

Evidence Rule 806 and the Problem of Impeaching the Nontestifying Declarant

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I. INTRODUCTION

Rule 806 of the Federal Rules of Evidence, which governs impeachment of a hearsay declarant, is a powerful weapon in both civil and criminal litigation.¹ For the most part, however, it has been overlooked by lawyers and by commentators.² Rule 806 deserves considerably more careful consideration than it has received, because the rule as written creates the potential for great prejudice and because it contains ambiguities that are causing confusion among and within the circuit courts of appeals.

Rule 806 performs an apparently simple function: it permits a nontestifying declarant whose out-of-court statement is introduced into evidence—either because it is admissible hearsay or because it is defined as nonhearsay in Rule 801(d)(2)(C), (D), or (E)—to be impeached as if the declarant actually had testified as a witness.³

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¹ Rule 806 was adopted in 1975 within the original body of the Federal Rules of Evidence. Although it was amended in 1987 to make its language gender-neutral, no substantive change has ever been made to the rule.

² See ABA LITIGATION SECTION, EMERGING PROBLEMS UNDER THE FEDERAL RULES OF EVIDENCE 532 (2d ed. 1991) ("There is little doubt that Rule 806 is underutilized."). The rule also has received little discussion to date in the literature. See Anthony M. Brannon, *Successful Shadowboxing: The Art of Impeaching Hearsay Declarants*, 13 CAMPBELL L. REV. 157, 158 (1991); Kimberly B. Glass, Comment, *Impeachment of Nontestifying Hearsay Declarants: A Neglected Weapon of Trial Practice*, 43 ALA. L. REV. 445, 445, 460 (1992); cf. Maureen A. Gorman & James Smith, *Evidence: The 1984-85 Term—A Selective Review of Seventh Circuit Decisions Applying the Federal Rules of Evidence*, 62 CHI.-KENT L. REV. 527, 546 (1986).

³ FED. R. EVID. 806. Rule 806 provides in full:

When a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by

The rule rests on a straightforward premise. When an out-of-court statement is admitted for its truth, the trier of fact must evaluate the importance and trustworthiness of the statement, just as if the statement had been made from the witness stand. In performing that evaluation, the credibility of the person who made the statement is often a central concern for the fact-finder. When an out-of-court statement is admitted for its truth, therefore, the declarant's credibility is in issue, in the same manner as it would be if the declarant were a testifying witness. In drafting Rule 806, the Advisory Committee recognized this point, stating: "The declarant of a hearsay statement which is admitted in evidence is in effect a witness. His credibility should in fairness be subject to impeachment and support as though he had in fact testified."⁴

Rule 806 thus seeks to allow litigants to treat declarants, for impeachment purposes, as if they were testifying witnesses. Accordingly, the rule is designed to permit a party to impeach a declarant using any method of impeachment that is permissible against a live witness.⁵ In addition, however, the rule also operates as a restriction, by limiting impeachment to those situations when it is independently authorized under some other rule of evidence.⁶

the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

Id. Rule 801 defines a declarant as "a person who makes a statement" and defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801 (b), (c). Federal Rule of Evidence 801(d)(2) defines statements that qualify as party admissions; those definitions are set out *infra* at note 126.

⁴ FED. R. EVID. 806 advisory committee's note; *see also* *United States v. Moody*, 903 F.2d 321, 328-29 (5th Cir. 1990); *United States v. Finley*, 934 F.2d 837, 839 (7th Cir. 1991); *United States v. Graham*, 858 F.2d 986, 990 (5th Cir. 1988), *cert. denied*, 489 U.S. 1020 (1989).

⁵ *United States v. Scott*, No. 93-7552, 1995 U.S. App. LEXIS 5598, at *21 (5th Cir. Mar. 21, 1995) ("[A]ny evidence that would have been admissible to impeach [the declarant] had he testified was admissible to impeach [the declarant] even though he did not testify."); *see also* MICHAEL H. GRAHAM, *HANDBOOK OF FEDERAL EVIDENCE* § 806.1, at 1005-06 (3d ed. 1991); 4 DAVID W. LOUSELL & CHRISTOPHER B. MUELLER, *FEDERAL EVIDENCE* § 501, at 1240 (1980).

⁶ *See Finley*, 934 F.2d at 839 (stating that Rule 806 "does not allow the use of evidence made inadmissible by some other rule. Rule 806 extends the privilege of impeaching the declarant of a hearsay statement but does not obliterate the rules of evidence that govern how impeachment is to proceed."). More generally, as the Fifth Circuit has

Since Rule 806 merely permits a declarant to be impeached as if he were a testifying witness, it is a “piggyback” rule that operates only in conjunction with the other impeachment rules. This aspect of the rule, however, greatly complicates the achievement of the rule’s apparently simple rationale.

When the other impeachment rules—which govern, for instance, impeachment with prior convictions, past bad acts, and prior inconsistent statements⁷—were formulated, they were designed to operate with respect to witnesses who testified in court. This expectation that the impeachment rules would be used against testifying witnesses significantly influenced the policy considerations and balancing of interests that shaped those rules. Thus, for instance, when Congress debated and eventually enacted Rule 609, which governs impeachment with prior convictions, Congress assumed that the rule would only permit impeachment of testifying witnesses, and the careful compromise embodied in Rule 609 is premised on that assumption.⁸

Rule 806, by contrast, is premised squarely on the opposite assumption: it assumes that the declarant will not be a testifying witness. When the other impeachment rules are used in conjunction with Rule 806, therefore, they are being used in a context very different from that envisioned when they were drafted. As a result, the balance of competing considerations that underlies the other impeachment rules is disrupted, leaving open the possibility of great and unintended mischief.

As written, Rule 806 does little to guard against this possibility. With one exception,⁹ the rule does not specifically address how it is to be used in

explained: “The scope of impeachment parallels that available if the declarant had testified in court, since rule 806 treats the physical location of the testifying declarant, for impeachment purposes, as legally insignificant.” *Moody*, 903 F.2d at 329.

⁷ FED. R. EVID. 609 (prior convictions), 608(b) (past bad acts), 613 (prior inconsistent statements).

⁸ *See, e.g.*, 120 CONG. REC. 2376 (1974) (remarks of Rep. Hogan); *id.* at 2377 (remarks of Rep. Dennis); *see also infra* note 17 and accompanying text.

⁹ Rule 806 does contain a provision designed to facilitate its combination with Rule 613, which governs impeachment with inconsistent statements. Rule 613 generally provides that extrinsic evidence of inconsistent statements may be admitted only if “the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.” FED. R. EVID. 613(b).

Recognizing the difficulty, and sometimes the impossibility, of complying with Rule 613’s requirements with respect to a declarant who may not be present at trial, Rule 806 specifically directs that “[e]vidence of a statement or conduct by the declarant at any time, inconsistent with the declarant’s hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain.” FED. R. EVID. 806; *see also id.* advisory committee’s note.

conjunction with the various restrictions and rationales of the other impeachment rules. Rather, Rule 806 offers only the general principle that a declarant's credibility may be impeached with evidence that would be admissible if the declarant had testified as a witness. As a consequence, Rule 806 fails to deal effectively with some of the difficult problems associated with permitting impeachment of a nontestifying declarant. Indeed, in some circumstances, the rule leads to startlingly prejudicial results.

This Article explores in depth the tensions and unintended defects in Rule 806. In doing so, the Article focuses on three areas in which the combination of Rule 806 with other evidentiary rules raises important and difficult questions.

First, the Article discusses the relationship between Rule 806 and Rule 609, looking particularly at the disturbing but very real possibility that the combination of the two rules will permit a prosecutor (or a codefendant) to impeach a criminal defendant with his prior convictions, even though he neither testified nor did anything to place his credibility in issue. Second, the Article considers the intersection between Rule 806 and Rule 608(b), focusing on whether it is sensible to enforce Rule 608(b)'s ban on extrinsic evidence when that rule is applied through Rule 806. Third, the Article analyzes the proper extent of Rule 806's application to declarants of statements admitted as party admissions under Rule 801(d)(2) and, in particular, to declarants of individual and adoptive admissions. The Article concludes that there are serious deficiencies in Rule 806 as currently written and applied and offers a proposed revision of Rule 806 that will better enable the rule to serve both its own purposes and those of the impeachment rules with which it is jointly applied.¹⁰

II. USE OF RULE 609 THROUGH RULE 806

Rule 609 of the Federal Rules of Evidence provides one of the most potent, and potentially prejudicial, methods of impeachment. Under Rule 609, counsel may impeach the credibility of a witness with the witness's prior convictions, subject to specified requirements and limitations.¹¹ In a criminal case, when the

¹⁰ The Judicial Conference of the United States' Advisory Committee on the Federal Rules of Evidence is currently studying the Federal Rules of Evidence with the aim of proposing amendments to update and improve them. The Advisory Committee is chaired by Judge Ralph K. Winter, Jr., with Professor Margaret A. Berger serving as the Committee's Reporter. See Ernest E. Svenson, *Judicial Conference to Review Rules of Evidence*, 18 LITIGATION NEWS No. 6, Aug. 1993, at 2.

¹¹ FED. R. EVID. 609. Rule 609(a), which sets forth the "[g]eneral rule" on impeachment with prior convictions, provides:

defendant is impeached with his prior convictions, it is widely recognized that the defendant faces a unique, and often devastating, form of prejudice. This prejudice arises from the significant risk that the jury will not use the evidence of convictions solely to evaluate the defendant's credibility, but also will use it as evidence of guilt or moral desert.¹² Because of this risk, Rule 609 was carefully crafted to achieve what its framers believed to be an acceptable balance between accommodating the prosecution's need for probative impeaching evidence and the defendant's right to be protected against undue prejudice.

That balance, which was achieved only after months of congressional debate and painstaking revision,¹³ is embodied in Rule 609, which permits a criminal defendant to be impeached, without restriction, with prior convictions for offenses involving dishonesty or false statement.¹⁴ With respect to other convictions, however, Rule 609 permits a criminal defendant to be impeached only if the crime was a felony and the prosecution demonstrates that the prior conviction's probative value on the issue of credibility outweighs the risk of prejudice to the defendant.¹⁵ As such, Rule 609 represents a "deliberate, yet

For the purpose of attacking the credibility of a witness, (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

Id.

¹² See, e.g., FED. R. EVID. 609 advisory committee's note to Amended Rule 609(a) (amended 1990); 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 609[02], at 609-31 (Aug. 1991); Gene R. Nichol, Jr., *Prior Crime Impeachment of Criminal Defendants: A Constitutional Analysis of Rule 609*, 82 W. VA. L. REV. 391, 392 (1980).

¹³ See *United States v. Smith*, 551 F.2d 348, 360-61 (D.C. Cir. 1976) (describing the "labyrinthine history of Rule 609"); see also *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 511-24 (1989) (same); *United States v. Lipscomb*, 702 F.2d 1049, 1059-62 (D.C. Cir. 1983) (same); 3 WEINSTEIN & BERGER, *supra* note 12, ¶ 609[01]-[03], at 609-1 to -41 (same).

¹⁴ FED. R. EVID. 609(a)(2).

¹⁵ FED. R. EVID. 609(a)(1). More precisely, Rule 609(a)(1) requires that "the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted" This definition is generally co-extensive with the definition of a felony.

uneasy compromise between opposing positions in a sharply-divided Congress."¹⁶

In reaching this compromise, it is clear that advocates on both sides of the congressional debate assumed that Rule 609 would permit impeachment of the criminal defendant only if he actually chose to testify in his own defense.¹⁷ This assumption played a critical role in the drafting of Rule 609, because Congress reached its careful compromise against the backdrop of its understanding that, if the criminal defendant feared that introduction of his prior convictions would unduly prejudice his case, he could protect himself by declining to testify.

When Rule 609 is employed in conjunction with Rule 806, however, it becomes possible to impeach even a nontestifying criminal defendant with his prior convictions. And this is true, regardless of whether the defendant has done anything to put his credibility in issue, as long as the defendant's out-of-court statement has been admitted for its truth.¹⁸ This use of Rule 806

¹⁶ *Green*, 490 U.S. at 523 n.28 (quoting Teree E. Foster, *Rule 609(a) in the Civil Context: A Recommendation for Reform*, 57 *FORDHAM L. REV.* 1, 8 (1988)); see also *Smith*, 551 F.2d at 360-61 ("Rule 609 was one of the most hotly contested provisions in the Federal Rules of Evidence. The current language of the rule is unquestionably the product of careful deliberation and compromise."); *Lipscomb*, 702 F.2d at 1063 ("the final version of Rule 609(a)(1) must be understood as a compromise between the House preference for excluding all prior convictions unless the crime involved 'dishonesty or false statement' and the Senate preference for admitting all prior felony convictions"); 3 *WEINSTEIN & BERGER*, *supra* note 12, at 609-8,-25.

¹⁷ For instance, Representative Hogan, a principal proponent of broad rights to impeach, argued: "The proponents of [allowing impeachment only with convictions of crimes involving dishonesty or false statement] argue that allowing proof of prior convictions unfairly prejudices the jury against the accused who takes the stand. First of all, *the fifth amendment gives him the right to refuse to take the stand at all and thereby prevent all prior convictions from coming to the jury's attention.*" 120 *CONG. REC.* 2376 (1974) (emphasis added); see also *id.* at 1414 (remarks of Rep. Hogan). Similarly, Representative Dennis, a principal proponent of narrow rights to impeach, argued: "Now, it is a great anomaly that we [permit unrestricted cross-examination with prior convictions], because *unless the man takes the witness stand, if he is a criminal defendant, it is absolutely impossible, ordinarily, to put in any evidence concerning his previous convictions . . .*" *Id.* at 2377 (emphasis added); see *id.* at 1419 (remarks of Rep. Dennis). Many other speakers echoed this same point. See, e.g., *id.* at 2378 (remarks of Rep. Brasco); *id.* at 2381 (remarks of Rep. Lott); *id.* at 37,080 (remarks of Sen. Kennedy). This assumption that Rule 609 would permit impeachment only of a defendant who chose to testify is not surprising because Rule 609, by itself, only operates against a testifying witness.

¹⁸ See *United States v. Newman*, 849 F.2d 156, 161-63 (5th Cir. 1988); *United States v. Robinson*, 783 F.2d 64, 67-68 (7th Cir. 1986); *United States v. Bovain*, 708 F.2d 606, 613-14 (11th Cir.), *cert. denied*, 464 U.S. 898, and *cert. denied*, 464 U.S. 997, and *cert.*

completely undermines Congress's assumption that the criminal defendant would be able to shield himself from introduction of his prior convictions by choosing not to testify. In doing so, Rule 806 offers an unforeseen and unsettling end run around the careful balance drawn in Rule 609. Moreover, by permitting Rule 609 to be used in this manner, Rule 806 imposes substantial, and in some circumstances unjustifiable, risks on the criminal defendant.

A. *The Intersection Between Rules 609 and 806: Impeachment of a Nontestifying Criminal Defendant*

Rule 806 clearly contemplates that a party may use Rule 609 to impeach the declarant of a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E), with his prior convictions.¹⁹ All of the courts that have examined the issue have so held.²⁰ Because Rule 806 places no restrictions on which declarants may be impeached, a criminal defendant whose out-of-court statements have been admitted for their truth is subject to impeachment under Rule 806.²¹ Thus, even a criminal defendant who chooses not to testify may nevertheless be subject to impeachment with his prior convictions if he becomes a declarant at his trial.

Most obviously, a criminal defendant can become a declarant if the defendant introduces his own out-of-court statement for its truth.²² In this situation, Rule 806 by its terms permits the credibility of the defendant—as declarant—to be attacked with evidence of his prior convictions under Rule 609, even if the defendant does not take the witness stand.²³

In addition, a criminal defendant can become a declarant if another party introduces the defendant's out-of-court statement for its truth. In this situation,

denied, 464 U.S. 1018 (1983); *United States v. Lawson*, 608 F.2d 1129, 1129–30 (6th Cir. 1979), *cert. denied*, 444 U.S. 1091 (1980).

¹⁹ See FED. R. EVID. 806 advisory committee's note (citing Rule 609 in explaining the scope and rationale of Rule 806).

²⁰ *United States v. Moody*, 903 F.2d 321, 328–29 (5th Cir. 1990); *United States v. Hall*, 854 F.2d 1036, 1042–43 (7th Cir. 1988); *Newman*, 849 F.2d at 161–63; *Robinson*, 783 F.2d at 67–68; *United States v. Noble*, 754 F.2d 1324, 1330–31 (7th Cir.), *cert. denied*, 474 U.S. 818 (1985); *Bovain*, 708 F.2d at 613–14; *Lawson*, 608 F.2d at 1130; see also *Rose Hall Ltd. v. Chase Manhattan Overseas Banking Corp.*, 576 F. Supp. 107, 156–57 (D. Del. 1983) (apparently assuming that Rule 609 would apply through Rule 806), *aff'd mem.*, 740 F.2d 958 (3d Cir. 1984), *cert. denied*, 469 U.S. 1159 (1985).

²¹ See *Noble*, 754 F.2d at 1330–31; *Bovain*, 708 F.2d at 613–14; *Lawson*, 608 F.2d at 1130.

²² FED. R. EVID. 801(c).

²³ See *Noble*, 754 F.2d at 1330–31; *Lawson*, 608 F.2d at 1129–30.

Rule 806 apparently permits the criminal defendant to be impeached with his prior convictions, even though the defendant did nothing to place his credibility in issue.²⁴

The drafters of Rules 609 and 806 appear not to have contemplated that the rules would combine to permit impeachment in these situations. Indeed, the possibility that a criminal defendant who chose not to testify could be impeached with his prior convictions is utterly at odds with the assumptions that underlie Rule 609. The question, therefore, is whether application of Rule 609 through Rule 806 against the nontestifying criminal defendant is consistent with the purposes of those rules and, in particular, with the delicate balance of competing policies embodied in Rule 609.

B. The Propriety of Using Rule 609 Through Rule 806 Against a Nontestifying Criminal Defendant

1. Use of Rule 609 Against a Criminal Defendant Who Offers His Own Hearsay Statements in Order to Advance His Case

As noted above, the criminal defendant can become a declarant by offering into evidence his own hearsay statements. The facts of *United States v. Noble*²⁵ provide a good example of this situation.

Noble was charged with conspiracy to distribute and distribution of counterfeit money. At trial, Noble did not testify. His lawyer, however, introduced a taped conversation between Noble and a Secret Service agent, who had been posing as an interested buyer. During that conversation, Noble repeatedly denied any knowledge of the counterfeiting operations. After introduction of the taped conversation, the prosecution impeached Noble with a prior counterfeiting conviction.²⁶

Rule 806, by its terms, permits such impeachment in this situation. By introducing his own exculpatory hearsay statements, Noble became a declarant. As such, his credibility was subject to attack under Rule 806, and the

²⁴ See *Bovain*, 708 F.2d at 613-14; *Robinson*, 783 F.2d at 67-68.

²⁵ 754 F.2d 1324.

²⁶ *Id.* at 1330-31. Similarly, in *Lawson*, the defendant was charged with uttering and possessing counterfeit money. *Lawson*, 608 F.2d at 1130. Although Lawson did not testify, Lawson's counsel introduced a written statement in which Lawson denied all complicity in the counterfeiting activities. In addition, in cross-examining a prosecution witness (a Secret Service agent), Lawson's counsel brought out the fact that Lawson had consistently denied any involvement in the scheme. The prosecution then impeached Lawson with two prior felony convictions. *Id.* The courts did not identify in either *Noble* or *Lawson* the specific hearsay exceptions that rendered the defendants' own hearsay statements admissible.

prosecution was entitled to use any authorized method of impeachment, including impeachment with prior convictions under Rule 609.²⁷

Moreover, use of Rule 609 through Rule 806 against a nontestifying defendant in these circumstances comports with the rationales of both rules. Rule 806 is founded on the notion that the declarant of an out-of-court statement which is admitted for its truth is in effect a witness, and thus in fairness his credibility should be subject to impeachment to the same extent as if he had in fact testified. When Noble introduced his own exculpatory out-of-court statements he, in effect, became a witness for himself, even though he did not actually take the witness stand. It is therefore entirely consistent with the rationale of Rule 806 to allow the prosecutor to impeach Noble "as though he had in fact testified."²⁸

Use of Rule 609 through Rule 806 in these circumstances also is consistent with the purpose of Rule 609. A motivating force behind Rule 609's enactment was the concern that, if the defendant were immune from impeachment with prior convictions, the defendant would be able to "appear as a witness of blameless life."²⁹ In permitting the criminal defendant to be impeached with his prior convictions, Congress expressed its judgment that the prosecution's need to protect against such misrepresentation can justify the substantial risk of prejudice to the accused.³⁰

Where, in an effort to advance his case, the defendant offers his own hearsay statements, it seems well within the intended scope of Rule 609 to allow the prosecutor to impeach the defendant's credibility. The facts of *Noble* are instructive. There, the defendant offered his own exculpatory hearsay statements, even though he did not formally testify. In doing so, Noble affirmatively made his credibility an issue, because he was telling his story

²⁷ FED. R. EVID. 806. In affirming Noble's conviction, the Seventh Circuit held that Rule 806 applied. The court reasoned: "When Noble's counsel introduced the taped conversation into evidence containing the defendant's exculpatory hearsay statements, the defense counsel made the defendant's credibility an issue." *Noble*, 754 F.2d at 1331; see also *Lawson*, 608 F.2d at 1130.

²⁸ FED. R. EVID. 806 advisory committee's note.

²⁹ 120 CONG. REC. 1414 (1974) (remarks of Rep. Hogan); 1 MCCORMICK ON EVIDENCE § 42, at 153 (John W. Strong ed., 4th ed. 1992) [hereinafter MCCORMICK]; 3 WEINSTEIN & BERGER, *supra* note 12, ¶ 609[02], at 609-41; Nichol, *supra* note 12, at 407-09.

³⁰ With respect to felonies not bearing directly on the defendant's veracity, the compromise embodied in Rule 609 recognizes the need for a case-by-case determination of whether the probative value of the impeaching evidence is sufficient to justify subjecting the defendant to such prejudice. See, e.g., *United States v. Lipscomb*, 702 F.2d 1049, 1064-66 (D.C. Cir. 1983).

himself.³¹ Rule 609 reflects Congress's determination that it is fair to allow the prosecutor to impeach a *testifying* defendant with prior convictions in order to prevent him from appearing as one who has led an exemplary life. It seems equally fair to allow the prosecutor to impeach a *nontestifying* defendant with his prior convictions, where the defendant has chosen to tell his story through his own hearsay statements rather than by taking the witness stand.³² Indeed, it is arguably more important to allow impeachment in this context, because the defendant has avoided the rigors of cross-examination by introducing his hearsay statements rather than testifying.³³

To put the matter somewhat differently, when Congress decided to allow the criminal defendant to be impeached with his prior convictions under Rule 609, it struck a bargain of sorts. If the defendant asks the jury to listen to, and believe, his own statement offered in aid of his defense, then the prosecutor may tell the jury about the defendant's prior convictions, as long as they will help the jury evaluate the defendant's credibility. When the defendant makes his statement out of court, and then offers it in court in lieu of testifying, he is still asking the jury to believe his statement offered in aid of his defense. A principled application of Rule 609, therefore, requires that the defendant who offers his out-of-court statement be held to the same bargain as the defendant who makes his statement in court. In both instances, the defendant is asking the jury to take his word and conclude that his statement is true.

2. *Use of Rule 609 Against a Criminal Defendant Who Has Not Affirmatively Placed His Credibility in Issue*

The reach of Rule 806, however, is not expressly limited to situations in which the defendant asks the jury to take his word. Rather, the clear import of Rule 806 is that, once a person's hearsay statement (or statement defined in Rule 801(d)(2)(C), (D), or (E)) has been admitted into evidence, the credibility of the declarant may be attacked regardless of who may be the sponsor or

³¹ *Noble*, 754 F.2d at 1330-31; see also *Lawson*, 608 F.2d at 1130 ("By putting these hearsay statements before the jury his counsel made Lawson's credibility an issue in the case the same as if Lawson had made the statements from the witness stand.").

³² See *United States v. McClain*, 934 F.2d 822, 833-34 (7th Cir. 1991) ("[T]he defendant should not be able to avoid completely this legitimate attack by, instead of testifying, presenting only exculpatory statements made in the past.").

³³ See generally Adam H. Kurland, *Prosecuting Ol' Man River: The Fifth Amendment, the Good Faith Defense, and the Non-Testifying Defendant*, 51 U. PITT. L. REV. 841, 910-11 n.210 (1990) (noting that the effect of Rule 806 "is not inconsiderable. However, a defendant may determine that it may not be as damaging as facing cross-examination.").

source of the statement.³⁴ As a result, the text of Rule 806 permits a criminal defendant to be impeached with his prior convictions in situations where another party, rather than the defendant, has put the defendant's credibility in issue by introducing his out-of-court statement. The policies underlying Rules 806 and 609, however, do not support impeachment in such a situation.

This situation can easily arise in the context of a joint trial. The facts of *United States v. Bovain*³⁵ are illustrative. In that case, seven defendants were tried jointly for unlawful distribution of, and conspiracy to distribute, heroin. At trial, the prosecution called Nichols, a conspirator who was cooperating with the government. Nichols testified about hearsay statements that Finch, a defendant, had made about the drug activities of Rickett, a codefendant. Rickett then impeached Finch's credibility, as a hearsay declarant, with evidence of Finch's prior convictions for stolen money orders and a narcotics offense.³⁶ Finch never testified during the trial.

By its terms, Rule 806 permits impeachment in this situation: If Finch, the defendant, had testified that Rickett, the codefendant, was involved in drug-related activities, Rickett could have impeached Finch with his prior convictions under Rule 609. Although Finch did not testify, the prosecutor introduced Finch's out-of-court statement that Rickett was involved in drug-related activities. That introduction made Finch a declarant; in essence, he was a witness against Rickett, even though he did not testify. Under Rule 806, a declarant may be impeached with prior convictions under Rule 609 as if the declarant were a live witness. Therefore, under the text of the rules, it was proper to allow Rickett to impeach Finch—a declarant and witness against him—with Finch's prior convictions.³⁷

Whether this result is consistent with the policies underlying Rule 609, however, is a much more troubling question, and it requires greater attention to the problems of unfairness and prejudice thus created than it has yet received. In analyzing the issue on appeal in *Bovain*, for instance, the Eleventh Circuit gave these problems no more than passing recognition. Rather, the court focused on the application of the text of Rule 806, which it found "straightforward and logical,"³⁸ only pausing to note that the situation was

³⁴ FED. R. EVID. 806.

³⁵ 708 F.2d 606 (11th Cir.), *cert. denied*, 464 U.S. 898, and *cert. denied*, 464 U.S. 997, and *cert. denied*, 464 U.S. 1018 (1983).

³⁶ *Id.* at 613. The trial court refused to admit evidence of Finch's convictions for forgery and escape. The reviewing court did not explain why the forgery conviction, which would normally be automatically admissible under Rule 609(a)(2), was excluded. *Id.* at 613-14.

³⁷ FED. R. EVID. 806.

³⁸ *Bovain*, 708 F.2d at 613. The court elaborated: "Because Finch is a hearsay

“unusual,” and that the trial court had acted within its discretion based on “the applicable policy considerations and rules”³⁹

The disrupting effect of this unforeseen application of the rules on the delicate balancing of policies that Congress sought to achieve through Rule 609, however, demands serious consideration. To that end, it is necessary to look more closely at the competing policies and concerns that led Congress to the careful compromise embodied in Rule 609.

In the congressional debate over Rule 609, there were basically two camps. One camp favored giving counsel unrestricted rights to impeach any witness, including the criminal defendant, with almost all prior convictions.⁴⁰ The other camp advocated placing significant limitations on the right to impeach, limiting impeachment to prior convictions involving dishonesty or false statement.⁴¹

Advocates of limited impeachment rights focused on the risk of prejudice that introduction of prior convictions creates for a criminal defendant.⁴² This risk of prejudice stems from the likelihood that the jury will misuse the evidence. Rule 609 permits evidence of prior convictions to be used only for impeachment purposes. Thus, the jury may only properly use such evidence to help evaluate whether the witness is credible.⁴³ The jury may *not* use the prior convictions as evidence that the defendant is the sort of person who would

declarant, his testimony may be treated like that of a witness (Rule 806), and as a witness, he can be impeached (Rules 608, 609). Therefore, the certified records of Finch’s prior convictions were admissible for impeachment purposes (Rule 609).” *Id.*

³⁹ *Id.* at 614.

⁴⁰ More specifically, advocates of this view would have given counsel the right to impeach any witness, including the criminal defendant, with any conviction for a crime punishable by death or imprisonment in excess of one year and with any conviction (regardless of punishment) for a crime involving dishonesty or false statement. *See* 120 CONG. REC. 1414 (1974) (remarks of Rep. Hogan); *id.* at 37,076 (remarks of Sen. McClellan). The Senate Bill embodied this view. *Id.* at 37,083.

⁴¹ *See id.* at 1419 (remarks of Rep. Dennis). The House Bill embodied this view. *Id.* at 2374, 2381, 2393–94.

⁴² *See id.* at 2379 (remarks of Rep. Wiggins) (admonishing the Congress should not “underestimate for one moment the prejudicial impact of permitting an inquiry into unrelated prior crimes by a man who is a party defendant in a criminal trial. . . . [T]he admission of evidence of unrelated crimes when the defendant himself is on the stand, borders upon a denial of due process”); *id.* at 37,080 (remarks of Sen. Kennedy) (commenting that “all authorities agree that the greatest source of prejudice to a defendant is a prior felony conviction”); *id.* at 2377 (remarks of Rep. Dennis); *id.* at 37,078 (remarks of Sen. Hart).

⁴³ FED. R. EVID. 609 advisory committee’s note to Amended Rule 609(a) (amended 1990) (noting that the Rule is clear that “evidence offered under Rule 609 is offered only for purposes of impeachment”); *see also* United States v. Gilliam, 994 F.2d 97, 99–100 (2d Cir.), *cert. denied*, 114 S. Ct. 335 (1993).

commit the crime charged or who should be in prison regardless of whether he is actually guilty of the particular crime charged.⁴⁴

The danger, and therefore the risk of prejudice, lies in the difficulty of making this distinction. It is widely agreed that a jury is unlikely to maintain the distinction, even with the help of a limiting instruction.⁴⁵ The problem arises because, as Dean Nichol has explained, “[k]nowing the ‘kind of person’ a defendant is for purposes of credibility cannot be separated from the knowledge of character as applied to the determination of guilt or innocence.”⁴⁶ As a result, despite any limiting instruction the judge might give, there is a significant risk that the jury will use the evidence of prior crimes in its determination of guilt.⁴⁷

⁴⁴ See FED. R. EVID. 609 advisory committee’s note to Amended Rule 609(a) (amended 1990); 1 MCCORMICK, *supra* note 29, § 42, at 153; 3 WEINSTEIN & BERGER, *supra* note 12, ¶ 609[02], at 609-30 to 609-31; James W. Betro, *The Use of Prior Convictions to Impeach Criminal Defendants—Do the Risks Outweigh the Benefits?*, 4 ANTIOCH L.J. 211, 211-12 (1986); Robert G. Spector, *Impeaching the Defendant by His Prior Convictions and the Proposed Federal Rules of Evidence: A Half Step Forward and Three Steps Backward*, 1 LOY. U. CHI. L.J. 247, 249 (1970).

⁴⁵ See, e.g., *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir.) (Learned Hand, J.) (explaining that it is unlikely that jurors can perform this type of “mental gymnastic”), *cert. denied*, 285 U.S. 556 (1932); *Bruton v. United States*, 391 U.S. 123, 131-37 (1968); *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) (“The naive assumption that prejudicial effects can be overcome by instructions to the jury, . . . all practicing lawyers know to be unmitigated fiction.”); *Dunn v. United States*, 307 F.2d 883, 886 (5th Cir. 1962) (“[A]fter the thrust of the saber, it is difficult to say forget the wound.”).

⁴⁶ Nichol, *supra* note 12, at 419; see also Abraham P. Ordovery, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b) and 609(a)*, 38 EMORY L.J. 135, 175-77 (1989); H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 869 (1982).

⁴⁷ See FED. R. EVID. 609 advisory committee’s note to Amended Rule 609(a) (amended 1990), which states:

[I]n virtually every case in which prior convictions are used to impeach the testifying defendant, the defendant faces a unique risk of prejudice—i.e., the danger that convictions that would be excluded under Fed. R. Evid. 404 will be misused by a jury as propensity evidence despite their introduction solely for impeachment purposes.

Id.; see also *United States v. Bagley*, 772 F.2d 482, 488 (9th Cir. 1985) (discussing the risk of prejudice that the defendant faces after impeachment with prior convictions), *cert. denied*, 475 U.S. 1023 (1986); *United States v. Fountain*, 642 F.2d 1083, 1091 (7th Cir.) (same), *cert. denied*, 451 U.S. 993 (1981); *United States v. Avarello*, 592 F.2d 1339, 1346 (5th Cir.) (same), *cert. denied*, 444 U.S. 844 (1979); *Gordon v. United States*, 383 F.2d

The danger that the jury will misuse evidence of a defendant's prior record is a real one, and the prejudice arising from misuse is substantial. Research conducted in this area indicates that criminal defendants who are impeached with their prior convictions are significantly more likely to be convicted, especially if the prior crimes are similar to the one currently charged.⁴⁸

Because the risks are so high and the prejudice so overwhelming, congressional advocates of narrow impeachment rights argued forcefully that the evidence rules should restrict this form of impeachment to convictions for crimes, such as perjury, that bear directly on veracity.⁴⁹ This view was

936, 940 (D.C. Cir. 1967) (same), *cert. denied*, 390 U.S. 1029 (1968); 120 CONG. REC. 37,078 (1974) (remarks of Sen. Hart); 1 MCCORMICK, *supra* note 29, § 42, at 153.

⁴⁸ HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 159-60 (1966) (studying the American jury system and finding that when the strength of the evidence was otherwise constant, conviction rates were up to 27% higher when the jury knew that the defendant had a prior conviction); Anthony N. Doob & Hershi M. Kirshenbaum, *Some Empirical Evidence on the Effect of s. 12 of the Canada Evidence Act upon an Accused*, 15 CRIM. L.Q. 88, 91-95 (1972-1973) (giving forty-eight mock jurors a breaking and entering fact pattern, and informing half that the defendant had prior convictions—those jurors who learned of the prior convictions gave the defendant a higher rating of guilt regardless of whether they received limiting instructions); Note, *To Take the Stand or Not to Take the Stand: The Dilemma of the Defendant with a Criminal Record*, 4 COLUM. J.L. & SOC. PROBS. 215, 218-19 (1968) (finding that 43% of trial judges and 98% of criminal defense attorneys responding to a questionnaire thought that jurors could not follow an instruction to consider prior crimes evidence only with respect to credibility and not guilt). *See generally* Robert D. Okun, *Character and Credibility: A Proposal to Realign Federal Rules of Evidence 608 and 609*, 37 VILL. L. REV. 533, 552-54 (1992) (citing, describing, and evaluating a variety of studies).

⁴⁹ For example, Representative Dennis argued:

[M]ost of the research on the subject indicates that a very large proportion of the miscarriages of justice which occur are in those cases where either we prejudice the man because he does take the witness stand in his own defense, or we scare him off and he does not tell his story because of that rule [allowing impeachment with prior convictions].

....

We amended this section [Rule 609], on my motion, to hold cross examination as to prior to [sic] convictions down to previous convictions which do in fact bear on credibility, that is convictions which involve falsehood or dishonesty and those only.

120 CONG. REC. 1419 (1974); *see also supra* note 42. Many commentators also advocate significant restrictions on impeachment with prior convictions. *See, e.g.*, James E. Beaver & Steven L. Marques, *A Proposal to Modify the Rule on Criminal Conviction Impeachment*, 58 TEMP. L.Q. 585, 619-21 (1985); James H. Gold, *Sanitizing Prior Conviction Impeachment Evidence to Reduce Its Prejudicial Effects*, 27 ARIZ. L. REV. 691, 697-708

reflected in the version of Rule 609 that originally passed the House of Representatives.⁵⁰

On the other side of the debate, congressional proponents of broad leeway to impeach the criminal defendant with his prior convictions stressed two closely related points. First, they emphasized that it would be unfair to allow the criminal defendant to present himself to the jury as a witness whose life has been exemplary.⁵¹ Representative Hogan, a principal advocate of this view in the House of Representatives, argued repeatedly that "it would be misleading to permit the accused to appear as a witness of blameless life on those occasions when the accused chooses to take the stand."⁵²

Second, congressional proponents of broad impeachment rights expressed concern that, when a witness testifies, the jury should have the information it needs to evaluate the witness's credibility. Senator McClellan, for instance, asked:

[W]hy should one who has already been convicted of rape or murder and is later being tried for armed robbery, not be able to be questioned about his previous crimes, so that a jury might properly evaluate the credibility of the testimony he is giving . . . [?]

. . . .

If the jury is to be permitted to correctly determine what the true facts are in a particular case, it must be permitted to have all the evidence before it

(1985); Nichol, *supra* note 12, at 418–21; Okun, *supra* note 48, at 568–72; Note, *Character Evidence by Any Other Name . . . : A Proposal to Limit Impeachment by Prior Conviction Under Rule 609*, 58 GEO. WASH. L. REV. 762, 794–801 (1990).

⁵⁰ 120 CONG. REC. 2374, 2393–94 (1974). Under the House Bill, Rule 609(a) would have stated: "For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible only if the crime involved dishonesty or false statement." *Id.*

⁵¹ *Id.* at 1414 (remarks of Rep. Hogan).

⁵² *Id.*; see also *id.* at 2376, 2380; McCORMICK, *supra* note 29, § 42, at 153 ("Most prosecutors would argue with much force that it would be misleading to permit the accused to appear as a witness of blameless life, and this argument has prevailed widely."); 3 WEINSTEIN & BERGER, *supra* note 12, ¶ 609[02], at 609-29 (noting that this view has been persuasive to some courts); Nichol, *supra* note 12, at 407–09 ("Fears have traditionally been expressed that, absent the availability of prior crime impeachment, a criminal defendant will be able to unfairly portray himself as a model citizen." The author proceeds persuasively to challenge this view, arguing that jurors recognize both that the defendant has an obvious motive to lie and that, having gotten this far in the system, there is a substantial possibility that he is guilty.).

that will enable it to judge the credibility of the witnesses who have given testimony. . . .⁵³

These views prevailed in the Senate, which passed a version of Rule 609 that would have made all felony convictions and all convictions for crimes involving dishonesty or false statement automatically admissible for impeachment purposes.⁵⁴

In the end, of course, Congress reached a compromise between the opposing views, so that convictions for crimes involving dishonesty or false statement were made admissible without qualification, and convictions for other crimes were made admissible only if the crime was a felony and the prosecution could demonstrate that the conviction's probative value outweighed the risk of prejudice to the defendant.⁵⁵ But again, this compromise was founded on the assumption that Rule 609 would apply only against *testifying* witnesses.⁵⁶ The question, therefore, is whether it is consistent with congressional intent and the notions of fairness that informed it to apply Rule 609 through Rule 806 against a defendant who has done nothing to place his credibility in issue. In order to analyze that question, it is important to understand the options that the criminal defendant normally enjoys under Rule 609.

In a criminal trial, if the defendant does not testify, he cannot be impeached with his prior convictions.⁵⁷ And that is so, even though, by pleading not guilty, the defendant is in a sense asking the jury to believe him. This principle

⁵³ 120 CONG. REC. 37,076 (1974). Other members of Congress echoed the same concerns. *See id.* at 2381 (remarks of Rep. Lott); *id.* at 2380 (remarks of Rep. Hogan); *id.* at 37,080 (remarks of Sen. Thurmond). Judicial opinions also reflect this concern. *See United States v. Garber*, 471 F.2d 212, 214-15 (5th Cir. 1972) ("The present rationale for admitting prior conviction evidence for impeachment purposes is that the jury should be informed about the character of a witness who asks the jury to believe his testimony."); *State v. Duke*, 123 A.2d 745, 746 (N.H. 1956) (opining that, when a criminal defendant testifies, "he asks the jury to accept his word. No sufficient reason appears why the jury should not be informed what sort of person is asking them to take his word. In transactions of everyday life this is probably the first thing that they would wish to know.").

⁵⁴ 120 CONG. REC. 37,083 (1974).

⁵⁵ FED. R. EVID. 609(a); *see supra* notes 11-15 and accompanying text.

⁵⁶ *See supra* note 17 and accompanying text.

⁵⁷ *See, e.g., United States v. Booker*, 706 F.2d 860, 862 (8th Cir.) (stating that the defendant "was not, of course, required to take the stand. By his election to do so, he voluntarily exposed himself to impeachment by these prior felony convictions."), *cert. denied*, 464 U.S. 917 (1983); *see also* FED. R. EVID. 609 advisory committee's note to Amended Rule 609(a) (amended 1990); *United States v. Fountain*, 642 F.2d 1083, 1092 (7th Cir.), *cert. denied*, 451 U.S. 993 (1981); *Gordon v. United States*, 383 F.2d 936, 939-41 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968).

reflects the strong tradition in our justice system that a person should be tried based on the facts of the case, not on the basis of his character.⁵⁸

Thus, the criminal defendant who has a prior record is understood to have a clear choice between testifying (with the attendant risk that he will be impeached with his prior convictions) and not testifying (thereby avoiding introduction of his prior convictions, but forgoing the opportunity to explain his defense himself). The choice is never an easy one, for:

If [the] defendant takes the stand, he faces impeachment by proof of his prior convictions and the consequent danger that the jurors instead of considering the convictions as relevant to credibility, will regard them as evidence of guilt, despite instructions to the contrary. If the defendant remains silent, statistics indicate that the jury is likely to conclude that he is guilty.⁵⁹

Nevertheless, the defendant is afforded this choice, which means that, if he believes that jury knowledge of his prior convictions would fatally prejudice his case, he can protect himself from admission of his record by opting not to testify.⁶⁰

⁵⁸ See FED. R. EVID. 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."); see also *Michelson v. United States*, 335 U.S. 469, 475-76 (1948). Justice Jackson explained:

The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge.

Id. (footnote omitted); *Beaver & Marques*, *supra* note 49, at 585 ("The rule against admitting evidence of prior convictions as substantive proof stems from the Anglo-American prejudice, a very noble prejudice, in favor of trying *cases* instead of trying *people*."); *Okun*, *supra* note 48, at 533; *Uviller*, *supra* note 46, at 868. See generally 1 *MCCORMICK*, *supra* note 29, § 188, at 793.

⁵⁹ 3 *WEINSTEIN & BERGER*, *supra* note 12, ¶ 609[02], at 609-31; see also 120 CONG. REC. 37,080 (1974) (remarks of Sen. Kennedy); *Spector*, *supra* note 44, at 250 ("The defendant is 'damned if he does and damned if he doesn't.'").

⁶⁰ See, e.g., *United States v. Holloway*, 1 F.3d 307, 311 (5th Cir. 1993) ("Since Rule 609(a) permits the use of a prior conviction for the impeachment of a defendant's testimony, by opting not to testify Holloway could have precluded the government from introducing the evidence that he was a convicted felon . . ."); see also *Fountain*, 642 F.2d at 1092; *Gordon*, 383 F.2d at 940.

Application of Rule 609 through Rule 806 against a nontestifying defendant who did not affirmatively place his credibility in issue, however, completely upsets this balance and strips the defendant of the opportunity even to make the difficult choice not to testify. In *Bovain*, for instance, the defendant had chosen not to testify.⁶¹ Although the opinion does not specify why he chose as he did, it is at least a fair assumption that, as in the broad run of cases, the defendant feared the jury's reaction to his substantial criminal record, which included a conviction similar to the crime charged.⁶² When a defendant chooses not to testify for that reason, he chooses *not* to place his credibility in issue, and he pays a considerable price for the privilege (*i.e.*, the risk that the jury will assume that he is afraid to testify because he is guilty).

Under the *Bovain* application of Rules 806 and 609, however, the defendant who has done nothing to place his credibility in issue—indeed, has actively sought to keep it from becoming an issue—loses the protection that silence normally affords him. Put more starkly, because the *prosecution* has sought to enhance its case against a codefendant by using the defendant's hearsay statements, the defendant faces the substantial—and now unavoidable—prejudice of impeachment with prior convictions.⁶³

In enacting Rule 609, Congress expressed its judgment that imposing these risks on the criminal defendant is fair when the defendant testifies in his own behalf. But there is a critical difference between a case in which the defendant testifies in his own behalf, and one in which the defendant does nothing to put his own credibility in issue. In the first case—the standard Rule 609 context—the defendant has, in a sense, “opened the door.” By asking the jury to believe his own testimonial account, the defendant has affirmatively placed his credibility in issue; that act justifies subjecting the defendant to rigorous impeachment under the policy resolution embodied in Rule 609. In the second case, however, the defendant has not “opened the door.” He has not affirmatively placed his credibility in issue; on the contrary, he has consciously sought to shield himself by declining to testify at trial. In this context, there are

⁶¹ *United States v. Bovain*, 708 F.2d 606, 613 (11th Cir.), *cert. denied*, 464 U.S. 898, and *cert. denied*, 464 U.S. 997, and *cert. denied*, 464 U.S. 1018 (1983). In *Bovain*, a prosecution witness testified about incriminating statements that Finch—a defendant—had made about Rickett—a codefendant. Rickett was then permitted to impeach Finch's credibility with his prior convictions under Rule 806. For a more detailed description of *Bovain*, see *supra* notes 35–39 and accompanying text.

⁶² *Bovain*, 708 F.2d at 613. Finch was charged with distribution of, and conspiracy to distribute, heroin. His criminal record included convictions for a narcotics offense, stolen money orders, forgery, and escape. *Id.*

⁶³ In a joint trial, the defendant can also become a hearsay declarant if a codefendant's witness repeats one of the defendant's hearsay statements.

no grounds for Congress's concern that the defendant could try to mislead the jury by presenting himself as "a witness of blameless life."⁶⁴ This important policy consideration underlying Rule 609 thus would not justify impeachment in this situation.

There are, however, some grounds for Congress's related concern that the jury should have sufficient information to evaluate a witness's credibility.⁶⁵ Rule 609 reflects Congress's judgment that a witness's prior convictions are probative evidence on the issue of credibility. Rule 609, however, is premised on the assumption that the rule would come into play only if the defendant chose to testify. This premise seems to have been critical to Congress's shaping of the rule; during the debates, members of Congress repeatedly returned to the fact that a criminal defendant could protect himself from introduction of his prior convictions by not testifying at his trial.⁶⁶ When this premise is no longer sound—because the defendant has not testified and has not otherwise placed his testimonial credibility in issue—the risk that the jury will misuse the evidence of prior convictions has much less to counterbalance it.

Once again, it is useful here to consider this problem from the standpoint of the bargain struck by Congress in Rule 609. Under the terms of that bargain, if the defendant chose to place his testimonial credibility in issue, then the prosecution would be permitted to impeach the defendant with prior convictions that were sufficiently probative of credibility. But if the defendant feared that the impact of his prior convictions would be too great, then he could prevent their introduction by not placing his credibility in issue. This exchange, however, is greatly undermined when one of the critical elements—the defendant's decision to place his testimonial credibility in issue—is no longer present.

In that situation, the concern that the jury should receive relevant information to evaluate the witness's credibility must give way to the greater concern that the criminal defendant will be unduly prejudiced by introduction of his prior convictions. It is true that the litigant adversely affected by the defendant's out-of-court statement may want and need to impeach his credibility.⁶⁷ That need alone, however, should not justify subjecting the

⁶⁴ 120 CONG. REC. 1414 (1974) (remarks of Rep. Hogan); *see supra* note 52 and accompanying text.

⁶⁵ *See supra* note 53 and accompanying text.

⁶⁶ *See supra* note 17 and accompanying text.

⁶⁷ The federal circuit courts have held that, in some circumstances, preventing a criminal defendant from impeaching the credibility of the declarant of an out-of-court statement admitted for its truth can violate the Confrontation Clause. *See United States v. Barrett*, 8 F.3d 1296, 1299 (8th Cir. 1993); *United States v. Moody*, 903 F.2d 321, 329 (5th Cir. 1990); *Smith v. Fairman*, 862 F.2d 630, 638 (7th Cir. 1988), *cert. denied*, 490

defendant to potentially insurmountable prejudice, a form of prejudice which threatens the very presumption of innocence that is afforded to the criminal defendant.⁶⁸

For these reasons, Rule 806 should be amended to prevent introduction of a criminal defendant's prior convictions in these circumstances. More specifically, Rule 806 should be amended to provide that, if the declarant is the accused, then the declarant may be impeached with prior convictions only if he has affirmatively placed his credibility in issue.

U.S. 1008 (1989). Thus, if the litigant adversely affected by the defendant's out-of-court statement is also a criminal defendant, then prohibiting that defendant from impeaching the declarant—his codefendant—with prior convictions might violate the Confrontation Clause. *United States v. Burton*, 937 F.2d 324, 329 (7th Cir. 1991) (indicating that refusing to allow a criminal defendant to impeach a declarant with prior convictions can violate the Confrontation Clause, but holding that the defendant had waived the issue and that there was not plain error in the district court's refusal to allow such impeachment in that case). *But see* *United States v. Robinson*, 783 F.2d 64, 67-68 & n.2 (7th Cir. 1986) (holding that refusing to allow the defendant to impeach the codefendants whose out-of-court statements had been admitted against him with their prior convictions did not violate the Confrontation Clause).

If the defendant's inability to impeach a codefendant with prior convictions were to violate the Confrontation Clause, the prosecution would, presumably, be required either to forgo use of the out-of-court statement or to sever the trial. *Cf.* *United States v. Bruton*, 391 U.S. 123, 143-44 (1968) (White, J., dissenting) (describing the practical consequences of the Court's holding that introduction of a codefendant's confession that implicates, but is inadmissible against, the defendant violates the Confrontation Clause). Even if the inability to impeach with prior convictions does not amount to a constitutional violation, however, such a restriction on impeachment may cause grave prejudice to the adversely affected defendant. This prejudice arises because the adversely affected defendant would be deprived of a powerful form of impeachment, which may hinder his efforts to undermine the credibility of a witness against him. For this reason, even if there is not a constitutional violation, the court should consider whether the restriction on impeachment is so prejudicial to the adversely affected defendant that the trial should be severed. *See* FED. R. CRIM. P. 14 (enabling the court to grant severance when joinder is prejudicial). The distinct questions of whether the facts in a particular case might violate the Confrontation Clause or whether, in the absence of such a constitutional violation, the trial court should nonetheless grant severance to avoid grave prejudice to the defendant, present difficult issues that are beyond the scope of this Article.

⁶⁸ In *Robinson*, the Seventh Circuit upheld the district court's decision prohibiting the defendant from impeaching codefendants—whose out-of-court statements had been admitted against him—with their prior convictions. In doing so, the Seventh Circuit emphasized that there “is a danger of prejudicing the presumption of innocence of that co-defendant by admission of evidence of his prior crimes, such evidence being generally inadmissible to show the character or guilt of the co-defendant.” *Robinson*, 783 F.2d at 67; *see also* *United States v. Hall*, 854 F.2d 1036, 1043 (7th Cir. 1988).

3. *Determination of When a Criminal Defendant Has Affirmatively Placed His Credibility in Issue*

The remaining issue is when a criminal defendant should be understood to have affirmatively placed his credibility in issue, such that he should be subject to impeachment under the conjunction of Rules 806 and 609. At either end of the spectrum of possible cases, the answers are clear. If, on the one hand, the defendant introduces his own hearsay statements in his case-in-chief, as the defendant did in *Noble*, then the defendant should be subject to impeachment with prior convictions under Rule 806.⁶⁹ If, on the other hand, another party (the prosecutor or a codefendant) introduces the defendant's out-of-court statements, as was the case in *Bovain*, then the defendant should not be subject to impeachment with prior convictions under Rule 806.⁷⁰

The difficult cases, of course, fall in the middle of the spectrum. These are cases in which the defendant's out-of-court statements are introduced as a result of questioning by the defense counsel, but are not affirmatively introduced as part of the defendant's case-in-chief. This type of situation would likely arise in one of two ways.

First, the defense counsel might raise or elicit the defendant's out-of-court statements in cross-examination of a prosecution witness. Suppose, for instance, that the prosecution witness had testified on direct examination that the defendant had made certain incriminating statements, or had engaged in

⁶⁹ See *supra* notes 25–33 and accompanying text.

⁷⁰ See *supra* notes 34–68 and accompanying text. If the prosecution calls a witness who testifies on direct examination to an exculpatory out-of-court statement that the defendant made, then the defendant likewise should not be subject to impeachment with prior convictions by the prosecution. In this situation, even though the statement may be helpful to the defense, it was not the defendant who elicited it; rather, it was the prosecution that elicited the statement from a prosecution witness. From the defendant's perspective, this situation is equivalent to the situation in *Bovain*; in both, the defendant did nothing to put his credibility in issue. Cf. *Tubbs v. State*, No. B14-89-00560-CR, 1990 Tex. App. LEXIS 681 (Mar. 29, 1990). In *Tubbs*, the prosecution used the state counterpart to Rule 806 to impeach the defendant with his prior convictions after a prosecution witness testified on direct examination about an exculpatory out-of-court statement made by the defendant. On appeal, the court found error, stating: "If the state chose to offer this statement for its veracity, their sole reason for doing so would be to introduce the otherwise in admissible [sic] convictions of the appellant. We choose not to believe this strategy was the intention of the state . . ." *Id.* at *3–4.

This same result would be reached if the proposal advanced in Part IV of this Article were adopted. If the prosecution introduced the defendant's out-of-court statement—inculpatory or exculpatory—the statement would qualify as an individual admission under Rule 801(d)(2)(A).

certain incriminating conduct. If the prosecution witness were then to testify on cross-examination about exculpatory statements that the defendant had also made, the question would arise as to whether the defendant had placed his credibility in issue.⁷¹ In such situations, the answer will necessarily turn on the facts and circumstances of the particular case. Nonetheless, it does seem possible in most instances to draw a principled distinction between cases in which the defendant can fairly be considered to have placed his credibility in issue, and those in which he should not be considered to have placed his credibility in issue.

This distinction lies in the defense counsel's need to raise or elicit the defendant's own hearsay statement on cross-examination. In some instances, the defense counsel will need to do so in order to correct a misleading impression that may have been created by the prosecution witness's testimony on direct examination. If, for example, the witness testified on direct examination that the defendant made certain incriminating statements, then the defense counsel might well need to ask the witness whether the defendant had contemporaneously made any other statements. In doing so, the defense counsel's purpose would be to dispel the misleading impression created by the partial account that the prosecution had elicited. In such instances, the defense should not be considered to have placed the defendant's credibility in issue.⁷²

By contrast, in some situations the defense counsel may choose to raise or elicit the defendant's own hearsay statements during cross-examination of a prosecution witness (rather than during the defendant's case-in-chief) for her own strategic reasons, and not in an effort to correct a distorted impression created by the prosecution. This situation is functionally equivalent to the situation in which the defense counsel introduces the defendant's statements

⁷¹ A situation of this nature arose in *United States v. Lawson*, 608 F.2d 1129, 1129-30 (6th Cir. 1979), *cert. denied*, 444 U.S. 1091 (1980). In that case, during cross-examination of a prosecution witness (a Secret Service agent), defendant Lawson's counsel brought out the fact that Lawson had consistently denied any involvement in the alleged counterfeiting scheme. Had the prosecution sought to impeach Lawson with his prior convictions based on that exchange alone, the court would have been confronted with the question whether Lawson had affirmatively placed his credibility in issue. Lawson's counsel, however, also later introduced a written statement in which Lawson denied all complicity in the counterfeiting activities, and in doing so, he affirmatively placed Lawson's credibility in issue. *Id.* at 1130; *see also supra* notes 26-33.

⁷² The underlying principle here is directly analogous to that underlying the "rule of completeness." FED. R. EVID. 106 advisory committee's note. Both are founded on the notion that the litigant should be given greater leeway to introduce evidence that is necessary to "explain and shed light on the meaning of the part already received." 1 MCCORMICK, *supra* note 29, § 56, at 228; *see also* LOUISELL & MUELLER, *supra* note 5, § 49, at 352-60; 1 WEINSTEIN & BERGER, *supra* note 12, ¶¶ 106[01]-[02], at 106-2.1 to -21.

during her case-in-chief; the only difference is the timing. When the impetus for introducing the statement is something other than the need to dispel a misleading impression by providing greater context, the defense can fairly be considered to have placed the defendant's credibility in issue.⁷³

The second situation in which the defendant's hearsay statements might be introduced as a result of questioning by the defense counsel, but not affirmatively introduced as part of the defendant's case-in-chief, would occur if the witness were to surprise the defense with testimony about the defendant's hearsay statements. If, for example, a defense witness on direct examination (or a prosecution witness on cross-examination) were unexpectedly to recount a hearsay statement that the defendant had made, the question would arise as to whether the defendant had placed his credibility in issue.

A possible approach in this situation would be to consider the defense to have affirmatively introduced the statement, unless the defense moves to strike it from the record. Such an approach has the advantage of ease of administration, for it would eliminate any need for the trial court to undertake the difficult task of determining whether the witness's testimony was indeed unexpected and spontaneous. Yet it has the significant disadvantage of forcing the defense to discredit (by asking to have stricken) a favorable statement that the defendant himself made, an apparently significant action to which the jury would naturally tend to ascribe undue importance.⁷⁴

⁷³ Another possible approach would be to employ a standard similar to that which the Supreme Court adopted in *United States v. Havens*, 446 U.S. 620 (1980). In *Havens*, the Court held that the government may use illegally obtained evidence to impeach a defendant's testimony on cross-examination, if the defendant's statements were "made in response to proper cross-examination reasonably suggested by the defendant's direct examination . . ." *Id.* at 627-28. In the context of Rule 806, courts could employ a similar standard by refusing to permit the defendant to be impeached with prior convictions if the defendant's hearsay statements were introduced in response to proper cross-examination reasonably suggested by the witness's direct examination. The disadvantage of this approach is that it is vague and easily manipulated. Courts have widely divergent views as to what constitutes the scope of direct examination, and those views would likely inform any decision as to whether the cross-examination was reasonably suggested by the witness's direct examination. *See generally* FED. R. EVID. 611(b); 1 MCCORMICK, *supra* note 29, §§ 21-27, at 83-95. In addition, "even the moderately talented" defense counsel should generally be able to find a way to introduce evidence on cross-examination that she would otherwise introduce during her case-in-chief. *Havens*, 446 U.S. at 632 (Brennan, J., dissenting) (citing *Walden v. United States*, 347 U.S. 62, 66 (1954)).

⁷⁴ *See generally* ROBERT H. KLONOFF & PAUL L. COLBY, SPONSORSHIP STRATEGY 17-45 (1990) (describing and explaining, as a matter of trial tactics and strategy, how a jury tends to magnify or diminish the credibility of evidence depending on which party presents the evidence and the circumstances of its presentation).

In these more difficult cases, therefore, the better approach would seem to be to require the prosecution to attempt to block the introduction of the hearsay statement as a prerequisite to impeaching the defendant with prior convictions. The prosecution could do so either by objecting to the admissibility of the statement or by indicating to the court, out of the jury's hearing, that if the statement were not withdrawn, the prosecution would seek to impeach the defendant with his prior convictions. Such a requirement would put the defense to a clear choice: withdraw the statement or affirmatively sponsor it. If the defense chose to withdraw the statement, then the prosecution could, of course, request a limiting instruction admonishing the jury to disregard the statement.⁷⁵ If, on the other hand, the defense chose to press for admission of the statement, then it could fairly be considered to have placed the defendant's credibility in issue.⁷⁶

In both the easy and more difficult cases, therefore, the core principle for applying Rule 609 through Rule 806 is that the criminal defendant should not be subject to impeachment with his prior convictions unless he can fairly be judged to have affirmatively placed his credibility in issue through the introduction of his own hearsay statements.⁷⁷ Rule 806 should be amended to rely explicitly on this principle. The explanatory notes to the rule also should provide more detailed guidance about how courts would be expected to exercise their discretion in applying this principle in the more difficult cases, as described above.

C. Proposed Amendment of Rule 806

Rule 806 thus should be amended to provide that, where the declarant is a

⁷⁵ See 1 MCCORMICK, *supra* note 29, § 52, at 201.

⁷⁶ Although requiring the prosecution to object to evidence as a prerequisite to impeachment is somewhat unusual, it seems a salutary measure in this situation. Imposing such a requirement will serve to put the defense on notice that, if it succeeds in admitting the defendant's hearsay statements, the defendant's credibility will be laid open to attack with prior convictions. The requirement thus will allow the defense counsel to withdraw the statement without appearing to discredit it; it also will protect the unwary defendant from potentially devastating impeachment in situations where the defense did not affirmatively seek to place the defendant's credibility in issue.

⁷⁷ Some commentators have persuasively argued that, with respect to impeachment of criminal defendants, Rule 609 should be restricted to situations "where a defendant affirmatively places his or her character for truthful or law-abiding behavior in issue." Okun, *supra* note 48, at 537, 568-70; see also Beaver & Marques, *supra* note 49, at 619-21. This Article's use of the concept of a defendant who "affirmatively places his credibility in issue" is different; it refers to the issue of credibility necessarily raised by the defendant's decision to testify.

criminal defendant, the declarant may be impeached with prior convictions only if he has affirmatively placed his credibility in issue. The following proposed amendment is designed to serve this purpose:

When a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. *If the declarant is an accused, the credibility of the declarant may be attacked with prior convictions only if the declarant has affirmatively placed the declarant's credibility in issue.* Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.⁷⁸

III. RULE 806 AND THE BAN ON EXTRINSIC EVIDENCE

The combination of Rule 806 with the other impeachment rules also creates difficult problems in the context of impeachment with specific instances of conduct showing untruthfulness under Rule 608(b).⁷⁹ As was the case with Rule 609, these problems stem from the grafting of Rule 806—which is designed to permit impeachment of a declarant who is not a testifying witness—onto a rule designed to permit impeachment of a witness who testifies in court.

Rule 608 authorizes and regulates one of the methods of impeachment provided in the Federal Rules.⁸⁰ In general, this impeachment method entails

⁷⁸ If this proposed amendment to Rule 806 were adopted, the explanatory notes should include some guidance for trial courts on how to determine whether the declarant has affirmatively placed his credibility in issue. *See supra* notes 69–77 and accompanying text.

⁷⁹ Rule 806 permits a declarant to be impeached under Rule 608. *See* FED. R. EVID. 806 advisory committee's note (citing Rule 608 in explaining the scope of Rule 806); *United States v. Barrett*, 8 F.3d 1296, 1299 (8th Cir. 1993) ("Federal Rule of Evidence 806 permits the impeachment of a hearsay declarant's reputation for truthfulness."); *United States v. Friedman*, 854 F.2d 535, 569–70 (2d Cir. 1988), *cert. denied*, 490 U.S. 1004 (1989); *see also* 4 LOUISELL & MUELLER, *supra* note 5, § 501, at 1240–49; 1 MCCORMICK, *supra* note 29, § 324.2, at 370–71.

⁸⁰ This impeachment method is one of a variety permitted by the Federal Rules and the common law. *See, e.g.*, FED. R. EVID. 613 (impeachment with inconsistent statements); FED. R. EVID. 609 (impeachment with prior convictions); *United States v. Abel*, 469 U.S.

introducing evidence that the witness has a poor character for veracity.⁸¹ More specifically, Rule 608 permits the attacking party to use reputation and opinion evidence and to inquire into specific instances of conduct, subject to the general requirement that the evidence must be probative of truthfulness or untruthfulness.⁸²

Rule 608(b) also states an important limitation on the use of such evidence. Although Rule 608(b) permits inquiry on cross-examination, the rule expressly prohibits the use of extrinsic evidence to prove specific instances of conduct showing untruthfulness.⁸³ As a result, the impeaching party may ask the witness about specific instances of conduct on cross-examination, but if the

45 (1984) (impeachment with evidence of bias). Impeachment pursuant to Rule 608 is permissible in both civil and criminal cases. Although the cases cited in this section of the Article tend to be criminal cases, the principles discussed apply in civil cases as well.

⁸¹ FED. R. EVID. 608. This method of impeachment is also authorized and regulated by Federal Rule of Evidence 609, which governs the use of prior convictions as a means of showing that the witness has a poor character for veracity.

⁸² Rule 608 provides:

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

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

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.

FED. R. EVID. 608.

⁸³ Rule 608(b) provides, in pertinent part: "Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence." FED. R. EVID. 608(b).

witness denies the misconduct, she must take the witness's answer; the impeaching party may not use extrinsic evidence to prove that the witness did engage in such conduct.⁸⁴

To some extent, of course, the prohibition on the use of extrinsic evidence limits the effectiveness of this method of impeachment. In the normal setting, however, where the attacking party is impeaching a testifying witness, the ability to question the witness about specific instances of conduct is nonetheless a powerful impeachment tool. By asking, specifically and repeatedly, about alleged misconduct, the attacking party is able to convey the information to the jury, thus creating suspicion and doubt.⁸⁵

It is clear that Rule 608(b) was crafted with the understanding that the attacking party would be impeaching a testifying witness, who could be asked about relevant specific instances of conduct. This is underscored by the text of the rule itself, which provides that specific instances of conduct "may not be

⁸⁴ See *Abel*, 469 U.S. at 55 (stating that Rule 608(b) "limits the inquiry to cross-examination of the witness, however, and prohibits the cross-examiner from introducing extrinsic evidence of the witness' past conduct"); *United States v. Brooke*, 4 F.3d 1480, 1484 (9th Cir. 1993) (refusing admission of extrinsic evidence of a specific instance of conduct for the purpose of impeaching credibility); *United States v. Martz*, 964 F.2d 787, 789 (8th Cir. 1992) (explaining that Rule 608(b) "forbids the use of extrinsic evidence to prove that the specific bad acts occurred"), *cert. denied*, 113 S. Ct. 823 (1993); *United States v. Weiss*, 930 F.2d 185, 199 (2d Cir.) (stating that Rule 608(b) "expressly precludes the use of extrinsic evidence to prove specific instances of misconduct"), *cert. denied*, 502 U.S. 842 (1991); *United States v. Frost*, 914 F.2d 756, 767 (6th Cir. 1990) (stating that defense counsel is "'stuck with' the response given on cross-examination" under Rule 608(b)); *United States v. May*, 727 F.2d 764, 765 (8th Cir. 1984) (stating that "specific instances of a witness's conduct used for impeachment may not be proved by extrinsic evidence"); *cf. Carter v. Hewitt*, 617 F.2d 961, 971 (3d Cir. 1980) (holding that extrinsic evidence may be used, but only if the witness admits that he engaged in the specific instance of conduct).

⁸⁵ 4 LOISELL & MUELLER, *supra* note 5, § 306, at 243 ("[I]ndependent evidence of misconduct by a witness is often unnecessary as a means of conveying to the jury a caution as to his truthfulness, for questions alone may impart such a caution, despite denials by the witness."); Ordover, *supra* note 46, at 144 ("The great danger in [impeachment with specific instances under Rule 608(b)] is that the insinuation of wrong-doing in the question may be adopted by the jury, which cannot satisfy itself as to the truth or falsity of the allegation."); *see also Brooke*, 4 F.3d at 1484 (holding that the attacking lawyer may continue to press the point even after the witness has denied engaging in the alleged misconduct); *United States v. Ling*, 581 F.2d 1118, 1121 (4th Cir. 1978) (same); 3 WEINSTEIN & BERGER, *supra* note 12, ¶ 608[05], at 608-30 to -31 ("Courts often summarize the no extrinsic evidence rule by stating that 'the examiner must take his answer.' This phrase . . . is misleading insofar as it suggests that the cross-examiner cannot continue pressing for an admission.") (citations omitted).

proved by extrinsic evidence. They may, however, . . . be inquired into on cross-examination of the witness."⁸⁶

When Rule 608(b) is applied through Rule 806, however, this understanding is no longer valid, because Rule 806 authorizes impeachment of declarants who are not testifying witnesses. If the declarant does not testify, as will often be the case, the impeaching party will not be able to inquire about specific instances of conduct on cross-examination because there will be no witness to cross-examine. In that situation, Rule 608(b)'s ban on extrinsic evidence may preclude any use at all of this impeachment weapon. By its terms, Rule 806 authorizes impeachment only with "evidence which would be admissible for those purposes if the declarant had testified as a witness."⁸⁷ Currently, therefore, Rule 806 would appear to forbid the use of extrinsic evidence of specific instances to impeach a nontestifying declarant, because if the declarant were a testifying witness, Rule 608(b) would forbid the use of extrinsic evidence.

On the other hand, it is possible that Rule 806 could be interpreted to modify the ban on extrinsic evidence contained in Rule 608(b). Rule 806 is designed to permit a party to impeach a declarant as if she were a testifying witness, and Rule 608(b) permits a testifying witness to be impeached with specific instances of conduct showing untruthfulness. Rule 806 thus could be understood to allow the general type of impeachment authorized in Rule 608(b), making allowances for necessary alterations in form. Although this construction stretches the language of Rule 806, the Second Circuit apparently adopted this approach in *United States v. Friedman*,⁸⁸ reasoning that Rule 608(b) "limits such evidence of 'specific instances' to cross-examination. Rule 806 applies, of course, when the declarant has not testified and there has by definition been no cross-examination, and resort to extrinsic evidence may be the only means of presenting such evidence to the jury."⁸⁹

⁸⁶ FED. R. EVID. 608(b).

⁸⁷ FED. R. EVID. 806. Courts have consistently interpreted this language to restrict impeachment under Rule 806 to that which is permissible under the other impeachment rules. See *United States v. Finley*, 934 F.2d 837, 839 (7th Cir. 1991) (Rule 806 "does not allow the use of evidence made inadmissible by some other rule. Rule 806 extends the privilege of impeaching the declarant of a hearsay statement but does not obliterate the rules of evidence that govern how impeachment is to proceed."); *United States v. Moody*, 903 F.2d 321, 329 (5th Cir. 1990) (noting that the "scope of impeachment parallels that available if the declarant had testified in court"); cf. *State v. Evans*, 522 N.W. 2d 554, 557-59 (Wis. Ct. App. 1994) (holding that, under the state counterpart to Rule 806, the credibility of a nontestifying declarant could not be attacked with specific instances of conduct).

⁸⁸ 854 F.2d 535 (2d Cir. 1988), cert. denied, 490 U.S. 1004 (1989).

⁸⁹ *Id.* at 570 n.8; see also GRAHAM, *supra* note 5, § 806.1, at 1006 n.4; 4 LOUISELL &

In order to determine how Rule 806 should be applied, the critical issue is whether, as a matter of principle, the prohibition on extrinsic evidence should extend to impeachment of a nontestifying declarant when Rule 608(b) is used through Rule 806. Resolution of that issue turns on whether the restriction that Rule 608(b) imposes on impeachment of testifying witnesses is sufficiently important that it should also be imposed on impeachment of nontestifying declarants. It is thus necessary to understand the reasons that underlie Rule 608(b)'s ban on extrinsic evidence.

A. *The Dangers of Extrinsic Evidence*

Rule 608 is widely understood to codify the common law rules that governed impeachment with character evidence.⁹⁰ The common law, like Rule 608(b), permitted the impeaching party to ask a witness about conduct showing untruthfulness, but forbade the impeaching party from proving such conduct with extrinsic evidence.⁹¹

It has long been recognized that the primary reason for the prohibition on extrinsic evidence is to avoid confusion of issues. This reason is based on the concern that allowing the impeaching party to introduce extrinsic evidence (that is, to call additional witnesses) to prove the specific instances of conduct might result in a "mini-trial" on that point. As Dean Wigmore explained: "There are two chief considerations; first, each additional witness introduces the entire group of questions as to his qualifications and his impeachment . . . ; secondly, this additional mass of testimony on minor points tends to overwhelm the material issues of the case and to confuse the tribunal in its efforts to

MUELLER, *supra* note 5, § 501, at 1241.

Only one other federal court—a district court in the Seventh Circuit—has specifically addressed the issue. *United States v. Finley*, No. 87 CR 364-1, 1989 U.S. Dist. LEXIS 6175, at *4 n.1 (N.D. Ill. May 19, 1989), *aff'd*, 934 F.2d 837 (7th Cir. 1991). Finding "no contrary authority," the district court indicated that it would permit extrinsic evidence in the Rule 806 context. The integrity of the district court's determination on this point, however, is suspect. Although the Seventh Circuit affirmed the district court's ultimate holding that the evidence offered under the conjunction of Rule 806 and Rule 608(b) was inadmissible hearsay, it took care to admonish that Rule 806 "does not allow the use of evidence made inadmissible by some other rule." *Finley*, 934 F.2d at 839. Taken seriously, the court's admonition would, of course, require enforcement of Rule 608(b)'s ban on extrinsic evidence.

⁹⁰ See, e.g., 1 MCCORMICK, *supra* note 29, § 41, at 137-41; 3 WEINSTEIN & BERGER, *supra* note 12, ¶ 608[05], at 608-28.

⁹¹ See 1 MCCORMICK, *supra* note 29, § 41, at 141; 3A JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 979 (Chadbourn rev. 1970).

disentangle the truth upon those material points."⁹² Courts have emphasized that extrinsic evidence is excluded for this reason. In *United States v. Martz*,⁹³ for instance, the court stated: "The purpose of barring extrinsic evidence is to avoid holding mini-trials on peripherally related or irrelevant matters."⁹⁴

Dean Wigmore also offered a second reason for the ban on extrinsic evidence: the prevention of unfair surprise.⁹⁵ The concern is that if the attacking party were to introduce false evidence of misconduct, the witness would have little ability to rebut it. Although the possibility of surprise is generally insufficient to support a rule excluding evidence, the danger here is that the impeaching party might falsely allege misconduct of any nature, over any part of the witness's life. False allegations of misconduct might put the witness at too great a disadvantage, for he could not be "expected to be prepared to *disprove every alleged act of his life*."⁹⁶

Commentators have suggested that a third concern further serves to justify the ban as well. This concern is based on the risk of prejudice that a party suffers when the jury learns of his, or even his witness's, misdeeds.⁹⁷ When a witness is impeached with a specific instance of conduct showing untruthfulness, the jury may properly use the evidence only to evaluate the

⁹² 3A WIGMORE, *supra* note 91, § 979, at 826; *see also* 3 WEINSTEIN & BERGER, *supra* note 12, ¶ 608[05], at 608-29; William G. Hale, *Specific Acts and Related Matters as Affecting Credibility*, 1 HASTINGS L.J. 89, 89-90 (1950) (extrinsic evidence is excluded because of "(1) confusion of issues; (2) undue consumption of time; (3) unfair surprise since such collateral issue cannot be anticipated and, hence, no preparation can be made to meet it").

⁹³ 964 F.2d 787 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 823 (1993).

⁹⁴ *Id.* at 789; *see also* *United States v. May*, 727 F.2d 764, 765 (8th Cir. 1984) ("Impeachment by extrinsic evidence threatens to expand the trial to an inquiry into collateral matters which could distract and confuse the jury."); *Carter v. Hewitt*, 617 F.2d 961, 971 (3d Cir. 1980) ("The purpose of rule 608(b)'s extrinsic evidence ban, as noted, is 'to avoid minitrials on wholly collateral matters which tend to distract and confuse the jury.'"); *United States v. Banks*, 475 F.2d 1367, 1368 (5th Cir. 1973); *Foster v. United States*, 282 F.2d 222, 223 (10th Cir. 1960) ("the witness is not on trial, his character is not in issue and extrinsic testimony in respect thereto tends to confuse the issues and promote unfair surprise and multifariousness").

⁹⁵ 3A WIGMORE, *supra* note 91, § 979, at 827.

⁹⁶ *Id.* Courts also have noted the prevention of unfair surprise as a reason for the rule banning extrinsic evidence. *See, e.g., Banks*, 475 F.2d at 1368; *Foster*, 282 F.2d at 223.

⁹⁷ *See, e.g.,* 4 LOUISELL & MUELLER, *supra* note 5, § 306, at 242-43 (noting that the third purpose for the ban is that "it reduces the risk of prejudice which unavoidably attends the introduction of evidence of specific bad acts, since juries are likely to misuse such evidence . . ."); 3 WEINSTEIN & BERGER, *supra* note 12, ¶ 608[05], at 608-29 (explaining that Rule 608(b)'s ban on extrinsic evidence "is mandated by considerations of policy against unduly extending the trial, surprise and prejudice"); Okun, *supra* note 48, at 544.

witness's credibility. It may not use the evidence substantively, as evidence that the party is the sort of person who would commit the charged offense (or, in a civil case, the act complained of), or who deserves to be punished regardless of whether he committed the wrong at issue.⁹⁸ The risk of prejudice lies in the substantial likelihood that the jury will be unable to confine its use of the evidence to evaluation of credibility, but will use it substantively as well.⁹⁹

For these various reasons, Rule 608(b) expressly prohibits the attacking party from using extrinsic evidence to prove specific instances of conduct when impeaching a testifying witness. The issue with respect to Rule 806 is whether these reasons are sufficient to support enforcement of the ban when doing so will effectively preclude any use of this impeachment tool. In order to make that determination, it is important to weigh the countervailing considerations that arise in the special situation of the nontestifying declarant.

B. Impeaching the Nontestifying Declarant

The drafters of Rule 806 recognized that the declarant of an out-of-court statement admitted for its truth is in effect a witness and that the jury needs to evaluate the declarant's credibility, just as it needs to evaluate the credibility of a witness who testifies in court.¹⁰⁰ Rule 806 thus seeks to allow a party to impeach the credibility of a declarant as if the declarant were a testifying witness.

If the specific restrictions contained in Rule 608(b) are enforced when that rule is applied in conjunction with Rule 806, however, the impeaching party will not be able to impeach the nontestifying declarant to the same extent that the impeaching party would be able to impeach a testifying witness. This is so because Rule 608(b) limits impeachment with specific instances of conduct showing untruthfulness to the single method of cross-examination. If the declarant does not testify, the attacking party will not have an opportunity to cross-examine the declarant about relevant misconduct. As a result, the impeaching party effectively will be precluded from impeaching the declarant with such misconduct.

If the attacking party cannot impeach the declarant with specific instances of conduct, she is clearly worse off than she would have been if her opponent had called the declarant to testify. Unless she is able (and willing) to call the declarant as her own witness, she now has no way of bringing to the jury's

⁹⁸ See, e.g., *United States v. Benedetto*, 571 F.2d 1246, 1248-49 (2d Cir. 1978); 3 WEINSTEIN & BERGER, *supra* note 12, ¶ 608[01], at 608-11.

⁹⁹ See, e.g., 3 LOUISELL & MUELLER, *supra* note 5, § 305, at 239; 3 WEINSTEIN & BERGER, *supra* note 12, ¶ 608[01], at 608-11.

¹⁰⁰ FED. R. EVID. 806 advisory committee's note.

attention damaging evidence of the declarant's untruthful conduct. Instead, the attacking party will be limited to using opinion or reputation evidence about the declarant's character for untruthfulness, which is often significantly less effective than evidence of specific instances of conduct.¹⁰¹

It is true that, if the declarant is available to testify, the attacking party has the right to call and cross-examine him.¹⁰² But this burden seems both significant and unfair. As Professors Louisell and Mueller argue: "The impeaching party ought not to be put to the burden of calling the declarant to the stand even if he is available, since his adversary has adduced the statement which gave rise to the need for impeachment."¹⁰³

In addition, if Rule 806 is applied to enforce the prohibition on extrinsic evidence, parties might be encouraged to offer hearsay evidence rather than live testimony. For example, if a party felt that a witness was vulnerable to attack under Rule 608(b), that party might attempt to insulate the witness from this form of impeachment by offering his out-of-court statements, rather than calling him to testify. If, however, the attacking party were allowed to impeach a nontestifying declarant with extrinsic evidence of untruthful conduct, the incentive to use hearsay evidence would be removed. Further, it might encourage parties to call available declarants to testify, because doing so would limit the attacking party to inquiring about specific instances of conduct on cross-examination.

These considerations militate strongly in favor of modifying Rule 608(b)'s ban on extrinsic evidence when the attacking party seeks to impeach a nontestifying declarant with specific instances of conduct showing untruthfulness. On the other side, of course, are the original reasons for the ban: the concerns about confusion, surprise, and prejudice. These reasons, however, do not support enforcement of the ban outside the setting of the testifying witness who is subject to cross-examination. Indeed, even with respect to a testifying witness, these reasons do not serve to justify a blanket exclusion of evidence of specific instances of conduct, but rather serve only to

¹⁰¹ Cf. FED. R. EVID. 405 advisory committee's note ("Of the three methods of proving character provided by the rule, evidence of specific instances of conduct is the most convincing."); see also *supra* note 85 and accompanying text.

¹⁰² The final sentence of Federal Rule of Evidence 806 states: "If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination." FED. R. EVID. 806.

¹⁰³ 4 LOUISELL & MUELLER, *supra* note 5, § 501, at 1241. Professors Louisell and Mueller thus urge that "Rule 806 should be read as modifying the otherwise-applicable Rule (in this case, Rule 608) to the extent of permitting extrinsic evidence of such misconduct." *Id.*

justify exclusion of extrinsic evidence of such conduct. In other words, these reasons have been considered sufficient only to limit the amount and type of impeachment with specific instances of conduct, not to ban it altogether.¹⁰⁴

When the declarant does not testify, the use of extrinsic evidence is not simply a secondary, additional means of conveying the impeaching information to the jury: it is the *only* means of doing so.¹⁰⁵ In this situation, in light of the considerations favoring such impeachment, the traditional ban on the use of extrinsic evidence must yield.¹⁰⁶

This is not to say that the dangers of confusion, surprise, and prejudice no longer exist when extrinsic evidence is offered to impeach a nontestifying declarant. They do exist, but they should be dealt with on an individualized basis, rather than with an across-the-board prohibition. For this reason, the trial court should have broad discretion to determine whether and to what extent to permit the use of extrinsic evidence in this context.

In exercising this discretion, trial courts will be engaged in a new and sometimes difficult task, because they will no longer be working under the mandate of a blanket rule excluding extrinsic evidence. The trial court will, of course, need to consider the particular facts and circumstances in each individual case. There are, however, certain factors that trial courts should generally consider. These factors include the need for impeachment in light of

¹⁰⁴ See 3 WEINSTEIN & BERGER, *supra* note 12, ¶ 608[05], at 608-36; see also 3A WIGMORE, *supra* note 91, § 979, at 823-28 (denominating the reasons of confusion and surprise as "reasons of auxiliary policy").

¹⁰⁵ The Second Circuit emphasized this point in concluding that the impeaching party should be permitted to use extrinsic evidence when applying Rule 608(b) through Rule 806. *United States v. Friedman*, 854 F.2d 535, 570 n.8 (2d Cir. 1988) ("Rule 806 applies, of course, when the declarant has not testified and there has by definition been no cross-examination, and resort to extrinsic evidence may be the only means of presenting such evidence to the jury."), *cert. denied*, 490 U.S. 1004 (1989).

¹⁰⁶ Faced with a similar problem, the Advisory Committee determined that the need for effective impeachment of a declarant is sufficiently important to justify eliminating important restrictions on impeachment with inconsistent statements. Federal Rule of Evidence 613(b), governing impeachment with inconsistent statements, provides in part: "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same." FED. R. EVID. 613(b). Recognizing that these requirements would preclude use of this impeachment weapon against a nontestifying hearsay declarant, the Advisory Committee stated: "The result of insisting upon observation of this impossible requirement in the hearsay situation is to deny the opponent, already barred from cross-examination, any benefit from this important technique of impeachment." FED. R. EVID. 806 advisory committee's note. Rule 806 thus directs: "Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain." FED. R. EVID. 806.

the importance of attacking the declarant's credibility with the extrinsic evidence, which will turn largely on the importance of the declarant's out-of-court statements and the availability of other forms of impeaching evidence; the quality of the impeaching evidence, in terms of its strength and reliability; the amount of time likely to be consumed, which will depend on the nature of the impeaching evidence and the extent to which it will be disputed; the potential confusion of issues; the likelihood of unfair surprise; and the risk of prejudice.¹⁰⁷

These factors will play out differently in individual cases. The facts of *United States v. Friedman*,¹⁰⁸ however, provide a useful example. In that case, the defendant was charged with various racketeering activities in conjunction with the operation of the New York City Parking Violations Bureau. At trial, the prosecution introduced numerous statements by a local politician named Donald Manes under the hearsay exemption for statements of a coconspirator.¹⁰⁹ The defendant then sought to attack the credibility of Manes, the declarant, with evidence that Manes had initially lied to police about a recent suicide attempt, falsely telling them that the slash wounds in his wrist and ankle had been inflicted by unknown assailants. The defendant offered to prove that Manes had lied about the suicide attempt by presenting the testimony of the assistant district attorney to whom Manes had lied, as well as a videotape of Manes reading a public statement in which he admitted that he had lied.¹¹⁰

On these facts, if the court were to find that the evidence was sufficiently probative of untruthfulness under Rule 608(b),¹¹¹ the court would then need to determine whether it should permit the defendant to introduce the extrinsic evidence. In making that determination, two factors seem particularly important. First, the prosecution had introduced multiple statements that Manes—a coconspirator—had made which implicated the defendant. The defendant's need to impeach Manes's credibility effectively thus appears to have been significant. Second, Manes himself had publicly admitted that he had lied about the incident. The impeaching evidence thus seems highly reliable and unlikely to have generated much additional rebuttal evidence, thereby

¹⁰⁷ In order to give the judge sufficient room to exclude extrinsic evidence, Rule 806 should expressly provide the district judge with broad discretion, making it clear that the judge need not employ the high standard for exclusion contained in Rule 403.

¹⁰⁸ 854 F.2d 535, 569-70 (2d Cir. 1988), *cert. denied*, 490 U.S. 1004 (1989).

¹⁰⁹ FED. R. EVID. 801(d)(2)(E).

¹¹⁰ *Friedman*, 854 F.2d at 569.

¹¹¹ In *Friedman*, the Second Circuit affirmed the district court's ruling that the incident was not sufficiently probative of untruthfulness to meet the requirements of Rule 608(b). *Id.* at 570. The court also indicated that its decision on this point was influenced by its concern that the jury would also use the false story as evidence of Manes's guilty state of mind. *Id.*

substantially reducing the risk of a time-consuming and distracting mini-trial on the issue. In addition, the suicide attempt was recent and notorious, which reduces the possibility of unfair surprise.

In circumstances such as these, therefore, it seems that the trial court should exercise its discretion to permit the use of extrinsic evidence. If, however, the facts were altered so that, although Manes was suspected of having lied, he had continued to insist on his initial story, the trial court might well refuse to allow the extrinsic evidence. In this situation, there would be a great risk that the trial would devolve into a lengthy tussle over whether Manes had in fact lied about the incident, with each side calling witnesses to testify to their versions of the events and to dispute the testimony of the opposing witnesses. In such circumstances, the trial court would need to evaluate carefully whether the defendant's need to impeach Manes's credibility was sufficiently great to warrant this risk of delay and confusion, and whether the additional proof on the issue could appropriately be restricted in some manner.

Although determining whether to permit the use of extrinsic evidence to impeach a nontestifying declarant will in some circumstances be a difficult task for the trial court, the considerations favoring such impeachment justify the effort. Thus, Rule 806 should direct the trial court to use its discretion in determining whether to allow the attacking party to use extrinsic evidence when she seeks to impeach a nontestifying declarant with specific instances of conduct pursuant to Rule 608(b).¹¹² The explanatory notes to Rule 806 also should provide more detailed guidance about how the courts should exercise this discretion, by setting out the factors discussed above and encouraging the trial courts to work to minimize any confusion, surprise, or prejudice that

¹¹² The opportunity to use extrinsic evidence, however, should be limited to situations in which the declarant does not testify. There is no need to give the attacking lawyer an additional weapon when the declarant is on the witness stand, available for questioning about specific instances of conduct showing untruthfulness.

This reasoning also applies to impeachment with inconsistent statements. If the declarant testifies, then the normal requirements of Rule 613 should apply: unless justice otherwise requires, the witness must be afforded the opportunity to explain or deny. In interpreting the Ohio counterpart to Rule 806, the court in *State v. Mathias*, No. 91CA31, 1994 Ohio App. LEXIS 1458 (Mar. 31, 1994), concluded:

The waiver of the [Ohio] Evid.R. 613(B) foundational requirement in [Ohio] Evid.R. 806 merely removes an impossible obstacle when the hearsay declarant does not testify and thus, cannot be confronted with the inconsistent statement. Accordingly, where, as here, a hearsay declarant also testifies as a witness, [Ohio] Evid.R. 806 does not excuse the [Ohio] Evid.R. 613 foundational requirement . . .

Id. at *9-10 (citation omitted).

might attend the introduction of extrinsic evidence.

Although this matter can safely be left within the trial court's discretion in most instances, there is one situation where the risk of prejudice is so high, and the effect of prejudice is so dramatic, that the bar against extrinsic evidence should remain firmly in place. This situation arises when the criminal defendant is the declarant subject to impeachment, but the defendant himself has not affirmatively placed his credibility in issue either by testifying or by introducing his own hearsay statements. In this situation, the rules of evidence should protect the criminal defendant from the potentially fatal prejudice of having the jury learn of his prior misdeeds. The reasons for this conclusion are elaborated in Part II of this Article, which addressed impeachment with prior convictions.¹¹³

C. Proposed Amendment of Rule 806

Rule 806 thus should be amended to provide the trial court with discretion to allow the use of extrinsic evidence to impeach a nontestifying declarant with specific instances of conduct pursuant to Rule 608(b). A proposed amendment to the text of Rule 806 follows:

When a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the

¹¹³ See *supra* notes 34–68 and accompanying text. Although evidence of prior convictions may be somewhat more prejudicial than evidence of misdeeds which did not result in conviction—because the conviction conclusively proves that the defendant committed the misdeed—both produce the same type and quality of prejudice. See Okun, *supra* note 48, at 536 n.11 (“Although most of the legal commentary has focused on impeachment with prior convictions, many of the criticisms of such impeachment apply with similar force to impeachment with prior bad acts that were not the subject of convictions.”); Ordover, *supra* note 46, at 141–50 (calling for a closer alignment of Rule 608(b), governing impeachment with prior misdeeds, and Rule 609, governing impeachment with prior convictions). Impeachment of a criminal defendant with prior misdeeds under the conjunction of Rules 806 and 608(b) thus should be subject to the same restriction proposed in Part II for impeachment with prior convictions.

An alternative approach would be to leave this matter within the discretion of the trial court. The argument in favor of this approach is that prior misdeeds can come in many forms; sometimes they are not even criminal in nature. As a result, the likelihood and extent of prejudice that the criminal defendant would face if impeached with prior misdeeds will vary depending on the particular misdeed at issue. If this approach were adopted, however, the trial court's discretion should be sharply confined with language in the explanatory notes directing trial courts to act with caution in permitting a criminal defendant who has not affirmatively placed his credibility in issue to be impeached with prior misdeeds.

declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. *If the declarant does not testify, the court may, in its discretion, permit the use of extrinsic evidence to prove specific instances of conduct that are probative of truthfulness or untruthfulness, as provided in Rule 608(b), as a means of attacking or supporting the credibility of the declarant.* Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.¹¹⁴

IV. APPLICATION OF RULE 806 TO PARTY ADMISSIONS

An additional concern with respect to Rule 806 involves the proper extent of its application to declarants of statements admitted as party admissions under Rule 801(d)(2). As written, Rule 806 specifies that it applies to two categories of declarants: (1) any declarant of a hearsay statement; and (2) any declarant of a statement admitted because it was authorized by the party-opponent, or made by the party-opponent's agent or employee, or made by a coconspirator within the terms of Rule 801(d)(2)(C), (D), or (E).¹¹⁵

¹¹⁴ If this proposed amendment to Rule 806 is adopted, the explanatory notes should include guidance for the trial court on how to exercise its discretion in determining whether to permit the use of extrinsic evidence. *See supra* notes 107–12 and accompanying text.

Rule 806 also should be amended to make clear that the criminal defendant who has not affirmatively placed his credibility in issue is not subject to impeachment with specific instances of conduct showing untruthfulness. This limitation on impeachment can best be accomplished by expanding the revision proposed in Part II to state: "If the declarant is an accused, the credibility of the declarant may be attacked with specific instances of conduct that are probative of untruthfulness, as provided in Rule 608(b), or with prior convictions, only if the declarant has affirmatively placed the declarant's credibility in issue." *See supra* note 78 and accompanying text. The explanatory notes to Rule 806 should also provide guidance for the trial court in determining whether the declarant has affirmatively placed his credibility in issue. *See supra* notes 69–77 and accompanying text. A comprehensive proposal for revising the text of Rule 806 is set out in the Conclusion of this Article.

¹¹⁵ FED. R. EVID. 806; *see also* FED. R. EVID. 801(d)(2)(C) (exempting "a statement by a person authorized by the party to make a statement concerning the subject" from hearsay when offered against a party); FED. R. EVID. 801(d)(2)(D) (exempting "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship" from hearsay when offered

By its terms, however, Rule 806 does not apply to declarants of statements admitted under Rule 801(d)(2)(A) or (B). Consequently, Rule 806 does not authorize impeachment of the declarant when the statement is admitted either as the party-opponent's own statement (an "individual admission") or as a statement that the party-opponent has adopted (an "adoptive admission").¹¹⁶

The issue is whether this exclusion is a sensible limitation on impeachment of nontestifying declarants, in light of the goals of Rule 806 and the structure of the evidence rules generally. As discussed earlier, the drafters of Rule 806 recognized that the declarant of an out-of-court statement admitted for its truth is, in effect, a witness.¹¹⁷ Through Rule 806, they thus sought to allow a party to impeach the credibility of a declarant as if he were a testifying witness.¹¹⁸ In evaluating whether declarants of statements admitted as individual and adoptive admissions should also be subject to impeachment under Rule 806, therefore, the critical question is whether it is appropriate to treat a nontestifying declarant as if he were a testifying witness in the particular setting of individual and adoptive admissions. Although there has been considerable misunderstanding and confusion in Congress and the courts over this question,¹¹⁹ careful analysis suggests that the current text of Rule 806 embodies the most satisfactory resolution of the competing considerations.

A. Application of Rule 806 to Individual and Adoptive Admissions

Consider the following situation. In a criminal trial, the prosecutor calls a witness who testifies that the defendant told him that the defendant had committed the crime. The prosecutor is able to introduce this testimony as an individual admission under Rule 801(d)(2)(A) because the witness is repeating the defendant's own statement, and it is being offered against the defendant.¹²⁰

The question that immediately arises under Rule 806 is whether the defendant would have a right to impeach his own credibility as the declarant of

against a party); FED. R. EVID. 801(d)(2)(E) (exempting "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy" from hearsay when offered against a party).

¹¹⁶ FED. R. EVID. 801(d)(2)(A) (exempting "the party's own statement, in either an individual or a representative capacity" from hearsay when offered against a party); FED. R. EVID. 801(d)(2)(B) (exempting "a statement of which the party has manifested an adoption or belief in its truth" from hearsay when offered against a party).

¹¹⁷ FED. R. EVID. 806 advisory committee's note; *see supra* note 4 and accompanying text.

¹¹⁸ FED. R. EVID. 806 advisory committee's note.

¹¹⁹ *See infra* part IV.A.1-2.

¹²⁰ FED. R. EVID. 801(d)(2)(A). A similar situation could arise in a civil case as well.

this statement. In many cases, of course, the defendant would have no interest in impeaching his own credibility before the jury. In some circumstances, however, the defendant might well wish to exercise this option. For instance, in the situation described, the defendant might wish to impeach his own credibility by introducing a prior inconsistent statement—that is, a statement in which he denied any involvement with the crime.¹²¹ Alternatively, the defendant might wish to suggest that his admission of guilt was false by showing that he has a reputation for untruthfulness—not a happy alternative, certainly, but one that may be preferable in a particular case to allowing a direct admission of guilt to go unchallenged.

Further, a small change in the facts described gives rise to a related question. Suppose a prosecution witness testifies that the defendant said that he had committed the crime, but that he had acted under duress. Again, the prosecutor could introduce this testimony as a party admission under Rule 801(d)(2)(A), but now, because the statement has an exculpatory component, the prosecutor might wish to impeach the defendant's credibility. This impeachment would be possible, at least with respect to a testifying witness, because the rules permit any party to attack the credibility of a witness, "including the party calling the witness."¹²²

The plain language of Rule 806 would bar impeachment in both of these situations. Rule 806 specifically provides that it applies to the declarant of "a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), or (E)."¹²³ The rule makes no reference to statements defined as individual or adoptive admissions in Rule 801(d)(2)(A) and (B). Under ordinary canons of statutory construction, the specific omission of subsections (A) and (B), coupled with the specific inclusion of the remaining subsections of Rule 801(d)(2), would dictate that courts interpret Rule 806 *not* to apply to declarants of statements admitted under Rule 801(d)(2)(A) and (B).¹²⁴

¹²¹ See, e.g., *United States v. Dent*, 984 F.2d 1453, 1460 (7th Cir.) (following the prosecutor's introduction of the defendant's guilty plea to a related state charge under Rule 801(d)(2)(A), the defendant sought to impeach his own credibility through Rule 806 by introducing statements that he had made to his lawyer which were inconsistent with the guilty plea), *cert. denied*, 114 S. Ct. 169, and *cert. denied*, 114 S. Ct. 209 (1993).

¹²² FED. R. EVID. 607. Again, a similar situation could arise in a civil case as well.

¹²³ FED. R. EVID. 806.

¹²⁴ The relevant canon of statutory construction is *expressio unius est exclusio alterius*, which admonishes that the expression of specific situations encompassed by the provision acts to exclude others not so expressed. See, e.g., *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 113 S. Ct. 1160, 1163 (1993) (applying the canon in interpreting Federal Rule of Civil Procedure 9(b)); *Camp v. Gress*, 250 U.S. 308, 314-15 (1919) (applying the canon in interpreting the Judicial Code); see also 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47.23 (5th ed. 1992).

The question raised here, however, is whether Rule 806 *should* give litigants any right to engage in this type of impeachment. In evaluating this question, it is necessary first to consider any reasons that Congress may have had for crafting the text of Rule 806 to exclude individual and adoptive admissions.

1. *The Drafting of Rule 806*

When Congress initially considered Rule 806, the rule was in the form proposed by the Advisory Committee. At that point, the rule was drawn more narrowly, providing only for impeachment of declarants of hearsay statements.¹²⁵ In evaluating the proposed rule, however, Congress recognized that it contained a problematic gap, which stemmed from the structure of the hearsay rules themselves and, more particularly, from the way in which the Federal Rules of Evidence classify party admissions.

Under the Federal Rules, statements that meet the formal definition of hearsay, but nonetheless are admissible as party admissions, are not classified as hearsay exceptions, but rather are defined in Rule 801(d) as not being hearsay at all.¹²⁶ As a result, the language of proposed Rule 806, which referred only to declarants of *hearsay* statements, would not have reached statements defined as party admissions under Rule 801(d)(2).

Recognizing this problem, Congress amended the proposed rule to specify that it also applies to statements "defined in Rule 801(d)(2), (C), (D), or (E)."¹²⁷ This amendment extended the scope of Rule 806 to allow

¹²⁵ See Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 329 (1973).

¹²⁶ Rule 801(d) provides, in pertinent part:

(d) Statements which are not hearsay. A statement is not hearsay if —

....

(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

FED. R. EVID 801(d)(2).

¹²⁷ FED. R. EVID. 806. The Senate Judiciary Committee's Report explained:

impeachment of the declarant when a statement is admitted because it was authorized by a party-opponent, or made by a party-opponent's agent or employee, or made by a coconspirator within the terms of Rule 801(d)(2).¹²⁸

At the same time, however, Congress consciously omitted from Rule 806 any reference to statements admitted under Rule 801(d)(2)(A) and (B). As a result, Rule 806 does not authorize impeachment of the declarant when the statement is admitted either as an individual admission or as an adoptive admission.¹²⁹ The question at hand is whether Congress had any principled reason for carving such declarants out of Rule 806. The legislative history of the rule strongly suggests that Congress did not. Rather, the legislative history indicates that Congress excluded declarants of individual and adoptive admissions because it misunderstood how the impeachment rules operate with respect to the parties in a case.

In Congress, it was the Senate Judiciary Committee that recognized the need to include in Rule 806 a reference to statements defined as nonhearsay in Rule 801(d)(2). In its Report, the Committee explained that it had included statements introduced under Rule 801(d)(2)(C), (D), and (E) to ensure that Rule 806 would reach them.¹³⁰ The Committee then went on to explain why it had

Rule 801 defines what is a hearsay statement. While statements by a person authorized by a party-opponent to make a statement concerning the subject, by the party-opponent's agent or by a coconspirator of a party—see rule 801(d)(2)(c), (d), and (e)—are traditionally defined as exceptions to the hearsay rule, rule 801 defines such admission by a party-opponent as statements which are not hearsay. Consequently, rule 806 by referring exclusively to the admission of hearsay statements, does not appear to allow the credibility of the declarant to be attacked when the declarant is a coconspirator, agent or authorized spokesman. The committee is of the view that such statements should open the declarant to attacks on his credibility. Indeed, the reason such statements are excluded from the operation of rule 806 is likely attributable to the drafting technique used to codify the hearsay rule, viz some statements, instead of being referred to as exceptions to the hearsay rule, are defined as statements which are not hearsay. The phrase "or a statement defined in rule 801(d)(2)(c), (d), and (e)" is added to the rule in order to subject the declarant of such statements, like the declarant of hearsay statements, to attacks on his credibility.

NOTES OF THE SENATE COMM. ON THE JUDICIARY, S. REP. NO. 1277, 93d Cong., 2d Sess. 22 (1974), reprinted in 1974 U.S.C.C.A.N. 7051, 7068-69 (footnote omitted).

¹²⁸ See FED. R. EVID. 801(d)(2)(C)-(E); see *supra* note 126.

¹²⁹ See FED. R. EVID. 801(d)(2)(A)-(B); see *supra* note 126.

¹³⁰ NOTES OF THE SENATE COMM. ON THE JUDICIARY, *supra* note 127, at 7069. Because party admissions were defined as nonhearsay in Rule 801(d)(2), Rule 806 would not have reached them if it had only authorized impeachment of declarants of *hearsay* statements. See *supra* text accompanying note 127.

not included a reference to individual and adoptive admissions admitted under Rule 801(d)(2)(A) and (B): "The committee considered it unnecessary . . . because the credibility of the party-opponent is always subject to an attack on his credibility [sic]." ¹³¹

The Senate Judiciary Committee's assumption that a party's credibility is always subject to attack is inexplicable. A party may be impeached only if she testifies, or if her out-of-court statement is admitted such that Rule 806 applies. ¹³² The Committee's report clearly indicates, however, that it excluded Rule 801(d)(2)(A) and (B) from the text of Rule 806 based on its mistaken assumption that a party is always subject to impeachment.

In enacting Rule 806 with the Senate Judiciary Committee's language, Congress did not elaborate on the reasons for excluding declarants of individual and adoptive admissions. ¹³³ In the absence of any further explanation, Congress may have joined in or simply failed to notice the Senate Judiciary Committee's mistaken assumption that there was no need to include such declarants in the rule. In any event, however, Congress appears not to have had, or at least it did not articulate, any reason based in sound policy for excluding declarants of individual and adoptive admissions from the scope of Rule 806.

2. *The Confusion Among and Within the Courts*

The apparent lack of rationale for the exclusion of individual and adoptive admissions has generated confusion in the federal courts. The Seventh Circuit's treatment of the issue is illustrative. Three times in three successive years, that court addressed the question of whether Rule 806 applies to declarants of individual and adoptive admissions—with markedly inconsistent results.

¹³¹ NOTES OF THE SENATE COMM. ON THE JUDICIARY, *supra* note 127, at 7069 n.28.

¹³² 4 LOUISELL & MUELLER, *supra* note 5, § 500, at 1238 n.82. It is surprising that the Senate Judiciary Committee misunderstood this basic point because there was extensive discussion in both the House and the Senate with respect to the fact that a criminal defendant cannot be impeached with his prior convictions unless he testifies. *See, e.g.*, 120 CONG. REC. 2376 (1974) (remarks of Rep. Hogan); *id.* at 2377 (remarks of Rep. Dennis); *id.* at 2378 (remarks of Rep. Brasco); *id.* at 2381 (remarks of Rep. Lott); *id.* at 37,080 (remarks of Sen. Kennedy).

¹³³ *Id.* at 37,083. The Senate Judiciary Committee's recommendation was accepted by the full Senate without further explanation. The Committee of Conference for both chambers then adopted the Senate amendment, also without further explanation as to the exclusion of individual and adoptive admissions. *Id.* at 39,942. The Committee did state, however, that it was adopting the Senate's version of the rule as that version "conforms the rule to present practice." *Id.*

In the first of these cases, *United States v. McClain*,¹³⁴ the Seventh Circuit refused to countenance the defendant's argument that he was entitled to impeach the declarant of an adoptive admission under Rule 806.¹³⁵ In doing so, the court relied on the plain language of the rule, emphasizing that "Rule 806 says nothing of 801(d)(2)(B), which governs non-hearsay statements adopted by the party against its interest."¹³⁶

The following year, the Seventh Circuit revisited the issue in *United States v. Velasco*.¹³⁷ In *Velasco*, however, the court departed from the language of the rule, relying instead on the contrary indications of congressional intent in the legislative history. Without mentioning its previous decision in *McClain*, the court announced:

Although [Rule 806's] language does not specifically include statements defined in 801(d)(2)(A), the rule under which [the defendant's] statement came in, Rule 806 is not inapplicable: "The committee considered it unnecessary to include statements contained in rule 801(d)(2)(A) and (B)—the statement by the party-opponent himself or the statement of which he has manifested his adoption—because the credibility of the party-opponent is always subject to an attack on his credibility [sic]."¹³⁸

¹³⁴ 934 F.2d 822 (7th Cir. 1991).

¹³⁵ In *McClain*, the prosecutor introduced tape recordings of incriminating conversations between the defendant and a government informant. McClain, the defendant, sought to impeach the informant's credibility under Rule 806. The trial judge refused to permit the impeachment, on the ground that the informant's statements were not hearsay because they were admitted only for the context that they provided, and not for their truth. On appeal, McClain argued that because the jury treated the informant's statements as adoptive admissions, he was entitled to impeach the informant under Rule 806. *Id.* at 832–33.

¹³⁶ *Id.* at 833. In rejecting the defendant's argument, the Seventh Circuit also held that impeachment was improper because the trial judge admitted the statements to provide context only. *Id.*

Even if the court had agreed that the informant's statements were adoptive admissions, and that the declarant of an adoptive admission is impeachable under Rule 806, there is a further question of whether the declarant for impeachment purposes is the informant, who uttered the statement, or the defendant, who adopted it. This issue is analyzed *infra* at notes 147–59 and accompanying text.

¹³⁷ 953 F.2d 1467 (7th Cir. 1992). In *Velasco*, the prosecution introduced a portion of the defendant's postarrest statement under Rule 801(d)(2)(A). The defendant sought to introduce the rest of the statement under Federal Rule Evidence 106, the rule of completeness. Although the Seventh Circuit ultimately upheld the trial judge's decision to refuse admission of the remaining portion, the court noted that admission of that portion would subject the defendant to impeachment under Rule 806. *Id.* at 1473–76.

¹³⁸ *Id.* at 1473 n.5 (quoting NOTES OF THE SENATE COMM. ON THE JUDICIARY, *supra*

The Seventh Circuit then reaffirmed its position that Rule 806 applies to declarants of statements admitted as individual and adoptive admissions the following year in *United States v. Dent*.¹³⁹ In that case, the court stated, "we have already held that this rule also applies to a party's own statement as defined in Rule 801(d)(2)(A) or (B) in *Velasco*."¹⁴⁰

The Seventh Circuit's holdings in *Velasco* and *Dent* stand in direct conflict with its earlier decision in *McClain*. The confusion within the Seventh Circuit is especially curious, since two of the three judges on the panel that decided *McClain* (including its author) were on the panel in *Velasco*.¹⁴¹ The Seventh Circuit's treatment of the issue is, however, symptomatic of the general confusion among the circuit courts of appeals that have addressed the issue.¹⁴²

It is clear that this confusion can be attributed, at least in part, to the tension between the plain language of Rule 806 and the conflicting indications

note 127, at 7069 n.28 (emphasis added)).

¹³⁹ 984 F.2d 1453 (7th Cir.), *cert. denied*, 114 S. Ct. 169, and *cert. denied*, 114 S. Ct. 209 (1993). In *Dent*, the prosecutor introduced the defendant's guilty plea to a related state charge as an individual admission under Rule 801(d)(2)(A). The defendant then sought to impeach his own credibility through Rule 806 by introducing statements that he had made to his lawyer which were inconsistent with the guilty plea. *Id.* at 1460.

¹⁴⁰ *Id.*

¹⁴¹ In *McClain*, Judge Cudahy wrote the opinion, in which Judges Easterbrook and Posner joined. (Judge Easterbrook wrote a brief concurring opinion on a different point.) In *Velasco*, Chief Judge Bauer wrote the opinion, in which Judges Cudahy and Easterbrook joined. (Judge Cudahy wrote a brief concurring opinion on a different point.) Judges Easterbrook and Bauer were also on the panel in *Dent*.

¹⁴² The Eleventh Circuit addressed the issue in *United States v. Price*, 792 F.2d 994 (11th Cir. 1986). In *Price*, the prosecutor introduced taped conversations between the defendant and a government informant. On appeal, the defendant argued that the trial judge should have permitted him to impeach the informant's credibility under Rule 806, because the informant's statements were admitted as adoptive admissions. *Id.* at 996-97. Although the court ultimately held that the statements were admitted for context only, it was careful to note that "the utterer of words which have been adopted as an admission by the defendant, is subject to impeachment under FRE 806." *Id.* at 997.

The Ninth Circuit reached the opposite conclusion with respect to this issue in *United States v. Becerra*, 992 F.2d 960 (9th Cir. 1993). In *Becerra*, a prosecution witness had testified that Angela, a government informant, had told him, in the defendant's presence, that the defendant knew the cocaine source. The defendant then sought to attack Angela's credibility under Rule 806, but the trial judge refused to permit it. On appeal, the Ninth Circuit affirmed the trial judge's ruling on alternate grounds. First, the court held that Angela's statement was not hearsay because it was admitted as foundation and not for its truth. Alternatively, however, the court held that "[e]ven if admitted for its truth, the statement was an adoptive admission, which is not hearsay. . . . Rule 806 does not apply." *Id.* at 965 (citations omitted).

of congressional intent in the legislative history.¹⁴³ The courts' confusion, however, is also due to the lack of attention given the issue. The courts which have held that Rule 806 does not apply to adoptive admissions introduced under Rule 801(d)(2)(B) have, at most, noted that "Rule 806 says nothing of 801(d)(2)(B)."¹⁴⁴ The courts which have held that Rule 806 does apply to individual and adoptive admissions introduced under Rule 801(d)(2)(A) and (B) have either assumed the point,¹⁴⁵ or have merely quoted from the legislative history, without offering any discussion of the resulting contradiction with the text of the rule.¹⁴⁶ None of the courts has engaged in a thoughtful analysis of whether any principled reasons exist for either refusing or permitting impeachment of declarants of statements admitted as individual and adoptive admissions.

B. Analysis of Whether Rule 806 Should Permit Impeachment of Declarants of Individual and Adoptive Admissions

The task, then, is to evaluate whether Rule 806 should permit impeachment of the declarant of a statement admitted as an individual or adoptive admission. A threshold problem in this evaluation is identifying who constitutes the declarant in the context of both individual admissions and adoptive admissions.¹⁴⁷ The identity of the declarant is important because the declarant's status as a party to the case, as opposed to a nonparty, will have a significant influence on any policy considerations.

¹⁴³ Since the disagreement among the courts turns on whether they rely on the plain language of Rule 806 or its legislative history, it appears inevitable that the disagreement will continue unless the problem is addressed in Rule 806 itself. *Cf.* Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 609–10 n.4 (1991) (discussing the proper role of legislative history in interpreting statutes); *id.* at 2488–90 (Scalia, J., concurring) (taking a contrary view of the proper role of legislative history); Blanchard v. Bergeron, 489 U.S. 87, 97–99 (1989) (Scalia, J., concurring) (same).

¹⁴⁴ United States v. McClain, 934 F.2d 822, 833 (7th Cir. 1991). In *Becerra*, the court's entire discussion of the issue was as follows: "Even if admitted for its truth, the statement was an adoptive admission, which is not hearsay. *See* United States v. Monks, 774 F.2d 945, 950 (9th Cir. 1985); FED. R. EVID. 801(d)(2)(B). Rule 806 does not apply." *Becerra*, 992 F.2d at 965. The *Monks* decision provided no analysis of the issue either.

¹⁴⁵ *See Price*, 792 F.2d at 996–97.

¹⁴⁶ *See* United States v. Velasco, 953 F.2d 1467, 1473 n.5 (7th Cir. 1992); United States v. Dent, 984 F.2d 1453, 1460 (7th Cir.), *cert. denied*, 114 S. Ct. 169, and *cert. denied*, 114 S. Ct. 209 (1993).

¹⁴⁷ Rule 801(b) defines a "declarant" as "a person who makes a statement." FED. R. EVID. 801(b).

1. *Identifying the Declarant*

In the context of individual admissions, the answer is straightforward: the declarant is always the party against whom the statement has been offered. Rule 801(d)(2)(A) only exempts from the hearsay rule those statements that are offered against a party and that are the party's own statements.¹⁴⁸

In the context of adoptive admissions under Rule 801(d)(2)(B), however, the declarant's identity is less obvious. The question is whether the declarant is the person who uttered the statement or the person who adopted the statement. The courts that have discussed this question in conjunction with Rule 806 have reached inconsistent conclusions. In *United States v. Price*, the Eleventh Circuit opined that "the *utterer of words* which have been adopted as an admission by the defendant, is subject to impeachment under FRE 806."¹⁴⁹ In *United States v. Finley*,¹⁵⁰ however, the district court held that "[t]he declarant of an adoptive admission is the *one who adopts it as his own statement*."¹⁵¹

The conclusion of the district court in *Finley* appears to be correct. Under

¹⁴⁸ Rule 801(d)(2)(A) provides, in part: "A statement is not hearsay if . . . the statement is offered against a party and is (A) the party's own statement, in either an individual or representative capacity." FED. R. EVID. 801(d)(2)(A).

¹⁴⁹ 792 F.2d 994, 997 (11th Cir. 1986) (emphasis added). For a discussion of the facts of *Price*, see *supra* note 142. The Seventh Circuit in *McClain* and the Ninth Circuit in *Becerra* also addressed situations in which the defendant sought to impeach the person who uttered a statement adopted by the defendant. In both cases, the courts held that Rule 806 does not apply to adoptive admissions, thus bypassing the question whether the person who uttered the statement is the declarant for Rule 806 purposes. *United States v. Becerra*, 992 F.2d 960, 965 (9th Cir. 1993); *United States v. McClain*, 934 F.2d 822, 833 (7th Cir. 1991).

¹⁵⁰ 708 F. Supp. 906 (N.D. Ill. 1989).

¹⁵¹ *Id.* at 911 (emphasis added). In *Finley*, the prosecutor planned to introduce taped conversations between the defendants and a government informant named Burnett. On a motion *in limine*, the defense argued that it should be entitled to impeach Burnett under Rule 806, because his statements were adoptive admissions of the defendants. The court rejected the argument, stating:

[E]ven assuming defendants did adopt Burnett's statements, making them admissible pursuant to Rule 801(d)(2)(B), that does not make Burnett subject to impeachment. The declarant of an adoptive admission is the one who adopts it as his own statement; the declarants would therefore be defendants, not Burnett. Thus if Burnett's statements are admissible as adoptive admissions of defendants, they may be introduced pursuant to Rule 801(d)(2)(B) only by the government. They do not afford defendants an excuse to impeach Burnett.

the Federal Rules, another person's statement only becomes an adoptive admission if the party against whom the statement is offered adopted the statement, or manifested belief in its truth.¹⁵² If those requirements are met, then the party has, in a real sense, taken the other person's statement and made it her own. In other words, once the party has embraced the statement, the identity of the utterer is no longer relevant because the statement is being offered as though it were the adopting party's own statement, without regard to who actually uttered it. Indeed, that is the very rationale for the statement's admissibility.¹⁵³

Courts have consistently recognized this same point in cases involving the Confrontation Clause. Defendants have argued that, if an adoptive confession is introduced against a criminal defendant, the Confrontation Clause requires that he have the opportunity to cross-examine the person who originally made it. But the courts have not been convinced. In *Poole v. Perini*,¹⁵⁴ for example, the Sixth Circuit explained that "[a]n adoptive confession avoids the confrontation problem because the words of the hearsay become the words of the defendant."¹⁵⁵ The court went on to hold that the defendant had not raised a legitimate claim under the Confrontation Clause because he was asserting, in essence, that he had not been given an opportunity to confront himself.¹⁵⁶

¹⁵² Rule 801(d)(2)(B) provides, in part: "A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . (B) a statement of which the party has manifested an adoption or belief in its truth." FED. R. EVID. 801(d)(2)(B).

¹⁵³ It could be argued that the person who uttered the statement should be considered the declarant where the person who adopted the statement did not have firsthand knowledge of the matters described in the statement, but rather was relying entirely on the credit of the utterer. In this situation, the argument could be made that it is the testimonial qualities of the utterer, and not those of the person who adopted the statement, that are important. *Cf.* RONALD J. ALLEN & RICHARD B. KUHNS, AN ANALYTICAL APPROACH TO EVIDENCE: TEXT, PROBLEMS, AND CASES 387-89 (1989). Even in that situation, however, the person who adopted the statement should be considered the declarant, for when a person adopts the statement of another, or manifests belief in its truth, that person takes the statement as her own. Although she may demonstrate her adoption in some shorthand way (through, for instance, nodding or tacitly accepting), once she has adopted the statement within the meaning of Rule 801(d)(2)(B), she has essentially reiterated the utterer's statement. Her adoption may thus be viewed as the functional equivalent of an individual admission. *See id.* On this understanding, it is clear that the person adopting the statement should still be considered the declarant, despite her lack of firsthand knowledge, because if she had repeated the statement that she adopted, there would be no question but that she was the declarant of an individual admission. *See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES 216 (2d ed. 1993).

¹⁵⁴ 659 F.2d 730 (6th Cir. 1981), *cert. denied*, 455 U.S. 910 (1982).

¹⁵⁵ *Id.* at 733.

¹⁵⁶ *Id.*

Similarly, in *Oaks v. Patterson*,¹⁵⁷ the court held that, once the defendant has adopted the statement of another, “[s]uch a statement is regarded as the acknowledgment of guilt or confession of the person assenting to it and not the statement of the original declarant.”¹⁵⁸

This reasoning applies with equal force to adoptive admissions under Rule 806 in both civil and criminal cases. Courts therefore should treat a statement falling within Rule 801(d)(2)(B) as having been made by the person who adopted it. As with individual admissions, therefore, the declarant of an adoptive admission will always be the party against whom the statement is offered.¹⁵⁹ This characteristic distinguishes individual and adoptive admissions under Rule 801(d)(2)(A) and (B) from admissions falling within Rule 801(d)(2)(C), (D), or (E) because the declarant of an individual or adoptive admission under (A) or (B) is always the party herself; under the other provisions, the declarant is always some third person (*i.e.*, the authorized spokesperson, agent or employee, or coconspirator).

2. *Legitimacy of Impeaching the Declarant-Party*

When the declarant is the party against whom the statement is being offered, the question of impeachment can arise in one of two ways: the declarant-party may wish to impeach her own credibility, or the party who introduced the statement (the “sponsoring” or “calling” party) may wish to impeach the credibility of its maker (the “declarant-party”).¹⁶⁰ In determining

¹⁵⁷ 278 F. Supp. 703 (D. Colo.), *aff'd per curiam*, 400 F.2d 392 (10th Cir. 1968).

¹⁵⁸ *Id.* at 706; *see also* Wernert v. Arn, 819 F.2d 613, 616–17 (6th Cir. 1987), *cert. denied*, 484 U.S. 1011 (1988); Shiflett v. Virginia, 447 F.2d 50, 58 (4th Cir. 1971), *cert. denied*, 405 U.S. 994 (1972); United States v. Rollins, 862 F.2d 1282, 1297 (7th Cir. 1988), *cert. denied*, 490 U.S. 1074 (1989); United States *ex rel.* Cheeks v. Russell, 424 F.2d 647, 653 (3d Cir. 1970), *cert. denied*, 400 U.S. 994 (1971); *cf.* United States v. Monks, 774 F.2d 945, 952 (9th Cir. 1985) (stating that the person adopting the statement can confront himself, but holding that the court must do a case-by-case Confrontation Clause analysis when the utterer’s statement has independent significance).

¹⁵⁹ The Senate Judiciary Committee apparently recognized this point, for it excluded statements falling within both Rule 801(d)(2)(A) and Rule 801(d)(2)(B) on the ground that the party-opponent’s credibility is always subject to attack. NOTES OF THE SENATE COMM. ON THE JUDICIARY, *supra* note 127, at 7069 n.28. In other words, the Committee assumed that the party-opponent would always be the declarant of a statement introduced under Rule 801(d)(2)(A) and (B).

¹⁶⁰ Even in a joint trial, the attacking party could only be the party who introduced the statement (the “sponsor”) or the party who made or adopted the statement. If the sponsor wished to use the statement against another party in the case, the sponsor would have to offer the statement against that party as either a party admission under Rule 801(d)(2)(C),

whether Rule 806 should permit such impeachment, it is necessary to focus on whether there are special considerations that arise when the declarant is a party to the case, and whether those considerations warrant restricting the normal right of impeachment which would obtain if that party had testified.

a. Impeachment by the Sponsoring Party

A basic premise of Rule 806 is that the party who introduced the statement is, in effect, offering the declarant as a witness.¹⁶¹ As a general matter, Rule 607 permits a party to impeach her own witness.¹⁶² Thus, if Rule 806 were extended to individual and adoptive admissions, a party introducing her opponent's statement could then seek to impeach her opponent's credibility.

The sponsoring party might wish to impeach the declarant-party's credibility for two reasons. First, the sponsor might simply want to get otherwise inadmissible, but very powerful, impeachment evidence to the jury, hoping that the jury will also use the evidence substantively. In a criminal case, for instance, the prosecutor might wish not only to introduce the defendant's confession, but also evidence of the defendant's otherwise inadmissible prior convictions, past bad acts, and prior inconsistent statements.¹⁶³ Courts have uniformly denounced this practice. The federal courts of appeals have agreed that, under Rule 607, impeachment by the calling party is impermissible "where employed as a mere subterfuge to get before the jury evidence not

(D), or (E) or as hearsay within some exception. Either way, Rule 806 clearly would permit impeachment. Alternatively, if the sponsor was unable to introduce the statement against the other party, or was not interested in doing so, that party would be entitled to a limiting instruction, directing the jury to use the evidence only against the declarant. That party, however, would not be entitled to impeach the declarant's credibility because, at least theoretically, the jury would not be considering the declarant's statement against that party.

¹⁶¹ See FED. R. EVID. 806 advisory committee's note.

¹⁶² FED. R. EVID. 607; see *supra* note 122 and accompanying text.

¹⁶³ Federal Rule of Evidence 609 permits impeachment with prior convictions, Federal Rule of Evidence 608(b) permits impeachment with specific instances of misconduct, and Federal Rule of Evidence 613 permits impeachment with prior inconsistent statements. Normally, the prosecution will be able to introduce the defendant's inconsistent statements as substantive evidence under Rule 801(d)(2)(A) or (B). If such statements are substantively inadmissible, because, for instance, they were taken in violation of the defendant's *Miranda* rights, then the prosecution might seek to use them as impeaching evidence. See *Harris v. New York*, 401 U.S. 222 (1971) (holding that the prosecutor may use *Miranda*-barred statements to impeach the credibility of the defendant's testimony); *Oregon v. Hass*, 420 U.S. 714 (1975) (holding that the prosecution may use statements taken in violation of the defendant's right to counsel to impeach the credibility of the defendant's testimony).

otherwise admissible.”¹⁶⁴

By contrast, the sponsoring party may have a second, more legitimate reason for wanting to impeach the declarant-party. If the declarant’s statement is both helpful and harmful to the sponsor’s case, the sponsor might well wish to introduce the statement and then impeach the declarant’s credibility in order to cast doubt on the harmful portion of the statement.¹⁶⁵

Courts have confronted a related issue in cases in which the prosecution has sought to impeach its own testifying, nonparty witness with a substantively inadmissible prior inconsistent statement. In those cases, courts have permitted the prosecution to impeach the witness in some circumstances.¹⁶⁶ Courts have

¹⁶⁴ *United States v. Morlang*, 531 F.2d 183, 190 (4th Cir. 1975); *see also* *United States v. Webster*, 734 F.2d 1191, 1192 (7th Cir. 1984) (noting that, although *Morlang* is a pre-rules case, its limitation on the prosecutor’s rights under Rule 607 “has been accepted in all circuits that have considered the issue”). The following cases indicate the uniformity of the circuits: *United States v. DeLillo*, 620 F.2d 939, 946–47 (2d Cir.), *cert. denied*, 449 U.S. 835 (1980); *United States v. Sebetich*, 776 F.2d 412, 428–29 (3d Cir. 1985), *reh’g denied*, 828 F.2d 1020 (3d Cir. 1987), *cert. denied*, 484 U.S. 1017 (1988); *United States v. Hogan*, 763 F.2d 697, 701–02 (5th Cir.), *modified on other grounds*, 771 F.2d 82 (5th Cir. 1985) *and* 779 F.2d 296 (5th Cir. 1986); *United States v. Crouch*, 731 F.2d 621, 622 n.1, 623–24 (9th Cir. 1984), *cert. denied*, 469 U.S. 1105 (1985); *United States v. Carter*, 973 F.2d 1509, 1513 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1289 (1993); *United States v. Billue*, 994 F.2d 1562, 1566 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 939 (1994); *United States v. Johnson*, 802 F.2d 1459, 1466 (D.C. Cir. 1986).

¹⁶⁵ *See, e.g.*, *United States v. Velasco*, 953 F.2d 1467, 1473 (7th Cir. 1992). In *Velasco*, the prosecutor introduced a portion of the defendant’s postarrest statement, in which the defendant admitted involvement in the crime. The defendant sought to introduce the rest of his statement, in which he explained why he was involved. The court held that, if the remaining portion were admitted, then Rule 806 would give the prosecution the right to impeach the defendant’s credibility. *Id.* at 1473 n.5; *see supra* notes 137–38 and accompanying text. Ultimately, the court held that the defendant was not entitled to introduce the explanatory portion of his postarrest statement. *Id.* at 1474–76.

In certain cases the declarant-party might succeed in introducing the remaining portion of her statement. She might do so, for example, under the rule of completeness, Rule 106, because the other party had introduced only a portion of the statement out of context. If the declarant-party did succeed in introducing the remainder, then the trial court would have to determine whether that portion of the statement should be treated, for purposes of Rule 806, as part of the statement that the other party introduced under Rule 801(d)(2)(A) or (B). That determination would lie within the trial court’s discretion. Nonetheless, it seems that in many cases the court should hold that the party who initiated introduction of the statement should be considered to have introduced the entire statement, because a party should not be able to avoid responsibility for the entire statement’s introduction by carving out and offering only the favorable portions.

¹⁶⁶ *See, e.g.*, *Webster*, 734 F.2d at 1193. In *Webster*, the Seventh Circuit discussed the prosecution’s need to impeach its own witness:

remained wary of the prosecution's motivation, however, requiring, for instance, that the prosecution show that its "primary purpose" is not to place otherwise inadmissible evidence before the jury.¹⁶⁷

With this type of requirement, courts have, at least to some extent, alleviated the concern that the calling party is simply trying to sneak in inadmissible evidence.¹⁶⁸ Even so, the calling party's motivation is difficult to police and, regardless of that party's motive, there remains a substantial risk that the jury will be unable to cabin its use of substantively inadmissible evidence. Moreover, when the calling party is not dealing with a nonparty witness, but rather is introducing her opponent's out-of-court admission, there is a significant additional consideration.

That consideration arises because it is no longer simply a person tangential

Suppose the government called an adverse witness that it thought would give evidence both helpful and harmful to it, but it also thought that the harmful aspect could be nullified by introducing the witness's prior inconsistent statement. . . . [W]e are at a loss to understand why the government should be put to the choice between the Scylla of forgoing impeachment and the Charybdis of not calling at all a witness from whom it expects to elicit genuinely helpful evidence.

Id.

¹⁶⁷ *Hogan*, 763 F.2d at 702. Other courts have imposed similar, though potentially somewhat different, requirements. *See, e.g., Webster*, 734 F.2d at 1192–93 (permitting the prosecution to impeach its own witness with a substantively inadmissible prior inconsistent statement as long as the prosecution acted in good faith); *DeLillo*, 620 F.2d at 946–47 (permitting the prosecution to impeach its own witness with a substantively inadmissible prior inconsistent statement if the witness's testimony was essential to the prosecution's case).

¹⁶⁸ Professor Graham has argued strenuously that the courts should return to requiring the calling party to show that it was both surprised and affirmatively damaged by the witness's adverse testimony. In explaining the advantages of the stricter rule, Professor Graham has stated:

The requirement of surprise and affirmative damage permitted a party to impeach his own witness when truly necessary. At the same time, the requirement prevented a party from calling a witness solely to place a substantively inadmissible prior inconsistent statement before the jury in the hope that the jury would disregard a limiting instruction and consider the statement as substantive evidence.

GRAHAM, *supra* note 5, § 607.3, at 425. In the context of Rule 806, imposing these requirements on the sponsoring party would effectively preclude that party from impeaching the declarant's credibility because the sponsoring party obviously would not be surprised by the content of the out-of-court statement that the sponsoring party itself had introduced.

to the case whose credibility the calling party has put in issue and then seeks to attack. The target of the attack is a party to the case itself. The problems, therefore, go beyond the already significant risk that the calling party's motive may be impure and that the jury will receive (and misuse) substantively inadmissible evidence. Now, the direct result of the use of the impeaching evidence is to damage the declarant-party's credibility.

The harm effected by this result is substantial because the credibility of a party is so centrally important to determining the outcome of any case. The Federal Rules and the common law contain a carefully balanced set of impeachment rules that restrict, in important ways, the ability of a party to impugn her opponent's credibility.¹⁶⁹ It is unfair to allow a party to sidestep these restrictions through the simple device of introducing an out-of-court statement that her opponent has made. When one party has introduced an out-of-court statement which puts her opponent's credibility in issue, therefore, that party should not, by virtue of her own act of introducing such evidence, thereby be liberated to take otherwise impermissible steps to attack her opponent's credibility.¹⁷⁰

This possibility is of particular concern in a criminal case because the otherwise inadmissible impeaching evidence can be particularly damaging to the defendant.¹⁷¹ But the harm caused by this result could be substantial in civil cases as well. As a matter of policy, therefore, a party should not be permitted to use her opponent's statements as a vehicle to introduce damaging, and otherwise inadmissible, impeachment evidence.

b. Impeachment by the Declarant-Party

The question remains, however, whether Rule 806 should permit the

¹⁶⁹ See, e.g., *United States v. May*, 727 F.2d 764, 765 (8th Cir. 1984) ("Although the Federal Rules of Evidence allow impeachment of a witness's credibility, Fed. R. Evid. 607, the rules carefully limit methods of impeachment.").

¹⁷⁰ Professors Louisell and Mueller have suggested that, because the sponsoring party would be entitled under Rule 607 to impeach the declarant-party if she had called the declarant-party as a witness, "[n]o good reason appears for a different result if one party introduces the out-of-court statements of the other as admissions." 4 LOUISELL & MUELLER, *supra* note 5, § 501, at 1255 n.28. The reasons described above, however, counsel strongly against permitting the sponsoring party to engage in such impeachment. Further, in a civil case, if the sponsoring party wishes to impeach her opponent, she may do so by calling her opponent as a witness, rather than merely introducing her opponent's out-of-court statement.

¹⁷¹ The most prominent example of such overwhelmingly prejudicial evidence, of course, is impeachment of the defendant with prior convictions under Rule 609. The extent and effect of this type of prejudice, in particular, is discussed in Part II.

declarant-party to impeach her own credibility once her individual or adoptive admission has been introduced.¹⁷² In many cases, of course, a party will not want to impeach her own credibility. There are exceptions, however. Most significantly, a party might want to introduce an inconsistent statement to suggest that her inconsistency undermines her credibility and thus casts doubt on the truth of her damaging admission.¹⁷³

Impeachment in these circumstances, however, almost necessarily involves a suspect purpose. If the party's inconsistent statement was admissible substantively, then the party would not need to introduce it as impeaching evidence. It is only when the inconsistent statement is inadmissible substantively (because, for instance, it is hearsay) that using it for impeachment is attractive. And using the statement for impeachment is very attractive in that situation because it enables the party to place the inadmissible, but presumably helpful, evidence before the jury with the attendant likelihood that the jury will use it substantively.¹⁷⁴

This risk also occurs when the calling party seeks to impeach her own witness with substantively inadmissible evidence. But the likelihood that the party seeking to impeach is acting in bad faith is much greater when the party

¹⁷² It is important to distinguish the issue here, which is whether the declarant-party should be permitted to impeach her own credibility, from a situation in which the declarant-party is simply trying to place her statement in context. The declarant-party should be permitted to place her statement in context by, for instance, developing or clarifying the circumstances in which the statement was made, the tone that was used, or the content of any other statements which accompanied and shed light on the statement introduced. If the declarant-party is providing context that will help the jury understand the statement, she is not impeaching her credibility, but rather is affording the jury a broader perspective on the tenor and meaning of the statement. This procedure is consistent with the principle of completeness, which permits a party to introduce further evidence that will help ensure that a statement admitted by the other party is presented fairly. See 1 LOUISELL & MUELLER, *supra* note 5, § 49, at 352-60; 1 MCCORMICK, *supra* note 29, § 56, at 225-28; 1 WEINSTEIN & BERGER, *supra* note 12, ¶¶ 106[01]-[02], at 106-2.1 to -21.

¹⁷³ See, e.g., *United States v. Dent*, 984 F.2d 1453 (7th Cir.), *cert. denied*, 114 S. Ct. 169, and *cert. denied*, 114 S. Ct. 209 (1993). In *Dent*, federal charges were brought against the defendant for being a felon in knowing possession of a firearm. At trial, the prosecutor introduced the defendant's plea of guilty to a misdemeanor state charge for unlawful use of a weapon, which arose out of the same facts. After the guilty plea was admitted under Rule 801(d)(2)(A), the defendant sought to impeach his own credibility through Rule 806 by introducing inconsistent, exculpatory statements that he had made to his state court lawyer. *Id.* at 1457, 1460.

¹⁷⁴ The court apparently recognized this point in *Dent*. There, the Seventh Circuit upheld the district court's ruling that "the lawyer's testimony regarding Dent's lack of any knowledge of the gun was not sought simply to impeach the plea, but to prove that Dent did not know the gun was present." *Id.* at 1460.

seeks to impeach herself, rather than some nonparty witness. It seems highly unlikely that the party genuinely would want to introduce the statement not for its truth, but rather to impress upon the jury that she is not to be believed.

Clearly, Rule 806 should not permit impeachment where the declarant-party's purpose is the illegitimate one of giving the jury substantively inadmissible evidence in the guise of impeachment. The courts' reasoning in the Rule 607 cases—which uniformly hold that the calling party may not impeach her own witness where impeachment is a “mere subterfuge” to give the jury otherwise inadmissible evidence—necessarily leads to this conclusion.¹⁷⁵

While it seems that the declarant-party's purpose in seeking to impeach herself with an inconsistent statement will almost always be improper, it is possible, although far less likely, that the declarant-party might wish to impeach her own credibility in other ways. She might wish to show, for instance, that she has a reputation for untruthfulness, or she might wish to show that she has some relevant defect in sensory or mental capacity which undermines the credibility of the admission. Although it certainly seems counter-intuitive that any party would genuinely seek to convince the jury that she is not credible, it is possible. For several interrelated reasons, however, Rule 806 should not permit a declarant-party to do so.

First, this conclusion is most consistent with the rationale for admitting party admissions into evidence. Party admissions are generally allowed into evidence not because they are inherently reliable, but rather based on notions of fairness in the adversary system. The sense that it is fair to allow one party to use her opponent's admissions stems, at least in part, from the feeling that the opponent “cannot object to [his own statement] being received as prima facie trustworthy.”¹⁷⁶

In addition, the critical concern about hearsay—the lack of opportunity to cross-examine—is absent in this setting because it is the adverse party's own statement that is being admitted.¹⁷⁷ Thus, any need that the party may have to

¹⁷⁵ *United States v. Morlang*, 531 F.2d 183, 190 (4th Cir. 1975); see *supra* note 164 and accompanying text.

¹⁷⁶ Edmund M. Morgan, *Admissions as an Exception to the Hearsay Rule*, 30 *YALE L.J.* 355, 361 (1920); see also CHARLES T. McCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* § 239, at 503 (1st ed. 1954) (“This notion that it does not lie in the opponent's mouth to question the trustworthiness of his own declarations is an expression of feeling rather than logic but it is an emotion so universal that it may stand for a reason.”).

¹⁷⁷ See 2 GREGORY P. JOSEPH & STEPHEN A. SALTZBURG, *EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES* § 61.3, at 2 (1987) (stating that Rule 806 “is designed to minimize a principal danger against which the hearsay rule protects—the inability of the factfinder to assess the credibility of the out-of-court declarant . . .”).

challenge her own statements can be satisfied by providing the party with the opportunity to take the witness stand.¹⁷⁸ As Dean Wigmore stated in recognizing this distinction, “a party is in theory present during the trial, and has in fact ample opportunity to protect himself by taking the stand for any explanations which he may deem necessary after hearing the testimony to his alleged admissions.”¹⁷⁹

Second, the possibility that a party would be permitted to impeach her own admission, and thus to put her credibility in issue in only a limited way, is conceptually problematic. If, for example, a party were to testify that her statement was unreliable, the opposing party would certainly be given the opportunity to cross-examine such testimony to explore whether it was self-serving or misleading. If, on the other hand, Rule 806 were to permit the party to impeach her own credibility without taking the witness stand, the opposing party would have no effective rejoinder. Rather, opposing counsel would be relegated to the standard alternative of seeking to rehabilitate the credibility of the witness.¹⁸⁰ This alternative is unsatisfactory for the opposing counsel because it would require her to bolster the credibility of her opponent in the case.

Finally, as noted above, it seems likely that in the vast majority of cases the declarant-party’s purpose in offering the impeaching evidence will be illegitimate because the party will be attempting to present otherwise inadmissible evidence to the jury, in the hope that the jury will use the evidence substantively.¹⁸¹ As a practical matter, it is difficult to conceptualize many

¹⁷⁸ In most situations, the party’s ability to take the witness stand will provide sufficient opportunity for that party to impeach her own statements. In a criminal case, however, where the declarant-party is the defendant, this response is not entirely satisfactory because under the Fifth Amendment a criminal defendant has a constitutional right not to take the witness stand. Although a rule restricting the defendant’s ability to impeach the credibility of her own statements without taking the witness stand will not force the defendant to testify, it may create greater pressure on her to do so. In the event that this pressure were to become so great as to violate the criminal defendant’s rights under the Fifth Amendment, then the demands of the Constitution would, of course, trump the specific requirements of Rule 806. It would thus be useful for the explanatory notes to Rule 806 to alert the trial courts to this possibility.

¹⁷⁹ 2 JOHN H. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 1051, at 1220 (1st ed. 1904). See generally *id.* §§ 1048–1051, at 1216–21. It is worth noting that the declarant-party can still introduce other, contradictory evidence that undermines the admission as part of her substantive case without taking the witness stand. Also, the declarant-party can, on cross-examination or through the rule of completeness, ensure that the admission is placed in its full context.

¹⁸⁰ See FED. R. EVID. 608(a), 806.

¹⁸¹ See *supra* notes 174–75 and accompanying text.

cases in which a party would genuinely seek to impeach her own credibility.¹⁸² This fact alone presents a significant argument for a blanket rule that will lead to the proper result in the great majority of cases.¹⁸³

Thus, the special considerations involved when the declarant is a party to the case counsel in favor of limiting the impeachment rights that would normally be accorded if that party had testified as a witness. The better approach, therefore, is to refuse to allow impeachment of declarants of statements admitted as individual and adoptive admissions under Rule 801(d)(2)(A) and (B).

C. Proposed Clarification of Rule 806

For these reasons, Rule 806 should not authorize impeachment of the declarant of a statement admitted under Rule 801(d)(2)(A) or (B).¹⁸⁴ This result is consistent with Rule 806 as it is currently written, but it conflicts with the indications of congressional intent in the legislative history of the rule, a situation which has caused confusion for the federal courts. The exclusion of individual and adoptive admissions from the scope of Rule 806 should therefore

¹⁸² See generally 4 LOISELL & MUELLER, *supra* note 5, § 501, at 1249 (“It is unlikely in the extreme that a party would seek to impeach himself.”).

¹⁸³ An important function of the rules of evidence is to facilitate the ease of administration of an extremely complex justice system. Where a clear rule is likely to provide the proper result in the great majority of cases, it is sensible to adopt that rule and thus obviate the need for judges to make individualized assessments amidst the hurly-burly of trial proceedings. This rationale informs many of the policy determinations embodied in the Federal Rules of Evidence, and it serves as a significant additional reason to prohibit impeachment in this context as well. See, e.g., FED. R. EVID. 404 (prohibiting use of character evidence to prove propensity); FED. R. EVID. 803(1)–(23) (providing categorical exceptions to the hearsay rule); FED. R. EVID. 804(b)(1)–(4) (same); FED. R. EVID. 902 (providing for self-authentication of certain exhibits).

¹⁸⁴ It is possible that the sponsoring party might try to make an end run around the prohibition on impeaching the declarant of an individual or adoptive admission by seeking to admit the statement under one of the hearsay exceptions in Rule 803 or 804. For instance, the prosecutor might offer the defendant’s out-of-court statement not as an individual admission, but rather as a statement against interest under Rule 804(b)(3). The structure of the rules, however, should be understood to prevent this practice. If the declarant’s statement falls within the definitions in Rule 801(d)(2), then the statement is deemed *not* hearsay. Thus, the prohibition against admission of hearsay, contained in Rule 802, would not apply, and the exceptions to the hearsay rule, contained in Rules 803 and 804, would never come into play. In other words, where the statement is defined as not hearsay, the hearsay exceptions are not applicable because they only serve to remove from the hearsay rule statements that would otherwise fall within it.

be clarified with the following revision to the text of Rule 806:

When a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), or (E) (*but not (A) or (B)*), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a ~~hearsay~~ *the declarant's* statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

This proposed clarification includes minor changes in the second and third sentences of the rule. These changes are designed to clarify that Rule 806 provides uniform treatment with respect to declarants of hearsay statements and declarants of statements defined in Rule 801(d)(2)(C), (D), or (E). The references to "hearsay" statements in the second and third sentences of the current rule might be taken to suggest that those provisions apply only to declarants of hearsay statements. These references are likely a result of sloppy drafting; the amendment that added statements defined in Rule 801(d)(2)(C), (D), or (E) to Rule 806 was incorporated in the first sentence, and the rest of the rule was not then revised to accommodate this change.¹⁸⁵

With respect to the second sentence, the omission of any reference to admissions is unproblematic. That sentence allows a party to impeach a hearsay declarant with evidence of an inconsistent statement without satisfying the requirement contained in Rule 613(b) that the witness be provided the opportunity to explain or deny. Rule 613(b) itself, however, specifically provides that it "does not apply to admissions of a party-opponent as defined in rule 801(d)(2)," thus obviating any need for Rule 806 to do the same.¹⁸⁶

With respect to the third sentence, however, the reference only to "hearsay" statements suggests that, if the opposing party calls the declarant as a witness, that party will only be *entitled* to cross-examine the declarant if the declarant's statement was hearsay, and not if it was defined as nonhearsay in Rule 801(d)(2)(C), (D), or (E). There is no sound justification for any such distinction. If the sponsoring party had called the authorized spokesperson, employee, agent, or coconspirator as a witness, the opposing party would be

¹⁸⁵ See 2 STEPHAN A. SALTZBURG & MICHAEL M. MARTIN, FEDERAL RULES OF EVIDENCE MANUAL 466-67 (5th ed. 1990).

¹⁸⁶ FED. R. EVID. 613(b).

entitled to cross-examine that witness. The opposing party should enjoy that same right against a declarant, especially since it is the sponsoring party's tactical decision to use an out-of-court statement rather than live testimony that forces the opposing party to call the declarant as a witness herself. The Supreme Court apparently recognized this point in *United States v. Inadi*,¹⁸⁷ in which the Court stated that "if the party against whom a co-conspirator statement has been admitted calls the declarant as a witness, 'the party is entitled to examine him on the statement as if under cross-examination.'" ¹⁸⁸ Two states, Alaska and Vermont, have corrected these drafting ambiguities in their versions of Rule 806.¹⁸⁹

V. CONCLUSION

Rule 806 serves a useful and desirable purpose in the Federal Rules of Evidence by permitting a nontestifying declarant whose out-of-court statement is admitted for its truth to be impeached on the same grounds that are available to impeach the credibility of a witness who actually testifies in court. It thus affords the trier of fact a more complete context in which to assess the value of out-of-court statements that have been admitted into evidence. For the most part, Rule 806 works effectively to serve this sensible purpose.

It is nonetheless true that the peculiar nature of Rule 806, which always applies in tandem with the separate witness-impeachment rules, results in conceptual and practical difficulties. These difficulties stem from the fact that Rule 806, which permits impeachment of nontestifying declarants, must operate in conjunction with impeachment rules that were specifically and carefully

¹⁸⁷ 475 U.S. 387 (1986).

¹⁸⁸ *Id.* at 397 (quoting FED. R. EVID. 806); see also 4 WEINSTEIN & BERGER, *supra* note 12, ¶ 806[01], at 806-12 to -13.

Professors Louisell and Mueller, however, suggest that this reading of Rule 806 might be unwise, because admissions by authorized spokespersons, employees, and agents under Rule 801(d)(2)(C) and (D) "usually involve declarants friendly to the party against whom their statements are offered." 4 LOUISELL & MUELLER, *supra* note 5, § 501, at 1249 n.12. This possibility, however, also arises when such persons are called to testify, and in both situations, Rule 611(c) gives the court leeway to deny the cross-examining lawyer the right to use leading questions. See FED. R. EVID. 611(c); *id.* advisory committee's note (explaining that the wording of the rule furnishes "a basis for denying the use of leading questions when the cross-examination is cross-examination in form only and not in fact").

¹⁸⁹ See ALASKA R. EVID. 806 (the rule is modeled on Federal Rule 806, but refers in the second sentence to "his statement" and in the third sentence to "a hearsay statement or a statement defined in Rule 801(d)(2)(C), (D), or (E)"); VT. R. EVID. 806 (the rule is modeled in Federal Rule 806, but refers in the second sentence to "the statement admitted in evidence," and in the third sentence to "a statement").

designed for use against testifying witnesses.

In order for Rule 806 to work fairly and effectively, therefore, it is important to analyze the policy considerations and the balancing of interests that shaped the other impeachment rules in the special context of impeachment of a declarant who is not a testifying witness. This Article has attempted to provide that kind of analysis in three areas, and it has reached the following conclusions. First, where the declarant is a criminal defendant, Rule 806 should only permit impeachment with prior convictions and specific instances of conduct showing untruthfulness if the defendant has affirmatively placed his credibility in issue. Second, Rule 806 should vest the trial court with discretion to allow the impeaching party to use extrinsic evidence of specific instances of conduct when impeaching a nontestifying declarant. Third, Rule 806 should not authorize impeachment of declarants of individual and adoptive admissions admitted under Rule 801(d)(2)(A) and (B).

Adoption of these proposals will better enable Rule 806 to work in harmony with the other impeachment rules. The full text of Rule 806 should thus be amended to read as follows:

RULE 806.
ATTACKING AND SUPPORTING CREDIBILITY
OF DECLARANT

When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E) (but not (A) or (B)), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness, subject to the following:

(a) If the declarant is an accused, the credibility of the declarant may be attacked with specific instances of conduct that are probative of untruthfulness, as provided in Rule 608(b), or with prior convictions, only if the declarant has affirmatively placed the declarant's credibility in issue;

(b) Except as provided in subsection (a), if the declarant does not testify, the court may, in its discretion, permit the use of extrinsic evidence to prove specific instances of conduct that are probative of truthfulness or untruthfulness, as provided in Rule 608(b), as a means of attacking or supporting the credibility of the declarant;

(c) Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's statement, is not subject to any requirement that the declarant may have been afforded an opportunity

to deny or explain.

If the party against whom the declarant's statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

In addition, the explanatory notes to Rule 806 should provide guidance to the courts on three points. First, they should describe when the declarant who is a criminal defendant should be considered to have affirmatively placed his credibility in issue, for purposes of applying subsection (a) of the proposed amended rule.¹⁹⁰ Second, they should provide guidance about how the courts should exercise their discretion under subsection (b) of the proposed amended rule in determining whether to permit the use of extrinsic evidence.¹⁹¹ Third, they should caution that, when the declarant-party is a criminal defendant who seeks to impeach the credibility of his own statement, the court should take care that the defendant's right not to testify under the Fifth Amendment is not unduly burdened.¹⁹²

¹⁹⁰ See *supra* notes 69-77 and accompanying text.

¹⁹¹ See *supra* notes 107-12 and accompanying text.

¹⁹² See *supra* note 178.