BOOK REVIEW*

Innovations in Evidence and Proof: Integrating Theory, Research and Teaching
Edited by PAUL ROBERTS AND MIKE REDMAYNE
(North America: Hart Publishing, 2007) 426 pages
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This is an excellent book and should be essential reading for those involved in the teaching of evidence, procedure and advocacy. It will also be of interest to legal academics and researchers generally, and in particular to those who advocate more emphasis on theory and comparative law in the law school curriculum. It may also provide a useful benchmark by which students may assess the adequacy, or otherwise, of courses on evidence and procedure. There is extensive reference to related scholarship and useful material on empirical research relevant to the laws of evidence.

The publication arose out of the colloquium on 'Teaching Evidence Scholarship' hosted by the University of Nottingham in September 2004. It comprises 14 chapters by leading scholars and legal academics in Australia, Canada, Northern Ireland, Scotland, South Africa, the USA and England and Wales. Two of the contributors are Australian: Jill Hunter from the University of New South Wales and Andrew Ligertwood from the University of Adelaide.

As the cover blurb notes, the essays

> range expansively over questions of interdisciplinary taxonomy, pedagogical methods and computer-assisted learning, doctrinal analysis, fact finding, techniques of adjudication, the ethics of cross examination, the implications of behavioural research for legal procedure, human rights, comparative law and international criminal trials.

The common purpose of the authors is said to be to 'indicate how the best interdisciplinary theorizing and research might be integrated directly into degree-level Evidence teaching'.[1]

The arguments about the need to re-focus university teaching and scholarship in the area of evidence reflect a broader concern about the direction of higher education generally and legal education in particular. There is little doubt where some of the other authors in this publication stand on the general trend in higher education. Paul Roberts in particular is highly critical of what he derides as 'an insidiously pervasive instrumental philosophy of education, which characterizes learning as the handmaiden of employment and promotes 'consumer choice' and 'customer satisfaction' in priority to intellectual growth and pedagogical

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1 Paul Roberts and Mike Redmayne (eds), *Innovations in Evidence and Proof: Integrating Theory, Research and Teaching* (2007) i.

expertise.'[2] He proceeds to suggest that: 'For those of us who judge instrumental conceptions of legal education to be seriously inadequate and lamentably misguided now is the time to say so, and loudly.'[3]

In the first chapter Roberts sets out a number of arguments as to why there is a need to 're-think' our approach to the law of evidence. As he notes: the science of proof is often treated as a satellite of the law of evidence; we need to take facts (more) seriously, echoing the familiar cri de coeur of William Twining in chapter 2;[4] expert evidence raises questions that are theoretically fundamental and yet intensely practical; and common lawyers have tended to think in terms of narrowly functional technical rules rather than thickly-textured procedural standards with transparent normative underpinnings.

Roberts seeks to promote greater theoretical, methodological and topical pluralism, and advocates greater pedagogic innovation and theoretical renewal. More specifically, he proposes that the agenda for re-thinking evidence in the twenty-first century should include greater focus on interrelated questions of taxonomy (in two dimensions), epistemology, political morality, and cosmopolitanism. This is all very interesting, but as Roberts himself acknowledges, his proposals may be fairly characterised as 'abstract and theoretical'.[5] That is perhaps both their strength and possibly their weakness. As a number of other contributors note, it is increasingly difficult to accommodate calls for a broader focus within increasingly attenuated courses on evidence. However, the article contains a wealth of practical suggestions for reform of courses and scholarship on the law of evidence. As other contributors also note: there is a need for greater focus on pre-trial proceedings; human rights law is increasingly important to evidentiary and procedural issues; reform is needed not only to courses on criminal evidence and procedure, but also to the subject of civil procedure so that it may become a more 'theoretically challenging, socially significant, juridically differentiated, empirically grounded and pedagogically coherent discipline in its own right',[6] and the list goes on.

Although directed predominantly at English evidence textbooks and teaching, Roberts' observations have particular relevance in Australia. However, as he notes, the project of re-thinking Evidence is a dynamic, collective and ongoing activity. Roberts seeks to provide an agenda for reform which 'can be no more than a menu or recipe. The proof of the pudding remains in the teaching'.[7] He proceeds to anticipate the objection that evidence courses have already been reduced in time and scope to the minimum necessary to cover the essential subject matter: 'There is simply no room to accommodate the fruits of re-thinking, however tempting or tasting they may look on the menu of notional

2 Paul Roberts, 'Rethinking the Law of Evidence: A Twenty-First Century Agenda for Teaching and Research,' in Paul Roberts and Mike Redmayne (eds), *Innovations in Evidence and Proof: Integrating Theory, Research and Teaching* (2007) 19, 20.

3 Ibid.

4 William Twining, 'Taking Facts Seriously – Again' in Paul Roberts and Mike Redmayne (eds), *Innovations in Evidence and Proof: Integrating Theory, Research and Teaching* (2007) 65.

5 Roberts, above n 2, 57.

6 Roberts, above n 2, 38.

7 Ibid 57.

possibilities'.[8] As any good advocate would do, Roberts anticipates this and a numerous other objections to his reform agenda. As he contends is the case with facts, the proposals need to be taken 'seriously'.

In the second chapter, William Twining re-iterates his now familiar, but important, argument about the need for 'taking facts seriously'.[9] He contends that although the argument is now well known it has 'made almost no impact.'[10] Insofar as this is true, it would appear not to be because his argument has not been accepted, at least among many evidence teachers and scholars. A number of the other contributors to this volume appear to embrace Twining's proposition that

> fact investigation, fact management and argumentation about disputed questions of fact in legal contexts (not just in court) are as worthy of attention and as intellectually demanding as issues of interpretation and reasoning about questions of law.[11]

Among other things, Twining maintains that inferential reasoning and other aspects of 'information processing' continue to be neglected in legal education and training. He contends that understanding evidence is an important part of understanding law; stresses the importance of evidence in legal practice; notes that evidence, proof and fact finding is a good vehicle for developing basic transferable skills; argues that the discipline provides scope for interesting new issues of comparison, generalisation and hybridisation as law becomes more cosmopolitan; and stresses the importance of evidence as an emerging multidisciplinary field. Moving beyond a generalised critique, he proceeds to outline elements of a model course in evidence, based on the 'building blocks' identified by Roberts, and proceeds to note some areas where there may be differences, at least of emphasis and priorities.

Twining states that the aim of the present chapter is threefold: first, to restate his original thesis; second, to outline how a single law course of evidence can be constructed within the constraints of curriculum overload and neglect of evidentiary issues; and third, to suggest some ways in which the recent emergence of evidence as an interdisciplinary field might affect the study and teaching of the subject. Each of these goals is achieved admirably.

In chapter 3, Christine Boyle focuses on the critically important, but arguably neglected, subject of 'relevance' and calls for a more 'principled approach'.[12] She contends that it would be a challenge to provide fact finders with an 'authoritatively analytical structure including a legal test of how to distinguish relevant from irrelevant information.'[13] In her view, this raises a question of whether decisions about relevance are governed by the law of evidence and thus by the rule of law at all.

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8 Ibid 62.

9 Twining, above n 4.

10 Ibid 65.

11 Twining, above n 4, 65.

12 Christine Boyle, 'A Principled Approach to Relevance: the Cheshire Cat in Canada' in Paul Roberts and Mike Redmayne (eds), *Innovations in Evidence and Proof: Integrating Theory, Research and Teaching* (2007) 87.

13 Ibid 87.

Boyle proceeds with an incisive analysis of cases drawn from English speaking Canada. As she notes, 'the law of evidence is a rich source of assumptions about human behaviour crystalised into doctrine.'[14] The focus on legal tests of relevance and legislation governing inferences is of broader 'relevance' beyond Canadian jurisprudence and evidence teaching. She outlines what a principled approach to inferences might entail:[15]

> In summary, while the basic test of relevance is logical relevance, it should be tempered by precedent, by the fact finder's critical self-consciousness and the rejection of discriminatory or overly speculative common sense. In essence this approach merges a comparison of probabilities with a critical attitude towards their common-sense reappraisal. The concept of prejudice would then be restricted to concerns about misuse of relevant evidence by the fact finder.

Boyle contends that constitutional norms and the principled approach to doctrinal rules may be criticised as indeterminate and inadequate protections against inappropriate intuition. It is not clear (to this reviewer at least) that the suggested 'principled approach' is immune from this criticism. However, the chapter is an important contribution to the debate about how the law of evidence should seek to grapple with the subject of relevance, which is of theoretical and practical importance.

In chapter 4, Mike Redmayne focuses on the important topic of evidential inference.[16] His analysis of several leading English cases is illuminating, and the examination of the complex subject of inferences from silence is incisive. His stress on the importance of taking facts and factual reasoning seriously re-iterates 'a message widely broadcast by Twining.'[17] However, as he notes, that message is always worth repeating, as many evidence scholars have not taken it to heart.

In chapter 5, Burkhard Schafer et al examine the development of computer support for evidence teaching.[18] The chapter describes the author's attempts to build a computing system at the Joseph Bell Centre for Forensic Statistics and Legal Reasoning at the University of Edinburgh. This approach to using computer based programs in courses on the interpretation and evaluation of evidence is based on concepts developed for teaching science in schools, with an emphasis on modeling and qualitative reasoning skills. Of particular interest is the fact that the system is question is based in part on the significant body of knowledge analysing the potential for errors in criminal investigations and prosecutions said to have arisen out of a number of high profile cases of wrongful conviction in the United Kingdom. The author's account of the way in which the system operates is fascinating.

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14 Ibid 112.

15 Ibid 117.

16 Mike Redmayne, 'Analysing Evidence Case Law' in Paul Roberts and Mike Redmayne (eds), *Innovations in Evidence and Proof: Integrating Theory, Research and Teaching* (2007) 119.

17 Ibid 138.

18 Burkhard Schafer, Jeroen Keppens and Qiang Shen 'Thinking With and Outside the Box: Developing Computer Support for Evidence Teaching' in Paul Roberts and Mike Redmayne (eds), *Innovations in Evidence and Proof: Integrating Theory, Research and Teaching* (2007) 139.

In chapter 6, Craig Callen examines in detail the vexed subject of hearsay.[19] The focus is on interdisciplinary and comparative perspectives. The chapter includes very useful legal information on the way in which different legal systems are grappling with the inclusion or exclusion of out of court communications. Equally of interest is the analysis of findings from recent empirical research on communications, including findings from cognitive psychology. The authors ably demonstrate the manner in which comparative and interdisciplinary scholarship can make an important contribution to the teaching of Evidence and to our general understanding of evidentiary issues.

In chapter 7, Jenny McEwan examines the influence of empirical research on adjudication in criminal cases.[20] The primary focus is on findings from behavioural science and in particular psychology and sociology. This includes an examination of some research on contamination of memory from suggestion; the fallibility of eye witness identification; the difficulties in detecting lying; jury decision-making; and particular problems experienced by vulnerable witnesses.

Although McEwan highlights the value of such research, she also points out some of the methodological limitations of many studies, particularly empirical research in the area of psychology. It is difficult to disagree with McEwan's contention that the law of evidence cannot afford to treat the findings of behavioural science as merely an interesting sideshow.[21] However, the author also contends that while empirical research may inform evidentiary debate (for example, about reconciling the desirability of fair treatment of witnesses with the necessity for a fair trial), it cannot tell us how to weigh the (competing) values in the balance. This proposition is of significance beyond the focal point of the author.

Behavioural science data are also the subject of chapter 8 by Roderick Bagshaw.[22] This examines the relevance of research in this area for evidence teaching and scholarship. Like McEwan, Bagshaw critically examines both the strengths and weaknesses of research in this area. Attention is usefully drawn to the limits of the ordinary experimental method and to the dangers of generalisation from research results. In doing so the author seeks to 'puncture any extravagantly inflated beliefs about the omniscience of scientists.'[23]

In chapter 9, Australian academic Andrew Ligertwood examines in detail the teaching of evidence with particular emphasis on 'the notion of law as a practical

19 Craig R Callen, 'Interdisciplinary and Comparative Perspectives on Hearsay and Confrontation' in in Paul Roberts and Mike Redmayne (eds), *Innovations in Evidence and Proof: Integrating Theory, Research and Teaching* (2007) 159.

20 Jenny McEwan, 'Reasoning, Relevance and Law Reform: the Influence of Empirical Research on Criminal Adjudication' in Paul Roberts and Mike Redmayne (eds), *Innovations in Evidence and Proof: Integrating Theory, Research and Teaching* (2007) 187.

21 Ibid 216.

22 Roderick Bagshaw, 'Behaviourial Science Data in Evidence Teaching and Scholarship' in Paul Roberts and Mike Redmayne (eds), *Innovations in Evidence and Proof: Integrating Theory, Research and Teaching* (2007) 219.

23 Ibid 238.

discipline.'[24] This is said to have two objectives: first, to explain the complexity of common law evidential issues, and second, to propound a particular pedagogical approach to introducing students to that complexity and the need for its scholarly analysis. The chapter reviews in detail how this 'practical orientation' has influenced the development of the evidence course at the University of Adelaide.

Ligertwood's central thesis is that 'within the discipline of law, evidential issues are most effectively analysed and understood in the context of the practical legal process within which they arise.'[25] Of particular interest is the author's comments on the familiar debate as to the relative advantages of professional law teachers compared with practitioner teachers. As Ligertwood notes, the latter may have insights beyond those who have not practised, whereas the former may have more coherent, broader and more critical perspectives which are central to the notion of university education. He advocates that a 'practical orientation' is essential and that students need to be proactively involved in the process. At the University of Adelaide, this is sought to be achieved through parallel courses in evidence and advocacy. As Ligertwood notes: 'Role plays and advocacy exercises bring Evidence doctrines to life.'[26] However, Ligertwood disavows any intention to provide merely vocational training. In his view, the pedagogical rationale for the innovations which he outlines goes much deeper. Advocacy exercises seek to serve as a medium for demonstrating more fundamental issues of process and evidence in order to develop students' 'critical interest and understanding of the issues.'[27] Moreover, he contends that experimentation with role play provides valuable lessons for legal educators and fundamental insights for students.

The other Australian contribution is chapter 10 by Jill Hunter.[28] She mounts a compelling critique of the traditional adversarial approach to cross examination. This is particularly topical at present in New South Wales in light of recent contentious proposals by the Bar Association to adopt more stringent restrictions on cross examination of witnesses,[29] which was fuelled by a proposal by the NSW Attorney-General to impose regulation if the Bar fails to do so; and given prominent media coverage of alleged excesses by defence counsel in sexual assault cases, culminating in a recent complaint lodged with the Legal Services Commissioner by the Director of Public Prosecutions.

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24 Andrew Ligertwood, 'Teaching Evidence Scholarship: Evidence and the Practical Process of Proof' in in Paul Roberts and Mike Redmayne (eds), *Innovations in Evidence and Proof: Integrating Theory, Research and Teaching* (2007) 239, 239.

25 Ibid 239.

26 Ibid 258.

27 Ibid 257.

28 Jill Hunter, 'Battling a Good Story: Cross-examining the Failure of the Law of Evidence' in Paul Roberts and Mike Redmayne (eds), *Innovations in Evidence and Proof: Integrating Theory, Research and Teaching* (2007) 261.

29 New South Wales Bar Association, *Legal Profession Act 2004: Proposed Amendment to the New South Wales Barristers' Rules* (2008) <http://www.nswbar.asn.au/docs/professional/pcd/s708.pdf> at 23 April 2008.

Hunter contends that the 'dark side' of cross examination damages witnesses, particularly sexual assault complainants and vulnerable persons. She is highly critical of the 'machismo adversarial legal culture' which not only permits but encourages forensic brutality. Although section 275A of the Criminal Procedure Act 1986 (NSW) is said to be a 'provision ripe with potential for effecting timely redistribution of power from the Bar to the Bench', it is clear that ambivalence arises out of the use of the term 'unduly', and there still remains the 'difficulty of articulating and policing a defensible line between acceptable and unacceptable cross examination.'[30] As Hunter concedes, drawing this line is no easy task for legislators, judges or commentators. Furthermore, it would appear from the presently heated debate within the NSW Bar Association over the proposed new ethical rules, that the Bar itself is divided on this issue.

Hunter's article also usefully refers to social science research on the inability of most members of the population to detect deceit and, among other things, provides useful reference to judgments of the High Court of Australia focusing on the importance of 'known' facts compared with the impact of the demeanor of witnesses.[31] Her focus on cross examination expands to encompass a critique of advocacy in general. She maintains that 'advocacy is about presenting a persuasive case constructed from an ambit claim. It is not about defending a position of truth. It is about a good story (but not necessarily a true story).'[32] Such generalisations are of course fraught with difficulty. However, Hunter's own advocacy for her position is persuasive if not compelling. It is difficult to disagree, as a matter of policy, with her contention that there is a 'need for witness questioning practices to accord with a civilised society's obligation to provide a humane justice system.'[33] After all, as she notes: 'Victim perspectives in law reform have moved centre stage.'[34] However, it is also difficult to disagree with her view that, as a matter of practice, drawing a bright line between acceptable and unacceptable forensic conduct is difficult. Notwithstanding what she characterises as our 'tired, sad and inadequate rules', she concedes that 'there is no magic bullet and no perfect trial process.'[35] She does however come up with a number of important reform proposals. As with her critique of the adverse impact of present adversarial cross examination practices, these need to be taken 'seriously'. As do many of the other authors, Hunter provides a wealth of case law and other resource material which will be of invaluable assistance to evidence teachers and students.

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30 Hunter, above n 28, 265.

31 Ibid 271. See, eg, *Fox v Percy* (2003) 214 CLR 118; *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (In liq)* (1999) 160 ALR 588; *Whisprun Pty Ltd v Dixon* (2003) 200 ALR 447, Kirby and Callinan JJ in dissent; all supporting *Societe d'Avances Commerciales v Merchants' Marine Insurance Co (The Palitana)* (1924) 20 Ll. L. Rep. 140.
(1924) 20 LI L Rep 140, 152 (Atkin LJ).

32 Ibid 274.

33 Ibid 289.

34 Ibid.

35 Ibid 286.

In his contribution in chapter 11, John Jackson joins the chorus of other contributors who argue for greater comparative material in evidence teaching.[36] Although evidence scholarship is said to have moved in this direction, teaching is said to be dominated by 'dated orthodoxy' and 'dominated by doctrine'.[37] According to Jackson, Evidence students fail to gain either practical insight into the handling of real life evidentiary issues or broader theoretical insight. The author proposes that we should dispense with doctrine almost entirely, and replace it with clinical work and experience in trial advocacy. Although agreeing with Roberts, and others, that there is a need for more focus on pre trial stages, Jackson also contends that post trial processes also need more attention. Moreover, he argues that there is also a need to examine other forms of adjudication, including tribunals and enquiries. In the Australian context, it is of interest to note that in the course of its recent examination of the law of legal professional privilege the Australian Law Reform Commission identified 41 federal bodies that presently exercise coercive investigative powers, often ancillary to civil litigation or prosecution for offence.[38]

Importantly, Jackson calls for more focus on comparative evidence not only between jurisdictions but also within jurisdictions. Moreover, as he notes, in the one (criminal) matter there may be different methods of proof at different temporal stages – for example, police interview, bail, committal, pre-trial, trial, post conviction at sentencing and at parole hearings. He also contends that our focus should expand to encompass extra legal dispute resolution processes and methods of proof used in other disciplines. However, he readily concedes that it is impossible within one evidence course to cover anything like this spectrum.

In the international arena, attention is drawn to the importance of military tribunals, which is of particular interest in light of the recent David Hicks case; international criminal trials; the impact of human rights law; and the particular challenges of new anti-terrorism laws, with their consequential impact on procedural due process and fairness. The chapter also incorporates a thoughtful analysis and critique of the limitations of traditional, and artificial, discussions of the adversarial and inquisitorial dichotomy.

A number of these issues are further explored in an interesting and scholarly manner by PJ Schwikkard in chapter 12.[39] Although in part focusing on South African law, the author examines the emerging 'convergence' in national and international evidence laws. In particular, the chapter examines the convergence of underlying values.

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36 John Jackson, 'Taking Comparative Evidence Seriously' in Paul Roberts and Mike Redmayne (eds), *Innovations in Evidence and Proof: Integrating Theory, Research and Teaching* (2007) 291.

37 Ibid 291–2.

38 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2007) Part 4.

39 PJ Schwikkard, 'Convergence, Appropriate Fit and Values in Criminal Process' in Paul Roberts and Mike Redmayne (eds), *Innovations in Evidence and Proof: Integrating Theory, Research and Teaching* (2007) 331.

International criminal evidence is the focus of chapter 13 by Paul Roberts, drawing upon some of the issues raised by him in chapter 1.[40] The chapter seeks to illustrate, based on detailed examples, why and how Evidence scholars might benefit from greater familiarity with international criminal justice questions, sources, methods and materials. As Roberts notes: 'this fledgling discipline harbours untapped potential for Evidence scholars.'[41] Roberts admirably achieves his stated goal of articulating questions and utilising 'methods and source materials of sufficient interest to inspire the imagination of fellow Evidence teachers, and to supply some useful signposts for the inquisitive to follow.'[42] Regrettably, within the constraints of this review, it is not possible to do justice to his contribution or to those of the other authors.

In the final chapter, Robert Cryer continues the international criminal focus by concentrating on the proceedings and judgments of international criminal courts.[43] The chapter concentrates on two aspects of the evidence of witnesses before such tribunals. These encompass issues of language, culture and interpretation, on the one hand, and the relationship between trauma and memory on the other. As Cryer notes, both of these issues are relevant to domestic civil and criminal proceedings. As he also notes, the work of international criminal tribunals has elucidated 'a number of illuminating practical difficulties and imaginative solutions.'[44]

Each of the chapters in this scholarly publication is evidence, as the blurb on the book suggests, of 'an exciting time of theoretical renewal and increasing empirical sophistication in legal evidence, proof and procedure scholarship.'

If one were searching for a basis for criticism of the collection, it might be contended that the focus is unduly on the area of criminal law. Any such criticism no doubt reflects the bias of the reviewer whose interests are primarily in the civil area. However, many of the evidentiary rules, theoretical perspectives, pedagogic insights and empirical research data are of direct relevance to civil litigation, and the teaching of evidence and procedure in their application to civil matters.

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40 Paul Roberts, 'Why International Criminal Evidence?' in Paul Roberts and Mike Redmayne (eds), *Innovations in Evidence and Proof: Integrating Theory, Research and Teaching* (2007) 347.

41 Ibid 379.

42 Ibid 380.

43 Robert Cryer, 'A Message from Elsewhere: Witnesses before International Criminal Tribunals' in Paul Roberts and Mike Redmayne (eds), *Innovations in Evidence and Proof: Integrating Theory, Research and Teaching* (2007) 381.

44 Ibid 400.