

TEACHING THE RULES OF “TRUTH”

JANE H. AIKEN*

*Purpose and Construction: These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that truth may be ascertained and proceedings justly determined.*¹

Sometimes I chuckle, other times I panic, when I reflect on the fact that as an Evidence teacher, I am ostensibly in the business of teaching the rules to get to truth. Imagine that. “I know the rules and I am going to teach them to you so that you can use those rules and get to truth yourself!” I wonder sometimes how I manage to hold my head up on that first day of Evidence class and discuss the purposes of the rules of evidence. Could there be a more impertinent statement than, “The rules of evidence are designed to ensure the admission of undistorted evidence that will help the trier of fact evaluate the evidence and arrive at the truth?” I say that without once engaging in the philosophical discussion of what do we mean when we say “truth,” although I imagine that might improve my teaching. But of course, if I did that, I might never get to all the exceptions to the hearsay rule.

Nevertheless, the modern Evidence course offers a unique opportunity to involve students in activities in which virtually no other course regularly taken in law school asks them to engage.² Instead of studying appellate cases in which the facts have already been found, students in Evidence think about how lawyers present those facts so that they can be “found.”³ It is both a deconstructing and a constructing endeavor with the ultimate goal being that the fact-finder finds the truth. While we are training students how to reduce

* William M. Van Cleve Professor of Law, Washington University in St. Louis School of Law. The author wishes to thank Katherine Goldwasser for her insights into teaching and grasp of the scope and importance of these issues, and for her excellent, comprehensive, and generous editing and also Mark Cooke, my research assistant, for his tireless efforts to find support for sometimes unsupportable propositions.

1. FED. R. EVID. 102.

2. I am not the first to write about how procedure courses are ripe teaching tools for social justice lessons. See, e.g., Elizabeth M. Schneider, *Gendering and Engendering Process*, 61 U. CIN. L. REV. 1223 (1993).

3. Evidence courses used to be taught via the study of appellate cases, but the teaching methodology has shifted to a more problem-based approach in recent years.

complex legal problems into meaningful bits of evidence that give a picture of what happened, we also can teach them to appreciate how often truth depends on point of view.⁴ The context in which rules are applied deeply affects their meaning. Such an insight transcends the Evidence course and can help open students' eyes to the fact that even facially neutral procedural rules implicate social justice concerns.⁵

Students are often aware of substantive problems with the justice system, particularly the criminal justice system. The recent spate of post-conviction exonerations has heightened this awareness.⁶ Innocence projects across the country have drawn attention to the perils of eyewitness testimony and all-too-frequent incidences of coerced confessions, shoddy police practices, and prosecutorial misconduct. The prevalence of racial disparity at every stage of the criminal justice process has also been widely noted.⁷ The attention given to exonerations and the deep racial bias embedded in our criminal justice system provides an opportunity to raise questions about how the rules of evidence might not lead to truth when the defendant does not share the same world view as the largely majoritarian police, prosecutors, defense attorneys, judges, and jurors who make the system work.⁸

One of the most important functions for the rules of evidence is to create a rubric in which accurate judgments can be made about the facts of cases. The law of evidence poses as a "neutral" body of procedural law, based in rational decision-making and immune from questions of values. The goal of a trial is to facilitate the presentation of a sufficient amount of evidence about a past event so that any fact-finder can bring to bear his or her "general knowledge" of how the world works to determine what happened and what the outcome should be. The idea is that the fact-finder applies common sense to rationally

4. It can also be a course in which point of view is disguised. See Ann Althouse, *The Lying Woman, The Devious Prostitute, and Other Stories from the Evidence Casebook*, 88 NW. U. L. REV. 914 (1994).

5. Teaching social justice lessons can be a bit dicey. One runs the risk of being "preachy" or becoming a talk show host instead of a law school professor. For an interesting article about this danger, see Frank Rene Lopez, *Pedagogy on Teaching Race & Law: Beyond "Talk Show" Discussions*, 10 TEX. HISP. J.L. & POL'Y 39 (2004).

6. Myrna Raeder, *What Does Innocence Have to Do With It?: A Commentary on Wrongful Convictions and Rationality*, 2003 MICH. ST. L. REV. 1315, 1316.

7. See generally Samuel R. Sommers and Phoebe C. Ellsworth, *Special Theme: The Other Race-Effect and Contemporary Criminal Justice: Eyewitness Identification and Jury Decision Making: Jury Decision Making: White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201 (2001).

8. See generally Kevin R. Johnson & Luis Fuentes-Rohwer, *A Principled Approach to the Quest for Racial Diversity on the Judiciary*, 10 MICH. J. RACE & L. 5 (2004); Sylvia R. Lazos Vargas, *Does a Diverse Judiciary Attain a Rule of Law That Is Inclusive?: What Grutter v. Bollinger Has to Say About Diversity on the Bench*, 10 MICH. J. RACE & L. 101 (2004).

produced evidence.⁹ The problem with this fundamental assumption underlying all of evidence law is that when the trial involves a litigant whose experience differs from the "general knowledge" of the world, the rules of evidence not only have a difficult time coping with the litigant's alternate world views, but often actively silence them.¹⁰ General knowledge, therefore, might better be read as "dominant (and sometimes inaccurate) view."¹¹

This Essay offers a few examples of ways in which Evidence professors can engage students in critical analysis of how deeply a point of view can influence the way the Rules apply. My hope is that through this understanding the students will no longer think of the Federal Rules of Evidence as a neutral body of procedural rules that if faithfully applied will result in "truth." I believe this insight is one of the most critical that a law student can gain in law school. It will make students more thoughtful in their analysis and application of the Rules, but more importantly, it will make them better critical thinkers and, ultimately, better lawyers.

Point of view is critical to the operation of the relevance rules. The Federal Rules define relevance as "any tendency to make the existence of any fact that is of consequence to the [litigation] more probable or less probable than it would be without the evidence."¹² The students confront what appears to be a neutral and impartial rule that merely calls for the application of logic to determine admissibility. Nevertheless, relevance rules are particularly susceptible to "invisible" bias. What is relevant depends on one's perspective.

For those outside the mainstream of judges (which is a great many people), the perspective and experience brought to bear in determining relevance have significant implications. A suspect's "nervousness" when approached by a police officer might be offered to show consciousness of guilt. Generally, a judge would not be nervous if a police officer approached him or her. Only if one had something to hide, a judge might think, would the approach of a police officer cause alarm. An excellent example of this phenomenon is Justice Scalia's biblical foray in *California v. Hodari*.¹³ In *Hodari*, some young people saw the police and ran, and the police gave chase and eventually arrested one of them on drug charges.¹⁴ Scalia wrote for the majority and at one point in the opinion, after noting that the state had conceded the police did

9. See generally Symposium, *Visions of Rationality in Evidence Law*, 2003 MICH. ST. L. REV. 847.

10. See Marilyn MacCrimmon, *The Social Construction of Reality and the Rules of Evidence*, 25 U.B.C. L. REV. 36, 39 (1991).

11. This has been empirically demonstrated in the race context. See, e.g., Sommers & Ellsworth, *supra* note 7; Chet K. W. Pagar, *Blind Justice, Colored Truths and the Veil of Ignorance*, 41 WILLAMETTE L. REV. 373 (2005).

12. FED. R. EVID. 401.

13. 499 U.S. 621 (1991).

14. *Id.* at 622–23.

not have reasonable suspicion (which clearly angered him), gratuitously opined “[t]hat it would be unreasonable to stop, for brief inquiry, young men who scatter in panic upon the mere sighting of the police is not self-evident, and arguably contradicts proverbial common sense. See Proverbs 28:1 (‘The wicked flee when no man pursueth’).”¹⁵

Therefore, the evidence of the suspect’s nervousness makes it somewhat more likely than it would be without the evidence that the suspect is guilty. Taken from another perspective, that of a person continually harassed by police officers, the “nervous behavior” does not indicate consciousness of guilt but rather fear of police abuse.¹⁶ If this were the reason for the suspect’s nervousness, the evidence would be irrelevant. However, given the minimal threshold of Rule 401, the fact that the nervousness might be explained by consciousness of guilt is sufficient to establish relevance. The question then becomes, how much weight does one give to the evidence when rules requiring an evaluation of weight, like Rule 403, are brought to bear? This is when point of view has its greatest effect. It is likely that the judge’s evaluation of weight will be considerably different from that of the person continually harassed by police.

Rule 403, the unfair prejudice rule,¹⁷ can be used to exclude evidence out of concern that juries will overvalue it, but the Rule is certainly under-utilized in this way. Normally evidence professors focus on the gruesome photograph or evidence of the witness’s engagement in morally questionable behavior as classic examples of material giving rise to a Rule 403 objection. Such reliance misses an opportunity both to teach a more nuanced understanding of Rule 403 and to engage the students in a firsthand experience of how weight depends on

15. *Id.* at 623 n.1. Of course, occasionally judges understand the outsider perspective. In his dissent in *Hodari*, Justice Stevens responded to Justice Scalia on this point:

The Court’s gratuitous quotation from Proverbs 28:1, see *ante*, at 623, n. 1, mistakenly assumes that innocent residents have no reason to fear the sudden approach of strangers. We have previously considered, and rejected, this ivory-towered analysis of the real world for it fails to describe the experience of many residents, particularly if they are members of a minority. See generally Johnson, *Race and the Decision To Detain a Suspect*, 93 *Yale L. J.* 214 (1983). It has long been “a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that ‘the wicked flee when no man pursueth, but the righteous are as bold as a lion.’” *Alberty v. United States*, 162 U.S. 499, 511 (1896).

499 U.S. at 630 n.4.

16. See generally David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 *MINN. L. REV.* 265 (1999).

17. Unfair prejudice is but one of several grounds for excluding evidence under Rule 403. For purposes of this analysis, I am focusing on the unfair prejudice dimension of the rule. See *FED. R. EVID.* 403.

point of view. Several Evidence scholars have used the case of *People v. Adamson*¹⁸ to do just that. Taking their lead,¹⁹ I first give the students these facts:

Josey Smith has been murdered. When the police arrived at the scene, they found her body sprawled on the floor. She had been stabbed with a knife. Her stockings had been rolled down her legs and the tops of the stockings were cut off. (I remind them that the case took place many years ago, and she wore stockings, not pantyhose.). For reasons that do not matter here, the police get a warrant to search Paul Wilson's house. Mr. Wilson is an African American male who works as a dock worker at the docks near his home. While searching his apartment, they find a drawer full of the tops of ladies' stockings. None of these stocking tops matched Josey Smith's stockings. Paul Wilson is indicted for the murder.

My first question to the students is, "Is the evidence that Mr. Wilson had a drawer full of stocking tops relevant to the prosecution's case?" Invariably, my students have said "yes." I then ask them to tell me what inferential links they would make to find such evidence relevant. I get an answer something like this: "A woman who has been murdered had the tops of her stockings cut off. It is unlikely that the woman wore her stockings that way on purpose. It seems far more likely that the cutting of the stocking tops was related to the murder. That being the case, the person who murdered the woman must have had had some kind of interest in the tops of women's stockings. A man who keeps tops of women's stockings in a drawer has some kind of interest in such stocking tops. Paul Wilson must have some kind of interest in the tops of women's stockings. The evidence showing that he has such an interest makes it somewhat more likely, than it would be without the evidence, that he is the man who killed her."

After going through the relevance analysis, I then ask, "What about a possible 403 objection? Is there any potential for unfair prejudice?" A student usually suggests that the prejudice might be that the jury might think Mr. Wilson is kinky and might punish him for that (or at least be less concerned about wrongly convicting him for the murder) and not use the evidence for its relevant purpose. Other students have suggested that the jury may not have clear knowledge that the defendant's stocking tops do not match the victim's stockings, and as such they could overvalue the evidence as a result. On the whole, however, the bulk of the students believe that such prejudice does not substantially outweigh the probative value.

18. 165 P.2d 3 (Cal. 1946).

19. This problem was developed by Katherine Goldwasser and is discussed in her article, *Response to Edward J. Imwinkelried, the Taxonomy of Testimony Post-Kumho: Refocusing on the Bottomlines of Reliability and Necessity*, 30 CUMB. L. REV. 227, 232-33 (2000). She credits Laird C. Kirkpatrick and Christopher B. Mueller, the authors of a well-known Evidence text, with the idea. See *id.* at 232 n.23.

I then ask, "What if the evidence was that Ms. Smith was found murdered and her T.V. was missing. Mr. Wilson's house was searched and they found a T.V. but it wasn't the same T.V. that was missing from the victim's house. Would that evidence be relevant in his prosecution for murder?" The students readily answer that this would not be relevant because there is not enough connection.

I then follow with "How are stocking tops different from a T.V.?" Students point out that stocking tops are peculiar . . . it is too much a coincidence that she had stocking tops missing and he had stocking tops in his drawer. I then probe what they mean by "peculiar." "How do you know that it is peculiar? How important is the idea that it is peculiar to your assessment of probative value and unfair prejudice?" The students agree that the peculiarity is the critical aspect of this evidence giving it both relevance and weight.

Finally, I ask, "What if I told you that at the time of these events, Mr. Wilson processed his hair and that it was very common at the time for African American men to put stocking tops on their hair to protect it when they worked. Furthermore, as a dockworker, he and many of his coworkers, both white and black, routinely wore stocking tops over their hair to protect it from the material that comes down on them when they are unloading ships. Does that change your mind as to its probative value and unfair prejudice?" I then engage the students in a discussion about how the probative value is decreased because it is not peculiar for Mr. Wilson to have tops of stockings in his drawer given his cultural and employment background. The unfair prejudice is great because the jury may draw the same conclusions that the students did at the beginning of the analysis.

I have found that leading the students through this analysis leads to insight because they experience firsthand the confusion and prejudice that Rule 403 is designed to prevent. More importantly, they get a life lesson as lawyers about thinking through a case and not jumping to conclusions about relevance and probative value without understanding the context in which it arises. Point of view makes all the difference. Indeed, I often find my questioning short-circuited as an African-American student understands immediately the prejudice of admission of this evidence and educates the rest of us about the use of stocking tops. I leave the students with the question, "What if you had been representing the defendant in this case and had failed to object to this evidence or had failed to educate the judge or jury about the lack of peculiarity of this item of evidence? Would the evidence presented at trial, having cleared the rules of evidence, help lead to the truth?"

Character evidence rules are rich with possibilities for exploring the impact of point of view. Character rules are based on the optimistic idea, expressed in Rule 404(a), that people are not defined by their past acts: once a thief, *not*

always a thief.²⁰ Known as the "propensity rule," this optimistic idea allows the Evidence professor to discuss the ways in which the rules of evidence can be used to level the playing field, to avoid the everyday shortcuts in judgment that we rely upon in daily life and focus the fact-finder on the events that gave rise to the litigation. Not using the past as indicative of present behavior (she did X in the past, so she must be the sort of person who does X, so she probably did X on the occasion at issue in the lawsuit) is very different from how people often make decisions. The justice system's insistence on dealing with the present, not the past, is worth discussing with students. At the same time, the insistence that the past is not admissible to prove action in conformity also demonstrates how evidence rules encourage juries to evaluate individual acts without regard to context. For those individuals who have suffered under racial, gender, or class bias, however, the context of their acts can explain a great deal. I try to teach this with the following problem:

Wilma Washington is being tried for the murder of her husband. She has asserted self-defense and is prepared at trial to testify about the years of abuse that she suffered from her husband. The prosecution plans to impeach her testimony at trial with her confession on the night of the murder. She had called 911 and said, "I have killed my husband." When the police arrived at the house, she was sobbing over his body and took full responsibility for her husband's death. When asked who caused her bruises, she had told the officer that she had fallen down the steps. When the officer on the scene asked if her husband had abused her, she had significantly downplayed any history of abuse. At trial, however, Wilma testifies that her husband beat her daily over eleven years of marriage and that recently the beatings had become more frequent and more brutal. The prosecution offers her confession both to impeach her current testimony about the events and as substantive evidence of her guilt.

The defense attorney seeks to offer into evidence the testimony of a physician who had examined Ms. Washington, three years prior to the killing. The physician had treated her in the emergency room for a broken nose, dislocated jaw, and small round burns on her chest. The doctor will testify that the doctor suspected domestic abuse and asked Ms. Washington about whether Mr. Washington had inflicted the wounds. The doctor is prepared to testify that

20. The Advisory Committee's Notes to Rule 404(a) refer to the California Law Revision Commission's rejection of a rule permitting the admission of character evidence to indicate action in conformity. As quoted in the Advisory Committee Notes, the Commission said:

Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.

FED. R. EVID. 404(a) Advisory Committee's Notes.

when asked that question, Ms. Washington immediately began defending her husband and downplayed the violence.

I then ask the students: “What is the relevance of the doctor’s testimony?” The students first see it as evidence of past abuse but then at some point, a student will say, “It shows that when confronted with questions about her abuser’s behavior, she covers for him and downplays the violence. This is relevant to show how much (or how little) weight the jury should give the confession.” I next ask, “Is it admissible for that purpose?” “What kind of evidence will the prosecution say this is?” (Propensity evidence) “What are the hurdles she must clear?” (Getting them looking at Rule 404).

The student will often look to the “mercy rule,” Rule 404(a)(1), as a way to introduce the doctor’s description of Ms. Washington’s behavior as evidence of a “pertinent trait” of her character.²¹ I ask, “If offered as 404(a)(1) evidence, what form must that evidence take?” If the student does not spot the problem, I point them to the Rule’s restriction requiring that proof of a “pertinent trait” of character be in the form of opinion or reputation evidence but not by evidence of specific acts.²² That will severely limit the doctor’s testimony if the court determines that this is a “pertinent” trait. In order to get the specifics in, the student might turn to Rule 404(b) and argue that the evidence is offered for another purpose akin to a common scheme or plan. However, this evidence appears to lack the specificity and identity that would permit it to get out from under the fatal “propensity” label and constitute a “common scheme or plan.”²³

Thus the character bar may well limit Ms. Washington’s ability to show how she was socialized to defer to men, how she has downplayed violence in the past, and how she might readily confess to acts she did not do or fail to focus on possible defenses because of her history with the batterer.²⁴ Without this evidence, the finder of facts has only his or her own experience to draw upon. What looks like irrational behavior to the “average” viewer (it makes no sense to think that a victim of violence at the hands of her husband would ever seek to downplay what he was doing to her), might, in fact, be quite rational in light of the context. The general, “rational,” view may not capture the experience of the battered woman and may therefore lead to wrong conclusions. Once again, application of the rules by a neutral mind is not the path to truth.

21. See FED. R. EVID. 404(a)(1).

22. See FED. R. EVID. 405.

23. See Richard B. Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777, 786–87 (1980).

24. See Kersti A. Yllo & Murray A. Straus, *Patriarchy and Violence Against Wives: The Impact of Structural and Normative Factors*, in PHYSICAL VIOLENCE IN AMERICAN FAMILIES: RISK FACTORS AND ADAPTATIONS TO VIOLENCE IN 8,145 FAMILIES, at 383, 392–94 (1990).

Conceivably, the defense could try to address this problem by calling an expert witness who could provide important background or context for the jury to use in assessing the believability of Ms. Washington's version of events. Before such an expert would be permitted to testify, however, the proponent would have to contend with a significant obstacle. In effect, the proffered testimony would go to Ms. Washington's credibility. But under the rules of evidence, experts generally are not allowed to make credibility assessments because witness credibility is thought to be well within the jury's ken.²⁵ This general restriction on expert testimony is another opportunity to explore "the rules of truth." Jurors are perfectly able to assess credibility without the help of an expert because fact-finders share the ability to use their "common sense" to evaluate witness demeanor, hesitancy, eye contact, and inconsistency. These "credibility attributes" are assumed to be the same for all witnesses, no matter what their age, gender, class, race, or ethnicity is, or the context in which such statements are made. In short, jurors are ostensibly experts in "human behavior" and as such, to make credibility determinations, they need only draw upon their universally applicable ideas about what indicates lack of truthfulness. These supposed "givens" fly in the face of the social scientific literature on the subject, which makes clear that notions of what constitutes "typical" evasive behavior, such as an unwillingness to look someone in the eye, are actually culturally specific. Thus, for example, an unwillingness to look someone in the eye is viewed as a strong sign of dishonesty in American culture.²⁶ That behavior in other cultures would not indicate a lack of truthfulness at all, but rather deferential behavior appropriate in a courtroom.²⁷ In such a case, the rules of evidence may thwart, instead of foster, truth.

The same assumption that fact-finders bring a shared universal understanding of facts can be seen in evidence law's treatment of admissions by silence. The Federal Rules permit fact finders to infer statements from the silence of a party when, as the Advisory Committee points out, "the person would, under the circumstances, protest the statement made in his presence, if untrue."²⁸ The Notes go on to say that "[t]he decision in each case calls for an evaluation in terms of *probable human behavior*."²⁹ The meaning of a person's silence, like eye contact, can depend on culture as well as experience. Truth here is a matter of point of view. The party may be merely reticent about contradicting another, may be suspicious and therefore silent, or may be inattentive due to incapacity caused by drug withdrawal or another condition

25. Although, "beyond the jury's ken" is not a standard articulated in the Federal Rules of Evidence, judges often use it in their determination of whether an expert is needed.

26. William Y. Chin, *Multiple Cultures, One Criminal Justice System: The Need for a "Cultural Ombudsman" in the Courtroom*, 53 Drake L. Rev. 651, 659 (2005).

27. *Id.*

28. FED. R. EVID. 801(d)(2)(B) Advisory Committee's Note.

29. *Id.* (emphasis added).

that one would not want aired in front of a fact-finder. Yet the Rule assumes universal cultural competence, leaving little room for such differences. Admissions by silence may also silence truth.

Not all rules of evidence are substantively neutral. The recently adopted exceptions to the character rules with regard to child abuse and sexual assault,³⁰ provide an avenue for discussion of why we would select these particular past acts to be singled out for different treatment rather than others.³¹ To highlight these issues, I offer the following problem:

Michael Tsosie is charged under two separate federal statutes with child sexual assault and fraud. The indictment alleges that Mr. Tsosie was employed at a child care center that offered care for the children of federal employees, a position he allegedly obtained by making fraudulent misrepresentations on his application for the position. The child sexual assault charges were brought after a parent of a 4-year-old child in the day care center alleged that Mr. Tsosie fondled the child on three occasions while the child was in his care. As part of its case in chief, the prosecution intends to offer a witness who will testify that the defendant fondled her thirty years prior when she was six years old and he was her caregiver. When she told her parents of his acts, they immediately fired Mr. Tsosie. Her parents did not report the incidents to the police at the time because the witness was reluctant to talk about the molestation and they did not want to put her through a trial. The parents are now deceased. The witness says she still has a clear memory of what Mr. Tsosie did to her, and when she heard that he had been given a position of trust caring for young children and was charged with child molestation, she felt it was her duty to come forward.

The fraud charge in the indictment was added when this witness emerged, because the employment application for the child care center asked if Mr. Tsosie had ever been fired from a job caring for children and he did not disclose the thirty-year-old firing. In support of the fraud charge, the prosecution intends to call a witness who was a former employer of Mr. Tsosie's. This witness will testify that Mr. Tsosie had filled out an application to work at the witness's place of business just last year, that the application had asked about firings within the past five years, and that Mr. Tsosie failed to disclose on the application that he had been fired from another position the year before for drinking on the job.

I then ask the students, will either of these two prosecution witnesses be permitted to testify? What objections are likely to be raised by the defense?

30. FED. R. EVID. 413–15.

31. See generally David P. Bryden & Roger C. Park, *Other Crimes Evidence in Sex Offense Cases*, 78 MINN. L. REV. 529 (1994); Thomas J. Reed, *Trial by Propensity: Admission of Other Criminal Acts Evidenced in Federal Criminal Trials*, 50 U. CIN. L. REV. 713 (1981); Jane Harris Aiken, *Sexual Character Evidence in Civil Actions: Refining the Propensity Rule*, 1997 WIS. L. REV. 1221 (1997).

What arguments will the prosecution make to try to meet those objections? How should the court rule?

This permits a discussion of the fact that the propensity to lie on employment applications, although fresh and relevant to the charge, would not be allowed under Rule 404's character bar. However, the prior acts of child sexual abuse would not be barred by Rule 404 since they are permitted under Rule 414. There may be an argument to preclude the evidence under Rule 403 but that would focus on problems with this evidence other than character. Why treat the character testimony differently? Unlike the subtle analysis that is required to identify how supposedly "neutral" rules have a negative impact on "outsiders," Rules 413 and 414 offer a real opportunity to discuss how procedural rules can be used substantively to disfavor a despised group. These Rules facilitate law enforcement's tendency to "round up the usual suspects" and then compound the chance of wrongful conviction by having the very evidence that may have placed the defendant under suspicion to begin with be used to prove the charged conduct. This significantly undermines the presumption of innocence that is part of what prompts the general character bar reflected in Rule 404. The result may be a wrongful conviction at odds with the truth of these events.

The Federal Rules of Evidence recognize that sometimes cultural context does matter. There are rules designed to minimize the effect of cultural preconceptions that are thought to cause people to give undue probative value to certain types of evidence.³² These are "truth-seeking" rules. They operate on the theory that excluding evidence is sometimes necessary in order to try to ensure that deeply rooted but unfounded preconceptions are not indulged. One of the primary rules of evidence that is designed to remedy the problem of giving undue probative value to a type of evidence is Rule 412,³³ the so-called "Rape Shield Rule," which limits the admissibility of evidence of a sex offense victim's sexual past in both criminal and civil cases.³⁴

Rule 412 offers very specific guidance in its criminal application for when evidence of a victim's prior sexual behavior or predisposition can be offered. However, unlike the criminal section of the Rule, the civil section of Rule 412 leaves the determination of admissibility to the discretion of the judge.³⁵ The judge weighs whether the evidence's "probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party."³⁶ Again, I use a problem. This one is based on an Eleventh Circuit opinion.

32. See generally Jane H. Aiken, *Protecting Plaintiffs' Sexual Pasts: Coping with Preconceptions Through Discretion*, 51 EMORY L.J. 559 (2002).

33. FED. R. EVID. 412.

34. Aiken, *supra* note 32, at 559. In 1994, Congress made significant changes to the Rules, including clarifying the criminal Rule and extending it to civil actions. *Id.*

35. FED. R. EVID. 412(b)(2).

36. *Id.*

The plaintiff, Ms. Judd, brings a tort action against the defendant for wrongful transmission of a sexually transmitted disease. She asserts a damage claim for both physical and emotional injury. She alleges that she contracted herpes from the defendant and she feels depressed and dirty due to the infection. At trial, the defendant offers testimony about the plaintiff on several subjects, including: the fact that she had breast augmentation surgery before she met the defendant, her past sexual activity, and her employment as a nude dancer.³⁷

I ask the students to analyze each piece of evidence to determine its relevance and its admissibility under Rule 412.³⁸ The students readily identify that the evidence of the plaintiff's prior sexual activity is directly relevant to causation of a sexually transmitted disease. Therefore, this evidence has high probative value with little unfair prejudice or harm to the victim, provided that whether the defendant was the source of the plaintiff's disease is at issue. The students have much more difficulty with the breast augmentation and employment as a nude dancer. Most suggest that these have little probative value to her claim in the lawsuit and thus should be excluded under Rule 412's balancing test. I then tell the students that the problem is based on a real case, explain that the trial court in the case admitted both items of evidence, and share with them some of the Eleventh Circuit's analysis of these rulings on appeal.

I find three aspects of the opinion particularly useful for class discussion. First, there is a brief background discussion of appellate review of district court rulings on the admissibility of evidence, in which the court says that although such review is ordinarily highly deferential, review of rulings under Rule 412 is "more [stringent] in view of the presumption of inadmissibility of evidence of an alleged victim's sexual behavior or . . . predisposition."³⁹ Second, there is a review of the trial court's "weighing" under Rule 412 of the probative value of the nude dancing evidence against its possible unfair prejudice or harm to the plaintiff, in which the appellate court approves the following reasoning: the fact that plaintiff worked as a nude dancer both before and after she contracted the sexually transmitted disease gave the evidence real probative value vis-à-vis plaintiff's claim that she was distressed and felt "dirty" after she contracted the disease; and the fact that a good deal of other evidence of the plaintiff's sexual history and predisposition was properly admitted at trial meant there was little or no prejudice.⁴⁰ Third, there is the court's treatment of the plaintiff's claim as to the breast augmentation surgery evidence. Although the court did not actually reach the merits of this issue, its handling of the issue was telling. Here, the ruling was that the plaintiff had

37. *Judd v. Rodman*, 105 F.3d 1339, 1340 (11th Cir. 1997).

38. Whether Rule 412 applied was raised on appeal but was not decided. *Id.* at 1341–42.

39. *Id.* at 1341 n.6.

40. *Id.* at 1343.

waived any objection based on Rule 412, because her objection at trial had been on relevancy grounds.⁴¹

I begin with the waiver of objection ruling. At first, this strikes the students as perhaps unfortunate for the plaintiff, but hardly noteworthy as a matter of evidence law; they learn early-on all about the pitfalls of failing to preserve evidence issues for appeal.⁴² But then I begin exploring with them a number of questions about the ruling, such as, "What bearing do you think it might have had on how the plaintiff framed her objections below that the case was in effect being tried as though Rule 412 did not even apply?"⁴³ Also, what, if anything, are we to make of the fact that Rule 412 is, in fact, a relevancy rule? When I move to the nude dancing evidence ruling, I begin by asking whether, under the logic seemingly approved by the court, if we substitute "bank teller" for nude dancer, the probative value would be the same? If there is laughter in response—and there often is—I remind the students that Rule 412 was designed to neutralize the effect of knowing that the plaintiff was engaged in a profession that is code for sexual promiscuity.⁴⁴ The Eleventh Circuit's analysis does not treat the nude dancing as neutral. The defendant's relevance logic seems to go something like this: because Ms. Judd can continue in her profession as a nude dancer, it is more likely that she does not feel dirty than without the evidence. Perhaps the court has engaged in more offensive logic: because Ms. Judd engages in nude dancing, she has a less credible claim to "feeling dirty" than without the evidence. Both kinds of relevance logic rely on the now impermissible inference that one can use lifestyle evidence to extrapolate sexual behavior and beliefs. If we truly neutralize the sexually coded profession of nude dancer by substituting "bank teller," the court's decision makes no sense. Plaintiff's employment as a bank teller before and after the event would offer us no insight into whether her claim that she "felt dirty" was genuine.

To wrap up the discussion, I ask the students to, in effect, take a step back, and think about what Rule 412 calls on judges to do in civil cases and why that might be problematic. The Rule appears to assume that, unlike the jury, the judge can evaluate probative value unencumbered by the very cultural

41. *Id.* at 1342.

42. *See* FED. R. EVID. 103.

43. The defense claimed that Rule 412 did not apply. *Judd*, 105 F.3d at 1340. The trial court demonstrated explicit skepticism about its applicability and refused to rule. *See id.* at 1341. In fact, the Eleventh Circuit never ruled on the issue either. *Id.* at 1342.

44. The Advisory Committee's Notes say: "This amendment is designed to exclude evidence that does not directly refer to sexual activities or thoughts but that the proponent believes may have a sexual connotation for the factfinder." FED. R. EVID. 412(a) Advisory Committee's Notes.

preconceptions that gave rise to the need for an exclusionary rule to begin with. I hope they will come to appreciate the irony.⁴⁵

The impact of point of view arises even in the simplest of evidence rules. Rule 804 permits the admission of hearsay evidence in limited situations in which the declarant is unavailable.⁴⁶ The Rule specifies the circumstances in which there is assumed to be unavailability. That definition includes when

[the declarant] is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means. A declarant is not unavailable as a witness if . . . absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.⁴⁷

I examine these requirements using a problem drawn from a Tenth Circuit opinion, *Garcia-Martinez v. City and County of Denver*.⁴⁸

Jose Garcia sued the Los Angeles police department for police brutality after sustaining significant neck and back injuries during an arrest in east L.A. Mr. Garcia is an undocumented person from Honduras. During the litigation, the Immigration and Naturalization Service issued a deportation order. Before that order was executed, however, the Plaintiff, Mr. Garcia, gave a deposition about the events that led up to his claim of brutality. After that deposition but before the case got to trial, Mr. Garcia voluntarily surrendered to the Immigration officials rather than being subject to surprise arrest on the street or in his home. Mr. Garcia was then deported to Honduras. The defense is aware of his deportation. Despite Mr. Garcia's absence, the case proceeds.

At trial, the plaintiff's attorney seeks to offer Mr. Garcia's deposition in lieu of his testimony, relying upon Rule 804(b)(1). The defense objects.⁴⁹

I ask my students to identify the potential grounds for objection. Because it is a deposition done in the same case, they note that the objection must be based on the failure to prove unavailability. I ask the students what showing the plaintiff must make. I ask the students whether showing the deportation order would be sufficient to show unavailability. Most say yes. Some suggest that his voluntary surrender undermines his claim of unavailability. I ask if they would think he was unavailable if he had been arrested and then deported?

45. The fact that judges are as human as jurors in their inability to disregard information that is not relevant to the proceedings is empirically documented in Andrew J. Wistrich, Chris Guthrie, & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2005).

46. FED. R. EVID. 804.

47. FED. R. EVID. 804(a)(5).

48. 392 F.3d 1187 (10th Cir. 2004).

49. *Id.* at 1189–90.

I then offer the opinion. The Court did not find Mr. Garcia unavailable.⁵⁰ It said:

In applying the rule, we look at two factors to determine "unavailability." The first factor is whether the proponent was able to "procure" the witness's attendance "by process or other reasonable means." Garcia-Martinez does not literally meet this requirement since he voluntarily failed to return to Colorado for trial. The second factor looks to whether the absence is "due to the procurement or wrongdoing" of the proponent of the testimony. Garcia-Martinez also does not literally meet this requirement, since his absence at trial was calculated.

Confronting the rule's plain language, Garcia-Martinez again asks us to apply a "good faith" exception. His argument is that the absence from trial must be for the "purpose of preventing the witness from attending or testifying." Fed.R.Civ.P. 804(a). Since his absence was due to exigent circumstances beyond his control, the court should find him "unavailable" under the rule. We disagree that he is entitled to an exception on this record.⁵¹

Mr. Garcia's lawyer appears to have assumed that the deportation papers would be sufficient. They were not. I next ask the students to consider the following hypothetical:

Joe Smith is a plaintiff in a civil action seeking damages. His deposition is taken. Before the case goes to trial, Mr. Smith, a member of the Army Reserves, is put on active status and sent to Iraq. He is deployed and is not present at the time of trial. The plaintiff's attorney requests that his deposition be used in lieu of testimony. The attorney offers evidence of Mr. Smith's deployment to prove the evidentiary requirement of unavailability.

How should the court rule? Should Mr. Smith have refused to go when called and risked arrest in order to show unavailability? If Mr. Smith does not attempt to get leave to go home from Iraq, does that defeat his lawyer's claim of unavailability?

When students attempt to draw different conclusions than the court in *Garcia-Martinez*, I ask them to explain how these hypothetical facts differ from the case. This discussion is rich with attempts to make distinctions that,

50. *Id.* at 1193.

51. *Id.* In dissent, Judge Lucero criticized the narrow reading of unavailability and said: I neither agree that he procured his own absence from trial, nor that he made an insufficient showing of a good-faith effort to be available for live testimony. His absence was procured by the United States government. In August of 2000, officers of the Immigration and Naturalization Service deported Garcia to Honduras, and at all times relevant to this action, he has remained under a standing deportation order. It is true he left the country on his own after filing the present action, but the law is no less compulsory to someone who complies with its dictates under fear of reprisal than for someone who waits for the corrective power of the state to do it for him.

Id. at 1195.

when pursued, become distinctions without a difference. Most students are unwilling to require that Mr. Smith not answer to his call to activate in order to be “available,” and the requirement to show that he sought permission to leave the field of battle to prove “unavailability” seems a waste of time.⁵² It is not lost on the students that this is a circuit court opinion, presumably subject to significant thought and review. I close this discussion by asking them how this evidentiary ruling, which ends any chance of resolution of the litigation, helps move the fact-finder toward truth and fair administration of justice as required by Rule 102.⁵³

These are a few examples of problems that can be used in an Evidence course to remind students that even though the goal of the rules of evidence is to arrive at “the truth,” the truth may be a function of point of view. As critical race theory and the incidence of “driving while black” has taught me, as a white woman, my experience of seeing a police car in my tail lights is very different than a black man’s experience of the same event. Yet it is my “general” perspective that often is privileged in the rules of evidence. Thus, rules of evidence implicate deep questions of social justice. As Evidence teachers, we need to equip our students with the tools to follow the injunction of Rule 102 “that the truth may be ascertained and proceedings justly determined.”⁵⁴ Teaching Evidence as a course provides an important avenue for teaching about complexity and about how hard it is to get to the truth, how non-neutral supposed neutral rules actually are, and how attention to process as much as attention to substance can ensure that we get closer to the truth.⁵⁵ Coping with the rules of evidence requires both planning and spontaneity. It requires strategic thinking and effective oral advocacy. It requires the ability to dissect a case into its component parts, evaluate the evidence, and present the story so to expose the embedded point of view. Students who are attuned to this bring a critical analysis to their approach to law that makes them far more perceptive and, ultimately, better lawyers. More importantly, such attention creates a higher likelihood of the kind of “truth” that will result in a just outcome.

52. Students inevitably point out that it is entirely likely that the court would grant any request to delay the trial until after Mr. Smith’s tour of duty. As with many hypothetical questions, it is important not to permit the “easy out.” Because we know that Mr. Smith will eventually be back in the state legitimately, there may be a clear distinction between the two cases. This does not explain why the *Garcia-Martinez* court did not grant a continuance in order to try to procure Mr. Garcia’s presence in his case against the state.

53. FED. R. EVID. 102.

54. *Id.*

55. See generally Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241 (2002).