

Evidence by the Video Method

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“Imagine,” says the law professor—and her students tune out.

After all, they know what’s coming. *Imagine* is their clue. That word alerts them their professor is spinning a classroom hypothetical, challenging them to apply their legal learning to imagined “facts” from life.

Yet students know the difference between the great wide world and their professor’s cloistered imagination. And they seem to resent carefully crafted hypotheticals and the professor’s hidden hand guiding them toward supposedly spontaneous moments of intellectual discovery. So they tune out.

Video clips offer a better choice. Unlike classroom hypotheticals, they don’t seem contrived for pedagogical purposes. Whether fact or fiction, the scenarios they present did not spring from the teacher’s crafty imagination. And unlike casebook problems assigned in advance, video clips don’t divide the class into leaders and laggards, those prepared for class and those not. Everyone sees the clip together—and while some students will have a tighter grip on the relevant law, all students receive the relevant facts at once.

What’s more, those facts aren’t flagged for importance. It’s hard for a teacher to spin out a hypothetical without dropping errant hints about which facts count most. As the filmmaker’s mission normally has nothing in common with the professor’s, critical facts may lie in the corner of the screen or in offhand dialogue muttered under the characters’ breath.

And video clips—at least most of them—are simply fun. They break up class. They keep the professor from droning on. And they breathe life into the law’s arid abstractions.

I. Choosing and Editing the Clips

Like a well-crafted hypothetical, a well-chosen video clip challenges students to *think*. So the best clips are not simply entertainment. Diverting as they may be, they are *part* of the teaching, not a distraction from it. And the best clips don’t merely show lawyers in action. Instead, they prompt students to think and speak as lawyers.

Hence the clips typically should be brief. They are a classroom tool, intended to generate and structure the conversation, not a substitute for class. Now and then a clip might cast so much light on a consequential point as to justify several minutes of classroom time. But a minute or two normally is

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enough. Just as a photo displaces a thousand words, a minute of video can convey whole paragraphs of a written hypothetical.

Though legal movies and TV shows, whether fictional or true life, are rich sources of classroom clips, there's no need for law to intrude in a classroom video. Applying law to life is what lawyers do. Having projected a scene from life, therefore, the teacher can call on students to wrap the law they've studied around on-screen facts. Of course, legal clips can serve a purpose. Many issues of courtroom procedure, trial strategy, witness impeachment, and evidence handling are hard to explore outside the courtroom context. And courtroom clips, if well made, can teach as much about lawyerly deportment as they do about substantive law.

II. Using Clips in Class

An extra advantage of teaching with video clips is that the teacher can absolve students of speaking in their own voice. A typical clip sets up a dispute between two courtroom advocates. So before running the clip, the teacher can appoint two student advocates. The first, ignorant of the facts, chooses whether to prosecute or defend. The second, equally ignorant, must oppose. Their peers plainly see these students aren't voicing their own views, but are speaking for assumed clients. This role-distancing can be useful, as student advocates tend to be more willing than students in general to take unpopular positions. Normally the teacher can reserve for herself the role of judge, as student judges don't always press student advocates to sharpen their points. But whenever a limiting instruction is needed, a third student can play judge and deliver an instruction to the class, sitting collectively as jurors.

After running a clip, the teacher lobbs questions to student advocates. Some questions may be simple—"State your client's strongest case." Some questions must bridge the gap between Hollywood fiction and classroom fodder by adding facts or refining issues. And sometimes the teacher must enact a courtroom scene based on on-screen facts and frame questions based on that enacted scene. I explore some of these approaches below.

Teaching by the video method works in almost every realm of law. Evidence is my usual gig, and I focus here on using clips in evidence class. But I've taught criminal procedure by the same technique, and prosecutorial ethics too. Elsewhere in this issue Phil Meyer and Catlin Davis describe using video clips when teaching first-year criminal law and legal storytelling;¹ Felice Batlan and Joshua Bass explain the use of pop-culture materials in teaching business

1. Philip N. Meyer & Caitlin Davis, *Law Students Go to the Movies II: Using Clips from Classic "Hollywood" Movies to Teach Criminal Law and Legal Storytelling to First-Year Law Students*, 68 J. LEGAL EDUC. 37 (2018).

associations,² and Naomi Mezey considers the technique in teaching civil procedure.³ We could multiply examples across the law school curriculum.

III. A Few Clips in Action

To explore this teaching tool, let's take up three evidence-related clips. One depicts real life; two are Hollywood make-believe. One shows a courtroom scene, the others scenes from life. All three clips happen to address domestic discord. Together they let us try out a range of teaching techniques.

A. Character Evidence: *People v. James Dailey*⁴

Some years back a TV crew set up camp in the San Diego District Attorney's Office. Together with Dick Wolf, filmmaker Bill Guttentag produced three seasons of *Crime & Punishment*, a reality show that shadowed prosecutors as they visited crime scenes, scouted out witnesses, and laid their evidence before a jury. Though every word was real, the series adopted the dramatic conventions and staccato styling of Wolf's flagship *Law & Order* franchise.

The prosecutor who pursued James Dailey for the murder of his wife in the show's inaugural episode had a problem: He had no body. The defendant's wife simply had vanished, and the defense planned to argue she slipped town, fearing she was pregnant with another man's baby. The prosecution theorized that Dailey, who owned a boat, dumped his wife's body at sea. But forensic analysis of the boat turned up no trace of blood and no sign of struggle.

Hoping to salvage a weak case, the prosecutor calls a witness who knows nothing of the missing wife, but all too much of Dailey's character. Her chilling testimony, presented in this clip, starts calmly enough. The prosecutor asks if she knows the defendant and sees him in court. Twice she answers yes. "When did you first meet him?" the prosecutor asks. Ignoring this simple question, the witness hesitates: "May I—excuse me—may I have the trash can close to me?" The judge looks up, bewildered. The prosecutor stammers: "Sure, OK. Are you not feeling well?" When the witness answers no, he stammers again: "OK. All right. OK. All right. Matter of fact, ma'am, if—if you feel ill, tell us and we'll take a break, OK?"

Soon we learn the source of the witness's nausea. "During your relationship with the defendant," the prosecutor asks, "did the defendant make threats to you?" Yes, she says—he'd done so often. He had warned that if she ever was unfaithful to him, "[h]e would torture me, take me somewhere to the forest, find a cave, some isolated area where I would be tortured and left for dead. Or if I was lucky he would come back and give me some water. But he would make sure I would be tortured." The witness spoke without emotion, as if

2. Felice Batlan and Joshua Bass, *Beyond Greed Is Good: Pop Culture in the Business Law Classroom*, 68 J. LEGAL EDUC. 23 (2018).

3. Naomi J. Mezey, *Teaching Images*, 68 J. LEGAL EDUC. 74 (2018).

4. *Crime & Punishment: People v. James Dailey* (NBC television broadcast June 23, 2002).

afraid to revisit her former terror. Her accented English gave “tortured” three syllables, making the word especially sinister.

After showing the clip, I pause to let it sink in. By this point in the course students are familiar with the character evidence ban of Federal Rule of Evidence 404. They know the rule forbids evidence of conduct when offered to prove character and action “in accordance with the character.” Till now, however, the students haven’t *seen* a violation of the rule. This clip makes plain one of the chief dangers prompting the rule—that jurors, outraged by a defendant’s past acts, will punish him for those acts even if unsure of his present guilt. After all, I ask the class, would *you* be content to let this man rejoin society?

Student defenders therefore have little difficulty in stating and supporting an objection to this testimony. Rule 404(b)(1) bans evidence of “other act[s]” (here Dailey’s past threats) to prove his character (here as a serial abuser) to show he acted “in accordance with the character” in killing his wife.

Student prosecutors face a far harder task when asked to justify admission of the witness’s testimony. Some venture to argue that Dailey’s past threats to abduct and torture his old girlfriend manifest his hostility toward domestic partners, which in turn supplied his *motive* to kill his wife. Prosecutors note that Rule 404(b)(2) permits evidence of other acts when offered “for another purpose, such as proving motive”

Astute defenders, however, see that this argument merely reframes forbidden claims about Dailey’s character. A desire to abuse domestic partners is unlike, say, a desire to avenge a particular slight. The latter we call a *motive*, for it impels a specific act and then often dissolves. But an abiding impulse to abuse romantic partners, which finds expression against successive partners, is not a mere motive but something we typically call a character trait. Proof of such a trait to show action in accordance with the trait is not “another purpose” under Rule 404(b)(2), but precisely what Rule 404(b)(1) forbids.

Unfortunately for student prosecutors, there simply is no good response to the defense objection. The witness’s testimony finds no legitimate route of admission under the Federal Rules of Evidence. Hence this clip of a California trial illustrates one of the most striking differences between California and federal evidence law. For while Section 1101 of the California Evidence Code largely mirrors FRE 404, California lawmakers have enacted an exception with no counterpart in the federal rules. Section 1109 provides in part that “in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant’s commission of other domestic violence is not made inadmissible by Section 1101” Known as the “Nicole Brown Simpson Law,” this provision dates to 1996, when lawmakers sought to erase the obstacles faced by O.J. Simpson’s prosecutors in seeking to admit evidence of his past assaults on his former wife at his trial for her murder.⁵

5. See Tom Lininger, *Evidentiary Issues in Federal Prosecutions of Violence Against Women*, 36 IND. L. REV. 687, 701-02 (2003); Myrna S. Raeder, *The Admissibility of Prior Acts of Domestic Violence: Simpson*

So this brief clip does several things. It challenges students to pose objections and parry them creatively, framing arguments that test the boundaries of a complex rule. It introduces an important distinction between federal and California evidence law. And it gives students a glimpse of a world without Rule 404. Without a rule barring propensity evidence, criminal trials might devolve into a recital of the defendant's most sordid deeds. For students who doubt the wisdom of rules received from the dead judges of old England, this clip permits exploration of another reality.

B. Hearsay: *Fatal Attraction*⁶

Not more than sixty seconds long, this clip from Adrian Lyne's *Fatal Attraction* delivers three challenging hearsay problems wrapped in a deceptively simple package.

The clip opens on the most ordinary of domestic scenes. Michael Douglas, playing Dan Gallagher, stands in the doorway of his family's country home staring at the heavily falling rain. At length he gathers his courage, quietly closes the door, and turns toward his wife. "Honey, we gotta talk," he says. She sits down and watches him with worry.

"Remember the girl who came to the apartment, the one I met in the Japanese restaurant?"

"The one with the blond hair," his wife says softly, her concern mounting. Gallagher nods grimly. "You're scaring me," she says. Then, pausing, she asks the question she fears most. "What is it? Did you have an affair with her?"

Gallagher's face is ashen. He hesitates. He answers simply, "Yes." And there the clip stops.

Students realize this can't end well. Indeed I tell them that a week later someone turns up dead, and someone else is charged with murder. Then I project three scenarios, one by one, onto the screen. Each scenario features a murder trial at which the prosecutor offers evidence of the husband's confession to his wife of his affair. In all three scenarios the defense objects on hearsay grounds. I advise students to ignore questions of marital privilege, which we'll take up with the next clip.

Scenario 1: The other woman is killed; the wife is charged with her murder; the prosecutor offers the husband's testimony about the confession he made to his wife. I remind the student prosecutor that the defense has objected to the husband's testimony on hearsay grounds. But a sharp prosecutor will see the evidence is not hearsay at all. The prosecutor presumably offers evidence of the husband's confession to show his wife's motive in killing the other woman. If offered for this purpose, the husband's confession is not coming in for its truth. Even if false, his confession could have driven his wife to kill the other woman.

and Beyond, 69 S. CAL. L. REV. 1463, 1473-76 (1996). By the reasoning laid out in *People v. Ogle*, 185 Cal. App. 4th 1138, 1144 (2010), threatening a girlfriend qualifies under Section 1109 as "domestic violence".

6. FATAL ATTRACTION (Paramount Pictures Sept. 11, 1987).

Scenario 2: The other woman is killed; the husband is charged with her murder; the prosecutor offers the wife's testimony about her husband's confession. Again I advise the student prosecutor that the defense has objected to the wife's testimony on hearsay grounds. Again, though, an alert prosecutor will see the objection fails. If offered by the prosecution against the husband, the husband's confession to his wife is admissible as a statement of the opposing party under Rule 801(d)(2)(A) or 801(d)(2)(B).

Scenario 3: The husband is killed; the other woman is charged with his murder; the prosecutor offers the wife's testimony about the husband's confession. This time the student prosecutor must work harder in meeting the defendant's hearsay objection. The prosecutor no longer can argue, as in Scenario 1, that the evidence is not hearsay. As in Scenario 1, the affair is relevant because it may have given the defendant a motive to kill. But now the truthfulness of the husband's confession matters. If the affair (or its termination) gave the other woman a motive to kill the husband, there *really* had to be an affair. If offered to prove the affair, the husband's confession therefore would be hearsay.

But is this hearsay admissible under one or another exception to the hearsay rule? The student prosecutor should see the most promising exception is Rule 804(b)(3) governing statements against interest. The husband's death satisfies the rule's demand that the declarant be unavailable. And the husband's admission surely was against his interest. No normal spouse would utter such a confession unless believing it true.

The student defender should respond, however, that the rule extends only to statements that undermine the speaker's pecuniary or proprietary interests or expose the speaker to civil or criminal liability. Congress specifically considered and rejected broadening the rule to embrace statements that make the declarant "an object of hatred, ridicule, or disgrace." So the usual disincentives to confessing an affair to one's spouse don't suffice to make such a confession a statement against interest under Rule 804(b)(3).

Facing this objection, a clever prosecutor will claim the husband's confession exposed him to the risk of divorce—and hence property division and alimony payments and child support and legal fees. Depending on the couple's financial condition, the husband's confession indeed may have undermined his pecuniary and proprietary interests, qualifying it for admission under the rule. Even the brief glimpse we have of the couple's country home shows they are people of some wealth, for whom divorce likely would prove financially painful.

In the end, then, the prosecutor probably prevails in all three scenarios. More importantly, the student advocates endure a drilling on three different questions of hearsay law—all driven by less than sixty seconds of film.

C. Marital Privileges: *The Bonfire of the Vanities*⁷

In Brian De Palma's celluloid recreation of Tom Wolfe's *Bonfire of the Vanities*, a brief moment of marital tension affords a rich exploration of the spousal testimonial privilege and marital confidences privilege.

Playing protagonist Sherman McCoy, Tom Hanks steps out on a rainy evening, telling his wife he's off to walk the dog. Instead we see him squeeze into a curbside phone booth with the dog clutched under his dripping raincoat. He drops a dime and dials and waits. Then he announces happily, "Maria, hello, it's me!" After an awkward pause, he says, "Oh, sorry, may I speak to Maria?"

Now we see that Sherman's wife, back in their bedroom, has just answered the phone. "Sherman?" she says. "Sherman, is that you? Sherman?" Suddenly realizing his mistake, Sherman slams down the phone and curses at his own stupidity. Collecting his wits and making the best of his mess, he returns home, strides into the bedroom, and greets his wife in a tone of breezy innocence. Accusingly she asks, "If you want to talk to someone named Maria, why do you call me instead?"

I advise students that Maria soon turns up dead, and Sherman is tried for her murder. The prosecution seeks to compel his wife's testimony about the on-screen events. A series of classroom questions challenges students to apply and distinguish the two marital privileges. Under federal evidence law the spousal testimonial privilege permits the witness spouse—here the wife—to refuse to testify against the defendant spouse on almost any matter in a criminal case. The marital confidences privilege permits either spouse in almost any case to refuse to disclose (and to bar the disclosure of) any intentionally private marital communication.

To organize the discussion, I project a grid onto the overhead screen. Across the top it reads "Spousal Testimonial Privilege" on the left and "Marital Confidences Privilege" on the right. Down the left margin it asks: (1) "Does the privilege apply in civil cases, criminal cases, or both?"; (2) "Who may assert the privilege?"; (3) "Does the privilege survive the marriage?"; (4) "Does the privilege apply to the phone call?"; (5) "Does the privilege apply to the bedroom conversation?"; and (6) "What is the privilege's rationale?" I ask students to supply answers to fill the grid's boxes.

The trickiest and most fateful question is whether Sherman can prevent his wife from testifying about the incriminating phone call, which links him with the murdered Maria. As the defendant spouse, he has no power to invoke the spousal testimonial privilege. So the issue is whether the marital confidences privilege applies to the phone call. If the *wife* claims the privilege, she likely can prevent the call's disclosure, as she understood almost from the outset that she was speaking with her husband in a seemingly private phone call. But can *Sherman* prevent the call's disclosure if his wife chooses to reveal it? Here the answer is likely no. Until the very end of the call Sherman believed

7. THE BONFIRE OF THE VANITIES (Warner Bros. Dec. 21, 1990).

he was speaking with Maria or someone in her apartment. Lacking intent to speak confidentially with his wife, he has no marital confidences privilege in the contents of the call.

This is a nifty problem made possible by Wolfe's imagination and De Palma's recreation. A teacher's attempt to craft this problem in a classroom hypothetical likely would end in a clumsy tangle of words. By the time the teacher explained Sherman's horrified discovery of his mistake, the students would have either drifted off or seen the problem coming.

IV. Fiction in the Classroom

I confess some discomfort with importing made-up tales into a law school classroom. It's one of the privileges of our profession that we truck in truth. Law books are filled with the strange and sometimes horrifying deeds of flawed humanity. In asking our students to examine these deeds and debate their gravity and weigh the proper societal reaction, we always have the excuse of truth. Ugly as the facts may be, they are the facts, and we do our students and society no good by shielding them from life's ugliness.

Importing fictional ugliness into the classroom seems far harder to justify. So when the facts are truly ugly—when a woman's boyfriend threatens to torture her in the forest and leave her to die or when a woman calls 911 pleading for help as she bleeds to death or when two young men plot their parents' murder—I use only clips from life. It may be hard to look at and listen to those clips, but the exercise is never gratuitous, as the law must confront the worst that human nature can work.

Still, it's nice now and then to take a breather from so much reality. And though I doubt there's much pedagogical value in absurdly contrived facts, fiction sometimes mirrors reality better than reality itself. After all, how can a camera capture a real husband's confession of an affair or his wayward call home while hoping to phone his mistress? If such hard-to-see events give rise to challenging legal questions, I'm indebted to the filmmakers who give them life.