

Prior Judicial Findings of Police Perjury: When Hearsay Presented as Character Evidence Might Not Be Such a Bad Thing

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Rule 608(b) of the Federal Rules of Evidence allows for inquiry into “specific instances of a witness’s conduct” on cross examination for the purposes of impeachment, but forbids the use of extrinsic evidence to prove that course of conduct. In a 1993 article subsequently cited by the Rules’ Advisory Committee, Professor Stephen Saltzburg argued that inquiry into the consequences of a witness’s prior course of action should also be forbidden, as it is tantamount to “tucking a third person’s opinion about prior acts into a question asked of the witness who has denied the act.” Despite the endorsement of the Advisory Committee, circuits have differed in their respective approaches to this problem, and have been particularly resistant to the Advisory Committee’s argument when the extrinsic evidence in question is a judicial finding from an earlier trial that testimony by the witness was not credible.

This Note explores the costs and benefits of varying approaches to this problem as applied to police testimony. While an increasing number of courts have rejected Saltzburg’s conclusion, most Courts confronting the issue have also noted that such questions would be barred under the hearsay rules if an objection had been properly raised. This Note argues that the extrinsic evidence approach should be abandoned, and that the hearsay rules should be relaxed in cases of prior judicial findings of police perjury, ultimately confiding the decision whether or not to admit to an ordinary Rule 403 analysis. Such an approach will not only allow the finder of fact to properly assess the reliability of police witnesses, but also deter police perjury before the fact.

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I. INTRODUCTION

For decades it has been a frequently repeated axiom of lawyers in criminal justice circles that police perjury is common occurrence.¹ On occasions in which police officers have been asked confidentially about the frequency of lying while under oath, those surveyed have largely confirmed these lawyers' suspicions.² Although scholars of the criminal justice system have found that that law enforcement officials most typically lie to ensure convictions of defendants they believe to be guilty³ and to protect themselves and other law enforcement officials from discipline,⁴ per-

1. See, e.g., ALAN M. DERSHOWITZ, *REASONABLE DOUBTS: THE CRIMINAL JUSTICE SYSTEM AND THE O.J. SIMPSON CASE* 60, 68 (1996); Christopher Slobogin, *Testifying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1044 (1996); Donald A. Dripps, *Police, Plus Perjury, Equals Polygraphy*, 86 J. CRIM. L. & CRIMINOLOGY 693, 698 (1996); Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 107 (1992) (survey of prosecutors, defense attorneys, and judges indicates a belief that, on average, perjury occurs 20% of the time, with defense attorneys estimating it occurs 53% of the time in connection with Fourth Amendment issues; only 8% believe that police never, or almost never, lie in court); Sarah Barlow, *Patterns of Arrests for Misdemeanor Narcotics Possession: Manhattan Police Practices 1960-62*, 4 CRIM. L. BULL. 549 (1968) (studying thousands of arrests in New York suggesting that police altered their testimony following the decision in *Mapp v. Ohio*, 81 S.Ct. 1684 (1963), to avoid suppression of evidence found on guilty defendants); Comment, *Effect of Mapp v. Ohio on Police Search-and-Seizure Practices in Narcotics Cases*, 4 COLUM. J.L. & SOC. PROBS. 87 (1968) (studying criminal cases in New York City before and after *Mapp* suggesting that police began lying to avoid suppression of contraband).

2. COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEPARTMENT, CITY OF NEW YORK, COMMISSION REPORT 38 (1994) [hereinafter "Mollen Commission"] (describing the "litany of manufactured tales" officers will routinely produce on the stand to avoid the exclusion of evidence); Myron W. Orfield, Jr., *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1050-51 (1987) (reporting the results of interviews of twenty-six narcotics officers in the Chicago Police Department in which "[v]irtually all of the officers admit[ted] that the police commit perjury, if infrequently, at suppression hearings").

3. See, e.g., ALAN M. DERSHOWITZ, *THE BEST DEFENSE* xxi-xxii (1983) ("Rule IV: Almost all police lie about whether they violated the Constitution in order to convict guilty defendants."); JEROME SKOLNICK, *JUSTICE WITHOUT TRIAL* 215 (1967) (exploring findings of an extensive observation study of police in a 400,000-person city, Skolnick concluded that police attempt to construct a story of compliance with the Constitution to ensure apprehension of criminals).

4. JEROME H. SKOLNICK & JAMES J. FYFE, *ABOVE THE LAW* 110 (1993) (noting the existence of a "code of silence" which prevents police officers from offering testimony which would lead to discipline of fellow officers); David S. Cohen, *Official Oppression: A Historical Analysis of Low-Level Police Abuse and a Modern Attempt at Reform*, 28 COLUM. HUM. RTS. L. REV. 165, 190-92 (1996) (recognizing the existence of "the infamous 'blue code of silence,' " and asserting that abuse of police authority cannot be alleviated by providing for mandatory additional officers on the scene because of the code); Dripps, *supra* note 1, at

jured testimony by law enforcement officials nonetheless results in wrongful convictions⁵ and undermines the integrity of (and public confidence in) the criminal justice system.⁶

While historically it has also been alleged that members of the judiciary routinely overlook glaring instances of police perjury occurring in their courts,⁷ some scholars have noted a trend in recent years of judges regarding police testimony with increased suspicion. These scholars note that judges are more readily declaring testimony by law enforcement officers as not credible, at least in cases where the dishonesty is particularly blatant.⁸ Because law enforcement officials are often called upon to testify in cases they have investigated, and thus repeat-players, this increased willingness by the judiciary to find testimony not credible raises the question of the evidentiary value of such a finding of incredibility in a later trial. The Advisory Committee notes to Rule 608(b) the Federal Rules of Evidence suggest that questioning a police officer about another court's assessment of the officer's credibility is a violation of Rule 608(b)'s ban on extrinsic

701 (asserting that police abuse can survive only if it is effectively covered-up through a police code of silence); Alexa P. Freeman, *Unscheduled Departures: The Circumvention of Just Sentencing for Police Brutality*, 47 HASTINGS L.J. 677, 725 (1996) (recognizing the code of silence as one of the obstacles to prosecution of police brutality); Robin K. Magee, *The Myth of the Good Cop and the Inadequacy of Fourth Amendment Remedies for Black Men: Contrasting Presumptions of Innocence and Guilt*, 23 CAP. U. L. REV. 151, 156, 203 (1994) (discussing the Mollen Commission's findings regarding the police code of silence).

5. For an attempt to estimate the percentage of wrongful convictions resulting in apart from police misconduct, see BARRY SCHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 246, 265 (2000). Anecdotal evidence also suggests that concerted attempts to secure wrongful convictions (as opposed to misconduct resulting in erroneous convictions) can be quite effective. On multiple occasions the testimony of a single officer has resulted in the incarceration of dozens of innocent individuals. See Simon Romero & Adam Liptak, *Texas Court Acts to Clear 38 in Town-Splitting Drug Case*, N.Y. TIMES, Apr. 2, 2003, at A1 (describing the overturning of 38 wrongful convictions based on the perjured testimony of a single undercover officer); Joyce Jensen, *Full Unconditional Pardons*, N.Y. TIMES, Jan. 9, 1977, § 4, at 22 (reporting that the Vermont Governor pardoned seventy-one persons wrongfully convicted of drug charges based on the testimony of a single officer).

6. See Morgan Cloud, *Judges, "Testilying," and the Constitution*, 69 S. CAL. L. REV. 1341, 1354–55 (1996) (describing the "important symbolic function" of police officers' actions and the resulting societal harm when those actions violate the rule of law).

7. Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1311, 1321 (1994); David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455, 469–74 (1999).

8. See, e.g., Melanie D. Wilson, *An Exclusionary Rule for Police Lies*, 47 AM. CRIM. L. REV. 1, 6–8 (2010) (noting several recent examples in New York courts of judges deeming police testimony not credible).

evidence to prove character, and thus not permitted.⁹ Yet, despite this admonition by the Advisory Committee, several Circuits have confronted the issue of the admissibility of questions related to the collateral consequences of an officer's prior testimony over the previous fifteen years, with differing results.¹⁰

This Note endorses a rule that balances the interests underlying the general ban on character evidence with the interests of judicial integrity and effective law enforcement. Part II (A) provides background on police perjury, reviewing motivations for and judicial responses to the problem of law enforcement officials lying under oath. Part II (B) reviews the general ban on character evidence and its exceptions, with a focus on its historical and current rationales. Part III reviews the varying responses of the circuits to the question of the admissibility of evidence of prior perjury by law enforcement officials, noting a trend over time favoring admissibility. Part IV evaluates various possible formulations of the rule, ultimately concluding that the trial judge should have discretion to admit or exclude evidence of prior perjury by a law enforcement official testifying for the prosecution under the ordinary balancing test prescribed by Federal Rule of Evidence 403.

II. BACKGROUND

A. THE PROBLEM OF POLICE PERJURY

While motivations for police perjury vary from case to case, scholars generally agree that two are particularly prevalent. First, when law enforcement officials perjure themselves, they often do so to avoid exclusion of probative evidence by denying or covering up violations of the Fourth Amendment.¹¹ Second, law enforcement officials who perjure themselves often do so to avoid

9. FED. R. EVID. 608(b) advisory committee's note 1.

10. See *infra* Part II.

11. See Mollen Commission, *supra* note 2, at 56; Cloud, *supra* note 7, at 1315 ("Police perjury occurs most frequently when officers are testifying about searches and seizures and witness interrogations."); Orfield, *supra* note 1, at 82-3 ("Significantly, the Courts respondents outlined a pattern of pervasive police perjury intended to avoid the requirements of the Fourth Amendment."); Christopher Slobogin, *supra* note 1, at 1054-60 (1996) (suggesting altering or abolishing the exclusionary rule as a solution to the problem of police perjury).

disclosing misconduct by other law enforcement officials.¹² While these motivations are frequently rationalized as moral imperatives (the former under an “ends justify the means” argument¹³ and the latter as part of a fraternal code of honor¹⁴), officers who commit police perjury for these reasons are also driven to do so out of self-interest.

When Myron Orfield surveyed 100 officers of the Narcotics Section of the Organized Crime Division of the Chicago Police Department as to their reasons for perjuring themselves in evidence suppression hearings, officers responded that their professional status is dependent on their ability not only to make arrests, but also to support the prosecution of their suspects in court.¹⁵ Officers reported that the frequency with which their evidence was excluded in suppression hearings was monitored by “concerned superiors,”¹⁶ and that frequent exclusion could lead to transfers to less desirable positions.¹⁷ Furthermore, officers reported that their reputation among peers would suffer if they were frequently unable to prevent evidence from being excluded from their cases.¹⁸ Social pressure to avoid testifying against other law enforcement officers is typically much more severe. Officers who violate what has been termed the “Blue Wall of Silence” have been subjected to intense, even life-threatening retaliation.¹⁹ While putting a stop to a system of violent extralegal

12. See Gabriel J. Chin & Scott C. Wells, *The “Blue Wall of Silence” As Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 250–56 (1998).

13. See Carl Klockars, *The Dirty Harry Problem*, in MORAL ISSUES IN POLICE WORK 55 (1985).

14. See Chin & Wells, *supra* note 12, at 250–51 (discussing “norms of internal solidarity, or brotherhood” within police departments); David Rudovsky, *Police Abuse: Can the Violence Be Contained?*, 27 HARV. C.R.-C.L. L. REV. 465, 480–82 (1992).

15. Orfield, *supra* note 2, at 1042–46.

16. *Id.* at 1046–47.

17. *Id.* at 1046.

18. *Id.* at 1048 (“The most common responses indicate that an officer’s pattern of suppression would engender a reputation for laziness, incompetence, or dishonesty. Specifically, Officer 5 noted, ‘It would ultimately injure your reputation as a professional. It would indicate a lack of proper training or work ethic.’ In somewhat stronger terms, Officer 11 stated, ‘It would indicate that the officer is an idiot and an incompetent. No one would want him around.’ Officer 14 said, ‘It means that the officer hasn’t learned a thing and that he has poor work habits.’ Officer 22 replied, ‘The officer’s peers would think he was stupid.’”).

19. See Chin & Wells, *supra* note 12, at 256–61 (noting that officers who defy the code are often subjected to ostracism and harassment which follows them for the entirety of

enforcement of the Blue Wall of Silence is beyond the scope of the discussion here, this Note advocates the adoption of certain evidentiary rules for subsequent use of a finding of police perjury may adjust police incentives such that they will be less inclined to lie to avoid the strictures of the Fourth Amendment, or to secure convictions generally.

While the most obvious mechanism for deterring police perjury is probably criminal prosecution of the officers who commit it,²⁰ prosecutors are typically reluctant to press charges against law enforcement officials when they lie on the stand.²¹ New York City's Mollen Commission on Police Corruption found that frequently problems of police misconduct "though not condoned, are ignored" by prosecutors.²² One motivating factor for this trend is the fact that cases of police misconduct are considered particularly difficult to prosecute.²³ When such cases are brought to trial (which are thought to be rare occurrences²⁴), stories of witnesses suddenly recanting on the stand or other circumstances that suggest witness tampering are not uncommon.²⁵ More often, instances of police perjury do not result in an actual prosecution and trial because judges do not always publicly identify police

their careers, citing, among others, the example of one police supervisor who had to be relocated thirty-eight times after reporting his subordinates' misconduct).

20. Civil remedies for victims of police perjury are often precluded by doctrines of official immunity. *See* Cloud, *supra* note 7, at 1313.

21. Prof. Michael Goldsmith notes that of the roughly 60,000 offenders sentenced in federal court between 1999 and 2004, the number sentenced for perjury was between 75 and 83, and fewer than 3% of those sentences included an "abuse of trust enhancement" which would apply to police officers and others entrusted with official authority. Michael Goldsmith, *Reforming the Civil Rights Act of 1871: The Problem of Police Perjury*, 80 NOTRE DAME L. REV. 1259, 1267 n.42 (2005). Goldsmith suggests that perjury in general is an under-prosecuted crime and that police perjury is a particularly under-prosecuted subcategory of perjury. *Id.*; *see also* Chin & Wells, *supra* note 12, at 261-64.

22. Mollen Commission, *supra* note 2, at 42.

23. Chin & Wells, *supra* note 12, at 261-62 (citing a Los Angeles Times article quoting California prosecutors declining to charge officers because they viewed the cases as unwinnable despite fairly obvious perjury); *but see* Jay S. Silver, *Truth, Justice, and the American Way: The Case Against the Client Perjury Rules*, 47 VAND. L. REV. 339, 358 n.75 (1994) ("The institutional tendency to tolerate police perjury likely stems from the prosecutor's interest in maintaining smooth working relations with police, who gather the government's evidence and are often its most important witnesses at trial, and from the prosecutor's own competitive drive to win and to advance professionally.").

24. Cloud, *supra* note 7, at 1313 ("Occasionally police officers are prosecuted for perjury, and from time to time they are punished. These cases are unusual, however, and undoubtedly represent only a fraction of the cases in which perjury has occurred.").

25. Chin & Wells, *supra* note 12, at 261-64 (describing sudden recanting of witness Harry Gross in the largest prosecution of police corruption of the 20th century).

perjury when it occurs in their courtrooms. As an initial matter, judges may not always be aware that the testimony offered by police officers has been falsified because officers as a group are unusually experienced as witnesses²⁶ and may be more able to fool a judge than an ordinary witness.²⁷ Even in cases where judges are aware that they are being presented with perjured testimony, scholars have noted that judges will frequently “wink” at such testimony and nonetheless deem it credible.²⁸

Perhaps unsurprisingly, judicial motivations for “winking” at police perjury mirror police motivations for offering perjured testimony. As an initial matter, while most factual matters are ultimately left in the hands of the jury in criminal cases, judges play an important fact-finding role.²⁹ In their role as fact finders judges typically dislike the exclusion of probative evidence, and are sometimes willing to bend the rules to avoid it.³⁰ The Supreme Court has itself on occasion expressed distaste for the need to suppress probative evidence to ensure police compliance with constitutional rules of criminal procedure.³¹ These concerns are particularly acute in the context of suppression hearings, where

26. See *id.* at 245 (“Police are professional witnesses, perhaps the most experienced witnesses of any occupational group.”); Stanley A. Goldman, *Guilt by Intuition: The Insufficiency of Prior Inconsistent Statements to Convict*, 65 N.C. L. REV. 1, 20 (1986) (suggesting that police officers have experience testifying in court); Comment, *Good Cop-Bad Cop: Reassessing the Legal Remedies for Police Misconduct*, 1993 UTAH L. REV. 149, 185 (asserting that since police officers are experienced witnesses they are well respected by jurors, appearing to be highly credible).

27. See Cloud, *supra* note 7, at 1321–22; Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 747 (1970) (arguing that the police are often able convincingly to fabricate probable cause).

28. Orfield, *Exclusionary Rule and Deterrence*, *supra* note 2, at 1023; Cloud, *supra* note 7, at 1312; DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 252 (1977).

29. Dorfman, *supra* note 7, at 466–67.

30. See Cloud, *supra* note 7, at 1322 (citing as a reason for countenancing of police perjury that “[u]nderstandably, many judges dislike excluding probative evidence.”); JEROME SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN A DEMOCRATIC SOCIETY* 221 (2d ed. 1975) (“The illegality of the search is likely to be tempered — even in the eyes of the judiciary — by the discovery of incriminating evidence.”).

31. See, e.g., *United States v. Leon*, 468 U.S. 897, 907 (1984) (“The substantial social costs exacted by the exclusionary rule for the vindication of Fourth Amendment rights have long been a source of concern An objectionable collateral consequence of this interference with the criminal justice system’s truth-finding function is that some guilty defendants may go free or receive reduced sentences as a result of favorable plea bargains.”).

officer testimony is often the only evidence the government presents.³²

Like police officers, judges may be pressured by social factors to accept police perjury. It has been suggested that judges may be reluctant to accuse a law enforcement official of perjury because to do so would be considered tactless.³³ In cases where such a finding of police perjury could have a dispositive effect on the case, social pressure can be extreme. In one notable case a federal judge was publicly pressured by politicians of national prominence, including the President of the United States,³⁴ to reverse a ruling excluding physical evidence in a drug case that seemed to hinge on a finding that the investigating officer's testimony was "at best suspect."³⁵ The judge was ultimately persuaded to grant the government's motion for rehearing and to reverse his earlier ruling excluding the evidence.³⁶ The uproar over the *Bayless* case serves to underscore the fact that judicial determinations that an officer has lied on the stand are so rare that they can be considered truly remarkable.

32. Michael D. Pepson & John N. Sharifi, *Lego v. Twomey: The Improbable Relationship Between an Obscure Supreme Court Decision and Wrongful Convictions*, 47 AM. CRIM. L. REV. 1185, 1228 (2010) ("Consequently, it is quite common to find the only live testimony at a suppression hearing to be the uncorroborated testimony of a police officer.").

33. Cloud, *supra* note 7, at 1323–24 (citing the fact that police officers regularly appear in court as a particular incentive for judges not to publicly discredit their testimony). See also *Bush v. United States*, 375 F.2d 602, 604 (D.C. Cir. 1967) (then-Judge Warren Burger stating that "[i]t would be a dismal reflection on society to say that when the guardians of its security are called to testify in court under oath, their testimony must be viewed with suspicion.").

34. See Cloud, *supra* note 7, at 1347–48; Alison Mitchell, *Clinton Presses Judge to Relent*, N.Y. TIMES, Mar. 22, 1996, at A1 (reporting that the White House had put Judge Baer 'on public notice today that if he did not reverse a widely criticized decision throwing out drug evidence, the President might ask for his resignation'); *id.* at A12 (reporting attacks by Senator Hatch, chairman of the Senate Judiciary Committee, by Representative Gingrich, Speaker of the House of Representatives, and by Senator Dole, Senate Majority Leader). See also Alison Mitchell, *Clinton Defends His Criticism of a New York Judge's Ruling*, N.Y. TIMES, Apr. 3, 1996, at A12; Ian Fisher, *Gingrich Asks Judge's Ouster for Ruling Out Drug Evidence*, N.Y. TIMES, Mar. 7, 1996, at B4; Katharine Q. Seelye, *Dole, Citing 'Crisis in the Courts,' Attacks Appointments by Clinton*, N.Y. TIMES, Apr. 20, 1996 at A1; *Excerpts From Speech: On the Judiciary*, N.Y. TIMES, Apr. 20, 1996, at A10; Linda Greenhouse, *Judges as Political Issues*, N.Y. TIMES, Mar. 22, 1996, at A1; Don Van Natta, Jr., *Publicity Stuns Woman in Washington Hts. Drug Case*, N.Y. TIMES, Apr. 11, 1996, at B5 (reporting that the defendant Carol Bayless blamed President Clinton for pressuring Judge Baer to reverse his decision suppressing evidence of her drug crimes).

35. *United States v. Bayless*, 913 F. Supp. 232, 239 (S.D.N.Y. 1996), *vacated on reconsideration*, 921 F. Supp. 211 (S.D.N.Y. 1996).

36. *Bayless*, 921 F. Supp. at 212.

Nonetheless, to say that police perjury is commonplace and motivated by significant institutional factors is not to say that it comes without significant social cost. Even in cases where the acceptance of police perjury ultimately results in the conviction of defendants who are in fact guilty, such testimony impugns the integrity of the justice system. Defendants in such circumstances, although rightfully convicted in the sense that they committed the crime for which they were convicted, will nonetheless often realize that their conviction was dependent upon perjury by law enforcement and will likely share this information with members of their community.³⁷ If acknowledged widely enough, this practice risks eroding the public's confidence in law enforcement officials. The Mollen Commission found that "many law enforcement officials . . . believe that police falsification has led to a rise in acquittals because juries increasingly suspect and reject police testimony."³⁸ Thus, as one pair of scholars has noted, "[p]erjury committed to enforce the law, then, paradoxically may ultimately lead to the acquittal of the guilty."³⁹

On the other hand, not every conviction secured through police perjury is "rightful." Some convictions secured on these grounds are in fact erroneous. The Innocence Project has estimated that police misconduct (including, but not exclusively, police perjury) contributes to approximately half of all wrongful convictions.⁴⁰ Convictions of this sort have been described by one scholar as "the most serious miscarriage of justice imaginable."⁴¹

B. THE "GROTESQUE STRUCTURE" OF THE LAW OF CHARACTER EVIDENCE AND RULE 608(B)

One simple way of evaluating the credibility of police testimony would be to survey previous determinations of the testifying officer's credibility. Evidence that would bear on a law enforcement official's general tendency for truthfulness, however,

37. Chin & Wells, *supra* note 12, at 249 ("The defendant knows that the police lied. The defendant's friends, family and neighbors may well believe him when he says PI did it, but the police lied on me.' Seeing members of one's community sent to prison based on solemn lies undermines belief in the very legitimacy of the law.").

38. Mollen Commission, *supra* note 2, at 39.

39. Chin & Wells, *supra* note 12, at 250.

40. Scheck et al., *supra* note 5, at 246, 265.

41. Lisa C. Harris, *Perjury Defeats Justice*, 42 WAYNE L. REV. 1755, 1758 (1996).

would fall under the umbrella of “character evidence;” one of the more controversial areas of evidence law. Under the current Federal Rules of Evidence, use of character evidence is disfavored as a general matter. Scholars frequently refer to a “character evidence prohibition” under the rules,⁴² but the exceptions to this prohibition are so numerous and long-established that it may be more useful to think of the rules governing such evidence as a “‘regulatory scheme’ that sometimes permits, sometimes restricts, and sometimes completely prohibits character evidence in trials.”⁴³

The complicated place of character evidence in our law has a long history.⁴⁴ According to Wigmore, early English courts used character evidence “without limitation.”⁴⁵ He cites examples of the use of character evidence “without question down to the latter part of the 1700’s”, ascribing this use to “a more primitive notion of human nature.”⁴⁶ Elsewhere in his treatise, however, Wigmore notes that evidence of past crimes had been excluded as early as the mid 1600s.⁴⁷ In the modern academic literature scholars have debated whether the prohibition on the use of character evidence should be abolished, reduced or maintained.⁴⁸ Scholars have de-

42. Edward J. Imwinkelried, *Reshaping the “Grotesque” Doctrine of Character Evidence: The Reform Implications of the Most Recent Psychological Research*, 36 SW. U. L. REV. 741 (2008); David P. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character*, 73 IND. L.J. 1161 (1998).

43. Barrett J. Anderson, *Recognizing Character: A New Perspective on Character Evidence*, 121 YALE L.J. 1912, 1918 (2012).

44. See generally Leonard, *supra* note 42, at 1167–72.

45. 1 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 194, at 646 (3d ed. 1940). See also *id.* § 194, at 646 n.1 (citing a number of English cases, dating to the seventeenth century).

46. 3 *id.* § 923, at 450.

47. See Leonard, *supra* note 42, at 1167.

48. See e.g., *id.* (arguing for the preservation of the ban on character evidence); Peter Tillers, *What is Wrong with Character Evidence?*, 49 HASTINGS L.J. 781 (1998) (discussing the debate and arguing that the value of the rule cannot be ascertained without a deeper understanding of the nature of human character); Roger C. Park, *Character at the Crossroads*, 49 HASTINGS L.J. 717 (1998) (discussing arguments for and against admitting character evidence as evidence of propensity in cases which do not involve sex crimes).

bated the meaning of character,⁴⁹ as well as whether such a thing as character exists at all.⁵⁰

In an oft-quoted passage, Justice Jackson characterized the rules of character evidence as “paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counter-privilege to the other.”⁵¹ In refusing to introduce a new national rule in the realm of character evidence, he reasoned that to “pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance between adverse interests than to establish a rational edifice.”⁵² The high regard for this particular passage in the literature emphasizes the limited value of small but rational changes to the character evidence rules. But the sentiment embodied in the “grotesque structure” passage — that changes to the rules should be disfavored for fear of upsetting the current balance of compromises and interests — also underscores the importance of interpreting and applying the rules as they exist in a rational and workable fashion.

One notable attempt to interpret and explicate one of the character evidence rules is Stephen Saltzburg’s explication of Federal Rule of Evidence 608(b) in *Impeaching the Witness: Prior “Bad Acts” and Extrinsic Evidence*.⁵³ Rule 608(b) is a paradigmatic example of character evidence rules as pieces of the grotesque structure: it is an exception to an exception to the general ban on character evidence. Rule 607 provides that “Any party . . . may attack the witness’s credibility.”⁵⁴ Rule 608(b) places limitations on 607. It reads, in relevant part:

49. The Federal Rules of Evidence do not define “character,” nor is there a commonly-accepted definition in judicial practice. See 22 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5233 (1st ed. Supp. 2011) (explaining that “character” in the law of evidence has not yet been satisfactorily defined). Nonetheless, there have been attempts to supply such a definition. See, e.g., Anderson, *supra* note 43.

50. Imwinkelreid *supra* note 42, at 767 (noting that “for decades legal circles have been concerned that psychologists were so badly divided over the existence and nature of character traits”).

51. *Michelson v. United States*, 335 U.S. 469, 486 (1948).

52. *Id.*

53. Stephen A. Saltzburg, *Impeaching the Witness: Prior “Bad Acts” and Extrinsic Evidence*, 7 CRIM. JUST. 28 (Winter 1993).

54. Fed. R. Evid. 607.

Specific Instances of Conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of: (1) the witness; or (2) another witness whose character the witness being cross-examined has testified about.⁵⁵

To borrow an example from Saltzburg, in order to prove that a particular witness had a history of untruthfulness, counsel would be permitted to ask a witness if she had been fired from a previous job for stealing. However, if the witness denied that they had been fired for such an offense, counsel would not be permitted to introduce extrinsic evidence (say, a letter from the witness' former employer stating the reason the witness was fired) to refute that testimony. This prohibition of extrinsic evidence helps promote judicial economy by avoiding a "trial within a trial" every time counsel attempts to impeach a witness with evidence of prior bad conduct.⁵⁶

In what he called "the most difficult problem," Saltzburg argues that, for the purposes of Rule 608, a witness also cannot be questioned about the collateral consequences of a prior course of action.⁵⁷ In Saltzburg's illustration, it is impermissible for counsel to ask a witness, "Isn't it true that the employer sent you a letter firing you for stealing money?", because it places the contents of extrinsic evidence before the trier of fact.⁵⁸ While Saltzburg's approach seemingly gives witnesses impunity to lie on the stand about their conduct (in our example it would allow the witness to deny, without fear of rebuttal, that she had been fired for stealing), Saltzburg notes that witnesses who tell demonstrable lies on the stand are subject to criminal prosecution for perjury. In theory, this threat of criminal liability should provide enough of a deterrent to keep witnesses honest while preventing the trial

55. Fed. R. Evid. 608.

56. Saltzburg, *supra* note 53, at 30.

57. *Id.* at 30-31.

58. *Id.*

from shifting focus to whether the witness committed an act which has no bearing on the merits of the case itself.⁵⁹

Therefore, under Saltzburg's understanding, defense counsel could not ask a testifying officer whether a judge in a prior proceeding had found the officer to be lying, unless the officer was later convicted of perjury as a result. Defense counsel would only be able to ask the officer if they had lied on the stand. If the officer denied doing so, defense counsel would be unable to rebut with any reference to a prior finding to the contrary, because that would put the content of extrinsic evidence before the trier of fact. Unfortunately the traditional means of compelling the witness to be truthful is ineffective in this situation because, as noted above, officers are very rarely prosecuted for lying on the stand.⁶⁰ While Saltzburg's approach may be desirable in ordinary cases, because officers are regularly called upon to give testimony in criminal cases, and because their testimony is often dispositive of critical issues in criminal trials (such as the admission or exclusion of evidence),⁶¹ Rule 608(b)'s prohibition on the introduction of extrinsic evidence should be limited to literal extrinsic evidence in cases such as these, and that questioning the officer about the collateral consequences of her testimony should be permitted.

In fact, courts confronting this issue have increasingly repudiated Saltzburg's conclusion that questioning a witness can constitute extrinsic evidence. This resistance to Saltzburg's theory of extrinsic evidence has been strongest when courts have considered whether to admit evidence of prior untruthful testimony, particularly when that untruthful testimony comes from law enforcement officials in criminal cases. Approaches have differed, however, and the question of which approach is appropriate has yet to be settled definitively.

59. *Id.* at 31. The Advisory Committee thought highly enough of Saltzburg's article to reproduce its argument in an explanatory note to 608(b) in the 2003 Amendments to the Rules. See Fed. R. Evid. 608 advisory committee's note.

60. See *supra* Part II.A.

61. *Id.*

C. HEARSAY

While Saltzburg and the Rules Committee both emphasize that Rule 608(b)'s bar on use of extrinsic evidence prevents cross-examination into collateral consequences, 608(b) is not the only grounds for excluding such lines of questioning. Saltzburg himself alludes to other grounds for excluding cross-examination of a witness regarding the consequences of their prior conduct; such questions call for hearsay.⁶² Using the earlier hypothetical, Saltzburg provides two examples that illustrate how the law would exclude such lines of questioning.

If defense counsel asked the witness, "Isn't it true that the employer sent you a letter firing you for stealing money?", this would be impermissible, *even if it were nonhearsay*, because it would put the contents of the letter before the trier of fact

If defense counsel asked the witness whether he was fired because his employer believed he stole the money, this would be impermissible because it would be an effort to inject the views of a third person, the employer, into the case to contradict the witness.⁶³

While the hearsay objection does not form the basis of Saltzburg's article, it provides a powerful argument that evidence of prior judicial findings should be excluded. While the absence of the phrase "even if it were nonhearsay" in the second example suggests that in certain cases artful phrasing of the relevant questions could avoid a hearsay objection (e.g. "Was evidence excluded because the judge believed you lied?"), it is far from clear that such phrasing would actually allow the questions to avoid a hearsay challenge.

In fact, evidence of prior judicial credibility determinations raises many of the traditional concerns about hearsay that form the rationale for the law's exclusion of hearsay as evidence. The conventional explanation for the exclusion of hearsay centers on

62. Saltzburg, *supra* note 53, at 30–31.

63. *Id.* (emphasis added).

the fact that its reliability has not been tested.⁶⁴ Where courtroom witnesses testify under the scrutiny of the finder of fact and are subject to cross-examination, hearsay declarants are not subject to such tests of reliability.⁶⁵ As such, opposing counsel has limited (if any) ability to impeach hearsay testimony.⁶⁶ This is just as true for hearsay that takes the form of judicial opinions. The fact finder in the present case would not be able to witness the judge from the prior case stating his conclusion, and opposing counsel cannot cross-examine a judicial opinion. In other circumstances, this could be remedied by calling the declarant, but because Rule 608(b) bars extrinsic evidence, a judge from a prior trial cannot be called to testify as to the credibility of the prior testimony of the other witness.

Circuit courts have had fewer opportunities to rule on the issue of whether such questions are inadmissible as hearsay, perhaps because defendants in such a situation do not wish to appeal an exclusion they think will be upheld. Some Courts of Appeals, when deciding whether past determinations of a witness's credibility are extrinsic evidence, have even alluded to concerns about hearsay when such issues had not been fairly presented to the court.⁶⁷ Nevertheless, although hearsay rules as they currently stand may provide a strong legal argument for excluding past findings of police perjury, no U.S. Court of Appeals has ruled such questioning inadmissible on hearsay grounds. Furthermore, there are strong policy reasons for allowing such questioning of law enforcement witnesses in criminal cases — perhaps even strong enough to allow for an alteration of the “grotesque structure” of Justice Jackson’s imagining.⁶⁸

64. Roger Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 55 (1987).

65. *Id.*

66. *Id.* at 55–56.

67. *See infra* Part III.D–E.

68. *See infra* Part IV.

III. JUDICIAL APPROACHES TO THE ADMISSIBILITY OF CROSS EXAMINATION REGARDING “COLLATERAL CONSEQUENCES” OF PRIOR CONDUCT

A. THE THIRD CIRCUIT AND *UNITED STATES V. DAVIS*

The first court of appeals to confront the problem raised in Saltzburg’s article was the Third Circuit in *United States v. Davis*.⁶⁹ In contrast with subsequent cases discussed in this Note, which deal with a criminal defendant’s ability to impeach a police witness, in *Davis* the defendant was a police officer himself. Davis, a member of the New York Transit Police, was convicted of a number of crimes arising out of a feud with a local member of organized crime who had dated Davis’ wife in high school and subsequently threatened both Davis and his wife.⁷⁰ The trial court had allowed the government, for purposes of impeaching Davis’ testimony, to cross-examine him about three prior disciplinary actions he had been subject to by his department.⁷¹ Davis had previously been suspended for forty-four days for stealing departmental gasoline for use in his personal vehicle, and had been found by Internal Affairs to have lied about tearing up a subway patron’s pass without justification.⁷² He had also been charged with (although not ultimately disciplined for) improperly putting a gun to a prostitute’s head.⁷³

Davis objected to the admission of this line of cross-examination, arguing that Federal Rule of Evidence 404(b), which regulates the admission of prior bad acts by a witness, does not permit the admission of prior bad acts to prove character.⁷⁴ The Third Circuit noted “under Federal Rule of Evidence 608(b), specific instances of conduct may be inquired into on cross-

69. 183 F.3d 231 (3d Cir.), amended by 197 F.3d 662 (3d Cir. 1999).

70. *Id.* at 236. The court noted that the appeal arose “out of a bizarre factual situation that reads like the plot of a Grade B melodrama.” Upon learning that his rival, Sabol, was a government informant, Davis leaked that information to the Sabol’s criminal associates in the hope that they would kill Sabol. While Davis did not succeed in engineering Sabol’s death, he did manage to sabotage the FBI’s investigation of Sabol’s associates and was subsequently convicted of obstruction of justice, racketeering, and witness tampering. *Id.* at 236–39.

71. *Id.* at 256.

72. *Id.*

73. *Id.*

74. *Id.* at 256–57.

examination, at the discretion of the court, if they are probative of a witness's truthfulness or untruthfulness" and ruled that two of the lines of questioning were permissible as probative of truthfulness.⁷⁵ In its initial opinion the court had stated that an "[i]nquiry into the first two incidents was clearly proper, because they went to Davis's truthfulness."⁷⁶ For this proposition, the court cited *Deary v. City of Gloucester*.⁷⁷

As written, the Court appeared to condone the government's questioning Davis about the collateral consequences (i.e. his suspension and the conclusions of the Internal Affairs investigation), because the "inquiry into the first two incidents," when it occurred at trial, had included inquiry into Davis' subsequent punishment.

However, the Court subsequently issued an order amending its initial opinion, excising the language quoted above and replacing it with the sentence, "Inquiry into the *facts* underlying the first two incidents was clearly proper, because they went to Davis's truthfulness."⁷⁸ The court also included an explanatory footnote:

This does not suggest that the government may introduce either reports or evidence that Davis was suspended for forty-four days, or documentation of the Internal Affairs determination that Davis lied about the subway-pass incident. Such evidence would not only be hearsay to the extent it contains assertion of fact, it would be inadmissible extrinsic evidence under Rule 608(b). More precisely, the government cannot make reference to Davis's forty-four day suspension or that Internal Affairs found that he lied about the subway-pass incident. The government needs to limit its cross examination to the *facts underlying* those events. To impugn

75. *Id.* at 257. The Court found that the incident in which Davis had allegedly threatened the prostitute was not probative of truthfulness.

76. *United States v. Davis*, 197 F.3d 662 (3d Cir. 1999) (order amending opinion).

77. 9 F.3d 191 (1st Cir. 1993) (questions about an incident in which a police officer witness had been disciplined for untruthfulness were appropriate under Rule 608(b)). The *Deary* Court had only confronted the question of whether the evidence of prior disciplinary sanction was probative of truthfulness and whether physical documents relating to the disciplinary action were properly admitted, not whether questions on cross-examination regarding such matters constituted extrinsic evidence. *Id.* at 196–97.

78. *Davis*, 197 F.3d at 662 (order amending opinion).

Davis's credibility, the government properly can question Davis about misappropriating departmental gasoline for personal use and putting a false name in a gas log, and it may question Davis about lying to an Internal Affairs officer about ripping up an individual's subway pass. If he denies that such events took place, however, the government cannot put before the jury evidence that he was suspended or deemed a liar by Internal Affairs. As Professor Saltzburg aptly warns, "counsel should not be permitted to circumvent the no-extrinsic-evidence provision [in Rule 608(b)(1)] by tucking a third person's opinion about prior acts into a question asked of the witness who has denied the act." Stephen A. Saltzburg, *Impeaching the Witness: Prior Bad Acts and Extrinsic Evidence*, 7 CRIM JUST. 28, 31 (Winter 1993). Allowing such a line of questioning not only puts hearsay statements before the jury, it injects the views of a third person into the case to contradict the witness. This injection of extrinsic evidence not only runs afoul of Rule 608(b), but also sets the stage for a mini-trial regarding a tangential issue of dubious probative value that is laden with potential undue prejudice.⁷⁹

With the amended opinion in *Davis*, the Third Circuit adopted Saltzburg's analysis in full. The Rules Committee for the Federal Rules of Evidence also subsequently endorsed the Saltzburg approach, citing *Impeaching the Witness* and *Davis* in the Advisory Committee Note to the 2003 Amendment to Rule 608(b). The relevant portion of the note reads:

It should be noted that the extrinsic evidence prohibition of Rule 608(b) bars any reference to the consequences that a witness might have suffered as a result of an alleged bad act. For example, Rule 608(b) prohibits counsel from mentioning that a witness was suspended or disciplined for the conduct that is the subject of impeachment, when that conduct is offered only to prove the character of the witness. See *United States v. Davis*, 183 F.3d 231, 257 n.12 (3d Cir. 1999) (emphasizing that in attacking the defendant's char-

79. *Id.*

acter for truthfulness “the government cannot make reference to Davis’s forty-four day suspension or that Internal Affairs found that he lied about” an incident because “[s]uch evidence would not only be hearsay to the extent it contains assertion of fact, it would be inadmissible extrinsic evidence under Rule 608(b)”). See also Stephen A. Saltzburg, *Impeaching the Witness: Prior Bad Acts and Extrinsic Evidence*, 7 *Crim. Just.* 28, 31 (Winter 1993) (“counsel should not be permitted to circumvent the no-extrinsic-evidence provision by tucking a third person’s opinion about prior acts into a question asked of the witness who has denied the act”).⁸⁰

B. THE D.C. CIRCUIT AND *UNITED STATES V. WHITMORE*

After the Rules Committee’s endorsement of *Davis*, however, no Court of Appeals has held that Saltzburg’s approach governs Rule 608(b). The closest any subsequent Court of Appeals has come to following the guidance of the Committee Note on the extrinsic evidence issue is an approving reference by the D.C. Circuit in the case of *United States v. Whitmore*.⁸¹ In *Whitmore* the trial judge had prevented defendant’s counsel from cross-examining the prosecution’s police witness about prior testimony in which the officer was found by the court to have lied.⁸² The trial court excluded the entire line of questioning on the grounds that, because the questioning concerned a judicial finding of perjury rather than a criminal conviction for perjury, its prejudicial effect substantially outweighed its probative value and that it was therefore subject to exclusion under Federal Rule of Evidence 403.⁸³ The D.C. Circuit disagreed, reasoning that “[n]othing could be more probative of a witness’s character for untruthfulness than evidence that the witness has previously lied under oath.”⁸⁴ It held that the trial court’s refusal to allow defense’s line of

80. Fed R. Evid. 608(b) advisory committee’s note 1.

81. 384 F.3d 836 (D.C. Cir. 2004) (order denying motion for rehearing) (per curiam).

82. *United States v. Whitmore*, 359 F.3d 609, 614–15 (D.C. Cir. 2004).

83. *Id.*

84. *Id.* at 619–21.

cross-examination was an abuse of discretion, reversed the defendant's conviction and remanded for retrial.⁸⁵

The government filed a petition for rehearing, but sought only to limit the scope of cross-examination on remand.⁸⁶ The government argued, citing the Advisory Committee Note, that the trial court must limit the defense's cross-examination to the facts underlying the officer's prior testimony, and exclude any references or questions to the judge's credibility determination in the prior case.⁸⁷ The D.C. Circuit denied the motion on the grounds that the government's request had not been raised prior to the motion for rehearing and was therefore waived.⁸⁸ But it granted the government's request in a roundabout way, stating "[n]onetheless, it is appropriate for us to call the district court's attention to the new Advisory Committee note because that note would apply to the scope of cross examination on retrial."⁸⁹ Thus, while formally denying the motion, the D.C. Circuit's opinion here seems to have granted the government's request by implicitly giving the court below an instruction to limit the defense's cross-examination. From the statement that the note "would apply" one can draw the inference that, should the trial court fail to follow the note, the panel would reverse.⁹⁰ Thus the D.C. Circuit has also endorsed Saltzburg's theory of cross-examination as extrinsic evidence, although it has as of yet only done so in *dicta*.

C. THE SEVENTH CIRCUIT AND *U.S. V. DAWSON*

Following *Whitmore*, however, the consistent trend among the Circuits has been to reject the Saltzburg approach and allow cross-examination into the consequences of prior conduct by a witness that tends to show dishonesty (at least in the absence of a hearsay objection). In the 2006 case *United States v. Dawson*, the Seventh Circuit became the first Court of Appeals to reject the extrinsic evidence theory.⁹¹ At the time, the *Dawson* appeal pro-

85. *Id.*

86. *Whitmore*, 384 F.3d at 836 (order denying motion for rehearing) (per curiam).

87. *Id.*

88. *Id.*

89. *Id.*

90. *See United States v. Dawson*, 434 F.3d 956, 957–58 (7th Cir. 2006) (observing that the *Whitmore* opinion "appears to approve of the statement in *Davis*").

91. 434 F.3d 956 (7th Cir. 2006).

vided the most direct presentation of the issue presented in Saltzburg's article to date. *Davis* and *Whitmore* had ruled on lines of questioning which may have included questions about collateral consequences of a witness' prior conduct and both courts expressed approval of the Saltzburg theory by way of clarification. In *Dawson* defense counsel had sought at trial to impeach the prosecution's witnesses (a government informant) by asking whether a judge in a prior trial had disbelieved their testimony.⁹² The trial judge in *Dawson* excluded that specific line of questioning.⁹³

On appeal, Judge Richard Posner, writing for the court, found that the trial court had erred in ruling that this line of cross-examination was inadmissible extrinsic evidence, reasoning that "[o]ur defendants were not proposing to use extrinsic evidence . . . but merely to ask each witness whether a judge had disbelieved him or her in a previous case"⁹⁴ and thus repudiated the Saltzburg theory. Despite this repudiation, the court went on to rule that the error was harmless and affirmed the defendants' convictions. Although it prevailed in the appeal overall, the government filed a motion for rehearing because it was concerned that the passage quoted above would give precedential weight to a repudiation of the Saltzburg theory.⁹⁵ Citing *Davis*, *Whitmore* and the Advisory Committee note, the government asked the court to delete or amend the passage quoted above.⁹⁶

Ruling on the motion for rehearing, Judge Posner doubled down on his repudiation of Saltzburg's approach. After deciding that the weight properly given to the Advisory Committee Note in the instance was "obscure,"⁹⁷ Posner went on to conclude that neither *Davis* nor *Whitmore* provided helpful guidance:

92. *Id.* at 396 (7th Cir. 2005).

93. *Id.*

94. *Id.*

95. *Dawson*, 434 F.3d at 957.

96. *Id.* at 956–58.

97. *Id.* at 958. Because the note was not keyed to a substantive change in Rule 608(b) but rather a clarification, Judge Posner observed that the note was akin to "post-enactment legislative history." *Id.* He went on to observe that the Rule itself concerned extrinsic evidence and the only reference to questions was contained in a quotation from Saltzburg's article. *Id.*

Davis and *Whitmore* do not dispel the obscurity. They do not distinguish clearly between presenting extrinsic evidence that the witness was found not credible and, in a paraphrase of Saltzburg's statement, "inject[ing] the views of a third person into the case to contradict the witness" merely by asking the witness about those views. The [explanatory footnote] from *Davis* was unexceptionable in distinguishing between questioning a witness and presenting extrinsic evidence to contradict his answer; all that makes the case *seem* to bear on the issue before us is the court's reference to Saltzburg.⁹⁸

Posner further objected to the approach adopted in *Davis* and *Whitmore* in that it gave no consideration to who the third party imposing the collateral consequences on the witness was.

In *Davis*, moreover, the third person was not a judge; and while one of the third persons in *Whitmore* was, the *per curiam* opinion does not bother to mention the fact. The distinction may be important. [Federal Rule of Evidence] 609 allows convictions to be used to challenge credibility, suggesting that findings by judges or juries are entitled to more weight than what any old third party might happen to think about a witness's credibility. The quotation from Saltzburg's article likewise refers to "a third person's opinion" without attempting to distinguish among third persons. It is possible that Saltzburg, and the committee, rather than interpreting Rule 608(b) were merely offering cautionary advice to district judges regarding the exercise of discretion in the control of cross-examination.⁹⁹

Having dismissed the arguments put forward in *Davis*, *Whitman*, and the Advisory Committee Note, Judge Posner adopted a more literal definition of the term "extrinsic evidence."

There would have been a problem in this case had the defendants' lawyer asked "has any federal judge ever found

98. *Id.* at 958 (citations omitted).

99. *Id.*

that you lied on the stand?” and when the witness answered “no” the lawyer sought to have the judge’s finding placed in evidence. *That* would be “extrinsic evidence” and would be barred by Rule 608(b) if the evidence were being used to undermine the witness’s “character for truthfulness.”¹⁰⁰

Judge Posner ultimately concluded that the admissibility of questions put to a witness on cross-examination were “outside the scope of Rule 608(b),” and that the proper instrument for ensuring that cross-examination does not confuse the jury or unnecessarily drag on is the management of the trial judge in her discretion.¹⁰¹ Concluding his denial of the government’s motion to rehear, Judge Posner summed up his holding:

The important point is that the decision whether to allow a witness to be cross-examined about a judicial determination finding him not to be credible is confided to the discretion of the trial judge; it is not barred by Rule 608(b), which, to repeat, is a rule about presenting extrinsic evidence, not about asking questions.¹⁰²

D. THE SECOND CIRCUIT AND *U.S. V. CEDEÑO*

Following Judge Posner’s opinion in *Dawson*, arguments that lines of cross-examination constitute extrinsic evidence largely disappeared from the case law. The next federal appeals court to address the admissibility of prior judicial findings of police perjury into evidence was the Second Circuit in *United States v. Cedeño*.¹⁰³ In *Cedeño*, the Second Circuit was presented with the question of whether defense counsel should have been permitted to question the prosecution’s police witness as to whether a state court judge in another proceeding had found his testimony not credible.¹⁰⁴ The court, relying primarily on precedent within the Second Circuit, concluded that it is within the trial court’s discretion whether to admit or exclude cross-examination into prior

100. *Id.* at 958–59.

101. *Id.* at 959.

102. *Id.*

103. 644 F.3d 79 (2d Cir. 2011).

104. *Id.* at 81.

determinations of a witness' credibility, but that the court below had abused its discretion in limiting its consideration of whether to admit the questioning a police officer about a prior finding of dishonesty under oath to two factors: (1) whether the prior judicial finding addressed the witness's veracity in that specific case or generally; and (2) whether the two sets of testimony involved similar subject matter.¹⁰⁵

The Second Circuit overturned the defendant's conviction, emphasizing the importance of giving criminal defendants "wide latitude" to cross-examine police witnesses. The court suggested that limiting the trial court's consideration to two factors "could unduly circumscribe both a trial court's discretion in a manner contrary to the plain meaning of Rule 608(b)(1), and a defendant's right under the Confrontation Clause to an effective cross-examination."¹⁰⁶ While the court cited *Whitmore*, it did so not for the argument that the cross-examination would be extrinsic evidence, but for the argument that the evidence was particularly probative since "[n]othing could be more probative of a witness's character for untruthfulness than evidence that the witness has previously lied under oath."¹⁰⁷ The Second Circuit proposed a non-exhaustive list of additional factors for consideration, including:

- 1) whether the lie was under oath in a judicial proceeding or was made in a less formal context;
- 2) whether the lie was about a matter that was significant;
- 3) how much time had elapsed since the lie was told and whether there had been any intervening credibility determination regarding the witness;
- 4) the apparent motive for the lie and whether a similar motive existed in the current proceeding; and
- 5) whether the witness offered an explanation for the lie and, if so, whether the explanation was plausible.¹⁰⁸

The government in *Cedeño* did raise one other argument against allowing defense counsel to pursue its proposed line of cross-examination: it attempted to argue at oral argument that

105. *Id.* at 82.

106. *Id.*

107. *Id.*

108. *Id.* at 83.

such a line of questioning would call for hearsay.¹⁰⁹ Because the government had not raised the argument prior to oral argument, however, the *Cedeño* court declined to address it. Further, the question could not be relitigated on remand because the *Cedeño* court ultimately found the trial court's abuse of discretion harmless error and affirmed the conviction.¹¹⁰

The subsequent case of *United States v. White* presented a substantially similar question to that presented in *Cedeño*.¹¹¹ The trial court in *White*, like the trial court in *Cedeño*, refused to allow defense counsel to cross-examine the prosecution's police witness about his prior perjury after applying the same two factors applied by the trial court in *Cedeño*.¹¹² Finding the trial court's application of the balancing test to have been an abuse of discretion, Judge Guido Calabresi, writing for the majority, remanded for a new trial with an instruction that the trial court should admit the cross-examination.¹¹³ In dissent, Chief Judge Dennis Jacobs objected to the instruction, as once again the government had raised a hearsay objection to the admission of the evidence, which the court had been unable to address since it was first raised at oral argument.¹¹⁴ Thus, although remand could have provided an opportunity to litigate the hearsay question, the majority declined to do so, resting its decision on the government's failure to make a timely argument,¹¹⁵ and the interest in allowing the defendant to present his best defense.¹¹⁶

E. THE TENTH CIRCUIT AND *U.S. V. WOODARD*

The most recent decision on the issue of the admissibility of cross-examination of police witnesses regarding prior findings of dishonest testimony comes in *United States v. Woodard*.¹¹⁷ In

109. *Id.* at 83 n.3.

110. *Id.* at 83.

111. 692 F.3d 235 (2d Cir. 2012).

112. *Id.* at 249. The trial court in *White* did not have the benefit of the Second Circuit's opinion in *Cedeño* as it had not come down at the time of the *White* trial.

113. *Id.* at 251. The court stated that "the district court's decision to exclude the prior adverse credibility finding with respect to officer Herrmann cannot be located within the range of permissible decisions." *Id.*

114. *Id.* at 253 (Jacobs, C.J., dissenting).

115. *Id.* at 244–45.

116. *Id.* at 239.

117. 699 F.3d 1188 (10th Cir. 2012).

Woodard, a drug possession case, the arresting officer had established probable cause to search Woodard's vehicle on the grounds that he detected the smell of marijuana emanating from the vehicle.¹¹⁸ Woodard had sought to cross-examine the officer about a prior trial in which the judge had found the officer had lied on the stand about smelling marijuana as a means to establish probable cause to search.¹¹⁹ The trial court refused to allow this line of cross examination on the grounds that it would create a trial within a trial and confuse the issues, and thus was subject to exclusion under Rule 403.¹²⁰ In response, Woodard filed an appeal alleging that his Sixth Amendment right to confront his accusers had been violated.¹²¹ The Tenth Circuit agreed the question had been properly framed as a Constitutional one, and therefore reviewed the exclusion *de novo*.¹²²

The *Woodard* Court concluded that this line of questioning should have been allowed, citing *Dawson* and *Cedeño*.¹²³ Finding the *Cedeño* court's approach "particularly helpful," the *Woodard* court applied the *Cedeño* seven factors to conclude that the line of questioning was both "relevant and highly probative."¹²⁴ It therefore remanded for a new trial in which the defendant would be allowed to cross-examine the government's witness.¹²⁵ Despite remanding the case to the trial court with instructions to admit the evidence, the Tenth Circuit also cryptically noted that "neither party addressed whether cross-examination of the inspector about the Variste court's credibility determination would raise hearsay concerns."¹²⁶ Just as the Second Circuit in *Cedeño* had, the *Woodard* court declined to address the issue. And just as the Second Circuit had in *White*, the Tenth Circuit declined to permit the trial court to revisit the issue, ordering the trial court to admit the evidence, this time without dissent. Thus, although two Circuits have had at least some opportunity to exclude cross-examination of law enforcement witnesses about prior findings of

118. *Id.* at 1192.

119. *Id.* at 1191.

120. *Id.* at 1192.

121. *Id.* at 1193.

122. *Id.* at 1193–94.

123. *Id.* at 1195.

124. *Id.*

125. *Id.* at 1199.

126. *Id.* at 1196 n.5.

that their prior testimony had been found dishonest, both Circuits seem to have ducked the question.

IV. A RULE OF JUDICIAL DISCRETION IN THE EXCLUSION OF PRIOR FINDINGS OF DISHONEST TESTIMONY

A. THE SALTZBURG THEORY OF EXTRINSIC EVIDENCE SHOULD BE DISCARDED

The current trend among the Circuits demonstrates that Saltzburg's theory of cross-examination as extrinsic evidence under Rule 608(b), despite its endorsement in the Rules Committee's Advisory Note, may be out of favor with the courts. Although Prof. Saltzburg makes a coherent argument that questions about collateral consequences of prior conduct are akin to extrinsic evidence, this trend is nonetheless encouraging. As Judge Posner noted in *Dawson*, this is a counterintuitive reading of the text of the Rule 608(b), which seems to be, as he puts it "is about presenting extrinsic evidence, not asking questions."¹²⁷ As a functional matter it isn't clear why the careful management of the trial judge in his discretion is not sufficient to avoid the concern of trials within trials and undue wasting of the court's time. Prof. Saltzburg's approach seems to take a simple directive and needlessly complicate it, thus making the "grotesque structure" even more grotesque.

Furthermore, because this question has been raised most often in the context of criminal trials in which the defendant seeks to cross-examine the government's police witness, the interest in allowing the defendant to present his best defense weighs heavily in favor of discarding the Saltzburg theory.¹²⁸ Courts weighing the issue have found that refusing to admit such evidence is an abuse of discretion¹²⁹ and even in one case a Constitutional harm.¹³⁰ As the *Whitmore* court noted "nothing could be

127. *United States v. Dawson*, 434 F.3d 956, 959 (7th Cir. 2006).

128. At least in the context of criminal trials. While separate rules for civil and criminal trials could be prescribed, this risks allowing the grotesque structure to grow even more grotesque.

129. *United States v. White* 692 F.3d 235, 251 (2d Cir. 2012); *United States v. Cedeño* 644 F.3d 79, 81–83 (2d Cir. 2011).

130. *Woodard*, 699 F.3d at 1196–98.

more probative of a witness's character for untruthfulness than evidence that the witness has previously lied under oath." And when, as in many criminal cases, crucial questions about the admission of physical evidence depend solely on the testimony of a law enforcement officer, the defense should be entitled to question the reliability of that testimony if there is reason to believe it untrustworthy.

Finally, the knowledge that a subsequent court may inquire into a police officer's testimony may deter him or her from committing perjury *ex ante*. As discussed above, law enforcement officials are thought to lie most frequently when testifying as to whether or not they violated the Fourth Amendment when collecting evidence, and they are thought to do so in order to burnish their professional and social status among their peers.¹³¹ At present, because findings of police perjury are rare and prosecutions of police perjury are even rarer, an officer who has a chance to ensure her evidence is admitted at trial has little to lose in the way of practical consequences by perjuring himself beyond injury to his public reputation for honesty if caught. But if an officer knows that perjured testimony could be used against her in subsequent suppression hearings or trials, she is forced to confront a serious risk to her professional status when contemplating committing perjury. As such, discarding Saltzburg's approach could actually have a salutary effect on the reliability of police testimony.

B. COURTS SHOULD RELAX THE HEARSAY RULES TO ALLOW LAW ENFORCEMENT OFFICIALS TO BE QUESTIONED ABOUT PRIOR INSTANCES OF PERJURY

While some courts may no longer follow Prof. Saltzburg's approach in excluding cross-examination into prior police perjury under Rule 608(b), the argument that such cross-examination is inadmissible as hearsay is a harder one to rebut under current law. And while discarding the Saltzburg theory may permit this sort of cross-examination when the government fails to raise a hearsay objection, the increased attention to the hearsay argument in the more recent circuit court decisions suggests that

131. See *supra* Part I.A.

prosecutors will increasingly frame their objections to such testimony as hearsay objections going forward. Judicial findings of fact do not, as a blanket rule, fall under any of the current exceptions to the hearsay rule.¹³² However the fact that both Circuit courts confronted with hearsay issues in this area have ducked the question may be instructive.

It is true that judicial findings of police perjury introduced as hearsay present the two primary problems with ordinary hearsay; such testimony cannot be impeached nor can the finder of fact observe the declarant making the statement, thus making its reliability less subject to testing. However, there are some crucial differences between hearsay in the form of judicial findings of fact and hearsay in the form of ordinary statement that should allay some of the fears supporters of the hearsay rule might raise in objection to admitting this kind of evidence. First, judicial findings of fact are made in an adversary system and are subject to appeal. Thus trial judges have incentives (if they do not wish to be reversed) to explain and justify their findings of fact (in this case perjury). However, these findings of fact are ordinarily subject to review for clear error, so the extent to which they are subject to verification on appeal is limited. Nonetheless, the fact that these findings are subject to systematic review, however limited, gives them, all things being equal, greater reliability than ordinary hearsay.

Furthermore, judicial findings of fact are entitled to greater deference than ordinary statements because they carry the force of law. If such findings of fact can be sufficient to admit or exclude evidence in a prior trial, or even in the case of criminal bench trials to deprive a defendant of their liberty, there is a strong argument to be made that they have enough inherent legitimacy and reliability for a judge in a subsequent trial to at least consider them under a Rule 403 analysis.

Finally, specifically regarding findings of police perjury, a finding by a judge that a police officer's testimony is not worthy of belief is an extraordinary event, despite the common perception that police perjury is a routine occurrence. As such, there is reason to believe that such findings will have a greater basis for reliability (as the judge will in general need more reliable basis for

132. See Fed. R. Evid. 801-07.

making such a ruling to comfortably make it). The foregoing reasons, when combined with reluctance of the courts of appeal to apply hearsay exclusions and the strong interests criminal defendants and society at large share in deterring and rooting out police perjury counsel strongly in favor of relaxing the hearsay rules in this area, perhaps enough to permit a further alteration to the “grotesque structure.”¹³³

133. *Michelson v. United States*, 335 U.S. 469, 486 (1948).