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Bergman, Paul

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TEACHING EVIDENCE THE “REEL” WAY

*By Paul Bergman**

The following essay is the author’s summary (and extension) of the presentation he gave at the Association of American Law Schools (AALS) Conference on Evidence in Alexandria, Virginia, on June 1, 2002. The author’s lame jokes are omitted in the interests of maintaining law review decorum.

I. INTRODUCTION

Popular culture is an increasingly useful prism through which to study social and cultural issues. In particular, popular legal culture provides important insights into widely held attitudes and beliefs about law, lawyers, and legal processes. For example, films almost always depict lawyers who work in large corporate firms as evil, greedy, and corrupt.¹ Even though such films are intended as entertainment rather than social commentary, the frequency of that depiction is evidence that it strikes a responsive chord with audiences’ general beliefs.

This presentation concerns a narrower use of popular legal culture. Rather than analyzing the social meaning of law in film, the discussion below considers the effective classroom use of scenes from law-related films in an Evidence course.² Lawyers and courtroom trials have been fodder for countless films,³ and scenes from such films can serve as excellent “texts” for illustrating evidentiary doctrine and presenting problems for classroom analysis. Of course, films almost always dramatize or even parody actual legal relationships and proceedings.

* Professor of Law, UCLA School of Law.

1. See Michael Asimow, *Embodiment of Evil: Law Firms in the Movies*, 48 UCLA L. Rev. 1339 (2001).

2. Use of film clips as described in this essay does not involve any infringement of rights under the copyright law. The United States Code provides that “fair use” of a work, including using a work for teaching purposes, is not an infringement of copyright. See 17 U.S.C. § 107.

3. For descriptions and analyses of many of the most notable courtroom films, see PAUL BERGMAN & MICHAEL ASIMOW, *REEL JUSTICE: THE COURTROOM GOES TO THE MOVIES* (1996).

However, this increases students' engagement with the texts without detracting from film clips' usefulness as teaching devices.⁴

II. ADVANTAGES OF TEACHING WITH FILM CLIPS

Perhaps the strongest rationale for using film clips is that they are an efficient and involving method of providing context for the application of evidence rules. Teaching Evidence to students who lack understanding of the trial process is like teaching "the crawl" to someone who has no idea what a swimming pool or other body of water looks like. Film clips depict problems and process simultaneously, and thus provide a level of understanding that the reading of appellate case opinions does not.⁵ Moreover, film clips help train students' ears, as well as their eyes, and thereby promote students' abilities to recognize evidentiary issues as they arise in the oral courtroom process.

Film clips are also useful teaching texts for a variety of other reasons:

- * Since most clips used in an Evidence class are no more than a few minutes in length, they can be easily shown and analyzed in the same class.

- * Clips provide all students with the same "data base." By contrast, when discussion is based on appellate court opinions, for example, it is unlikely that all students will be equally familiar with the cases.

- * Diversity of classroom activities is itself of value for motivating students, and film clips are a method of expanding the variety of classroom activities.

- * The use of clips tends to extend the "shelf life" of law school

4. While today's discussion focuses on clips from commercial films, other forms of film texts are available to Evidence teachers. For example, the daily television schedule is replete with both actual trials and dramatic series featuring law-related themes, and these programs can be recorded and selected portions shown in class. Evidence teachers need not commit themselves to a lifetime of television viewing in order to find segments of programs to serve as useful legal texts. For example, CourtTV, a service of Time-Warner Entertainment and Liberty Media Corporation, currently televises actual trials, and often makes selected portions of trials available for purchase. Moreover, students often record law-related television programs, and if they are aware that an instructor likes to show clips in class, will often excitedly bring copies of programs with interesting evidentiary problems to the instructor.

5. Role-play exercises are another method by which instructors can intermingle problems with process. Advantages of film clips compared to role-plays is that the former are shorter and typically more engrossing. However, both have legitimate uses in Evidence courses.

teaching. Outside of law school, students are consumers of popular legal culture. Students who study and analyze law-related scenes in the classroom tend to do the same thing when they watch and discuss law-related films outside of class.

* Evidence teachers often talk in class about how litigators use visual exhibits such as photographs and computer reenactments to engage jurors and add to the persuasive force of arguments. Thus, Evidence teachers can practice what they preach by incorporating visual media such as film clips into the classroom.

* Law-related films are a primary source of information about the legal system for most lay people. Helping students to become sophisticated consumers of popular legal culture will help them understand and relate to the attitudes of clients, witnesses, jurors, and other non-lawyers with whom they will interact professionally.

* Many law school classrooms are equipped for videotape playback, so using this teaching method should be easy even if an instructor's technological skills are no more advanced than those of the author.

III. TEACHING PURPOSES OF FILM CLIPS

Undoubtedly, the primary purpose for which Evidence instructors are likely to show film clips is to present evidentiary issues for classroom analysis. That is, the most effective clips do not simply illustrate the introduction of various forms of evidence, such as hearsay that constitutes a party admission. Instead, or in addition, clips should present evidentiary problems. For example, a clip of a courtroom scene may depict a lawyer eliciting testimony concerning an out-of-court statement, followed by the adversary's hearsay objection and a judge's ruling sustaining or overruling the objection. The issue for classroom discussion would focus on the propriety of the ruling. Used for this purpose, a clip is simply a dramatic and entertaining method of presenting an issue that might also be presented through an appellate case or short problem. However, instructors may show clips for other reasons, including the following:

* *Illustrating courtroom techniques.* The ubiquitousness of popular legal culture probably means that all students are generally familiar with trial processes. However, using a scene from a courtroom film is an effective method of illustrating discrete and lesser-known aspects of the trial process, especially those that relate to evidentiary issues. For example, an instructor might show a clip depicting the

marking and offering of an exhibit and a hearing concerning the sufficiency of the foundation for the exhibit.⁶ The use of clips in this manner can be particularly advantageous for instructors who ask students to participate in classroom role-play exercises. But even if students will not take part in role-play exercises, film clips illustrating courtroom procedures can provide a visual context that in turn facilitates students' understanding of the principles governing Evidence law.

* *Analyzing ethical issues related to evidentiary principles.* For example, an instructor might ask students to consider the ethical propriety of an attorney's pretrial witness preparation.⁷ While an instructor might alternatively ask students to read the transcript of a witness preparation meeting, a clip depicts visual and auditory information that may influence the ethical propriety of an attorney's conduct that can't be obtained from a "cold transcript."

IV. PRACTICAL SUGGESTIONS FOR USING CLIPS EFFECTIVELY

Despite their advantages, film clips are as capable of being over-used as any other teaching method. Even an avid devotee of film clips is unlikely to average more than one clip every two classes. In the usual 50-minute class format, one clip ordinarily suffices, and rarely will it be possible or advisable to show more than two clips.

Even if most students have seen the film from which a clip is taken, instructors should lay the groundwork for post-clip analysis by providing information that enables the students to understand what the scene depicts. For example, if a scene depicts testimony concerning an out-of-court statement, and the instructor wants the students to decide whether it constitutes hearsay, the students need to know enough about the story to understand the declarant's identity, and the purpose for which the testimony is offered.

6. The clip shouldn't be "self-authenticating," to stay with evidentiary jargon. That is, the instructor should explain and amplify on whatever the clip depicts, and invite student comments and questions.

7. One such scene that an instructor may use comes from the film *THE VERDICT* (20th Century Fox 1982). The scene depicts defense attorney Concannon preparing a defendant, an allegedly negligent anesthesiologist, for testimony. Concannon's preparation probably comports with ethical rules, though he seems to be padding the bill by having a slew of associates watch the preparation session. The famous "lecture" scene from *ANATOMY OF A MURDER* (Columbia Films 1959) is another possibility, though perhaps less well suited to an Evidence course because it is not immediately courtroom-related. The lecture scene depicts a criminal defense attorney whose client is charged with murder leading the client towards an insanity defense.

An instructor who plans to call on a student to analyze a clip's contents should normally identify the student before, and not after, showing the scene. This procedure is fair to the student, and increases the likelihood of a well-thought out response. An instructor might also identify the issue that the student will be expected to discuss. For example, an instructor may say something along these lines: "The attorney's final question elicits the witness' opinion, and what I want to know from you is whether you think the witness should have been allowed to testify to that opinion." Alternatively, the instructor may wish to make the clip available before class to the student who will be called on to analyze its content. Or, instead of asking an individual student to comment on a scene, the class could be divided into small groups of, say, prosecutors and defense attorneys. Having given them time for discussion, the instructor could then ask representatives of the groups to present arguments concerning such matters as the admissibility of evidence or the ethical status of an attorney's behavior.

At present, the most commonly-available method for showing movie scenes is to play a VHS videotape on a VCR, with the picture shown either on a TV monitor or, in larger classrooms, projected onto a screen.⁸ To facilitate the ability to incorporate film clips in classes, Evidence instructors should consider the following steps:

- * Ask the school's law librarian to begin (or expand upon) a collection of law-related films.

- * Purchase (or better yet, ask the law school to purchase) a small combination TV/VCR for your office, so that you can locate a scene you want to use in the convenience of your office.⁹

- * Copy a clip that you anticipate using regularly onto a separate tape. You will then have the scene readily available without having to search an entire film for the desired scene each time you show it.

8. Most law school classrooms now have the capacity for showing videotapes. As technology advances, clips may be shown via computer, DVD, or other formats, not all of which may be generally available in law school classrooms for some time.

9. Thirteen-inch TV/VCR units are now commonly available for less than \$200. If your law school provides financial support for faculty teaching and research, a TV/VCR should be an appropriate expenditure.

V. SELECTED FILM SCENES¹⁰

To make this discussion of using film clips as legal texts more concrete, I discuss below a number of clips that I used in my Evidence course in Spring 2002.¹¹ As in the selection of other legal texts such as appellate court opinions and problems, however, flexibility is a key to effective teaching. My selection of clips, both in content and number, changes from one course to the next based on such factors as my teaching interests, topics that seem of particular concern to students, and current evidentiary issues. Consequently, the clips set forth below are examples only, and other instructors' selections of clips may be very different.

A. Principles of Relevance

Background: Determinations of relevance are based on experience rather than on abstract principles of logic.¹² Demonstrating the connection between an attorney's factual argument and jurors' experiences helps students appreciate the importance of their pre-law school accumulation of knowledge to their understanding of evidentiary principles.

*Clip: "My Cousin Vinny"*¹³ - In this brilliant legal comedy, inexperienced lawyer Vinny arrives in the deep South to represent his cousin and a friend, both of whom are mistakenly accused of robbing a convenience store and killing the clerk. The scene depicts Vinny's cross-examination of a prosecution witness who testified that the defendants ran out of the store five minutes after they entered it, and that he can remember how long the defendants were in the store because they entered it when he started cooking his breakfast and ran out of the store when he sat down to eat.¹⁴ Vinny destroys the witness' estimate of

10. The clips included in this section were shown and discussed at the Association of American Law Schools Evidence Conference on Evidence in Alexandria, Virginia, on June 21, 2002.

11. Altogether, I showed a total of about twenty clips in this course, which had forty-four class meetings of fifty minutes each.

12. See, e.g., 2 MCCORMICK ON EVIDENCE 278-79 (John W. Strong ed., 5th ed. 1999) ("Yet, how can a judge know whether the evidence could reasonably affect an assessment of the probability of the fact to be inferred? [O]rdinarily, however, the answer must lie in the judge's personal experience, general knowledge and understanding of human conduct and motivation.")

13. MY COUSIN VINNY (20th Century Fox 1992).

14. The significance of the short time period to the prosecution is that it

time by eliciting testimony that the witness had eggs and grits for breakfast and pointing out that grits have to be cooked for twenty minutes, not five minutes.

Analysis: The jurors' disbelief of the witness' five-minute time estimate rests on their personal experience as regular preparers and consumers of grits. As grits are a staple of southern cuisine, Vinny can reasonably expect the jurors to realize that the witness' time estimate is mistaken, and that the events actually transpired over a twenty minute period of time. By contrast, jurors living in other parts of the country might know very little about cooking grits, so Vinny might have had to call an expert witness to provide this information.¹⁵

B. Bases of Expert Testimony

Background: Expert testimony is usually complex, with the general foundational principles underlying expert testimony often hidden beneath the intricacies of a specific field of expertise. One useful approach for explaining general foundational principles is to distinguish "major" from "minor" premises. Major premises are an expert witness' stock-in-trade, the scientific or technical knowledge that an expert brings to a case.¹⁶ Minor premises are items of case-specific evidence, which an expert may know from first-hand knowledge, or of which an expert may be informed by the parties.¹⁷ Experts typically arrive at opinions by evaluating minor premises in the light of major

undermines a defense argument that two different people entered the store and committed the crime after the defendants left.

15. As is often the case, instructors might use this clip to illustrate a variety of other points. For example, while Vinny's point is valid, his questioning technique is suspect, since he asserts that cooking grits takes twenty minutes. On the other hand, the clip also depicts an excellent cross-examination tactic often called "closing the door." Before making his argument explicit, Vinny has the witness admit that he used "regular" rather than "instant" grits, and that he likes grits cooked the "regular" way. By establishing these points before making his argument explicit, Vinny eliminates possible explanations that might have undermined his argument. Finally, the last portion of the clip is relevant to a discussion of the "collateral evidence rule," which provides that extrinsic evidence is admissible to impeach a witness only if the impeachment relates to an important issue. See 2 MCCORMICK, *supra* note 12, at 70. Students should realize that while in the abstract the cooking time of grits does not seem important to a murder trial, the witness' testimony makes it a crucial item of evidence. Had the witness insisted that his grits cooked in five minutes, Vinny might have decided not to rely on the jurors' experiences and offered extrinsic evidence of the cooking time of grits.

16. STEVEN I. FRIEDLAND, ET AL., EVIDENCE LAW AND PRACTICE 238 (2002).

17. *Id.*

premises.¹⁸

*Clip: "My Cousin Vinny"*¹⁹ - After qualifying as an expert witness on "automotive mechanics," Vinny's fiancée, Mona Lisa Vito, testifies that the defendant's car could not have made the tire marks left outside the convenience store as a result of the killers' car speeding off.

Analysis: Though distinguishing between major and minor premises can help students understand the role of expert testimony, the terms themselves may be off-putting because they are abstract and more reminiscent of logic than experience. This scene can help students realize that they are quite capable of distinguishing evidence that comports with one type of premise from evidence that comports with the other. After showing the scene, an instructor may ask students to organize themselves into small groups and make lists of "major premise" and "minor premise" evidence. For example, Mona Lisa Vito's testimony that "Positraction was not available on 1964 Buick Skylarks," and that "Positraction is limited slip differential that distributes power equally to both tires" is technical knowledge that she brings to the case, and thus constitutes major premises. On the other hand, her testimony that the "tire marks on the road were of equal length" and that "the right tire mark stays flat and even when the left tire mark goes up on the curb" are items of case-specific evidence that constitute minor premises. She arrives at her opinion by describing the significance of the minor premises to the major premises.

C. Admissibility of Demonstrations

Background: Parties may seek to bolster or attack a witness' credibility by offering evidence of a demonstration or experiment whose results are consistent or inconsistent with the witness' testimony. The admissibility of a demonstration or experiment often depends on whether the conditions under which it was conducted are "substantially similar" to those that existed when the actual events took place.²⁰

*Clip: "Criminal Court"*²¹ - Defense Attorney Steve Barnes' client

18. *Id.* at 238-41.

19. *See supra* note 13.

20. *See* 2 MCCORMICK, *supra* note 12, at 344 ("Thus, where the film or tape appears to present a replication of the original event it will generally be required that the experiment be conducted under substantially similar circumstances.").

21. CRIMINAL COURT (RKO 1946). This movie may not be commercially available, but it does air occasionally on television, especially on channels dedicated to older films, such as American Movie Classics and Turner Classic Movies.

is on trial for murder. The prosecution eyewitness testifies that he stood next to the victim and watched as the defendant approached the victim, pulled out a gun, and fired. Unable to shake the witness' story on cross-examination, Barnes becomes increasingly frustrated and angry. He accuses the witness of perjury and the D.A. of knowingly presenting false testimony in order to further the D.A.'s political ambitions. Shouting that he will "take justice into [his] own hands," Barnes pulls a gun from his jacket pocket. The witness and everyone else in the courtroom, jurors included, dive for cover. Barnes walks to the jury box and asks the jurors to observe the witness cowering behind the witness chair. The witness' actions upon seeing him wave a gun around, argues Barnes, demonstrates that he did not "stand calmly by and watch the murder take place." The jury finds Barnes' client not guilty.²²

Analysis: Under Federal Rule of Evidence (FRE) 403, the admissibility of Barnes' experiment depends on whether its probative value is substantially outweighed by dangers of confusion and unfair prejudice.²³ Probative value, in turn, requires "substantial similarity" between the actual events and the in-court demonstration. Reasonable arguments for and against admissibility are possible. For example, a similarity is that in both instances a gun confronted the witness; a dissimilarity is that unlike in the actual event, the attorney's pulling out the gun was preceded by angry words. The possibility of reasonable opposing arguments makes this scene a good opportunity for an instructor to divide students into teams of prosecutors and defense attorneys, and give them a few minutes to develop and present arguments to a student assigned to act as judge.²⁴

D. The Hearsay Rule

Background: The hearsay rule is typically the backbone of an Evidence course. One of the more difficult hearsay concepts is that admissibility may turn on whether an out-of-court statement is relevant

22. For a discussion of other courtroom demonstration scenes, many of which raise similar legal issues to the experiment in *CRIMINAL COURT*, see Paul Bergman, *Pranks for the Memory*, 30 U.S.F. L. REV. 1235 (1996).

23. FED. R. EVID. 403.

24. The cross-examination tactic depicted in the clip was not entirely the product of a screenwriter's fanciful imagination. The scene is based on a tactic employed by Earl Rogers, a well-known litigator in the early part of the 20th century. For more information about the actual case in which Rogers used this tactic, see *FINAL VERDICT* (Doubleday & Co., Inc. 1992), a biography of Earl Rogers written in 1962 by his daughter, Adela Rogers St. Johns.

for something other than “the truth of the matter asserted.”²⁵

*Clip: “The Good Mother”*²⁶ - The scene depicts a hearing in which a divorced father seeks to wrest custody of his young daughter away from his ex-wife. The father is remarried and the mother has a live-in boyfriend, Leo. The father testifies to his daughter’s unusual interest in sexual matters, and then the father testifies to an out-of-court statement she made to him. He testifies that while he was in the bathroom and wearing only a towel, his daughter came in asked him to “let me see it,” and also said that “Leo lets me see his penis.” The mother’s attorney makes a hearsay objection, which the judge sustains. The judge admonishes the father’s attorney, “you know better than (to try to offer that evidence).”

Analysis: Despite the judge’s severe scolding of the father’s attorney, the daughter’s statement is admissible for a non-hearsay use. Regardless of whether the daughter’s statement about Leo is accurate, the fact that she made the statements is itself evidence that living with the mother was not a good situation. The judge can reasonably infer from her making the statements that the daughter had been exposed to inappropriate sexual information and situations.²⁷

E. Character Evidence: Character as a Material Fact

Background: The admissibility of character evidence often depends on the purpose for which it is offered.²⁸ Evidence rules are the least restrictive on admissibility when character is a material fact. Character is not a material fact in most criminal or civil cases, but it is in child custody cases.²⁹

25. See FED. R. EVID. 801(c).

26. THE GOOD MOTHER (Warner Bros./Touchstone Pictures/Silver Screen Partners 1988).

27. JAGGED EDGE (Colombia Pictures 1985) also has a useful scene for hearsay analysis. In that film, a husband is on trial for the murder of his wealthy wife. The prosecution’s theory is that he killed her to prevent a divorce that would destroy his social and economic status. Virginia Howell, a prosecution witness who was very friendly with the wife, testifies that shortly before the wife was killed, the wife told Virginia that “my husband doesn’t love me, he’s been seeing other women, I’m going to divorce him.” The defense makes a hearsay objection, and the judge admits the statements for “state of mind.”

28. All three forms of character evidence (reputation, opinion and specific acts) are admissible for a relevant character trait when character is an “essential element of a charge, claim or defense.” FED. R. EVID. 405(b).

29. See 2 MCCORMICK, *supra* note 12, at 282.

*Clip: "Kramer vs. Kramer"*³⁰ - After abandoning her family to "find herself," a mother returns eighteen months later and seeks to take legal custody of her six-year-old son from her now ex-husband. The scene depicts the cross-examination of the father by the mother's attorney. The attorney questions the father about a number of incidents which had taken place while the son was in his sole custody, including the son's falling off a swing set and incurring a permanent scar, and the father losing one job and taking another at a much lower salary. At the scene's conclusion, the mother's lawyer asks the father whether in his own opinion he has a bad temper, then withdraws the question.

Analysis: The cross-examiner primarily focuses on specific acts that involve a range of character traits, including attentiveness, responsibility and earning capacity. This is consistent with the broad scope of a child custody case because almost any trait of character can be relevant to a determination of a child's best interests. The evidence is admissible because it is not offered as proof that the father engaged in specific conduct, but rather because it tends to show the kind of person he is. Though the mother's attorney withdraws the question, the father probably could be asked for his opinion of his own propensity to lose his temper.

F. Character Evidence: The "Mercy Rule"

Background: Character evidence for a relevant character trait is also admissible when offered by a defendant in a criminal trial to prove that the defendant is not the type of person who would have committed the charged crime.³¹

*Clip: "Bananas"*³² - In this spoof, Fielding Mellish is charged with treason for participating in anti-Vietnam War demonstrations before going to South America and taking part in a successful revolution. A witness apparently called by the prosecution testifies that Mellish is a "warm, wonderful human being." When the self-represented Mellish asks the court reporter to read back the favorable testimony, the reporter reads, "Mellish is a dirty, rotten, conniving little rat."³³

Analysis: While this scene may primarily provide comic relief, evidence of Mellish's good character is potentially admissible to rebut the charge that he is a traitor. However, the testimony that he is "warm

30. KRAEMER VS. KRAEMER (Colombia Pictures 1979).

31. FED. R. EVID. 404(a)(1).

32. BANANAS (United Artists 1971).

33. Perhaps Evidence instructors need to spend more time on this courtroom risk?

and wonderful” is probably irrelevant to the issue of whether Mellish is the kind of person who would have committed treason. The scene can also help to explain why criminal defendants generally do not offer “mercy rule” evidence. If the character witness is simply a personal acquaintance of little repute (as in the clip), such evidence is unlikely to carry much weight. Moreover, as in the clip, mercy rule evidence tends to be brief and conclusory. In light of the limited benefits compared to the risks of mercy rule evidence opening up their own characters to counter-attack by prosecutors,³⁴ few defendants offer mercy rule evidence.

G. Character Evidence: Impeachment With Prior Acts and Convictions

Background: Character evidence is also potentially admissible to attack a witness’ credibility. Subject to judicial discretion, a cross-examiner can ask about misdeeds that bear on truthfulness but did not result in a conviction, but cannot offer extrinsic evidence of the misdeeds if the witness denies their occurrence.³⁵ Prior convictions can be admissible to impeach a witness’ credibility,³⁶ and if they involve crimes of dishonesty are automatically admissible.³⁷

*Clip: “Anatomy of a Murder”*³⁸ - Lt. Manion is charged with murdering Barney Quill. Manion admits killing Quill, but claims that he was temporarily insane (acted under an uncontrollable “irresistible impulse”) after learning that Quill had raped and beaten Manion’s wife. The prosecutor calls a jailhouse snitch, who testifies that Manion had told him that he (Manion) had deceived his lawyer and the jury and intended to beat up his wife after being acquitted of murder. On cross, the defense attorney attacks the snitch’s testimony with a variety of misdeeds, including the snitch’s having served three prison terms for arson, one term for assault with a deadly weapon, and one term for larceny. The witness had also been in jail on charges of indecent exposure, window peeping, perjury, and disorderly conduct.

Analysis: The prison sentences presumably followed felony convictions. Larceny is a crime involving dishonesty and thus is automatically admissible. Questioning and evidence regarding the other

34. See FED. R. EVID. 404(a)(1) (“or by the prosecution to rebut the same.”).

35. See FED. R. EVID. 608(b).

36. See FED. R. EVID. 609(a)(1).

37. See FED. R. EVID. 609(a)(2).

38. ANATOMY OF A MURDER (Colombia Pictures 1959).

felony convictions is admissible subject to judicial discretion. The snitch's jail time could have been the result either of simply arrest or of conviction of misdemeanors. If the snitch had been convicted of perjury, that too is automatically admissible regardless of whether it constituted a felony or a misdemeanor. The questions referring to arrests or convictions for indecent exposure, window peeping, and disorderly conduct are improper. Arrests may not be inquired into at all, and most of the acts themselves, or even convictions, would be improper because the acts do not involve dishonesty.³⁹ Subject to judicial discretion, however, the defense attorney could cross-examine about the perjury incident even if it did not result in a conviction, since perjury involves dishonesty.

H. Lay Witness Opinions

Background: An opinion by a lay witness is potentially admissible if the opinion is based on the witness' personal observations⁴⁰ and in the judge's view would be helpful to the trier of fact.⁴¹

Clip: "Let Him Have It"⁴² - London police officers intercept two would-be warehouse burglars, ages 19 and 16. The younger culprit pulls out a gun and an unarmed police officer asks him for it. The older culprit shouts, "let him have it." The younger one instead begins firing, wounding one police officer and killing another. Both culprits are charged with murder. At trial, the wounded police officer testifies to the older defendant's statement prior to the shooting. Asked by the prosecutor what the statement "let him have it" meant, the officer testifies that it meant, "start shooting."

Analysis: Judges have broad discretion with respect to the admissibility of opinions. Factors supporting admissibility here include the officer's personal participation in the events and the difficulty of conveying subtle shades of meaning in the absence of the opinion. Factors detracting from admissibility include the impossibility of the officer knowing the speaker's intent and the potential for unfair prejudice when a wounded officer testifies to the events leading to the killing of a

39. SUSPECT (Columbia/Tri-Star Pictures 1987) also has a useful scene for admissibility of prior misdeeds. That scene depicts a prosecutor's cross-examination of a defendant charged with murder.

40. FED. R. EVID. 602.

41. FED. R. EVID. 701.

42. LET HIM HAVE IT (First Independent/Vivid/Le Studio Canal Plus/British Screen Pictures 1991).

companion police officer. On balance, the opinion should not have been admitted, but this is a suitable scene for small group development of competing arguments.⁴³

I. Defense Psychiatrists and the Ultimate Opinion Rule

Background: The Federal Rules of Evidence abolished the common law rule that forbid expert opinion testimony concerning a dispute's "ultimate issue."⁴⁴ However, Congress resurrected the limitation with respect to expert witnesses testifying to criminal defendants' mental states. Expert testimony as to a criminal defendant's mental condition that constitutes an element of a crime or a defense is inadmissible.⁴⁵

*Clip: "Anatomy of a Murder"*⁴⁶ - To support Lt. Manion's claim that he was temporarily insane when he shot and killed Barney Quill, the defense presents an army psychiatrist who examined Manion after the shooting. The psychiatrist testifies that Manion was "temporarily insane" at the time of the shooting. He also testifies that Manion suffered from "dissociative reaction" at the time of the shooting, a popular term for which is "irresistible impulse."

Analysis: Despite the limitation in FRE 704(b), criminal defendants

43. The film is based on the famous 1953 London trial of Bentley (the nineteen year old) and Craig (the sixteen year old). The trial gained notoriety not only because a police officer was killed, but also because Bentley had suffered brain injuries during the bombing of London and had a limited ability to understand what he was doing. Bentley's defense was that he never uttered the fateful words which the prosecution offered to prove that he had incited the shooting. Bentley's attorney argued in the alternative that even if he did make the statement, he may only have been telling Craig to hand his weapon over to the police. The jury convicted both Bentley and Craig but recommended mercy for Bentley. Nevertheless, the judge sentenced Bentley to death, the only such sentence ever handed down following a recommendation of mercy. Despite massive protests, the sentence was carried out. Craig, the actual shooter, was too young to execute and so he received a ten-year prison sentence. After Bentley was executed, his family, and particularly his sister Iris, continued to try to clear his name. In the 1990s, the British government formally apologized for executing a mentally deficient person. Some years later, the police files on the case were opened to public inspection, which revealed that Bentley never said "let him have it." The police officer committed perjury in order to convict a defendant who was eligible for capital punishment. The uproar over the Bentley-Craig case was one of the reasons that England outlawed capital punishment in 1965. (Because courtroom films are often based on actual events, another advantage of film clips is that they show the impact of Evidence rules on actual cases.)

44. 2 MCCORMICK, *supra* note 12, at 22.

45. See FED. R. EVID. 704(b).

46. ANATOMY OF A MURDER (Columbia Films 1959).

are often able to offer a significant amount of expert testimony concerning their mental states. To some extent, what the rule forbids is crassness, meaning that a defendant cannot offer expert testimony that parrots the exact legal language that constitutes a charge or a defense. Under this interpretation, the rule would probably render improper the psychiatrist's testimony that Manion was temporarily insane. A broader interpretation of the rule might also prevent the doctor from testifying that "Manion was under the influence of dissociative reaction at the moment of the shooting." However, the doctor could testify that Manion suffered from dissociative reaction, because that is a medical diagnosis and not a legal judgment. The doctor could also testify that irresistible impulse is a popular name for dissociative reaction.

J. The Rape Shield Law

Background: Reversing many years of common law practice, the rape shield rule bars character evidence concerning the prior sexual behavior of a sexual assault victim.⁴⁷ The topic obviously must be dealt with sensitively in the classroom. Appellate court opinions, problems, and film clips should be selected with regard to the potential feelings and past experiences of students, and classroom discussions should be thorough but respectful.

Clip: "Anatomy of a Murder"⁴⁸ - The prosecution's factual theory is that the victim, Barney Quill, did not rape Mrs. Manion; rather, they were lovers. Manion found out about the affair and killed Quill in a jealous rage. Testifying on direct examination, Mrs. Manion denies that she had an affair with Quill and insists that Quill raped her. The scene for analysis depicts part of the prosecutor's cross-examination. He elicits evidence from Mrs. Manion that she had previously been married, that she married Manion three days after her divorce was final (defense counsel volunteers this information) and suggests, therefore, that she must have known Manion before her divorce.

Analysis: The scene offers students an opportunity to consider a number of less-than-obvious rape shield issues. The prosecutor does not refer to any overt sexual behavior by Mrs. Manion; rather, he asks about her divorce and when she began dating Lt. Manion.⁴⁹ However, FRE

47. FED. R. EVID. 412(a).

48. See *supra* note 46.

49. Later on in the same cross-examination, the prosecutor is more explicit. For example, he asks Mrs. Manion whether it is her practice to wear panties when she leaves

412 refers broadly to “other sexual behavior,” and the context in which the questions are asked suggests that the prosecutor is attacking Mrs. Manion’s sexual character. The subtle suggestion is that she cheated on her first husband, and therefore may have been cheating on Manion. Nevertheless, the questions would probably not be barred by FRE 412.⁵⁰ By its terms, FRE 412 applies only in proceedings “involving alleged sexual misconduct.”⁵¹ As this is a murder trial, it seemingly does not involve sexual misconduct.⁵² If it did, however, Mrs. Manion would be protected even though she is not the complaining witness because the rape shield rule protects “any alleged victim.”⁵³

K. The Original Writing (“Best Evidence”) Rule

Background: The original of a writing is generally required to prove its contents.⁵⁴ Subject to a variety of exceptions, secondary evidence (including written copies and oral testimony) is generally

the house alone at night. This portion of the cross is less useful both because it is more likely to cause discomfort in the classroom, and because it would obviate the subtle analysis that the earlier portion generates.

50. However, a judge might bar the question under FRE 403, particularly since the events took place some years earlier.

51. FED. R. EVID. 412(a) (“The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct.”).

52. A more liberal interpretation of the rule would apply FRE 412 to any questions raising a witness’ character for sexual behavior, on the ground that the case then “involves sexual misconduct.” However, this interpretation would render the limitation in FRE 412 superfluous; every case could potentially involve sexual misconduct.

53. Another scene that can usefully be shown in connection with a rape shield law discussion is from the film *TOWN WITHOUT PRY* (MGM/UA 1961). The scene depicts in a not-too-graphic way the kind of cross examination that was common before the enactment of the rape shield law. Four soldiers stationed in Germany are accused of participating in the rape of a young German woman; the defense is consent. Cross-examining the young woman, the defense lawyer elicits evidence that she had undressed and exercised in front of an open window where a neighbor could see her, and that she had let her boyfriend see her naked. The defense attorney’s desired inference (that she has a propensity to engage in sexual behavior and therefore consented to sex with the soldiers) is barred by the rape shield law. Another potentially useful scene is in a very mediocre 1997 made-for-television movie called *INDEFENSIBLE: THE TRUTH ABOUT EDWARD BRANNIGAN* (Carla Singer Productions/Hamdon Entertainment/Joe Cacaci Productions 1999). Brannigan is a well-known lawyer who is charged with raping a female associate; the defense is consent. To impeach the associate’s credibility, the defense offers evidence that she had previously had a child out-of-wedlock, and lied about the father’s identity on the birth certificate. The prosecution objects that the evidence is barred by the rape shield law; the defense contends that it is admissible under FRE 608 as an act of dishonesty.

54. FED. R. EVID. 1002.

inadmissible to prove a writing's contents.

*Clip: "The Verdict"*⁵⁵ - In a medical malpractice case, the key issue concerns how much time two anesthesiologists had been informed had elapsed between the time a patient last ate and the time she underwent surgery. The anesthesiologists offer into evidence the hospital admitting form that they were given, indicating that nine hours had elapsed. The scene depicts a portion of the defense attorney's cross-examination of a surprise plaintiff's witness, the admitting room nurse. The nurse testifies that only an hour had elapsed. Cross-examined aggressively about her ability to remember such a small detail from four years earlier, the nurse testifies that the defendant's form is a phony, and that she has with her a copy of the original form showing a "1" and not a "9." The shocked defense attorney objects to "the introduction of a copy when we have the original," and the judge sustains the objection.

Analysis: The nurse's testimony that "I wrote a '1' on the form and not a '9'" violates the best evidence rule. She is testifying orally to the contents of the document. Since she apparently has the copy of the admitting room form in her lap, the plaintiff's attorney should have offered the form into evidence. The offer of a photocopy rather than the original is not improper since (a) the defense has already offered what purports to be the original into evidence, and (b) the photocopy qualifies as a duplicate.⁵⁶ With both the plaintiff's and the defendant's versions of the form in evidence, the jurors would decide the issue of which is accurate as they would other questions of fact.⁵⁷

VI. SCENES FROM LAW-RELATED TELEVISION SHOWS

Law-related themes are as much a staple of television shows as of movies. Scenes from TV shows can be harder for Evidence instructors to acquire because individual shows are not often commercially available. However, instructors and others may copy such shows on personal recording equipment and so may find scenes that would make for helpful Evidence class analysis. Here are a couple that were included in my 2002 Evidence Conference presentation.

55. THE VERDICT (20th Century Fox 1982).

56. See FED. R. EVID. 1003.

57. See FED. R. EVID. 1008.

A. Admissibility of Business Records

Background: Statements contained in regularly-prepared reports or records are admissible as an exception to the hearsay rule unless the circumstances suggest that they are untrustworthy.⁵⁸

*Clip: "Murder One"*⁵⁹ - This is a television show which stopped airing original shows some years before the conference was held. One plotline concerned the identity of a prostitute's murderer, and the scene depicts a hearing on defense counsel's offer of the prostitute's diary into evidence as a business record. The defense argues that in the diary, the prostitute routinely recorded the names and transaction details of customers whom she had blackmailed, and thus could show that people other than the defendant had a motive to kill her. Over prosecution objection, the judge admits the diary into evidence as a business record.

Analysis: The judge correctly rules that business records may be admitted into evidence even though the transactions that they record are illegal.⁶⁰ However, the defense fails to offer any evidence of trustworthiness other than the diary itself. Without foundational evidence giving the judge a basis to conclude that the entries are routine and were made at or near the time that the transactions took place, the diary should not have been admitted into evidence. An instructor might usefully ask how foundational evidence might be gathered when the sole source of the entries is deceased and the business is an illegal and possibly one-person operation.

B. Dying Declarations

Background: A statement made by an unavailable declarant is admissible as an exception to the hearsay rule if it is based on personal knowledge and under a sense that death was imminent, and concerns the cause and circumstances of what the declarant believed to be impending death.⁶¹

*Clip: "The Practice"*⁶² - A wife is on trial for the attempted murder of her husband, who has a bad heart and is recuperating from his injuries and thus testifies from his hospital bed. The scene depicts the husband's testimony that his wife ran their car into him when he got out

58. FED. R. EVID. 803(6)

59. *Murder One* (ABC television broadcast, 1995-96).

60. See 2 MCCORMICK, *supra* note 12, at 440.

61. See FED. R. EVID. 804(b)(2).

62. *The Practice* (ABC television broadcast, 1997).

of the car to open the garage door. He testifies that based on seeing the look on his wife's face and the speed with which the car came towards him, she meant to hit him.⁶³ The defense attorney's theory is that it was an accident, and on cross-examination aggressively suggests that the husband is lying because if his wife is convicted he won't have to give her half his property on divorce. The questioning so greatly agitates the husband that he goes into cardiac arrest and dies. Just before he dies, however, the prosecutor asks him, "Did your wife intend to kill you? Squeeze the doctor's hand if she did." The husband squeezes the doctor's hand, and the prosecutor offers this incident into evidence as the husband's dying declaration.

Analysis: This scene raises a variety of issues. First is the issue of assertive conduct; the husband's squeezing of the doctor's hand is clearly assertive conduct for purposes of the hearsay rule. Was the statement made out of court? The answer is uncertain. A trial is taking place in the hospital, but when the emergency arises the doctors take over and perhaps at that point court is no longer in session. The husband is obviously unavailable, and at the time he squeezed the doctor's hand probably realized that death was imminent. However, it is unclear whether the statement concerns the cause of death. If the heart attack resulted from being hit by the car, it does concern the cause of death. But if it resulted from other medical problems, or perhaps constituted "death by aggressive cross examination," the statement seemingly does not concern the cause of death. The husband's personal knowledge is also questionable, since his statement pertains to his wife's intent. Even if the prosecution overcomes all of these foundational hurdles, the husband's statement would still not be admissible. The wife is charged with attempted murder, and FRE 804 (b)(2) makes dying declarations admissible only in civil cases and homicide prosecutions. If the prosecution were able to dismiss the attempted murder charge and refile the case as a murder charge, then the husband's statement might be admissible.

VII. CONCLUSION

Scenes from law-related films and television shows offer Evidence instructors wonderful opportunities to diversify classroom activities and present interesting problems for classroom analysis in an entertaining

63. This portion of the scene might also be used to review the lay witness opinion rule. FED. R. EVID. 701.

way. The scenes described and analyzed above are merely a sampling of what is available. I encourage other Evidence instructors who use film and TV clips to share their sources to the educational benefit of all law students.