The First Decade under Article VI of the Federal Rules of Evidence: Some Suggested Amendments to Fill Gaps and Cure Confusion

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I. INTRODUCTION

IN any human lifetime, a decade is a milestone. Whether it is a wedding anniversary or a law school reunion, we tend to stop, celebrate, and sometimes evaluate achievements every ten years. On July 1, 1985, many of us celebrated—or at least marked—the tenth anniversary of the effective date of the Federal Rules of Evi-

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vidence, the first fairly comprehensive codification of federal evidence principles.\(^1\) The enactment of the Federal Rules appears to have been the culmination of the codification movement in the federal system that lasted for thirty-seven years after adoption of the Federal Rules of Civil Procedure. Similarly, civil and criminal rule reform in the various states usually preceded efforts to codify evidence principles.\(^2\) Not until the first draft of the Federal Rules issued forth in 1969, however, did the evidence codification movement in the states get off the ground.\(^3\) Aided by the promulgation of the 1974 Uniform Rules of Evidence, which were designed for state adoption, thirty jurisdictions have—more or less uniformly—overhauled their system of evidence law into some form of code.\(^4\)

1. Under former rule 26 of the Federal Rules of Criminal Procedure, the federal courts in criminal trials were to follow any applicable federal statute relating to evidence and, if none was applicable, to guide themselves “by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.” Fed. R. Crim. P. 26, 18 U.S.C. app. (1970) (amended 1972). This mandate for rational judicial lawmaking survives in Federal Rule of Evidence 501—the general provision on privileges. See generally Fed. R. Evid. 501. In civil actions, the tripartite test of former Federal Rule of Civil Procedure 43(a) was a stop-gap measure that directed the federal judge to admit evidence if either a federal statute, a federal equity rule, or a rule of the forum state permitted it. See Clark, Foreward to Symposium on the Uniform Rules of Evidence, 10 Rutgers L. Rev. 479, 482 (1956). Note that, as of 1938, when the rules of civil procedure were adopted, neither the American Law Institute’s “radical” Model Code of Evidence of 1942 nor the substantially redrafted and more “conservative” version in the 1953 Uniform Rules of Evidence had been completed.


3. Between the issuance of the 1969 first draft of the Federal Rules and the 1975 effective date of the final draft, at least three states—Nevada, New Mexico, and Wisconsin—adopted evidence codes patterned on the then proposed federal provisions. See Wroth, supra note 2, at 1318-19 & nn.13, 15-16.

4. The following 30 states have adopted some form of evidence code modeled on (but not always identical to) the Federal or Uniform Rules: Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Hawaii, Idaho, Iowa, Maine, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Texas (civil), Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. See Wroth, supra note 2, at 1318-20 & nn.13, 15-16, 22-23; See also 21 C. Wright & K. Graham, supra note 2, § 5007, at 7 n.12 (Supp. 1985). The following jurisdictions are actively considering a similar adoption: Rhode Island, New Jersey, and New York. See Wroth, supra note 2, at 1920 & n.28. Additionally,
One of the high-risk areas of evidence law codification is that “bread-and-butter” set of topics relating to the competency and impeachment of trial witnesses under article VI of the Federal and Uniform Rules. After presenting some preliminary thoughts on codification, this article seeks to evaluate the success of the framers’ efforts based on a decade of judicial opinions on the following four aspects of article VI: (1) the requirement of rule 601 that federal courts defer to state law regarding the competency of witnesses who take the stand to testify as to any element of a civil action arising under state “substantive” law; 5 (2) the effects of the failure of the Federal Rules to present a reasonably complete statement of the principles for impeaching witnesses; 6 (3) the awkward and confusing—if not incorrect—language in which either the Advisory Committee to the Federal Rules or the Congress expressed the main principles of character impeachment under rules 608 and 609; 7 and (4) the overly broad license afforded by rule 613(b) to allow trial counsel to depart from the natural and efficient order of laying a foundation for prior inconsistent statements without good cause. 8 On the subject of competency under rule 601, this article suggests that Congress need not have demanded that the federal courts defer to all state competency rules in civil actions tried in federal court on the basis of diversity jurisdiction. The article further argues that, subject to any clear and overriding demands of state “substantive” policy, rules 601 through 606 provide adequate and rational tests for preliminary screening of the minimum ability of each witness to provide possibly useful testimony. 9 Finally, the article focuses on topics relating to impeachment of witnesses. These issues are of pressing importance in the daily conduct of trials. Moreover, military court-martials are now governed by the Military Rules of Evidence, and Puerto Rico has adopted its own evidence code based on the Federal Rules. See Wroth, supra note 2, at 1320 & nn.25-27; See also 1 J. Weinstein & M. Berger, Weinstein’s Evidence ¶ 101[02]-[03], at 101-9 to -13 (1985). Finally, Canada and some of its provinces are debating adoption of codes that might resemble the Federal and Uniform Rules. See, Wroth, supra note 2, at 1321 & n.33. See also 21 C. Wright & K. Graham, supra note 2, § 5005, at 2 n.0.1 (Supp. 1985).

5. For a discussion of this aspect of rule 601, see infra notes 38-144 and accompanying text.
6. For a discussion of the problems presented by this omission in the Federal Rules, see infra notes 149-221 and accompanying text.
7. For a discussion of the confusion surrounding the language used in rules 608 and 609, see infra notes 223-317 and accompanying text.
8. For a discussion of problems surrounding the application of rule 613(b), see infra notes 326-58 and accompanying text.
9. For a discussion of this aspect of rules 601 through 606, see infra notes 101-45 and accompanying text.
each topic illustrates the many difficulties created by an article that uses confusing language as to the impeachment problems it does address, and that relegates either to traditional but unsystematic bodies of case law or to vague principles of relevance a number of specific and crucial areas it does not address. From time to time, the article boldly suggests some statutory/rule language that might help to fill in the gaps and clarify the garbles, or at least to stimulate criticism and debate on how the rules ought to address these complex and important problems.

II. PRELIMINARY THOUGHTS ON THE STRENGTHS AND WEAKNESSES OF EVIDENCE CODES

The movement toward restating the principles of evidence in statute or rule format may well be a small segment of that “orgy of statute making” referred to by Professor Gilmore. The common law development of evidence law was accretional, slow, and not readily accessible. The case law of any given jurisdiction simply could not satisfactorily or consistently keep up with the thousands of practical problems of admissibility and exclusion which arose each day in hundreds of thousands of trials. In many instances, the only authority on an evidentiary issue might have been a thirty-year-old appellate case whose currency could well be suspect. In other instances, the only authority on point might have emanated from another state and its probable impact on local appellate courts would be speculative at best. It took a giant like Wigmore many decades and multiple volumes to analyze and synthesize the sea of common law evidence opinions. The new or occasional trial lawyer found it difficult enough to become familiar with the variegated evidentiary precedents in his own jurisdiction—often factually distinguishable from the particular problem facing him—much less to repeat the process when the chance came to try an important case in a neighboring state. Compounding all of this difficulty was the need to master the evidentiary customs of each local trial judge, which, not infrequently, strayed from the precedents.

10. For a discussion of problems under the Federal Rules of Evidence with regard to impeachment of witnesses, see generally infra notes 145-351.
12. This argument for codification has been dubbed the “Pocket Bible” approach. See 21 C. WRIGHT & K. GRAHAM, supra note 2, § 5006, at 96.
13. For example, as a fledgling Assistant United States Attorney, the author of this article once attempted to cross-examine a character witness for the defense in what he deemed to be the best traditions of Michelson v. United States,
Codification, on the other hand, can rapidly and comprehensively organize and reform the subject of trial evidence. It can even achieve a substantial degree of federal-state and interstate uniformity, except to the extent that some states tinker with the "uniform" provisions—often to enshrine some favorite local practice of the trial bar or attempt to improve the original model. In the early days after enactment of an evidence code, a trial lawyer should find the basic principles of evidence law fairly accessible. Where the rule seems unclear, he can consult the Advisory Committee's notes or their equivalent or, where appropriate, the legislative history. As time passes, however, the random chance of appellate determinations produces authoritative glosses on the code language in the form of numerous judicial opinions. In fact, interpretations of the language of the Federal Rules often vary widely among the twelve federal circuits. As relatively independent sovereigns, the states also adopt varying constructions of rule language identical to other state evidence codes and to the Federal Rules. Furthermore,
federal rulemakers and state legislatures and rulemakers sporadically amend one or another rule of evidence.\textsuperscript{20}

As was suggested by the traditional resistance of bench and bar to the code concept, the risks of codification were real.\textsuperscript{21} In attempting both to reform anachronistic rules and to grasp the favored approach against a long background of judge-made law, the Advisory Committee and Congress appeared to have taken certain leaps of faith. First, both may have assumed that the courts could readily straighten out over time any inconsistency, confusion, or ambiguity in language. Second, it was presumably taken for granted that bench and bar could readily put into action the codified principles, and would know how to handle the many holes in the fabric of everyday evidence law that code reform left untouched. Third, the framers appeared to believe that the rulemaking process or legislation could timely update the unsound rules and clarify the sound—but unclear—provisions.\textsuperscript{22}

Complicating the task of developing a uniform, national law of evidence was the choice by the framers of the Federal Rules not to attempt a comprehensive, European style of code.\textsuperscript{23} For the

\textsuperscript{20.} E.g., FED. R. EVID. 412 (amending rule 404(a); effective 1978); FED. R. EVID. 410 (amending rule 410; effective 1980); FED. R. EVID. 704(b) (amending rule 704; effective 1984). See 10 FED. R. EVID. NEWS 8 (1985). New Mexico has passed a general update of its code to conform to the final draft of the Federal Rules. See N.M. R. EVID. 101-1102. Wisconsin has passed a unique addition to its code, specifically dealing with medical records. See Wis. STAT. ANN. § 908.03(6m) (West Supp. 1985).

21. One of the particular hazards of evidence codification lies in the fact that it may be perceived as threatening the old and the familiar law, and that, unlike most areas of law, it regulates the conduct of lawyers and judges and not of clients. See Cleary, supra note 16, at 909. Another hurdle is the perception by bench and bar that if a code attempts too much "reform," the opponents aim their fire at the change. See C. WRIGHT & K. GRAHAM, supra note 2, at 91-92. As to a code that simply restates the common law rules, however, the argument is that there is no need for it. See id.

22. Interestingly, in a partial retreat from codification, congressional views of the principles of federalism led to deletion of the specific rules of privilege in the Supreme Court's 1972 version of article V of the Federal Rules, whereas the Commissioners on Uniform State Laws exploited their greater freedom by retaining codified rules of privilege in article V of the Uniform Rules of Evidence. See generally 21 C. WRIGHT & K. GRAHAM, supra note 2, § 5135, at 464-66.

23. On the similar approach of the A.L.I. Model Code of Evidence, Professor Edmund Morgan remarked:

The third method [of framing evidence rules] is to draw a series of rules in general terms covering the larger divisions and subdivisions of the subject without attempting to frame rules of thumb for specific situations and to make the trial judge's rulings reviewable for abuse of dis-
most part, this policy decision was followed by the Commissioners on Uniform State Laws in framing the Uniform Rules.24

In lieu of creating a code comprehensive in detail and scope, the framers of the Federal Rules focused on what they deemed the more significant areas of evidence law, or those most in need of clarification or reform.25 On some topics, such as authentication under rule 901, the framers provided only a general standard, and reformulated the traditional specifics as mere “examples” of applying the overall test.26 Although the Advisory Committee initiated a similar approach to hearsay law in its first draft,27 the feedback from bench and bar caused a reformulation

creation. This leaves to the trial judge much room for the exercise of a sound judgment; it does not hamper him with detailed restrictions, and tends to discourage useless appeals. In short, to use Professor Maguire’s phrase, the choice is between a catalogue, a creed, and a Code. The Institute decided in favor of a Code.


24. The Commissioners did, however, retain a “codified approach” to the law of privilege. See supra note 2.

A well known commentator has suggested that there are four virtues of a successful code: (1) completeness, (2) coherence, (3) courage at grasping the nettles of difficult issues, and (4) correctness. Younger, Introduction: Symposium: the Federal Rules of Evidence, 12 Hofstra L. Rev. 251, 252 (1984). Younger gives the Federal Rules of Evidence low marks on elements (1) through (3). Id.

25. For example, the framers included provisions abolishing the rule against impeaching one’s own witness in rule 607, and regulating impeachment by attack on character for untruthfulness in rules 608 and 609. The framers, however, apparently left to case law development or to regulation by the broad provisions of rules 401, 402, and 403 the equally important areas of impeachment for bias, lack of capacity, and specific contradiction. For a discussion of this disparity of treatment, see infra notes 147-358 and accompanying text.

26. Rule 901 provides in pertinent part: “By way of illustration only, and not by way of limitation, the following [ten subdivisions] are examples of authentication or identification conforming with the requirements of this rule.” Fed. R. Evid. 901(b). It has been authoritatively suggested that the more comprehensive provisions of articles IX and X of the Federal Rules have been a factor in reducing the number of appellate claims of error in their application. See Berger, The Federal Rules of Evidence: Defining and Refining the Goals of Codification, 12 Hofstra L. Rev. 255, 264-65 (1984).

27. The 1969 draft included a rule 803 that provided in pertinent part:
(a) General Provisions: A statement is not excluded by the hearsay rule if its nature and the special circumstances under which it was made offer assurances of accuracy not likely to be enhanced by calling the declarant as a witness, even though he is available.
(b) Illustrations: By way of illustration only, and not by way of limitation, the following are examples of statements conforming with the requirements of this rule.

Draft]. The remainder of the 1969 version of rule 803 contained provisions similar to present rule 803(1)-(23).

28. See Rules of Evidence for the United States District Courts and Magistrates, 51 F.R.D. 315, 422 (1971) (revised draft of rule 803(24) [hereinafter cited as Revised Draft]. The prototype of rule 803(24) appeared for the first time at the end of the catalogue of exceptions to the 1971 revised draft version of rule 803. Id. The 1971 draft of rule 803(24) provided: "(24) Other Exceptions: A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness." Id. The Supreme Court draft of rule 803(24) was identical to the preceding. See Rules of Evidence for the United States District Courts and Magistrates, 56 F.R.D. 183, 303 (1972) (Supreme Court draft rule 803(24)) [hereinafter cited as Supreme Court Draft]. Congress, however, raised the qualitative test for "catchall hearsay" by the added elements in the present rule, including a requirement of advance notice of intention to introduce novel hearsay. See Fed. R. Evid. 803(24).

29. See, e.g., United States v. Verdoorn, 528 F.2d 103 (8th Cir. 1976). The Verdoorn court was presented with the question of the admissibility of prosecutor statements made during plea bargaining when offered by the accused. Id. at 107. Although the Federal Rules neither expressly nor impliedly addressed the issue, the Court declared that, "meaningful dialogue between the parties would, as a practical matter, be impossible if either party had to assume the risk that plea offers would be admissible in evidence." Id. The Verdoorn opinion appears to read rules 408 and 410 together in light of their underlying purposes and the social importance of plea bargaining.

30. After extensive consideration of the legislative history of rule 803(8) (the "public records" exception), the Second Circuit discerned a pervasive congressional purpose to ban the use of uncross-examined police reports against the accused not only under rule 803(8), which does have specific exclusionary language, but also under rule 803(6), which does not. See United States v. Oates, 560 F.2d 45, 78 (2d Cir. 1977).

31. See G. Calabresi, A Common Law for the Age of Statutes 102 (1982). Cf. United States v. Morlang, 531 F.2d 183, 188-90 (4th Cir. 1975). Morlang was tried before the effective date of the Federal Rules. Id. at 190. The
In some areas, of course, the courts might confidently conclude that the framers simply did not intend to modify or affect prior judge-made law. On the other hand, it has been persuasively argued that the Federal Rules do, in a sense, share a characteristic of a comprehensive code. The framers may well have intended that, as to all evidence problems not expressly covered by the Federal Rules, the courts should rely on the relevancy considerations and countervailing factors of rules 401, 402, and 403. Under the latter approach, a strong bias exists toward admissibility. In the absence of some particular exclusionary provision of the Constitution, of a statute, or of a rule, trial judges should admit all evidence relevant under rule 401 if its probative value is not substantially outweighed by the dangers and other considerations spelled out in rule 403.

Without pausing further to debate the merits of all the various approaches to codification, or to code interpretation, it seems clear that, under the Federal Rules as enacted, the courts often must make excessively fine judgments as to what subjects fall within and what subjects fall outside the purview of a given rule. In deciding such questions, the courts' determinations often will be affected by whether the court deems Congress to have intended the rule in question to be read broadly or narrowly. The courts also will consider such delicate issues as whether the framers used the rule terminology in its traditional common law sense or in some unspecified technical or special sense, or whether they intended the same word or phrase to have the same meaning.

32. See, e.g., Werner v. Upjohn Co., 628 F.2d 848, 856 (4th Cir. 1980) (“The new rules contain many gaps and omissions and in order to answer these unresolved questions courts certainly should rely on common law precedent.”), cert. denied, 449 U.S. 1080 (1981).


34. Rule 403 provides: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Fed. R. Evid. 403.

35. A good example is rule 612, which regulates refreshing memory of witnesses by the use of writings. Since rule 612 is limited to regulating documentary refreshment, it is unclear whether rule 612 was intended to modify or abolish other recognized techniques. See Fed. R. Evid. 612.

when used in different provisions. Unfortunately, the Federal Rules appear to provide very little interpretative guidance in these areas.

III. COMPETENCY: RULE 601 AND STATE LAW

The notion of a threshold competency requirement that a potential witness must meet or be banned from the witness stand is of ancient lineage. In more primitive (but not too distant) times, the law in its sagacity precluded testimony by the parties and other persons who possessed an interest in the outcome of the litigation. In addition, the law ruled out testimony by persons convicted of certain crimes and by those suffering from mental disorders. Unlike our civil law brethren, however, the trend in American litigation law has been to convert the former grounds of total disqualification into matters which the opponent may employ to impeach or diminish the apparent credibility of the witness on cross-examination or otherwise. During cross-examination, an attorney can try to do this by eliciting the fact of bias stemming from interest in the suit or from family relationship to a person with such an interest, by attacking the veracity charac-

37. Id. § 46.06, at 104.
38. Comparison of the Federal Rules and the California Evidence Code may be instructive on the matter of built-in aids to interpretation. As its only express interpretative guideline, federal rule 102 provides: "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." FED. R. EVID. 102. In contrast, the California Evidence Code provides 12 sections on construction in general (sections 1-12) and 28 definitions of key terms used in the code (sections 100-250). See generally CAL. EVID. CODE §§ 2-250 (West 1966 & Supp. 1985). Another approach is that proposed in rule 102 of the 1982 draft of a New York code of evidence which, after using language substantially identical to federal rule 102, requires resort to "the principles of the common law as they may be interpreted in the light of reason and experience" in the absence of regulation by the constitution, statute or evidence code. See A CODE OF EVIDENCE FOR THE STATE OF NEW YORK § 102 (West 1982) (proposed draft by New York State Law Revision Comm'n).
ter of the witness through evidence of prior convictions, or by questioning the capacity of a witness to observe, recall, or narrate as a result of mental disorders. The growing emphasis upon admitting all relevant evidence\textsuperscript{42} for the trier’s consideration, and an increasing trust in the intellectual capacity of the modern juror,\textsuperscript{43} may have played a powerful role in the gradual trend toward eliminating the historical per se rules which banned certain types of persons from giving testimony.

A. Intended General Effect of Proposed Rule 601

The original framers of federal rule 601 no doubt intended to accelerate this process manifold by proposing in the 1972 Supreme Court draft that “[e]very person is competent to be a witness except as otherwise provided in these rules.”\textsuperscript{44} Although the text of rule 601 is unclear regarding what “these rules” refers to, the Advisory Committee’s note to the draft would limit the applicability of the phrase to “competency” rules found in article VI.\textsuperscript{45} At the risk of oversimplification, an arguably valid—albeit somewhat narrow—reading of proposed rules 601 through 606 would have been that any person would be competent to take the witness stand in any federal trial if the following four conditions are present: (1) a reasonable person could find that the witness has present personal knowledge of some relevant matter as required by rule 602;\textsuperscript{46} (2) the witness says, “I do” to the oath or

\textsuperscript{42} The policy culminates in rule 402, which provides: “All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.” FED. R. EVID. 402.

\textsuperscript{43} See Ladd, A Modern Code of Evidence, 27 IOWA L. REV. 214, 219 (1942), reprinted in MODEL CODE OF EVIDENCE 329, 338 (1942) ("A rational [evidence] code must be built upon the assumption . . . that a jury is composed of men and women of ordinary intelligence.") See also C. WRIGHT & K. GRAHAM, supra note 2, at 139 ("Today, most jurors are considerably better educated than those of last century.").

\textsuperscript{44} Supreme Court Draft, supra note 28, at 261 (rule 601).

\textsuperscript{45} See FED. R. EVID. 601 advisory committee note. “This general ground-clearing eliminates all grounds of incompetency not specifically recognized in the succeeding rules of this Article.” Id. It is unclear why the drafters used the phrase “these rules” rather than “this article” in the text of rule 601. The sensible indication that “competency” rules in proper sense are preempted by rules 601-606 should eliminate spurious suggestions that the expert testimony requirements of rule 702 have something to do with “competency” in the sense used in rule 601.

\textsuperscript{46} See Supreme Court Draft, supra note 28, at 262 (rule 602). The Supreme Court draft of rule 602 provided:

A witness may not testify to a matter unless evidence is introduced
affirmation administered pursuant to rule 603:47 (3) the witness can communicate to the trier in English words, or their equivalent, or has a qualified interpreter under rule 604;48 and (4) the witness is not the trial judge49 or a trial juror50 in that case. With the exception of the rare problems of dealing with the trial judge and juror as witnesses, the original scheme of federal competency law would have centered upon the personal knowledge principle of rule 602 and the apparently minimal requirements of swearing or affirming under rule 603. Practically eliminated were former restrictions on mental or moral qualifications for witnesses as a preliminary obstacle to taking the stand.51

sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

Id. Conversely, the trial judge should not exclude testimony as not based upon personal knowledge unless he concludes that no reasonable person could find personal knowledge of matter X on the part of the witness. The requirement is phrased in terms of present personal knowledge, i.e., at the time of taking the stand, thus appearing to implicate both the perception and memory components of testimonial evidence.

47. See id. at 263 (rule 603) ("Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so."). Compliance with rule 603 appears to be a condition precedent to taking the stand. See United States v. Fowler, 605 F.2d 181 (5th Cir. 1979) (accused may not testify if he refuses to take oath or affirmation). Arguably, the trial judge should, in cases of doubtful mental capacity, probe the witness' understanding that, by assenting to the oath or affirmation, he or she becomes subject to the penalties of perjury.

48. See Supreme Court Draft, supra note 28, at 263 (rule 604) ("An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation.").

49. See id. at 264 (rule 605) ("The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point."). By analogy, the incompetency may well extend to the trial judge's confidential agent, the law clerk. See, e.g., Kennedy v. Great Atl. & Pac. Tea Co., 551 F.2d 593 (5th Cir. 1977) (error for judge to permit his law clerk to testify as to what he saw on visit to accident scene).

50. See Fed. R. Evid. 606(a) ("A member of the jury may not testify as a witness before that jury in the trial of the case in which he is sitting as a juror. If he is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury."). See also Supreme Court Draft, supra note 28, at 164-65 (rule 606(a)). Rule 606(b) regulates the competency of a juror to testify as to the invalidity of a prior verdict or indictment. Fed. R. Evid. 606(b).

51. See Fed. R. Evid. 601 advisory committee note.

The note provides in pertinent part:

No mental or moral qualifications for testifying as a witness are specified. Standards of mental capacity have proved elusive in actual application. . . . A witness wholly without capacity is difficult to imagine.
The potentially liberating effect proposed rule 601 might have had in civil actions can best be seen in federal criminal cases, independent as they continue to be from state competency law.\textsuperscript{52} In criminal trials the federal courts have, by and large, greatly reduced the occasion for conducting hearings out of the presence of the jury on the preliminary question of witness competence. They often explain by citing the first sentence of rule 601 as generating a "presumption" of competency.\textsuperscript{53} Rule 602 does, of course, demand "evidence sufficient to support a finding" of personal knowledge, and in certain situations the trial judge may have to question the witness or otherwise take evidence to determine whether the witness possesses such knowledge.\textsuperscript{54} An important characteristic of rule 602 rulings, however, is the specificity of their scope. Except in the very rare case of total incapacity to function as a perceptive human being, the usual question will come down to whether a witness who does appear to have personal knowledge about facts X and Y also has it with respect to fact Z.\textsuperscript{55} Seldom, if ever, will the judge have to keep the witness off the stand altogether. In fact, significant evidence of the effec-

\textsuperscript{52} Note that the second sentence of rule 601 applies only in civil actions, thus making rules 601 through 606 the exclusive regulations of witness competency in federal criminal trials. See generally M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 601.1 (1981). Similarly, with respect to an element of a civil claim or defense arising under federal substantive law, rules 601 through 606 control testimonial competency.\textsuperscript{Id.}

\textsuperscript{53} See, e.g., United States v. Odom, 736 F.2d 104 (4th Cir. 1984) (every witness is presumed competent under rule 601); United States v. Gutman, 725 F.2d 417, 420 (7th Cir.) (district judge has wide discretion in determining witness' mental competency), cert. denied, 105 S. Ct. 244 (1984); United States v. Roach, 590 F.2d 181, 185-86 (5th Cir. 1979) (due to rule 601 there is no longer need for competency hearings); United States v. Callahan, 442 F. Supp. 1218, 1221 (D. Minn. 1978) (acknowledging that rule 601 raises presumption of competency). See also Gray v. State, 650 P.2d 880 (Okla. Crim. App. 1982) (implying Oklahoma statute raises presumption of competency as does rule 601).

\textsuperscript{54} By making the threshold of admissibility the minimal test of "evidence sufficient to support a finding" as under rule 104(b), and by allowing the trial judge to rely in part on the witness' own claim of personal knowledge, rule 602 apparently intends that hearings would rarely be necessary. Cf. United States v. Raineri, 91 F.R.D. 159, 163-64 (W.D. Wis. 1980) (rejecting request for mental examination of government witness due to danger of harassment and invasion of privacy, and preferring judicial voir dire or a competency hearing).

\textsuperscript{55} Unlike many "competency" rules, rule 602 operates selectively, and not on an all or nothing basis. See 2 J. WIGMORE, supra note 39, §§ 650, 654. That is, under rule 602 the witness is stopped only when she appears about to testify based on some source other than her own perceptions and memories. See id.
tiveness of the first sentence of rule 601 is the non-existence of an opinion in a federal criminal proceeding that upholds the total disqualification of a witness on functional grounds. The courts clearly have understood that the basic message of the rule is to allow the trier to hear all relevant testimony that is based on the witness' personal knowledge and is given under oath or affirmation.

B. Impact of Proposed Rule 601 on Dead Man's Statutes

One of the more valuable achievements of proposed rule 601 would have been to clear away the nettles of "dead man's statutes" in all federal civil litigation. In oversimplified essence, these hapless vestiges of the abolition of incompetency based on interest totally exclude the testimony of a survivor to a transaction in an action against the estate of a deceased party to the transaction. Universally condemned by the giants of evidence.

56. In addition, the closest a state court has come to totally disqualifying a witness was in Arizona, where the Arizona Court of Appeals upheld a lower court's finding that a 79-year-old witness was competent at deposition but not at trial. See State v. Peeler, 126 Ariz. 254, 614 P.2d 335 (Ct. App. 1980).

57. "The Dead Man's Acts are surviving traces of the common law disqualification of parties and interested persons. They exist in variety too great to convey conviction of their wisdom and effectiveness. These rules contain no provision of this kind." FED. R. EVID. 601 advisory committee note. See also Wright v. Wilson, 154 F.2d 616 (3d Cir. 1946) (discussing federal statutes that enshrined state dead man's acts). For a further discussion of Wright, see infra notes 73-79 and accompanying text. According to the House Judiciary Committee Report, the "greatest controversy centered around the [rule 601] rendering inapplicable in the federal courts the so-called Dead Man's Statutes which exist in some States." HOUSE COMM. ON JUDICIARY, FED. RULES OF EVID., H.R. REP. No. 650, 93d Cong., 1st Sess. 9 (1973), reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7075, 7083 [hereinafter cited as H.R. REP. No. 650].

58. For an indication of the almost byzantine complexity of most of these statutes, see C. McCORMICK, supra note 39, § 65; 2 J. WIGMORE, supra note 39, at 575-80; Ray, Dead Man's Statutes, 24 OHIO ST. L.J. 89, 91-93 (1963) (setting forth five sample statutes). For a description of the hundreds of appellate opinions required to construe the tortuous language of these statutes, see MODEL CODE OF EVIDENCE 93 (1942). One commentator summarizes Texas constructions of its dead man's statute as follows:

A doctor, for example, may not in a suit against the patient's estate testify to the visits he has made or the treatment given, nor may a surgeon suing for his fee testify to the performing of an operation. So also one who claims to be a creditor for moneys advanced or goods sold may not testify to those transactions. In a will contest the interested members of the family, who would naturally know most about the mental capacity of the decedent are barred from giving their knowledge to the jury. Moreover, when third persons not interested in the estate have testified that one of the family, taking under the will, has used undue influence, that person is barred from taking the stand and denying the claimed wrongdoing. Can this be fair?
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law, these statutes appear to embody a pathological fear of undetectable perjury, which they doggedly appear to assume all—or most—survivor witnesses will commit. Instead of leaving the credibility of the survivor to the jury and seeking some other procedure to redress the perceived imbalance of proof, the typical dead man’s statute condemns the honest survivor to a frequently insuperable task of trying to prove a valid claim without his or her own testimony.

The original draft of rule 601 would have struck the death knell to dead man’s statutes in federal civil litigation. During the amending process, however, Congress added the following sentence to rule 601: “However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.” With this absolute language, Congress requires that, when federal courts are applying state substantive law under the mandate of Erie Railroad v. Tompkins, they must apply not only state limitations on witness competency based on age, mental capacity, and other similar grounds but also state dead man’s statutes. Moreover, the federal courts presumably will have to ignore rules 605 and 606


59. See, e.g., C. McCormick, supra note 39, § 65 (the most drastic rules were common law rules which excluded testimony due to interest); 2 J. Wigmore, supra note 39, § 578 (such statutes cannot be defended as logical or practically sound); Ladd, The Uniform Rules of Evidence—Witnesses, 10 Rutgers L. Rev. 523, 526 (1953) (elimination of such statutes would be one of the best improvements made).

60. For possible alternative approaches, see infra text accompanying notes 95-100 & 113-34.

61. This cynicism seems inconsistent with the assumptions of modern evidence reformers. “A model code must presuppose... a society in which honest people outnumber the degraded, the deceitful, and the false-swearing.” Ladd, supra note 43, at 220, reprinted in Model Code of Evidence 329, 339 (1942).


63. 304 U.S. 64 (1938).

64. H.R. Rep. No. 650, supra note 57, at 9, reprinted in 1974 U.S. Code Cong. & Ad. News 7075, 7083. “Acknowledging that there is substantial disagreement as to the merit of Dead Man’s Statutes, the Committee nevertheless believed that where such statutes have been enacted they represent State policy which should not be overturned in the absence of a compelling federal interest.” Id. For an example of disagreement among states on standards of competency based on age, compare State v. Froehlich, 96 Wash. 2d 301, 303-04, 635 P.2d 127, 128-29 (1981) (statute placed no burden on state to show competency of witness over age of ten) with State v. Goodrich, 432 A.2d 413, 416 (Me. 1981) (Maine rule 601(b) required that eleven-year-old witness for prosecution be shown to be able to express herself in order to be competent to testify).
in diversity actions and follow the possibly differing state approaches to regulating the admission of testimony from federal trial judges65 and federal trial jurors.66 In an apparent effort to honor "state policy" on such matters, Congress failed to distinguish between state "substantive" policy and state "procedural" policy and unwisely treated the law of privilege under rule 501 and the law of witness competency under rule 601 as of equivalent status and importance in our federal system.67

C. The Unsoundness of the "State Law" Amendment to Rule 601

While no one doubts the power of Congress to require the federal courts to apply all state competency laws without regard to their underlying policies, the passage of ten years should provide a perspective on whether, in this respect, Congress was as wise as it was powerful. The remainder of this section examines the desirability of retaining the second sentence of rule 601 with special consideration to why Congress appeared to emphasize dead man's statutes.68 Three modes of analysis are employed, each of which enjoys some support as an approach to interpreting the complex implications of Erie. The first relies upon the theory that the Erie doctrine is a single monolithic presence, which controls all aspects of the questions of whether a federal court must apply state law in diversity litigation and to what sorts of issues. Second, the article examines the apparent rationale of Hanna v. Plumer,69 and of the Rules Enabling Act,70 to determine whether

65. In contrast to rule 605's total ban on judicial testimony at the trial, for example, the Advisory Committee referred to such recognized alternatives as "incompetency only as to material matters, leaving the matter to the discretion of the judge, or recognizing no incompetency." FED. R. EVID. 605 advisory committee note.

66. For the variety of views on juror competency both during trial and with regard to impeaching their verdicts, see 8 J. WIGMORE, EVIDENCE §§ 2345-2356 (McNaughton rev. ed. 1961).

67. This is suggested by the linguistically parallel treatment Congress accorded to state privileges in rule 501 and to the state law of competency in rule 601. See FED. R. EVID. 501, 601. Note also the following comment by the Advisory Committee: "For the reasoning underlying the decision not to give effect to state statutes in diversity cases, see Advisory Committee's note to Rule 501." FED. R. EVID. 601 advisory committee note.


The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the prac-
modification or elimination of the duty to apply state competency law in diversity matters would either be unconstitutional or "abridge, enlarge or modify any substantive right" under the test of the Act. Finally, under a third rationale of Erie, the article examines the balance of federal versus state interests with respect to competency provisions. For present purposes, the article takes no position on whether any one of the three approaches is more valid than any other application of Erie and federalism doctrine.

1. Competency Rules and Primary Private Activity

This first interpretation of Erie focuses upon the threshold
question of whether the *Erie* doctrine and the Rules of Decision Act require that federal courts apply state competency laws as to a witness about to testify in proof of an element of a civil claim or defense controlled by state law, e.g., of contract, tort or property. In response to that question, this article argues that competency limitations ought to be classified as "housekeeping rules," having primarily to do with setting minimum standards of reliability for witnesses in federal trials. This approach is consistent with the view that the *Erie* doctrine expresses constitutional concerns with unequal application and enforcement in state and federal courts of principles affecting primary private activity. Though application of a differing federal rule on competency may often appear to affect the outcome of a litigation as between a federal or a state forum, it has such an effect only in the same manner as traditionally acceptable differences between rules of discovery or rules about hearsay. Thus, this article concludes that, under the first theory of the *Erie* doctrine, retention of the language of rule 601 that directs federal courts to apply all state rules of competency that differ from those found in rules 601 through 606 is not required.

There appears to be no federal decision prior to the enactment of the Federal Rules that requires the result codified by rule 601. The leading case cited for the proposition that federal courts must recognize survivor incompetency is *Wright v. Wilson*. *Wright* involved an automobile accident case in which federal jurisdiction was based on diversity of citizenship. The trial judge excluded the testimony of the surviving plaintiff, the only living eyewitness to the accident, and, not surprisingly, the defendant's estate won the verdict. On appeal, the plaintiff complained of the exclusion. At that time, eight years after *Erie*, Federal Rule of Civil Procedure 43(a) provided that all evidence should come in if it is admissible under any one of the following sources of law:


74. 154 F.2d at 617. This application of the term "transaction" to an auto accident is surely one of the stranger interpretations of the term.

75. *Id.* The defendant was not available to testify, because he died after the suit was filed. *Id.*
(1) federal statutes, (2) prior rules of federal equity courts, or (3) forum state law. Analyzing the law of the forum state, Pennsylvania, the court of appeals concluded that Pennsylvania law clearly would ban the plaintiff's testimony. With respect to federal statutes and equity decisions, the court undertook a careful historical review and concluded that prior to 1906 federal statutory law either required compliance with state law or contained its own anti_survivor provision, and after that year federal statutory law made state law the sole determinant. In concluding his opinion the distinguished Judge Herbert F. Goodrich lamented:

We reach the result without enthusiasm. The rule excluding a survivor's testimony seems to stand in the almost unique situation of being condemned by all of the modern writers on the law of evidence. It is said to be as unsound and undesirable as the rule excluding the testimony of parties of which the survivor rule is a part. But we believe this to be a case where a rule so thoroughly established through many generations of judicial history should be removed by legislative action or court rule which applies generally and not by judicial legislation against a party in a particular case.

Thus the leading pre-rules decision on the question of competency and state law turns on the Wright court's forty-year-old interpretation of former civil rule 43(a) and obsolete federal statutes. The decision lends no support to the proposition that the Erie doctrine or the Rules of Decision Act require federal courts, in a diversity case, to apply state competency law.

In the absence of any compelling precedent, our analysis fo-

77. Wright, 154 F.2d at 617-18.
78. Id. at 618-19.
79. Id. at 620.
80. Cf. Hortman v. Henderson, 434 F.2d 77, 80 (7th Cir. 1970) (in diversity suit court followed former civil rule 43(a) in applying dead man's statute of forum state, noting "manifest unfairness" thereof); Stricker v. Morgan, 268 F.2d 882, 886-88 (5th Cir. 1959) (applying Mississippi's dead man's statute and citing prior rule 43(a) as precedent), cert. denied, 361 U.S. 963 (1960); Poultach Oil & Refining Co. v. Ohio Oil Co., 199 F.2d 766 (9th Cir. 1952) (applying Montana dead man's statute under prior rule 43(a)).
cuses upon the underlying purpose of state competency rules, to determine whether they ought to be characterized as "substantive" in the sense that they are intended to have an appreciable impact upon the primary private activity of persons in society. More specifically the issue is whether such rules should be classified with those exclusionary rules of evidence based on extrinsic policies such as the law of privilege, if not with principles of tort and contract.

The social, non-litigative influence of privilege rules seems reasonably well accepted. For example, courts and legislatures assume that the application of the attorney-client or interspousal communications privileges are likely to have an impact upon the everyday viability of those relationships by fostering confidential disclosures. Since the states—not the federal government—possess primary legislative jurisdiction over primary private activity, rule 501 arguably is a sound exercise in federalism because it requires resort to state privilege law in diversity litigation.

81. "Erie recognized that there should not be two conflicting systems of law controlling the primary activity of citizens, for such alternative governing authority must necessarily give rise to a debilitating uncertainty in the planning of everyday affairs." Hanna, 380 U.S. at 474 (Harlan, J., concurring). See generally H. Hart & H. Wechsler, The Federal Courts and the Federal System 633-35 (1953) (decisions such as Erie help organize and guide people's everyday lives).

82. Even as to the issue of applying state privilege law in diversity matters, the Advisory Committee vigorously argued that the main impact of privilege rules is on "method of proof," that unavailability of state privileges in federal criminal litigation and in civil federal question matters would undercut conformity in civil matters, that there is a strong federal interest in the quality of justice administered in its courts, and that the anti-forum-shopping argument ignores the hitherto controlling effect of rule 43(a) that favored admissibility of relevant evidence. Fed. R. Evid. 501 advisory committee note. For a persuasive privacy-oriented analysis, see Krattenmaker, Interpersonal Testimonial Privileges Under the Federal Rules of Evidence: A Suggested Approach, 64 Geo. L.J. 613 (1976) (testimonial privileges should be regarded as plea for a right to privacy).

83. See Krattenmaker, supra note 82, at 647-58. Though it would not necessarily be controlling, the present author laments the lack of empirical evidence indicating a cause-effect relationship between the presence or absence of a privilege rule and the behavior of the average client or patient.

84. For a discussion of the complexity of federal/state law on privilege matters prior to 1975, see 9 C. Wright & A. Miller, Federal Practice and Procedure § 2408 (1971). For explication of Wigmore's thesis that a privilege suppressing relevant evidence is only tolerable if it tends to foster an extrinsic relationship favored by society, see 8 J. Wigmore, supra note 66, §§ 2192, 2197, 2285.

85. In explaining its rejection of the concept of a separate body of federal privilege law for all civil actions, the House Judiciary Committee declared: The rationale underlying the proviso is that federal law should not supersede that of the States in substantive areas such as privilege absent a compelling reason. The Committee believes that in civil cases in the
contrast, incompetency rules based on such factors as immaturity, mental incapacity, and infancy seem to constitute judicial "housekeeping" rules. Such rules reflect judgments on what types of persons possess that minimum kernel of credibility that would make them worth hearing in the courtroom. They are part and parcel of a court's process of ascertaining the truth. It is difficult to understand why considerations based on the allocation of powers between federal and state governments should prohibit a federal court from allowing a mentally ill person to testify on the chance that he or she will present some credible data that will throw light upon the issues merely because state law bars the forum state court from hearing that witness. Nor is it clear how following one rule rather than the other would tend to alter significantly the way in which state citizens carry out their everyday affairs. Little or no significant extrinsic state interest seems implicated any more than would a difference in hearsay law between the federal and local state courts.

Federal courts where an element of a claim or defense is not grounded upon a federal question, there is no federal interest strong enough to justify departure from State policy.


86. See 2 J. Wigmore, supra note 39, § 501, at 709. Wigmore asserts:
The whole question [of mental competency] is one of degree only, and the attempt to measure degrees and to define that point at which total incredibility ceases and credibility begins is an attempt to discover the intangible. The subject is not one which deserves to be brought within the realm of legal principle, and it is profitless to pretend to make it so. Here is a person on the stand; perhaps he is a total imbecile, in manner, but perhaps also there will be a gleam of sense here and there in his story. The jury had better be given the opportunity of disregarding the evident nonsense and of accepting such sense as may appear.

Id.

87. The essential fortuity of mental illness resembles the fortuity of the death of the other party to a transaction, which triggers the dead man's statute. This suggests that in neither instance do people shape their private dealings in reliance upon such occurrences.

88. For examples of pre-Federal Rules of Evidence diversity cases that accept the difference between state and federal hearsay rules, see, Desheles v. T.W. & C.B. Sheridan Co., 482 F.2d 852, 855 (6th Cir. 1973) (admissibility of unattached health statement offered by insured was governed by federal law though state statute barred such a statement); Castilleja v. South Pac. Co., 445 F.2d 183, 186-87 (5th Cir. 1971) (admissibility of former testimony was governed by old rule 26(d) of Federal Rules of Civil Procedure pursuant to rule 43(a) not by state law); Monarch Ins. Co. v. Spach, 281 F.2d 401, 410-11 (5th Cir. 1960) (relevant out-of-court statement by key witness was admissible for impeachment and to support defense of false swearing although state statute would make it inadmissible for failure to turn over to opponent).
Nor would there seem to be any controlling difference, from an "outcome affecting" viewpoint, between competency rule variations and differences between state and federal hearsay rules. True enough, a certain percentage of claims could get to a federal jury under rules 601 to 606 that would not reach a jury in a state with a high standard of mental competency. The same could be said, however, about the increased percentage of cases that would make a prima facie case in federal court, but not in a state court because of a lack of one or more of the innovative hearsay exceptions found in article VIII of the Federal Rules.

A pre-Federal Rules case illustrating the outcome impact of applying differing federal hearsay law in a diversity action is the seminal opinion of Judge John Minor Wisdom in Dallas County v. Commercial Union Assurance Co. In the summer of 1957, the tower of the Dallas County courthouse collapsed. In the ensuing federal diversity litigation over insurance coverage, a single question of fact was controlling: whether the collapse resulted from damage done to supporting timbers by lightning earlier that summer, which the policy would cover, or from a fire that happened over half a century earlier, for which there seemingly was no coverage. As a key item of evidence supporting the fire theory, the insurance company introduced an unsigned, but contemporary, 1901 newspaper account of a fire in the courthouse which occurred while it was under construction. Affirming a judgment for the insurer, Judge Wisdom concluded that, although the news story clearly was hearsay, and not within the "business records" or "ancient documents" exceptions, it fit general notions of circumstantial reliability and necessity, and thus was admissible.

Judge Wisdom's inability to find precedent for his ruling


90. See Fed. R. Evid. 803(1) (present sense impressions); Fed. R. Evid. 803(4) (diagnostic statements made to nontreating physician); Fed. R. Evid. 803(18) (learned treatises); Fed. R. Evid. 803(22) (felony convictions); Fed. R. Evid. 803(24), 804(b)(5) (hearsay having guarantees of general trustworthiness). See also Dellefield v. Blockdel Realty Co., 128 F.2d 85 (2d Cir. 1942). In Dellefield, an unsuspected connection between hearsay doctrine and dead man's statutes was suggested by Judge Charles Clark, who remarked, "Originally designed to modify the hearsay rule, which closed the mouth of a dead man to the injury of his estate, these [dead man's] statutes now give an undue advantage to the representatives of the deceased as to what part of the story shall be disclosed." Id. at 93 n.1.

91. 286 F.2d 389 (5th Cir. 1961).

92. Id. at 390.

93. Id. at 397-98.
clearly suggests that in most, if not all, state court systems, the courts would have rejected the newspaper evidence. From all that appears in the opinion, the inadmissibility of the news story would have barred any direct defense proof to rebut those witnesses who claimed the damage was caused by lightning, and would, in all likelihood, have produced a plaintiff’s verdict. And yet the cases and commentary are conspicuously barren of any suggestion that Erie or the Rules of Decision Act demand federal judicial conformity to differing state rules on hearsay. 94

The matter may be slightly more complex with dead man’s statutes. Unlike bars to testimony based on age and mental incapacity, the dead man’s statutes do not preclude testimony on the ground that the witness’ perception, memory, or communications skills are impaired. On the contrary, it is irrebuttable presumed under dead man’s statutes that the survivor will commit perjury whenever asked to testify about transactions with the deceased. Moreover, the statutes conclusively presume that oath, cross-examination, and witness demeanor will be insufficient to enable the trier to detect the insincerity of the survivor witness. Such a principle seems to embody, if anything, a philosophy about people as vehicles for truthful communication in court, not a rule resting on extrinsic societal values. 95

It may be contended that the existence of a dead man’s statute represents a state value judgment that decedents’ estates are worthier of protection than the claims of contract or tort claimants against them, 96 or that there is some unfairness or disadvan-

94. For cases applying the federal hearsay rules where application of the state rule would have produced a contrary result, see supra note 88.
95. See 2 J. Wigmore, supra note 39, § 576, at 816. Professor Wigmore has noted that
the tribunal’s opportunity for a careful weighing of a witness’ measure of credit, and the means afforded for doing so by cross-examination and the like, form the safeguards which induce us to take the risk of admitting interested witnesses; we rely on being able to make the proper allowance for the danger; if, then, the tribunal is apt to ignore those safeguards, the reason for admission is much weaker. Some such thought must have operated to prolong the delay in abolishing disqualification by interest.

Id. 96. See id. § 578, at 821. In response to the authorities cited in § 578, Wigmore states:
The argument... that [the lack of dead man’s statutes] ‘would place in great peril the estates of the dead’ sufficiently typifies the superficial reasoning on which the rule rests. Are not the estates of the living endangered daily by the present rule, which bars from proof so many honest claims? Can it be more important to save dead men’s estates from false claims than to save living men’s estates from loss by lack of proof?
tage to the decedent’s estate by allowing the survivor to testify in the absence of the decedent’s testimony.\textsuperscript{97} The statutes might arguably stand as a warning that any offeror who is familiar with the statute and who has reason to suspect that his offeree is more likely than the rest of humankind to drop dead before performing his part of the bargain had better bring along a string of witnesses to each bargaining session and reduce everything to writing in the presence of these witnesses.\textsuperscript{98} In these ways, dead man’s statutes might affect business affairs. Such evidentiary foresight, however, does not distinctively differ from careful advance planning of any commercial transaction with an eye to the difficulties of proof under clearly procedural rules relating to hearsay, authentication, or “best evidence.”\textsuperscript{99} As primarily a housekeeping rule based on hard-and-fact assumptions about perjury and about equal access to proof, the principle embodied in the exclusionary dead man’s statutes does not appear to fall within the mandate of \textit{Erie}. If this conclusion is sound, then the \textit{Erie} doctrine would not prevent Congress from repealing the second sentence of rule 601.\textsuperscript{100}

\textit{Id.}

\textsuperscript{97} The fear of unreliable survivor testimony distinguishes dead man’s statutes from statutory privileges. The latter suppress both reliable and unreliable testimony for the sake of extrinsic social values. The invention of an accurate “truth serum” for example, would totally undercut the rationale of dead man’s statutes but not the rationales underlying privileges. \textit{Cf.} Weinstein, \textit{The Uniformity-Conformity Dilemma Facing Draftsmen of Federal Rules of Evidence}, 69 \textit{COLUM. L. REV.} 353, 365 (1969) (dead man’s statutes may be viewed as attempt to ascertain truth or as means of protecting estate of deceased).

\textsuperscript{98} \textit{Cf.} C. McCormick, supra note 39, § 65, at 159. McCormick writes, “The practical consequence of these statutes is that if a survivor has rendered services, furnished goods or lent money to a man whom he trusted, without an outside witness or admissible written evidence, he is helpless if the other dies and the representative of his estate declines to pay.” \textit{Id.}

\textsuperscript{99} \textit{See, e.g., FED. R. EVID.} 1001(3) (providing that each copy of contract executed in multiplicate shall be considered an “original”); \textit{FED. R. EVID.} 803 (5) (providing guidelines for advance compliance with requirements regarding use of recorded recollection in later litigation).

\textsuperscript{100} Note that the Rules of Decision Act expressly excepts federal statutory enactments from its mandate that state law shall provide the rule of decision in federal courts exercising diversity jurisdiction. \textit{See} 28 U.S.C. § 1652 (1982) (“laws of the several states except where the Constitution or ... Acts of Congress otherwise require, or provide, shall be regarded as rules of decision”). The exception should be construed to include the Federal Rules of Evidence. \textit{See In re Air Disaster Near Chicago}, 701 F.2d 1189 (7th Cir.), \textit{cert. denied}, 444 U.S. 866 (1983). The court in \textit{Air Crash Disaster} reversed a district court ruling that a trial court applying Illinois state law could not admit evidence of a decedent’s tax liability to assist in computing the survivor’s loss. \textit{Id.} at 1192. Although the court noted that it “need not resolve [the] \textit{Erie} conundrum in this case,” because federal and Illinois law were similar, the court stated:

\begin{quote}
[T]he Federal Rules of Evidence apply and ... as a consequence the district court may not categorically exclude certain kinds of evidence
\end{quote}
2. The Influence of the Civil Rules Enabling Act Norms

This portion of the analysis of the need for including the second sentence of rule 601 focuses upon the Supreme Court’s more recent discussion of federal rulemaking vis-a-vis *Erie* considerations in *Hanna v. Plumer.* After noting that the Evidence Rules Enabling Act fails to include the type of “substantive right” clause found in the Civil Rules Enabling Act and construed in *Hanna,* this article argues that many, if not most, state competency rules would not be found to embody a state “substantive” right in any event, that such rules deal with litigation concerns, and that Congress and probably the Supreme Court would have the power to tell the federal courts to apply federal rules 602 through 606 on competency even as to evidence of matters affecting state-created rights. On the theory that some states may have expressed an intent to implement substantive state policies by means of a rule of competency, it is proposed that, in lieu of the present per se command in federal rule 601 to apply all state competency law, a federal diversity court should presumptively follow article VI of the Federal Rules unless the party opposing the testimony persuades the court of the existence of state substantive goals underlying a particular state incompetency statute.

In *Hanna,* the Supreme Court established that an independent constitutional basis for federal civil rulemaking rests on article III of the Constitution and the necessary and proper clause as implemented by the Civil Rules Enabling Act. The Court declared that the federal courts should not determine the validity of a civil rule under the *Erie* line of decisions. This suggests that the next logical step is to examine whether the proposed repeal of the second sentence of rule 601 would run afoul of the Evidence

related to the determination of damages. If the rules had been promulgated under the Supreme Court’s rulemaking power, 28 U.S.C. § 2072, and did not transgress the limits of that power, this would be true under the reasoning of *Hanna v. Plumer.* But the Rules of Evidence stand on even firmer footing, for they are statutory. In such a case the rules of decision act, coupled with the Supremacy Clause of the United States Constitution, demands that the rules apply in federal courts, unless Congress exceeded its power to regulate courts in enacting them. *Id.* at 1193 (citations omitted).

101. 380 U.S. 460 (1965). In *Hanna,* the Court addressed the issue of whether in a diversity suit service of process shall be made pursuant to state law or by the procedure set forth in rule 4(d)(1) of the Federal Rules of Civil Procedure. *Id.* at 461.

102. *Id.* at 469-74. The *Hanna* Court stated that it is an “incorrect assumption that the rule of [*Erie*] constitutes the appropriate test of validity and therefore the applicability of a Federal Rule of Civil Procedure.” *Id.* at 470.
Rules Enabling Act if the Supreme Court rather than Congress were to propose the change.\(^{103}\)

As part of a package including the enactment of the Federal Rules of Evidence in 1975, Congress for the first time fashioned a delegation of rulemaking power specifically tailored to the process of amending the Federal Rules.\(^{104}\) The Evidence Rules Enabling Act currently provides:

The Supreme Court of the United States shall have the power to prescribe amendments to the Federal Rules of Evidence. Such amendments shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session of Congress but not later than the first day of May, and until the expiration of one hundred and eighty days after they have been so reported; but if either House of Congress within that time shall by resolution disapprove any amendment so reported it shall not take effect. The effective date of any amendment so reported may be deferred by either House of Congress to a later date or until approved by Act of Congress. . . . Any such amendment creating, abolishing, or modifying a privilege shall have no force or effect unless it shall be approved by Act of Congress.\(^{105}\)

\(^{103}\) See Rules of Evidence (Evidence Rules Enabling Act), 28 U.S.C. § 2076 (1982). It has been suggested that even though the Hanna opinion did not point it out, the effect of including a "substantive right" clause in the Civil Rules Enabling Act, constitutes a narrower grant by Congress of rule-making power to the federal courts than the power over procedure which the Constitution grants to the Congress. See 19 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4509, at 137-42 (1982).

Despite the absence of such a "substantive right" clause in the Evidence Rules Enabling Act, it has been suggested that Congress, by its interception and revision of the original Federal Rules of Evidence as drafted by the Supreme Court, made it known that the "proscription against altering substantive rights should be taken seriously." See id. at 141.


\(^{105}\) 28 U.S.C. § 2076 (1982). It may be significant to the status of the second sentence of rule 601 that Congress expressed its main federalism concerns in the Evidence Rules Enabling Act in the form of retaining control over amendments to rules on privileges—and not as to competency matters. One might be able to reasonably infer a congressional judgment that only privilege rules truly affect state "substantive" rights. For a further discussion of this reasoning, see infra text accompanying notes 108-113.
The most significant omission from the Act for present purposes is any language, such as that found in the Civil Rules Enabling Act, that would limit the rulemaking power of the Supreme Court in amending the Federal Rules so as not to "abridge, enlarge or modify any substantive right." Although Professor Ely characterizes this omission as unfortunate, the reasons for his characterization are unclear.

The omission could signify that, unlike in the Civil Rules Enabling Act, Congress intended the Evidence Rules Enabling Act to delegate the whole of its rulemaking power to the Supreme Court as to evidence rules other than those involving privileges. Under the considered dictum in *Hanna*, Congress arguably possesses the constitutional power, under article III and the necessary and proper clause, to enact an amendment to the Federal Rules that pertains to the admission and exclusion of facts at trial that could override differing state rules even though the latter arguably embody "substantive" policies. On the the-

There would seem to be a serious question of the constitutionality of the Evidence Rules Enabling Act in providing a "one-house" veto of a proposed amendment to the evidence rules, and perhaps even of the authorization to one house to extend the effective date beyond 180 days. Cf. *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983) (one house veto power over action of federal agency is unconstitutional under U.S. Const. art. I, §§ 1, 7, requiring bicameral action and presentment to president for signature or veto). Whether the provisions of the Evidence Rules Enabling Act are severable will depend on the intent of the Congress in fashioning that statute in a distinctively different cast from 28 U.S.C. §§ 2072 and 2075. See *Chadha*, 462 U.S. at 931-35.


108. See 19 C. Wright, A. Miller & E. Cooper, supra note 103, § 4509, at 136-64; Ely, supra note 106, at 718-22. In the case of the Civil Rules Enabling Act, Professors Ely, Wright, Miller & Cooper rely on the presence of a "substan-
tive right clause" as evidence that Congress did not, in that section, intend a plenary delegation of rulemaking power to the Supreme Court. Id. This article argues, however, that the omission of such a general limitation and the singling out only of privilege law for positive congressional enactment suggests a contrary interpretation of the Evidence Rules Enabling Act.

109. The *Hanna* Court stated:

For the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.
ory that Congress has delegated a power of similar scope to the
Supreme Court in the Evidence Rules Enabling Act, it would fol-
low that the Court could validly prescribe an evidentiary amend-
ment, such as one removing any restrictions on the application of
rules 601 through 606 on competency in diversity litigation.110

Some might quarrel with such an amendment on a policy
level as involving an arbitrary exercise of federal power to the
detriment of federalism. Such persons might wish to treat the
omission of limiting language in the Evidence Rules Enabling Act
as inadvertent, suggesting that the courts should interpret the Act
as if it did impose a limitation on abridging, enlarging or modify-
ing "any substantive right." To answer this objection, a further
examination is required of the nature and purposes of state com-
petency laws in light of interpretations of the Civil Rules Enabling
Act as to the significance of the phrase "substantive right."

Speaking descriptively, it is assumed that "substantive"
rights cluster about legal norms of conduct in the everyday lives
of citizens and either formulate those norms or otherwise influ-
ence the adoption of one set of norms rather than another. Such
principles do not serve exclusively or primarily the fairness or ef-
fiency of the conduct of litigation.111 The status of restrictions on

380 U.S. at 472. Cf. Ely, supra note 106, at 701-02. Professor Ely rejects the
"enclave" theory of the Erie doctrine for a "checklist" approach based on the
enumerated powers of Congress found in article I of the Constitution. Id. Only
those areas of influence not constitutionally delegated to the federal govern-
ment would be areas of exclusive state domain. Id. This suggests that radical
changes can be made in the area of "primary private activity" by preemptive
federal legislation based, e.g., on the interstate commerce or spending clauses.
See id. Professor Ely states that "it was precisely the situation to which the [En-
abling] Act's draftsmen were addressing themselves in the second sentence, the
possibility that a Rule could fairly be labeled procedural and at the same time
abridge or modify substantive rights..." Id. at 719.

110. Of course, such an amendment would be subject to congressional
the text of § 2076, see supra note 71. The ability of Congress to disapprove of
such an amendment depends on whether § 2076 is constitutional, and on the
possibility that the one-house veto clause contained in § 2076 is invalid under
the mandate of Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919
(1983). If so, the practical difficulty of blocking a Supreme Court amendment to
the Federal Rules would be considerable. Both the House and Senate would
have to enact a disapproving statute and either have it signed by the President,
or passed over his veto, within 180 days—surely a large order for a Congress
burdened with weighty matters of national defense, tax reform, and budget defi-
cits. Id. at 946-59. For a further discussion of Chadha, see supra note 105.

111. Professor Ely would read the term "substantive right" in § 2076 as "a
right granted for one or more nonprocedural reasons, for some purposes or
purposes not having to do with the fairness or efficiency of the litigation pro-
cess." Ely, supra note 106, at 725. On the other hand, Professor Wellborn ar-
gues that this definition may be underinclusive in excluding "procedural" rules
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testimony by infants, mentally ill persons, and those convicted of perjury seems clearly evidentiary in nature under this approach. The legal systems of the several states have made varying reliability judgments as to whether, and to what extent, such persons are so lacking in minimum credibility as to make their testimony inadmissible. These seem clearly to be judgments about the probative value of testimony and about the management of litigation not linked to important state nonprocedural policies.

With respect to dead man's statutes, the situation is similar. At the clearly "substantive" end of the scale, of course, the law has fashioned various principles to govern whether an estate owes a third party a certain sum for money in fact loaned, for services rendered, or for goods sold and delivered to decedent. There is no indication, however, that the states intended dead man's statutes as a directive to the estate not to pay a living claimant who has nothing to back up his claim but his own testimony. There has been some suggestion that a policy of "protection of estates" might underlie the statute. On the other hand, many courts have explained the statutes as based on some theory of procedural mutuality, i.e., if the deceased cannot testify neither should the survivor, or, as noted, upon an assumption that no survivor can be trusted. Concern is expressed about the equality of access to proof and disproof as between survivor and estate.

designed to achieve "substantive" purposes, e.g., the parol evidence rule and the statute of frauds. See Wellborn, The Federal Rules of Evidence and the Application of State Law in the Federal Courts, 55 Tex. L. Rev. 371, 403 (1977). The doctrines cited by Professor Wellborn, however, do not seem based on achieving fairness and efficiency in the litigation process but appear to serve normative contract goals. In any event, it would seem that barring mentally ill or youthful witnesses from the stand embodies a forensic reliability judgment having nothing discernible to do with protection of the rights of sick persons or the young.

112. For example, there are provisions in various jurisdictions where ages such as seven or four, mark a bright line below which a child is subject to a rebuttable presumption of incompetency. See generally 2 J. Wigmore, supra note 39, § 508.

113. See Ely, supra note 106, at 725.

114. See, e.g., 2 J. Wigmore, supra note 39, § 578 at 823 (approving of waiver of protection of dead man's statute as "honorable" thing to do to prevent injustice to a claimant).

115. For a discussion of this policy, see supra note 96-99 and accompanying text.

116. See 2 J. Wigmore, supra note 39, § 488, at 695-96 (citing 19th century statutory provisions based on such artificial notions as "mutuality"). C. McCormick, supra note 39, at 159-60 (rationale for mutuality aspect of dead man's statutes is prevention of unfairness and fraud).

117. For a discussion of this policy, see supra notes 97-100 and accompanying text.
One might well articulate the overarching principle as "estates should honor true and just claims." The nature of the varying state approaches to effectuating this principle is instructive. There are four main types: (1) the various exclusionary forms of dead man's statutes; (2) the "corroboration" approach;\(^ {118}\) (3) the specially tailored hearsay exceptions for decedents' statements; and (4) abolition of all forms of special statute. The last, of course, leaves the matter to effective cross-examination of the survivor, assessment of the probabilities based on surrounding circumstances, and the application of modernized hearsay doctrine.\(^ {119}\) These four techniques simply represent differing judgments as to how to achieve procedural fairness in processing estate claims. That the state where the federal court hearing the case is sitting has retained a "sledgehammer" approach by totally banning survivor testimony appears to mean only that the state has failed to reappraise its cynical belief that all survivor testimony is inherently suspect. In many instances, mere legislative inertia—not vital state policy—may account for keeping a dead man's statute.\(^ {120}\) It strains the imagination to suggest that it

\(^{118}\) This may simply be restating the notion that the statutes preserve "mutuality." For a discussion of the artificial nature of "mutuality", see C. McCORMICK, supra note 39, at 159-61.

\(^{119}\) See, e.g., 2 J. WIGMORE, supra note 39, § 578, at 822. Wigmore quotes former Justice Taft, stating:

Cross-examination, for instance, has been found to be well calculated to uncover a fraudulent scheme concocted by an interested party; and, where that has failed, the scrutiny to which the testimony of a witness is subjected by the court and by the jury, has proven efficacious in discovering the truth, to say nothing of the power of circumstantial evidence to discredit the mere oral statement of an interested witness.

Id. (quoting statement of Justice Henry W. Taft).

\(^{120}\) There seems to be similar difficulty in determining the intent or purpose underlying state legislation or judge-made rules in the application of "interest analysis" as applied to horizontal conflicts of law. As Professor Leflar noted in this regard:

Since the rules being interpreted seldom gave any answer to the conflicts problem (if they did, the problem was easy) the interpretative process reduced itself to a freewheeling analysis of governmental purposes and functions as related to the fact-law question. Subjective reactions were inevitable. Governmental interest could, in the hard cases, be discovered by one analyst and denied by another.


Authoritative, objective evidence of the underlying purpose of dead man's statutes may be especially hard to come by, because they were exceptions to the abolition of disqualification based on interest, and often were enacted in the last century. Cf. C. McCORMICK, supra note 39, at § 59 (in America dead man's statutes grew out of exceptions to rule in England banning interested persons from being witnesses). Moreover, much of the justification for retention of the statutes found in state judicial opinions may be rationalizing afterthoughts.
would gravely upset the delicate balance of federal-state power to enable the federal courts to strive for fair adjudication of claims against estates brought under diversity jurisdiction by employing the minimal federal competency limitations of article VI coupled with liberal impeachment, authentication, "best evidence," and hearsay rules.

According to one authority, it was not a congressional belief in the existence of strong, extrinsic "substantive" policies behind the dead man's statutes in the *Erie* sense that persuaded Congress to add the second sentence to rule 601, but a concern over the alleged dangers of "forum-shopping." The concern appears to be that, without the second sentence of rule 601, the survivor—who will typically be the plaintiff—will choose the federal forum whenever so doing will enable him to avoid the strictures of a local state dead man's statute. Admittedly, the Supreme Court has declared that minimization of forum-shopping is one of the "twin aims" of *Erie*. Implicit in this proposition, however, should be a distinction between shopping for more favorable procedural or evidentiary rules—a danger for which the Court seems

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121. See 3 D. LOUISELL & C. MUeller, *supra* note 18, § 250, at 6-7, Quoting Professor Field, the authors noted: "The Dead Man's Statute ... does not influence out-of-court conduct, since the death of a party will be rarely be foreseen. But the evil of the result turning on choice of forum is a sufficient reason, I believe, for following state law." *Id.* (quoting Letter of Professor Field, July 31, 1973).

122. Despite the forum-shopping concern, it seems likely that plaintiffs in diversity cases seldom choose a federal forum over a state forum merely because of a single difference in a legal rule. It is more common that plaintiffs perceive a net advantage based on their evaluation of the entire complex of evidence and procedure rules, e.g., liberal joinder and broad discovery in the federal system versus the requirement of jury unanimity and the frequently crowded state of the federal dockets.

123. After noting that *Erie* was a reaction to the sort of forum shopping practiced under Swift v. Tyson, the Hanna Court declared:

Not only are nonsubstantial, or trivial, variations not likely to raise the sort of equal protection problems which troubled the court in *Erie*; they are also unlikely to influence the choice of a forum. The 'outcome-determination' test therefore cannot be read without reference to the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.

*Hanna*, 380 U.S. at 468.

Note, however, Professor Ely's comment:

But while the likelihood of forum shopping may turn out to be a handy touchstone for identifying those situations exhibiting the evils against which the [Rules of Decision] Act was directed, forum shopping is not an evil per se. It is evil only if something evil flows from it; indeed, the very idea of the diversity jurisdiction was to provide an alternative to state court.

to make allowance\textsuperscript{124}—and shopping for more advantageous normative principles than those the defendant might have relied upon in conducting his daily affairs—a danger lying closer to the heart of \textit{Erie} concerns.\textsuperscript{125} The same distinction appears to undercut any arguments that it is unfair to have different competency rules apply to one state citizen hauled before a state court by a co-citizen but not to another citizen of the same state hauled into federal court by an out-of-stater due to the accident of diversity of citizenship.\textsuperscript{126} It is submitted that most federal-state variations in competency law tend to produce no more “unfairness” than federal-state differences in the breadth of discovery\textsuperscript{127} or in the scope of hearsay exceptions.\textsuperscript{128}

Even assuming that state laws reflect considerable concern over the processing of claims against estates in a fair manner, there is no reason to assume that the federal courts are any less interested in the same goal. Clearly, the exclusionary form of dead man’s statutes constitutes the worst of the various procedural approaches to achieving the goal of fairness, smacking of a due process violation.\textsuperscript{129} Not only have commentators rallied

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\textsuperscript{124} See \textit{Hanna}, 380 U.S. at 473 ("\textit{Erie} and its offspring cast no doubt on the long-recognized power of Congress to prescribe housekeeping rules for federal courts even though some of those rules will inevitably differ from comparable state rules.").

\textsuperscript{125} The \textit{Hanna} Court’s reference to \textit{Swift v. Tyson}, as well as the linkage of forum-shopping to \textit{Swift} and to the "inequitable administration of the laws," suggest that modern \textit{Erie} doctrine is not primarily concerned with \textit{procedural} forum shopping, but rather with the inequity of having state and federal courts apply differing sets of normative principles to a party’s business or private conduct. \textit{See id.} at 467-68.

\textsuperscript{126} Professor Ely refers to "the unfairness of subjecting a person involved in litigation with a citizen of a different state to a body of law different from that which applies when his next door neighbor is involved in similar litigation with a co-citizen." \textit{Ely, supra} note 106, at 712.

\textsuperscript{127} An example of a valid difference between state and federal courts is that a defendant in a personal injury action in state court might not be able to avail himself of a compulsory physical examination of the plaintiff along the lines of rule 35 of the Federal Rules of Civil Procedure. \textit{See Fed. R. Civ. P.} 35. \textit{Cf. Sibbach v. Wilson & Co.}, 312 U.S. 1 (1941) (\textit{rule 35 is procedural and within power of Congress to promulgate}).

\textsuperscript{128} The perceived evidentiary imbalance between the survivor and the estate seems in part to be a function of the broad exclusionary scope of the hearsay rule in effect at the time the dead man’s statutes were enacted as applied to oral or written statements made by the decedent during his or her lifetime. The broader avenues of admitting hearsay under article \textbf{VIII} of the Federal Rules of Evidence, especially under the catch-all exceptions found in rules 803(24) and 804(b)(5), arguably tend to eliminate much of the problem of counterproof for an estate, and hence to neutralize any arguments for retention of a survivor incompetency rule.

\textsuperscript{129} Since the practical effect of the exclusionary dead man’s statutes fre-
against exclusionary dead man's statutes as a means of promoting fairness at trial, but there appears to be developing a state consensus against this type of statute. For example, quite apart from the codification movement, a fair number of states either have abolished their statutes or have modified them to require consequently is to deny the survivor his or her "day in court" on a possibly meritorious claim, it is surprising that the courts have not seriously questioned their constitutionality.

The case against the exclusionary dead man's statutes may be summarized in the following points:

1. The statutes are based upon a fallacious philosophy, i.e., that the number of dishonest men is greater than the number of honest ones; and that self-interest makes it probable that men will commit perjury. These assumptions run contrary to human experience.

2. The statutes create an intolerable injustice by preventing proof of honest claims and defenses. In seeking to avoid the possibility of injustice to one side, they work a certain injustice to the other. It is difficult to understand why all the concern is for the possibility of unfounded claims against the estate. Why is there no concern for loss by the survivor who finds himself unable to prove his valid claim against the decedent's estate? Surely a litigant should not be deprived of his claim merely because his adversary dies. It cannot be more important to save dead men's estates from false claims than it is to save living men's estates from loss by lack of proof.

3. The statutes are psychologically unsound. They do not disqualify many persons who are vitally interested in the outcome of the suit but who have no direct pecuniary interest such as spouses of parties, close relatives, or officials of corporate parties. On the other hand, they often disqualify certain totally disinterested persons or persons with only a slight pecuniary interest. The pecuniary interest limitation is unsound.

4. The statutes fail to accomplish their purported purpose since they suppress only a small part of the opportunities for perjured testimony. They block the testimony of the witness only as to certain subjects, leaving him free to testify falsely as to other matters if he sees fit to do so. Furthermore, a witness who will not stick at perjury will not hesitate to suborn perjury by getting a third person to testify as to those matters as to which his own testimony is barred.

5. The statutes impede the search for truth. The real hazard in shaping any exclusionary rule is that the jury cannot be expected to make sensible findings when it is deprived of substantial parts of available evidence bearing on the issue in dispute. The great danger thus lies in the suppression of truth.

6. The statutes underestimate the efficacy of cross-examination in exposing falsehood, and the abilities of the judge and jury to separate the false from the true. These safeguards have proved adequate in other situations involving the testimony of parties and interested persons. Why not here?

7. The statutes burden the parties with uncertainties and appeals. For a hundred years or more, our courts have been struggling with the interpretation of these statutes. The result is a labyrinth of decisional law that often has brought confusion rather than clarity. The statutes continue to mystify able judges and lawyers in endless complexities of interpretation and application. Within the limited space available, it has been possible to touch upon only a very few of the many problems arising under such statutes. But the vagaries and inconsistencies pointed out are sufficient to demonstrate that thousands and thousands of decided cases have built here one of the most complex and hazardous fields of the law of evidence. See generally Ray, supra note 58.

For additional authorities criticizing dead man's statutes, see supra note 59.

For a discussion of the progress of law reform in this area as of 1963,
roboration of the survivor's testimony as a condition to sending the case to a jury, often coupled with a special hearsay exception for out-of-court statements and writings by the deceased. Moreover, most of the states that have adopted modern evidence codes seized the opportunity to abrogate their dead man's statutes—often spiced with a critical comment. It is suggested that, unlike the preservation of confidential relationships from compelled disclosure, dead man's statutes are not essential to the protection of legitimate state concerns.

3. The Balance of Federal and State Interests

In the area of application of Erie and the Rules of Decision Act, there also is some support for a third mode of analysis: a balancing of federal versus state interests taking its original cue


133. Among the states adopting modern evidence codes as of June, 1983, the following 21 have followed the lead of 1974 Uniform Rule 601, which incorporates the first sentence only of Federal Rule 601, and have either abrogated their existing dead man's statutes or failed to recognize such a theory of exclusion: Alaska, Arizona, Arkansas, Delaware, Hawaii, Iowa, Maine, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Vermont, and Washington. See 3 D. LOUISELL & C. MUELLER, supra note 18, § 250, at 8 n.8 (1979 & Supp. 1985); Wroth, supra note 2, at 1336-37 & nn.152-58.

134. Present rule 601 arguably does not require federal courts to follow state "corroboration" statutes which do not deal with competency to testify, but with sufficiency of the evidence to go to the jury. The sufficiency of the evidence to get to the jury is usually held to be a matter of federal law even in diversity cases. See C. WRIGHT, supra note 69, at 607-09. Cf. Consolidated Constr., Inc. v. Smith, 634 P.2d 902, 904-05 (Wyo. 1981) (Wyoming's rule 601 on competency does not supersede state corroboration-type statute).

One solution for those who believe that federal courts should apply the forum state's corroboration and hearsay principles to survivor claims would be to have Congress repeal the second sentence of rule 601 and, in its place, enact a "corroboration" statute similar to the one it enacted for the District of Columbia. See D.C. CODE ANN. § 14-302 (1979). This would exempt the federal courts from following state exclusionary statutes. At the same time, it would accord estates a procedural advantage to make up for the loss of the decedent's testimony. Note, however, Professor Ray's argument that even corroboration statutes are unsatisfactory because they are difficult to administer and preclude recovery by that class of persons who have nothing but their own testimony to rely upon. Ray, supra note 58, at 111-12.
from *Byrd v. Blue Ridge Electric Cooperative*. The thesis here is that an analysis of the interests of the states in having their competency rules enforced in the federal courts, as against the interests of the federal courts in adopting a rational and uniform approach to the ascertainment of truth through testimonial proof, will show that, as to most types of state competency rules, the balance favors the federal interest in application of article VI standards. This reading of the *Erie* doctrine does not require preservation of the present automatic mandate in rule 601 to apply every differing state competency rule. Rather, federalism concerns suggest a more sophisticated analysis of the underlying purposes of each competing competency rule with a view to federal enforcement only of those provisions clearly linked to substantive state policies.

In *Byrd*, the Supreme Court retreated substantially from a pure "outcome-determination" view of the *Erie* doctrine, and ruled that affirmative countervailing considerations permitted a federal diversity court to submit certain employment issues to a jury even though the state court would have sent the same issues to the judge.

Although Congress in justifying its addition of the second sentence to rule 601 failed to perceive it, there are weighty interests indeed on the federal side of the balance in the area of competency law. Rule 402 reflects a pervasive federal policy favoring the admission of all relevant evidence in federal trials unless the evidence is inadmissible under some constitutional, statutory, or rule provision. No such provision favors the use

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135. 356 U.S. 525 (1958). *Byrd* was a diversity case in which the plaintiff, Byrd, sued Blue Ridge for negligence. *Id.* at 526. Blue Ridge asserted that the plaintiff was its employee under state law and therefore was banned from recovery under the state workers compensation statute. *Id.* at 527. Byrd won a jury verdict, which the appellate court reversed. *Id.* at 526. The Supreme Court held for Byrd. *Id.* at 540.

136. *Id.* at 538. In *Byrd*, the affirmative countervailing considerations were the influence, if not the command, of the seventh amendment on civil jury trials. *Id.*

137. See H.R. REP. No. 650, supra note 57, at 9, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7075, 7083 ("Acknowledging that there is substantial disagreement as to the merit of Dead Man's Statutes, the Committee nevertheless believed that where such statutes have been enacted they represent State policy which should not be overturned in the absence of a compelling federal interest.").

138. A post-*Byrd* but pre-*Hanna* opinion by Judge John R. Brown illustrates the weight of federal concern with admitting all relevant evidence to ascertain the truth as against a state exclusionary rule. *See Monarch Ins. Co. v. Spach*, 281 F.2d 401 (5th Cir. 1960). In *Monarch*, the trial court had excluded an interview statement by the president of a corporation based on a Florida statute making
of dead man's statutes. Requiring the federal courts to exclude a party from the stand, merely because another party to the transaction at issue has died, is asking the courts to abandon rationality. To ban one presumably honest witness because fate has caught up with his opponent—but not by virtue of any weakness in the witness' narration, sincerity, perception, or memory and not by virtue of irrelevancy or privilege—makes no sense. Present rule 601 also seems to require further stultification when it demands that a federal judge honor such eccentric state limitations on "competency" as those barring testimony of a police officer who operates from an unmarked car or of a physician who spends less than seventy-five percent of his time in a given field of expertise.139 Such requirements seriously impair not only the federal

such statements inadmissible if not turned over, upon request, to the witness prior to the trial. \textit{Id.} at 404. Judge Brown declared:

Not the least of these countervailing [federal] considerations is the indispensable necessity that a tribunal, if it is to be an independent court administering law, must have the capacity to regulate the manner by which cases are to be tried and facts are to be presented in the search for the truth of the cause. . . . A United States District Court clothed with power by Congress pursuant to the Constitution is not a mere adjunct to a state's judicial machinery. In entertaining diversity cases it is responding to a constitutional demand made effective by congressional action and, . . . it has a constitutional duty to hear and adjudicate. Investment of this profound power and duty carries with it the capacity, if not the affirmative obligation, to prescribe such rules as will enable the federal district courts to fulfill these constitutional demands without, at the same time, trespassing upon others of equal and fundamental nature. . . . An important countervailing policy consideration in the \textit{Blue Ridge} sense therefore is the historic purpose of the Federal Rules and the forces which led Congress to pass the Rules Enabling Act. The broad aim, especially in fields of practice, was to reverse the philosophy of conformity to local state procedure and establish, with but few specific exceptions, an approach of uniformity within the whole federal judicial trial system.

\textit{Id.} at 407-08 (emphasis in original).

139. \textit{See} \textit{OHIO R. EVID.} 601. In subdivision (C), the rule makes incompetent a police officer who makes an arrest from an improperly marked police car, whereas subdivision (D) makes a physician an incompetent witness when testifying on liability in a medical malpractice suit unless the physician is "licensed to practice . . . by the state medical board or by the licensing authority of any state" and spends three-quarters of his time in his field. On speed trap evidence, see \textit{CAL. VEH. CODE} § 40804 (West 1985).

Somewhat less odd are those state statutes making a perjurer incompetent in contrast to the federal "impeachment" approach under rule 609(a)(2). \textit{See 42 PA. CONS. STAT. ANN.} § 5912 (Purdon 1982) (under Disqualification Act unpardoned perjurer is incompetent witness in most instances); \textit{VT. STAT. ANN. tit.} 13, § 2907 (1959). Vermont's § 2907 has survived evidence codification and makes a convicted perjurer an incompetent witness, although the Vermont courts have narrowly construed the statute to refer only to conviction under the Vermont perjury statute. \textit{See, e.g., State v. Polidor, 130 Vt. 34, 38, 285 A.2d 770, 772-73 (1971)} (witness who was found guilty of conspiracy to commit perjury in
jury's function of assessing credibility, but also the broader role of federal courts as truth-finders and as justice-administrators.

D. Proposed Amendment of Rule 601

Notwithstanding the foregoing discussion, there may be instances now or in the future where a state legislature clearly declares an underlying "substantive" purpose, i.e., one unrelated to litigation management, in a competency rule. If the courts should construe section 2076 as this article has suggested, Congress could, by repealing the second sentence of rule 601, instruct the federal courts to ignore such considerations. Just as the present per se mandate to apply all state competency rules, whether or not they rest on nonlitigation considerations, has the virtue of simplicity, so would the total elimination of any duty to honor any state competency rule—even those expressly bottomed on achieving a desired impact on primary activity.

Federalism, however, is not a tidy concept, but a complex set of interrelationships. It would, therefore, be more in tune with
the complexity of the issues to avoid a federal "sledgehammer" approach. Instead of simply eliminating the congressional mandate now in rule 601, therefore, Congress could, if so persuaded, modify the rule in two steps: (1) It could repeal the second sentence of rule 601, thus eliminating the demand to adhere to all types of state competency law, whether rational or not and whether aimed at nonlitigative ends or not; and (2) it could amend the first sentence of rule 601 to read:

Every person is competent to be a witness except as otherwise provided in this Article, unless in a civil action the application of these rules to a particular matter will abridge, enlarge or modify a substantive right guaranteed by state law.

The intent of this amendment would be to incorporate analogous principles developed under similar language in the Civil Rules Enabling Act. Under the proposed language, the party seeking to invoke a state incompetency rule would bear the burden of finding and presenting evidence tending to establish that the state rule embodies a state "substantive" policy even though the rule also is connected to the management of litigation. If the analysis of competency rules suggested in this article is close to the mark, such a burden will, in all likelihood, prove to be insurmountable in most instances. The addition of the proposed language would, however, respond to federalism concerns similar to those expressed in the Civil Rules Enabling Act, and might encourage the states to be clearer as to whether they intend present

ism, and that the constitutional power of the states to regulate the relations among their people does overlap the constitutional power of the federal government to determine how its courts are to be operated. Where these interests come into conflict, there can be no wholly satisfactory answer. . . . There may be no alternative but to leave questions such as these for the ad hoc determination of judges keenly aware of their responsibilities to two sovereigns.

Id.


143. See Ely, supra note 106, at 725. Professor Ely contends:

The most helpful way, it seems to me, of defining a substantive rule—or more particularly a substantive right, which is what the [Enabling] Act refers to—is as a right granted for one or more nonprocedural reasons, for some purpose or purposes not having to do with the fairness or efficiency of the litigation process.

Id. Professor Ely then argues that the term should include not only matters of "primary private activity" but also "the fostering and protection of certain states of mind" plus various immunities from liability. Id. at 725-26.
or future competency rules to embody state "substantive" policies.

Under any one of the three philosophies of federal-state choice of law outlined in the preceding sections of this article, there seems to be a strong case for reconsidering of the wisdom of retaining the second sentence of rule 601 in its present form. Slavish federal adherence to each exclusionary rule a state characterizes as one of "competency" seems no longer tenable. The amendment suggested above would free the federal courts from their present duty of automatic application of such provisions in diversity matters. At the same time, an express reference to state "substantive" concerns should sensitize the federal courts to the possibility that, in a given instance, a state could clothe a competency rule with the mantle of a significant state non-litigative policy thus requiring federal recognition as applied to any element of a civil claim or defense arising under state law.

IV. FILLING THE IMPEACHMENT GAPS IN ARTICLE VI

One of the more remarkable things about the Federal Rules of Evidence in general, and article VI in particular, are the significant issues left unaddressed. Few trial lawyers would contest the notion that cross-examination for impeachment purposes is a vital tool of the profession. Inability to cross-examine the out-of-court declarant, after all, forms the crucial underpinning of the whole vast structure of doctrine excluding hearsay evidence. Centuries of experience with thousands of witnesses and myriad opinions by the courts have distilled out seven basic methods of attempting to challenge the apparent credibility of a wit-

144. See Monarch Ins. Co. v. Spach, 281 F.2d 401 (5th Cir. 1960). The Monarch court reasoned that under former Federal Rule of Civil Procedure 43(a) a federal court was not required to exclude evidence in literal accordance with a state statute if the evidence was probative, trustworthy, and not outcome determinative under Erie. Id. at 411-13. Though the present topic lies in the field of vertical (federal-state) choice of law, it might not be amiss to point out the contention of a noted conflicts scholar on a principle of horizontal (interstate) choice of law: "Superiority of one rule of law over another, in terms of socio-economic jurisprudential standards, is far from being the whole basis for choice of law, but it is without question one of the relevant considerations." Leflar, supra note 120, § 107, at 212.

145. See C. McCormick, supra note 39, § 19, at 47. McCormick states, "For two centuries, common law judges and lawyers have regarded the opportunity of cross-examination as an essential safeguard of the accuracy and completeness of testimony, and they have insisted that the opportunity is a right and not a mere privilege."

146. Id. at 48. See also 5 J. Wigmore, supra note 39, § 1362, at 3.
ness after a well orchestrated direct examination: (1) prior inconsistent statements or self-contradiction; (2) bias; (3) defects in the basic testimonial functions of narration, perception, or memory; (4) specific contradiction by other witnesses; (5) reputation or opinion evidence as to the witness’ untruthful propensities; (6) prior convictions for crime; and (7) prior deceptive conduct not the subject of a conviction. For reasons not altogether clear, article VI expressly authorizes only the last three methods.147

Probably the most common and valuable method of impeachment consists of a cross-examiner’s catching the witness in a self-contradiction.148 Proof that a witness has made a prior statement materially at variance with all or part of the witness’ trial testimony goes a long way toward shaking the fact-finder’s confidence in the narration, perception, memory, or sincerity of the witness.149 The Federal Rules grant no express authorization to em-

147. See FED. R. EVID. 608(a) (reputation or opinion evidence pertaining to witness’ propensities for untruthfulness); FED. R. EVID. 609 (prior criminal convictions); FED. R. EVID. 608(b) (prior deceptive conduct not subject to conviction).

Rule 608(a) provides:
The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

FED. R. EVID. 608(a).

Rule 609, one of the most complex of the rules, provides for impeachment of a witness’ “credibility” by evidence of felony convictions and convictions for crimes of “dishonesty or false statement.” FED. R. EVID. 609(a). The rule sets a ten-year time limit, and regulates the admissibility of juvenile adjudications and the effect of pardons and appeals from the prior conviction. FED. R. EVID. 609(b)-(e).

Rule 608(b) provides:
Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

FED. R. EVID. 608(b).

148. See J. KELNER & F. McGOVERN, SUCCESSFUL LITIGATION TECHNIQUES: STUDENT EDITION 14-6 (1981) (“The most effective way to destroy the testimony of a witness by cross examination is by the use of prior inconsistent statements made by him.”).

149. See 3A J. WIGMORE, supra note 39, § 1017 (once jury has been shown
ploy the impeachment technique of self-contradiction. There are, however, rules regulating both the impeachment foundation problem,\textsuperscript{150} and the hearsay status of a witness' out-of-court prior inconsistent statements.\textsuperscript{151} Thus, there is little doubt in anyone's mind that this type of challenge to credibility is contemplated by the Federal Rules. The Federal Rules fail to provide any direct guidance, however, about the following important topics relating to impeachment through the use of prior inconsistent statements: (1) the requirement of "good faith" on the part of the examiner;\textsuperscript{152} (2) the question of "collateral" versus "noncollateral" matters as a key to the use of extrinsic evidence to rebut the witness' denial of the prior inconsistency;\textsuperscript{153} and (3) the effect of the witness' admission of the self-contradiction on the later use of "extrinsic" proof.\textsuperscript{154}

With respect to the other methods of impeachment, no justification comes to mind for omitting a rule regulating the procedural aspects of bias impeachment. The theory of bias impeachment rests on the assumption that conscious and unconscious emotional attraction toward, or repulsion from, one of the parties to the litigation, as well as an innocent or corrupt interest in its outcome, can tempt a witness to distort his or her account of the event witnessed.\textsuperscript{155} Other than an aside in the Advisory Committee note that witness has erred on one point, it is ready to infer capability of making other errors).

\textsuperscript{150} See Fed. R. Evid. 613. Rule 613(a) abolishes the "Rule of Queen Caroline's Case," which held that a cross-examiner must show a prior statement to a witness before questioning that witness about the statement. Queen Caroline's Case, 129 Eng. Rep. 976 (1820). For a more complete discussion of the Rule of Queen Caroline's Case, see infra notes 333-37 and accompanying text. In addition, rule 613(b) specifies the foundation requirements for introducing extrinsic evidence of prior inconsistent statements. For further discussions of rules 613(a) and 613(b), see infra notes 335-37 (rule 613(a)) & 338-59 (rule 613(b)) and accompanying text.

\textsuperscript{151} See Fed. R. Evid. 801(d)(1)(A). The rule provides that certain inconsistent statements of trial witnesses who have testified under oath at a prior trial, proceeding, hearing, or deposition are not hearsay.

\textsuperscript{152} See generally 3 D. Louisell & C. Mueller, supra note 18, § 357, at 558 (discussing requirement that cross-examiner show statement or disclose contents to opposing counsel on request to reduce risk of manufactured self-contradictions).

\textsuperscript{153} But see id. § 349, at 497. Louisell and Mueller note, "While no provision in the Rules of Evidence expressly sets a limit to impeachment by contradiction, Rule 403 entitles the judge to impose one." Id.

\textsuperscript{154} It should be noted, however, that rule 403, in broad terms, empowers the trial judge to exclude relevant evidence which is needlessly cumulative or time-wasting. See Fed. R. Evid. 403.

\textsuperscript{155} For a general discussion of bias, interest, and corruption matters as affecting credibility, see 3A J. Wigmore, supra note 39, §§ 943-969.
mittee’s note to rule 601,156 an incidental reference in article IV,157 and two references in the Advisory Committee’s notes within article VI,158 however, the Federal Rules give no guidance in the area of bias impeachment. Despite an article in 1972 pointing to this important omission,159 and a 1974 Supreme Court ruling that a state’s failure to allow an accused to elicit from a Government witness highly biasing facts violated the sixth amendment,160 the final form of the Federal Rules included no provisions on bias impeachment.

While this lacuna fortunately has not prevented lawyers from utilizing this vital tool of bias impeachment, there have been some unnecessary problems. In the last ten years, for example, various courts, presumably swayed by rule 608(b)’s broad regulation of attacks on “credibility,” have imposed a “bias exception” upon the rule’s prohibitions.161 Not until December of 1984 did

156. FED. R. EVID. 601 advisory committee note. The note states, “Interest in the outcome of litigation and mental capacity are, of course, highly relevant to credibility and require no special treatment to render them admissible along with other matters bearing upon the perception, memory, and narration of witnesses.” Id.

157. See FED. R. EVID. 408. The rule excludes compromise evidence on the issue of liability or the amount of a claim, but provides, “This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness . . . .” Id.

158. See FED. R. EVID. 608(a) advisory committee note; FED. R. EVID. 610 advisory committee note. On the question of what constitutes an attack on the character of a witness for the purposes of allowing rehabilitation, the Advisory Committee declared, “Evidence of bias or interest does not.” FED. R. EVID. 608(a) advisory committee note. The Advisory Committee also made the following comment on impeachment by evidence as to the witness’ religious beliefs: While the rule forecloses inquiry into the religious beliefs or opinions of a witness for the purpose of showing that his character for truthfulness is affected by their nature, an inquiry for the purpose of showing interest or bias because of them is not within the prohibition. Thus disclosure of affiliation with a church which is a party to the litigation would be allowable under the rule.


160. See Davis v. Alaska, 415 U.S. 308 (1974) (precluding defendant from cross-examining chief government witness as to his possible bias arising from his involvement with police as a juvenile denied defendant his confrontation rights).

161. See, e.g., United States v. Corbin, 734 F.2d 643, 655 (11th Cir. 1984) (party’s right to impugn character for truthfulness of opposing party’s witness is limited to questioning witness on cross-examination, except where extrinsic testimony would tend to show witness is biased); United States v. Ray, 731 F.2d 1361, 1364 (9th Cir. 1984) (rule 608 does not bar introduction of evidence to show witness is biased); Johnson v. Brewer, 521 F.2d 556, 562 n.13 (8th Cir. 1975) (prohibitions in rule 608 against offering evidence of witness misconduct for purpose of attacking credibility do not apply to evidence of bias).
the Supreme Court finally confirm that bias impeachment remains a viable tool to the federal cross-examiner. In United States v. Abel, the Court held that evidence was properly admitted on cross-examination to show bias where the evidence indicated that a defense witness and the accused were members of a secret prison organization dedicated to lying to achieve its goals. The Abel Court also appeared to settle another major issue concerning bias impeachment—that extrinsic evidence is allowed if the witness denies the biasing fact or statement. The Court failed to explain, however, whether the traditional body of common law, the broad language of rules 401 and 402, or some amalgam of both provide the controlling source of modern bias doctrine.

Several other practical questions still remain unresolved. These include (1) whether an attorney must lay a foundation as to bias by examining the witness about it as a condition to bringing in extrinsic evidence; (2) if a foundation is necessary, whether the foundation must be laid prior to the introduction of extrinsic evidence—such as during cross examination—or can be done at any time during the trial; (3) whether the answer to the second issue above turns on whether the impeachment is by reference to

163. Id. at 467.
164. Id.
165. In its opinion, the Court discussed both the broad language of rules 401 and 402 in defining relevant evidence and its admissibility, and the body of common law concerning impeachment for bias. See id. at 468-69. Concerning the use of extrinsic evidence, the Court stated that "the 'common law of evidence' allowed the showing of bias by extrinsic evidence, while requiring the cross-examiner to 'take the answer of the witness' with respect to less favored forms of impeachment." Id.
166. This was not in issue in Abel since the prosecutor had, in fact, cross-examined the witness about the matter. See id. at 467.
167. Regarding the foundation requirement for the use of extrinsic evidence of prior inconsistent statements, rule 613(b) provides, "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require." Fed. R. Evid. 613(b). The Advisory Committee noted that "[t]he traditional insistence that the attention of the witness be directed to the statement on cross-examination is relaxed in favor of simply providing the witness an opportunity to explain and the opposite party an opportunity to examine on the statement, with no specification of any particular time or sequence." Id. advisory committee note (emphasis added).

For a rule that ordinarily would require a prior foundation as to prior inconsistent bias statements, see Hawaii Rev. Stat. § 626-1, Rules of Evidence, Rule 609.1 (Special Pamphlet 1980). See also United States v. DiNapoli, 557 F.2d 962 (2d Cir. 1977) (affirming trial court's refusal to permit defense counsel to introduce testimony as to bias because defense had not laid foundation for testimony); United States v. Harvey, 547 F.2d 720, 722 (2d Cir. 1976) ("This Circuit
a circumstantial fact suggesting bias or to an out-of-court assertion of bias by the witness; 168 and (4) whether extrinsic evidence may come in even if the witness admits the biasing fact or statement. Although a few of the recent state evidence codes have addressed these issues in part, 169 the end of the first decade of the Federal Rules marks an appropriate time for them to address expressly the key aspects of bias impeachment.

The Federal Rules ignore similar questions of foundation and proof with respect to capacity impeachment. 170 The theory of capacity impeachment appears to be that the trier ought to hear any relevant evidence that might tend to show any abnormal impairment of the witness' accuracy or completeness of perception, memory, or ability to communicate his experience to the court. Such evidence might include evidence of mental illness, 171 drug use, or intoxication—whether operating at the time of the event witnessed, at the time of the witness' appearance at trial, or at both times. Here too, the only reference in the Federal Rules is a general allusion in an Advisory Committee's note, presumably relegating these questions to the vague provisions of rules 401 and 403. 172 There was strong common law support for the no-

follows the rule applicable in a number of other Circuits, that a proper foundation must be laid before extrinsic evidence of bias may be introduced.

168. See Schmertz & Czapanskiy, supra note 159, at 265 (advocating requirement of foundation where bias evidence consists of prior out-of-court assertions, in light of susceptibility of words to manipulation and misinterpretation).

169. See, e.g., FLA. STAT. ANN. § 90.608(1)(b) (West 1979); MILITARY R. EVID. 608(c) (codified at 45 Fed. Regs. 16,932, 16,974 (1980)); UTAH R. EVID. 608(c). Hawaii's rule 609.1 is perhaps the most satisfactory treatment so far. It provides:

(a) General Rule. The credibility of a witness may be attacked by evidence of bias, interest, or motive. (b) Extrinsic evidence of bias, interest, or motive. Extrinsic evidence of a witness' bias, interest, or motive is not admissible unless, on cross-examination, the matter is brought to the attention of the witness and the witness is afforded an opportunity to explain or deny the matter.

HAWAII REV. STAT. § 626-1, Rules of Evidence, Rule 609.1 (Special Pamphlet 1980) (emphasis added). Unfortunately the reference to "cross-examination" in the Hawaii rule may create an interpretative problem as to impeachment of one's own witness similar to that found in federal rules 608(b) and 609(a). For a discussion of this problem, see infra notes 182-86. The 1980 New York draft of § 607(c) briefly dealt with bias impeachment but this section does not appear in the proposed 1982 draft. See A CODE OF EVIDENCE FOR THE STATE OF NEW YORK § 169 (West 1982) (proposed draft by New York State Law Revision Comm'n).

170. See generally C. MCCORMICK, supra note 39, § 45 (discussing use of defects of capacity to attack credibility of witness).

171. For a valuable summary of common mental problems as they might affect credibility in particular ways, see Weihofen, Testimonial Competence and Credibility, 34 GEO. WASH. L. REV. 58, 81-90 (1965).

172. FED. R. EVID. 601 advisory committee note. The note states, "Interest
tion that questions relating to abnormalities in the witness' capacity constituted a valid probe of credibility, although there was less agreement on whether such abnormalities affecting a witness' credibility could be established through the testimony of other witnesses. The Federal Rules do not specifically address this issue. They also fail to deal with the further issues relating to the possible need for a preliminary foundation for capacity impeachment and on the propriety of extrinsic proof despite an admission of the impeaching fact by the witness. Because the apparent intent of rule 601 is to avoid any absolute testimonial ban of mentally ill persons, and because the incidence of mental problems among the general population from whence come trial witnesses shows no sign of abating, the Federal Rules ought to address the important procedural issues of how to go about challenging the mental capacity of witnesses.

Another mode of impeachment ignored by the present Federal Rules is that often called "specific contradiction." To illustrate this method, assume that the plaintiff has called W-1 who has testified that \( A = B \). The defendant may call W-2 in a later stage of the trial and elicit from W-2 that \( A \neq B \). If the proposition that \( A = B \) is independently relevant in the case, one could look upon the testimony of W-2 as simply the vehicle for affirmative counterproof of a probative, consequential fact. One could also view the testimony of W-2, however, as indicating that W-1 may have been mistaken in his assertion, and, having once been in error, may be liable to err in other matters. In other words, W-2's testimony might be a means of impairing the credibility of W-1, not only upon whether \( A = B \) but also as to any other part of his testimony, in reliance upon the

in the outcome of litigation and mental capacity are, of course, highly relevant to credibility and require no special treatment to render them admissible along with other matters bearing upon the perception, memory, and narration of witnesses."  

173. See C. McCormick, supra note 39, § 45, at 105; 3 J. Wigmore, supra note 39, § 935, at 770 n.1.  

174. For a discussion of rule 601 and the mentally ill witness, see supra notes 51 & 172.  

175. See Statistical Abstract of the United States 112 (1985). The abstract reveals that between 1971 and 1979, for example, the annual number of "patient care episodes" reported by mental health facilities in the United States increased by 59%. Id.  

176. See generally, C. McCormick, supra note 39, § 47 (discussing impeachment by disproving facts testified to by witness).  

177. See 3A J. Wigmore, supra note 39, § 1000, at 957-58. Professor Wigmore states:  

We are not asked, and we do not attempt to specify, the particular de-
maxim "falsus in uno; falsus in omnibus."\textsuperscript{178}

Furthermore, in the specific contradiction area of impeachment, there are important practical questions about preliminary foundation, the effect of admitting or denying the truth of a fact by \(W-1\), and the sorts of facts on which the testimony of \(W-2\) is admissible.

On the latter point, the hornbook answer is that one cannot call \(W-2\) to contradict \(W-1\) on a "collateral matter."\textsuperscript{179} The absence of any definite reference to these problems in the Federal Rules indicates that a party can only call \(W-2\) if the matter in question is relevant under rule 401 and not unfairly prejudicial, confusing, or timewasting under rule 403. Since even this much is not clearly spelled out, however, the gaps have led some courts to seek inappropriate enlightenment on specific contradiction matters in the character impeachment provisions of rule 608(b).\textsuperscript{180}

After ten years of uncertainty, clarifying amendments to the Federal Rules ought to be enacted to provide basic guidance on the subject of specific contradiction.

\textbf{A. Impeachment of One's Own Witness}

An aura of uncertainty also surrounds the scope of rule 607 arising in part from the lacunae in article VI. Rule 607 provides that "[t]he credibility of a witness may be attacked by any party, including the party calling him."\textsuperscript{181} This major reform of the common law of evidence aims to do away with the traditional requirement that the proponent of the witness cannot impeach that witness without showing "surprise" and "affirmative harm" to his case caused by the turncoat's testimony.\textsuperscript{182}

\textsuperscript{178} The Latin phrase means "false in one thing, false in everything," suggesting that a witness who lies about one thing, discredits the rest of his testimony. \textit{LATIN WORDS & PHRASES FOR LAWYERS} 90 (R.S. Vasan ed. 1980).

\textsuperscript{179} See C. McCormick, \textit{supra} note 39, § 47, at 110.

\textsuperscript{180} See id. § 47, at 112-13 & n.27.

\textsuperscript{181} FED. R. EVID. 607.

\textsuperscript{182} But cf. MICH. R. EVID. 607(2)(c) (calling party may impeach his witness if witness' testimony was "contrary to that which the calling party had anticipated and was actually injurious to the calling party's case").
The rules are less than clear on what impeachment techniques a proponent may use against his own witness. Interestingly, the only specific methods for "attacking credibility" that immediately follow rule 607 relate to attacks on the character of witnesses for untruthfulness under rules 608 and 609. Not until rule 613 can implicit authorization be found for impeachment by self-contradiction. In addition, as noted, the Federal Rules are silent as to impeachment through proof of bias, capacity, or specific contradiction. Both from the omissions noted and from the structure and sequence of the rules in article VI, it might be inferred that the Federal Rules intend the main avenues of impeaching one's own witness to lie in attacking the witness' character for truthfulness under rules 608 and 609. Some jurisdictions, however, expressly or impliedly preclude these methods to impeach one's own witness.\textsuperscript{183} In addition, both rules 608(b) and 609(a) refer only to impeachment during "cross-examination," thus appearing to suggest that the Federal Rules do not permit trial attorneys to impeach their own witnesses through evidence of prior convictions or prior misconduct on "direct" examination.\textsuperscript{184} Finally, the distance of rule 613 from rule 607 and rule 613's indirect phraseology would seem to belie the fact that the most widely accepted type of impeachment of one's own witness—and in some jurisdictions the only way—is through self-contradiction.\textsuperscript{185} Of course, one could argue that, in using the phrase "attack . . . credibility" in rule 607, the framers implicitly included all impeachment techniques available at common law with the exception of such methods which might be expressly disapproved. At decade's end, however, the opportunity is here to nail down the question of what sorts of impeachment of one's own witness the Federal Rules actually intend to permit.

\textsuperscript{183} See, e.g., Fla. Stat. Ann. § 90.608(2) (West 1979) ("A party producing a witness shall not be allowed to impeach his character."); 14 D.C. Code Ann. § 14-102 (1981) (apparently abrogating common law rule against impeaching one's own witnesses only with respect to use of prior inconsistent statements); Ohio R. Evid. 607 ("The credibility of a witness may be attacked by any party except that the credibility of a witness may be attacked by the party calling the witness by means of a prior inconsistent statement only upon a showing of surprise and affirmative damage."). \textit{See generally} C. McCormick, supra note 39, § 38, at 83-84 (discussing use of prior inconsistent statements to impeach one's own witness).

\textsuperscript{184} For proposed revisions of the language in rules 608 and 609, see infra text accompanying notes 265-67 & 275-85 (rule 608) and 299, 306-12, 316-19 & 324 (rule 609).

\textsuperscript{185} For a discussion of self-contradiction, see supra notes 148-54 and accompanying text.
The Federal Rules may be searched in vain for assistance on two other vital aspects of impeachment practice: (1) what constitutes "extrinsic evidence," and (2) what it means to say that the cross-examiner must have a "good faith basis" for asking impeaching questions on cross-examination—especially those tending to impugn the witness' character. Although the proposed amendments that follow include some approaches to answering these questions, the article further develops these two matters in connection with its later discussion of rules 608 and 609.186

The following language is suggested to expand rule 607 to fill in most of the major gaps in impeachment practice:

**RULE 607: GENERAL RULE ON IMPEACHMENT**

(a) Any party, including the party calling the witness, may attack the credibility of a witness by an inquiry of that witness, resting on a good faith factual basis, designed to:

(1) Elicit the making of statements by the witness which are inconsistent with his present testimony. Where a party attempts to impeach a witness called by that party, however, the examiner ordinarily may not, without a preliminary showing that the witness' testimony was both unexpected and affirmatively damaging, elicit any such statements which are neither exempted from hearsay status by rule 801(d), nor within one of the exceptions found in rules 803 or 804.187

186. For a discussion of the "extrinsic evidence" issue, see infra notes 260-67 and accompanying text. For a discussion of the "good faith" issue, see infra notes 268-87 and accompanying text.

187. Although constrained by the apparently absolute permission granted by federal rule 607 to impeach one's own witness, a number of courts have declared that the prosecution may not put on a known hostile witness for the primary purpose of bringing out prior inconsistent hearsay statements under the guise of impeachment. See, e.g., United States v. Hogan, 763 F.2d 697, corrected and reh'g denied in part, 771 F.2d 82 (5th Cir. 1985), United States v. Morlang, 531 F.2d 183 (4th Cir. 1975); State v. Ortlepp, 363 N.W.2d 39 (Minn. 1985). The Eleventh Circuit has applied a similar rule in a civil antitrust action. See Balogh's, Inc. v. Getz, 778 F.2d 649, 652-53 (11th Cir. 1985). It is submitted that Congress' decision not to exempt all out-of-court witness statements from the hearsay rule requires greater safeguards in both civil and criminal cases against unchecked impeachment of one's own witnesses by prior unsworn statements. Several approaches suggest themselves: (1) amend rule 801(d)(1)(A) so that it does exempt all inconsistent statements, thus obviating the problem; (2) amend article VI to make it explicit that the trial courts ought to apply rule 403 considerations to the use of hearsay statements to impeach one's own witness. See State v. Price, 202 Neb. 308, 275 N.W.2d (1979); (3) make use of such statements depend upon a finding as to the subjective intent of the impeaching party as apparently suggested in *Hogan*; or (4) restore in somewhat more flexible form the traditional "surprise" and "damage" requirements as to impeachment of...
(2) Show that the facts or opinions are not as testified to by the witness being impeached;

(3) Show that the witness is interested in the outcome of the proceeding;

(4) Bring out any weaknesses in the capacity of the witness to perceive, remember, or narrate the matters about which he has testified; or

(5) Show the character of the witness for untruthfulness in accordance with the provisions of rules 608 and 609.

(b) The calling of an additional witness primarily to prove the making of a prior inconsistent statement by the main witness elicited under rule 607(a)(1) ordinarily shall not be permissible if:

one's own witness by unsworn statements, as has been done in the proposed rule in the text. Without attempting a definitive solution at this point, the present author suggests that trial lawyers are probably more familiar with approach (4) and that it might be more easily applicable than an assessment of the examiner's intent under approach (3). Moreover, the "ordinarily" qualification would allow the trial court to adapt the proposed test to borderline situations. See United States v. DeLillo, 620 F.2d 939 (2d Cir.) (parts of Government witness' story were favorable to Government and parts were not), cert. denied, 449 U.S. 835 (1980). For succinct discussions of the decisions and commentary setting forth varying recommendations on this point, see M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 607.3 (1981) and S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 333-36 (3d ed. 1982).

For completeness, the proposed language also makes allowance for the possibility that the inconsistent statement might fall within a recognized exception to the ban on hearsay under rules 803(1)-(24) or 804(b)(1)-(5) and would thus not raise the spectre of calling a witness to impeach him with out-of-court statements consisting of inadmissible hearsay.

188. A drafter's note would be included to explain that the broad term "interested" is intended to include matters traditionally referred to as bias, interest, or corruption.

189. The present author has deliberately chosen the singular here on the theory that an article VI provision of this type should focus on the minimum or the least that the impeaching counsel is entitled to by way of "extrinsic evidence." In the first place, the production of a single rebuttal witness often will be all that is required to perfect the particular impeachment effort, e.g., the witness who can recall the making of the prior inconsistent statement or who can testify as to a biasing fact. It is submitted that trial judges can, and should, draw a tight rein over the use of more than one rebuttal witness by invoking the administrative "considerations" of rule 403 to prevent "needless presentation of cumulative evidence" and possibly by invoking rule 611(a)(2), which recognizes the trial judge's duty to exercise control of the mode and order of proof to "avoid needless consumption of time." See generally FED. R. EVID. 403, 611(a)(2).

190. It has been stated that a cross-examiner who has failed to secure an unequivocal admission by the witness as to the making or truth of the inconsistency must produce extrinsic evidence to establish the statement's admissibility—assuming other requisites are met. See, e.g., Robertson v. M/S Sanyo Maru, 374 F.2d 463, 465 (5th Cir. 1967) (reversible error for trial court to admit and con-
(1) The main witness fully admits either the making of
the statement or the truth of its contents; 191
(2) The impeaching party does not satisfy the require-
ments of rule 613(b); 192 or
(3) The inconsistency relates to a matter which lacks
relevance independently of the inconsistency. 193
(c) With respect to impeachment under rule 607(a)(2), the
calling of an additional witness shall ordinarily be permissible
only to prove a fact or opinion which is relevant independently of
its inconsistency with the testimony of the main witness.
(d) With respect to impeachment based on interest under

sider prior statement denied by witness where cross-examiner failed to satisfy
authentication and "best evidence" requirements), cert. denied, 400 U.S. 854
to support its holding. 374 F.2d at 465 (citing C. McCormick, McCormick on
Evidence § 37, at 68 (1954)). However, the learned author on the page cited in
fact declares: "If the witness denies the making of the statement, or fails to
admit it, but says 'I don't know' or 'I don't remember' then the requirement of
'laying the foundation' is satisfied and the cross-examiner, at this next stage of
giving evidence, may prove the making of the alleged statement." See C. McCOR-
mick, supra (emphasis supplied). Thus, as far as the law of impeachment is con-
cerned, enforcement of the good faith basis requirement should reduce the
number of instances where prejudicial impeachment cannot be backed up by
admissible extrinsic evidence. Though there would not appear to be a per se
rule demanding the introduction of extrinsic back-up evidence in every case,
rule 403 considerations might impel a trial judge to require such evidence de-
pending on the circumstances. The present proposals are limited to matters
that seemingly belong in article VI, and speak in terms of "permissibility" on the
theory that, as suggested by the actual issues before the Robertson court, any ex-
aminer who wishes to introduce the prior statement will have to comply with the
authentication requirements of article IX and with the original documents provi-
sions of article X.

191. Since Congress defined as nonhearsay certain types of sworn inconsis-
tent statements in rule 801(d)(1)(A), one could arguably afford more generous
use of extrinsic proof to such statements than to the typical unsworn interview
statement, as the former can serve as affirmative evidence. For administrative
simplicity, proposed rule 607(b)(1) treats all inconsistent statements alike as to
admissibility of extrinsic evidence. Moreover, the key to the traditional limita-
tions on impeachment through extrinsic evidence lies primarily in the independ-
ent relevance of its content. The term, "ordinarily," provides some leeway for
the trial judge, however, to relax one or more of the usual conditions for extrin-
sic evidence. See, e.g., Fed. R. Evid 611(c). For example, where the relevance of
a statement's assertions presents a close question, the judge might allow extrin-
sic proof more often for nonhearsay statements within rule 801(d)(1)(A) than for
unsworn statements. Finally, since most "nonhearsay" statements would come
from a trial record or deposition, authentication would seldom be unduly time-
consuming.

192. For the text of the amendment that this article proposes to rule
613(b), see infra text accompanying notes 357-58.

193. See 3A J. Wigmore, supra note 59, § 1003 (discussing test of collateral-
ness accepted by some courts).
rule 607(a)(3), the calling of an additional witness to establish the interest of the main witness ordinarily shall be permissible unless:

1. The main witness did not have a prior opportunity to deny or explain the matter; or
2. The main witness has fully admitted the impeaching fact or statement.\(^{194}\)

\(^{194}\) Here, as with prior inconsistent statements generally under proposed rule 607(b)(1), a witness' unequivocal admission of the impeaching matter serves as record proof thereof, and ordinarily would rule out the use of extrinsic evidence on the theory that such evidence would constitute the "needless presentation of cumulative evidence" under rule 403.

\(\text{As the proposals show, there is an attempt to grapple with the "collateral/non-collateral" puzzle. The present Federal Rules appear to refer the court to the general guidelines of rules 401 and 403 when an impeaching party seeks to bring in extrinsic rebuttal evidence by way of showing a self-contradiction or by way of calling a contradicting witness.}\(^{196}\)

\(^{196}\) Efforts to define "collateral" evidence on mental or emotional capacity within the range of normality. See C. MCCORMICK, supra note 39, § 45, at 105. It would seem that this definition is substantially the same as the "independently relevant" standard adopted in the proposals herein.

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194. Here, as with prior inconsistent statements generally under proposed rule 607(b)(1), a witness' unequivocal admission of the impeaching matter serves as record proof thereof, and ordinarily would rule out the use of extrinsic evidence on the theory that such evidence would constitute the "needless presentation of cumulative evidence" under rule 403.

There is recent support for the notion that a prior foundation ought to be laid with the witness before offering extrinsic evidence as to bias. See United States v. Rovetuso, 768 F.2d 809, 817 (7th Cir. 1985). See also United States v. Leslie, 759 F.2d 366, 379-80 (5th Cir. 1985) (citing 3 J._WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 607-03, at 607-43 (1982)) (court applied foundation requirements of rule 613(b) to out-of-court inconsistent statement evidencing bias but then referred to prior foundation requirement); HAWAII REV. STAT. § 626-1, Rules of Evidence, Rule 609.1 (Special Pamphlet 1980).

195. Due to the frequent unreliability of a witness' insights into his or her mental disorders, limiting the impeaching party to a mental patient's admissions on cross-examination as to the nature and extent of the manifestation of mental disorder, or of corresponding hospital treatment would seem unsound. "Extrinsic" lay or expert testimony probably would throw much more accurate light on the witness' true capacity to function as a witness. For this reason, the rule is oriented toward admissibility. The "ordinarily" standard should allow the trial judge sufficient flexibility to make a judgment as to whether counsel has been able to elicit sufficient relevant data from the witness to warrant exclusion of excessively complex and repetitive extrinsic proof pursuant to rule 403. The traditional cases apparently were divided on the admissibility of extrinsic evidence on mental or emotional capacity within the range of normality. See C. MCCORMICK, supra note 39, § 45, at 105.

196. See id. § 47, at 112-13. United States v. Rockwell, the Third Circuit cited rule 403 as applicable to the determination of what is excludable as "collateral" and declared, "We also refuse to depart from the traditional understanding of collateral evidence which we believe is characterized in accordance with its relation to the substantive issues at trial." 781 F.2d 985, 989 n.6 (3d Cir. 1986). It would seem that this definition is substantially the same as the "independently relevant" standard adopted in the proposals herein.
in any useful manner have not been very successful. Likewise, attempts to substitute the slippery term "material" have failed to achieve significant success.\textsuperscript{197} The failure to clarify the term "material," may cause further confusion if that term is interpreted to mean merely "provable," i.e., constituting or relating to the merits of the litigation. The baggage of ambiguity long carried about by the term "material" specifically persuaded the framers to substitute for it the phrase "of consequence to the determination of the action" in the basic relevancy definition found in rule 401.\textsuperscript{198} Important considerations of administrative efficiency, however, strongly suggest that the Federal Rules ought to expressly empower trial judges to demand a showing that a matter has something more than marginal probative value before agreeing to prolong the trial by having new witnesses appear solely to impeach another witness on that point. If a witness changes his story on a minor detail that has no independent probative value before agreeing to prolong the trial by having new witnesses appear solely to impeach another witness on that point. If a witness changes his story on a minor detail that has no independent probative value on the merits, of course, the Federal Rules should instruct the trial courts to restrict the inquiry to cross-examination.\textsuperscript{199} The proposed revision of rule 607 suggested by this article adopts Wigmore's test of "independent relevance" as a basic criterion for determining whether it is worth the trial time to allow extrinsic proof.\textsuperscript{200}

\textsuperscript{197} In defining specific contradiction, for example, § 90.608(1)(e) of Florida's evidence statute allows "[p]roof by other witnesses that material facts are not as testified to by the witness being impeached." FLA. STAT. ANN. § 90.608(1)(e) (West 1979) (emphasis added).

\textsuperscript{198} See FED. R. EVID. 401. As the Advisory Committee explained. "The language is that of California Evidence Code § 210; it has the advantage of avoiding the loosely used and ambiguous word 'material.'" FED. R. EVID. 401 advisory committee note. Note, however, that Congress amended rules 803(24) and 804(b)(5) on the residual hearsay exceptions using the term "material" without clarification of its meaning. See 4 D. LOUISELL & C. MUELLER, supra note 18, § 472, at 934.

\textsuperscript{199} Thus, the trial judge ought to be able to exclude even a matter that possesses probative value apart from its impeachment effect under rule 403, based not only on "unfair prejudice," but also upon "considerations of undue delay, waste of time, or needless presentation of cumulative evidence." See FED. R. EVID. 403.

\textsuperscript{200} According to Wigmore, the only test of collateralness that possesses definiteness, concreteness, and ease of application is to ask, "Could the fact, as to which error is predicated, have been shown in evidence for any purpose independently of the contradiction?" 3A J. WIGMORE, supra note 39, § 1003. A "self-contradiction" would meet the test when it is a question of probing the consistency of the witness' various versions of the facts and circumstances of the litigated events. It also serves as a useful guideline on what sorts of litigative facts an opponent should be allowed to "specifically contradict" by calling other witnesses. As to impeaching the personal credibility of the witness, the law has recognized that certain types of impeachment warrant extrinsic rebuttal, e.g.,
With respect to those forms of impeachment on which most common law courts traditionally did allow extrinsic proof—bias and capacity—the simple application of the notion of "independent relevance" would seem question-begging, and might confuse rather than enlighten. For this reason, the proposals contain separate provisions dealing with extrinsic evidence of bias and capacity. Whether capacity and bias impeachment rest on circumstantial facts or on prior utterances of the witness, the proposals classify both impeachment methods as "noncollateral."

On the question of allowing extrinsic proof, the proposed amendments include the term "ordinarily" to allow for the flexible exercise of judicial discretion in the atypical situation. Thus, an otherwise "collateral" fact might furnish the "linchpin" of an important witness' story and may warrant extrinsic rebuttal within the technique of either specific contradiction or self-contradiction. For example, in a given street robbery trial, the weather conditions might not have any specific bearing on visibility. It might be the case, however, that a witness who identifies the accused as the robber claims that it was cold and blustery at the time, and the defense has several witnesses who recall that it was a warm and rainless day. One could reasonably argue that the witness, had he actually been on the scene as claimed, could hardly have been so greatly mistaken. Extrinsic rebuttal here tends to extract the cornerstone of his credibility as an

bias, capacity, and prior convictions; and that some do not, e.g., prior misconduct under rule 608(b). See id. § 1005.

201. In ruling on the admissibility of extrinsic attacks on bias, capacity, and character, the "independently relevant" test was traditionally not self-executing. The judge would have to consult distinct doctrines pertaining to personal impeachment because they are not directly "relevant" to the litigative facts, but to the individual characteristics of each witness. The proposals in the article deal with the "independently relevant" question by specifically building it into each impeachment provision, generally along traditional lines.

202. The author also uses the qualifying term "ordinarily" in proposed rule 613(b) on the admissibility of prior inconsistent statements of a witness. For a discussion of the author's proposed rule 613(b), see infra notes 357-58 and accompanying text.

203. See C. McCormick, supra note 39, § 47, at 111-12. Professor McCormick states:

To prove untrue some fact recited by the witness that if he were really there and saw what he claims to have seen, he could not have been mistaken about, is a convincing kind of impeachment that the courts must make place for, although the contradiction evidence is otherwise inadmissible because it is collateral under the tests mentioned above. To disprove such a fact is to pull out the linchpin of the story.

Id.
As it is easy to conjure up examples of somewhat probative facts that might be substantially outweighed by the dangers of unfair prejudice, the term "ordinarily" also would recognize discretion in the trial judge to preclude extrinsic proof under rule 403 standards even as to "independently relevant" matters. In the robbery scenario above, for instance, the trial court usually would allow the defense to show that an eyewitness was two blocks away from the robbery scene at the time, but perhaps not by calling Lucy, whom the witness was attempting to rob at that time and place.

All of the proposed amendments would be subject to rule 403 discretion at least in a residual or "background" sense. Nevertheless, the specification in statutory language of typical patterns historically applied to the established methods of impeachment can serve as worthwhile signposts to the litigation bar. In the heat of trial, both judge and attorneys can safely and efficiently follow the suggested guidelines in most impeachment rulings. This would make it less necessary to delay the proceedings from time to time in order to perform a particularized balancing analysis under the nonspecific norms of rule 403. The proposed amendments' relatively specific guidance also might assist in the sound development of the law of impeachment on the appellate level. Instead of merely dismissing evidentiary rulings of the trial courts as "not an abuse of discretion," the courts of appeal might tend more often to engage in rigorous statutory interpretation which, in itself, may ultimately provide more concrete guidance to the trial bench and bar.

B. Rehabilitation of Impeached Witnesses

Present rule 608(a) regulates impeachment of truthfulness by reputation or opinion. The rule, however, also contains some el-
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ments of rehabilitation doctrine.207 Completeness suggests that any revisions of article VI also should fill in the gaps on rehabilitation or support of impeached witnesses.208 The general notion of fairness suggests that the Federal Rules expressly should provide both the witness and the party calling him a reasonable chance to respond to impeaching evidence.

Since most impeachment efforts begin during cross-examination of adverse witnesses,209 the classic time for rehabilitation efforts is redirect examination. As a general proposition, the law should provide the witness who has admitted an impeaching fact on cross-examination a fair chance to explain it away, i.e., to suggest innocent inferences from the impeaching fact or to add circumstances that might tend to neutralize the attack on his credibility. For example, if the cross-examiner elicits under rule 608(b) that the witness had filed a false Government claim five years before, the witness ought to be given the opportunity, with due regard to the penalties of perjury, to point out that he never actually received any money from the claim, or that he later withdrew it, or, that having unlawfully received the money, made restitution, or any other aspect of the entire matter that might tend to weaken the discrediting force of the false claim incident. Alternatively, the witness might concede that he had obtained money from the false claim and had spent it, but want to point out that since that time, he had reformed his life.210 Similarly, a witness who is impeached under rule 609 by an undenied prior conviction should be given the chance to respond in order to attempt to weaken the inference of untruthful character from the commission of the underlying criminal act.211 Likewise, similar allowance

207. In rule 608(a)(2) it is provided that "evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise." Fed. R. Evid. 608(a). Although rule 608(b) also refers to proof of "character for truthfulness," it appears to do so mainly in the context of cross-examination of witnesses who have testified on direct as to the bad veracity character of another witness. For a general discussion of rule 608(b), see infra notes 222-87.

208. For a general discussion of rehabilitation of an impeached witness, see C. McCormick, supra note 39, § 49; 4 J. Wigmore, supra note 39, §§ 1100-44.

209. Utilizing character witnesses under rule 608(a) inherently involves evidence "extrinsic" to the witness being impeached, presumably because it would be anomalous and unproductive to ask the witness about her own reputation for untruthfulness or about her own opinion of her own lack of veracity.

210. See generally 4 J. Wigmore, supra note 39, § 1112 (listing various techniques used to explain away bad reputation).

211. For opinions discussing what types of responses are appropriate from a witness impeached with a prior conviction, see Dryden v. United States, 257 F.2d 517 (5th Cir. 1956) (no abuse of discretion for trial judge to allow Govern-
ought to be made to mitigate the potential damage of any other impeaching fact going to bias or lack of capacity. 212

Second, any rule amendment ought to take into account the present references in rule 608 to proof of good character. Thus, rule 608(a) allows the “credibility” of a witness to be “supported” by evidence in the form of reputation or opinion. Under certain conditions, rule 608(a)(2) will allow “evidence of truthful character.” Rule 608(b) also purports to regulate the admissibility of specific instances of conduct of a witness, “for the purpose of . . . supporting his credibility.”

Third, a proposal ought to try to say something useful about the parameters of using prior consistent statements for rehabilitation purposes. 213 Nothing in present article VI deals with this important technique. Rule 801(d)(1)(B), in article VIII, naturally focuses mainly on the hearsay aspect of such statements. 214 It would seem wise to include an article VI provision on consistent statements. The proposal below essentially incorporates the language of the hearsay provision as also representing the preferable approach in the law of witness rehabilitation. 215

Finally, the Federal Rules probably should regulate the ad-

212. See generally 4 J. Wigmore, supra note 39, § 1119 (discussing rehabilitation after impeachment).

213. For a discussion of rehabilitation by prior consistent statements, see id. §§ 1122-33.

214. Rule 801(d) provides in pertinent part:

A statement is not hearsay if—(1) . . . The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive . . . .

FED. R. EVID. 801(d)(1)(B).

215. In general, the language of the proposal literally incorporates the “nonhearsay” qualifications of rule 801(d)(1)(B) and makes them identical for impeachment purposes. This approach was adopted in § 791 of the California Evidence Code, which provides in pertinent part:

Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after:

(b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias,
missibility of prior consistent statements when offered to rehabilitate the credibility of a witness who has been impeached by prior inconsistent statements.\footnote{216}

To rectify the omissions discussed above, the following language is proposed:

RULE 607(f): REHABILITATION OF IMPEACHED WITNESS

Subject to the provisions of rule 403, a party may attempt to support the credibility of a witness whose credibility has been attacked, as follows:

(1) The witness may deny or explain any impeaching fact or statement.\footnote{217}

(2) The credibility of a witness whose character for truthfulness has been attacked may be supported by evidence of truthful character pursuant to rule 608.\footnote{218}

(3) Evidence that the witness made other statements consistent with his trial testimony is not ordinarily admissible unless:

(A) the statement satisfies the conditions of rule 801(d)(1)(B)\footnote{219}

\footnote{216. See C. McCormick, supra note 39, § 49, at 118-20 (discussing authorities supporting use of such statements to fortify witness' denial of prior inconsistent statements). See also Cal. Evid. Code § 791(a) (West 1966). Section 791(a) is much broader than proposed rule 607(f)(3) in providing for the use of a witness' consistent statements after "evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement." Id.}

\footnote{217. For an example of similar "deny or explain" language, see Fed. R. Evid. 613(b).}

\footnote{218. See Fed. R. Evid. 608(a) advisory committee note. The note states: Opinion or reputation that the witness is untruthful specifically qualifies as an attack [upon character] under the rule, and evidence of misconduct, including conviction of crime, and of corruption also fall within this category. Evidence of bias or interest does not. Whether evidence in the form of contradiction is an attack upon the character of the witness must depend upon the circumstances. Id. (citations omitted).}
The proposal is hardly revolutionary and attempts to track what appears to be the trend of the law in this area. Providing reasonably specific guidelines in code form should aid busy trial courts in making rulings on rehabilitation of witnesses which are closer to the desired goal that rehabilitation evidence be probative and relatively focused, as well as consistent with the administrative constraints of rule 403.

C. Ironing Out the Wrinkles in Rule 608(b)

Rule 608(b) regulates the “cross-examination to credit,” or the eliciting from the witness on cross-examination of prior misconduct not the subject of a conviction in order to generate an inference that the witness' character for truthfulness is poor. Thus, rule 608(b) typically would allow the cross-examiner to question a witness as to whether the witness recently forged a signature, lied as to his prior employment history on a government form of rule 801(d)(1)(B). Under the “ordinarily” standard, a court could permit introduction for purely rehabilitative purposes of consistent statements made either after the motive to falsify or simply nearer in time to the event. See generally 4 J. WEINSTEIN & M. BERGER, supra note 4, ¶ 801(d)(1)(B)(01), at 801-149 to -160 (1985).

220. See C. MCCORMICK, supra note 39, § 49, at 119. According to McCormick, prior consistent statement rehabilitation does not apply to witnesses whose character has been assailed. He states, "When the attack [upon credibility] takes the form of impeachment of character, by showing misconduct, convictions or bad reputation, it is generally agreed that there is no color for sustaining by consistent statements. The defense does not meet the assault." Id. at 118.

221. See generally id. § 49.

222. For a discussion of the traditional principles applicable to attacking the witness' character, see id. § 42. See also 3A J. WIGMORE, supra note 39, §§ 981-987. The principles are now regulated by rule 608(b)(1). In addition, rule 608(b)(2) governs the form of cross-examination that tests a character witness' purported knowledge about the background of the party on whose behalf he is present. The customary inquiries are whether the character witness has heard or is aware of specific instances or rumors of misconduct by the party, which are inconsistent with the trait for which the witness vouched on direct. For example, if a character witness has testified on direct that a party's reputation for truthfulness in a given community is good, the cross-examiner usually may inquire as to whether the character witness has heard that the party recently had been arrested for fraud in that community. If the character witness admits hearing this, his estimate of the party's reputation probably will be diminished; whereas, if the witness denies hearing it, he admits to substantial gaps in his familiarity with the community hearsay about the party's activities.
job application, or understated his taxes. If the witness denies any or all of these deceptive acts, the examiner must “take his answer” because rule 608(b) specifically bans extrinsic evidence in rebuttal.

Prior misconduct impeachment is controversial. It was disfavored in the federal courts prior to the enactment of the Federal Rules,223 and several of the code states expressly have restricted or banned such impeachment,224 or simply have omitted rule 608(b) from their evidence codes.225 These states may have simplified impeachment doctrine by eliminating the delicate process of regulating a type of discrediting that can turn into an open-ended smear of the witness’ character. This article, however, accepts arguendo the general notion that the Federal Rules ought to permit some form of misconduct impeachment.226 The article does take issue, however, with the inadequate and confusing guidance provided to bench and bar by the present language of rule 608(b).

First, some preliminary thoughts on the “politics” of evidentiary reform may be useful. As any perusal of one of the many pamphlets containing the Federal Rules and their legislative history indicates, rule 609 received a far greater share of time and attention by Congress than did rule 608(b).227 While it is not in-

223. See, e.g., United States v. Kaufman, 453 F.2d 306, 311 (2d Cir. 1971) (permitting impeachment by past offenses only where the offenses resulted in convictions); Ramirez v. United States, 294 F.2d 277, 284 (9th Cir. 1961) (“Evidence of acts of misconduct or of arrests which do not result in a conviction are inadmissible to impeach a witness.”).

224. See, e.g., ALASKA R. EVID. 608(b). Alaska’s rule 608(b) provides in pertinent part: “Evidence of specific instances of the conduct of a witness offered for the purpose of attacking or supporting that witness’ credibility is inadmissible unless such evidence is explicitly made admissible by these rules, other rules promulgated by the Alaska Supreme Court or by enactment of the Alaska legislature.” Id. Oregon’s rule 608 provides: “Further, such specific instances of conduct may not, even if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness.” OR. REV. STAT. § 40.350 (1983). See also CAL. EVID. CODE § 787 (West 1966) (banning inquiry into misconduct on cross-examination); TEXAS R. EVID. 608(b) (same).

225. See FLA. STAT. ANN. § 90.609 (West 1979).

226. In everyday life, persons tend to form opinions as to the character of others far more often from awareness of specific behavior than from general reputation in the community. Presumably, the number of relevant acts of deception committed by a given dishonest witness would greatly outnumber the actual convictions for crimes of “dishonesty or false statement” that would be governed by rule 609(a)(2). Indeed, modern social science may have found evidence tending to support the notion that there is such a thing as a person with a “lying character.” See A. YARMEY, THE PSYCHOLOGY OF EYEWITNESS TESTIMONY 177-78 (1979).

227. For example, Congress went through several draft approaches and
tended to suggest that rule 609 deserved less attention, it is suggested that rule 608(b) deserved more. Rule 609 is also a "misconduct" rule, under which the impeacher can prove the underlying misconduct by introducing a hearsay judgment of a prior conviction. In contrast, an examiner utilizing rule 608(b) must get the witness to admit the bad behavior on cross-examination or fail in his impeachment effort. Under rule 609, the judgment of conviction serves as an assurance that the witness in fact performed the misdeed, because either (1) a previous jury found beyond a reasonable doubt in the course of a due process trial proceeding that the witness committed the offense or (2) the witness pled guilty. On the other hand, it often is less clear whether deceptive conduct elicited under rule 608(b) actually occurred, because the question of its occurrence has not gone through any such judicial refining process. Thus, rule 608(b) impeachment is potentially far more open-ended and prejudicial than the use of convictions under rule 609. Although the framers more carefully defined the underlying conduct in rule 609(a), put a specific ten-year time limit on the use of prior convictions in rule 609(b) and generally banned juvenile adjudications in rule 609(c), they did not include any similarly specific safeguards as to the use of "unprocessed" misconduct under rule 608(b). Moreover, rule much debate as to rule 609. See J. Weinstein & M. Berger, supra note 4, at 609-2 to -40. In contrast, Congress readily settled upon a draft that merely deleted the reference to "remoteness" in rule 608(b), substituted discretionary language, and included some supposedly clarifying language. Id. at 608-2 to -3.

228. See FED. R. EVID. 803(22). The courts seemingly have overlooked the important relationship between rule 803(22), which provides a hearsay exception for prior judgments of conviction, and rule 609, which assumes the judgment can prove the underlying conduct, and addresses the relevance and prejudice aspects of using varying types of prior judgments to impeach. This ignored nexus may tend to explain the questionable holdings that mere guilty verdicts are equivalent to "convictions" under rule 609. See United States v. Smith, 623 F.2d 627 (9th Cir. 1980) (guilty verdict was properly used to impeach despite fact of pending motion for judgment of acquittal); United States v. Vanderbosch, 610 F.2d 95 (2d Cir. 1979) (jury verdict admissible prior to entry of judgment of conviction); United States v. Duncan, 598 F.2d 839 (4th Cir.) (jury verdict admissible against defendant testifying on own behalf), cert. denied, 444 U.S. 871 (1979); United States v. Klein, 560 F.2d 1236 (5th Cir.) (jury's finding of guilt competent as impeachment evidence subject to explanation by counsel that finding may be set aside at later date), cert. denied, 434 U.S. 1079 (1977). In Duncan, the Fourth Circuit went so far as to approve the trial judge's suspension of the main trial to accept a witness' verdict of guilty in another case so that it could be used to impeach that witness. 598 F.2d at 864.

229. This further highlights the importance of tight discretionary control and enforcement upon counsel of a "good faith basis" for posing such impeachment questions. For a discussion of the need to require a good faith basis for impeachment, see infra notes 268-85 and accompanying text.

230. Compare FED. R. EVID. 609(a)-(d) with FED. R. EVID. 608(b). Of course,
609(a)(1) contains discretionary language tailored to protect the accused as a witness from unfairly prejudicial impeachment, whereas rule 608(b) makes no express differentiation for the delicate situation of the accused who takes the stand in his own defense.

It is suggested that the combination of imprecise terminology in rule 608(b) with the gaps in impeachment law noted above has produced much unnecessary confusion and wheel-spinning. The main offending passage is the first sentence of rule 608(b), which provides: "Specific instances of the conduct of a witness for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence." It is the use of the vague term "credibility" in this context, rather than the more specifically appropriate phrase "character for truthfulness," which seems to have caused the trouble. For example, if we accord "attacking his credibility" the perceptive application of rules 403 and 611(a)(3), which are expressly incorporated in the Advisory Committee's note to rule 608(b), could lead to the making of similar differentiations based on remoteness under rule 608(b), but it is unclear to what extent courts are likely to do so. The more specific language of rule 609 seemingly constitutes a stronger mandate to exclude evidence of remote misconduct. Cf. United States v. Kennedy, 714 F.2d 968, 973 (9th Cir. 1983) (employing a ten-year period to gauge remoteness of rule 608(b) misconduct evidence without citing rule 609(b)), cert. denied, 465 U.S. 1034 (1984).

Note that earlier drafts of rule 608(b) had required that the misconduct not be too "remote in time," but Congress deleted this phrase and added general discretionary language, presumably linked to rule 403. See J. WEINSTEIN & M. BERGER, supra note 219, at 608-2 to -3. The House Committee had alleged that the rule was ambiguous as to whether the courts should measure "remoteness" from the time of trial or from the time of the event. See H.R. REP. No. 650, supra note 57, at 10, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7075, 7084. In dealing with the veracity character of a witness under article VI, however, relevance should logically depend upon the existence of truthful propensity or lack thereof at the time of giving testimony.

The author believes that the next stage of rule reform should include a radical reexamination of rule 608(b). Some of the issues that ought to be explored include: (1) whether to preclude use of misconduct impeachment against the accused; (2) whether to impose a specific time limit on the age of the conduct in question such as ten years, as is done with convictions under rule 609(b), or a shorter period; (3) whether to limit the rule more specifically to acts involving "false statement" by analogy to rule 609(a)(2) on convictions; (4) whether to restrict or eliminate introduction of misconduct committed when the witness was a juvenile as in rule 609(d); and (5) whether, to avoid unfair surprise to the witness, to require the cross-examiner planning to impeach under rule 608(b) to afford the witness and the proponent advance notice of some sort. A small step toward reading rules 608(b) and 609 in pari materia has been suggested in a recent Ninth Circuit case. See United States v. Dickens, 775 F.2d 1056, 1058 (9th Cir. 1985) (court fortified its rejection of admissibility of prior associational conduct under rule 608(b) by invoking the explicit, more stringent standards of rule 609).
its plain meaning as including all recognized methods of making a witness appear less believable, then this sentence radically alters prior law that generally allowed the introduction of extrinsic evidence in the case of impeachment by prior conduct if relevant to bias and capacity. The framers clearly did not intend such a result.

As the same conduct by a witness may be a valid source of various inferences bearing in different ways upon believability, the generality of the quoted language of rule 608(b) has caused unnecessary confusion about the validity of other traditional avenues of admitting specific instances of conduct through extrinsic evidence. For example, if the witness had cashed a large but worthless check at a credit union, a reasonable trier of fact might draw any of the following inferences: that the witness was a fraud, that he was biased against credit unions, that he had a mental problem, or that his perception of the spurious appearance of the check was inferior. Only if the desired inference was that of intentional fraud as the basis for inferring a settled disposition to lie would the strictures of rule 608(b) come into play.

The troublesome terminology of rule 608(b) surfaced in United States v. Batts (Batts I), where the defendant had given a general impression of non-involvement with drugs on direct examination, and specifically denied any involvement with cocaine

232. For the seven recognized methods, see supra text accompanying note 147. See also C. McCormick, supra note 39, §§ 33-48.

233. For a discussion of the use of extrinsic evidence to show bias and capacity, see supra notes 161-69 (bias) & 170-75 (capacity) and accompanying text.


235. This poses the problem of “multiple admissibility.” The Federal Rules provide: “When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.” Fed. R. Evid. 105. Depending on the circumstances, a trial court might determine that no limiting instruction would be adequate to dispel unfair prejudice from the jurors’ minds and exclude the evidence altogether under rule 403. Cf. Fed. R. Evid. 105 advisory committee note (“A close relationship exists between this rule and Rule 403. . . .”).

236. 558 F.2d 513 (9th Cir. 1977), modified en banc, 573 F.2d 599 (9th Cir.), cert. denied, 439 U.S. 859 (1978).
on cross-examination, to which there was no objection. The trial
judge allowed the Government to put on extrinsic testimony that
the defendant had entered into a prior cocaine deal with an in-
formant. In its opinion, rather than treating the matter as one
involving “specific contradiction” and addressing the “collat-
eral/noncollateral” issue, the United States Court of Appeals for
the Ninth Circuit found that rule 608(b)’s ban on extrinsic evi-
dence was the major obstacle to admissibility. Declaring that “the
ultimate purpose of the rules of evidence should not be lost by a
rigid, blind application of a single rule of evidence,” the court
found authority for the necessary flexibility to obviate the per se
ban on extrinsic proof in the literature and in rule 102. Disre-
garding rule 608(b), the court of appeals affirmed the conviction.
About ten months later, however, after the appeal was reheard en
banc and returned to the panel, the Batts II court withdrew its
prior opinion and substituted one that, while reaffirming the con-
viction, relied on the ground that the extrinsic evidence was ad-
missible under rule 404(b) to rebut the defendant’s claim of lack
of knowledge about cocaine. The Batts I misinterpretation of
rule 608(b), however, remained in the Federal Reporter, mislead-
ing the Government, and at least one court into citing the
withdrawn opinion.

In the example proffered above about the bad check, it
makes a difference, if the impeacher later seeks to produce extrin-
sic proof of the incident, whether the predominant thrust of the
cross-examination was an attack on the witness’ character for
truthfulness or a challenge to his bias. Under the character im-
peachment theory, rule 608(b) stands as an absolute bar to calling
other witnesses to prove the witness’ bad conduct. Under the
theory of bias, however, the courts usually do allow extrinsic re-

237. Id. at 517.
239. 573 F.2d at 603.
240. See United States v. Herman, 589 F.2d 1191, 1196 (3d Cir. 1978) (Government argued that judge-made exception to rule 608(b) permits con-
tradic t by uncharged acts of misconduct when defendant’s own testimony places
his character or conduct in false light), cert. denied, 441 U.S. 913 (1979).
241. See United States v. Opager, 589 F.2d 799, 802-03 (5th Cir. 1979) (quoting Batts I for proposition that rule 608(b) should not bar evidence intro-
duced to contradict a witness’ testimony as to material issue of fact). Cf. State v.
Clark, 296 N.W.2d 359, 367-68 (Minn. 1980) (although accused claimed on di-
rect that he was not driving stolen car, admission of extrinsic evidence on rebut-
tal was held error under rule 608(b)).
In addition to the anomalous decisions relying upon Batts I, rule 608(b) arguably has been miscited in the context of "specific contradiction."\(^{243}\) Suppose that the accused takes the stand and makes gratuitous claims of having lived an altogether virtuous life and denies having had any association with, or knowledge of, a specific type of crime. The traditional view is that the trial court possesses discretion to permit the Government not only to cross-examine on the point, but also to call a witness to rebut or specifically contradict such a claim.\(^{244}\) The traditional view is supported by the justification that the accused has voluntarily "opened the door" to matters of personal history not otherwise admissible under the Federal Rules over objection, and has thereby waived the protections of the Federal Rules. A similar situation can arise with any witness who testifies on direct about relevant facts as to which there is extrinsic evidence available in rebuttal. In both areas, some trial courts have been beguiled by the broad language of rule 608(b) into citing the rule as pertinent.

In United States v. Opager,\(^{245}\) for example, a Government informant testified that he and the accused had worked in the same beauty salon in 1974, where the informant saw the accused use and sell cocaine. When the accused attempted to introduce business records of the salon showing that the informant did not work with the accused in 1974, the trial court excluded the evidence in reliance on the extrinsic evidence ban of rule 608(b). It took an appeal to the Fifth Circuit to rectify the misinterpretation of rule 608(b).\(^{246}\)

\(^{242}\) See United States v. Abel, 105 S. Ct. 465, 468 (1984) (concluding that evidence offered to impeach by showing bias was admissible because relevant and not unduly prejudicial).

\(^{243}\) See, e.g., United States v. James, 609 F.2d 36 (2d Cir. 1979) (finding error in trial judge's refusal under rule 608(b) to admit extrinsic evidence as to bias; distinguishing bias impeachment from character impeachment); United States v. Opager, 589 F.2d 799 (5th Cir. 1979) (reversing trial court's erroneous reliance on rule 608(b) to bar extrinsic evidence offered for purpose of specific contradiction); State v. Sonnenberg, 117 Wis. 2d 159, 344 N.W.2d 95 (1984) (court held that Wisconsin's rule 608(b) prevented state from calling witness to specifically contradict testimony of accused on cross-examination). For a further discussion of the cases misciting rule 608(b), see infra notes 245-46 (Opager), 247-49 (Sonnenberg) & 251-52 (James) and accompanying text.


\(^{245}\) 598 F.2d 799 (5th Cir. 1979).
608(b), and to recognize that the accused was not trying to show the propensity of the informant to lie generally, but was attempting to specifically contradict the informant on the single important fact of his prior employment.\footnote{246. Id. at 801-02. See also United States v. Vaglica, 720 F.2d 388, 394 (5th Cir. 1983) (prosecution incorrectly interpreted rule 608(b) to bar admission of evidence to contradict witness' testimony as to material issue of fact); United States v. Babbitt, 683 F.2d 21, 25 (1st Cir. 1982) (court held it proper to admit 1951 and 1964 arrests to rebut denial of police record; no citation to rule 608(b)); United States v. Contreras, 602 F.2d 1237, 1241-42 (5th Cir.) (rule 608(b) inapplicable to cross-examination on drug connection opened up on direct), cert. denied, 444 U.S. 971 (1979); Nimmo v. State, 607 P.2d 344, 350-51 (Wyo. 1980) (proper to contradict witness by extrinsic evidence as to relevant fact even though such evidence could be treated as misconduct evidence within rule 608(b)); Cf. United States v. DiMatteo, 716 F.2d 1361 (11th Cir. 1983), vacated, 105 S. Ct. 769 (1984). In DiMatteo, the trial court ruled that, if the defense called a particular witness, the prosecution would be permitted to impeach that witness through both cross-examination and extrinsic evidence. Consequently, the defense decided to forego calling the witness, and the defendant was convicted. 716 F.2d at 1364. On appeal to the Eleventh Circuit, the court of appeals reversed the conviction, holding that the trial court erred in its ruling because the Government had admitted at trial that it intended to use the extrinsic evidence to attack the witness' credibility. Id. at 1367. The Supreme Court vacated and remanded the Eleventh Circuit's decision. On remand, the court of appeals affirmed the conviction on the ground that the defense's failure to call the witness foreclosed the court's ability to review the claim of error. United States v. DiMatteo, 759 F.2d 831 (11th Cir. 1985).}

Even appellate courts can be misdirected by rule 608(b). In \textit{State v. Sonnenberg},\footnote{247. 117 Wis. 2d 159, 344 N.W.2d 95 (1984).} for example, a sexual child abuse case, the accused not only testified on direct that he was a happily married man and never sought sexual satisfaction from any woman other than his wife, but he specifically denied on cross that he had propositioned a woman to go to bed with him just ten days prior to the trial. The trial court permitted the prosecution to call a witness who testified that the accused had asked her to have sex with him in exchange for drugs a week and half before the trial. After being convicted of second-degree sexual assault, Sonnenberg appealed, asserting that this testimony was improperly admitted as impeachment. The Wisconsin Supreme Court held, \textit{inter alia}, that Wisconsin's version of rule 608(b)\footnote{248. Wis. Stat. Ann. \S 906.08(2) (West 1975).} prevented the state from calling the woman in question to rebut the accused. It is suggested that the court either misapplied rule 608(b) or failed to recognize that the state called the woman to "specifically contradict" a matter broached on direct examination by the accused, not to extrinsically prove collateral deceptive conduct to suggest
the lying disposition of the accused.\textsuperscript{249}

The bias impeachment vacuum noted above\textsuperscript{250} also has led some courts to rely upon rule 608(b) for guidance in this area even though the rule's total ban on extrinsic evidence clearly would contravene the common law tradition. In \textit{United States v. James},\textsuperscript{251} a securities fraud trial, a Government witness who was an unindicted coconspirator answered on cross that he did not expect his present testimony to benefit him in his own separate fraud proceeding. The district court then invoked rule 608(b) to preclude the accused from putting in extrinsic proof that the Government had promised the witness immunity. Finding error in the district court's construction of rule 608(b), the Second Circuit properly distinguished between extrinsic evidence as to bias—which traditional common law allows—and extrinsic evidence of misconduct bearing on veracity character—which rule 608(b) forbids.\textsuperscript{252}

It has been necessary for several other appellate courts to write opinions instructing the lower courts as to the distinctively different areas in which rule 608(b) and bias impeachment operate.\textsuperscript{253} In fact, a journey to the Supreme Court of the United States was seemingly necessary to reaffirm the continued viability of bias impeachment, and to distinguish it from the sphere of rule 608(b). During a bank robbery trial in \textit{United States v. Abel},\textsuperscript{254} the district court permitted the introduction of extrinsic evidence to rebut the defendant's denials of membership in a secret prison

\textsuperscript{249} Note that the matter may well have lacked "independent relevance," thus making the court's result sound on that basis. It is suggested only that rules 401 and 403 do not govern rule 608(b)'s per se ban of extrinsic evidence. Cf. \textit{State v. Leuin}, 11 Ohio St. 3d 172, 464 N.E.2d 552 (1984) (construing Ohio rule 608(b) as precluding extrinsic proof on matters addressed on direct). Note, however, the convincing dissent. \textit{Id.} at 175, 464 N.E.2d at 555 (Holmes, J., dissenting).

\textsuperscript{250} For a discussion of the Federal Rules' failure to address bias impeachment, see supra notes 155-69 and accompanying text.

\textsuperscript{251} 609 F.2d 36 (2d Cir. 1979), \textit{cert. denied}, 445 U.S. 905 (1980).

\textsuperscript{252} See 609 F.2d at 45-47.

\textsuperscript{253} See, \textit{e.g.}, \textit{United States v. Diecidue}, 603 F.2d 535, 550 (5th Cir. 1979) (rejection by accused of homosexual advances by Government witness was admissible to show bias and not governed by rule 608(b)), \textit{cert. denied}, 445 U.S. 946 (1980); \textit{United States v. Ruiz}, 579 F.2d 670, 672-74 (1st Cir. 1978) (suspension of defense witnesses from police force for brutality was within "bias exception" to rule 608(b)); \textit{United States v. Brown}, 547 F.2d 438, 445-46 (8th Cir.) (rule 608(b) does not ban extrinsic proof offered to rebut claim that defense witness was hostile to defendant), \textit{cert. denied}, 430 U.S. 937 (1977); \textit{State v. Worley}, 100 N.M. 720, 723, 676 P.2d 247, 249-50 (1984) (prior similar sex act by defense witness was relevant on bias, and not governed by New Mexico's rule 608(b)).

gang whose members were bound by a pledge to kill or commit perjury to help other members. The Ninth Circuit reversed the trial court, mainly on the theory that mere membership was not sufficient to show a propensity to lie. Unanimously reversing the Ninth Circuit, the Supreme Court examined the tradition of bias impeachment and concluded that, despite its absence from the Federal Rules, there was no intention to abolish this method of impeachment. The Court suggested that either federal common law or rules 401 and 403 would govern bias impeachment. Apparently utilizing the theory of "multiple admissibility," but without citing rule 105, the Court sidestepped the possible applicability of rule 608(b), and was content to declare, "It would be a strange rule of law which held that relevant, competent evidence which tended to show bias on the part of a witness was nonetheless inadmissible because it also tended to show that the witness was a liar." The presence of Abel on the books, however, might not be adequate to bring home to lawyers and judges in the hurly-burly of everyday trial work the important distinctions discussed above. The most effective way to bring home the point would be to adopt clarifying amendments to the Federal Rules.

There are three other problems about rule 608(b)—one of them is a definitional problem; the second is an implication that perhaps ought to be brought out into the open; and the third is a textual problem.

255. 707 F.2d 1013, 1016-17 (9th Cir. 1983). The court noted that the evidence—that the witness was a member of a gang whose members had pledged to commit perjury to protect each other—was offered to lead the jury into drawing the conclusion that the witness' testimony was false. Id. at 1016. The court stated that the trial court's broad discretion to admit evidence does not extend to "allowing impeachment by association." Id.

256. 105 S. Ct. at 468-69. The Court reasoned that given the strength of the common-law authority permitting the use of extrinsic evidence in impeachment for bias, it was doubtful that the drafters of the Federal Rules intended to eliminate this avenue of impeachment. Id. at 468.

257. Id. at 471.

258. There also may be some confusion as to the relationship between rule 608(b) and capacity impeachment. Cf. United States v. Lindstrom, 698 F.2d 1154 (11th Cir.), cert. denied, 464 U.S. 783 (1983). In Lindstrom, the Eleventh Circuit reversed a mail fraud conviction finding, inter alia, that the trial court unconstitutionally restricted the cross-examination of a key witness which was intended to have shown that the witness had a vendetta against the defendants resulting from psychiatric illness. 698 F.2d at 1159. Although the reasoning of Lindstrom is unclear, the court did cite rule 608(b) in connection with its discussion of the district court's severe restrictions on defense cross-examination of a Government witness' mental problems. See id. at 1162.

259. For proposed language which it is believed would effectively drive home the point, see infra text accompanying notes 265-67, 275-85.
Rule 608(b)'s primary definitional problem stems from the rule's use of the term "extrinsic evidence" without defining the term.\textsuperscript{260} The main difficulty has been whether the extrinsic evidence restrictions only ban the calling of other witnesses—usually at a later stage of the trial—or whether they also preclude the introduction of relevant documentary evidence during the process of cross-examination and impeachment of the witness.

The Third Circuit soundly opted for the former interpretation in the civil rights action of \textit{Carter v. Hewitt},\textsuperscript{261} ruling that the law should not classify the mere introduction of a document during cross-examination as "extrinsic evidence" as used in rule 608(b), and that the "core concerns" of the rule are to preclude the confusion and time consumption of calling other witnesses to establish the prior misconduct.\textsuperscript{262} The Third Circuit's interpretation is consistent with that employed by Wigmore.\textsuperscript{263} Logically, this meaning more clearly implicates the trial administration concerns of rule 403.

A few courts, however, have given a broader reading of the term "extrinsic"—apparently to preclude any source of proof other than the oral question and answer between counsel and witness.\textsuperscript{264} This more expansive construction of "extrinsic evidence" under rule 608(b) is broader than the construction courts have

\textsuperscript{260}. Even the California Evidence Code, with its useful definition sections, fails to define the term. \textit{See generally CAL. EVID. CODE §§ 100-250 (West 1966)}.

\textsuperscript{261}. 617 F.2d 961 (3d Cir. 1980). The evidence in question was a letter written by a civil rights plaintiff asserting that the suit was a "set up" to put pressure on the prison. \textit{Id.} at 964-65.

\textsuperscript{262}. \textit{Id.} at 970. The court also noted that the precedents cited by the plaintiff, unlike the situation in \textit{Carter}, involved denials of the impeaching fact by the witness. \textit{Id.} On the general trial efficiency goals of restrictions on extrinsic evidence in the area of impeachment, see United States v. Walton, 602 F.2d 1176, 1180 (4th Cir. 1979) (no "trial within a trial"); United States v. Simmons, 444 F. Supp. 500, 507 (E.D. Pa. 1978) ("avoid minitrials on wholly collateral matters which tend to distract and confuse the jury").

\textsuperscript{263}. \textit{See 3A J. WIGMORE, supra note 39, § 878. See also United States v. Zandi, 769 F.2d 229, 236-37 (4th Cir. 1985) (no violation of ban on extrinsic evidence under rule 608(b) for Government to introduce various false documents whose authorship defendant admitted during cross-examination). For a discussion of the good faith basis, see M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE §§ 607.2, 613.3 (1981)}.

\textsuperscript{264}. \textit{See, e.g., United States v. Leake, 642 F.2d 715, 719 n.2 (4th Cir. 1981) (indictments, warrants, and judgments were inadmissible under rule 608(b), but could have been used as "aid in phrasing questions" about specific misconduct). See also United States v. Whitehead, 618 F.2d 523, 529 (4th Cir. 1980) (holding that bar association suspension documents constituted extrinsic evidence, but failing to clarify whether examiner could have admitted documents through witness being impeached).
applied to the same term under rule 613(b).\textsuperscript{265} Rule 613(b) apparently uses the term “extrinsic evidence” in contradistinction to counsel’s effort on \textit{cross-examination} to get the witness himself to admit to authorship of a prior inconsistent statement. For purposes of rule 608(b), the better construction would seem to be that “extrinsic” does not include any evidence for which the examiner can lay a proper foundation for admissibility during cross-examination of the witness being impeached.\textsuperscript{266} Although such cross-examination evidence properly falls outside the \textit{per se} ban of rule 608(b), there may be trial situations wherein the more flexible discretionary standards of rule 403 might limit the introduction of documentary misconduct evidence even during cross-examination. An example of such a situation might be the introduction of voluminous prior statements admitted by the witness to be authentic. Although universal judicial acceptance of Wigmore’s approach to extrinsic evidence might be satisfactory, such acceptance may be long in coming. Those leaning toward codification technique probably would stress the efficiency of substituting the phrase “calling another witness” for “extrinsic evidence” in rule 608(b).\textsuperscript{267}

The second question raised by rule 608(b) involves a quasi-ethical matter not addressed by the rule, but arguably important to its just functioning—the judicially-fashioned requirement of “good faith basis” on the part of the examiner.\textsuperscript{268} Without such a standard, one can imagine the possibility of unscrupulous counsel framing groundless questions about recent and seemingly relevant misconduct by the witness whose righteous denials would hardly remove the sting from the inquiries.\textsuperscript{269} A textual basis for

\textsuperscript{265} See United States v. Fuentes-Lozano, 600 F.2d 552, 553 (5th Cir. 1979) (codefendant’s bail bond executed by defendant was admissible as evidence of prior inconsistent statement impeaching defendant’s statement that he did not know codefendant); Hilyer v. Howat Concrete Co., 578 F.2d 422, 427 (D.C. Cir. 1978) (statement given to police was admissible as extrinsic evidence used for impeaching witness regarding prior inconsistent statement under rule 613(b)).

\textsuperscript{266} Cf. United States v. Simpson, 709 F.2d 903, 907-09 (5th Cir.) (no error committed in introducing documentary evidence of SEC injunction where witness admits involvement with securities violations), \textit{cert. denied}, 464 U.S. 942 (1983). The examiner has failed to lay the foundation, however, if the witness sought to be impeached denies the authenticity of the document, or that it refers to him, or that the misconduct asserted therein actually occurred. In such a case, the prohibition of rule 608(b) would prevent the examiner from calling further witnesses to prove the fact of the principal witness’ misconduct.

\textsuperscript{267} This change presumably could be made in rule 613(b) as well.

\textsuperscript{268} For a brief reference to good faith as to cross-examination of character witnesses, see 3A J. \textit{Wigmore}, \textit{supra} note 39, § 988.

\textsuperscript{269} Of course, there is a built-in risk of psychological backfire against
demanding a good faith foundation for questions under rule 608(b) can be found not only in the discretionary controls built into rule 608(b), 270 but also in the express references to rule 403 in the Advisory Committee’s note to rule 608(b) 271 and in the duty of trial judges under rule 611(a)(3) to “protect witnesses from harassment or undue embarrassment.” 272

Unfortunately, the rules of professional ethics are less than clear on this precise problem. The ABA’s Model Code of Professional Responsibility, which has been legislatively or judicially adopted in most jurisdictions, appears to ban only argument to the jury based on irrelevant or inadmissible evidence and the asking of questions with no reasonable basis in relevance which are intended to degrade a person. 273 In the new Model Rules of Professional Conduct, rule 3.3(a) does refer to the fabricating of evidence, 274 which is closer to the mark, but may not cover the impeaching question that rests on a flimsy or speculative basis, such as multiple hearsay or unconfirmed rumor.

Regardless of the presence or absence of textual authority, counsel if the jury becomes aware that counsel is damaging a witness in bad faith.

270. See Fed. R. Evid. 608(b). The rule provides: “Specific instances of misconduct may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination . . . .” Id.

271. Fed. R. Evid. 608(b) advisory committee note. The note states: “Also, the overriding protection of Rule 403 requires that probative value not be outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury, and that of Rule 611 bars harassment and undue embarrassment.” Id.


273. See Model Code of Professional Responsibility DR 7-106(c) (1978). The disciplinary rule provides:

In appearing in his professional capacity before a tribunal, a lawyer shall not: (1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence. (2) Ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.

Id.

274. Model Rules of Professional Conduct Rule 3.3(a) (1983) (“A lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false.”). See United States v. Greer, 643 F.2d 280 (5th Cir.), cert. denied, 454 U.S. 854 (1981). The Greer court held that it was not improper for the trial judge to warn an inexperienced cross-examiner that the Model Code of Professional Responsibility requires a basis for inquiry into possible bribes furnished by a Government witness. 643 F.2d at 282. The provision presumably relied upon by the trial judge provides:

In his representation of a client, a lawyer shall not: file a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

the vital question is what it should mean to require that counsel have a "good faith basis" for asking about prior misconduct or about any other impeaching matter. Three alternatives suggest themselves: (1) that counsel must have credible and admissible evidence at hand to prove the occurrence of the misconduct; (2) that counsel must be aware of the existence of admissible evidence but need not have such ready to introduce into evidence; or (3) that counsel must be able to show the court that he or she learned of the misconduct from reasonably reliable sources whether or not they qualify for admission under the Federal Rules.

Because of the endless variety of impeachment possibilities, the first approach might demand that every trial attorney have a witness-room full of witnesses prepared to give backup testimony. Such an approach would unduly inhibit impeachment by imposing overwhelming burdens, delays, and expenses on showing good faith.275 Thus, the preferable choice would seem to devolve upon either the second or third approach. Pretrial investigation and discovery might be expected to turn up admissible testimony and documentary records sufficient to satisfy the second approach. In light of the typically variable contingencies of trial, however, adoption of the second approach probably would require a disproportionate effort on behalf of the party seeking to utilize rule 608(b). By analogy to the "reasonable reliance" standard for the bases of expert opinion found in rule 703,276 the third choice might strike the proper balance.

The reported decisions are few and inconsistent as to what constitutes a "good faith basis." In regard to a good faith basis for questioning defense character witnesses about an alleged prior arrest for receiving stolen goods, the Supreme Court in Michelson v. United States277 cryptically remarked that the trial judge should ascertain out of the jury's hearing that "the target of

275. There also may be a technical question of whether, since rule 608(b) forbids actually putting extrinsic witnesses on the stand in rebuttal, these mere "backup" persons would be subject to a subpoena. See generally Fed. R. Civ. P. 45 (referring to subpoenas for "attendance" of witnesses at trial hearing); Fed. R. Crim. P. 17 (same).

276. See Fed. R. Evid. 703. The rule provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Id.

277. 335 U.S. 469 (1948).
the question was an actual event." 278 Some lower federal courts
have alluded to requiring that counsel be "in possession of facts
supporting his belief," 279 or that the judge consider the "truth"
of the basis for impeachment of the character witness. 280 Other
courts have approved counsel's reliance on otherwise inadmissi-
ble FBI "rap sheets" rather than the certified copy of a convic-
tion, 281 upon the Government's offer to prove the facts, 282 or
upon out-of-court admissions of the defendant. 283 The disagree-
ment among the courts seems to indicate that there may be no
more specific way to define the notion, and that the third ap-
proach delineated above might be best.

The Fifth Circuit recently found good faith where a prosecu-
tor cross-examined a defense character witness as to whether he
knew that defendant's bus had been used to transport large

278. Id. at 481. Cf. Fed. R. Evid. 103(c). The rule provides: "In jury cases,
proceedings shall be conducted, to the extent practicable, so as to prevent inad-
missible evidence from being suggested to the jury by any means, such as mak-
ing statements or offers of proof or asking questions in the hearing of the jury." Id.
(emphasis added). As the Advisory Committee points out, "The judge can fore-
close a particular line of testimony and counsel can protect his record without a
series of questions before the jury designed at best to waste time and at worst 'to
waft into the jury box' the very matter sought to be excluded." Id. advisory
committee note. See also United States v. Reese, 568 F.2d 1246, 1249 (6th Cir.
1977) (where prosecutor conducts cross-examination of defense character wit-
ness on basis of rumors, trial judge should first conduct voir dire inquiry into
"whether there were any such rumors" to avoid prejudicial "random shots");
United States v. Wells, 525 F.2d 974, 977 (5th Cir. 1976) (trial judge should
conduct in camera inquiry on "good faith factual basis" for cross-examination of
center witnesses).

279. See, e.g., United States v. Tolliver, 665 F.2d 1005 (11th Cir. 1979) (lim-
itation of cross-examination was in accord with general rule allowing questions
tending to incriminate or degrade witness only where counsel is in possession of
facts supportive of belief that witness committed offense), cert. denied, 456 U.S.
955 (1982).

280. See, e.g., United States v. Baskes, 649 F.2d 471, 477 (7th Cir. 1979)
(trial judge must consider truth of basis for impeaching questions before al-
lowing cross-examination of character witness), cert. denied, 450 U.S. 1000

281. See, e.g., United States v. Scott, 592 F.2d 1139, 1143 (10th Cir. 1979)
(use of rap sheet was sufficient to insure that prosecution is not merely taking
"shot in the dark").

282. See, e.g., United States v. Bright, 588 F.2d 504, 512 (5th Cir.), cert. de-
 nied, 440 U.S. 972 (1979). In Bright, the Government offered to prove that the
accused had received a letter of reprimand from the state bar as the "factual
basis" for cross-examination of a defense character witness. The court con-
cluded that this proffer of evidence was sufficient to demonstrate a "good-faith
factual basis for the incidents inquired about." 588 F.2d at 512.

283. See, e.g., United States v. Crippen, 570 F.2d 535, 539 (5th Cir. 1978)
(defendant's testimony before grand jury provided sufficient basis for cross-ex-
amination of character witness concerning prior deceptive acts of defendant),
amounts of cocaine.\textsuperscript{284} Although the prosecutor had relied upon a photograph apparently taken inside defendant’s bus, it turned out that the photo was taken inside a converted railroad car, not the defendant’s bus. This case tends to suggest that good faith might have two elements: one is the subjective belief in the matter by the examiner and the other would be a reasonable basis for that belief. Despite the difficulty of definition, however, the concept of good faith basis is vital to proper and fair functioning of such sensitive provisions as rule 608(b). For this reason, the amendments to the Federal Rules proposed in this article include reference to a “good faith factual basis.”\textsuperscript{285}

The final textual problem with rule 608(b) lies in its use of the term “cross-examination” of the witness. Although arguments might be made that a party should not be allowed to impeach its own witness on “direct” examination by eliciting that witness’ prior misconduct, rule 607 as now written is not so limited. Other than the use of the restrictive term “cross-examination” in rule 608(b), there is no suggestion that a proponent cannot employ any authorized mode of impeaching the witness that the opponent could otherwise use. The Tenth Circuit has relied upon this language to uphold a trial court ruling that prevented a party from eliciting prior misconduct on direct examination.\textsuperscript{286} Unless the restrictive language of rule 608(b) is accepted as limiting the scope of impeaching one’s own witness under rule 607, the term “examination” should be substituted.\textsuperscript{287}

D. Cleaning up Rule 609 on Prior Conviction Impeachment

Much controversy has centered on rule 609, and much has been written about it.\textsuperscript{288} It is not without trepidation that this article includes this subject as one of several points in a piece attempting a succinct analysis of article VI. This section of the article addresses the major glitches in the drafting of the rule, and offers a few suggestions on some of the current controversies regarding the interpretation of rule 609(a).

\begin{footnotesize}
\begin{enumerate}
\item See United States v. Nixon, 777 F.2d 958 (5th Cir. 1985).
\item For the relevant proposed language, see supra text preceding note 187.
\item See Bennett v. Longacre, 774 F.2d 1024, 1027 (10th Cir. 1985).
\item For a discussion of a similar use of the term cross-examination in rule 609(a), see infra text accompanying notes 293-99.
\item See, e.g., 3 D. LOUISELL & C. MUELLER, supra note 18, §§ 314-324 at 284-376; 3 J. WEINSTEIN & M. BERGER, supra note 4, ¶ 609[01]-[11], at 609-46 to -109.
\end{enumerate}
\end{footnotesize}
Presumably for fear of inflaming the jury into convicting the accused on less than convincing evidence as to guilt of the particular crime charged, rule 404(a) makes prosecution evidence of bad character inadmissible to prove that the accused acted in accordance with his alleged pre-existing propensity.\textsuperscript{289} Under rule 404(a)(3), one of the exceptions to the ban involves the attacks on a witness' character for truthfulness regulated by rules 607, 608, and 609.

In the form in which rule 609(a) left the Supreme Court, it appeared to authorize for purposes of impeachment the admission of evidence of all felonies and of all crimes of "dishonesty or false statement," whatever the grade of the offense.\textsuperscript{290} There was no express mention, however, of the intervention of discretionary screening by the trial judge, though conceivably a party could have made an argument invoking rule 403 to that end.

With the realization that impeachment by prior conviction can be peculiarly prejudicial when the witness is the accused, the congressional committees labored to draft provisions that both (1) recognized the potential relevance to veracity character of some types of evidence of prior convictions, and (2) minimized the danger either that a jury would convict the accused based on his record rather than on the evidence, or that the jury would never get to hear the accused's testimony because of his fear of exposing his record from the stand in the course of impeachment.\textsuperscript{291} The basic compromise was to set up two classes of convictions. Courts were to admit highly probative convictions—those involving "dishonesty or false statement" whatever the grade of the offense—and they were to require that less probative offenses be felonies. In addition, where the prior conviction was

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{289} See Fed. R. Evid. 404(a). For an overview of the "propensity rule," see 2 J. Weinstein & M. Berger, supra note 4, at \S 404(04), at 404-28 to -40.
\item \textsuperscript{290} Supreme Court Draft, supra note 28, at 269 (rule 609(a)). The Supreme Court draft provided:
  \begin{enumerate}
  \item General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (2) involved dishonesty or false statement regardless of the punishment.
  \end{enumerate}
  \textit{Id.}
\item \textsuperscript{291} See S. Rep. No. 1277, 93d Cong., 2d Sess. 14, \textit{reprinted in} 1974 U.S. Code Cong. & Ad. News 7051, 7061. The report states, "In your committee's view, the danger of unfair prejudice is far greater when the accused, as opposed to other witnesses, testifies, because the jury may be prejudiced not merely on the question of credibility but also on the ultimate question of guilt or innocence." \textit{Id.}
\end{itemize}
\end{footnotesize}
of the accused, the courts were to subject each felony conviction to a prejudice-probativeness balancing analysis before admitting it for impeachment. In the course of modifying the Supreme Court version of rule 609(a), however, Congress inserted several awkward and unfortunate phrases.

The Supreme Court draft made no reference to the mode of proving prior convictions, but Congress did so by requiring such convictions to be "elicited from [the witness] or established by public record during cross-examination." Although the stated purpose was merely to establish that rule 609 is not available to impeach someone who does not take the stand, literal compliance with this language would create practical difficulties.

First, one could read the limitation to "cross-examination" as meaning that a direct examiner cannot impeach his or her own witness under rule 607 by prior convictions. This is not an implausible reading since a few jurisdictions that do permit parties to impeach their own witnesses limit the method of impeachment to prior inconsistent statements. Nothing in the history or language of rule 607, however, suggests any such limitation. In fact, there are a few federal court decisions holding that the Government can "impeach" its own witnesses through evidence of prior convictions. Of course, a court arguably could construe hostile "direct" examination, which is designed to impair the credibility

\[292. \text{See Fed. R. Evid. 609(a). The present rule provides:}\]

(a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or

(2) involved dishonesty or false statement, regardless of the punishment.

\[Id.\]


\[295. \text{See United States v. Wooldridge, 572 F.2d 1027 (5th Cir.), cert. denied, 439 U.S. 849 (1978); cf. United States v. Halbert, 640 F.2d 1000 (9th Cir. 1981) (Government can elicit on direct that codefendants had pled guilty to charges stemming from same mail fraud scheme). It should be asked, however, whether such attempts are genuine efforts to impair the credibility of the witnesses or simply a tactic to take the sting out of an adversary's impeachment efforts.}\]
of one’s own witness, as “cross” examination in effect—if not in temper. To so construe the examination, however, would distort the conventional understanding of the difference between direct and cross.\footnote{296}

Second, Congress presumably tried to deal with the case where a witness denies or forgets a prior conviction,\footnote{297} by inserting language providing that the fact of a prior conviction may be “established by public record during cross-examination.” This technique might be practical where merely showing the certified record to the witness will, in fact, “refresh” his memory or awaken his conscience, and lead him to admit the conviction. On the other hand, it makes no sense to apply the technique where the examiner, though in good faith, doesn’t happen to have the certified record in hand at the time of cross-examination, or merely has an uncertified copy that might not be admissible. Nor is it of much help when the witness, confronted with the conviction record, denies that he is the “same John Smith who was convicted of robbery in 1984.” In such an instance, the examiner will not be able to establish the conviction “by public record during cross-examination.” If the examiner desires to pursue the matter, he or she will have to authenticate the conviction record by extrinsic evidence and then call some witness with personal knowledge of the witness’ identity as the person named in the judgment of conviction, e.g., the arresting officer or the court clerk.\footnote{298} Perhaps the simplest statutory solution to these unnecessary difficulties would be to delete the phrase “during cross-examination.”\footnote{299}

\footnote{296. The California Evidence Code defines direct examination as “the first examination of a witness upon a matter that is not within the scope of a previous examination of the witness,” and cross-examination as “the examination of a witness by a party other than the direct examiner upon a matter that is within the scope of the direct examination of the witness.” See Cal. Evid. Code §§ 760, 761 (West 1966). It should be asked, however, whether the latter definition may be too narrow, since bias and character impeachment seldom have anything to do with the content of the direct, but rather probe the personal qualities of the witness. In limiting the scope of cross-examination, the Federal Rules wisely make express allowance for impeachment. See Fed. R. Evid. 611(b).

297. See S. REP. No. 1277, 93d Cong., 2d Sess. 15, reprinted in 1974 U.S. Code Cong. & Ad. News 7051, 7061. (“It is to be understood, however, that a court record of a prior conviction is admissible to prove that conviction if the witness has forgotten or denies its existence.”).


299. Cf. A Code of Evidence for the State of New York § 609(a) (West 1982) (proposed draft by New York State Law Revision Comm’n). The term “public record” may also be too restrictive because it arguably bars testimonial proof of a conviction when the record is lost. If found to be so, one could delete the whole phrase added by Congress between the word “admitted” and the
Central to congressional thinking on rule 609(a) was concern for the dilemma faced by the accused with a conviction record: If he takes the stand in his own behalf, he risks the chance that the prosecution will attempt to impeach him by various prior convictions (perhaps for the identical offense), and if he does not take the stand in order to avoid the "bad man" effect of impeachment, he deprives himself of a chance to tell the jury his side of the case. As a compromise to avoid the seemingly automatic impeachment of the accused that the 1972 Supreme Court draft presumably would have allowed, Congress specified that the trial judge may allow impeachment by evidence of a felony conviction not involving dishonesty or false statement, "only if . . . the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant." As the legislative comment clearly suggests, and most courts have since ruled, "defendant" means none other than "the accused." Since there is some indication of confusion among bench and bar on this point, no obvious reason comes to mind for not changing "defendant" to "the accused in a criminal case."

There are several other important issues involving interpretation of the word "but" in rule 609(a). In order to clearly differentiate federal rule 609 from federal rule 608(b), however, it would be important to make some express reference to the permissibility of extrinsic proof of a conviction which is not admitted by the witness. For a critique of the congressional terminology, see J. Weinstein & M. Berger, supra note 219, at 609(12).

300. For the text of the Supreme Court's draft of rule 609(a), see supra note 290.

301. FED. R. EVID. 609(a).

302. See CONF. REP. NO. 1597, 93d Cong., 2d Sess. 9-10, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7098, 7103 [hereinafter cited as Conference Committee Report]. The report states, "Such evidence should only be excluded where it presents a danger of improperly influencing the outcome of the trial by persuading the trier of fact to convict the defendant on the basis of his prior criminal record." Id.


304. See, e.g., Howard v. Gonzales, 658 F.2d 352, 358-59 (5th Cir. 1981) (applying rule 609(a)(1) to the impeachment of a civil rights plaintiff).

305. Cf. ALASKA R. EVID. 609(b) (referring to "the accused in a criminal case"); FLA. STAT. ANN. § 90.610 (West 1979) (using the term "accused"); W. VA. R. EVID. 609(a)(1) (using phrase "a witness accused in a criminal case."). Cf. HAWAII REV. STAT. § 626-1, Rules of Evidence Rule 609(a) (Special Pamphlet 1980) (retaining the term "defendant" but clarifying its meaning by attaching modifier "in a criminal case."). Interestingly enough, present federal rule 609(d) allows limited use of a juvenile adjudication as to witnesses "other than the accused."
tation of rule 609(a)(1) in addition to those discussed above. First, there is the question of whether the phrase "prejudicial effect to the defendant" was intended only to limit judicial consideration of the potential prejudice to the accused where he testifies as a witness, or whether Congress wanted courts to exercise discretion and determine whether discrediting other defense witnesses by excessive felony impeachment would injure the defendant by casting a cloud over his case as a whole. The Conference Committee language seems to suggest the narrower reading, whereas the Chairman of the House Judiciary Committee declared that rule 609(a)(1) mandates evaluation of prejudice to the entire defense case. While the matter is not free of doubt, it would seem that the Conference Committee interpretation should carry the day. In addition, the standards for impeaching defense witnesses other than the accused should be subsumed into the solution arrived at on the next topic rather than be governed by the higher standard of rule 609(a)(1).

The second major unsettled issue is whether evidence of all felony convictions less than ten years old as defined in rule 609(b) are automatically admissible for purposes of impeaching witnesses other than the accused in a criminal prosecution. Several lower federal courts support the "preemption" view that the singling out of the accused for discretionary screening by the trial judge in rule 609(a)(1), and the rule's provision of a balancing standard more restrictive than that found in rule 403 imply


The danger of prejudice to a witness other than the defendant (such as injury to the witness' reputation in his community) was considered and rejected by the Conference as an element to be weighed in determining admissibility. It was the judgment of the Conference that the danger of prejudice to a nondefendant witness is outweighed by the need for the trier of fact to have as much relevant evidence on the issue of credibility as possible. Such evidence should only be excluded where it presents a danger of improperly influencing the outcome of the trial by persuading the trier of fact to convict the defendant on the basis of his prior criminal record.

Id.


308. Under rule 609(a)(1), "probative value" must outweigh "prejudice to the defendant" to gain admissibility, whereas under rule 403, relevant evidence comes in unless probative value is "substantially" outweighed by unfair preju-
that automatic admissibility is compelled by the rule.\textsuperscript{309} Others view rule 403 as providing a pervasive residual discretion that, like water, rushes in to occupy all space not occupied by rule 609(a)(1).\textsuperscript{310} A third alternative interpretation is that, although rule 609(a)(1) preempts the balancing analysis found in rule 403, admissibility remains conditioned by rule 611(a)(3). Under this theory, the trial judge should, as under rule 608(b), exercise a discretionary control over conviction impeachment to protect witnesses from “harrassment or undue embarrassment.”\textsuperscript{311}

On balance, it would seem that Congress appeared to operate on the assumption that rule 611(a)(3) and the ten-year limits of rule 609(b) provided adequate protection to witnesses other than the accused without the need for application of rule 403. This appearance stems from the fact that Congress used the mandatory phrase “shall be admitted” in rule 609(a) and singled out only the accused for special discretionary screening. Unless the courts are prepared to read rule 611(a)(3) fairly expansively, however,\textsuperscript{312} the Federal Rules arguably ought to be amended to

dice, etc. \textit{See Fed. R. Evid.} 403. Thus, where prejudice and probative value are deemed in equipoise, the trial judge should exclude the evidence under rule 609(a)(1), but admit it under rule 403.

\textsuperscript{309} \textit{See}, e.g., Diggs v. Lyons, 741 F.2d 577, 582 (3d Cir. 1984) (trial court lacks discretion in determining whether to admit evidence of prior conviction for purposes of impeachment of civil plaintiff), \textit{cert. denied}, 105 S. Ct. 2157 (1985); United States v. Nevitt, 565 F.2d 406, 408-09 (9th Cir. 1977) (court has no discretion as to Government witnesses), \textit{cert. denied}, 444 U.S. 847 (1979); United States v. Thorne, 547 F.2d 56 (8th Cir. 1976). \textit{See also} C. \textsc{McCormick}, \textit{supra} note 39, at 94. \textit{But see} Diggs, 741 F.2d at 582-83 (Gibbons, J., dissenting).

\textsuperscript{310} \textit{See}, e.g., Diaz v. Cianci, 737 F.2d 138 (1st Cir. 1984) (rule 403 application upheld as to juvenile conviction of plaintiff for assault in transaction giving rise to the civil suit); Czajka v. Hickman, 703 F.2d 317 (8th Cir. 1983) (rule 403 applied to admissibility of convictions to impeach civil plaintiff). \textit{Cf.} Shows v. \textsc{M/V} Red Eagle, 695 F.2d 114, 118-19 (5th Cir. 1983) (holding that rule 403 standard was violated in civil action by conviction impeachment, while not deciding applicability of rule 609(a)(1) in civil actions); Tussel v. \textsc{Witco} Chem. Corp., 555 F. Supp. 979 (W. D. Pa. 1983) (strict standards of rule 609(a)(1) apply only to accused in criminal proceeding; rule 403 governs in civil actions); Moore v. \textsc{Volkswagenwerk}, 575 F. Supp. 919, 921-23 (D. Md. 1983) (applying rule 403 to conviction impeachment in civil action).

\textsuperscript{311} \textit{See Fed. R. Evid.} 611(a)(3). The Advisory Committee’s note to rule 611(a)(3) explains that the rule “calls for a judgment under the particular circumstances whether interrogation tactics entail harassment or undue embarrassment. Pertinent circumstances include the importance of the testimony, the nature of the inquiry, its relevance to credibility, waste of time, and confusion.” \textit{Id.} advisory committee note. Although the above discretionary factors resemble those of rule 403, the focus here appears to be upon the interests of the witness rather than of the party calling the witness. \textit{Cf.} \textit{Unif. R. Evid.} 609(a)(1) (1974) (broadly extending discretionary protection “to a party or the witness”).

\textsuperscript{312} \textit{Cf.} United States v. Colyer, 571 F.2d 941, 946-47 n.7 (5th Cir.) (suggesting that rule 611(a)(3) would have provided support for trial judge’s exclu-
authorize the trial judge to employ rule 403 to protect civil witnesses against unfairly prejudicial impeachment and, consistently with the requirements of the confrontation clause, to protect Government witnesses in criminal cases along the same lines.

The following illustration points up the difficulty of dispensing with discretionary controls on conviction impeachment in civil actions. Suppose the plaintiff in a personal injury case alleges that defendant ran into him while he was trying to cross a street on a bicycle. Defendant takes the stand to explain his version of the accident. Plaintiff's counsel has a certified copy of a court judgment showing that defendant had been convicted of vehicular homicide, which under governing law is punishable by up to three years in prison. On the one hand, the offense qualifies as a felony under rule 609(a)(1) and, on that basis, would come within the "shall be admitted" command of the rule. On the other hand, it would be hard to justify exclusion on the grounds that plaintiff is engaging in "harrassment or undue embarassment" of defendant within the intendment of rule 611(a)(3). Despite its almost non-existent probative value on veracity and its high potential for portraying defendant as a dangerous driver, there appears to be no way to prevent the use of this conviction for impeachment if the court must read rule 609(a)(1) as impliedly precluding resort to the balancing analysis of rule 403.313

Rule 609(a)(2) poses a problem similar to that raised by rule 609(a)(1). Specifically, the issue raised by rule 609(a)(2) is whether all crimes "of dishonesty or false statement" less than ten years old are automatically admissible against all types of witnesses in all kinds of litigation, or whether rule 403 provides some form of backdrop for discretionary exclusion. Here the legislative history quite strongly indicates an intention to erect a per se rule of admissibility due to the high probative value of such convictions on veracity character.314 Moreover, the courts generally agree on this interpretation, even in the a fortiori situation of use against an accused.315 On this point, no amending language

313. The fact pattern is from M. GRAHAM, EVIDENCE TEXT, RULES, ILLUSTRATIONS AND PROBLEMS 610 (NITA, 1983).

314. See Conference Committee Report, supra note 302, at 9, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7098, 7103. The report states, "The admission of prior convictions involving dishonesty and false statement is not within the discretion of the Court. Such convictions are peculiarly probative of credibility and, under this rule, are always to be admitted." Id.

315. See United States v. Kuecker, 740 F.2d 496, 501 (7th Cir. 1984);
seems necessary.

There are two controversial subissues, however, with respect to the meaning and application of rule 609(a)(2)'s phrase "dishonesty or false statement" in both the Federal Rules and the Uniform Rules. The first subissue deals with the types of crimes comprised by this category. Although there is no doubt that mere crimes of violence lie outside rule 609(a)(2), the term "dishonesty" arguably could include property offenses involving theft. However, according to statements in the committee reports,\(^\text{316}\) which are given decisive weight by the vast majority of federal decisions,\(^\text{317}\) the phrase includes only *crimina falsi*, or crimes of deception, and does not encompass crimes of theft. Several of the new code states, against the background of their own common law tradition and legislative history,\(^\text{318}\) give the natural meaning to both descriptive terms, and interpret "dishonesty" as referring to crimes of theft.\(^\text{319}\) If Congress did not intend such an


\(^{316}\) See Conference Committee Report, *supra* note 302, at 9-10, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7098, 7103. The report states, "The Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully." *Id.*


\(^{318}\) Each code state is free either to interpret this phrase to comply with its own prior law on impeachment, or to develop its own legislative intent as to what sorts of convictions ought to be automatically admissible. For a questionable example of this exercise of independence, see W. VA. R. EVID. 609(a)(1) (limiting impeachment of the accused to crimes involving "perjury or false swearing" based on decision in *State v. McAboy*, 236 S.E.2d 491 (W. Va. 1977)).

interpretation, then precise draftsmanship suggests elimination from rule 609(a)(2) of the term “dishonesty” as superfluous and potentially misleading.

The second subissue raised by rule 609(a)(2) is whether, and if so, how deeply, the court should delve into the underlying facts of a particular prior conviction to ascertain whether it “involved” falsehood. The most restrictive view would insist that the falsity be a statutory element of the crime.320 Under this theory, the trial court determining the admissibility of evidence of a prior conviction would be fairly sure either that a previous jury had found the element of falsity or fraud beyond a reasonable doubt, or that the witness expressly had admitted this element in a guilty plea. Similarly, under this view, very little trial time would have to be taken in analyzing the record of the prior proceeding since the indictment would ordinarily incorporate all of the statutory elements. On the other hand, several courts have suggested a broader approach, which permits the introduction of evidence of a prior conviction under rule 609(a)(2) if the proponent of such evidence can show either that falsehood was a statutory element, or that the witness did in fact commit the prior offense through the use of deceit.321 This more generous construction would appear to increase substantially the number of qualifying offenses. It also seems to harmonize persuasively with rule 803(22), the hearsay exception that makes felony convictions admissible to “prove any fact essential to sustain the judgment.”322

On the other hand, the broader interpretation does involve the risks of confusion of issues and undue delay. The trial judge often would have to scan the record of the prior case in order to determine the precise manner in which the trier found that the

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321. See United States v. Grandmont, 680 F.2d 581 (1st Cir. 1982) (robbery by purse snatching not crime of dishonesty or false statement); United States v. Glenn, 667 F.2d 1269 (9th Cir. 1982) (burglary committed by deceitful means falls within rule 609(a)(2)); United States v. Whitman, 665 F.2d 313 (10th Cir. 1981) (larceny by deceptive means was within rule 609(a)(2)); United States v. Papia, 560 F.2d 827 (7th Cir. 1977) (where deceit is not statutory element of crime, burden is on proponent to show conviction rested on deceptive behavior).

322. See Fed. R. Evid. 803(22). The rule appears to supply the necessary hearsay predicate for impeachment through prior convictions under rule 609. Anyone wishing to improve the Federal Rules, however, should consider how to harmonize rules 803(22) and 609 since the former excepts only felony convictions from the hearsay prohibition, whereas the latter admits both convictions for ordinary felonies and for crimes involving dishonesty or false statement regardless of the grade of the offense.
witness had committed the particular offense.\textsuperscript{323} Moreover, the trial record might suggest two versions of how the witness carried out the prior offense, one involving deceit and the other not. In this case, a general verdict of guilt might not constitute a reliable jury finding of deception. On balance, with due regard to efficient resolution of the collateral issue of witness impeachment, the restrictive approach seems preferable. This type of impeachment, after all, does share the probative weaknesses of character evidence generally, when offered to show behavioral conformity with the prior propensity. More specifically, Congress has evinced a policy favoring discretionary regulation of impeachment of the accused under rule 609(a)(1) and, this article has argued, ought to recognize discretionary controls as to other types of witnesses. In this context, it would seem unwise to expand the scope of automatic admissibility especially when going behind the judgment and indictment would seem to involve the danger of a time-consuming "mini-trial." To achieve this result, Congress should amend rule 609(a)(2) to read, "... involved false statement as an essential element of the charge..."\textsuperscript{324}

As the brief treatment of rule 609 suggests, the purpose of this article is far from attempting a definitive resolution of all the many problems that rule 609 presents.\textsuperscript{325} To the contrary, while

\textsuperscript{323} Even though rule 403 might seldom warrant exclusion of such offenses on the grounds of unfair prejudice, the rule's administrative considerations of "undue delay" or "waste of time" are germane to the question of how much court time should be expended delving into the trial record of each witness' conviction. In all fairness, it would seem the judge should allow the party calling the witness to comb the record of the witness' prior trial for indications that the jury which convicted the witness did not find that the witness committed the offense via deception. Rehashing the evidence of five- to ten-year-old trials on a routine basis to determine side-issues of credibility does seem highly inefficient, however. Moreover, where the witness has pleaded guilty to a charge not on its face involving deception, and where the plea acceptance procedure under Federal Rule of Criminal Procedure 11(e) did not secure an admission that the witness had used deceptive methods, it might be difficult to find a reliable source of information as to how the witness had committed the particular offense. See Fed. R. Crim. P. 11(e).

\textsuperscript{324} The phrase "essential element of a charge" is borrowed from rule 405(b), where it appears to refer to an essential ingredient or ultimate element of the claim or defense which the statutory definition of the offense and the corresponding indictment or information would explicitly set forth. See 2 D. Louisell & C. Mueller, supra note 18, § 150, at 133-35.

\textsuperscript{325} Rule 609 fails to expressly address two important issues. The first issue concerns the effect of lack of counsel or of some other constitutional defect in the prior proceeding on its admissibility for impeachment. See Loper v. Beto, 405 U.S. 473 (1972) (use, for impeachment purposes, of prior convictions that are void due to lack of counsel for defendant violated due process). The second issue concerns the proper procedure for determining whether such a defect existed.
the author does express cautious opinions on how to resolve some of the major issues arising under rule 609(a), the primary goal of this article is to identify the unsettling language that ought to be clarified through amendment. Increasing the clarity of rule 609(a) can substantially ease the lot of trial attorneys and judges who wrestle almost daily with problems of impeachment by prior conviction.

E. Tightening the Foundation for Prior Statements Under Rule 613

Surely, the most common and effective means to draw into question the credibility of a witness is to show that the witness previously had made a statement at variance with the tale of events he or she purveyed at trial. For example, assume that in

Another important matter is whether the American courts should treat convictions obtained in foreign courts, often under radically different procedures, differently for impeachment purposes than convictions obtained in American federal and state courts. Even if the courts assume that foreign convictions should be handled in a similar manner, there are questions concerning how to determine whether there were any fundamental violations of the foreign procedure and who has the burden of satisfying such concerns. See, e.g., United States v. Wilson, 556 F.2d 1177 (4th Cir.) (accused failed to meet burden of showing that his West German conviction lacked procedural protections necessary for fundamental fairness), cert. denied, 434 U.S. 986 (1977).

As to matters of rule 609 construction, there is an important issue as to whether, in light of the reference to a “judgment of previous conviction” in rule 803(22), a “conviction” as used in rule 609 includes also a “verdict” of guilty on which judgment has not been entered. See, e.g., United States v. Duncan, 598 F.2d 839, 864-65 (4th Cir.) (rule 609 conviction includes guilty verdict on which judgment has not been entered), cert. denied, 445 U.S. 871 (1979).

Another important question deals with the admissibility for impeachment purposes under rule 609 of a conviction entered upon a plea of nolo contendere in light of the express ban on the use of such pleas against the pleader found in rule 410, and on the use of judgments of conviction based on such pleas in rule 803(22). See, e.g., United States v. Williams, 642 F.2d 136 (5th Cir. 1981) (upholding impeachment using conviction based on plea of nolo contendere despite rule 410, and ignoring rule 803(22)).

Finally, a problem of opaque verbiage that is bound to give the courts trouble lies in the failure of the Congress to clarify what it meant by the term “subsequent crime” in rule 609(c). The rule provides in pertinent part that “[e]vidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment . . . or other equivalent procedure . . . , and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year . . . .” FED. R. EVID. 609(c). The problem stems from the fact that there are several plausible alternative interpretations of what the crime must be “subsequent” to. It is unclear whether the crime must be subsequent to the commission of the pardoned crime, the trial for that crime, or the entry of judgment for that crime. Another way to view the rule is to interpret it to require that the conviction for the later offense be “subsequent” to the commission of the prior crime, or to the entry of the prior conviction.

326. For a discussion of the importance and frequency of impeachment through prior inconsistent statements, see 3 GOLDSTEIN TRIAL TECH. 2d (CALLA-
A civil action for injuries allegedly sustained as a result of defendant's drunk driving, a witness testifies on direct that the defendant had been "as sober as a judge" at the time he got behind the wheel of his high-powered sports car, and plaintiff's attorney is able to introduce evidence that the witness had once told an investigator that the defendant had been "drunk as a skunk" at the time. Comparison of the trial testimony with the evidence of the witness' prior statement might lead the trier of fact to one of the following conclusions: (1) one of the witness' statements is a lie; (2) the witness was gravely mistaken about defendant's condition on one of the two occasions; (3) the witness was speculating on one or both of the two occasions; or (4) the witness had been threatened or bought off by defendant.³²⁷

In allowing this use of prior inconsistent statements, the courts feared that the jury might regard such evidence as affirmative proof of matters asserted in the statements, thus contravening the hearsay rule.³²⁸ Hence, under traditional practice, opposing counsel usually asked the trial judge to instruct the jury not to regard the prior statement as positive evidence of the matters asserted therein, but simply to focus on the inconsistency between the two versions as such, and to take that inconsistency into account in determining whether, or to what extent, to credit the witness' trial testimony.³²⁹

As originally drafted by the Advisory Committee, rule 801(d)(1)(A) would have exempted all prior inconsistent statements of trial witnesses from the general ban on hearsay, thus obviating the need for a limiting instruction.³³⁰ The jury would be

³²⁷. Accord 3A J. Wigmore, supra note 39, § 1017. Wigmore states, "The general end attained is . . . some undefined capacity to err; it may be a moral disposition to lie, it may be partisan bias, it may be faulty observation, it may be defective recollection, or any other quality. No specific defect is indicated; but each and all are hinted at." Id. (emphasis in original).

³²⁸. For the most part, this concern held true, even though the witness was available for cross-examination at the trial as to whether his testimony or his prior statement was closer to the truth. See generally State v. Saporen, 205 Minn. 358, 285 N.W. 898 (1939). Saporen is the leading case supporting the traditional emphasis on cross-examination opportunity at the same time the inconsistent statement was uttered.


³³⁰. The 1972 Supreme Court draft would have provided in rule 801(d)(1)(A) that "[a] statement is not hearsay if— . . . The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony . . . ." Supreme Court Draft, supra note 28, at 293 (rule 801(d)(1)(A)).
free to believe either the trial testimony or the prior statement in whole or in part. As a result of Congress' revision, however, the federal courts have to deal with two types of prior inconsistent statements. First, there are statements "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition." Present rule 801(d)(1)(A) dispenses these from the hearsay ban, and from the need for a limiting instruction. As to these formal sworn statements, the jury may credit either the trial version, the out-of-court version, or neither version by this witness of the event, essentially based on the jury's observations of the witness' demeanor at trial. The second class of inconsistent statements includes all other types falling outside rule 801(d)(1)(A), e.g., the typical unsworn interview statement taken by police or insurance investigators. As to statements of this second class, the trial judge, if requested, should attempt to explain to the jury the traditional theory that they should consider the mere fact of discrepancy and give no affirmative value to the out-of-court assertions.

Apart from the hearsay aspects, two basic issues faced the framers of the Federal Rules with respect to the trial procedure aspects of impeachment by prior inconsistent statement. The first was whether to retain the so-called "Rule in Queen Caroline's Case." Under this principle, quickly abrogated by statute in England, but surviving to date in many American states, the cross-examiner had to allow the witness to read over his prior statement before questioning him about the supposed inconsistency. The second was whether to retain the so-called "Rule in Queen Caroline's Case." Under this principle, quickly abrogated by statute in England, but surviving to date in many American states, the cross-examiner had to allow the witness to read over his prior statement before questioning him about the supposed inconsistency.

331. See DiCarlo v. United States, 6 F.2d 364 (2d Cir.), cert. denied, 268 U.S. 706 (1925). In DiCarlo, Judge Learned Hand stated, "If, from all that the jury see of the witness, they conclude that what he says now is not the truth, but what he said before, they are none the less deciding from what they see and hear of that person and in court." 6 F.2d at 368. Later, the Model Code would have provided: "Evidence of a hearsay declaration is admissible if the judge finds that the declarant (a) is unavailable as a witness, or (b) is present and subject to cross-examination." MODEL CODE OF EVIDENCE Rule 503 (1942).

332. See generally United States v. Livingston, 661 F.2d 239 (D.C. Cir. 1981) (prior unsworn statements admissible solely to impeach); United States v. Ragghianti, 560 F.2d 1376 (9th Cir. 1977) (trial court erred in failing to instruct on limited impeachment purpose of prior unsworn statement; proper procedure is to give such instruction at time of admission and at end of trial). Cf. United States v. Eddy, 597 F.2d 430, 434-35 n.9 (5th Cir. 1979) (prior self-contradicting statement is not part of affirmative evidence). Of course, nothing in hearsay doctrine prevents such unsworn statements from independently qualifying under an exception to the hearsay rule, such as an excited utterance or recorded recollection. For a complete list of the hearsay exceptions, see FED. R. EVID. 803, 804.

tencies.\textsuperscript{334} Deeming that this procedure tipped the scales too heavily in favor of the dishonest witness, and against the effectiveness of cross-examination, the framers of the Federal Rules abolished it in rule 613(a), which provides: "In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown or its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel."\textsuperscript{335}

By not requiring that examining counsel first let the witness read his prior statement, rule 613(a) arguably tends to make dissembling by the witness more difficult—and perhaps more visible. At the same time, the provision for disclosure to opposing counsel upon request "is designed to protect against unwarranted insinuations that a statement has been made when the fact is to the contrary."\textsuperscript{336} In the belief that rule 613(a) has worked fairly well and has provoked little comment or opinion writing,\textsuperscript{337} the article suggests no amendment to the rule.

The framers also tackled a second important aspect of self-contradiction procedure—the question of whether trial counsel must lay a preliminary foundation with a witness on cross-examination as a condition precedent to putting on "extrinsic" proof of the making of a prior inconsistent statement. The traditional view was that the cross-examiner must first draw the witness' attention to the time, place, and circumstances of the making of the alleged statement as a preliminary foundation, and obtain either an admission or a denial from the witness as to whether he or she actually had made the prior statement.\textsuperscript{338} In the succinct summary of Professor Cleary, the reporter for the Advisory Committee:

The objectives of the [traditional] procedure are: (1) to save time, since the witness may admit having made the

\textsuperscript{334} See generally C. McCormick, supra note 39, § 28; 4 J. Wigmore, supra note 39, § 1260.

\textsuperscript{335} Fed. R. Evid. 613(a).

\textsuperscript{336} Fed. R. Evid. 613(a) advisory committee note. In effect, this procedure serves as a check on the "good faith" of the examiner. See C. McCormick, supra note 39, at 82 n.24.

\textsuperscript{337} See United States v. Lawson, 683 F.2d 688, 694 (2d Cir. 1982). The Lawson court stated, "At least in the absence of a claim of privilege or confidentiality, Rule 613(a) does not allow for the exercise of discretion. It flatly commands disclosure of a document such as this to opposing counsel." Id. Cf. C. McCormick, supra note 39, § 28 (recommending that trial judge have discretion to require the cross-examiner to show the impeaching document to witness in order to protect honest but forgetful witness from being painted as liar).

\textsuperscript{338} See generally 3A J. Wigmore, supra note 39, §§ 1025-1029.
statement and thus make the extrinsic proof unnec-

sary; (2) to avoid unfair surprise to the opposite party by

affording him an opportunity to draw a denial or expla-

nation from the witness; and (3) to give the witness him-

self, in fairness, a chance to deny or to explain the

apparent discrepancy.\textsuperscript{339}

In the belief that only objective (1) worked in favor of the

traditional demand for a prior foundation, the framers of the Fed-

eral Rules removed any sequential requirements by providing in

rule 613(b): “Extrinsic evidence of a prior inconsistent statement

by a witness is not admissible unless the witness is afforded an

opportunity to explain or deny the same and the opposite party is

afforded an opportunity to interrogate him thereon, or the inter-

ests of justice otherwise require.”\textsuperscript{340} Thus, in several strokes of

the pen, the framers “liberated” trial lawyers from having to lay a

prior foundation for impeaching with prior inconsistent state-

ments during the witness’ first and main appearance on the stand.

The principal justifications for removing all time restraints are

that the impeacher might not discover the statement in time, or

he might wish to cross-examine several collusive witnesses,\textsuperscript{341}

and that “it is supremely easy to forget” to lay the prior

foundation.\textsuperscript{342}

To illustrate the contexts in which the various foundational

approaches might operate, assume that Paul sued Don in 1984 for

\textsuperscript{339} Rules of Evidence (Supplement): Hearings Before the Subcomm. on Criminal


\textsuperscript{340} FED. R. EVID. 613(b).

\textsuperscript{341} FED. R. EVID. 613(b) advisory committee note (“Under this procedure, several collusive witnesses can be examined before disclosure of a joint prior inconsistent statement... Also, dangers of oversight are reduced.”).

\textsuperscript{342} See C. MCCORMICK, supra note 39, at 80. Professor McCormick states: The traditional requirement as explained above may well work unfairly for the impeacher, who may only learn of the inconsistent statement after the cross-examination of the witness has ended and the witness by leaving the court has made it impracticable to recall the witness for further cross-examination to lay a foundation belatedly. It is moreover a requirement which can serve as a trap since it must be done in advance before the final impeachment is attempted and is supremely easy to overlook.

Id. One may question whether proper exploitation of pretrial discovery in civil cases or the principles of pretrial disclosure in criminal trials should make unawareness of prior witness statements fairly rare for competent counsel. Moreover, the prior foundation requirement does not seem any more obviously forgettable than the obligations of timely and specific objections and offers of proof imposed by rule 103(a).
personal injuries, claiming that in 1981 Don lost control of his car, crossed the centerline of a two-lane road, and hit Paul’s car head on as a result of having consumed ten brandies on an empty stomach. Also assume that William was Don’s passenger. Within this general frame of reference, assume further the following alternative scenarios under traditional pre-Federal Rules practice:

Don calls William, who testifies on direct examination that Don had very little to drink and was in full control of his faculties when he got behind the wheel. A few weeks after the accident, George, a private investigator hired by an attorney for an injured bystander, had obtained a signed statement from William wherein William asserted that Don had quaffed ten brandies and was so drunk he could hardly walk to his car.

(a) On cross-examination, Paul’s attorney reminds William of the time, place, and circumstances of George’s visit and of the taking of a statement from William. William admits making the prior inconsistent statement. On redirect, Don’s lawyer elicits from William that he had actually been referring to another incident of drunk driving by a party other than Don. Believing that he has effectively impeached William, and that the court would probably sustain Don’s objection to extrinsic proof of the admitted statement, Paul does not call George.

(b) Paul’s attorney has a statement taken from William and reminds William of the time, place, and circumstances of George’s visit and of the taking of a statement from William. William denies making the inconsistent statement, claiming that George did not ask him about Don’s sobriety, but only about how the accident happened. On rebuttal, Paul puts George on the stand to establish that the statement is a true and complete version of William’s account of the accident.

(c) After George takes William’s statement, Paul’s attorney forgets to lay the foundation while he is cross-examining William. When the attorney tries to put George on the stand during rebuttal, Don objects to the extrinsic evidence for lack of a prior foundation, and the trial judge sustains the objection.

(d) George takes William’s statement, but, despite due diligence, Paul does not learn about it until after William has completed his testimony and has been excused by
the court. Unless Paul can persuade the court to recall William for further foundational cross-examination at some point, presumably a discretionary matter, Paul probably will not be able to call George to authenticate William’s prior inconsistent statement.

(e) George takes statements from both William and his wife, both of whom owe Don a large sum of money. The prior foundation requirement may make it ineffectual for Paul to put George on the stand to authenticate both statements only after both William and his wife are firmly committed to their collusive story favoring Don.

(f) Solely in the hope that William and his wife would not be readily available to be recalled for denials or explanations, Paul does not make use of the available prior statement during the first appearance of William and his wife during the defense case, and calls George as his very last witness to prove their inconsistent statements.

(g) In scenarios (c), (d), and (e) assume further that, without objection, Paul puts George on the stand during rebuttal and, for the first time, proves the statements of William and his wife. When Don tries to recall the witnesses, he learns that William and his wife are visiting relatives in a distant city.

Rule 613(b) does two things in the context of the above scenarios. First, it removes any requirement that the impeacher afford the witness a chance to deny or explain the statement before the extrinsic proof is introduced. The impeacher can, for no reason other than tactics or lack of diligence, put on extrinsic proof at any time during the trial, thus leaving it to the proponent of the witness to shoulder the burden of getting the witness back into court to exercise the right to “deny or explain” the alleged self-contradiction. As presently drawn, rule 613(b) would seem to allow Paul to call George as of right under variations (a) through (g) without any accountability to either opposing counsel or the court. Second, rule 613(b) now provides that, “in the interests of justice,” the trial court can totally dispense with affording a witness the opportunity to deny or explain a prior inconsistent statement. Unfortunately, under this vague rubric rule 613(b) does not clearly direct the court to take into account that Paul’s timing in putting on extrinsic evidence from George, whether justified or not under the circumstances, may itself have disabled Don from
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recalling William and his wife to reappear at the trial, as in scenarios (f) and (g).

It is submitted that rule 613(b) is misguided in totally scrapping any principled incentive to follow the traditional and efficient procedure of requiring a previous foundation, and in trusting all to the discretion of the impeaching attorney. The rule's breadth of scope apparently is based on the relatively rare situations in scenarios (d) and (e) in which a prior foundation would be impracticable, and on scenario (c) (forgetfulness), in which the trial court probably ought to examine the degree of diligence and competence displayed by the attorney before devising a discretionary solution.

As scenarios (a) and (b) reveal, laying the prior foundation when counsel has the witness on cross-examination clearly is simpler and more efficient than waiting until a later point in the trial. In addition, such a procedure does not appear to be overly burdensome to competent counsel. In the vast majority of instances, counsel has both the witness and the statement in court at the same time. For both adversaries, it is much more convenient for the impeacher to shoot his arrow immediately after the direct examination, and to allow a proponent to bring out any rehabilitating explanations during the next stage of redirect. If the witness

343. As Professor Cleary admits, "In my view, the existing practice would continue in general to be followed under the rule. It is convenient and effective to raise the matter on cross-examination, and doing so would avoid problems that might ultimately arise if witnesses become unavailable before the end of the trial." *House Hearings, supra* note 339, at 75. Even under the present language of rule 613(b), the Fifth Circuit has laid great stress on the prior foundation element. *See United States v. Leslie*, 759 F.2d 366 (5th Cir.) *reh'g granted*, 761 F.2d 195 (1985) (en banc). *Leslie* involved a narcotics conspiracy trial in which Giron, a former codefendant who testified for the Government, stated during cross-examination that he was unaware at the time of his plea agreement that the Government would call him as a witness against Leslie. At no time did defense counsel mention the existence of a prior statement inconsistent with this claim. Later, Leslie wished to put on Moriarty, Giron's attorney, to testify that Giron admitted he was going to testify against Leslie. Applying rule 613(b) to prior statements evidencing bias, the court of appeals upheld the trial court's exclusion of Moriarty's testimony and declared,

After Moriarty was excused as a witness at the hearing, the district court on three successive occasions offered Leslie the opportunity to question Giron. On each occasion, Leslie declined the opportunity and essentially waived his chance to ask Giron to explain or deny making the statement. Having failed to satisfy this minimal foundation requirement, Leslie cannot successfully argue that the district court abused its discretion in preventing him from calling Moriarty to testify about Giron's alleged prior statement.

admits making the statement, the whole question of calling other witnesses is obviated. This reduces inconvenience to witnesses and brings about a substantial saving of court time.\textsuperscript{344}

On the other hand, present rule 613(b) offers counsel with an impeaching statement in his or her briefcase a broad license to waive cross-examination or to examine on other matters, and let the witness leave the stand and, perhaps, be excused by the trial judge.\textsuperscript{345} If the impecchner later calls a witness to prove the earlier witness' prior inconsistent statement, this seemingly would shift an unfair and unnecessary burden to the party who called the earlier witness either to forego explanation,\textsuperscript{346} or to go to the often

\textsuperscript{344} In Professor Cleary's view, "The time saved is not great." \textit{House Hearings}, supra note 339, at 74. But the whole theory of limiting impeachment by extrinsic evidence to noncollateral matters is the administrative inefficiency of introducing a new witness. Professor Wigmore states:

The reasons invariably advanced by the courts [for the rule of collaterality] have reference solely to the formation of a new collateral issue for outside testimony; i.e., if the witness deny the prior utterance, the impecchner would proceed to prove it by other witnesses and the impecched would wish to disprove it by other witnesses, and it is to this process that the objections of unfair surprise and confusion of issues apply.

\textit{3A J. Wigmore, supra} note 39, at 1019. Moreover, each of the new witnesses is impeachable by the traditional methods. \textit{See id.} \textsection 894. Although rule 403 allows the trial court to set reasonable limits to inquiry into side-issues, there may be due process problems with drawing it too narrowly.

\textsuperscript{345} Although the proponent of the witness may know the opponent has a prior inconsistent statement, the opponent's present ability to play a "shell game" with the statement leaves the proponent to guess whether and when the opponent will try to introduce it and whether to burden the witness by making him stay in the courthouse or "on call" in the local community for an indefinite period of time. In light of rule 607, the proponent could, of course, elicit the statement on direct along with any explanation or denial to "spike the guns" of the would-be impeccher. In the case of multiple inconsistent statements, however, this might unduly clutter and confuse the presentation of the proponent's direct case. Moreover, the direct examiner would have to decide whether to take this tactic at a point in the trial where he may be uncertain whether the opponent has inconsistent statements and, if so, how many. In addition, the proponent may not know whether the opponent really intends to use any or all such statements on cross-examination.

\textsuperscript{346} Cf. \textit{United States v. Barrett}, 539 F.2d 244 (1st Cir. 1976). In \textit{Barrett}, the defendant was charged with dealing in stolen postage stamps. Adams testified for the Government that the defendant, Barrett, admitted his involvement to Adams shortly after arrest. At trial, the defendant unsuccessfullly offered the testimony of two witnesses to the effect that Adams later told them that Barrett was not involved in the offense. On appeal, the Government sought to sustain the trial judge's exclusion, pointing to the lack of prior foundation during the cross-examination of Adams. In finding reversible error, the First Circuit declared:

The foregoing indicates that while good practice still calls for the laying of a foundation, one is not absolutely required. It would have been desirable for defense counsel to have asked Adams on cross-examination if he had made the purported statement to the witness. And where
considerable trouble of trying to have the witness recalled or resubpoenaed for the denial or explanation.347

To illustrate the heavy burden rule 613(b) places upon the party whose witness is impeached by belated introduction of an inconsistent statement, consider *Wilmington Trust Co. v. Manufacturers Life Insurance Co.* 348 In that case, co-trustees of the estate of an insured decedent, who had died from gunshot wounds in 1976, sued to collect life insurance proceeds. The insurer denied liability and counterclaimed for rescission of the insurance contract, claiming that the insured had committed suicide, and alleging that he had given false answers in the application as to his prior aviation activity. In the separate trial on the suicide issue, one of the insurer’s chief witnesses to the insured’s state of mind testified that the insured had discussed suicide with him on several occasions, including once on a hunting trip in October 1975. 349 Over the insurer’s objection based on hearsay and lack of prior foundation, the trial judge allowed the trustees to call a rebuttal witness who testified that the insurer’s witness had told him that he and the insured had had a violent argument over the shooting of an elk on the October 1975 hunting trip, and that the insured’s witness and the insured had returned by separate airplanes.350 Affirming verdicts for the insurer, the Eleventh Circuit explained that rule 613(b) permits an impeacher to present ex-

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347. In evaluating the complexities of ensuring that the party calling a witness has a chance both to interrogate the witness on a prior inconsistent statement and to give the witness an opportunity to deny or explain the statement, it seems important to keep in mind the fact that impeachment generally is a “side show,” not the main event.


349. 749 F.2d at 698-99. Although not discussed by the court, it seems to have been assumed that the insured’s hearsay statement fell within the “state of mind” exception of rule 803(3). For a discussion of the exception, see generally C. McCormick, *supra* note 39, §§ 294-96.

350. 749 F.2d at 699. Although the *Wilmington Trust* court treated the case as one involving rule 613(b) impeachment through prior inconsistent statement,
trinsic proof of a witness' prior statement before the witness is granted an opportunity to deny or explain it.\textsuperscript{351} As to what rule 613(b) demands of the caller of the witness, the court declared: "Manufacturers [the insurer] could have requested that Bealem [insurer's chief witness on insured's state of mind] be allowed to testify in surrebuttal concerning this conversation or to reopen its case. This was not done and by that failure the provision for confrontation was waived."\textsuperscript{352} Thus, because the insurer, without any reason given, let its witness leave the stand without bringing up this important oral self-contradiction, the court of appeals remitted the insurer to the hazards of invoking the trial court's discretion either to allow reopening of the plaintiff's rebuttal case or to permit surrebuttal.\textsuperscript{353} Even if the courts should read rule 613(b) to confer upon the proponent of a witness a legal—rather than a discretionary—right to produce a witness for denial or explanation, the proponent still must assume the practical risk of the witness' fortuitous unavailability.\textsuperscript{354} 

\begin{itemize}
\item It is suggested that the court should have treated the case as one involving bias impeachment.
\item \textsuperscript{351} Id.
\item \textsuperscript{352} Id. Cf. United States v. Leslie, 759 F.2d 366 (5th Cir.) (imposing burden on impeacher to lay foundation rather than, as in Wilmington Trust, upon the proponent of the witness), \textit{reh'g granted}, 761 F.2d 195 (1985) (en banc).
\item \textsuperscript{353} For an example of the complexity of discretionary factors pertinent to allowing an accused to reopen his case, see United States v. Larson, 596 F.2d 759, 777-80 (8th Cir. 1979). For examples of decisions upholding trial court discretion in declining to permit late stages of evidence presentation, see Kines v. Butterworth, 669 F.2d 6 (1st Cir. 1981) (precluding surrebuttal on collateral and impeachment matter), \textit{cert. denied}, 456 U.S. 980 (1982); United States v. Clark, 617 F.2d 180 (9th Cir. 1980) (preclusion of surrebuttal recall of psychiatrist); United States v. Hyde, 574 F.2d 856 (5th Cir. 1978) (no abuse of discretion in denial of re-cross); United States v. Di Napoli, 557 F.2d 962, 964-65 (2d Cir.) (no abuse of discretion under rule 613(b) where trial judge refused (1) to let accused prove bias of Government witness through extrinsic evidence because he failed to lay a prior foundation which he easily could have laid, and (2) to permit recalling to stand a witness to deny or explain prior inconsistent statement), \textit{cert. denied}, 434 U.S. 858 (1977). For a case that found rule 613(b) inapplicable to subsequent inconsistent statements, see United States v. Bibbs, 564 F.2d 1165, 1168-69 (5th Cir. 1977), \textit{cert. denied}, 435 U.S. 1007 (1978).
\item \textsuperscript{354} One way a party might protect his private litigation interests within the framework of present rule 613(b) would be to object to the introduction of extrinsic impeachment evidence without prior foundation if the witness to be impeached is in fact "unavailable" for recall, perhaps by analogy to the unavailability standards of rule 804(a). But even if the court should accept that the unavailability of the witness is sufficient reason to exclude the impeachment evidence, such a solution does not seem satisfactory from a systemic viewpoint, because the court would prevent the trier of fact from hearing a relevant self-contradiction merely because the impeacher failed to provide the witness a chance to deny or explain at the traditional time. Nor would it seem to deal adequately with the situation where the witness technically is available, but only...
One distinguished commentary on the Federal Rules strongly objects to the time-wasting and witness-burdening potential of present rule 613(b).\textsuperscript{355} and notes that Florida, Minnesota and Wisconsin did not adopt the federal language.\textsuperscript{356} In the same work, it is suggested that the rule be changed to require the prior foundation approach subject to exceptions for unintentional omission for good cause.\textsuperscript{357} The position of this article is not dissimilar. It is recommended that rule 613(b) be amended to retain the sensible practice of requiring a prior foundation as the ordinary procedure, while leaving play in the joints to deal with the exceptional situations. Accordingly, the first sentence of rule 613(b) should be amended to read:

Extrinsic evidence of a prior inconsistent statement by a witness is not ordinarily admissible unless the witness is afforded a prior opportunity to explain or deny the same and the opposite party is afforded a prior opportunity to interrogate him thereon.

This minimal change in the present wording of rule 613(b) would make the customary and more efficient foundation procedure once again the norm. The term "ordinarily" clearly preserves judicial discretion to depart from that procedure for sensible reasons in light of the trial court's general control of the order of proof under rule 611(a). Thus, depending on the reasons given for counsel's failure to comply with the prior foundation requirement, the judge could give counsel a subsequent chance to enable his witness to deny or explain the inconsistencies. Moreover, in the case of accidental unavailability of the wit-

\textsuperscript{355} S. Saltzburg \& K. Redden, Federal Rules of Evidence Manual 595-96 (4th ed. 1986). The authors note that rule 613(b) can "waste time. It may also give prior statements which a witness would readily acknowledge more impact than they might warrant, because the statements will not be followed immediately by an explanation. Finally, the change inconveniences witnesses who wish to minimize the time they must take from work or other activities." \textit{Id.} at 596 (quoting R. LAMPERT \& S. Saltzburg, A Modern Approach to Evidence 288-90 (1977)).

\textsuperscript{356} S. Saltzburg \& K. Redden, supra note 345, at 427.

\textsuperscript{357} \textit{Id.} The authors state their view that "the traditional foundation requirement had worked well in most cases, and that relaxing it in special cases would have made a great deal of sense. \textit{Id.} In addition, the authors "believe that reasonable people will see that there is a danger of harassing witnesses under the federal approach . . . ." \textit{Id.}
ness, the judge might dispense entirely with the denial/explanation process.\textsuperscript{358} Accompanying such an amendment, explanatory notes should suggest possible reasons for permitting counsel to depart from the norm—such as the problems of late discovery, collusive witnesses, or forgetting the prior foundation.

To summarize all of the proposed amendments as to prior inconsistent statements, a party ordinarily should be allowed to introduce extrinsic evidence of the making of a prior inconsistent statement if (1) absent unusual circumstances, he has afforded the witness a prior chance to deny or explain the statement; (2) the witness has denied making the statement; and (3) the inconsistency pertains to an independently relevant fact. It is submitted that these relatively modest changes should increase the efficiency of the impeachment process and, in these days of monumental trials, advance the cause of achieving justice through litigation.

V. Conclusion

By and large the Advisory Committee and Congress did an excellent job in formulating the language of the Federal Rules to accomplish the complex and varied purposes that even a partial codification of evidence law seeks to bring about. This article singles out a number of areas for critical analysis, and recommends possible improvements, based not only upon study of the texts of the rules in question, but also upon a decade of judicial experience as reflected in the reported cases. The article first suggests abolition of the per se requirement that federal courts apply all state competency rules as to elements of civil actions governed by state normative law in favor of a more complex standard based on analysis of the substantive implications of each state rule as they arise. To fill the unfortunate omissions as to bias and capacity impeachment, proposed amendments are set forth that would itemize the traditional methods of impeachment and regulate the use of extrinsic evidence as to each type. With respect to rules 608 and 609, the article provides suggestions for clarifying language to avoid the continued confusion evidenced in some judicial opinions. Finally, it is recommended that the traditional foundation requirements be put back into rule 613(b) in somewhat modified form.

\textsuperscript{358} In the belief that the term "ordinarily" allows substantial play for judicial discretion to grant exceptions from foundation requirements, the proposal would eliminate the "interests of justice" phrase of current rule 613(b).
It is hoped that these observations will stimulate debate and channel the thought and experience of bench, bar, and classroom into the evaluation and revision of these complex and controversial areas of testimonial evidence. In line with the noble aspirations of rule 102, this continuing process of analysis, criticism, and improvement of the Federal and Uniform Rules of Evidence may better enable the courts to achieve the ends of ascertaining truth and administering justice. 359

359. In addition to the suggestions discussed in this article, the author would beckon others to review article VI of the Federal Rules with a view to exploring some further problems. One question to consider would be whether, in a world where some creeds are specifically dedicated to deceiving the established authorities, rule 610, which bans all impeachment by reference to religious beliefs, should be modified to allow for a greater degree of exploration in these areas. Cf. United States v. Abel, 105 S. Ct. 465 (1984). Another issue to explore concerns the failure of rule 612 to specify all of the recognized methods of refreshing recollection arguably authorized by prior case law. Should this rule be changed to spell out the effect that the use of a privileged document by the holder to refresh memory should have upon the continued retention of the privilege? Also, should rule 614, which now merely authorizes judicial calling and interrogation of witnesses, be redrafted to encourage the process to a greater degree? Finally, one might wonder if rule 615 on sequestration of witnesses should specify the appropriate sanctions for violation of the rule, both with or without the connivance of party or counsel, at least in general terms.