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Evidence Engendered

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Although Edward Cleary left Champaign-Urbana long before I arrived, he paved the way for those of us who are teaching evidence at Illinois today, following in his footsteps without having had the opportunity to meet him. We rely on his work as the Reporter for the Advisory Committee that drafted the Federal Rules of Evidence, using the Advisory Committee’s Notes to help clarify the scope of the Rules and, more fundamentally, to teach the importance of legislative history as a tool of statutory interpretation. His comprehensive treatise on Illinois evidence law\(^1\) provides invaluable assistance in educating us about the differences between state and federal evidentiary practices. Our colleagues who served on the faculty with Ed Cleary have told us of his teaching skill, his care for his students, and his support of innovative methods of legal education.\(^2\) Although he may have taught at Illinois before the arrival of feminist jurisprudence, I therefore believe that he would have appreciated, if not entirely endorsed, my attempt to articulate a feminist approach to evidence.

The reader without a background in feminist theory may approach this article with some skepticism, wondering how a feminist perspective can possibly be relevant to the study of “neutral” procedural rules that are unrelated to the history of discrimination against women. On the other hand, the reader well-versed in the theories of feminist jurisprudence may be skeptical for a different reason: given that the law of evidence is premised on the adversarial, structured, hierarchical, confrontational atmosphere of the courtroom, she might object, evidence is an inherently gendered subject reflective of male values and therefore cannot be modified to incorporate a feminist perspective.

Although both readers have a point, I believe that the truth lies somewhere in the middle—that the evidence rules are gendered in a number of important respects but could be improved by including a femi-
This article attempts both to describe the ways in which current evidentiary rules reflect traditionally male norms and to suggest methods of incorporating a feminist perspective.

In some areas, my conclusions are preliminary and tentative: feminist theory raises questions about current doctrine but provides no clear-cut answer to those questions. In fact, at certain points the feminist critique leads in different directions, making it impossible to accommodate all feminist values at one time. In these areas, additional time and reflection will be necessary to determine which approach best furthers the feminist ideal. At other points, implementing the feminist ideal in the context of our gendered society will disserve the interests of women. In these areas, the optimal approach in the short term may be a stop-gap measure that is not ideal but is the best alternative in a nonideal world.

Part I of this article briefly describes feminist legal theory and its evolution. Part II then discusses the extent to which evidence as a whole is a gendered topic that reflects predominantly male traits and ideals, and Part III analyzes various specific evidentiary doctrines from a feminist perspective. Finally, Part IV examines ways of incorporating feminist theories in teaching an evidence course.

I. AN INTRODUCTION TO FEMINIST LEGAL THEORY

Although feminist jurisprudence has had different emphases during its various stages of development, its basic premise has remained constant: that the legal system subordinates women. Because the law was created by white men of privileged socioeconomic background, it inevitably reflects the viewpoint of that minority group and ignores the perspectives of others, including women. The purpose of feminist jurisprudence is therefore to "'examin[e] . . . the relationship between law and society from the point of view'" of women. More generally, feminist theory "pursues the perpetual critique"—it "question[s] everything."5

In its earliest form, feminist scholarship explored the ways in which legal rules explicitly discriminated against women. Advocating equal treatment of women and men,6 feminists sought to break down barriers denying women equal opportunity in areas such as employment,7 hous-


6. See, e.g., NATIONAL ORGANIZATION FOR WOMEN, STATEMENT OF PURPOSE, reprinted in B. FRIEDAN, IT CHANGED MY LIFE: WRITINGS ON THE WOMEN'S MOVEMENT 87 (1976) ("The purpose of NOW is to take action to bring women into full participation in the mainstream of American society now, exercising all the privileges and responsibilities thereof in truly equal partnership with men."); Ginsburg, Gender and the Constitution, 44 U. CIN. L. REV. 1 (1975).

ing, credit, and education.

After many of these overt forms of discrimination had allegedly disappeared, however, some feminists realized that formal equality would not end the subordination of women. They saw, for example, that prohibiting employment discrimination against women did not prevent employers from insulating traditionally male professions by denying jobs to women of childbearing age because of purported dangers in the workplace, or by permitting sexual harassment of women by male coworkers. Similarly, requiring equal pay for equal work did not close the wage gap, given continued segregation of women in lower-status jobs, gender bias in assessing the value and difficulty of different occupations.

8. The Fair Housing Act of 1968, 42 U.S.C. §§ 3604-3676 (1988), prohibited discrimination, for example, in the sale and rental of housing and the provision of brokerage services.


11. See supra note 7.


13. See, e.g., N. BETZ & L. FITZGERALD, THE CAREER PSYCHOLOGY OF WOMEN 232-34 (1987) (harassment is widespread and detrimental to women's advancement in job market); U.S. MERIT SYSTEMS PROTECTION BOARD, SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT: AN UPDATE 20 (June 1988) (women who work in male-dominated jobs more likely to be harassed); Crull, The Impact of Sexual Harassment on the Job: A Profile of the Experiences of 92 Women, in SEXUALITY IN ORGANIZATIONS 67, 69-70 (1980) (24% of the women surveyed were fired and 42% were pressured into resigning as a result of harassing behavior); Law, "Girls Can't Be Plumbers"—Affirmative Action for Women in Construction: Beyond Goals and Quotas, 24 HARV. C.R.-C.L. L. REV. 45, 51-52 (1989) (finding widespread harassment of the few women in construction industry, where men are particularly threatened by and hostile to women); see also N. BETZ & L. FITZGERALD, supra, at 158-59 (observing that although formal job discrimination may have disappeared, informal discrimination is still prevalent because employers prefer men for traditionally male jobs and women for traditionally female jobs).


and evaluation of women's job performance according to male standards of behavior.\textsuperscript{18}

Because the law is constructed around traditionally male norms, formal equality turned out to bear little resemblance to actual equality. In some cases, achieving formal equality did nothing to prevent hostile courts from acting in an overtly discriminatory fashion. For example, the Supreme Court's decision that employers who denied benefits to women disabled by pregnancy were not discriminating against women, but only against "pregnant persons,"\textsuperscript{19} had an adverse impact on women that was readily apparent.\textsuperscript{20}

In other cases, a facially neutral rule was implemented according to a traditional male perspective and thus in a manner detrimental to women. For example, many states have revised their alimony laws in the interest of gender equality. Instead of an award intended to enforce a husband's obligation to support his wife, alimony has become available to either spouse depending on financial need.\textsuperscript{21} This change has led to a reduction in the alimony payments made to women; the courts have presumed that women and men compete equally in the job market and therefore have made unrealistic assumptions about a woman's ability to support herself and her children.\textsuperscript{22} As a result, a man's standard of living rises substantially after divorce because he is spending less (or noth-

\textsuperscript{18} See, e.g., Becker, supra note 17, at 944-46; Kaye, Women Lawyers in Big Firms: A Study in Progress Toward Gender Equality, 57 FORDHAM L. REV. 111 (1988); Taub, Keeping Women in Their Place: Stereotyping Per Se As a Form of Employment Discrimination, 21 B.C.L. REV. 345, 353-58 (1980); Williams, Deconstructing Gender, 87 MICH. L. REV. 797, 822-34 (1989); Zimmer, How Women Reshape the Prison Guard Role, 1 GENDER & SOC'Y 415 (1987); see also Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, 1989 U. CHI. LEGAL F. 139, 141-50 (noting that courts have failed to understand problems facing women of color in the job market and therefore have not adequately protected them from employment discrimination); Note, Conceptualizing Black Women's Employment Experiences, 98 YALE L.J. 1457 (1989) (same).


ing\textsuperscript{23} to support his family, while a woman's standard of living declines dramatically.\textsuperscript{24} Likewise, the criminal law permits the use of deadly force against an assailant whom the defendant reasonably believed posed an imminent danger of death or serious bodily harm.\textsuperscript{25} Although again the standard appears neutral on its face, judges and juries often apply male norms of "reasonableness" and therefore convict women who acted to protect themselves in situations where the reasonable man might not have been afraid—where, for example, an abusive husband was only threatening his wife or had recently completed a beating.\textsuperscript{26}

Disenchantment with the quest for formal equality led some feminists to begin emphasizing differences between women and men. Men tend to value autonomy, abstract reasoning, individual rights, hierarchical organization, and detachment from others, they said, whereas women are more likely to value relationships, contextual reasoning, interdependence, and connection and responsibility to others.\textsuperscript{27} Recognizing the biological, social, and psychological differences between women and men, together with the fact that society was created in large part by privileged white men to reflect their values, some feminists have rejected efforts to assimilate into the male-dominated world, preferring instead to attempt to restructure society to take into account women's concerns and values.\textsuperscript{28} Others, however, fear that focusing on gender differences will perpetuate stereotypes about women and thereby contribute to their continued subordination.\textsuperscript{29}

\begin{footnotesize}
\textsuperscript{23} See U.S. Bureau of the Census, Child Support and Alimony: 1987, Current Population Reports, Special Studies, Series P-23, No. 167, at 4, 8 (June 1990) (only 45% of divorced women received any child support payments and only 16.8% were awarded alimony).

\textsuperscript{24} See, e.g., L. Weitzman, supra note 21, at 323-43 (using index of economic well-being developed by federal government and adjusting for family size and for each family member's age and sex, study of 2500 cases in California revealed that on average, man's standard of living increased by 42% and woman's declined by 73%); Corcoran, Duncan & Hill, The Economic Fortunes of Women and Children: Lessons from the Panel Study of Income Dynamics, in WOMEN AND POVERTY 7, 16 (1986); N.Y. Times, Mar. 2, 1991, at 8, col. 1 (Bureau of Census report released March 1, 1991 found that the percentage of children in poverty doubled, increasing from 19% to 36%, within four months after father left home; family income, adjusting for family size, declined by 26% after father left).

\textsuperscript{25} See 1 W. LAFAVE & A. SCOTT, SUBSTANTIVE CRIMINAL LAW 652 (1986).


\textsuperscript{29} See, e.g., Radin, The Pragmatist and the Feminist, 63 S. CAL. L. REV. 1699, 1717, 1718
\end{footnotesize}
The most recent stage of feminist theory recognizes differences among women and criticizes the earlier feminist literature for assuming that all women share the same perspectives and experiences, regardless of their race, class, and sexual orientation. Because feminism involves listening to women and taking their concerns seriously, a feminist must not presume that white, middle-class, heterosexual women speak for all women but must instead strive to rise above the confines of her own limited perspective and consider the diversity of women's experience.

Others have applied these feminist methods to the law governing torts, contracts, crimes, property, constitutional rights, family (1990) (suggesting that women’s “ethic of care” might be “an artifact of coping with oppression,” and warning that “a group that seeks liberation from a dominating system of thought should be very suspicious of adopting its categories”); Williams, supra note 18. This controversy recently focused on the Supreme Court’s decision in California Fed. Sav. & Loan Ass’n v Guerra, 479 U.S. 272 (1987). In that case, the Court upheld a state statute that required employers to provide up to four weeks of unpaid leave to employees disabled by pregnancy, rejecting the employer’s argument that Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1988), preempted the state statute. The advocates of special treatment supported the legislation, see, e.g., Finley, supra note 20; Kay, supra note 20, while the supporters of equal treatment opposed the statute because it treated women and men differently, see, e.g., Williams, supra note 20.


For example, Angela Harris has challenged the feminist critique of rape laws because it ignores the perspective of women of color, for whom “rape is a far more complex experience, and an experience as deeply rooted in color as in gender.” Harris, supra, at 598. Harris notes that women of color are more vulnerable to rape than white women and are less protected by the criminal justice system, but at the same time they approach the rape laws with a “unique ambivalence” because “for black people, male and female, ‘rape’ signify[es] the terrorism of black men by white men, aided and abetted, passively (by silence) or actively (by ‘crying rape’) by white women.” Id. at 601, 599.

31. As Katharine Bartlett has observed, “recognizing oppression one has not experienced” is a very difficult task, one that I, like everyone else, can only attempt to accomplish. Bartlett, Feminist Legal Methods, 103 HARV. L. REV. 829, 849 (1990).


relationships,\textsuperscript{37} and civil procedure.\textsuperscript{38} To date, however, no one has analyzed the law of evidence from a feminist perspective. What follows is my attempt to do so.

II. A FEMINIST CRITIQUE OF THE LAW OF EVIDENCE AS A WHOLE

Feminist theory would question on several levels the very concept of a code of evidence—a body of formal, abstract, complex evidentiary rules like the Federal Rules of Evidence.\textsuperscript{39} In place of the current evidence codes, a feminist perspective would advocate an approach to evidence that was less abstract and more tied to the context of a particular case, that simplified the rules to make them more accessible to nonlawyers and therefore less hierarchical, that fostered cooperation rather than competition between the parties, and that envisioned less formal procedures. At the same time, a feminist approach would strive to incorporate women's perspectives and accommodate their needs. Accomplishing the latter goals requires efforts to ensure that the law of evidence does not explicitly discriminate against women and that facially neutral rules are not applied in ways detrimental to women. In addition, the evidence rules must reflect not only the views of privileged white men but also the differing concerns and perspectives of others. The following discussion explores ways in which these feminist goals might be implemented, and the extent to which they all can be accommodated at this time.

A. The Abstract Nature of the Law of Evidence

First, the feminist critique would question the abstractness and universality of evidence codes, and their tendency to ignore the unique factual context of each case and the interests of the individual litigants. For example, the evidentiary rules appropriate for takeover litigation involving two large corporations, each represented by a team of attorneys, are not necessarily suitable in a custody trial aimed at determining the best interests of the child or in a welfare recipient's suit to recover improperly withheld benefits. A feminist approach to evidence would be more concerned with finding rules appropriate to a given context than with articulating abstract rules of general usefulness.\textsuperscript{40}

On the other hand, the only alternatives to an abstract, general evi-
Evidence code would be to create different sets of rules for different types of cases; to give the trial court virtually unchecked power in ruling on questions of evidence; or to eliminate the evidence rules altogether, allowing the jury to hear any evidence the parties wish to present. Formulating separate evidence rules for each unique situation would be an unmanageable task, given the variation in the types of suits filed, the interests and resources of the parties, and the quality of their attorneys.41

The second option, complete judicial discretion, is likely to lead to arbitrariness; rules are enacted for the very purpose of limiting capricious decisionmaking.42 In addition, leaving the evidentiary rules to the sole discretion of judges, most of whom are upper- or middle-class white men, will tend to perpetuate a traditional male perspective,43 leading to discrimination against women. Even a cursory examination of other areas in which judges have enjoyed unfettered discretion in the past illustrates the adverse effects such an approach is likely to have on women.

For example, judges currently apply the amorphous “best interests of the child” standard in resolving custody disputes;44 the presumption in favor of the mother has been eroded by the goal of formal gender equality.45 Stereotypes about gender roles have led judges to deny custody to women who work outside the home, who have sexual relationships after separating from the children’s father, or who otherwise fail to measure up to idealistic judicial notions of motherhood. Likewise, fathers have obtained custody when they exhibit some minimal interest in child rearing, when they remarry, or when they are better able to support the children financially.46 In addition to disadvantaging women in specific

FEMINIST THINKING 204-11 (1986) (noting that women, like men, adhere to principles, but that women’s principles value relationships and therefore differ from those followed by men).


42. See, e.g., Bartlett, supra note 31, at 852; Matsuda, Public Response to Racist Speech: Considering the Victim’s Story, 87 MICH. L. REV. 2320, 2325 (1989) (preferring formal rules and procedures because “informality and oppression are frequent fellow-travelers’’).

43. See Minow, supra note 30, at 45-50; Resnik, On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges, 61 S. CAL. L. REV. 1878, 1908 (1988) (“A judge is either male or female and is of a particular race, class, and social position; the appearance of neutrality, of evenhandedness, of impartiality is false comfort.”); Tanford, supra note 41, at 838-39, 857 (judges’ “ideological predispositions” and “political biases” influence their evidentiary rulings); cf. Abrahamson, The Woman Has Robes: Four Questions, 14 GOLDEN GATE U.L. REV. 489, 494 (1984) (observing that in exercising her judicial responsibilities, “[a]ll my life experiences—including being a woman—affect me and influence me”).

44. See H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 797-98 (2d ed. 1988).

45. See id. at 799-800; L. WEITZMAN, supra note 21, at 217.

custody cases, these gendered attitudes and the uncertainty created by the vague "best interests of the child" standard have substantially improved the negotiating position of the father in a divorce proceeding: unsure of the outcome of a custody fight, the mother is often willing to bargain away alimony, child support, and a favorable division of marital property in the face of the father's threat to seek custody.47

Traditionally, judges have also been given substantial discretion in sentencing, and gender bias has led them to impose harsher sentences on women who offend judicial expectations of proper gender roles. Thus, women tend to receive longer sentences than men when they are convicted of violent crimes,49 and girls are likely to be punished more severely for noncriminal status offenses like running away, while similar behavior by boys is typically ignored.50 Likewise, gender bias has resulted in inappropriately lenient sentences in domestic assault cases51 and

decisions on woman's job or man's financial assets). But cf. L. WEITZMAN, supra note 21, at 223-43 (concluding that abolition of presumption favoring mothers had little impact on percentage of fathers who requested or obtained custody; finding, however, that almost two-thirds of fathers who seek custody are successful).


49. See, e.g., A. BROWNE, WHEN BATTERED WOMEN KILL 11 (1987); Smart, Criminological Theory: Its Ideology and Implications Concerning Women, in WOMEN AND CRIME IN AMERICA 6, 13 (L. Bowker ed. 1981); Temin, Discriminatory Sentencing of Women Offenders: The Argument for ERA in a Nutshell, 11 AM. CRIM. L. REV. 355 (1973); see also L. SCHAFFRAN, PROMOTING GENDER FAIRNESS THROUGH JUDICIAL EDUCATION: A GUIDE TO THE ISSUES AND RESOURCES 146 (1989) (noting that women of color and poor women charged with killing abusive husbands are less likely to be acquitted or given suspended sentences).

In some cases, however, women receive more lenient sentences because judges do not want to separate them from their families. See, e.g., Daly, Discrimination in the Criminal Courts: Family, Gender, and the Problem of Equal Treatment, 66 SOC. FORCES 152 (1987); Daly, Rethinking Judicial Paternalism: Gender, Work-Family Relations, and Sentencing, 3 GENDER & SOC'Y 9 (1989). Although this disparity is based on gendered attitudes about the woman's role as primary caretaker, in fact women continue to have primary responsibility for child rearing and household chores—even though most women hold jobs outside the home as well. See, e.g., N. BETZ & L. FITZGERALD, supra note 13, at 204-05; P. BLUMSTEIN & P. SCHWARTZ, AMERICAN COUPLES 144-46 (1983); A. HOCHSCHILD, THE SECOND SHIFT 1-10, 277-84 (1989); Williams, supra note 18, at 823; see also N. BETZ & L. FITZGERALD, supra note 13, at 5 (as of 1984, women constituted 44% of work force; 63% of women aged 18 to 64 worked outside the home, including more than half of all married women, 61% of mothers with children under 18, and 52% of mothers with preschool children); Williams, supra note 18, at 832 (as of 1987, 59% of married women worked outside the home, including 51% of mothers with children under three and 54% of those with children under six). If family obligations are a relevant factor in sentencing, judges ideally should examine the actual facts of each case to determine whether the defendant is entitled to leniency on that ground. In the absence of rigorous scrutiny of each individual case, a presumption that women are more likely to have child rearing responsibilities is more realistic and thus the second best alternative.


51. See, e.g., ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE, FINAL REPORT
in rape cases where the victim was acquainted with the defendant or engaged in behavior the judge considered inappropriate, such as flirting or dressing provocatively.\textsuperscript{52}

This record leaves little room for optimism should judges be given unfettered discretion in defining the rules of evidence—and that pessimism is only confirmed by examining areas in which judges currently enjoy substantial discretion in making evidence rulings. When exercising their broad discretion in admitting expert testimony, for example, some judges have excluded testimony describing the battered woman syndrome and the rape trauma syndrome because of myths about battered women and rape victims.\textsuperscript{53} Similarly, misplaced concerns about the credibility of rape and child abuse victims have led judges to permit defense attorneys to engage in harassing and abusive cross-examination of the victims and to introduce irrelevant evidence about their private lives.\textsuperscript{54} Absolute judicial discretion in making evidentiary decisions unrestrained by legislative rules or appellate court review would likely make these and similar rulings even more prevalent.

The final alternative, abolishing evidence rules altogether and letting the jury determine what evidence it deems important, would create similar problems. Like judges, jurors subscribe to gendered attitudes and thus are likely to act in ways harmful to women if their prejudices are not constrained by rules that exclude irrelevant and prejudicial evidence.\textsuperscript{55}

The disadvantages of the only feasible alternatives suggest that the “middle course”\textsuperscript{56} advocated by Ed Cleary and reflected in the Federal Rules may be the most sensible in the short run. These abstract rules are intended to govern all cases, and therefore may well “function as impediments to optimally sensitive decisionmaking.”\textsuperscript{57} Perhaps, however, as Tom Mengler has argued, the drafters of the Rules “belie[ved] that each trial is unique and calls for discrete resolution” and therefore proposed a set of rules designed to give judges “the maneuverability to craft rulings to do individual justice.”\textsuperscript{58} Although complete judicial discretion or outright abolition of the evidence rules might be even more consistent with a contextual feminist approach, imposing limits is necessary in a world

\textsuperscript{52} See, e.g., Bohmer, Judicial Attitudes Toward Rape Victims, 57 JUDICATURE 303, 304-05 (1974); Report of the New York Task Force on Women in the Courts, supra note 22, at 58; Schafran, supra note 22, at 17, 48; see also infra note 88 and accompanying text.

\textsuperscript{53} See infra notes 88-89, 173-79 & 188-205 and accompanying text. See generally infra note 172.

\textsuperscript{54} See infra notes 137-39 and accompanying text.

\textsuperscript{55} See, e.g., infra notes 88-89 & 185-87 and accompanying text.


\textsuperscript{57} Schauer, Formalism, 97 YALE L.J. 509, 539 (1988).

\textsuperscript{58} Mengler, supra note 41, at 458.
where judges and jurors are infected by the society’s gendered attitudes.\textsuperscript{59}
For now, therefore, the ideal of contextual decision making must be sacrificed in favor of the more pragmatic, though perhaps less satisfying, approach of working within the current structure to change those aspects of the evidence rules that discriminate against women or ignore their concerns.\textsuperscript{60}

\textbf{B. The Hierarchical Nature of the Law of Evidence}

A feminist approach to evidence would also suggest that the rules of evidence are unnecessarily technical and hierarchical. Their complexity makes the law of evidence inaccessible to all but the most practiced litigators and thereby contributes to the hierarchical mystique that surrounds the legal profession and the litigation process.\textsuperscript{61}

Any teacher or student of evidence can readily come up with her own favorite illustrations of the intricacies embedded in the Federal Rules. For example, the conditional relevance rule applies when the relevance of a piece of evidence “depends upon the fulfillment of a condition of fact”; in such cases, the courts are instructed to admit the evidence “upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.”\textsuperscript{62} Almost all testimony provides only a piece in the puzzle, however, so that any evidence can be considered irrelevant if the rest of the pieces are not yet in place. Even an eyewitness’s testimony that she saw the defendant shoot the victim is relevant only if the incident she witnessed occurred on the day of the alleged crime.\textsuperscript{63} The conditional relevance rule therefore needlessly creates an “obstacle course” for trial lawyers and judges instead of relying on commonsense judgments about the pertinence of a given piece of evidence.\textsuperscript{64}

\textsuperscript{59} Peggy Radin has referred to this dilemma as the “‘Heads the man wins, tails the woman loses’ irony of the double bind.” Radin, supra note 29, at 1704 n.13.
\textsuperscript{60} For examples of other feminist literature advocating a utilitarian or pragmatic approach, see, e.g., Becker, The Rights of Unwed Parents: Feminist Approaches, 63 SOC. SERV. REV. 496, 505-13 (1989); Radin, supra note 29.
\textsuperscript{61} Cf. Williams, Alchemical Notes: Reconstructing Ideals from Deconstructed Rights, 22 HARV. C.R.-C.L. L. REV. 401, 403 (1987) (“non-corporate clients look[] to lawyers almost as gods,” asking them to “work the very best of whatever theory-magic [they] learned in law school”). But cf. Mengler, supra note 41, at 427-31 (arguing that Federal Rules were drafted with the aim of simplifying law of evidence).
\textsuperscript{62} FED. R. EVID. 104(b).
\textsuperscript{63} As an illustration of the type of evidence that does not raise issues of conditional relevance, the Advisory Committee’s Note to Rule 104(b) mentions testimony in a murder case that on the day before the murder, the defendant bought a weapon of the type used in the killing. FED. R. EVID. 104(b) advisory committee’s note. Even in that case, however, the conditional relevance problems disappear only if the prosecutor has already introduced evidence describing the murder weapon and establishing the date of the killing. Cf. Ball, The Myth of Conditional Relevancy, 14 GA. L. REV. 435, 440 n.9 (1980) (defendant’s purchase of weapon on day prior to murder irrelevant unless defendant used gun to kill victim).
\textsuperscript{64} Ball, supra note 63, at 469; see also C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5052, at 248 (1977) (describing Rule 104(b) as “a provision that is best ignored”); Ball, supra note 63, at 454 (referring to conditional relevance rule as “a rescue apparatus
Likewise, the commentators have been baffled by the question whether a mother’s out-of-court declaration that “Harriet is the finest of my daughters” is properly considered hearsay. Some argue that the statement is not hearsay because it is offered as circumstantial evidence of the mother’s feelings toward Harriet, rather than for the truth of the matter asserted (that Harriet is in fact the finest of her daughters). Others, however, consider the remark hearsay because it is indistinguishable from the statement “I think Harriet is the finest of my daughters” and is offered to prove the truth of that assertion.

Finally, the line between evidence of habit, which is admissible to prove a propensity to act in a certain fashion, and evidence of character, which generally is not admissible for that purpose, is almost impossible to draw. The Advisory Committee suggested that character refers to “a generalized description of one’s disposition, or of one’s disposition in respect to a general trait, such as honesty, temperance, or peacefulness.” Habit, on the other hand, is “more specific”; “it describes one’s regular response to a repeated specific situation.” But the Advisory Committee also conceded that “[c]haracter and habit are close akin,” and its general definitions do not resolve questions such as the permissibility of introducing testimony that the defendant in a tort suit previously started three fires when she fell asleep while smoking when offered to suggest that the fire that destroyed the plaintiff’s property was caused in like fashion. A tendency to fall asleep while smoking is not a general personality trait and therefore does not seem to qualify as character evidence, but the defendant did not fall asleep while smoking often or regularly enough to constitute a habit.

intended to save the administration of the law of evidence from . . . mythical dangers” that instead “confuse[s] the jury and muddle[s] the administration of the evidence rules far more than letting matters alone would have done”).


Under the latter theory, the statement nevertheless would be admissible under the hearsay exception for statements of a declarant’s then-existing state of mind. See FED. R. EVID. 803(3). Although both groups ultimately would admit the statement, making the debate largely theoretical, “the confusion that broad use of the concept of circumstantial evidence creates in the overall analysis of hearsay versus not hearsay remains.” M. GRAHAM, supra note 39, at 92.

67. See FED. R. EVID. 406.

68. See id. 404(a).

69. But see Mengler, supra note 41, at 423 (suggesting that “[t]he scarcity of published opinions construing the habit rule suggests courts were not having much trouble drawing the distinction”).

70. FED. R. EVID. 406 advisory committee’s note (quoting C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 162, at 340-41 (1954)).

71. Id. (quoting C. MCCORMICK, supra note 70, at 341).

72. Id. (quoting C. MCCORMICK, supra note 70, at 340).

73. This problem comes from E. GREEN & C. NESSON, PROBLEMS, CASES, AND MATERIALS ON EVIDENCE 138 (1983). Green and Nesson believe that FED. R. EVID. 403’s general standard for
The complexity in the rules ensures that they are understood only by lawyers—more specifically, by those lawyers who litigate on a regular basis. Litigants are likely to find the rules incomprehensible, thereby alienating them from the trial process and contributing to their impression that they lack any real control over their case.\(^7\) If the legal system wants litigants to feel satisfied that justice has been done, perhaps the rules of evidence should be more accessible to the average person. Likewise, if it is interested in finding truth and doing justice, rather than merely resolving disputes, perhaps the rules should focus more on facilitating the introduction of crucial testimony than on determining whether it has satisfied each of the technical requirements for admission.\(^7\)

Although the law of evidence can be made less inaccessible and therefore less hierarchical by eliminating some of the needless complexity in the rules, the most straightforward approach to evidence would be to give the judge or jury complete discretion, which is problematic for the reasons outlined above.\(^7\) Moreover, additional rules may be necessary to eliminate the gender bias in the current evidence codes, even though promulgating new rules will add to the complexity of evidentiary doctrine. For example, the law governing the admissibility of character evidence would be less complex if rape shield laws had never been enacted, but such statutes are necessary to respect the autonomy of women, protect rape victims from unnecessary trauma, and encourage women to report rape charges.\(^7\) Likewise, analyzing the law of privileges from a feminist perspective may suggest the need for additional privileges,\(^7\) which will add complexity to the current law. In an imperfect world, however, complexity may be necessary in the short run to protect the interests of women.

\textbf{C. The Adversarial Nature of the Law of Evidence}

Perhaps most fundamentally, feminists would question the rules of evidence to the extent that they presuppose an adversarial environment and therefore reflect male values of individual autonomy, competition, and aggressiveness. Leslie Bender has described the “competitive, spartan

\footnotesize{balancing probative value and prejudice governs this question because the evidence falls in “an undefined middle” ground between habit and character. See E. Green & C. Nesson, Teacher's Manual for Problems, Cases, and Materials on Evidence II-27 to -28 (1983) [hereinafter E. Green & C. Nesson, Teacher's Manual]; see also Mengler, supra note 41, at 416-25 (noting that Advisory Committee Note to Fed. R. Evid. 406 gives conflicting signals as to whether or not habit must be nonvolitional or semiautomatic to qualify under Rule 406 and thus allows trial judges discretion in defining admissible habit evidence).

\(^7\) See, e.g., Williams, supra note 61, at 403; cf. Korn, supra note 38, at 102 (suggesting that parties may prefer arbitration because it gives them sense of having “some control over the process”).

\(^7\) Cf. Tanford, supra note 41, at 846 ("[t]rials appear less concerned with truth than with proof—whether the parties can satisfy the rules of a closed system") (emphasis deleted).

\(^7\) See supra notes 42-55 and accompanying text.

\(^7\) See infra notes 146-52 and accompanying text.

\(^7\) See infra notes 162-67 and accompanying text.}
ring style" of the adversary system as "an intellectualized substitute for duelling or medieval jousting." Carrie Menkel-Meadow has observed that "[t]he conduct of litigation is relatively similar . . . to a sporting event—there are rules, a referee, an object to the game, and a winner." The rules of evidence contribute to this image, encouraging attorneys to find devious ways to introduce inadmissible evidence damaging to the opponent's case while excluding admissible evidence detrimental to their own case.

For example, the Federal Rules prevent the prosecutor from using evidence of a defendant's criminal record to show propensity—that is, to suggest that the defendant is the type of person who would have committed the crime charged. But such evidence is admissible when offered to prove intent—that is, to suggest that the defendant's prior illicit intent makes it more likely that her state of mind was similar at the time of the alleged crime. Likewise, the plaintiff in a tort suit may introduce testimony that the defendant repaired the defect that caused the plaintiff's injuries if offered to show something other than "negligence or culpable conduct" on the part of the defendant. Given the obvious impact such evidence will have on a jury, and the jury's inability to consider the testimony only for the permissible purpose, attorneys have a real incentive

79. Bender, supra note 32, at 7.
80. Menkel-Meadow, supra note 40, at 51; see also Frug, supra note 33, at 1133.
81. See Fed. R. Evid. 404(a).
82. See, e.g., United States v. Beechum, 582 F.2d 898, 911, 916 (5th Cir. 1978) (interpreting Fed. R. Evid. 404(b)), cert. denied, 440 U.S. 920 (1979); 2 D. LOUISELL & C. MUELLER, supra note 66, § 140, at 225; see also Fed. R. Evid. 404(b) (permitting evidence of prior crimes for other purposes as well, including "motive, opportunity, . . . preparation, plan, knowledge, identity, or absence of mistake or accident"). The Beechum dissent criticized the majority for permitting the prosecution to introduce a defendant's prior convictions so long as the judge "metaphysically classifies the question as propensity to intend rather than as propensity to commit." 582 F.2d at 921 (Goldberg, J., dissenting).
83. See Fed. R. Evid. 407 (permitting evidence of subsequent repairs if offered to impeach defense witness or to establish feasibility of precautionary measures or defendant's ownership of or control over cause of accident); see also Fed. R. Evid. 408 (permitting plaintiff to present testimony that defendant offered to settle case if offered for some purpose other than proving defendant's liability for the claim, such as suggesting witness's bias or prejudice, rebutting allegation of "undue delay," or proving obstruction of criminal investigation); Fed. R. Evid. 409 (excluding evidence of offer to pay medical expenses if introduced to show liability); Fed. R. Evid. 411 (evidence of insurance inadmissible if offered to show negligence or wrongful conduct, but admissible to prove "agency, ownership, or control, or bias or prejudice of a witness").

The policy considerations underlying these exclusionary rules—the fear that people will not repair defects or offer to compromise disputed claims if evidence of their generosity can be used against them, see Fed. R. Evid. 407-409 advisory committee's notes—they themselves seem to reflect a male perspective. Although consistent with the feminist's goal of taking responsibility for others, the presumption that the law of evidence must encourage that sense of responsibility assumes a male approach to relationships.

84. See, e.g., 2 D. LOUISELL & C. MUELLER, supra note 66, § 140, at 193-94 (most defendants whose prior crimes have been introduced do not seek limiting instructions "for obvious reasons"); id. § 165, at 389 (although defendant in personal injury case can request limiting instruction when evidence of subsequent repair has been introduced, that option "would seem to offer even less in the way of comfort"); Tanford, supra note 41, at 867-69 & n.248. See generally Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) ("The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated
to attempt to squeeze the evidence into one of the categories of permissible use—and they usually succeed.\(^{85}\)

The adversarial nature of the litigation process also encourages lawyers to use tactics to intimidate opposing counsel and her witnesses, hoping to rattle them so that they will be unable to effectively present their evidence, or at least will appear less credible and competent in the jury's eyes. For example, attorneys may object to every question that is not phrased in precisely proper form.\(^{86}\) They may feed on the jury's tendency to view women as less credible than men by calling female (but not male) witnesses by their first names,\(^{87}\) or by taking advantage of inaccurate stereotypes about rape victims\(^{88}\) or battered women.\(^{89}\) Or they may make condescending or inappropriate comments to opposing counsel who are women, giving the jurors the distinct impression that they need...
not take female attorneys seriously either.90

These efforts to present prejudicial evidence and to subvert the opponent's case are not likely to contribute to accurate fact-finding. A legal system more consistent with feminist values of cooperation and responsibility to others would not tolerate such a litigation process because it "impedes not only 'the supposed search for truth' but also the expression of concern for the person on the other side."91

Within the confines of the current adversary system, however, an attorney who unilaterally chooses to follow a feminist model of litigation is likely to find her opponent continuing to act in the more traditional, competitive style and attempting to take advantage of her. Her obligation to serve her client's interests may therefore collide with her attempts to cooperate with the other side. Additional rules could be promulgated to require all attorneys to act in a more cooperative fashion, but it is difficult to legislate a sense of responsibility to others and increasing the number of rules governing the litigation process also adds to its complexity. Without massive restructuring of the adversary system, therefore, the feminist ideal of a more cooperative litigation process is unlikely to be realized in the short term.

D. The Formal Nature of the Law of Evidence

A final characteristic of the current adversary process, as reinforced by the rules of evidence, is its formality. The courtroom setting is austere and imposing, the procedures traditional and ritualistic. Ostensibly intended to impress the litigants and the public with the solemnity of the occasion and the authority and wisdom of the tribunal,92 traditional legal theorists might also believe that this formality actually advances the truth-seeking process.

A feminist approach, on the other hand, would question whether formality might instead hinder accurate fact-finding and preclude more cooperative methods of resolving disputes that could lead to results satisfactory to both parties. For example, studies suggest that a victim of child abuse may be more willing to testify in less intimidating surroundings.93 Similarly, the interests of justice might be better served in domes-


91. C. GILLIGAN, supra note 27, at 135; see also Tanford, supra note 41, at 850 ("The more fundamental characteristic of our trial system is in fact its adversarial structure, not its commitment to accurate results.").

92. See R. POSNER, THE PROBLEMS OF JURISPRUDENCE 127 (1990); cf. Tanford, supra note 41, at 857 (trials serve "an important social symbolic function" by "help[ing] define the limits of acceptable social conduct" and "reinforcing community behavioral and moral norms").

tic violence cases if a battered woman seeking a protective order were accompanied by an advocate, even one not licensed to practice law, so that she did not have to face her abusive husband alone.94

Closely connected to the formality of the litigation process is the starring role given the attorneys. Although in theory the trial is intended to aid the jurors in ascertaining the truth, they are usually not invited to ask the questions they deem relevant to their decision.95 Similarly, if one of the goals of the trial process is to make litigants feel as though they received their “day in court,” they should be allowed to question witnesses or otherwise participate meaningfully in the process. As Carrie Menkel-Meadow has observed, “direct communication” might be preferable to “third party mediated debate” because “two apparently conflicting positions can both be simultaneously legitimate, and there need not be a single victor.”96

In the past, however, more informal procedures have served to disadvantage women. For example, the mediation model, where a third person acts to encourage communication between the parties in an effort to enable them to solve the problem themselves, has been used in divorce, custody, and domestic violence cases. Because it is aimed at achieving compromise, “[t]he basic predicate of successful mediation is equality of bargaining power between the parties.”97 Given the disparity in power between women and men, mediation has given men a competitive advantage when more formal procedures might have better protected women.98

Fundamental changes in the formality of the litigation process

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95. See MCCORMICK, supra note 65, §§ 8, at 14-15 & n.4.
96. Menkel-Meadow, supra note 40, at 51-52; see also Resnik, supra note 43, at 1908.
98. Mediation has proven unsatisfactory for women involved in divorce or custody disputes for a number of reasons: the imbalance in financial resources gives the woman an incentive to accept a less favorable settlement in order to avoid costly litigation; mediation results more frequently in joint custody because the goal is compromise, rather than the best interests of the child; the woman’s natural desire to be conciliatory may lead her to accept a less favorable outcome; and the mediation process is not bound by precedent, so that the results may be inequitable or unenforceable. See, e.g., Erlanger, Chambless & Melli, supra note 47; Lefcourt, supra note 47; Resnik, supra note 43, at 1940-43; Woods, Mediation: A Backlash to Women’s Progress on Family Law Issues, 19 CLEARINGHOUSE REV. 431, 435-36 (1985).

An abusive relationship involves an especially serious imbalance of power. In addition, mediation has not helped the battered woman because she may be afraid to speak openly during the mediation sessions, and, by seeking a compromise outcome, the mediation process does not hold the abuser accountable or unequivocally condemn his conduct. See, e.g., ATTORNEY GENERAL’S TASK FORCE ON FAMILY VIOLENCE, supra note 51, at 23-24; U.S. COMM’N ON CIVIL RIGHTS, supra note 51, at 61-76; Germame, Johnson & Lemon, supra note 94; Lerman, supra note 94.

Nevertheless, some feminists believe that mediation may be preferable to adversarial litigation. See Menkel-Meadow, supra note 40, at 52-53 & n.78; Rifkin, Mediation from a Feminist Perspective: Promise and Problems, 2 LAW & INEQUALITY 21 (1984).
therefore cannot be accomplished in a world of unequal bargaining power without harming the interests of women. Less drastic reforms, like making the trial less intimidating for child witnesses or permitting advocates to accompany battered women in court can, however, be effected in the short term.

Adopting even more informal procedures in the context of an adjudicative proceeding may not have the same drawbacks as fundamental changes in the litigation process: disputes can be resolved even in the absence of a compromise agreeable to both parties, and disparities in bargaining power may therefore have less impact on the outcome of an adjudicative proceeding. On the other hand, a more informal adjudicative process may give lawyers greater rein to engage in the abusive behaviors described above. Until lawyers are willing to act to further feminist principles of cooperation, more formal procedures may be necessary.

Although a feminist approach to the law of evidence would ideally construct a system that valued context over abstractness, accessibility over hierarchy, cooperation over competition, and informality over formality, none of those ideals can be realized within the confines of a legal system so firmly rooted in traditional male norms. Attempting to fully implement those goals at this time would ultimately redound to the detriment of women. Therefore, a more pragmatic feminist approach to the law of evidence, which exposes the ways in which the current evidentiary rules incorporate a male perspective and then proposes reforms that reflect the perspectives and interests of women, appears to be the best short-term solution. The following discussion analyzes a number of specific evidentiary rules from that pragmatic perspective.

III. A Feminist Critique of Specific Evidentiary Doctrines

A pragmatic feminist approach to the law of evidence must, first, propose changes to evidence rules that expressly discriminate against women, as well as those that, though apparently neutral, have a disparate impact on women. Second, it must criticize rules that reflect male values and ideals and therefore subordinate or simply ignore other perspectives. Finally, it must determine whether any aspects of the feminist ideals of context, accessibility, cooperation, and informality can be built into the current rules without disadvantaging women.

A. Relevance and Prejudice

The Federal Rules consider evidence relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence."99 The accompanying Advisory Committee Note instructs trial judges to use "principles evolved by experience or science, applied

logically to the situation at hand” to determine the relevance of a given piece of evidence. 100

Though seemingly neutral and impartial, relevance is in fact in the eye of the beholder. The assumption that judges can logically determine whether testimony has the requisite connection to the issues in the case "presuppose[s] the universality of a particular reference point or standpoint"; 101 whether or not one considers a fact pertinent depends in large part on her particular point of view and life experiences. As one of the standard evidence treatises explains, “the answer [to relevance questions] must lie in the judge’s own experience, his general knowledge, and his understanding of human conduct and motivation." 102 Leaving relevance determinations to trial judges, most of whom are privileged white men, therefore leads to rulings that reflect that group’s limited “experience,” “knowledge,” and “understanding,” and necessarily solidifies a white male perspective to questions of relevance.

For example, in People v. Adamson, 103 a celebrated murder trial in California, the prosecutor sought to introduce evidence that the tops of three women’s stockings were discovered in the defendant’s room. One of the victim’s stockings was missing and the top of the other had been torn off, but none of the stockings found in the defendant’s room matched the torn stocking. The trial court nevertheless admitted the evidence, and the California Supreme Court affirmed, reasoning that the defendant’s “interest in women’s stocking tops ... tend[ed] to identify [him] as the person who removed the stockings from the victim.” 104 This conclusion may seem perfectly logical unless one realizes that Adamson was black and that many black men wore stocking tops at that time to straighten their hair. 105 Considering the case from the perspective of people of color thus substantially undercuts the probative value of the evidence. When viewed in this light, the discovery of the stocking tops no more identified the defendant as the murderer than would the discovery of razor blades in the home of a person suspected of committing a murder with a razor blade of a different type. 106

100. Id. advisory committee’s note.
101. Minow, supra note 4, at 48.
102. McCormick, supra note 65, § 185, at 544; see also Ball, supra note 63, at 461-62 (judge determines relevance “by a form of judicial notice, drawing on what he knows as a reasonable judge about the behavior of the universe, including the humans in it”).
104. Id. at 485, 165 P.2d at 7.
106. Elaine Shoben deserves the credit for this analogy.

Although defense counsel could have tried to explain Adamson’s possession of the stocking tops, nothing in any of the reported opinions indicates that the attorney thought to make this argument. In any event, the point is that trial judges exclude evidence in other cases when their world view suggests that it is irrelevant, even though opposing counsel could raise alternate explanations for the evidence in those cases as well.
Similarly, evidence that a rape victim did not immediately report the crime may seem to cast doubt on the victim’s credibility—if viewed from the perspective of a man who does not hesitate to assert his legal rights and has confidence in our law enforcement and criminal justice systems.107 A woman, however, is often socialized to believe that she is at least partly at fault for sexual assault: she must have led him on. Even if a rape victim rejects that myth herself, she may be afraid that others who hear of the charges will blame her. Moreover, reporting the rape requires her to endure searching and often hostile examination by the police and prosecutor; to relive the horror of the experience over and over again; and to face skepticism by the judge and jury, perhaps ultimately leading to an acquittal or a very light sentence.108 Therefore, when viewed from the woman’s perspective, a rape victim’s delay in coming forward may suggest little about the credibility of the charges.109

Just as some evidence may appear less relevant if viewed from a different perspective, other evidence may seem more relevant. Katharine Bartlett has explained why incorporating a feminist perspective may enhance the probative value of certain evidence: “feminist practical reasoning deems relevant facts related to the woman question—facts about whose interests particular rules or legal resolutions reflect and whose interests require more deliberate attention.”110


109. See, e.g., ILLINOIS TASK FORCE ON GENDER BIAS IN THE COURTS, supra note 22, at 100; Berger, supra note 88, at 6, 24, 30; Griffin, Rape: The All-American Crime, in THE CRIMINAL JUSTICE SYSTEM AND WOMEN 223, 230-33 (1982); Massaro, supra note 88, at 422-23; Robin, Forcible Rape: Institutionalized Sexism in the Criminal Justice System, 23 CRIME & DELINQ. 136, 137 (1977); Note, A Matter of Time, supra note 107, at 1102, 1106 n.120; Note, The Case Against the Cautionary Instruction, supra note 88, at 158-59; Comment, The Admissibility of Expert Testimony, supra note 88, at 182-88.

110. Although considering the perspectives of others in making relevance determinations may lead to the exclusion of some evidence that would seem relevant to a traditional white male judge, that result is not inconsistent with contextual reasoning. Contextual reasoning makes the context of the case important, but the relevant context does not necessarily include any evidence a litigant might want to introduce. In the examples cited in the text, for instance, putting the case in context makes certain evidence less relevant. Thus, following the feminist model of contextual reasoning does not mean that all evidentiary disputes are automatically resolved in favor of admitting the evidence.

For example, the feminist perspective would find a rape defendant's prior abuse of the victim relevant to the question whether she voluntarily consented to intercourse at the time of the alleged rape. Considering the context of the violent relationship between the victim and the defendant, as well as the nature of sexual relationships between women and men in general, helps to establish that the woman was acting to avoid further injury and was not voluntarily consenting.\textsuperscript{1} Likewise, if a black defendant who had been sentenced to death in connection with the murder of a white person challenged the sentence on equal protection grounds, a feminist approach would look beyond the motives of the one jury that sentenced the defendant and take into account the historical context in which the case occurred. Statistical evidence showing that blacks who kill whites are significantly more likely to receive a death sentence than are defendants in other murder cases would therefore be relevant.\textsuperscript{11}

Finally, the feminist perspective would suggest that the so-called "day in the life" film, which depicts the life of the plaintiff in a personal injury case, has substantial probative value. Although such films give the jury a more vivid picture of the impact of the plaintiff's injuries than oral testimony or even photographs could provide, some courts have excluded them on the grounds that they are of limited relevance\textsuperscript{14} or that they constitute out-of-court statements not subject to cross-examination.\textsuperscript{15} A feminist approach, by contrast, would admit such evidence because it tends to focus the jury's attention on the real-life context of the case and thus emphasizes the interests of the parties rather than the abstract legal issues.\textsuperscript{16}

The danger that judicial bias and narrow perspective may lead

as a type of 'screen' that makes certain facts relevant and others not"; "$[p]utting the facts in the linguistic code required by the court sterilize[s] them," "$strip[s] [them] of the features that gave [them] meaning" to the litigants, and deprives them of their "power to outrage").\textsuperscript{112} See Estrich, supra note 88, at 1108-09, 1111-12. But cf State v. Alston, 310 N.C. 399, 409, 312 S.E.2d 470, 476 (1984) (finding that intercourse was against victim's will, but that defendant had not used force or threat of force because "[a]lthough [the victim's] general fear of the defendant may have been justified by his conduct on prior occasions, . . . such general fear was not sufficient to show that the defendant used the force required to support a conviction of rape").\textsuperscript{113} But cf McCleskey v. Kemp, 481 U.S. 279, 297 (1987) (rejecting equal protection claim because statistics are "clearly insufficient to support an inference that any of the decisionmakers in [this] case acted with discriminatory purpose").


judges to underestimate the value of certain evidence may not seem particularly troubling because the definition of “relevance” in the Federal Rules is a fairly liberal one. The Federal Rules operate on the theory that “[a] brick is not a wall,” and a piece of evidence therefore need not make the proponent’s theory of the case more probable than not, but only “more probable . . . than it would be without the evidence.”

Even if evidence can easily satisfy this low threshold of relevance, however, it will be excluded if its probative value is “substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of unfair delay, waste of time, or needless presentation of cumulative evidence.”

This balancing approach is consistent with feminist principles in the sense that it permits the judge to make rulings about relevance and prejudice based on the context of the specific case. In applying the balancing test, however, the judge’s individual perspective will be crucial in measuring precisely how much probative value the evidence has and how likely it is to prejudice the jury. The outcome of the balancing process may well vary depending on the judge’s background and outlook, leaving determinations of relevance and prejudice to the broad discretion of the trial judge therefore tends to incorporate a white male perspective in these areas.

In general, however, the balancing approach is consistent with contextual reasoning and would comport with feminist values if judges recognized the narrowness of their own experiences and tried to consider the perspectives of others in analyzing issues of probative value and prejudice. Although any one judge’s experiences are necessarily limited, diversifying the judiciary will help incorporate the perspectives of others because, as Martha Minow has observed, “[t]he more powerful we are, the less we may be able to see that the world coincides with our view precisely because we shaped it in accordance with those views.”

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117. MCCORMICK, supra note 65, § 185, at 543.

118. FED. R. EVID. 401.

119. Id. 403.

120. See Mengler, supra note 41, at 414, 440, 445 (describing balancing process as “nebulous inquiry into the minds of a handful of lay people [that] involves a great deal of guesswork”; “model[] of indeterminacy”; and inquiry that turns on “gut reactions”); Tanford, supra note 41, at 833 (“[a]ssigning the initial weights to an item’s probative value and prejudicial effect is . . . a question of personal bias”; judges are then asked to perform “metaphysical task of balancing incommensurable qualities”); Teitelbaum, Sutton-Barbere & Johnson, Evaluating the Prejudicial Effect of Evidence: Can Judges Identify the Impact of Improper Evidence on Juries?, 1983 WIS. L. REV. 1147, 1163-73 (finding that lawyers, and therefore presumably judges as well, have very different views concerning prejudicial effect of specific evidence).

121. Minow, supra note 30, at 73.
B. Character and Competence

By presuming that every witness is competent to testify,¹²² the Federal Rules of Evidence depart from the common-law approach, which automatically disqualified certain categories of witnesses. For example, no party or interested person was allowed to testify.¹²³ The spouse of a party or interested person likewise was barred from testifying, on the theory that a wife had no identity independent of her husband.¹²⁴ If he was an incompetent witness, she must necessarily have been as well.

Even under the modern approach of presumed competency, the trial judge may exclude evidence on competence grounds if no reasonable juror would believe the witness's testimony. In implementing this strict standard, the judge is really determining minimum credibility rather than competency.¹²⁵ Given the common perception that women are less capable, less rational, and therefore less credible than men,¹²⁶ the standard is susceptible to gendered application. In fact, however, judges seldom find witnesses incompetent to testify;¹²⁷ any gender bias in perceptions of credibility is therefore likely to have its greatest impact when the jury is deliberating, and not when the judge is determining competency. Nevertheless, further empirical research should be undertaken to determine whether judicial findings of incompetence tend to discriminate against women.

The common law also barred convicted felons from testifying.¹²⁸ The Federal Rules contain no such outright prohibition but instead allow evidence of a witness's prior convictions in certain circumstances.¹²⁹ For instance, a criminal defendant's prior felony convictions are admissible to impeach her testimony so long as their probative value outweighs their prejudicial effect to the defendant.¹³⁰

Potential witnesses, especially criminal defendants, are likely to be

¹²³. See id. advisory committee's note.
¹²⁴. See id.; 3 D. LOUISELL & C. MUELLER, supra note 66, § 251, at 15.
¹²⁶. See, e.g., Olsen, supra note 37, at 1575-76; Report of the New York Task Force on Women in the Courts, supra note 22, at 113-18; Schafran, supra note 22, at 16; see also infra note 206 and accompanying text. Doubts about the credibility of poor women and women of color are especially problematic. See Report of the New York Task Force on Women in the Courts, supra note 22, at 121-22.
¹²⁷. See Fed. R. Evid. 601 advisory committee's note.
¹²⁹. See Fed. R. Evid. 609; see also id. 608(b) (permitting cross-examination concerning witness's prior acts of untruthfulness that did not lead to conviction).
¹³⁰. See Fed. R. Evid. 609(a)(1). Under recent amendments to Rule 609, see infra note 134, the balancing test described in the text applies only when a prosecutor seeks to introduce a criminal defendant's prior felony convictions. Prior felonies committed by other witnesses are evaluated under the less restrictive standard set out in Rule 403, which excludes evidence only if its "probative value is substantially outweighed by the danger of unfair prejudice." Fed. R. Evid. 403 (emphasis added).

The other type of convictions admitted under Rule 609 are those that "involved dishonesty or false statement, regardless of the punishment." Id. 609(a)(2).
intimidated by the threatened disclosure of their prior convictions and may choose not to testify—even though a criminal defendant’s decision not to testify may decrease the likelihood of acquittal. A feminist approach to evidence would tend to be more concerned about justice to the parties and the feelings of the witnesses and therefore would question the practice of admitting prior felonies of limited relevance to truthfulness—for example, evidence of a defense witness’s sodomy conviction in a trial involving charges that the defendant mailed a threatening letter or of a defendant’s conviction for possession of a small amount of heroin in a trial on theft charges—when their introduction would discourage the presentation of crucial testimony or unnecessarily embarrass the witness.

132. See United States v. Blankenship, 870 F.2d 326, 328-29 (6th Cir. 1988).
133. See United States v. Barnes, 622 F.2d 107, 108-09 (5th Cir. 1980); see also United States v. Booker, 706 F.2d 860, 862-63 (8th Cir.) (admitting evidence of defendant’s three prior firearms convictions despite his offer to stipulate to those convictions in trial involving charges of possession of firearm by convicted felon), cert. denied, 464 U.S. 917 (1983).
134. The trial judge has discretion to exclude a witness’s prior convictions to protect her from “harassment or undue embarrassment.” FED. R. EVID. 611(a). The cases described in the text demonstrate, however, that this discretion is not exercised in all cases where the prior felony is of limited relevance to truthfulness.

In some respects, the Federal Rules may seem to be moving in the direction advocated in the text: a recent amendment to the Rules makes clear that in some circumstances the judge must consider prejudice to the witness and all the parties, not merely the defendant in a criminal case, in determining the admissibility of a witness’s prior felony convictions.

As originally adopted, the Federal Rules provided that felony convictions could be used to impeach a witness’s testimony if the court concluded that “the probative value of admitting this evidence outweighs its prejudicial effect to the defendant.” FED. R. EVID. 609(a)(1) (emphasis added). The Supreme Court interpreted this language literally to refer only to prejudice to criminal defendants, thus requiring the admission of prior felony convictions if the potential prejudice would affect the witness, the prosecution, or either party in a civil suit. See Green v. Bock Laundry Mach. Co., 109 S. Ct. 1981 (1989).

Last year, the Supreme Court proposed an amendment to FED. R. EVID. 609(a)(1) that became effective on December 1, 1990. The amendment provides that prior felony convictions of witnesses other than a criminal defendant are admissible unless their probative value is substantially outweighed by their prejudicial effect. The amendment places stricter limitations on the use of a criminal defendant’s prior felonies: they may be introduced only if their probative value outweighs their prejudicial effect to the defendant. Although continuing to distinguish criminal defendants from all other witnesses, the Advisory Committee rejected Bock Laundry’s conclusion that prior convictions prejudicial to litigants other than criminal defendants are automatically admissible.

Nevertheless, even the revisions to Rule 609 may not be as solicitous of the concerns of the parties and the witnesses as a feminist approach would advocate. First, the standard to be applied to prior felonies committed by witnesses other than criminal defendants strongly favors their admission. Cf. 2 D. LOUISELL & C. MUELLER, supra note 66, § 125, at 18-19 (discussing identical standard in FED. R. EVID. 403). Second, in evaluating prejudice, the courts presumably will consider primarily the effect evidence of prior felonies will have on the outcome of the case, rather than the witness’s interests in avoiding embarrassment and publicity. Although the Advisory Committee Note to the amended rule mentions the concerns of the witness at one point, its focus is on protecting the litigants. See AMENDED FED. R. EVID. 609(a) advisory committee’s note (noting that prior convictions of prosecution witnesses ordinarily will be admissible because “there is little chance that the trier of fact will misuse the convictions offered as impeachment evidence as propensity evidence,” but that the criminal record of defense witnesses may be excluded because a defendant is “likely to suffer some spill-over effect” from impeachment of her witnesses); see also Bock Laundry, 109 S. Ct. at 1990; id. at 1996 (Blackmun, J., dissenting); cf. supra note 134 (discussing trial judge’s authority to exclude prior felonies to protect the witness).
The character evidence issues of most direct concern to women sur-
round the rape shield laws enacted in most jurisdictions during the
1970s. Although the specific contours of the statutes vary greatly
among the states, their primary purpose is to limit the circumstances
in which the defendant may introduce evidence of a rape victim's prior
sexual conduct. Before the enactment of shield laws, such evidence was
deemed relevant to prove that the victim was the type of person who
might have consented to intercourse with the defendant: because she
consented with another man, she must have consented with this one.
The evidence also cast doubt on her credibility as a witness: a woman
who is not a virgin is also not a truthful person (although evidence of
prior sexual history was not necessarily admitted in other types of cases
where women provided crucial testimony). As John Henry Wigmore
put it,

[t]he unchaste... mentality finds incidental but direct expression in
the narration of imaginary sex incidents of which the narrator is the
heroine or the victim. On the surface the narration is straightfor-
ward and convincing. The real victim, however, too often in such
cases is the innocent man; for the respect and sympathy naturally
felt by any tribunal for a wronged female helps to give easy credit to
such a plausible tale.

These doubts about the credibility of rape victims led to the adop-
tion of other special evidentiary rules in rape cases. Until recently, the
uncorroborated testimony of the victim was an insufficient basis for a
rape conviction in many states. Although a woman's unsubstantiated
testimony could support an assault or theft conviction, it could not sup-
port a rape conviction. Moreover, until the 1970s, most states required
the trial judge to instruct the jury to view the victim's testimony with
caution because rape charges are easily brought and not so easily dis-
proved; this instruction was not given in other criminal trials where the
victim of the crime testified for the prosecution but is still used in rape
cases in many jurisdictions. Finally, Wigmore suggested that a trial

135. See Galvin, Shielding Rape Victims in the State and Federal Courts: A Proposal for the
Second Decade, 70 MINN. L. REV. 763, 765 n.3 (1986) (shield rules have been enacted by Congress
and 48 state legislatures and have been imposed by courts in one other state).
136. See id. at 773-76, 906-16; Tanford & Bocchino, Rape Victim Shield Laws and the Sixth
137. See Berger, supra note 88, at 15-16; Borgida & White, Social Perception of Rape Victims:
The Impact of Legal Reform, 2 LAW & HUM. BEHAV. 339, 340 (1978); Tanford & Bocchino, supra
note 136, at 546.
138. See Berger, supra note 88, at 16; Borgida & White, supra note 137, at 340; Tanford &
Bocchino, supra note 136, at 546, 549.
139. 3A J. WIGMORE, EVIDENCE § 924a, at 736 (J. Chadbourn rev. ed. 1970).
140. See Note, Defining the Boundaries, supra note 107, at 696 & n.36. See generally Note, The
Rape Corroboration Requirement: Repeal Not Reform, 81 YALE L.J. 1365 (1972) [hereinafter Note, Rape
Corroboration]. For an example of a rape statute requiring independent corroborative
evidence, see MODEL PENAL CODE § 213.6(5) (Official Draft and Revised Comments 1980).
141. See Note, The Case Against the Cautionary Instruction, supra note 88, at 155-56. For an
example of a rape statute requiring such an instruction, see MODEL PENAL CODE § 213.6(5) (Official
judge should never permit a rape case to go to the jury "unless the female complainant's social history and mental makeup ha[d] been examined and testified to by a qualified physician."\(^{142}\)

Recent efforts to reform rape laws have led to the abolition of the corroboration requirement in most states,\(^ {143}\) along with the enactment of rape shield laws. Nonetheless, some shield laws do not impose greater substantive restrictions on the admission of sexual history evidence than on any other evidence, permitting introduction of a victim's sexual history so long as the judge concludes that the testimony is relevant.\(^ {144}\) Even stricter shield laws like that which Congress added to the Federal Rules in 1978 place no limit on evidence of "past sexual behavior with the accused" when offered to prove consent.\(^ {145}\)

Given the low reporting rates for rape\(^ {146}\) and the high incidence of acquaintance rape,\(^ {147}\) a feminist theory of evidence would insist that shield laws be written so as to respect a woman's sexual autonomy, encourage her to report rape charges, and minimize the trial's traumatic effect on her.\(^ {148}\) The feminist approach therefore would reject the cavalier assumption that the victim's consent on some prior occasion is probative of her consent in this case. Respecting a woman's autonomy requires that she be given the same right to choose her sexual partners that a man would enjoy: she should not be a target for rapists simply because she had prior sexual relationships. Likewise, the defendant's knowledge of the victim's sexual history does not suggest that his mistaken perception of consent was reasonable.\(^ {149}\) He was not acting rea-

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Draft and Revised Comments 1980). A number of recent decisions have concluded, however, that the instruction is unnecessary. See Note, Defining the Boundaries, supra note 107, at 696 & n.37.

142. 3A J. WIGMORE, supra note 139, § 924a, at 737 (emphasis deleted).

143. See Note, Defining the Boundaries, supra note 107, at 696 & n.36.

144. See Galvin, supra note 135, at 774 (some shield laws merely specify procedural requirements—typically, an evidentiary hearing—for the admission of sexual history evidence); Tanford & Bocchino, supra note 136, at 593-94 (same). But cf. Galvin, supra note 135, at 879-83 (suggesting that even in these states courts regularly exclude sexual history evidence).

145. FED. R. EVID. 412(b)(2)(B); see also Galvin, supra note 135, at 908-16 (almost all state shield laws permit such use of sexual history evidence).

146. See, e.g., Berger, supra note 88, at 5; Robin, supra note 109, at 137; Note, A Matter of Time, supra note 107, at 1101-02; Note, The Case Against the Cautionary Instruction, supra note 88, at 157-58.

147. See, e.g., C. MACKINNON, supra note 28, at 247 (the rapist and the victim are strangers in 55% of rapes and attempted rapes reported to police, but in only 17% of all rapes and attempted rapes); Estrich, supra note 88, at 1164-65 (survey of 930 women found that 56% of them had been raped, 82% of those by nonstrangers; separate surveys of college students found that approximately 20% had been victims of date rape).

148. See Borgida & White, supra note 137, at 339-40 (primary explanation for rape victims' reluctance to press charges was their "desire to avoid the ordeal of courtroom testimony," which "often precipitates as much of a psychological crisis as the rape itself"); id. at 348-49 (stricter shield laws tend to improve jury's perception of victim's credibility, decrease likelihood that jury will find consent, and increase chances of conviction); see also supra note 109 and accompanying text.

reasonably if he assumed that the woman's consent under other circumstances indicated her willingness to have a sexual relationship with him.\textsuperscript{150}

Even evidence of the victim's prior sexual relationship with the accused should not invariably be permitted. Most courts automatically admit such evidence without evaluating the circumstances surrounding the prior sexual involvement or the nature of the subsequent relationship between the victim and the defendant.\textsuperscript{151} A prior relationship with the defendant may help demonstrate his reasonable perception of consent in a case where the sexual contact was close in time to the alleged rape and there was no evidence of violence directed against the woman or of significant intervening changes in their relationship. On the other hand, admitting evidence of sexual contact that occurred in the distant past or prior to the termination of a relationship between the two creates the same presumption of permanent consent that has been soundly criticized in marital rape cases.\textsuperscript{152}

Evidentiary issues akin to those arising in rape cases have also begun to surface in cases involving charges of sexual harassment.\textsuperscript{153} Defend-

\textsuperscript{150} The feminist approach serves the additional purpose of minimizing the risk that common myths about rape victims, see supra note 88; infra notes 173 & 185 and accompanying text, will lead jurors who hear evidence of the victim's sexual history to assume that her prior sexual experience does indicate that she consented, or at least that the defendant reasonably thought that she had.

\textsuperscript{151} See Galvin, supra note 135, at 816; see also Berger, supra note 88, at 58-59 (arguing that excluding evidence of prior sexual relationship with the accused violates confrontation clause); Galvin, supra note 135, at 807 (same).

The Supreme Court recently agreed to consider whether a rape defendant's constitutional rights were violated when the trial court excluded evidence of his prior sexual contact with the victim because he failed to comply with the state shield law's notice requirement. See Michigan v. Lucas, 433 Mich. 878, 446 N.W.2d 291 (1989), cert. granted, 111 S. Ct. 507 (1990) (No. 90-149).


Limiting the admissibility of a rape victim's sexual history is not inconsistent with the feminist ideal of contextual reasoning. Expanding the frame of reference to consider the context of a particular case does not necessarily make all evidence admissible. See supra note 110.

Likewise, a contextual approach does not mandate that evidence of the woman's sexual history be admitted even though it would permit evidence of the defendant's prior violence against her. See supra note 112 and accompanying text. In context—that is, taking into account the nature of sexual relationships between women and men and the need to protect women's sexual autonomy—a woman who has experienced violence in the past can reasonably be expected to submit to intercourse for fear of further harm. Protecting the woman's autonomy requires that sexual conduct under those circumstances be deemed nonconsensual. On the other hand, focusing on that same context leads to the conclusion that a man cannot reasonably assume that a woman is interested in a sexual relationship with him based on her sexual history.

\textsuperscript{153} Sexual harassment is defined as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" if "(1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 29 C.F.R. § 1604.11(a) (1990).

To date, only California has enacted a shield law for sexual harassment cases. See Comment,
ants in such cases have sought to present evidence of the plaintiff's sexual history, dress, and behavior in the office. At the same time, plaintiffs have attempted to introduce testimony concerning the defendant's character—specifically, evidence that he had subjected other women to similar harassing behavior.

Judges should not admit testimony of a woman's sexual history any more readily in sexual harassment cases than in rape trials. The plaintiff's prior sexual relationships with others do not suggest that she solicited the unwanted attention, and do not justify the defendant's assumption to the contrary. On the other hand, evidence of the defendant's prior harassment of other women should be admitted in some instances. The evidence may help establish that the defendant created a hostile work environment or that an adverse employment decision was intended to punish the plaintiff for rejecting his advances.

C. Privileges

As a general matter, privilege rules might be seen as furthering feminist principles because they value the preservation of relationships over the admission of relevant evidence. But the current utilitarian justification for the privilege rules—that they are needed to encourage communication in the context of confidential relationships—is more consistent with male values. The utilitarian rationale suggests that privileges were created to protect men, who are often reluctant to share their personal thoughts and therefore may need the assurance of protection that the privilege rules supply, rather than women, who are more likely to decide to confide in others independent of the evidentiary safeguard.

A feminist approach to evidence would instead be based on the humanistic rationale for privileges—that certain relationships are entitled to protection by their very private nature. Although the nonutilitarian,
humanistic justification for the privilege rules has not received extensive recognition in the courts,\textsuperscript{161} the feminist perspective would build on this theory with an eye towards extending protection to those relationships valued by women.

The feminist critique would also question the hierarchical configuration of the modern privilege doctrine. The privilege rules tend to shelter relationships accorded a high status by traditional, male norms, even though the policy considerations used to justify those privileges support extending protection to analogous relationships. For example, the marital privilege is limited to legally recognized marriages\textsuperscript{162} and therefore does not apply to people who are living together or who are involved in homosexual relationships—that is, people whose lifestyles do not conform to traditional norms.\textsuperscript{163} Moreover, the privilege does not protect confidential conversations between family members\textsuperscript{164} or best friends, even though women may consider those relationships as confidential and intimate as the marital relationship.\textsuperscript{165}

The current status of professional privileges is similarly hierarchical. All states recognize the attorney-client privilege, and most protect communications to doctors and members of the clergy.\textsuperscript{166} But only about one-third of the states extend the attorney-client privilege to accountants, and only a handful of jurisdictions have applied the doctor-patient privilege to protect communications to social workers, rape counselors, teachers, school counselors, marriage counselors, or nurses.\textsuperscript{167} Thus, the professional privileges protect those occupations that historically have

\begin{itemize}
\item \textsuperscript{161} The utilitarian rationale, associated with Wigmore, currently appears to be the primary justification for the privilege rules, see MCCORMICK, supra note 65, § 72, at 171-72, although some commentators have espoused the humanistic rationale, see, e.g., A. WESTIN, PRIVACY AND FREEDOM 31-39 (1967); Black, The Marital and Physician Privileges—A Reprint of a Letter to a Congressman, 1975 DUKE L.J. 45, 49-50; Krattenmaker, Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence, 62 GEO. L.J. 61, 85-94 (1973).
\item \textsuperscript{162} See MCCORMICK, supra note 65, § 81, at 195.
\item \textsuperscript{163} In fact, the origins of the marital privilege can be traced to discriminatory attitudes about women: the privilege has its roots in the common-law rule that disqualified a party's spouse from testifying because a wife had no identity independent of her husband. See 2 D. LOUISELL & C. MUELLER, supra note 66, § 217, at 866-67; see also supra note 124 and accompanying text. Even today, the privilege seems to be more protective of men because most marital privilege cases involve men seeking to prevent their wives from testifying against them. See Lempert, A Right to Every Woman's Evidence, 66 IOWA L. REV. 725, 727 (1981).
\item \textsuperscript{166} See MCCORMICK, supra note 65, § 76.2, at 183-84.
\item \textsuperscript{167} See id. at 185; see also Couch v. United States, 409 U.S. 322, 335 (1973) (rejecting accountant-client privilege); Report of the New York Task Force on Women in the Courts, supra note 22, at 61-63 (discussing rape counselor privilege).
\end{itemize}
been male-dominated and exclude equivalent lower-status jobs that traditionally have been more accessible to women. Likewise, the privileges tend to provide greater protection to individuals of higher socioeconomic status—those, for example, who can afford to consult a psychiatrist rather than a social worker or marriage counselor.

By contrast, a feminist view of privileges would not distinguish between conversations with doctors and conversations with rape counselors because both relationships are equally private. In fact, even the utilitarian approach should support broadening the scope of the current privileges: society has an interest in encouraging people to make full disclosures to nurses and social workers as well as to doctors and psychiatrists. Some may object that creating additional privileges will deprive the courts of too much relevant evidence. Although that criticism may have some merit, those who are interested in facilitating the admission of relevant evidence should re-examine the privilege rules with an eye towards developing a more balanced approach that eliminates the discriminatory effects of the current structure.

A feminist approach to evidence would not necessarily extend the privilege rules to every arguably confidential relationship. It would support, for example, the Supreme Court's recent decision to require disclosure of confidential university peer review materials sought by a professor who alleged that she had been denied tenure because of her race, sex, and national origin.\textsuperscript{168} The feminist's humanistic rationale for privileges would not characterize the relationship between an employer and a job performance evaluator as one of the private relationships especially deserving of protection.

\section*{D. Expert Testimony}

The Federal Rules permit the introduction of expert testimony if it will "assist the trier of fact to understand the evidence or to determine a fact in issue" and the witness is "qualified as an expert by knowledge, skill, experience, training, or education."\textsuperscript{169} In making these determinations, many courts follow the three-part test set out in \textit{Frye v. United States}: (1) the subject of the expert's testimony must be outside "'the range of common experience or common knowledge,'" and must instead require "'special experience or special knowledge';" (2) the expert's methodology must be "sufficiently established to have gained general acceptance in the particular field in which it belongs'; (3) and the witness must be "'skilled in that particular science, art, or trade to which the question relates.'"\textsuperscript{170} Although the general trend has been to relax evi-

\textsuperscript{169} FED. R. EVID. 702.
\textsuperscript{170} 293 F. 1013, 1014 (D.C. Cir. 1923) (quoting Brief for Appellant). Although the drafters of the Federal Rules did not indicate whether they intended to retain the \textit{Frye} test or to adopt a more flexible approach, see Mengler, \textit{supra} note 41, at 447-49, many federal courts continue to follow \textit{Frye}. See, e.g., United States v. Smith, 869 F.2d 348, 353 (7th Cir. 1989); Novak v. United States,
dentary requirements for such testimony, gender bias has resulted in the exclusion of expert testimony on issues directly affecting women.

For example, prosecutors in rape cases have attempted to introduce expert psychological testimony on the rape trauma syndrome to explain what may appear to be unusual behavior on the part of the victim—her failure to report the crime promptly, her inability to identify her attacker, her loss of memory about events prior to the incident, and her apparent calmness after the rape. In addition, prosecutors have sought to present such testimony to suggest that a woman who experienced symptoms of rape trauma syndrome did not consent to intercourse.

Although courts regularly admit rape trauma syndrome testimony when offered to explain the victim’s unusual behavior, they have been more reluctant to permit prosecutors to use the evidence to suggest that the victim was in fact raped. A number of courts have excluded such evidence on the grounds that the jury is perfectly capable of determining whether or not the woman consented and thus whether or not the defendant is guilty of rape. These courts have concluded that the subject of the expert’s testimony is not “beyond the ken” of the jury, thus failing the first prong of the Frye test, or would not be “helpful” to the jury within the terms of the Federal Rules.

Courts have used similar reasoning to exclude expert psychological testimony on the battered woman syndrome. Battered women who killed their husbands in nonconfrontational circumstances have attempted to introduce expert testimony to explain why they reasonably feared for their lives when, for example, they struck back while their husbands were asleep, and why they did not leave the abusive relationship instead of resorting to self-defense. Although most courts have now concluded that this testimony falls outside the jury’s common experience, some have excluded it on the theory that the jury can resolve the woman’s self-


171. See Massaro, supra note 88, at 439.

172. See generally Gianelli, The Admissibility of Novel Scientific Evidence: Frye v. United States a Half-Century Later, 80 COLUM. L. REV. 1197, 1221 (1980) (“Instead of using [the Frye standard] as an analytical tool to decide whether novel scientific evidence should be admitted, it appears that many courts apply it as a label to justify their own views about the reliability of particular forensic techniques.”).

173. See Note, Defining the Boundaries, supra note 107, at 713-17.

174. See id. at 717-24.

175. See id. at 713-14.

176. See Massaro, supra note 88, at 438; Note, Defining the Boundaries, supra note 107, at 726-27.

177. See Kinports, supra note 26, at 396-407.

178. See, e.g., Hawthorne v. State, 408 So. 2d 801, 805-06 (Fla. Dist. Ct. App.) (per curiam), petition denied, 415 So. 2d 1361 (Fla. 1982); State v. Hodges, 239 Kan. 63, 67-69, 716 P.2d 563, 566-
defense claim without the assistance of expert testimony—fear is a commonly understood emotion that the jury is capable of evaluating.179

A final example arises in tort cases where plaintiffs seek to introduce expert testimony on the proper valuation of homemaking or caretaking services. The evidence is offered to assist the jury in awarding damages either to injured women no longer able to provide such services or to plaintiffs who receive care at home from other (typically female) members of their family. Again, some courts have admitted this testimony, but others have decided that such matters are within the jury’s common experience and therefore not proper subjects of expert testimony.180

The decision to exclude expert testimony in these cases reflects an assumption that issues of importance to women are simple, “common” matters that everyone understands, rather than “technical,” male issues that might require expert testimony. By contrast, courts have readily admitted expert testimony on subjects much less complicated than the psychological effects of rape or spouse abuse. For example, courts have not hesitated to permit experts to testify that the defendant was driving so as to avoid being followed;181 that the impression of a shoe print left at the scene of the crime matched a sample print taken from the defendant’s shoe;182 that an accident was caused by the plaintiff’s failure to drive in his own lane, which “may” have been the result of the plaintiff’s unfamiliarity with the car;183 and that more than $12,000 in cash found in a bag on the front seat of the defendant’s car was to be used to purchase narcotics.184

The obvious discrepancies in the case law not only devalue the concerns and experience of women as common and simplistic but also perpetuate myths that stereotype and subordinate women. Absent expert


I acted as cocounsel representing the American Psychological Association in Kelly and on the subsequent appeal in Hawthorne, 470 So. 2d 770 (Fla. Dist. Ct. App. 1985). The Association filed an amicus brief in both cases, supporting the admission of expert testimony on the battered woman syndrome in cases where women are charged with killing abusive husbands.


180. See Finley, supra note 32, at 51-54; see also El-Meswari v. Washington Gas Light Co., 785 F.2d 483, 487 (4th Cir. 1986) (mother’s physical and emotional injury resulting from daughter’s death was matter that jury could evaluate without expert testimony).

181. See United States v. Andersson, 813 F.2d 1450, 1458-59 (9th Cir. 1987); United States v. Stewart, 770 F.2d 825, 831 (9th Cir. 1985), cert. denied, 474 U.S. 1103 (1986).


183. See Gladhill v. General Motors Corp., 743 F.2d 1049, 1052 (4th Cir. 1984).

184. See United States v. Mang Sun Wong, 884 F.2d 1537, 1543-44 (2d Cir. 1989), cert. denied, 110 S. Ct. 1140 (1990); see also United States v. Carson, 702 F.2d 351, 369 (2d Cir.) (admitting expert testimony that defendant’s furtive conduct appeared to involve the sale of narcotics), cert. denied, 462 U.S. 1108 (1983).
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guidance on the rape trauma syndrome, for example, the jury in a rape case may well believe that a failure to report the rape promptly and a lack of emotion after the assault suggest that the charges are unfounded, or that acquaintance rape or rape unaccompanied by serious bodily harm is not "real" rape. In battered women's self-defense cases, the uneducated jury may assume that if the woman was truly abused, she would have left the relationship, and may expect her to conform to male standards of behavior in resisting attacks by her husband. In the tort context, the jury is left to assume that the proper measure of damages is the minimum wage paid in the market for housekeeping tasks or, even worse, that "what is provided without financial reward may be considered of little or no financial value in the marketplace." Unless expert testimony is admitted on these issues of concern to women, legal norms reflecting a male perspective will be applied to women in circumstances where they are not appropriate.

Expert testimony on questions of importance to women has also been excluded on the ground that it was not sufficiently reliable, or, in the language of the Frye test, had not been generally accepted in the relevant scientific community. For example, some courts have rejected testimony on the battered woman syndrome because "acceptance or recognition of the phenomenon is largely limited to the people who are actively engaged in the research," and the testimony therefore has not received "a showing of substantial support from the appropriate field of science." To these courts, consensus among those most familiar with the psychological impact of long-term abuse is not enough; some other group of experts (perhaps those who are more credible because they are men or because their work does not focus on women?) must also endorse the research.

In questioning the reliability of expert testimony about the battered woman syndrome, some judges have cited language appearing in the introduction to Lenore Walker's comprehensive study of battered women:

"I think this research has raised more questions for me than it has answered. As a trained researcher, I felt uneasy about stating some of my conclusions in this book. They seemed too tentative to write down in the positive manner which I have used. Yet they are

185. See, e.g., ILLINOIS TASK FORCE ON GENDER BIAS IN THE COURTS, supra note 22, at 110; Massaro, supra note 88, at 402-10, 429-30, 442-43; Note, Defining the Boundaries, supra note 107, at 726-31; see also supra note 88.


confirmed repeatedly by all the available data so far. Seizing on Walker's admission of uncertainty and completely ignoring the final sentence, some judges would refuse to permit expert testimony describing the battered woman syndrome because the research is "in its infancy."

Although many courts have reached the contrary conclusion, none have recognized the gender bias implicit in relying on Walker's introduction to exclude the testimony. Women tend to speak in more qualifying, hesitant language, whereas men are more likely to speak with assurance even when they are not in fact so certain of their position. Thus, Walker's introduction says little about the unreliability of her theory—especially when considered in the context of the entire statement.

In challenging the validity of expert testimony on the battered woman syndrome, judges have also relied on the portion of Walker's introduction in which she acknowledges that the book is written "from a feminist vision": "I view women as victims in order to understand what the toll of such domestic violence is like for them. Unfortunately, in doing so I tend to place all men in an especially negative light . . . ." One judge characterized this statement as "a trifle disconcerting." In refusing to permit Walker to testify in another case, the court charged that "Dr. Walker may make certain conclusions and state certain theories, then engage in research to attempt to substantiate those theories and conclusions."

These criticisms are based on the naive assumption that experts approach their research from a position of complete neutrality and that science is not subject to manipulation. Moreover, the suggestion that Walker may be too biased to testify as an expert witness ignores the many cases in which courts have readily admitted expert testimony in fields that historically have held negative attitudes towards women. The medical profession, for example, is not immune from the gender bias prevalent in our society. A physician's reaction to a patient's symptoms may well depend on the patient's gender, with women's complaints taken less seriously and dismissed more often as psychosomatic. Similarly,

191. Ibn-Tamas, 455 A.2d at 894-95 (Gallagher, J., concurring); Buhrle, 627 P.2d at 1376-77. Other courts have used this rationale to bar expert testimony concerning the rape trauma syndrome. See generally Massaro, supra note 88, at 447-52.
194. L. WALKER, supra note 190, at xvii.
195. Ibn-Tamas, 455 A.2d at 894 (Gallagher, J., concurring).
196. Buhrle, 627 P.2d at 1377.
198. See, e.g., Armitage, Schneiderman & Bass, RESPONSE OF PHYSICIANS TO MEDICAL COMPLAINTS IN MEN AND WOMEN, 241 J. A.M.A. 2186 (1979); Fidell, SEX ROLE STEREOTYPES AND THE AMERICAN PHYSI-
Freudian psychiatrists may believe that women fantasize about rape and incest, and the mental health community in general has a long history of viewing women as hysterical, neurotic, and unstable, as well as responsible for any psychological problems their children might develop. Yet one does not find judges refusing to admit expert testimony in these fields because they find gender bias that devalues women "disconcerting."

The reservations about the reliability and neutrality of Walker's research are especially ironic in light of the courts' willingness to permit psychiatrists to testify at a capital sentencing hearing concerning the likelihood that the defendant will pose a future danger to society. Such evidence is routinely admitted, even though the American Psychiatric Association believes that two-thirds of the predictions are inaccurate and that psychiatrists lack the expertise to make reliable estimates of long-term future dangerousness. Moreover, the so-called experts are allowed to testify despite evidence that they are not neutral but instead routinely err on the side of overpredicting dangerousness. Dr. James Grigson, for example, whose testimony in innumerable death penalty hearings has earned him the nickname "Doctor Death," apparently bases his predictions of future dangerousness on a ninety-minute interview and "has yet to meet a defendant whom he does not think dangerous."

A feminist theory of evidence would question not only the courts' reluctance to admit expert testimony on issues of concern to women, but also gender differences in the treatment of expert witnesses. The perception that women are less capable and authoritative than men tends to undermine the credibility of women who testify as experts, especially those who work in traditionally male-dominated fields. In addition, as
suggested above, women may receive less deference because of their tendency to qualify their statements and admit uncertainty about their results. Gender bias will have an even greater effect on the expert's credibility if the judge permits irrelevant cross-examination questions about her personal life that no attorney would consider asking a male witness.207

E. The Confrontation Clause

A feminist theory of evidence would find much to criticize in the most recent Supreme Court decisions interpreting the reach of the confrontation clause, which ensures criminal defendants the right “to be confronted with the witnesses against [them].”208 The Court has been willing to sacrifice the confrontation rights of defendants facing drug conspiracy charges but has given prosecutors much less latitude in child abuse cases. The Court has thereby authorized exceptions to the confrontation guarantee in an uneven fashion—and in a way that suggests insensitivity to issues of importance to women. The disparity may be due to a belief that drug conspirators are more dangerous to society than child abusers, or to a judgment that out-of-court statements made by coconspirators are more reliable than out-of-court assertions by child abuse victims. In either case, the contrast between the cases reflects a male view of the world that is inconsistent with feminist concerns.

The Court has typically permitted the use of hearsay evidence in a criminal case so long as the prosecution demonstrated both that the declarant was unavailable to testify at trial and that the out-of-court statement either fell within a long-established hearsay exception or otherwise had “particularized guarantees of trustworthiness.”209 In United States v. Inadi, however, the Court allowed the prosecution to introduce a coconspirator’s out-of-court statements without proof that the coconspirator was unavailable to testify.210 The Court reasoned that coconspirator statements are “usually irreplaceable as substantive evidence” and therefore have probative value regardless of the declarant’s availability at the time of trial: “[c]onspirators are likely to speak differently when talking to each other in furtherance of their illegal aims than when talking to each other in furtherance of their illegal aims than when

(judges give less credence to female experts); Schafran, supra note 22, at 15-17 (judges comment on dress and personal appearance of female experts and address them by first names and inappropriate terms of endearment); Schaller, The Advancement of Women in Academic Medicine, 264 J. A.M.A. 1854, 1854-55 (1990); Sherman, Women as Expert Witnesses: Trials and Tribulations, 19 TRIAL, Aug. 1983, at 46, 47. See generally Etaugh & Kasley, Evaluating Competence: Effects of Sex, Marital Status, and Parental Status, 6 PSYCHOLOGY WOMEN Q. 196 (1981) (women are generally perceived as less competent than men); Lott, The Devaluation of Women’s Competence, 41 J. Soc. Issus 43 (1985) (competent women’s work product is evaluated more critically, and their success is attributed to luck rather than ability).

207. See Sherman, supra note 206, at 47 (expert’s family, children, and socioeconomic status were subjects of cross-examination questions).

208. U.S. CONST. amend. VI.


The following Term, in *Bourjaily v. United States*, the Court modified the traditional hearsay exception for coconspirator statements.\(^{212}\) Previously, the prosecutor had been required to introduce evidence independent of the coconspirator's statement in satisfying the prerequisites for admission—in particular, the requirement of evidence establishing the existence of a conspiracy involving both the coconspirator-declarant and the defendant.\(^{213}\) Instead, *Bourjaily* held, the trial court may consider the coconspirator's statement itself when determining whether that preliminary showing has been made.\(^{214}\) The Court then concluded that coconspirator statements have historically been excepted from the hearsay rule and therefore need no particular indicia of reliability to satisfy the dictates of the confrontation clause\(^{215}\)—even though the long-established hearsay exception for coconspirator statements differed from the new exception *Bourjaily* had approved.

In *Idaho v. Wright*, by contrast, the Court reversed a child abuse conviction on confrontation clause grounds where the trial court permitted a pediatrician to testify that one of the victims had reported that she and her sister had been abused by the defendant.\(^{216}\) Explaining that statements coming within a long-established hearsay exception "'possess "the imprimatur of judicial and legislative experience,"'"\(^{217}\) the Court concluded that statements admitted under a residual hearsay exception, like those at issue in *Wright*, "almost by definition . . . do not share the same tradition of reliability that supports the admissibility of statements under a firmly rooted hearsay exception."\(^{218}\) The confrontation clause therefore required specific evidence of trustworthiness before the child's hearsay statements could be admitted under the residual exception.

\(^{211}\) Id. at 395.
\(^{213}\) See id. at 176-77 (citing United States v. Nixon, 418 U.S. 683, 701 (1974); Glasser v. United States, 315 U.S. 60, 74-75 (1942)); see also FED. R. EVID. 801(d)(2)(E) (also requiring that statement be made "during the course of and in furtherance of the conspiracy").
\(^{214}\) See 483 U.S. at 176-81. The Court did not decide, however, whether a coconspirator's out-of-court statement can by itself establish the existence of a conspiracy so as to satisfy the requirements for admission. See id. at 181.
\(^{215}\) See id. at 182-84.
\(^{216}\) 110 S. Ct. 3139 (1990). The trial court refused to let the girl testify on the ground that she was unable to communicate effectively to the jury, a ruling that the Supreme Court did not address. See id. at 3147.
\(^{217}\) Id. (quoting Lee v. Illinois, 476 U.S. 530, 552 (1986) (Blackmun, J., dissenting) (quoting G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 78, at 277-78 (1978))).
\(^{218}\) Id. at 3148. Idaho's residual hearsay exception, modeled after FED. R. EVID. 803(24), allows the admission of

[a] statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement in question.

IDAHO RULE EVID. 803(24).
Apparently the Court did not recognize—at least it did not acknowledge—the seeming inconsistency between this analysis and *Bourjaily*. *Bourjaily* had concluded that even a coconspirator hearsay rule that looked quite different from the traditional rule nevertheless fell within a long-established hearsay exception and therefore required no independent evidence of reliability to satisfy confrontation clause concerns. The disparity between the two decisions is even more ironic given that statements are not admitted under a residual hearsay exception absent evidence of their reliability, whereas coconspirator hearsay is admissible on the theory that conspirators act as each other’s agents, and not because coconspirator statements are particularly reliable.

*Wright* also concluded that the victim’s out-of-court statement accusing the defendant of sexually abusing her lacked sufficient indicia of reliability to satisfy the confrontation clause. The Court ruled that the only pertinent consideration in evaluating the reliability of a hearsay statement is the statement’s “inherent trustworthiness.” Independent evidence corroborating the assertion is irrelevant, according to the Court, because it is “no substitute for cross-examination of the declarant at trial”:

The use of corroborating evidence to support a hearsay statement’s “particularized guarantees of trustworthiness” would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial, a result we think at odds with the requirement that hearsay evidence... be so trustworthy that cross-examination of the declarant would be of marginal utility.

The Court acknowledged that the child’s volunteered statement that the defendant had also abused her sister “presented a closer question” because “the spontaneity of the statement and the change in demeanor” indicated that the accusation was truthful. Nevertheless, the Court concluded that that statement was inadmissible as well because it was not as reliable as evidence admitted under the long-standing hearsay exceptions for excited utterances or statements made for purposes of medical diagnosis.

This part of the Court’s analysis in *Wright* is also contrary to its holdings in the drug conspiracy cases. The Court has such confidence in the reliability of coconspirator statements that it permits the prosecutor to introduce them without accounting for the absence of the declarant or

221. 110 S. Ct. at 3150.
222. *Id.* at 3152.
223. *Id.* at 3150.
224. *Id.* at 3152.
225. *See id.; see also* FED. R. EVID. 803(2) (hearsay exception for excited utterances); *id.* 803(4) (hearsay exception for statements made for purposes of medical diagnosis or treatment).
presenting any evidence of their reliability. As explained above, however, courts use notions of agency and not the inherent reliability of coconspirator statements to justify the coconspirator hearsay exception.\textsuperscript{226} Thus, coconspirator hearsay is not necessarily as trustworthy as excited utterances or statements made for purposes of medical diagnosis; in fact, the \textit{Inadi} dissent listed a number of reasons to doubt the general reliability of coconspirator statements.\textsuperscript{227} At the very least, the risks of inaccuracy suggest that cross-examination of a coconspirator-declarant would be of more than "marginal utility,"\textsuperscript{228} so that the government should be permitted to deny the defendant that opportunity only when the declarant is unavailable to testify.

In \textit{Maryland v. Craig}, the companion case to \textit{Wright}, the Court upheld the use of a one-way closed-circuit television to present the testimony of the victims in a child abuse case.\textsuperscript{229} The Court reasoned that the state's interest in protecting the children from the trauma of testifying outweighed the defendant's right to have them testify in her presence because the procedure preserved the other elements of the confrontation guarantee: the children testified under oath, they were subject to cross-examination, and the jury had an opportunity to see their demeanor.\textsuperscript{230}

Justice Scalia dissented, however, arguing that the defendant had been denied her constitutional right to face her accusers. He distinguished cases like \textit{Inadi} on the ground that there the defendant had no right to insist on a face-to-face encounter with a government witness who had not appeared at trial at all.\textsuperscript{231} In the dissent's view, therefore, Inadi's rights were not violated by the admission of an out-of-court statement made by a coconspirator who may well have been available to testify, but Craig's rights were infringed by the introduction of live testimony, with an opportunity to cross-examine, by means of closed-circuit television! Although two of the four \textit{Craig} dissenters—Justices Brennan and Marshall—would have reversed the convictions in both drug conspiracy cases as well as in the two child abuse cases, the other two—Justices Scalia and Stevens—found the confrontation clause violated only in the two child abuse cases and not in the drug conspiracy cases.

The Justices' differing interpretations of the confrontation clause in these four cases may be attributable to myths about the relative credibility of child abuse victims and drug conspirators. In fact, Justice Scalia's dissent in \textit{Craig} expressly questioned the trustworthiness of child abuse victims, observing that "children are substantially more vulnerable to

\begin{itemize}
  \item \textsuperscript{226} See supra note 220 and accompanying text.
  \item \textsuperscript{227} See 475 U.S. 387, 404-05 (1986) (Marshall, J., dissenting) (coconspirator's out-of-court statement may be ambiguous, spoken in slang or private code, or intended to mislead listener concerning strength or aims of conspiracy).
  \item \textsuperscript{228} \textit{Wright}, 110 S. Ct. at 3150.
  \item \textsuperscript{229} 110 S. Ct. 3157 (1990).
  \item \textsuperscript{230} See id. at 3166-70.
  \item \textsuperscript{231} See id. at 3172-73 (Scalia, J., dissenting).\
\end{itemize}
suggestion than adults, and often unable to separate recollected fantasy (or suggestion) from reality." Alternatively, the discrepancies among the cases may reflect beliefs about the relative societal harm resulting from the two crimes. These beliefs may be traceable to the legal system's traditional reluctance to prosecute child abusers due to concerns about preserving family privacy and the common-law notion that fathers owned their children and therefore had every right to beat them.

Feminist theory would question these rationales, both of which resemble arguments feminists have rejected when offered in analogous cases involving women. Like children, women are perceived as less credible, especially when they are accusing men of abuse. Empirical evidence indicates, however, that child abuse is widespread and that fears of false charges are exaggerated. Similarly, the traditional unwillingness to prosecute child abusers parallels the reluctance to convict husbands for assaulting their wives: domestic violence is considered a family problem rather than a matter of concern to the criminal justice system, and historically women were treated as the property of their husbands and therefore were legally subject to abuse. A feminist approach to evidence would challenge these views and would also consider efforts to protect children as deserving of priority as the war on drugs.

IV. A FEMINIST APPROACH TO TEACHING EVIDENCE

Adopting a feminist perspective in teaching evidence will affect both the substance of the course and the teaching method. On the substantive front, the evidence instructor can incorporate the issues analyzed above in Parts II and III with an eye towards achieving several goals. She can educate students about the biased nature of some evidence rules by discussing, for example, the special evidentiary rules applied in rape cases. She can illustrate the discriminatory impact of apparently neutral evidence rules by asking why matching shoe prints and analyzing driving behavior are complicated matters requiring expert testimony,
while properly valuing a woman's caretaking services is not. And she can inform students about relevant aspects of women's legal history by explaining the background of rape shield laws and spousal privileges, thereby placing the current doctrines in their historical gendered context.

In addition, the instructor can incorporate issues of interest to women in teaching basic evidentiary principles. Cases where experts testified about the battered woman syndrome or the rape trauma syndrome can be used to outline the rules governing expert testimony. The logic of the current structure of evidentiary privileges can be explored by discussing why information disclosed to a psychiatrist is privileged, whereas conversations with a rape counselor or social worker are not. Questions about the admissibility of the plaintiff's sexual history in a sexual harassment case and of the defendant's prior harassment of other women can be analyzed to explain the character evidence rules as well as the concepts of prejudice and probative value.

Although some might object that the law school curriculum “should not be expected to satisfy special interest groups,” this argument has little force when the “special interest group” at issue comprises forty percent of the class. Moreover, Mary Joe Frug has responded persuasively to this criticism: “confining issues that particularly concern women to domestic relations or sex discrimination courses . . . perpetuate[s] the idea that women's interests are personal, concerning only themselves or their families. Men, in contrast, are concerned with the rest of life.”

In addition to affecting the substance of the course, a feminist approach to evidence will also have an impact on the teaching method. On the most basic level, a feminist teaching method requires the use of gender-neutral language in the classroom and the course materials, and the inclusion of cases, problems, and hypotheticals that depict women with admirable character traits playing diverse roles—that is, women who do not merely conform to stereotypical notions of female traits and occupations.

239. See supra notes 180-81 and accompanying text.
240. See supra notes 137-42 and accompanying text.
241. See supra note 163.
242. See supra notes 173-79 & 185-96 and accompanying text.
243. See supra notes 166-67 and accompanying text.
244. See supra notes 153-57 and accompanying text.
245. Frug, supra note 33, at 1091-92.
248. See id. at 1094-97; Tobias, supra note 32, at 501-04; Weiss & Melling, supra note 193, at 1337. See generally D. BARON, GRAMMAR AND GENDER 6, 99-100, 175-76 (1986); Henley, This New Species That Seeks a New Language: On Sexism in Language and Language Change, in WOMEN AND LANGUAGE IN TRANSITION 3, 6-8 (J. Penfield ed. 1987).
249. See Frug, supra note 33, at 1077-87; Tobias, supra note 32, at 497-501.
A feminist teaching method also requires a retreat from the traditional focus on abstract legal rules and an emphasis instead on the factual, social, and human context of the cases. As Jennifer Jaff explained, "I want students to see this process [of legal reasoning] as more than a game of logic; they must come to see it as a way of articulating the needs and desires of real people."\textsuperscript{250} Applying this theory to the study of civil procedure, a course similar to evidence in many respects, Elizabeth Schneider has observed that questions of procedure necessarily involve "the human dilemmas of disputes, legal ethics, [and] legal strategy," thus enabling her to teach civil procedure in a way that "help[s] students develop a greater sensitivity to the normative dimensions of procedure, and help[s] them understand how procedure affects human lives."\textsuperscript{251}

Emphasizing context rather than abstract rules is especially appropriate and easily accomplished in an evidence course. A number of evidence texts focus on problems rather than cases. The problem method necessarily involves the students in the facts of specific situations, thus permitting the instructor to raise questions about strategy and ethics and the interests of the real-world litigants described in the problems.\textsuperscript{252}

Structuring an evidence course around specific problems not only incorporates feminist concepts of context, but also, in my view, is the soundest approach to the study of evidence. True understanding of the rules of evidence comes only with practice. Rather than passively reading court opinions that they may blindly accept as gospel, students who are analyzing how evidentiary principles should be applied in particular circumstances are actively involved in the learning process.\textsuperscript{253} They become more familiar with the rules and are encouraged to question the approaches the courts have taken in resolving evidence issues. Although simulations and role-playing would provide the most active form of learning, an evidence instructor may have too little time or too many students to make those options practicable. Asking students to prepare for class by thinking about the best solution to a number of problems, and then discussing the various ways to approach the problems in the classroom, is the next best alternative.

Moreover, because the law of evidence depends heavily on the facts of each situation, with the application of the rules varying from case to case, femi-

\textsuperscript{250} Jaff, Frame-Shifting: An Empowering Methodology for Teaching and Learning Legal Reasoning, 36 J. LEGAL EDUC. 249, 263 (1986).

\textsuperscript{251} Schneider, supra note 38, at 42. In addition to encouraging students to consider the context of the cases and the real-world impact of the rules of evidence, a feminist teaching method may help alleviate the alienation felt by women law students, who often find their concerns devalued and their voices silenced in the traditional law school classroom. See, e.g., Banks, Gender Bias in the Classroom, 38 J. LEGAL EDUC. 137 (1988); Weiss & Melling, supra note 193, at 1332-55.

\textsuperscript{252} See Frug, supra note 33, at 1107-08 (characterizing the problem method as more "feminine" than the case method).

\textsuperscript{253} See, e.g., Fox, The Good Law School, the Good Curriculum, and the Mind and the Heart, 39 J. LEGAL EDUC. 473, 482 (1989); Johnson & Scales, An Absolutely, Positively True Story: Seven Reasons Why We Sing, 16 N.M.L. REV. 433, 437-38 (1986); Menkel-Meadow, supra note 40, at 58-59; Schneider, supra note 38, at 43.
case, a course that focuses primarily on case law sacrifices some breadth of experience. Reading twenty pages of appellate court opinions may indicate how several courts interpreted the rules in two or three cases, but the same amount of reading in a problem book exposes students to the issues that arise in applying the rules in a wider variety of contexts. If practice is the key to learning evidence, applying the rules to a number of diverse factual settings is more useful than limiting the students' experience to a few cases.

The fact-based nature of the law of evidence makes it difficult to predict how the rules will be applied by a given judge in a given case, and also has implications for the role of the instructor as well as the method of instruction. Rather than the omniscient purveyor of knowledge who hides the answers from the students, impressing them with her wisdom, the person standing in the front of an evidence classroom cannot pretend to know the "right" answer. Students who may accept the indeterminacy of the law in their constitutional law classes are understandably frustrated to learn that in evidence as well there are not always answers to be learned, but only arguments to be made. It may seem wrong that evidence principles are not more clear-cut, given that they involve procedural rules used by lawyers and judges across the country on a daily basis. Part of the evidence instructor's job is to convince her students that their initial view of evidence as a group of fixed rules is inaccurate. When she takes on this role, she is teaching in a manner far removed from the traditional male law professor following in the footsteps of Socrates or Kingsfield.

V. CONCLUSION

Ideally, a feminist approach to evidence would be less abstract, less complex and hierarchical, less competitive, and less formal than the evidence codes currently in place. None of those goals can fully be implemented within the confines of the current legal system, however, without adversely affecting the interests of women. A more contextual approach to evidence issues would substantially increase the discretion given the judge or jury, thereby leaving room for their gendered attitudes to work to the detriment of women. Additional rules may be necessary to protect women from gender bias, even though promulgating more rules will add to the complexity of evidentiary doctrine. A more cooperative style of litigation cannot be effected without massive restructuring of the adversary system. And more informal procedures will disadvantage women so

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254. See Mengler, supra note 41, at 457 (noting that "the predictability quotient [of the Federal Rules] is not high"; "[l]itigants typically come to court uncertain about the admissibility of at least some of their critical evidence").

long as they do not enjoy the same bargaining power as men and the adversary system encourages attorneys to engage in abusive practices.

In the short run, therefore, feminist values are in conflict. The ideal must give way to a more pragmatic approach that devises temporary solutions for an imperfect world. For now, feminists should strive to change those evidence rules that discriminate against women either on their face or as applied and to ensure that the law of evidence incorporates women’s perspectives and concerns. Specific evidence rules that disfavor women can be modified in the short run, and the teaching process can be adapted to a feminist model. More fundamental reform of the law of evidence can come only later, when the legal system no longer reflects only the perspective of the privileged white male class that created it.