

# Proving Corruption: Extrinsic Evidence of Uncharged Perjury

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## INTRODUCTION

Consider the following scenario: In a criminal trial for illegal possession of a firearm, a police officer testifies that she stopped the defendant on the street, frisked him, and found a gun in his pocket. The defense then produces video footage from a bystander that shows the officer actually retrieving the gun from underneath a nearby bush. The defendant is acquitted, but the prosecutor decides not to charge the officer with perjury.<sup>1</sup>

One year later, a different defendant is charged with assaulting a police officer—the same officer from the first case. The officer testifies that the defendant threw a rock at her. On cross-examination, the defense attorney asks the officer, “One year ago, didn’t you get away with lying on the stand in this very courtroom?” The officer denies it. Should the defense attorney be able to introduce a transcript of the officer’s prior testimony, as well as the contradictory video? Current understandings of the Federal Rules of Evidence (FRE)—specifically, FRE 608(b)—and similar state evidence codes would say no, because the officer was never convicted of perjury.

The FRE codify a permissive theory of evidence adapted from the common law of evidence. Relevant evidence is presumptively admissible, subject to exceptions in the Constitution, federal statutes, the FRE, or other rules created by the Supreme Court.<sup>2</sup> The basic test for excluding evidence is embodied in FRE 403, which allows a trial court to exclude evidence “if its probative value is substantially outweighed” by certain dangers: “unfair prejudice,

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<sup>1</sup> Perjury occurs when a person either willfully testifies under oath to a material matter which she does not believe to be true or, in a declaration under penalty of perjury, gives information identified as true that she does not believe to be true. See 18 USC § 1621.

<sup>2</sup> See FRE 402. For the definition of “relevant evidence,” see FRE 401 (“Evidence is relevant if: (a) it has any tendency to make a fact more or less probable . . . and (b) the fact is of consequence in determining the action.”).

confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”<sup>3</sup> Other exclusionary rules in the FRE are derived from FRE 403, replacing the broad standard with a specific rule governing a particular circumstance.<sup>4</sup>

One such rule is FRE 404(b), which forbids introducing “[e]vidence of a crime, wrong, or other act . . . to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.”<sup>5</sup> It does allow evidence of prior acts to be admitted “for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.”<sup>6</sup> FRE 608(b), in turn, allows “specific instances of a witness’s conduct” to be “inquired into [on cross-examination] if they are probative of the character for truthfulness or untruthfulness of” either “the witness” or “another witness whose character the witness being cross-examined has testified about.”<sup>7</sup>

FRE 608(b) also codifies a long-standing common-law rule of evidence, known as the extrinsic evidence bar. While the witness may be asked on cross-examination about prior acts relevant to his character for truthfulness, the cross-examining party may not introduce extrinsic evidence of those acts,<sup>8</sup> unless the acts resulted in a criminal conviction.<sup>9</sup> Thus, in the hypothetical above, the defense attorney would not be able to contradict the officer’s denial with the video and prior testimony because both pieces of evidence would be extrinsic to the officer’s testimony on the stand.

Prior acts may be proven by extrinsic evidence when they relate to other forms of impeachment, including bias and interest.<sup>10</sup> Together, bias and interest make up the category of motive to lie

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<sup>3</sup> FRE 403.

<sup>4</sup> See, for example, FRE 802 (providing that hearsay is presumptively inadmissible); FRE 803–04 (creating specific exceptions to the general rule against hearsay).

<sup>5</sup> FRE 404(b)(1).

<sup>6</sup> FRE 404(b)(2).

<sup>7</sup> FRE 608(b).

<sup>8</sup> Extrinsic evidence is anything other than the witness’s own testimony about the prior act, including the testimony of another witness. For discussion of a complication in this definition, see Part II.B.

<sup>9</sup> See FRE 609 (providing for certain circumstances in which “evidence of a criminal conviction” may be introduced to “attack[ ] a witness’s character for truthfulness”).

<sup>10</sup> See Edward J. Imwinkelried, *Formalism versus Pragmatism in Evidence: Reconsidering the Absolute Ban on the Use of Extrinsic Evidence to Prove Impeaching, Untruthful Acts That Have Not Resulted in a Conviction*, 48 Creighton L Rev 213, 222–23 (2015).

(or slant or distort one's testimony).<sup>11</sup> Courts are divided over whether impeachment is "another purpose," albeit an unlisted one, for which extrinsic evidence is admissible under FRE 404(b)(2), or whether FRE 404(b) does not apply to impeachment evidence at all.<sup>12</sup> Either way, courts admit evidence of other acts when they are relevant to bias.<sup>13</sup>

A recently resurrected theory of impeachment would allow the defense attorney to introduce the video and prior testimony in the opening hypothetical. In the last few years, the DC Court of Appeals<sup>14</sup> has issued several opinions developing a theory of impeachment called "corruption bias." This type of impeachment involves demonstrating that a witness is willing to obstruct the discovery of truth by manufacturing or suppressing testimony. Proof of such willingness typically takes the form of prior instances of uncharged perjury. According to the DC Court of Appeals, corruption bias, as a subset of bias, is distinct from evidence of a bad character for truthfulness. Corruption bias evidence is therefore not subject to the DC Court of Appeals' version of the FRE 608(b) extrinsic evidence bar and is potentially admissible.<sup>15</sup>

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<sup>11</sup> "Motive to lie" is shorthand for a collection of motives that need not operate consciously. Biases and other motives can influence a witness to subconsciously slant or distort the truth in ways that fall short of outright lies.

<sup>12</sup> The Second and Tenth Circuits treat FRE 404(b) as applying only to substantive evidence, not evidence that is admitted for impeachment purposes. See *United States v Watson*, 766 F3d 1219, 1244–46 (10th Cir 2014); *United States v Schwab*, 886 F2d 509, 511 (2d Cir 1989). See also David A. Moran, *Evidence*, 1993 Detroit Coll L Rev 703, 710 (describing FRE 404(b) as applying to evidence "admitted for substantive purposes" and FRE 608(b) and 609(a) as applying to evidence offered "to impeach witnesses"). The Third, Fourth, and Eleventh Circuits, on the other hand, hold that FRE 404(b) does apply to impeachment evidence, thus implying that FRE 608(b) functions as an exception to the general rule. See *United States v Bradley*, 644 F3d 1213, 1273 (11th Cir 2011); *United States v Stockton*, 788 F2d 210, 219 n 15 (4th Cir 1986); *Pounds v Board of Trustees*, 2000 WL 655936, \*4 (4th Cir); *United States v Shannon*, 766 F3d 346, 352 n 9 (3d Cir 2014). See also FRE 404, Advisory Committee Notes to the 1991 Amendment ("The amendment requires the prosecution to provide notice, regardless of how it intends to use the extrinsic act evidence at trial, i.e., during its case-in-chief, for impeachment, or for possible rebuttal.").

<sup>13</sup> See, for example, *United States v Watler*, 461 F3d 1005, 1009–10 (8th Cir 2006) (holding that the defense should have been able to introduce the fact that a witness had threatened to kill the defendant because "a death threat suggests personal animus," although ultimately finding that the error was harmless).

<sup>14</sup> The DC Court of Appeals, not to be confused with the United States Court of Appeals for the DC Circuit, is the local appellate court in the District of Columbia. It hears appeals from the DC Superior Court, and its decisions may be appealed to the United States Supreme Court. See 28 USC § 1257.

<sup>15</sup> See, for example, *Longus v United States*, 52 A3d 836, 852–53 (DC 2012). For DC's common-law version of FRE 608(b), see *Sherer v United States*, 470 A2d 732, 738 (DC 1983).

The DC Court of Appeals' result is largely correct and should be adopted by other courts, but its classification of this evidence as a type of bias evidence is misleading and obscures the justification for the rule. Corruption is not bias, but rather a historically and doctrinally distinct species of impeachment. In addition, the DC Court of Appeals has not paid attention to whether the witness was punished for prior perjury. As defended in this Comment, corruption evidence is evidence that tends to show a witness previously committed perjury—or a related act, such as witness tampering or obstruction of justice—for which she either was not punished or was punished less than she could have been. Corruption evidence counters the special credibility that juries attach to witnesses who testify in court and under oath by demonstrating that the witness has less reason to fear the consequences of lying under oath. The lack of prior punishment and the lack of fear of future punishment are generally caused by a relationship between the witness and the government—such as when the witness is a police officer or a government informant. While bias evidence demonstrates that the witness has a special motive to lie, corruption evidence contradicts the inference that the witness has a special motive to tell the truth.

Resurrecting corruption as a valid theory of impeachment that is exempt from the extrinsic evidence bar will increase many witnesses' incentives to be truthful and will reduce the systemic bias created by prosecutors' decisions not to charge government witnesses with perjury.<sup>16</sup> Resurrecting corruption will also address some of the problems with the current, artificially enlarged extrinsic evidence bar that have caused some judges—led by Judge Richard Posner of the Seventh Circuit<sup>17</sup>—to adopt a constrained definition of extrinsic evidence. This constrained definition has allowed extrinsic evidence to be smuggled in through cross-examination.<sup>18</sup> Posner's approach has strong appeal as a matter of policy, but corruption impeachment provides a more solid analytical basis for the result. At the same time, admitting extrinsic evidence of corruption will not violate FRE 404(b),<sup>19</sup> require jurors

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<sup>16</sup> See Part III.D.

<sup>17</sup> See text accompanying notes 142–46.

<sup>18</sup> See Parts II.B, III.E.

<sup>19</sup> See Part IV.A.

to make careful distinctions between character inferences and corruption inferences,<sup>20</sup> or overwhelm courts with an endless stream of time-consuming disputes over prior acts.<sup>21</sup>

Part I discusses the historical development and modern understanding of the extrinsic evidence bar, and Part II presents the two modern developments that challenge that understanding: the DC Court of Appeals' corruption bias cases and attempts by federal courts to circumvent the extrinsic evidence bar by redefining extrinsic evidence. Part III argues that corruption impeachment should be accepted by federal and state courts, while Part IV responds to objections to the argument. Finally, Part V explores the practical issues courts will face in evaluating the admissibility of corruption impeachment when the evidence is less clear-cut than in the hypothetical explored above.

## I. THE EXTRINSIC EVIDENCE BAR

The extrinsic evidence bar for prior bad acts relating to a witness's character for truthfulness provides the backdrop for the resurrection of corruption evidence. The extrinsic evidence bar has deep historical roots in the common law of evidence, and it has survived in the FRE and the modern common law of the DC Court of Appeals.<sup>22</sup> Meanwhile, prior acts relevant to other types of impeachment have always been, and continue to be, exempt from the extrinsic evidence bar.<sup>23</sup>

### A. Development of the Extrinsic Evidence Bar

Before the 1700s, courts generally allowed proof of a witness's character for truthfulness by extrinsic evidence of specific acts committed by the witness.<sup>24</sup> *Trial of Ambrose Rookwood*<sup>25</sup> represents a turning point away from allowing such evidence.<sup>26</sup> In *Rookwood*, the defendant offered to prove that the prosecution's chief witness—who was also one of the defendant's alleged conspirators—had engaged in “robbing upon the highway, [ ] clipping,

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<sup>20</sup> See Part IV.B.

<sup>21</sup> See Part IV.C.

<sup>22</sup> See Part I.A.

<sup>23</sup> See Part I.B.

<sup>24</sup> See John Henry Wigmore, 3A *Evidence in Trials at Common Law* § 979 at 823 (Little, Brown 1970) (James H. Chadbourn, ed).

<sup>25</sup> 13 How St Tr 139 (1696).

<sup>26</sup> Wigmore, 3A *Evidence* § 986 at 855 (cited in note 24).

[ ] conversing with clippers, [ ] fornication, [and] buggery.”<sup>27</sup> The defense attorney argued that “no jury that have any conscience, will upon their oaths give any credit to the evidence of a person against whom such a testimony is given.”<sup>28</sup> The judge, siding with the prosecutor’s argument that false accusations of past crimes by the witness were too easy to fabricate, concluded that the defense “may bring witnesses to give an account of the general tenour of his conversation,” but that the court would not “try now at this time, whether [the witness] be guilty of robbery or buggery.”<sup>29</sup>

Courts adopted the rule of *Rookwood* quickly.<sup>30</sup> Dean John Henry Wigmore argued that two considerations were responsible for adoption of the rule: first, the confusion of issues and the resulting proliferation of witnesses caused by conducting a trial-within-a-trial; second, the ease of presenting false evidence of alleged bad acts that a witness would find impossible to anticipate and prepare to refute.<sup>31</sup> A third consideration must also be noted: evidence of a witness’s general character for truthfulness is not very probative of whether she is telling the truth while testifying.<sup>32</sup> But, as Wigmore emphasized, the evidence is not irrelevant—its probative value may not be very high, but it is not zero.<sup>33</sup>

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<sup>27</sup> *Rookwood*, 13 How St Tr at 178, 209. “Clipping” involved cutting or filing small amounts of precious metals off of multiple coins, which could then be used to create new coins. George Cooper, *The Origin of Financial Crises: Central Banks, Credit Bubbles, and the Efficient Market Fallacy* § 3.3.3 at 46 (Harriman 2008). It was essentially a form of counterfeiting, and, at the time of *Rookwood*, was punishable as high treason. See, for example, Ref No t16771010-4, *The Proceedings of the Old Bailey* (Oct 10, 1677), archived at <http://perma.cc/2G6L-HF52>.

<sup>28</sup> *Rookwood*, 13 How St Tr at 210.

<sup>29</sup> *Id* at 211.

<sup>30</sup> See Wigmore, 3A *Evidence* § 986 at 855 (cited in note 24).

<sup>31</sup> See *id* § 979 at 826–27.

<sup>32</sup> See Kenneth S. Broun, ed, 1 *McCormick on Evidence* § 40 at 245 (Thomson Reuters 7th ed 2013) (observing that certain “empirical studies of untruthfulness indicate that a person’s general character trait for truthfulness is a poor predictor of whether she is untruthful on a specific occasion”); Martin F. Kaplan, *Character Testimony*, in Saul M. Kassin and Lawrence S. Wrightsman, eds, *The Psychology of Evidence and Trial Procedure* 150, 158 (Sage 1985) (“[B]ehavior is greatly influenced by the external situation. General dispositions, for truthfulness or whatever, are imperfect predictors of behavior in a particular instance. . . . One of the most cited conclusions in personality psychology is that honesty is situationally specific.”) (citation omitted).

<sup>33</sup> See Wigmore, 3A *Evidence* § 979 at 827 (cited in note 24) (stating that “no consideration of relevancy is the source of the exclusion,” while acknowledging the existence of “one situation in which an exception should be recognized,” implying that the evidence is at least sometimes relevant).

In this way, it is related to the more absolute bar on character evidence to prove acts in conformity with that character.<sup>34</sup>

An exception to the extrinsic evidence bar is that bad acts may be proved by records of criminal convictions. Bad acts may also be proved by asking a witness about specific conduct during cross-examination, because the witness's answers on cross are not extrinsic evidence.<sup>35</sup> Such methods of proof are permitted because they do not involve the same amount of risk as general extrinsic evidence—they are quick to introduce, apparently accurate, and do not invite a minitrial.<sup>36</sup> These exceptions demonstrate that courts are willing to let juries make inferences about truthfulness based on prior dishonest conduct, so long as the evidence of that prior conduct is admitted in a way that does not implicate the risks of introducing such evidence more generally. While application of these rules was not without complications,<sup>37</sup> the principle was accepted in the common-law courts of England<sup>38</sup> and the United States.<sup>39</sup>

When the FRE were adopted in 1975, FRE 608(b) incorporated the extrinsic evidence bar.<sup>40</sup> Meanwhile, FRE 608(a) allowed extrinsic opinion and reputation evidence of bad character for truthfulness,<sup>41</sup> and FRE 609 adopted the rule allowing certain evidence of prior convictions to be used to attack a witness's character for truthfulness.<sup>42</sup> FRE 608(b) has been amended to increase its clarity, but the current version has preserved the bar:

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<sup>34</sup> See FRE 404(a)(1) (providing that “[e]vidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait”). Unlike FRE 608(b), which creates only an extrinsic evidence bar, FRE 404 bars admission of evidence for the purpose of establishing a character inference whether that evidence is intrinsic or extrinsic.

<sup>35</sup> See Wigmore, 3A *Evidence* § 979 at 827–28 (cited in note 24). See also id § 980 at 828–35 (discussing proof of bad acts by record of conviction); id §§ 981–84 at 838–54 (discussing proof of bad acts by cross-examination of the witness).

<sup>36</sup> See id § 979 at 826–28. See also Roger Park and Tom Lininger, *The New Wigmore: A Treatise on Evidence; Impeachment and Rehabilitation* § 3.4 at 126–27 (Aspen 2012).

<sup>37</sup> See, for example, Wigmore, 3A *Evidence* § 980a at 835–38 (cited in note 24) (discussing whether evidence of mere arrest or indictment without a conviction should be allowed).

<sup>38</sup> See id § 986 at 855. But see id § 986 at 856 (discussing and criticizing a different rule in the chancery courts that allowed extrinsic evidence of acts that went to a witness's “general credit”).

<sup>39</sup> See id § 987 at 911.

<sup>40</sup> See FRE 608(b), Act of Jan 2, 1975, Pub L No 93-595, 88 Stat 1926, 1935.

<sup>41</sup> See FRE 608(a), Act of Jan 2, 1975, 88 Stat at 1935.

<sup>42</sup> See FRE 609, Act of Jan 2, 1975, 88 Stat at 1935–36.

Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

- (1) the witness; or
- (2) another witness whose character the witness being cross-examined has testified about.<sup>43</sup>

While the District of Columbia courts are not bound by the FRE,<sup>44</sup> they follow essentially the same rule: a lawyer may ask the witness on cross-examination about prior acts bearing on the witness's character for truthfulness, but the lawyer is stuck with the witness's answer.<sup>45</sup> In addition, the lawyer must have a factual predicate for asking the question,<sup>46</sup> a rule also judicially imposed in federal court.<sup>47</sup> Many states also have codes of evidence that closely track the FRE,<sup>48</sup> although some provide for a near-total ban on prior acts relevant to character for truthfulness, rather than just a ban on extrinsic evidence.<sup>49</sup> The arguments in this Comment focus on the federal courts, but they also apply in other jurisdictions with comparable rules.

## B. Distinguishing Other Types of Impeachment

The common-law extrinsic evidence bar did not extend to proof of "bias, corruption, and interest—all being merely varieties

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<sup>43</sup> FRE 608(b).

<sup>44</sup> See *King v United States*, 74 A3d 678, 681 n 12 (DC 2013). Evidence in the District of Columbia is still governed by the common law rather than a code. See DC Super Ct Rule Crim Proc 26 ("The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these Rules otherwise provide, by the principles of the common law as they may be interpreted by the courts in the light of reason and experience.").

<sup>45</sup> See *Sherer v United States*, 470 A2d 732, 738 (DC 1983). See also *Bennett v United States*, 763 A2d 1117, 1123 (DC 2000) (describing FRE 608(b) as "a rule this court has looked to for guidance in applying the doctrine of *Sherer*"). But see *Woodward & Lothrop v Hillary*, 598 A2d 1142, 1150 n 11 (DC 1991) ("By citing to [FRE] 608(b), we do not mean to suggest identity in all respects between that rule and the rule stated in *Sherer*.").

<sup>46</sup> See *Sherer*, 470 A2d at 738.

<sup>47</sup> See, for example, *United States v Abair*, 746 F3d 260, 264 (7th Cir 2014); *United States v Skelton*, 514 F3d 433, 444 (5th Cir 2008); *United States v Whitmore*, 359 F3d 609, 621–22 (DC Cir 2004); *United States v Cudlitz*, 72 F3d 992, 1001 (1st Cir 1996).

<sup>48</sup> See, for example, Ariz Rule Evid 608(b); Mich Rule Evid 608(b).

<sup>49</sup> See, for example, Tex Rule Evid 608(b) (forbidding both inquiry into and extrinsic evidence of character for truthfulness, with the exception of certain criminal convictions).



of the single quality of emotional partiality.”<sup>50</sup> The 2003 Amendment to FRE 608(b) clarified that the bar applied only to evidence about the witness’s character for truthfulness.<sup>51</sup> This Amendment indicated that FRE 608(b), like the common-law rule, did not apply to other types of attacks on credibility.<sup>52</sup> Extrinsic evidence of prior acts is admissible for two primary types of attacks on credibility, corresponding roughly to Wigmore’s categories of “bias” and “interest.”<sup>53</sup> Both of these involve attacking a witness’s credibility by showing that the witness has a motive to distort the truth, consciously or unconsciously. The distinction between bias and interest is not essential to the doctrine, and “bias” is often used as a catchall term for both,<sup>54</sup> but the distinction helps to clarify the inferences presented by these various types of evidence.

Wigmore defined bias as “all varieties of hostility or prejudice against the opponent *personally* or of favor to the proponent personally.”<sup>55</sup> Bias need not be individualized, however; it may also be directed at a class of people. The core characteristic of bias is “a witness’s interest in the outcome of a trial, including a friendly or hostile association with one of the parties that could induce [the witness] to shade, distort, or falsify his testimony.”<sup>56</sup> Prior acts can be evidence of bias either because they explain why the bias exists, or because they show the witness acting on the bias.

A witness who is personally biased has a motive to lie either to help a party she likes or to harm a party she dislikes.<sup>57</sup> Acts that demonstrate a witness’s bias for or against a particular party can take many forms, including threats by the witness against a

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<sup>50</sup> Wigmore, 3A *Evidence* § 943 at 778 (cited in note 24). See also *McHugh v State*, 31 Ala 317, 320 (1858) (distinguishing between attacks on general and particular credibility).

<sup>51</sup> Compare FRE 608(b) (1988) (addressing “attacking or supporting the witness’ *credibility*”) (emphasis added), with FRE 608(b) (2003) (addressing “attack[ing] or support[ing] the witness’ *character for truthfulness*”) (emphasis added). See also FRE 608, Advisory Committee Notes to the 2003 Amendment (“The Rule has been amended to clarify that the absolute prohibition on extrinsic evidence applies only when the sole reason for proffering that evidence is to attack or support the witness’ character for truthfulness.”).

<sup>52</sup> See Daniel D. Blinka, *Why Modern Evidence Law Lacks Credibility*, 58 *Buff L Rev* 357, 385 (2010) (“Extrinsic evidence . . . may be called to prove the bias or interest of a target witness who denies or minimizes the influence.”).

<sup>53</sup> Wigmore, 3A *Evidence* § 945 at 782 (cited in note 24).

<sup>54</sup> See Christopher B. Mueller, Laird C. Kirkpatrick, and Charles H. Rose III, *Evidence: Practice under the Rules* § 6.19 at 513 (Aspen 4th ed 2012).

<sup>55</sup> Wigmore, 3A *Evidence* § 945 at 782 (cited in note 24).

<sup>56</sup> Graham C. Lilly, Daniel J. Capra, and Stephen A. Saltzburg, *Principles of Evidence* § 9.3 at 328 (West 7th ed 2015).

<sup>57</sup> See Phillip W. Broadhead, *Why Bias Is Never Collateral: The Impeachment and Rehabilitation of Witnesses in Criminal Cases*, 27 *Am J Trial Advoc* 235, 264 (2003).

party or victim,<sup>58</sup> prior false accusations by the complainant against the same defendant,<sup>59</sup> shared membership in a gang,<sup>60</sup> an agreement to be rewarded for testifying,<sup>61</sup> or an expressed interest in a defendant receiving a lower sentence.<sup>62</sup> A witness who is biased against or in favor of a class also has a motive to lie, even though the motive is more broadly applicable.<sup>63</sup> Bad acts demonstrating class bias may include racist acts (as showing bias against people of a certain race),<sup>64</sup> refusal to participate in the

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<sup>58</sup> See, for example, *United States v Watler*, 461 F3d 1005, 1009–10 (8th Cir 2006) (“A witness’s desire to kill the defendant is probative of bias . . . [because] a death threat suggests personal animus toward the defendant.”); *Hanners v State*, 41 S 973, 975 (Ala 1906) (holding that evidence of a witness’s earlier threats against the deceased in a murder trial could be admissible to prove “his hostility to the prosecution and his bias for the defendant”).

<sup>59</sup> See Paul F. Rothstein and Edward J. Imwinkelried, *Just What Evidence of Witness Misdeeds Does Federal Evidence Rule 608(b) Exclude?—Imwinkelried vs. Rothstein*, 49 Creighton L Rev 121, 125 & n 9 (2015) (Rothstein arguing that evidence of prior false rape accusations by the same complainant against the same defendant “are offered to show specifically that the complaining witness lies about rape by this accused—i.e. has a motive to ‘get’ this defendant,” and further asserting that his “analysis would be the same even if the false allegations . . . were allegations against individuals other than the defendant”). But see id at 136–37 (Imwinkelried agreeing that prior false accusations against the same defendant would be admissible as suggesting “a personal animus directly against the accused,” but arguing that false accusations against other men would not be admissible to suggest “an animus against the general class of men”).

<sup>60</sup> See, for example, *United States v Takahashi*, 205 F3d 1161, 1165 (9th Cir 2000) (holding that shared membership in a prison gang between a witness and the defendant was admissible evidence of bias); *United States v Abel*, 469 US 45, 52 (1984).

<sup>61</sup> This sort of bias often comes up when a prosecution witness in a criminal case receives favorable treatment in exchange for cooperation and when expert witnesses are paid by one party for their testimony. See, for example, *Delaware v Van Arsdall*, 475 US 673, 679–80 (1986) (finding the trial court in error for refusing to admit evidence that a cooperating State witness had had pending charges against him dismissed); *United States v 412.93 Acres of Land, More or Less, in Franklin and Towamensing Townships, Carbon County, Pennsylvania, Tract No 113*, 455 F2d 1242, 1247 (3d Cir 1972) (affirming admission of the per diem fee given to an expert witness for testifying in order to show possible bias).

<sup>62</sup> See, for example, *United States v Vasquez*, 635 F3d 889, 897 (7th Cir 2011) (holding that evidence that the witness—a codefendant’s wife—wanted “to get her husband a lower sentence” was admissible to prove bias).

<sup>63</sup> See *Brinson v Walker*, 547 F3d 387, 394 (2d Cir 2008) (“[R]acial bias, at least when held in extreme form, can lead people to lie or distort their testimony . . . even though the bias is directed generally against a class of persons and not specifically against the accused.”).

<sup>64</sup> See Broun, ed, 1 *McCormick on Evidence* § 39 at 238 & n 19 (cited in note 32). See also, for example, *United States v Figueroa*, 548 F3d 222, 227–28, 232 (2d Cir 2008) (holding that it was error, though harmless, to prevent the defendant from cross-examining a witness about his swastika tattoos as evidence of racial bias); *Brinson*, 547 F3d at 392–95 (holding that it was error to prevent a party from cross-examining a witness about being fired from his job at a restaurant for refusing to serve black patrons). However, parties sometimes cannot marshal sufficient evidence of racism to establish racial bias. See, for example, *United States v Watson*, 409 F3d 458, 463–64 (DC Cir 2005) (holding that the

investigation of a prison riot (as showing a bias toward the prisoners),<sup>65</sup> or suspension from a police force for the use of excessive force (as showing a bias against plaintiffs who are making a separate claim for excessive force).<sup>66</sup>

The paradigm case of “interest” for Wigmore was “a pecuniary interest in the event of the cause.”<sup>67</sup> Wigmore also characterized accomplices and coindictes as having an interest in the case, both when testifying for the prosecution, because they would have a motive to “curry[ ] favor,”<sup>68</sup> and when testifying for the defense, because of the coindictes’s motive to “exonerate the other accused and thus help towards his own freedom.”<sup>69</sup> While bias involves a connection between the witness and a party, interest involves a connection between the witness and the dispute.<sup>70</sup> However, the particularities of Wigmore’s classifications are not particularly relevant to modern courts—the important point is that even when motives to lie are not naturally classifiable as “biases,” such motives can still be proved by extrinsic evidence.

As with bias, interest can be specific or more general. A specific interest can arise, as in Wigmore’s example, when the defendant calls a witness who has been indicted for the same offense.<sup>71</sup> The witness has a clear interest in telling a story that absolves herself; and if it also absolves her accomplice, so much

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defense could not cross-examine an officer about an alleged pattern of racially discriminatory stops because the defense did not adequately establish that any racial bias existed).

<sup>65</sup> See, for example, *Douglas v Owens*, 50 F3d 1226, 1231–32 (3d Cir 1995) (holding that, in a civil suit by a prisoner against guards for excessive force during a riot, the guards should have been able to introduce evidence showing that a prison imam who testified on behalf of the prisoner was fired for refusing to cooperate with the investigation against the prisoners, because the refusal to cooperate “exhibit[ed] some bias in favor of prisoners like Douglas”).

<sup>66</sup> See, for example, *United States v Rios Ruiz*, 579 F2d 670, 672–74 (1st Cir 1978) (affirming the admission of evidence of suspension of witnesses from the Puerto Rican police force because of their use of excessive force).

<sup>67</sup> John Henry Wigmore, 2 *Evidence in Trials at Common Law* § 576 at 810 (Little, Brown 1979) (James H. Chadbourne, ed). See also Wigmore, 3A *Evidence* § 966 at 812 (cited in note 24) (discussing the shift from “interest” as a reason for disqualifying a witness to “interest” as a method of impeachment).

<sup>68</sup> See Wigmore, 3A *Evidence* § 967 at 814–15 (cited in note 24). This example is better characterized as involving bias toward the prosecution rather than an interest in the outcome of the case.

<sup>69</sup> *Id.* § 967 at 816.

<sup>70</sup> See *id.* § 945 at 782.

<sup>71</sup> See, for example, *Titus v State*, 23 S 77, 78–79 (Ala 1898).

the better. A witness might also be motivated to frame the defendant for a crime in order to exonerate people the witness cares about<sup>72</sup> or because of a fear of contradicting other witnesses.<sup>73</sup>

A witness could also have a more general interest in a class of cases. A general interest can be demonstrated by proving that the witness lied before *in similar circumstances*. This type of impeachment is exempt from the extrinsic evidence bar because it asks the jury to draw an inference about a *motive* that is allegedly present in the current case. Whereas specific interests in the case at hand often involve motives that the jury will assume the witness has as a matter of common sense—for example, an interest in money or in avoiding punishment—impeachment by general interest involves demonstrating that the witness has a motivation that would not otherwise be assumed. Such evidence can take the form of past false accusations: if the facts of the prior and present case are similar enough, the jury can conclude that the complainant had a motive to lie in the prior case, one that explains “what would otherwise be an unusual fabrication,”<sup>74</sup> and that the same motive is present in the current case. For example, a witness might make false accusations because of an unusually strong desire for attention.<sup>75</sup> Or a witness might make false statements out of a desire to insert herself into a case.<sup>76</sup> This type of impeachment

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<sup>72</sup> See, for example, *United States v Beck*, 625 F3d 410, 418–19 (7th Cir 2010) (holding that the defense should have been able to introduce evidence of a witness’s gang membership to argue that he might be framing the defendants in order to protect other members of the gang).

<sup>73</sup> See, for example, *United States v Manske*, 186 F3d 770, 777–79 (7th Cir 1999) (holding that the defense should have been able to bring out some witnesses’ fear of what another witness “or his associates would do to them if they contradicted him . . . even though the incidents upon which they based that fear arose outside the context of this case”).

<sup>74</sup> *Redmond v Kingston*, 240 F3d 590, 592 (7th Cir 2001).

<sup>75</sup> See, for example, *id.* at 591–92 (“[T]he fact that the girl had led her mother, a nurse, and the police on a wild goose chase for a rapist merely to get her mother’s attention [in a prior case] . . . show[ed] that she had a motive for what would otherwise be an unusual fabrication.”). While *Redmond* was about the extent of permissible cross-examination rather than the admissibility of extrinsic evidence, the court explicitly invoked FRE 608(b) and suggested that the same interpretation would apply. See *id.* at 593. See also, for example, *Kittelson v Dretke*, 426 F3d 306, 322–23 (5th Cir 2005) (holding that evidence of a witness’s prior unsubstantiated sexual assault claims could be used to impeach her testimony in a later case because it showed the witness’s “motive to make up such an accusation in order to gain attention and sympathy”); *Commonwealth v Hicks*, 503 NE2d 969, 973 (Mass App 1987) (“[T]he false accusation against the victim’s own boyfriend would have been a permissible subject of cross-examination to show [her] motive [to lie in the present case].”).

<sup>76</sup> See, for example, *Fuller v State*, 113 S2d 153, 177 (Ala 1959) (discussing the proposed impeachment of a witness by showing that he had previously fabricated being the witness to a crime, because it would show that “he has delusions and hallucinations and

requires identifying a particular motive—or at least a set of possible motives—that is plausibly present in both cases.

The inferential chains for specific and general interest impeachment are schematically identical. Both rely on the witness having a motive to lie in a certain set of cases and the present case falling within that set. It is helpful to think about the two kinds of impeachment separately because of the difference in what the jury must be convinced of. If the motive is an ordinary one shared by almost everyone, the impeaching party needs to convince the jury only that the motive exists in this case. On the other hand, if the motive is more unusual, then the party must convince the jury first that the person has the motive at all, and then that it applies in the specific case.

It is not immediately obvious why extrinsic evidence of prior acts bearing on a witness's bias or interest is admissible, given that such evidence is barred if it bears only on a witness's general character for truthfulness.<sup>77</sup> Confusion of the issues and unfair surprise<sup>78</sup> are equally problematic with evidence of past acts bearing on bias or interest. However, bias and interest are more probative of truthfulness in the present case than is general character.<sup>79</sup> Bias and interest draw on deep-seated human inclinations—to help oneself or people one cares about, and to harm people one dislikes—and can therefore have powerful effects on a witness's testimony. Evidence of bias thus “colors every bit of testimony given by the witness whose motives are bared.”<sup>80</sup> Because it can be so powerful, the costs of extrinsic evidence are often worth paying to hear bias evidence, even though those same costs are never considered worth paying to hear character evidence.

The higher probative value of bias and interest provides a policy justification for excluding those forms of impeachment from

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likes to be identified with investigations of this kind,” but ultimately upholding the exclusion of the evidence, seemingly because the court did not believe it was sufficiently probative).

<sup>77</sup> See Wigmore, 3A *Evidence* § 948 at 783–84 (cited in note 24). See also FRE 608(b).

<sup>78</sup> See text accompanying note 31 (noting that confusion and unfair surprise were the original justifications for the exclusion of extrinsic evidence of specific acts demonstrating a character for untruthfulness).

<sup>79</sup> See *Redmond*, 240 F3d at 593 (valuing evidence of bias over evidence of character, as “very few people, other than the occasional saint, go through life without ever lying, unless they are under oath”). See also Park and Lininger, *The New Wigmore* § 6.1 at 244 (cited in note 36) (“[B]ias is never a collateral issue. In other words, it is always a material topic.”) (citation omitted); William G. Hale, *Bias as Affecting Credibility*, 1 Hastings L J 1, 1 (1949).

<sup>80</sup> *United States v Blackwood*, 456 F2d 526, 530 (2d Cir 1972).

the extrinsic evidence bar, but a doctrinal explanation is still necessary for what distinguishes evidence of motives to lie from evidence of general character. Character evidence—also called “propensity evidence”—is generally banned by FRE 404, and FRE 608 can be seen as an exception to this ban.<sup>81</sup> A propensity argument relies on inferring present behavior from past acts.<sup>82</sup> However, this description is overinclusive for purposes of distinguishing character impeachment from bias and interest: some methods of proving bias and interest also involve inferring present behavior from past acts. For instance, a witness’s bias against a particular ethnic group can be proved by introducing evidence of past times the witness has lied to frame someone from that ethnic group. In a sense, this is propensity evidence: it asks the jury to conclude that the witness is lying to frame someone from the ethnic group now, because the witness has done so in the past.<sup>83</sup> However, extrinsic evidence is admissible to prove that the prior lies happened, notwithstanding FRE 404(b) and 608(b), because the prior lies demonstrate bias.<sup>84</sup>

What distinguishes that type of propensity evidence from evidence of a bad character for truthfulness is the intermediate step in the inferential chain: the motive to lie.<sup>85</sup> Motives are more directly related to a witness’s actions than general character is, because motives provide reasons for actions rather than just vague

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<sup>81</sup> See FRE 404(a)(3) (“Evidence of a witness’s character may be admitted under Rules 607, 608, and 609.”). For a discussion of whether FRE 404 applies to impeachment evidence at all, see note 12 and accompanying text.

<sup>82</sup> See Imwinkelried, 48 Creighton L Rev at 227 (cited in note 10).

<sup>83</sup> See Broun, ed, 1 *McCormick on Evidence* § 39 at 234 n 2 (cited in note 32) (“Partiality may be established by evidence of . . . the witness’s conduct, indicating partiality; in [this] situation, the inference is from the conduct apparently manifesting the feeling to the existence of the feeling itself.”).

<sup>84</sup> The prior lies are relevant to the witness’s character for truthfulness, but because they also go to bias, the extrinsic evidence bar is not triggered. See FRE 608, Advisory Committee Notes to the 2003 Amendment (“The Rule has been amended to clarify that the absolute prohibition on extrinsic evidence applies *only* when the *sole reason* for proffering that evidence is to attack or support the witness’ character for truthfulness.”) (emphases added). For further discussion of evidence that goes to both character for truthfulness and another form of impeachment, see Part IV.B.

<sup>85</sup> See Broadhead, 27 Am J Trial Advoc at 263 (cited in note 57) (“The key purpose of impeachment by a demonstration of bias . . . is to exhibit to the jury the witness’s *motivation* to give testimony that is slanted, false, and not credible or worthy of belief.”). See also *United States v Greenwood*, 796 F2d 49, 54 (4th Cir 1986); Edward J. Imwinkelried, et al, 1 *Courtroom Criminal Evidence* § 713 at 7-56 (Matthew Bender 5th ed 2011) (acknowledging that bias can distort testimony even if the desire to lie is not conscious). The Seventh Circuit has recently reaffirmed that distinguishing propensity evidence from other types of evidence requires carefully examining the inferential chain the jury would be asked to follow. See *United States v Gomez*, 763 F3d 845, 856 (7th Cir 2014) (en banc).

predispositions. Thus, motive evidence is more probative than character evidence for evaluating actions. This explains why extrinsic evidence that asks the jury to conclude that the witness has a propensity to lie is barred by FRE 608(b), but extrinsic evidence that asks the jury to conclude that the witness has a propensity to act in a biased fashion or has a motive to lie falls outside FRE 608(b)'s ban.

## II. CORRUPTION AND CIRCUMVENTION

Two recent developments have complicated the doctrine presented in Part I. The first, which reaches a largely correct result through confused reasoning, is the revival by the DC Court of Appeals of impeachment by what Dean Wigmore called "corruption."<sup>86</sup> The second is a narrowing of the definition of extrinsic evidence by several federal courts. This narrowing has allowed lawyers to circumvent the extrinsic evidence bar by cross-examining witnesses about other people's opinions regarding the witnesses' alleged prior bad acts.<sup>87</sup> This narrowing, despite strong policy justifications, rests on weak analytical footing.<sup>88</sup> However, a similar result can be reached by resurrecting corruption as a type of impeachment exempt from the extrinsic evidence bar.<sup>89</sup>

### A. Corruption

Wigmore identified three types of impeachment that were not subject to the extrinsic evidence bar for prior bad acts: "bias, corruption, and interest."<sup>90</sup> While bias and interest remain a significant part of modern evidence law,<sup>91</sup> corruption has largely been ignored.<sup>92</sup> When the term is still used, its meaning is restricted to extreme self-interest, involving either a bribe or an unusual motive to lie.<sup>93</sup> This restriction makes corruption out to be just a subset of motives to lie. While this classification was part of the sense

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<sup>86</sup> Wigmore, 3A *Evidence* § 957 at 803 (cited in note 24). See also Part II.A.

<sup>87</sup> See Part II.B.

<sup>88</sup> See notes 152–56 and accompanying text.

<sup>89</sup> See Part III.E.

<sup>90</sup> Wigmore, 3A *Evidence* § 943 at 778 (cited in note 24).

<sup>91</sup> See Part I.B.

<sup>92</sup> See, for example, Jack B. Weinstein and Margaret A. Berger, 4 *Weinstein's Federal Evidence* § 608.02[1] at 608-6 (Matthew Bender 2d ed 2015) (making no mention of corruption in a list of methods commonly used to attack a witness's credibility).

<sup>93</sup> See, for example, Broun, ed, 1 *McCormick on Evidence* § 39 at 240–41 (cited in note 32). But see note 110 and accompanying text.

in which corruption was understood,<sup>94</sup> its full historical meaning was broader. Wigmore's understanding of corruption included "[a] willingness to swear falsely," even when that willingness was neither based on a financial motive nor limited to the case at hand.<sup>95</sup> This is corruption in the sense of "impairment of integrity, virtue, or moral principle";<sup>96</sup> someone is corrupt *as a witness* if she fails to be moved by the obligations of the oath because she does not fear the consequences of violating it.<sup>97</sup>

For this understanding of corruption, Wigmore drew on *Anonymous*,<sup>98</sup> an 1833 case from the South Carolina Court of Appeals. There, the court admitted extrinsic evidence to prove that a witness had said, in church, that "if he heard any man say, he would not swear a lie, he would not believe him, for on some particular occasions he would, for he thought any man would."<sup>99</sup> In other words, the witness had indicated that he did not view the oath as completely obligatory. The court acknowledged that this statement would not be provable by extrinsic evidence if it went only to the witness's "general bad character."<sup>100</sup> But, the court went on to argue that proving that someone "believes he is under no legal or moral obligation, at all times and under all circumstances, to tell the truth under the sanction of an oath . . . is not establishing bad character from particular facts."<sup>101</sup> Rather, "[i]t is showing, that the witness holds such opinions of the obligation of an oath, as to render him unworthy of belief."<sup>102</sup>

The *Anonymous* court's theory of impeachment did not turn on the witness having a motive to lie. Rather, the court focused on the witness's "opinions of the obligation of an oath,"<sup>103</sup> something distinct from either theory of impeachment discussed in Part I.B. The facts of *Anonymous* seem quaint to modern eyes, because the case relies so heavily on the moral and religious nature

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<sup>94</sup> See Wigmore, 3A *Evidence* § 961 at 806 (cited in note 24).

<sup>95</sup> *Id.* § 957 at 803.

<sup>96</sup> *Black's Law Dictionary* 422 (West 10th ed 2014). This is the sense in which the Supreme Court used the term when saying that life without parole is an appropriate punishment for only those juveniles "whose crime reflects irreparable corruption." *Miller v Alabama*, 132 S Ct 2455, 2469 (2012), quoting *Roper v Simmons*, 543 US 551, 573 (2005).

<sup>97</sup> See Wigmore, 3A *Evidence* § 957 at 803 (cited in note 24).

<sup>98</sup> 19 SCL (1 Hill) 251 (SC 1833), cited in *Sweet v Gilmore*, 30 SE 395, 398 (SC 1898), and Wigmore, 3A *Evidence* § 957 at 803 (cited in note 24).

<sup>99</sup> *Anonymous*, 19 SCL (1 Hill) at 257 (emphases omitted).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 257–58.

<sup>102</sup> *Id.* at 258.

<sup>103</sup> *Anonymous*, 19 SCL (1 Hill) at 258.



of the oath: the court even emphasizes the fact that the witness made the statement *in church*. The modern understanding of the oath, on the other hand, focuses more on temporal deterrence. This difference is also related to the old, though now abandoned,<sup>104</sup> practice of disqualifying or impeaching witnesses because of their religious beliefs—either atheism or “cacotheism.”<sup>105</sup> When the theological sanction of the oath was considered its primary motivating force, the fact that a witness did not believe in a deity who imposed punishments for perjury would make the witness’s testimony less credible, because such a belief “destroyed the only test by which he can claim credit at the hands of men.”<sup>106</sup> However, despite this change in the understanding of the oath, the court’s distinction between general character for truthfulness and susceptibility to the oath still makes sense. Now that the force of the oath is seen as a matter of temporal punishment rather than divine judgment, susceptibility to the oath should be considered in reference to the threat of punishment actually faced by the witness, rather than her religious beliefs. It is the fact of exposing oneself to the *temporal* penalties for perjury that allows one to “claim credit” from the jury.

That the *Anonymous* theory of impeachment did not gain more prominence may be due, in part, to Wigmore’s confusion about the theory.<sup>107</sup> He classifies it together with theories that imply a bias specific to the case at hand<sup>108</sup> and theories involving a “specific corrupt intention for the case in hand.”<sup>109</sup> The theory in *Anonymous* is far more general: it relates to the witness, not to the facts of the case, and it does not rely on the witness having any particular motive to lie. However, the theory did not die out completely. A series of twentieth-century cases invoked something like

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<sup>104</sup> Lawyers may no longer impeach witnesses based on the witnesses’ religious beliefs. See FRE 610.

<sup>105</sup> See Wigmore, 3A *Evidence* § 936 at 772 (cited in note 24). Cacotheism is the belief in a “religion [that] sanctions false testimony.” See Wigmore, 2 *Evidence* § 518 at 725 (cited in note 67) (emphasis omitted).

<sup>106</sup> *Anonymous*, 19 SCL (1 Hill) at 258.

<sup>107</sup> See Wigmore, 3A *Evidence* § 956 at 802–03 (cited in note 24) (“The theoretical place of this sort of impeachment is not easy to determine. It is related in one aspect to interest, in another to bias, in still another to character (i.e., involving a lack of moral integrity).”).

<sup>108</sup> See *id.* §§ 960–61 at 805–07.

<sup>109</sup> *Id.* § 963 at 810.

the corruption theory in support of allowing complaining witnesses to be impeached with evidence of prior false accusations.<sup>110</sup>

The reasoning of the courts in these cases is not always clear. Only three courts—the Eighth Circuit, the Alaska Court of Appeals, and the Delaware Superior Court—explicitly discussed corruption impeachment. In *Johnson v Brewer*,<sup>111</sup> the Eighth Circuit invoked corruption in the sense that it demonstrates “insensitiv[ity] to the obligations of [one’s] oath,” but as only one of several theories supporting the admissibility of the evidence.<sup>112</sup> In *Morgan v State*,<sup>113</sup> the Alaska Court of Appeals expressed doubts about whether corruption impeachment survived the adoption of evidence codes modeled on the FRE, but it held that admission of corruption evidence, although not given under oath, was required on constitutional grounds because it had “a special relevance—a relevance that removes this evidence from the normal ban on attacking a witness’s general character for honesty through the use of specific instances of dishonesty.”<sup>114</sup> In *State v Bailey*,<sup>115</sup> the Delaware Superior Court cited Wigmore’s discussion of corruption and concluded that “when it has been shown that the witness’s prior charges were false, the fact of their having been made is admissible.”<sup>116</sup> Other courts have also admitted prior false accusations, but without invoking corruption. One court, for instance, mysteriously held that the prior false accusations were

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<sup>110</sup> See *Johnson v Brewer*, 521 F2d 556, 560–61 (8th Cir 1975) (admitting evidence that the government’s informant had previously framed another individual); *Peeples v State*, 681 S2d 236, 238–39 (Ala 1995) (finding error in the trial court’s exclusion of the defendant’s evidence that the complainant had made false sexual assault accusations in the past); *Ex parte Loyd*, 580 S2d 1374, 1375–76 (Ala 1991) (same); *State v Lewis*, 45 SE 521, 521 (NC 1903) (allowing the admission of prior false accusations by the complainant in a theft case); *Morgan v State*, 54 P3d 332, 335–36 (Alaska App 2002) (finding error in the trial court’s refusal to admit prior false accusations by the complainant in a sexual assault case); *State v Taylor*, 580 P2d 785, 786–87 (Ariz App 1978) (noting that prior false accusations made by the complainant of being assaulted while drunk would be admissible, but upholding the exclusion of this evidence on other grounds); *People v Hurlburt*, 333 P2d 82, 87–88 (Cal App 1958) (finding prior false accusations by the complainant in a sexual assault case admissible); *State v Bailey*, 1996 WL 587721, \*4, 6–7 (Del Super) (same).

<sup>111</sup> 521 F2d 556 (8th Cir 1975).

<sup>112</sup> *Id* at 559–62.

<sup>113</sup> 54 P3d 332 (Alaska App 2002).

<sup>114</sup> *Id* at 336. See also Jules Epstein, *True Lies: The Constitutional and Evidentiary Bases for Admitting Prior False Accusation Evidence in Sexual Assault Prosecutions*, 24 *Quinnipiac L Rev* 609, 620–22, 632–37, 652 (2006) (drawing on the historical status of corruption impeachment to argue for a constitutional right to impeach complaining witnesses by using their prior false accusations).

<sup>115</sup> 1996 WL 587721 (Del Super).

<sup>116</sup> *Id* at \*4, 6.

not being used for impeachment at all, but rather “to disprove the very charge before the court.”<sup>117</sup> These cases, with the possible exception of *Johnson*, did not preserve the full breadth of the corruption-impeachment doctrine as it was laid out in *Anonymous* and understood by Wigmore. They do, however, suggest that courts recognize that there is something distinct about prior lies in particularly formal contexts.

In *In the Matter of C.B.N.*,<sup>118</sup> the DC Court of Appeals drew on *Johnson* and invoked the “insensitiv[ity] to the obligations of [the] oath” version of the corruption theory.<sup>119</sup> The court used the theory to reverse the trial court’s exclusion of evidence that a witness had blackmailed third parties by threatening to falsely testify against them if they did not pay him.<sup>120</sup> There was no evidence that the witness had attempted to blackmail the actual defendant—and the defendant would know if he had—so there is no obvious theory of bias or interest.<sup>121</sup> But the court concluded that extrinsic evidence should be admissible because the witness’s “willingness to obstruct the discovery of the truth by manufacturing or suppressing testimony”<sup>122</sup> demonstrated that he “was completely insensitive to the obligations of his oath.”<sup>123</sup>

Starting in 2012, the DC Court of Appeals once again revived the corruption theory of evidence. In *Longus v United States*,<sup>124</sup> the court used the theory to admit extrinsic evidence that the witness, a police officer, had tampered with witnesses in a prior case, allegations for which he was currently under investigation by federal prosecutors.<sup>125</sup> In *Vaughn v United States*,<sup>126</sup> the court noted that a prior false accusation by a corrections officer—accusing an inmate of assault—for which the officer was demoted from lieutenant to sergeant would be provable by extrinsic evidence as evidence

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<sup>117</sup> *Hurlburt*, 333 P2d at 87.

<sup>118</sup> 499 A2d 1215 (DC 1985).

<sup>119</sup> *Id* at 1219, quoting *Johnson*, 521 F3d at 560–61.

<sup>120</sup> *In the Matter of C.B.N.*, 499 A2d at 1217, 1219–20.

<sup>121</sup> *Id* at 1219–20. If the witness had attempted to blackmail the actual defendant, he would have a financial interest in following through on the threat, in order to keep future blackmail threats credible. However, because the witness did not attempt to blackmail the defendant, there did not appear to be any such motive in play. See *id* at 1219 (“We must grant that the proffered statement did not suggest . . . that D.W. testified against appellant for pecuniary reasons.”).

<sup>122</sup> *Id* at 1219, quoting Wigmore, 3A *Evidence* § 956 at 803 (cited in note 24).

<sup>123</sup> *In the Matter of C.B.N.*, 499 A2d at 1219, quoting *Johnson*, 521 F3d at 560.

<sup>124</sup> 52 A3d 836 (DC 2012).

<sup>125</sup> *Id* at 851–53.

<sup>126</sup> 93 A3d 1237 (DC 2014).

of his corruption in a later case.<sup>127</sup> Finally, in *Coates v United States*,<sup>128</sup> the court held that the defendant could introduce extrinsic evidence to prove that the informant in the case had previously fabricated a confession by another individual, a fabrication for which the informant was apparently never punished.<sup>129</sup> *Coates* also established that when the falsity of the witness's prior testimony is disputed, the test of admissibility is relevance: Does the evidence make it more likely than it would otherwise be that the previous testimony was a lie?<sup>130</sup> If so, then the evidence is admissible, subject to balancing probative value against risks such as jury confusion.<sup>131</sup>

Corruption has a long history as a valid theory of impeachment in various courts. However, it also has a long history of having its nature and analytical justifications misunderstood, which has contributed to it not being invoked as frequently as it could be. While courts have continued to recognize corruption's "special relevance,"<sup>132</sup> they have found it difficult to explain why corruption evidence is not simply evidence of character for truthfulness. The latest manifestation of this confusion is the modern practice, since *Johnson*, of treating corruption as a form of bias.<sup>133</sup> The DC Court of Appeals has even coined the phrase "corruption bias."<sup>134</sup> Replacing this misleading categorization with a more accurate one—of corruption as a form of impeachment distinct from, but on a level with, bias—will clarify the contours of the doctrine and justify its resurrection by courts without amending the rules of evidence.<sup>135</sup>

## B. Circumventing the Extrinsic Evidence Bar

The second complication in the extrinsic evidence bar doctrine concerns the definition of "extrinsic evidence." Does it encompass asking a witness, on cross-examination, about a third

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<sup>127</sup> *Id.* at 1243, 1265 n 33. The corruption issue was mentioned only in passing, while the court was addressing a claim brought under *Brady v Maryland*, 373 US 83 (1963).

<sup>128</sup> 113 A3d 564 (DC 2015).

<sup>129</sup> *Id.* at 572–73.

<sup>130</sup> See *id.* at 573–74.

<sup>131</sup> See *id.* at 574–75.

<sup>132</sup> *Morgan*, 54 P3d at 336.

<sup>133</sup> See *Johnson*, 521 F2d at 560–61. See also *Coates*, 113 A3d at 572; *Vaughn*, 93 A3d at 1265 n 33; *Longus*, 52 A3d at 852; *In the Matter of C.B.N.*, 499 A2d at 1219.

<sup>134</sup> See *Longus*, 52 A3d at 853.

<sup>135</sup> See Part III.A.

party's opinion regarding the witness's alleged misconduct? Excluding such questions from the definition of extrinsic evidence, as some courts have done, reaches a result that is sometimes consistent with allowing extrinsic proof of corruption, but on less solid analytical grounds.

Imagine the following exchange on cross-examination:

Counsel: Haven't you falsified overtime claims?

Witness: No.

Counsel: Weren't you disciplined for falsifying overtime claims?

Witness: Yes.<sup>136</sup>

The obvious goal of the second question is to get the jury to interpret the employer's act (disciplining the witness) as a statement that the witness did falsify the claims.<sup>137</sup> Commentators, led by Professor Stephen A. Saltzburg, took the position that this is not only hearsay,<sup>138</sup> but also extrinsic evidence because, even though it is elicited on cross-examination, it smuggles in another individual's assertion about the underlying act.<sup>139</sup> The Third Circuit agreed in *United States v Davis*,<sup>140</sup> and the Advisory Committee on Rules of Evidence endorsed Saltzburg's view in its Notes to the 2003 Amendment.<sup>141</sup>

However, several courts have begun to allow this type of cross-examination in a particular context: when past judicial findings show that the witness's testimony was not credible. Judge Posner, writing for the Seventh Circuit in *United States v Dawson*,<sup>142</sup> was the first to explicitly reject the argument that such questions constitute extrinsic evidence.<sup>143</sup> At the suppression

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<sup>136</sup> A similar hypothetical exchange is discussed in Lilly, Capra, and Saltzburg, *Principles of Evidence* § 9.3 at 323–24 (cited in note 56).

<sup>137</sup> See *id.*

<sup>138</sup> Certain conduct that is intended to imply an assertion is hearsay when introduced for the truth of that assertion. See *id.* § 5.2 at 153.

<sup>139</sup> See Stephen A. Saltzburg, *Impeaching the Witness: Prior "Bad Acts" and Extrinsic Evidence*, 7 *Crim Just* 28, 30–31 (Winter 1993). See also Imwinkelried, 48 *Creighton L Rev* at 216–18 (cited in note 10); Lilly, Capra, and Saltzburg, *Principles of Evidence* § 9.3 at 323–24 (cited in note 56); Broun, ed, 1 *McCormick on Evidence* § 41 at 253 & n 26 (cited in note 32).

<sup>140</sup> 183 F3d 231, 257 n 12 (3d Cir 1999), as amended by 197 F3d 662 (3d Cir 1999).

<sup>141</sup> See FRE 608, Advisory Committee Notes to the 2003 Amendment ("It should be noted that the extrinsic evidence prohibition of Rule 608(b) bars any reference to the consequences that a witness might have suffered as a result of an alleged bad act.").

<sup>142</sup> 434 F3d 956 (7th Cir 2006).

<sup>143</sup> Peter Walkingshaw, Note, *Prior Judicial Findings of Police Perjury: When Hearsay Presented as Character Evidence Might Not Be Such a Bad Thing*, 47 *Colum J L & Soc*

hearing in *Dawson*, the defense wanted to ask the testifying agents about prior hearings in two previous cases in which other judges had disbelieved their testimony.<sup>144</sup> The government argued, relying on the Advisory Committee Notes and the Third Circuit case *Davis*, that asking about the prior finding would introduce extrinsic evidence in violation of FRE 608(b).<sup>145</sup>

Posner's opinion rejected these arguments. It characterized the Advisory Committee Notes to the 2003 Amendment as "post-enactment legislative history," because no changes to the text in the 2003 Amendment bear on the definition of "extrinsic evidence."<sup>146</sup> It then endorsed a bright-line rule: any answer elicited on cross-examination is not extrinsic evidence.<sup>147</sup> The opinion also invoked the probative value of a judicial finding of incredibility as a policy consideration favoring admissibility, as well as the seemingly absurd result of not allowing such inquiries when there is a "pattern of dishonest testimony by the witness."<sup>148</sup> Several courts have followed *Dawson* and allowed judicial findings of incredibility to be asked about on cross-examination,<sup>149</sup> and the Seventh Circuit has continued to apply the *Dawson* rule.<sup>150</sup> Meanwhile, other courts have continued to follow the approach advocated by Saltzburg and adopted by the Advisory Committee on Rules of Evidence.<sup>151</sup>

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Probs 1, 21 (2013), citing *Dawson*, 434 F3d at 956 ("In the 2006 case *United States v. Dawson*, the Seventh Circuit became the first Court of Appeals to reject the extrinsic evidence theory.").

<sup>144</sup> See *Dawson*, 434 F3d at 957.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 958.

<sup>147</sup> See *id.* at 959 (concluding that FRE 608(b) "is a rule about presenting extrinsic evidence, not about asking questions").

<sup>148</sup> *Dawson*, 434 F3d at 958–59 (noting that "[i]t would be within the district judge's discretion" to forbid asking about the judicial finding if it was an isolated incident or otherwise of low probative value, even though the question would not be covered by the extrinsic evidence bar). See also Imwinkelried, 48 Creighton L Rev at 229 (cited in note 10) (arguing that the justification for *Dawson*'s result is the high probative value of the judicial determinations).

<sup>149</sup> See, for example, *United States v. Woodard*, 699 F3d 1188, 1195 (10th Cir 2012); *United States v. Cedeño*, 644 F3d 79, 82–83 (2d Cir 2011); *King v University Healthcare System, LC*, 2009 WL 2222700, \*1–2 (ED La); *People v Eldridge*, 2015 WL 3766750, \*1–2 (Mich App). See also *United States v. Edwards*, 2012 WL 1119875, \*5 & n 3 (MD NC) (expressing tentative agreement with *Dawson*).

<sup>150</sup> See, for example, *United States v. Dvorkin*, 799 F3d 867, 883 (7th Cir 2015); *United States v. Holt*, 486 F3d 997, 1001–02 (7th Cir 2007).

<sup>151</sup> See, for example, *United States v. Whitmore*, 384 F3d 836, 836–37 (DC Cir 2004), denying petition for rehearing en banc (per curiam); *Harnsberger v Sugule*, 2014 WL 6675149, \*1–2 (D Kan); *United States v. Mock*, 2013 WL 2318895, \*1–2 (MD Ala); *Ashford v Bartz*, 2009 WL 2356666, \*3 (MD Pa); *Thompson v Mancuso*, 2009 WL 2616713, \*8–9

*Dawson* is unconvincing for three reasons. First, it creates a *preference* for hearsay evidence, even though hearsay is generally disfavored under the FRE.<sup>152</sup> Assuming a party properly objects and raises the hearsay issue, *Dawson* evidence will therefore be allowed *only* when it can be brought within a hearsay exception.<sup>153</sup> Second, allowing a lawyer to introduce the views of third parties implicates the minitrial concern just as much as if those third parties were called to testify themselves. The party who called the witness must still find a way to counter the third party's implied assertion about the misconduct. FRE 608(b)(2) makes clear that the minitrial concern is not just about the number of witnesses: it allows only those witnesses who are called to rehabilitate a witness's character to be cross-examined about the prior bad acts of the primary witness.<sup>154</sup> On *Dawson*'s logic, FRE 608(b)(2)'s exception should be extended to any witness who has been called for any purpose. Third, the *Dawson* approach is at odds with the consistent description of the extrinsic evidence bar as a rule that the lawyer must accept the answer given by the witness.<sup>155</sup> *Dawson* allows a lawyer to contradict a witness's claim to have not lied in the prior case by introducing the prior finding of incredibility through the witness. While the lawyer must at some point accept the witness's answer if the witness denies even the fact of the judicial finding, the lawyer is *not* required to accept the witness's answer about the underlying misconduct, which is what the extrinsic evidence bar requires.

The latter two issues—that *Dawson* evidence implicates minitrial concerns and allows an attorney to challenge a witness's

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(ED Pa); *Harris v Clark*, 2009 WL 2408724, \*2 (ED Wis); *Molina v City of Oxnard*, 2003 WL 25667613, \*4 (CD Cal); *Weaver v McKnight*, 97 A3d 920, 943–45 & n 8 (Conn 2014).

<sup>152</sup> See FRE 801–02.

<sup>153</sup> See *United States v Jeanpierre*, 636 F3d 416, 423 (8th Cir 2011) (noting that the type of evidence at issue in *Dawson* is often classified by appellate courts as hearsay); *Holt*, 486 F3d at 1002 (affirming the exclusion of *Dawson* evidence as hearsay). See also *Woodard*, 699 F3d at 1196 n 5 (noting that the hearsay issue was not raised by the parties). But see *Rosales v Kelly*, 2011 WL 5873374, \*1–2 (SDNY) (characterizing, somewhat mysteriously, the fact and grounds of a reprimand as nonhearsay, but finding in the alternative that the evidence fell within the hearsay exception for public records containing the results of an investigation in civil cases or against the government in criminal cases).

<sup>154</sup> See FRE 608(b)(2).

<sup>155</sup> See, for example, Broun, ed, 1 *McCormick on Evidence* § 41 at 253 & n 26 (cited in note 32); Wigmore, 3A *Evidence* § 981 at 838 (cited in note 24). See also United States' Omnibus Motion in *Limine*, *United States v Branscum*, Case No 4:14-CR-00218, \*14–15 (ED Ark filed Feb 22, 2016) (available on Westlaw at 2016 WL 944963) (arguing that the sort of evidence allowed under *Dawson* should be precluded because it violates the rule that the cross-examiners “are stuck with the answers they receive”).

answer about the prior misconduct—highlight the weak analytical footing of *Dawson*: it rests on an arbitrary definition of extrinsic evidence that is disconnected from the actual reasons for the extrinsic evidence bar. *Dawson*'s strange preference for hearsay evidence is the result of this analytical weakness. In addition, the Advisory Committee Notes deserve more deference than *Dawson* gives them. While the Amendment did not change the language directly related to what counts as extrinsic evidence, the Amendment was meant to “conform[ ] the language of the Rule to its original intent.”<sup>156</sup> The Advisory Committee's endorsement of Saltzburg's approach is not just a postenactment statement by some of the people involved in passing the Rule; it is an official statement of the drafting body about its understanding of the Rule at a time when it was proposing amendments. Even Professor Edward J. Imwinkelried, who is sympathetic to *Dawson* and thinks that judicial findings of incredibility should be admissible to impeach witnesses, acknowledges that the opinion is hard to justify as an interpretation of FRE 608(b).<sup>157</sup> However, *Dawson*'s result can be reached, and the split it has engendered resolved, by treating judicial findings as corruption evidence rather than character evidence.<sup>158</sup>

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<sup>156</sup> FRE 608, Advisory Committee Notes to the 2003 Amendment.

<sup>157</sup> See Imwinkelried, 48 Creighton L Rev at 229 (cited in note 10). See also *id* at 242 (noting that the *Dawson* rule is an instance of courts “significantly deviat[ing] from a plain meaning construction” of Rule 608(b) and arguing that this “indicates that a large number of courts have serious misgivings about the wisdom of 608(b)'s complete ban”). Imwinkelried suggests an amendment to FRE 608(b) to allow judicial discretion in admitting extrinsic evidence of untruthful acts. See *id* at 240–42. A recently published debate between Imwinkelried and Professor Paul Rothstein also considers this point. Rothstein argues that when a witness admits to the adverse finding on cross-examination no extrinsic evidence has been admitted, because “no other evidence than the question-and-answer” has been admitted, and because the witness has in essence “admit[ted] the truth of what is [claimed]” by the prior finding. Rothstein and Imwinkelried, 49 Creighton L Rev at 127, 129–30 (cited in note 59) (emphasis omitted). Imwinkelried responds that such evidence is inadmissible “because of the interplay between the hearsay rule and Rule 608(b)'s prohibition of extrinsic evidence,” as establishing a hearsay exception will require relying on truly extrinsic evidence. *Id* at 140. However, Rothstein's argument is subject to a more direct attack: when a witness admits that a judge previously found the witness incredible, the witness is not thereby admitting that the judge was *correct*. The finding has impeachment value only to the extent the jury believes the judge's assertion. The judge's assertion is an out-of-court statement introduced for the truth of the matter asserted, and is therefore hearsay. The prior finding is, therefore, extrinsic to the witness's testimony. For another argument in favor of *Dawson*, see Walkingshaw, Note, 47 Colum J L & Soc Probs at 27 (cited in note 143) (characterizing Saltzburg's interpretation of Rule 608(b) as “a counterintuitive reading of the text” that “take[s] a simple directive and needlessly complicate[s] it,” and arguing that the *Dawson* line of cases is an “encouraging” trend).

<sup>158</sup> See Part III.E.



### III. RESURRECTING CORRUPTION EVIDENCE

The DC Court of Appeals' resurrection of corruption evidence should be extended, in a modified form, to other courts that follow the traditional extrinsic evidence bar. Parties should be allowed to impeach witnesses with extrinsic evidence that the witness has committed perjury in the past for which the witness was less than fully punished. This proposal is more modest than suggestions to amend the FRE to eliminate or soften the extrinsic evidence bar,<sup>159</sup> because it can be adopted by courts as an interpretation of the existing Rules. There are analytical<sup>160</sup> and policy<sup>161</sup> arguments for adopting the rule put forward by the DC Court of Appeals, although corruption should be understood as distinct from bias.

#### A. Corruption Is Not Bias or Motive to Lie

While modern courts that have admitted corruption evidence have drawn on a common-law tradition, their innovation—starting in *Johnson*—was to classify corruption evidence as a “form[ ] of bias.”<sup>162</sup> This formulation makes the corruption theory difficult to understand: Who is the witness biased toward or against?

It is possible that a witness who has lied under oath in the past is biased against the court, a bias she has demonstrated by disregarding her obligation to tell the truth. But that interpretation would ascribe an implausible mental state to such witnesses. It is unlikely that a significant number of people are motivated to lie *because* they are in court. Such a motivation is possible, of course—someone who does not recognize the legitimacy of a court might feel motivated to actively obstruct it, rather than simply feeling less of an obligation to assist it. But such motivations are likely to be far rarer than the corruption theory envisions. And while corruption will often involve a relationship between the witness and the government—a relationship that explains why the witness was not prosecuted for perjury—the relationship creates a motive for the government to abstain from perjury charges, rather than a motive for the witness to lie on the stand.

Corruption evidence is also similar to prior false accusation evidence at first glance, so it might involve a similar motive to

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<sup>159</sup> See, for example, Imwinkelried, 48 Creighton L Rev at 240–42 (cited in note 10).

<sup>160</sup> See Parts III.A–B.

<sup>161</sup> See Parts III.C–E.

<sup>162</sup> *Johnson*, 521 F2d at 563. See also *Longus*, 52 A3d at 853 (referring to “corruption bias impeachment”).

lie.<sup>163</sup> However, the motive inference that turns prior false accusations into evidence of interest rests on similarities between the two situations, such that the same motive could be present in both. Corruption evidence, on the other hand, does not require any such similarity, because it concerns only whether the witness is sensitive to the obligations of the oath.

The inclination of courts to fit corruption into the “bias” box is understandable. They are drawing on a history of confusion about the precise nature of corruption evidence,<sup>164</sup> and bias is a familiar category. But miscategorizing corruption as a form of bias confuses the doctrine further, because it obscures what separates corruption from general bad character, and therefore makes it more difficult to define the boundaries of corruption.

#### B. Corruption Is Not Bad Character for Truthfulness

While the Eighth Circuit and DC Court of Appeals are incorrect to treat corruption as a species of bias or interest, they are correct to distinguish corruption from evidence of a witness’s character for truthfulness. Corruption is properly understood as a theory of evidence distinct from, but on par with, bias evidence—that is, it presents the jury with an inference other than the witness’s bad character for truthfulness. Corruption evidence allows the jury to infer that, while the oath or affirmation appears to be a strong motive to tell the truth, this witness may not be sufficiently moved by it.

The oath<sup>165</sup> is the cornerstone of testimonial evidence.<sup>166</sup> Together with the other formalities of live, in-court testimony—such as face-to-face confrontation and cross-examination—the oath provides a powerful motive for truth-telling.<sup>167</sup> While the moral

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<sup>163</sup> For a discussion of false accusation evidence, see notes 74–75 and accompanying text.

<sup>164</sup> See Wigmore, 3A *Evidence* § 956 at 802–03 (cited in note 24) (“The theoretical place of this sort of impeachment is not easy to determine. It is related in one aspect to interest, in another to bias, in still another to character (i.e., involving a lack of moral integrity).”).

<sup>165</sup> “Oath” is used here as a general term for both oaths and affirmations.

<sup>166</sup> See *United States v Dunnigan*, 507 US 87, 97 (1993) (“All testimony, from third-party witnesses and the accused, has greater value because of the witness’ oath and the obligations or penalties attendant to it.”).

<sup>167</sup> See FRE 603 (“Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness’s conscience.”). See also *Redmond v Kingston*, 240 F3d 590, 593 (7th Cir 2001) (“[V]ery few people, other than the occasional saint, go through life without ever lying, unless they are under oath.”); *United States v Grayson*, 438 US 41, 54 (1978) (rejecting the idea that “the

and religious obligations of the oath used to provide its primary motivating effect,<sup>168</sup> society also attaches serious criminal penalties to perjury.<sup>169</sup> The oath ceremony is public, conducted in the jury's view, and usually explicitly mentions the penalties attached to the oath.<sup>170</sup> The jury can be expected to conclude that even though lying is not an uncommon human act, it will be much less common in court.

Corruption impeachment counteracts that inference: it demonstrates that the formalities and penalties that motivate others to tell the truth do not have that effect—or not the same degree of effect—on the witness.<sup>171</sup> Proof that a witness has committed perjury in the past for which she was not punished shows that the witness has little to fear from lying under oath again. Unlike bias evidence, corruption does not show that the witness has a specific motive to lie in this case. Instead, it shows that a specific motive to tell the truth—the oath and attendant penalties—is absent, or at least weakened.<sup>172</sup>

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oath is mere ritual without meaning”); Francis Wayland, *The Elements of Moral Science* 317–22 (Cooke 2d ed 1835) (explaining the theories that underlie oath-giving requirements).

<sup>168</sup> See John Henry Wigmore, 6 *Evidence in Trials at Common Law* § 1831 at 432 (Little, Brown 1976) (James H. Chadbourn, ed) (“The two expedients of the oath and the perjury penalty are similar in their operation; that is, they influence the witness subjectively against conscious falsification, the one by reminding him of ultimate punishment by a supernatural power, the other by reminding him of speedy punishment by a temporal power.”).

<sup>169</sup> See, for example, 18 USC § 1621 (providing that persons found guilty of perjury may be imprisoned up to five years, fined, or both).

<sup>170</sup> See, for example, Brendan Koerner, *Where Did We Get Our Oath? The Origin of the Truth, the Whole Truth, and Nothing but the Truth* (Slate, Apr 30, 2004), archived at <http://perma.cc/5T5S-EPHF> (quoting “[a] typical affirmation used in U.S. District Courts” as follows: “You do affirm that all the testimony you are about to give in the case now before the court will be the truth, the whole truth, and nothing but the truth; this you do affirm under the pains and penalties of perjury?”).

<sup>171</sup> See Epstein, 24 *Quinnipiac L Rev* at 652 (cited in note 114) (“[A] witness’s willingness to falsely accuse someone, thereby engaging the legal system, is confirmatory of a disregard for that system’s requirement of truthful testimony and a willingness to abuse that same system.”).

<sup>172</sup> Courts have recognized the danger of unjustified credibility judgments in other contexts, particularly when dealing with purported expert testimony that is not scientifically reliable. See *United States v Foshier*, 590 F2d 381, 383 (1st Cir 1979) (noting the “substantial danger of undue prejudice and confusion because of [the proffered expert testimony’s] aura of special reliability and trustworthiness”). Corruption evidence counters the similar “aura of special reliability and trustworthiness” that derives from the fact that a witness is testifying under oath. See also *United States v Solomon*, 753 F2d 1522, 1526 (9th Cir 1985) (concluding that “[t]he prejudicial effect of an aura of scientific respectability outweighed the slight probative value” of certain expert testimony). Both *Foshier* and *Solomon* predate the current standard for the admission of scientific evidence under

The facts of *Longus* help illuminate the proper corruption inference, and demonstrate how it is somewhat narrower than the language employed by the DC Court of Appeals suggests. In *Longus*, the corruption impeachment was based on witness tampering for which the officer was under investigation at the time of the trial.<sup>173</sup> The defense presented two impeachment arguments: first, that the officer had a motive to curry favor with the government—a bias—in order to avoid substantial punishment for the witness coaching;<sup>174</sup> second, that the witness coaching demonstrated the officer's corruption.<sup>175</sup> The court held that the defense should be able to make both arguments, and also that the potential punishment the officer was facing was relevant to the officer's motive to curry favor.<sup>176</sup>

However, the court did not acknowledge that the potential punishment is relevant to the corruption argument as well. If the officer had been punished for his manipulation of sworn testimony, then the corruption argument—that the normal motives to not obstruct truthful testimony are absent—would be substantially weakened. Instead, given the uncertainty of the sanctions the officer would ultimately be subjected to, the currying favor and corruption arguments should have operated in the alternative. The officer faced one of two possible outcomes, assuming the prior act actually occurred. First, there could be a substantial threat of serious punishment for the prior act, in which case he has a strong motive to curry favor but no less than the normal motive to tell the truth under oath. Second, the investigation could pose no serious risk to the officer, in which case he does not have much of a motive to curry favor, but he also has little to fear from committing perjury in the present case. The corruption theory thus adds to the impeachment from the currying favor theory, but the two are not as independent as the *Longus* court suggested they are.

The inference that corruption evidence suggests to the jury does not involve the witness's general character for truthfulness.

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*Daubert v Merrell Dow Pharmaceuticals*, 509 US 579 (1994), but their reasoning still illuminates the problem of evidence that the jury will accord special weight to.

<sup>173</sup> See *Longus*, 52 A3d at 851. For a discussion of witness tampering and obstruction of justice, rather than perjury, as corruption evidence, see notes 222–23 and accompanying text.

<sup>174</sup> See *Longus*, 52 A3d at 851.

<sup>175</sup> See *id.* at 852.

<sup>176</sup> See *id.* at 851–54.

General character evidence asks the jury to conclude that the witness is a liar, and that the witness is therefore likely to act upon her propensity to lie in the present case.<sup>177</sup> Corruption evidence, on the other hand, asks the jury to discount the special credit it would otherwise give to the witness on account of the witness testifying under oath. It does not rely on showing that the witness is, in general, a liar, only that the witness does not feel obligated by the oath to tell the truth because the witness does not need to fear the normal consequences of perjury. The prior lie for which the witness did not suffer consequences is evidence of that lack of fear—normally caused by a relationship between the witness and the government—that eliminates or reduces the traditional incentives to tell the truth under oath. While corruption evidence will also necessarily be evidence of the witness's bad character for truthfulness, the two inferences are distinct.<sup>178</sup> Because corruption evidence is distinct from evidence of the witness's general character for truthfulness, it falls outside the bright-line rule established by FRE 608(b) to bar extrinsic evidence of prior acts.<sup>179</sup>

### C. Admitting Extrinsic Evidence of Corruption

As discussed, the justification for exempting bias and motive-to-lie evidence from the extrinsic evidence bar is the higher probative value of such evidence relative to character evidence.<sup>180</sup> This justification also applies to corruption evidence. Corruption evidence counteracts the inference of trustworthiness that the jury draws from watching the witness take the oath by demonstrating that this witness, because of her particular circumstances, does not face the same consequences from committing perjury.<sup>181</sup> This evidence sets the witness apart from the great majority of

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<sup>177</sup> See Part I.A. See also Imwinkelried, et al, 1 *Courtroom Criminal Evidence* § 707 at 7-15 (cited in note 85).

<sup>178</sup> See Part IV.A. Similarly, bias evidence is often also relevant to character for truthfulness, but that does not render it inadmissible. See *United States v Abel*, 469 US 45, 56 (1984) (“It would be a strange rule of law which held that relevant, competent evidence which tended to show bias on the part of a witness was nonetheless inadmissible because it also tended to show that the witness was a liar.”). This rule makes sense because the main justification for limiting the admissibility of character evidence is its limited probative value. The fact that something proves bias—or corruption—in addition to character makes it more probative.

<sup>179</sup> See FRE 608, Advisory Committee Notes to the 2003 Amendment (“[T]he absolute prohibition on extrinsic evidence applies *only* when the *sole reason* for proffering that evidence is to attack or support the witness' character for truthfulness.”) (emphases added).

<sup>180</sup> See notes 79–80 and accompanying text.

<sup>181</sup> See notes 165–70 and accompanying text.

other witnesses, and it is therefore highly probative for the jury's evaluation of whether the witness is telling the truth. Because the jury is allowed to infer credibility from the oath, they should be allowed to hear evidence that would counteract that inference.<sup>182</sup>

An additional reason to admit extrinsic evidence in these circumstances is that witnesses are particularly unlikely to admit to uncharged perjury on cross-examination, because—if the allegation is true—they have already gotten away with perjury once.<sup>183</sup> Evidence of uncharged perjury is also more probative because, while everyone can be expected to be untruthful sometimes, jurors expect a much higher degree of truthfulness from witnesses who are under oath.<sup>184</sup> Deviations from the norm of truthfulness under oath are therefore more probative on average than other instances of untruthfulness. Evidence that undermines the central pillar of the system's trust in witnesses' veracity has, and should have, a substantial effect on the jury's evaluation of a witness.

#### D. Addressing Systemic Issues in the Criminal Justice System

In addition to the policy considerations addressed in the previous Section, which are relevant to both corruption evidence and bias evidence, there are additional policy justifications that relate specifically to corruption evidence in the criminal justice system. There are two types of common repeat witnesses in criminal cases: police officers and government informants.<sup>185</sup> Perjury by

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<sup>182</sup> This is parallel to the argument for allowing facts *contradicting* a claimed bias to be proved by extrinsic evidence. See John Henry Wigmore, 4 *Evidence in Trials at Common Law* § 1119 at 253 (Little, Brown 1972) (James H. Chadbourn, ed) (“A denial of the fact of bias or the like, by other testimony, is always allowable; for any testimony of the opponent admissible to prove a discrediting fact must of course in fairness be allowed to be met by testimony denying the alleged fact.”).

<sup>183</sup> See text accompanying note 198.

<sup>184</sup> See *Redmond*, 240 F3d at 593.

<sup>185</sup> See Emily Jane Dodds, Note, *I'll Make You a Deal: How Repeat Informants Are Corrupting the Criminal Justice System and What to Do about It*, 50 Wm & Mary L Rev 1063, 1073–79 (2008) (characterizing “repeat player[ ]” informants as a substantial problem, but noting that data on how many informants are repeat players are difficult to come by). See also Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U Cin L Rev 645, 654–57 (2004) (discussing the prevalence of cooperating witnesses in the criminal justice system generally); Gabriel J. Chin and Scott C. Wells, *The “Blue Wall of Silence” as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U Pitt L Rev 233, 245 (1998) (“Police are professional witnesses.”).

both police officers<sup>186</sup> and informants<sup>187</sup> is a serious problem, as many commentators and participants in the criminal justice system have recognized. Moreover, jurors likely give too much weight to testimony by both police officers and informants.<sup>188</sup> FRE 609's procedure for impeaching witnesses with prior convictions, including convictions for perjury, is inadequate when applied to police officers and informants who have little reason to fear a perjury prosecution.<sup>189</sup>

Corruption impeachment would discourage perjury by such witnesses. Committing perjury would risk the witness's credibility not only in the present case, but also in any future case in which corruption evidence is admissible. A witness who is caught in a lie loses future value as a government witness. Corruption evidence therefore harnesses the motivation of defense lawyers to discover and document instances of police perjury, and the leverage that prosecutors can exert over police and government informants, to discourage an invidious and endemic form of perjury.<sup>190</sup>

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<sup>186</sup> See Radley Balko, *How Do We Fix the Police 'Testilying' Problem?* (Wash Post, Apr 16, 2014), archived at <http://perma.cc/83MD-S229> (describing the various ways in which the rules of criminal procedure encourage police to commit perjury to secure a conviction, and the difficulties inherent in trying to fix these incentives); Randy E. Barnett, *The Harmful Side Effects of Drug Prohibition*, 2009 Utah L Rev 11, 28, quoting Arthur D. Hellman, *Laws against Marijuana: The Price We Pay* 105 (Illinois 1975) ("There is substantial evidence to suggest that police often lie in order to bring their conduct within the limits of the practices sanctioned by judicial decisions."); Chin and Wells, 59 U Pitt L Rev at 245–56 (cited in note 185) (discussing the problems created by police perjury, and noting that even though "police officers may not be inherently more likely to commit perjury than civilian witnesses . . . they testify in cases where liberty or even life is routinely at stake" and thus "police perjury is more likely to lead to serious injustice—imprisonment or even execution of an innocent person").

<sup>187</sup> See Russell D. Covey, *Abolishing Jailhouse Snitch Testimony*, 49 Wake Forest L Rev 1375, 1376–90 (2014) (arguing that "no evidence is more intrinsically untrustworthy than the allegations of a jailhouse snitch"); Myrna S. Raeder, *See No Evil: Wrongful Convictions and the Prosecutorial Ethics of Offering Testimony by Jailhouse Informants and Dishonest Experts*, 76 Fordham L Rev 1413, 1419 (2007) ("The incentives for jailhouse informants to lie are so great, and the consequences so minimal, that prosecutorial reliance on this category of cooperating witnesses is always ethically challenging."); Natapoff, 73 U Cin L Rev at 663–64 (cited in note 185) (noting the "infamous unreliability" of informants).

<sup>188</sup> For the special weight given to police testimony, see Benjamin J. Branson, Note, *"Good Cop, Bad Cop?" Anyone's Guess: A Review of the Pitchess Motion for Criminal Discovery in the State of California*, 31 Whittier L Rev 279, 314 (2009); Chin and Wells, 59 U Pitt L Rev at 261–62 (cited in note 185). For jurors' inability to sufficiently discount informant testimony, see Covey, 49 Wake Forest L Rev at 1390–96 (cited in note 187).

<sup>189</sup> See Part IV.E.

<sup>190</sup> See Joanna C. Schwartz, *Who Can Police the Police?*, 2016 U Chi Legal F \*3, 18–20, 22–24 (forthcoming) (arguing that of the three qualities required of a successful police reformer—leverage, motivation, and resources—criminal defendants and their attorneys

Allowing corruption impeachment would also create incentives for the government to avoid relying solely on the testimony of witnesses who have previously lied in court to build their case. Instead, the government might put more effort into finding objective evidence to corroborate the witness's testimony. Finally, admitting corruption evidence may actually give prosecutors more of an incentive to punish government witnesses who are caught committing perjury.<sup>191</sup> Because the corruption inference relies on the lack of a threat of consequences, the government will be able to point to any punishment it does impose as a way to counter the impeachment argument. If a government witness has been convicted of perjury, that conviction will be admissible under FRE 609 even without the corruption inference. Accepting the corruption theory of impeachment will therefore help moderate the perverse incentive to avoid charging government witnesses with perjury in order to preserve their credibility in future cases.

#### E. Vindicating *Dawson* without Circumventing the Extrinsic Evidence Bar

As discussed, *Dawson* and the courts that follow it define extrinsic evidence to not include any answers elicited on cross-examination, even questions that call for the witness to state the views of a third party about whether the prior conduct occurred.<sup>192</sup> This definition is unconvincing,<sup>193</sup> but the policy arguments in favor of admitting prior judicial findings that a witness has lied on the stand are compelling.<sup>194</sup>

The three concerns with *Dawson*—its preference for hearsay, its endorsement of minitrials over issues bearing only on a witness's character for truthfulness, and its refusal to require attorneys to be stuck with the witness's answer about the prior act—do not apply to corruption impeachment. Because corruption impeachment allows the introduction of extrinsic evidence, it does not depend on hearsay evidence in the way that *Dawson* does. The

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have greater motivation but less leverage and fewer resources, while prosecutors have greater leverage and more resources but less motivation).

<sup>191</sup> On the other hand, the government will have somewhat less of an incentive to investigate possible instances of perjury by police and informants, because such investigations will have to be disclosed and could be used against the government as corruption impeachment.

<sup>192</sup> See Part II.B.

<sup>193</sup> See text accompanying notes 152–55.

<sup>194</sup> See note 148 and accompanying text.



other two issues with *Dawson* are questions of doctrine, not policy. Having minitrials and not being stuck with the witness's answer are not necessarily bad things when there is a prior judicial finding that the witness was not credible. However, they are core characteristics of extrinsic evidence, while *Dawson* purports to not involve extrinsic evidence. *Dawson* adopts an implausible definition of extrinsic evidence to circumvent the extrinsic evidence bar, rather than explaining why the extrinsic evidence bar does not apply. This muddies the doctrine and obscures the real justifications for admitting the evidence.

The corruption theory eliminates the need to circumvent the extrinsic evidence bar. Judicial findings that a witness lied in a prior case go directly to the witness's corruption (assuming that the witness was not punished for that perjury), and so can be proved by extrinsic evidence. The corruption theory will not necessarily justify admission of evidence of past lies in every case in which *Dawson* would allow a lawyer to ask about prior judicial findings on cross-examination, either because such questions will still be inadmissible hearsay or because opening the door to more extrinsic evidence than just the questions on cross-examination will increase the costs of the minitrial in terms of delay or juror confusion. But the corruption theory emphasizes the relevant factors—how probative the evidence is, how time consuming it will be to adequately explore, how confusing it will be for the jury, and whether the witness was punished for the prior perjury—rather than relying on an unnatural definition of extrinsic evidence that privileges hearsay over nonhearsay. While *Dawson* arbitrarily excludes certain evidence from the definition of extrinsic evidence, the corruption theory straightforwardly admits extrinsic evidence in specific circumstances and focuses on doing so in an efficient and effective manner. Recognizing corruption impeachment will also allow the party who initially called the witness to put on extrinsic evidence to rebut the suggestion that there was prior perjury, which would not be allowed under *Dawson*. The corruption theory thus enables courts to vindicate the policy concerns of *Dawson* in a way that is consistent with the text and history of FRE 608(b).

#### IV. RESPONSE TO OBJECTIONS

Corruption evidence is analytically distinct from evidence of a witness's general character for truthfulness, thus falling outside

FRE 608(b), and there are strong policy reasons to treat corruption evidence like bias evidence for purposes of the extrinsic evidence rule. But there are reasons why courts might be hesitant to recognize corruption as a valid form of impeachment. Corruption impeachment might seem to involve a forbidden propensity inference under FRE 404(b); it might seem to demand that lay jurors carefully distinguish two very closely related inferences; it might seem to risk overwhelming courts with frequent difficult balancing tasks under FRE 403; it might seem redundant because corruption evidence will sometimes be admissible for bias or interest impeachment; and it might seem to be unnecessary given that perjury convictions are admissible to impeach a witness under FRE 609. However, each of these objections can be overcome.

A. Corruption Impeachment Is Not FRE 404(b) Propensity Evidence

Courts are divided over whether impeachment evidence that relies on prior acts is governed by FRE 404(b).<sup>195</sup> Even in a court that does apply FRE 404(b)'s prohibition on propensity evidence to impeachment evidence, however, corruption impeachment would not be barred. The forbidden propensity inference involves proving "a person's character in order to show that on a particular occasion the person acted in accordance with the character."<sup>196</sup> Corruption impeachment, however, does not rely on this inference. Instead, it involves proving something about the witness's *situation* that has implications for the witness's motive to tell the truth: because of the witness's relationship to the government, she does not need to fear the consequences of perjury in the same way that other witnesses do.

Evidence that a witness committed perjury in the past and was not punished for it is relevant to her situation in two ways. First, it is evidence about how the government would respond if she committed perjury again; if it did not punish her the last time,

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<sup>195</sup> Compare *United States v Watson*, 766 F3d 1219, 1245–46 (10th Cir 2014) (holding that impeachment evidence that relies on prior acts is outside the scope of FRE 404(b)), and *United States v Schwab*, 886 F2d 509, 511 (2d Cir 1989) (same), with *United States v Bradley*, 644 F3d 1213, 1273 (11th Cir 2011) (holding that FRE 404(b) applies to evidence of prior bad acts used for impeachment purposes), *Pounds v Board of Trustees*, 2000 WL 655936, \*4 (4th Cir) (same), and *United States v Stockton*, 788 F2d 210, 219 n 15 (4th Cir 1986) (noting that impeachment qualifies as a genuine "other purpose" under FRE 404(b)). See also note 12 and accompanying text.

<sup>196</sup> FRE 404(b)(1).

there is reason to think it will not punish her this time.<sup>197</sup> Second, and more importantly, it is evidence of how the witness likely perceives the risk of punishment. Because the ultimate question is the witness's motivation to tell the truth, her subjective evaluation of the consequences of lying is crucial. Evidence of a general pattern of officers and informants not being punished for perjury and related misconduct is relevant to the objective probability that this witness would be punished. However, the witness's own experiences are likely to be the most salient subjective factor. A witness who "has lied in the past and gotten away with it before . . . may be emboldened to lie again."<sup>198</sup> This is a "propensity-free chain of reasoning,"<sup>199</sup> even though it draws on a prior lie to infer something about the probability of a future lie. The prior lie is being used to prove a noncharacter fact about the witness, which in turn is relevant to whether the witness will lie under oath again.

The distinction between character and situation is supported by interactionism, the current psychological understanding of how individuals behave.<sup>200</sup> Interactionism holds that behavior is primarily dictated not by either character traits or situations, but instead by the interaction between traits and situations.<sup>201</sup> Most importantly, "[i]nteractionists have abandoned the notion of situation-free trait descriptions. Rather, they insist that a situational component must be factored into, included in, or incorporated into the very conception of a disposition or character trait."<sup>202</sup> Corruption impeachment does not rely on the discredited idea of a "situation-free trait." Instead, it identifies an aspect of the witness's situation that will interact with the witness's character to affect truthfulness. If the witness's situation has changed substantially since the prior unpunished perjury—if, for instance, an individual committed perjury while she was a government informant, but she is no longer in that role—the probative value of the corruption impeachment is correspondingly reduced or eliminated.

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<sup>197</sup> This could be seen as an inference about the government's propensity for punishing its own officers or informants. However, FRE 404(b) does not bar evidence that goes to the "propensity" of an organization rather than an individual.

<sup>198</sup> Imwinkelried, 48 Creighton L Rev at 239 (cited in note 10).

<sup>199</sup> *United States v Gomez*, 763 F3d 845, 856 (7th Cir 2014) (en banc).

<sup>200</sup> See Edward J. Imwinkelried, *Reshaping the "Grotesque" Doctrine of Character Evidence: The Reform Implications of the Most Recent Psychological Research*, 36 Sw U L Rev 741, 751–55 (2008).

<sup>201</sup> See id at 751–52.

<sup>202</sup> Id at 758 (citations omitted).

## B. Jurors Need Not Sharply Distinguish Corruption and Character

The distinction between corruption and bad character for truthfulness is subtle, and while corruption is a noncharacter inference, corruption evidence will always also be evidence of a bad character for truthfulness. Jurors could be instructed on the distinction and told to consider the evidence only as it applies to the witness's motive to tell the truth because of the threatened sanctions, but they might find that rule difficult to apply.<sup>203</sup> However, their failure to do so is not problematic as long as FRE 608(b) exists. FRE 608(b) allows evidence of prior bad acts relevant to a witness's character for truthfulness to be admitted through cross-examination. This reflects the judgment that juries will be able to appropriately evaluate and weigh such evidence. The extrinsic evidence bar is meant to prevent minitrials over low-value evidence, not to prevent juries from considering evidence because of a risk they will overvalue it.<sup>204</sup> This aspect of FRE 608(b) is fundamentally different from the treatment of propensity evidence under FRE 404(b), which is an absolute bar on admitting prior bad acts in order to prove a person's propensity. FRE 404(b) is most concerned with the undue prejudice that comes from the jury wanting to punish a *party*—typically, the defendant—for being a “bad guy.” The risk of undue prejudice—of the jury overvaluing the evidence—is just as present when the witness admits to the prior act during cross-examination under FRE 608(b) as when the witness denies the act and extrinsic evidence is admitted on the corruption theory. Therefore, so long as FRE 608(b) continues to embody the judgment that public policy favors allowing cross-examination about prior acts bearing on a witness's character for truthfulness, the risk of corruption evidence being misused by the jury for character purposes should not be fatal to its admission.

## C. Corruption Evidence Will Not Overwhelm Courts

Even though corruption evidence is distinct from character evidence, and even though the policy arguments that favor admitting extrinsic evidence of bias and interest also favor admitting

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<sup>203</sup> See Ted Sampsell-Jones, *Preventive Detention, Character Evidence, and the New Criminal Law*, 2010 Utah L Rev 723, 732 (noting the difficulty that jurors often have “cabin[ing]” evidence that is admitted for one purpose and not another).

<sup>204</sup> See notes 31–36 and accompanying text.

extrinsic evidence of corruption, it could still be argued that extrinsic evidence of corruption will be too much of an administrative nightmare to justify admitting it. If we take seriously the DC Court of Appeals' ruling that corruption evidence is subjected to a standard relevance test—that it is admissible if it makes corruption more likely than it would otherwise be<sup>205</sup>—will courts end up supervising the relitigation of almost every prior instance of a witness's testimony each time they take the stand?

Courts will not be overwhelmed by corruption evidence and minitrials for several reasons. First, FRE 403's balancing test will apply to corruption evidence just as it applies to all other evidence. FRE 403 codifies the same balancing test that led common-law courts and the FRE's drafters to create the extrinsic evidence bar. It requires the judge to apply that test to specific pieces of proffered evidence, rather than applying the test, *ex ante*, to an entire category of evidence.<sup>206</sup> Allowing corruption impeachment will therefore only replace a rule with a standard—it will not mandate that such evidence always be admitted. Some courts have already developed tests under FRE 403 that apply to similar types of evidence.<sup>207</sup>

Second, various effects on the parties' incentives will limit the circumstances in which corruption evidence is available and in which parties try to introduce it. This in turn will limit how often courts will need to apply FRE 403's balancing test to corruption evidence. Failing to convince the jury that a witness—particularly a police officer—has previously committed perjury is likely to backfire and make the jury dislike the party proffering the evidence.<sup>208</sup> Even if the jury is convinced of the prior bad act, if the proof takes an unreasonably long time to produce then the jury

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<sup>205</sup> See *Coates*, 113 A3d at 573–74.

<sup>206</sup> See FRE 403; text accompanying notes 31–32.

<sup>207</sup> See, for example, *United States v Cedeño*, 644 F3d 79, 82–83 (2d Cir 2011) (identifying factors that can inform a district court's decision about whether to allow a witness to be cross-examined about prior judicial findings of incredibility). See also Broun, ed, 1 *McCormick on Evidence* § 41 at 250–51 (cited in note 32) (identifying five factors courts often weigh when determining whether to allow cross-examination about acts of misconduct for impeachment purposes). For a more in-depth discussion of how courts should evaluate corruption evidence under FRE 403, see notes 224–28 and accompanying text.

<sup>208</sup> See Imwinkelried, 48 *Creighton L Rev* at 240 (cited in note 10) (“It is an old adage in trial work that ‘if you attack the king, you must kill the king.’ If you level a serious accusation against a witness but fail to produce proof substantiating the accusation, the jurors may resent the unproven accusation and hold it against the cross-examiner.”); Broun, ed, 1 *McCormick on Evidence* § 40 at 246 (cited in note 32).

may hold the delay against the cross-examining party.<sup>209</sup> In addition, a witness—particularly a repeat witness—who knows that a lawyer can introduce extrinsic evidence is less likely to deny the prior lie in the first place. And the fear of impeachment by corruption should reduce perjury,<sup>210</sup> and therefore also reduce the prevalence of corruption evidence.

#### D. The Importance of Multiple Theories of Relevance

Sometimes, though not always, corruption evidence is also relevant to a particular theory of bias. In *Longus*, for instance, the police officer's misconduct was admissible as bias evidence—his motive to seek favorable treatment from the government, given that he was currently under investigation for the prior witness coaching—and as corruption evidence.<sup>211</sup> Additionally, the facts surrounding the past lie might be similar enough to allow the jury to conclude that the same motive was at play.<sup>212</sup> Alternative theories on which the evidence could be admissible might seem to reduce the need for corruption impeachment.

However, an additional theory on which a piece of evidence is relevant affects the FRE 403 balancing of probative value against undue prejudice and waste of time. The probative value of a piece of evidence is measured by the strength of the inferences it allows the jury to draw. Recognizing corruption impeachment adds a new inference that increases the probative value of the evidence. This makes it more likely that a judge will find that the probative value of the evidence outweighs the risk of undue prejudice and the costs in terms of time and possible confusion of admitting the evidence.

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<sup>209</sup> See Charles E. Bruess, *What You Didn't Learn in Law School about Trial Practice*, 55 Res Gestæ 14, 22 (Mar 2012) (noting that “[j]urors do not like to be kept waiting for parties, counsel or witnesses”).

<sup>210</sup> See Part III.D.

<sup>211</sup> See *Longus*, 52 A3d at 851–52.

<sup>212</sup> In *Vaughn*, for example, the defendants were accused of assaulting a fellow inmate and a corrections officer, in an incident involving corrections officers' use of a chemical agent. *Vaughn*, 93 A3d at 1244–45. One of the witnesses at trial was a corrections officer who was not present at the incident, but identified the defendants from security footage. *Id.* at 1246. An internal investigation had previously found that officer to have falsely accused an inmate of assault in order to justify his use of a chemical agent on that inmate. *Id.* at 1248–49. The facts surrounding the prior lie were therefore similar enough to the present case that a similar motive could feasibly be in play, though there were also important differences, such as the fact that in the new case a different officer used force and only the identity of the assailants, not the fact of the assault, was at issue. See *id.* at 1245.

In addition, the admissibility question is not all-or-nothing.<sup>213</sup> Admitting evidence of prior perjury on one theory may mean admitting only a very limited set of facts. In *Longus*, the trial judge found that only the fact of the witness tampering investigation was relevant to the “curry[ing] favor” theory of bias, and the defense was not allowed to introduce evidence that the officer had actually committed the act.<sup>214</sup> The truth of the accusation is obviously relevant to the corruption theory, however.<sup>215</sup> Even if the alternative theory of admissibility is enough to support admission of all the underlying facts, the theory of admissibility limits the arguments that counsel is allowed to make to the jury about the witness’s credibility.

The facts of *Coates* are a useful illustration. A jailhouse informant claimed that the defendant had confessed to murder.<sup>216</sup> Several years before, the same informant had made a similar claim about another defendant, but that other defendant had been incarcerated at the time of that murder, and so could not have committed the crime.<sup>217</sup> It is certainly possible to argue that the prior false accusation is evidence of an interest or general motive to lie, because the informant was seeking favorable treatment from the government in both circumstances. But a desire to obtain favorable treatment in one’s criminal case is a commonsense motive. The jury does not need to be convinced the informant is motivated by self-interest—the jury needs to be shown only what the informant stands to gain from testifying.<sup>218</sup> However, the prior lie is far more significant when viewed as evidence that the oath is insufficient to overcome the motive to lie—that is, when it is viewed as corruption evidence.<sup>219</sup>

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<sup>213</sup> See, for example, *Longus*, 52 A3d at 851.

<sup>214</sup> Id. The appeals court in *Longus* did find, however, that the truth of the underlying accusation should have been admitted even on the currying favor theory, because it affected “how the detective viewed the gravity of his situation.” Id.

<sup>215</sup> See id at 852.

<sup>216</sup> See *Coates*, 113 A3d at 568.

<sup>217</sup> See id at 569.

<sup>218</sup> For a discussion of the distinction between proving motives that the jury will assume the witness has and those that are more unusual, see notes 74–76 and accompanying text.

<sup>219</sup> In *Coates*, although the victim of the prior false accusation was never charged, and the informant therefore did not make the false accusation under oath, he was willing to make a false accusation that he knew he would eventually need to repeat under oath. See *Coates*, 113 A3d at 569. The prohibition on making false reports of this sort implicates the same governmental interests as the prohibition on perjury, and so the informant’s ability to avoid adverse consequences for the lie was relevant to show his lack of fear of consequences for perjury. For a more complete discussion of this issue, see note 223 and accompanying text.

Compared with the current understanding of the bias and interest exceptions to FRE 608(b), the corruption theory of impeachment allows extrinsic evidence of more prior bad acts, more detailed evidence of acts that would otherwise be admissible in limited form, and more convincing arguments to the jury about inferences to draw from the evidence that is admitted.

#### E. Introducing Perjury Convictions under FRE 609 Is Insufficient

Corruption evidence always involves evidence of criminal acts. Because FRE 609 allows witnesses to be impeached with certain prior criminal convictions, which would include perjury convictions,<sup>220</sup> the corruption impeachment theory might seem redundant.

However, witnesses who testify for the government in criminal cases—including police officers and informants—are unlikely to be charged with perjury even when there is clear evidence that they lied.<sup>221</sup> Indeed, the fact that a witness was *not* charged with perjury after a prior lie is at the core of the corruption inference. The corruption theory of impeachment fills an important gap in the coverage of FRE 609, a gap that systematically skews perceptions of witnesses' credibility in favor of the government. While under FRE 609 the future admissibility of a government witness's perjury—and hence, the witness's incentives to not commit perjury in the first place—depends on the *government* filing criminal charges against the witness, corruption impeachment depends on defense lawyers' diligence in discovering convincing evidence of past lies that the government chose not to punish.

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<sup>220</sup> See FRE 609.

<sup>221</sup> For discussion of the lack of prosecution of police officers, see Schwartz, 2016 U Chi Legal F at \*23 & n 98 (cited in note 190); Chin and Wells, 59 U Pitt L Rev at 261–64 & n 104 (cited in note 185) (citing evidence and prosecutorial testimony showing that “[p]olice criminality, including police perjury, even where guilt is clear, has not traditionally been dealt with aggressively by prosecutors”). See also *United States v Whitmore*, 359 F3d 609, 614 (DC Cir 2004) (noting that the US Attorney’s office declined to prosecute police officer Efrain Soto for perjury after a judge found that his testimony was “palpably incredible” and that “Officer Soto lied”); Hal Dardick and Rick Pearson, *Alvarez: ‘I Don’t Believe Any Mistakes Were Made’ on Laquan McDonald Case* (Chicago Tribune, Feb 5, 2016), archived at <http://perma.cc/HP9G-ZQ7U> (quoting the lead prosecutor saying that bringing charges against police officers is “complex”). For discussion of the lack of prosecution of jailhouse informants, see Covey, 49 Wake Forest L Rev at 1383 (cited in note 187); Natapoff, 73 U Cin L Rev at 666 (cited in note 185) (noting that prosecutors’ reputations for treatment of their informants affect their ability to recruit new informants).



## V. THE MECHANICS OF CORRUPTION IMPEACHMENT

If courts accept the theory of corruption impeachment, they will still have to put it into practice. This involves answering three questions: What types of arguments can parties make about corruption evidence? What types of prior acts are relevant to corruption impeachment? And how should courts evaluate the probative value of corruption evidence?

The following exchange is a stylized cross-examination for corruption impeachment:

Counsel: You are testifying under oath?

Witness: Yes.

Counsel: You know lying under oath is a crime?

Witness: Yes.

Counsel: But supposing you were to lie today, you don't think you would be prosecuted for perjury, do you?

Witness: Yes, I do.

Counsel: But haven't you committed perjury before?

Witness: Yes.

Counsel: When you committed perjury before, you weren't prosecuted for it?

Witness: No, I was not.

Extrinsic evidence could be introduced if the witness, unlike the witness in this example, denied the prior perjury. After completing the impeachment, the lawyer could argue in closing that the jurors should give less credence to the witness than they otherwise would: while most witnesses fear serious consequences if they lie on the stand, this witness does not. The opposing party, in turn, could attempt to rehabilitate the witness in several ways. For instance, the prosecutor could argue that the witness did not actually commit perjury in the prior case, that the prior perjury was relatively minor, or that the witness actually did face serious consequences for the prior perjury, even if those consequences fell short of criminal prosecution.

Perjury is the core type of corruption evidence, because the strength of the corruption inference depends on the consequences the witness faces for committing perjury. However, other types of prior acts are also relevant because they are closely related to perjury. Witness tampering is the most closely related; the main difference between witness tampering and perjury is that the individual committing witness tampering attempts to falsify another

witness's testimony rather than her own.<sup>222</sup> Obstruction of justice—in the form of giving false statements while anticipating that one will be called to testify about those statements at a trial—is also a related crime.<sup>223</sup> Someone who gives a false statement of that sort knows that she is setting herself up either to be exposed for the previous lie and suffer the consequences of it, or to continue the lie under oath in court. Because the interest protected by the perjury statute—the integrity of the criminal fact-finding process—is similar to those protected by each of these other statutes, the ability of a witness to avoid punishment for witness tampering or obstruction of justice is relevant to whether they will be concerned about punishment for committing perjury.

The further the prior bad act is from perjury, the less probative it will be of the extent to which threatened perjury penalties will motivate the witness to testify truthfully. Various other factors will also affect the probative value of corruption impeachment, which the court should weigh against the risks of wasted time and confusion to the jury when considering whether to allow extrinsic evidence of corruption under FRE 403.

Modified versions of the factors identified by the Second Circuit for evaluating *Dawson* evidence are a good starting point for evaluating corruption evidence.<sup>224</sup> The modified versions are: First, how similar are the prior case and the present case? If the two cases are similar, the jury can more confidently infer that the witness expects similar consequences if she lies again. If the cases are very different—for instance, if the prior case was a minor state charge and the present case is part of a serious federal investigation—the inference is weakened. Second, was the prior

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<sup>222</sup> See 18 USC § 1512(b) (providing, in part, that “[w]hoever knowingly . . . corruptly persuades another person . . . with intent to [ ] influence . . . the testimony of any person in an official proceeding . . . shall be fined . . . or imprisoned not more than 20 years, or both”).

<sup>223</sup> See 18 USC § 1001(a) (providing, in part, that “whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch . . . knowingly and willfully . . . makes any materially false, fictitious, or fraudulent statement or representation . . . shall be fined . . . [or] imprisoned not more than 5 years . . . or both”).

<sup>224</sup> See *United States v Cedeño*, 644 F3d 79, 82–83 (2d Cir 2011) (noting various factors relevant to admitting *Dawson* evidence, including (1) “whether the prior judicial finding addressed the witness’s veracity in that specific case or generally,” (2) “whether the two sets of testimony involved similar subject matter,” (3) “whether the lie was under oath in a judicial proceeding or was made in a less formal context,” (4) “whether the lie was about a matter that was significant,” (5) “how much time had elapsed since the lie was told and whether there had been any intervening credibility determination regarding the witness,” (6) “the apparent motive for the lie and whether a similar motive existed in the current proceeding,” and (7) “whether the witness offered an explanation for the lie and, if so, whether the explanation was plausible”).

bad act an instance of perjury, or some other, related form of misconduct? Other types of uncharged misconduct are relevant, but less so because it is possible that the government would punish an officer for perjury even if not for witness tampering, or an informant for perjury even if not for making a false unsworn statement. Third, was the prior bad act about an important issue in the case? A lie about an important issue is more significant than a lie about a minor or peripheral issue. As with the first factor, the more significant an act the witness avoided punishment for, the stronger the inference that the witness is free from the threat of consequences for perjury. Fourth, how much time has elapsed since the prior act? The longer ago it was, the less probative it is, because the effect of getting away with prior misconduct will be less salient for the witness's decision about whether to tell the truth in the present case. Fifth, has the government offered a plausible explanation for why the witness was not charged for the prior bad act, and does the explanation not also apply to the present circumstances? This is a conditional relevancy issue—the prior uncharged perjury is relevant to demonstrate corruption only if the witness *should* have been charged with perjury.<sup>225</sup> These factors, however, are just a starting point, and trial courts should consider any other circumstances that are relevant to the strength of the corruption inference. As the Second Circuit held, a “rigid application” of these factors “could unduly circumscribe [ ] a trial court’s discretion.”<sup>226</sup>

The probative value gleaned from these and other factors should be weighed against the FRE 403 dangers of admission—particularly confusion of the issues and wasted time.<sup>227</sup> As argued above, however, the court should not weigh the risk that the jury will draw an unwarranted character inference as “unfair prejudice.”<sup>228</sup> The more uncertain the evidence of prior perjury is, the more likely it is that corruption impeachment will devolve into a long trial-within-a-trial that will waste time and confuse the jury

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<sup>225</sup> See FRE 104(b) (“When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.”). Prior perjury could also demonstrate corruption even if the contemporaneous investigation did not produce enough evidence to prosecute the witness for perjury, if the government did not investigate the prior perjury as thoroughly as it could have.

<sup>226</sup> *Cedeño*, 644 F3d at 82.

<sup>227</sup> See FRE 403.

<sup>228</sup> FRE 403. For the argument that drawing a character inference from corruption evidence is not unfair prejudice, see Part IV.B.

when they should be focusing on the primary issue of guilt. On the other hand, even a disputed instance of corruption may not take a lot of time to put before the jury. In *Coates*, for instance, the prosecution denied that the informant had lied about the confession, even though the alleged confessor was physically incapable of committing the murder because he was in custody at the time.<sup>229</sup> In a case like that, relatively little evidence needs to be put before the jury in order for the parties to argue the alternative explanations: either the informant fabricated the confession, or the alleged confessor did.

As with other forms of impeachment, corruption evidence will arrive in various forms, each with different costs and benefits. It is impossible to offer a comprehensive test for when evidence of corruption should be admitted and when it should be excluded. However, corruption impeachment is distinct from impeachment by bad character for truthfulness and thus exempt from the extrinsic evidence bar in FRE 608(b), and it also does not rely on a propensity inference forbidden under FRE 404(b). In evaluating arguments for admitting corruption evidence, courts should focus on the question whether the witness is motivated by the threatened penalties of perjury to tell the truth under oath.

#### CONCLUSION

Corruption evidence is distinct from both bias and character evidence. Unlike bias, corruption does not provide an independent motive to lie. However, unlike general character evidence, corruption evidence directly counters the inference that a witness has a special motive to tell the truth because of the oath and the threat of perjury charges. In countering that inference, it does not rely on propensity; rather, it presents the witness's own experience with getting away with perjury or similar acts in order to argue that the witness is not afraid of being punished for perjury.

Further empirical research is warranted into the effects of the oath, both on witness veracity and juror perceptions of that veracity. In the meantime, however, when a witness's past acts demonstrate her ability to get away with disregarding the oath and manipulating the trial process by manufacturing testimony, the opposing party should be able to demonstrate those past acts by extrinsic evidence.

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<sup>229</sup> See *Coates*, 113 A3d at 572. For the facts of *Coates*, see text accompanying notes 216–17.

While other courts should not follow the DC Court of Appeals in classifying corruption as a form of bias, they *should* reach a similar result by acknowledging that corruption is an independent form of impeachment that should not be subject to the extrinsic evidence bar for proving prior bad acts. The fact that corruption evidence falls outside FRE 608(b) means that courts *can* admit extrinsic evidence of prior bad acts that demonstrate corruption. The policy arguments demonstrate that they *should* do so. Admitting extrinsic evidence of corruption both improves the fact-finding process in a particular case and has positive systemic effects on the incentive structure of repeat-player witnesses and prosecutors. Corruption evidence can be accepted as an isolated reform, without dramatically changing any other area of evidence law, and its use will not overwhelm courts or dramatically extend trials.