On The Horns of an Evidentiary Dilemma:
The Intersection of Federal Rules of Evidence
806 and 608(b)

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"The declarant of a hearsay statement which is admitted in
evidence is in effect a witness. His credibility should in fairness
be subject to impeachment and support as though he had
in fact testified."\(^1\)

"How can you impeach somebody that hasn’t testified?"\(^2\)

I. INTRODUCTION: THE DILEMMA

Federal Rule of Evidence 806 is an astonishing
combination of careful and exacting precision and the failure to
anticipate some obvious issues that arise from the Rule’s
collision with other Rules and with policies underlying the
Federal Rules of Evidence.\(^3\) Rule 806 provides that the
credibility of a hearsay declarant “may be attacked, and if attacked may be supported, by any evidence which would be
admissible for those purposes if declarant had testified as a
witness.”\(^4\)

The rule recognizes that a non-testifying declarant is, in the

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excellent research assistance of James Buck and the support of the University of Maryland
School of Law and Dean Karen Rothenberg.
1. FED. R. EVID. 806 advisory committee’s note.
2. United States v. Velasco, 953 F.2d 1467, 1473 n.5 (7th Cir. 1992).
3. One example of the Rule’s precision is its inclusion of out-of-court statements
offered for their truth that are, under the Rules, not hearsay. FED R. EVID. 806. Rule 806
applies to party admissions made by agents or co-conspirators, but attributable to a party to
the litigation. FED. R. EVID. 806, 801(d)(2)(C), (D), (E). Yet Rule 806 does not, by its
terms, reach personal or adoptive admissions because the Rule “assumes that the declarant
will not be a testifying witness.” See FED. R. EVID. 806, 801(d)(1)(A), (B); see also
Margaret Meriwether Cordray, Evidence Rule 806 and the Problem of Impeaching the
4. FED. R. EVID. 806.
words of the Advisory Committee, "in effect a witness," and should be subjected to the tests of credibility afforded in-court witnesses through cross-examination and impeachment. The party proffering the hearsay statement of a non-testifying declarant should not be afforded the benefit of insulating that evidence from the rigors of cross-examination and impeachment any more than is made necessary by the physical absence of the declarant. Thus, although the fact-finder will necessarily be deprived of the benefit of perceiving such things as physical demeanor, voice quality, inflection, etc., Rule 806 contemplates that those forms of impeachment recognized by the rules will apply equally to the non-testifying declarant.

Consequently, Rule 806 perforce cross-references all of the rules governing impeachment of witnesses. Difficulties arise, however, because hearsay declarants, are not, by definition, in-court witnesses, and some of the rules governing the impeachment of in-court witnesses cannot be applied as written to non-testifying declarants. For example, Rule 613(b) provides: "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same . . . ." Of course, any statement of a non-testifying witness is provable only through the use of extrinsic evidence because, apodictically, the non-testifying witness is not subject to cross-examination. Similarly, it is impossible to afford the non-testifying declarant an opportunity to explain or deny any inconsistent statement.

In another example of the care with which the rule was drafted, Rule 806 recognizes this difficulty and resolves it by

5. Id. advisory committee's notes.
7. Unless there is a video or audio-taped recording of the declarant while making the statement, the fact-finder will be deprived of these observations. See, e.g., United States v. Finley, 934 F.2d 837, 838-39 (7th Cir. 1991); infra notes 177-86, see also infra notes 34-36.
8. See United States v. Scott, 48 F.3d 1389, 1397 (5th Cir. 1995) ("[A]ny evidence that would have been admissible to impeach [the declarant] had he testified was admissible to impeach [the declarant] even though he did not testify."); Moody, 903 F.2d at 329 ("The scope of impeachment [under rule 806] parallels that available if the declarant had testified in court . . . ."); 3 Michael H. Graham, Handbook of Federal Evidence § 806.1, at 599-604 (5th ed. 2001); 4 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence §§ 510-511, 891-900 (2d ed. 1994); Cordray, supra note 3, at 496.
dispensing with the requirement that the declarant be afforded an opportunity to deny or explain the inconsistent statement.\textsuperscript{10} Presumably, the importance of providing for the impeachment of the non-testifying declarant trumps the policies underlying the requirements of Rule 613.\textsuperscript{11} For if a non-testifying declarant’s statements are immunized from impeachment by introduction of the declarant’s prior inconsistent statements, while the testifying witness is subject to such impeachment, hearsay would be privileged over in-court testimony—a priority that flies in the face of basic evidentiary policy.

The foundations, preconditions, or restrictions on other modes of impeachment can be applied to the non-testifying declarant as easily as to the in-court witness, with one exception. One may introduce evidence of a non-testifying declarant’s bias or interest in the outcome,\textsuperscript{12} of her prior convictions (assuming they meet the requirements of Rule 609),\textsuperscript{13} of her reputation for mendacity,\textsuperscript{14} and so forth. However, if the opponent seeks to impeach the credibility of the non-testifying declarant through evidence of specific instances of the declarant’s misconduct that cast doubt on the declarant’s character for veracity, there is a problem.

Rule 608(a) allows for an inquiry into the credibility of a witness through the witness’s reputation for veracity or through the opinion of another witness about the principal witness’s

\begin{itemize}
  \item \textsuperscript{10} \textit{FED. R. EVID} 806.
  \item \textsuperscript{11} Rule 613 was designed to allow “the witness the chance to explain any circumstances that would resolve the apparent inconsistency.” 4 \textit{JACK B. WEINSTEIN \& MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE} § 613.05(2)(a) (Joseph M. McLaughlin ed., 2d ed. 2002); \textit{see, e.g.}, United States v. Franzese, 392 F.2d 954, 960-61 (2d Cir. 1968) (stating that witnesses’ explanation of their inconsistent testimony in implicating defendants was the result of death threats).
  \item \textsuperscript{12} \textit{See, e.g.}, United States v. Checks, 582 F.2d 668, 684 n.44 (2d Cir. 1978) (finding it proper for defense counsel to question witness on pending criminal charges against the declarant).
  \item \textsuperscript{13} \textit{See, e.g.}, United States v. Serna, 799 F.2d 842, 849-50 (2d Cir. 1986) (qualifying criminal defendant’s exculpatory testimony from previous trial, by informing the jury that defendant had been convicted); United States v. Noble, 754 F.2d 1324, 1330-32 (7th Cir. 1985) (allowing evidence of defendant’s previous conviction, where defendant offered exculpatory tape).
  \item \textsuperscript{14} \textit{See, e.g.}, \textit{Moody}, 903 F.2d at 327-30 (finding error in preventing defense counsel from questioning witness as to her opinion of the character and reputation for truthfulness or untruthfulness of a declarant).
\end{itemize}
character for veracity.\textsuperscript{15} Whether we are dealing with a testifying witness or a non-testifying declarant should make no difference in the application of these modes of impeachment.

By contrast, Rule 608(b) permits the use of specific instances of misconduct to show character for veracity only during cross-examination of the witness being impeached.\textsuperscript{16} Extrinsic evidence of the prior misconduct of a witness to show the witness's character for veracity is not admissible,\textsuperscript{17} whether such evidence is documentary\textsuperscript{18} or the testimony of another witness.\textsuperscript{19} The prohibition on the use of extrinsic evidence of a witness's misconduct serves several purposes:\textsuperscript{20} It minimizes jury confusion;\textsuperscript{21} it reduces undue consumption of time by avoiding contests over whether the witness actually engaged in the claimed misconduct;\textsuperscript{22} it prevents surprise and embarrassment to a witness falsely alleged to have engaged in misconduct;\textsuperscript{23} and, it minimizes undue prejudice to the party who may serve as a witness or to the party calling the witness.\textsuperscript{24}

\textsuperscript{15} FED. R. EVID. 608(a); see also United States v. Abel, 469 U.S. 45, 54-55 (1984); United States v. Barrett, 8 F.3d 1296, 1299 (8th Cir. 1993).

\textsuperscript{16} FED. R. EVID. 608(b).

\textsuperscript{17} Id.; see Abel, 469 U.S. at 55; United States v. Brooke, 4 F.3d 1480, 1484 (9th Cir. 1993); United States v. May, 727 F.2d 764, 765-66 (8th Cir. 1984); Cordray, supra note 3, at 521. The recent amendment to Rule 608(b) makes it clear that if the extrinsic evidence is offered for some purpose other than to show the witness's character for veracity, Rule 608(b) is not applicable. FED. R. EVID. 608 advisory committee's note; see also United States v. Corbin, 734 F.2d 643, 655 (11th Cir. 1984); United States v. Ray, 731 F.2d 1361, 1364 (9th Cir. 1984); Johnson v. Brewer, 521 F.2d 556, 562 n.13 (8th Cir. 1975).

\textsuperscript{18} United States v. Elliott, 89 F.3d 1360, 1368 (8th Cir. 1996) (seeking to introduce the witness's resume); United States v. Martz, 964 F.2d 787, 789 (8th Cir. 1992) (permitting questioning about prior criminal plea); United States v. Weiss, 930 F.2d 185, 199 (2d Cir. 1991) (denying use of an insurance application).

\textsuperscript{19} Abel, 469 U.S. at 55; Brooke, 4 F.3d at 1484; United States v. Frost, 914 F.2d 756, 767 (6th Cir. 1990).

\textsuperscript{20} See generally Cordray, supra note 3, at 523-24.

\textsuperscript{21} Id.; see also 3 MUeller & KIRKPATRICK, supra note 8, § 267, at 179-80; 3A JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 979 (James H. Chadbourne rev., 1970).

\textsuperscript{22} 3A WIGMORE, supra note 21, § 979; Cordray, supra note 3, at 524; see also Martz, 964 F.2d at 789 (stating that the purpose of precluding extrinsic evidence is to avoid "mini-trials" on collateral issues).

\textsuperscript{23} 3A WIGMORE, supra note 21, § 979; Cordray, supra note 3, at 524; see also United States v. Banks, 475 F.2d 1367, 1368 (5th Cir. 1973).

\textsuperscript{24} 3 MUeller & KIRKPATRICK, supra note 8, § 267, at 179-80; Cordray, supra note 3, at 524; see also United States v. Benedetto, 571 F.2d 1246, 1248-49 (2d Cir 1978) (stating "that once the jury is told of the defendant's other crimes, the jury will impermissibly infer that he is a bad man likely to have committed the crime for which he is
Rule 608(b) assumes a testifying witness. It prohibits the impeachment of such a witness with evidence of the witness's prior misconduct, unless the misconduct is relevant to veracity. Even then, the rule insists upon limiting such evidence to what can be adduced on cross-examination of the witness being impeached. If the witness persistently denies the misconduct, that is the end of the matter; extrinsic evidence that the witness has committed the acts she now denies, no matter how conclusive, is not admissible.

Obviously, if the person to be impeached is a non-testifying declarant, there can be no cross-examination. Rule 608(b) seems to say that extrinsic evidence of misconduct is not admissible; yet the only way one can adduce evidence of specific instances of misconduct of the non-testifying declarant is through some means other than cross-examination of that declarant, the person to be impeached. Thus, if Rules 806 and 608(b) are read literally, an avenue of impeachment available when a witness appears and testifies on the merits is foreclosed when the very same evidence on the merits is offered through the hearsay statements of a non-testifying declarant. Yet, evidentiary policy should not be read to favor hearsay over in-court testimony.

How then, are we to reconcile these conflicting pressures? A (perhaps surprisingly) small number of courts have considered the question of whether extrinsic evidence of misconduct of a non-testifying declarant may be admitted to impeach the declarant's veracity. No court, however, has addressed the issue with the care or precision required to resolve the competing values embodied in the rules. In the next section, we shall examine those cases.

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25. Cordray, supra note 3, at 497.
26. FED. R. EVID. 608(b).
27. Id.
28. Id.; Cordray, supra note 3, at 520-21.
II. THE CASES

A. United States v. Friedman

United States v. Friedman\textsuperscript{29} appears to have been the first case to consider the lacuna between Rule 806's provision for impeaching hearsay declarants as if they were testifying witnesses, and Rule 608(b)'s limitation on the use of prior misconduct of witnesses to whatever might be drawn from the witness on cross-examination.

Friedman arose out of the New York City Parking Violations Bureau scandal.\textsuperscript{30} Friedman, the defendant, and a number of other individuals operated the bureau as a racketeering enterprise, which the court characterized as "a cesspool of corruption."\textsuperscript{31} Donald Manes, one of the city's highest ranking Democratic politicians, and a central figure in the conspiracy, committed suicide prior to the trial.\textsuperscript{32} The government's case against Friedman included several out-of-court statements by Manes, offered through the testimony of another member of the cabal and admitted in evidence as statements of a co-conspirator.\textsuperscript{33}

Prior to his death, Manes had attempted suicide and lied about it to the investigating police officers and to the public in a videotaped statement.\textsuperscript{34} To impeach Manes's out-of-court statements offered against him, Friedman sought to introduce evidence of Manes's false story, both through testimony and a videotape of Manes's public statement.\textsuperscript{35} The trial court excluded this evidence pursuant to Rule 403, and the United States Court of Appeals for the Second Circuit affirmed.\textsuperscript{36}

On appeal, Friedman argued that Rule 806 required the admission of Manes's false story because, if Manes had been alive to testify at trial, he could have been cross-examined about the story pursuant to Rule 608(b).\textsuperscript{37} The court of appeals noted,

\textsuperscript{29} 854 F.2d 535 (2d Cir. 1988).
\textsuperscript{30} Id. at 540-41.
\textsuperscript{31} Id. at 541.
\textsuperscript{32} Id. at 542-43.
\textsuperscript{33} Id. at 569.
\textsuperscript{34} Friedman, 854 F.2d at 569.
\textsuperscript{35} Id.
\textsuperscript{36} Id. at 569-70.
\textsuperscript{37} Id. at 569.
however, that Rule 806 does not establish a standard of probative value, and that the trial court was within its discretion in determining that Manes’s false account of his suicide attempt was insufficiently probative of the credibility of the statements offered against Friedman at trial.\textsuperscript{38}

Because the trial court’s refusal to admit Manes’s statement was based solely on considerations of its probative value (under Rule 403), it was not necessary for the court of appeals to consider the difficulty presented by simultaneously applying Rule 608(b)’s limitation (to cross-examination) on introducing evidence of prior misconduct and Rule 806’s provision for allowing impeachment of a hearsay declarant with any evidence that would normally be admissible to impeach a witness in open court.\textsuperscript{39} At trial, the government argued that because the limitation in Rule 608(b) applied to Rule 806, any extrinsic evidence of Manes’s (the hearsay declarant’s) misconduct should not be admitted to impeach his testimony.\textsuperscript{40} However, the Government abandoned this argument on appeal—yet another reason that the Second Circuit had no occasion to consider the question.\textsuperscript{41}

Despite the Government’s failure to press the issue, and citing no authority (for there does not appear to have been any), the Friedman court added a footnote to its opinion: “[Rule 608(b)] limits such evidence of ‘specific instances’ to cross-examination. Rule 806 applies, of course, when the declarant has not testified and there has by definition been no cross-examination, and resort to extrinsic evidence may be the only means of presenting such evidence to the jury.”\textsuperscript{42} This relatively strong suggestion, that extrinsic evidence of a non-testifying declarant’s misconduct may be admissible to impeach the declarant’s statements, is, of course, dictum on an issue that had not been briefed or argued. Moreover, there was no attempt to weigh the competing values reflected by Rule 608(b) and Rule 806. Nevertheless, other courts have since cited Friedman for

\textsuperscript{38} Id. at 570 (stating “[s]uch assessments, like determinations of relevance and rulings as to the proper scope of cross-examination, must be left to the ‘broad discretion’ of the trial judge”).

\textsuperscript{39} Fed. R. Evid. 806.

\textsuperscript{40} Friedman, 854 F.2d at 570 n.8.

\textsuperscript{41} Id. at 570.

\textsuperscript{42} Id.
the proposition that extrinsic evidence of a non-testifying declarant's misconduct may be admissible to impeach. 43

B. United States v. White

United States v. White 44 involved a complicated, multi-defendant, multi-count prosecution for murder, drug conspiracy and RICO conspiracy. 45 Part of the government’s case consisted of hearsay statements by Arvell Williams, an associate of the defendants who had become a government informant. 46 The trial court admitted the hearsay statement over the defendants’ hearsay and Confrontation Clause objections. 47 It determined, by a preponderance of the evidence, that the defendants had murdered Williams. 48 On appeal, the United States Court of Appeals for the D.C. Circuit agreed with the trial court that the defendants had forfeited any objection to the use of Williams’s hearsay statements since, by killing him, they were themselves responsible for the lack of cross-examinable testimony at trial. 49

Although the trial court admitted Williams’s out-of-court statements in evidence, it also permitted the defendants to impeach those statements. 50 The court permitted defense counsel to cross-examine Sergeant Sutherland, one of the police witnesses, about Williams’s drug use, drug dealing and prior

44. 116 F.3d 903 (D.C. Cir. 1997).
45. Id. at 909-10.
46. Id. at 910.
47. Id.
48. Id.
49. White, 116 F.3d at 911. The White holding is now codified as Rule 804(b)(6). See Fed. R. Evid. 804(b)(6) (providing that, if the declarant is unavailable as a witness, “[a] statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness” is not excluded by the rule against hearsay). There is a division of authority over whether the rule is limited to wrongdoing specifically intended to prevent the declarant’s testimony or whether it applies as well to statements of the victim for whose homicide the defendant is being tried. Compare United States v. Emery, 186 F.3d 921, 926 (8th Cir. 1999) (allowing hearsay statements made by victim against defendant in murder trial), with United States v. Dhinsa, 243 F.3d 635, 654 (2d Cir. 2001) (holding that before evidence may be admitted under Rule 804(b)(6), the trial court must find that the opponent of the statement must have been "motivated in part by a desire to silence the witness").
50. White, 116 F.3d at 920.
The trial court would not, however, permit cross-examination of Sergeant Sutherland with respect to whether Williams had made false statements on an employment application or whether Williams had ever violated court orders, though it is difficult to see a distinction between these attempts at impeachment.

The *White* court seemed to conclude that Sergeant Sutherland could have properly been cross-examined about Williams’s false statements and violations of court orders, but that reference could not have been made “to any extrinsic proof of those acts.” Nevertheless, the court of appeals concluded that the trial court’s refusal to permit this line of inquiry was within the trial court’s discretion because the inquiry’s utility was questionable in light of Sutherland’s short acquaintance with Williams, which made it unlikely that he would have known about these instances of misconduct. Moreover, evidence of Williams’s misconduct was of marginal probative value on the question of Williams’s credibility, given Sutherland’s extensive testimony concerning Williams’s drug use, drug dealing, and prior convictions. The *White* court’s application of the abuse of discretion standard of review suggests that the court of appeals based its appraisal of the trial court’s ruling on an analysis of Rule 403. Alternatively, the *White* court may have regarded as harmless error the trial court’s refusal to allow cross-examination of Sergeant Sutherland concerning the declarant’s alleged false statements or his disobedience to court orders.

In any event, what is important for present purposes is that the D.C. Circuit indicated that no “reference to any extrinsic proof” of the misconduct of Williams, the non-testifying declarant, would have been permissible. Although Rule 806 allows for the impeachment of a hearsay declarant by any means permissible if the declarant had testified in court, Rule 608(b) bars the use of extrinsic evidence to show specific acts of

51. Id.
52. Id.
53. Id.
54. Id.
55. *White*, 116 F.3d at 920.
56. Id.
57. FED. R. EVID. 806.
misconduct relevant to credibility; impeachment by prior misconduct is, therefore, limited to cross-examination of the witness. Nevertheless, the White court approved the cross-examination of Sergeant Sutherland (the in-court witness) concerning the misconduct of Williams (the out-of-court declarant).  

Apparently, the court of appeals did not think that the cross-examination of Sergeant Sutherland constituted the introduction of extrinsic evidence of Williams's conduct. The court's analysis, however, suffers from a misreading of Rule 608(b). Rule 608(b) prohibits the use of extrinsic evidence of the prior misconduct of a witness. Prior misconduct may be inquired into on cross-examination of the witness—that is, the witness whose credibility is being impeached. The testimony of a different witness, including the witness to the hearsay statement that is the subject of the impeachment, is, itself, extrinsic evidence of the misconduct of the declarant; Rule 608(b), then, contemplates the cross-examination only of the person who made the statement to be impeached. Thus, despite the White court's pronouncement against allowing extrinsic evidence, when the court approved the cross-examination inquiry of Sergeant Sutherland—the witness to Williams's statements—with respect to Williams's misconduct, it actually endorsed the admission of extrinsic evidence.

Only if Williams himself could have been cross-examined concerning his own prior misconduct would the strictures of Rule 608(b) have been satisfied. It is perhaps easier to see this if we imagine Williams on the stand, making the same statements that he made out-of-court. The defense could have sought to impeach Williams by inquiring about his prior misconduct. The defense would not, however, have been entitled to call Sergeant Sutherland to testify to Williams's misconduct precisely because it would have been extrinsic evidence of that misconduct,

58. Fed. R. Evid. 608(b).
59. White, 116 F.3d at 920.
60. Fed. R. Evid. 608(b).
61. Id.
62. Id.
63. White, 116 F.3d at 920.
prohibited by Rule 608(b). That Williams’s statements were made out-of-court does nothing to render Sergeant Sutherland’s testimony about Williams’s prior misconduct anything other than extrinsic. Despite the court’s misconception of extrinsic evidence, other courts have read White as barring the use of extrinsic evidence of prior misconduct during impeachment of an out-of-court declarant.  

C. United States v. Saada

In United States v. Saada, the defendants staged a flood of their business warehouse and were later convicted of multiple counts of insurance fraud and related counts of mail and wire fraud. One of the defendants / accomplices purposely broke off a sprinkler head, which flooded a portion of the defendants’ warehouse; subsequently, the defendants filed false claims for water damage to goods that had not been damaged in the flood.

The defendants claimed the flood occurred accidentally when one of the defendants moved a heavy box piled near the ceiling. To support their contention that the sprinkler head broke accidentally, the defendants offered the testimony of an employee who had been working in the warehouse at the time of the flood. She testified that Yaccarino, a vice president of the business and a former state court judge, “had run into the office kitchen screaming words to the effect of ‘oh my God, Neil [one of the defendants] did something stupid, [threw] something, now he has got a mess . . . . I can’t believe it. He is so stupid. He threw it. He is stupid, he is dumb.’”

Although Yaccarino was deceased at the time of trial, the court admitted the hearsay statement that he made during the flood, as an excited utterance in support of the defendants’ contention that the sprinkler head had been broken accidentally. The government then attempted to impeach

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64. Saada, 212 F.3d at 220-21; Martisko, 566 S.E.2d at 280 (interpreting the West Virginia Rules of Evidence).
65. 212 F.3d 210.
66. Id. at 213-14.
67. Id. at 214.
68. Id.
69. Id. at 218-19.
70. Saada, 212 F.3d at 218 (alterations in original).
71. Id.
Yaccarino's hearsay statements by showing that he had been removed from the bench and disbarred for unethical conduct, including the factual details underlying his removal and disbarment. 72

The defendants objected to this form of impeachment on the grounds that extrinsic evidence of specific acts was inadmissible on the question of credibility. 73 Prior specific acts may be inquired into on cross-examination, of course (and, presumably, as here on redirect where the testimony to be impeached is first introduced on cross-examination), but extrinsic evidence of such acts is not admissible to impeach. 74 The difficulty for the government was that the evidence to be impeached was from the mouth of a hearsay declarant and hence, by definition, not subject to cross-examination. 75 Thus, the only way the jury could be informed of the impeaching facts was through extrinsic evidence. 76

Put another way, the defendants argued that if Yaccarino had been called as a witness, Rule 608(b) would have precluded the government from proving the impeaching facts other than through the examination of Yaccarino. 77 Since Rule 806 permits the impeachment of a hearsay declarant with evidence that would be admissible if the declarant had testified as a witness, and extrinsic evidence of bad acts of the witness would not have been admissible in that circumstance, it should not have been admissible to impeach Yaccarino's hearsay statements. 78

The trial court overruled the defendants' objection and permitted the government to use the specific act evidence to cast doubt on the credibility of Yaccarino, the out-of-court declarant. 79 On appeal, the government argued that, since Yaccarino was dead and could not be called as a witness, nor cross-examined about the specific act evidence, the trial court was correct in allowing the government to use extrinsic evidence

72. Id. at 219.
73. Id.
74. Id.
75. Saada, 212 F.3d at 219.
76. Id.
77. Id.
78. Id.
79. Id.
of those specific acts to impeach his out-of-court statements.\textsuperscript{80} In effect, the government argued that Rule 806 modifies Rule 608(b)'s ban on extrinsic evidence of specific acts to impeach.\textsuperscript{81} As the trial court had noted:

Rule 806 says [the declarant’s out-of-court statement] may be attacked by any evidence which would be admissible if former Judge Yaccarino had testified. If former Judge Yaccarino had testified, I would allow the government to cross-examine him with respect to the removal from office, and disbarment under the second sentence of Rule 608(b). Certainly his disbarment and removal from office would relate to his character for truthfulness or untruthfulness.\textsuperscript{82}

On appeal, the United States Court of Appeals for the Third Circuit noted that whether Rule 806 should be read to modify Rule 608(b), as the government urged, was a question of first impression.\textsuperscript{83} Indeed, only two other circuits, the Second Circuit\textsuperscript{84} and the D.C. Circuit,\textsuperscript{85} had addressed the question, and as the court read them, they were in conflict.\textsuperscript{86}

\textit{Friedman}, according to the court, suggested that extrinsic evidence of a hearsay declarant’s specific misconduct, if probative of truthfulness, would be admissible to impeach the declarant’s out-of-court statement despite Rule 608(b)’s provision limiting specific misconduct evidence to what might be adduced on cross-examination of a testifying witness.\textsuperscript{87} The court quoted \textit{Friedman} on the use of specific instances of a declarant’s conduct probative of the declarant’s truthfulness: “Rule 806 applies, of course, when the declarant has not testified and there has by definition been no cross-examination, and resort to extrinsic evidence may be the only means of presenting such evidence to the jury.”\textsuperscript{88} As discussed previously, this statement by the \textit{Friedman} court is, at best, \textit{dictum}; in any event, it is merely a suggestion of what might be an appropriate

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\item \textsuperscript{80} \textit{Saada}, 212 F.3d at 219-20.
\item \textsuperscript{81} \textit{Id}.
\item \textsuperscript{82} \textit{Id.} at 220 n.10.
\item \textsuperscript{83} \textit{Id.} at 220.
\item \textsuperscript{84} \textit{Friedman}, 854 F.2d 535; see also supra notes 29-43 and accompanying text.
\item \textsuperscript{85} \textit{White}, 116 F.3d 903; see also supra notes 44-64 and accompanying text.
\item \textsuperscript{86} \textit{Saada}, 212 F.3d at 220-21.
\item \textsuperscript{87} \textit{Id}.
\item \textsuperscript{88} \textit{Id.} (quoting \textit{Friedman}, 854 F.2d at 570 n.8).
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balancing of the interests protected by each of the two rules.  

The Saada court read White to conflict with Friedman.  

According to the Saada court, the D.C. Circuit, in White, concluded that the trial court was incorrect in limiting the impeachment of the unavailable out-of-court declarant through cross-examination of the witness who testified to the declarant’s statement. In addition to allowing the witness to testify to the declarant’s drug use, drug dealing, and prior convictions, the trial court should have permitted cross-examination of the witness about the declarant’s specific conduct in making false statements and disobeying a court order. The conflict with Friedman arose because the White court “observed that defense counsel ‘could not have made reference to any extrinsic proof of those acts’ during cross-examination.” The Saada court, thus, read White as barring the use of extrinsic evidence of a declarant’s specific acts to impeach the non-testifying declarant.  

As we have seen, however, in our discussion of White, the testimony of the witness to the out-of-court statement about the declarant’s prior misconduct is extrinsic evidence with respect to prior misconduct. It is only cross-examination of the testifying witness concerning her own misconduct that is not extrinsic evidence. Thus, when the Saada court read White as prohibiting the use of extrinsic evidence, while permitting the testifying witness to offer evidence of the misconduct of the out-of-court declarant, it perpetuated and extended White’s misunderstanding of the rules. White actually permits the use of a certain type of extrinsic evidence of the declarant’s misconduct: extrinsic evidence that is part of the cross-examination of the witness testifying to the out-of-court statement.  

Thus, the Third Circuit’s holding in Saada divides the

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89. See supra notes 42-43 and accompanying text.
90. Saada, 212 F.3d at 220-21.
91. Id.
92. Id.
93. Id. (quoting White, 116 F.3d at 920).
94. Id. at 221.
95. See supra notes 56-63 and accompanying text.
96. Saada, 212 F.3d at 221.
97. White, 116 F.3d at 920.
universe of prior misconduct impeachment evidence of a hearsay declarant into two categories. In the first category is an inquiry into the misconduct of the declarant undertaken through the cross-examination of the witness who testifies to the statement. The court does not recognize this as extrinsic evidence of the declarant’s misconduct, and so permits the inquiry as if it were the declarant herself being cross-examined.\(^9\)

The second category includes all other forms of extrinsic evidence; the court finds evidence in this category inadmissible.\(^9\) The court was not persuaded to read Rule 806 as modifying the limitations on the use of extrinsic evidence of prior misconduct to impeach that are imposed by Rule 608(b).\(^1\) The argument in favor of permitting extrinsic evidence was that the refusal to do so would limit the impeachment of the hearsay declarant beyond what would have been the case if the declarant had testified.\(^2\) But, the court noted, the testifying witness might be cross-examined about the hearsay declarant’s prior misconduct (category 1).\(^3\) Even if the testifying witness had no awareness of the declarant’s misconduct, other modes of impeachment of the declarant might be used.\(^4\) Compounding the confusion between the declarant and the witness testifying to the out-of-court statement, the court noted that these other modes of impeachment were available to impeach the latter as well as the former.\(^5\) Either the declarant or the testifying witness might be impeached by opinion or reputation evidence of character for veracity, evidence of criminal convictions, or evidence of prior inconsistent statements.\(^6\)

To bolster its view that Rule 806 did not dispense with Rule 608(b)’s limitation on the use of extrinsic evidence of prior misconduct where the person to be impeached is a hearsay declarant, the court compared the limitation in Rule 608(b) with Rule 806’s treatment of impeachment by the use of prior

\(^{98}\) Saada, 212 F.3d at 221-22.
\(^{99}\) Id.
\(^{100}\) Id.
\(^{101}\) Id.
\(^{102}\) Id.
\(^{103}\) Saada, 212 F.3d at 221.
\(^{104}\) Id.
\(^{105}\) Id.
inconsistent statements under Rule 613.\textsuperscript{106} Rule 613 requires that a witness, who is to be impeached by otherwise admissible extrinsic evidence of a prior inconsistent statement, be given the opportunity to admit, explain, or deny the statement.\textsuperscript{107} Analogous to impeachment by prior misconduct, if the speaker of the prior statement is a hearsay declarant who is not a testifying witness, it will be impossible to meet the requirements of Rule 613.\textsuperscript{108} Yet, in the case of impeachment by prior inconsistent statement, Rule 806 provides that otherwise admissible extrinsic evidence of a declarant’s prior inconsistent statement “is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain.”\textsuperscript{109} The court interpreted the lack of a similar allowance in Rule 806 for the use of extrinsic evidence to impeach a non-testifying hearsay declarant through the use of the declarant’s prior misconduct, as support for its unwillingness to depart from Rule 608(b)’s limitation on the use of such evidence.\textsuperscript{110}

The \textit{Saada} court recognized that applying Rule 608(b)’s limitation on the use of extrinsic evidence to impeach of a hearsay declarant would prevent impeachment by showing the declarant’s prior conduct, unless the declarant could be called to testify or, reiterating its earlier analytical error, “unless the witness testifying to the hearsay has knowledge of the declarant’s misconduct.”\textsuperscript{111}

Ironically, after having developed this comprehensive, if flawed analysis, the court concluded that the error in admitting the extrinsic evidence of the declarant’s misconduct was harmless.\textsuperscript{112}

D. \textit{Mishkin v. Ensminger (In re Adler, Coleman Clearing Corp.)}

\textit{Mishkin v. Ensminger (In re Adler, Coleman Clearing Corp.)}

\begin{itemize}
  \item[106.] \textit{Id.} at 221-22.
  \item[107.] \textit{FED. R. EVID.} 613(b).
  \item[108.] \textit{See Saada}, 212 F.3d at 221 (interpreting \textit{FED. R. EVID.} 613).
  \item[109.] \textit{Id.} (quoting \textit{FED. R. EVID.} 806).
  \item[110.] \textit{Id.} at 221-22.
  \item[111.] \textit{Id.} at 222 (citing 4 \textit{MUELLER & KIRKPATRICK, supra} note 8, \$ 511, at 894 n.7; Cordray, \textit{supra} note 3, at 525-30).
  \item[112.] \textit{Saada}, 212 F.3d at 226.
\end{itemize}
involved a dispute in the course of a bankruptcy proceeding. The trustee claimed that Hanover, Sterling and Co. and its brokers, including brokers whose trades the debtor cleared, had committed fraud against the debtor by booking millions of dollars of false or unauthorized trades. The defendants sought to preclude the trustee from introducing evidence of earlier misconduct involving securities fraud by some of the Hanover brokers who were not parties to this litigation. The evidence consisted of various instances of misconduct by Hanover brokers, including one broker’s guilty plea to securities fraud.

The United States Bankruptcy Court for the Southern District of New York ruled that much of this evidence was admissible under Rule 404(b) to show the knowledge and intent of the Hanover brokers. The Mishkin court also considered whether it was admissible to impeach the deposition testimony of one of the Hanover brokers and the business records of other brokers, which had been offered to show the occurrences of the underlying trades. Confusing matters further, the court noted that Rule 608(b) limits proof of the conduct of a witness to “extrinsic evidence only on cross-examination.” Relying on Friedman, however, the court admitted the evidence; the Mishkin court echoed Friedman: Where there could have been no cross-examination because the statements are hearsay, “resorting to extrinsic evidence may be the only means of presenting such evidence.”

Again, however, if the evidence is adduced from the witness it is not “extrinsic evidence.” Thus, like the White court before it, the Mishkin court misconstrued the nature of extrinsic evidence, which is, after all, evidence other than that which may

114. Id. at *1.
115. Id. at *1-3.
116. Id. at *2-5. The court ruled that a presentencing guilty plea was not admissible as a conviction under Rule 609 because the defendant might have sought to withdraw the plea before sentencing. Id. at *9 (citing United States v. Vanderbosch, 610 F.2d 95, 96-97 (2d Cir. 1979); United States v. Semensohn, 421 F.2d 1206, 1208 (2d Cir. 1970)).
118. Id. at *10.
119. Id.
120. See supra notes 29-43 and accompanying text.
121. Mishkin, 1998 WL 160036, at *10 (quoting Friedman, 854 F.2d at 570 n.8).
be adduced from the witness on cross-examination. Nevertheless, it is noteworthy that the *Mishkin* court made no distinction between the guilty plea of one of the declarants which was used to impeach that declarant and the other evidence of misconduct that was not based on the statements of the declarant who was the target of impeachment.\textsuperscript{122} One might argue that if the evidence of misconduct of a hearsay declarant is that declarant’s own statement, it is the functional equivalent of adducing the information through the cross-examination of that declarant.\textsuperscript{123}

But that is not the case with respect to other independent extrinsic evidence of a declarant’s misconduct offered to impeach. With respect to other evidence, the dangers that Rule 608(b) attempts to avoid are present. In any event, the court made no attempt to balance the policies underlying Rule 806 with those underlying Rule 608(b).\textsuperscript{124}

E. *State v. Martisko*

The most recent case to have considered the tension between Rules 806 and 608(b) arose not under the Federal Rules of Evidence, but under their West Virginia counterpart.\textsuperscript{125} The language of the rules and the underlying values, however, are virtually identical.\textsuperscript{126} In *State v. Martisko*,\textsuperscript{127} the defendant was convicted of domestic abuse, despite his victim’s failure to appear in court and testify.\textsuperscript{128} The responding police officers, none of whom saw the defendant strike the victim, were

\begin{itemize}
\item \textsuperscript{122} *See id. at* \textsuperscript{8-10}.
\item \textsuperscript{123} *Cf.* United States v. Burton, 937 F.2d 324, 329-30 (7th Cir. 1991) (finding that tape recorded statements of declarant included statements of his own prior misconduct). \textit{But see Finley,} 934 F.2d at 839 (ruling that declarant’s out-of-court statement describing himself as a “liar and a bullshitter” was inadmissible hearsay); \textit{see infra} notes 177-82 and accompanying text.
\item \textsuperscript{124} \textit{See generally Mishkin,} 1998 WL 160036, at \textsuperscript{8-10}.
\item \textsuperscript{125} W. VA. R. EVID. 608(b), 806.
\item \textsuperscript{126} West Virginia has adopted Federal Rule of Evidence 806 in its entirety. \textit{Compare} FED. R. EVID. 806, \textit{with} W. VA. R. EVID. 806. Furthermore, West Virginia has substantially adopted Federal Rule 608(b); the West Virginia rule, however, (like the original Federal Rule of Evidence 608(b)) uses the term “credibility,” rather than “character for truthfulness,” and does not apply to testimony given by an accused. \textit{Compare} FED. R. EVID. 608(b), \textit{with} W. VA. R. EVID. 608(b).
\item \textsuperscript{127} 566 S.E.2d 274 (W. Va. 2002).
\item \textsuperscript{128} \textit{Id.} at 276.
\end{itemize}
permitted to testify that upon their entrance to the residence, the victim stated, "[h]e hit me,' or words to that effect."129 The officers were also permitted to testify that a friend or neighbor of the victim, who had notified the police of the altercation, told them that she had also been hit and kicked by the defendant.130 The victim’s statement and the statement of the neighbor were properly admitted as excited utterances, an exception to the rule against hearsay.131

The defense unsuccessfully sought to impeach the absent victim through documentary evidence that purported to show that the victim had herself been convicted of domestic violence against an earlier boyfriend and that she had filed similar charges against the boyfriend, but had later recanted.132 On appeal, the Supreme Court of Appeals of West Virginia held it error to exclude the documents or to disallow the cross-examination of the police witnesses about their knowledge of the victim’s prior conduct.133

The court noted the “catch-22” presented by the interaction of Rules 806 and 608(b): “Rule 806 allows one to attack the credibility of an out-of-court declarant as if he or she were present.”134 But, Rule 608 allows inquiry into specific instances of conduct only on cross-examination.135 “Obviously, if Rule 806 applies, there has been no live testimony, thus there cannot be any cross-examination.”136 After reviewing what the court characterized as a split of authority in the federal courts, represented by Friedman,137 White,138 and Saada,139 as well as the suggestion for amendment of Rule 806 by Professor Cordray,140 the court declined the opportunity to develop a new rule to govern impeachment of hearsay declarants through the

129. Id.
130. Id. at 276-77.
131. W. VA. R. EVID. 803(2).
132. Martisko, 566 S.E.2d at 277.
133. Id. at 281-82.
134. Id. at 280 (interpreting W. VA. R. EVID. 608).
135. Id.
136. Id.
137. See supra notes 29-43 and accompanying text.
138. See supra notes 44-64 and accompanying text.
139. See supra notes 65-112 and accompanying text.
140. Martisko, 566 S.E.2d at 280-82 (citing Cordray, supra note 3, at 525).
use of extrinsic evidence of prior misconduct.\textsuperscript{141}  

The \textit{Martisko} court did, however, recognize the peculiar situation presented in the case before it; a conviction based entirely on hearsay evidence with no opportunity to impeach the out-of-court accuser.\textsuperscript{142} In those circumstances, the court held that the defendant “should have been permitted to impeach the credibility of [the declarant] either by introducing the documents in question or by re-calling the police witnesses and questioning them about [the declarant’s] prior acts.”\textsuperscript{143}

\section*{III. FILLING THE LACUNA}

Each of the courts that considered the problem at the intersection of Rules 806 and 608(b), whether a non-testifying hearsay declarant may be impeached by evidence of the declarant’s misconduct, fundamentally misinterpreted Rule 608(b). Rule 608(b) allows inquiry on cross-examination of the witness with respect to the witness’s misconduct if relevant to the witness’s character for veracity.\textsuperscript{144} In the cases considered, however, the courts—even in \textit{United States v. White}\textsuperscript{145} and \textit{United States v. Saada},\textsuperscript{146} which claimed to preclude extrinsic evidence of the non-testifying declarant’s misconduct—would permit evidence of that misconduct through the cross-examination of the witness to the declarant’s statement. But it is the non-testifying declarant’s character for veracity that is relevant, and Rule 608(b) contemplates only an inquiry of the person whose character for veracity counts.\textsuperscript{147} The testimony of the witness to the statement, with respect to the misconduct of the declarant is, under Rule 608(b), extrinsic evidence of that misconduct.

Thus, the disagreement among the courts is more limited than one might at first assume. The courts disagree not over

\begin{itemize}
\item \textsuperscript{141} \textit{Id.} at 281.
\item \textsuperscript{142} \textit{Id.}
\item \textsuperscript{143} \textit{Id.} at 281-82.
\item \textsuperscript{144} \textit{FED. R. EVID.} 608(b) (providing “[s]pecific instances of the conduct of a witness, for the purposes of attacking or supporting the witness’ character for truthfulness, other than conviction of a crime as provided in rule 609, may not be proved by extrinsic evidence”) (emphasis added).
\item \textsuperscript{145} 116 F.3d 903 (D.C. Cir. 1997).
\item \textsuperscript{146} 212 F.3d 210 (3d Cir. 2000).
\item \textsuperscript{147} \textit{FED. R. EVID.} 608(b).
\end{itemize}
whether extrinsic evidence of a non-testifying declarant’s misconduct is admissible to impeach the declarant, but only over whether the introduction of such evidence is limited to the cross-

examination of the witness who recounts the declarant’s statements on the merits or extends to other kinds of extrinsic evidence as well.\textsuperscript{148} Such an approach is reminiscent of an older inquiry into degrees of secondary evidence under the common law “best evidence rule.”\textsuperscript{149} Rule 608(b), however, does not appear to contemplate an inquiry into the misconduct of one person—the declarant—through the cross-examination of a different person—the witness to the declarant’s statement.\textsuperscript{150}

If the non-testifying declarant is impeachable with misconduct evidence at all, there are a number of ways in which the issue might be presented. For example, if the statements of the non-testifying declarant are testified to by a witness, the declarant’s misconduct may be offered through the witness to the statement—a scenario the courts seem to assume is permissible (though without analysis of rule, principle or policy).\textsuperscript{151} Or, a declarant’s misconduct may be shown out of the mouth of the declarant herself, either as part of the statement admitted on the merits, in some other statement that is testified to by a witness to the statement(s), or offered through writings or recordings of the statement(s).\textsuperscript{152} Finally, the testimony of an independent witness may be offered to prove the declarant’s prior misconduct, or a writing or recording evidencing that misconduct may be offered.\textsuperscript{153}

\textsuperscript{148} Compare Saada, 212 F.3d at 220, with United States v. Friedman, 854 F.2d 535, 569-70 (2d Cir. 1988).

\textsuperscript{149} See 4 JOHN HENRY WIGMORE, EVIDENCE IN TRIAL AT COMMON LAW § 1175, at 401-402 (James H. Chadbourn rev., 1972) (discussing the distinctions among degrees of secondary evidence under the “best evidence rule”).

\textsuperscript{150} See FED. R. EVID. 608(b).

\textsuperscript{151} See United States v. Stefonek, 179 F.3d 1030, 1036-37 (7th Cir. 1999) (allowing witness to be asked about prior convictions of hearsay declarant about whose testimony witness testified); Fred Warren Bennet, How to Administer the “Big Hurt” In a Criminal Case: The Life and Times of Federal Rule of Evidence 806, 44 CATH. U. L. REV. 1135, 1154-56 (1995).

\textsuperscript{152} See, e.g., United States v. Finley, 934 F.2d 837, 840 (7th Cir. 1991) (discussing impeachment of declarant via declarant’s in court testimony); Carter v. Hewitt, 617 F.2d 961, 970 (3d Cir. 1980) (using letter by declarant to impeach declarant); see also infra notes 154-92 and accompanying text.

\textsuperscript{153} See, e.g., United States v. Moody, 903 F.2d 321, 327-29 (5th Cir. 1990) (finding it was error to disallow defendant to call and question witnesses on declarant’s reputation,
Each of these scenarios involves the use of extrinsic evidence, but the degree to which the values reflected by Rule 806 and 608(b) are in conflict differ from one scenario to the other. For example, where the impeaching facts are proffered through an inquiry of the witness that testifies to the hearsay statement, much of the problem with offering extrinsic evidence of those impeaching facts is absent—at least if the cross-examiner must take the witness’s answer.

Typically, the witness called to testify to the making of the hearsay statement is, in some sense, vouching for that statement. It would be the rare case that the proponent of a hearsay statement would offer it through the testimony of a witness who would also testify that she did not believe the statement to be true. Thus, it would not seem unfair to inquire of that witness whether her belief in the statement would be diminished, if she had known of whatever prior misconduct the opponent of the hearsay statement would have been able to use to impeach the declarant, had the declarant testified.

Obviously, this sort of inquiry mirrors the inquiry one would make in impeaching a character witness called to vouch for the declarant’s veracity. As in that situation, if the cross-examiner must take the witness’s answer—other evidence of the declarant’s misconduct may not be introduced—the burden of calling additional witnesses and the risk of confusing the jury is minimized. The courts that have confronted the issue of impeaching the hearsay declarant through prior misconduct have permitted precisely this approach, though their failure to see this as extrinsic evidence—albeit of a limited variety—of prior misconduct can be a source of confusion.

The hearsay declarant’s misconduct may be evidenced by the declarant’s own statements, either as part of the statement offered by the proponent or in some independent statement, after the prosecution, in its case-in-chief, relied on inculpatory statements of non-testifying declarants).

154. See Fed. R. Evid. 608(a), (b)(2).
155. As discussed previously, confusion of the jury and preventing protracted litigation on collateral issues are two of the reasons for the extrinsic evidence rule. 3A Wigmore, supra note 21, § 979.
document or recording. *Carter v. Hewitt*\(^{157}\) is instructive. In *Carter*, a state prisoner (Carter), brought a civil rights action, alleging that he had been beaten by prison guards.\(^{158}\) During the defense’s cross-examination of Carter he was shown a letter written by “Abdullah” to another inmate and asked if he had written it.\(^{159}\) Carter acknowledged having written the letter, though he had denied doing so in a prior prison disciplinary proceeding.\(^{160}\) Carter also acknowledged the denial.\(^{161}\) The letter described how to file a brutality complaint against a prison guard and contained a plea to establish a pattern of such complaints for use in the media and the courts.\(^{162}\) Over objection, Carter was directed to read the letter aloud, and the court ultimately admitted the letter itself in evidence.\(^{163}\)

On appeal, Carter challenged the admissibility of the letter.\(^{164}\) The defendants did not argue that the letter was admissible, but that its admission was harmless.\(^{165}\) The court found that if admission of the letter was error, it was not harmless because both the presiding magistrate judge and the district court had relied heavily on the letter in finding for the defendants.\(^{166}\) Despite the defendants’ failure to argue for the admissibility of the letter, the United States Court of Appeals for the Third Circuit held that the letter was admissible.\(^{167}\)

Initially, the court concluded that the letter was admissible under Rule 404(b) as substantive evidence of Carter’s plan to promote the filing of false complaints and that his own complaint was filed as part of that plan.\(^{168}\) More importantly for our purposes, however, the letter was held admissible to impeach Carter’s character for veracity, despite Rule 608(b)’s apparent limitation on the use of extrinsic evidence for this

\(^{157}\) 617 F.2d 961 (3d Cir. 1980).
\(^{158}\) Id. at 963.
\(^{159}\) Id. at 964.
\(^{160}\) Id.
\(^{161}\) Id.
\(^{162}\) *Carter, 617 F.2d* at 964-65.
\(^{163}\) Id.
\(^{164}\) Id. at 966.
\(^{165}\) Id.
\(^{166}\) Id.
\(^{167}\) *Carter, 617 F.2d* at 966.
\(^{168}\) Id. at 966-67.
purpose. As the Carter court interpreted Rule 608(b), its purpose is "to prohibit impeachment of a witness through extrinsic evidence of his bad acts when this evidence is to be introduced by calling other witnesses to testify." The court suggested, without holding, that when the extrinsic evidence of prior misconduct is introduced through the witness whose credibility is being challenged—presumably, as where that witness lays the foundation for the authenticity of the extrinsic evidence—the "core concerns [of Rule 608(b)] are not implicated."  

According to the court, however, a stronger reason for admitting the extrinsic evidence of the witness’s misconduct for purposes of impeachment was that the witness did not deny the prior act, but merely attempted to cast it in a less damaging light. In other cases in which impeaching evidence was excluded, although offered from or through the witness to be impeached, the witness denied committing the impeaching acts. Where the witness denies the impeaching misconduct, other evidence is needed to refute the denial. In contrast, where, as in Carter, the witness does not deny the impeaching acts, the reasons for excluding extrinsic evidence “lose their force.”  

Carter, of course, is not entirely apposite. The person targeted for impeachment in Carter was a witness at the trial, and the extrinsic evidence was offered through the cross-examination of that witness. Nevertheless, the evidence offered to impeach was extrinsic, and the underlying values remain the same. Where the person to be impeached is the source of the evidence of the misconduct used to impeach and no additional witnesses need be called to establish the impeaching misconduct, there is no greater strain on the values

169. Id. at 969-70.
170. Id. at 969 (emphasis added).
171. Id. at 970.
172. Carter, 617 F.2d at 970.
173. Id. (citing United States v. Herzeberg, 558 F.2d 1219, 1222 (5th Cir. 1977); United States v. Turquitt, 557 F.2d 464, 467-68 (5th Cir. 1977); United States v. Dinitz, 538 F.2d 1214, 1218 (5th Cir. 1976); Carlsen v. Javurek, 526 F.2d 202, 207 (8th Cir. 1975)).
174. Id.
175. Id. at 971.
176. Id. at 964-65.
underlying Rule 608(b) than the court found in Carter. There will be no substantial additional expenditure of time, as would be required if additional witnesses were to be called. There will be no evidence offered to rebut the alleged misconduct, and therefore, no "mini-trials" over whether the declarant did or did not engage in the alleged misconduct. Accordingly, if the declarant to be impeached is herself the source of the extrinsic evidence of misconduct, Carter suggests that Rule 608(b)'s restriction on extrinsic evidence is inapplicable.

Although the concerns underlying Rule 608(b) may be ameliorated where the declarant to be impeached has admitted the prior misconduct, other rules of evidence may present difficulties. United States v. Finley\textsuperscript{177} is illustrative. Finley concerned yet another criminal enterprise involving parking violations bureau contracts.\textsuperscript{178} The prosecution introduced audio and videotapes that implicated the defendant in the enterprise.\textsuperscript{179} Some of these tapes included statements of one of the defendant's co-conspirators in which the defendant was portrayed as an active participant in the enterprise.\textsuperscript{180} Apparently, the declarant co-conspirator, after pleading guilty, did not testify at the trial.\textsuperscript{181} In an attempt to discredit the out-of-court statements of the declarant, the defendant sought to introduce his statement to a psychotherapist, that he (the declarant co-conspirator) was "a liar and a bullshitter."\textsuperscript{182} In addition, the defendant sought to impeach the declarant with the diagnosis of the psychotherapist that the co-conspirator "took credit for events in which he played no role and that [he saw the government informant to whom the previously admitted statements had been made] as a father figure, whom he tried to please."\textsuperscript{183}

Even if Rule 806 otherwise allowed the defendant to impeach the video and audio taped statements of the co-

\textsuperscript{177} 934 F.2d 837.
\textsuperscript{178} Id. at 838.
\textsuperscript{179} Id.
\textsuperscript{180} Id.
\textsuperscript{181} Id. at 838-39.
\textsuperscript{182} Finley, 934 F.2d at 838-39. Lambesis, Finley's co-conspirator, was sent to the psychotherapist by his lawyer. Id. at 838.
\textsuperscript{183} Id. at 838-39. The psychotherapist's diagnosis was included in a memorandum that Lambesis's lawyer prepared in order to get his sentence reduced. Id. at 838.
conspirator, the evidence offered by the defendant was itself hearsay. 184 The co-conspirator’s statement that he was “a liar and a bullshitter” was plainly offered for its truth, as was the psychotherapist’s report. 185 Because the defendant did not call either the co-conspirator or the psychotherapist, their out-of-court statements constituted inadmissible hearsay. 186

Although Finley appears to have involved impeachment under Rule 608(a), rather than impeachment by specific prior acts under Rule 608(b), it nonetheless suggests the importance of compliance with the other rules when evidence is offered to impeach an out-of-court declarant. If the rules are read to permit impeachment of a hearsay declarant through the declarant’s prior misconduct, where the source of the evidence of that misconduct is the declarant herself, the impeaching evidence may not violate other evidentiary rules. If the evidence of the declarant’s misconduct consists of admissions to the prior behavior made by the declarant, the most likely impediment to admissibility will be the rule against hearsay. 187

The sharpest conflict between the policies underlying Rules 806 and 608(b) occurs where the opponent of the hearsay evidence seeks to call an additional witness to testify to prior misconduct of the declarant. 188 In this situation, all the dangers Rule 608(b) was designed to prevent are present. 189 Additional time is necessary to adduce the testimony of a new witness (or, at least, to develop a new line of testimony of a witness already testifying). If the witness is permitted to testify to the prior misconduct of the hearsay declarant, fairness suggests that the proponent of the declarant’s statement be given the opportunity to cross-examine the witness in an effort to impeach her credibility with respect to whether the declarant’s alleged misconduct actually occurred. Presumably, the proponent of the

184. Id. at 839.
185. Finley, 934 F.2d at 839.
186. Id.
187. See FED. R. EVID. 801, 802.
188. See, e.g., Moody, 903 F.2d at 327-29 (finding it was error to disallow defendant to call and question witnesses on declarant’s reputation, after prosecution, in its case-in-chief, relied on inculpatory statements by non-testifying declarants).
189. Again, the policy considerations behind Rule 608(b) are the prevention of unfair prejudice, unfair surprise, and the litigation of peripheral issues. 3A Wigmore, supra note 21, § 979.
hearsay statement would be entitled to call her own witnesses to rebut the testimony of the impeaching witness. Consequently, issues would multiply creating the potential for jury confusion. Moreover, the opponent of the hearsay statement would fare better than if the declarant had testified at trial, where inquiry would be limited to cross-examination. On the other hand, where the only reasonably obtainable evidence of the declarant’s misconduct is the testimony of an independent witness, the refusal to allow that witness’s testimony would place the proponent of the hearsay statement in a better position than if the declarant had testified at trial; a situation Rule 806 was designed to avoid.190

Where such a collision of values occurs, it may be preferable to leave the question to the discretion of the trial court, as envisioned by Rule 102.191 The trial court might consider such factors as the importance of the hearsay statement to the issue to be decided,192 the importance of the credibility of the declarant in determining that issue, the extent to which the alleged misconduct bears on the declarant’s credibility in terms of the nature of the misconduct, and its remoteness in time from the time the statement was made. Although granting such discretion to the trial court would introduce a measure of uncertainty, it may be the best way to reconcile the conflicting policies at stake.

IV. CONCLUSION

Rule 806 of the Federal Rules of Evidence is premised on the notion that a hearsay declarant is, in effect, a witness whose “testimony,” insofar as possible, should be subject to the same sort of testing as would be provided by cross-examination of an in-court testifying witness.193 One need not subscribe to Dean Wigmore’s dictum that cross-examination is “the greatest legal

190. See FED. R. EVID. 806 advisory committee’s notes (stating that the declarant’s credibility “should in fairness be subject to impeachment and support as though he had in fact testified”).
191. “These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.” FED. R. EVID. 102.
193. FED. R. EVID. 806 advisory committee’s note.
engine ever invented for the discovery of truth" to believe that
cross-examined testimony has a greater claim to veracity than
the same statement untested by the rigors of the adversary
system. Thus, the law of evidence should not provide incentives
for the proffer and admission of hearsay evidence.

Rule 806 is designed to minimize the advantages to the
proponent offering hearsay, by attempting to provide
impeachment tools equivalent to those that would be available if
the declarant had testified in court. It seeks to accomplish that
goal by permitting the impeachment of hearsay declarants "by
any evidence which would be admissible for those purposes if
declarant had testified as a witness." By and large, Rule 806
is successful in that ambition. But where the hearsay declarant
has engaged in conduct that might cast doubt on her veracity,
Rule 806 leaves a lacuna that can serve to privilege hearsay over
in-court testimony.

If the declarant had testified as a witness in court, she might
have been cross-examined about her prior conduct. Extrinsic
evidence of that prior conduct, however, would have been
inadmissible. If the declarant does not testify in court, of
course, she is not subject to cross-examination, and hence
cannot be asked about the prior misconduct. If no extrinsic
evidence of that prior misconduct may be admitted, the prior
misconduct cannot be brought to the attention of the fact-finder
who, perforce, will not consider it in assessing the veracity of
the declarant.

Courts and commentators that have considered this
dilemma have partially resolved the difficulty by misconceiving
the meaning of "extrinsic evidence." Properly construed, in this
context, extrinsic evidence is any evidence other than testimony
adduced through cross-examination of the person whose
credibility is at stake. Thus, despite numerous assumptions to
the contrary in judicial and academic writing, examination of a
witness to a hearsay statement about the prior misconduct of the

194. 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIAL AT COMMON LAW § 1367, at 32
195. FED. R. EVID. 806.
196. FED. R. EVID. 608(b).
197. Id.
198. See supra notes 147-48 and accompanying text.
out-of-court declarant who made the statement, is actually extrinsic evidence of that prior misconduct.

A better resolution to the difficulty is to reconcile, insofar as possible, the policies underlying the rule permitting impeachment of the hearsay declarant as if she were a witness\textsuperscript{199} with the policies underlying the rule prohibiting the use of extrinsic evidence of a witness’s prior misconduct to impeach the witness’s veracity.\textsuperscript{200} Where extrinsic evidence of a declarant’s prior misconduct can be shown without substantial additional cost in time or confusion of the issues than if the declarant were an in-court witness cross-examinable about the conduct—for example, where the declarant has admitted to the prior misconduct or the witness to the declarant’s hearsay statement is aware of the prior misconduct—trial courts’ discretion to permit the impeachment should be recognized. Where more is required to show the misconduct, the court should consider and balance a number of factors—the importance of the declarant’s statement, the extent to which the misconduct might affect the fact-finder’s assessment of the declarant’s veracity because of the nature of the misconduct or its attenuation in time—in determining the admissibility of such additional evidence.\textsuperscript{201} The exercise of such discretion is perhaps the only way to assure that the rules of evidence are applied “to the end that the truth may be ascertained and proceedings justly determined.”\textsuperscript{202}

\textsuperscript{199} \textit{Fed. R. Evid.} 806.
\textsuperscript{200} \textit{Fed. R. Evid.} 608(b).
\textsuperscript{201} See supra notes 191-92 and accompanying text.
\textsuperscript{202} \textit{Fed. R. Evid.} 102.