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APPELLATE REVIEW OF EVIDENTIARY RULINGS

DAVID P. LEONARD*

The Federal Rules of Evidence confer great authority on trial judges to apply the rules to serve the trial's many goals. Although "individualized justice" is a laudable goal, the open-textured nature of the rules creates a risk that trial judges will exercise virtually unlimited power.

Professor David Leonard poses two questions about this broad authority conferred on trial judges: first, whether the Federal Rules provide trial judges with adequate guidance to make informed rulings; and second, whether appellate courts ever can provide meaningful review. Professor Leonard examines the two questions in the context of rule 608(b), governing the use of specific acts to impeach a witness's credibility, and rule 611, concerning the trial court's control over the mode and order of interrogation of witnesses. Professor Leonard argues that proper application of the two rules dictates that appellate courts show more deference to trial courts' mode-and-order rulings than to their character-impeachment rulings.

Finally, Professor Leonard presents findings of a statistical survey of published appellate court decisions considering trial court error in applying rules 608(b) and 611. The survey demonstrates that appellate court review typically is superficial and rarely results in a finding of error. Professor Leonard concludes that appellate courts have misunderstood their role in review of evidentiary rulings, and thus have granted essentially unreviewable power to trial courts in evidentiary matters.

INTRODUCTION

Modern evidence law places great power in the hands of the trial judge. Authorities have perceived a need for greater flexibility in the application of evidentiary rules, and stricter rules have given way to a

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1. The authors of one evidence treatise have written of "the need for flexibility and discretion in the court's conduct of particular cases and particularly in its application of the rules of evidence." J ACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE at
more open-ended, judgment-based system. Whereas rules once strictly regulated everything from who is competent to testify2 to the precise phrasing a prosecutor must use when cross-examining a criminal defendant's character witness,3 modern rules provide much more leeway to trial courts.4 To a great degree, the creation of more open-ended rules is a positive development, for the laudable goal of "individualized justice"5 can best be achieved by designing adjudicatory rules that take account of the subtle differences raised by each trial, even trials over events seemingly as mundane and routine as auto accidents. Though it might well be inaccurate to characterize such flexible rules as "discretionary,"6 there is little doubt that trial judges enjoy enormous freedom in their conduct of the trial and in their rulings on particular forms of evidence.

A grant of "leeway" to an actor, of course, can be tantamount to a grant of extraordinary power if the actor's judgment is either unguided by the structure of the rules themselves or unconstrained by the likelihood of significant review and reversal by a higher body. Unless we are willing to entrust almost unlimited power to a single individual—a possibility our entire federal constitutional structure was intended to check—we should be cautious about allocating essentially unbridled power. In the matter of evidence law we should, at the very least, examine two

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iv (1991); see also Thomas M. Mengler, The Theory of Discretion in the Federal Rules of Evidence, 74 IOWA L. REV. 413, 458 (1989) (stating that drafters' decision to make the Federal Rules of Evidence neither overly specific nor overly general was partly motivated by a recognition "that each trial is unique and calls for discrete resolution").


3. See, for example, Michelson v. United States, 335 U.S. 469, 482 (1948), noting that cross-examination questions testing the knowledge of defendant's character witness must be phrased in the form "have you heard" rather than "did you know." At the time, defendant's character evidence could take the form only of reputation testimony.

4. Today, competency rules are far more liberal. See, e.g., FED. R. EVID. 601 (providing that generally, "every person is competent to be a witness"). Rules regulating the form of question permitted on cross-examination of a criminal defendant's character witness have also been liberalized. Partly because the Federal Rules permit both reputation and opinion testimony, and partly because the common-law rule has been viewed as overly technical, the cross-examiner is not limited to the restrictive "have you heard" question form. See FED. R. EVID. 405 advisory committee's note (pointing out that the distinction between the "have you heard" and "did you know" forms of question has "slight if any practical significance").

5. See KENNETH C. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 19 (1969) ("Rules will not suffice. Rules must be supplemented with discretion. . . . For many circumstances the mechanical application of a rule means injustice; what is needed is individualized justice, that is, justice which to the appropriate extent is tailored to the needs of the individual case.").

6. In a recent article I discussed this question in detail, arguing that, properly understood, "discretion" is not an appropriate term to describe the authority of either trial or appellate courts. See David P. Leonard, Power and Responsibility in Evidence Law, 63 S. CAL. L. REV. 937, 974-88 (1990).
questions. First, we should consider whether the rules of evidence are themselves structured to provide significant guidance to the trial court. In other words, where the rules require the court to exercise judgment, do they establish parameters for the exercise of that judgment? Second, we should ask both whether appellate courts are capable of meaningfully reviewing trial courts' application of judgment-based rules and whether they are doing so regularly.

The goal of this Article is to examine these two questions in the context of two commonly used provisions of the Federal Rules of Evidence. The first rule governs the use of specific instances of a witness's conduct to impugn her character for truthfulness. The second rule concerns the trial court's control over the mode and order of interrogation of witnesses. Both rules require the trial judge to exercise judgment; neither can be applied without considering the factual context of individual cases.

Part I of the Article reviews briefly the meaning of "judicial discretion" in the law of evidence. It argues that binding legal standards do in fact constrain trial courts' application of even judgment-based evidence rules. Part II describes the origins, functions, and form of the two judgment-based evidence rules that make up the core of this study. In par-

7. FED. R. EVID. 608(b). The rule provides, in relevant part:
Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' 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 the witness' character for truthfulness or untruthfulness . . . .

Id.

8. Id. 611. The rule provides in full:
(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

Id.

9. See infra notes 14-42 and accompanying text.
10. See infra notes 43-180 and accompanying text.
ticular, it differentiates between categorical, or per se, aspects of evidence rules and those aspects of the rules that require the trial court to exercise judgment. Part III points out that appellate courts should apply two standards of review to trial court application of evidence rules. One standard, de novo review, is appropriate for reviewing alleged errors in the application of per se aspects of the rules; the other, "abuse of discretion," should be used for review of trial court application of judgment-based rules or parts of rules. Part IV compares the trial and appellate courts' functions in the application and review of judgment-based parts of the evidence rules under study here. It shows that judgment-based standards in each of the rules limit appellate review differently. It demonstrates, in other words, that the term "abuse of discretion" is not a unitary standard. Rather, it permits the appellate court to show different degrees of deference to trial court rulings. Part IV explains the factors that determine the appropriate amount of deference that should be shown, and apply these factors to the two rules under study. The Article concludes that more deference is due to the trial court's mode-and-order decisions than to its rulings on the admissibility of specific acts of a witness to impeach her character for truthfulness.

The final section of the Article describes and analyzes a preliminary statistical survey of published appellate decisions in which a party asserted trial court error in the application of each rule. This survey of all published federal appellate decisions for a ten-year period reveals troubling trends in the way appellate courts review application of these rules. Appellate courts tend to conduct only the most superficial review of trial court "discretionary" rulings, and rarely find error. Perhaps more disturbing, the cases suggest that often appellate courts neither analyze the factors that guide the trial courts' exercise of judgment nor determine whether different degrees of deference are justified on appellate review. Instead, they apply extremely high degrees of deference to all judgment-based rulings. The statistics show, in fact, that it is even more difficult to prevail on an allegation of error in the application of the specific-acts character-impeachment rule than on mode-and-order decisions—a result contrary to the appropriate practice. In the entire ten-year period, only a single reported federal case found error in the application of the "discretionary" part of the impeachment rule. The study suggests that appellate courts have misunderstood and oversimplified their role in the review of evidentiary rulings. As a result, the grant of signifi-

11. See infra notes 181-208 and accompanying text.
12. See infra notes 209-58 and accompanying text.
13. See infra notes 259-326 and accompanying text.
cant "leeway" to trial courts has become a license to exercise essentially unreviewable power.

I. "Judicial Discretion" and the Rules of Evidence: An Overview

In a recent article I discussed in detail the meaning of the term "judicial discretion" and its applicability to the law of evidence. The article concluded that, properly understood, the term "discretion" does not describe correctly the powers of trial courts in the application of evidence rules. It is necessary to review that analysis only briefly here, in order to explain the nature of trial and appellate courts' functions in the application of evidence rules.

The concept of "discretion" as applied to law has several components. First, it embraces the idea of the legal gap—the concept that for some legal questions there is no authority that requires the court to decide the issue one way or another. The presumed existence of gaps in the law makes possible the second component of judicial discretion: the existence of a choice between two or more possible decisions. The third component of judicial discretion is the court's authority to fill the gap by choosing from among possible decisions. Finally, discretion implies insulation. Having made its choice, the court will be subjected to little or no oversight.

Ronald Dworkin, who has argued forcefully that discretion does not exist in developed legal systems, has written that in theory there are three types of discretion. In the first, a "weak" form, discretion signifies situ-
ations in which "for some reason the standards an official must apply cannot be applied mechanically but demand the use of judgment." 20 The second form, also "weak," exists when an "official has final authority to make a decision and cannot be reviewed and reversed by any other official." 21 Finally, Dworkin suggests that there might be a "strong" form of discretion that means more than the use of judgment or the reviewability of its exercise. Strong discretion imbues an official with the power to make a decision without being "bound by standards set by the authority in question." 22

Dworkin has argued that in our legal system judges do not possess "strong" discretion. 23 In his view, our system consists of both "rules" and "principles." The former operate in an all-or-nothing fashion, while the latter possess a "dimension of weight or importance" 24 and incline decisions one way or the other. Though legal principles do not point to the correct decision as clearly as do rules, they do constitute "law" and have a binding effect on the actions of judges. As such, judges are bound by authoritative standards when deciding cases that require the exercise of judgment; thus, they do not possess strong discretion. Dworkin's theory effectively denies the existence of "gaps" in the law. Therefore, one party always has a right to a decision in his favor. It is the judge's duty to discover these rights and to rule accordingly, not to invent new rights retrospectively. 25 Determining the rights of the parties can, of course, be quite difficult in cases on the fringes of existing precedent. Dworkin suggests that in such cases judges attempt to use rules and legal principles to construct a theory of rights that best explains existing precedent, and then attempt to apply that theory to the case at hand. 26

Though Dworkin's views are controversial, 27 I believe he is correct, and that his views can be applied to matters of evidence law as well as to

21. Id.
22. Id. at 33.
24. Dworkin, supra note 20, at 27.
26. Dworkin suggests that judges ask themselves a question, and then proceed from there:

What set of principles best justifies the precedents? — that builds a bridge between the general justification of the practice of precedent, which is fairness, and his own decision about what that general justification requires in some particular hard case.

[The judge] must . . . develop his concept of principles that underlie the common law by assigning to each of the relevant precedents some scheme of principle that justifies the decision of that precedent.

Id.
27. See Leonard, supra note 6, at 943-52.
substantive legal issues.²⁸ I believe that even in the absence of mechanical evidence rules, trial judges are bound by law in making evidentiary decisions; they do not possess “strong” discretion.²⁹ The only form of discretion trial judges truly possess in the application of evidence rules is Dworkin’s weakest form, which requires the court to exercise judgment in the application of rules. Indeed, modern evidence law is replete with rules requiring the application of judgment. From overriding provisions that must be applied in virtually all situations³⁰ to narrow provisions governing specific types of evidence,³¹ the trial judge must make on-the-spot, running rulings on a myriad of evidentiary issues in every trial.³² Absent a fundamental change in the nature of modern evidence rules (which would be a mistake), it is inevitable that trial judges will possess the weak form of discretion that simply requires them to exercise judgment in the application of rules. In doing so, however, they are bound by authoritative legal standards; they have neither unreviewable power nor the power to decide on bases not already set forth in the law’s governing rules and principles.

²⁸. Id.
²⁹. Id. at 986.
³⁰. The Federal Rules of Evidence contain several fundamental rules setting forth particular principles applicable to virtually all evidentiary decisions. Rule 102 provides that the 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 truth may be ascertained and proceedings justly determined.” FED. R. EVID. 102. These words represent the drafters’ fundamental purposes for the rules of evidence, and require that the rules be construed flexibly. See Leonard, supra note 6, at 957-60. Another fundamental rule is rule 402, which provides that all relevant evidence be admitted unless the Constitution, an act of Congress, or other evidentiary rules make it inadmissible. See FED. R. EVID. 402. This rule codifies an inclusionary approach to evidence, reflecting the drafters’ belief that the underlying purposes of the rules will best be served if more evidence is heard. See Leonard, supra note 6, at 960-61.
³². The need to make quick rulings may be one reason for both deference to the trial court in many situations and more careful review in others. On one hand, trial judges face dual pressures. They must rule on evidentiary questions as they arise, and they must do so without consuming so much time that the trial becomes disjointed and even more economically burdensome on the parties and the judicial system than it already is. These pressures suggest that attendant circumstances influence appellate courts’ review of alleged evidentiary errors. On the other hand, some evidentiary decisions more fundamentally influence the parties’ rights than others, and trial courts should be encouraged to take more time with these decisions. One way of encouraging such action is for appellate courts to scrutinize more closely alleged errors in the application of such rules. This set of problems is relevant to the two rules that are the subject of this Article. See infra notes 43-180 and accompanying text.
The argument that trial judges are bound by authoritative standards in the application of judgment-based evidence rules carries significant consequences for both trial and appellate courts. Accepting the argument would mean that, contrary to what some authors have written, 33 trial courts do not have even a limited "right to be wrong." Rather, they bear the responsibility of applying evidence rules carefully and openly, taking account of the structure of the individual rules (including any clearly defined prerequisites to their application), 34 any explicitly stated underlying principles those specific rules were designed to serve, 35 and the overriding goals of the entire system of evidence rules. 36 In addition, it is the judge's responsibility to put her conclusion, as well as her specific application of the various factors, on the record. 37 Unfortunately, trial courts have not always taken these steps, particularly when applying rules that require balancing probative value and prejudicial effect. 38

That so many evidence rules are structured in a judgment-based fashion also creates significant responsibilities for appellate courts. Even given the superior position of trial courts in assessing such things as the credibility of witnesses and the degree to which the jury's attention has remained focused on the key issues in the case, 39 appellate courts still have the ability and the responsibility to exercise meaningful review of some trial court actions. Unfortunately, even when trial courts place their rulings and rationales on the record, appellate courts all too often seem unwilling to review trial court decisions founded on judgment-based evidence rules, stating simply that the trial court had "discretion"

33. See, e.g., Rosenberg, supra note 16, at 637.

34. For example, even though rule 608(b) grants the trial court authority to permit inquiry into specific instances of a witness's conduct to impeach her credibility, the rule explicitly limits such inquiry to cross-examination. See infra notes 67-73 and accompanying text.

35. For example, in responding to a party's objection concerning the way in which a witness is being examined, the court must take account of the underlying goals of rule 611(a): to "make the interrogation and presentation effective for the ascertainment of truth,... avoid needless consumption of time,... and protect witnesses from harassment or undue embarrassment." FED. R. EVID. 611(a).

36. See, e.g., supra note 30 and accompanying text.

37. See Leonard, supra note 6, at 1010-12.

38. See, e.g., FED. R. EVID. 403 (permitting exclusion of otherwise relevant evidence if its prejudicial effect substantially outweighs its probative value); see Victor J. Gold, Limiting Judicial Discretion to Exclude Prejudicial Evidence, 18 U.C. DAVIS L. REV. 59, 61 (1984) [hereinafter Gold, Limiting Judicial Discretion] (arguing that the grant of "discretion" in rule 403 "has been taken by the courts as license for an unprincipled, ad hoc approach to each case"); see also Victor J. Gold, Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence, 58 WASH. L. REV. 497, 499-510 (1983) [hereinafter Gold, Observations] (discussing problems in application resulting from a failure to define "unfairly prejudicial" concept of rule 403).  

39. See Leonard, supra note 6, at 1000-01; Rosenberg, supra note 16, at 663-65.
and that its exercise of such discretion will not be "second guessed" in the absence of clear abuse. As one treatise notes in discussing appellate review of trial courts' rulings based on the probative value-prejudice balancing rule,

some of the most conspicuous abuses of Rule 403 discretion are to be found in appellate opinions. Too often these opinions treat [the rule] as a grant of unfettered discretion to the trial judge... rather than as a rule requiring a careful balancing of factors so as to check discretion.

It should not, therefore, be surprising to find little review of so-called "discretionary" aspects of the rules that are the subject of this study. The rules of evidence, however, contain both judgment-based standards and clearer, per se tests. Appellate courts should not treat these two kinds of provisions equally, nor should it be assumed that appellate courts should review the application of all judgment-based standards with the same degree of deference.

II. TWO JUDGMENT-BASED EVIDENCE RULES

A. Use of Specific Instances of Conduct to Impeach Credibility

For centuries English and American courts have operated on the assumption that the character of a person can be an indicator of the person's truthfulness as a witness. For almost as long, however, there has been tension between admitting evidence of a person's general bad character (on the theory that bad people are likely to lie), and admitting only more direct evidence of a person's character for truthfulness. Wigmore asserted that the use of bad character in general "appears as originally

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40. See infra notes 293-326 and accompanying text.
42. By use of the term "per se," I am referring to rules that permit no flexibility in application. Once it is determined what the words of such rules mean, trial judges do not have authority to exercise their judgment in applying the rules. For a fuller discussion of this concept in negligence cases, see David P. Leonard, The Good Samaritan Rule as a Procedural Control Device: Is It Worth Saving?, 19 U.C. DAVIS L. REV. 807, 810-26 (1986).
43. One treatise notes:

The theory underlying the use of evidence of character or conduct for impeachment purposes is that a person who possesses certain inadequate character traits—as evidenced in a variety of ways including that he has acted in a particular way—is more prone than a person whose character, in these respects, is good, to testify untruthfully. It follows from this hypothesis that evidence of his bad character, or conduct is relevant to prove that he is lying.

3 WEINSTEIN & BERGER, supra note 1, ¶ 608[01], at 608-10 (footnote omitted).
allowable” in England,44 and was used “without question” until the latter part of the 1700s.45 However, he was critical of such broad allowance of character evidence, considering it to “fit[... a more primitive notion of human nature.”46 He noted that toward the end of the 1700s opposition to its use arose, with reform advocates claiming that only evidence of character for truthfulness should be accepted.47 Before long a compromise was reached whereby, at least in theory, the only inquiry concerned the witness’s character for truthfulness.48

In the United States, courts at first admitted character evidence broadly to impeach a witness’s credibility.49 Even today different states take widely divergent positions concerning the admissibility of this type of evidence, and some still permit inquiry into general bad moral character.50 Although such evidence does satisfy the generous definition of relevance currently in use,51 authorities have long recognized that it is often of very limited probative value. Wigmore, for instance, wrote of the “comparative triviality” of the evidence,52 and claimed that “[a]ttacking

45. Id.
46. Id. Wigmore was also concerned with the effect such evidence can have on a witness: [T]he ruthless flaying of personal character in the witness box is not only cowardly—because there is no escape for the victim—and brutal—because it inflicts the pain of public exposure of misdeeds to idle bystanders—but it has often not the slightest justification of necessity. Severe limits must be put to such conduct.

Id. § 983, at 841.
47. Id. § 920, at 723.
48. This occurred in a somewhat curious way, as Wigmore described:
   By the first part of the 1800s, a compromise had been reached; and, while character for truth only was taken as the fundamental requirement, the estimate was allowed to be based on the witness’ knowledge of the other’s general character, so that the inquiry in form became a compromise . . ., i.e., “Knowing his general character, would you believe him on oath?”

Id.
49. Id. at 729.
51. See FED. R. EVID. 401 (defining as “relevant” all evidence “having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence”). I have discussed the liberality of this theory in David P. Leonard, The Use of Character to Prove Conduct: Rationality and Catharsis in Evidence Law, 58 U. COLO. L. REV. 1, 5-8 (1986-87); see also George F. James, Relevancy, Probability and the Law, 29 CAL. L. REV. 689, 704-05 (1941) (discussing the difficulty inherent in the concepts of logical and legal relevancy, and the inappropriateness of establishing precise precedent-based tests for determining relevancy of evidence).
52. 3A WIGMORE, supra note 44, § 921, at 724.
a witness' character is often but a feeble and ineffective contribution to the proof of the issue; and its drawbacks appear in their most emphasized form where the broader method of attack is allowed." 53

A witness’s character can, of course, be proved in many ways. Three of these are through testimony concerning the witness’s community reputation, through another witness’s personal opinion of his character, and through specific instances of his conduct that reflect his character. 54 Contemporary evidence law generally admits all three forms of evidence, establishing comparatively more liberal rules for the use of reputation and opinion evidence 55 than for the use of specific instances of conduct. 56 Specific instances of conduct, it is thought, are sometimes more probative of a person’s character but require more restriction because they carry graver risks of prejudicing the jury and distracting its attention, as well as other disadvantages. 57 However, a debate parallel to that involving the use of character evidence in general has long raged over what particular acts of a person’s misconduct should be admitted to impeach his credibility. Wigmore found that the cases showed two different attitudes toward the kinds of acts that could be admitted to evidence a witness’s veracity. The first allowed “any kind of misconduct . . . indicating bad general character,” including robbery, assault, or adultery. 58 The second, which he favored as “entirely logical,” 59 allowed “only such misconduct as indicates a lack of veracity—fraud, forgery, per-

53. Id. at 728.
54. Id. § 920, at 723 (dividing character evidence into “particular instances of conduct,” “personal knowledge,” and “reputation”). As one treatise notes, there might be other means of proving character than these. WRIGHT & GRAHAM, supra note 41, § 5265, at 588 (use of expert evidence). For example, when one thinks of “opinion” evidence of character, what normally comes to mind is lay opinion. But it is also conceivable that a party might offer expert opinion of character, and it is somewhat unclear whether modern evidence codes such as the Federal Rules of Evidence would permit such evidence; it appears likely that they do, though. Id.; see also 3 WEINSTEIN & BERGER, supra note 1, ¶ 608[04], at 608-27 (asserting that “[e]xpert witnesses . . . may now be called to express their opinion of the witness’ veracity”). But see Bastow v. General Motors Corp., 844 F.2d 506, 510-11 (8th Cir. 1988) (refusing to allow defendant’s expert, a clinical psychologist, to testify as to plaintiff’s character for untruthfulness). There also seem to be other means of proving character that do not fit within the three-part scheme of the Federal Rules of Evidence, including “demeanor, circumstantial evidence of reputation, and public opinion polls of the community.” WRIGHT & GRAHAM, supra note 41, § 5262, at 565 (footnotes omitted).
55. See FED. R. EVID. 608(a).
56. See id. 608(b).
57. The advisory committee note to rule 405 states: “Of the three methods of proving character provided by the rule, evidence of specific instances of conduct is the most convincing. At the same time it possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time.” Id. 405 advisory committee’s note.
58. 3A WIGMORE, supra note 44, § 983, at 840.
59. Id. Although he favored it, Wigmore characterized this as the minority approach. Id.
jury, and the like." Mason Ladd advocated a position between these extremes. He believed in the exclusion of crimes such as murder and assault, but maintained that crimes such as robbery, larceny, and burglary should be admitted to impeach a witness's truthfulness on the theory that while these crimes do not show "a propensity to falsify, [they] do disclose a disregard for the rights of others which might reasonably be expected to express itself in giving false testimony whenever it would be to the advantage of the witness."

Today, most states take a somewhat limited approach to the admission of acts of misconduct, at least requiring that those acts bear on the witness's character for truthfulness rather than general bad moral character. Though there is some question about the precise rule invoked by the drafters of the Federal Rules of Evidence, this is the approach they appear to have intended with regard to character evidence offered to impeach a witness's credibility.

Rule 608 of the Federal Rules of Evidence is representative of this breakdown. The first part of the rule governs the use of reputation and opinion evidence of character. It treats both forms in the same manner, allowing such evidence to impeach a witness's credibility and establishing no per se limitations on its use other than that the evidence "may refer only to [the witness's] character for truthfulness or untruthfulness," and that evidence of truthful character may be admitted only after the witness's truthfulness has been attacked. The rule, however, is not one of automatic admission. It empowers the trial judge to admit opinion and reputation evidence that fits within its requirements, and even though it does not contain the term "discretion" or make any other explicit reference to flexibility in application, it most likely allows exclusion if the evidence would be overly prejudicial.

60. Id.
63. See Fed. R. Evid. 608 (permitting general use of character to impeach); id. 609 (permitting use of prior convictions to impeach).
64. Rule 608(a) provides:
The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
65. This is implicit within the rule's use of the phrase "may be attacked or supported by evidence in the form of opinion or reputation." Id. (emphasis added). This language should
The second part of rule 608, which governs the use of specific instances of a witness’s conduct to impeach her credibility, is of more immediate concern. The rule provides, in relevant part:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ 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 the witness’ character for truthfulness or untruthfulness . . . .

This is a complex rule that represents legislative drafting of two distinctively different types. First, the rule creates a per se exclusion of an entire class of evidence: any “extrinsic” evidence of specific instances of a witness’s conduct. Although the meaning of “extrinsic” in this setting is not completely clear, what is clear is that such evidence is simply not be contrasted with the “shall be admitted” language of rule 609. *Id.* 609 (governing the use of prior convictions to impeach a witness’s credibility). The trial court appears to retain its powers under rules 403 and 611. 3 *Weinstei*n & *Berger,* supra note 1, ¶ 608[01], at 608-13 (referring to rule 608 generally and noting that “the trial court has considerable discretion to vary admission of character evidence depending upon the type of case and the status of the witness”); see United States v. Davis, 639 F.2d 239, 244 (5th Cir. 1981) (allowing evidence to be excluded under rule 403 if it is needlessly cumulative); cf. *McCormick on Evidence,* supra note 50, § 44, at 102-03 (discussing trial court’s power to exclude reputation evidence that is too remote in time or that does not cover reputation in the appropriate community).

66. *See 3A Wigmore,* supra note 44, § 920, at 723 (noting the then-general exclusion of opinion evidence).

67. *FED. R. EVID.* 608(b). The rule goes on to govern evidence “concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.” *Id.* This last part of the rule creates complications that need not be considered here. For a discussion of that part of the rule, see 3 *Louise*l & *Mueller,* supra note 61, § 309, at 257-67.

68. Partly addressing this issue, one treatise notes:

Courts often summarize the no extrinsic evidence rule by stating that “the examiner must take his answer.” This phrase is descriptive of federal practice in the sense that the cross-examiner cannot call other witnesses to prove the misconduct after the witness’ denial; it is misleading insofar as it suggests that the cross-examiner cannot continue pressing for an admission—a procedure specifically authorized by the second sentence of Rule 608(b).

3 *Weinstein & Berger,* supra note 1, ¶ 608[05], at 608-30 to 608-31 (footnotes omitted); see also 3 *Louise*l & *Mueller,* supra note 61, § 306, at 242-46 & Supp. 1991, at 139-50 (discussing the no-extrinsic-evidence rule). In *Carter v. Hewitt,* 617 F.2d 961, 969-70 (3d Cir. 1980), the court held that the extrinsic evidence rule was not violated when, during the cross-examination of a witness, a letter that the witness admittedly had written and which bore on his character for truthfulness, was offered in evidence. The court stated: “When . . . the extrinsic evidence is obtained from and through examination of the very witness whose credibility is under attack, . . . [rule 608(b)’s] core concerns are not implicated.” *Id.* at 970. The
If the trial court admits it, the court will have committed error. The rule also contains another per se aspect: the specific instance of the witness's conduct must be probative of the witness's truthfulness or untruthfulness. Although courts have disagreed about what acts qualify as probative of truthfulness or untruthfulness, once a court decides whether the act satisfies its definition, it will be clear whether this per se hurdle to admissibility has been crossed. Thus, if a trial court admits an act that is not probative of truthfulness or untruthfulness according to its prevailing definition, the court will have committed error.

court found this particularly true where the witness did not deny authorship of the letter; he only claimed the letter had a different meaning from that encouraged by the other party. Whether the language in Carter also would allow admission of self-authenticating documents is not clear. Other courts appear to hold that documents are excludable as extrinsic evidence at least when the witness denies having engaged in the conduct evidenced by those documents. See, e.g., United States v. Peterson, 808 F.2d 969, 973-74 (2d Cir. 1987) (witness's denial of forging a check endorsement rendered the check inadmissible if offered solely to impeach credibility). The advisory committee's note to rule 608(b) does not define the term "extrinsic evidence."

69. One possible exception is the impeachment of a hearsay declarant. Federal Rule of Evidence 806 permits a hearsay declarant to be impeached in the same manner as other witnesses. At least two general situations can arise in this context. First, if the declarant does not testify, she cannot be cross-examined, and the evidence of her conduct offered to impeach her credibility must come during the examination of another witness or perhaps through the use of documentary evidence. Second, if the declarant is available, the party against whom her statement was offered presumably can call her to the stand. But then the impeachment would occur on direct examination rather than cross-examination. It appears that rule 806 permits the use of extrinsic evidence in either situation. See FED. R. EVID. 806 advisory committee's note; United States v. Friedman, 854 F.2d 535, 570 n.8 (2d Cir. 1988).

70. See, for example, United States v. DiMatteo, 716 F.2d 1361, 1364 (11th Cir. 1983), where the trial court allowed extrinsic evidence of a specific instance of a witness's conduct. Although the appellate court reversed the conviction in DeMatteo, id. at 1366-67, it should be emphasized that even clear error in applying the rules does not necessarily lead to reversal. Reversal is only required when the error affected "a substantial right of the party." FED. R. EVID. 103(a).

71. Some courts appear to follow Ladd's position, see supra note 61 and accompanying text, while others adhere more closely to the strict limitations proposed by Wigmore, see supra notes 59-60 and accompanying text. For a discussion of the federal courts' position, see 3 LOUISELL & MUELLER, supra note 61, § 305, at 227-35. The authors found "very few decisions which seem to repose such broad discretion in the trial judge as to imply that there is virtually no limit to the kinds of bad acts upon which inquiry is proper." Id. at 234.

72. See, e.g., United States v. Dickens, 775 F.2d 1056, 1058-59 (9th Cir. 1985) (holding cross-examination concerning witness's association with organized crime not probative of truthfulness or untruthfulness); United States v. Reed, 700 F.2d 638, 644 (11th Cir. 1983) (holding trial court's allowance of cross-examination concerning the witness's possession of a small amount of marijuana not to be probative of truthfulness or untruthfulness).

A similar error can occur if the court uses the rule to exclude evidence made admissible by another rule or principle. For example, in United States v. Calle, 822 F.2d 1016 (11th Cir. 1987), a prosecution witness testified on direct examination that he was a small-time drug user. Id. at 1018-19. The defense wished to establish on cross-examination that he was in fact a major drug trafficker who had supplied the cocaine in the transaction at issue in the trial. Id.
Whenever some threshold requirement of the rule is not satisfied for each of these per se aspects of rule 608(b), the trial court does not have the power to admit the evidence in its "discretion." As a result, the appellate court, in reviewing the trial court's admission of the evidence, should not review under an "abuse of discretion" standard. Instead, it should review the question de novo, by simply asking whether the trial court committed an error of law in admitting evidence in violation of the terms of the rule, and then determine whether that error was prejudicial.\textsuperscript{73}

The second part of the rule is completely different in structure. Unlike the implicit powers granted by the provision governing opinion and reputation, and in sharp contrast to the per se exclusion of extrinsic evidence and acts not probative of truthfulness or untruthfulness, this part of the rule explicitly directs the court to exercise discretion when ruling on the admissibility of specific instances of conduct for purposes of impeachment. As such, the drafters expressed a recognition both of the need for such evidence in many cases and of its potential dangers. As one treatise states:

Rule 608 expresses the Advisory Committee's feeling that since the issue of credibility is often central, depriving the jury of relevant information about witnesses is unwarranted and unduly interferes with the law's basic emphasis on truth-finding. It recognizes, however, that a mechanical test of admission may be incapable of achieving justice in a particular case.\textsuperscript{74}

There is no doubt that in determining the admissibility of specific instances of conduct, the trial court is empowered—indeed obligated—to weigh the value of the evidence against its dangers. The drafters themselves made this clear:

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The trial court apparently misunderstood the defense's theory on cross-examination and excluded the evidence under rule 608(b). \textit{Id.} at 1019. The appellate court reversed, holding that "[a]lthough \textit{Fed. R. Evid.} 608(b) prohibits a party from introducing extrinsic evidence of prior misconduct merely to impeach the general credibility of a witness, 'extrinsic evidence which contradicts the material testimony of a prior witness is admissible.'" \textit{Id.} at 1021 (quoting \textit{United States v. Russell}, 717 F.2d 518, 520 (11th Cir. 1983)); \textit{see also} \textit{United States v. Ray}, 731 F.2d 1361, 1364 (9th Cir. 1984) (holding that trial court excluded evidence under rule 608(b) that it should have admitted on a theory of impeachment by bias); \textit{United States v. Vaglica}, 720 F.2d 388, 393-94 (5th Cir. 1983) (finding error similar to that in \textit{Calle}); \textit{Carson v. Polley}, 689 F.2d 562, 572 (5th Cir. 1982) (finding similar error).

\textsuperscript{73} Sometimes appellate courts do not follow this principle. \textit{See}, e.g., \textit{United States v. McNatt}, 931 F.2d 251, 255 (4th Cir. 1991) (applying an "abuse of discretion" standard to the trial court's refusal to permit inquiry on specific instances of one witness's conduct during the redirect examination of another witness). For a discussion of standards of review, \textit{see infra} notes 181-208 and accompanying text.

\textsuperscript{74} 3 \textsc{Weinstein & Berger}, \textit{supra} note 1, ¶ 608[05], at 608-39 (footnote omitted).
Safeguards are erected in the form of specific requirements that the instances inquired into be probative of truthfulness or its opposite. . . . Also, the overriding protection of Rule 403 requires that probative value not be outweighed by danger of unfair prejudice, confusion of issues or misleading the jury, and that of Rule 611 bars harassment and undue embarrassment.75

Balancing the probative value of the evidence against the dangers and costs incidental to its admission can be a very complex and difficult process. The evidence is considered relevant by virtue of the generalization that one who engages in certain kinds of behavior is less likely to be truthful as a witness. Beyond that, the probative value of the evidence will vary according to a number of factors. First, some forms of behavior are more probative of truthfulness than others. Thus, courts generally consider evidence that a witness has lied previously (particularly as a witness or in other official settings) to be highly probative of truthfulness as a witness, and have admitted it under rule 608(b).76 On the other hand, courts usually find evidence that the witness has committed assault or murder or has failed to pay debts to be only tangentially related to truthfulness, and have excluded it.77 Falling in the middle are certain acts that do not ordinarily impugn character for truthfulness but might do so in the circumstances in which they were accomplished.78 Other factors affecting the probative value of specific instances of conduct are the importance of the testimony of the witness being impeached,79 the nearness or remoteness in time of the conduct,80 and the extent to which the evidence is cumulative of other evidence already received.81

The other side of the equation involves the dangers and costs of such evidence. These can be great, whether they fit within the categories of rule 403 or whether they are classified as matters involving the mode and

75. FED. R. EVID. 608(b) advisory committee's note.
76. See, e.g., United States v. Sullivan, 803 F.2d 87, 90-91 (3d Cir. 1986) (lying on a tax return); United States v. Bagaric, 706 F.2d 42, 65 (2d Cir. 1983) (committing perjury); United States v. Reid, 634 F.2d 469, 473-74 (9th Cir. 1980) (lying to a governmental agency).
77. See, e.g., United States v. Page, 808 F.2d 723, 730 (10th Cir. 1987) (assault); United States v. Lanza, 790 F.2d 1015, 1020 (2d Cir. 1986) (failing to pay debts); United States v. Sampol, 636 F.2d 621, 656 n.21 (D.C. Cir. 1980) (assassination).
79. See, e.g., United States v. Watson, 669 F.2d 1374, 1383 (11th Cir. 1982) (underlying witness's testimony was considered the "lynchpin" of the government's case against the defendant).
80. Compare United States v. Jackson, 882 F.2d 1444, 1447-48 (9th Cir. 1989) (holding evidence of an incident 14 years earlier not too remote) with United States v. Merida, 765 F.2d 1205, 1216-17 (5th Cir. 1985) (considering evidence of an incident 10 years earlier too remote).
81. See, e.g., Jackson, 882 F.2d at 1447 (finding evidence cumulative).
order of interrogation of witnesses and therefore fit within the rubric of rule 611. One treatise separates the most important considerations into several categories: "The major concerns should be to protect the parties from prejudice, the witnesses from harassment and undue embarrassment, the jury from being confused and misled, and all who are concerned (court, jury, parties) from a trial unnecessarily prolonged." 82

Chief among the dangers is the potential that the evidence will lead the jury to decide the case on inappropriate factors. To a great degree, the level of this danger depends on the identity of the witness. If the witness being impeached is the criminal defendant, there is grave danger that the jury will convict him for having engaged in bad prior conduct rather than for having committed the charged crime. 83 Although this danger is not as great when the witness being impeached is a government witness or even a criminal defendant's witness, other dangers lurk in such cases, including unduly consuming time, 84 confusing or misleading the jury, 85 and improperly harassing or embarrassing the witness. 86 These dangers, of course, exist whenever a party seeks to prove acts other than the ones directly at issue in the trial. Another danger can arise from the jury's tendency to accord undue weight to the evidence. 87

Balancing the probative value of the evidence against its potential dangers and costs requires courts to weigh all of the factors arrayed on each side of the scale as well as others that might arise under the circumstances of a given case. Here the judgment and experience of the trial judge, and her sensitivity to the unique circumstances of each case, be-

82. 3 LOUISELL & MUELLER, supra note 61, § 305, at 238.
83. Id. at 239; see, e.g., United States v. Pintar, 630 F.2d 1270, 1285-86 (8th Cir. 1980) (holding that prosecution's undue emphasis on illegal kickbacks, not one of the crimes charged, was prejudicial to defendant). Although the stakes are different, the chances of unfair prejudice can also be great when a party uses the other act to impeach the credibility of a civil plaintiff or defendant.
84. 3 LOUISELL & MUELLER, supra note 61, § 305, at 240-41. This affects the policy of Federal Rule of Evidence 403. It can also affect the ability of the trial to determine truth by distracting the jury's attention from the crucial issues of the case. Such a result would offend the purposes of the rules set forth in rule 102. See supra note 30 and accompanying text.
85. 3 LOUISELL & MUELLER, supra note 61, § 305 at 240-41.
86. Id. at 240. Such an eventuality would violate the policy of rule 611. Wigmore believed this violated notions of common decency. See supra note 46 and accompanying text.
87. Studies show that a person's behavior in a given situation is very difficult to predict based on general personality traits or even somewhat similar past behavior. See Leonard, supra note 51, at 26-31 (summarizing studies). The more similar the other instance of conduct, the more likely it is to speak to the actor's later behavior. However, the more similar the conduct is to the acts at issue in the case, the greater the chance that the evidence will be used prejudicially, particularly if the witness being impeached is the criminal defendant and the impeaching prior act is very similar to the crime for which she is being tried. In such a case, there is extreme risk that the jury will convict based on the person's prior conduct and bad character rather than on her conduct on the occasion in question.
come particularly important. If we truly value both consistency and the individualization of justice, the system must encourage trial judges to perform this difficult balancing process carefully and explicitly, and assure meaningful and effective review of trial courts’ rulings. This complex rule allowing a party to offer specific instances of a witness’s conduct to impeach her credibility is studded with land mines; its improper application can have a grave effect on the outcome of cases, and can injure the trial’s ability to determine the truth, deal out substantial justice, and satisfactorily resolve disputes. Thus, the trial court must exercise great care when applying the rule, and the appellate court, while deferential, should carefully review the trial court’s actions.

The need for careful application of rule 608(b)’s terms and the delicacy of the trial court’s balancing task can be illustrated by reviewing the actions of the trial and appellate courts in United States v. DeGeratto. The defendant was charged in a nine-count federal indictment with transporting and receiving stolen property. The prosecution offered evidence that defendant knowingly purchased several truckloads of stolen food products and sold the goods at stores he managed for their owner, the Loren Corporation. The Loren Corporation’s sole shareholder was Loren Stern. At trial, several participants in the alleged crimes testified for the Government about DeGeratto’s activities. DeGeratto testified on his own behalf, denying all knowledge of the stolen goods. DeGeratto also called the stores’ meat concessionaires, who denied knowing of the alleged transactions and claimed that they could not have sold the stolen meat because they lacked the freezer capacity to store it. A receiving clerk and the general manager of the stores testified that they did not see certain allegedly stolen goods in places where Government testimony had indicated they had been stored.

The court permitted the prosecutor to cross-examine defendant at length concerning his possible involvement with a prostitution business. DeGeratto had testified previously before a grand jury concerning this

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89. 876 F.2d 576 (7th Cir. 1989).
90. Id. at 579-80.
91. Id. at 580.
92. Id.
business after the prosecutor told him that he was not a target of the
grand jury's investigation. According to the transcript of DeGeratto's
grand jury testimony, DeGeratto had been asked by his employer to sign
a check to Doris Fischer, another target of the investigation. DeGeratto
tested that when he inquired about the check, his bookkeeper told him
that the check had been written at Loren Stern's direction. DeGeratto
tested that he then asked Stern about the check and that Stern ex-
plained that Fischer was a business friend who did not have a means of
honoring credit cards. DeGeratto said Stern was helping Fischer by pro-
viding the credit card service through his stores' account for a fee of
fifteen percent of the credit card charges. Ultimately, DeGeratto signed
approximately ninety checks to Fischer or her business, Butterfly Enter-
prises. DeGeratto testified, however, that he did not know Fischer at the
time and did not know then that she ran a prostitution business. He
claimed that he had met her only after the credit card arrangement had
been terminated.93

On cross-examination, the prosecutor questioned DeGeratto exten-
sively about the prostitution matter. Though he admitted signing checks
to Fischer and her business, he repeatedly denied knowing the nature of
her business at the time. He testified that Stern, a lawyer, had told him
that the credit card processing was a legal activity. He explained that
Stern told him to sign the checks, and because Stern owned the Loren
Corporation, DeGeratto did what Stern told him to do.94 The prosecu-
ctor also referred to the prostitution matter during his rebuttal closing
argument, stating that DeGeratto was "a smart sophisticated operator
making 700 grand a year that we know of, prostitution rings going
through his business."95

Despite defendant's objections,96 the trial court admitted the prosti-
tution evidence. The court found only that the evidence involved a "bad
act," that its "probative value outweighs any prejudice," and that it
could therefore "be used to impeach the credibility of the defendant."97

93. Id. at 580-81.
94. Id. at 581.
95. Id.
96. Defendant's attorney objected to the evidence during cross-examination but failed to
object to the prosecutor's comments during closing argument. The court nevertheless consid-
ered both the cross-examination and the prosecutor's closing argument, reviewing the latter
under the "plain error" standard. Id. at 585.
97. Id. at 582. In addition to arguing that the evidence was admissible under rule 608(b),
the prosecution argued that the evidence was admissible under rule 404(b), which allows evi-
dence of "other crimes, wrongs or acts" to show some fact at issue other than through a
character propensity inference. On appeal, the United States Court of Appeals for the Seventh
Circuit found that the evidence was not admissible under rule 404(b). Id. at 585.
In making such a perfunctory ruling, the trial court apparently failed to analyze specifically the probative value of the evidence or the potential prejudice it might cause to DeGeratto, and did not seriously attempt to balance these two factors. At the very least, the court did not make a clear record of its inquiry into those matters, thus impeding appellate review.\textsuperscript{98}

Nevertheless, by conducting its own analysis of the record, a panel of the United States Court of Appeals for the Seventh Circuit found reversible error, stating, "[w]hatever weighing and balancing there may have been in the admission of [the prostitution] evidence we hold it to have been a clear abuse of discretion."\textsuperscript{99} For the most part, the court's analysis demonstrates the kind of careful review the potential dangers of this kind of evidence require. After rejecting two plainly incorrect prosecution arguments for the admissibility of the evidence,\textsuperscript{100} the court turned to the specific application of rule 608(b), comparing the facts to those of other cases. The court emphasized two primary facts: that DeGeratto was never charged with involvement in prostitution (and was in fact told that he was not the subject of the grand jury's investigation),\textsuperscript{101} and that he continued to deny any connection with prostitution.\textsuperscript{102} Then the panel considered the probative value and potential

\textsuperscript{98} Trial courts significantly impede effective appellate review when they do not place their rulings and rationales on the record. \textit{See} Leonard, \textit{supra} note 6, at 1011-12.

\textsuperscript{99} \textit{DeGeratto}, 876 F.2d at 584. This is a very rare finding. It is the only published decision in a 10-year period in which the appellate court found an abuse of discretion of this type in the application of rule 608(b). \textit{See infra} notes 288-326 and accompanying text.

\textsuperscript{100} The court first rejected the prosecution's argument that it was merely asking DeGeratto several questions about his involvement with the two subjects of the grand jury's investigation, writing that the questioning "cannot be so blandly minimized." \textit{DeGeratto}, 876 F.2d at 582. The court also rejected the prosecution's argument that DeGeratto admitted writing monthly checks to Butterfly Enterprises for the net amount of the prostitution ring's credit card receipts and that the store kept 15% as a commission. The court wrote that this mischaracterized DeGeratto's testimony, and that he only admitted writing the checks, steadfastly denying knowledge of the prostitution activities. \textit{Id.}

\textsuperscript{101} The court found that this fact distinguished the case from United States v. Fulk, 816 F.2d 1202, 1206 (7th Cir. 1987), in which defendant denied ever being accused of misrepresentation, and the court properly permitted the prosecutor to impeach defendant with evidence that his chiropractor's license had been suspended because he had engaged in deceptive practices. The court distinguished Fulk's untruthful denial of past misconduct from DeGeratto's situation, in which DeGeratto was never charged with prostitution-related activities and denied having engaged in them. \textit{DeGeratto}, 876 F.2d at 582.

\textsuperscript{102} In this respect, the court distinguished United States v. Taylor, 728 F.2d 864, 872-73 (7th Cir. 1984), in which defendant was charged with possession of an unregistered machine gun. Defendant denied knowledge of the gun and of some cocaine found when he was arrested. On cross-examination, he denied that he was familiar with cocaine. The court permitted the prosecution to confront him with the fact that cocaine had been found at his home on a previous occasion and that on another occasion he had been arrested for cocaine possession in Florida. \textit{Id.} at 882-83. The Seventh Circuit found no similarity in DeGeratto's case, holding
prejudice of the prostitution information. The court implied that alleged involvement in prostitution could turn many citizens against DeGeratto, and distinguished the case from those in which a past matter is raised on direct examination and referred to only briefly during cross-examination. Here, there was no evidence that DeGeratto was involved in prostitution crimes. This was "not a situation where a defendant's link to another criminal prosecution was amplified only slightly. The transcript strongly suggests that an effort was made by the prosecutor to convict DeGeratto of an uncharged prostitution conspiracy." The court then held that "[t]he prosecution's emphasis on prostitution was extremely prejudicial and excessive. It could not but depict DeGeratto before the jury as a bad man in ways unrelated to the stolen property charge upon which he was being tried." The court concluded:

The prostitution questioning was not proper under Rule 608 because what alleged prostitution evidence the government had was not sufficient to permit a good faith belief that DeGeratto knowingly helped the prostitution operation. Even if the subject of prostitution could have been properly approached for impeachment purposes, this cross-examination went much too far with too little; the prosecutor should not have been allowed to continually focus on it. It was an unworthy attempt by the government.

The Seventh Circuit was undoubtedly correct, and its careful analysis of the potential prejudicial effect of the evidence demonstrates that it took seriously (in a way the trial court obviously did not) the dangers of evidence offered under rule 608(b). The court failed, however, to recognize a more fundamental flaw in the Government's attempt. Even assuming there was sufficient evidence to support a finding that DeGeratto

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103. DeGeratto, 876 F.2d at 583. The Government had argued that prejudice was not likely because DeGeratto was charged with a felony and prostitution is a misdemeanor. The court called this argument contrary to common sense, noting that "[t]he prejudice from alleged prostitution involvement, at least with many citizens, does not turn on whether prostitution is a felony or only a misdemeanor, but on the very nature of the conduct." Id.

104. See, e.g., United States v. Fountain, 768 F.2d 790, 795 (7th Cir. 1985), cert. denied, 475 U.S. 1124 (1986). In Fountain the subject of the prior crimes was raised on direct examination, and the prosecutor did not dwell on them during cross-examination.

105. DeGeratto, 876 F.2d at 583-84.

106. Id. at 584.

107. Id.
knowingly engaged in prostitution activities, how is such activity relevant to his “truthfulness or untruthfulness”? This is the key threshold inquiry under rule 608(b), and one that does not call on the trial court to exercise “discretion.” It is therefore strange that this is the one inquiry the appellate court did not make. The trial court’s error would have been considerably more obvious had the appellate court simply inquired whether assisting the credit activities of a prostitution business was an act that bore on DeGeratto’s truthfulness as a witness. The court may well have concluded that, like murder, this crime’s relationship to honesty is sufficiently attenuated that it is simply inadmissible under rule 608(b), and that the “discretionary” language of the rule never came into play. Even if the appellate court had concluded that assisting a prostitution business does tend to make it more likely that DeGeratto would lie on the witness stand, the inquiry should have caused the court to see just how little value the evidence had. In its opinion the court only hinted at the low probative value of the underlying act, and did not directly analyze its relationship to honesty.

The DeGeratto case therefore illustrates several important points. It shows how important the exclusionary side of rule 608(b) can be in the administration of trials, particularly criminal trials. It also illustrates the effect on the parties of the trial court’s failure to analyze the rule’s precise elements, both per se and discretionary. And it demonstrates how careful both trial and appellate courts must be in their review of decisions made under this complex rule. Highly sophisticated analysis was needed to determine the admissibility of the evidence in DeGeratto, where credibility was the most important issue. Unfortunately, trial and appellate courts seldom employ searching analysis to decide these questions.

B. Control Over the Mode and Order of Witness Interrogation

If the circumstances under which a party might seek to impeach a witness with specific instances of conduct vary enough to suggest employing a judgment-based rule, then such a rule is practically mandated to guide the court’s control over the mode and order of interrogation of witnesses and presentation of evidence. As one treatise states:

108. I assume that after Huddleston v. United States, 485 U.S. 681, 688-92 (1988), this would be the threshold admissibility standard. Even though Huddleston dealt with admissibility of “other crimes, wrongs or acts” under rule 404(b), the Supreme Court would likely hold that the standard for determining a person’s involvement in other bad acts is the same under rule 608(b). This is a case of conditional relevance, in which evidence of another crime is irrelevant unless the defendant engaged in the act with the requisite mental state. Such cases fall within rule 104(b), which leaves the primary finding for the jury if the court determines, as a threshold matter, that there is sufficient evidence to support that finding.

109. See supra notes 71-72 and accompanying text.
It seems . . . essential that control over mode and manner be a matter of discretion: The circumstances are too numerous and unpredictable for specific regulation; so much in the mode and manner of questioning witnesses and presenting evidence is invisible in the record that a reviewing court must allow considerable leeway to the trial judge.\textsuperscript{110}

Because each trial is unique, therefore, a rulemaker cannot predict in advance precisely what witnesses a party will wish to call, the order in which they will be called, or the types of questions parties might wish to ask to produce meaningful testimony.\textsuperscript{111} Without a great deal of flexibility in administering the trial, the judge would find it quite difficult to achieve truth-determination, fairness, substantial justice, and a degree of party and public satisfaction with the process and outcome.\textsuperscript{112} The Federal Rules of Evidence seek to secure these goals in rule 611, the purpose of which, in the words of one treatise, “is to encourage flexibility in order to promote the public’s and parties’ interests in the efficient ascertainment of truth without unnecessarily sacrificing the dignity of the individual witness.”\textsuperscript{113} The provision is drafted in sweeping strokes, making it “broad enough to authorize innovations in the presentation of evidence provided the court considers the particular circumstances of the case to ensure that no prejudice ensues to parties or witnesses.”\textsuperscript{114} As another treatise states, “Rule 611 depends heavily for success in its operation upon the sound exercise of discretion by the trial judge.”\textsuperscript{115}

Rule 611 divides mode-and-order issues into three categories, one rather broad and the other two more narrow. The broad category consists of all general questions about the order of calling witnesses and the

\textsuperscript{110} 3 LOUISELL & MUELLER, supra note 61, § 334, at 406.

\textsuperscript{111} Referring generally to the structure of the Federal Rules of Evidence, one treatise notes that the rules “acknowledge that rules cannot be devised that will automatically suit each situation; justice may demand that they be tailored to fit the facts of the particular case.” 3 WEINSTEIN & BERGER, supra note 1, ¶ 611[02], at 611-42.

\textsuperscript{112} Even though the mode-and-order rule is largely judgment-based in structure, the rule does not grant the trial court “discretion” to admit or exclude any evidence it deems relevant if such evidence offends some other rule. So, for example, when one court used rule 611 to admit evidence that otherwise would have been excluded under rule 608, the court committed error. United States v. Reed, 700 F.2d 638, 643-45 (11th Cir. 1983). When a trial court makes this kind of error, “abuse of discretion” is not the appropriate standard for review. The appellate court should simply hold that the trial court erred and reverse if the ruling affected a substantial right of a party.

\textsuperscript{113} 3 WEINSTEIN & BERGER, supra note 1, ¶ 611[01], at 611-15.

\textsuperscript{114} Id. at 611-19.

\textsuperscript{115} 3 LOUISELL & MUELLER, supra note 61, § 333, at 398. The advisory committee was aware of the need for flexibility when it proposed its version of rule 611. It wrote: “Spelling out detailed rules to govern the mode and order of interrogating witnesses and presenting evidence is neither desirable nor feasible.” FED. R. EVID. 611(a) advisory committee’s note.
ways in which they may be examined. The more narrow categories concern the permissible scope of cross-examination and when a party may ask leading questions. In all three categories the rule follows tradition by providing the trial judge with flexibility to tailor the rule to the demands of individual cases. The extent of authority granted to trial judges, however, has varied over time.

1. General Control Over the Mode and Order of Interrogation

Trial judges traditionally have possessed the power to control the course of the trial. For example, they may allow a party to elicit testimony in narrative form, control the order in which evidence will be heard, permit redirect and re-cross-examination, allow a party to recall witnesses or re-open its case, and permit the taking of testimony in “installs.” Ultimately, the trial judge must assure that

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116. See Fed. R. Evid. 611(a).
117. See id. 611(b).
118. See id. 611(c).
119. For example, the use of questions eliciting narrative responses was approved as long ago as 1892. See Northern Pac. R.R. v. Charless, 51 F. 562, 570 (9th Cir. 1892), rev’d on other grounds, 162 U.S. 359 (1896). The United States Court of Appeals for the Second Circuit approved the same concept much more recently. United States v. Young, 745 F.2d 733, 761 (2d Cir. 1984), cert. denied, 470 U.S. 1084 (1985).
120. The application of rule 611 sometimes implicates constitutional considerations, particularly a criminal defendant’s Fifth and Sixth Amendment rights. See 3 WEINSTEIN & BERGER, supra note 1, §§ 611[03]-04, at 611-51 to 611-76. These considerations, however, are beyond the scope of this Article.
121. See, e.g., MCCORMICK ON EVIDENCE, supra note 50, § 24, at 56; 6 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1867 (James H. Chadbourn ed., rev. ed. 1976) [hereinafter 6 WIGMORE]. Wigmore wrote:

It is obvious that, while a usual order for introducing topics of evidence and witnesses is a desirable thing, a variation from that order . . . will not necessarily cause direct harm; it can do so only where it tends to confuse the jury, or where it misleads the opponent or finds him unprepared to meet it. Moreover, the necessity for such a variation and the likelihood that it will confuse or mislead must depend almost entirely upon the particular circumstances of each case.

Accordingly, it is a cardinal doctrine, applicable generally to all of the ensuing rules, that they are not invariable, that they are directory rather than mandatory, and that an alteration of the prescribed customary order is always allowable in the discretion of the trial court.

Id. at 655-56 (footnote omitted).
122. 3 LOUISELL & MUELLER, supra note 61, § 334, at 407-08; WEINSTEIN & BERGER, supra note 1, §§ 611[01], at 611-19 to 611-20.
123. 3 LOUISELL & MUELLER, supra note 61, § 334, at 408-10.
124. Id. at 410.
125. Id.
126. Id. at 412-13.
127. 3 WEINSTEIN & BERGER, supra note 1, §§ 611[01], at 611-21 to 611-22 (citing United States v. DeLuna, 763 F.2d 897, 911-12 (8th Cir. 1985)).
the adversary system works; flexible control over the course of the trial is thought to be a necessary prerequisite to achieving that goal. The parties' tactics and well-established conventions effectively control the course of the trial in most respects, but it is up to the judge to step in when something unusual happens or when a dispute arises and the court is asked to rule.\footnote{130}

Rule 611 follows this general approach, and clearly states certain basic values of the rules that the court should uphold when exercising its power:

The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.\footnote{131}

The modern rule therefore gives the court substantial power to control the offering of evidence, but also indicates the considerations that must guide the court in making its judgment in individual cases. The rule places a good deal of trust in the abilities of trial judges, "acknowledging that final control rests in the judge to make the examination of witnesses compatible with the goals of the rule."\footnote{132} The court does not have unbridled discretion when applying this rule, at least in theory. In practice, the trial court's power is considerably broader. One court has written that while "[t]he advocates carry the primary responsibility for the mode of proof,... Rule 611 entrusts to the trial court the ultimate authority to see that a trial accomplishes its fundamental truth-seeking purpose."\footnote{133} Consider how one treatise describes the reviewability of trial court mode-and-order rulings under rule 611(a): "Once the judge exercises his power, his decision is virtually immune to attack and will be overturned only in the rare case where the appellate court finds a clear abuse of discretion that seriously damaged a party's right to a fair trial."\footnote{134} As might be expected, appellate courts have rarely found such "abuse of discretion."\footnote{135}

\footnote{128}{"The ultimate responsibility for the effective working of the adversary system rests with the judge." \textit{FED. R. EVID.} 611(a) advisory committee's note.}
\footnote{129}{3 \textit{WEINSTEIN & BERGER, supra} note 1, ¶ 611[01], at 611-16 to 611-17.}
\footnote{130}{\textit{Id.}}
\footnote{131}{\textit{FED. R. EVID.} 611(a).}
\footnote{132}{3 \textit{WEINSTEIN & BERGER, supra} note 1, ¶ 611[02], at 611-42.}
\footnote{133}{Oberlin v. Marlin Am. Corp., 596 F.2d 1322, 1329 (7th Cir. 1979).}
\footnote{134}{3 \textit{WEINSTEIN & BERGER, supra} note 1, ¶ 611[01], at 611-17 (footnote omitted).}
\footnote{135}{\textit{See infra} notes 268-87 and accompanying text.}
2. Control Over the Scope of Cross-Examination

In the matter of controlling the scope of cross-examination, federal judges and many state judges today enjoy greater authority than they had at common law. The modern rule, however, has the somewhat anomalous effect of limiting witness examination more than was generally true under the common law. One commentator has reported that in both England and the United States, throughout the first quarter of the nineteenth century, courts permitted parties to cross-examine witnesses both on matters raised during the direct examination and on matters that constituted part of the cross-examiner's case. In essence, they allowed the cross-examiner to inquire into anything deemed relevant, though judges enjoyed some authority to limit cross-examination. Then, in 1840, the United States Supreme Court seized upon a single Pennsylvania decision that had suggested that cross-examination was limited by the subjects inquired into during the direct examination. Writing for the Court, Justice Joseph Story stated:

[A] party has no right to cross-examine any witness except as to facts and circumstances connected with the matters stated in his direct examination. If he wishes to examine him to other matters, he must do so by making the witness his own, and

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136. The rule generally does not exclude evidence that would have been admissible at common law, but can prevent a party from offering that evidence at a certain point in the trial (during the cross-examination of a witness). It is likely that if the information is sufficiently important, the party will recall the witness as part of his case-in-chief and elicit the information on direct examination. The effect of a trial court's rulings under the scope of cross-examination rule is discussed infra notes 209-19 and accompanying text.

137. 6 WIGMORE, supra note 121, § 1885, at 698.

138. 3 WEINSTEIN & BERGER, supra note 1, ¶ 611[02], at 611-35 to 611-36, (citing 6 WIGMORE, supra note 121, § 1890, at 715). McCormick also described the common-law practice, and noted that it still exists today in some jurisdictions:

In England and some of the states, the simplest and freest practice prevails. In these jurisdictions, the cross-examiner is not limited to the topics which the direct examiner has chosen to open, but is free to cross-examine about any subject relevant to any of the issues in the entire case, including facts relating solely to the cross-examiner's own case or affirmative defense.

MCCORMICK ON EVIDENCE, supra note 50, § 21, at 51 (footnote omitted). Presumably, this much more liberal practice also applied to redirect examination and any subsequent interrogation of the witness.

139. MCCORMICK ON EVIDENCE, supra note 50, § 24, at 56; 3 WEINSTEIN & BERGER, supra note 1, ¶ 611[02], at 611-35 to 611-36; 3A WIGMORE, supra note 44, § 944, at 778; id. § 983(2), at 847-48.

140. Ellmaker v. Buckley, 16 Serg. & Rawle 72 (Pa. 1827). Speaking for the Pennsylvania Supreme Court, Chief Justice Gibson wrote: "A witness may not be cross-examined to facts which are wholly foreign to the points in issue (and I would add, to what he has already testified), for the purpose of contradicting him by other evidence." Id. at 77; see 6 WIGMORE, supra note 121, § 1885, at 699.
calling him, as such, in the subsequent progress of the cause.\(^{141}\)

Thus emerged the federal practice, never consistently defined or uniformly administered,\(^ {142}\) of limiting cross-examination to the "scope" of the direct examination.\(^ {143}\) That more restrictive view of the judge's authority to limit the content of cross-examination, though controversial,\(^ {144}\) was codified as Federal Rule of Evidence 611(b). The rule reads: "Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional

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142. McCormick on Evidence, supra note 50, § 21, at 523; 3 Weinstein & Berger, supra note 1, ¶ 611[02], at 611-36.

143. The precise meaning of "scope" is somewhat difficult to discern. One leading authority defines the test as follows:

On matters other than those to attack the credibility of a witness, a cross-examiner may cross-examine a witness only with respect to a relevant matter that is within the scope of the direct examination. A matter is within the scope of the direct examination if it is (a) a matter as to which the witness has testified expressly on direct examination, or (b) a matter that may be reasonably inferred from the witness' express direct-examination testimony.

144. One treatise notes that the more restrictive federal approach is at variance with the aims of the federal rules of evidence expressed in Rule 102, the emphasis in Rule 401 on the reception of all relevant evidence, and the provisions in Article VI which implement the policy of admission by abolishing incompetencies in Rule 601 and by abrogating the rule against impeaching one's own witness in Rule 607. For the consequence of a restrictive rule ... is to suppress relevant evidence.

3 Weinstein & Berger, supra note 1, ¶ 611[02], at 611-40 to 611-41. The rule has been widely criticized. Wigmore pointed out that the federal practice can lead to more litigation concerning the propriety of the court's exercise of judgment, creating delay and confusion. This in turn leads to a greater chance for reversal and retrial on "trifling errors of ruling which do not affect the merits of the case or the truth of the facts." 6 Wigmore, supra note 121, § 1888, at 710; see also McCormick on Evidence, supra note 50, § 27, at 60 (stating that the restrictive practice can lead to "bickering" in the courtroom and the repetition of those controversies on appeal). In its 1937-38 deliberations, the American Bar Association Committee for Improvement of the Law of Evidence wrote that the limited rule

"is probably the most frequent rule (except the Opinion rule) leading in trial practice today to refined and technical quibbles which obstruct the progress of the trial, confuse the jury, and give rise to appeal on technical grounds only. Some of the instances in which Supreme Courts have ordered new trials for the mere transgression of this rule about the order of evidence have been astounding.

We recommend that the rule allowing questions upon any part of the issue known to the witness ... be adopted."

Id. § 27, at 60-61 (quoting ABA Comm. for Improvement of the Law of Evidence 1937-38); see also 6 Wigmore, supra note 121, § 1888, at 711 (discussing the committee's report).
Under rule 611(b), the judge, therefore, enjoys greater power to restrict cross-examination than was the case before the second half of the 1800s. But that power is neither unlimited, nor unguided, at least in theory. The power is limited by the rule's basic codification of the more restrictive "scope" concept that has emerged from over a century of federal litigation. Other explicit concerns and policies of the Federal Rules of Evidence also guide the court's exercise of power. As one treatise states, the rule recognizes that the object of adducing all relevant information on cross-examination may have to be modified in the interests of justice. As in the case of Rule 403, the judge must balance the factors of prejudice, confusion and delay against the probative value of the testimony which would be excluded in deciding whether to curtail cross-examination.

Public policy has also been taken into consideration when deciding whether to restrict cross-examination.\textsuperscript{146}

Trial courts today may therefore enjoy greater power to control cross-examination than they had at common law, but their power has limits. Whether the appellate courts have acted as though such limits exist is another question, one that will be taken up shortly.\textsuperscript{147}

\section{3. Control Over the Use of Leading Questions}

Traditionally, leading questions\textsuperscript{148} have been considered undesirable on direct examination of witnesses and allowable on cross-examina-

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{145} \textit{FED. R. EVID. 611(b)}. The rule originally submitted to Congress by the Supreme Court would have returned the federal practice to the wide-open rule of cross-examination: "A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. In the interests of justice, the judge may limit cross-examination with respect to matters not testified to on direct examination." \textit{FED. R. EVID. 611(b)} report of House Committee on the Judiciary, H.R. REP. 650, 93d Cong., 1st Sess. 12 (1973). Following congressional debate, the rule was changed to its current form, adopting the more restrictive federal practice. \textit{See} 3 \textit{WEINSTEIN \& BERGER, supra} note 1, at 611-4 to 611-7 (initial congressional action). For discussion of the legislative history of rule 611, see 3 \textit{LOUISELL \& MUELLER, supra} note 61, § 333, at 399-403; 3 \textit{WEINSTEIN \& BERGER, supra} note 1, at 611-3 to 611-9.

\item \textsuperscript{146} 3 \textit{WEINSTEIN \& BERGER, supra} note 1, ¶ 611[02], at 611-42 to 611-43 (footnotes omitted).

\item \textsuperscript{147} \textit{See infra} notes 268-72 and accompanying text.

\item \textsuperscript{148} Wigmore defined a leading question as one that "suggests the specific answer desired." 3 \textit{JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW} § 769, at 155 (James H. Chadbourn ed., rev. ed. 1970). Wigmore noted that whether a question is leading is very contextual, and therefore application of the restriction against leading questions must rest with the trial court. \textit{Id.} § 770, at 157; \textit{see also} 3 \textit{LOUISELL \& MUELLER, supra} note 61, § 339, at 461-62 (discussing the factors a court should consider when deciding whether a question is leading).
\end{enumerate}
\end{footnotesize}
Restricting leading questions on direct examination has been justified on a number of bases. First, because a witness is presumed to have a bias in favor of the party who called her, the court should not permit the party to lead the witness. Second, if allowed to lead a witness on direct examination, the party calling the witness, knowing what she has to say, could manipulate the examination to bring out only the favorable parts of the witness's story. Third, it is thought that a witness intending to be fair and honest might assent to leading questions that do not express the witness's real meaning. These rationales do not apply to most cross-examination.

At the same time, the trial court has long had the power to alter these general rules to meet the needs of individual cases. Wigmore believed that the application of the rules restricting the use of leading questions "must rest largely, if not entirely, in the hands of the trial court." As another treatise notes, this is necessary because "only the judge actually presiding at the trial is in a position to fully assess the impact of the question on the witness and the effect of any impropriety on the conduct of the litigation." While the number of situations in which it might be desirable to allow a questioner to lead a witness on direct examination is potentially infinite, trial courts face several common situations. For example, it may be desirable to lead the witness in order to develop the witness's testimony. Immature or frightened witnesses, witnesses with faulty recollection, and witnesses whose physical or mental condition makes it difficult for them to testify in the normal way.

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149. 3 Weinstein & Berger, supra note 1, ¶ 611[05], at 611-76; see also 3 Louisell & Mueller, supra note 61, § 339, at 460-61 (suggesting that by "longstanding convention[]", leading questions are generally not allowed on direct but are permitted on cross-examination).

150. 3 Weinstein & Berger, supra note 1, ¶ 611[05], at 611-77 (citing G. Stephen Denroche, Leading Questions, 6 Crim. L.Q. 21, 22 (1963)); see also Ellis v. City of Chicago, 667 F.2d 606, 612 (7th Cir. 1981) (noting that restrictions are "designed to guard against the risk of improper suggestion inherent in examining friendly witnesses through the use of leading questions"). One treatise lists three similar reasons that leading questions are considered harmful: (1) they may cause the witness to develop false memories of events; (2) they may discourage the witness from trying to relate her actual memories in favor of acquiescing in the questioner's version of events; and (3) they may distract the witness from key details and direct her attention only to those parts of her story favorable to the questioner's client. 3 Louisell & Mueller, supra note 61, § 339, at 459-60.

151. 3 Weinstein & Berger, supra note 1, ¶ 611[05], at 611-76 (stating that it has "long been the case . . . that the matter falls within the area of trial court discretion").

152. 3 Wigmore, supra note 148, § 770, at 157 (emphasis added).

153. 3 Weinstein & Berger, supra note 1, ¶ 611[05], at 611-78. In addition, only the trial judge is in a position to decide whether to permit the party to rephrase a leading question after the judge has sustained an objection. Id.; see also W.H. Enfield, Direct Examination of Witnesses, 15 Ark. L. Rev. 32, 36 (1960) (noting that even though "the damage is already done," most courts will allow the questioner to rephrase and continue).
fashion all may benefit from an examiner's use of leading questions. Courts also permit leading questions in several other situations. They generally allow a party to lead when questioning a witness concerning introductory or undisputed matters or to refresh her recollection. And when a witness is deemed hostile to the party calling him, the rules traditionally treat the direct examination as though it were cross-examination and allow the use of leading questions.

Federal Rule of Evidence 611(c) codifies the traditional view regarding the use of leading questions, using language implying that flexibility. The rule provides, in relevant part: "Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination."

The court must exercise judgment when faced with an objection to leading questions arising from any of these situations. As with the other issues involving the mode and order of witness interrogation, however, the trial court's power in exercising that judgment is not unlimited, at least in theory. Not only must the court take account of the needs of the party seeking to interrogate the witness with leading questions, but it

154. 3 Weinstein & Berger, supra note 1, § 611[05], at 611-79 to 611-80.
155. Id.; see also 3 Louisell & Mueller, supra note 61, § 339, at 466 (commenting that leading questions may be permitted simply to save time); 3 Wigmore, supra note 148, § 775, at 168 (noting that ordinarily there is no risk of improper suggestion because there is no motive for it). In such cases the dangers of leading are minimal, and the use of leading questions is a way to move the trial forward more efficiently.
156. 3 Louisell & Mueller, supra note 61, § 339, at 466-69 (discussing the use of leading questions to refresh recollection as well as the risks of permitting a party to employ the procedure).
157. "Where the witness, though called by the party examining, is in fact biased against his cause and is thus indisposed to favor it by accepting suggestions of desired testimony[,] . . . a question cannot be objectionable as leading." 3 Wigmore, supra note 148, § 774, at 167. Wigmore included among such witnesses those who are hostile, biased, or interested by being sympathetic with the opponent's cause, and those "unwilling for any other reason to tell all they may know." Id. at 167-68. Of course, a court would also permit one calling the adverse party himself to lead the party on direct examination. See also 3 Louisell & Mueller, supra note 61, § 339, at 464-66 (discussing the use of leading questions with hostile witnesses, adverse parties, or those identified with adverse parties).
158. 3 Weinstein & Berger, supra note 1, § 611[05], at 611-76.
159. The Advisory Committee note states that the rule "is phrased in words of suggestion rather than command." Fed. R. Evid. 611 advisory committee's note. One treatise observes that the rule gives the trial court a great deal of discretion: "[T]he first sentence of Rule 611(c) makes it clear that the trial judge has broad discretion to allow leading questions to be put to a witness whenever these may be 'necessary to develop his [sic] testimony.'" 3 Louisell & Mueller, supra note 61, § 339, at 462 (quoting Fed. R. Evid. 611(c) (footnote omitted)).
160. Fed. R. Evid. 611(c). The rule also provides that "[w]hen a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions." Id.
must also balance these needs against the overall purposes and goals of the evidence rules. Rule 102 and the first part of rule 611 make these purposes and goals clear. The court must interpret and apply the rules to aid in the ascertainment of truth, secure fairness, avoid needless consumption of time and expense, protect witnesses from harassment or embarrassment, and seek justice. While these purposes and goals are anything but narrow in the abstract, a court applying them to particular sets of facts has significant guidance to determine the proper ruling.

Although the language of the rules explicitly limits the trial court's exercise of judgment in its application of the leading-question rule, it is common to find statements by both courts and commentators to the effect that the trial court's judgment is essentially unbridled and unreviewable. One treatise states that "reversals on the basis of non-compliance with Rule 611(c) will be exceedingly rare." This appears to track traditional practice. Wigmore asserted that some jurisdictions will not even entertain alleged error based on a trial court's leading-question rulings. Another treatise states that "[o]nly occasionally is the action of a trial judge disapproved for abuse of discretion." Such statements, although perhaps questionable, should not be surprising in light of the "discretionary" language of rule 611 and appellate courts' traditional refusal to review trial court rulings on mode and order of interrogation. Perhaps this is acceptable; there may indeed be more reason to favor a limited appellate role in the review of rulings under rule 611 than with certain other rules, including rule 608(b). But this does not mean that rule 611 deals only with the minor details of a trial or with form rather than substance. On the contrary, its application can at times have a significant effect on the rights of the parties. For example, in Loinaz v. EG&G, Inc., a breach of contract action, the defendant requested that he be allowed to present his key witness, his wife, out of turn because she was going to have elective surgery and would be unavailable

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161. See supra notes 110-35 and accompanying text.
162. See supra note 30 and accompanying text.
163. Indeed, I would argue that the court should be able to determine the result mandated by the law. See supra notes 27-38 and accompanying text.
164. 3 Weinstein & Berger, supra note 1, ¶ 611[05], at 611-76. The authors implied that this follows traditional practice with respect to trial court rulings on the use of leading questions. Id.
165. 3 Wigmore, supra note 148, § 770, at 161.
166. 3 Louisell & Mueller, supra note 61, § 339, at 463 & n.85. The authors cited only one clear case of this kind: United States v. Shoupe, 548 F.2d 636, 641 (6th Cir. 1977). The case preceded the period of the survey conducted for this Article.
167. See infra notes 209-58 and accompanying text.
168. 910 F.2d 1 (1st Cir. 1990).
at a later date. The trial court denied the motion, and defendant substituted a deposition for his wife's testimony. Plaintiffs prevailed, and on appeal defendant claimed that the trial court abused its discretion in forbidding him to call the witness out of turn. A panel of the United States Court of Appeals for the First Circuit agreed with the defendant and held that the trial court's decision severely prejudiced him by depriving him of the live testimony of the only witness who could testify about a critical meeting. In reaching that decision, the court thought it particularly important that the "entire case, both that of the plaintiffs and that of the defendant, rested on credibility." The trial court failed to consider this issue and placed too much weight on the fact that the witness's surgery was elective. Thus, the court "failed to consider a factor that should have been given significant weight in [its] ruling on the Rule 611 motion, and gave improper weight to another factor."1

Because the outcome of the case was so dependent on the jury's determination of the parties' and witnesses' credibility, the defendant was significantly prejudiced by having to present a key witness's testimony solely by deposition. Even if the jury did not improperly infer some obfuscatory motive on defendant's part, the jury would be at a significant disadvantage in judging the credibility of the missing witness, or in comparing her credibility with that of those who did testify in court.

Another illustrative case is United States v. Simtob. There the criminal defendant taped a telephone conversation between himself and the prosecution's key witness, who testified at trial pursuant to a plea agreement. Defendant claimed that the conversation contained statements that were perjurious or inconsistent with the testimony the witness gave at trial. The defendant moved to re-open the case in order to play the tape for the jury, and the trial court denied the motion without even listening to the tape to determine its contents. Although recognizing that the trial court has control over the mode and order of interrogation of witnesses and that the appellate court must employ an abuse-of-

169. Id. at 8.
170. Id. at 10.
171. It is possible the jury would believe defendant did not call his wife to testify because he feared that she would provide a damaging account of the crucial meeting or that even if her testimony on direct examination was favorable, she would not appear credible or would otherwise be impeached on cross-examination. The jurors are unlikely to appreciate fully the adversarial nature of the deposition at which the wife's testimony was taken.
172. 901 F.2d 799 (9th Cir. 1990).
173. Id. at 802.
174. Id. at 803-04.
175. Id. at 804; see Fed. R. Evid. 611(a).
discretion standard in reviewing the trial court’s action, the United States Court of Appeals for the Ninth Circuit held that

where the tape was represented as containing information important to the ascertainment of the truth, the trial court clearly erred in failing at least to make some personal review of its content in camera. The trial judge, in effect, declined to exercise his discretion at all; his determination of the tape’s cumulative nature or, alternatively, of its value to the defense, was therefore made without a proper “consideration of relevant factors.”

The court held that the trial court abused its discretion and that its error was not harmless.

That ruling seems fully appropriate. If in fact the conversation with the Government’s witness cast serious doubt on the credibility of the witness’s key testimony, there is every reason to believe that the jury should have heard that conversation. By failing even to listen to the conversation to determine its potential relevance and probative value, the trial court failed in its most fundamental responsibility in regulating the trial. The court allowed its view of the proper form of the trial to overshadow the trial’s truth-seeking function. The trial court’s action was therefore the purest kind of abuse of “discretion,” and reversal was essential.

These cases illustrate that control over the “mode and order of interrogation of witnesses” is more than formality. It places significant responsibility in the hands of the trial judge, and the exercise of that responsibility can have far-reaching effects. Nevertheless, it is possible that the trial court’s responsibility and function under the mode-and-order rule differ in important respects from its role under the character-impeachment rule, and that therefore the appellate function might properly differ in the two cases. We must now turn to possible differences in the method of review.

176. Simtob, 901 F.2d at 804.
177. Id.
178. Id.
179. Of course, truth determination is the most critical trial function that was adversely affected by the trial court’s refusal even to listen to the tape. But the court’s refusal affected other trial functions as well, including the search for a resolution that proves satisfactory both to the litigants and to society at large, and the ratification of the formal trial as a legitimate, objective forum for the resolution of conflict.
180. See infra notes 209-58 and accompanying text.
III. DETERMINING APPROPRIATE STANDARDS FOR REVIEW OF EVIDENTIARY RULINGS

That not all evidentiary rulings should be reviewed according to the same standard is a fundamental proposition. Yet it is common for appellate courts to make overly broad statements about the trial court's powers in evidentiary rulings. As one appellate court recently wrote: "The admission or exclusion of evidence at trial is a matter committed to the discretion of the trial court. Accordingly, we review evidentiary rulings of the court only for abuse of its discretion." Unfortunately, even the commentators pay scant attention to the different standards appropriate to appellate review of trial court evidentiary rulings. What is needed is more careful analysis of the precise rule involved and error alleged in each instance. Sometimes the rule alleged to have been violated is flexible and requires the exercise of judgment based at least in part on factors the trial court is better able to evaluate than an appellate court. In those instances, a deferential standard (such as "abuse of discretion") is appropriate. At other times, however, a per se evidence rule (or part of a rule) has allegedly been violated. In those cases, there is no "discretion" to be abused. The appropriate standard of review is simple error of law, or de novo review. Though I believe there should be degrees of deference even within the abuse-of-discretion standard of review, it is first important to differentiate between the basic abuse-of-discretion and de novo standards.

The United States Court of Appeals for the Third Circuit has apparently recognized this distinction. In In re Japanese Electronic Products Antitrust Litigation,\(^{182}\) the trial court considered the admissibility of certain records under a part of the public-records exception to the hearsay rule that admits "factual findings resulting from an investigation made pursuant to authority granted by law."\(^{183}\) These records are not admissible if "the sources of information or other circumstances indicate lack of trustworthiness."\(^{184}\) The trial court, in a carefully reasoned opinion, set forth eleven factors it considered relevant to the trustworthiness de-

181. United States v. Moody, 903 F.2d 321, 326 (5th Cir. 1990). Another court wrote that the trial court "has broad discretion in making evidentiary rulings at trial." United States v. Weiss, 930 F.2d 185, 197 (2d Cir. 1991) (citing Alford v. United States, 282 U.S. 687, 694 (1931)). Although that statement was correct in the context of the issue the court was then examining (the trial court's control over the scope and extent of cross-examination), the statement evidences an overly expansive view of general trial court power in the admission and exclusion of evidence.


183. Id. at 264 (quoting FED. R. EVID. 803(8)(C)).

184. FED. R. EVID. 803(8)(C).
termination, and applied those factors to admit certain records and exclude others. On appeal, the court indicated that the scope of its review depended on the basis for the trial court's trustworthiness determinations. If the court founded those determinations on "findings of historical fact about the manner in which a report containing findings was compiled," it would review the determination using a deferential "clearly erroneous standard." However, if a determination of untrustworthiness was based on factors not properly considered, "such a determination[] would be an error of law." As the court stated, "There is no discretion to rely on improper factors."

The Third Circuit's decision represents a reasonable place from which to begin determining the proper standard of review of trial court evidentiary rulings. Unfortunately, it does not go quite far enough. It is not sufficient simply to ask whether the trial court considered the proper factors in making its decision. The appropriate standard of review also depends on the types of factors that are applicable. Some kinds of factors are best judged by the trial court, while appellate courts can better determine others. Thus, a deeper analysis is needed.

The Ninth Circuit, dealing in a different but arguably analogous context, has offered such an analysis. In United States v. McConney the defendant appealed his conviction for receiving firearms shipped in interstate commerce. The primary issue on appeal concerned the constitutionality of federal agents' entry into the defendant's home with a search warrant. The agents announced their identity but did not wait for defendant either to grant or refuse permission for them to enter. According to existing constitutional standards, that entry would be justi-

187. Id. That standard is contained in Federal Rule of Civil Procedure 52. Such a standard is equivalent to an abuse of discretion test. As the Supreme Court has stated:
When an appellate court reviews a district court's factual findings, the abuse of discretion and clearly erroneous standards are indistinguishable. A court of appeals would be justified in concluding that a district court had abused its discretion in making a factual finding only if the finding were clearly erroneous.
189. Id.
190. 728 F.2d 1195 (9th Cir. 1984) (en banc).
191. Id. at 1197-98.
192. Id. at 1199.
193. Id. at 1198.
fied only if there were exigent circumstances, which the court defined as "those circumstances that would cause a reasonable person to believe that entry . . . was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts." 194 The trial court found that exigent circumstances existed. 195 The question on appeal was, in part, what standard of review of the trial court's finding was appropriate. 196

Two standards for review of this question found substantial support in the existing case law: the highly deferential "clearly erroneous" standard typically applicable to questions of fact, and the nondeferential de novo standard usually applied to questions of law. 197 The court considered the factors driving the decision whether exigent circumstances existed, and noted that they involved both questions of fact and questions of law. 198 Therefore, the court could not simply retreat to the idea that questions of fact should be reviewed deferentially and questions of law de novo. Rather, it needed deeper analysis to resolve the problem. The court believed that the solution to the question of the proper degree of deference lay in an inquiry into the "policy concerns that properly underlie standard of review jurisprudence generally." 199 It identified two policy objectives that supported a "clearly erroneous" standard for review of questions of fact. First, the standard "minimizes the risk of judicial error by assigning primary responsibility for resolving factual disputes to the court in the 'superior position' to evaluate and weigh the evidence—the trial court." 200 Second, the "clearly erroneous" standard "relieve[s the appellate court] of the burden of a full-scale independent review and evaluation of the evidence. Consequently, valuable appellate resources are conserved for those issues that appellate courts in turn are best situated to decide." 201

The court then discussed the policy considerations supporting the de novo standard of review for questions of law. 202 The court noted the "structural" advantages appellate courts have in deciding questions of law: "First, appellate judges are freer to concentrate on legal questions

194. Id. at 1199.
195. Id.
196. Id.
197. Id. at 1200-01.
198. Id. at 1199.
199. Id. at 1201.
200. Id.
201. Id.
202. Id.
because they are not encumbered, as are trial judges, by the vital, but
time-consuming, process of hearing evidence. Second, the judgment of at
least three members of an appellate panel is brought to bear on every
case." The court also noted that because appellate rulings of law be-
come controlling precedent and affect the rights of future litigants,
"[f]rom the standpoint of sound judicial administration, . . . it makes
sense to concentrate appellate resources on ensuring the correctness of
determinations of law."  

Having identified the policy concerns that underlie each standard of
review, the court set forth the following test:

If the concerns of judicial administration—efficiency, accuracy,
and precedential weight—make it more appropriate for a dis-
trict judge to determine whether the established facts fall within
the relevant legal definition, we should subject his determina-
tion to deferential, clearly erroneous review. If, on the other
hand, the concerns of judicial administration favor the appel-
late court, we should subject the district judge's finding to de
novo review.

The court found that the de novo standard was more appropriate to re-
view of the trial court's finding of exigent circumstances.

203. Id.
204. Id.
205. Id. at 1202.
206. Id. at 1204-05. The United States Supreme Court also has engaged in scope-of-review
jurisprudence recently. In Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447 (1990), the Court
considered what standard should be applied to a trial court's decision to impose sanctions
under rule 11 of the Federal Rules of Civil Procedure. Id. at 2452. The Court recognized that
both factual and legal determinations must be made by a trial judge ruling on a motion for rule
11 sanctions:

The court must consider factual questions regarding the nature of the attorney's
prefiling inquiry and the factual basis of the pleading or other paper. Legal issues are
raised in considering whether a pleading is "warranted by existing law or a good faith
argument" for changing the law and whether the attorney's conduct violated Rule
11. Finally, the district court must exercise its discretion to tailor an "appropriate
sanction."

Id. at 2457 (quoting FED. R. CIV. P. 11). At the time of Cooter & Gell, various circuits
employed different standards of review for these questions; the Supreme Court simplified the
matter by holding that all questions are to be reviewed using the deferential abuse-of-discretion
standard. Id. at 2460-61. In reaching that conclusion, the Court relied on the difficulty of
distinguishing legal from factual considerations in the context of rule 11, the trial court's better
position for making such decisions, and the fact that deferential review would give trial courts
the flexibility they need to resolve the question based on the unique facts of each case. Id. at
2458-60.

Certain questions (such as the correctness of the district court's determination of the rele-
vant law for purposes of deciding whether the pleading was "warranted by existing law or a
good faith argument" for changing it) arguably should be reviewed under the less deferential
standard. Nevertheless, the Court was correct to base its decision on the underlying policy and
This general analytical approach should be applied to the determination of the appropriate standard of review of trial court evidentiary rulings. When a party alleges violation of an evidence rule, the appellate court should first determine whether the trial court considered the appropriate factors in reaching its decision. If it did not, the trial court committed error of law. If the appellate court decides that the trial court did employ the appropriate factors, the appellate court must then look closely at the nature of the particular factors involved and consider whether the trial court is in a superior position to make any factual determinations necessary to the ruling, whether full-scale appellate review would consume too much appellate time, whether the appellate court’s multijudge structure makes it better suited to reaching an evaluation of the matter, and whether there is need for the development of a body of law on the question.

Based on this test, most evidence rules establishing per se tests for the admission of an item of evidence should be reviewed under the nondeferential, de novo standard. In applying those rules, factual questions rarely take precedence. In addition, little appellate energy would be needed to resolve the question, the deliberative processes of an appellate court make it particularly suited to deciding the question, and there is a real need for clarity in the law to govern trial court conduct in future cases. For example, as already stated, a party may not use “extrinsic evidence” of a witness’s conduct to impeach her credibility. Whether the procedure used by a party in a given case violates this rule is a question that involves no significant fact-finding. In addition, determination of the question would consume minimal appellate resources, is particularly well-suited to the considered deliberation of an appellate court, and cries out for clear, authoritative treatment.

When an evidence rule requires the trial court to exercise “discretion,” the test generally suggests that more deference to the trial court’s finding is appropriate. For example, whether a party should be permitted to ask leading questions of a hostile witness because the procedure is needed to develop the witness’s testimony is a question highly dependent on the facts of the individual case, some of which (such as the way the witness has spoken his answers) will appear only vaguely in a trial record. Moreover, making such a factual determination would expend substantial appellate resources, and fact-finding is unlikely to be within the expertise of an appellate body or particularly suited to clear, authori-
tative standards. As a result, the abuse-of-discretion standard is appropriate.

In general, therefore, policy considerations justify de novo review of evidentiary decisions based on per se rules and support an abuse-of-discretion standard on review of the trial court's application of judgment-based evidentiary rules. But even this analysis does not go far enough. It is a mistake to assume that even if the abuse-of-discretion standard applies, that test should have the same meaning in all cases in which an appellate court reviews trial court application of judgment-based rules. On the contrary, considerations similar to those that differentiate de novo review cases from abuse-of-discretion cases lead to the conclusion that different levels of deference are needed for different kinds of judgment-based evidentiary rules, even within the rubric of "abuse of discretion."

IV. COMPARING THE TRIAL AND APPELLATE COURTS' FUNCTIONS UNDER RULES 608(b) AND 611

Unwise application of both the character-impeachment and mode-and-order rules can significantly affect the progress and outcome of individual cases. Even so, application of the two rules is different in ways that might justify somewhat divergent appellate review when the trial court is alleged to have erred. It is important to recognize that such differences exist; too often, when appellate courts speak of trial court "discretion" in the application of evidence rules, they assume that the trial court's powers are the same in all cases, and that appellate review is limited in the same way regardless of the rule that the trial court applied. Both assumptions are wrong. Different judgment-based evidence rules call on the trial court to exercise dissimilar types of judgment in different contexts using variously constructed standards. The decisions that emerge from the application of these rules are more easily reviewed at certain times than at others. To lump together all cases of "trial court discretion" is to oversimplify the nature of the problem and to avoid assuming responsibility for both the creation of meaningful standards and the performance of considered appellate review.

It is possible to construct a framework for analyzing the differences among judgment-based evidence rules using the character-impeachment and mode-and-order rules as points of departure. The framework differentiates the trial court's powers in applying the different rules. It justifies different levels of appellate review for rulings on judgment-based evi-

209. See supra notes 89-109 (character impeachment), 168-80 (mode and order), and accompanying texts.
Evidence rules, even if the rubric "abuse of discretion" supplies the basic standard for review of all such decisions. In pursuing this analysis, three means for differentiating judgment-based rules will be used. The first concerns the possible consequences of the judge's rulings; it requires an analysis of the meaning of "admit" and "exclude" under the two rules, a look at the kind of evidence the rules regulate, and the likely effect of that evidence on the outcome of the case. The second differentiation concerns the divergent tasks and abilities of the trial and appellate courts in effectuating the purposes of the evidence rules and meeting the goals of the trial. The third differentiation concerns the degree of need for clear authoritative standards and the practical possibility of creating such standards.

A. The Possible Consequences of the Judge's Ruling

1. The Meaning of "Admit" and "Exclude" Under Rules 608(b) and 611.

Not all evidence rules have the same effect. Some lead directly to the admission or exclusion of a discrete item of evidence. Others affect the way a party may elicit evidence or when a party may present that evidence. Rule 608(b), governing character impeachment by specific acts, and rule 611, under which the trial court controls the mode and order of interrogation, are different for this reason. Both require the exercise of judgment and both technically empower the judge to admit or exclude evidence, but rule 608(b) is largely a "yes or no" rule governing a particular item of evidence, while rule 611 usually does not exclude particular evidence but only controls the way the interrogating party can elicit that evidence. Although this somewhat oversimplifies the subtle nature of decisionmaking based on the two rules, it is nevertheless generally true.

Suppose that in a prosecution of X for first-degree murder, X chooses to take the stand and testifies that she was a thousand miles away in another state at the time the killing took place. On cross-examination the prosecution wishes to elicit X's admission that a year earlier she had lied to a police officer. Before the jury hears this evidence, X's lawyer objects on the ground that the probative value of the evidence in demonstrating X's credibility is greatly outweighed by the danger of unfair prejudice. In this hypothetical, there is no effective opportunity for

210. Recall that rule 403 in part governs the trial court's exercise of discretion to admit or exclude evidence under rule 608(b). See supra notes 75-88 and accompanying text. Specifically, X's attorney will argue that the jury will convict X not for her actions on this occasion, but because she is a bad person who lies to law enforcement officials.
compromise by "sanitizing" the information;\textsuperscript{211} the information contains little detail. The judge can thus decide either to admit it or exclude it. The effect of this decision is clear: the jury will either be made privy to this prior instance of X's conduct or will never learn of it. Assuming that there is no other purpose for which the prosecutor might offer evidence of the incident,\textsuperscript{212} it is simply not a matter the jury will have occasion to consider.

Contrast this with the trial court's application of the mode-and-order rule. Suppose that in the same murder trial, the prosecution calls W, a friend of the defendant X. On direct examination, W testifies that he had two face-to-face conversations with X on the day the killing took place and in the same city in which it occurred. One conversation took place an hour before the killing, and the other a couple of hours later. X's attorney then begins the cross-examination of W by seeking to cast doubt on W's story. The attorney wishes, however, to raise another matter during cross-examination. Before trial X told the attorney that she had known W for many years, and that even though W would be testifying against her, X was sure W would agree that X was a peaceful person. X's attorney agrees to ask W's opinion of X's character for peacefulness.\textsuperscript{213} When the attorney begins the preliminary questions leading to W's opinion of X's character for peacefulness, however, the prosecutor objects that this evidence is beyond the scope of the direct examination. X's attorney responds that the trial court has discretion to allow this evidence under rule 611(b).\textsuperscript{214}

Whether to allow or disallow the questions is, in a sense, a binary choice, but the effect of that choice will be much different from the effect of using character evidence to impeach a witness's credibility. If the trial court allows X's attorney to proceed, the questioning will continue at that point and the witness's opinion of X's peaceful character will, at

\textsuperscript{211} Cf. People v. Barrick, 33 Cal. 3d 115, 126-28, 654 P.2d 1243, 1249-51, 187 Cal. Rptr. 716, 722-24 (1982) (expressing doubt as to the effectiveness of efforts to "sanitize" a reference to a prior conviction offered to impeach the criminal defendant).

\textsuperscript{212} This would certainly not be permissible substantive character evidence under Federal Rule of Evidence 404(a). And assuming there is no connection between the event that gave rise to the police officer's questions and the present case, there seems to be no basis for offering it under rule 404(b). See FED. R. EVID. 404.

\textsuperscript{213} This evidence would be permissible substantive character evidence under rule 404(a)(1). See id. 404(a)(1).

\textsuperscript{214} Rule 611(b) provides that "[t]he court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination." Id. 611(b). A response that the evidence is within the scope of the direct examination would be difficult to justify. See supra note 143. Unless W's direct examination testimony impermissibly implied that X had a bad character for peacefulness (this is forbidden by rule 404(a)), X's character for peacefulness would not be within the scope of the direct examination.
least theoretically, be offered. If, however, the trial court sustains the prosecutor's objection, the jury will not necessarily be deprived of the information. This is because the rule governing the scope of cross-examination concerns only when and how evidence will be elicited, not whether the evidence can be offered at all. Following the trial court's ruling preventing \( X \)'s attorney from cross-examining \( W \) on this matter, \( X \) still has the option of calling \( W \) to testify during \( X \)'s case-in-chief to offer an opinion of \( X \)'s character for peacefulness. Thus, the trial court's ruling that the evidence would exceed the scope of the direct examination need not be fatal to the jury's learning the information itself; \( X \) can still present the evidence to the jury during \( X \)'s case-in-chief.\(^{215}\)

This analysis of rules 608(b) and 611 does oversimplify matters to some extent. For one thing, not all decisions under rule 608(b) are completely binary. In the hypothetical involving the cross-examination of defendant \( X \), suppose the prosecutor not only wished to ask whether \( X \) had lied to a police officer a year earlier, but also wanted to elicit detail about that encounter by seeking \( X \)'s admission that the police officer had questioned her about another criminal matter the officer was investigating, and that when the officer asked where she had been on a specific date, \( X \) had lied to protect herself from possible prosecution. The hypothetical cross-examination is now much more detailed, and raises the potential for significantly increased prejudice to \( X \) as a result of several factors: in the previous encounter the police officer questioned \( X \) about criminal activity;\(^{216}\) the officer's question concerned the same type of subject as that at issue in the present case (\( X \)'s whereabouts on a specific date),\(^{217}\) and \( X \) lied to protect herself from possible prosecution.\(^{218}\)

\(^{215}\) See, e.g., Williams v. Giant Eagle Mkts., Inc., 883 F.2d 1184 (3d Cir. 1989). In Williams the appellant claimed that the trial court erred when it refused to allow her to exceed the scope of the direct examination during the cross-examination of a witness called by the other party. The Third Circuit approved of the trial court's strict limitation on the subject matter of the cross-examination, and stated that "the district court's action did not preclude her from calling [the witness] to testify in her case-in-chief." Id. at 1190.

\(^{216}\) If the jury believed \( X \) was involved in previous criminal activity and therefore had a "criminal" character, it might convict \( X \) based on her bad character rather than for her conduct on the occasion at issue. The Federal Rule of Evidence 404(a) prohibits this chain of reasoning. In the hypothetical, \( X \) has not offered any positive character evidence to demonstrate her innocence, and even if she had, the prosecution arguably could use its negative character evidence only to neutralize \( X \)'s good character evidence, not affirmatively to establish her guilt. See Leonard, supra note 51, at 19-21.

\(^{217}\) The credibility of \( X \) and of other witnesses probably will be the deciding factor in this case. The fact that \( X \) has lied previously about her whereabouts might seem highly probative to jurors grasping for whatever hard evidence they can find on whether \( X \)'s alibi is truthful. Yet psychologists have demonstrated that even specific-acts character evidence often has very limited value. See Leonard, supra note 51, at 26-29 (discussing the psychological literature). Therefore, the jurors' need for some evidence, together with the compellingly similar prior
The judge's decision in this instance is therefore not precisely all-or-nothing. Unlike the original hypothetical, in which it would be difficult or impossible to effectively "sanitize" the questions regarding the past conduct, the court could attempt to fashion limits on the prosecution's use of the evidence, perhaps by omitting details such as the reason for X's having lied to the officer, or even the subject matter of the lie. Both the court's power under rule 608(b) and its general power to control the mode of interrogation\(^{219}\) give it the authority to fashion such limits. Nevertheless, at its core, the essential binary decision remains: either the jury will be presented with some evidence of X's past untruthful conduct to demonstrate her lack of credibility in the instant case, or it will not. Once the trial court has determined that the core specific-acts evidence can come in, its exercise of power to sanitize the evidence will not change the fact that the jury will hear of X's past untruthful conduct.

In an analogous way, the mode-and-order hypothetical also oversimplifies the nature of the trial court's task. Although it is unlikely that questions about the scope of cross-examination will lead to all-or-nothing decisions about what jurors may eventually hear, other aspects of the trial court's powers in controlling the mode and order of interrogation might, in some cases, have that effect. Suppose, for example, that following the prosecution's case in chief, X calls witness Z to support her alibi. During her direct examination, Z appears cooperative to those unfamiliar with the case, but X's attorney is aware from previous interviews with Z that she is holding back certain crucial details. If the attorney's subtle efforts to elicit this detail using nonleading questions prove unproductive, the attorney will likely seek permission to lead the witness. If the prosecutor objects on grounds that this is direct examination, X's attorney would reply that the court should exercise its discretion to allow leading questions either because Z is a hostile witness or because she has identified herself with the Government, the adverse party.\(^{220}\) If the trial court grants X's motion, X's attorney will be permitted to seek the information using leading questions.

If, however, the court denies the motion, X's attorney may still seek

\(^{218}\) The jurors might convict X less for what she did on this occasion than for having avoided prosecution in an earlier matter. Somewhat more mildly, the jurors might pay less attention to the facts of the present case than they otherwise would because they would be predisposed against a person who has been involved with prior criminal behavior.

\(^{219}\) The court could limit the detail that the prosecutor could elicit or mention by using its general powers to control the mode and order of witness interrogation under rule 611(a).

\(^{220}\) Rule 611(c) permits leading questions "[w]hen a party calls a hostile witness, an adverse party, or a witness identified with an adverse party." Fed. R. Evid. 611(c).
to elicit the information using nonleading questions. If these continue to prove unproductive, further requests to lead are likely to follow, and if the information is truly crucial, the court is likely to allow X’s attorney to use leading questions. Still, there is some chance that the trial court’s rulings will prevent crucial information from reaching the jury. If X is entirely unable to elicit key information using nonleading questions, and the court continues to refuse X’s attorney permission to lead, the judge’s exclusionary rulings will have the same basic effect as her decision to exclude specific-acts character evidence to impeach a witness’s credibility. Of course, the more crucial the information and the more futile the nonleading questions, the easier it will be for the appellate court to find error in the trial court’s exercise of judgment. Such instances, however, are relatively rare. The survey conducted for this Article revealed no cases in which the trial court committed reversible error by refusing to permit a party to lead a witness. The more a party demonstrates the importance of the information and the futility of nonleading questions, the more likely it is that the trial court will understand the necessity of allowing leading questions. Thus, very few exclusionary decisions under rule 611 will actually have the drastic effect that exclusionary decisions under rule 608(b) can have.\footnote{Even compromise is possible. A trial court wary of leading questions on direct examination might allow X’s attorney to use a few leading questions to elicit some of the most crucial details, but require the attorney to continue to use nonleading questions on other matters.}

To summarize, the meanings of “admit” and “exclude” are different in the character-impeachment rule than in the mode-and-order setting. Generally, if a trial court rules against a party seeking to offer specific instances of conduct to impeach the character of a witness, that ruling deprives the jury of relevant, though potentially prejudicial, evidence. Conversely, a ruling in favor of the offering party assures that the jury will hear such relevant information, but also creates a significant risk of prejudice. It is not possible to establish the same structure for most mode-and-order decisions. Rulings generally change only the means of eliciting the evidence and the time during the trial when the jury will hear it. Thus, mode-and-order rulings seldom deprive the jury of relevant evidence or offer a party significant protection from any prejudice the evidence might create.

Taken alone, this factor does not resolve the question of how much deference an appellate court should show to trial court decisions under the two rules, but it does suggest that a difference is called for. If a trial court’s ruling will truly affect the nature of the evidence available to the jury deliberating a verdict, there is more reason for an appellate court to exercise close scrutiny than a situation where the trial court’s ruling does
not fundamentally change the nature of the proof offered at trial, taken as a whole. But there are more reasons to favor different levels of deference. The specific-acts character rule regulates more dangerous information than does the mode-and-order rule.

2. The General Nature of Evidence Admitted or Excluded Under the Two Rules

The character-impeachment rule regulates evidence that almost always carries the potential for explosive effect. The issue in each instance is whether the jury should hear a type of damaging evidence about a person that has enormous intuitive importance, even if its actual effect on the witness's credibility is not particularly great. Whenever the parties present conflicting accounts concerning key factual questions, the credibility of the individual witnesses will become a crucial issue in the trial. It is logical to assume that in such instances, jurors will seek ways to differentiate among the stories. One way to distinguish among the conflicting stories is to consider the witnesses themselves and their characters for truthfulness. If the parties present no such evidence, the jurors will have little useful information on this issue, but if the parties do offer character evidence concerning the truthfulness of a witness, such evidence is likely to affect the jurors.

Because jurors sometimes overvalue character evidence, unfair prejudice can result from its admission. This is particularly true where the character evidence concerns the credibility of a testifying party, and perhaps most especially when that party is a criminal defendant. To return to the hypothetical murder prosecution of X, evidence of X's prior bad acts that indicate her character for truthfulness raises a significantly greater likelihood of unfair prejudice to X than if the character evidence concerned only one of X's witnesses. Prejudice can arise from the jury's overvaluation of the evidence, its conviction of X for the prior con-

222. See supra note 87 and accompanying text.

223. Obviously, jurors also will look at factors other than a witness's character for truthfulness, including the witness's opportunity and ability to observe the events, potential bias, and the general plausibility of the witness's story.

224. The failure to offer specific evidence does not, of course, prevent jurors from drawing character conclusions from observing the witnesses' appearance and demeanor while in the courtroom or testifying.

225. If the prosecution offers bad-act character evidence concerning one of X's witnesses, the jury will most likely discount the testimony of that witness. In some cases jurors undoubtedly use evidence of the witness's bad character for truthfulness as indirect evidence of X's untruthfulness or guilt. But this possibility is somewhat more attenuated than a case in which the prosecution directly offers evidence of the defendant's bad character for truthfulness by showing that the defendant has engaged in untruthful behavior on other occasions.
duct rather than the alleged conduct in issue, or its conviction of X simply for being the kind of person who should be removed from society.

Admission and exclusion of this kind of character evidence therefore demands skillful and delicate balancing. The worse the prior untruthful conduct, the more probative it may appear to be on the issue of the witness's likely truthfulness. At the same time, however, the more morally objectionable the prior conduct, the more likely prejudice will result from its use. The potentially explosive nature of virtually all character evidence is precisely what has led to the creation of rules tightly restricting its use and has prompted proposals to tighten the reins even further.

No doubt the mode-and-order rule can regulate evidence with potentially dangerous effects, but it will do so far less frequently than the character-impeachment rule. The mode-and-order rule gives the trial court authority over all testimony in a case, including the most crucial testimony. Yet application of the rule generally does not prevent the jury from hearing evidence; it only regulates how a party may elicit that evidence and when the party may do so. Thus, it is not a rule designed to exclude or even limit potentially explosive evidence; if a party is able to elicit that evidence through means approved by the trial court, the jury will hear it.

Rule 608(b) is therefore fundamentally different from rule 611 in terms of how and what it regulates. Rule 608(b) is specifically aimed at a particularly dangerous form of evidence, and provides both per se and judgment-based standards for determining the admissibility of that evi-

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226. The Federal Rules of Evidence restrict character evidence offered for virtually any purpose. Rule 404(a) generally forbids character evidence offered as circumstantial evidence of out-of-court conduct, allowing only limited exceptions. Even when those exceptions apply, rule 405 strictly limits the forms such evidence may take. See Leonard, supra note 51, at 21-25. Rule 608, as already discussed, places certain per se restrictions on the use of character evidence to demonstrate a witness's credibility, and then places trust in the trial court's judgment with regard to evidence that satisfies the per se rules. See supra notes 67-81 and accompanying text. It is only when character is "an essential element of a charge, claim, or defense" that the rules allow very broad proof. Fed. R. Evid. 405(b).

227. The American Bar Association has adopted a proposal that would reverse Huddleston v. United States, 485 U.S. 681 (1988), in which the Supreme Court interpreted the "other crimes, wrongs or acts" provision of rule 404(b) to allow the jury to hear a great deal of evidence. Huddleston, 485 U.S. at 688-89. The A.B.A. House of Delegates adopted a Criminal Justice Section proposal that referred to the "particularly great" potential for unfair prejudice when the prosecution offers extrinsic acts of the accused. ABA Criminal Justice Section, Report to the House of Delegates 2 (Feb. 1989) (on file with author). The proposal would follow the approach that a number of circuits previously had taken, which made it more difficult to offer extrinsic-acts evidence. A.B.A. House of Delegates Report No. 109B, Summary of Action Taken by the House of Delegates of the American Bar Association 38 (Midyear Meeting 1989) (on file with author).

228. See supra notes 213-15 and accompanying text.
dence. Rule 611, on the other hand, is one of those general provisions of the Federal Rules of Evidence that is not geared to the content of a particularly defined kind of evidence;\textsuperscript{229} it grants the trial judge power only to control the means by which a party can offer any evidence. Taken together with the fact that rule 608(b) rulings generally either allow the jury to hear certain evidence or prevent it from doing so, this may have significant implications for the meaning of trial court “discretion” under the two rules and the ability of the appellate court to conduct meaningful review of decisions made under the rules.

3. The Likely Effect of Evidence Regulated by the Two Rules on the Outcomes of Cases

A court’s rulings under rule 608(b) are also likely to have a greater effect on the outcome of trials than do the court’s mode-and-order rulings under rule 611. In trials where credibility has become a key issue, there is no doubt that specific-acts character-impeachment evidence can be pivotal. In the hypothetical murder prosecution, for example, the crucial fact is whether $X$’s alibi is truthful. If the prosecution and $X$ present directly conflicting stories, one placing $X$ at the crucial time in the city where the killing took place and the other placing $X$ a thousand miles away, the jury can resolve the case only by deciding which party’s story is more plausible.\textsuperscript{230} Though other factors will aid the jury in its decision, character-impeachment evidence stands a reasonable chance of being pivotal. This kind of situation is not at all unusual; in many criminal trials the credibility of witnesses is a primary issue, and the admission or exclusion of character-impeachment evidence therefore is particularly important.

The same cannot be said as often of evidence regulated under rule 611. While the interrogation of certain key witnesses will probably raise issues under the rule, rule 611 does not usually lead to the exclusion of crucial testimony.\textsuperscript{231} In fact, the more crucial the information sought, the more likely it is that the trial court will exercise its authority under rule 611 to allow the party to elicit that information. Because ascertaining truth is a fundamental goal of the evidence rules\textsuperscript{232} and is specifically

\textsuperscript{229} A number of other provisions of the Federal Rules of Evidence are not aimed at specifically defined evidence. Among them are rule 102 (“Purpose and Construction” of the rules); rule 104 (“Preliminary Questions”); and rule 403 (“Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time”).


\textsuperscript{231} \textit{See supra} notes 213-15 and accompanying text.

\textsuperscript{232} \textit{See Fed. R. Evid.} 102.
mentioned as a guiding factor in rule 611 itself, the trial court usually allows counsel reasonable room to develop key witnesses’ testimony. Thus, rule 611 seldom excludes truly pivotal evidence. When its flexible provisions are employed to allow a party to elicit testimony through somewhat unusual means (such as by permitting a cross-examiner to exceed the scope of the direct examination), this is usually done to assure that the trier of fact hears information crucial to determining the truth.

Although this reasoning also applies to rule 608, it is applicable to a far lesser degree. If indeed the actual probative value of character-impeachment evidence (as demonstrated by psychological data) is a good deal lower than its intuitive probativeness, and the potential for unfair prejudice from its admission is high, decisions to exclude the evidence will rarely have a significant effect on the jury’s ability to achieve an accurate verdict. Moreover, the court’s decision to admit character-impeachment evidence under the rule will aid truth determination only marginally, while raising potential for prejudice seldom present when the trial court exercises its powers under rule 611.

The comparative standing of the two rules is thus rather complex. Rule 608 governs evidence that is often central to the resolution of a crucial issue, but weak and dangerous if the jury hears it. Rule 611, on the other hand, does not as often regulate pivotal evidence, but when it does, its limitations become less important because the trial court virtually always errs on the side of allowing counsel leeway in eliciting truly important testimony. Unlike the evidence that rule 608 regulates, the testimony subject to rule 611 objection rarely carries grave prejudicial risk. This suggests that there is less need for close appellate scrutiny of a trial court’s application of the mode-and-order rule than of the character-impeachment rule.

**B. Comparing the Expertise and Abilities of Trial and Appellate Courts in Applying the Two Rules**

Every legal dispute is an exploration of a set of discrete and unique external events, each of which one or more participants and nonparticipants have witnessed. But just as every event giving rise to the trial is unique, so too is each trial a unique event with its own participants and witnesses. One treatise puts the matter bluntly: “Those unfamiliar with the operations of a busy metropolitan federal district court cannot fully appreciate the subtle interplay of a wide variety of factors that make a trial of any length take on a personality as strongly differentiated from

233. *Id.* 611(a).
other trials as one human being is from another.” \(^{234}\)

When a trial is over, it is an historical event much like the external event that gave rise to it in the first place. Perhaps the only difference between the underlying event and the completed trial is that by rule and practice reasonably accurate, contemporaneous records of the trial are kept, making it possible to reconstruct less problematically what occurred in that proceeding.

But the fact that experts prepare trial transcripts, although significant, should not be overvalued. Both trial and appellate judges seem to believe that trial judges, as first-hand witnesses to the trial, are in a somewhat superior position, compared with appellate judges reading a cold record, to understand how the evidence rules should be applied to achieve the ends of justice. \(^{235}\) Just as only a first-hand witness to a bar-room brawl can appreciate fully the reasons that led one person to strike another and others to become involved in the melee, only a first-hand “witness” to a trial can appreciate fully the “subtle interplay of factors” that should incline an evidentiary decision one way or the other.

In a very real sense, the trial judge does have abilities superior to those of the appellate court reviewing the transcript later. \(^{236}\) Whether the trial judge is in a superior position to evaluate the subtleties of the trial, however, depends on the evidentiary decisions at issue. Unfortunately, the idea that the trial court is in a superior position with regard to evidentiary matters has become a shield preventing review of even those decisions that appellate courts are quite capable of evaluating. The accuracy of this general rule depends on several considerations. Among them are: (1) The number of factors a trial court must consider in making the decision; (2) the degree to which those factors can be articulated clearly; (3) whether the factors depend on the facts and context of the case in

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234. 1 Weinstein & Berger, supra note 1, at iv.

235. This belief too often has led to overly superficial appellate review. See infra notes 293-324 and accompanying text.

236. Lawyers intuitively understand the degree to which live testimony compels the listener far more than the presentation of a transcript compells the reader. An interesting example of this arose in Meyers v. United States, 171 F.2d 800 (D.C. Cir. 1948), cert. denied, 336 U.S. 912 (1949). In Meyers, the defendant was charged with subornation of perjury. Id. at 802. The perjury allegedly occurred when Bleriot Lamarre, a witness, testified before a Senate committee. Id. At trial the prosecution offered both the transcript of Lamarre’s testimony and the live testimony of William Rogers, who had questioned Lamarre before the Senate committee. Id. at 812. Certainly the most reliable evidence of the words Lamarre spoke when he testified before the Senate committee was the expertly prepared transcript. But the transcript could not tell all; in particular, it could not reveal how Lamarre spoke the words. If it could have done so, the only legitimate reason for offering Rogers’s testimony would have been that the jurors were more likely to remain awake and attentive to his testimony than to a reading of the crucial portions of the transcript.
which the evidentiary issue arises; and (4) the degree to which the factors depend on more than just the content of a particular witness’s testimony. The practical ability of appellate courts to review decisions made under rules 608(b) and 611 can be differentiated based on these considerations.

“Mode-and-order” decisions tend to be highly dependent on the unique circumstances of the trial in which the issue arises. No two trials will involve the same set of witnesses, and no two witnesses are alike in their ability or willingness to recall and relate facts. Indeed, perhaps the most context-sensitive issue imaginable is whether it is necessary to allow an interrogator to lead a witness in order to develop his testimony. Of course, some things can be understood and evaluated without directly observing the witness. For example, an appellate judge could probably discern a witness’s motive to hide facts just as well as a trial judge could.237 But most considerations that would bear on the propriety and wisdom of allowing the interrogator to lead the witness depend far more on factors such as the way the witness speaks and the expression on the witness’s face. Little or none of this information would appear in a transcript, yet the information is crucial to determining whether it is necessary to lead the witness in order to develop his testimony. The trial judge is in a better position than the appellate court to make a fully informed decision when the party seeks permission to lead the witness. The trial court’s superior ability to evaluate many of the crucial factors does not mean that it has “unbridled discretion” in the application of the leading-question rule. Rather, this may be a situation in which the appellate court would find it extremely difficult or even impossible in practice to determine whether the trial court erred.238

Similar arguments can be made concerning whether a party should be allowed to call a witness out of turn or to cross-examine a witness on matters not within the scope of the direct examination. With regard to both, rule 611 again calls on the trial court’s judgment. Whether the goal of determining truth or the ends of justice would require a party to call a witness out of turn depends on a number of factors that cannot be con-

237. In the hypothetical murder prosecution, for example, if X’s alibi was that she was in another state taking part in an illegal activity, and she calls as a witness another participant in the activity, an appellate court is probably just as able as a trial court to determine that the witness might be reluctant to be truthful about his own whereabouts because of fear of prosecution.

238. As one author has written:

In the dialogue between the appellate judges and the trial judge, the former often seem to be saying: “You were there. We do not think we would have done what you did, but we were not present and may be unaware of significant matters, for the record does not adequately convey to us all that went on at the trial.”

Rosenberg, supra note 16, at 663.
veyed fully in a trial transcript. One of these is the degree to which the jury’s attention to crucial matters seems to be diminishing. Though an appellate court can make a theoretical judgment about the coherence of a party’s case based upon a particular ordering of witnesses, the decision whether to allow a party to call a witness out of turn also depends on an observation of the jurors’ demeanor in order to determine whether they appear to have lost interest in certain issues or to have become confused about those matters. Whether a party should be permitted to exceed the scope of a direct examination also depends on highly contextual and personal factors. In particular, the decision depends at least in part on whether questions involving matters not directly stated or implied during his direct examination would unduly harass a particular witness.

An appellate court could make such a determination only in theory; the trial court, by observing the demeanor of the witness, can better determine the fairness of allowing the procedure. All of these mode-and-order situations are closely analogous to the trial court’s participation in the delicate fact-finding process, a process toward which appellate courts are extremely deferential. Because of trial courts’ superior position in evaluating the factors necessary in making mode-and-order decisions, appellate courts most often should defer to their judgment.

Rule 608(b) operates very differently. Although the decision whether to allow a party to impeach a witness with prior instances of the witness’s conduct undeniably depends on the interplay of a variety of subtle factors, and while those factors operate somewhat differently in each trial, much of the crucial information needed to decide the evidentiary issue is just as available to the appellate court as to the trial court. Once the per se requirements of the rule have been satisfied, the determination whether to allow this form of impeachment depends on whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice or other perils mentioned in rule 403 and the effect that admission or exclusion would have on the various goals mentioned in rule 611. Although rule 611 concerns, such as the prevention of witness harassment, will play a role, the key element in determining admissibility in most cases is likely to be the balance of probative value against the danger of unfair prejudice, which forms the core of rule 403. Many appellate courts have acted as though trial court deci-

239. See supra notes 181-208 and accompanying text.

240. The prior act must be probative of truthfulness or untruthfulness, and it must be offered during cross-examination without the use of extrinsic evidence. See supra notes 67-72 and accompanying text.

241. See supra notes 74-88 and accompanying text.
sions under rule 403 are essentially unreviewable, but this is not true. Although decisions of this kind are tied to the facts of individual cases, appellate courts can measure issues on both sides of the scale as well, or nearly as well, as trial courts.

The first issue a court must consider under rule 403 is the probative value of the evidence. In making this decision the judge does not consider the credibility of the evidence, only its value if the jury believes it. Thus, determining probative value does not involve consideration of such subtle factors as the way a witness speaks or the expression on her face. The court must consider only the value of the evidence on the particular issue it is offered to prove, if the evidence is believed. In making a ruling under rule 608(b), the issue is the probative value of character-impeachment evidence. A trial court is not in a better position than an appellate court when evaluating the probative value of the evidence precisely because it does not judge the credibility of the witness's testimony in making that determination. An appellate court is equally skilled.

Determining the potential for unfair prejudice raises somewhat more difficult problems, but that matter too can be subjected to the kinds of standards an appellate court can review effectively. "Unfair preju-

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242. The authors of one treatise have noted:

Too often these [appellate] opinions treat Rule 403 as a grant of unfettered discretion to the trial judge . . . rather than as a rule requiring a careful balancing of factors so as to check discretion. Worse yet is the use of discretion as a magic solvent for evidentiary issues on appeal.

22 WRIGHT & GRAHAM, supra note 41, § 5223, at 316 (footnotes omitted).

243. One author has written that "the assessment of probative value and its comparison to unfair prejudice requires consideration of intangible, subjective factors peculiar to each case." Gold, Limiting Judicial Discretion, supra note 38, at 77.

244. One court has stated that "[w]eighing probative value against unfair prejudice . . . means probative value with respect to a material fact if the evidence is believed, not the degree the court finds it believable." Ballou v. Henri Studios, Inc., 656 F.2d 1147, 1154 (5th Cir. 1981) (emphasis added) (citing Bowden v. McKenna, 600 F.2d 282, 284-85 (1st Cir.), cert. denied, 444 U.S. 899 (1979)). Another author has written that "evidence has probative value if it enhances the accuracy of jury factfinding. Accurate factfinding is enhanced when evidence logically increases the certainty of a fact in issue and the extent to which its certainty is logically established." Gold, Limiting Judicial Discretion, supra note 38, at 73. The author described the process of determining probative value in the following way:

[P]robative value under Rule 403 can and should be accurately measured by considering both the degree to which the evidence increases the certainty of the existence of a fact in issue, given the other evidence in the case, [and] the probability the jury will correctly perceive the degree of certainty and the fact affected.

Id. at 79.

245. Although some situations might implicate the other dangers mentioned in rule 403, the strongest reason for excluding evidence under the rule is its potential for unfair prejudice. This discussion assumes that unfair prejudice is the danger the court is considering.
dice,” according to the Advisory Committee, “means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.”246 One author has argued that the role of emotion in creating unfair prejudice has been overemphasized, and has offered the following definition of unfair prejudice:

[E]vidence is unfairly prejudicial when it detracts from the accuracy of factfinding by inducing the jury to commit an inferential error. Inferential errors occur when the jury perceives evidence to be logically probative of a fact when it is not, perceives the evidence to be more probative of fact than it logically is, or bases its decision on improper bias.247

Thus, according to the author, “[u]nfair prejudice is measurable by reference to two factors: the extent to which an inferential error will detract from the goal of accurate factfinding, and the likelihood the jury will commit such an error.”248 It should be no more difficult for an appellate court to determine the extent to which an inferential error will impede truth determination than it is for a trial court to do so. The decision is not dependent on factors the trial court is alone capable of determining. Instead, it depends on a consideration of the nature and potential strength of evidence already in the record and on an analysis of the improper direction in which the questioned evidence might lead. An appellate court can determine both of these factors. The second question, the likelihood that the jury will commit the error, also can be analyzed by an appellate court. The court must predict the jury’s likely reaction to the evidence. While this might depend to a limited extent on observing the jurors during trial, it depends much more on psychological factors that an appellate court can understand and apply equally well.249

Once the court has identified the probative value of an item of evidence and its potential for creating unfair prejudice, the court must decide whether to admit or exclude the evidence. This is a complex task indeed, but the decision is neither open-ended nor unreviewable. The primary goal of the ruling must be to promote accurate factfinding, and if admitting the evidence would substantially impede this goal by creating inferential error on the jury’s part, the court should exclude the evidence.250 A trial court that has examined carefully the probative value of

246. Fed. R. Evid. 403 advisory committee’s note.
247. Gold, Limiting Judicial Discretion, supra note 38, at 73 (footnotes omitted); see also Gold, Observations, supra note 38, at 503-10 (suggesting that “evidence is unfair to the extent it has a tendency to cause the trier of fact to commit inferential error”).
248. Gold, Limiting Judicial Discretion, supra note 38, at 84.
249. See Gold, Observations, supra note 38, at 510-24 (reviewing the psychological literature on human inferential processes).
the evidence and the prejudice it might engender should be able to determine whether the probative value is substantially outweighed by the danger of unfair prejudice, and an appellate court should be able to determine whether the trial court's decision made sense. This does not mean that the appellate court should show no deference to the trial court's decision. On the contrary, because some aspects of the decision depend on factors the trial court is indeed more capable of evaluating, the appellate court should not find error unless it is quite convinced that the trial court was wrong; the abuse-of-discretion standard is still applicable. Even so, the appellate court should be able to determine with a reasonable degree of certainty whether the trial court did in fact "abuse" its "discretion" in all but the closest of cases.

That an appellate court is capable of exercising independent judgment in balancing the rule 403 factors does not, in itself, prove that it should exercise such close scrutiny of the trial court's judgment-based decision. Such an argument needs more support, and the additional support arises from the kinds of considerations that favor the use of a de novo standard of review in other contexts. Recall that structural reasons support de novo review of questions of law. Because appellate courts are not saddled with the burdensome task of taking evidence, they are freer to concentrate on legal questions. We expect appellate courts to make better decisions on questions of law because several minds, rather than one, work on the task. Because appellate courts can effectively balance the underlying probative value against the prejudicial effect, which is necessary for a rule 608(b) decision, and because they have both more time and more minds to contribute to the decision, appellate courts are well suited to reach the correct balance. In short, these considerations of judicial administration favor the appellate court, or at least suggest that the appellate court can scrutinize trial court rule 608(b) decisions effectively. Because rule 611 decisions, on the other hand, are far more dependent on facts and circumstances not adequately conveyed

251. Recall that the rule only allows exclusion when the probative value of the evidence is substantially outweighed by the danger of unfair prejudice or other factors. Thus, the rule does not upset the general bias of the Federal Rules of Evidence toward admissibility. Leonard, supra note 6, at 965.

252. I should emphasize that I am not advocating the use of a de novo standard for the review of rule 608(b) decisions. Rather, I am using some of the factors that support such a standard to demonstrate that appellate courts can defer less to trial courts in matters involving this rule than those involving rule 611, while still respecting the "discretion" of the trial courts.

253. See supra text accompanying notes 203-04.

254. This assumes, of course, that appellate decisionmaking is truly a group effort. If, in practice, only one judge on a particular appellate panel scrutinizes each case, and the other judges engage in far more superficial review, this rationale for closer appellate scrutiny loses its force.
by the written trial record, the balance tips in the direction of the trial
court, and decisions should not be scrutinized as closely at the appellate
level.

C. The Degree of Need for Authoritative Standards and the Possibility
   of Creating Them

The last section discussed how close appellate scrutiny of trial court
rulings on questions of law is warranted by the appellate court's superior
ability to decide such questions, and how this affects the question of re-
view of rule 608(b) and rule 611 decisions. But there is another reason
that appellate courts should decide questions of law: doing so creates the
kind of authoritative standards trial courts need as they handle future
cases raising the same issues. This consideration also argues for closer
appellate scrutiny of rule 608(b) decisions. Because appellate courts are
reasonably capable of making independent admissibility decisions under
that rule, and because similar rule 608(b) issues arise repeatedly in the
trial courts, the justice system as a whole would benefit from the creation
of authoritative standards. Standards appellate courts create have far
wider effect than those established by trial courts, and thus the goal of
predictability is better served.

In the case of rule 608(b), this benefit is acutely valuable. Because of
the serious dangers raised by the admission of evidence under that rule,
there is a great need for authoritative standards. These standards could
assist trial courts by creating meaningful ways of both determining pro-
bative value and prejudicial effect and weighing these competing factors
against each other. Such standards would, in turn, help lawyers prepare
cases for trial by clearly delineating what evidence a court will admit and
what evidence it will exclude. The entire judicial process benefits when
appellate courts create meaningful, predictable standards from the vagar-
ies of judgment-based evidentiary rules. Because this is possible with rule
608(b), it should be done.

Conversely, because appellate courts are not as capable as trial
courts of determining the subtle balance of factors necessary to a decision
under rule 611, and because it is far more difficult to create clearly de-

255. The *McConney* court discussed how this factor favored de novo review of questions of
law. *See supra* text accompanying note 203.
with great precision, it is unlikely that appellate courts can fashion very meaningful authoritative standards that would clarify significantly the broad language of the rule. In short, there is little value to close appellate scrutiny of these decisions, and the trial courts need little help in understanding the factors they must ultimately apply.

D. Summary

These considerations suggest that even though the drafters explicitly provided for trial court “discretion” in the application of rules 611 and 608(b), that term has different meanings in the two rules. In particular, the factors the trial court must consider in applying each rule are subtly different. There is no clear test for applying the mode-and-order rule; the court must consider fluid factors that cannot be defined with precision. The only real guidelines the trial court has are the broad policy goals of the law of evidence; these require the court to make a quick judgment of how well the trial would serve the goals of the law were one course taken over another. This method represents the highest form of contextual decisionmaking. Review of such decisions can be only marginally meaningful, and one would expect that even the most conscientious appellate panels would hesitate before finding error in the application of the mode-and-order rule.

This observation does not mean that appellate courts should never find error in trial court mode-and-order decisions; had the drafters intended this result, they presumably could have made those decisions unreviewable as a matter of law. Rather, it means that appellate courts should be highly deferential to those aspects of the trial court’s decision that are most dependent on factors the trial court is in a better position to judge. When a trial court’s decision seems to have turned on such factors, the appellate court should show greater deference. When the decision turned on factors the appellate court is equally or almost equally qualified to judge, less deference is necessary.

Rulings pursuant to rule 608(b), on the other hand, are subject to a more clearly definable test. Some components of that test256 are explicitly spelled out in the rule, and indeed do not call on the trial court’s exercise of judgment. The components that involve the exercise of “discretion”257 may be somewhat more difficult to apply, but they can be

256. Here I am speaking of the per se aspects of the rule, such as the “no extrinsic evidence” and “probative of truthfulness or untruthfulness” components. See supra notes 67-72 and accompanying text.

257. Here I refer chiefly to the determination of probative value and prejudicial effect (as well as other dangers), and their balancing under the circumstances of the case. See supra notes 74-88 and accompanying text.
fairly clearly defined. Courts have shied away from the admittedly complex task of rendering these components clearer and more predictable. Yet this task can be accomplished and should be undertaken. This does not mean that careful application of rule 608(b) does not require the trial judge to consider some of the same broad policy matters that guide decisions under rule 611; the court should factor those matters into all evidentiary decisions. The difference is that while broad policy considerations provide the only true guidance in the application of rule 611, they are only one aspect of the decisionmaking process under rule 608(b). With meaningful standards defined by appellate courts—the courts best suited to that task—trial courts will be able to conduct trials more consistently and predictably.

This difference in the nature of the tests of rules 611 and 608(b) is fundamental. It means that although the judgment-based aspects of both rules are technically reviewable under the abuse-of-discretion standard, appellate courts should apply different levels of deference in reviewing them. Simply put, even the most careful appellate panels should find error less frequently in the application of rule 611 than in the application of rule 608(b).

No meaningful appellate review will be possible under either rule, however, unless trial courts operate in a fashion that allows them to be held accountable for their decisions. In particular, trial courts must place in the written record not only their ultimate evidentiary rulings, but also the reasons for those rulings. Trial courts must articulate the tests they applied and the specific factors they deemed crucial to their decisions. Only then can appellate courts know when particular decisions depended chiefly on factors the trial court was in a better position to judge. Only then can appellate courts best understand just how much deference is appropriate. Unfortunately, there are far too many instances in which trial courts fail to take these rather modest steps, and in those cases appellate courts are left guessing about the basis for the trial court's action.

The next section will discuss a preliminary case survey conducted to determine whether appellate courts have in fact scrutinized trial court decisions under the two rules differently according to the kinds of considerations discussed above.

258. For a general discussion of the importance of accountability for rulings on judgment-based evidence rules, see Leonard, supra note 6, at 1010-12.
V. A Study of Reported Appellate Decisions Reviewing Trial Court Rulings Under Rules 611 and 608(b)

A. Introduction

I have described how appellate courts should treat trial court decisions under rules 608(b) and 611. It is useful to review the cases from the United States Courts of Appeals to determine whether actual practice meets the standards I have set forth. This task is tricky, largely because only a portion of federal appellate cases are published. In the Ninth Circuit, for example, each disposition is classified as an “opinion,” a “memorandum,” or an “order.”259 All opinions are published, but no memoranda are published and orders are published only by order of the court.260 To be classified as an opinion a disposition generally must have some special importance according to specific criteria.261

The less a case raises issues of importance, or handles them in a fashion that will be helpful to litigants and trial courts in the future, the less likely it is that the case will be published.262 A large number of cases

259. 9TH CIR. R. 36-1.
260. Id.
261. Ninth Circuit Rule 36-2 provides that the disposition can be designated as an opinion if it
   (a) Establishes, alters, modifies or clarifies a rule of law, or
   (b) Calls attention to a rule of law which appears to have been generally overlooked, or
   (c) Criticizes existing law, or
   (d) Involves a legal or factual issue of unique interest or substantial public importance, or
   (e) Is a disposition of a case in which there is a published opinion by a lower court or administrative agency . . . , or
   . . .
   (g) Is accompanied by a separate concurring or dissenting expression, and the author of such separate expression requests publication . . .
9TH CIR. R. 36-2. The Ninth Circuit rules, as well as those adopted by other circuits, were created in large part as a result of a movement to reduce the number of published dispositions. See Morris L. Cohen et al., How to Find the Law 42-43 (9th ed. 1989); William L. Reynolds & William M. Richman, An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform, 48 U. CHI. L. REV. 573, 577-79 (1981). The Seventh Circuit maintains similar rules, permitting publication when the decision, among other things, “(i) establishes a new, or changes an existing rule of law; (ii) involves an issue of continuing public interest; (iii) criticizes or questions existing law; [or] (iv) constitutes a significant and non-duplicative contribution to legal literature.” 7TH CIR. R. 53(c).
262. A study of publication rates for the 12 months ending June 30, 1990, revealed that approximately 31.6% of the dispositions in the federal courts of appeals were published. L. Ralph Mecham, Annual Report of the Director of the Administrative Office of the United States Courts 78 (1990). This statistic compares with a publication rate of approximately 38.3% for the 12-month period ending in 1979. Reynolds & Richman, supra note 261, at 587.
in which errors are predicated on a trial court's application of rule 608(b) or rule 611 are therefore not published, and most likely would not contain particularly interesting or helpful discussion. The existence of large numbers of unpublished dispositions could therefore prove significant for the current study. If a survey of published dispositions generates a number of instances in which courts gave the rules overly superficial treatment, there is a strong likelihood that many more such dispositions remain unpublished.

Although it would be possible in theory to locate all unpublished dispositions, doing so would involve additional complications not worth the effort, at least for a preliminary study. As a result, only published dispositions were reviewed. Cross-checking efforts were made, however, to increase the number of relevant cases revealed. In addition, a period of approximately ten years was chosen to provide a large sample. Thus, although the cases that the search revealed might not be a perfect representation of all cases, there is reason for confidence that the survey uncovered useful information about the behavior of the federal courts of appeals.

The discussion begins with a numerical breakdown of cases in which parties asserted trial court errors in the application of the rules. The cases were categorized according to the rule the trial court allegedly mis-

263. The search was conducted as follows: A researcher checked the tables referencing the Federal Rules of Evidence in the front of each volume of the Federal Reporter (Second) beginning with volume 667 and ending with volume 925. All cases citing rules 608 and 611 were then reviewed. Then, a Westlaw search was conducted for the same time period to determine if additional cases existed. Any cases the Westlaw search revealed that were not published in the Federal Reporter (Second) were omitted from the final statistics. This cross-check was designed largely to reveal cases that for some reason were not listed in the Federal Rules of Evidence table in the front of the bound volumes or in which courts were applying the rules but not specifically citing them. Finally, a search was made of various evidence treatises to determine if additional case authority exists. A few additional cases were found in this manner.


265. Some judgment was exercised in selecting cases. At times, for example, trial courts fail to understand the scope and meaning of rule 608(b) and employ it to exclude evidence that another rule renders admissible. See, e.g., United States v. Calle, 822 F.2d 1016, 1018-19 (11th Cir. 1987) (discussed supra note 72). In those situations, the trial court will have committed error, but the error is more one of misapplying the evidence rules as a whole than of erring in the application of rule 608(b). As a result, such cases were excluded from the numerical survey. It should be noted that trial court error of this kind is best treated as per se error—an error of law in applying the rule—rather than as "discretionary" error. Thus, even if included in the survey, the cases fall outside the group that is the focus of this Article.

266. Most, although not all, of these cases are criminal cases. Because the double jeopardy clause of the Fifth Amendment prevents the prosecution from appealing acquittals in criminal cases, all of the criminal cases the survey revealed are appeals from judgments of conviction.
applied. Then, with respect to each rule, further analysis was conducted according to the type of error alleged and how the court disposed of the case. Table 1 summarizes appellate treatment of alleged trial court errors in the application of rule 611. The table indicates the total number of reported cases raising each subpart of the rule (general questions dealing with mode and order of interrogation, scope of cross-examination, and the use of leading questions). The table also reports the total number of times in which an appellate court found harmless error, and the total number of times an appellate court found reversible error. Because there are no per se aspects to rule 611, all errors are necessarily of the "discretionary" type. Table 2 shows appellate treatment of rule 608(b). Cases are divided according to whether the party asserted error of law caused by the trial court's alleged misapplication of per se aspects of the rule or "abuse of discretion" by misapplication of judgment-based parts of the rule.267 Within each category of error, cases are categorized according to whether the error was serious enough to require reversal. Table 3 summarizes key data from the tables 1 and 2.

The discussion that follows reflects on the nature of the actual appellate review of decisions founded on rules 608(b) and 611. It also discusses whether (based either on the numerical data or on the analysis used by courts) courts follow different standards for review of decisions founded on the two rules.

B. Mode-and-Order Rulings Under Rule 611

<table>
<thead>
<tr>
<th>Rule</th>
<th>Total Cases</th>
<th>Harmless &quot;Discretionary&quot; Error Found</th>
<th>Reversible &quot;Discretionary&quot; Error Found</th>
</tr>
</thead>
<tbody>
<tr>
<td>611(a)</td>
<td>53</td>
<td>3</td>
<td>6</td>
</tr>
<tr>
<td>611(b)</td>
<td>42</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>611(c)</td>
<td>20</td>
<td>2</td>
<td>0</td>
</tr>
</tbody>
</table>

267. Some judgment was exercised in categorizing the cases. For example, in United States v. Schwab, 886 F.2d 509 (2d Cir. 1989), the trial court permitted the prosecutor to cross-examine the defendant concerning alleged prior instances of tax fraud and perjury. Id. at 510. Though the Government had filed criminal charges in both instances, the defendant had been acquitted of tax fraud and the perjury charge had been dismissed. Id. On appeal the court held that it was error to allow inquiry into these matters, id. at 513, but never clearly indicated whether this was a matter over which the trial court had discretion or whether such evidence is excluded by the rule per se. The court, however, hinted that the matter was within the trial court's discretion, id., and that seems appropriate. The case is therefore categorized as arising under the "discretionary" part of rule 608(b).
The figures show that errors based on rule 611 are raised fairly frequently but are not often found. Among the cases surveyed, the courts of appeals found error in twelve cases, representing just over ten percent of the total.\textsuperscript{268} When appellate courts found error, they deemed that error reversible in half of the cases\textsuperscript{269} and harmless in the other half.\textsuperscript{270} Further, every reversible error case involved application of the trial court’s general mode-and-order powers, codified in subsection (a) of the rule, rather than matters involving the scope of cross-examination or the use of leading questions. Even when the harmless-error cases are added, there is a great deal of variation in error rate among the three parts of rule 611.\textsuperscript{271}

These figures suggest that trial courts have practically free rein to

\textsuperscript{268} One case not reflected in the survey is \textit{In re Burg}, 103 B.R. 222 (Bankr. 9th Cir. 1989). There, the Ninth Circuit held that the bankruptcy court committed reversible abuse of discretion when it required certain evidence to be presented in written form rather than as oral testimony. \textit{Id.} at 226. The case is not included because it was not found in the \textit{Federal Reporter} (Second).

\textsuperscript{269} The reversible error cases are: Loinaz v. EG&G, Inc., 910 F.2d 1, 7-8 (1st Cir. 1990) (holding it error to refuse to allow party to call a witness out of turn); Patrick v. City of Detroit, 905 F.2d 1108, 1116 (6th Cir. 1990) (holding it error to refuse party’s request to recall witness for cross-examination and requiring partial reversal); United States v. Moody, 903 F.2d 321, 371 (5th Cir. 1990) (holding it error to refuse permission to put on surrebuttal case after opponent presented new evidence during rebuttal); United States v. Simtob, 901 F.2d 799, 804 (9th Cir. 1990) (holding it error to refuse party’s request to re-open case to present new evidence and to cross-examine a witness who allegedly committed perjury during the trial according to new evidence); United States v. Reed, 700 F.2d 638, 644-45 (11th Cir. 1983) (finding general error in interpreting the scope and application of rule 611); and EEOC v. Monarch Mach. Tool Co., 737 F.2d 1444, 1445 (6th Cir. 1980) (holding it error to refuse party’s request to re-open case to respond to certain evidence). In \textit{Reed} the trial court had admitted evidence based both on rule 611 and on rule 608(b), and the appellate court found the evidence inadmissible under either rule. \textit{Reed}, 700 F.2d at 644-45. For purposes of this survey, \textit{Reed} is therefore classified as a reversible-error case under both rules.

\textsuperscript{270} The harmless error cases are: Munn v. Algee, 924 F.2d 568, 572 (5th Cir.) (holding that trial court abused its discretion under rule 611(b) when it allowed party to cross-examine witness on irrelevant matter that also went beyond the scope of the direct examination), \textit{cert. denied}, 112 S. Ct. 277 (1991); Kaczmarek v. Allied Chem. Corp., 836 F.2d 1055, 1061-62 (7th Cir. 1987) (holding that trial court abused its discretion under rule 611(a) when it refused to allow party to call witness to testify as to certain facts on rebuttal); United States v. Kaplan, 832 F.2d 676, 684-85 (1st Cir.) (holding that trial court’s refusal to permit criminal defendant to cross-examine a witness on matter within the scope of the direct examination was abuse of discretion under rule 611(a), \textit{cert. denied}, 485 U.S. 907 (1987); Johnson v. Ashby, 808 F.2d 676, 678 (8th Cir. 1987) (holding that trial court’s time limits for introduction of testimony were an abuse of discretion under rule 611(a), but party failed to preserve error); Haney v. Mizell Memorial Hosp., 744 F.2d 1467, 1477-78 (11th Cir. 1984) (holding that trial court’s refusal to permit leading questions was an abuse of discretion under rule 611(c)); Ellis v. City of Chicago, 667 F.2d 606, 612-13 (7th Cir. 1981) (same).

\textsuperscript{271} Errors based on rule 611(a) occurred in approximately 17\% of the cases raising that rule. The courts of appeals found two-thirds of those errors sufficiently serious to require reversal. In cases involving the trial court’s application of rule 611(b), only one error was found, representing only 2.4\% of the cases in which the appellant urged such error. That error
control the scope of cross-examination and the use of leading questions, but are checked to a somewhat greater extent when they seek to limit testimony in the exercise of their more general mode-and-order powers. Every reversal based on rule 611 occurred because the trial court prevented a party from presenting certain evidence, or prohibited a party from presenting evidence in a particular order. This tendency is not surprising. Conventional wisdom suggests that trial judges believe that the more evidence the jury hears, the more likely the truth will be found. Rulings that exclude or place limitations on evidence are thus thought to deprive the fact-finder of relevant information, decreasing the chances of achieving accurate verdicts. Rulings that increase the scope of the proof, on the other hand, often increase the chance of accurate verdicts.\textsuperscript{272} Even given these cases, however, the reversal rate based on rule 611(a) must be viewed in context. Appellate courts found no reversible error in nearly ninety percent of the cases.

The low error rates in the application of all parts of rule 611 seem appropriate. As I have argued, mode-and-order decisions are so greatly affected by the context of the case that trial judges are usually in a better position to decide these matters than are appellate courts.\textsuperscript{273} Thus, appellate courts should show substantial deference to the decisions of trial courts, and find error only in unusual cases. One gets precisely this sense when reading the cases. In \textit{United States v. Demarrias},\textsuperscript{274} for example, the defendant was charged with sexually abusing his fourteen-year-old stepdaughter. During the direct examination of the stepdaughter, the prosecutor "in effect read a prior statement [of the witness] into the record" and simply asked her, "Did you write that?"\textsuperscript{275} The witness gave an affirmative answer. The trial court allowed the leading question, and the appellate court stated:

[\textit{D}istrict courts have the discretion to [allow leading questions on direct examination], particularly when the witness is a young victim. Under these circumstances, we believe that the district court acted properly in allowing the question to have been stated in a leading form, since the victim exhibited a reluctance to testify in other forms. Nor do we think that the statement was so prejudicial as to mandate exclusion under Rule

\begin{itemize}
  \item was held harmless. Harmless error was found in 10% of the cases asserting error in the application of rule 611(c); no reversible errors were found.
  \item Although this is often correct, it does tend to oversimplify matters. In some cases too much evidence will confuse or mislead the jury as to crucial facts, decreasing the accuracy of those verdicts.
\end{itemize}

\textsuperscript{272} See supra notes 235-39 and accompanying text.

\textsuperscript{273} See supra notes 235-39 and accompanying text.

\textsuperscript{274} 876 F.2d 674 (8th Cir. 1989).

\textsuperscript{275} Id. at 678.
403. The balancing required under that rule rests with the sound discretion of the district court, and we find no plain error in its decision.\textsuperscript{276} Although the appellate court should have addressed specifically the factors of probative value and prejudicial effect rather than referring to the trial court's discretion in deciding that question and concluding that there was no plain error, the ultimate decision seems sound. The trial court was in a good position to weigh the reluctance of the young witness to testify concerning the acts in question and to determine that the need for the evidence was not outweighed by any dangers that a leading question might create.

In \textit{United States v. Grey Bear}\textsuperscript{277} defendants were convicted of murder and witness tampering. Patricia DeMarce, a key prosecution witness, was rather soft-spoken and frightened when she testified at trial. The trial court permitted the prosecution to use leading questions to develop her testimony. In reviewing the propriety of that action, the appellate court wrote: "The record reveals that leading questions were used infrequently and judiciously in order to develop testimony given by an unusually softspoken and frightened witness."\textsuperscript{278} The court said little more, and little more was needed. Clearly, the appellate court was able to view as justified the trial judge's decision to permit the prosecutor to use some leading questions in interrogating this witness.

One case that dramatically illustrates the contextual nature of mode-and-order decisions is \textit{O'Dell v. Hercules, Inc.}\textsuperscript{279} Nearly one hundred individuals sued the manufacturer of Agent Orange, a defoliant used extensively during the Vietnam War. The plaintiffs claimed that exposure to dioxin, a byproduct of the substance, had caused personal injury and property damage. The trial judge, no doubt sensing the complex proof issues the case would raise, bifurcated the trial into liability and damages phases.\textsuperscript{280} After the liability phase the jury brought in a verdict for defendant, and the plaintiffs appealed. On appeal plaintiffs claimed that the trial court improperly limited their cross-examination of defendant's witnesses. The appellate court rejected this claim, stating that "the trial court's control of witness testimony, exclusion of evidence, and limitation of proof were reasonable in light of the complexities inherent in a trial of the liability issue in a bifurcated toxic chemical waste

\textsuperscript{276} \textit{Id.} (citation omitted).
\textsuperscript{277} 883 F.2d 1382 (8th Cir. 1989).
\textsuperscript{278} \textit{Id.} at 1393.
\textsuperscript{279} 904 F.2d 1194 (8th Cir. 1990).
\textsuperscript{280} The liability phase extended for approximately one year, leading to more than 2000 pages of transcript. The parties entered more than 600 exhibits as well. \textit{Id.} at 1198.
exposure case and did not constitute an abuse of discretion."\textsuperscript{281} Again, this result seems appropriate. Throughout the liability phase of the trial the judge labored to restrict proof to those items relevant to that ultimate issue.\textsuperscript{282} If the judge had not exercised such careful control, the jury likely would have become confused and its attention would have been diverted from the liability question to the question of damages. In such a complex action, the trial judge should, and does, have substantial authority over mode-and-order matters. As the appellate court stated, citing rule 611(a), "a court may exercise reasonable control over the mode of interrogating witnesses and presenting witnesses to more effectively ascertain the truth and for other statutorily permitted reasons."\textsuperscript{283}

The brevity of appellate discussion of alleged errors in trial court mode-and-order rulings is also instructive. Appellate courts often relegate discussion of rule 611 issues to the final paragraphs of the opinion, and usually deal with the matter in summary fashion. In \textit{Williams v. Giant Eagle Markets, Inc.},\textsuperscript{284} for example, the trial court had "rigidly confined" plaintiff's cross-examination of a defense witness "to the precise issues covered on direct examination."\textsuperscript{285} The appellate court found that the matters plaintiff sought to raise on cross-examination were relevant, but stated that the trial court had acted within its authority: "The instant case exemplifies the broad discretion given to the trial judge. While another judge may have been less stringent in limiting counsel's cross-examination, we do not find that the trial judge's rulings in this case rise to the level of reversible error."\textsuperscript{286} Although more discussion of the issue would have been preferable, it is doubtful that the expenditure of substantial additional appellate resources on the question would have yielded a different result or even a more reasoned decision.

None of the foregoing suggests that appellate courts are powerless to reverse trial courts' mode-and-order decisions. On the contrary, as I have argued, even though such decisions are often highly context-driven,

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{281} \textit{Id.} at 1203.
\item \textsuperscript{282} For example, the trial court excluded evidence of certain plaintiffs' fear resulting from alleged exposure to the chemicals, symptoms of injury arising from the burning of chemical waste in the air, and property marketability. The court held this evidence irrelevant to the question of liability. \textit{Id.}
\item \textsuperscript{283} \textit{Id.} This does not mean that an appellate court would not be able to make the same relevancy judgments that the trial court made when determining the appropriateness of proffered testimony at certain points in the trial. Rather, the appellate court was properly deferential to the trial court's decision about the need to bifurcate this particular trial and to limit strictly the evidence permissible at each phase. \textit{O'Dell} was a highly contextual decision.
\item \textsuperscript{284} 883 F.2d 1184 (3d Cir. 1989).
\item \textsuperscript{285} \textit{Id.} at 1190.
\item \textsuperscript{286} \textit{Id.}
\end{itemize}
\end{footnotesize}
appellate courts are at times well situated to judge the trial courts' actions and to find reversible error. The presence of six such errors in the survey sample (all of which arose from general mode-and-order decisions under subsection (a) of rule 611) is evidence of this fact. When the trial court steps sufficiently outside the bounds of its proper authority, appellate courts can generally step in.\(^\text{287}\)

C. Specific-Acts Character Impeachment Under Rule 608(b)

### TABLE 2

<table>
<thead>
<tr>
<th>Rule 608(b)</th>
<th>“Per Se” Error</th>
<th>“Discretionary” Error</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Cases</td>
<td>Harmless Found</td>
<td>Reversible</td>
</tr>
<tr>
<td>146</td>
<td>7</td>
<td>5</td>
</tr>
</tbody>
</table>

From the data in table 2, it is apparent that although appellants raised errors in the trial court's application of rule 608(b) many times,\(^\text{288}\) appealing parties rarely achieved reversal based on this rule, and almost never succeeded when the alleged error was of the "discretionary" type. Appellate courts found error of a per se nature in just over eight percent of the cases,\(^\text{289}\) and of those, the appellate courts adjudged more than half the errors to be harmless.\(^\text{290}\) "Discretionary" error was found in only a single case, representing less than one percent of the 146 cases in the rule

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\(^{287}\) I already have discussed two cases in which courts took this action. The cases are Loinaz v. EG&G, Inc., 910 F.2d 1 (1st Cir. 1990) and United States v. Simtob, 901 F.2d 799 (9th Cir. 1990). See supra notes 168–80 and accompanying text.

\(^{288}\) In the published dispositions, appellate courts discussed alleged trial court errors in the application of rule 608(b) more often than they discussed alleged errors in the application of all parts of rule 611. Because parties do not always indicate which aspect of rule 608(b) the trial court allegedly misapplied, no effort was made to separate the rule 608(b) cases into those raising per se errors and those raising errors in the "discretionary" parts of the rule.

\(^{289}\) At times the court treated as "discretionary" an error I would call per se based on the framework set forth in this Article. For example, in United States v. Johnson, 848 F.2d 904 (8th Cir. 1988), the court wrote that extrinsic evidence "generally" is inadmissible under rule 608(b), and then suggested that the trial court had "discretion" under that rule to admit the evidence. \textit{Id.} at 905. It then went on to state that "any error" in admitting the evidence was harmless. \textit{Id.} This language is difficult to interpret; I treated the error as involving the per se aspect of the rule.

\(^{290}\) The harmless per se error cases are: United States v. McDonald, 905 F.2d 871, 875 (5th Cir.) (holding evidence of drug use not probative of truthfulness or untruthfulness); cert. denied, 111 S. Ct. 566 (1990); United States v. Schwab, 886 F.2d 509, 513-14 (2d Cir. 1989) (holding evidence of conduct for which defendant had been acquitted or in which criminal case had been dismissed inadmissible under the rule), cert. denied, 493 U.S. 1080 (1990); Pinkham v. Maine Cent. R.R., 874 F.2d 779, 780 (1st Cir. 1989) (holding marijuana use not probative of truthfulness or untruthfulness); Johnson, 848 F.2d at 906 (holding extrinsic evidence not admissible); J. Yanan & Assocs., Inc. v. Integrity Ins. Co., 771 F.2d 1025, 1031 (7th Cir. 1985)
608(b) sample. In that case, the error was serious enough to require reversal.291

Cases in which parties predicated error on the trial court's application of the "discretionary" part of rule 608(b) are most important for this study. Appellate courts are finding error in far fewer situations than under rule 611.292 Although the sample was not particularly large, involving a few hundred rather than several thousand cases, this result is still significant because it is precisely the opposite of what the present analysis suggests should be found. According to that analysis, reversals under rule 608(b) should be more common than under rule 611.

Whether the low incidence of error means that trial courts are doing an exemplary job in applying the rule or that appellate courts are simply not reviewing the cases closely enough is a key question. If appellate courts closely scrutinize trial courts' application of the rule and still rarely reverse, the low rate of reversal would suggest that trial courts are in fact doing an admirable job of applying the rule. On the other hand, if appellate courts handle these cases in summary fashion, applying only superficial analysis, the low rate of reversal would be much less indicative of a high degree of skill in the trial courts.

Unfortunately, the latter is more often true. Appellate courts appear to conduct appallingly superficial review of trial courts' application of rule 608(b). Rarely do they spend more than a brief paragraph discussing and evaluating the precise basis of the trial court's ruling. Far more commonly, the courts simply explain the context in which the party offered the evidence, refer to the rule and its provision for trial court "discretion," and find no error on the basis that the trial court acted within its powers.

In United States v. Cusmano,293 for example, the Government
charged the defendant with obstructing, delaying, and affecting commerce by extortion and conspiracy in violation of the Hobbs Act. 294 Cusmano and a codefendant owned J & J Cartage Company, a trucking business, and the Government alleged that the defendants unlawfully coerced their drivers to pay eleven percent of their gross earnings to the Teamster Health and Welfare Pension Fund. 295 Cusmano did not deny that the employees agreed to pay the fee, but claimed that the agreement resulted from legitimate labor negotiations. 296 Cusmano testified on his own behalf, and on cross-examination the court permitted the Government to ask him about the bankruptcy proceedings of his trucking company. 297 A jury believed the Government’s version of events and convicted Cusmano on all counts.

On appeal Cusmano claimed that the evidence was irrelevant and unfairly prejudicial. 298 The Government claimed the evidence was admissible under rule 608(b) to impeach Cusmano’s credibility. 299 Following is the United States Court of Appeals for the Sixth Circuit’s entire analysis of the issue (excluding its statement of the parties’ claims):

We find the district court did not abuse its discretion in admitting this evidence for purposes of impeachment. Throughout the direct examination, Cusmano testified about the close business relationship he had with his employees. He also testified extensively about the economic collapse of J & J Cartage Company. In light of this testimony, the United States was in a proper posture to challenge the credibility of Cusmano. This challenge took the form of proof of how he was able to eventually transfer all the assets of J & J to his own personal account, leaving the trucking firm with no assets. Thus, the evidence of J & J’s bankrupt proceedings was properly admitted. 300

Even a cursory look at the court’s discussion reveals that the court neither set forth the district court’s rationale for admitting the evidence nor independently evaluated that rationale. For that matter, the court did not even state the applicable test; the only indication that the court was aware of the factors relevant to the analysis is found in its statement that Cusmano claimed the evidence was “irrelevant and unduly prejudicial as evidence of another crime extraneous to the charges against

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295. Cusmano, 729 F.2d at 381-82.
296. Id. at 382.
297. Id. at 383.
298. Id.
299. Id.
300. Id.
him."\textsuperscript{301} Nowhere did the court analyze the probative value of the evidence, the nature of the dangers the evidence would create if the jury heard it, or how those factors weighed against each other in this instance. The omissions are a common feature of the cases in the survey.

One might excuse a lack of analysis in some obvious cases. In United States v. Jones,\textsuperscript{302} for example, the Government charged Jones with making false statements before a grand jury and obstruction of justice. She admitted that her testimony before the grand jury had been inaccurate, but claimed that at the time she testified she did not remember the true facts and that when her memory was refreshed later, she corrected her version of the events.\textsuperscript{303} The trial court allowed the prosecution to cross-examine Jones about instances in which she made false statements on her tax returns and on applications for employment, an apartment, a driver's license, a loan, and membership in a trade organization.\textsuperscript{304} The trial court admitted the questions on the basis that they "probe just what Miss Jones means when she says 'I don't remember.'"\textsuperscript{305}

On appeal the United States Court of Appeals for the Second Circuit first set forth the relevant part of rule 608(b), and then simply stated:

Jones testified throughout the grand jury proceedings and her trial that she could not remember important facts. The inquiry into her history of intentionally making false statements was proper because it "tend[ed] to undermine defendant's innocent explanation" that her false statements were the result of a faulty memory. "[T]he oftener a like act has been done, the less probable it is that it could have been done innocently."\textsuperscript{306} This analysis is somewhat superficial but is arguably sufficient under the circumstances. In Jones the entire case concerned matters of credibility.\textsuperscript{307} The prior acts used to impeach Jones's credibility were precisely the kinds of acts of dishonesty the rule envisions will often be admissible. Moreover, the apparent frequency with which Jones lied was itself proba-

\textsuperscript{301.} Id.
\textsuperscript{302.} 900 F.2d 512 (2d Cir.), cert. denied, 111 S. Ct. 131 (1990).
\textsuperscript{303.} Id. at 517-18.
\textsuperscript{304.} Id. at 520.
\textsuperscript{305.} Id.
\textsuperscript{306.} Id. at 521 (citations omitted) (quoting 2 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 312 (3d ed. 1940)).
\textsuperscript{307.} Admittedly, this is a double-edged sword. Evidence relevant to Jones's credibility was particularly probative, but there were also heightened dangers of unfair prejudice from a jury's giving too much weight to Jones's prior bad acts and convicting her based on those acts rather than the ones for which she was on trial. This is why more discussion at the appellate level would have been preferable. Nevertheless, the scales in this case tipped strongly in favor of admission.
tive of the likelihood that she would dishonestly seek to exonerate herself from responsibility for the inaccuracies in her grand jury testimony. Little analysis is needed to see that the evidence was admissible to impeach her credibility; the court can be excused for failing to set forth the analysis in greater depth.

The Cusmano court cannot be excused so easily. First, it is not immediately obvious how Cusmano's acts in connection with his company's bankruptcy were "probative of [his] truthfulness or untruthfulness," and the court engaged in no analysis of this question. Possibly his acts indicated a scheme to deprive his employees of money dishonestly in order to gain economic advantage, but one must stretch to reach that conclusion. Further, before the court admits the evidence on that basis, it at least ought to inquire how much detail concerning Cusmano's acts was appropriate. Even if this were the prosecution's theory in offering the evidence, and the court judged the acts probative of his untruthfulness, the value of the evidence on that question is arguably slight. Second, the court did not even discuss the potential for prejudice or confusion that the evidence created. There was at least some risk that the jury would misuse the evidence and convict Cusmano based on his criminal character, yet the court did not discuss this question or any of the other dangers mentioned in rule 403. Finally, with no discussion of the prejudice side of the equation, the absence of balancing language is not surprising.

This criticism of Cusmano, it must be emphasized, is not based on the court's ultimate conclusion. It is entirely possible that, given the strong admissibility bias of rule 403 and that rule's significant effect on the ultimate decision to admit or exclude under rule 608(b), the court, after careful analysis, would have reached the same conclusion. It is also possible that the trial court could have admitted the evidence on an entirely different theory.\(^\text{308}\) The problem with the case stems from the district court's apparent failure to articulate its precise rationale,\(^\text{309}\) and from the appellate court's failure to approach the question analytically. As I have pointed out, the fact that the standard of review is abuse of discretion does not mean that the appellate court cannot, or should not, exercise meaningful review of the trial court's decision.

\(^{308}\) The prosecution and courts missed a much clearer and cleaner argument for admission of the evidence. If in fact the prosecution's substantive theory was that Cusmano and his codefendants engaged in a conspiracy to extort funds from their employees and loot their company, the company's bankruptcy might have been a part of that scheme. If so, the evidence would have been admissible simply as part of the defendants' criminal conduct, not as impeachment of Cusmano's credibility. Perhaps a closer analysis of the evidence would have led the appellate court to this or a similar conclusion.

\(^{309}\) I am assuming that the district court did not articulate its basis any more than reported by the appellate court. The district court's decision is not reported on its own.
Another example of the appellate courts' typical attitude toward review of trial court application of the "discretionary" parts of rule 608(b) is *Navarro de Cosme v. Hospital Pavia*,310 a civil action by a husband and wife against a physician and hospital following the death of the couple's near-term fetus. The plaintiffs alleged that the defendants treated the wife negligently during her ninth month of pregnancy, and that this treatment resulted in the death of the fetus.311 At trial plaintiffs called a physician as an expert witness, and during the qualification phase of his testimony, the court permitted the defendants to cross-examine him concerning an occasion in which he had billed a party an inflated fee for his services as an expert witness, the fact that his notary license had been suspended for failing to submit certain required reports, and the fact that he had been sued three times for malpractice.312

In reviewing the appropriateness of these questions under rule 608(b), the appellate court merely summarized the discretionary part of the rule, stated that "[t]he district court has wide discretion" in applying it, and concluded: "In this case, it is clear that the matters under inquiry on the cross-examination of Dr. Hernandez Cibes all pertained to his credibility as a witness. Hence the district court did not err in permitting the cross-examination of Dr. Hernandez Cibes."313 The court then moved to the next issue without ever examining the probative value of each prior bad act on the witness's credibility.

Although it appears clear that overbilling for services is an act of dishonesty that evidences a witness's character for untruthfulness, it is not at all clear that the other acts qualify. What kind of forms did the witness fail to file? How did three malpractice actions bear on his credibility? It is difficult to justify admitting these acts under rule 608(b)'s provisions. In addition, the court never discussed such factors as the potential for unfair prejudice to the plaintiffs, so that factor was never balanced against the probative value of the evidence for impeachment purposes. Also, the court did not consider the harassing and embarrassing effect the evidence might have on the witness. It is quite possible that some or all of the evidence would not have passed through the rule 608(b) filter had the trial court conducted a careful analysis in the first instance or had the appellate court done so on review. As with *Cus-

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310. 922 F.2d 926 (1st Cir. 1991).
311. *Id.* at 928-29.
312. *Id.* at 932. When the plaintiffs objected to this evidence, the trial court defined an expert witness and stated that the witness "has to submit to the rigor of qualifications which includes not only the technical aspects; . . . but also . . . his standing in the community and his performance as a physician." *Id.* at 933.
313. *Id.*
mano, such analysis might also have led to the conclusion that at least some of the evidence was admissible on a completely different theory.\textsuperscript{314}

One more case should be discussed in detail. In \textit{United States v. Farias-Farias}\textsuperscript{315} defendant was convicted of the federal crimes of importing marijuana and possession of marijuana with intent to distribute. At trial Farias testified that he did not know that the substance was in his car at the time he sought to cross the border from Mexico into the United States.\textsuperscript{316} On cross-examination, and over objection, the court allowed the prosecutor to ask Farias whether he revealed to customs agents during his post-arrest interrogation that he previously had been arrested for drunk driving, alien smuggling, carrying a concealed weapon in a vehicle, and carrying a loaded firearm in a public place.\textsuperscript{317} The trial court agreed to instruct the jury that it had allowed the questions solely on the issue of defendant’s credibility, but refused to order the prosecutor not to mention the charges on which defendant had been arrested on these prior occasions.\textsuperscript{318} In answering the questions, Farias claimed that he had in fact told the customs agent that he had been arrested "two or three times or four."\textsuperscript{319} In rebuttal, the court allowed the Government to call the customs agent who had questioned Farias. The agent claimed that Farias had told him only of one arrest for drunk driving.\textsuperscript{320}

On appeal, Farias claimed that it was error to allow the prosecution to inquire into his prior arrests. After setting forth the basic rules, the United States Court of Appeals for the Fifth Circuit stated that

\textsuperscript{314} As to the evidence of malpractice claims against the witness, an alternative admissibility argument becomes apparent with closer analysis. Perhaps this evidence was offered not to impeach his credibility by showing that he had a bad character for truthfulness, but simply to show that he was not qualified as an expert witness or, even if qualified technically, that he was not as credible an expert as one who had not been sued for malpractice. (Recall that the questions were asked during the qualification phase of his testimony.) It is possible to read the trial judge’s ruling following plaintiffs’ objection in this way.

\textsuperscript{315} 925 F.2d 805 (5th Cir. 1991).

\textsuperscript{316} \textit{Id.} at 808.

\textsuperscript{317} \textit{Id.}

\textsuperscript{318} \textit{Id.}

\textsuperscript{319} \textit{Id.} at 809.

\textsuperscript{320} \textit{Id.} There is some question about the propriety of calling the agent once Farias had claimed on cross-examination that he had informed the agent of several arrests. The United States Court of Appeals for the Fifth Circuit seems to have viewed this not as extrinsic evidence establishing Farias’s bad character for truthfulness, but as extrinsic evidence that contradicted Farias on a “‘material issue of the case.’” \textit{Id.} at 810 (quoting United States v. Opager, 589 F.2d 799, 803 (5th Cir. 1979)). In essence, the court viewed Farias’s apparent dishonesty to the customs agent as part of the material facts of the case, which the jury was entitled to hear. As such, the use of extrinsic evidence would not violate the common-law rule forbidding such evidence when offered to contradict a witness on a “collateral” matter. See State v. Oswald, 62 Wash. 2d. 118, 120-21, 381 P.2d 617, 618-19 (1963).
“[a]dmission of the impeaching evidence is discretionary with the trial judge” and that “[t]he trial judge's discretion under Rule 608(b) is very substantial.”321 The court then briefly discussed the importance of credibility in resolving the case and noted that the prosecution “was entitled to try and show that Farias did not tell the whole truth at the border and consequently was not telling the truth at trial.”322 The appellate court engaged in little further analysis. The only explicit discussion of how rule 403 might be applied to the facts of this case is in a footnote, which, in its entirety, reads as follows: “We note that the trial judge made the finding under rule 403 that the probative value of the evidence substantially outweighed the prejudicial value. We cannot say that the trial judge abused his discretion in making this determination.”323

This cursory treatment of the very serious issue of potential prejudice is unjustified. Although there is little question that Farias's dishonesty when questioned by a government agent on a prior occasion would be probative of his untruthfulness,324 the substance of at least a number of the prior arrests raises grave potential for unfair prejudice. Specifically, there is a substantial chance that the jury, on hearing that Farias had previously been arrested for alien smuggling and carrying firearms, would have convicted Farias based not on his conduct in present the case, but on his general bad character or his past conduct. Although the judge's limiting instruction told the jury that it was not to do so, this possibility cannot be dismissed lightly. At the very least, the appellate court should have discussed the matter of potential prejudicial effect. Relegating the matter to a footnote simply stating that the court “cannot say that the trial judge abused his discretion” is not sufficient.

This case should be contrasted with United States v. Owens,325 which raised analogous issues. In Owens both the panel decision by the Court of Military Review and the decision by the Court of Military Appeals, sitting en banc, showed far greater sophistication and care when analyzing the admissibility of several instances of dishonesty to impeach

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321. Farias-Farias, 925 F.2d at 809 (citations omitted).
322. Id.
323. Id. at 809 n.6.
324. The Fifth Circuit noted that the nature of the arrests was "relevant to afford full proper probative force to the evidence that Farias falsely denied any arrests other than one for drunk driving when questioned . . . by the customs agents at the border." Id. at 810. The court then mentioned that arrests for trivial matters would be less probative of Farias's truthfulness, and arrests for more serious matters or ones analogous to the matter about which the agents were questioning Farias would be more probative. Id.
325. 21 M.J. 117 (C.M.A. 1985) (en banc). This case is not a part of the present survey because it was not reported in the Federal Reporter (Second). I discuss it here because it raises issues analogous to those in Farias-Farias and because it handles those issues in a much more appropriate way. For a full discussion of Owens, see Leonard, supra note 6, at 968-71, 975-82.
the defendant's credibility. Although one might reasonably disagree with the court's ultimate decision approving the trial court's admission of the evidence, the court considered the rule 403 balance with great care, looking specifically at the probative value and potential prejudicial effect of each prior bad act defendant had failed to mention when applying for a military job. Rather than simply stating that it would not upset the trial court's decision in determining the balance, the appellate court balanced those factors itself before reaching the decision that no error occurred.

Other examples could be given, but there is little reason to dwell on specific cases. The point is that all too often, once the appellate courts find that the evidence was offered pursuant to the "discretionary" part of rule 608(b), their analysis ceases. It is as though the trial court's action is simply not subject to review once the appellate court determines that the trial court applied the correct rule.

326. See, e.g., Varhol v. National R.R. Passenger Corp., 909 F.2d 1557 (7th Cir. 1990). In Varhol, a former employee brought a personal injury action against his railroad employer under the Federal Employers' Liability Act following a train derailment. There was no dispute that the plaintiff already suffered from multiple sclerosis when the accident occurred. The dispute concerned the degree to which the accident exacerbated his illness. During plaintiff's cross-examination the court allowed the defendant to ask about an instance in which the plaintiff had been suspended from his employment for purchasing and using stolen train tickets. Plaintiff admitted doing this, and that he had made restitution. He claimed, however, that he had not purchased and used the stolen tickets knowing that they were stolen. Id. at 1566. The jury found for the plaintiff, but awarded only $237 in damages on the basis that the derailment caused only one percent of his damages. Id. at 1561. Plaintiff appealed on the basis that the damages were inadequate.

On appeal, the court engaged in a laudable analysis of whether the evidence was probative of truthfulness or untruthfulness, and concluded that while "[s]tealing does not necessarily involve false statement or deceit, ... people generally regard acts such as stealing ... as acts that 'reflect[ ] adversely on a man's honesty and integrity.'" Id. at 1567 (quoting Gordon v. United States, 383 F.2d 936, 940 (D.C. Cir. 1967)). Once it completed its analysis of the per se aspect of the rule, however, the court simply concluded that the connection between the act and dishonesty was sufficient to allow admission, subject to the district court judge's sound exercise of discretion. In this case, Varhol's credibility was a key issue. The stolen ticket evidence did arguably reflect upon his honesty, and Varhol's counsel had the opportunity to minimize any adverse inference on redirect examination. Therefore, we do not think it was an abuse of discretion to allow Amtrak to attack Varhol's credibility by cross-examining Varhol about the stolen tickets.

Id.
D. A Comparative Summary

TABLE 3

<table>
<thead>
<tr>
<th>Rule</th>
<th>Total Cases</th>
<th>Harmless Error Found</th>
<th>Reversible Error Found</th>
</tr>
</thead>
<tbody>
<tr>
<td>608(b)</td>
<td>146</td>
<td>0 (0%)</td>
<td>1 (.68%)</td>
</tr>
<tr>
<td>611</td>
<td>115</td>
<td>6 (5.2%)</td>
<td>6 (5.2%)</td>
</tr>
</tbody>
</table>

I have argued that the “discretion” granted to the trial court under rule 608(b) is different in nature from that given to the trial court under rule 611, and that this difference should lead to closer appellate scrutiny of rule 608(b) decisions than rule 611 decisions. I have also shown that the effect of rule 608(b) decisions on the rights and obligations of the parties can be far greater than the effect of decisions under rule 611, thus increasing the need for full and careful review of rule 608(b) decisions. Although deference to the trial court is appropriate under either rule, less deference can be justified when appellate courts scrutinize rule 608(b) decisions than when they review rule 611 decisions.

One would hope that a survey of appellate decisions would reveal closer scrutiny. Unfortunately, it reveals nothing of the sort. At best, the cases show no difference in the level of scrutiny accorded to decisions under the two rules. At worst, however, appellate courts have it precisely backwards, scrutinizing rule 611 decisions (particularly those excluding relevant evidence under the trial court’s general mode-and-order powers) more closely than those under rule 608(b). Rather than recognizing that evaluating most of the key considerations governing “discretionary” decisions under rule 608(b) is within their reach, appellate courts treat the trial court’s powers under the rule as practically inviolable. In criminal cases this generally means that decisions to permit the defendant or his witnesses to be impeached with prior bad conduct will be upheld with little serious consideration of the prejudicial potential of this evidence by either the trial court or an appellate panel.

CONCLUSION

If the results of the preliminary survey prove representative of the run of federal appellate decisions scrutinizing trial court evidentiary rulings, extreme deference now defines the relationship of appellate to trial courts in the application of evidence rules. This is a troubling development in an era when the rules are becoming increasingly flexible. With so much left in the hands of trial courts, the absence of meaningful appel-
late review can lead to a breakdown in the trial's ability to serve the functions of the rules.

The answer to the problems that judgment-based evidence rules raise lies not in the elimination or even the restriction of trial court discretion. Rather, it lies in a willingness on the part of appellate courts to recognize that discretion comes in several varieties, some of which should repel close appellate scrutiny while others should invite and welcome it. Only when appellate courts cease dealing with trial court evidentiary rulings on the basis of truisms and begin to exercise their powers analytically will our evidence law become more coherent and consistent. Only when appellate courts demonstrate a willingness to undertake their task in this fashion will trial courts recognize their own obligation to make evidentiary rulings cautiously, explicitly, and with reference to the values set forth in the evidence rules themselves.