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LEVELING THE PLAYING FIELD: FEDERAL RULES OF EVIDENCE 412 & 415: EVIDENCE CLASS AS A PLATFORM FOR LARGER (MORE IMPORTANT) LESSONS

*By Jane H. Aiken**

Teachers often approach Federal Rules of Evidence 412 and 415 with trepidation. After all, it means that a law teacher will have to talk about sex, with a group (often a large group) of law students—many of whom are in their early twenties and have never had a non-peer conversation about sex. It looks like a recipe for disaster. Let me suggest just the opposite—it offers the law teacher an opportunity to address perhaps one of the most important lessons of law school: the law only works if there is a level playing field. Unfortunately, the fields in which the law is important are far from level. Law students often enter law school with the idea that if we could apply the rules evenly, across the board, justice would be done. Some even leave with this idea firmly in tact. Others begin to glimpse that power and powerlessness have a significant impact on how and when the law is applied. These students risk leaving law school deeply cynical, unless we offer them insight into ways in which the law can be used to address these inequities. Students expect to find these issues addressed in their civil rights class. Evidence may be the last place where students look for tools to address such societal problems. Nevertheless, evidence clearly offers a platform for these insights. In some ways, discovering how the law can reinforce powerlessness through subject matters as “benign” as evidence helps students to understand the pervasiveness of oppression. Furthermore, rules of evidence serve as useful examples of how procedural rules can be used to address important substantive issues of unfairness.

While issues of prejudice are inherent in the teaching of evidence, the “sexual character rules” add a somewhat more threatening and pointed addition to the discussion. Evidence teachers have little prob-

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lem discussing Rule 403, which requires us to discuss “unfair” prejudice. Rules 412 and 415, however, are far more proactive in dealing with prejudice.¹ These rules attempt to address some of the underlying misconceptions about sexual activity, particularly about women and sexual activity. These issues are often considered private and personal, and thus not the proper subject for discussion in large survey courses. Such issues create a certain degree of anxiety and nervousness in the class. Furthermore, beliefs about proper sexual behavior often run deep, incorporated into one’s meaning schemes without a great deal of reflection. The chance that someone could say something insensitive seems pretty high. This combination can be off-putting for the teacher. Yet it is just this kind of disorientation that opens learners to greater insight.² Given the importance of the lessons that can be learned through the study of Rules 412 and 415, teachers should embrace this teaching and learning moment.

Usually when the evidence teacher encounters Rules 412 and 415, he or she has spent a good deal of time talking about the reasons behind Rule 404: the character evidence bar. Students should, by then in the evidence course, understand that juries often tend to overvalue character evidence. Rule 404 is therefore designed to limit jury access to that information, and reflects the optimism that people should be judged for what they do, not what they have done in the past.³ The stark departure from those principles reflected in Rules 412 and 415 demands a compel-

1. I am focusing on the use of these rules in the civil context. The criminal rules, particularly 413 and 414, raise significant fairness issues when applied in the criminal context. Much of this discussion is drawn from former work that I have done in this area. See Jane Harris Aiken, *Sexual Character Evidence in Civil Actions: Refining the Propensity Rule*, 1997 WIS. L. REV. 1221 (1997); Jane H. Aiken, *Protecting Plaintiffs’ Sexual Pasts: Coping with Preconceptions Through Discretion*, 51 EMORY L.J. 559 (2002).

2. See, e.g., JACK MEZIROW, ET AL., *FOSTERING CRITICAL REFLECTION IN ADULTHOOD* (1990); PATRICIA CRANTON, *UNDERSTANDING AND PROMOTING TRANSFORMATIVE LEARNING* (1994).

3. Rule 404 states in part: “evidence of a person’s character or trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion” FED R. EVID. 404(a). The concern that underlies the rule is the risk that the fact finder will rule against a party because he or she is a bad person, regardless of the facts of the instant case. McCormick explains this concern:

[E]vidence that an individual is the kind of person who tends to behave in certain ways almost always has some value in circumstantial evidence as to how he acted . . . in the matter in question Yet, evidence of character in any form—character, opinion from observation, or specific acts—generally will not be received to prove that a person engaged in certain conduct

EDWARD W. CLEARY, *MCCORMICK ON EVIDENCE* §188, at 554 (3d ed. 1984).

ling justification. I suggest to my students that in the civil context, there are compelling reasons for the admission of sexual character evidence. In contexts in which there are allegations of sexual misconduct, jurors tend to minimize the evidence which is just the opposite of what prompts the need for Rule 404. They tend not to believe the plaintiff's story unless they have evidence that the defendant has behaved that way before.⁴ If plaintiffs are prevented from offering sexual character evidence about the alleged perpetrator, juries assume that he has never done this sort of thing before, and therefore discredit the plaintiff's claims. This response resonates from a patriarchal social system that assumes that "women get what they ask for," and if there is a swearing contest between a man and a woman about sexual misconduct, the man will be believed.⁵

The need for victim corroboration particularly arises in those sexual misconduct cases (e.g., a sexual harassment suit) where the parties know one another. Unlike other offenses, sexual misconduct cases raise the question of whether the victim consented, or "welcomed," the behavior. In sexual harassment cases, the alleged harasser often appears in the lawsuit with the added respectability of a supervisory or managerial position. One need only remember the Clarence Thomas hearings to recognize this phenomenon: there was the constant cry, "If he truly is a sexual harasser, where are the others?"⁶ Evidentiary rules that preclude introducing prior sexual misconduct reinforce the notion that the man has never before engaged in such conduct and therefore the victim's claim must be false. That presumption is in the man's favor. To combat this phenomenon, Federal Rule of Evidence 415 removes the character evidence bar for sexual assault cases. The rule "opens the door" to evidence that can counterbalance biased responses about victim credibility, thereby allowing the jury to make a more objective credibility assessment.

Employing the Federal Rules of Evidence to combat inherent juror biases makes for provocative and instructive classroom discussion. As

4. Some students intuitively agree. Others want some kind of empirical proof. Such proof exists: see Roger L. Hutchinson, et al., *Students Perceptions of Male Sexually Aggressive Behavior as a Function of Educational Level and Gender*, 30 *SEX ROLES* 407, 410 (1994); Joy A. Livingston, *Responses to Sexual Harassment on the Job: Legal, Organization, and Individual Actions*, 38(A) *J. SOC. ISSUES* 5, 6 (1982).

5. See Karen Andrews, *The Admissibility of Other-Crimes Evidence in Acquaintance-Rape Prosecutions*, 17 *S. ILL. U. L.J.* 341 (1993); Sara Sun Beale, *Prior Similar Acts in Prosecution for Rape and Child Sexual Abuse*, 4 *CRIM. L.F.* 307 (1993).

6. JANE MAYER & JILL ABRAMSON, *STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS* 324 (1994).

such, evidence teachers should not shy away from the topic. If the fact finding process' preliminary purpose is to arrive at the truth, the law must take all cultural biases into consideration. Evidentiary rules should be drafted in accordance with this objective. Lest the student (or teacher) think this is a radical thought and a misuse of the rules of evidence, Federal Rule of Evidence 412 explicitly embraces remedying fact-finder bias as its goal. The Advisory Committee states that Rule 412 is designed to "remedy stereotypical thinking in the fact finding process."⁷ As drafted, Rule 412 substantially limits what had become a typical defense used in sexual harassment cases. The rule thwarts the attempt to imply that "she invited it." Juries should no longer be treated to lurid stories about the plaintiff's alleged sexual exploits.⁸ Without such tales, juries can evaluate a claim of sexual misconduct unhampered by that bias. Thus, the same concerns that motivated the admission of evidence under Rule 415 justify the exclusion of evidence under Rule 412.

The notion that "playing fields are level" often leads students toward a blind insistence on symmetry in all rules. Asymmetry is treated as synonymous with unfairness. It will undoubtedly be argued that Rules 412 and 415 "stack the deck" in the plaintiff's favor. Rule 415 says that prior sexual misconduct is relevant and probative of behavior on the present occasion. Rule 412's rationale is that a woman's sexual history is not a good predictor of her present behavior. This apparent asymmetry creates a chance to engage students in a discussion of symmetry and compelling reasons for not having it. Rather than relying on surface notions of apparent fairness, students can engage in a substantive analysis of why different rules might be appropriate. This analysis facilitates a deeper understanding of the rules of evidence and provides larger lessons about how law operates in a society in which bias is embedded.

7. The Advisory Committee Note to the 1994 amendment states:

The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the fact finding process. By affording victims protection in most instances the rule also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders.

FED. R. EVID. 412 Advisory Committee Note (pertaining to the 1994 amendments).

8. Ellen E. Schultz & Junda Woo, *The Bedroom Ploy: Plaintiff's Sex Lives Are Being Laid Bare in Harassment Cases—Defense Lawyers Use Tactic To Counteract Litigants As Suits Get More Costly—What Evidence Is Irrelevant?*, WALL ST. J., Sept. 19, 1994, at A1.

Professors can help students move from the surface analysis toward the basic underlying policy reasons for these rules. It is through this deep understanding that the student can find that such symmetry may indeed be found when analyzing Rules 412 and 415: they are both geared toward reducing fact finder bias. Rule 412 does not rest on the assumption that sexual character evidence is irrelevant in predicting present behavior. It is premised on the idea that courts should not tolerate wholesale attacks on the sexual character of a person to encourage the fact finder not to believe that person. It is designed to undercut the bias that jurors bring to the fact finding process. Rule 415 is an important companion to Rule 412. It is also concerned with fact finder bias. Instead of precluding evidence that invites bias, Rule 415 ensures that the rules of evidence do not preclude evidence that would counteract bias. Rules 412 and 415 can be used to cleanse the fact finding process of biases that have reinforced the asymmetry of power and powerlessness in matters of sex. Both of these rules assist the trier of fact in focusing on the behavior of the alleged perpetrator, rather than indulging in stereotypical beliefs that women cannot be believed when making claims of sexual misconduct. The result is a powerful tool to combat long-held stereotypes that have infected sexual misconduct cases, including that the victim either invited the treatment, or deserved it, or is not to be believed without sufficient corroboration.

Discussion of Rule 412 allows evidence teachers to teach students about the importance of discerning the assumptions that drive the law. Rule 412 is particularly instructive in creating an avenue to explore assumptions about judicial decision making. Rule 412's civil application allows teachers to ask the students to identify what the assumptions were that prompted the need for the rule. Students will often mention that cultural stereotypes give evidence of a victim's sexual behavior or predisposition more weight than is appropriate. Precluding this evidence has the effect of barring the invitation to engage in stereotypical and gender-biased thinking. Identifying these assumptions is extremely important. However, teachers would be amiss if they did not note that the drafters have made certain debatable assumptions about judges. The rule requires the judge to determine if the "probative value substantially outweighs the danger or harm to any victim and unfair prejudice to any party."⁹ In other words, evidence of sexual behavior or predisposition is likely to be inappropriately weighted by jurors, but the law assumes that judges are not affected by these cultural stereotypes that affect the

9. FED. R. EVID. 412(c).

weight. This irony is fodder for a great conversation about the role of the judge in evidence determinations.

Evidence is not just a course in learning rules about how a trial is conducted. The course offers teachers a chance to discuss justice, fairness and the problem of bias that infects everyone, including judges, in our culture. Law students should give a good deal of thought to these questions before they leave law school. As law teachers, we should have some obligation to engage the students in this discussion and offer examples of ways in which such bias can be countered. More importantly, as teachers, we should make sure that students leave law school with some idea of how the law can reinforce power and powerlessness and how the even-handed application of the law may not suffice if we are truly interested in justice. Teaching Rules 412 and 415 opens the door to these insights and suggests ways in which the law can play a role in remedying societal bias. Evidence teachers should embrace the opportunity and not shy away. They offer unique opportunities for thoughtful, provocative, and necessary lessons.