If you were dishonest in the past…

There was a time in this nation's history when jurors knew the witnesses – they were neighbors or more – and had some sense of who was reliable and who was not, who was prone to lie and who could be counted on to tell the truth.[1] This was probably an imperfect tool, one subject to petty prejudices and grievances distorting judgment, but it was something.

Now? With the impartial jury to whom the witnesses are strangers we turn to surrogate measures for detecting dishonesty, in particular the metric of "character." The assumption is simple and at first compelling – if dishonesty is baked into your character, then it is something you are likely to do even (or especially) on the witness stand. Sadly, there are only two flaws in this reasoning – we have no proof that character in general will predict who will lie *in the solemnity of the courtroom, under oath*; and our tests [surrogate measures] for dishonest character are a history of prior convictions, *see* Federal Rule of Evidence 609, and specific instances of the witness' past conduct not resulting in conviction that "are probative of the character for…untruthfulness," Federal Rule 608(b).

Let's put aside the use of prior convictions, itself the subject of much scholarly disdain.[2] Focus with me, if you will, on the words of 608(b) – past conduct that is "probative of the character for…untruthfulness[.]" Can you identify which acts are, and which are not? And if your claim is "yes, I can," are you the Potter Stewart of our time - "I know it when I see it . . . ." *Jacobellis v. State of Ohio*, 378 U.S. 184, 197, 84 S. Ct. 1676, 12 L. Ed. 2d 793 (1964) (Stewart, J., concurring,

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[1] "Early jury selection, like present-day voir dire, focused on the degree to which potential jurors were knowledgeable about the facts of the case. Unlike the situation today, however, knowledge of the facts was a requirement for jury service, not an obstacle." Minow and Cate, WHO IS AN IMPARTIAL JUROR IN AN AGE OF MASS MEDIA?, 40 Am. U.L. Rev. 631, 638 (Winter, 1991).

[2] "The critics argue that prior convictions have very little probative value to prove dishonesty on the stand…" Simmons, AN EMPIRICAL STUDY OF RULE 609 AND SUGGESTIONS FOR PRACTICAL REFORM, 59 B.C. L. Rev. 993, 995 (2018).

referring to obscene materials). Said a little more kindly, "are you sure, are you very sure?" (with apologies to Vinny Gambini).

Test yourself. Which of these would meet your criteria for admissibility under Rule 608(b):

- Adultery in the past 3 years
- Adultery more than a decade ago
- Adultery by a politician (any time period)
- Adultery by a religious leader (any time period)
- Paying a nanny or maid under the table
- Working while collecting Social Security disability
- Illegal drug use
- Fraud
- Bribery of a city official to get a permit approved early

If we distributed this list in a classroom, at a CLE, or a judicial conference, it is highly doubtful that there would be uniformity. Why? because courts nationally are divided on how to approach this issue. A research paper by a Temple Law student, Cormick Mcaughlin, showed the following disagreement about how to address 608(b) admissibility:

> 1. The broad approach; 2. The narrow approach; and 3. The middle approach.[3] Under the broad approach, courts will hold that "virtually any conduct indicating bad character also indicates untruthfulness."[4] Courts applying the narrow approach find that misconduct bears on truthfulness only if it directly involves lying or deception.[5] Lastly, courts applying the middle approach will find that "behavior seeking personal advantage by taking from others in violation of their rights" is seen as bearing on character for truthfulness.[6]

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[3] Mueller & Kirkpatrick, supra note 5, § 6.40, at 819; see also United States v. Manske, 186 F.3d 770, 774-75 (7TH Cir. 1999) (acknowledging commentators' view of three approaches).

[4] Muller & Kirkpatrick, supra note 5, §6.40, at 819; see also 4 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 608.22(2)(c)(i), at 608-57 (Joseph M. McLaughlin ed., 2d ed. 1997) ("[U]nder a broad view, virtually any conduct indicating bad character relates to untruthfulness.").

[5] Mueller & Kirkpatrick, supra note 5, §6.40, at 819; Weinstein & Berger, supra note 9, §608.22 (2)(c), at 608-57.

[6] Weinstein & Berger, supra note 9, § 608.22(2)(c), at 608-57 (quoting Manske, 186 F.3d at 774-75).

But beyond the legal terrain is the question of "who is right?" Said differently, what are we relying on but our own stereotypes when we say "yes, *that act*? You bet it is probative of the character trait of being untruthful."

As best as I can tell, there is virtually no science that establishes when predicate act A predicts the likelihood of lying in the future [the "character" trait 608(b) allows jurors to consider. To see if there were such a foundation, I wrote to Aldert Vrij, https://researchportal.port.ac.uk/en/persons/aldert-vrij , author of DETECTING LIES AND DECEIT, 2nd Edition (Wiley and Sons 2008). I explained how Rule 608(b) works and then asked the following:

> *My question, and request for assistance, is this: Can you guide me to any research on either of the following points:*
>
> - *Whether "character" is an accurate predictor of the likelihood to lie in a particular setting, the courtroom?*
> - *Are there any acts from a person's past that might predict a willingness/inclination to lie in the future? Under our Rule 608(b), that determination is left entirely to a Judge's discretion - Judge A might find adultery to meet the standard, Judge B might not, and the same is true with any past conduct in the nature of fraud or deceit.*

Professor Vrij's response was prompt and terse.

> *Dear Jules,*
>
> *These are two interesting questions but I am not aware of any research addressing them. Sorry for not being able to guide you to relevant research.*
>
> *Best*
>
> *Aldert*

This is not surprising. As early as 1987, one court discussing Rule 609 noted that

> The proposition that felons perjure themselves more often than other, similarly situated witnesses (e.g., a criminal defendant who has not been convicted of a felony or a prisoner in a civil rights suit whose only prior conviction is a misdemeanor) is one of many important empirical assertions about law that have never been tested, and may be false. It is undermined, though not disproved, by psychological studies which show that moral conduct in one situation is not highly correlated with moral conduct in another.[7]

The final sentence of that observation applies equally well to acts that did not result in conviction.

This is borne out by what is known as "interactionism," a theory in psychology that posits current human conduct as a product of trait [derived from past conduct] *and situation*, not either standing alone.[8] At its simplest, and as applied to Rule 608(b) decision-making, it is not enough that a person lied or acted deceptively in the past – it must have been in a situation akin to that of giving testimony. As Imwinkelreid explains,

> The judge should go further and ask whether the psychological situational cues were likely to be similar on both occasions…[T]he situations which present a person with the choice of lying or being truthful are similarly variegated. One person might readily lie to protect an intimate relationship but not for purely monetary reasons. Another person could be inclined to lie in an interpersonal setting but not in a formal academic context. By the same token, still another person might be disposed to engage in sexual misconduct at a party but not at a professional meeting.[9]

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7 Campbell v. Greer, 831 F.2d 700, 707 (7th Cir. 1987)(citations omitted).

8 For a detailed discussion of "interactionism," *see* Imwinkelreid, ARTICLE: RESHAPING THE "GROTESQUE" DOCTRINE OF CHARACTER EVIDENCE: THE REFORM IMPLICATIONS OF THE MOST RECENT PSYCHOLOGICAL RESEARCH, 36 Sw. U. L. Rev. 741 (2008).

9 *Id.*, 766-767.

But the law does not require this, and it may be a task beyond what can be accomplished in a courtroom.

So what are the takeaways? I suggest several:

- When we teach Evidence, use 608(b) to show the imperfections of the Rules and how rulemakers sometimes take a gut assumption and treat it as scientific truth.
- Have a discussion on the ethics of arguing for admissibility based on a stereotype with little or no foundation in human behavior.
- When advocating for admissibility under 608(b), understand its inherent flexibility and discretion and somehow to convey to the judge that "if the witness would lie about X, they'd lie about anything."
- Finally, as with other Rules, maybe it is time to bring science into the courtroom. Lawyers may not be unable to remove 608(b) from the FRE, but they have that other tool – Rule 403 – to argue persuasively that if any proof is likely to mislead, it is proof unmoored from science.

Until then, contemplate this – if Bill Clinton were a witness to an auto accident and you were the Judge, would you permit the following cross-examination:

> Q: Are you the same Bill Clinton who lied to his cabinet, his spouse, and to a nation of 300+ million, when you said you never had sex with that woman?

There is no right answer – and there is no likely contribution to determining truth if the question is allowed.