JUST WHAT EVIDENCE OF WITNESS MISDEEDS DOES FEDERAL EVIDENCE RULE 608(b) EXCLUDE?—IMWINKELRIED VS. ROTHSTEIN

PAUL F. ROTHSTEIN†

I. INTRODUCTION

Professor Edward Imwinkelried, one of the country’s most renowned Evidence scholars, in a recent article in this journal,¹ perceptively identifies three specific examples of evidence of a witness’s prior unconvicted-for misconduct which he correctly believes should be admissible to impeach the witness’s credibility in the discretion of the trial judge:

1. Evidence of demonstrably false previous accusations of rape against the present defendant by the complaining witness in a rape prosecution (assuming the rape shield would not exclude²) which the witness will not admit to during cross examination;


2. A rape shield—for example Federal Rule of Evidence 412—excludes from evidence the sexual history of complainant. But frequently rape shields are held not to cover evidence of previous false rape accusations either because the evidence is not deemed evidence of “sexual behavior” or “sexual predisposition” of the type banned by the shield, or because, as in Professor Imwinkelried’s specific example, the previous accusations were against the defendant himself. Conduct that is previous conduct involving the defendant himself, is usually exempted from the shield, as it is in, for exam-
2. Documentary evidence proving a misdeed of a testifying witness clearly evincing the witness's lack of credibility, where the witness himself on cross exam could authenticate the document so it could be used conveniently and expeditiously without undue time consumption; and

3. Evidence of the result in a civil action, for example where the witness was a party and an adverse verdict clearly establishes his position was fabricated, or where he was only a witness but the verdict makes it clear the trier of fact rejected his contention as fabricated.

I agree with Professor Imwinkelried that these can be powerful pieces of evidence and should be admissible in the judge's discretion upon consideration of such factors as probative value on the issue of the witness's credibility, time consumption, and prejudice. But Professor Imwinkelried and I disagree as to whether the literal language of Federal Rule of Evidence 608(b) bans them absolutely. Professor Imwinkelried believes it does, and therefore should be amended. I believe it does not and therefore does not require amendment.

II. THE ARGUMENT

Rule 608(b) bans evidence of a witness's unconvicted-for misdeeds if proving them involves using "extrinsic" evidence, no matter how powerfully probative of lying they are, how little time they would consume to present, and how little prejudice they might entail. "Extrinsic" (as opposed to "intrinsic") evidence is evidence adduced through means other than cross examination of the witness being impeached. For example, a misdeed is proved "extrinsically" if the way it is evidenced is by independently introducing other witnesses, documents, or recordings that attest to the witness's commission of the misdeed or provide details about it.3

Professor Imwinkelried implies his three numbered instances (above) are merely examples and that there are many other instances, too, where evidence of witness misdeeds demonstrating the witness's non-veracity should be discretionarily admissible even if extrinsically proved, but which Rule 608(b)'s blanket extrinsic evidence ban allows only on cross examination. His whole argument, however, hinges on the three examples. He cites cases in which he says courts have recognized the value of the kind of evidence in his examples and have found

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it necessary to violate the rule to let it in, and other cases where he says the courts have refused to do so even though it would be desirable to let the evidence in.\(^4\)

It is my contention that it is only a misconstruction of Rule 608(b) that would preclude discretion to admit his three examples of evidence. Under a proper construction, the evidence is not excluded and the Rule therefore does not need revision. The courts that want to admit the evidence do not need to disregard the rule. The evidence can be admitted perfectly consistently with the rule. Further, Professor Imwinkelried has not convincingly shown that there is other deserving evidence outside of his three examples that is banned by the Rule.

A. THE THREE EXAMPLES ARE NOT REALLY RENDERED INADMISSIBLE BY THE RULE

Professor Imwinkelried’s argument regarding the three examples relies on two misconceptions, though each has some support in previous (but misguided in my opinion) authority. The first misconception is that Rule 608 applies to all unconvicted-for misdeeds of a witness offered to impeach the witness’s credibility whatever the theory of impeachment. In fact, the Rule only applies where the theory is showing a bad character regarding credibility. This first mistake is manifest in his example number one above, prior false allegations of rape against the present rape defendant.

The second misconception is this. He is under the misconception that even if proving the misdeed can be completely accomplished through cross examination, the evidence is still “extrinsic” and banned by the terms of Rule 608(b) if it has anything to do with a document or a previous judicial event. This applies to his example number two, documents acknowledged by the witness during cross examination, attesting to the prior misdeed, and his example number three, previous civil case events, adduced through the present cross examination.\(^5\)

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4. See Imwinkelried, \textit{supra} note 1, at 218-19, 228-32.

5. My terminology labels these as “misconceptions” but the reader should be aware that both Professor Imwinkelried’s view on each of them (including the view of authorities on which he relies) and my view are both reasonable alternative views of the legal concepts involved. It is not that I think his view is unreasonable or in supportable; just that, of course, I believe mine are preferable. This is a debate between reasonable scholars, both of whose interpretations are legitimate and respectable. It is a difference of opinion, in the highest traditions of legal scholarship. The differing views are presented for the reader to select between. This entire paper should be read in that light.
B. The Terms of Rule 608(b)

In pertinent part, Rule 608(b) provides: 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 . . . 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 . . . untruthfulness of . . . the witness . . . .

A few terms in the rule that are instrumental to our inquiry need further explaining: “Extrinsic” evidence is generally defined as evidence other than that adduced during cross examination of the witness being impeached. In other words, although the evidence is addressed to impeach the credibility of this witness, it is introduced through another witness, or through a document, a recording, or some other item introduced independently. “Character for truthfulness or untruthfulness” means a proclivity of the witness to be truthful or untruthful that may surface in a variety of matters.

Let us examine more closely the three evidence examples identified by Professor Imwinkelried that he alleges are absolutely excluded by a literal reading of Rule 606(b), to see if they really are so excluded.

C. Professor Imwinkelried’s Example Number One: Extrinsic Evidence of Prior Clearly False Accusations of Rape by the Same Complaining Witness Against the Current Rape Defendant

In this example the offered evidence consists of some kind of extrinsic evidence like testimony of another person or a record establishing the prior accusations and their falsity. In other words, the evidence is not just an inquiry and response on cross examination of the complaining witness (which would be called “intrinsic” evidence and which clearly would be allowed insofar as Rule 608(b) is concerned). The thing that allegedly makes the evidence inadmissible under 608(b) is its “extrinsic” nature—its “non-cross-exam” nature. If the evidence is confined just to cross examination, there is no conceivable problem posed by 608(b).

But, under a proper construction of Rule 608(b), this evidence, whether in the extrinsic or intrinsic form, would not be subject to Rule

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6. See United States v. Thomas, 467 F.3d 49, 55-56 (1st Cir. 2006), cert. denied 549 U.S. 1294 (2007); United States v. Martz, 964 F.2d 787, 788-89 (8th Cir. 1992); United States v. Brooke, 4 F.3d 1480, 1484 (9th Cir. 1993).

7. See United States v. James, 609 F.2d 36, 46 (2d Cir. 1979); Rothstein, supra note 3 at 440, 445, 446; Federal Rules of Evidence 608 advisory committee’s note, 56 F.R.D. 183, 268 (1973).

8. This example is set forth at Imwinkelried, supra note 1, at 230-31.
608(b) at all! The prior incidents here (the prior false allegations of rape) are not offered as showing the witness has a general "character" for incredibility (the only kind of impeachment covered by Rule 608(b)), but rather are offered to show specifically that the complaining witness lies about rape by this accused—i.e. has a motive to "get" this defendant.\(^9\) By its express terms, Rule 608(b) applies only when a "character" for incredibility is being shown.\(^10\) Here the effort is more properly described as impeachment by showing a particular motive or bias.\(^11\)

"Character" is a very general propensity consisting of a broad trait like "dishonesty," "untrustworthiness," "unreliability," "violence," etc. While we might say a complaining witness has an "untrustworthy character," we would be doing violence to language to say "the complaining witness has a character to falsely accuse Daniel Defendant of rape" although we might say "she has a propensity to do so." A specific propensity is different from a character-type propensity, which is a general propensity manifesting itself in a wide variety of circumstances.\(^12\) The impeachment of the witness here is not proceeding on a theory of a general character for untrustworthiness, which is all that is covered by Rule 608(b). It is rather proceeding along the lines of a specific propensity to accuse this specific defendant specifically of rape. The main Advisory Committee Note for Rule 608(b)\(^13\) as well as many cases,\(^14\) make clear that Rule 608(b)'s strictures—including the

\(^9\) My analysis would be the same even if the false allegations made by the victim and offered by the defendant here were allegations against individuals other than the defendant.

\(^10\) Under Federal Rules of Evidence 404(b), which is the master rule on character, it is expressly recognized—as under the law of every state in the union—that other wrongs used to show "motive," "plan," or a very specific pattern or "modus operandi" to do very specific things or things in a certain way, do not constitute a character showing. See Paul F. Rothstein, Comment, The Doctrine of Chances, Brides of the Bath, and a Reply to Sean Sullivan, 14 J. L., PROBABILITY & RISK 51, 51-52 (2015). This non-character showing is what we have here.

\(^11\) Lest I be misunderstood to be saying this is the only way to look at what character is, what form of impeachment is involved here, and how Rule 608(b) should be interpreted on these matters, see supra note 5.


\(^13\) See first few lines of Rule 608 advisory committee's note, supra note 7.

\(^14\) See, e.g., United States v. James, 609 F.2d 36, 46-47 (2d Cir. 1979) (impeaching by misdeed to show improper bias or motive rather than general character for incredibility, is not within Rule 608(b)); United States v. Ray, 731 F.2d 1361, 1364 (9th Cir. 1984) (noting that "Rule 608(b) does not bar introduction of evidence to show that the witness is biased."); United States v. Garcia, 900 F.2d 571, 575 (2d Cir. 1990) (explaining that Rule 608(b) does not prevent the admission of evidence for impeachment by contradiction); United States v. Perez-Perez, 72 F.3d 224, 227 (1st Cir. 1995) (providing that "[i]mpeachment by contradiction is a recognized mode of impeachment not governed by Rule 608(b)"; emphasis in original); cf. United States v. White, 405 F.3d 208, 214 (4th Cir. 2005) (explaining that Rule 608(b) does not apply to substantive use).
ban on extrinsic evidence—do not apply if the purpose of the offer of an incident of the witness’s wrongdoing is not to show a general character for incredibility, but rather some other form of impeachment more specifically focused on the facts of the present case.\textsuperscript{15}

It may even be that this prior-false-allegation evidence should not be deemed impeachment evidence at all, but rather substantive evidence, going directly to whether the rape occurred. In that event, it would not be subject to the ban on extrinsic evidence of Rule 608(b) at all, since that rule deals only with evidence offered on the issue of witness credibility.\textsuperscript{16}

D. PROFESSOR IMWINKELRIED’S EXAMPLE NUMBER TWO: A DOCUMENT SHOWING AN UNRELATED FALSITY (NOT CONVICTED FOR) PERPETRATED BY THE WITNESS\textsuperscript{17}

Presumably what we are talking about here, under Professor Imwinkelried’s second example, is a document that establishes that a present witness told an untruth on another particular occasion—an untruth relating to another matter than one involved in the particular litigation. Thus, unlike example number one above (prior false rape allegations), the effort of the offering attorney here would be the kind of impeachment—impeachment of character for credibility—that is covered by Rule 608(b). The untruthful incident here has not resulted in a conviction, because that would be covered by Rule 609 instead. So what we have here might be, for example, a document from the IRS showing a witness in a murder trial lied on his tax return (assuming we can get around the hearsay rule by invocation of the “not for truth” concept or the public records hearsay exception\textsuperscript{18}).

\textsuperscript{15} A classic example where Rule 608(b) does not apply to an incident of wrongdoing by the witness when the wrongdoing is offered on another theory than impeachment of general credibility character, would be where the defense attempts to show that a prosecution witness has committed another unrelated crime and has not been prosecuted for it, suggesting that the witness is beholden to the prosecution and that is why the witness is testifying in this case for the prosecution. This is impeachment by bias or motive, not covered by Rule 608(b), even though the offer is of a specific instance of wrongdoing committed by the witness. See James, 609 F.2d at 46-47 (impeaching by mislead to show improper bias or motive rather than general character for incredibility, is not within Rule 608(b)); see also Ray, 731 F.2d at 1364 (noting that Rule 608(b) does not limit the introduction of evidence showing that a witness is biased).

\textsuperscript{16} See White, 405 F.3d at 214 (illustrating that Rule 608(b) does not apply to substantive use). This might also be called impeachment by contradiction, also not covered by the rule. See Garcia, 900 F.2d at 575 (noting the admission of evidence for impeachment by contradiction is permissible under Rule 608(b)).

\textsuperscript{17} This example is set forth at Imwinkelried, supra note 1, at 232.

\textsuperscript{18} See Rothstein, Ræder, & Crump, supra note 3, at 393-94 (describing the “truth of the matter asserted” concept); see also Fed. R. Evid. 803(8) (providing public records hearsay exception).
The question here, then, is whether this is indeed "extrinsic" evidence, which, when impeachment of character-for-credibility is attempted, is barred by the express terms of Rule 608(b). Professor Imwinkelried is of the belief that it is extrinsic evidence and therefore is so barred. But a closer look reveals that it may not be extrinsic evidence. That depends upon some additional facts, which we take up in the following paragraphs.

In Professor Imwinkelried's example of this kind of evidence, he postulates that the document will be authenticated by the witness himself. This is why Professor Imwinkelried thinks the document should be discretionarily admissible, even though he believes the strict terms of Rule 608(b) make it automatically inadmissible. He argues it should be admissible (if other Rules like Rule 403 are satisfied) because it will be authenticated by the witness himself. Thus it will not entail the undue time consumption that Rule 608(b)’s ban on extrinsic evidence was intended to prevent. It could, however, be argued that for this very reason, it is not "extrinsic" evidence at all. Extrinsic evidence is evidence that would take time beyond the cross examination to introduce.

Nevertheless, introducing a document does seem like it comes within a common-sense definition of extrinsic evidence, whether the document is introduced during cross examination, or during the cross examiner's next chance to put on his own evidence (say his rebuttal case). Let us accept this proposition, i.e., that the document is extrinsic evidence whenever it is offered. Then the answer to the question whether we have extrinsic evidence in Professor Imwinkelried’s example depends upon whether in the example, the document is itself being offered into evidence, or whether when the witness we are impeaching himself authenticates the document (as stipulated in the example), the witness also admits the truth of what is recited in it—in other words, admits not only that the document was issued from the IRS to him (which is all authentication actually involves), but also admits that the document is correct that the witness lied to the IRS. If he admits the latter, then the document is not itself being introduced; rather, the witness has adopted its contents into his testimony. In other words, he has testified on cross examination that he lied to the IRS. This is clearly not extrinsic evidence. It is intrinsic evidence. It is a part of the cross examination.

19. Imwinkelried, supra note 1, at 218, 232.
20. If the witness refuses to authenticate, then of course it would clearly be extrinsic evidence if the lawyer offering the document wishes to go further and get the evidence in, because that would require another witness, presumably.
The 2003 Advisory Committee’s Note attending an amendment to Rule 608 seems to support Imwinkelried’s position that this is extrinsic evidence, regardless of the distinction I have made regarding the witness’s adoption of the content.\textsuperscript{21} That Committee’s Note—which in other respects is absolutely superb—refers for support to an ambiguous comment by justly esteemed evidence expert Professor Stephen Saltzburg which says that certain forbidden extrinsic evidence cannot be “tucked into” a cross examination in order to escape the ban on extrinsic evidence.\textsuperscript{22} I believe that view (if it is indeed the view of these two authorities) is mistaken both conceptually and practically, and does violence to the plain meaning and legal meaning of the word “extrinsic” in the rule.\textsuperscript{23}

To the extent the 2003 Advisory Committee’s Note suggests that adoption of the content of the document by the witness during cross exam, is banned extrinsic evidence, the Note is out-of-keeping with the intent of the original Advisory Committee’s Note written by the original drafters of Rule 608(b) which seemed to say that anything that was wholly done on cross examination of the witness-being-impeached would not be considered extrinsic.\textsuperscript{24}

If the witness does \textit{not} admit that the document correctly reports that he committed the misdeed, and the document is attempted to be admitted itself (whether during the cross examination or later, independently) then the document clearly \textit{is} extrinsic evidence as banned by Rule 608(b), and properly \textit{should be} excluded, in my view, for the reasons expressed in the next paragraph below and in the section of this article labeled “conclusion.”

Professor Imwinkelried may believe there should be discretion in this case to admit, because, depending on the exact facts, it may be important and the witness should not be encouraged to perjury, but I think the time and distraction into collateral matters overrides any slim probative worth it is likely to have. Some jurisdictions don’t allow intrinsic or extrinsic impeachment by misdeeds not resulting in convictions, believing that the balance comes out against admission even when the inquiry is narrowly confined to cross examination.\textsuperscript{25}

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\item \textsuperscript{21} 2003 Amendment to Federal Rule of Evidence 608 advisory committee’s note, reproduced in Appendix I in \textit{Rothstein}, \textit{supra} note 2, at 1043.
\item \textsuperscript{22} Stephen A. Saltzburg, \textit{Impeaching the Witness: Prior Bad Acts and Extrinsic Evidence}, 7 CRM. JUST. 28, 31 (Winter 1993). At least one court has directly addressed the “tucking in” comment and rejected it. United States v. Dawson, 434 F.3d 956, 957 (7th Cir. 2006), cert. denied 549 U.S. 1101 (2006).
\item \textsuperscript{23} Again, lest I be misunderstood to be saying that such view is \textit{unreasonable}, see \textit{supra} note 5. I am just saying we have a legitimate, respectable scholarly difference of opinion, both opinions deserving consideration by the reader.
\item \textsuperscript{24} \textit{See} Rule 608 advisory committee’s note \textit{supra} note 7, at subdivision (b).
\item \textsuperscript{25} \textit{Rothstein, Raeder, & Crump}, \textit{supra} note 3, at 173.
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Professor Imwinkelried does have a point that some witnesses may be encouraged to commit perjury if the inquiry is allowed on cross examination and a witness's perjurious response cannot be followed up by extrinsic refutation. He argues that other incentives against perjury here are weak: that perjury prosecutions in this situation are rare as a matter of prosecutorial discretion, and that there is a privilege against civil liability in many jurisdictions in connection with being a witness in a case. Nevertheless, I think the inducement to perjury here constitutes a rather small risk. Witnesses by and large are still afraid of committing perjury and don't think they are safe from perjury-based civil or criminal proceedings. Anyway, Professor Imwinkelried's solution still gives the judge discretion to exclude extrinsic follow-up, and the judge usually would do so. Thus there would still be some temptation to perjury. At any rate, if perjury in this situation is a substantial problem, that is an issue best addressed by reforming perjury law, tort law (the litigation privilege), and prosecutorial practices.

E. Professor Imwinkelried's Example Number Three: Incidents Repudiating the Witness that Occurred in Connection With a Prior Litigation

According to Professor Imwinkelried, this category includes evidence of the result of a civil action, for example where the witness was a party and an adverse verdict clearly establishes his position as a party was fabricated, or where he was only a witness but the verdict makes it clear the trier of fact rejected his contention as fabricated.

Imwinkelried believes this evidence is excluded automatically by Rule 608(b)'s ban on extrinsic evidence whether it is just referred to in a question-and-answer on cross (which he would call "tucking in") or goes beyond that by physically introducing the document (or a recording or other witness) establishing the previous judicial event casting doubt on the witness. He thinks they both should be allowed subject to Rule 403 discretion.

I believe the former form ("tucking in") is not extrinsic evidence, but rather is intrinsic evidence because it takes place entirely on cross examination and involves introducing no other evidence than the question-and-answer there. Thus it is not excluded by Rule 608(b)'

26. Imwinkelried, supra note 1, at 238-40.
27. Id.
28. See references to Rule 403 and advocacy of a discretionary standard in Imwinkelried, supra note 1, at 240-41, 242.
29. This example is set forth at Imwinkelried, supra note 1, at 228-32.
30. See Imwinkelried, supra note 1, at 228-29.
31. Id.
automatic extrinsic-evidence ban and consequently is admissible subject to Rule 403 discretion. In contrast, the latter form (physically introducing other evidence) is extrinsic evidence subject to Rule 608(b)'s automatic ban, and rightfully so. My reasoning on all these points is the same as those I advanced above in my discussion of Imwinkelried's example number two (documents establishing the witness's misdeed) and in my section labeled "conclusion" below.32 In essence, example number three is very like example number two.

Briefly stated, I am saying regarding this example number three, that if the witness can be gotten to admit during his cross exam the occurrence of the civil adverse event, the fact that the cross examiner mentioned the event during cross in order to elicit the admission, is not extrinsic evidence and consequently is not banned by Rule 608. Nor is the witness's admission, since it all takes place in cross examination. The "tucking in" point and the 2003 Advisory Committee's Note are wrong on this.33 So, the entire exchange would be admissible, subject to Rule 403 discretion, provided the hearsay rule can be surmounted some way, perhaps by arguing (perhaps somewhat problematically) (1) that the civil verdict is not INTENDED as a statement "the witness is incredible" (though it may IMPLY it) or (2) that the verdict or judgment is a public record.

Suppose the witness does not admit it occurred or admits and attempts to explain it. Then any attempt of the impeaching attorney to do more than orally explore or refute during cross the witness's denial or explanation—for example if the attorney attempts at any point to physically introduce some other evidence to explore or refute it—would properly in my view, be banned as extrinsic, for the reasons stated. It would not be worth the downside risks. Inducement to perjury is not a significant concern.34

III. CONCLUSION

Professor Imwinkelried argues that Rule 608(b) needs amendment to allow the judge to admit a witness's unconvicted-misdeeds that indicate incredibility regardless of whether the misdeed is intrinsically or extrinsically adduced, whenever in an individual case the evidence is found by the judge to be probative on credibility to a degree outweighing potential prejudice, confusion, and time consumption.

32. See supra notes 19-26 and accompanying text; see also infra notes 35-40 and accompanying text.
33. See supra notes 21-24 and accompanying text.
34. See supra notes 26-28 and accompanying text; see also infra notes 40-41 and accompanying text.
Professor Imwinkelried’s whole case is based almost entirely on his three enumerated examples. These are his “proof” that certain evidence of misdeeds of witnesses can on occasion be very good economical evidence of incredibility yet will be banned by the terms of Rule 608(b).

I submit that Rule 608(b) does not absolutely ban the evidence in his three categories and the judge can admit it in her/his discretion. This is because in some instances the evidence is not the kind of character evidence covered by the Rule in the first place. This is the case in his example number one, prior false rape allegations against the defendant. In other instances the evidence is not banned because it is not really “extrinsic.” This is the case in his example number two, documents proving the misdeed, to the extent the witness admits the contents of the document; and his example number three, civil results, to the extent the civil event that challenges the witness’s credibility can be shown entirely through the cross examination of the witness.

Since there is no applicable ban, the judge indeed often already has the weighing discretion to admit deserving evidence in these categories that Professor Imwinkelried advocates. All relevant evidence (which these categories unquestionably contain) that is not within a ban, is subject to Rule 403, which grants such judicial discretion.35

I further submit that when Professor Imwinkelried’s example number two (documents attesting to the misdeed) and example number three (civil results) are offered via truly extrinsic evidence (for example via documents or witnesses truly introduced independently of the cross examination), they should automatically be excluded as Rule 608(b) does since they are almost always of marginal utility, and I therefore do not agree with Imwinkelried that there should be discretion to admit them. They would normally be too time consuming or carry things too far afield for their legitimate worth. The fact-finder would tend to get confused about what wrongdoing is actually the central focus of the trial. It is not worth the risk of a trial within a trial that in all fairness would necessarily be engendered. It should be noted again in this regard that many jurisdictions absolutely exclude even wholly intrinsic evidence of this kind as not worth the time and prejudicial distraction, and not worth arguing over, even though intrinsic evidence is confined to cross examination where these downside dangers are at a minimum.36

Whether intrinsically or extrinsically adduced, character evidence of this sort involves a rather diffuse and easily exaggerated but actually very weak form of proof—a general character for lying offered to

35. See Rothstein, Raeder, & Crump, supra note 3, at 72-84.
prove lying on a particular occasion. Lots of literature questions whether character showings have any predictive power at all.\textsuperscript{37} It may (or may not!) be worth spending a little capital on such evidence during cross examination, where the negative effects are low, but certainly not when the evidence goes beyond the cross examination. And, in the normal case, the extrinsic evidence banned by Rule 608(b) can be expected to add little to what could be gotten through cross examination.

Thus discretion to admit the extrinsic evidence exhorted by Professor Imwinkelried is in my opinion a bad idea. An automatic ban on the extrinsic evidence of general character for credibility as Rule 608(b) imposes is appropriate and preferable to spending time, effort, expense, argument, and judicial resources on an unpredictable individualized discretionary judgment on the facts of each particular case.

Aside from Professor Imwinkelried’s three examples, I doubt that there are other instances where extrinsic unconvicted-misdeed evidence\textsuperscript{38} offered to show a bad credibility-character is ever worth the downside risks we have discussed. Rarely if ever will there be other important kinds of evidence excluded by the Rule’s ban. In my view, the extrinsic evidence that the Rule’s ban excludes—if the Rule is correctly interpreted—is almost always of marginal significance, can frequently be suggested by intrinsic evidence, and is normally outweighed by the downside dangers discussed. As noted, many jurisdictions exclude this kind of evidence even if it is only intrinsically offered. Despite the fact that the downside risks are minimized when the evidence is intrinsic, these jurisdictions still feel the risks outweigh the benefits of this character evidence.

When it seems fairly certain in advance that almost all evidence in a category—like the extrinsic evidence of credibility character that Rule 608(b) bans—will be of marginal significance or time consuming, prejudicial, and confusing beyond its worth, a blanket rule of inadmissibility is to be preferred over a rule of judicial discretion, which promotes litigation over how the discretion should be exercised on the facts of each particular case before individual judges who have particular proclivities, and fosters unpredictability, dis-uniformity, and consequent unfairness as among like cases.

Indeed, by the same token as argued by Professor Imwinkelried for this evidence, it could be argued that almost everything covered by

\textsuperscript{37} The writings of Professor David Leonard collected much of this literature including psychological findings. See, e.g., David P. Leonard, The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence, 58 U. COLO. L. REV. 1 (1987).

\textsuperscript{38} Remember, we are talking about non-convictions. The solidity and economy of proof makes convictions a different case. See FED. R. EVID. 609.
the entire Federal Rules of Evidence, should have been left to judicial discretion on the facts of each particular case, rather than subjected to the exclusionary rules that exist in that body of rules. After all, occasion-ally an important and economical piece of evidence might be excluded by these exclusionary rules. But for the reasons discussed above, the Rules subject many areas to rule-mandated inadmissibility. One such area, quite properly, is the area we are concerned with here, that is, extrinsic unconvicted-misdeed evidence to show credibility character. A good case could even be made that unless the evidence is solidified in a conviction, even the intrinsic form should be banned.39

I therefore conclude that Rule 608(b) properly automatically bans extrinsic evidence of unconvicted-for misdeeds offered to show bad credibility-character. Although that way we might occasionally be excluding something that on balance is of some legitimate value, such cases will be rare. Having a predictable uniform rule—rather than constantly litigating the balancing issue with the judge and on appeal—is more important in this area.

I do agree with Professor Imwinkelried that letting a witness know he cannot be challenged on occasion may occasionally invite perjury.40 Nevertheless, I think this risk is small. Perjury is a crime, and by-and-large witnesses think twice about perjuring themselves, even though it is true that perjury of this kind is seldom prosecuted and there is a civil privilege that may prevent lawsuits against the perjuring witness, as Professor Imwinkelried points out.41 But the cost of Professor Imwinkelried's solution would be too great. It would mean litigating about the admissibility of evidence that almost always

39. Recall that we are not talking about evidence in Professor Imwinkelried's category number one (former false rape allegations) which is not this kind of evidence at all. See supra notes 8-11 and accompanying text.
40. See Imwinkelried, supra note 1, at 238-40.
41. Id. If there is a problem here, it would seem to be one that should be addressed by reform of the law and of prosecutorial practices. Professor Imwinkelried's solution, to grant judicial discretion regarding extrinsic evidence, still presents the risk of perjury. There would still be instances where a judge in the exercise of the discretion would disallow the extrinsic refutation of the witness's perjurious denial of wrongdoing. Furthermore, the same inducement to perjury that Professor Imwinkelried decry currently exists in a number of places in Evidence law. Under Federal Rules of Evidence 405(a), extrinsic evidence contradicting a possibly perjurious denial of a character witness's knowledge of contradicting incidents cannot be adduced, see Rothstein, Ræder, & Crump, supra note 3, at 115; and the collateral matters rule that may disallow extrin-sic evidence of a contradiction or inconsistency. Id. at 283-87. And, Rule 403 is a general rule allowing the judge to disallow refutations of falsehoods in many instances. It is true that witnesses in these areas and under Professor Imwinkelried's proposal granting discretion, cannot always predict in advance whether the refutation will be allowed or not, so the "inducement" to commit perjury might be less. Probably, however, under Professor Imwinkelried's proposal a practice would develop of exercising the discretion in favor of excluding extrinsic evidence of misdeeds except in extraordinary cases, and savvy witnesses would know this in advance.
is of marginal importance, and too time consuming, misleading, confusing, and prejudicial for its worth.

In sum Professor Imwinkelried, in his excellent and thought-provoking article, is correct that a number of courts are excluding some evidence in categories number one, number two, and number three that they shouldn't. He does a service by calling our attention to that. The courts are doing it because they are under the impression that Rule 608(b) by its literal terms demands it. Professor Imwinkelried believes this is a proper impression and exhorts the revision of Rule 608(b). I believe it is a mistaken impression. But at any rate, he and I agree they should not automatically exclude everything in these categories. He generalizes that there are lots of other instances as well, where deserving evidence is nevertheless banned automatically by the literal terms of Rule 608(b)'s extrinsic evidence prohibition. I do not believe that case has been made.

Nevertheless his article is in the highest traditions of scholarship—to stimulate thoughts and thoughtful debates that might not otherwise have been born, as he has done here and countless times in the past.
A REPLY TO PROFESSOR ROTHSTEIN’S COMMENT

Edward J. Imwinkelried

I was delighted when the law review informed me that Professor Rothstein had submitted comment on my previous article in this review. Whenever anyone publishes an article, they worry that it will be a “missive into the void”—something that no one will ever read or pay attention to. I was very gratified to learn that as distinguished a scholar as Professor Rothstein had both read the article and taken the time to submit a thoughtful critique. I am indebted to him.

At the outset, I want to make clear that Professor Rothstein and I share several points of agreement. For example, I concur with his statement that the three illustrations cited in my previous article “can be powerful items of evidence on occasion . . . [that] should be admissible in the judge’s discretion upon consideration of such factors as probative value . . . and prejudice.”42 I also agree with Professor Rothstein’s position that Rule 608(b) applies “only . . . where the theory [of logical relevance] is showing a bad character regarding credibility.”43

In my previous article, I cited the three examples as an indication of many courts’ misgivings about the restrictive interpretation of Rule 608(b). However, given the extensive judicial support for a restrictive reading of the rule, I urged an amendment to Rule 608(b). In his comment, Professor Rothstein asserts that an amendment is unnecessary because, properly construed, Rule 608(b) does not bar the admission of any of the three types of evidence. Professor Rothstein’s comment is insightful. However, on reflection, I adhere to my original belief that an amendment is still desirable. In the case of the first type of evidence, it is unclear whether in the typical case the evidence would be admissible on a theory other than Rule 608(b). In the case of the second type of evidence, the hearsay rule will prevent the cross-examiner from escaping from Rule 608(b)’s prohibition of extrinsic evidence. And in the case of the last type of evidence, on the merits I agree with Professor Rothstein that the rule should be construed to allow the introduction of the evidence. However, since a restrictive judicial attitude has become ingrained in many jurisdictions during the 40 years of Rule 608(b)’s existence, an amendment is the most

42. See Edward J. Imwinkelried, Should Rape Shield Laws Bar Proof That the Alleged Victim Has Made Similar, False Rape Accusations in the Past?: Fair Symmetry with the Rape Sword Laws, ___ Pac. L.J. ___ (forthcoming 2016).

43. See United States v. DeMarco, 784 F.3d 388, 394 (7th Cir. 2015) (noting that Rule 608 “permits extrinsic evidence to be admitted . . . to show bias, contradiction, or inconsistent statements.”).
straightforward approach to ensuring the admissibility of the evidence.

I. THE FIRST TYPE OF EVIDENCE: EVIDENCE OF AN ALLEGED RAPE VICTIM'S EARLIER FALSE ACCUSATIONS

Professor Rothstein states that there is no need to rely on Rule 608(b) to introduce this type of evidence, since it is alternatively admissible under Rule 404(b). In pertinent part, Rule 404(b) states:

(1) Prohibited Uses. Evidence of a crime, wrong, or other 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.

(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.44

As the statutory language indicates, the rule permits a proponent to introduce a person's uncharged misconduct to establish that person's "motive" to perform a relevant act. In his words, Professor Rothstein believes that this type of evidence is admissible to show that the alleged victim "has a motive to 'get' this defendant."

Professor Rothstein is correct that in some cases involving evidence of the alleged victim's prior false rape accusations, the defense could introduce the evidence under Rule 404(b) to establish the alleged victim's motive to make a false accusation against the accused. Consider a variation of the facts in the United States Supreme Court's 2013 case, Nevada v. Jackson.45 There the rape accused tried to introduce evidence that on other occasions, the alleged victim had falsely accused him of sexually assaulting her—accusations that the police could not substantiate. The Supreme Court ruled that the state court had not erred in excluding the evidence. The Court noted that although the police had been unable to substantiate the accusations, that showing fell short of proof that the prior accusations were false.46 Suppose, though, that the accused had been able to prove that the other accusations were false. In that situation, the false accusations would tend to show that the alleged victim had a personal animus di-

44. Fed. R. Evid. 404(b).
45. 133 S. Ct. 1990 (2013). In this case, the defense evidently did not even raise the possibility of a Rule 404(b) theory of admissibility. See Nevada v. Jackson, 133 S. Ct. 1990, 1990-94 (2013).
46. There are many instances in which, although an accusation is true, investigators are unable to marshal enough evidence to establish the truth of the accusation.
rectly against the accused; and as Professor Rothstein suggests, the defense could successfully invoke Rule 404(b). There would be no need to rely on Rule 608(b). The issue of Rule 608(b)'s extrinsic evidence prohibition would become moot.

However, that variation of Jackson is an atypical case. In the vast majority of published opinions, the defense evidence concerns the alleged victim's false rape accusations against men other than the accused. In the usual case, the defense would have to argue that the prior accusations establish the alleged victim's animus against a class of persons including the accused. By way of example, consider the following hypothetical.47 The accused is charged with an assault on a member of a particular foreign consulate. The accused denies committing the offense. The prosecution has evidence that the accused committed three prior violent attacks on other members of the consulate staff. Given the number of uncharged incidents and the small size of the class, under Rule 404(b) the court could admit the evidence based on the following chain of reasoning: Initial inference—the uncharged misconduct shows that the accused harbored a strong animus against a certain class, that is, the members of the consulate; intermediate inference—the alleged victim was a member of that class; and conclusion—the animus could plausibly supply a motive to commit the charged offense.

Although Rule 404(b) applies in the above hypothetical, the hypothetical is distinguishable from the typical case in which the defense attempts to introduce testimony about a prior false rape complaint by the alleged victim. In the latter situation, the only relationship between the subject of the prior false complaint and the accused is that they both are men. Thus, here the underlying theory of logical relevance is: Initial inference—the evidence shows that the alleged victim had an animus against the general class of men; intermediate inference—the accused was a member of the class; and conclusion—the animus could plausibly furnish a motive to falsely report that the accused had raped her. The key question is whether, standing alone,48 a prior false rape complaint against one man is adequate support for the initial inference that the alleged victim harbors an animus against the general class of men. Unless the defense has more, the answer should be no. In part, the feminist argument that led to the

47. See United States v. Khorrami, 895 F.2d 1186, 1192-94 (7th Cir. 1990).
48. There are extreme cases in which it is defensible to infer an animus against a large class. For example, in People v. Hoffman, 570 N.W.2d 146, 148 (Mich. Ct. App. 1997), the prosecution argued that the accused was a misogynist who hated the general class of women. In Hoffman, the prosecution presented testimony that the accused has said that "all women are sluts and bitches and deserve to die." Hoffman, 570 N.W.2d at 148.
widespread enactment of rape shield statutes was that male-female relationships are highly dependent on the specific personalities of the two individuals.\(^{49}\) In that light, a woman's attraction to and willingness to have sex with one man does not support "an inference of consent on another occasion with another man."\(^ {50}\) By the same token, a woman's anger at one man does not support an inference of hatred of another, unrelated man. To be sure, the fact that the alleged victim previously filed a false rape complaint against one man is probative of her anger toward that man; but that man is not the accused in the pending case. Hence, in the typical case, the defense cannot invoke Rule 404(b) to justify introducing the testimony about the alleged victim's earlier false complaint against another man. If Rule 404(b) is unavailable, the defense will probably have to fall back on Rule 608(b).

II. THE SECOND TYPE OF EVIDENCE: FORMAL JUDICIAL OR JURY FINDINGS (OTHER THAN CONVICTIONS) THAT THE WITNESS ENGAGED IN UNTRUTHFUL CONDUCT

In his discussion of this type of evidence, Professor Rothstein states that Rule 608(b)’s prohibition of extrinsic evidence should not be interpreted as forbidding the opponent from questioning the witness “on cross” about an earlier, formal finding by a judge or jury that the witness has lied. He acknowledges that the Advisory Committee Note accompanying the 2003 amendment to Rule 608(b), citing an article by Professor Stephen Saltzburg, seems to forbid such questioning. However, Professor Rothstein believes that Professor Saltzburg is wrong.

On the merits, though, Professor Saltzburg is right. Professor Rothstein quotes the part of the 2003 Note referring to the extrinsic evidence prohibition. However, Professor Rothstein’s quotation omits an essential component of Professor Saltzburg’s argument; in explaining its position, the Advisory Committee quotes Professor Saltzburg’s statement that “[s]uch evidence would . . . be hearsay to the extent it contains an assertion of fact.” Professor Saltzburg’s argument is not based solely on the extrinsic evidence prohibition; rather, his argument rests on the interplay between the prohibition and the hearsay rule.

In some cases, it will be difficult to determine whether the jury or judge in the earlier proceeding decided that witness lied.\(^ {51}\) However,

\(^{49}\) The classic article is Vivian Berger, Man’s Trial, Woman’s Tribulation: Rape Cases in the Courtroom, 77 Colum. L. Rev. 1, 55-56 (1977).

\(^{50}\) Id. at 56, (quoting B. Babcock, A. Freedman, E. Norton & S. Ross, Sex Discrimination and the Law 839 (1975)).

\(^{51}\) United States v. White, 692 F.3d 235, 249-51 (2d Cir. 2012).
to simplify the analysis, assume that at the conclusion of a criminal suppression hearing, a judge explicitly finds that the moving party lied about the search in question or that at the end of a civil discovery sanctions hearing, a judge expressly announces a finding that a litigant lied about his or her destruction of requested documents.

The starting point of the analysis is that the earlier finding is hearsay if it is proffered in a later case. The finding is assertive under Rule 801(a):\textsuperscript{52} it asserts the fact that the witness lied in the prior proceeding. Further, the proponent is offering the finding for a hearsay purpose under Rule 801(c)(2):\textsuperscript{53} the proponent is proffering the testimony to prove the truth of that very assertion. Finally, the judge in the earlier proceeding is a hearsay declarant with respect to the pending trial; under Rule 801(b):\textsuperscript{54} the judge is “the person [declarant] who made the statement,” and under Rule 801(c)(1):\textsuperscript{55} the judge did “not make [the statement] while testifying at the current trial or hearing.” Rule 803 enumerates several hearsay exceptions for particular types of judgments.\textsuperscript{56} The very existence of those exceptions reflects the fact that a trier of fact in an earlier proceeding can be a hearsay declarant in a subsequent proceeding.

Thus, when the cross-examiner poses the question, “Did the judge at the earlier suppression hearsay expressly say that you lied under oath?”, the direct examiner may object that the question calls for hearsay. Can the cross-examiner overcome the objection?

Professor Rothstein notes that in this situation, the cross-examiner cannot appeal to Rule 609.\textsuperscript{57} That statute permits the cross-examiner to impeach the witness by forcing the witness to concede that he or she has suffered certain types of convictions. However, in the situations in which Rule 608(b) comes into play, there is no judgment of conviction; there is at most an explicit finding by a judge or jury.

Can the cross-examiner cite any Rule 803 hearsay exception to defeat the direct examiner’s hearsay objection? The Rule 803(23) exception for judgments involving personal, family, or general history or a boundary is certainly inapposite. The only other possibility under Rule 803 is the exception for certain judgments of previous conviction.\textsuperscript{58} However, for several reasons the trial judge should reject any attempt by the cross-examiner to justify the questioning under that

\textsuperscript{52} FED. R. EVID. 801(a).
\textsuperscript{53} FED. R. EVID. 801(c)(2).
\textsuperscript{54} FED. R. EVID. 801(b).
\textsuperscript{55} FED. R. EVID. 801(c)(1).
\textsuperscript{56} FED. R. EVID. 803(22) (judgment of a previous conviction); FED. R. EVID. 803(23) (judgment involving personal, family, or general history, or a boundary).
\textsuperscript{57} FED. R. EVID. 609.
\textsuperscript{58} FED. R. EVID. 803(22).
exception. If the prior finding was made in a civil action, Rule 803(22) would be inapplicable, since the statute refers to "evidence of a final judgment of conviction ... ."\textsuperscript{59} Furthermore, even if there were a criminal conviction, the exception permits only the proof of a finding of "fact essential to the judgment ... ."\textsuperscript{60} In the usual case, it will not be "essential" to the judgment that the judge or jury found that the witness lied; the only "essential" finding will be that the witness's testimony was erroneous.

If neither Rule 609 nor Rule 803 is of any avail to the cross-examiner, what argument will the cross-examiner have to fall back on? The cross-examiner might contend that the prior finding is so reliable that the trial judge ought to admit the evidence under the residual hearsay exception, Rule 807.\textsuperscript{61} The problem is that this hearsay analysis will force the cross-examiner to offer truly extrinsic evidence. As we shall soon see, with respect to the third type of evidence--such as a letter by the declarant in which the declarant describes the untruthful conduct--the declarant is competent to lay the foundation; the declarant can authenticate the evidence, and there is no tenable hearsay objection to the evidence. Hence, when the cross-examiner is questioning about the third type of evidence, the cross-examiner can lay the entire foundation on cross-examination. In sharp contrast, the witness is obviously incompetent to lay foundation to bring the prior finding within the residual hearsay exception codified in Rule 807. Professor Saltzburg is correct in concluding that the problem arises because of the interplay between the hearsay rule and Rule 608(b)'s prohibition of extrinsic evidence. Of course, the direct examiner might not be acute enough to recognize the hearsay objection. However, if the direct examiner interposes that objection, the hearsay analysis will force the attorney attacking the witness's credibility to attempt to introduce extrinsic evidence; and that attempt will run afoul of Rule 608(b).\textsuperscript{62}

\textsuperscript{59} \textit{Id.}

\textsuperscript{60} \textit{FED. R. EVID.} 802(22)(c).

\textsuperscript{61} \textit{FED. R. EVID.} 807; see also United States v. Boyce, 742 F.3d 792, 802 (7th Cir. 2014) (Posner, J., concurring), \textit{cert. denied} 134 S. Ct. 2321 (2014) (discussing Rule 807).

\textsuperscript{62} It should make no difference whether the attorney attacking the witness's credibility attempts to lay the Rule 807 foundation before or after the cross-examination of the witness. If anything, attempting to lay the foundation earlier will make it more difficult to introduce the evidence. The changed timing poses three issues. The first is logistical. If the attorney tries to lay the foundation immediately before the witness's testimony, presumably the attempt will occur during a phase of the case controlled by the opposition. Thus, if a defense attorney endeavored to introduce a transcript of the prior hearing quoting the judge's finding, the attempt would presumably be occurring during the plaintiff's case-in-chief or the plaintiff's rebuttal. It is true that under Federal Rule 611(a), the judge has discretion to grant leave to present testimony out of order. However, judges rarely do so, especially when the witness to be impeached cannot lay the foundation for the evidence. By way of example, after plaintiff's witness number one testified and before plaintiff's witness number two (the witness to be im-
III. THE THIRD TYPE OF EVIDENCE: SITUATIONS IN WHICH THE WITNESS IS COMPETENT TO LAY THE FOUNDATION FOR DOCUMENTARY EVIDENCE THAT SHOWS THE WITNESS'S UNTRUTHFUL CONDUCT

Professor Rothstein forcefully argues that the courts should not apply Rule 608(b)'s extrinsic evidence prohibition when the evidence takes the form of a document that proves the witness's deceitful conduct and that the witness is competent to lay the foundation for. I wholeheartedly support Professor Rothstein's argument.

This type of evidence differs fundamentally from the second type of evidence. Suppose that during pretrial discovery, the cross-examiner obtained a copy of a letter written by the witness. In the letter, the witness describes an untruthful act that would qualify under Rule 608(b). The cross-examiner can lay the complete foundation for the exhibit by questioning the witness.

- If the witness authored the letter, the witness can obviously authenticate the letter under Rule 901(b)(1). 63
- Perhaps more importantly, unlike a formal judicial or jury finding that the witness lied in a previous proceeding, the letter is not subject to a hearsay objection. Suppose that earlier in the cross-examination, the questioner asked the witness point blank whether he or she had committed the fraudulent act. If the witness denied the act, the letter would be admissible as a prior "inconsistent" statement under Rule 613(a). 64 The courts interpret the term "inconsistent" in the rule very liberally; the pretrial statement need not be "diametrically opposed" to the witness's trial testimony. 65 Given that liberality,

63. Fed. R. Evid. 901(b)(1).
64. Fed. R. Evid. 613.
65. United States v. Cisneros-Gutierrez, 517 F.3d 751, 758 (5th Cir. 2008); United States v. Richardson, 515 F.3d 74, 84 (1st Cir. 2008); United States v. Gajo, 290 F.3d 922, 931 (7th Cir. 2002); Udembra v. Nicoli, 237 F.3d 8, 18 (1st Cir. 2001); United States v. Cody, 114 F.3d 772, 776-77 (8th Cir. 1998); United States v. Matlock, 109 F.3d 1313, 1319 (8th Cir. 1997); United States v. Strother, 49 F.3d 869, 874 (2d Cir. 1995).
the document easily qualifies under 613(a); there will ordinarily be a flat contradiction between the witness's trial testimony and the contents of the document. To be sure, since the document was not sworn, the document's contents will not be admissible as substantive evidence. However, if the contents are inconsistent with the witness's denial of lying, the document is admissible over a hearsay objection. The contents are admissible for a nonhearsay purpose under Rule 801(c)(2). Even if the facts in the document are false, the document is logically relevant on an impeachment theory. The inconsistency between the witness's prior writing and his or her trial testimony gives the jury insight into the witness's state of mind; the inconsistency indicates that the witness is either lying or uncertain. In short, the fact of the earlier inconsistent statement is logically relevant for impeachment purposes even if the fact stated in the statement is false.

Professor Rothstein is on firm ground when he contends that when the cross-examiner can use the witness's own testimony to lay a complete foundation for the item of evidence, the courts should not invoke Rule 608(b)'s extrinsic evidence prohibition to block the use of the document during cross. The courts ought to give any statute a purposive interpretation. The court should identify the legislative purpose that animates the statute and inquire whether, on the facts of the case, it would effectuate that purpose to apply the statute. The primary purpose of the extrinsic evidence prohibition is to minimize both the risk of undue consumption of time entailed in the presentation of the extrinsic evidence and the danger that the jurors' consideration of the extrinsic credibility evidence will distract them from the historical merits. When the witness can authenticate the document, the additional time expenditure will be minimal:

Q Mr. Larson, I now hand you what has previously been marked as Defense Exhibit C for identification. Do you recognize it?

A Yes.

Q What is it?

A A letter.

Q Isn't it true that you wrote this letter?

66. See Fed. R. Evid. 801(d)(1)(A) (providing that a statement is not hearsay if it is inconsistent from the trial testimony and was stated “under penalty of perjury”).
70. 1 McCormick, supra note 68, at § 41.
A  Yes.

Q  Let me direct your attention to the second paragraph in the letter . . .

    The necessary foundation can be laid in a minute. If the judge believes that the lie is egregious enough to give the jury meaningful insight into the witness’s credibility, Rule 608(b) should not be construed to bar the questioning.

    The point in my original article was not that the courts interpreting Rule 608(b) as precluding this line of questioning are reading the statute correctly. The point was simply that a number of courts have given the statute that illiberal reading. Professor Rothstein acknowledges that in the case of this type of evidence—as well as the other two kinds of evidence—a number of courts have cited Rule 608(b) as the justification for excluding the evidence.

    At this point in the history of Rule 608(b), we need to be realistic. Although I concur with Professor Rothstein that the courts should construe the rule as allowing at least the third type of evidence, the fact remains that there are contrary judicial precedents. Those courts have not read Rule 608(b) as astutely as Professor Rothstein. Rule 608(b) is not a newly-minted statute. The rule was part of the original version of the Federal Rules of Evidence that took effect in 1975—more than 40 years ago. The restrictive Rule 608(b) precedents barring all three types of evidence have become entrenched in many jurisdictions. To be frank, I am not optimistic that a law review article or two, espousing a more limited, sensible reading of Rule 608(b), will undo almost half a century of precedent. I remain convinced that an amendment to the rule is desirable.
In this rebuttal, I summarize the various positions in the debate between us and add my final rebuttal. I organize it according to the three types of evidence that are the subject of the debate.

I. THE FALSE RAPE EVIDENCE

Professor Imwinkelried’s Original Article: Rule 608(b)’s extrinsic evidence ban bans this evidence. But it could be very good evidence if admissible. Thus the Rule needs amendment to eliminate the extrinsic evidence ban.

Professor Rothstein’s Response: This evidence is not subject to Rule 608(b) since it is not general “character for credibility” evidence, but rather evidence of bias, in that it addresses lying in only this kind of case (rape by this defendant or by someone else) rather than a tendency to lie generally. For example, the bias might be described as some kind of nefarious or perverse motivation.

Professor Imwinkelried’s Reply: Construes Professor Rothstein’s argument as saying this evidence is admissible because it is “motive” evidence under Rule 404(b). Concedes this evidence is not banned by Rule 608(b) if the false rape charge was against the same defendant because that could fit Rule 404(b)’s “motive” category (assuming Rule 404(b) can overcome Rule 608(b)). But Professor Imwinkelried rejects Professor Rothstein’s footnote that says the evidence is admissible (on Professor Rothstein’s same theory) even if the false charge was against another person than this defendant. Professor Imwinkelried rejects that because that evidence would be unlikely to fit Rule 404(b) “motive,” he claims.

Professor Rothstein’s Rebuttal: I am not saying this evidence fits Rule 404(b) motive, but rather is impeachment by showing bias as opposed to showing general character for incredibility. General character for incredibility is the only kind of impeachment covered by Rule 608(b). I am not arguing the evidence is admissible under Rule 404(b), but rather is admissible merely as relevant bias evidence and needs no special rule to make it admissible.71 As such, the situation is the same whether the prior false charge was against this defendant, or another person. (Anyway, why couldn’t a tendency to make false sex charges against various different people be called a nefarious or per-

verse "motive" under Rule 404(b)?) At any rate, I only mentioned Rule 404(b) "motive" as an analogy.

II. THE CIVIL JUDICIAL PROCEEDING EVIDENCE

Professor Imwinkelried's Original Article: Rule 608(b)'s extrinsic evidence ban bars this evidence. This evidence could be great evidence. So Rule 608(b) needs to be amended so it doesn't bar it—i.e., so the evidence can come in.

Professor Rothstein's Response: Rule 608(b) does not ban the evidence (assuming the evidence is confined to inquiry and response during cross examination and no document is actually introduced).

Professor Imwinkelried's Reply: Well, but the hearsay rule also bans the evidence.

Professor Rothstein's Rebuttal: If the hearsay rule bans the evidence and no exception to the hearsay rule can be found, it would ban the evidence under your proposal too. Your proposal is to amend Rule 608(b)'s ban so the evidence could be admitted. But that wouldn't make the evidence admissible. The hearsay rule would still stand in the way. Are you going so far as to propose amendment of the hearsay rule as well?

III. DOCUMENTARY PROOF OF MISDEEDS FULLY AUTHENTICATED (ETC.) BY THE WITNESS

Professor Imwinkelried's Original Article: This evidence is banned under Rule 608(b)'s extrinsic evidence ban and shouldn't be because it can be valuable evidence. The rule needs amending by removing the extrinsic evidence ban.

Professor Rothstein's Response: A proper reading of Rule 608(b)'s extrinsic evidence ban would not ban this evidence.

Professor Imwinkelried's Reply: I agree. But some judges are misreading the rule and excluding the evidence. The only practical way to prevent this is to amend the rule.

Professor Rothstein's Rebuttal: But your amendment would be overkill—it would render not only this evidence potentially admissible, but all extrinsic evidence currently banned by the rule. This is a bad idea. It opens the door to protracted admissibility arguments and potential admission of a kind of evidence which in most cases is worth little and is confusing, distracting, and time consuming. A better way

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72. A hearsay exception probably could be found—the catchall (Rule 807), the public records exception (Rule 803(3)), or the business records exception (Rule 803(6)) for example.
would be to educate the judges who misread the rule. Getting the word out as to what the proper reading is could take place through organizations like the Federal Judicial Center, normal judicial education programs and manuals, leading treatises, and Continuing Legal Education programs. Or perhaps there could be a more limited amendment; or a statement in an Advisory Committee Note (maybe when another amendment is found necessary for some other more legitimate reason).