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N.J.R.E. 608 and Specific Instances of Conduct: The Time Has Come for New Jersey to Join the
Majority
Jenn Montan*

I. Introduction

Every trial, whether criminal or civil, requires the factfinder, whether judge or jury, to carefully weigh the competing evidence and determine the disputed issues between the parties. As such, the right of the parties to impeach the credibility of the witnesses is fundamental to the truth-seeking process in all litigation. The right to impeach is considered such an important right that Federal Rule of Evidence (FRE) 607 expressly authorizes witness impeachment and provides that “[a]ny party, *including the party that called the witness*, may attack the witness’s credibility.”¹

There are various, well-recognized grounds for impeaching the credibility of a witness. For example, a party may show that a witness is biased in favor of or against a particular party, that the witness lacks competency because of a mental or sensory incapacity or a lack of personal knowledge, or that the witness has made a prior statement which is inconsistent with the witness’s testimony.² Another recognized method for impeaching the credibility of a witness is to demonstrate that the witness possesses a character trait for untruthfulness.³ An attack on a witness’s character for truthfulness is designed to demonstrate that the witness is by disposition untruthful and therefore not credible as a witness in any case.⁴ It is this impeachment attack that raises difficult questions as to the proper method for proving a witness’s character for truthfulness

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¹ FED. R. EVID. 607 (emphasis added). New Jersey Rule of Evidence (N.J.R.E.) 607 similarly authorizes and extends the right to impeach to the party calling the witness. *See* N.J.R.E. 607 (“Except as otherwise provided by Rules 405 and 608, for the purpose of impairing or supporting the credibility of a witness, any party *including the party calling the witness* may examine the witness and introduce extrinsic evidence relevant to the issue of credibility”) (emphasis added).

² ROGER PARK & TOM LININGER, *THE NEW WIGMORE. A TREATISE ON EVIDENCE: IMPEACHMENT AND REHABILITATION* § 2.1 (2017).

³ CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, *FEDERAL PRACTICE AND PROCEDURE* § 6111 (2d ed. 2017).

⁴ *Id.*

and the extent to which untruthful character evidence may be shown through cross-examination or through the introduction of extrinsic evidence.

Specifically, the question arises whether, and in what manner, a witness may be impeached with specific instances of non-conviction misconduct that are probative of the witness's character for truthfulness. The New Jersey Supreme Court recently addressed this issue in *State v. Scott*, a case which squarely presented the division between FRE 608 and N.J.R.E. 608 and triggered two divergent concurring opinions as to the proper course for New Jersey law going forward.⁵

With respect to impeachment of a witness's character for truthfulness, both FRE 608(a) and N.J.R.E. 608(a) expressly provide that a party may attack or support a witness's character for truthfulness through the introduction of character witnesses who may testify in the form of reputation or opinion as to the witness's character for truthfulness.⁶ In addition, FRE 608(b) and N.J.R.E. 608(a) both prohibit the introduction of extrinsic evidence to prove specific instances of conduct in order to attack or support a witness's character for truthfulness.⁷

FRE 608(b) and N.J.R.E. 608(a) diverge, however, on whether inquiry on cross-examination may be permitted as to specific instances of conduct that are probative of the witness's character for truthfulness. FRE 608(b) expressly provides that the court may allow such inquiry on cross-examination,⁸ whereas N.J.R.E. 608(a) prohibits such inquiry.⁹ N.J.R.E. 608(a) provides that "a trait of character cannot be proved by specific instances of conduct"¹⁰ and the New Jersey

⁵ *State v. Scott*, 229 N.J. 469, 488 (2017).

⁶ FED. R. EVID. 608(a) ("A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character . . ."); N.J.R.E. 608(a) ("The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, provided, however, that the evidence relates only to the witness' character for truthfulness or untruthfulness . . .").

⁷ *See* FED. R. EVID. 608(b); N.J.R.E. 608(a).

⁸ FED. R. EVID. 608(b).

⁹ N.J.R.E. 608(a)

¹⁰ *Id.*

courts interpret this provision to prohibit not only the introduction of extrinsic evidence of specific instances of conduct, but also inquiry as to such conduct on cross-examination.¹¹ FRE 608(b) provides in pertinent part:

Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of: (1) the witness; or (2) another witness whose character the witness being cross-examined has testified about.¹²

N.J.R.E. 608(a) provides:

The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, provided, however, that the evidence relates only to the witness' character for truthfulness or untruthfulness, and provided further 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. Except as otherwise provided by Rule 609 and by paragraph (b) of this rule, *a trait of character cannot be proved by specific instances of conduct.*¹³

New Jersey's formulation falls in the minority approach with respect to the use of specific instances of conduct to impeach a witness's character for truthfulness.¹⁴ Only three other states have complete ban on the use of specific instances of conduct.¹⁵ This departure from FRE 608(b) became the focal point of debate between Chief Justice Rabner and Justice Albin in *State v. Scott*.

In *State v. Scott*, the defendant, Thomas Scott, was charged with possession of heroin.¹⁶ At trial, he argued that he did not knowingly possess the heroin because someone else placed it in his jeans pocket before he put them on.¹⁷ Defendant sought to call his mother, Darlene Barbella, to

¹¹ *State v. Scott*, 229 N.J. 469, 488 (2017) (Rabner, C.J., concurring) (“N.J.R.E. 608, however, bars not only the use of extrinsic evidence but also *cross-examination* into specific instances of misconduct.”).

¹² FED. R. EVID. 608(b).

¹³ N.J.R.E. 608(a) (emphasis added).

¹⁴ *Scott*, 229 N.J. at 491 (Rabner, C.J., concurring).

¹⁵ See MASS. GUIDE EVID. 608(b); OR. R. REV. Rule 608; TEX. R. EVID. 608(b).

¹⁶ *Scott*, 229 N.J. at 473.

¹⁷ *Id.*

testify in support of this contention.¹⁸ Barbella was going to testify that she found the heroin in defendant's apartment lying on a table next to defendant's cousin and known drug user, Jordan Scott, and placed the heroin in the pocket of a pair of jeans she believed belonged to Jordan.¹⁹ To impeach her, the State sought to introduce evidence of two prior occasions on which Barbella allegedly lied to police to exonerate her son, the defendant.²⁰ The trial court ruled the State's evidence admissible.²¹ As a result, the defendant chose not to call Barbella and instead called Lauren Halbersberg, defendant's friend, to testify to the same events.²²

The Appellate Division affirmed the trial court's ruling that the evidence would have been admissible at trial.²³ In holding that the trial court abused its discretion by ruling that the proposed impeachment testimony was admissible, the New Jersey Supreme Court rejected the State's argument that Rule 608 provided grounds for admissibility.²⁴ The court noted that "Rule 608 explicitly excludes specific instances of conduct as a means of proving character for untruthfulness, permitting only opinion or reputation evidence."²⁵

This finding by the court regarding the application of N.J.R.E. 608 prompted concurring opinions from Chief Justice Rabner and Justice Albin debating whether New Jersey's bar on the use of specific instances of conduct to impeach a witness's character for truthfulness is still a proper approach.²⁶ Chief Justice Rabner argued that the outcome of the case highlights the problems posed by the current rule.²⁷ As a result, the Chief Justice proposed that it is time to

¹⁸ *Id.* at 474.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Scott*, 229 N.J. at 474.

²³ *Id.* at 477.

²⁴ *Id.* at 483.

²⁵ *Id.*

²⁶ *Id.* at 486 (Rabner, C.J., concurring); *Id.* 494–95 (Albin, J., concurring).

²⁷ *Id.* at 492 (Rabner, C.J., concurring).

consider whether N.J.R.E. 608 should be revised to fall in line with the majority of states and its federal counter part, FRE 608.²⁸ Chief Justice Rabner highlighted the disadvantages of New Jersey's rule and called upon the New Jersey Supreme Court Committee on the Rules of Evidence to consider the question for "a simple reason: the topic relates directly to the jury's search for the truth, which a system of justice should foster."²⁹

In response, Justice Albin argued that no justification for altering the current version exists.³⁰ Justice Albin explained that the current Rule is in line with the historic development of New Jersey's common law, which has always barred such evidence because its probative value is outweighed by the potential prejudice of diverting jurors from the central issues in a case.³¹ Justice Albin posited that while New Jersey's rules may not be perfect, they "accommodate two important goals: the search for truth and the need for fairness in [the] criminal and civil justice system."³²

State v. Scott highlighted some of the problems and dangers N.J.R.E. 608 has created and has presented the opportunity to assess New Jersey's approach and determine whether change is needed. This Comment will examine the arguments set forth in the concurring opinions in *State v. Scott* and consider whether New Jersey should amend N.J.R.E. 608(a) and adopt the majority approach and allow, on cross-examination, the use of specific instances of conduct that are probative of the witness's character for untruthfulness. Part II will review New Jersey's approach by examining the history and development of N.J.R.E. 608 from common law to its current formulation and review how the rule is applied with regard to specific instances of conduct. Part III will examine the majority approach with a focus on the formulation and application of the

²⁸ *Scott*, 229 N.J. at 494.

²⁹ *Id.*

³⁰ *Id.* at 496 (Albin, J., concurring).

³¹ *Id.* at 495.

³² *Id.* at 496.

federal analogue to N.J.R.E. 608, FRE 608. Part IV will assess the potential dangers of allowing specific instances of conduct and examine the arguments and counter arguments regarding how the majority approach addresses these issues. Part V will examine New Jersey’s options to address this issue and make changes to the current rule. Overall, this Comment will argue that New Jersey’s current formulation of Rule 608 does not adequately address the use of specific instances of conduct. While apprehension for allowing the use of specific instances of conduct is valid, a complete bar raises equally valid concerns; adoption of a rule that takes a restrictive approach will provide an adequate compromise that properly addresses the issues raised on both sides.

II. Development of N.J.R.E. 608

New Jersey is one of four states that have a complete bar on the use of specific instances of conduct to prove a character trait.³³ This approach embodies the New Jersey common-law rule. Early cases made clear that an attempt to impeach the character of a witness is limited to the witness’s reputation in the community for truth and veracity.³⁴ For example, in an early case from 1883 the rule was set out by the court in *Paul v. Paul*.³⁵ The court held that unless character is the central issue, such as rape, or breach of promise, “proof that a witness was a common prostitute,

³³ See *supra* text accompanying notes 12–13.

³⁴ See *King v. Ruckman*, 20 N.J. Eq. 316, 357 (Ch. 1869) (“But the greatest portion of the testimony is such as cannot be regarded. It is evidently founded upon the fact that Ruckman has been guilty of very improper conduct with regard to the cattle of his neighbors, [and] is a troublesome, litigious man Such witnesses are necessarily produced when they alone know or witnessed facts required to be proved; but when selected to give character to a witness, are not of much value. The only testimony allowed in such case is as to the general reputation of the witness impeached, in the neighborhood, for truth and veracity”), *rev’d*, 21 N.J. Eq. 599 (1870); see also *Atwood v. Impson*, 20 N.J. Eq. 150, 157 (Ch. 1869) (“[P]articular transactions . . . [are] not evidence which the law permits, or should permit, to affect the credibility of a witness. . . . The object of the law is to show the character of the witness as to telling the truth; general reputation in the community where he is known, is the test and the only test which the law allows as to character.”); *State v. Hendrick*, 70 N.J.L. 41, 45 (Sup. Ct. 1903) (“A witness may be discredited by evidence attacking his character for truth and veracity but not by the proof of particular independent facts, though bearing upon the question of veracity.”).

³⁵ 37 N.J. Eq. 23 (Ch. 1883).

offered to impeach her testimony, is incompetent.”³⁶ The court cited *La Beau v. People*, for the general rule that

inquiries as to particular acts of immorality [are] inadmissible . . . it would be impossible for the witness to be prepared for a defense of particular acts, and it would lead to an indefinite number of issues. Therefore, on an issue upon the character of a witness, it cannot be allowed to inquire into particular facts.³⁷

Early on, New Jersey recognized the potential dangers of allowing inquiries into specific instances of conduct to prove a character trait and as a result followed this general rule that barred use of such evidence.

In *State v. De Paola*, decided in 1950, the Supreme Court of New Jersey continued with the application of this common-law rule.³⁸ The defendant was convicted of murder.³⁹ At trial, the defendant took the stand and on cross-examination was asked about prior liquor-license applications in which the defendant allegedly provided a false answer to a question on the application while under oath.⁴⁰ The prosecution aimed to use the specific instances of conduct to show that if the defendant had lied on multiple applications, then he was lying now and his testimony could not be trusted.⁴¹ The defendant was compelled to answer the question and admitted that each year from 1941 to 1948, he had lied on the liquor-license applications.⁴² On appeal, the defendant argued that the trial court erred in allowing this line of questioning on cross-examination.⁴³ The State argued that the matter was within the discretion of the trial court and the testimony objected to was permissible to show lack of veracity on the part of the defendant.⁴⁴ The

³⁶ *Id.* at 26.

³⁷ 33 How. Pr. 66, 72 (N.Y. Gen. Term. 1865).

³⁸ 5 N.J. 1 (1950).

³⁹ *Id.* at 7.

⁴⁰ *Id.* at 9.

⁴¹ *Id.* at 10.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *De Paola*, 5 N.J. at 10.

court found little merit to the State’s theory, noting that there was no authority cited in support of its contention.⁴⁵

The court examined New Jersey case law regarding the approach to this issue and found that New Jersey had adopted a “rule which excludes the proof of independent facts to discredit a witness.”⁴⁶ The court noted that the acts referred to were not connected to the charge upon which the defendant was being tried and were unrelated to the central issues of the case.⁴⁷ Moreover, the defendant had not been convicted for perjury or false swearing by reason of his misconduct in this respect.⁴⁸ In light of these findings, the court held that the admission of the testimony was reversible error.⁴⁹

De Paola and the early New Jersey cases illustrate the rule regarding inquiry into specific instances of conduct that New Jersey had developed. Prior bad acts that did not result in a conviction that were probative of a witness’s character for untruthfulness could not be inquired into on cross-examination. Some of the underlying rationales were that such testimony was collateral to the main issues of the case and it would be unreasonable to expect that a defendant-witness could be prepared to defend against possible questioning into any area of his life.⁵⁰

New Jersey formally codified the prohibition on specific instances of conduct in 1967 under N.J. EVID. R. 22(d), which provided, “as affecting the credibility of a witness . . . evidence of specific instances of his conduct, relevant only as tending to prove a trait of his character, shall

⁴⁵ *Id.* at 11.

⁴⁶ *Id.* at 12 (quoting *State v. Hendrick*, 70 N.J.L. 41, 45 (Sup. Ct. 1903)).

⁴⁷ *Id.* at 13.

⁴⁸ *Id.* at 10.

⁴⁹ *Id.* at 13.

⁵⁰ *See also Ippolito v. Turp*, 126 N.J.L. 403, 407 (1940) (“Every man is supposed to be capable of supporting his general reputation whenever it is attacked but not to meet specific transactions not an issue in the cause.”).

be inadmissible.”⁵¹ When N.J. EVID. R. 22 was prepared it was “representative of current New Jersey [common] law.”⁵²

In the early 1980s, the New Jersey Supreme Court appointed a Committee on the Rules of Evidence to survey the feasibility of amending the New Jersey evidence rules.⁵³ The Committee was to consider whether or to what extent New Jersey should adopt the Federal Rules of Evidence, which were enacted in 1975 and by that time were followed by many states.⁵⁴ In 1991, the Committee recommended a sweeping change in the New Jersey evidence scheme and the new rules went into effect in 1993.⁵⁵ The revised rules constituted an amalgamation of the federal and then-current New Jersey evidence rules, following federal numeration and arrangement.⁵⁶

New N.J.R.E. 608 incorporated the limiting principles of N.J. EVID. R. 22(d) with respect to admission of evidence of a trait of character for truthfulness or untruthfulness when offered under N.J. EVID. R. 20 to affect the credibility of a witness.⁵⁷ The Committee noted that N.J.R.E. 608 follows the formulation of FRE 608; however, the Committee rejected the provision in paragraph (b) of the federal rule that allowed for the use of specific instances of conduct on cross-examination.⁵⁸ The Committee believed that this rejection “retains present New Jersey practice” noting that “N.J. EVID. R. 22(d), followed by this rule, prohibited ‘specific instances of conduct’ proof in any form if introduced to prove a trait of character.”⁵⁹ Moreover, the Committee believed

⁵¹ N.J. EVID. R. 22 (effective 1967).

⁵² *Report of the New Jersey Supreme Court Committee on Evidence*, March 1963 (1963) (citing *State v. De Paola*, 5 N.J. 1 (1950)).

⁵³ Alma G. Lopez, *New Jersey’s Other-Crimes Rules and the Evidence Committee’s Abrogation of Almost Two Hundred Years of Judicial Precedent*, 24 SETON HALL L. REV. 394, 423 (1993).

⁵⁴ *Report of the New Jersey Supreme Court Committee on Evidence*, 129 N.J.L.J. 1 (Oct. 10, 1991).

⁵⁵ Lopez, *supra* note 53, at 425–26 (citing Stephen W. Townsend, Esq., *Notices to the Bar: Supreme Court of New Jersey Revisions to the Rules of Evidence*, 134 N.J.L.J. 798, 798 (July 5, 1993)).

⁵⁶ Lopez, *supra* note 49, at 423.

⁵⁷ *Report of the New Jersey Supreme Court Committee on Evidence*, 129 N.J.L.J. 1, 25 (Oct. 10, 1991).

⁵⁸ *Id.*

⁵⁹ *Id.*

that N.J.R.E. 607 already “affords sufficient scope for the effective impeachment of credibility.”⁶⁰ Thus, New Jersey maintained its approach to specific instances of conduct in rejecting the federal formulation.

In 2004, a case came before the New Jersey Supreme Court that forced the court to consider whether the general prohibition on specific conduct evidence could be subject to an exception in a particular context.⁶¹ In *State v. Guenther*, the court had to decide whether the credibility of a witness who has accused a defendant of sexual abuse may be impeached by evidence that the witness had made a prior false criminal accusation.⁶² The defendant, Kenneth Guenther, was accused by his stepdaughter, D.F., of sexually abusing her over the course of five years.⁶³ During trial, defendant received documents revealing that D.F. admitted to falsely accusing her neighbor of sexually abusing her.⁶⁴ The defense requested permission to cross-examine D.F. regarding this prior false accusation and in the event that she denied making the false accusation, the defendant stated his intent to impeach D.F. with extrinsic evidence.⁶⁵ The trial court denied this request and ruled that “the purported false accusation was ‘irrelevant’ and ‘extremely collateral’ and, therefore, inappropriate for consideration by the jury.”⁶⁶ The defendant was convicted of sexual assault.⁶⁷

On appeal from the trial court, the Appellate Division remanded for the determination of whether D.F. made the false accusation and if so whether it was false.⁶⁸ The court directed that if it is found that the accusation was made but determined that the evidence was inadmissible, the

⁶⁰ *Id.*

⁶¹ *State v. Guenther*, 181 N.J. 129, 132 (2004).

⁶² *Id.*

⁶³ *Id.* at 134.

⁶⁴ *Id.* at 132.

⁶⁵ *Id.* at 133.

⁶⁶ *Id.* at 134.

⁶⁷ *Guenther*, 181 N.J. at 138.

⁶⁸ *Id.*

verdict would stand.⁶⁹ If the court found, however, that D.F. made the false accusation and that it was admissible, a new trial would be necessary.⁷⁰ The State petitioned for certification arguing that the decision was contrary to N.J.R.E. 608 and the New Jersey Supreme Court granted certification to address the issue.⁷¹

The court had to determine whether the common-law principle embodied in N.J.R.E. 608 had continuing vitality when applied to evidence of a victim-witness's prior false accusation.⁷² The court traced the development of the rule noting that it was "not a lack of relevance that gave rise to the rule" prohibiting the use of specific instances of conduct to attack the witness's character for truthfulness, but "the 'auxiliary policies' regarding unfairness to the witness, confusion of issues, and undue consumption of time."⁷³ Thus, according to the court, these auxiliary policies illustrate that the bar on the use of specific instances of conduct to prove a character trait was adopted "for pragmatic reasons associated with the efficient and orderly presentation of a trial."⁷⁴ These reasons remain the present justification for the rule today.⁷⁵ The court explained, however, that when these "auxiliary policies" do not apply, the rationale for the exclusion of such evidence no longer exists.⁷⁶

With these principles in mind, the court then addressed whether limited circumstances warrant an exception to N.J.R.E. 608.⁷⁷ The court noted that various jurisdictions across the country have addressed this issue and in sexual crime cases have permitted cross-examination of

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 138–39.

⁷² *Id.* at 141.

⁷³ *Guenther*, 181 N.J. at 142 (citing 3A WIGMORE ON EVIDENCE § 979, at 827 (Chadbourn rev.1970)).

⁷⁴ *Id.*

⁷⁵ *Id.* at 141.

⁷⁶ *Id.* at 142.

⁷⁷ *Id.* at 147.

a witness-accuser who has falsely alleged a sexual crime on a previous occasion.⁷⁸ In light of this, the court concluded that in a criminal case involving impeachment of a victim-witness whose credibility was the central issue in the case, a defendant has the right to show that a victim-witness has made a prior false criminal accusation for the purpose of challenging that witness's credibility.⁷⁹

The court outlined the proper procedure for determining whether the evidence should be admitted as well as the relevant factors to consider, stressing that courts must ensure that “testimony on the subject does not become a second trial, eclipsing the trial of the crimes charged.”⁸⁰ The court emphasized that its ruling was not creating a new rule of evidence but carving out a narrow exception to N.J.R.E. 608 to allow for the introduction of relevant evidence that may affect jurors’ estimation of the credibility of a key witness.⁸¹ Thus, the court concluded, this limited exception will enhance the “fairness and truth-seeking function of a trial,”⁸² and is consistent with the rationale underpinning the rule.⁸³ *Guenther* illustrates New Jersey’s current formulation of the rule with the now-added exception. Moreover, *Guenther* summarized the continuing rationale for maintaining the bar on specific instances of conduct but also outlined the circumstances that would render the rule and its underlying policies no longer necessary.

⁷⁸ *Id.* at 151–54.

⁷⁹ *Guenther*, 181 N.J. at 154, 156 (noting that the holding is limited to “criminal case[s] that involve[] the impeachment of a victim-witness whose credibility was the central issue in the case”). The exception recognized by the court here is reflected in N.J.R.E. 608(b):

The credibility of a witness in a criminal case may be attacked by evidence that the witness made a prior false accusation against any person of a crime similar to the crime with which defendant is charged if the judge preliminarily determines, by a hearing pursuant to Rule 104(a), that the witness knowingly made the prior false accusation.

⁸⁰ *Guenther*, 181 N.J. at 157.

⁸¹ *Id.* at 159.

⁸² *Id.*

⁸³ *Id.* at 154.

III. Majority Approach to Impeachment of a Witness's Character for Truthfulness Through Specific Instances of Conduct

This Part turns to the majority approach regarding specific conduct evidence in the context of attacking a witness's character for truthfulness and how the rule is applied. FRE 608(b) is representative of the majority approach. A majority of states follow the federal approach and permit cross-examination into specific instances of conduct if they are probative of the witness's character for truthfulness.⁸⁴

FRE 608 envisions three ways of showing that a witness is by character or disposition either truthful or untruthful: (1) by testimony as to reputation;⁸⁵ (2) by testimony in the form of opinion;⁸⁶ and (3) by evidence of specific instances of conduct.⁸⁷ With respect to specific instances of conduct, FRE 608(b) uses the verb "may" in this setting, making it clear that the matter is left

⁸⁴ Ten states use the language from the current version of FRE 608(b) as amended in 2011. *See* ARIZ. R. EVID. 608(b); IOWA R. EVID. 608(b); ME. R. EVID. 608(b); MISS. R. EVID. 608(b); N.H. R. EVID. 608(b); N.M. R. EVID. 11-608(B); N.D. R. EVID. 608(b); S.D. CODIFIED LAWS § 19-19-608(b) (2016); UTAH R. EVID. 608(b); W. VA. R. EVID. 608(b). Six states use the language from the version of FRE 608(b) as amended in 2003. *See* COLO. R. EVID. 608(b); GA. CODE ANN. § 24-6-608(b) (2013); MINN. R. EVID. 608(b); OHIO R. EVID. 608(B); TENN. R. EVID. 608(b); WIS. STAT. ANN. § 906.08(2) (2018). Sixteen states use the language from the original 1975 version. *See* ARK. R. EVID. 608(b); DEL. R. EVID. 608(b); IDAHO R. EVID. 608(b); KY. R. EVID. 608(b); MICH. R. EVID. 608(b); MT. R. REV. Rule 608(b); NEB. REV. STAT. § 27-608(2) (1975); NEV. REV. STAT. § 50.085(3) (1975); N.C. GEN. STAT. § 8C-1, Rule 608(b) (1983); OKLA. STAT. tit. 12, § 2608(B) (1978); R.I. R. EVID. 608(b); S.C. R. EVID. 608(b); VT. R. EVID. 608(b); WASH. R. EVID. 608(b); WYO. R. EVID. 608(b). Six states adopted only the latter part of the rule, FRE 608(b)(2); they permit cross-examination of a character witness with specific instances of conduct about the character for truthfulness or untruthfulness of the underlying witness. *See* ALA. R. EVID. 608(b); ALASKA R. EVID. 608(b); IND. R. EVID. 608(b); LA. CODE EVID. ART. 608(B); PA. R. EVID. 608(b); VA. SUP. CT. R. 2:608. Connecticut also follows the federal approach. CONN. CODE EVID. 6-6(b). Maryland also allows cross-examination about a witness's prior conduct that is probative of untruthfulness, when the questioner, if challenged, "establishes a reasonable factual basis" outside the jury's presence. MD. R. 5-608(b). Hawaii permits cross-examination about specific instances of a witness's conduct, if probative of untruthfulness, and affords judges discretion to allow the use of extrinsic evidence. HAW. REV. STAT. § 626-608(b) (1993). Kansas allows any party to "introduce extrinsic evidence concerning any conduct by [the witness] and any other matter relevant upon the issues of credibility." KAN. STAT. ANN. § 60-420 (1963). California permits evidence of specific instances of conduct to challenge a witness's credibility in criminal but not civil cases. *See* CAL. CONST. art. I, § 28; CAL. EVID. CODE § 787; *People v. Harris*, 767 P.2d 619, 640-41 (Cal. 1989).

⁸⁵ FED. R. EVID. 608(a).

⁸⁶ *Id.*

⁸⁷ FED. R. EVID. 608(b).

to the discretion of the court.⁸⁸ This raises two questions: (a) what general considerations govern a court's exercise of discretion under subdivision; and (b) when is specific-instances evidence probative of truthfulness or untruthfulness?⁸⁹

A. What Governs the Court's Exercise of Discretion?

While the current text of subdivision (b) provides no guidance, an early version of that provision stated that FRE 403 and FRE 611 supply the governing principles.⁹⁰ Drafters eventually removed from the text this reference to FRE 403 and FRE 611; however, as indicated in the Advisory Committee notes, the revision did not render those rules irrelevant to the analysis.⁹¹ Accordingly, the courts recognize that FRE 403 and FRE 611 identify the principles controlling the exercise of discretion under FRE 608(b).⁹² Under those rules, the court's job is to balance the probative value of specific-instances evidence against the potential dangers and costs of that evidence.⁹³

Some of the general factors courts consider in this analysis are: (1) whether the witness's testimony is crucial or unimportant, (2) the relevancy of the act of misconduct to truthfulness, (3) the nearness or remoteness of the misconduct to the time of trial, (4) whether the matter inquired into is likely to lead to time-consuming, distracting explanations on cross-examination or re-

⁸⁸ *Id.* (“But the court *may*, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness”) (emphasis added).

⁸⁹ WRIGHT & GOLD, *supra* note 4, § 6118.

⁹⁰ *Id.* § 6111.

⁹¹ FED. R. EVID. 608(b) advisory committee's notes (“[T]he 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.”).

⁹² *See United States v. Seymour*, 472 F.3d 969, 971 (7th Cir. 2007) (“Rule 608(b) is explicit that the determination of whether to allow specific instances of conduct to be used to challenge a witness's reputation for truthfulness is committed to the discretion of the district judge, and Rule 403 establishes the standard for the exercise of the judge's discretion in evidentiary matters”).

⁹³ WRIGHT & GOLD, *supra* note 4, § 6118; *see also* FED. R. EVID. 403 (“[T]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”); *United States v. Saunders*, 166 F.3d 907, 920 (7th Cir. 1999) (finding probative value of evidence concerning character for veracity must outweigh danger of unfair prejudice, confusion of issues, or misleading jury).

examination, and (5) whether there will be unfair humiliation of the witness and undue prejudice to the party which called the witness.⁹⁴ It is further recognized that courts have broad discretion in making this determination and a trial judge's ruling can be overturned only on a finding of abuse of discretion.⁹⁵

For example, in *United States v. Bunchan*, the Court of Appeals addressed whether the trial court abused its discretion in limiting inquiry into specific instances of conduct on cross-examination.⁹⁶ The defendant sought to cross-examine a government witness about criminal charges that were currently pending against him for indecent assault and battery of a child.⁹⁷ The defendant argued that the inquiry was permissible under FRE 608(b) as a specific instance of prior conduct relevant to the witness's character for truthfulness.⁹⁸ The trial court permitted the defendant to elicit, through cross-examination of the witness, that there were state court charges currently pending against him.⁹⁹ But the trial court ordered that he could not inquire into the nature of the charges, finding such an inquiry "far too prejudicial under FRE 403."¹⁰⁰

The Court of Appeals found no abuse of discretion in the trial court's restriction of the cross-examination of the witness.¹⁰¹ Citing FRE 403, the Court of Appeals noted that the ruling

⁹⁴ CHARLES T MCCORMICK ET AL., MCCORMICK ON EVIDENCE §41, at 93 (5th ed. 1999); *see also* *United States v. Leake*, 642 F.2d 715, 719 (4th Cir. 1981) ("[P]roper factors to be employed in measuring the scope of cross-examination [are]: the importance of the testimony to the government's case, the relevance of the conduct to the witness's truthfulness, and the danger of prejudice, confusion, or delay raised by evidence sought to be adduced."); *Telum, Inc. v. E.F. Hutton Credit Corp.*, 859 F.2d 835, 839 (10th Cir. 1988) (finding the probative value of evidence that one of the defendant's agents embezzled \$40,000 in connection with the plaintiff's lease was greatly outweighed by risk of unfair prejudice).

⁹⁵ *See* JACK B. WEINSTEIN & MARGARET A. BERGER, 4-608 WEINSTEIN'S FEDERAL EVIDENCE § 608.02c (2017); *see also* *United States v. Ortiz*, 5 F.3d 288, 290-91 (7th Cir. 1993) (holding no abuse of discretion in excluding, as irrelevant, personnel file of government agent offered for impeachment and finding that Rule 608(b) expressly provided that instances of conduct may be inquired into on cross-examination "in the discretion of the court" and that the "district court has broad discretion in assessing admissibility of any evidence").

⁹⁶ 580 F.3d 66, 71 (1st Cir. 2009).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

allowed defendant to raise the possibility that the witness would receive lighter treatment on the state charges if he testified favorably for the government.¹⁰² The Court of Appeals found, however, that exposing the nature of the pending state charges was not necessary to present such evidence.¹⁰³ Further, the Court of Appeals noted that FRE 608(b) only permits inquiry into prior conduct if the conduct is probative of the witness's character for truthfulness or untruthfulness.¹⁰⁴ The Court of Appeals held that the trial court did not abuse its discretion in determining that "the nature of the sexual assault charges was not sufficiently probative of [the witness's] character for truthfulness to outweigh the serious danger of prejudicing the jury against him"¹⁰⁵

Bunchan illustrates the role of FRE 403 in the determination of whether inquiry into specific instances of conduct on cross-examination will be permitted. This approach allows judges to balance the interests on both sides and take into account particular facts and circumstances of the case before the court. Moreover, as in this case, it allows judges to admit the evidence where it is probative of a witness's character for truthfulness but can limit the inquiry so as to preclude any of the dangers listed in FRE 403.

B. What Conduct is Probative of Truthfulness?

FRE 608(b) provides that a court may allow specific instances of conduct "if they are probative of the character for truthfulness or untruthfulness."¹⁰⁶ The critical question, therefore, is what kinds of conduct are probative of truthfulness. Courts have taken three basic approaches to determining whether certain conduct is relevant to the witness's character for truthfulness.¹⁰⁷ Under a broad view, virtually any conduct indicating bad character relates to untruthfulness.¹⁰⁸

¹⁰² *Bunchan*, 580 F.3d at 71.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ FED. R. EVID. 608.

¹⁰⁷ 3 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 6:33 (Thomson/West 4th ed.).

¹⁰⁸ *Id.*

Under the middle view, “behavior seeking personal advantage by taking from others in violation of their rights” may be admissible if committed under circumstances reflecting on veracity.¹⁰⁹

Under the narrow view, conduct is admissible only if it directly involves falsehood or deception, such as forgery or perjury.¹¹⁰

Under the broad view, the expansive scope of possible acts that indicate bad behavior opens up the witness’s entire life to probing, leaving the witness vulnerable to embarrassment and abuse.¹¹¹ Moreover, the indirect inferences on which the veracity argument depends are too weak to justify this approach.¹¹² Recognizing these difficulties and potential for abuse, virtually no modern decisions seem to take this view.¹¹³ Most courts tend to fall in either the middle view or narrow view as they recognize the dangers the broad view presents and insist on closer links between the conduct and veracity.¹¹⁴

In *United States v. Manske*, the Court of Appeals had to decide whether FRE 608(b) allowed cross-examination concerning a witness’s threats of violence which were intended to influence the truthfulness of other witness’s testimony against him.¹¹⁵ The trial court did not permit inquiry into the instances of conduct, holding that such evidence was irrelevant.¹¹⁶ The trial court noted that FRE 608(b) did not allow the use of the threat evidence to cross-examine the witness because such evidence did not go to character for truthfulness, “but rather, to the character for violence and [the witness’s] threatening nature.”¹¹⁷

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ MUELLER & KIRKPATRICK, *supra* note 107, § 6:33.

¹¹⁴ *Id.*

¹¹⁵ 186 F.3d 770 (7th Cir. 1999).

¹¹⁶ *Id.* at 774.

¹¹⁷ *Id.*

On appeal, the Court of Appeals began by discussing the three approaches in determining whether this conduct was probative of truthfulness or untruthfulness.¹¹⁸ The Court of Appeals ultimately adopted the middle view.¹¹⁹ The court explained that under this view specific act evidence is admissible when, although “the specific instance of conduct may not facially appear relevant to truthfulness, closer inspection reveals that it bears on the issue.”¹²⁰ The Court of Appeals noted that this more flexible standard under the middle view is a wise approach.¹²¹ This standard allows questions that would not be embraced by the narrow view, which precludes evidence that may not facially appear to be relevant to truthfulness.¹²²

Applying this approach, the Court of Appeals found that FRE 608(b) did not limit inquiry only to conduct involving fraud or deceit, but permits cross-examination into “acts that reflect adversely on a person’s honesty and integrity.”¹²³ Thus, the court held that “threatening to cause physical harm to a person who proposes to testify against you is . . . probative of truthfulness.”¹²⁴ The Court of Appeals noted that the trial court construed the threat evidence too narrowly by perceiving the threats as probative only of violence.¹²⁵ The violent conduct, however, was a proper subject of inquiry on cross-examination because under the circumstances the threatening conduct was aimed at concealing or distorting the truth, thus implicating the witness’s truthfulness.¹²⁶

While these categories have been recognized, courts generally confine their analyses to the specific conduct raised before them and assess, on a case-by-case basis, whether the conduct is

¹¹⁸ *Id.* at 775.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Manske*, 186 F.3d at 775.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 776.

¹²⁶ *Id.*

probative of truthfulness or untruthfulness.¹²⁷ For example, the Court of Appeals in *United States v. Leake* considered whether the trial court erred by refusing to permit defense counsel to question a witness on cross-examination concerning various fraudulent financial schemes.¹²⁸ In interpreting the scope of FRE 608 and more specifically, what matters can be raised on cross-examination, the Court of Appeals found that FRE 608 “authorizes inquiry only into instances of misconduct that are ‘clearly probative of truthfulness or untruthfulness,’ such as perjury, fraud, swindling, forgery, bribery, and embezzlement.”¹²⁹

The Court of Appeals held that the conduct defense counsel sought to expose was probative of the witness’s truthfulness.¹³⁰ The witness’s conduct included obtaining money under false pretenses, defrauding an innkeeper, various checks drawn by the witness that had been returned for insufficient funds, numerous default judgments that had been entered against the witness in civil actions seeking repayment of loans, and the witness, or firms that he controlled, had entered numerous contracts to build churches, received payment, but failed to complete the work under the contracts.¹³¹ The court concluded that such conduct “certainly establish[es] a pattern of fraudulent activity that, if revealed, would have placed [the witness’s] credibility in question.”¹³²

Further examples of particular conduct that many courts have concluded are probative of truthfulness or untruthfulness include conduct that consists of acts clearly implicating veracity

¹²⁷ WRIGHT & GOLD, *supra* note 4, § 6118.

¹²⁸ 642 F.2d 715, 718 (4th Cir. 1981).

¹²⁹ *Id.* (quoting 3A WIGMORE ON EVIDENCE § 982 (Chadbourn rev. 1970)).

¹³⁰ *Id.* at 719.

¹³¹ *Id.*

¹³² *Id.*

such as insurance fraud,¹³³ lying in court,¹³⁴ tax fraud,¹³⁵ using a false name or identity,¹³⁶ lying repeatedly,¹³⁷ lying on credit card application,¹³⁸ lying on a job application,¹³⁹ lying on a license application,¹⁴⁰ bank fraud,¹⁴¹ and bribery.¹⁴² Conversely, courts have generally found that conduct is not probative of truthfulness or untruthfulness where the conduct consisted of marital

¹³³ See *United States v. Amahia*, 825 F.2d 177, 180 (8th Cir. 1987) (upholding cross-examination concerning specific facts of insurance fraud).

¹³⁴ See *United States v. Whitmore*, 359 F.3d 609, 619 (D.C. Cir. 2004) (“Nothing could be more probative of a witness’s character for untruthfulness than evidence that the witness has previously lied under oath.”).

¹³⁵ See *Chnapkova v. Koh*, 985 F.2d 79, 82 (2d Cir. 1993) (holding evidence that witness had not filed tax returns for eight years was a proper subject on cross-examination as it bore directly on her credibility as a witness).

¹³⁶ See *United States v. Mansaw*, 714 F.2d 785, 789 (8th Cir. 1983) (“A witness’ use of false names or false identities is a proper subject of cross-examination under [FRE] 608.”); *United States v. Reid*, 634 F.2d 469, 473 (9th Cir. 1980) (affirming cross-examination about statements made in a letter in which the witness admitted to falsifying his name, his occupation, and the name of his business).

¹³⁷ See *United States v. Jones*, 900 F.2d 512, 520–21 (2d Cir. 1990) (affirming cross-examination regarding false statements on applications for employment, apartment, driver’s license, loan, and membership in an association).

¹³⁸ See *United States v. Sperling*, 726 F.2d 69, 75 (2d Cir. 1984) (finding that it was proper for the government to cross-examine a witness regarding his false credit card applications to show a general lack of credibility).

¹³⁹ See *United States v. Howard*, 774 F.2d 838, 845 (7th Cir. 1985) (affirming inquiry on cross-examination regarding false statements the witness made on two employment applications because the witness’s honesty or lack thereof on the applications was “plainly probative of his character for truthfulness”).

¹⁴⁰ See *United States v. Carlin*, 698 F.2d 1133, 1137 (11th Cir. 1983) (permitting cross-examination of witness as to the truthfulness of his answer on his verified application for used car dealer licenses).

¹⁴¹ See *United States v. Chevalier*, 1 F.3d 581, 584 (7th Cir. 1993) (holding cross-examination into alleged bank fraud was proper because such conduct constitutes specific instances of conduct probative of truthfulness).

¹⁴² See *United States v. Wilson*, 985 F.2d 348, 352 (7th Cir. 1993) (affirming cross-examination regarding prior acts of bribery because bribery is probative of a witness’s character for truthfulness).

infidelity,¹⁴³ prostitution,¹⁴⁴ drug-related acts,¹⁴⁵ domestic abuse,¹⁴⁶ child abuse,¹⁴⁷ violent crimes,¹⁴⁸ arson,¹⁴⁹ murder,¹⁵⁰ parole violations,¹⁵¹ manslaughter,¹⁵² and assault.¹⁵³

Thus, whether conduct is probative of truthfulness or untruthfulness is largely left to the discretion of the court. Though, courts tend to look toward conduct that clearly speaks to veracity and if presented with conduct that is not on its face probative of veracity, will evaluate the evidence in light of the circumstances to determine whether the conduct, upon closer inspection, bears on the question of veracity.¹⁵⁴

¹⁴³ See *United States v. Ndiaye*, 434 F.3d 1270, 1290 (11th Cir. 2006) (finding a letter husband sent to female neighbor asking to meet up may suggest he “was not being entirely candid with his wife,” but it does not “directly relate to [the witness’s] truthfulness and honesty”); *United States v. Thiongo*, 344 F.3d 55, 60 (1st Cir. 2003) (evidence that the witness bore one man’s child while married to another was not probative of untruthfulness).

¹⁴⁴ See *United States v. Smith*, 831 F.2d 657, 661 (6th Cir. 1987) (citing FED. R. EVID. 608(b)) (holding no abuse of discretion in not permitting questions on cross-examination that witness dressed as a prostitute or engaged in prostitution as it would have little relevance to her credibility as a witness).

¹⁴⁵ See *Elliott v. Aspen Brokers, Ltd.*, 811 F. Supp. 586, 590 (D. Colo. 1993) (holding that evidence that a witness had been allegedly involved in past drug activity would not be admitted to challenge witness’s character for truthfulness because “courts generally agree that a witness’ past drug activity is not probative of his character for truthfulness”); *United States v. Pickard*, 211 F. Supp. 2d 1287, 1292 (D. Kan. 2002) (“Drug use is not admissible under Rule 608(b) because it is not probative of truthfulness.”).

¹⁴⁶ See *Miller v. United States*, 135 F.3d 1254, 1256 (8th Cir. 1998) (upholding trial court’s decision to deny inquiry into instances of domestic violence because such acts are not probative of a witness’s propensity for truthfulness).

¹⁴⁷ See *Starling v. Union Pac. R.R. Co.*, 203 F.R.D. 468, 484 (D. Kan. 2001) (finding evidence of prior charge of child abuse which did not result in a conviction was not a proper subject on cross-examination under FRE 608(b)).

¹⁴⁸ See *United States v. Parker*, 133 F.3d 322, 327 (5th Cir. 1998) (holding violent crimes are irrelevant to a witness’s character for truthfulness); *United States v. Pena*, 978 F. Supp. 2d 254, 266 (S.D.N.Y. 2013) (prohibiting cross-examination about a witness’s violent acts toward women and finding no reason to depart from the “general rule” that evidence of acts relating to violence are properly excluded as having insufficient bearing on a witness’s credibility).

¹⁴⁹ See *United States v. Cudlitz*, 72 F.3d 992, 996 (1st Cir. 1996) (“[Witness] might have been cross-examined under Rule 608(b) as to prior instances of forgery or perjury; but soliciting arson, although showing bad character generally, is not ‘probative of . . . untruthfulness.’”).

¹⁵⁰ See *United States v. Barrett*, 766 F.2d 609, 615 (1st Cir. 1985) (finding no abuse of discretion in refusing to allow cross-examination of witness concerning pending murder charge under FRE 608(b)); *United States v. Ramirez-Rivera*, 800 F.3d 1, 43 (1st Cir. 2015) (finding no abuse of discretion in prohibiting inquiry into specific details of murder as they do not tell anything of the witness’s tendency to be truthful).

¹⁵¹ See *United States v. Tomaiolo*, 249 F.2d 683, 689 (2d Cir. 1957) (finding violation of the terms of the defendant-witness’s parole was not an offense relevant to his credibility).

¹⁵² See *United States v. Pickard*, 211 F. Supp. 2d 1287, 1293 (D. Kan. 2002) (finding a charge of manslaughter and events surrounding it inadmissible under FRE 608(b) because they are not probative of the witness’s veracity).

¹⁵³ See *United States v. Lamb*, 99 F. App’x 843, 847 (10th Cir. 2004) (“[A]bsent more specific allegations, mere assault does not impugn a witness’s credibility . . .”).

¹⁵⁴ See also *Gordon v. United States*, 383 F.2d 936, 940 (D.C. Cir. 1967) (“A ‘rule of thumb’ thus should be that convictions which rest on dishonest conduct relate to credibility whereas those of violent or assaultive crimes generally do not . . .”).

C. Prohibition of Extrinsic Evidence

Although FRE 608(b) permits inquiry on cross-examination about specific instances of conduct, the rule expressly prohibits the use of extrinsic evidence to prove such conduct occurred in order to attack or support a witness's character for truthfulness.¹⁵⁵ Extrinsic evidence is evidence offered through documents or other witnesses, rather than elicited from cross-examination of the witness himself or herself.¹⁵⁶ For example, in *United States v. Mangiameli*, the Court of Appeals considered whether the trial court erred in excluding portions of the proffered testimony of a defense witness offered to impeach the veracity of a prosecution witness.¹⁵⁷ The defense witness would have testified regarding specific instances of the untruthfulness under oath by the prosecution witness.¹⁵⁸

The Court of Appeals found that evidence of multiple instances of lying under oath was calculated to prove the prosecution witness's general character for veracity thus, subject to the restrictions of FRE 608(b).¹⁵⁹ The court further noted that the provisions of FRE 608(b) provide that specific instances of a witness's conduct, for the purpose of attacking his character for truthfulness, may not be proved by extrinsic evidence.¹⁶⁰ Therefore, the Court of Appeals concluded that the defense may have inquired into the specific instances of conduct to attack the prosecution witness's character for truthfulness upon cross-examination of that witness.¹⁶¹ But,

¹⁵⁵ FED. R. EVID. 608(b); *see* *United States v. Perez-Perez*, 72 F.3d 224, 227 (1st Cir. 1995) (“The notion underlying the rule is that while certain prior good or bad acts of a witness may constitute *character* evidence bearing on veracity, they are not evidence of enough force to justify the detour of extrinsic proof.”).

¹⁵⁶ WEINSTEIN & BERGER, *supra* note 95, § 608.20[c]; *see also* *United States v. Boulerice*, 325 F.3d 75, 82 n.5 (1st Cir. 2003) (explaining testimony elicited under cross-examination is not “extrinsic” and evidence “is ‘extrinsic’ if offered through documents or other witnesses, rather than through cross-examination of the witness himself or herself”).

¹⁵⁷ 668 F.2d 1172, 1175–76 (10th Cir. 1982).

¹⁵⁸ *Id.* at 1175.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 1176.

¹⁶¹ *Id.*

by seeking to introduce the specific conduct evidence through the testimony of another witness, the defense attempted to attack the prosecution witness's character for truthfulness by extrinsic evidence of conduct, "which is forbidden by Rule 608(b)."¹⁶² Therefore, the Court of Appeals held that the evidence was properly excluded.¹⁶³

Moreover, the prohibition on extrinsic evidence means that once counsel asks the witness about the specific instance of conduct, counsel is "bound by the witness's answer."¹⁶⁴ And if the witness denies the conduct, counsel may not introduce any further evidence, by way of calling another witness or introducing physical evidence, to prove the witness committed the act.¹⁶⁵ In this way FRE 608(b) gives meaning to the adage that the questioner must "take the answer of the witness."¹⁶⁶ For example, in *United States v. Goings*, the Court of Appeals held that the trial court had discretion to exclude written evidence that a government witness failed to repay the entire advance from her next paycheck.¹⁶⁷ The Court of Appeals explained that FRE 608(b) allows cross-examination about specific instances of conduct that concern the witness's character for truthfulness, "but forbids the introduction of extrinsic evidence to prove the specific bad act occurred."¹⁶⁸ Therefore, after the witness specifically denied that she had ever failed to fully repay a payroll advance from her next paycheck, "the defendants could not introduce extrinsic evidence to contradict her."¹⁶⁹

¹⁶² *Id.*

¹⁶³ *Mangiameli*, 668 F.2d at 1176.

¹⁶⁴ WEINSTEIN & BERGER, *supra* note 95, § 608.22[1]; *see also* *United States v. Martinez*, 76 F.3d 1145, 1150 (10th Cir. 1996) (holding if a witness denies making a particular statement on collateral matter, the examiner may not introduce extrinsic evidence to prove that witness did in fact make that statement); *United States v. Corbin*, 734 F.2d 643, 654 (11th Cir. 1984) (excluding evidence that government witness shot someone after he denied it on cross, because such evidence "falls squarely within Rule 608," which limits inquiry to questions on cross).

¹⁶⁵ MUELLER & KIRKPATRICK, *supra* note 107, § 6:36.

¹⁶⁶ *Id.*; *see also* *United States v. Matthews*, 168 F.3d 1234, 1244 (11th Cir. 1999) (concluding if the witness denies conduct, it may not be proved by extrinsic evidence and the questioning party must take the witness's answer).

¹⁶⁷ 313 F.3d 423, 426–27 (8th Cir. 2002).

¹⁶⁸ *Id.* at 427.

¹⁶⁹ *Id.*

IV. Advantages and Disadvantages of the Majority Approach to Impeachment of a Witness's Character for Truthfulness Through Specific Instances of Conduct

A. Dangers in Allowing Inquiry into Specific Instances of Conduct

While character evidence may be relevant on the question whether a witness is testifying truthfully, the use of such evidence may cause problems with judicial administration and unfairness to the parties.¹⁷⁰ In fact, it has been suggested that a complete bar on the use of specific instances of conduct to attack a witness's character for truthfulness may be the preferable approach "given the dangers of prejudice (particularly if the witness is a party), of distraction and confusion, of abuse by asking unfounded questions, and the difficulties of determining whether particular acts relate to character for truthfulness."¹⁷¹

In his concurring opinion in *State v. Scott*, Justice Albin illustrated these problems and noted that this form of impeachment has been prohibited because "the probative value of such questioning is outweighed by the potential prejudice of diverting jurors from the central issues in a case."¹⁷² Moreover, Justice Albin explained that the threat of collateral attacks regarding specific instances that are "wholly unrelated to the litigation" could keep crime victims from coming forward and injury victims from bringing their claims.¹⁷³ Such a threat might also deter defendants from taking the stand, thus depriving the jury of their testimony.¹⁷⁴ And finally,

¹⁷⁰ See Victor Gold, *Two Jurisdictions, Three Standards: The Admissibility of Misconduct Evidence to Impeach*, 36 Sw. U. L. REV. 769, 770–79 (2008) (discussing benefits and costs of misconduct impeachment, focusing on the adverse effect such evidence has on accurate fact finding, the tendency to encourage witness harassment, and potential for undue delay); 3A JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 979, at 826 (2d ed. 1940) ("[E]ach additional witness introduces the entire group of questions as to his qualifications and his impeachment, and the amount of new evidence thus made possible may increase in far greater than geometrical proportion to the number of new witnesses, so that the trial may become in length extremely protracted, and with relatively little profit . . . th[e] additional mass of testimony on minor points tends to overwhelm the material issues of the case and to confuse the tribunal.").

¹⁷¹ MCCORMICK, *supra* note 94, §41, at 92.

¹⁷² *State v. Scott*, 229 N.J. 469, 495 (2017) (Albin, J., concurring).

¹⁷³ *Id.*

¹⁷⁴ *Id.*

parties would be encouraged to forage for impeachment evidence to launch wide-ranging attacks on a witness's credibility.¹⁷⁵

One of the general dangers presented by specific instances of conduct is the potential to confuse or distract the jury from the substantive issues being tried.¹⁷⁶ Evidence of specific acts is usually not relevant to the issues being tried, which can create a danger of confusion for the jury.¹⁷⁷ In addition, whether a jury is able to limit its consideration of character evidence to the character evidence's effect on the witness's credibility, even after instruction, is doubtful.¹⁷⁸ More concerning is when the witness is a party, which makes the ramifications of this prejudicial effect especially serious. In a criminal case, this exposes a testifying defendant to the danger that the jury may believe that the defendant is a bad person deserving of punishment, regardless of whether he or she committed the offense.¹⁷⁹

Misconduct evidence also raises questions concerning the appropriate treatment of witnesses. Such evidence creates potential for unfairness and embarrassment.¹⁸⁰ Wigmore suggested that imposing limits on misconduct evidence was compelled by common decency: “[T]he ruthless flaying of personal character in the witness box is not only cowardly—because there is no escape for the victim—and brutal—because it inflicts the pain of public exposure of misdeeds to idle bystanders—but it has often not the slightest justification of necessity.”¹⁸¹

¹⁷⁵ *Id.*

¹⁷⁶ See WRIGHT & GOLD, *supra* note 4, § 6112 (“Evidence of witness character also can undermine the integrity of jury decision-making by distracting the jury from the issues in the case and inducing a decision on an improper basis.”).

¹⁷⁷ See *id.* (“[U]nlike evidence of bias or prior inconsistent statements, evidence concerning witness character bears no specific link to the facts or parties in a case.”); see also *United States v. Perez-Perez*, 72 F.3d 224, 227 (1st Cir. 1995) (finding that evidence of police officer's misconduct was not material to defendant's guilt or innocence).

¹⁷⁸ WEINSTEIN & BERGER, *supra* note 95, § 608.02[2]; see also *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (“The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction.”) (citation omitted).

¹⁷⁹ MUELLER & KIRKPATRICK, *supra* note 103, § 6:34; see also WRIGHT & GOLD, *supra* note 4, § 6112 (“[W]hen the jury receives evidence that a witness is a bad man, it may be inclined to punish the party associated with that witness.”).

¹⁸⁰ Gold, *supra* note 170, at 778.

¹⁸¹ *Id.* (citing 3A WIGMORE ON EVIDENCE, § 979, at 826 (Chadbourn rev., 1970)).

Potential for unfair surprise to a witness is present because opposing counsel can forage through a witness's past and inquire into any conduct from the witness's life that may bear on truthfulness.¹⁸² This presents an unfair challenge as witnesses cannot be expected to defend against every aspect of their lives, thus increasing the chances a witness "will be surprised by, and unprepared to respond to, totally unfounded charges of misconduct."¹⁸³ Misconduct evidence also may deter witnesses from coming forward for fear of being publicly humiliated since witnesses may be subjected to an unrestrained public dissection of their character, thus depriving "justice of the fullest opportunity to obtain useful testimony."¹⁸⁴

Finally, each of these dangers all have the underlying possibility of causing undue delay.¹⁸⁵ The potential for "mini-trials" and side-excursions into each witness's past, which as noted above are usually not relevant to the substantive issues of the case, create a real danger of not only confusing the issues but prolonging the trial.¹⁸⁶ There is also the possibility of a witness who, even though is being impeached, does not dispute the alleged misconduct but "may want to provide an explanation that diminishes its import or testify to other conduct that reveals the

¹⁸² See *State v. Scott*, 229 N.J. 469, 498 (2017) (Albin, J., concurring) ("Under our current rule, we have concluded that it would not be fair that a witness must answer for his whole life and respond to long ago instances of untruthful conduct.").

¹⁸³ WRIGHT & GOLD, *supra* note 4, § 6112; see also 3A WIGMORE, *supra* note 170, § 979, at 826 ("This unfairness here lies in the fact that the opponent who desired by other witnesses to impeach by particular instances of misconduct might allege them as of any time and place that he pleased, and that, in spite of the utter falsity of the allegations, it would be practically impossible for the witness to have ready at the trial competent persons who would demonstrate the falsity of allegations that might range over the whole scope of his life.").

¹⁸⁴ WEINSTEIN & BERGER, *supra* note 95, § 608.02[2] (citing 3A WIGMORE ON EVIDENCE, § 921, at 724 (Chadborn rev., 1970)); Gold, *supra* note 166, at 778 ("This 'ruthless flaying' can even undermine accurate fact-finding. Witnesses may be reluctant to come forward, and important evidence may be lost, when witnesses are to be subjected to in-court dissection of their character and past conduct.").

¹⁸⁵ WEINSTEIN & BERGER, *supra* note 95, § 608.02[2]; Gold, *supra* note 166, at 778 (explaining that limits on the admissibility of misconduct evidence can be justified on the ground that such evidence has the potential to "burden a trial with distracting and time-consuming detours from the central issues").

¹⁸⁶ WRIGHT & GOLD, *supra* note 4, § 6112 ("[W]ithout limits on admissibility, a case can dissolve into a series of mini-trials examining the life history of each witness. Such a process would distract and confuse the jury, thus undermining the fundamental goal of accurate fact-finding.").

misconduct to be unrepresentative of her character.”¹⁸⁷ Thus, further detracting from the main issues and spending prolonged time on collateral matters wholly unrelated to the case.

B. Arguments for Using the Majority Approach to Impeachment of a Witness’s Character for Truthfulness Through Specific Instances of Conduct

While the use of specific instances of conduct to attack a witness’s character presents various dangers, conscious awareness of these concerns provided the basis for crafting FRE 608.¹⁸⁸ Specific conduct evidence is not permitted wholesale and is subject to various limitations. In his concurring opinion in *State v. Scott*, Chief Justice Rabner illustrated the benefits of the majority approach noting that there are safeguards put in place that protect against these concerns.¹⁸⁹ In addition, Chief Justice Rabner emphasized that New Jersey’s current formulation shields witnesses from being questioned about specific conduct that bears directly on credibility and thus has the effect of presenting witnesses to the jury “under an artificial light.”¹⁹⁰ Therefore, the majority approach as represented by FRE 608 is crafted in a way to alleviate the dangers outlined in the previous section and gives equal weight to the competing concern of impeding the search for the truth.¹⁹¹

First, the Advisory Committee on Rules of Evidence recognized the potential for abuse and dangers, thus the rule was crafted to address the dangers of permitting specific conduct evidence.¹⁹² The Advisory Committee Notes to subdivision (b) provide, “[e]ffective cross-examination demands that some allowance be made for going into matters of this kind, but the possibilities of abuse are substantial. Consequently, safeguards are erected in the form of specific requirements .

¹⁸⁷ Gold, *supra* note 160, at 779 (quoting 3A WIGMORE ON EVIDENCE, § 983, at 841(Chadbourn rev., 1970)).

¹⁸⁸ FED. R. EVID. 608(b) advisory committee’s notes.

¹⁸⁹ *State v. Scott*, 229 N.J. 469, 492–93 (2017) (Rabner, C.J., concurring).

¹⁹⁰ *Id.* at 487, 492.

¹⁹¹ *See id.*

¹⁹² FED. R. EVID. 608 advisory committee’s notes.

. . .”¹⁹³ Those requirements include that the conduct be probative of truthfulness or untruthfulness.¹⁹⁴ Moreover, the overriding protection of FRE 403 requires that probative value not be outweighed by danger of unfair prejudice, confusing the issues, or misleading the jury.¹⁹⁵ FRE 611 further bars harassment and undue embarrassment.¹⁹⁶ In addition, FRE 608(b) is intended to be restrictive.¹⁹⁷ In fact, the original rule was amended by Congress to ensure that it would be restrictively interpreted by trial courts.¹⁹⁸ The rule does not authorize inquiry on cross-examination into instances of conduct that do not actually indicate a lack of truthfulness.¹⁹⁹

One of the major limitations contained in FRE 608(b) is the prohibition on the use of extrinsic evidence.²⁰⁰ This limitation is designed to protect against undue delay as well as confusion of the issues.²⁰¹ As explained above, when a witness is questioned about prior misconduct, counsel is “bound” by the witness’s answers and may not introduce extrinsic evidence to prove the misconduct.²⁰² Thus, counsel may not call another witness or bring in other evidence to disprove a denial and show that the conduct occurred.²⁰³ It is recognized that absent the limitation, this process may amount to a considerable time expenditure that could lead to time

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ See *United States v. Manske*, 186 F.3d 770, 774 (7th Cir. 1999) (explaining that FRE 608(b) is “a rule of limited admissibility”); MUELLER & KIRKPATRICK, *supra* note 107, § 6:29 (“[T]he focus of Rule 608 is not on credibility in [a] broad sense[], but on the aspect of credibility that we describe as ‘character for truthfulness or untruthfulness.’”).

¹⁹⁸ MUELLER & KIRKPATRICK, *supra* note 103, § 6:29 (explaining that FRE 608(b) was amended in 2003 resulting in the word “credibility” being deleted and replaced with “character for truthfulness”).

¹⁹⁹ *Id.*

²⁰⁰ FED. R. EVID. 608(b) (“[E]xtrinsic evidence is not admissible to prove specific instances of a witness’s conduct in order to attack or support the witness’s character for truthfulness.”).

²⁰¹ See *State v. Scott*, 229 N.J. 469, 494 (2017) (Rabner, C.J., concurring); see also *United States v. Simmons*, 444 F. Supp. 500, 507 (E.D. Pa. 1978) (finding FRE 608(b) excludes extrinsic evidence “to avoid minitrials on wholly collateral matters which tend to distract and confuse the jury”).

²⁰² See *supra* pp. 22–23.

²⁰³ WEINSTEIN & BERGER, *supra* note 95, § 608.22[1]; see also *United States v. Martinez*, 76 F.3d 1145, 1150 (10th Cir. 1996) (holding if a witness denies making a particular statement on a collateral matter, the examiner may not introduce extrinsic evidence to prove that the witness did in fact make that statement).

consuming “mini trials” on collateral issues.²⁰⁴ This concern illustrates the principal purpose of this safeguard—to limit the time spent on issues that are not central to the case and to maintain the focus of the trial on substantive issues and matters bearing directly on credibility.²⁰⁵ In addition, it reduces the risk of unfair prejudice that accompanies inquiry into behavior bearing on untruthfulness since such behavior is likely to consist of some form of negative conduct and juries are likely to misuse the evidence, especially if the witness is a party.²⁰⁶

In sum, as explained by Chief Justice Rabner, the bar against extrinsic evidence alleviates the possible dangers from inquiry into specific instances of conduct for two reasons. First, “[t]here is no danger of confusion of issues, because the matter stops with question and answer.”²⁰⁷ Second, “[t]here is no danger of unfair surprise, because the impeached witness is not obliged to be ready with other witnesses to answer the extrinsic testimony of the opponent, for there is none to be answered”²⁰⁸ Thus, many of the major concerns that come with permitting inquiry into specific instances of conduct are addressed and properly limited by the prohibition against extrinsic evidence.

In addition, FRE 608(b) is also subject to FRE 403 and FRE 611 as further safeguards to bar testimony that would confuse the issues, distract the jury, or cause undue prejudice or harassment.²⁰⁹ As explained above, the text of the rule leaves to the judge’s discretion the determination of whether or not to allow inquiry into specific instances of conduct.²¹⁰ The judge

²⁰⁴ MCCORMICK, *supra* note 94, § 49, at 110–11.

²⁰⁵ MUELLER & KIRKPATRICK, *supra* note 103, § 6:36.

²⁰⁶ *Id.*

²⁰⁷ State v. Scott, 229 N.J. 469, 488 (2017) (Rabner, C.J., concurring) (quoting 3A WIGMORE ON EVIDENCE, § 981, at 838 (Chadbourn rev., 1970)).

²⁰⁸ *Id.*

²⁰⁹ FED. R. EVID. 608(b) advisory committee’s notes (“[T]he 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.”).

²¹⁰ See *supra* pp. 12–16.

must consider whether the conduct is probative of truthfulness or untruthfulness. Moreover, the overriding requirements of FRE 403 require a judge to balance the issues and ensure that the determination is guided by the understanding that such evidence can have a detrimental effect on the parties and the policies and goals of the justice system.

United States v. Shinderman provides an illustration of the careful balancing process that courts employ.²¹¹ In this case, the Court of Appeals had to determine whether the trial court abused its discretion in permitting the government, on cross-examination, to question the defendant about his responses to questions when applying for a medical license.²¹² The defendant applied for a medical license in 2001 and 2002.²¹³ On each application, he answered “no” to a question asking whether he had ever “been charged, summonsed, indicted, arrested or convicted of any criminal offense”²¹⁴ The government had evidence that defendant had been arrested twice for drug-related offenses, although neither arrest culminated in a conviction.²¹⁵

The government wanted to cross-examine defendant regarding the applications, seeking to cast doubt upon his truthfulness.²¹⁶ The defendant objected and moved to exclude any such inquiry.²¹⁷ He admitted that he had been arrested, but asserted that the arrests had been expunged and therefore, he had answered the questions truthfully and on the advice of counsel.²¹⁸ Defendant offered an affidavit from his counsel to support this contention.²¹⁹ The trial court concluded that the affidavit “provided ‘no convincing ground’ to support the defendant’s belief that the arrests

²¹¹ 515 F.3d 5 (1st Cir. 2008).

²¹² *Id.* at 19.

²¹³ *Id.* at 16.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Shinderman*, 515 F.3d at 16.

²¹⁸ *Id.*

²¹⁹ *Id.*

had vanished” and did not have to be disclosed on the applications.²²⁰ Then, in the exercise of its discretion, the trial court ruled that the government could cross-examine defendant about his arrest-related answers.²²¹ The trial court precluded the government from introducing the arrest records themselves into evidence.²²²

In assessing this ruling, the Court of Appeals noted that a judge’s discretion in determining the scope of cross-examination is subject to the “overarching need to balance probative worth against prejudicial impact.”²²³ The court found no abuse of discretion and emphasized that a witness’s willingness to lie to the government in an application for a license is highly probative of his character for truthfulness.²²⁴ Moreover, the court noted that temporal considerations weighed in favor of permitting the evidence since defendant’s answers were “not remote in time but, rather, were roughly contemporaneous” with the criminal conduct charged.²²⁵ Finally, the central factual issue at trial revolved around the defendant’s intent, making his credibility highly relevant to the outcome of the case.²²⁶

After determining that the misconduct evidence could be a matter for cross-examination under the requirements of FRE 608(b), the court then addressed the question of prejudice.²²⁷ The court noted that revelation of prior arrests carried some potential for adverse effect, however, ultimately concluded that the effect was not particularly inflammatory or of such detriment to compel exclusion of the evidence.²²⁸ Also relevant to this determination, the court noted, was the

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Shinderman*, 515 F.3d at 16 (citing FED. R. EVID. 608(b) advisory committee’s notes) (noting that the balancing function is spelled out in FRE 403).

²²⁴ *Id.* at 17.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.* (“We long have recognized that ‘all evidence is meant to be prejudicial; it is only *unfair* prejudice which must be avoided.’” (quoting *United States v. Rodríguez-Estrada*, 877 F.2d 153, 156 (1st Cir.1989))).

affirmative steps the trial court took to minimize any risk of unfair prejudice.²²⁹ The trial court did not permit the government to elicit any unnecessary or tawdry details regarding the arrests.²³⁰ The trial court allowed the defendant to tell the jury about the ultimate disposition of the arrests and about his belief that they had been expunged.²³¹ Furthermore, the trial court offered to give a limiting instruction.²³²

This case highlights the arguments in favor of the majority approach and illustrates all of the factors properly taken into account by judges when determining whether cross-examination into specific instances of conduct is appropriate. Further, the case demonstrates that this role given to judges is not taken lightly and the rule requires in-depth balancing which serves to alleviate and account for the possible dangers from the use of specific instances of conduct.

C. Counterarguments to the Use of the Majority Approach to Impeachment of a Witness's Character for Truthfulness Through Specific Instances of Conduct

While the federal rule was crafted with these dangers in mind, it is argued that the limitations in FRE 608(b) and the other rules of evidence will not provide adequate safeguards needed to prevent these dangers, and in some cases actually serve to create additional concerns. As explained by Justice Albin in his concurring opinion in *State v. Scott*, the New Jersey Supreme Court has “determined that ‘wide-ranging collateral attacks on the general credibility of a witness’ may lead to jury confusion and distract the jury from ‘the true issues in the case.’”²³³ Justice Albin argued that these concerns are not diminished merely because extrinsic evidence cannot be

²²⁹ *Shinderman*, 515 F.3d at 17.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ *State v. Scott*, 229 N.J. 469, 498 (2017) (Albin, J., concurring) (quoting *State v. Guenther*, 181 N.J. 129, 141–42 (2004)).

introduced.²³⁴ Justice Albin also cautioned that the only limitation guarding the expansive use of specific instances of conduct is Rule 403 which leaves all of the concerns and potential for danger within the discretion of trial judges.²³⁵

First, regarding the limitation on the use of extrinsic evidence, it is recognized that the exclusion of extrinsic evidence of specific conduct to impeach a witness's character for truthfulness does not completely eliminate the danger of confusion and prejudice from inquiry into collateral matters "because the very question itself can convey the theoretically barred information to the jury."²³⁶ Merely asking a question about a specific instance of misconduct and leaving with the jury only a bare denial from the witness can have prejudicial effects on the witness as well as allow the jury to engage in speculation on an issue that is collateral to the merits of the case.²³⁷

Moreover, the phrase "taking his or her answer" can be misleading because it can be understood as suggesting that the cross-examiner cannot continue pressing for an admission that the past conduct did occur.²³⁸ FRE 608(b), however, authorizes this procedure.²³⁹ Thus, while

²³⁴ *Id.* at 498–99 ("Allowing expansive collateral attacks on a witness's credibility through prior specific conduct would likely have the unintended consequence of prompting attorneys to forage through a witness's past Such prior acts of dishonesty would bear little relevance to the [witness's] credibility in court but likely would have an outsized effect on the jury's evaluation of that witness. The admission of the singular incident, or incidents, of untruthfulness would allow the jury to engage in the most simplistic and dangerous assumption—once a liar, always a liar.").

²³⁵ *Id.* at 497–98.

²³⁶ WEINSTEIN & BERGER, *supra* note 95, § 608.22; *see also* MUELLER & KIRKPATRICK, *supra* note 103, § 6:34 ("Simply asking can impeach. Few opportunities for lawyers provide better opportunity to inject prejudice and collateral issues into a case than cross-examination of witnesses on prior acts for purposes of suggesting untruthfulness. In some respects, this mechanism of impeachment invites abuse because the examining lawyer almost cannot lose.").

²³⁷ *Scott*, 229 N.J. at 497 (Albin, J., concurring); *see also* *United States v. Davenport*, 753 F.2d 1460, 1463 (9th Cir. 1985) ("The prejudice to the defendant was, thus, created by the question itself rather than by the testimony given in response. The danger in such a situation is that the prosecution will use the question to waft an unwarranted innuendo into the jury box, knowing that the witness' denial will only serve to defend her credibility, while leaving uncontradicted the reference to the defendant's prior bad conduct."); Gold *supra* note 166, at 778 n.25 (citing 3A WIGMORE ON EVIDENCE, § 988, at 921 (Chadbourn rev., 1970)) ("This method of inquiry or cross-examination is frequently resorted to by counsel for the very purpose of injuring by indirection a character which they are forbidden directly to attack in that way; they rely upon the mere putting of the question (not caring that it is answered negatively) to convey their covert insinuation.").

²³⁸ WEINSTEIN & BERGER, *supra* note 95, § 608.22[1].

²³⁹ *See id.*

counsel is “bound by the witness’s answer,” this merely means extrinsic evidence may not be introduced.²⁴⁰ Counsel may proceed, however, with questioning and continue pressing for admission, for instance, “by reminding the witness of the penalties for perjury.”²⁴¹ This creates concern for undue harassment and still leaves open the threat of jury distraction and confusion pertaining to issues collateral to the merits of the case.²⁴²

Second, apart from the limitation on extrinsic evidence, the only safeguard on the expansive use of specific instances of conduct to attack a witness’s character for truthfulness is Rule 403.²⁴³ The concern with Rule 403 is that while it does take into account the dangers that are associated with cross-examination on specific instances of conduct, trial courts are given broad discretion to make this determination.²⁴⁴ Thus, all of these concerns are left in the hands of one judge and the determination cannot be overturned unless the reviewing court finds an abuse of discretion.²⁴⁵ It has been argued that the task of regulating prejudice delegated by Rule 403 allocates broad power to trial judges to make individualized decisions about the relative importance of competing principles, and as such is “inconsistent with the general hierarchical

²⁴⁰ MCCORMICK, *supra* note 94, § 41, at 94; *see also* United States v. Ling, 581 F.2d 1118, 1121 (4th Cir. 1978) (“[T]he examiner must be content with the witness’ answer Although the cross-examiner may continue to press the defendant for an admission, he cannot call other witnesses to prove the misconduct after defendant’s denial.”).

²⁴¹ MCCORMICK, *supra* note 94, § 41, at 94; *see also* MUELLER & KIRKPATRICK, *supra* note 107, § 6:36 (“[T]he cross-examiner need not take the first answer given. The very idea of cross implies testing and probing, which necessarily means that the lawyer conducting the cross-examination must have a chance to press and even to push the witness.”).

²⁴² MCCORMICK, *supra* note 94, § 41, at 94; *Scott*, 229 N.J. at 498 (Albin, J., concurring) (“Concerns about witness fairness and jury confusion are not diminished merely because extrinsic evidence cannot be introduced to impeach the witness.”).

²⁴³ *Scott*, 229 N.J. at 497–98 (Albin, J., concurring).

²⁴⁴ *See supra* note 95 and accompanying text.

²⁴⁵ *See* United States v. Brown, 500 F.3d 48, 58 (1st Cir. 2007) (“We typically review Rule 403 determinations for abuse of discretion.”); United States v. Shinderman, 515 F.3d 5, 17 (1st Cir. 2008) (“Rule 403 judgments are typically battlefield determinations, and great deference is owed to the trial court’s superior coign of vantage. ‘Only rarely—and in extraordinarily compelling circumstances—will we, from the vista of a cold appellate record, reverse a district court’s on-the-spot judgment concerning the relative weighing of probative value and unfair effect.’” (quoting *Freeman v. Package Mach. Co.*, 865 F.2d 1331, 1340 (1st Cir.1988))).

structure of our legal system. Trial judges customarily exercise more limited, reviewable discretion within a framework of standards set by higher authority.”²⁴⁶

Moreover, as Justice Albin noted, even in cases involving similar conduct, different judges may come to different results when weighing the Rule 403 factors or when determining whether conduct is probative of truthfulness.²⁴⁷ Thus, it is argued, the admissibility of potentially damaging evidence is improperly left with the discretion of trial judges to be determined on a case-by-case basis that is subject to change and ultimately does not adequately address the concerns that arise when permitting inquiry into specific instances of conduct to attack a witness’s character.

V. New Jersey’s Options to Address the Issue and Make Changes to the Current Rule

While Justice Albin expressed valid concerns regarding the use of specific instances of conduct to impeach a witness’s character for truthfulness, a complete ban on any use of such evidence presents equally troubling concerns. There are options to address the issues on both sides. Allowing inquiry into past misconduct does have benefits. While it is recognized that it can be difficult to point to past conduct and determine with any degree of certainty whether the witness is telling the truth or lying, credibility is a critical issue in every case.²⁴⁸ “Character evidence, despite its flaws, may still serve a purpose in calling to the jury’s attention what might be an otherwise unknown deficiency of the witness and thus give the jury a more adequate basis for judging his testimony.”²⁴⁹

²⁴⁶ Alexander J. Tanford, *A Political-choice Approach to Limiting Prejudicial Evidence*, 64 INDIANA L.J. 831, 832 (1989).

²⁴⁷ *Scott*, 229 N.J. at 498 (Albin, J., concurring). Compare *Gustafson v. State*, 590 S.W.2d 853, 858 (Ark. 1979) (finding inquiry about theft under Rule 608(b) proper), with *Rhodes v. State*, 634 S.W.2d 107, 110–11 (Ark. 1982) (modifying *Gustafson* finding interpretation of Rule 608(b) too broad and holding inquiry about theft improper).

²⁴⁸ WEINSTEIN & BERGER, *supra* note 95, § 608.02[1].

²⁴⁹ *Id.* (citing Mason Ladd, *Techniques and Theory of Character Testimony*, 24 IOWA L. REV. 498, 534 (1939)).

Witnesses are often carefully prepped and coached by counsel to “project an in-court character which suggests a high level of credibility.”²⁵⁰ Evidence that reveals the true character of a witness can be used to “poke holes in this facade.”²⁵¹ Moreover, witnesses may be inclined to testify truthfully because a lie may open them up to an attack on their character in court.²⁵² Further, character evidence can act as a check on an attorney who may be tempted to offer testimony from an unreliable witness because that witness’s lack of credibility could be revealed by opposing counsel on cross-examination.²⁵³ Finally, admitting evidence regarding a witness’s character for truthfulness can advance accurate fact-finding (a basic policy goal of the evidence rules), because “just as a jury can be prejudiced against the plaintiff by the inclusion of some evidence, it can be misled by the exclusion of other evidence.”²⁵⁴

In light of the costs and benefits of allowing specific instances of conduct to impeach a witness’s character for truthfulness and taking into account the arguments posed by both sides, it seems that New Jersey’s current formulation does not do enough to address all of the concerns. The case that ignited this debate between the justices highlights the problems with New Jersey’s current formulation. Where the prosecutor had a good-faith basis to ask the question, what is wrong with asking a witness whether she had lied before to protect her son about a serious matter? Such an inquiry bears directly on the witness’s character for truthfulness. As expressed by Chief

²⁵⁰ WRIGHT & GOLD, *supra* note 4, § 6112; *see also* Victor Gold, *Covert Advocacy: Reflections on the Use of Psychological Persuasion Techniques in the Courtroom*, 65 N.C. L. REV. 481, 484–86 (1987) (discussing “courtroom style” psychological techniques lawyers use that are aimed at inducing juries to employ an extralegal basis for its decisions).

²⁵¹ WRIGHT & GOLD, *supra* note 4, § 6112.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Vichare v. AMBAC Inc.*, 106 F.3d 457, 468 (2d Cir. 1996) (explaining that “there are two sides to the 608(b) coin,” prejudice and probative value, and exclusion of evidence solely because it may be prejudicial cuts against the primary policy implicated by FRE 608, accuracy, by depriving the jury of information that bears directly on a witness’s credibility leading to inaccurate results).

Justice Rabner, however, New Jersey’s approach shields witnesses from this type of inquiry and as a result impedes the search for truth and presents witnesses to the jury in an artificial light.²⁵⁵

Moreover, it is difficult to reconcile why N.J.R.E. 608(b) allows evidence of a witness’s prior false criminal accusations but inquiry into a witness’s statements made to exonerate a person is prohibited.²⁵⁶ The New Jersey Supreme Court made clear in *Guenther* that its decision was not made “on constitutional grounds, but rather by making a narrow exception to N.J.R.E. 608 consistent with the rationale of that rule.”²⁵⁷ Thus, the question remains as to what the logical difference is between a prior false accusation and a false statement to exonerate that allows for the disparate treatment under N.J.R.E. 608. In addition, the exception to N.J.R.E. 608 that resulted from *Guenther*, now 608(b), allows “[t]he credibility of a witness in a criminal case [to] be attacked by *evidence* that the witness made a prior false accusation”²⁵⁸ This exception not only allows inquiry into specific instances of conduct but goes beyond the federal rule and does not prohibit the use of extrinsic evidence; rather it is left within the discretion of trial judge as to whether such evidence should be admitted.²⁵⁹ Thus it is difficult to understand why FRE 608(b) is disfavored when it provides a rule of limited admissibility, it protects against the dangers presented by specific instances of conduct, and does not go as far as N.J.R.E. 608(b) by prohibiting extrinsic evidence.

The facts of *State v. Scott* provide a good example of how FRE 608(b) could be applied and avoid any of the concerns regarding the use of specific instances of conduct. The State sought

²⁵⁵ *State v. Scott*, 229 N.J. 469, 487, 492 (2017) (Rabner, C.J., concurring).

²⁵⁶ *Id.* at 492–93 (“False testimony to exonerate is just as troublesome as a false criminal accusation. Both impede the search for the truth. Indeed, it is hard to explain to the public why one area can be probed and not the other.”).

²⁵⁷ *State v. Guenther*, 181 N.J. 129, 154 (2004).

²⁵⁸ N.J.R.E. 608(b) (emphasis added).

²⁵⁹ *Id.*; *see also Guenther*, 181 N.J. at 157 (“Among the factors to be considered in deciding the issue of admissibility are . . . the number of witnesses, the items of extrinsic evidence, and the amount of time required for presentation of the issue at trial If the court, pursuant to its gate-keeping role, determines that evidence of the prior false accusation is admissible, the court has the discretion to limit the number of witnesses who will testify concerning the matter at trial.”).

to introduce evidence of two prior occasions on which the witness, Barbella, allegedly lied to police to exonerate her son, the defendant.²⁶⁰ Applying FRE 608(b), the trial judge would have the discretion to admit the evidence. Whether such evidence could be permitted would be subject to Rule 403 and any testimony that would confuse the issues, distract the jury, or cause undue prejudice would not be permitted. The majority in *Scott*, and Chief Justice Rabner in his concurring opinion, noted that there was a question concerning the prejudicial effect that could result from asking about this prior conduct because it reveals that the defendant had previously been in trouble with the police.²⁶¹ The trial judge, however, could sanitize the evidence and only allow the State to ask whether Barbella had lied to the police to exonerate *others* in the past. Thus, by removing the fact that she had lied to exonerate her son, the prejudice that could result against defendant is eliminated but the jury would still receive the information that relates to the witness's character for untruthfulness. In addition, if Barbella chose to deny that she had made those statements, the prosecutor, under FRE 608(b), would have to take the witness's answer and no extrinsic evidence could come in to prove that Barbella engaged in the alleged conduct.

Given this illustration and the competing concerns regarding specific instances of conduct, it would be beneficial for New Jersey to change N.J.R.E. 608(a) to align with the majority approach. While the disadvantages outlined above do present valid concerns, New Jersey could use the federal rule as a starting point and craft a rule that will take into account the arguments and concerns expressed on both sides. The states have created different ways to handle the use of specific instances of conduct with many taking a more restrictive approach. For example, Tennessee's rule, which follows a more restrictive approach, could be a framework for New Jersey to follow.

²⁶⁰ *Id.*

²⁶¹ *Scott*, 229 N.J. at 483 (majority opinion), 493 (Rabner, C.J., concurring).

A. Tennessee Approach

Tennessee Rule of Evidence 608(b) provides:

Specific instances of conduct of a witness for the purpose of attacking or supporting the witness's character for truthfulness, other than convictions of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, if probative of truthfulness or untruthfulness and under the following conditions, be inquired into on cross-examination of the witness concerning the witness's character for truthfulness or untruthfulness or concerning the character for truthfulness or untruthfulness of another witness as to which the character witness being cross-examined has testified.²⁶²

Both FRE 608(b) and Tennessee Rule of Evidence 608(b) allow for the impeachment of a witness by inquiring on cross-examination into specific instances of conduct that are probative of truthfulness or untruthfulness.²⁶³ Tennessee Rule of Evidence 608(b) also does not permit the introduction of extrinsic evidence to prove the specific instance of conduct had occurred.²⁶⁴ Tennessee, however, has a number of added procedural safeguards that are designed to prevent common types of abuse on cross-examination.²⁶⁵ Tennessee Rule of Evidence 608(b) has three specific provisions that must be satisfied in order to use specific conduct evidence to attack a witness's character for truthfulness:

(1) The court upon request must hold a hearing outside the jury's presence and must determine that the alleged conduct has probative value and that a reasonable factual basis exists for the inquiry; (2) The conduct must have occurred no more than ten years before commencement of the action or prosecution, but evidence of a specific instance of conduct not qualifying under this paragraph (2) is admissible if the proponent gives to the adverse party sufficient advance notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence and the court determines in the interests of justice that the probative value of that evidence, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and (3) If the witness to be impeached is the accused in a criminal prosecution, the State must give the accused reasonable written notice of the impeaching conduct before trial, and the court upon request

²⁶² TENN. R. EVID. 608(b).

²⁶³ FED. R. EVID. 608(b); TENN. R. EVID. 608(b).

²⁶⁴ TENN. R. EVID. 608(b).

²⁶⁵ Robert Banks, Jr., *Some Comparisons Between the New Tennessee Rules of Evidence and the Federal Rules of Evidence Part II*, 20 MEM. ST. U. L. REV. 499, 531–36 (1990).

must determine that the conduct's probative value on credibility outweighs its unfair prejudicial effect on the substantive issues. The court may rule on the admissibility of such proof prior to the trial but in any event shall rule prior to the testimony of the accused. If the court makes a final determination that such proof is admissible for impeachment purposes, the accused need not actually testify at the trial to later challenge the propriety of the determination.²⁶⁶

Tennessee also added a further restriction concerning juvenile conduct which has no comparable federal provision for such evidence.²⁶⁷ Tennessee Rule of Evidence 608(c) provides:

Evidence of specific instances of conduct of a witness committed while the witness was a juvenile is generally not admissible under this rule. The court may, however, allow evidence of such conduct of a witness other than the accused in a criminal case if the conduct would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination in a civil action or criminal proceeding.²⁶⁸

Tennessee did not formally adopt the federal rule. In *State v. Morgan*,²⁶⁹ the Tennessee Supreme Court incorporated FRE 608(b) into Tennessee case law.²⁷⁰ Thus, Tennessee Rule of Evidence 608(b) reflects the Tennessee Supreme Court's view of impeachment by specific instances of conduct that attack a witness's character for truthfulness.²⁷¹ As a result the rule is even more specific than the federal version.²⁷²

B. How New Jersey Can Incorporate Tennessee's Rule to Address Justice Albin's Concerns

New Jersey has the capability of drafting a restrictive rule similar to Tennessee in order to fully address the concerns Justice Albin has expressed. Similar to Tennessee, New Jersey can require a hearing to determine that a reasonable factual basis exists for cross-examining a witness about specific instances of conduct and whether the alleged conduct has probative value in assessing the credibility of the witness. In addition, in criminal cases, the rule could require

²⁶⁶ TENN. R. EVID. 608(b).

²⁶⁷ Banks, *supra* note 265, at 536.

²⁶⁸ TENN. R. EVID. 608(c).

²⁶⁹ 541 S.W.2d 385 (Tenn. 1976).

²⁷⁰ TENN. R. EVID. 608 advisory commission's comment.

²⁷¹ *Id.*

²⁷² *Id.*

counsel to give pretrial notice of intent to question a witness about misconduct, provide an evidentiary basis, and show that the probative worth outweighs unfair prejudice.²⁷³ This would expressly incorporate the requirements under Rule 403 into the language of the rule, make notice of the intent to use specific conduct evidence a requirement, and place a burden on the party seeking to admit such evidence to present specific facts and circumstances.

Moreover, if still not satisfied by Rule 403, New Jersey could adopt an altered balancing test for courts to employ in making the determination regarding prejudice. Minnesota, for example, in criminal cases, requires the court to employ a balancing test that “is not the Rule 403 test favoring admissibility unless probative value is ‘substantially outweighed’ by unfair prejudice.”²⁷⁴ Rather, the rule incorporated the balancing test used by the court in *State v. Fallin*,²⁷⁵ and under this test, “the court should not allow the cross-examination if probative value and unfair prejudice are closely balanced.”²⁷⁶ The evidence should not be allowed unless the prosecutor establishes that the probative value on the issue of credibility outweighs the potential for unfair prejudice.²⁷⁷ Thus, this rule would err on the side of exclusion if the prejudicial effect of the evidence is a closer call.

New Jersey can adopt a time limit that declares certain actions after a specified number of years presumptively barred. New Jersey could take this a step further and set a shorter time limit than the ten-year limit in Tennessee’s rule and add any further burdens on the party seeking to present such evidence. New Jersey could also add further restrictions as deemed necessary like

²⁷³ Minnesota also has a similar restriction. See MINN. R. EVID. 608(c) (prosecutor must give pretrial notice of intent to question defendant or defense witnesses about misconduct, providing evidentiary basis, and showing that probative worth outweighs unfair prejudice).

²⁷⁴ MINN. R. EVID. 608(c) advisory committee’s comment to 2006 amendment.

²⁷⁵ 540 N.W.2d 518 (Minn. 1995).

²⁷⁶ MINN. R. EVID. 608(c) advisory committee’s comment to 2006 amendment (citing *State v. Fallin*, 540 N.W.2d 518, 522 (Minn. 1995)).

²⁷⁷ *Id.*

Tennessee did by adding subsection (c) to its rule to address specific concerns in particular contexts. Further, New Jersey could adopt restrictions and standards to help guide judges when making the determination to allow cross-examination into specific instances of conduct. With regard to what conduct is probative of truthfulness, New Jersey can elect to take the narrow view which provides that conduct is admissible only if it directly involves falsehood or deception.

VI. Conclusion

The Supreme Court of New Jersey in *State v. Guenther* explained that New Jersey bars “the use of prior instances of conduct to attack the credibility of a witness for two essential reasons: to prevent unfairness to the witness and to avoid confusion of the issues before the jury.”²⁷⁸ These goals, however, can be met by carefully crafting a rule that would address such concerns and at the same time provide for the use of specific instances of conduct in cases, like the case at issue here, where such instances bear directly on a witness’s veracity. As Justice Albin explained when writing for the court in *State v. Guenther*, when “the ‘auxiliary policies’ underlying the rule do not apply, the rationale for the exclusion of such evidence no longer exists.”²⁷⁹ As shown by FRE 608(b) and the majority of states that have adopted similar rules, it is possible to adopt a rule that will address the auxiliary policies and under such a rule, the rationale for total exclusion of specific instances of conduct would no longer exist.

²⁷⁸ *State v. Guenther*, 181 N.J. 129, 141 (2004).

²⁷⁹ *Id.* at 142.