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NOTES

EVIDENCE—AN ALTERNATIVE TO THE ERODED EXCLUSIONARY RULE—FEDERAL RULE OF EVIDENCE 608(b)

I. INTRODUCTION

The illegal seizure of a size 38-40, medium tee shirt resulted in the conviction of Attorney J. Lee Havens for importing cocaine in violation of federal law. The government, absent a warrant, confiscated the tee shirt in contravention of the fourth amendment’s bar against unreasonable searches and seizures. Consequently, the tee shirt was considered tainted evidence because it was procured by illegal police conduct. In United States v. Havens, however, the government was permitted to use the tee shirt, despite its tainted character, to impeach the accused. Havens evinced further erosion of the exclusionary rule of evidence. The exclusionary rule is an instrument used to protect the personal liberties guaranteed by the fourth and fifth amendments to the United States Constitution by barring the prosecution’s use of evidence obtained through improper police conduct.

Since it first was enunciated, the exclusionary principle has been qualified to bar tainted evidence only from the prosecution’s

1. United States v. Havens, 446 U.S. 620 (1980). Defendant also was convicted of conspiring to import cocaine and of knowingly and intentionally possessing a controlled substance. Id. at 621.
2. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. Const. amend. IV.
5. See note 2 supra.
6. “[N]or shall any person . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .” U.S. Const. amend. V.
8. Id. at 392.
case-in-chief. The case-in-chief consists of the substantive proof presented to determine a defendant's guilt or innocence with respect to the crimes charged. The United States Supreme Court has permitted the use of evidence to impeach a defendant-witness regarding matters collateral to the case-in-chief. Further, the Court permitted the use of such tainted evidence to impeach the accused in matters directly related to, but still outside, the formal scope of the prosecution's case-in-chief.

A more recently created rule concerned with the exclusion of evidence is Federal Rule of Evidence 608(b) (rule 608(b)). Rule 608(b) is not addressed specifically to situations involving tainted evidence. Rather, it addresses the exclusion of evidence concerning certain instances of a witness' prior conduct: By regarding a defendant-witness' behavior in the fact paradigms surrounding the tainted evidence as a specific instance of conduct, cases otherwise invoking the exclusionary rule may come within the purview of rule 608(b).

This note will briefly trace the history of the exclusionary rule, including the current judicial trend toward reducing the rule's scope. The mechanics of rule 608(b) will then be examined. This examination will be followed by an analysis of the overlap of the exclusionary rule and rule 608(b). Finally, rule 608(b) will be evaluated as a method of excluding evidence that otherwise would be admissible due to the receding scope of the exclusionary rule.

II. EROSION OF THE EXCLUSIONARY RULE

The United States Supreme Court first articulated the exclusionary rule in Weeks v. United States, in which it overturned a conviction for illegal use of the mails. The Court was very concerned with the use of evidence obtained as a result of entry into Weeks' residence by police who then proceeded, in violation of the fourth amendment, to seize personal effects of defendant. The Court determined that the trial judge had improperly allowed the prosecution to use these personal effects as evidence against defendant. The
ant. The Court sought simultaneously to discourage police impropriety and to protect judicial integrity by barring the illegally obtained evidence. In declaring the interrelation of these two concerns the Court stated:

The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts. . . .

The exclusionary rule was further strengthened in 1920 by *Silverthorne Lumber Co. v. United States*, in which the Court barred the government's indirect use of illegally seized evidence. Documents were taken from petitioner's office pursuant to an invalid subpoena and subsequently were returned by order of the trial court. The government then sought to use the information it had obtained through the illegal seizure. To do so, the Court reasoned, "reduces the Fourth Amendment to a form of words." Unless the evidence was obtained independently, it could "not be used at all" whether presented before the court or not.

Five years later, in *Agnello v. United States*, the Supreme Court barred the government from presenting cocaine illegally seized from defendant's house. The evidence was barred, not only from the government's case-in-chief, but also from the government's attempt to impeach defendant.

Although the exclusionary rule originally was used as an absolute bar to admission of tainted evidence, as exemplified by *Agnello*, policy considerations have prompted exceptions to that rule. The primary reason for the exceptions is the Court's intent to prevent a defendant from shielding his perjury behind the government's disability to present tainted evidence. Based on this consideration, the Supreme Court, in *Walder v. United States*, upheld the admission

15. *Id.* at 398.
16. *Id.* at 392.
17. *Id.*
18. 251 U.S. 385 (1920).
19. *Id.* at 390-91.
20. *Id.* at 392.
21. *Id.*
23. *Id.* at 35.
of rebuttal testimony concerning illegally seized heroin. The Court reasoned that to prevent the government from rebutting Walder's sweeping denial on direct examination, that he dealt in or possessed any narcotics, would extend the *Weeks* doctrine to the point of perverting the fourth amendment. Thus, the door was opened for the prosecution's limited use of tainted evidence for impeachment purposes in certain situations.

Statements made in the absence of *Miranda* warnings were used to impeach defendant in *Harris v. New York*. In contrast to *Walder*, in which defendant was impeached on collateral matters, Harris was impeached on matters included in his testimony on cross-examination: matters which focused more directly on the crimes charged. Harris' conviction for selling heroin to undercover agents was upheld in the Court's further attempt to expose perjured testimony of the accused.

Following *Harris*, it was a short step for the Supreme Court to permit illegally obtained evidence to impeach a defendant regarding matters directly related to the crimes charged yet not part of the prosecutor's case-in-chief. In *Oregon v. Hass*, defendant's statements made subsequent to defective *Miranda* warnings were used to convict Hass of stealing a bicycle from a residential garage. Hass denied, on both direct and cross-examination, that he had known the location from which the bicycle was taken. As in *Harris*, the Supreme Court believed that "[a]ssuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief." *Havens* is the most recent decision in this line. The Supreme

25. *Id.* at 65.
26. *Id.*
27. These warnings are derived from *Miranda v. Arizona*, 384 U.S. 436 (1966). When the police take an individual into custody or otherwise deprive him of his freedom in a significant manner he is entitled to a warning prior to questioning. The warning must include notification and the individual must have actual knowledge that: 1) He has the right to remain silent; 2) anything he says can be used against him in a court of law; 3) he has the right to the presence of an attorney; and, 4) if he cannot afford an attorney, one will be appointed for him prior to any questioning, should he so desire. *Id.* at 467-73.
29. *Id.* at 225.
30. *Id.* at 226.
32. *Id.* at 716-17.
33. *Id.* at 721 (quoting *Harris*, 401 U.S. at 225).
Court held that "a defendant's statements made in response to proper cross-examination . . . are subject to otherwise proper impeachment by the government, albeit by evidence that has been illegally obtained that is inadmissible on the government's direct case, or otherwise, as substantive evidence of guilt."34 At the time of his arrest, Havens was carrying in his suitcase a tee shirt with holes cut out. The holes corresponded to swatches sewn onto a shirt worn by a coconspirator who previously had been arrested.35 The swatches served as makeshift pockets which contained cocaine smuggled into Miami International Airport from Lima, Peru. Havens was searched without a warrant and his tee shirt was confiscated.36 The evidence was subsequently suppressed pursuant to a motion prior to trial.37 The issue of the confiscation of the cut-out tee shirt was raised initially by the government on cross-examination.38 Havens there denied knowing that the tee shirt was in his suitcase. The trial court permitted the prosecution to enter the tee shirt as evidence to rebut defendant's denial.39

As a result of these recent decisions, the early development and strengthening of the exclusionary rule has been eclipsed by qualifications and exceptions. The rule no longer stands in absolute terms to protect a defendant at trial from the potential effect of tainted evidence. As a more pandemic consequence, the effectiveness of the exclusionary rule as a countermeasure to police misconduct may be reduced, since improperly procured evidence can now be used against a defendant in limited circumstances.

The United States Supreme Court is unlikely to retreat from its current interpretation restricting the use of the exclusionary rule.40 Limiting the use of the rule, however, does not necessarily preclude the use of other rules of evidence to confront problems concerning tainted evidence.41 Rule 608(b) is one alternative method that can be employed to close some of the technical loopholes created by the current interpretations that limit the use of the exclusionary rule. Such loopholes inure to the benefit of law enforcement officials, the

34. 446 U.S. at 627-28.
35. Id. at 621-22.
36. Id. at 622.
37. Id.
38. Id. at 622-23.
39. Id. at 623.
41. See, e.g., FED. R. EVID. 403; FED. R. EVID. 404; FED. R. EVID. 609.
very objects against whom the rule originally was designed to protect.

III. RULE 608(b) AND THE EXCLUSION OF EVIDENCE

The Federal Rules of Evidence, which became effective in the Federal Courts on July 1, 1975,42 require that evidence of certain prior conduct of a witness be excluded from the trial. This principle of exclusion is embodied in rule 608(b).43

Notwithstanding the use of evidence of prior convictions pursuant to Federal Rule of Evidence 609,44 the first sentence of rule

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

FED. R. EVID. 608(b).
44. FED. R. EVID. 609 provides:
(a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.
(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.
(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.
(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an
608(b) enunciates a general rule prohibiting proof, by extrinsic evidence, of specific instances of conduct for impeaching or supporting a witness' credibility. The second sentence immediately carves an exception to the general rule of exclusion. There have been significant differences, however, in the interpretation of this exception by the circuit courts. In some cases, courts within the same jurisdiction have disagreed.45

The prevailing interpretation46 of the exception recognizes an attorney's right to inquire of a witness, on cross-examination only, prior specific instances of conduct. The rule, under this view, stops short of allowing the cross-examiner the liberty of introducing extrinsic evidence to rebut a witness' answer.47 In addition, the cross-examiner is limited to an inquiry into the witness' general credibility. Though restricted, cross-examination is far from enervated. In practice, considerable prejudice and confusion may arise merely from the

adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence. . . .

Id.

45. Of the ten circuits that have interpreted the exception, the Fourth, Seventh, Eighth, and Tenth have barred extrinsic evidence under rule 608(b), while the First and Second Circuits have admitted it. The Third, Fifth, and Ninth Circuits have demonstrated confusion through inconsistent holdings. See cases cited notes 46 & 54 infra.


47. United States v. Bosley, 615 F.2d 1274, 1277 (9th Cir. 1980); 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 608[05], at 608-22 (1981).

Even those commentators normally supportive of a liberal reading of rule 608(b) would stop short of allowing extrinsic evidence to incriminate the criminal defendant.

And where the accused has made assertions in his direct testimony which might be proved wrong by evidence of other misdeeds, hence impeaching the accused by contradiction, courts have held that the self-incrimination privilege does not shield him from inquiry into such matters, necessarily meaning that Rule 608(b) does not stand in the way either.

3 D. LOUISELL & C. MEULLER, FEDERAL EVIDENCE § 310 (1979) (footnote omitted) (emphasis added).
method of inquiry. "[T]he very question itself can convey the theoretically barred information to the jury. A skillful but unscrupulous cross-examiner can . . . ask the witness about incidents in his life in such detail . . . as to render his denials completely suspect."

In *United States v. Herman*, representative of the majority view of rule 608(b), defendant, a former state court magistrate, was convicted of accepting bribes from a bail bonding firm. This constituted violation of the Racketeer Influenced and Corrupt Organizations Act. After an unsuccessful attempt during its case-in-chief to introduce a bail bond agency operator's testimony that defendant had accepted payments from him, the government tried to introduce this evidence in rebuttal. The trial court admitted the evidence for the limited purpose of rebutting the character evidence offered by defendant. The court of appeals overturned the conviction and ruled that the rebuttal testimony was prohibited by the express provisions of rule 608(b).

A minority of circuit courts has eschewed a strict reading of the rule 608(b) limitation on the use of extrinsic evidence. These courts believe that restricting a cross-examiner to mere inquiry without recourse to proof by extrinsic means is an improper manifestation of congressional intent. Implicit in this interpretation is the idea that the focus of the limitation within rule 608(b) is upon the scope of cross-examination. Since reliance upon extrinsic evidence is generally within the full scope of permissible cross-examination, under the minority interpretation, rule 608(b) does not act to preclude such evidence.

The minority view is exemplified by the Third Circuit's opinion

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48. 3 J. WEINSTEIN & M. BERGER, supra note 47, at 608-26 (footnote omitted). "The possibility of abuse has led a minority of American jurisdictions to forbid all cross-examination as to particular misconduct not the subject of convictions." *Id.* at 608-26; see *Id.* at n.6.
50. *Id.* at 1194.
51. *Id.* at 1195.
52. *Id.* at 1196.
53. *Id.* at 1196.
in *Carter v. Hewitt*\(^5^7\) and the Fifth Circuit’s opinion in *United States v. Opager*.\(^5^8\) In *Hewitt*, plaintiff, an inmate at a state prison, charged that three prison guards had severely beaten him during a routine search of his cell.\(^5^9\) While being cross-examined, plaintiff was shown a letter that he had authored indicating that the allegations against the guards were part of a sham plot “‘to establish a pattern of barbaric brutal harassment . . . .’”\(^6^0\) The letter, extrinsic evidence used for impeachment purposes, thus was entered into the trial record.

The court of appeals in *Opager* reversed defendant’s conviction for violating federal narcotics laws.\(^6^1\) A former coworker of defendant testified that Opager had used and sold cocaine during the years they had worked together.\(^6^2\) The defense sought to impeach the state’s witness by offering business records which demonstrated that Opager and the witness had not worked together during the period alleged by the prosecution.\(^6^3\) The court of appeals concluded that the district court erred in applying rule 608(b) to determine the admissibility of the business records.\(^6^4\)

Despite the general confusion with regard to the interpretation of rule 608(b),\(^6^5\) it is possible nevertheless to reconcile the divergent views when applying the rule specifically to the exclusion of illegally obtained evidence. To understand the operation of rule 608(b) in cases involving tainted evidence, however, it is necessary to examine the interplay between rule 608(b) and the exclusionary rule.

**IV. OVERLAP OF RULE 608(b) AND THE EXCLUSIONARY RULE**

Rule 608(b) makes no reference to the exclusion of evidence tainted by illegal searches and seizures or violations of the *Miranda* rule. The Advisory Committee Notes\(^6^6\) and legislative history\(^6^7\) of

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\(^5^7\) 617 F.2d 961 (3d Cir. 1980).
\(^5^8\) 589 F.2d 799 (5th Cir. 1979).
\(^5^9\) 617 F.2d at 963.
\(^6^0\) Id. at 964-65.
\(^6^1\) 589 F.2d at 806.
\(^6^2\) Id. at 801.
\(^6^3\) Id.
\(^6^4\) Id.
\(^6^6\) Advisory Comm. Note, FED. R. EVID. 608(b).
rule 608(b) similarly are silent with respect to the effects of improperly obtained evidence.\footnote{68} The absence of such cross-reference lends support to the notion that the application of rule 608(b), a creation of the legislature, was not intended to be preempted by the judicially created exclusionary doctrine. The two rules can operate independently. The exclusionary rule specifically bars evidence subject to suppression for violations of the fourth amendment. Rule 608(b) focuses on the use of extrinsic evidence for specific instances of conduct relevant to a witness’ veracity.\footnote{69} Extrinsic evidence in the context of rule 608(b) entails proof by means outside the witness’ own testimony. It is often in the form of testimony by a rebuttal witness or physical exhibits.

The exclusionary rule applies specifically to criminal defendants, while rule 608(b) does not expressly apply to defendants but rather, to witnesses in general. In addition, the law, both prior\footnote{70} and subsequent\footnote{71} to the effective date of the Federal Rules of Evidence, has recognized that the mechanics involved when a criminal defendant testifies are similar to those involving other types of witnesses. Thus, criminal defendants necessarily are included in this broad category. The accused is obliged to speak truthfully and accurately when taking the stand and is subject to the normal character impeachment through cross-examination and rebuttal.\footnote{72} A blanket principle which equates defendants with other witnesses, however, may be undesirable since, in many circumstances, “[t]here is a substantial danger that the jury will believe that the defendant is a bad


\footnote{69} See note 43 supra.

\footnote{70} United States v. Turquitt, 557 F.2d 464, 471 (5th Cir. 1977).


\footnote{72} United States v. Davenport, 449 F.2d 696, 700 (5th Cir. 1971).
man deserving of punishment even if he did not do the particular act charged.\textsuperscript{73} This danger is especially apparent in a case such as \textit{Walder}, where defendant was indicted previously for similar offenses.

A. \textit{Effect of Collateral Matters}

Although the focal points of the two rules vary, the operation of rule 608(b) may converge with that of the exclusionary rule in certain situations. The general exclusionary policy of rule 608(b) in avoiding unnecessary minitrials on collateral issues\textsuperscript{74} applies to instances involving tainted evidence where such evidence is extrinsic and relates to specific misdeeds of a witness.\textsuperscript{75} Under either role, evidence identified as being both illegally obtained and extrinsic would be restricted from use in the prosecution's case-in-chief.

The policy underlying rule 608(b) seeks to save the trial from being encumbered by matters only collaterally related to the issues being litigated.\textsuperscript{76} The term "collateral" in the context of rule 608(b) assumes a different sense than its use with respect to the exclusionary rule.\textsuperscript{77} A collateral matter under the exclusionary rule is one that is

\textsuperscript{73} 3 J. \textsc{Weinstein} \& M. \textsc{Berger}, \textit{supra} note 47, at 608-35. A pragmatic approach entails a ruling in advance that the attacks on the defendant through bad acts will be limited in order to induce him to take the stand; to prevent his appearing in a false light compared to other witnesses, the court may ask that similar attacks be limited against the people's main witness. \textit{Id.} at 608-35-36. \textit{But see} Special Subcommittee Hearings, \textit{supra} note 61, at 316 (memorandum of G. Robert Blakely).

\textsuperscript{74} Carter v. Hewitt, 617 F.2d 961, 971 (3d Cir. 1980); 3 D. \textsc{Louisell} \& C. \textsc{Meuller}, \textit{supra} note 46, § 306.

\textsuperscript{75} Few courts of appeals have considered cases dealing with the exclusionary rule in conjunction with rule 608(b). \textit{See, e.g.,} United States v. Benedetto, 571 F.2d 1246, 1250 n.5 (2d Cir. 1978); United States v. Batts, 558 F.2d 513, 520 (9th Cir. 1977) (Kennedy, J., dissenting), \textit{withdrawn and modified,} 573 F.2d 599 (9th Cir.), \textit{cert. denied,} 439 U.S. 859 (1978).

Although the actual "misconduct" is perpetrated by the police in such circumstances, some improper conduct is implicated with respect to the witness. An illegal search and seizure, for example, may implicate the witness' possession of illicit narcotics. The "specific instance of conduct" here must necessarily focus upon the illicit possession rather than upon the illegal search and seizure itself.

\textsuperscript{76} 3 D. \textsc{Louisell} \& C. \textsc{Meuller}, \textit{supra} note 46, § 306.

\textsuperscript{77} Although under the exclusionary rule the United States Supreme Court has acknowledged a distinction between matters that are collateral and those that are directly related to the elements of a case, the effect has been the same for both. The Court in \textit{Oregon v. Hass}, 420 U.S. 714 (1975), and in \textit{Harris v. New York}, 401 U.S. 222 (1971) treated matters directly related to the case in a way similar to its treatment of collateral matters in \textit{Walder v. United States}, 347 U.S. 62 (1925). \textit{But see} 401 U.S. at 227 (Brennan, J., dissenting).
outside the government's case-in-chief. Impeachment is the exclusionary rule's primary form of collateral matter since it often occurs after the government rests its case-in-chief. Thus, impeachment may focus upon the substantive issues of the trial, as well as upon more tangential topics that are otherwise admissible.

Under rule 608(b), however, an issue's collateral makeup is determined, not by its relation to the case-in-chief, but rather by its importance, necessity, and probative value in relation to a witness' veracity or to the central issues of the case. This means that matter that is collateral but admissible under the exclusionary rule, may also be collateral under rule 608(b). Since the inverse of the relationship is not necessarily true, the term “collateral” as used under rule 608(b) is of narrower scope than under the exclusionary rule. It is conceivable that tainted evidence that otherwise may be admissible in the government's impeachment case under the exclusionary rule may be barred as being collateral to a particular witness' veracity or to the central issues in the case under rule 608(b).

In *Harris*, the Supreme Court permitted the admission of illegally obtained evidence for collateral purposes provided that the evidence's trustworthiness satisfied legal standards. Determining satisfaction of legal standards in this sense could correspond precisely to the type of minitrial on collateral matter which the legislature sought to avoid with rule 608(b). Rule 608(b) requires merely a good faith standard to be imposed on the cross-examiner regarding the factual predicate of the alleged prior misconduct. The good faith requirement strongly indicates that adjudicating trustworthiness of evidence is not within the purview of the rule. This may require, for example, testimony by the arresting police officers that statements made or acts done in the absence of proper Miranda warnings were not involuntary or the result of coercion.

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82. See 420 U.S. at 723; 401 U.S. at 224.
of focusing on an issue's collateral nature is to bar under rule 608(b) evidence that currently is admissible under the exclusionary rule.

B. Dynamics of Defendant's Denial

An analysis of several of the cases that have interpreted rule 608(b) indicates that some courts consider it of prime importance to discern the dynamics relating to a defendant's denial. It is this denial which is the act that ultimately triggers rule 608(b), as well as the exclusionary principle. These dynamics call for scrutiny of the timing, method, and extent of the denial. Timing concerns whether the denial was made during the defendant's direct testimony or on cross-examination. The method of denial refers to whether the defendant's statement was uttered voluntarily or elicited by the cross-examiner. Extent of denial classifies the denial as either specific and clear or general and ambiguous. The following discussion analyzes the operation of this denial-dynamics approach.

The Ninth Circuit, in United States v. Batts, interpreted rule 608(b) so that extrinsic evidence would be admissible to refute a defendant's denial of prior misconduct when that evidence would cast his denial testimony in a "false light" before the jury. Batts' direct testimony included a general account of the events surrounding his arrest for importation of, and possession with intent to distribute, hashish. During cross-examination, Batts was asked a series of questions concerning a "coke spoon" he was wearing on a necklace at the time of his arrest. The questioning ultimately extracted a denial by Batts of any knowledge concerning the use of cocaine. The prosecution was aware that, seven months prior to his arrest in the instant action, defendant had sold cocaine to an undercover agent. Although evidence of the cocaine sale was suppressed, the prosecution successfully offered rebuttal testimony concerning Batts' prior

83. See United States v. Bosley, 615 F.2d 1274, 1276-77 (9th Cir. 1980); Carter v. Hewitt, 617 F.2d 961, 971 (3d Cir. 1980); United States v. Opager, 589 F.2d 799, 802 (5th Cir. 1979); United States v. Benedetto, 571 F.2d 1246, 1249-50 n.5 (2d Cir. 1978); United States v. Herzberg, 558 F.2d 1219, 1223-24 (5th Cir.), cert. denied, 434 U.S. 920 (1977); United States v. Batts, 558 F.2d 513, 516 (9th Cir. 1977), withdrawn and modified, 573 F.2d 599 (9th Cir.), cert. denied, 439 U.S. 859 (1978).
84. 558 F.2d 513 (9th Cir. 1977), withdrawn and modified, 573 F.2d 599 (9th Cir.), cert. denied, 439 U.S. 859 (1978).
85. 558 F.2d at 517.
86. Id. at 515.
87. Id. at 516.
88. Id.
89. Id. The evidence was suppressed as a consequence of an illegal search and seizure and thus, the indictment was dismissed.
involvement with cocaine. 90

A major problem with the majority's opinion in *Batts* relates to the link between direct and cross-examination of defendant. The court was satisfied that it was "at least arguable that appellant [Batts] had opened up the subject area [of cocaine use] by testifying to other contemporaneous events at the port of entry." 91 It is apparent, contrary to the court's perception, that the illegally seized evidence was related to a line of inquiry and a subsequent denial initiated by the prosecution on cross-examination. In no way was even a general denial implicit in defendant's direct testimony. *Batts* condones the use of suppressed evidence as a specific instance of conduct predicated upon tenuous links between a defendant's direct testimony and his cross-examination. 92

In a more recent decision, the same circuit addressed a situation similar to that in *Batts*, although the extrinsic evidence in question was not subject to any prior suppression. In *United States v. Bos-

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90. *Id.*

91. *Id.* The court then cited Banning v. United States, 130 F.2d 330, 338 (6th Cir. 1942), *cert. denied*, 317 U.S. 695 (1943), for the proposition that a cross-examiner has the right to fill in for the trial court all the details respecting matters brought out by direct examination. *Batts*, 558 F.2d at 516 n.6. It would be difficult under such broad rubric to prevent a talented cross-examiner from cleverly creating some opportunity for a linkage, thus developing a situation where admission of suppressed evidence would become commonplace.

92. *Batts* first considered that evidence relating to the "coke spoon" was received in evidence without objection prior to defendant's cross-examination. The court further stated that defendant's testimony concerning the coke spoon would, nevertheless, have been admissible under Federal Rule of Evidence 611(b). 558 F.2d at 516. This rule provides in part that "[t]he court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination." *Fed. R. Evid.* 611(b).

Rule 608(b), although a rule into which cross-examination is interwoven, does not encompass the full panoply of power envisioned by the rulemakers in cross-examination. Cross-examination ordinarily must relate to matters exposed on direct examination. *Id.* Under rule 608(b), this mere relevancy standard was ultimately replaced by a more limiting standard requiring that the specific instances be probative of veracity. Compare *Fed. R. Evid.* 608(b) with Prelim. Draft (Mar. 31, 1969), reprinted in 46 F.R.D. 161, 293 (1969). In light of the legislative history of rule 608(b) and the Advisory Committee Notes, which appear to relate only to rule 611(a), the court in *Batts* erroneously extended itself on the matter of the scope of cross-examination under rule 608(b). See sources cited note 67 *supra*.

defendant was indicted for distribution of, and conspiracy to distribute, cocaine. In response to specific questions during cross-examination, Bosley denied having delivered cocaine to anyone. The circuit court reversed the trial judge’s ruling that allowed the government to call a witness in rebuttal. In contrast to Batts, the government had a stronger case in Bosley since the denial was more closely related to matters exposed during defendant’s direct testimony. Nevertheless, extrinsic evidence was prohibited. Bosley noted that defendant’s denial was specifically elicited by the government and, therefore, within the rule 608(b) ban on extrinsic evidence. It, however, left open the question whether a different result would have been reached had the denial been volunteered during direct testimony or as an unelicited statement on cross-examination. Underlying this question is the further inquiry: What constitutes collateral matter under rule 608(b) since extrinsic evidence of such matter is barred by the rule?

Prior misconduct not resulting in a criminal conviction may be considered collateral to the instant trial. Yet, a prior misdeed should attain a higher level of centrality to a case when a defendant raises the matter on his direct testimony or volunteers it in response to cross-examination. The important element is that, in both instances, the defense is putting the subject in issue. The goal of rule 608(b) is to prevent unnecessary sidetracking on noncentral issues at trial. Once the sidetracking becomes necessary, as a consequence of the defense putting the subject at issue, the ban of rule 608(b) should be lifted since the matter inquired into becomes germane to the litigation.

Determining whether a matter has been raised by the defense should require more than merely “cracking open” the topic. The statement or denial should be clear and there should be a clear contradiction between the defendant’s pronouncements and what is

93. 615 F.2d 1274 (9th Cir. 1980).
94. There was a question on appeal whether Bosley’s denial referred to deliveries made at any time or merely during the course of the conspiracy. The court concluded the latter. Id. at 1276-77.
95. Prior to his cross-examination, Bosley stated that he was not involved in the alleged sale of drugs. Id. at 1276.
96. Id. at 1277.
98. Id.
99. Id.
sought to be proved by the proffered evidence. 100 Otherwise, there is a threat of trying the very issues sought to be avoided under rule 608(b).

A further illustration of the operation of the dynamics analysis can be drawn from United States v. Benedetto. 101 This is a leading case from the Second Circuit, in which defendant had been convicted of illegally receiving money in connection with his official duties as a government meat inspector. Four witnesses were produced by the defense to prove that no bribes ever were taken. The trial judge then permitted the prosecution to call a rebuttal witness to the stand. 102 Although Benedetto is among the minority in permitting rebuttal by the use of extrinsic evidence, the decision is consistent with an analysis of rule 608(b) that focuses upon the characteristics of a defendant’s denial. Benedetto stated on direct examination that he had not accepted bribes. 103 On cross-examination, he made a specific denial with regard to money offered by a particular individual. The court stated that, “[o]nce a witness (especially a defendant-witness) testifies as to any specific fact on direct testimony, the trial judge has broad discretion to admit extrinsic evidence tending to contradict the specific statement, even if such statement concerns a collateral matter in the case.” 104 The admission of extrinsic evidence, therefore, was warranted since “Benedetto’s statement was closely intertwined with the central issue of this case . . . .” 105

Several courts, however, have barred extrinsic evidence of prior misconduct in spite of its potential probative value. 106 This result is more consistent with the plain language of rule 608(b). The notion that the examiner must “take the witness’ answer” does not limit the


101. 571 F.2d 1246 (2d Cir. 1978).

102. Id. at 1248.

103. Id.

104. Id. at 1250 (citing Walder v. United States, 347 U.S. 62 (1954)).

105. Id. Benedetto is unclear as to its reliance on rule 608(b). Although the issue in the case is squarely within the scope of the rule, the decision referred more to matters identified with reputation and opinion evidence under rule 608(a) than to specific instances of conduct under rule 608(b). 571 F.2d at 1250 nn. 5 & 6.

106. See note 40 supra; cf. 3 J. Weinstein & M. Berger, supra note 41, at 608-23-24, 29-30 (inquiry into specific instances of conduct limited by Fed. R. Evid. 403 considerations to protect witness).
inquiry; but rather, it prevents the calling of other witnesses in rebuttal.

The application of rule 608(b), which is predicated on the timing, method, and extent of a defendant’s denial, can be employed to reexamine the cases involving suppressed evidence that were decided under the exclusionary rule. The results in Walder, Hass, and Agnello would remain unchanged, while those in Harris and Havens would be altered. In Walder, defendant voluntarily denied during direct examination any prior misconduct,107 as did defendant in Hass.108 He further reiterated his clear and complete denial on cross-examination.109 In both cases, the evidence would be admissible. In Agnello, the evidence remained excluded since the denial, albeit a clear one, was elicited on cross-examination only. The collateral issue was never raised by defendant’s direct testimony.110 The eliciting of less than clear denials in both Harris111 and Havens112 militates for excluding the suppressed evidence that ultimately was admitted in each instance. Consequently, it seems clear that the analysis of rule 608(b) used by the circuit courts can be applied in certain instances to alter the effects of the exclusionary rule.

C. Transactional Approach to Rule 608(b)

An alternative to the technical analysis of rule 608(b), which centers upon the intricacies of a defendant’s denial, is a more general approach based on the factual transactions of a particular case. This latter application of rule 608(b) may be drawn from the language and prior history of the rule.

Rule 608(b) uses the requirement of probative value as an explicit vehicle to determine an issue’s collateral tenor. Earlier drafts of rule 608(b) also included a requirement that the matter inquired into by the cross-examiner not be “remote in time.”113 A major reason for carving this phrase out of the text was the fear of introducing additional and unnecessary grounds for appeal.114 Inclusion of the language might have diminished the preferred approach of trusting

107. 347 U.S. at 63.
108. 420 U.S. at 716-17.
109. 347 U.S. at 64.
110. 269 U.S. at 29, 35.
111. 401 U.S. at 223.
112. 446 U.S. at 622-23.
the "common sense, fairness and discretion"\(^{115}\) of the trial judge. This history of rule 608(b), however, does not demand an automatic discarding of the remoteness criterion, especially if such consideration is within the parameters of common sense, fairness, and discretion. Remoteness may also be implicit in the process of balancing probative value against undue prejudice\(^{116}\) under Federal Rule of Evidence 403 (rule 403)\(^{117}\).

In certain circumstances, remoteness in time can be a component of the trial judge’s broad discretion in determining the probative value and collateral nature of specific instances of conduct. The remoteness component can be realized most effectively by using a transactional approach to the fact paradigms of each case. When the specific instance of conduct is part of the same transaction and occurrence that gave rise to the charges for which a defendant-witness is on trial, the court should be more amenable to admitting extrinsic evidence. While technically collateral, the matter in controversy may be closely related to the main issues in dispute\(^{118}\).

A transactional evaluation of the collateral nature of an issue provides a method for bridging the gap between the conflicting interpretations of rule 608(b). Where prior misdeeds fall within the transactional framework of the case, the minority rule\(^{119}\) controls. This means broader admissibility of extrinsic evidence. Prior misconduct, falling outside the transactional framework, is treated in accord with the majority viewpoint\(^{120}\), which limits the use of extrinsic evidence.

This analysis may also be applied to the cases decided under the exclusionary rule. The controversies surrounding the suppressed tee shirt in *Havens* and the statements made in violation of the *Miranda* warning in *Harris* and *Hass* materially bear upon the elements of the crimes charged. The collateral nature of these minitrials tends to abate when guilt or innocence pivots on a defendant’s credibility.

Incidents connected to the suppressed evidence in *Walder* were beyond the transactional frame of the facts that gave rise to the arrests and indictments. Walder’s prior indictment, later dismissed, bore no relation to his eventual trial other than the similarity of the crimes charged in both arrests\(^{121}\). *Agnello* is a more difficult case

\(^{115}\) Id.
\(^{116}\) United States v. McClintic, 570 F.2d 685, 691 n.6 (8th Cir. 1978).
\(^{117}\) Fed. R. Evid. 403.
\(^{118}\) See United States v. Benedetto, 571 F.2d 1246 (2d Cir. 1978).
\(^{119}\) See notes 54-64 *supra* and accompanying text.
\(^{120}\) See notes 46-53 *supra* and accompanying text.
\(^{121}\) 347 U.S. at 62-63.
under this analysis since narcotics were seized from defendant's residence within a short time after he had transported the packages that allegedly contained narcotics. The acts, however, that were the basis of the arrests were completed before the police entered and searched Agnello's house. Thus, the transactions and occurrences of the conspiracy were ended. Agnello did not deny that there was cocaine in the packages. He merely denied having any knowledge of the contents. His guilt or innocence did not pivot upon his credibility with respect to the existence of cocaine. Admission of the transactionally, collaterally tainted evidence rightfully was barred.

A trial judge should be cognizant of the rule 403 balancing process when faced with an offer of proof comprised of evidence subject to suppression. Admitting such evidence or exposing its existence could lead a jury to lend unwarranted credence to it at the risk of convicting someone for being a "bad person" based on prior misdeeds similar to those for which a defendant currently is on trial. Suppressed evidence necessarily implicates an arrest, from which a jury might wrongly infer guilt. The inference of guilt, which is not at issue under rule 608(b), may be more imposing where the accused's activities were suspicious enough to have aroused the attention of the police rather than that of a mere private citizen who ultimately may testify against him. A jury might reflexively presume the correctness of a police officer's decision to place a suspect under arrest. The jury, in addition, might be unduly influenced by suppressed physical evidence such as displays of narcotics or related paraphernalia.

One pragmatic suggestion was offered by the Second Circuit in Bene-
detto: "[A]dmission of such strongly prejudicial evidence should normally await the conclusion of the defendant's case, since the court will then be in the best position to balance to probative worth of, and the Government's need for, such testimony against the prejudice to the defendant."127 This may aid in abating the potential for prejudice, but it far from vitiates the need for a rule 608(b) interpretation that will be responsive to the problems of suppressed evidence.

A transactional interpretation of rule 608(b) provides a workable method for diminishing prejudicial effects borne by tainted evidence. Its application is consistent with both the legislative history and the policy behind the rule. Further, in the area of suppressed evidence, a transactional approach aids in bridging the gap between divergent interpretations of rule 608(b) as propounded by the circuit courts.

V. CONCLUSION

The exclusionary rule of evidence is a doctrine originally created by the judiciary to protect the individual liberties granted by the fourth and fifth amendments. The specific goal of the doctrine has been two-fold: To protect society by discouraging errant police conduct and to uphold the integrity of the judicial system.

A recent line of decisions by the United States Supreme Court has altered the effectiveness of the exclusionary rule by permitting limited use of improperly obtained evidence in the government's impeachment case. These decisions have rendered the exclusionary rule unable to perform as a functional deterrent of police misconduct and have reduced the rule's ability to promote judicial integrity. In addition, the rule is no longer an effective instrument to protect defendants at trial from the prejudice of illegally obtained evidence.

To solve the problems that resulted from the emasculation of the exclusionary rule, Federal Rule of Evidence 608(b) may be used as an effective alternative to bar the prosecution's use of illegally obtained evidence. By defining a defendant-witness' participation in the events relating to the improper procurement of evidence as specific instances of his conduct, rule 608(b) can operate to overlay the exclusionary rule in the government's impeachment case. Gaps left by the exclusionary rule can thus be filled by rule 608(b) since each rule, though overlapping, applies independently of the other.

Rule 608(b) can act effectively to bar tainted evidence where a criminal defendant, as a result of solicitations by the cross-examiner, utters a putative denial that is general and ambiguous. Tainted evidence would be prohibited as extrinsic provided that the defendant does not raise a specific issue relating to the evidence and that such issue is not germane to the central issues in the case. This would include, therefore, instances wherein a defendant voluntarily denies a particular allegation either during his direct testimony or as an unelicited statement on cross-examination. Concentrating on the dynamics of a defendant's denial thus provides a method of applying rule 608(b) consistent with the rule's primary objective to avoid unwarranted minitrials on tangential issues.

An alternative analysis of rule 608(b) that similarly can act to alter the effects of the exclusionary rule focuses on the transactional nature of a particular case. This approach can be used to determine an issue’s collateral nature and, consequently, whether extrinsic evidence must be barred. If the incidents relating to the illegal seizure of evidence lie outside the factual framework of the central issues in the case, such illegal evidence must be barred as extrinsic under rule 608(b). This application is consistent with the majority interpretation of rule 608(b). The minority view would prevail, however, when prior misdeeds fall within the framework of transactions and occurrences that give rise to the charges for which a defendant-witness stands trial.

The transactional theory finds its basis in the requirement of elementary fairness and discretion by the trial judge with respect to the probative value of proffered evidence. Implicit in the requirements of discretion and probative value, by which rule 608(b) measures an issue’s collateral nature, is the remoteness criterion. This element, removed from the rule by the drafters for technical reasons, precludes inquiry by the cross-examiner if the subject matter is remote in time from the central issues at bar. The transactional approach is an equitable method of employing the remoteness factor since it, in turn, is grounded in the court’s discretion and sense of fairness.

When applying transactional theory of analysis to the cases decided under the exclusionary rule, it is important to consider whether the illegal evidence in question is related materially to the elements of the crimes charged. If such a material relationship exists, the prohibition against using the illegal evidence should become less onerous. In this situation, the threat of lapsing into unwanted minitrials would be minimal.
The use of evidence subject to suppression often raises the spectre of prejudice. A transactional theory operates to reduce such prejudice. This approach, in addition, is consistent with the policy behind rule 608(b), as well as with the divergent applications of the rule by the circuit courts.

Whether applying rule 608(b) under a denial-dynamics approach or a transactional approach, the rule can operate as an effective response to some of the problems caused by illegally obtained evidence.

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