

**VIEWING FEDERAL RULES OF EVIDENCE  
404(B) AND 608(B) AS PARTS OF  
THE SAME LEGISLATIVE SCHEME:  
THE TIGHTENING OF RULE 404(B) MAKES IT  
THE RIGHT TIME TO CLARIFY RULE 608(B)**

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#### INTRODUCTION

I would like to discuss Federal Rule of Evidence 608(b),<sup>1</sup> which governs the admission of specific instances of a witness's untruthful conduct to impeach the witness's credibility. As we know, Rule 608(b) reads:

SPECIFIC INSTANCES OF CONDUCT. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of . . . the witness . . .<sup>2</sup>

However, I will not talk about Rule 608(b) in isolation. Rather, I will discuss Rule 608(b) in the context of the evolution of another provision of the Federal Rules of Evidence—Rule 404(b),<sup>3</sup> which governs the admission of a person's specific acts for substantive purposes, such as proving the accused's identity as the perpetrator of the charged crime.<sup>4</sup> That rule states:

(1) *Prohibited Uses.* Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

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1. FED. R. EVID. 608(b).

2. *Id.*

3. *Id.* 404(b).

4. *Id.*

(2) *Permitted Uses*. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

(3) *Notice in a Criminal Case*. In a criminal case, the prosecutor must:

(A) provide reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it;

(B) articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and

(C) do so in writing before trial—or in any form during trial if the court, for good cause, excuses lack of pretrial notice.<sup>5</sup>

I have endeavored to follow the development of Rule 404(b) and the related case law for approximately four decades.<sup>6</sup> During that period, Rule 404(b) has emerged as the most frequently cited Federal Rule of Evidence on appeal.<sup>7</sup> In addition, the rule and its case law have undergone significant change.<sup>8</sup> As Part I will point out, in many respects, the substantive standards for admitting Rule 404(b) evidence have tightened, and the related procedural rules for pretrial notice and limited instructions have been changed to subject evidence proffered under Rule 404(b) to closer scrutiny by both the judge and the opposing party.

In the post–World War II period, American law enforcement authorities have amassed staggering amounts of data about criminal activity in the United States.<sup>9</sup> Jurisdictions now maintain extensive databases about crimes and recidivist criminals in particular.<sup>10</sup> For example, the National Crime Information Center developed the Computerized Criminal History (CCH) Program.<sup>11</sup> As in the case of the CCH, massive quantities of data have been compiled and computerized by national, state, and local law enforcement

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5. *Id.*

6. *See, e.g.*, EDWARD J. IMWINKELRIED, *UNCHARGED MISCONDUCT EVIDENCE* (1st ed. 1984).

7. Daniel J. Capra & Liesa L. Richter, *Character Assassination: Amending Federal Rule of Evidence 404(b) to Protect Criminal Defendants*, 118 COLUM. L. REV. 769, 771 (2018) (explaining that Rule 404(b) is “the most frequently utilized and cited rule of evidence and ‘has generated more published opinions than any other subsection of the rules’” (quoting EDWARD J. IMWINKELRIED, PAUL C. GIANNELLI, FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, *COURTROOM CRIMINAL EVIDENCE* § 901 (6th ed. 2016))).

8. *See* FED. R. EVID. 404 advisory committee’s notes to 1991, 2000, 2006, 2011 & 2020 amendments.

9. 2 EDWARD J. IMWINKELRIED, *UNCHARGED MISCONDUCT EVIDENCE* § 11:1, Westlaw (database updated Jan. 2024).

10. *See* John Wesley Hall, Jr., *The Trial of a Recidivist and Proof of Other Crimes*, CASE & COMMENT, Sept.–Oct. 1979, at 46, 48.

11. *National Crime Information Systems*, U.S. DEP’T JUST., <https://www.justice.gov/tribal/national-crime-information-systems> [<https://perma.cc/P9B9-2V4J>] (last visited Apr. 3, 2024).

agencies.<sup>12</sup> Doing so enables each jurisdiction to quickly access and share its data with jurisdictions throughout the United States.<sup>13</sup>

Given these huge, computerized databases, prosecutors today have more information about an accused's other misdeeds than ever before. It is relatively easy for a prosecutor in New York to learn about a New York accused's prior criminal activity in California or Missouri.<sup>14</sup> In the past, prosecutors have enjoyed great success resorting to Rule 404(b) as a gateway for introducing testimony about an accused's prior misconduct at a criminal trial.<sup>15</sup> Respected commentators have gone to the length of asserting that the courts have applied Rule 404(b) so liberally that they have permitted "wholesale evasion[]" of the character evidence prohibition,<sup>16</sup> "almost total[ly] negat[ed the prohibition] in practice,"<sup>17</sup> reduced the prohibition to mere "rhetoric,"<sup>18</sup> and at the very least frequently misapplied the rule to allow prosecutors to regularly ignore the prohibition.<sup>19</sup> The thrust of the criticism is that, under Rule 404(b), the courts have allowed prosecutors to use conclusory "catch-phrases"<sup>20</sup> and engage in "game-playing" to "disingenuously" introduce bad character evidence in violation of Rule 404(b).<sup>21</sup>

Although those previous criticisms have merit, Part I of this Essay argues that the substantive and procedural standards for admitting bad acts evidence under Rule 404(b) have been toughened. As a matter of substance, several courts have repudiated the use of buzzwords such as "res gestae,"<sup>22</sup> and other courts now subject prosecution proffers to more rigorous scrutiny when the government endeavors to invoke such theories as the doctrine of objective chances, the inextricable intertwinement doctrine, and proof of plan.<sup>23</sup>

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12. See generally Adedeji B. Badiru, Janice M. Karasz & Bob T. Holloway, *AREST: Armed Robbery Eidetic Suspect Typing Expert System*, 16 J. POLICE SCI. & ADMIN. 210 (1988).

13. 2 IMWINKELRIED, *supra* note 9.

14. See *id.*

15. Capra & Richter, *supra* note 7, at 769, 780, 784–85, 831.

16. Daniel D. Blinka, *Character, Liberalism, and the Protean Culture of Evidence Law*, 37 SEATTLE U. L. REV. 87, 110 (2013).

17. John Leubsdorf, *Presuppositions of Evidence Law*, 91 IOWA L. REV. 1209, 1223 (2006).

18. Kenneth J. Melilli, *The Character Evidence Rule Revisited*, 1998 BYU L. REV. 1547, 1548.

19. See Thomas J. Reed, *Admitting the Accused's Criminal History: The Trouble with Rule 404(b)*, 78 TEMP. L. REV. 201, 201–02, 212, 216, 218, 227, 251 (2005).

20. A. A. S. ZUCKERMAN, *THE PRINCIPLES OF CRIMINAL EVIDENCE* 229 (1989).

21. Leo Letwin, "Unchaste Character," *Ideology, and the California Rape Evidence Laws*, 54 S. CAL. L. REV. 35, 51 (1980).

22. *Rojas v. People*, 504 P.3d 296, 301, 304 (Colo. 2022) (abandoning the res gestae doctrine and referring to it as "always-nebulous and long-superfluous" and "a convenient way to bypass the more rigorous requirements" of Rule 404(b)); *State v. Fetelee*, 175 P.3d 709, 723 (Haw. 2008) (noting that many courts have abandoned the res gestae doctrine); *State v. Lake*, 503 P.3d 274, 296 (Mont. 2022) ("[W]e have discarded the common law concept[] of res gestae . . . 'which, like magic incantations, had been invoked . . . [to] admit evidence of questionable value without subjecting it to critical analysis.'" (quoting *State v. Guill*, 228 P.3d 1152, 1160 (Mont. 2010))).

23. See, e.g., *United States v. Green*, 617 F.3d 233, 248 (3d Cir. 2010) ("Like its predecessor res gestae, the inextricably intertwined test is vague, overbroad, and prone to

Perhaps even more importantly, on the procedural front, there are now pretrial notice requirements that give the defense much more time to evaluate and critique the prosecution's claims that the evidence in question possesses legitimate, noncharacter relevance.<sup>24</sup> For their part, many appellate courts are pressuring trial judges to administer limiting instructions that single out the supposed noncharacter theory and explain the theory in clear, detailed terms.<sup>25</sup>

Part I concludes by predicting that in the long term, the tightening of Rule 404(b)'s substantive and procedural standards will give prosecutors a powerful incentive to resort to Rule 608(b) as an alternative justification for informing the jury of the accused's other misdeeds. Currently, prosecutors make minimal use of Rule 608(b). Prosecutors prefer Rule 404(b) as a theory of admissibility because it permits the substantive use of extrinsic testimony about an accused's other misconduct.<sup>26</sup> Given the courts' past receptivity to Rule 404(b) evidence, prosecutors have felt little need to turn to Rule 608(b), which allows the testimony to be used only for the limited purpose of impeachment and restricts resort to extrinsic evidence. For the last three decades, I have made it a practice to scan every opinion published in a Federal Supplement advance sheet. It speaks volumes that the typical Federal Supplement advance sheet contains multiple 404(b) cases but no 608(b) cases.<sup>27</sup> In the near future, that might change.

Part II discusses the problems that will arise if prosecutors begin to shift toward Rule 608(b). Part II points out that Rule 608(b) is the subject of several splits of authority. To begin with, may the proponent employ Rule 608(b) if the act in question has already been the subject of a conviction? In addition, during 608(b) cross-examination, to what extent—if any—may the

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abuse, and we cannot ignore that danger it poses to the vitality of Rule 404(b)."); *United States v. Taylor*, 522 F.3d 731, 734 (7th Cir. 2008) (regarding the inextricable intertwinement doctrine as unsatisfactory); *United States v. Edwards*, 581 F.3d 604, 608 (7th Cir. 2009) (stating that the inextricable intertwinement doctrine and the formula of needing to complete the story "lack clarity").

24. *See* FED. R. EVID. 404(b)(3). The state notice requirements are collected in 2 IMWINKELRIED, *supra* note 9, § 9:10 (listing fifteen states).

25. *See, e.g.*, *United States v. Archer*, 910 F.3d 854, 862 (6th Cir. 2018) ("Limiting instructions should identify 'the specific factor named in the rule that is relied upon to justify admission of the other acts evidence . . . .'" (quoting *United States v. Bell*, 516 F.3d 432, 441 (6th Cir. 2008))); *United States v. Williston*, 862 F.3d 1023 (10th Cir. 2017) (requiring district courts to "instruct the jury to consider the 404(b) evidence for only for the specific, proper purpose for which it was admitted").

26. All of the theories of admissibility expressly mentioned in Rule 404(b)(2) relate to the historical merits of the case rather than the credibility of a witness. *See* FED. R. EVID. 404(b)(2).

27. The very first 2024 Federal Supplement advance sheet is illustrative. The advance sheet dated January 1, 2024 contains 606 F. Supp. 3d 1–1382. There is no mention of Rule 608(b) in the advance sheet. However, the advance sheet contains a major uncharged misconduct decision, *Carroll v. Trump*, 660 F. Supp. 3d 196 (S.D.N.Y. 2023). In the case, E. Jean Carroll's defamation action against former President Donald J. Trump, the court decided to apply Federal Rule of Evidence 415, which carves out an exception to the character evidence prohibition codified in Rule 404(b). *See generally id.* The court also touches on Rule 403, the discretionary balancing provision that courts frequently apply to Rule 404(b) evidence. *See id.* at 206–09.

cross-examiner use documentary evidence to pressure the witness to concede their performance of the untruthful act? Finally, despite the rule's seemingly explicit ban on "extrinsic evidence" of the act, may the cross-examiner confront the witness if a judge or jury has made a finding rejecting the witness's testimony on a prior occasion? As we shall soon see, there is some case law on each of these issues. However, compared to the volume of Rule 404(b) decisions, the bodies of relevant Rule 608(b) case law are small.<sup>28</sup> To date, these issues have not been especially troublesome because, again, by a wide margin, prosecutors have usually opted to take the Rule 404(b) route rather than the Rule 608(b) track.<sup>29</sup>

In addition to identifying the splits of authority, Part II evaluates the conflicting views on these issues. I hope that by calling the attention of Advisory Committee on Evidence Rules (the "Committee") to these issues and describing the competing policy considerations, this Essay will persuade the Committee to address these issues and help the Committee choose how to come down on these issues. The resolution of these 608(b) issues arguably requires an amendment to the rule. As it has done in the past, the Committee could offer guidance to courts applying Rule 608(b) in an Advisory Committee note ("Note"). However, I understand that the Committee's settled practice is that it will not issue a new Note unless the Note accompanies a proposed amendment. If the toughening of Rule 404(b) standards has the foreseeable effect of prompting prosecutors to turn more frequently to Rule 608(b), that amendment and Note guidance might prove valuable in the near future.

## I. THE TIGHTENING OF THE SUBSTANTIVE AND PROCEDURAL STANDARDS FOR INVOKING RULE 404(B) AND THE LIKELY IMPACT OF THAT DEVELOPMENT ON RULE 608(B)

### A. *Substantive Standards*

As we shall see, the past three decades have witnessed a desirable trend in which courts have more carefully policed the substantive application of Rule 404(b).

#### 1. *Res Gestae*

Initially, consider the *res gestae* doctrine. In the past, numerous courts had cited the doctrine as a justification for admitting evidence of other acts as "*res gestae*," that is, acts that were part of the same transaction or episode as the charged crime or that at least were committed in the same short period as the charged crime. However, many contemporary courts—both federal and

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28. There are thousands of Rule 404(b) cases. A Westlaw search in the mid-1980s found over 1,894 federal cases in point and over 11,000 cases on the state versions of the rule. *See* 1 EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 1:4, Westlaw (database updated Jan. 2024); Capra & Richter, *supra* note 7, at 771; Reed, *supra* note 19, at 211–12.

29. *See supra* note 28 and accompanying text.

state—have condemned and consequently abandoned the *res gestae* doctrine. In the words of one federal court, the “very looseness and obscurity” of the phrase creates “too many opportunities for . . . abuse.”<sup>30</sup> In 2021, another federal court declared that the doctrine illustrates only “the marvelous capacity of a Latin phrase to serve as a substitute for reasoning.”<sup>31</sup> In 2022, the Colorado Supreme Court joined the jurisdictions “that have abandoned this always-nebulous and long-superfluous doctrine.”<sup>32</sup> The Hawaii<sup>33</sup> and Kansas<sup>34</sup> Supreme Courts have expressly rejected the doctrine as an independent basis for admitting evidence of an accused’s uncharged misconduct. The Montana Supreme Court repudiated the doctrine as a “magic incantation[.]”<sup>35</sup> The Indiana Supreme Court succinctly stated that, in that jurisdiction, the doctrine “is no more.”<sup>36</sup>

As the ensuing paragraphs demonstrate, although stopping short of completely jettisoning a supposed noncharacter theory that had been popular in the past, a large number of courts have heightened the foundational requirements for invoking the theory. Consider three illustrative theories: the doctrine of objective chances, the doctrine of inextricable intertwinement, and proof of plan.

## 2. The Doctrine of Objective Chances

One such theory is the doctrine of objective chances. The seminal case, of course, is the famous English “brides in the bath” case, *Rex v. Smith*.<sup>37</sup> On July 12, 1912, Smith’s wife was found drowned in her bath.<sup>38</sup> Her life was insured in Smith’s favor.<sup>39</sup> The prosecution offered evidence that two other women who had been married to Smith had been discovered drowned in their own bathtubs.<sup>40</sup> The Court of Criminal Appeal sustained the admission of the evidence on the theory that, cumulatively, the incidents constituted an extraordinary coincidence that was relevant to show that one or some of the deaths were not accidental.<sup>41</sup> The U.S. Court of Appeals for the Seventh

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30. *United States v. Hill*, 953 F.2d 452, 457 n.1 (9th Cir. 1991) (quoting 1 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 218 (3d ed. 1940)).

31. *United States v. Higgins*, 526 F. Supp. 3d 311, 315 (S.D. Ohio 2021) (quoting *Higgins v. Warden*, 715 F.2d 1050, 1057 (6th Cir. 1983)).

32. *Rojas v. People*, 504 P.3d 296, 300 (Colo. 2022).

33. *See State v. Fetelee*, 175 P.3d 709 (Haw. 2008).

34. *See State v. Campbell*, 423 P.3d 539, 546 (Kan. 2018) (refusing to hold that all “marital discord” evidence was admissible when the accused was charged with murdering his wife).

35. *State v. Lake*, 503 P.3d 274, 296 (Mont. 2022) (quoting *State v. Guill*, 228 P.3d 1152 (Mont. 2010)).

36. *Snow v. State*, 77 N.E.3d 173, 180 (Ind. 2017).

37. (1915) 11 Crim. App. 229 (U.K.).

38. *Id.* at 229.

39. *Id.* at 235.

40. *Id.*

41. *Id.* at 239.

Circuit capsulized the logic of the doctrine when it remarked, “[t]he man who wins the lottery once is envied; the one who wins it twice is investigated.”<sup>42</sup>

However, the key to triggering this doctrine is a showing that the accused has been involved in similar incidents more frequently than an average, innocent person would become enmeshed in such events. To be sure, some cases like *Smith* involve “once in a lifetime events” such as a spouse’s death by drowning or winning the lottery.<sup>43</sup> In those cases, standing alone, common sense suggests that together, the charged incident and the other incident amount to an exceptional coincidence. However, in other cases, to demonstrate the threshold for an extraordinary coincidence, the prosecution ought to be required to present expert testimony or official data to establish the ordinary baseline frequency.<sup>44</sup> In many cases in the past, the courts overlooked the need for such data and applied the doctrine without demanding any proof of the baseline frequency.<sup>45</sup> However, astute judges are now calling attention to that issue. In a Utah case, an accused homeless person claimed self-defense.<sup>46</sup> To rebut the defense, the prosecution offered evidence that during a four-year period, the accused had been involved in three similar incidents.<sup>47</sup> In a thoughtful concurrence in the case, Judge Ryan M. Harris faulted the trial judge for admitting the evidence under the doctrine of chances even though there was no reliable evidence of the frequency with which a similarly situated, innocent person would have had to resort to self-defense.<sup>48</sup> Judge Harris wrote that the trial judge had relied on nothing more than an “intuition-level conclusion” about the frequency with which “a person living in that part of the city of [Salt Lake typically] became involved in . . . fight[s].”<sup>49</sup> Judge Harris stated that the trial judge “needed to take

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42. *United States v. York*, 933 F.2d 1343, 1350 (7th Cir. 1991). *See generally* *United States v. Stevens*, 303 F.3d 711 (6th Cir. 2002) (a series of fires in buildings owned by the accused); *United States v. Woods*, 484 F.2d 127 (4th Cir. 1973). There is an ongoing controversy over the question of whether the doctrine possesses genuine noncharacter relevance. *See generally* Hillel J. Bavli, *An Aggregation Theory of Character Evidence*, 51 J. LEGAL STUD. 39 (2022); Paul F. Rothstein, *Intellectual Coherence in an Evidence Code*, 28 LOY. L.A. L. REV. 1259 (1995); Edward J. Imwinkelried, *A Brief Essay Defending the Doctrine of Objective Chances as a Valid Theory for Introducing Evidence of an Accused’s Uncharged Misconduct*, 50 N.M. L. REV. 1 (2020); Andrew J. Morris, *Federal Rule of Evidence 404(b): The Fictitious Ban on Character Reasoning from Other Crime Evidence*, 17 REV. LITIG. 181 (1998). However, as we shall see, even assuming *arguendo* that the doctrine is a valid noncharacter theory, some courts have applied its foundational requirements too laxly. Edward J. Imwinkelried, *Criminal Minds: The Need to Refine the Application of the Doctrine of Objective Chances as a Justification for Introducing Uncharged Misconduct Evidence to Prove Intent*, 45 HOFSTRA L. REV. 851, 879–80 (2017) [hereinafter Imwinkelried, *Criminal Minds*]. There are signs, though, that the courts are beginning to apply those requirements more rigorously. *See, e.g.*, *United States v. Utter*, 97 F.3d 509, 513 (11th Cir. 1996); *People v. Winkler*, 271 Cal. Rptr. 3d 88, 123–26 (Ct. App. 2020); *State v. Skillicorn*, 479 P.3d 254, 267–72 (Or. 2021).

43. *Smith*, 11 Crim. App. 229.

44. Imwinkelried, *Criminal Minds*, *supra* note 42, at 864.

45. *Id.* at 863–64.

46. *State v. Lane*, 444 P.3d 553, 556 (Utah App. 2019).

47. *See id.* at 557.

48. *Id.* at 563–67 (Harris, J., concurring).

49. *Id.* at 567.



additional evidence—from experts, if necessary—to arrive at a sound conclusion about whether the number of assaults in which [the defendant] was involved was atypical for a resident of that part of town.”<sup>50</sup>

### 3. The Inextricable Intertwinement Doctrine

As a growing number of courts abandoned the *res gestae* theory, prosecutors, as a fallback, turned increasingly to the inextricable intertwinement doctrine.<sup>51</sup> According to this doctrine, if in some sense, the other act is inextricably intertwined with the testimony about the charged offense, evidence of the other act is also admissible.<sup>52</sup> Over time, the courts used such expressions as “blended with,” “integral to,” “intermingled,” “interrelated,” “interwoven,” and “intertwined with.”<sup>53</sup> In some cases, the doctrine can be applied legitimately. For instance, the crime and the other incident might be closely intertwined. As a case in point, suppose that the accused confessed to committing the charged crime, but that on its face, the statement is ambiguous because the accused stated that on the charged occasion, they acted *exactly the way* they did at the time of the other incident. As a practical matter, the jury cannot understand the confession to the charged crime without the benefit of testimony about the other incident.<sup>54</sup> If, as in the example, the judge finds the requisite connection—whether due to the defendant’s testimony or otherwise—between the charged crime and the other act, the judge permits reference to the other act on the theory that it is an inseparable part of the story of the charged crime.<sup>55</sup>

However, like the vague *res gestae* notion, the loose inextricable intertwinement doctrine lent itself to abuse.<sup>56</sup> In the final analysis, the question was whether the witnesses to the charged crime could coherently describe that crime without referring to the other act—a problem of redacting

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50. *Id.*

51. *See, e.g.*, United States v. Carillo, 660 F.3d 914, 927 (5th Cir. 2011); United States v. McCann, 613 F.3d 486, 499 n.6 (5th Cir. 2010); *Conference on Possible Amendments to Federal Rules of Evidence 404(b), 807, and 801(D)(1)(a)*, 85 FORDHAM L. REV. 1517, 1524 (2017) (providing remarks of Judge David F. Hamilton) (“[O]ur circuit . . . deep-sixed the inextricably intertwined category of evidence . . . . In our court’s experience, we just found that it was an incoherent mess that contributed nothing of value to making the decisions and tended to produce fuzzier thinking . . .”).

52. 1 *INWINKELRIED*, *supra* note 28, § 6:33.

53. *Id.*

54. United States v. Skowronski, 968 F.2d 242, 246–47 (2d Cir. 1992) (noting that the coconspirator stated that the charged crime would be committed in a manner “similar” to the uncharged crime); *see also* United States v. Alqahtani, 523 F. Supp. 3d 1304, 1311 (D.N.M. 2021) (finding that the reference of additional firearms is not forbidden propensity evidence in part because the references to the number of guns the defendant or his girlfriend own are “inseparable from the earlier mention of the . . . handgun”).

55. *See* United States v. Dudley, 941 F.2d 260, 262 (4th Cir. 1991).

56. United States v. Green, 617 F.3d 233, 248 (3d Cir. 2010) (“Like its predecessor *res gestae*, the inextricably intertwined test is vague, overbroad, and prone to abuse, and we cannot ignore that danger it poses to the vitality of Rule 404(b).”).

and editing.<sup>57</sup> Fairly early on, appellate courts began tasking trial judges to take “a hard look to ensure there is a clear link or nexus between the evidence and the story of the charged offense, and that the purpose for which the evidence is offered is actually essential.”<sup>58</sup> As time passed, more courts began rejecting strained prosecution attempts to rely on the doctrine to justify admitting testimony about uncharged acts.<sup>59</sup> The Seventh Circuit characterized the doctrine as “overused, vague, and quite unhelpful.”<sup>60</sup> For that reason, the court not only directed its trial judges to examine the claimed nexus more carefully but also went to the length of announcing that “[h]enceforth, . . . inextricable intertwinement is unavailable” as a theory of admissibility in that jurisdiction.<sup>61</sup> Most federal courts have not gone that far but no longer accept superficial claims of inextricable intertwinement by the prosecution at face value.<sup>62</sup>

#### 4. Plan

The text of Rule 404(b)(2) expressly mentions proof of “plan” as an acceptable, noncharacter theory of logical relevance.<sup>63</sup> The rub is that the rule does not define the term.<sup>64</sup> Some plan scenarios clearly possess legitimate noncharacter relevance.

For example, in cases that involve “sequential” plans, there is a natural sequence to the offenses: the accused first steals the key to a till and later uses the key to steal money from the till.<sup>65</sup> Or the accused initially steals the instrumentalities needed to carry out a crime and then employs them to commit the crime.<sup>66</sup> Proof of the first crime tends to prove the accused’s commission of the second crime without positing any assumption about the accused’s personal, subjective bad character. For example, if there were only one key to the till, the accused’s theft of that key would be relevant to singling out the accused as the perpetrator of the second crime.

In cases involving “chain” plans, the accused is attempting to achieve some larger objective, and the individual crimes are merely means to the end

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57. See Edward J. Imwinkelried, *The Second Coming of Res Gestae: A Procedural Approach to Untangling the “Inextricably Intertwined” Theory for Admitting Evidence of an Accused’s Uncharged Misconduct*, 59 CATH. U. L. REV. 719, 733–41 (2010).

58. *United States v. Brizuela*, 962 F.3d 784, 795 (4th Cir. 2020).

59. See, e.g., *United States v. Steiner*, 847 F.3d 103, 112–13 (3d Cir. 2017); see also *United States v. Stephens*, 571 F.3d 401, 410–11 (5th Cir. 2009); *United States v. Taylor*, 522 F.3d 731, 734–35 (7th Cir. 2008); *United States v. Cervantes*, 170 F. Supp. 3d 1226, 1239 (N.D. Cal. 2016); *United States v. Nektalov*, 325 F. Supp. 2d 367, 370–71 (S.D.N.Y. 2004).

60. *United States v. Gorman*, 613 F.3d 711, 719 (7th Cir. 2010).

61. *Id.*; see also Stephen A. Saltzburg, *Inextricably Intertwined?: Maybe Not*, 16 CRIM. JUST. 60, 62 (2001).

62. See *supra* note 51 and accompanying text.

63. FED. R. EVID. 404(b)(2).

64. See *id.*

65. 1 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 215 (3d ed. 1940).

66. See Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988, 1009 (1938).

of attaining that objective.<sup>67</sup> Thus, a potential heir to an estate might murder the other competing heirs to ensure that they inherit the property, or someone might bribe several city council members in order to gain enough votes to ensure the approval of a matter pending before the council.<sup>68</sup> The overarching goal of securing title or a favorable vote inspires all the killings or bribes; evidence of the other crimes is relevant for a purpose other than showing that the accused has a propensity to kill or bribe.

Finally, in cases involving “template” plans, there is evidence that before committing a series of crimes, the accused gave forethought to the subsequent commission of the offenses.<sup>69</sup> The accused might even have gone to the length of preparing a written list of targets<sup>70</sup> or victims.<sup>71</sup> Just as Rule 404(b) mentions “plan” as a permissible use of 404(b) evidence, it refers to “preparation.”<sup>72</sup> Again, the evidence is relevant to prove the accused’s guilt without any assumption about the accused’s character.

However, in many past cases, the courts went further and invoked the plan “rubric” when there was nothing more than evidence of several recent, similar crimes.<sup>73</sup> In this situation, “plan” is merely a euphemism for bad character.<sup>74</sup> As in the case of the inextricable intertwinement doctrine, a growing number of federal courts now demand more before allowing the prosecution to invoke the plan theory.<sup>75</sup> In the words of the U.S. Court of Appeals for the Second Circuit, “the mere similarity of separate crimes committed within a short period of time does not create a ‘common plan or scheme.’”<sup>76</sup>

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67. See *United States v. Griffith*, 284 F.3d 338 (2d Cir. 2002) (involving an overall plan); *State v. Pate*, 173 N.E.3d 567, 587 (Ohio Ct. App. 2021) (stressing that “plan evidence should show that the crime being charged and the other acts are part of the same grand design by the defendant”); *State v. Smith*, 165 N.E.3d 1123, 1133 (Ohio 2020) (explaining common-scheme or plan evidence).

68. See Thomas Quigley, Note, *Admissibility of Evidence Under Indiana’s “Common Scheme or Plan” Exception*, 53 IND. L.J. 805, 812–13 (1978) (discussing a plan to intimidate enough nonunion truck drivers to force a company to enter into an agreement with a union; the union was not merely attempting to intimidate nonunion drivers, but doing so as a means to achieve a larger end, and each act of intimidation was a step in executing that plan).

69. M. C. Slough, *Other Vices, Other Crimes: An Evidentiary Dilemma*, 20 U. KAN. L. REV. 411, 419 (1972) (antecedent thought); Note, *Admissibility of Similar Crimes: 1901-1951*, 18 BROOK. L. REV. 80, 101–04 (1980) (preconceived plan).

70. See *United States v. Fortenberry*, 919 F.2d 923, 924–25 (5th Cir. 1990).

71. *People v. Corona*, 145 Cal. Rptr. 894, 900–02 (Ct. App. 1978) (describing a “death ledger” naming the victims).

72. FED. R. EVID. 404(b)(2).

73. 1 IMWINKELRIED, *supra* note 28, § 3:26.

74. *People v. Tassell*, 679 P.2d 1, 7–8 (Cal. 1984).

75. See generally *Becker v. ARCO Chemical Co.*, 207 F.3d 176 (3d Cir. 2000); *United States v. Himelwright*, 42 F.3d 777 (3d Cir. 1994); *United States v. LeCompte*, 99 F.3d 274, 278 (8th Cir. 1996); *United States v. Tai*, 994 F.2d 1204 (7th Cir. 1993); *United States v. Temple*, 862 F.2d 821, 823 (10th Cir. 1988) (“This circumstantial evidence is entirely too thin . . .”); *United States v. Lynn*, 856 F.2d 430 (1st Cir. 1988).

76. *United States v. Chartier*, 970 F.2d 1009, 1013 (2d Cir. 2009).

Thirty years ago, all the above theories were gateways to admissibility that prosecutors often successfully turned to.<sup>77</sup> Today, in many cases, the prosecutor's attempt to invoke the theory will fail.<sup>78</sup>

### B. Related Procedural Restrictions

As Part I.A demonstrated, the courts have made it more difficult for prosecutors to introduce uncharged misconduct under Rule 404(b) by toughening the rule's substantive standards. As previously stated, some courts have repudiated the *res gestae* and inextricable intertwinement glosses on the rule, and other courts are applying the foundational requirements for the doctrine of objective chances and plan theories more rigorously. At the same time, two procedural changes relating to pretrial notice and limiting instructions have also raised the 404(b) barriers.

#### 1. Pretrial Notice

In 1991, Rule 404(b) was amended to add a pretrial notice requirement.<sup>79</sup> The original amendment required only that, *on request*, the prosecution disclose to the defense "the general nature of any such evidence" that the prosecutor intends to offer at trial.<sup>80</sup> As a practical matter, even that limited requirement made it more difficult for prosecutors to introduce Rule 404(b) evidence. If the defense requested and received the disclosure before trial, the defense would have ample time to think through the potential prosecution theories of admissibility, such as plan. Prosecutors realized that they had to be better prepared to substantiate their claim of noncharacter relevance because the defense would no longer be caught by surprise at trial.

The further amendment that took effect in 2020 gave the notice requirement even more teeth.<sup>81</sup> By the terms of that amendment, even absent a defense request, the prosecution must now disclose the nature of the evidence.<sup>82</sup> Much more importantly, under 404(b)(3)(B), the prosecution must "articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose."<sup>83</sup> In short, in its mandatory pretrial notice, the prosecutor must identify the item of evidence that it intends to proffer at trial, specify its intended use (e.g., one of the permissible purposes listed in the text of 404(b)(2)), and explain how the jury can reason from that item of evidence to that fact of consequence

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77. 1 IMWINKELRIED, *supra* note 28, § 3:26.

78. *Id.* § 3:26 n.32 (collecting cases holding that the prosecution's showing of an alleged plan was insufficient).

79. FED. R. EVID. 404 advisory committee's note to 1991 amendment.

80. The Note accompanying the 2020 amendment to Rule 404(b) expressly mentions the prior requirement for a request and states that the amendment repeals the requirement. *Id.* advisory committee's note to 2020 amendment; *see also* 2 IMWINKELRIED, *supra* note 9, § 9:10 n.41.

81. FED. R. EVID. 404 advisory committee's note to 2020 amendment.

82. *Id.*

83. *Id.* 404(b)(3)(B).

without positing an assumption about the accused's personal bad character.<sup>84</sup> Because the text of the amended rule requires that the prosecution identify both the purpose and the reasoning, without more, a prosecutor's bald, conclusory assertion that the evidence is admissible to prove identity or intent falls short. Prosecutors must now think through their claimed noncharacter theory of logical relevance in greater depth and much earlier in the process. Once the prosecution identifies a theory in the pretrial notice, the defense can sharply focus on that theory and develop more specific objections to the proffer.

## 2. Limiting Instructions

The rule drafters made it more challenging for prosecutors to introduce uncharged misconduct by initially imposing and then toughening a pretrial notice requirement.<sup>85</sup> Appellate courts have intensified the challenge by changing the law governing limiting instructions on such evidence.<sup>86</sup> In particular, the appellate courts increasingly prohibit using so-called shotgun instructions.<sup>87</sup>

Previously, many trial judges gave shotgun instructions mentioning all the permissible purposes listed in Rule 404(b). In one case, the district court judge “told the jurors they could use the evidence for all seven of the purposes explicitly listed in Rule 404(b).”<sup>88</sup> Such an instruction is an invitation for the jury to misuse the testimony as bad character evidence. Even if the item possesses genuine noncharacter relevance on one theory, such as *modus operandi*, testimony about a bad act possesses dual relevance. In addition to its permissible use, the item is relevant as evidence of the accused's bad character. By treating the accused's character as an intermediate inference, the jurors can reason to other facts of consequence in the case; the instruction might list six other “purposes” on which the evidence is relevant only by employing the accused's character as an intermediate inference. Consequently, a growing number of courts condemn shotgun instructions as an unacceptable laundry list of the purposes mentioned in Rule 404(b).<sup>89</sup>

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84. *See id.*

85. *See supra* notes 79–84 and accompanying text.

86. *See* 2 IMWINKELRIED, *supra* note 9, § 9:74.

87. *See, e.g.,* United States v. Cortijo-Diaz, 875 F.2d 13, 15–16 (1st Cir. 1989) (“[T]his instruction, which consisted of a laundry-list of permitted uses contained in the rule, was simply incapable of limiting the damage caused by this evidence.”); United States v. Davis, 726 F.3d 434 (3d Cir. 2013) (explaining that a jury instruction must provide more than “the entire litany of permissible theories under Rule 404(b)” (quoting United States v. Sampson, 980 F.2d 883, 889 (3d Cir.1992))); United States v. Morales-Quinones, 812 F.2d 604, 612 (10th Cir. 1987) (“[A] broad statement merely invoking or restating Rule 404(b) will not suffice.”); *see also* 4 DAVID P. LEONARD, THE NEW WIGMORE: A TREATISE ON EVIDENCE § 6.4.1 (2023) (stating that courts “frequently apply a kitchen sink approach to the admission of uncharged misconduct evidence to prove knowledge”).

88. United States v. Johnson, 98 F. App'x 5, 7 (D.C. Cir. 2004).

89. *See, e.g.,* United States v. Garcia-Sierra, 994 F.3d 17, 34 (1st Cir. 2021) (“[F]or limiting instructions to be ‘suitably prophylactic’ in the Rule 404(b) context, they must guide

By virtue of the first step, trial judges must specify the particular purpose or purposes on which they believe that the testimony possesses legitimate noncharacter relevance.<sup>90</sup> As a second step, some federal courts are now encouraging trial judges to elaborate on that purpose or those purposes.<sup>91</sup> Traditionally, most appellate courts have balked at requiring trial judges to do so. In part, the courts have been reluctant to prescribe that requirement because perhaps it was arguable that the trial judge's elaboration on the purpose or purposes could amount to improper judicial comment on the evidence.<sup>92</sup> Another contributing factor may have been the appellate courts' unwillingness to impose on trial judges the sometimes difficult task of composing an instruction clearly delineating the noncharacter theory. However, the 2020 amendment to Rule 404(b) simplifies the trial judge's task. As previously stated, the amendment requires the prosecution to specify both the permissible use of the evidence and the supporting "reasoning."<sup>93</sup> If the trial judge vigorously enforces that requirement, the judge can pressure the prosecutor to lay out the complete chain of circumstantial reasoning underlying the proffer. The prosecutor's notice can then serve as an excellent starting point for the judge to craft a more refined limiting instruction. Beginning in 2021—the year after the amendment took effect—an occasional appellate opinion has directed trial judges to "clearly direct[ the jury] toward the specific permissible relevance that the prior-bad-acts evidence has to the case."<sup>94</sup>

### C. *The Cumulative Impact of the Changed Substantive Standards and Procedural Restrictions*

As previously pointed out, prosecutors now have access to massive amounts of data about an accused's prior criminal activity. Under the Federal Rules of Evidence, prosecutors have two routes for introducing evidence about such activity: Rules 404(b) and 608(b). In the past, prosecutors have

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the jury's attention away from the forbidden propensity inference by clearly directing it toward the specific permissible relevance that the prior-bad-acts evidence has to the case." (quoting *United States v. Sabean*, 885 F.3d 27, 38 (1st Cir. 2018)); *Davis*, 726 F.3d at 445 (explaining that "the jury charge included a wide list of purposes"); *Becker*, 207 F.3d at 205 (finding the district court's jury instructions deficient because they listed an "entire litany" of purposes under Rule 404(b) (quoting *Sampson*, 980 F.2d at 889)); *United States v. Everett*, 270 F.3d 986, 991–92 (6th Cir. 2001) (stating that the trial judge "must carefully identify . . . the specific factor named in the rule that is relied upon to justify the admission of the other-acts evidence" (quoting *United States v. Spikes*, 158 F.3d 913, 929 (6th Cir. 1998)); *United States v. Kern*, 12 F.3d 122, 125 n.3 (8th Cir. 1993) ("[W]e do not countenance the district court's use of this virtual laundry list of permissible Rule 404(b) purposes."); *Cortijo-Diaz*, 875 F.2d at 15–16; *United States v. Munson*, 819 F.2d 337, 346 (1st Cir. 1987).

90. See generally Edward J. Imwinkelried, *Limiting Instructions on Uncharged Misconduct Evidence Under Federal Evidence Rule 404(b), the Most Cited Evidentiary Rule on Appeal: The Need to Explain the How and the What as Well as the Which*, 45 AM. J. TRIAL ADVOC. 263 (2023).

91. 2 IMWINKELRIED, *supra* note 9, § 9:74 n.19 (collecting cases).

92. See HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 418–21 (1986).

93. FED. R. EVID. 404(b)(3).

94. *United States v. García-Sierra*, 994 F.3d 17, 34 (1st Cir. 2021).

understandably preferred Door A—Rule 404(b).<sup>95</sup> Although Rule 608(b) evidence is admissible for the limited purpose of impeachment, Rule 404(b) testimony qualifies as substantive evidence on the historical merits.<sup>96</sup> Moreover, although Rule 608(b) purports to bar “extrinsic evidence” (other than concessions elicited during the witness’s cross-examination), the courts routinely admit extrinsic evidence qualifying under Rule 404(b).<sup>97</sup> Before the recent reforms, many courts liberally admitted such evidence under Rule 404(b) even though the defense had no advance pretrial notice of the evidence and, at trial, the government relied on conclusory claims that the evidence was logically relevant on a noncharacter theory.<sup>98</sup> After deciding to admit the evidence, trial judges administered limiting instructions that gave jurors little useful guidance on how to confine the evidence to legitimate, noncharacter uses.<sup>99</sup>

As Part I.A demonstrated, federal courts are now tightening the substantive standards under Rule 404(b).<sup>100</sup> They have jettisoned spurious theories such as *res gestae* and insist that prosecutors lay fuller foundations to invoke noncharacter theories such as plan and the doctrine of objective chances.<sup>101</sup> Moreover, as Part I.B added, prosecutors can no longer spring such evidence as a surprise at trial.<sup>102</sup> The defense is entitled to advance notice of the government’s intent to resort to Rule 404(b) and can be much better prepared to formulate specific objections to the 404(b) proffer. Furthermore, as appellate courts are increasingly banning shotgun instructions, trial judges know that they must draft limiting instructions that hone in on the permissible purpose or purposes. In addition, since the 2020 amendment requires that prosecutors disclose the “reasoning” underlying their claim of noncharacter relevance, trial judges have a strong incentive to demand that prosecutors comply with the 2020 amendment.<sup>103</sup>

The cumulative impact of these substantive and procedural changes is clear: it is now harder for prosecutors to introduce uncharged misconduct evidence through Door A—Rule 404(b). Door B—Rule 608(b)—is likely to become more attractive than it has been in the past. Part II turns to Rule 608(b). As we shall see, though, there are several splits of authority over the scope of Rule 608(b).<sup>104</sup> Previously, the existence of those splits of authority was tolerable and posed few problems because prosecutors had so little

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95. *See supra* note 28 and accompanying text.

96. *See* FED. R. EVID. 404(b), 608(b).

97. *See* 1 IMWINKELRIED, *supra* note 28, § 2:8 (listing the types of evidence admissible to prove the person’s commission of an act proffered under Rule 404(b) and making no mention of a ban on “extrinsic evidence”).

98. *See supra* Part I.A.

99. *See* 2 IMWINKELRIED, *supra* note 9, § 9:74 (discussing the appellate courts’ prior toleration of conclusory trial court jury charges including “shotgun” instructions listing all the permissible theories enumerated in Rule 404(b)(2)).

100. *See supra* Part I.A.

101. *See supra* Part I.A.

102. *See supra* Part I.B.

103. FED. R. EVID. 404 advisory committee’s note to 2020 amendment.

104. *See infra* Part II.

occasion to turn to Door B. However, the tightening of substantive rules and procedural restrictions under Rule 404(b) may change the dynamic. In the future, prosecutors may invoke Rule 608(b) more often, and the splits of authority under Rule 608(b) will then grow in importance and become more troublesome. The Committee should consider whether it is time to address some or all of those splits of authority in anticipation of increased reliance on Rule 608(b).

## II. THE SPLITS OF AUTHORITY OVER THE SCOPE OF RULE 608(B) AND THE MANNER IN WHICH THE COMMITTEE MIGHT CONTRIBUTE TO THE RESOLUTION OF THOSE SPLITS

Although the body of case law construing Rule 404(b) dwarfs the Rule 608(b) case law, three splits of authority have emerged under Rule 608(b). Further, although the typical item of 404(b) evidence plays a modest role in the case, 608(b) can be the theory that the defense relies on to introduce evidence of a rape complainant's prior false rape accusation<sup>105</sup>—currently an important, hot-button issue.

### A. *Can the Proponent Invoke Rule 608(b) If the Act in Question Has Already Been the Subject of a Conviction?*

Both Rules 608(b) and 609<sup>106</sup> are parts of Article VI of the Federal Rules of Evidence devoted to “Witnesses.”<sup>107</sup> They both deal with impeachment techniques.<sup>108</sup> Moreover, by their terms, both allow the opponent to attack the witness’s “character for truthfulness.”<sup>109</sup> Rule 609(a) permits the opponent to use conviction evidence as a basis for impeaching that character trait:

IN GENERAL. The following rules apply to attacking a witness’s character for truthfulness by evidence of a criminal conviction:

(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

(A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and

(B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and

(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of

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105. Edward J. Imwinkelried, *Formalism Versus Pragmatism in Evidence: Reconsidering the Absolute Ban on the Use of Evidence to Prove Impeaching, Untruthful Acts that Have Not Resulted in a Conviction*, 48 CREIGHTON L. REV. 213, 228–32 (2015).

106. FED. R. EVID. 609.

107. *See id.* 608(b), 609.

108. *See id.*

109. *See id.*



the crime required proving—or the witness’s admitting—a dishonest act or false statement.<sup>110</sup>

What if the untruthful act (otherwise a proper subject of inquiry under Rule 608(b)) is part of an event that was the subject of a prior conviction? Does the existence of the conviction preclude the opponent from inquiring under Rule 608(b)? The federal courts of appeal are divided over that question.<sup>111</sup>

### 1. The Mootness of the Issue

At first blush, the issue might appear moot. After all, assuming the conviction is admissible under Rule 609, a small step seems to permit the opponent to elicit the further detail that during the course of conduct that is the subject of the conviction, the accused committed an untruthful act. However, on closer scrutiny, that is not the case.

Initially, consider Rule 609(a)(1) regulating the use of felony-grade convictions. The rub is that when 609(a)(1) governs, the courts ordinarily limit the opponent to eliciting the details of the name of the underlying crime,<sup>112</sup> the date and site of the conviction,<sup>113</sup> and the sentence.<sup>114</sup> Suppose that the accused lured a victim to their death by lying to them about the purpose of a meeting in a relatively secluded area. Assume further that the accused was later convicted of the felony of murdering the victim. On the one hand, at trial, the prosecutor could elicit the fact that in December 2021 in St. Louis, the accused was convicted of first-degree murder and sentenced to thirty years’ imprisonment. On the other hand, given the case law construing Rule 609(a)(1), the prosecutor could not elicit the specific detail that the accused had lied to the victim as part of the accused’s plan to murder the victim.

But even if Rule 609(a)(1) would not permit the inquiry, one would think that the inquiry is surely permissible under Rule 609(a)(2). After all, that provision seems to allow inquiry about any conviction for crimes falsi offenses consisting of “a dishonest act or false statement.”<sup>115</sup> However, on close scrutiny, the language of the rule is more restrictive. Inquiry is permissible only “if the court can readily determine that establishing the elements of the crime required proving—or the witness’s admitting—a

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110. *Id.* 609(a).

111. *United States v. Deleon*, 308 F. Supp. 3d 1229, 1235 (D.N.M. 2018).

112. *See, e.g.*, *United States v. White*, 222 F.3d 363, 370 (7th Cir. 2000); *Ochoa v. County of Kern*, 628 F. Supp. 3d 1006, 1012 (E.D. Cal. 2023) (“[A]bsent exceptional circumstances, evidence of a prior conviction admitted for impeachment purposes may not include collateral details and circumstances attendant upon the conviction.’ . . . ‘Generally, only the prior conviction, its general nature, and punishment of felony range are fair game for testing the [witness’s] credibility.’” (first and third alterations in original) (first quoting *United States v. Sine*, 493 F.3d 1021, 1036 n.14 (9th Cir. 2007); then quoting *United States v. Osazuwa*, 564 F.3d 1169, 1175 (9th Cir. 2009))).

113. *See, e.g.*, *United States v. Estrada*, 430 F.3d 606, 616 (2d Cir. 2005) (only the “essential facts” of the conviction).

114. *See, e.g.*, *United States v. Albers*, 93 F.3d 1469, 1480 (10th Cir. 1996); *Starmel v. Tompkin*, 634 F. Supp. 3d 41, 44 (N.D.N.Y. 2022).

115. FED. R. EVID. 609(a)(2).

dishonest act or false statement.”<sup>116</sup> Assume arguendo that at the trial culminating in the conviction, the prosecution had introduced admissible evidence that the accused had lied to the victim; a third party might have overheard the accused’s end of the accused’s telephone conversation with the victim. Standing alone, including that testimony in the record of the trial is insufficient to trigger Rule 609(a)(2). The text of the rule requires that the judge be able to “readily” make the necessary determination.<sup>117</sup> The accompanying Note explains:

The amendment requires that the proponent have ready proof that the conviction required the factfinder to find, or the defendant to admit, an act of dishonesty or false statement. Ordinarily, the statutory elements of the crime will indicate whether it is one of dishonesty or false statement. Where the deceitful nature of the crime is not apparent from the statute and the face of the judgment—as, for example, where the conviction simply records a finding of guilt for a statutory offense that does not reference deceit expressly—a proponent may offer information such as an indictment, a statement of admitted facts, or jury instructions . . . . But the amendment does not contemplate a “mini-trial” in which the court plumbs the record of the previous proceeding to determine whether the crime was in the nature of *crimen falsi*.<sup>118</sup>

Thus, there is no complete overlap between Rules 609(a)(2) and 608(b); there are times when Rule 609(a)(2) is inapplicable because of the “readily determined” limitation, but the untruthful underlying act would otherwise be an appropriate subject of inquiry under 608(b).

The upshot is that in the murder hypothetical, neither Rule 609(a)(1) on felony-grade offenses nor 609(a)(2) on *crimen falsi* offenses would permit the prosecutor to inquire about the lie. The bottom line is that the issue is not moot.

## 2. The Merits of the Statutory Construction Issue

If the issue is a live one, what are the relevant arguments? A proponent of barring inquiry can first point to the text of Rule 608(b). The introductory language is: “Except for a criminal conviction under Rule 609 . . . .”<sup>119</sup> However, that language restricts the admissibility of extrinsic evidence of the deceitful act, not a definition of the basic scope of Rule 608(b).<sup>120</sup>

The proponent might next point to a passage in the original Note to Rule 608(b). That Note refers to “[p]articular instances of conduct, though not the subject of criminal conviction.”<sup>121</sup> Yet, that reference is ambiguous. The use of “though” does not necessarily mean that the drafters forbade the use

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116. *Id.*

117. *Id.*

118. *Id.* 609 advisory committee’s note to 2006 amendment.

119. *Id.* 608(b).

120. *Id.*

121. *Id.* 608 advisory committee’s note to 1972 proposed rules.

of Rule 608(b) when there has been a conviction.<sup>122</sup> Suppose that the violation of a constitutional rule is a per se error. Referring to that rule, a court might write: “A violation, though not prejudicial in character, is a ground for reversal.” Given the common usage of the term “though,” the court would mean that whether or not the violation was prejudicial, the violation is reversible. By the same token, the passage in the Note could mean that whether or not the act has been “the subject of criminal conviction,” the act is a subject for inquiry.

As we have seen, there is at most a questionable statutory construction case for barring inquiry under Rule 608(b) if the untruthful act was part of an act that has been the subject of a conviction. Even more to the point, Rules 608 and 609 purport to be distinct methods of impeachment, and the text of Rule 608(b) does not expressly bar the use of an untruthful act when there has been a prior conviction. In addition, barring inquiry would be inconsistent with Rule 404(b) case law. Like Rule 608(b), Rule 404(b)(1) refers to an “act.”<sup>123</sup> Yet, the cases are legion in which courts have allowed the proponent to use convictions to prove the acts admissible under Rule 404(b).<sup>124</sup> Indeed, some courts declare that a prior conviction is “the strongest proof” of an accused’s identity for purposes of Rule 404(b).<sup>125</sup> As a general proposition, it is dubious to “import” restrictions from one Federal Rule of Evidence provision into another provision.<sup>126</sup> Doing so can strain the notion of “context” to the breaking point. Concededly, if a Note to one rule identifies a constitutional concern that (1) inspires a restriction codified in the first rule and (2) is also relevant to another rule, there is a case for extending the restriction from one rule to the other.<sup>127</sup> The constitutional concern that inspires the restriction might also apply to the provision in the other rule. Whenever reasonably possible, a court should construe a statute in a manner to uphold its constitutionality. Extending a constitutionally inspired restriction from one rule to another would be consistent with that statutory construction policy. However, in the instant case, the Notes to Rules 608 and 609 do not identify any constitutional concern that would seemingly justify treating Rule 609 as essentially preempting Rule 608.

This is one of the issues on which there is little Rule 608(b) case law. Allowing this split of authority to persist has been tolerable in the past because, again, prosecutors have usually chosen Door A rather than Door B.

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122. *See id.*

123. *Id.* 404(b).

124. *See* 1 IMWINKELRIED, *supra* note 28, § 2:8.

125. *Id.*

126. *See* Imwinkelried, *supra* note 105, at 228–32.

127. *See* United States v. Oates, 560 F.2d 45, 69–73 (2d Cir. 1977) (discussing the legislative history of Rule 803(b) indicating that Congress intended to safeguard the accused’s Confrontation Clause rights by amending the proposed language of Rule 803(8)(B)). Rule 803(8)(A)(ii) excludes certain observations by “law-enforcement personnel” from the scope of the official record exception to the hearsay rule. FED. R. EVID. 803(8). When a court construes the Note to Rule 803(8) as a clear signal that the drafters believed the Confrontation Clause mandated that restriction, there would be a strong case for also precluding the admission of such evidence under Rule 803(6) governing business records. *See id.* 803(6).

However, if the government begins invoking Door B, Rule 608(b), much more frequently in the future, this is an issue that the Committee should consider addressing.

*B. To What Extent, If Any, May the Opponent Use Exhibits Such as Writings During the Cross-examination to Pressure the Witness to Concede that They Committed the Untruthful Act?*

On its face, Rule 608(b) embodies a general prohibition on the use of “extrinsic evidence.”<sup>128</sup> The question is the breadth of that prohibition. There is agreement that the prohibition comes into play after the witness to be impeached has left the stand.<sup>129</sup> When the witness has already concluded their testimony and left the stand, the prohibition would apply if the opponent later called a second witness to prove the first witness’s commission of the untruthful act.<sup>130</sup> However, the point of disagreement is the extent to which, if at all, the cross-examiner may use exhibits to pressure the first witness to concede that they committed the untruthful act. Does the “extrinsic evidence” prohibition go that far?

The authority on this question is fragmented. The language of both the rule and the accompanying Note appears to cut in favor of an expansive definition of “extrinsic evidence,” barring the use of documents during cross-examination. The text of Rule 608(b) contains a blanket prohibition of “extrinsic evidence.”<sup>131</sup> The Note to the 2003 amendment to Rule 608(b) refers to “the absolute prohibition on extrinsic evidence” imposed by the rule.<sup>132</sup> The language of Rule 608(b) can be construed as meaning that the cross-examiner’s only right is to refer directly to the untruthful act; the limited right is to refer only to the untruthful act itself without any use of documents expressly referring to the act or implying the act by reflecting actions that third parties have taken against the witness because of the act.

Relying on the text of the rule and the Note, many courts bar not only evidence presented after the witness leaves the stand but also the use of virtually any documents during the witness’s cross-examination. For example, in a case in which the witness had suffered a prior civil fraud judgment, the U.S. Court of Appeals for the Fifth Circuit held that it was error for the trial judge to permit the cross-examiner to force the witness to “read aloud the last sentence of the opinion.”<sup>133</sup> Other courts have barred references during cross-examination to findings by administrative

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128. FED. R. EVID. 608(b).

129. *See, e.g.*, *Blumhagen v. State*, 11 P.3d 889, 893 (Wyo. 2000) (testimony by another witness).

130. CHRISTOPHER MUELLER, LAIRD KIRKPATRICK & LIESA RICHTER, *EVIDENCE* § 6:27 (6th ed. 2018).

131. FED. R. EVID. 608(b).

132. *Id.* advisory committee’s note to 2003 amendment.

133. *United States v. Herzberg*, 558 F.2d 1219, 1222–23 (5th Cir.); *see also* *Lech v. Goeler*, 92 F.4th 56 (1st Cir. 2024) (“[E]xtrinsic evidence includes any evidence other than trial testimony.” (quoting *United States v. Balsam*, 203 F.3d 72, 87 n.18 (1st Cir. 2000))).

agencies,<sup>134</sup> state bar records,<sup>135</sup> bankruptcy judgments,<sup>136</sup> and the witness's own resume<sup>137</sup> and other statements.<sup>138</sup>

However, there are contra authorities.<sup>139</sup> There is a statutory construction argument as well as a policy argument in favor of the result reached by those authorities. The statutory construction argument is based on context, namely, the wording of Rule 613 governing prior inconsistent statement impeachment. Rule 613(a) controls cross-examination about the statement.<sup>140</sup> The rule eliminates the need for the cross-examiner to show a prior inconsistent writing to the witness.<sup>141</sup> Rule 613(a) expressly refers to such writings but does not characterize them as “extrinsic evidence” if used during cross-examination.<sup>142</sup> In contrast, 613(b) includes the expression “extrinsic evidence”<sup>143</sup>:

EXTRINSIC EVIDENCE OF A PRIOR INCONSISTENT STATEMENT. Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it . . . .<sup>144</sup>

The original Note makes it clear that under Rule 613(b), there is no “particular timing” requirement and that, hence, the “extrinsic evidence” can be introduced after the witness has left the stand so long as the witness is excused subject to recall.<sup>145</sup> Both the text of the rule and the Note suggest that in Rule 613(b), “extrinsic evidence” narrowly means evidence introduced after the witness leaves the stand.<sup>146</sup> That suggestion supports the argument that in Rule 608(b), the identical expression, “extrinsic evidence,”

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134. *See* *United States v. Teron*, 478 F. App'x 683, 685 (2d Cir. 2012) (findings by the Civilian Complaint Review Board).

135. *See* *Bonin v. Calderon*, 59 F.3d 815, 829 (9th Cir. 1995).

136. *United States v. Joseph*, 156 F. App'x 180, 184 (11th Cir. 2005).

137. *United States v. Elliott*, 89 F.3d 1360, 1368 (8th Cir. 1996).

138. *United States v. Smith*, 277 F. App'x 870, 872 (11th Cir. 2008).

139. *United States v. Jones*, 728 F.3d 763, 767 (8th Cir. 2013) (a federal magistrate's findings at a detention hearing); *United States v. Desantis*, 134 F.3d 760 (6th Cir. 1998) (administrative agency findings); *United States v. Whitehead*, 618 F.2d 523 (4th Cir. 1980) (suspension from the practice of law).

140. FED. R. EVID. 613(a).

141. *See id.* advisory committee's notes to 1972 proposed rules.

142. *Id.* 613(a).

143. *Id.* 613(b).

144. *Id.* Of course, the pending amendment to Rule 613(b) will change the wording of the provision to read: “Extrinsic Evidence of a Prior Inconsistent Statement. Unless the court orders otherwise, extrinsic evidence of a witness's prior inconsistent statement may not be admitted until after the witness is given an opportunity to explain or deny the statement . . . .” COMM. ON RULES OF PRAC. & PROC. JUD. CONF. OF THE U.S., PRELIMINARY DRAFT: PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, BANKRUPTCY, AND CIVIL PROCEDURE, AND THE FEDERAL RULES OF EVIDENCE 291 (2022), [https://www.uscourts.gov/sites/default/files/preliminary\\_draft\\_of\\_proposed\\_amendments\\_to\\_the\\_federal\\_rules\\_2022.pdf](https://www.uscourts.gov/sites/default/files/preliminary_draft_of_proposed_amendments_to_the_federal_rules_2022.pdf) [<https://perma.cc/B2VR-77D8>].

145. FED. R. EVID. 613(b) advisory committee's note to 1972 proposed rules. Again, the pending amendment will change the timing rule. *See* COMM. ON RULES OF PRAC. & PROC. JUD. CONF. OF THE U.S., *supra* note 144, at 291.

146. FED. R. EVID. 613(b) advisory committee's note to 1972 proposed rules.

should not apply to or limit the witness's cross-examination. As in Rule 613(b), Rule 608(b)'s wording might signify that after the witness leaves the stand, the cross-examiner may not present evidence, such as documents contradicting the witness's denial of an untruthful act.

That reading of "extrinsic evidence" becomes all the more credible when considering Rule 608(b) in light of its common law antecedents. The ban on "extrinsic evidence" under Rule 608(b) is traceable to the common law "collateral fact" rule to that mode of impeachment.<sup>147</sup> However, the collateral fact rule did not restrict cross-examination about untruthful acts.<sup>148</sup> Instead, the restriction applied to evidence presented after the witness to be impeached has left the stand.<sup>149</sup> The cross-examiner had to "take the witness's answer"<sup>150</sup> and could not call a second witness to testify to the untruthful act the witness to be impeached had denied.<sup>151</sup>

There is also a sensible policy argument pointing to this conclusion. On several occasions, Professor John R. Schmertz, the former editor of *Federal Rules of Evidence News*, argued that, at the very least, the cross-examiner should be permitted to pressure the witness by using documents that the witness is competent to authenticate.<sup>152</sup> In Professor Schmertz's mind, the primary rationale for the limitation on the use of documents during cross-examination is that the battle over the document might "waste trial time" if the parties have a lengthy wrangle over the authenticity of the document.<sup>153</sup> However, consider perhaps the most sensitive variation of the problem: the cross-examination of an accused criminal. When asked about a prior untruthful act, the accused perjures himself and denies the act. The accused persists in refusing even after the cross-examiner reminds them of the penalties for perjury. However, unbeknownst to the accused, the cross-examiner obtained a copy of a letter that the accused wrote to a relative or friend. In the letter, the accused admits the untruthful act. Under Rule 901(b)(1)<sup>154</sup>, the accused is competent to authenticate their own letter,<sup>155</sup> and the relevant contents of the letter also qualify as non-hearsay since they are the statements or admissions of a party-opponent under Rule 801(d)(2)(A).<sup>156</sup> Allowing the cross-examiner to resort to the letter will likely prolong the cross-examination. However, Professor Schmertz makes a plausible argument that in these circumstances, the additional time

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147. 1 KENNETH S. BROWN, GEORGE E. DIX, EDWARD J. IMWINKELRIED, DAVID H. KAYE & ELEANOR SWIFT, MCCORMICK ON EVIDENCE § 49 (Robert P. Mosteller ed., 8th ed. 2020).

148. *Id.* at 386.

149. *Id.* at 386–87.

150. *Id.* at 386.

151. *Id.* at 387.

152. *Rule 607: Impeachment of Witness*, FED. RULES EVIDENCE NEWS, Jan. 1996, at 96-168, 96-168; *Rule 608(b): Impeachment by Prior Misconduct*, FED. RULES EVIDENCE NEWS, Jan. 1996, at 96-136, 96-136.

153. *See Rule 607: Impeachment of Witness*, *supra* note 152, at 96-168.

154. FED. R. EVID. 901(b)(1).

155. *See id.* (stating that testimony of a witness with knowledge is sufficient to "satisfy the requirement of authenticating or identifying an item of evidence").

156. *Id.* 801(d)(2)(A).

expenditure is likely to be minimal, and the interest in exposing perjury is so substantial that the cross-examiner ought to have the right to confront the accused witness with their own letter establishing the prior untruthful act.<sup>157</sup> The accused has lied once—the Rule 608(b) act—and Professor Schmertz believed that it was in the interest of justice to prevent the accused from compounding the falsehood by lying a second time about the prior lie.<sup>158</sup>

Again, this is an issue that the Committee could clarify for the judiciary. The Committee could state its view of whether the reference to “extrinsic evidence” in Rule 608(b) altogether bans any cross-examination reference to and use of documents that would tend to prove the witness’s commission of an untruthful act. The above hypothetical involves perhaps the strongest case for carving out an exception. But for a ban on later extrinsic evidence, the opponent could probably overcome both authentication and hearsay objections to the evidence, and the additional trial time needed to confront the accused witness with the document would likely be negligible.

However, if the Committee decided that the prohibition of the use of “extrinsic” documents during cross-examination should not be absolute but rather merely general, the question would arise what other, if any, additional exceptions there should be.

*C. What Other Exceptions, If Any, Should There Be to the General Ban on the Use of Documents During Cross-examination to Pressure the Witness to Concede Their Commission of an Untruthful Act?*

In a sense, the above hypothetical involving an accused witness is the simplest case. The witness is competent to authenticate the letter, and the letter is not subject to a hearsay objection. Other exhibits might be vulnerable to one or both objections, and it thus might be contended that the solitary exception should be for situations like the hypothetical. However, several courts have gone further and permitted the cross-examiner over objection to refer to findings by judges and juries.<sup>159</sup> Before identifying and analyzing the potential objections to that practice, it is worth remembering that it is well-settled under Rule 608(b) that, although the cross-examiner must have a good faith basis in fact for believing that the witness committed the untruthful act, the information furnishing the basis, in fact, need not be independently admissible evidence.<sup>160</sup>

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157. See *supra* note 152 and accompanying text.

158. See *id.*

159. See, e.g., *United States v. Jones*, 728 F.3d 763, 767 (8th Cir. 2013); see also 1 EDWARD J. IMWINKELRIED, PAUL C. GIANNELLI, FRANCIS A. GILLIGAN, FREDRIC I. LEDERER & LIESA RICHTER, *COURTROOM CRIMINAL EVIDENCE* § 709 n.150 (7th ed. 2022) (collecting cases).

160. *United States v. Craig*, 953 F.3d 898, 903 (6th Cir. 2020) (“Inadmissible evidence [can] provide the good-faith basis for cross-examination . . . .” (quoting 5 ROGER PARK & TOM LININGER, *THE NEW WIGMORE: A TREATISE ON EVIDENCE* § 2.3 (1st ed. Supp. 2020))); *United States v. Courtney*, 439 F. App’x 383, 385 (5th Cir. 2011); *United States v. Davis*, 609 F.3d 663, 680–81 (5th Cir. 2010); *United States v. McCallum*, 885 F. Supp. 2d 105, 116–17 (D.D.C. 2012), *aff’d*, 721 F.3d 706 (D.C. Cir. 2013).

Yet, even if the form of the information does not render the information independently inadmissible, the form could both reduce the probative worth of the document and possibly trigger a long colloquy over whether the evidence establishes the witness's commission of an untruthful act. Professor Stephen A. Saltzburg had such concerns in mind when he wrote his often-cited 1993 article approvingly quoted in the Note accompanying the 2003 amendment to Rule 608(b): "[C]ounsel should not be permitted to circumvent the no-extrinsic-evidence provision by tucking a third person's opinion about prior acts into a question asked of the witness who has denied the act."<sup>161</sup>

Although Professor Saltzburg released his article in 1983 and the Note approvingly quoted the article in 2003, the controversy has not ended.<sup>162</sup> For example, there are subsequent decisions that, despite the article and Note, permit references to judge and jury findings during cross-examination.<sup>163</sup> The possible variations of the problem fall on a spectrum. Consider three points on the spectrum.

#### 1. One End of the Spectrum—Independently Admissible Evidence that the Witness Lied

At one end of the spectrum, the documentary evidence of the act would be independently admissible but for the prohibition of extrinsic evidence in Rule 608(b). Consider a prior judgment convicting the witness of an offense such as fraud constituting an untruthful act. If the judgment fell within Rule 803(22), the judgment would be admissible over a hearsay objection.<sup>164</sup> Furthermore, if a proper chain of attesting or authenticating certificates was attached, the judgment would be self-authenticating under Rules 902(1) or 902(4).<sup>165</sup> In both respects, this variation of the problem is analogous to the hypothetical discussed in Part II.B involving the accused witness's own letter.

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161. FED. R. EVID. 608(b) advisory committee's note to 2003 amendment (quoting Stephen A. Saltzburg, *Impeaching the Witness: Prior Bad Acts and Extrinsic Evidence*, 7 CRIM. JUST. 28, 31 (1993)).

162. *See id.*

163. *United States v. Jones*, 728 F.3d 763, 767 (8th Cir. 2013); *United States v. Dawson*, 434 F.3d 956, 957–59 (7th Cir. 2006) (noting that because the statement regarding "tucking a third person's opinion about prior acts into a question" appears only in the reference to the article in the Note, the court should not construe the amendment as precluding a question inquiring whether a judge had disbelieved the witness in a previous case, as "findings by judges or juries are entitled to more weight than what any old third party might happen to think about a witness's credibility"); *United States v. Nelson*, 365 F. Supp. 2d 381, 384 (S.D.N.Y. 2005).

164. FED. R. EVID. 803(22) ("*Judgment of a Previous Conviction*. Evidence of a final judgment of conviction [is not excluded by the rule against hearsay] if: (A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea; (B) the conviction was for a crime punishable by death or by imprisonment for more than a year; (C) the evidence is admitted to prove any fact essential to the judgment; and (D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.").

165. *Id.* 902(1), (4).



2. The Middle of the Spectrum—Evidence that Is Not Independently Admissible but Is Trustworthy Enough to Support a Reliable Inference that the Witness Lied

In the middle of the spectrum, there are variations when the evidence might not be independently admissible, but it is relatively clear that there has been a reliable determination that the witness committed an untruthful act. By way of example, suppose that the witness is a police officer. The officer previously testified at a Fourth Amendment suppression hearing. The officer was the sole prosecution witness at the hearing. The hearing became a swearing contest. The officer testified flatly that they distinctly recalled their encounter with the accused and adamantly insisted that the accused had expressly consented to a search. For their part, the defendant gave opposing testimony and vehemently denied consenting; they testified that they repeatedly—and loudly—told the officer that they refused to consent to the search. The denouement was that the presiding judge granted the suppression motion. In these circumstances, it is relatively clear that the judge chose to disbelieve the officer, and, more to the point, there is a powerful inference that the judge found that the officer had lied. Suppose that at the current trial, the officer becomes a witness, and the defense counsel wants to question the officer about the outcome of the earlier hearing. The defense counsel has a transcript of the entire suppression hearing, including all the testimony and the judge’s ruling. As in the case of the judgment discussed above, a proper set of attesting or authenticating certificates could render the transcript self-authenticating under Rules 902(1) or 902(4).<sup>166</sup> However, unlike the judgment, the judge’s ruling at the suppression hearing would not fall within the Rule 803(22)<sup>167</sup> exceptions for judgments.<sup>168</sup> To be sure, the defense counsel might advance the argument that the judge’s implied finding that the officer lied is reliable enough to qualify for admission under the residual hearsay exception, Rule 807.<sup>169</sup> The bottom line is that whether or not the information is independently admissible, there is a strong case that the judge’s implied finding is reliable enough to be mentioned during cross-examination.

3. The Other End of the Spectrum—the Difficulty of Determining Whether the Prior Finder of Fact Reliably Found that the Witness Had Lied

At the other end of the spectrum are variations in which the facts make it exceedingly difficult to determine whether there has been a determination, much less a reliable determination, that the witness committed an untruthful act. The original version of Rule 608(b) referred to “credibility.”<sup>170</sup> However, in 2003, the rule was amended to narrow its scope by substituting

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166. *Id.*

167. *Id.* 803(22).

168. *Id.*

169. *Id.* 807.

170. *See id.* 608 advisory committee’s note to 2003 amendment.

“truthfulness” for “credibility.”<sup>171</sup> If, under the post-2003 version of Rule 608(b), the judge is to permit the cross-examiner to inquire about the witness’s testimony in a prior hearing, the judge must conclude that (1) the jury or judge rejected the witness’s testimony and (2) they rejected the testimony as untruthful, not merely as mistaken. An innocent mistake would reflect adversely on the witness’s “credibility,” but it would not amount to untruthfulness. The previous suppression hearing example was a simplified fact situation. To begin with, it would be easy to conclude that the prior judge had rejected the officer’s testimony because the officer was the only prosecution witness at the hearing. Then, given the emphatic nature of the officer’s testimony and the stark contrast with the defendant’s testimony at the hearing, the judge at the current hearing could easily infer that the judge at the earlier suppression hearing believed that the officer was lying.

In all probability, cases at this end of the spectrum are more common than variations in the middle of the spectrum. There will often be multiple witnesses at a hearing. Moreover, even if the judge concludes that the earlier judge or jury rejected the witness’s testimony, it may not be clear that the factfinder did so because the factfinder concluded the witness was lying. Especially if the witness used any qualifying language such as “possibly” or “approximately” in their prior testimony, it may be more reasonable to assume that the factfinder concluded that the witness was mistaken. In any event, at this end of the spectrum, resolving questions (1) and (2) could necessitate a time-consuming, painstaking review of the record of the prior hearing. That problem harks back to the 2006 amendment to Rule 609(a). As previously stated, that amendment enables the judge to admit a conviction under Rule 609(a)(2), but only when the judge can “readily determine that establishing the elements of the crime required proving—or the witness’s admitting—a dishonest act or false statement.”<sup>172</sup> Here, too, the Committee might conclude that although, at this end of the spectrum, that inquiry should sometimes be permitted under Rule 608(b), it should be permissible only when the judge at the present hearing can “readily determine” that at the prior hearing, the finder rejected the current witness’s testimony as untruthful, not merely mistaken. Such cases might be rare.

Just as the factual variations fall on a spectrum, the Committee has a wide range of choices along a spectrum. Assume *arguendo* that the Committee has decided to permit the use of documents during cross-examination in the narrow situation Professor Schmertz identified. In that light, the Committee could:

(1) oppose any exceptions to the extrinsic evidence ban other than the fact situation that Professor Schmertz contemplated;

(2) recognize an additional exception for cases in which the evidence of the lie would be independently admissible but for the ban on extrinsic evidence;

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171. *See id.* 608.

172. *Id.* 609(a)(2).

(3) craft an even broader exception applicable whenever the judge determines that the prior factfinder made a reliable determination, rejecting the witness's earlier testimony as untruthful; or

(4) analogize to Rule 609(a)(2) and draft a narrower exception permitting the judge to do so only when the record allows the judge to "readily" make that determination.

Especially if the Committee believes that the Rule 609(a)(2) amendment inserting "readily" has worked satisfactorily, this last option might be attractive.

#### CONCLUSION

The outstanding issues under Rule 608(b) require clarification. In the past, these issues have posed few problems because prosecutors have not attempted to exploit Rule 608(b) to the extent that they have relied on Rule 404(b). The typical Federal Supplement advance sheet contains several Rule 404(b) opinions but usually at most one Rule 608(b) opinion. However, that may change in the future. Changes in Rule 404(b)'s substantive standards and related procedures will likely make it more difficult for prosecutors to successfully navigate Rule 404(b) in the future. Given the vast amount of information about citizens' criminal activity in the possession of law enforcement authorities, there will be pressure on prosecutorial agencies to turn from Door A, Rule 404(b), to Door B, Rule 608(b). That development would magnify the importance of the splits of authority under Rule 608(b). The Committee can help the judiciary stay ahead of the curve by addressing these issues before the number of Rule 608(b) cases increases dramatically. The Committee could propose amending Rule 608(b) by incorporating one of the four positions listed on the spectrum described at the end of Part II.C and elaborating on the amendment in a new Note. Such words to the wise judges should suffice.

I encourage the Committee to view individual rules in the context of the larger Federal Rules of Evidence framework. Textualism has enhanced the importance of contextual analysis.<sup>173</sup> Attempting to identify other rules that would be impacted by the enactment of a pending rule reduces the risk that the law of unintended consequences will come into play—with undesirable or even drastic results. In the past, the Committee has done a wonderful job of analyzing the merits of proposals to revise individual rules. It would be desirable if, going forward, the Committee made it a regular, systematic

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173. See Imwinkelried, *supra* note 105, at 218. Textualists are skeptical of legislative history in part because political science research has demonstrated that special interest groups can sometimes successfully manipulate such extrinsic material. See RONALD L. CARLSON, EDWARD J. IMWINKELRIED, CORTNEY E. LOLLAR & JULIE SEAMAN, EVIDENCE: TEACHING MATERIALS FOR AN AGE OF SCIENCE AND STATUTES 29–30 (9th ed. 2023). Moreover, materials such as committee reports lack the status of law. See *id.* at 29. In contrast, like text, the context—other statutes that are often part of the same legislative scheme—has the formal status of law. Edward J. Imwinkelried, "Importing" Restrictions from One Federal Rule of Evidence Provision to Another: *The Limits of Legitimate Contextual Interpretation in the Age of Statutes*, 72 OKLA. L. REV. 231, 252–54 (2020).

practice to consider every proposed rule change in context and made a conscious effort to identify other rules that might be impacted by the proposal.<sup>174</sup> The Federal Rules of Evidence are intended to function as a coherent legislative scheme. The analysis of Rules 404(b) and 609(a) can shed valuable light on Rule 608(b). More broadly, consideration of changes in individual rules against the backdrop of the legislative scheme can enhance the quality of the Committee's work product.

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174. To its credit, the Committee has sometimes done so in the past. For example, most recently, the Committee considered amending Rule 611(d) (now designated a new, standalone Rule 107) but also gave thought to the impact of such an amendment on Rule 1006. ADVISORY COMM. ON EVIDENCE RULES, AGENDA FOR COMMITTEE MEETING 91-93 (2023), [https://www.uscourts.gov/sites/default/files/evidence\\_rules\\_agenda\\_book\\_3-31-23.pdf](https://www.uscourts.gov/sites/default/files/evidence_rules_agenda_book_3-31-23.pdf) [https://perma.cc/EDD7-ZAXX].