); *Crimes Act* 1958 (Vic) s 61; *Evidence Act* 1971 (ACT) s 76F; *Sexual Offences (Evidence and Procedure) Act* 1983 (NT) s 4(5), (6); *Evidence Act* 1995 (NSW) ss 164–65; *Criminal Code* 1924 (Tas) s 136; *Evidence Act* 1906 (WA) s 50; *Evidence Act* 1995 (Cth) ss 164–65.

[73] K Mack, "You Should Scrutinise Her Testimony with Great Care": Corroboration of Women's Testimony about Sexual Assault, in Easteal, *supra* note 52. For a clear judicial recognition of this, see Coldrey J comment in *Ware*, "[i]t may be doubted whether the historical rationale advanced … was ever founded upon more than … specious generalisation": (1994) 73 A Crim R 17, 30.

[74] *Longman v R* (1989) 168 CLR 79.

[75] *Id*.

[76] Easteal, *supra* note 52.

[77] J Temkin, *Rape and the Legal Process* (London: Sweet & Maxwell, 1987) 134.

[78] Thanks to Prof Richard Maltby, Screen Studies, Flinders University of South Australia for suggesting this teaching exercise.

[79] M Le Brun and R Johnstone, *The Quiet (R)evolution: Improving Student Learning in Law* (Sydney: Law Book Company, 1994) 178–81.