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Rule 609(a) in the Civil Context: A Recommendation for Reform

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Rule 609(a) in the Civil Context: A Recommendation for Reform

Cover Page Footnote

Professor, University of Oklahoma College of Law. My thanks to colleagues who reviewed a draft of this article: Art Greenbaum, Larry Herman, Lou Jacobs, Drew Kershen, Charlie Krauskopf, Joan Krauskopf, Peter Kutner, Kevin Saunders, Bob Smith, Bob Spector, Rick Tepker, Mickie Voges and Leo Whinery.

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*TEREE E. FOSTER**

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INTRODUCTION

NO rule of evidence has provoked commentary so passionate or profuse as that which permits impeachment of a testifying witness in a criminal case by introducing that witness' previous convictions.[1] The en-

* Professor, University of Oklahoma College of Law. My thanks to colleagues who reviewed a draft of this article: Art Greenbaum, Larry Herman, Lou Jacobs, Drew Kershen, Charlie Krauskopf, Joan Krauskopf, Peter Kutner, Kevin Saunders, Bob Smith, Bob Spector, Rick Tepker, Mickie Voges and Leo Whinery.

1. *See, e.g.*, Griswold, *The Long View*, 51 A.B.A. J. 1017 (1965); Ladd, *Credibility Tests—Current Trends*, 89 U. Pa. L. Rev. 166 (1940) [hereinafter Ladd I]; Ladd, *Techniques and Theory of Character Testimony*, 24 Iowa L. Rev. 498 (1939); Spector, *Impeachment Through Past Convictions: A Time for Reform*, 18 De Paul L. Rev. 1 (1968); Note, *To Take The Stand Or Not To Take The Stand: The Dilemma of a Defendant with a Criminal Record*, 4 Colum. J. L. & Soc. Probs. 215 (1968) [hereinafter Note, *The Dilemma of a Defendant with a Criminal Record*]; Note, *Procedural Protections of the Criminal Defendant—A Reevaluation of the Privilege Against Self-Incrimination and the Rule*

actment of the Federal Rules of Evidence in 1975 spurred a fresh wave of critical commentary. Much of this scholarship castigated Rule 609[2] as unresponsive to the oft-stated assertion that impeaching a criminal defendant and other defense witnesses by their former convictions fails to advance appreciably the fact-finder's assessment of credibility. Rather, such impeachment is unduly prejudicial to the defense.[3] The danger is

Excluding Evidence of Propensity to Commit Crime, 78 Harv. L. Rev. 426 (1964); Note, *Impeachment of the Defendant—Witness by Prior Convictions*, 12 St. Louis U.L.J. 277 (1968); Note, *Other Crimes Evidence At Trial: Of Balancing and Other Matters*, 70 Yale L.J. 763 (1961) [hereinafter Note, *Other Crimes Evidence at Trial*].

2. Federal Rule of Evidence 609 provides in pertinent part:

> (a) General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.
>
> (b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

It must be acknowledged that Rule 609 worked substantial changes in impeachment law by excluding much of the evidence freely admitted in earlier times, both as to remote crimes and crimes of sex and violence. The law in existence prior to Rule 609 is described in Ladd I, *supra* note 1, at 174-84. *See generally* Jones, *Convicting the Innocent—Revisited: A Remedy Afforded by Federal Rule 609*, 38 J. Mo. Bar 168 (1982).

3. *See* Bridge, *Burdens Within Burdens at a Trial Within a Trial*, 23 B.C.L. Rev. 927 (1982); Glick, *Impeachment by Prior Convictions: A Critique of Rule 609 of the Proposed Rules of Evidence for U.S. District Courts*, 6 Crim. L. Bull. 330 (1970); McGowan, *Impeachment of Criminal Defendants by Prior Convictions*, 1970 Law & Soc. Ord. 1; 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 (1970); Surratt, *Prior-Conviction Impeachment Under the Federal Rules of Evidence: A Suggested Approach to Applying the "Balancing" Provision of Rule 609(a)*, 31 Syracuse L. Rev. 907 (1980); Note, *Impeachment by Prior Conviction: Adjusting to Federal Rule of Evidence 609*, 64 Cornell L. Rev. 416 (1979); Note, *Impeachment by Prior Convictions: Procedural Problems, Substantive Dilemmas, and Constitutional Infirmities*, 4 Crim. Just. J. 223 (1980); Note, *Impeachment Under Rule 609(a): Suggestions for Confining and Guiding Trial Court Discretion*, 71 Nw. U.L. Rev. 655 (1977) [hereinafter Note, *Suggestions for Confining and Guiding Trial Court Discretion*].

One commentator asserts that introduction of prior crimes to impeach a criminal defendant "is fundamentally at odds with due process of law." Nichol, *Prior Crime Impeachment of Criminal Defendants: A Constitutional Analysis of Rule 609*, 82 W. Va. L. Rev. 391, 420 (1980); *see also* Beaver & Marques, *A Proposal to Modify the Rule on Criminal Conviction Impeachment*, 58 Temp. L.Q. 585 (1985); Note, *Constitutional Problems Inherent in the Admissibility of Prior Record Conviction Evidence for the Purpose of Impeaching the Credibility of the Defendant Witness*, 37 U. Cin. L. Rev. 168 (1968). *But see* Note, *Impeachment With Prior Convictions Under Federal Rule of Evidence*

that evidence of prior crimes will lead jurors to infer not only a lack of veracity of the defendant or his witnesses, but also a tendency to engage in criminal activity.

The defendant who has previously transgressed thus confronts a harsh dilemma: remain silent and risk the factfinder's intuitive conclusion that an innocent person would be eager to relate his version of the facts, or testify and substantially increase the risk of a guilty verdict. Several commentators point to a burgeoning body of social psychology research demonstrating that prior specific acts, even those resulting in conviction, bear no relationship to current veracity. They argue that this data discredits the premises upon which Rule 609 is based and that the rule should be repealed in criminal cases.[4]

A recent spate of cases struggles with another "vexing question"[5] posed by Rule 609—to what extent does the language of the rule permit prior convictions to be used to impeach the credibility of witnesses in civil litigation?[6] The divergent constructions of Rule 609 propounded by these courts[7] have provoked yet another surge of scholarship focusing upon the operation of this rule in the civil context.[8] These scholars recommend that a federal trial judge be permitted to invoke the minimal discretion afforded by Federal Rule 403 as a means of controlling the use of prior convictions to impeach a witness in a civil proceeding.[9]

609(a)(1): A Plea for Balance, 63 Wash. U.L.Q. 469 (1985) [hereinafter Note, *A Plea For Balance*] (arguing that Federal Rule 609 disadvantages the prosecutor and grants an unwarranted "evidentiary windfall" to the criminal defendant that Congress should redress by equalizing the balance of advantage for prosecution and defense).

4. *See* Beaver & Marques, *supra* note 3, at 603-21; Lawson, *Credibility and Character: A Different Look at an Interminable Problem*, 50 Notre Dame Law. 758, 766-89 (1975); Mendez, *California's New Law On Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 U.C.L.A. L. Rev. 1003, 1042-60 (1984); Spector, *Rule 609: A Last Plea for its Withdrawal*, 32 Okla. L. Rev. 334, 349-54 (1979).

5. Campbell v. Greer, 831 F.2d 700, 703 (7th Cir. 1987).

6. *See, e.g.*, Green v. Bock Laundry Mach. Co., No. 87-5712 (3d Cir. Mar. 14) (prior conviction admitted to impeach witness), *cert. granted*, 108 S. Ct. 2843 (1988); Campbell v. Greer, 831 F.2d 700 (7th Cir. 1987) (same); Hannah v. City of Overland, 795 F.2d 1385 (8th Cir. 1986) (admission of prior convictions held harmless error); Wierstak v. Heffernan, 789 F.2d 968 (1st Cir. 1986) (prior conviction excluded).

7. *See infra* text accompanying notes 32-51.

8. *See* Savikas, *New Concepts in Impeachment: Rule 609(a), Federal Rules of Evidence*, 57 Chi. B. Rec. 76 (1975); Smith, *Impeaching the Merits: Rule 609(a)(1) and Civil Plaintiffs*, 13 N. Ky. L. Rev. 441 (1987); Note, *The Place for Prior Conviction Evidence in Civil Actions*, 86 Colum. L. Rev. 1267 (1986) [hereinafter Note, *Prior Conviction Evidence in Civil Actions*]; Note, *Prior Convictions Offered for Impeachment in Civil Trials: The Interaction of Federal Rules of Evidence 609(a) and 403*, 54 Fordham L. Rev. 1063 (1986) [hereinafter Note, *The Interaction of Federal Rules 609(a) and 403*]; Note, *Evidence*—Diggs v. Lyons: *The Use of Prior Criminal Convictions To Impeach Credibility in Civil Actions Under Rule 609(a)*, 60 Tul. L. Rev. 863 (1986); Note, *The Interaction of Federal Rules 609(a)(2) and 403 of the Federal Rules of Evidence: Can Evidence of a Prior Conviction Which Falls Within the Ambit of Rule 609(a)(2) Be Excluded By Rule 403?*, 50 U. Cin. L. Rev. 380 (1981) [hereinafter Note, *The Interaction of Rules 609(a)(3) and 403*].

9. Federal Rule Evidence 403 provides:

This Article urges that the practice of using convictions for impeachment in the civil setting be abolished. Rule 609, as it affects civil cases, is flawed in two respects. The first flaw is superficial; the rule is badly drafted.[10] If the practice of permitting civil witnesses to be impeached with prior convictions is to continue, then this flaw can and must be remedied by congressional amendment. The plain terms of Rule 609(a)(1) abrogate judicial discretion concerning the admissibility of prior convictions to impeach civil witnesses. The rule mandates admission of all convictions for crimes characterized as offenses of "dishonesty or false statement" and all other felonies where probative value outweighs "prejudicial effect to the defendant."[11] In spite of this, judicial opinions construing Rule 609(a)(1) in the civil context are in disarray.

These drafting problems are addressed by two recent reports proposing amendments to Rule 609(a).[12] These reports provide an essential, thought-provoking and valuable contribution to the evolution of the Federal Rules of Evidence. The proposed versions clarify the rule's language, but they perpetuate the broad use of civil witnesses' prior convictions.[13]

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

10. *See* 10 J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice § 609.14[4], at VI-148 (1987) (Rule 609(a)(1) "is deficient, in that it cannot be sensibly applied in civil cases."); *see also* Campbell v. Greer, 831 F.2d 700, 703 (7th Cir. 1987) ("absurd" to apply Rule 609 literally in civil cases); Moore v. Volkswagenwerk, A.G., 575 F. Supp. 919, 921 (D. Md. 1983) (Rule 609 is "tailored to criminal trials").

11. Fed. R. Evid. 609(a).

12. One report, by the Section of Criminal Justice of the American Bar Association Criminal, is the first major reexamination of the Federal Rules of Evidence since their enactment. Committee on Rules of Criminal Procedure and Evidence, Federal Rules of Evidence: A Fresh Review and Evaluation, 1987 A.B.A. Sec. of Criminal Justice [hereinafter ABA Proposed Draft]. The other report, the Proposed Amendments to the Federal Rules of Appellate Procedure, Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, Federal Rules of Bankruptcy Procedure and the Federal Rules of Evidence 109 S. Ct. 30 (Prelim. Draft 1988) [hereinafter Judicial Conference Draft], promulgated by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, selects only Rule 609 for proposed revision.

13. The American Bar Association's version of Rule 609 provides in pertinent part:

> (a) General Rule.
> For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted only if the crime:
> (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect; or
> (2) involved untruthfulness or falsification, regardless of the punishment, unless the court determines that the probative value of admitting this evidence is substantially outweighed by the danger of unfair prejudice. This subsection (2) applies only to those crimes whose statutory elements necessarily involve untruthfulness or falsification.

ABA Proposed Draft, *supra* note 12, at 56.

The Judicial Conference's version provides in part:

The rule's second flaw is fundamental, and requires reassessment of its underlying premises. Rule 609 is the product of the law's long-standing and dogmatic assumptions that criminal convictions reflect character, and that character determines veracity. Although intuitively appealing, this assumption has been thoroughly undermined by social psychology research.[14] Moreover, in perpetuating unwarranted emphasis on *who* the litigants are rather than on *what* they have done, Rule 609 redirects the inquiry from the facts of the dispute to the morals of the parties, and thus subverts the basic goal of fairness in the truth-seeking process. The minimal discretion provided by Rule 403, even if operable under Rule 609, is insufficient protection against this eventuality.

Periodic questioning of the values and premises underlying evidentiary rules is necessary to streamline the rules, eliminate anachronistic provisions, and "bring the law of evidence closer to reality in its truth finding function."[15] After thirteen years, the operation of the Federal Rules of Evidence in civil litigation demonstrates that piecemeal judicial attempts at clarification of Rule 609 are unavailing. These deficiencies can be remedied only by drastic revision.[16]

> (a) General Rule—For the purpose of attacking the credibility of a witness,
> (1) evidence that a witness other than a criminal defendant 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 the evidence that a criminal defendant 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 defendant; and
> (2) evidence that a witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

Judicial Conference Draft, *supra* note 12, at 29.

The major difference between these two versions centers on the admission of prior convictions not involving untruthfulness or falsification. The Judicial Conference draft admits these convictions against all witnesses, except the criminal defendant, subject to a Rule 403 balancing. *See id.* The American Bar Association's draft gives the trial judge more discretion by excluding these convictions where the prejudice outweighs the probativity of the convictions. *See* ABA Proposed Draft, *supra* note 12, at 56. This Article rejects the use of Rule 403 as a means of controlling the use of prior convictions for impeachment purposes, *see infra* notes 232-40 and accompanying text, and therefore prefers the adoption of the American Bar Association's version of Rule 609.

14. *See* Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. Colo. L. Rev. 1, 25-31 (1986); *see also supra* note 4 and accompanying text.

15. Ladd I, *supra* note 1 at 166; *see* ABA Proposed Draft, *supra* note 12, at 56; Judicial Conference Draft, *supra* note 12, at 29.

16. The potential for skewed trial results occasioned by impeaching the criminal defendant and defense witnesses is overwhelming, as persuasively argued by a number of commentators. *See, e.g.*, Gordon v. United States, 383 F.2d 936 (D.C. Cir. 1967) (fear of admitting evidence of prior convictions may prevent defendant from testifying), *cert. denied*, 390 U.S. 1029 (1968); Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965) (same); sources cited *supra* notes 1, 3-4. The scope of this Article, however, is restricted to civil cases for at least three reasons. First, on pragmatic grounds, the practice of using prior convictions as a credibility determinant in criminal cases "is firmly entrenched in our jurisprudence." United States v. Martinez, 555 F.2d 1273, 1275 (5th Cir. 1977); *see* Ladd

This Article first scans the legislative debate and deliberation that pre-

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I, *supra* note 1, at 178. The protracted debate precipitated by the proposed Rule 609 during legislative hearings on the Federal Rules of Evidence attests to this fact. *See infra* notes 18-31 and accompanying text. Unyielding opposition of prosecutors, combined with legislative inertia, *see* Spector, *supra* note 4, at 337 n.19, and perhaps with well-founded reluctance to tackle the "interminable" problem of convictions in criminal cases, *see* Lawson, *supra* note 4, at 758, makes it unlikely that Congress would be amenable to radical reform on the criminal side in the near future. *See* Diggs v. Lyons, 741 F.2d 577, 583 (3d Cir. 1984) (Gibbons, J., dissenting), *cert. denied*, 471 U.S. 1078 (1985).

In contrast, the legislative furor provoked by Rule 609 focused upon its effect on the criminal defendant because Congress wholly disregarded the application of Rule 609 to civil litigants. *See infra* text accompanying notes 28-31. Thus, the pragmatic concerns are absent when civil litigation is involved.

Second, abolishing the use of convictions to impeach witnesses in criminal cases raises sixth amendment concerns. The constitutionality of the practice has never been successfully challenged, despite arguments that impeachment by prior convictions violates due process and other constitutional safeguards. *See, e.g.*, Beaver & Marques, *supra* note 3, at 591-97 (violates right to trial by jury, right to testify and the equal protection clause); Nichol, *supra* note 3, at 409-21 (violates right to trial by an impartial jury). However, abolishing the practice in criminal cases would necessarily prevent the defendant from attacking the prosecution witnesses' believability, and thus, might raise substantial questions of constitutional magnitude concerning the defendant's right to confront adverse witnesses and to present evidence. *See* Leonard, *supra* note 14, at 49-50 (excluding defendant's offer of character evidence would be constitutionally suspect); *cf.* Rock v. Arkansas, 107 S. Ct. 2704 (1987) (exclusion of hypnotically refreshed memory violates defendant's right to testify); Davis v. Alaska, 415 U.S. 308 (1974) (defendant's right to cross-examine adverse witnesses outweighs state's interest in protecting confidentiality of juvenile record); Chambers v. Mississippi, 410 U.S. 284 (1973) (defendant cannot be denied opportunity to cross-examine or impeach adverse witnesses). Moreover, to transform the impeachment process from a two-way to a one-way street by allowing the defendant, but not the prosecutor, to make use of opposing witnesses' past convictions, would raise serious questions about the overall appearance of fairness of the criminal trial process. *See* Leonard, *supra* note 14, at 49; Note, *A Plea for Balance*, *supra* note 3, at 481-89. Unlike criminal matters, neither litigant in a civil dispute is entitled to specialized constitutional consideration, because identical due process guarantees protect both equally.

The third reason that this article is confined to civil cases is that impeachment by prior convictions in criminal cases presents subtle systemic considerations. Professor Leonard argues, in a recent article, that the factor of rationality cannot wholly account for the staying power of evidentiary rules pertaining to character proof. *See* Leonard, *supra* note 14, at 2. He attributes the continued longevity of character rules, including the rule allowing impeachment by past convictions in criminal cases, to their utility in fulfilling the function of "catharsis," defined as the need to admit evidence that is intuitively, if not rationally, probative in order to assure societal acceptance of litigation results. *See id.* at 39-42, 49-50.

Moreover, as Professor Crump states convincingly, criminal litigation is a special example of the proposition that the trial process encompasses more than a search for truth. *See* Crump, *How Should We Treat Character Evidence Offered To Prove Conduct?*, 58 U. Colo. L. Rev. 279, 280 (1987). A delicate balance must be maintained between the individual and the state. The individual's constitutional rights warrant vigilant protection, not only for the sake of the criminal defendant, but also in service of the collective rights of society. Yet the state seeks not only to punish the guilty and vindicate the innocent, but also to vindicate society's quest for justice. As Professor Crump points out, character evidence might serve to recalibrate this balance in imperceptible ways. *See id.* at 280-84.

Significantly, the bulk of civil litigation addresses private disputes and traditionally focuses upon resolution of disputed facts, rather than upon the identity of the parties. This distinction is recognized by the absolute exclusion of character proof offered as cir-

ceded Rule 609 to ascertain whether the legislature intended to grant discretion to judges to exclude convictions in civil cases. Next, it examines judicial decisions construing the rule in civil cases to identify the different positions courts have taken when prior convictions become an impeachment device, and concludes that the resolution of this conflict does not lie with the courts. The Article then evaluates the traditional view on this issue and demonstrates that the introduction of criminal convictions into the civil litigation process is dysfunctional. Social psychology research refutes the proposition that former convictions add probative weight to the credibility assessment. Moreover, revealing civil witnesses' previous legal transgressions invites the factfinder to assess the moral worth of witnesses and litigants, and to award or withhold damages accordingly.[17] Finally, the Article recommends that Rule 609 be amended to ban the use of prior convictions to impeach civil witnesses.

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cumstantial evidence of conduct. *See* Fed. R. Evid. 404, 405. Character evidence in civil trials lacks the same intuitive appeal as an implicit explanation for the parties' conduct. The "cathartic" trial function is thus fulfilled when trials are generally fair, and are generally perceived as fair. Alerting the factfinder to the moral failings of civil parties and witnesses invites speculation as to the respective moral merit of the litigants and consequent adjustment of awards accordingly. Thus, in civil cases, Rule 609 actually disserves the "cathartic" function by undermining both the reality and the perception of fairness.

Finally, there is no residual societal interest in punishing the guilty or vindicating the innocent, because civil trials revolve around providing appropriate relief to those who prove cognizable injury. Unlike criminal cases, where the state assumes diverse roles—litigant, representative of society in its quest for justice, protector of the individual defendant's rights—there is no tension among the divergent state roles in civil cases. Except where the state is itself a party, the state's interest lies solely in providing a forum where civil disputes can be resolved equitably. The balance struck is generally between individuals, and that balance, evenly struck, needs no recalibration.

Because the complex pragmatic, constitutional and systemic considerations that accompany the question of using criminal convictions in criminal litigation are absent in civil litigation, the policy questions are crystallized, and presented in starker outline.

Another scope restriction of this Article should be explained. The arguments made here—that prior convictions are invalid indicators of testimonial veracity, and import unwarranted, harmful prejudice into the fact determination and thus distort the civil process—are equally applicable to reputation and prior specific bad acts evidence. *See* Fed. R. Evid. 608(a) and 608(b). This Article argues that all forms of character evidence should be prohibited as impeachment tools in civil cases, unless character evidence reveals a witness' bias. This Article focuses on past convictions because this form of character impeachment is the most egregious, *see infra* note 181, and because the law remains mindful of Justice Jackson's admonition regarding character evidence generally: "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." Michelson v. United States, 335 U.S. 469, 486 (1948). Perhaps if the "misshapen stone" of prior convictions is first extracted the remaining stones of reputation and specific bad acts can be nudged out more readily in the future.

17. This problem is exacerbated in the civil rights actions brought by prisoners and arrestees under 42 U.S.C. § 1983 (1982 & Supp. IV 1986). *See infra* note 88.

I. THE LEGISLATIVE STALEMATE: COMPROMISE AFTER PITCHED BATTLE

The "labyrinthine history"[18] of Rule 609, as well as judicial decisions construing it,[19] confirm that this rule emerged in its present form as a deliberate, yet uneasy compromise between opposing positions in a sharply-divided Congress.[20] The disagreement concerned the effect that using prior convictions of defense and prosecution witnesses as a credibility determinant would have on the criminal defendant.[21]

The version of Rule 609 submitted for legislative consideration excised all judicial discretion; all felonies and *crimen falsi* offenses were admissible to impeach any witness, including a criminal defendant who chooses to testify.[22] Galvanized by this proposal, the House ultimately approved a version that similarly abrogated judicial discretion, but authorized im-

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18. United States v. Smith, 551 F.2d 348, 360 (D.C. Cir. 1976). The extensive legislative background of Rule 609 is exhaustively catalogued elsewhere. *See* Tobias, *Impeachment of the Accused by Prior Convictions and the Proposed Federal Rules of Evidence: The Tortured Path of Rule 609, Hearings Before the Special Subcomm. on Reform of Federal Criminal Laws of the Comm. on the Judiciary*, H.R. Rep. No. 2, 93d Cong., 1st Sess. 105-15 (1973); 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 609-609[01] (1987) [hereinafter Weinstein's Evidence]; *see also* Diggs v. Lyons, 741 F.2d 577, 579-81 (3d Cir. 1984) (describing the extensive legislative history of Rule 609); United States v. Lipscomb, 702 F.2d 1049, 1059-62 (D.C. Cir. 1983) (same).

19. *See, e.g.*, Diggs v. Lyons, 741 F.2d 577, 580-81 (3d Cir. 1984); United States v. Lipscomb, 702 F.2d 1049, 1063 (D.C. Cir. 1983); United States v. Smith, 551 F.2d 348, 361 (D.C. Cir. 1976); Garnett v. Kepner, 541 F. Supp. 241, 244 (M.D. Pa. 1982), *superseded by* Diggs v. Lyons, 741 F.2d 577 (3d Cir. 1984).

20. *See, e.g.*, 120 Cong. Rec. 40,895 (1974) (statement of Rep. Hogan) (referring to Rule 609 as a "rule which has caused considerable controversy and which was settled by compromise in the committee of conference"); 120 Cong. Rec. 40,891 (1974) (statement of Rep. Hungate) ("The conference rule strikes a middle ground" between the House and the Senate versions); *see also* Smith, *supra* note 8, at 447-55 (analysis of house debates on Rule 609); Surratt, *supra* note 3, at 917-21 (Rule 609 represents a congressional compromise); Note, *Prior Conviction Evidence in Civil Actions, supra* note 8, at 1269-70 (Rule 609 was the subject of conflict in both houses).

The consideration Congress devoted to Rule 609 was exhaustive, much more than that devoted to any other evidence rule. *See* United States v. Toney, 615 F.2d 277, 280 (5th Cir.), *cert. denied*, 449 U.S. 985 (1980); Weinstein's Evidence, *supra* note 18, ¶ 609[04], at 609-75.

21. *See, e.g.*, 120 Cong. Rec. 37,075-83 (1974) (Senate debate on Senate Judiciary Committee proposal); 120 Cong. Rec. 2375-82 (1974) (House debate on House Judiciary Committee proposal). For a detailed description of the legislative debates see Smith, *supra* note 8, at 447-55.

22. The Advisory Committee's proposal stated:

> (a) *General Rule.* For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (2) involved dishonesty or false statement regardless of punishment.

56 F.R.D. 183, 269 (1973).

This proposal was the Advisory Committee's third published draft. Each draft had provoked strident opposition from some segment of Congress.

The initial draft allowed impeachment by conviction for any felony or any crime in-

peachment only by crimes of dishonesty and false statement.[23] The Senate, on the other hand, approved the automatic admissibility provisions of the Advisory Committee proposal.[24] Thus, the Conference Committee had to contend with a House proposal restricting impeachment to convictions for crimes of dishonesty and false statement, and a Senate proposal sanctioning impeachment by convictions for all felonies in addi-

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volving dishonesty or false statement and afforded the trial judge no discretion to exclude. *See* 46 F.R.D. 183, 295-96 (1969).

In response to criticism that this proposal ignored the discretionary approach formulated by the Court of Appeals for the District of Columbia in Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965) and Gordon v. United States, 383 F.2d 936 (D.C. Cir. 1967), the Advisory Committee next devised an unpublished draft that granted the trial judge discretion to exclude *non-crimen falsi* felony convictions "lacking in probative value on the issue of credibility." Weinstein's Evidence, *supra* note 18, ¶ 609[01], at 609-51.

The second published draft extended judicial discretion to both dishonesty and false statement crimes and other felonies. Exclusion was permitted, echoing the Rule 403 standard, when probative value "is substantially outweighed by the danger of unfair prejudice." 51 F.R.D. 315, 391 (rev. draft 1971). This incorporation of judicial discretion displeased some members of Congress, who viewed it as contrary to a recent legislative repudiation of the *Luck-Gordon* line of cases. District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, Sec. 133(a), § 14-305(b)(1), 84 Stat. 473, 551 (codified at D.C. Code § 14-305(b)(1)). Senator McClellan rebuked the Committee for ignoring "the Congressional judgement on this matter," 117 Cong. Rec. 29,845 (1971), and proposed an amendment to the Rules Enabling Act, 28 U.S.C. § 2078, that would have restricted the Advisory Committee's rulemaking power. *See* Weinstein's Evidence, *supra* note 18, ¶609[01] at 609-54 to -57. Apparently chastened, *see* Fed. R. Evid. 609 advisory committee's note, 56 F.R.D. 183, 270 (1973), the Advisory Committee submitted as its third, and final, published draft the nondiscretionary version it had proposed three years earlier.

23. *See* H.R. Rep. No. 650, 93d Cong., 1st Sess. 11, *reprinted in* 1974 U.S. Code Cong. & Admin. News 7075, 7084-85. Initially, the House Special Subcommittee on Reform of Federal Criminal Laws amended the Advisory Committee's submission by restoring judicial discretion concerning non-*crimen falsi* felonies. *See id.* But, citing concerns of little relevance, unfair prejudice and deterrent effect on witnesses—particularly on criminal defense witnesses—the House Committee on the Judiciary excised the grant of discretion. *See id.* The House rejected a proposed amendment by Representative Hogan, an attempt to withhold discretion in the opposite direction, which would have mandated admission of all felony and dishonesty and false statement convictions. *See* 120 Cong. Rec. 2375-76, 2393-94 (1974).

24. *See* 120 Cong. Rec. 37,075-76, 37,083 (1974). The Senate Judiciary Committee took exception to the House version, viewing the dangers of prejudice and disincentive to testify as far more burdensome to the criminal defendant-witness. *See* S. Rep. No. 1277, 93d Cong., 2d Sess. 14, *reprinted in* 1974 U.S. Code Cong. & Admin. News 7051, 7060-61. The Committee proposed that the criminal defendant be impeached only by prior dishonesty and false statement crimes. *See id.* Other witnesses would be impeached by other felony crimes if probative value outweighed prejudicial effect. *See id.* The Senate, perhaps persuaded by Senator McClellan, rejected this committee version, and voted to restore the Advisory Committee's proposal removing discretion to exclude either felonies or dishonesty and false statement crimes. *See* 120 Cong. Rec. 37,075-76, 37,083 (1974). Senator McClellan stated during the floor debate:

> We have gone pretty far already in trying to protect criminals and granting every advantage to them against society. . . . [The Judiciary Committee's proposal would deprive jurors of] the right or the opportunity to weigh the testimony of the defendant in light of the fact that the defendant is a convicted felon.

120 Cong. Rec. 37,076 (1974).

tion to crimes of dishonesty and false statement. Both proposals, however, deemed it appropriate to extinguish judicial discretion as a means to advance their respective policy objectives.[25] The Conference Committee crafted the compromise eventually approved by both houses.[26] This compromise preserved the nondiscretionary admissibility of convictions for dishonesty and false statement offenses, but vested discretion in the trial judge concerning convictions for other felonies. These convictions are available for impeachment only where their probity outweighs their prejudicial effect to the defendant.[27]

Although it was apparent that Rule 609 would apply with equal force in civil and criminal litigation,[28] there is a conspicuous absence in the legislative history of thoughtful consideration of the rule's implications for civil cases.[29] Even the Conference Committee, fixated upon the pol-

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25. The inimical policy objectives advanced by the House and Senate reflect the different concerns that predominated in each group. The House majority sought to safeguard the criminal defendant's unfettered choice as to whether to take the stand, and to obviate the likelihood that jurors would misuse the impeachment evidence as proof of a criminal propensity. The Senate majority, in contrast, sought to preserve the prerogative of the jury to convict those tried for criminal offenses, even on the basis of highly prejudicial information. *See* Surratt, *supra* note 3, at 929. As Judge Weinstein states:

> The controversy engendered [by Rule 609] is attributable to the subject matter of the rule which involves two, sometimes conflicting, ends of the criminal law—safeguarding the innocent and punishing the guilty. Permitting unlimited use of defendant's criminal past for impeachment undoubtedly results in more convictions; it also increases the likelihood that a person will be found guilty who, this time at least, has not committed a crime. Limiting the use of convictions for impeachment provides more protection for the innocent, but it also raises the spectre of the guilty out on the streets because the jury has been denied information helpful in evaluating the credibility of witnesses.

Weinstein's Evidence, *supra* note 18, ¶ 609[01], at 609-49 to -50; *see also* United States v. Jackson, 405 F. Supp. 938, 942 (E.D.N.Y. 1975) (Rule 609 embodies the policy of encouraging defendants to testify without sacrificing the government's case).

26. *See* 120 Cong. Rec. 40,070, 40,896-97 (1974).

27. *See* Fed. R. Evid. 609(a)(1). As one commentator points out: "[I]t was the *assumptions* underlying both versions that were the subject of compromise. It appears likely that those who voted to accept the compromise version read into it their own concerns, exemptions, and interpretations." Smith, *supra* note 8, at 455 (emphasis in original). Both House and Senate were apprised that the Federal Rules of Evidence would be approved or rejected in toto. *See* 120 Cong. Rec. 40,896 (1974) (statement of Rep. Smith). Given the enormous amount of time and effort Congress spent considering the Federal Rules, there was a marked reluctance to reject particular provisions. 120 Cong. Rec. 40,069 (1974) (statement of Sen. McClellan).

28. *See* Fed. R. Evid. 1101(b); H.R. Rep. No. 650, 93d Cong., 1st Sess. 11, *reprinted in* 1974 U.S. Code Cong. & Admin. News 7075, 7084; *Federal Rules of Evidence: Hearings on H.R. 5463 Before the Comm. on the Judiciary*, 93d Cong., 2d Sess. 19 (1974).

29. The Senate floor debates are devoid of reference to the rule's impact on civil cases. *See, e.g.*, 120 Cong. Rec. 37,076-80 (1974) (no mention of civil cases in debate on proposed amendment). In the House, four representatives made fleeting reference to the fact that the rule would apply equally to witnesses in civil cases. These passing remarks engendered neither discussion nor controversy. *See* 120 Cong. Rec. 2,377 (1974) (statement of Rep. Dennis); *id.* at 2,379 (statement of Rep. Hogan); *id.* at 2,379 (statement of Rep. Wiggins); *id.* at 2,381 (statement of Rep. Lott).

As to prosecution witnesses, Congress plainly viewed Rule 609 as absolute, allowing trial judges no discretion to exclude prior felony or *crimen falsi* convictions. *See* 120

icy objectives furthered by its compromise proposal in the criminal context, kept silent concerning the rule's ramifications in civil litigation.[30] Despite the vigorous debate and conscientious consideration lavished upon the implications of Rule 609 for criminal defendants, the rule's application to civil litigants appears to have emerged as a consequence of legislative ennui. Congress simply overlooked the effects of the rule's language on civil cases, or at best, cast a weary, apathetic glance in that direction.[31]

Cong. Rec. 40,891 (statement of Rep. Hungate) (Rule 609 "means that in a criminal case the prior felony conviction of a prosecution witness may always be used"); *id.* at 40,894 (statement of Rep. Dennis) ("[n]ow a defendant can cross examine a government witness about any of his previous felony convictions; he can always do it, because that will not prejudice him in anyway [sic]. . . . Only the Government is going to be limited."). It is also interesting that the type of information some members of Congress sought to provide for in Rule 609, such as government witnesses' bargains with the prosecutor in exchange for favorable testimony, is readily admissible to show bias, and is not within the ambit of the prior convictions rule. *See* 120 Cong. Rec. 2,378-79 (1974) (statements of Reps. Brasco and Hogan).

30. The Conference Committee Report focuses solely on criminal trials in explaining the judicial discretion provided by Rule 609(a)(1):

> With regard to the discretionary standard established by paragraph (1) of Rule 609(a), the Conference determined that the prejudicial effect to be weighed against the probative value of the conviction is specifically the prejudicial effect *to the defendant.* The danger of prejudice to a witness other than the defendant (such as injury to the witness' reputation in his community) was considered and rejected by the Conference as an element to be weighed in determining admissibility. It was the judgment of the Conference that the danger of prejudice to a nondefendant witness is outweighed by the need for the trier of fact to have as much relevant evidence on the issue of credibility as possible. Such evidence should only be excluded where it presents a danger of improperly influencing the outcome of the trial by persuading the trier of fact to convict the defendant on the basis of his prior criminal record.

120 Conf. Rep. No. 1597, 93d Cong. 2d Sess. 9-10, *reprinted in* 1974 U.S. Code Cong. & Admin. News 6098, 7103 (emphasis in original). Juxtaposition of the verb "to convict" and the noun "the defendant" shows that the grant of judicial discretion is circumscribed to the use of felony convictions to impeach a criminal defendant. *See id.* The legislators apparently adopted this construction and confined their comments on the Report to the criminal context. *See* 120 Cong. Rec. 40,891 (1974) (statement of Rep. Hungate); *id.* at 40,894 (statement of Rep. Dennis); *id.* at 40,895 (statement of Rep. Hogan).

31. Judge Gibbons has noted "the snippets of legislative history in which four Members of Congress anticipated that some court might reach so ridiculous a result" as to admit all previous felony convictions against all civil witnesses. *See* Diggs v. Lyons, 741 F.2d 577, 583 (3d Cir. 1984) (Gibbons, J., dissenting); *supra* note 29. But he remained unpersuaded "that the result was intended by Congress." *See Diggs*, 741 F.2d at 583. He further declared:

> The overwhelming weight of the legislative background material on Rule 609 suggests a preoccupation by Senator McClellan and others with defendants in criminal proceedings. The result was, in my view, a legislative oversight as to the legislation's effect upon civil plaintiffs. By the time the oversight was recognized by Congressmen Dennis, Hogan, Wiggins and Lott legislative fatigue had set in . . . .

Id.; *see* Moore v. Volkswagenwerk, A.G., 575 F. Supp. 919, 921 n.1 (D. Md. 1983) (legislative failure to provide for civil cases "may have been an unintentional oversight"); Note, *Prior Conviction Evidence in Civil Actions*, *supra* note 8, at 1274.

II. THE JUDICIAL RESPONSE: FLOUNDERING IN THE DARK

The current problems experienced in applying Rule 609 to the civil context stem from Congress' focus on the criminal defendant. This confusion among the courts emphasizes the need for amendment if the use of prior convictions to impeach civil witnesses is to continue.[32] Plainly, Rule 609(a)(2) requires the admission of all convictions for crimes of dishonesty and false statement. Judicial agreement on this construction is unanimous.[33] Courts differ, however, in construing Rule 609(a)(1)'s balancing proviso, which requires that the court heed only "prejudicial effect to the defendant." Most courts agree that "the defendant" refers to the criminal accused;[34] otherwise, Rule 609(a)(1) would permit the civil defendant, but not the plaintiff, to object to the use of his criminal record for impeachment purposes.[35] If the discretionary balancing process explicitly permits judicial screening of felony convictions offered to impeach the criminal defendant and defense witnesses, by what standard does the trial judge decide whether to admit felony convictions offered to impeach civil witnesses? Three distinct views have emerged on this issue.

Under one view, all felony convictions of all civil witnesses are automatically admissible[36] because Rule 609(a)(1) literally allows discretion only in evaluating convictions that adversely affect the criminal defend-

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32. *See* Campbell v. Greer, 831 F.2d 700, 703 (7th Cir. 1987) ("Rule 609(a) . . . needs some judicial patchwork."); Moore v. Volkswagenwerk, A.G., 575 F. Supp. 919, 920 (D. Md. 1983) ("The Federal Rules of Evidence provide poor guidance as to whether criminal convictions are admissible to attack the credibility of a non-party witness in a civil case. No rule expressly deals with this situation.").

33. *See* United States v. Kueker, 740 F.2d 496, 501 (7th Cir. 1984); United States v. Wong, 703 F.2d 65, 66-68 (3d Cir.), *cert. denied*, 464 U.S. 842 (1983); United States v. Kiendra, 663 F.2d 349, 354 (1st Cir. 1981), *overruled on other grounds*, Luce v. United States, 469 U.S. 38, 40 (1984); United States v. Leyva, 659 F.2d 118, 122 (9th Cir. 1981), *cert. denied*, 454 U.S. 1156 (1982); United States v. Toney, 615 F.2d 277, 279 (5th Cir. 1980).

34. *See, e.g.*, Campbell v. Greer, 831 F.2d 700, 703 (7th Cir. 1987); Roshan v. Fard, 705 F.2d 102, 104 (4th Cir. 1983) (dictum); Boyer v. Chicago and N.W. Transp. Co., 603 F. Supp. 132, 133 (D. Minn. 1985); Moore v. Volkswagenwerk, A.G., 575 F. Supp. 919, 920-21 (D. Md. 1983); Tussel v. Witco Chem. Corp., 555 F. Supp. 979, 983-84 (W.D. Pa. 1983); Ball v. Woods, 402 F. Supp. 803, 811 n.19 (N.D. Ala. 1975), *aff'd*, 529 F.2d 520 (5th Cir.), *cert. denied*, 426 U.S. 940 (1976); *see also* S. Saltzberg & K. Redden, Federal Rules of Evidence Manual 520-21 (4th ed. 1986). *But see* Diggs v. Lyons, 741 F.2d 577, 581 (3d Cir. 1984) (apparently viewing "to the defendant" as encompassing both civil and criminal defendants); *but see also* Green v. Shearson Lehman/American Express, Inc., 625 F. Supp. 382, 383 (E.D. Pa. 1985) (dictum) (novel construction of "to the defendant" as refering "to the person who was the defendant in the criminal case resulting in the felony conviction").

35. According to one court, "[t]hat would indeed be absurd. It would load the dice in favor of defendants in civil cases, even though it is often a matter of happenstance in a civil suit which party is plaintiff and which defendant." Campbell v. Greer, 831 F.2d 700, 703 (7th Cir. 1987); *see* 3 D. Lousell & C. Mueller, Federal Evidence § 316, at 324-25 n.26 (1979); S. Saltzberg & K. Redden, *supra* note 34, at 520.

36. *See Campbell*, 831 F.2d at 703-08; Diggs v. Lyons, 741 F.2d 577, 579-83 (3d Cir. 1984); NLRB v. Jacob E. Decker & Sons, 569 F.2d 357, 362-63 (5th Cir. 1978); Garnett v. Kepner, 541 F. Supp. 241, 244-45 (M.D. Pa. 1982); Ball v. Woods, 402 F. Supp. 803,

ant. These courts reason that Congress intended Rule 609(a) to be the sole provision governing witness impeachment by former convictions. The residual discretion afforded by Rule 403 does not apply because Rule 609(a) specifically addresses circumstances under which judicial discretion is permitted.[37] Under this absolutist approach, all felony convictions of all civil witnesses are available for impeachment under Rule 609(a)(1). Moreover, all convictions for crimes of dishonesty and false statement are available under Rule 609(a)(2).[38]

A second approach evaluates civil witnesses' felony convictions under the prescribed balancing test of Rule 609(a)(1).[39] This interpretation treats the rule's specification of "to the defendant" as the equivalent of "to the witness against whom the conviction is offered" in a civil case. Consequently, felony convictions of civil witnesses are admitted when the conviction is more helpful in assessing veracity than it is prejudicial.

The third view resorts to the residual balancing provision, Rule 403. Some courts in this third group deem the Rule 609(a) balancing process inapplicable to civil cases, holding that Congress' preoccupation with mitigating prejudice to the criminal defendant and defense witnesses does not reflect an intent to restrict judicial discretion in civil cases.[40] Rules 102 and 611[41] vest discretion in the trial judge to construe the Federal

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811 n.19 (N.D. Ala. 1975), *aff'd*, 529 F.2d 520 (5th Cir.), *cert. denied*, 426 U.S. 940 (1976).

The author of the majority opinion in *Diggs v. Lyons*, Senior Circuit Judge Albert B. Maris, is the former chairman of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, and an important participant in the development of the Federal Rules of Evidence. Judge Maris expressed his misgivings concerning his absolutist approach to Rule 609(a):

> We have felt compelled to give the rule the effect which the plain meaning of its language and the legislative history require. We recognize that the mandatory admission of all felony convictions on the issue of credibility may in some cases produce unjust and even bizarre results. Evidence that a witness has in the past been convicted of manslaughter by automobile, for example, can have but little relevance to his credibility as a witness in a totally different matter. But if the rule is to be amended to eliminate these possibilities of injustice, it must be done by those who have the authority to amend the rules, the Supreme Court and the Congress. We, therefore, leave the problem to them. It is not for us as enforcers of the rule to amend it under the guise of construing it.

Diggs, 741 F.2d at 582.

37. *See Campbell*, 831 F.2d at 705-07; *Diggs*, 741 F.2d at 581-82.

38. Regardless of the approach adopted concerning discretion under Rule 609(a)(1), courts unanimously agree that Rule 609(a)(2) mandates admission of all convictions for dishonesty and false statement offenses. *See* cases cited *supra* note 33.

39. *See* Petty v. Ideco, 761 F.2d 1146, 1152 (5th Cir. 1985); Murr v. Stinson, 752 F.2d 233, 234-35 (6th Cir. 1985); Lenard v. Argento, 699 F.2d 874, 895 (7th Cir.), *cert. denied*, 464 U.S. 815 (1983); Howard v. Gonzalez, 658 F.2d 352, 359 (5th Cir. 1984); Calhoun v. Baylor, 646 F.2d 1158, 1163 (6th Cir. 1981); Green v. Shearson Lehman/American Express, Inc., 625 F. Supp. 382, 383 (E.D. Pa. 1985) (dictum).

40. *See* Donald v. Wilson, 847 F.2d 1191, 1197 (6th Cir. 1988); Moore v. Volkswagenwerk, A.G., 575 F. Supp. 919, 920-23 (D. Md. 1983); Tussel v. Witco Chem. Corp., 555 F. Supp. 979, 981-85 (W.D. Pa. 1983).

41. *See* Fed. R. Evid. 102, 611.

Rules of Evidence in accordance with principles of justice and fairness, and to control the mode and manner of witness interrogation. Further, Rule 403 allocates minimal residual discretion to the judge to exclude unduly prejudicial evidence. These courts admit felony convictions offered to impeach civil witnesses unless the evidence is substantially more prejudicial than useful in evaluating credibility.[42]

Other courts following this third view have refused to confront the issue whether Rule 609(a)(1)'s balancing proviso extends beyond the criminal defendant. These courts construe Rule 403 as an overriding provision "that cuts across the rules of evidence"[43] and thus do not reach the issue of Rule 609's scope. Regardless of the application of Rule 609(a)(1) to civil litigation, Rule 403 affords the trial judge a modicum of discretion to exclude a civil witness' unduly prejudicial felony conviction.[44]

Courts permitting discretion in the civil impeachment process voice concern that unchecked use of previous felony convictions will encourage the jury to focus upon a comparative moral evaluation of the parties, and calculate damages accordingly.[45] This concern is warranted. The solution of resorting to Rule 403, however, is difficult to square with the language of the rule. Rule 609(a) specifically governs the use of criminal convictions to impeach. Congress incorporated in Rule 609(a)(1) a specialized balance that, by its terms, appears to be restricted to criminal defendants. It is doubtful that Rule 403, a residual discretionary balancing provision, was intended to "overlap, supplant, or contradict the policy premises"[46] of a provision as precise as Rule 609(a)(1).

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42. Clearly, reliance upon the Rule 403 balancing standard affords only slight protection to civil witnesses against prejudicial effects of their previous transgressions because it is an inclusionary test, and affords the trial court only minimal discretion to exclude. *See* Boyer v. Chicago & N.W. Transp. Co., 603 F. Supp. 132, 134 (D. Minn. 1985); Moore v. Volkswagenwerk, A.G., 575 F. Supp. 919, 921-22 (D. Md. 1983); *see also infra* text accompanying notes 235-40, 252.

43. Shows v. M/V Red Eagle, 695 F.2d 114, 118 (5th Cir. 1983); *see* Jones v. Board of Police Comm'rs, 844 F.2d 500, 504-06 (8th Cir. 1988); Diaz v. Cianci, 737 F.2d 138, 139 (1st Cir. 1984); Radtke v. Cessna Aircraft Co., 707 F.2d 999, 1000-01 (8th Cir. 1983); Czajka v. Hickman, 703 F.2d 317, 319 (8th Cir. 1983).

44. Several other courts have acknowledged the question of Rule 609(a)(1)'s scope, but have found resolution of the issue unnecessary. *See* Jones v. Collier, 762 F.2d 71, 72 n.2 (8th Cir. 1985) (source of balancing power not specified); Christmas v. Sanders, 759 F.2d 1284, 1291 (7th Cir. 1985) (defendant failed to preserve admissibility issue); Linskey v. Hecker, 753 F.2d 199, 202 (1st Cir. 1985) (unnecessary to decide whether Rule 609 or Rule 403 provides appropriate standard; under either approach, civil plaintiff's numerous convictions properly admitted in a personal injury action).

45. *See* Shows v. M/V Red Eagle, 695 F.2d 114, 118-19 (5th Cir. 1983); Davenport v. De Robertis, 653 F. Supp. 649, 659 (N.D. Ill. 1987), *superseded by* Campbell v. Greer, 831 F.2d 700 (7th Cir.), *modified*, Davenport v. De Robertis, 844 F.2d 1310 (7th Cir.), *cert. denied*, 57 U.S.L.W. 3280 (1988); Boyer v. Chicago & N.W. Transp. Co., 603 F. Supp. 132, 134 (D. Minn. 1985). For a discussion of the prejudice inherent in introducing convictions in civil cases, see *infra* text accompanying notes 82-114.

46. Campbell v. Greer, 831 F.2d 700, 705 (7th Cir. 1987); *see also* Diggs v. Lyons, 741 F.2d 577, 581-82 (3d Cir. 1984), *cert. denied*, 471 U.S. 1078 (1985).

Furthermore, it is clear that Rule 403 does not modify the mandatory provisions of Rule 609(a)(2).[47] It strains logic to view Rule 403 as modifying one subsection of a specific rule containing its own balancing proviso, but not as modifying the other subsection, where neither the rule nor its legislative history reveals any intent to invoke Rule 403's residual discretion.[48]

Even if Rule 609(a)(1) is amenable to constructions granting discretion to exclude civil witnesses' convictions, the rule should be amended to provide clarity and precision.[49] Congress enacted the Federal Rules of Evidence to achieve uniformity and certainty in federal litigation.[50] That goal cannot be attained if the use of prior convictions in the impeachment process "depends on judicial construction contrary to the express words of the Rule."[51] The chaos in civil litigation engendered by Rule 609(a) confirms the need for amendment to promote clarity of construction and uniformity of decision. More importantly, it underscores the need to reexamine the premises of the rule and its application, if any, in the civil context.[52]

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47. See cases cited *supra* note 33.

48. *See Campbell*, 831 F.2d at 705-06.

49. *See* Diggs v. Lyons, 471 U.S. 1078 (1985) (White, J., Brennan, J., and Marshall, J., dissenting from denial of *certiorari*) (confusion among circuits requires action by Supreme Court); Campbell v. Greer, 831 F.2d 700, 709 (Will, J., concurring) (Rule 609(a) should be amended to clarify its limited application to criminal defendants).

50. *See* S. Rep. No. 1277, 93d Cong., 2d Sess. 1, *reprinted in* 1974 U.S. Code Cong. & Admin. News 7051.

51. Savikas, *supra* note 8, at 82.

52. The Supreme Court could resolve the construction problems that plague Rule 609(a)(1) by propounding a definitive interpretation, as three members of the Court have urged. *See* Diggs v. Lyons, 471 U.S. 1078 (1985) (White, J., Brennan, J., and Marshall, J., dissenting from denial of *certiorari*). But Professor Lewis, in a recent article, warns of the impracticability of requiring the judiciary to resolve a "multifaceted problem" concerning the construction of a federal rule "through piecemeal adjudication." *See* Lewis, *The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rules Revision*, 85 Mich. L. Rev. 1507, 1557-58 (1987). Case-by-case adjudication, he maintains, is a salutory process by which disputes concerning the meaning of a particular rule are identified but

> there comes a time when the accumulated results of adjudication yield diminishing returns. . . . If . . . a federal rule presents interpretive difficulties that are susceptible of arbitrary resolution, I see no good reason to consign still more lawyers and judges to wallowing around in the adjudicative abyss when crisp answers are only a statute away.

Id. at 1558.

The difficulties courts have experienced in interpreting the language of Rule 609(a)(1) reveal only the tip of the iceberg. The real difficulty, as discussed in the next section, is the "multifaceted" and intractable problem of the utility of demonstrating bad character by showing past criminal transgressions in order to impeach witnesses in civil cases. The validity of the assumptions underlying this practice, as well as the implications for civil dispute resolution, must be squarely confronted. This confrontation is best accomplished through the legislative factfinding process, rather than by continued adjudication.

III. Civil Litigation: Legal Determination or Moral Pronouncement?

The confusion engendered by the language of Rule 609(a)(1) presents only a superficial problem. The fundamental dilemma is whether proof of a witness' prior misconduct has any place in civil litigation. Visceral evaluation of character plays an enormously significant role in our daily lives.[53] A myriad of choices—whom we love and befriend, with whom we socialize or do business, whom we deem worthy of professional status[54] or advancement in the workplace, whom we support for public office—are profoundly influenced by our common-sense judgments about another person's character.

At least two factors account for this emphasis. First, we perceive character as an anthology of specific traits, and we assume that these traits, and therefore character itself, remain relatively stable throughout the course of a lifetime. Knowledge of a person's character serves as a rough predictor of that person's likely future conduct in the course of personal, social, business or professional relationships.[55] Second, judgments about another's character, to some undefinable extent, are tinged with moral overtones. Persons of unsavory character are deemed unworthy of our association and we shrink from the prospect of another's bad character being attributed to ourselves.

Although character is a significant factor in influencing everyday decisions, the law excludes proof of both general character and prior specific acts as circumstantial evidence of conduct in civil cases.[56] Jurors are forbidden to draw inferences about the conduct on trial from their common-sense judgments about either the litigants' general character or their previous specific behavior. This absolute exclusion focuses the factfinder on disputed factual issues, and obviates the possibility that civil litigants' cases will be evaluated on the basis of the moral attractiveness of parties and witnesses, rather than the legal merit of their cases.[57] The law also assumes, however, that "[w]hile truth is true whether it comes from a polluted or a pure source, when facts are in dispute the source of the conflicting testimony may cast light in determining what the truth is."[58] Thus, the jury is encouraged to make inferences about a witness' veracity at trial from that witness' previous behavior. Moreover, the law assumes

53. *See* Ladd I, *supra* note 1, at 171.

54. One commentator has questioned the current certification procedures for determining admissibility to the bar because of the inherent limitations in predicting moral behavior and the subjectivity of bar standards. *See* Rhode, *Moral Character as a Professional Credential*, 94 Yale L.J. 491 (1985).

55. *See* Ebbesen, *Cognitive Processes in Understanding Ongoing Behavior*, in Person Memory: The Cognitive Basis of Social Perception 179-225 (R. Hastie et al. eds. 1980) (discussing alternative conceptions of the way in which persons encode, retain and retrieve information concerning others' behavior).

56. *See* Fed. R. Evid. 404, 405.

57. *See* C. McCormick, Evidence §§ 188-89, at 553-56 (3d ed. 1984).

58. Ladd I, *supra* note 1, at 171.

that jurors, aided by proper instruction, are equipped to distinguish between evidence pertaining to witnesses' conduct and evidence relevant to their credibility.[59]

The quest for truth and justice, and the fairness of the trial process generally, are irrevocably impeded when "highly prejudicial evidence that has no basis in fact" forms a basis for trial verdicts.[60] Thus, critical evaluation of the relative weight of the probity and prejudice inherent in prior convictions proof is necessary to determine the utility of this impeachment information in civil litigation.

A. *Inherent Probative Value and Prejudice of Prior Convictions Evidence: A Critique of the Traditional View*

Courts admit evidence of prior convictions for impeachment purposes because jurors are accustomed to making judgments about another's trustworthiness based on specific data about that person's previous behavior.[61] More importantly, prior convictions are regarded as valid indicators of credibility, so that the jury would appear to be entitled to this information as an aid to its factfinding function.[62]

Many types of information that jurors might find useful in discharging this responsibility, however, are routinely rejected as trial proof to further systemic policy objectives.[63] Such restrictions help avoid the dangers associated with evidence bearing only scant probative worth, but tainted by the potential for overwhelming prejudice.[64] Even assuming

59. *See* Fed. R. Evid. 105.

60. *See* Mendez, *supra* note 4, at 1060.

61. "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." State v. Duke, 100 N.H. 292, 293, 123 A.2d 745, 746 (1956); *see also* United States v. Palumbo, 401 F.2d 270, 273 (3d Cir. 1968) (people want to be aware of prior convictions), *cert. denied*, 394 U.S. 947 (1969).

62. *See* United States v. Martinez, 555 F.2d 1273, 1275 (5th Cir. 1977); Richards v. United States, 192 F.2d 602, 605 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 946 (1952).

63. Constitutional privileges, such as the fourth amendment's exclusionary rule, *see* Mapp v. Ohio, 367 U.S. 643, 649 (1961), and the fifth amendment's privilege against self-incrimination, *see* Jackson v. Denno, 378 U.S. 368 (1964), often operate to deprive the factfinder of vital information in service of fundamental societal goals. Evidentiary privileges exclude much information that is relevant to disputed issues of fact for purposes of fostering societally-sanctioned relationships. *See* Fed. R. Evid. 501; C. McCormick, *supra* note 57, §§ 72-72.1, at 170-72. Article IV of the Federal Rules of Evidence includes a number of provisions that exclude arguably reliable information in order to further significant policy objectives. *See* Fed. R. Evid. 407 (subsequent corrective measures), 408 (compromise attempts), 409 (offers to fund an injured person's medical expenses), 410 (offers to enter a plea of guilty).

64. *See, e.g.*, Fed. R. Evid. 404, 405 (character), 411 (insurance), 412 (previous sexual behavior of complaining witness in sexual offense prosecution); *see also* United States v. Alexander, 526 F.2d 161, 168 (8th Cir. 1975) (polygraph results); People v. Shirley, 31 Cal. 3d 18, 68, 641 P.2d 775, 805, 181 Cal. Rptr. 243, 274, *cert. denied*, 459 U.S. 860 (1982) (hypno-induced evidence not per se inadmissible but subject to prejudicial error test); State v. Hurd, 86 N.J. 525, 536, 432 A.2d 86, 91 (1981) (hypno-induced evidence only admissible upon fulfillment of established safeguards).

that prior convictions evidence is somewhat probative of in-court veracity, the danger exists that jurors will misuse this information. This consideration is wholly unrelated to the goal of fairness in the trial process,[65] and indeed, may be inimical.

The validity of prior convictions as an indicator of veracity at trial depends upon a double inference: first, an individual who has engaged in serious criminal activity has manifested utter disregard for governing social norms;[66] and second, an individual so bereft of integrity[67] and respect for "the social norms evidenced by positive law"[68] is more likely to lie than other witnesses. As best articulated by Justice Holmes:

> [W]hen it is proved that a witness has been convicted of a crime, the only ground for disbelieving him which such proof affords is the general readiness to do evil which the conviction may be supposed to show. It is from that general disposition alone that the jury is asked to infer a readiness to lie in the particular case, and thence that he has lied in fact. The evidence has no tendency to prove that he was mistaken, but only that he has perjured himself, and it reaches that conclusion solely through the general proposition that he is of bad character and unworthy of credit.[69]

Thus, the utility of prior convictions proof is to discredit generally the witness' character for veracity. The "general readiness to do evil" manifests the witness' similarly general incredibility: "It is not the specific tendency of the witness to falsify but the general bad character of the witness as evidenced by the single act of which he was convicted that creates the basis of admissibility."[70] This same premise—"that crookedness and lying are correlated"[71]—is the guiding force of Rule 609(a).

In civil cases, the probative value calculus for prior convictions ap-

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65. As one commentator has observed:

> Accuracy is an aspect of fairness. The goal of fairness is thus not ignored by defining unfair prejudice as the danger presented by evidence tending to promote inferential error. Admittedly, however, fairness in the law of evidence often means considerably more than accurate factfinding. The law is replete with rules which, in the cause of fairness, exclude highly probative evidence and thus detract from the goal of accuracy.

Gold, *Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence*, 58 Wash. L. Rev. 497, 507 (1983).

66. *See* Mills v. Estelle, 552 F.2d 119, 120 (5th Cir.), *cert. denied*, 434 U.S. 871 (1977); Brown v. United States, 370 F.2d 242, 244 (D.C. Cir. 1966).

67. *See* State v. Duke, 100 N.H. 292, 123 A.2d 745 (1956).

68. *Mills*, 552 F.2d at 120.

69. Gertz v. Fitchburg R.R., 137 Mass. 77, 78 (1884). Senator McClellan similarily stated:

> Surely a person who has committed a serious crime—a felony—will just as readily lie under oath as someone who has committed a misdemeanor involving lying. Would a convicted rapist, cold-blooded murderer or armed robber really hesitate to lie under oath any more than a person who has previously lied? Would a convicted murderer or robber be more truthful than such a person?

120 Cong. Rec. 37,076-077 (1974) (statement of Sen. McClellan).

70. Ladd I, *supra* note 1, at 176.

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

pears to have two components:[72] the degree to which the offense for which the witness was convicted directly implicates veracity; and the importance of the credibility question, and thus the need for impeachment data.[73]

Rule 609(a) articulates a "sliding scale" determination of probative value.[74] Offenses that directly reveal previous lack of veracity—perjury, forgery, subornation of perjury, bribery, fraud, embezzlement, false pretenses[75]—are deemed so probative of truth-telling that they must be admitted under Rule 609(a)(2).[76] Other crimes, in contrast, reveal little about veracity, and are less probative of credibility.[77] Obviously, the probative worth of prior convictions evidence pales if the underlying assumption—that the nature of the underlying offense is so indicative of the in-court veracity of the offender—is undermined.[78]

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72. A third factor, beyond the scope of this article, is remoteness of the conviction. Federal Rule 609(b) presumes that convictions obtained more than ten years prior to their use as impeachment tools are not probative, and places a heavy burden on the proponent to demonstrate the remote conviction's usefulness. Compare this with the *Luck-Gordon* discretionary approach to probative worth of the criminal defendant's previous convictions, which identifies five factors: (1) nature of the crime; (2) remoteness of the prior conviction and the witness' subsequent history; (3) similarity between the past crime and the charged crime; (4) necessity for the criminal defendant's testimony; and (5) centrality of the credibility question. *See* Gordon v. United States, 383 F.2d 936, 940 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968); Luck v. United States, 348 F.2d 763, 769 (D.C. Cir. 1965); Weinstein's Evidence, *supra* note 18, ¶ 609[03] at 609-64 to -73.

73. In another sense, the need for the impeachment data is a factor affecting the prejudicial nature of the evidence. *See infra* note 94 and accompanying text.

74. *See* Bridge, *supra* note 3, at 953; Surratt, *supra* note 3, at 930-31.

75. *See* Fed. R. Evid. 609, advisory committee's note, 56 F.R.D. 183, 270 (1972); Surratt, *supra* note 3, at 931.

76. Fed. R. Evid. 609(a)(2). *See* Tussel v. Witco Chem. Corp., 555 F. Supp. 979, 983 (W.D. Pa. 1983); Judicial Conference Draft, *supra* note 12, at 29; ABA Proposed Draft, *supra* note 12, at 56. Psychological research indicates, however, that specific acts of untruthfulness are not a reliable indicator of future untruthful behavior. *See infra* notes 117-40 and accompanying text. For the argument that any relationship between prior criminal activity and in-court veracity is less than convincing, see *infra* text accompanying notes 141-48 & 168-79.

77. *See, e.g.*, Wierstak v. Heffernan, 789 F.2d 968, 971-72 (1st Cir. 1986) ("theft, stealth and drug use" deficient in probative value on proclivity to lie on the witness stand); Christmas v. Sanders, 759 F.2d 1284, 1292 (7th Cir. 1985) (rape not highly probative of credibility); Davenport v. De Robertis, 653 F. Supp. 649, 658-59 (N.D. Ill. 1987) (crimes not involving dishonesty or false statement only slightly probative on issue of credibility), *superseded by*, Campbell v. Greer, 831 F.2d 700 (7th Cir.), *modified*, 844 F.2d 1310 (7th Cir.), *cert. denied*, 57 U.S.L.W. 3280 (1988); Tussel v. Witco Chem. Corp., 555 F. Supp. 979, 984 (W.D. Pa. 1983) (doubtful whether narcotics convictions relevant to credibility in personal injury actions); Garnett v. Kepner, 541 F. Supp. 241, 244 (M.D. Pa. 1982) (convictions of second degree murder, burglary, arson, and reckless endangerment only minimally probative on credibility). *But see* Diggs v. Lyons, 741 F.2d 577, 582 (3d Cir. 1984) (convictions for murder, attempted escape and criminal conspiracy highly probative of credibility), *cert. denied*, 471 U.S. 1078 (1985); United States v. Lipscomb, 702 F.2d 1049, 1053-54, 1058-60, 1070-71 (D.C. Cir. 1983) (legislative history supports view that all felonies are probative of credibility; although less probative than stealth or deception crimes, robbery probative of credibility because anyone desperate enough to steal is desperate enough to lie).

78. *See infra* text accompanying notes 117-48.

The importance of the credibility question is determined by the nature of the case. Where plaintiff's and defendant's versions of the pertinent facts sharply conflict in material respects, the need for effective credibility determinants increases.[79] If the link between a previous specific act—conviction for a criminal offense—and a "general readiness to do evil"[80] is demonstrably tenuous, then this need for credibility proof is better fulfilled by other available, more effective, impeachment devices.[81]

The intrinsic probative worth of prior convictions as credibility determinants must be balanced against the unfair prejudice inherent in such proof. If prejudice is defined as a tendency of information to persuade the factfinder "to unintentionally commit an inferential error,"[82] then the prejudicial nature of prior convictions proof is obvious. The jury reasons that a witness who has been convicted of criminal activity has flagrant contempt for governing social norms and because the witness manifests a "general readiness to do evil,"[83] the witness is likely to be oblivious to the moral constraints of testifying truthfully. Thus, jurors are instructed to use their finding of a witness' disregard for social mores and accompanying willingness to engage in criminal activity only in assessing the witness' veracity, even though the inference that a witness who has shown a "general readiness to do evil"[84] is morally reprehensible, and therefore undeserving of justice,[85] can be compelling. Even the deliberations of conscientious jurors in this context are prey to contamination by inferential error in considering witnesses' prior convictions.[86]

The prejudicial nature of past convictions as impeachment evidence in

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79. *See* Christmas v. Sanders, 759 F.2d 1284, 1292 (7th Cir. 1985); United States v. Lamb, 575 F.2d 1310, 1314 (10th Cir.), *cert. denied*, 439 U.S. 854 (1978); United States v. Oakes, 565 F.2d 170, 173 (1st Cir. 1977); Smith v. United States, 406 F.2d 667, 668 (D.C. Cir. 1968), *cert. denied*, 394 U.S. 963 (1969); United States v. Jackson, 405 F. Supp. 938, 942-43 (E.D.N.Y. 1975). In Gordon v. United States, 383 F.2d 936 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968), Judge (later Chief Justice) Burger noted that "because the case had narrowed to the credibility of two persons . . . there was greater, not less compelling reason for exploring all avenues which would shed light on which of the two witnesses was to be believed." *Id.* at 941.

80. Gertz v. Fitchburg R.R., 137 Mass. 77, 78 (1884).

81. *See infra* text accompanying notes 108-14.

82. Gold, *supra* note 65, at 506. Professor Gold finds inferential error "when the jury incorrectly decides that evidence is probative of an alleged fact or event," and "when the jury decides that evidence is more or less probative of a fact or event than it is." *Id.*

83. *Gertz*, 137 Mass. at 78.

84. *Id.*

85. *See* Note, *The Interaction of Rules 609(a)(2) and 403*, *supra* note 8, at 380.

86. As Professor Gold states:

> Prejudice resulting from evidence that induces inferential error is subtle because it occurs when the jury diligently pursues the issues it is charged with deciding but errs in a manner that may not be obvious to its members or to others. Such prejudice is relatively common because . . . humans regularly use flawed procedures and preconceptions in evaluating evidence and drawing inferences therefrom. Prejudice resulting from evidence that induces inferential error is dangerous precisely because it is so subtle and common.

Gold, *supra* note 65, at 507 (citations omitted).

civil cases affects the general fairness of the trial process in several ways. Introducing evidence as inflammatory as prior criminal conduct deflects jurors from their obligation of neutrality by focusing their attention upon the respective moral qualifications of the litigants, rather than upon the specific conduct of the parties and the legal merits of their cases.[87] Informing jurors of a litigant's previous transgressions persuades them to draw the compellingly close inference that bad character translates not only into a lack of veracity, but also into improper conduct.[88] Thus, although substantive use of character as circumstantial proof of conduct is strictly prohibited in civil cases,[89] the temptation is overwhelming for jurors to use the litigant's convictions not only in questioning whether they should believe the litigant, but also in determining whether, in the present case, the litigant actually acted in the manner alleged by his op-

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87. One court has held that:

> [t]he attention of the jury . . . should properly focus on the conduct of the plaintiff and the defendant with respect to the accident which gave rise to the plaintiff's claim. Admitting [plaintiff's] conviction could only serve to poison the minds of the jurors by arousing their punitive instincts thereby diverting their attention from the issues that are central to this action.

Boyer v. Chicago and N.W. Transp. Co., 603 F. Supp. 132, 134 (D. Minn. 1985); *see* Beaver & Marques, *supra* note 3, at 602.

88. The risk that inferential error will infect the jury's deliberation is particularly aggravated when the government introduces prior convictions evidence against prisoners and arrestees who file 1983 actions. Not only the plaintiff in these cases, but also most of the plaintiff's witnesses, are convicted felons, and the jurors are already well aware of this fact. *See* Furtado v. Bishop, 604 F.2d 80 (1st Cir. 1979), *cert. denied*, 444 U.S. 1035 (1980). Confronted by a number of unsympathetic witnesses who have manifested a disregard for governing law, there is a great temptation to commit an inferential error by assuming that the section 1983 plaintiff "provoked" or "deserved" the treatment of which he complains, and in any event, is entitled to no further consideration by the legal system. Introducing the convictions of plaintiff and his witnesses unnecessarily exacerbates the problem. *See* Davenport v. DeRobertis, 653 F. Supp. 649, 659 (N.D. Ill. 1986) (prisoners' convictions very likely to suggest "to the jury that particular plaintiffs [are] evil men who [do] not deserve consideration of their claims").

Yet, the cases reflect a judicial inclination to admit crimes of questionable probative value for their impeachment utility, which is often marginal. *See, e.g.*, Campbell v. Greer, 831 F.2d 700, 703-05 (7th Cir. 1987) (inmate alleging cruel and unusual punishment by prison guards and officials properly impeached by rape conviction that was the reason for his incarceration); Wierstak v. Heffernan, 789 F.2d 968, 971 (1st Cir. 1986) (arrestee alleging unjustified beating by police impeached by convictions for possession of heroin, possession of hypodermic needles, attempted daytime breaking and entering, grand larceny, possession of burglary tools, driving to endanger, and assault on a police officer; fifteen year old convictions for nighttime breaking, entering and larceny and possession of a harmful drug, and six year old convictions for possession of a hypodermic needle and syringe and possession of a class A controlled substance excluded); Jones v. Collier, 762 F.2d 71, 72 (8th Cir. 1985) (inmate in a suit against prison guards testified on direct examination to his convictions for burglary and rape after trial court ruled them admissible); Diggs v. Lyons, 741 F.2d 577, 579-80 (3d Cir. 1984) (state prisoner alleging unconstitutional use of force in prevention of his escape, as well as denial of access to legal assistance, impeached by convictions for two murders, bank robbery, attempted prison escape and criminal conspiracy).

89. *See* Fed. R. Evid. 404, 405.

ponent.[90] Perhaps most troubling is the potential for civil litigants to seek an inequitable advantage by trying to sway the jurors, and thus affect the merits of the dispute, through demonstrating the moral depravity of the opponent under the guise of presenting proper impeachment proof.[91]

Once jurors are convinced that a litigant, with a prior criminal conviction, is a bad person, there is a risk that they will evaluate the litigant's evidence less conscientiously and thus reach a verdict contrary to what their decision would have been absent the damaging convictions evidence.[92] Furthermore, jurors will be less reluctant to deprive the morally reprehensible litigant of a verdict.[93]

The prejudice inherent in prior conviction evidence is magnified when the witness already has been impeached by other credibility-testing methods. This is contrary to the judicial view that augmenting already-thorough impeachment information by adding prior convictions data is merely harmless error.[94] Introducing a witness' prior convictions, when there is no need for further insight into credibility, is an unwarranted invitation to the jurors to appraise the moral attractiveness of the witness and to use this information improperly.

The hapless civil litigant who has been convicted previously is virtually powerless to combat these prejudicial ramifications. A civil litigant is compelled to testify by the need to apprise the jury of his version of the disputed facts. Often, only the parties have information that is vital to the factfinder, or at least have more information than other witnesses. Unlike the criminal defendant, the civil litigant enjoys no constitutional

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90. *See* Diaz v. Cianci, 737 F.2d 138 (1st Cir. 1984); United States v. Martinez, 555 F.2d 1273 (5th Cir. 1977); United States v. Palumbo, 401 F.2d 270 (2d Cir. 1968), *cert. denied*, 394 U.S. 947 (1969); *see also* Gold, *supra*, note 65, at 525 ("greatest danger is . . . that they will convict because their conclusion that defendant is a bad person leads them to draw inferences concerning his likely conduct that are not reasonable or are believed with an unreasonable degree of certainty").

91. For examples of civil cases that provoke the suspicion that prior convictions impeachment proof was offered in the hope that jurors would use it substantively, see Linskey v. Hecker, 753 F.2d 199 (1st Cir. 1985); Murr v. Stinson, 752 F.2d 233 (6th Cir. 1985); Diggs v. Lyons, 741 F.2d 577 (3d Cir. 1984); Radtke v. Cessna Aircraft Co., 707 F.2d 999 (8th Cir. 1983); Garnett v. Kepner, 541 F. Supp. 241 (M.D. Pa. 1982).

92. *See* Beaver & Marques, *supra* note 2, at 602; Smith, *supra* note 8, at 442.

93. *See* Shows v. M/V Red Eagle, 695 F.2d 114, 119 (5th Cir. 1983) (reversing verdict for defendant because evidence of plaintiff's conviction for armed robbery "was wafted before the jury to trigger their punitive instincts and there is a great risk that it did so"); *see also* Mills v. Estelle, 552 F.2d 119, 120 (5th Cir.), *cert. denied*, 434 U.S. 871 (1977); Boyer v. Chicago and N.W. Transp. Co., 603 F. Supp. 132, 134 (D. Minn. 1985); R. Lempert & S. Saltzburg, A Modern Approach to Evidence 218 (2d ed. 1983); Ladd I, *supra* note 1, at 190-91; Sharpe, *Two-Step Balancing and the Admissibility of Other Crimes Evidence: A Sliding Scale of Proof*, 59 Notre Dame L. Rev. 556, 560-61 (1984).

94. *See, e.g.*, Christmas v. Sanders, 759 F.2d 1284, 1293 (7th Cir. 1985); Czajka v. Hickman, 703 F.2d 317, 319 (8th Cir. 1983); Furtado v. Bishop, 604 F.2d 80, 93 (1st Cir. 1979), *cert. denied*, 444 U.S. 1035 (1980); Garnett v. Kepner, 541 F. Supp. 241, 245 (M.D. Pa. 1982).

protection in opting to forego the opportunity to testify.[95]

Moreover, the civil litigant is burdened by prejudicial effects of conviction evidence when the litigant's witnesses are former convicts. No litigant enjoys the prerogative of choosing occurrence witnesses. Potential disclosure of a witness' shady past provides a potent disincentive to testify.[96] Thus the civil litigant may be deprived of vital testimony. Even if the previously convicted civil witness does testify, the jury, relying on the common-sense "birds of a feather" notion,[97] is likely to attribute the moral depravity of the witness to the litigant who presented his testimony.

Recent judicial developments reduce the likelihood that a civil litigant can obtain an effective pretrial determination of the admissibility of his, or his witnesses', prior convictions through a motion in limine.[98] Thus, for the civil litigant concerned about potential use of his, or his witnesses' prior convictions, there is no way to gauge before trial the risks attendant to testifying.[99]

In response to recurring charges that introduction of prior convictions under the guise of impeachment irrevocably taints the trial process, the legal system steadfastly relies upon the limiting instruction. It maintains that proper instruction on the restricted use of prior convictions is sufficient to ensure the fairness of the trial process.[100] The doctrine of limited

95. Of course, the fact that the criminal defendant is constitutionally entitled to a presumption of innocence does not mitigate the harshness of the dilemma confronting a previously convicted defendant in determining whether to testify. However meager the protection offered by these constitutional constraints is in reality, civil litigants cannot avail themselves of it. Moreover, if a party does not testify, the adverse inference is that the testimony would have been unfavorable, and nothing would prevent the opponent from referring to this adverse inference during argument.

96. *See* Note, *The Interaction of Rules 609(a)(2) and 403*, *supra* note 8, at 380.

97. *See, e.g.*, Diggs v. Lyons, 741 F.2d 577, 583 (3d Cir. 1984) (Gibbons, J., dissenting); Radtke v. Cessna Aircraft Co., 707 F.2d 999, 1000-01 (8th Cir. 1983); United States v. Lipscomb, 702 F.2d 1049, 1063 (D.C. Cir. 1983); *see also* Spector, *supra* note 4, at 347 (when a defendant's witness is impeached by prior convictions, the defendant risks being associated with the witness as another criminal); Note, *The Interaction of Federal Rules 609(a) and 403*, *supra* note 8, at 1067 (same).

98. In Luce v. United States, 469 U.S. 38 (1984), the Court held that a criminal defendant must testify in order to predicate error upon a claim of improper impeachment by prior convictions; a defendant cannot argue on appeal that the trial judge's erroneous ruling regarding the admissibility of his prior convictions improperly induced him to forego testifying. The Court reasoned that in order to perform the balancing process mandated by Rule 609(a)(1), "the court must know the precise nature of the defendant's testimony, which is unknowable when . . . the defendant does not testify." *Id.* at 41 (citation omitted). In Spell v. McDaniel, 606 F. Supp. 1416 (E.D.N.C. 1985), the court applied the *Luce* rule in a civil action predicated on 42 U.S.C. § 1983 (1982). *Id.* at 1421.

99. In jurisdictions that adhere to an absolutist construction of Rule 609(a)(1) in civil cases, *see* cases cited *supra* note 36, a pretrial calculation of the risks attendant to presenting testimony of a witness who has been convicted of a crime can be made based on the knowledge that the witness' conviction will be admissible.

100. Note, *Other Crimes Evidence at Trial*, *supra* note 1, at 765. In State v. Duke, 100 N.H. 292, 123 A.2d 745 (1956), the court opined that "rules founded on the fear that the Trial Judge will not use discretion and the jury be devoid of common sense tend to defeat

admissibility,[101] effectuated by the limiting instruction, plays a vital role in the trial process without which the process could not function.[102] Generally, the limiting instruction is effective in advising the jurors as to the proper purpose for which they may consider evidence that may be put to multiple uses.[103] But when the limiting instruction concerns prior convictions admitted to impugn a civil party's in-court veracity, the jury is required to use proof showing general moral perversion solely to determine whether the impeached party-witness should be believed, and to disregard inferences that the witness' depravity affected his conduct in the case and renders him unworthy of a favorable verdict. If the impeached witness is not a party, the jury is required to disregard the compellingly close inference that the party is tainted by his witness' immorality. Confining the consideration of prior convictions demands tremendous sophistication because it is counter-intuitive, given the emphasis that most people place on character assessment in their daily lives.

Courts have expressed skepticism about the abilities of jurors to cope with this incongruity.[104] Commentators are virtually unanimous in condemning as "mere legal sophistry"[105] the proposition that limiting in-

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the whole purpose of trial by jury." *Id.* at 294, 123 A.2d at 746; *see also* Crump, *supra* note 16, at 283 (experimental assessment that jurors "approach opinion and reputation character evidence with the same sort of skepticism that a psychologist might"). *But see* Leonard, *supra* note 14, at 47 ("factfinders are ill-equipped to judge the value of character evidence"). Dean Griswold admonishes that the legal system tolerates excessive self-deception concerning prior convictions and the utility of the limiting instruction:

> We say that the evidence . . . is admissible only to impeach . . . testimony, and not as evidence of the prior crimes themselves. Juries are solemnly instructed to this effect. Is there anyone who doubts what the effect of this evidence in fact is on the jury? If we know so clearly what we are actually doing, why do we pretend that we are not doing what we clearly are doing?

Griswold, *The Long View*, 51 A.B.A. J. 1017, 1021 (1965).

101. *See* Fed. R. Evid. 105.

102. *See* Parker v. Randolph, 442 U.S. 62, 74-75 (1979).

103. *See* Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 S. Cal. L. Rev. 220, 248-50 (1976).

104. "The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction." Krulewitch v. United States, 336 U.S. 440, 453 (Jackson, J., concurring) (citation omitted). Judge Learned Hand characterized the task allocated to jurors concerning prior convictions as "a mental gymnastic which is beyond, not only their power, but anybody's else." Nash v. United States, 54 F.2d 1006, 1007 (2d Cir.), *cert. denied*, 285 U.S. 556 (1932); *see* United States v. Lipscomb, 702 F.2d 1049, 1062 (D.C. Cir. 1983); United States v. Martinez, 555 F.2d 1273, 1275 (5th Cir. 1977); Tussel v. Witco Chem. Corp., 555 F. Supp. 979, 985 (W.D. Pa. 1983); People v. Allen, 429 Mich. 558, 568-69, 420 N.W.2d 499, 504-05 (1988).

105. Beaver & Marques, *supra* note 2, at 602.

Professor Mendez observes that, while courts remain divided concerning the effectiveness of limiting instructions, "at least some legal commentators have intuitively grasped the emerging findings of psychologists and have urged that the ineffectiveness of limiting instructions should be considered by trial judges in excluding evidence that may be unduly prejudicial." Mendez, *supra* note 4, at 1049; *see* Gold, *supra* note 65, at 527, 530; Ladd I, *supra* note 1, at 176; Spector, *supra* note 4, at 347; Note, *Prior Convictions Evidence in Civil Actions*, *supra* note 8, at 1268; *Other Crimes Evidence at Trial*, *supra* note 1, at 765, 777. *See generally* Note, *The Limiting Instruction—Its Effectiveness and Effect*,

structions provide an antidote to the prejudice inherent in prior convictions evidence. These suspicions about the efficacy of limiting instructions in relieving prejudice innate in prior convictions proof are amply supported by empirical evidence.[106] The practice of relying on limiting instructions to rectify the unfairness posed by convictions evidence is particularly insidious because jurors are likely to be unaware of the intuitive appeal of this proof. Even conscientious, well-intentioned jurors are likely to be affected.[107]

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51 Minn. L. Rev. 264 (1966) (limiting instructions are ineffective in curing prejudice from incompetent evidence).

106. The classic study is H. Kalven & H. Ziesel, The American Jury 160 (1966), which reports the now-familiar conclusion that in criminal cases, jurors are unwilling or unable to abide by judicial cautionary instructions concerning prior convictions. This conclusion is based upon data that when the strength of the evidence is constant, jurors will acquit in forty percent fewer cases if informed that the defendant has a criminal record. Interestingly, the judge is also much less likely to acquit the previously-convicted defendant. *See id.*; *see also* Broeder, *The University of Chicago Jury Project*, 38 Neb. L. Rev. 744, 747-53 (1959) (field studies on different variables that affect judge's decisions); Note, *Other Crimes Evidence at Trial*, *supra* note 1, at 777 (" 'jurors almost universally used defendant's record to conclude that he was a bad man and hence was more likely than not guilty of the crime for which he was then standing trial' ") (quoting letter from Dale W. Broeder to Yale Law Journal (Mar. 14, 1960) (discussing intensive jury interviews)). Indeed, the results of one survey indicate that ninety-eight percent of attorneys and forty-three percent of judges queried expressed doubts that cautionary instructions are at all effective. *See* Note, *The Dilemma of the Defendant with a Criminal Record*, *supra* note 1, at 218.

Existing studies focus on the impact of prior convictions in criminal cases, and specifically on the criminal defendant. There is, however, no reason to assume that jurors are better equipped in civil litigation to cope with the prejudicial information about moral depravity conveyed by prior convictions. *See supra* text accompanying notes 82-94. This conclusion is borne out by literature discussing the plight of civil plaintiffs—often poor, uneducated, and previously convicted—who invoke § 1983 to sue police officers for damages following allegedly illegal searches and seizures. *See, e.g.*, Casper, Benedict & Perry, *The Tort Remedy in Search and Seizure Cases: A Case Study in Juror Decision Making*, 13 Law & Soc. Inquiry 279 (1988) (description of plaintiff's criminal past results in jury bias in police misconduct trials); Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 Minn. L. Rev. 493 (1955) (same); Newman, *Suing the Lawbreaker: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 Yale L.J. 447, 454 (1978) (same); Project, *Suing the Police in Federal Court*, 88 Yale L.J. 781, 788-809 (1979) (same); Note, *Grievance Response Mechanisms for Police Misconduct*, 55 Va. L. Rev. 909 (1969) (same); *infra* note 115.

107. Professor Gold states that:

> [I]nstructions may be considerably less efficacious than is commonly assumed. When people are required to conduct self analysis in order to determine why they act a certain way or think certain thoughts, they are subject to making the same errors they tend to make when engaging in any other inferential task. This suggests that, even if jurors diligently attempt to ignore the prejudicial aspect of evidence as instructed by the court, they may not be conscious of the impact that evidence has upon them and thus will be unable to control it.

Gold, *supra* note 65, at 527-28 n.134 (citations omitted); *see* Gold, *Covert Advocacy: Reflections on the Use of Psychological Persuasion Techniques in the Courtroom*, 65 N.C.L. Rev. 481, 504 n.128 (1987). This conclusion is borne out by social psychology literature. *See, e.g.*, Doob & Kirshenbaum, *Some Empirical Evidence on the Effect of § 12 of the Canada Evidence Act Upon an Accused*, 15 Crim. L.Q. 88, 90 (1972) (limiting instructions are not effective to combat prejudice from introduction of prior convictions); Hans &

A plethora of impeachment devices—more effective than crude character proof because they more precisely reveal a witness' in-court veracity—are available as safeguards in the critical credibility determination. Each witness is subject to probing cross-examination concerning every aspect of his testimony.[108] A witness' demonstrable biases can be exposed[109] as can the witness' flaws affecting his ability to perceive, remember and articulate.[110] The witness' own damning prior statements can be introduced to undermine trial testimony,[111] and the witness can be contradicted by any non-collateral information.[112] Especially when the testifying witness is a party, or a person closely associated with a party, the witness' interest is obvious, and jurors surely are capable of evaluating its effect on the witness' faculties and testimonial veracity. In addition, jurors will spontaneously derive impressions about the character and credibility of litigants and witnesses from their appearance, apparel and courtroom demeanor.[113]

Doob, *Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries*, 18 Crim. L.Q. 235, 249 (1976) (same); Sue, Smith & Caldwell, *Effects of Inadmissible Evidence on the Decisions of Simulated Jurors: A Moral Dilemma*, 33 J. App. Soc. Psych. 345 (1973) (same); Wissler & Saks, *On the Inefficacy of Limiting Instructions*, 9 Law & Hum. Behav. 37 (1985) (same); *see also infra* notes 150-79 & 245-48 and accompanying text (discussing juror's responses to character evidence).

108. *See* R. Lempert & S. Saltzberg, *supra* note 93, at 352 (cross-examination is the "most important" of trial safeguards to ensure testimony accuracy); 5 J. Wigmore, Evidence § 1367, at 32 (Chadbourn rev. ed. 1974) ("[cross-examination] is beyond any doubt the greatest legal engine ever invented for the discovery of truth"); Ladd I, *supra* note 1, at 167-68 ("[G]eneral principles for examination of witnesses, not usually thought of in connection with the tests of credibility, are important in permitting the triers of fact to have ample opportunity to judge the truthfulness of testimony."). *See generally* F. Wellman, The Art of Cross-Examination (4th ed. 1936) (anthology of examples of effective discrediting of witnesses' testimony without resorting to previous convictions).

109. Revealing a witness' bias is the most persuasive of available impeachment devices because it provides the jury with specific insight into a seemingly neutral witness' testimonial bases. *See* 3A J. Wigmore, Evidence § 940, at 775-76 (Chadbourn Rev. ed. 1974), §§ 948-69, at 783-820; *see also* Ladd I, *supra* note 1, at 171 (Bias evidence "is intangible in its effect and yet gives the clearest insight to an understanding or explanation of testimony given in court.").

110. *See* 3A J. Wigmore, *supra* note 109, §§ 931-39, at 758-75; Ladd I, *supra* note 1, at 170-71.

111. *See* 3A J. Wigmore, *supra* note 109, §§ 1017-46, at 993-1065; Ladd I, *supra* note 1, at 170.

112. *See* 3A J. Wigmore, *supra* note 109 §§ , 1000-15, at 956-91. Of course, if a witness affirmatively claims to be a person of good character, evidence of prior wrongdoing, including past convictions, is admissible as specific contradiction of that testimonial assertion. *See* United States v. Jackson, 405 F. Supp. 938, 943 (E.D.N.Y. 1975).

113. *See* Ladd I, *supra* note 1, at 169-70; Mendez, *supra* note 4, at 1046; Slovenko, *Body Language on Trial*, 66 Mich. B.J. 664 (1987); Walker, *The Judge's Corner: The Demeanor of the Witness*, 59 Fla. B.J. 44 (1985). Any attempt to eliminate these natural impressions from the factfinding process would prove futile. *See* Gold, *Covert Advocacy: Reflections on the Use of Psychological Persuasion Techniques in the Courtroom*, 65 N.C.L. Rev. 481, 485 n.22, 486 n.24, 504 n.129, 506 (1987); Ladd I, *supra* note 1, at 169-70. *See generally* Vinson, *Litigation: An Introduction to the Application of Behavioral Science*, 15 Conn. L. Rev. 767 (1983) (jurors' impressions of another person proceed according to the same laws of selective perception that they employ towards other stimu-

Even under the traditional view, any scant benefit derived from relying upon prior convictions as a veracity determinant is overwhelmed by the massive, irreversible prejudice inherent in this proof.[114] The overriding. objective in civil litigation of premising verdicts solely upon the legal force of the litigants' respective cases would be advanced by removing from the trial process any reliance upon the litigants' and the witnesses' moral rectitude. An absolute ban on prior convictions evidence is a necessary prelude to achieving this goal.

B. *Inherent Probative Value and Prejudice of Prior Convictions Evidence: The Social Psychology Perspective*

Under the traditional view, the probative worth of prior convictions evidence as a credibility determinant is suspect,[115] and the prejudice it imports into the civil process is overwhelming.[116] The additional hazards to the fairness of the trial process—identified by social psychology studies—lead to the conclusion that prior convictions proof, as an impeachment device, is bereft of both rational and scientific validity.[117] This section briefly reviews the social psychology research probing the assumed link between prior specific bad acts and lack of veracity and finds the connection tenuous at best.[118] This section also demonstrates

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lae). But the intuitive appeal of character evidence, and the intrinsic, potent risk of inducing inferential error that it engenders when introduced in the form of past criminal convictions can be averted:

> [W]e make no claim that we possess a precise gauge useable as a measure of the corrosive bite of evidence categorized as prejudicial. There are no empirical data or studies of psychological influence that can be brought to bear, at least with any clear focus on a specific case. Instead we here express our awareness of the reality of the courtroom by applying rules born of experience not logic, derived intuitively and not mathematically.

Shows v. M/V Red Eagle, 695 F.2d 114, 119 (5th Cir. 1983).

114. *See generally* Gold, *supra* note 65, at 525 ("the most serious prejudicial danger . . . is the possibility that jurors might consider such evidence probative of character and conduct"); Lawson, *supra* note 4, at 777 (research in jury perceptions leaves "little doubt that evidence of prior misconduct places a defendant in a generalized unfavorable light with jurors"); Spector, *supra* note 4, at 351 (prior convictions evidence exerts a decisive influence on the believability of a witness).

115. *See supra* notes 61-81 and accompanying text.

116. *See supra* notes 82-114 and accompanying text.

117. *See* Leonard, *supra* note 14, at 31; *supra* note 4 and accompanying text. Other legal commentators have expressed similar conclusions. *See, e.g.*, Lawson, *supra* note 4, at 783 ("the theory of behavior that was so compatible with the law's notions about character has ceased to have *any* scientific recognition") (emphasis in original); *see also* Leonard, *supra* note 14, at 2 ("If the conclusions of the psychological community are correct, the very foundation upon which the rationality of character evidence is based has been removed."). The intuitive appeal of character traits as the source of human behavior traces its roots at least as far back as Aristotle. *See* Rhode, *supra* note 54, at 556-57.

118. Contemporary legal commentators have been exploring the social psychology literature analyzing the relationship between prior specific conduct and future untruthfulness for almost a decade and a half. Thus, there exists already an able, thorough body of legal literature. *See supra* note 4; *see also* Leonard, *supra* note 14, at 2 (discussing the

that jurors misuse evidence introduced under Rule 609(a).[119]

Historically, the primary premise of the law's reliance upon character evidence has been the belief that character is a compilation of innate, discernible traits that govern behavior patterns and remain relatively stable throughout the course of a person's lifetime.[120] The conception of character as inducing behavior consistent with one's innate traits lends credence to the practice of inferring character from specific conduct and adverting to character evidence as a predictor of in-court veracity.[121] This perspective on behavior-predicting factors reinforces our "intuitive sense of character."[122] It also mirrors the "trait" or "generality" theory of behavior advanced by social psychology research.[123]

According to the trait theory, behavior derives from a unique combination of traits that make up the character of each individual.[124] Trait-oriented psychologists focus on specific conduct that augurs the existence of character traits.[125] Behavior becomes predictable once underlying generalized traits are discerned and identified.[126] Thus, a person who manifests a character trait for aggressiveness would display belligerent behavior in an unending variety of contexts: while driving on the highway, at a basketball game, or in the corporate boardroom.[127] Likewise, the individual possessing a character trait for sociability would remain affable in these contexts.[128] And, particularly pertinent to the impeachment process, a person who would steal in one situation would also swindle in another, cheat in a third, and lie whenever feasible.[129]

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impact of psychological research on the use of prior convictions to impeach); Rhode, *supra* note 54, at 560 (same).

119. *See supra* note 4; *see also* Leonard, *supra* note 14, at 9-10 (juror's mind must create generalizations to jump from the circumstantial testimony to the proposition of veracity).

120. *See* Lawson, *supra* note 4, at 780. The "trait" theory was pioneered by Gordon Allport, who theorized that character traits "are not creations in the mind of the observer, nor are they verbal fictions; they are here accepted as biophysical facts, actual psychophysical dispositions. . . ." G. Allport, Personality—A Psychological Interpretation 339 (1937).

121. *See* 2 J. Wigmore, Evidence § 519, at 726 (Chadbourn Rev. ed. 1974); Spector, *supra* note 4, at 350.

122. Leonard, *supra* note 14, at 26.

123. *See infra* note 125.

124. *See* H. Eysenck, Crime and Personality 20-21 (1977); Lawson, *supra* note 4, at 780; Leonard, *supra* note 14, at 26.

125. *See* G. Allport, *supra* note 120 at 286; Lawson, *supra* note 4, at 780-81; Mischel, Jeffery & Patterson, *The Layman's Use of Trait and Behavior Information to Predict Behavior*, 8 J. Res. Personality 231, 231-32 (1974).

126. *See* H. Eysenck, *supra* note 124, at 20; S. Hampson, The Construction of Personality 95 (1982).

127. *See* Mendez, *supra* note 4, at 1052-53; Mischel, Jeffery & Patterson, *supra* note 125, at 231-32.

128. *See* H. Eysenck, *supra* note 124, at 20.

129. *See* Burton, *Generality of Honesty Reconsidered*, 70 Psych. Rev. 481, 482 (1963); *see also* Mendez, *supra* note 4, at 1052 (under trait theory, evidence of prior criminal conduct generally considered probative that defendant committed the act with which he is charged).

Attempts by trait-oriented psychologists to buttress their theory with empirical data have failed utterly,[130] rendering it suspect as an overarching theory of behavior.[131] Moreover, this trait-oriented theory of behavior was discredited thoroughly by the advent of a counter-theory, termed "specificity" or "situationism."[132]

Situationism views behavior as a learned response to specific contextual factors;[133] it is precise situational determinants that shape behav-

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130. *See* W. Mischel, Personality and Assessment 123, 177 (1968); Bowers, *Situationism in Psychology: An Analysis and a Critique*, 80 Psych. Rev. 307, 325 (1973); Burton, *supra* note 129, at 482; Mendez, *supra* note 4, at 1052.

131. *See* D. Peterson, The Clinical Study of Social Behavior 23 (1968) (after ten years of unproductive research, trait theory abandoned); P. Vernon, Personality Assessment: A Critical Survey 239 (1964) (trait theory deemed invalid despite much research devoted to it); Lawson, *supra* note 4, at 781 (general dissatisfaction with the theory); Mendez, *supra* note 4, at 1052 (trait theory rejected).

132. A classic study, performed by Professors Hartshorne, May & Shuttleworth over a period of five years in the 1920s, on more than 11,000 child-subjects between the ages of eight and sixteen, has been described by a contemporary commentator as "a landmark which has not been surpassed by later work." H. Eysenck, *supra* note 124, at 25. The following sources report and analyze the results of that study: H. Hartshorne, Character in Human Relations (1932); H. Hartshorne, M. May & F. Shuttleworth, Studies in the Organization of Character (1930); H. Hartshorne & M. May, 1 Studies in the Nature of Character—Studies in Deceit (1928).

These psychologists initiated their investigations in order to test the validity of the concept that a character trait for "honesty" existed, a trait considered to determine a person's moral behavior in a variety of situations. They devised over one hundred different situations wherein the children studied could cheat, sometimes only with great difficulty, and sometimes without fear of detection. All behavior was carefully monitored.

The researchers expected their results to accord with intuitive, generally-held notions of character: that the behavior of an individual who is fundamentally honest will reflect honesty in all situations, regardless of contextual incentives to be either honest or dishonest; and that a dishonest person would similarly behave dishonestly despite situational differences. As Professor Hartshorne stated concerning expectations, "[a]t one end of the scale we would have a piling up of saints and at the other sinners, with nothing much in between." H. Hartshorne, *supra*, at 210.

Their results "surprised the experimenters and shocked the world of psychology." Lawson, *supra* note 4, at 784. Some subjects manifested very little consistency of honest or dishonest behavior. Some students cheated only on arithmetic tests, others only on spelling tests, others only in classroom contexts, and still others only in extracurricular games. The researchers could find no predictability concerning whether students would cheat, and if so, under what circumstances. They concluded that the thousands of subjects studied exhibited no unified character trait for honesty, and that honesty is primarily a function of situational factors and not a consistent behavior determined by an underlying character trait. See H. Hartshorne & M. May, *supra*, at 411-12; H. Hartshorne, M. May & F. Shuttleworth, *supra*, at 1. Thus, as one prominent psychologist concluded, "behavioral consistencies . . . are constructed by observers, rather than actual consistency in the subject's behavior." W. Mischel, *supra* note 130, at 43.

Regarding the use of children as experimental subjects, see H. Hartshorne, *supra*, at 209 ("[t]he average child is no better integrated in terms of an ethical idea than if he had never heard of it").

133. As one commentator has stated:

> [P]ast experience affects the individual's information processing strategies, which govern the way situational variables are perceived, and hence their effects on behaviour . . . . As a result of past experience, people approach situations

ior.[134] Situation-oriented psychologists maintain that the predictability of behavior derives from the correlation of identical elements shared by the situations being compared,[135] with even slight situational variances drastically reducing predictive behavioral consistency.[136] Evidence that a person would cheat on his income tax return or on the baseball field, or deceive his counterparts in the corporate boardroom, bears meager predictive value for that person's veracity when testifying under oath.[137]

Yet a third perspective on behavior is emerging. Termed "interactionism," this approach merges aspects of the trait and situationism approaches.[138] Interactionism regards behavior as the product of both innate character traits and contextual variables in which character and context interact to some, as yet undefinable, degree to produce behav-

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> with characteristic modes of information processing which will determine the unique meaning of that situation for that person.
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> . . . The major difference between [situationism] and traditional personality theory is that the former does not depend on consistency to the same degree as the latter, because it recognises that these cognitive person factors operate in conjunction with situational factors to determine behaviour.

S. Hampson, *supra* note 126, at 77-78 (citation omitted); *see also* Burton, *supra* note 129, at 482 (behavior is the product of the situation in which a person finds himself); Mischel, Jeffery & Patterson, *supra* note 125, at 231 (same).

134. *See generally* H. Eysenck, The Structure of Human Personality 3 (1970); W. Mischel, Introduction to Personality (1971); Bowers, *supra* note 130, at 307-08; Burton, *supra* note 129, at 482.

135. Professor Burton explains:

> The doctrine of specificity of moral behavior holds that a person acts in each situation according to the way he has been taught to act under these particular conditions. The predictability of one's moral behavior from one situation to another depends on the number of identical elements which the two settings share.

Burton, *supra* note 129, at 482; *see also* Mendez, *supra* note 4, at 1052-53 (research indicates that behavior is determined by specific situations and is not easily predicted).

136. First, behavior depends on stimulus situations and is specific to the situation: response patterns even in highly similar situations often fail to be strongly related. Individuals show far less cross-situational consistency in their behavior than has been assumed by trait-state theories. The more dissimilar the evoking situations, the less likely they are to lead to similar or consistent responses from the *same* individual. *Even seemingly trivial situational differences may reduce correlations to zero.*

W. Mischel, *supra* note 130, at 177 (emphasis added).

137. For example,

> [Situationism] does not accept the abstract concept of "honesty" as a valid character trait, but instead argues that *there are many different kinds of specific behaviors which tend to be independent even though they may be included under the same rubric.* Therefore, knowing that a person has cheated in a final examination in no way permits one to predict what the same person would do if tempted to cheat in a different setting such as a competitive game or business venture. Furthermore, there is little if any association between the extent to which a person will experience anxiety following a deviation in one moral area with the intensity of guilt following deviation in a different area.

Burton, *supra* note 129, at 482 (emphasis added); *see* H. Eysenck, *supra* note 124, at 15; H. Hartshorne & M. May, *supra* note 132, at 411-12; H. Hartshorne, *supra* note 132, at 209.

138. *See* S. Hampson, *supra* note 126, at 280.

ior.[139] It is this indeterminate blend that induces consistency.[140]

Most social psychology theorists have rejected the trait theory, in favor of either situationism or interactionism.[141] Decades ago, Dean Wigmore criticized the law's reliance upon the predictive value of character for testimonial veracity,[142] but concluded that rejection of the law's dependence upon character proof should be postponed "until science provides a better method."[143] During the intervening decades, social psychology research has raised the possibility that the differences between situationism and interactionism as alternative perspectives on behavior-influencing considerations may never be wholly resolved.[144] The emergence of these divergent approaches to behavior determination, and the consequent rejection of the trait-oriented approach by most psychologists, discredits the law's continued reliance on proof of character traits to evaluate credibility.

It is no longer advisable to wait for a consensus on situationism, interactionism or some yet-unarticulated approach. Further delay perpetu-

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139. *See id.* at 78-95.

140. Continuing psychological research concerning the extent to which situation and attitude determine behavior may provide a basis for finding predictability and consistency. Researchers have determined, for example, that self-monitoring by individuals affects consistency to some extent. In other words, consistency is more likely to be found in subjects who regard their behavior as consistent. *See generally*, Bem & Allen, *On Predicting Some of the People Some of the Time: The Search for Cross-Situational Consistencies in Behavior*, 81 Psych. Rev. 506 (1974); Bem & Funder, *Predicting More of the People More of the Time*, 85 Psych. Rev. 485 (1978); Gibbons, *Sexual Standards and Reactions to Pornography: Enhancing Behavioral Consistency Through Self-Focused Attention*, 36 J. Person. & Soc. Psych. 976 (1978); Vestewig, *Cross-Response Mode Consistency in Risk-Taking as a Function of Research in Personality*, 12 J. Res. Personality 152 (1978).

141. *See* S. Hampson, *supra* note 126, at 63; Lawson, *supra* note 4, at 782; *see also* Bowers, *supra* note 130, at 308, 327. Even Allport, who pioneered the trait-oriented approach, *see* G. Allport, *supra* note 125, at 286-343, has conceded the tenuousness of his initial approach:

> [M]y earlier views seemed to neglect the variability induced by ecological, social, and situational factors. This oversight needs to be repaired through an adequate theory that will relate the inside [the psychic structure] and outside [situational factors] systems more accurately.

Allport, *Traits Revisited*, 21 Am. Psychologist 1, 9 (1966). Interestingly, research into character traits of criminals has yielded no clear-cut results concerning distinguishing characteristics of persons in this group, as opposed to non-criminals, *see* S. Hampson, *supra* note 126, at 256-60, a fact of particular significance in assessing the viability of Rule 609 in civil litigation.

142. Dean Wigmore aptly described the tension between law and psychology:

> From the point of view of modern psychology, the moral disposition which tends for or against falsehood is an elusive quality. Its intermittent operation in connection with other tendencies, and the difficulty of ascertaining its quality and force, make it by no means a feature peculiarly reliable in the diagnosis of testimonial credit. Hence, to the psychologist, the common law's reliance on character as an index of falsehood is crude and childish.

3A J. Wigmore, *supra* note 109, § 922, at 725 (footnote omitted).

143. *Id.*

144. *See* Leonard, *supra* note 14, at 30.

ates the practice of introducing highly prejudicial information of dubious probative worth for reasons largely historical[145] and intuitive, rather than policy-oriented and rational. Although psychologists presently do not agree as to precisely what mixture of facts shapes behavior, the great majority do agree as to what *does not*:[146] the trait-oriented approach.[147] This consensus, along with the complete failure of trait theorists to validate their approach empirically, raises serious doubts about the value of the trait-oriented approach as a tool in the impeachment process.[148]

Social psychology data reflect the conclusion that prior convictions have virtually no probative value as a predictor for determining a witness' in-court veracity. The question then becomes, to what extent is this information unduly prejudicial? How do jurors perceive and integrate prior convictions information, and to what extent does this information induce inaccurate or distorted judgments? The law assumes that jurors have the ability, aided by cautionary instructions, to place even highly prejudicial information in appropriate perspective.[149] This assumption is belied[150] by extensive, uncontroverted social psychology findings[151] that serious distortions routinely plague the process by which impressions of

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145. *See* Rhode, *supra* note 54, at 556-57.

146. *See* Lawson, *supra* note 4, at 773-74; Leonard, *supra* note 14, at 29-30, 37-42.

147. Professor Leonard describes the flaw in the trait theory as follows:

> Of great importance to the use of character evidence in trials are two final propositions demonstrated by psychological research. First, even if traits exist, the existence or non-existence of a trait cannot be inferred in a particular individual from a single observation of that person's conduct. A person's trait of honesty, for instance, cannot be validly inferred from one situation in which the person returned a lost credit card to its owner. The second proposition is the converse of the first: even if we know a person's trait, it will not accurately predict a single, isolated instance of conduct. Its true predictive value is only achieved when a number of instances are considered: "[S]ince a trait is a generalized tendency to behave in a certain manner, one may not exhibit trait-relevant behavior in every situation or on different occasions in the same situation."

Leonard, *supra* note 14, at 29 (quoting Sherman & Fazio, *Parallels Between Attitudes and Traits as Predictors of Behavior*, 51 J. Personality 308, 325 (1983)) (footnote omitted).

148. *See* Hampson, *Honesty and Truthfulness as Measureable Personality Traits?*, 38 Bull. British Psych. Soc'y 64 (1985) ("the notion that socially constructed traits such as honesty can have straightforward biological counterparts now seems naive"); *see also* Lawson, *supra* note 4, at 782-83 (expressing doubts about the value of the trait approach in predicting behavior); Leonard, *supra* note 14, at 30-31 (same); Mendez, *supra* note 4, at 1058-59 (same); Spector, *supra* note 4, at 351 (evidence of character has no probative value).

149. *See supra* notes 100-07 and accompanying text.

150. As one commentator put it:

> In evaluating the prejudicial nature of evidence, courts have made many assumptions about the inferential processes of jurors and the potential of evidence to cause inferential error. These assumptions are usually unproven and unconvincing. This should not be surprising, since judges do not necessarily have more ability to analyze the inferential processes of the human mind than do the jurors whose minds they attempt to analyze.

Gold, *supra* note 65, at 509 (footnote omitted).

151. *See* W. Mischel, *supra* note 130, at 41-59; Asch, *Forming Impressions of Personality*, 41 J. Abnormal & Soc. Psych. 258 (1946); Beaver & Marques, *supra* note 2, at 603;

others, and consequent judgments about others, are formed.[152]

One psychologist's investigation of laypersons' perspectives on character reveals that, from an early age, people intuitively develop extensive, complex theories about character that are used for descriptive and inferential purposes.[153] These beliefs permit people to distinguish among the people they encounter in their everyday lives, and to predict their behavior.[154] However, these visceral beliefs often lead persons inadvertently to overvalue specific acts as indicators of general character and to exaggerate the predictive value of a prior bad act for future conduct.

The most significant intuitively-held belief about character is the process termed "attribution."[155] Under this view, people unwittingly tend to attribute their own specific behavior to situational factors, but, when viewing the acts of others, attribute their behavior to the presence of consistent character traits.[156] Attribution is grounded in an innate tendency to view others' characters as integrated and unified, predictable and stable.[157] People intuitively perceive that a previous particular act is the product of the actor's disposition.[158] Further, people predict that the actor's future conduct will be consistent with that dispositional, or character, trait.[159] The function of character traits is exaggerated, whereas the function of situational variances as pivotal factors influencing the behavior of others is minimized.[160]

Gold, *supra* note 65, at 522; Lawson, *supra* note 4, at 767; Mendez, *supra* note 4, at 1044; Spector, *supra* note 4, at 351-53.

152. As one commentator queried, "[w]hat happens when a person receives one specific piece of information about another person? Does the receiver simply record the data and reserve judgment, or will the receiver generalize from the specific piece of information to postulate a whole personality? Research shows that it is quite clearly the latter." Spector, *supra* note 4, at 352 (footnote omitted); *see also* Ebbesen, *Cognitive Processes in Understanding Ongoing Behavior*, in Person Memory: The Cognitive Basis of Social Perception, *supra* note 55, at 216-21.

153. *See* S. Hampson, *supra* note 126, at 134.

154. *See id.*

155. *See generally* G. Allport, *supra* note 120, at 520 (describing this process as "so persistent, and seemingly so unavoidable, that it should be constantly borne in mind"); K. Shaver, An Introduction to Attribution Process 1-7 (1975); Gold, *supra* note 65, at 522-23 (referring to this process as "Fundamental Attribution Error"); Spector, *supra* note 4, at 351 ("[o]ne of the more enduring propositions supported by psychological data"). For a thorough discussion of the process of attribution see Lawson, *supra* note 4, at 776-79.

156. *See* S. Asch, Social Psychology 206 (1952); R. Nisbett & L. Ross, Human Inference: Strategies and Shortcomings of Social Judgment 31 (1980); Alexander & Epstein, *Problems of Dispositional Inference in Person Perception Research*, 32 Sociometry 381, 383-84 (1969); Asch, *supra* note 151, at 284-85. Thus, an individual attributes his own abrupt behavior to a "bad day," while perceiving other similarly abrupt persons as "irascible" or "grouchy."

157. *See* Alexander & Epstein, *supra* note 156, at 382-83; Asch, *supra* note 151, at 284-85; Ichheiser, *Misunderstandings in Human Relations—A Study in False Social Perception*, 55 Am. J. Sociol. 1, 27 (1949); Lawson, *supra* note 4, at 772-76.

158. *See* Alexander & Epstein, *supra* note 156, at 382-84; Asch, *supra* note 151, at 258.

159. *See* R. Nisbett & L. Ross, *supra* note 156, at 31; Alexander & Epstein, *supra* note 156, at 382-84.

160. *See* F. Heider, The Psychology of Interpersonal Relations 169-70 (1958); Alexan-

Two aspects of this attributional process are particularly important. First, the "halo effect" describes the tendency to overestimate the role that one known characteristic, good or bad, plays in the character of another.[161] If one dominant character trait is found—often inferred from a specific act—the observer extrapolates other, similar characteristics, and assumes that these characteristics are part of the observed person's character.[162] Moreover, there is a tendency to oversimplify the effect of the "known" characteristic on the total character make-up of the person observed.[163]

These correlative processes, attribution and the "halo effect," interrelate as follows. A homeowner engages a contractor for minor home repairs. The contractor arrives four hours late and takes eight hours, rather than the three hours previously estimated, to complete the agreed-upon work. The homeowner might conclude that the contractor is not conscientious. A neighbor, upon hearing this reference, would be likely to assume further, from this limited description, that the contractor was also "unreliable," "lazy," "careless" and "disorderly."[164]

The second significant aspect of the attribution process is a phenomenon known as "communicator credibility."[165] Studies demonstrate that the effectiveness of a communication corresponds closely to the audience's attitude toward the communicator.[166] Audiences are significantly influenced by the speaker's character in evaluating the persuasiveness of the speech.[167]

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der & Epstein, *supra* note 156, at 383, 384; Ichheiser, *supra* note 157, at 46-47. *But see* Mischel, Jeffery & Patterson, *supra* note 125, at 241, concluding that lay persons use both trait and behavioral information in making predictions.

161. *See* G. Allport, *supra* note 120, at 521.

162. *See id.*; S. Hampson, *supra* note 126, at 99. *See generally* Rosenberg & Olshan, *Evaluative and Descriptive Aspects in Personality Perception*, 16 J. Personality & Soc. Psychol. 619, 619-20 (1970) (study confirming that favorable inferences are drawn from one or more favorable traits).

163. *See* Ichheiser, *supra* note 157, at 46-47.

164. *See* S. Hampson, *supra* note 126, at 99. Professor Hampson explains:

> When we compose a spoken or written description of ourselves or others, a part of that description will probably consist of personality traits: we are able to convert our direct experience of a person into a more abstract form expressed in a series of traits. These descriptions are usually meaningful to others, as is demonstrated by the second use of implicit personality theory: inferring the presence of additional traits on the basis of a brief trait description.

Id.

165. *See* Lawson, *supra* note 4, at 767.

166. C. Hovland, I. Janis & H. Kelley, Communication and Persuasion 19-21 (1953); H. Kelman & C. Hovland, *"Reinstatement" of the Communicator in Delayed Measurement of Opinion Change*, 48 J. Abnorm. & Soc. Psych. 327, 327-35 (1953).

167. For the classic study on "communicator credibility," see C. Hovland, I. Janis & H. Kelley, *supra* note 166, at 31-33. An identical tape of a speech concerning juvenile delinquency was played for several different audiences, each of whom was asked beforehand to judge its educational value. One group of audiences was told that the speaker was a juvenile court judge, "a highly trained, well-informed, and experienced authority on criminology and delinquency." *Id.* at 31. A second group of audiences was told that the speaker was a randomly-chosen member of the audience, but was provided no other

These social psychology data have obvious implications for the practice of using criminal convictions to impeach civil witnesses. Psychologists' conclusions that behavior is substantially situation-oriented, and not derived wholly from character traits, are counter-intuitive to the average person, who is likely to predict behavior based on perceived character traits. Despite the minimal value of convictions evidence for predicting in-court veracity, jurors are likely to attribute overall bad character to the impeached witness from the fact of a former conviction. Indeed, the inference of general bad character is the appropriate inference that jurors are expected to draw from this proof.[168] From this inference of general bad character, jurors are likely to attribute similar negative characteristics to the witness, and to perceive the witness only in terms of known character traits. The "halo effect" will induce jurors to view the impeached witness solely on the basis of the known dominant characteristic, as evidenced by the conviction, and to reject any possibility that the witness is anything but thoroughly unsavory. Not only will the persuasiveness of the witness' testimony be devastated, but the jurors are also likely to infer that the witness' pretrial conduct accords with his reprehensible character.[169] Because these inferential processes are innate, even well-intentioned, conscientious jurors are prone to these distortions[170] and, consequently, to inferential error in their award of a

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information. *Id.* A third group was also told that the speaker was a member of the audience, but the speaker was introduced as a former "delinquent . . . [who] was currently involved in some shady transactions, being out on bail after arrest on a charge of dope peddling." *Id.* at 32. Although the content of the communication did not vary at all, audience judgments concerning the value and fairness of the presentations differed greatly. The audience evaluated the "judge's" presentation as the highest, the "delinquent's" as lowest, and the unidentified person's as intermediate, but closer to the judge's ratings. *See id.* Also of importance, the group hearing the "judge's" speech favored the most lenient treatment of juvenile offenders; with the group hearing the "delinquent's" speech favoring the harshest. *Id.* at 32-33.

Empirical data demonstrating that negative traits exert far greater influence on audience receptivity than counterpart positive traits also bear upon the testimonial appeal of witnesses. *See* Levin, Wall, Dolegal & Norman, *Differential Weighting of Positive and Negative Traits in Impression Formation as a Function of Prior Exposure*, 96 J. Exper. Psych. 114, 114 (1972); *see also* Lawson, *supra* note 4, at 776; *supra* note 4. This phenomenon is especially troubling, because in a civil case, evidence of good character is not permitted. Fed. R. Evid. 404, 405. Jurors hear only specific conduct proof—including prior convictions—leading to inference of negative character, without benefit, unlike criminal cases, of countervailing evidence of good character. Fed. R. Evid. 404(a)(1).

168. *See supra* notes 58-86 and accompanying text.

169. For example:

> A man is under suspicion of murder. During the investigation certain definite abnormalities of his sexual behavior come to light, even though there is no evidence that they are *related* in any way to the committed murder. [T]he frequent reaction of many people, if verbalized, would read something like this: "This man whose sexual life deviates so strangely from the norm can also be expected to deviate from other social norms in any other respect."

Ichheiser, *supra* note 157, at 27-28 (emphasis added).

170. *See* Vernon, *supra* note 131, at 36; P. Warr & C. Knapper, The Perception of People and Events 16 (1968); *see also* S. Asch, *supra* note 156, at 258 (difficult to forget an opinion about a person once it has been formed).

verdict.

Numerous factors, otherwise irrelevant to credibility, operate in the litigation context and affect the testimonial appeal of witnesses. For example, all jurors approach their factfinding responsibility with accumulated experiences, biases and preconceptions.[171] A person filters new information through information stored in aggregated memory of past experience, and draws on the stored data in forming new impressions and beliefs about new information received.[172] A person is likely to readily assimilate new information that confirms the pre-existing accumulation of experience, bias and preconception yet resist and undervalue conflicting data.[173] A person's assessment of neutral data is tinged by this innate tendency to achieve consistency. Inferential error occurs when a person's "filter" is permeated by misconceptions, and thus inaccurately portrays objective reality.[174] Yet, these "filters" function without conscious effort. A person is thus unaware of the lack of objectivity with which the "filter" appraises trial information.[175]

Moreover, a witness' demeanor, appearance and apparel exert great influence on juror receptivity of his testimony. Jurors tend to remain receptive to testimony of witnesses they "like," and to disregard testimony of "disliked" witnesses.[176] Jurors tend to make these judgments on the basis of superficial, utterly irrelevant, physical characteristics.[177]

In all likelihood, these factors of bias and demeanor often sway jurors' consideration of testimony far beyond their genuine probity. Yet, these factors are beyond judicial or legislative control. The law can do no more than allow advocates to dismiss both jurors whose biases are extreme or specific to the present case,[178] and jurors who appear unduly sensitive to apparel, appearance or demeanor.[179]

When a civil witness' prior convictions are revealed there is a danger that jurors will reflexively reject any information offered by a "common criminal." They will draw negative inferences about his conduct in the present case if he is a party, or about the moral quality of the party who

171. The psychology term describing this process is "knowledge structures." *See* R. Nisbett & L. Ross, *supra* note 156, at 28-42; Gold, *supra* note 65, at 521-23.

172. *See* R. Nisbett & L. Ross, *supra* note 156, at 28-42, 167-92.

173. *See id.*; Gold, *supra* note 65, at 521; Rhode, *supra* note 54, at 561.

174. *See* R. Nisbett & L. Ross, *supra* note 156, at 195-227; Gold, *supra* note 65, at 521-22.

175. *See* R. Nisbett & L. Ross, *supra* note 156, at 195-227; Gold, *supra* note 65, at 521-22.

176. *See* C. Hovland, I. Janis & H. Kelley, *supra* note 166, at 33; Lawson, *supra* note 4, at 770-71.

177. *See* A. Cohen, Attitude Change and Social Influence 28-29 (1964) (distinguishing relevant aspects of persuasive communication, such as "intelligence, honesty, sincerity, responsibility," from irrelevant aspects, those which "bear no objective relevance to the topic of communication").

178. *See* D. Louisell, G. Hazard & C. Tait, Pleading and Procedure 967 (5th ed. 1983) (describing challenges for cause).

179. *See id.* at 968 (describing peremptory challenges).

presented him if he is not. The judgmental error induced by prior convictions evidence can be ameliorated simply by modifying the existing rule.

Psychology research, although persuasive, does not provide sufficient justification for revolutionizing the impeachment process in civil cases. It does, however, further undermine the assumptions held by proponents of the traditional view about the wisdom of using character evidence to impeach civil witnesses. Considered in conjunction with legal arguments that prior convictions evidence is, at best, minimally probative and enormously prejudicial, the psychology data force the inquiry: What justifications for preserving this avenue of impeachment remain?

IV. A Recommendation for Reform

Commentators have argued that Rule 609(a) should not apply to civil cases, so that the residual balancing process of Rule 403 would govern admissibility of convictions to impeach civil witnesses.[180] This suggestion implicitly recognizes the fundamental difference between criminal and civil litigation, but affording the trial judge the meager discretion allotted by Rule 403 is insufficient to counter the severe risks of prejudice and inferential error that convictions evidence imports into the trial process.

A. *The Focus of Civil Litigation: Conduct, Not Character*

The focus of civil litigation is a comparative evaluation of the persuasiveness of plaintiff's claims and defendant's defenses.[181] The critical issues relate to the conduct of the respective parties concerning the event giving rise to the cause of action.[182] Assessment of the parties' conduct results in either a judgment and damages, or other requested relief, for plaintiff, or a judgment of non-liability for defendant. Justice is served when the trial process is fair, permitting each party to introduce evidence relevant to the conduct at issue. No moral stigma attaches to a civil verdict.[183] The character of the parties is wholly irrelevant to the funda-

180. *See supra* notes 8, 41-48 and accompanying text.

181. The arguments advanced here also apply to other forms of character-impugning impeachment devices, such as evidence of reputation or opinion of bad character for veracity, Fed. R. Evid. 608(a), or prior specific acts, Fed. R. Evid. 608(b). This Article addresses only prior convictions, for the reasons stated at note 16, *supra*, and its proposals would leave Rule 608(a) and (b) intact. Neither reputation/opinion evidence nor prior specific instances of untruth are likely to inculcate the trier of fact with the same degree of prejudice as that flowing from the legal and social stigma of a criminal conviction. Reform in these areas, although desirable, is less pressing.

182. In criminal cases, the defendant is permitted to rely upon his good character, *see* Fed. R. Evid. 404(a)(1); Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. Pa. L. Rev. 845, 855 (1982), and, in self-defense cases to impugn the victim's character to substantiate his claim of innocence. *See* Fed. R. Evid. 404(a)(2).

183. Egregious conduct motivated by ill will, maliciousness or conscious disregard for others' rights, however, is penalized by an award of punitive damages. *See* Smith v.

mental issue of conduct, and is meticulously rejected when offered to raise circumstantial inferences of conduct.[184]

Importing character evidence into the civil trial process in the form of prior convictions allows parties to accomplish through the side-door of impeachment precisely what the exclusion of character evidence as substantive proof of conduct is intended to obviate.[185] The jury is apt to engage in a comparative moral evaluation of parties and their witnesses and, in all likelihood, will view prior convictions as revelatory of conduct.[186] The temptation is to reward the "good" litigant with a favorable verdict, or conversely, to punish the "bad" litigant with an unfavorable verdict.[187]

Civil adjudication accomplishes more than resolution of immediate disputes. That is, "adjudication should be viewed as a form of social ordering, as a way in which the relations of [persons] to one another are

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Wade, 461 U.S. 30 (1983); Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981). Even so, it is the character of defendant's conduct, not the character of defendant, that determines the propriety of the award.

184. *See* Fed. R. Evid. 404, 405. Federal cases sanction the use of character evidence in civil cases, at least if close to being criminal in nature, despite the prohibition expressed in the federal rules. *See, e.g.*, Perrin v. Anderson, 784 F.2d 1040, 1043-46 (10th Cir. 1986) (proof of victim's previous violent encounters with police admitted to demonstrate victim provoked altercation with police in which he was killed); Carson v. Polley, 689 F.2d 562, 575-76 (5th Cir. 1982) (exceptions to Rule 404(a) allowing character evidence to apply to civil cases); Crumpton v. Confederation Life Ins. Co., 672 F.2d 1248, 1253 (5th Cir. 1982) (opinion evidence as to the deceased's good character allowed in civil action on the issue of whether deceased had committed a rape); Hackbart v. Cincinnati Bengals, Inc., 601 F.2d 516, 525-26 (10th Cir.) (character evidence allowed in civil action examining whether defendant was a "dirty football player"), *cert. denied*, 444 U.S. 931 (1979).

Although substantive use of character evidence in civil cases is far beyond the scope of this Article, this extension of character evidence is unwarranted and potentially limitless. In a civil assault and battery action, both plaintiff and defendant are likely to testify. The jury should be trusted to reconstruct the incident in question from their testimony and that of their witnesses. The "civil analogue" theory is difficult to restrict: wrongful death is an analogue of murder; civil fraud is an analogue of criminal fraud; conversion is an analogue of theft, and so forth. Aside from actions grounded in negligence or strict liability, almost every civil action has a criminal analogue. Allowing character proof in these cases would virtually destroy the prohibitory rule to no good purpose.

185. *See* Radtke v. Cessna Aircraft Co., 707 F.2d 999 (8th Cir. 1983). Plaintiffs sued for injuries sustained when the aircraft in which they were passengers crashed upon takeoff. Plaintiffs alleged that the pilot lost control because his seat unexpectedly became unlatched, and sued the manufacturer on a products liability theory. The manufacturer claimed that the accident was attributable to pilot error. At trial, Cessna impeached the pilot, a principal witness for plaintiffs, with a six-year-old multi-count felony drug conviction. A verdict for defendant was affirmed.

Of course, Cessna could have offered evidence of the pilot's drug use at the time of the accident as substantive proof of lack of due care. That Cessna did not offer this evidence indicates that Cessna had no such proof. Yet Cessna achieved the same effect—raising an inference of lack of due care attributable to drug use—by using the side door of impeachment.

186. *See supra* notes 82-91 and accompanying text.

187. *See supra* note 92 and accompanying text.

governed and regulated."[188] The status of a person as a convicted felon is immaterial to the allocation of that person's rights. A convicted felon should be entitled to recover damages if struck by a negligently driven truck;[189] a woman convicted of murder is entitled to be free from unwanted sexual advances by a prison guard;[190] and an arrestee is entitled to be free from unnecessary physical violence by arresting officers.[191] These rights are not affected by the character of the individuals who hold them, nor should the process by which these rights are adjudicated be infected with irrelevant proof of their character. Uniform treatment of character evidence, whether offered as circumstantial proof of conduct or of credibility, would enhance the fairness of the civil trial process.

Despite these justifications for abolishing the practice, two reasons explain the continued use of prior convictions to impeach civil witnesses: first, the law's historic dependence upon certain aspects of character proof in the trial process; and second, the need to admit all evidence probative of the critical question of credibility.

The law's historic reliance upon character proof in the trial process is a concern of some weight. Evidence law is amendable to reform, as exemplified by certain changes in common law evidence principles worked by the Federal Rules of Evidence.[192] The Supreme Court recognized in a

188. *See* Fuller, *The Forms and Limits of Adjudication, reprinted in* G. Hazard & J. Vetter, Perspectives on Civil Procedure 17-18 (1987).

189. *See* Linskey v. Hecker, 753 F.2d 199 (1st Cir. 1985). In *Linskey* the plaintiff was hit by a truck while riding his bicycle when he was fourteen years old. By the time the action finally came to trial, he was twenty one years old. In the interim, the plaintiff was convicted fifteen times—seven larcenies, six burglaries, one armed robbery, and one shoplifting conviction. All of these convictions were admitted to impeach the plaintiff's believability. A verdict for defendant was affirmed. The appellate court assured that no undue prejudice resulted from these convictions because "[t]he jury was instructed to consider the evidence only in evaluating [plaintiff's] credibility." *Id.* at 202.

190. *See* Garnett v. Kepner, 541 F. Supp. 241 (M.D. Pa. 1982). In *Garnett*, the plaintiff, an inmate, won a substantial judgment for compensatory and punitive damages incurred when defendant, an employee of the institution, allegedly coerced her to have sexual relations with him. The trial court excluded plaintiff's convictions for second-degree murder, burglary, arson, recklessly endangering another person, and risking and causing a catastrophe, on the ground that these crimes, being crimes of passion and violence, manifest low probative value on the issue of credibility. Nevertheless, the trial judge vacated the judgment and ordered a new trial in response to defendant's motion for judgment notwithstanding the verdict. The trial judge reasoned that although plaintiff was "extensively impeached" by her own varied recitals of the incident, her "youth and subdued appearance" might have influenced the jury. "Evidence of her prior crimes may have changed the jury's evaluation of her truthfulness." *Id.* at 245. Because the trial judge had already found the prior crimes to be lacking in probative value, it must be assumed that the potential persuasiveness of this proof lay in its power to influence the jury to decide that plaintiff was a morally reprehensible person. Many inferences flow from this finding, only one of which is that plaintiff's testimony should be viewed with skepticism.

191. *See* Hannah v. City of Overland, 795 F.2d 1385, 1391-92 (8th Cir. 1986) (error, albeit harmless, to admit plaintiff's convictions for rape, sodomy, kidnapping, larceny, receiving stolen property, and burglary, in a § 1983 action against the police and city).

192. *See, e.g.*, Fed. R. Evid. 412 (prior sexual behavior of complaining witness in sex offense prosecution generally excluded); Fed. R. Evid. 703 (expert witness can consider

different context that "we cannot escape the reality that the law on occasion adheres to doctrinal concepts long after the reasons which gave birth to them have disappeared and after experience suggests the need for change."[193] As discussed above, the premises underlying Rule 609(a) have been discredited.[194] Thus, even centuries of conditioning to accept prior convictions proof do not justify perpetuating this impeachment device.[195]

Prior convictions evidence is not probative of in-court credibility and is, in fact, unduly prejudicial.[196] Furthermore, prior convictions proof—indeed, character proof generally—is, at best, a flimsy impeachment device. It is generally agreed that most testimonial inaccuracies stem not from witness prevarication, but from perceptual and memory flaws.[197] Character proof, which suggests lack of compunction in the witness about fabrication, is powerless to address this most potent problem in evaluating witness credibility. Where testimonial falsehood is to be probed, revealing a witness' precise biases and predilections is immeasurably more effective.[198] Specific contradiction, whether by the witness' own previous statements or by other contrary information is also more effective.[199]

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any data generally "relied upon by experts in the particular field"); Fed. R. Evid. 801(d)(1)(A) (certain prior inconsistent statements made under oath admissible as substantive proof).

193. Trammel v. United States, 445 U.S. 40, 48 (1980).

194. *See supra* text accompanying notes 61-179.

195. *See* Gold, *supra* note 65, at 499 ("the law of evidence [should] pay attention to how people think").

The law's treatment of evidence of prior sexual behavior of the victim provides an apt analogy. Traditionally, the victim's "character," as evidenced by her prior sexual contacts, was deemed probative of the consensual nature of her conduct with the defendant. The law remained impervious to criticisms of this practice, and to the adverse systemic effects it perpetuated, until political pressures arising from the women's movement forced statutory protections for victims of sexual assault and rape. Rejection is now virtually universal. *See, e.g.*, Fed. R. Evid. 412 (generally excluding prior sexual behavior of alleged victim in sex offense prosecution). *See generally* Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 Colum. L. Rev. 1 (1977); Tanford & Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. Pa. L. Rev. 544 (1980); Comment, *The Rape Shield Paradox: Complainant Protection Amidst Oscillating Trends of State Judicial Interpretation*, 78 J. Crim. Law & Crim. 644 (1987).

Persons affected by Rule 609 in civil cases have little cohesiveness as a political force. Yet the premise underlying Rule 609 is no more valid than the now-discredited premise concerning prior conduct of the rape or sexual assault victim.

196. *See supra* text accompanying notes 117-79.

197. *See generally* E. Loftus, Memory (1980); J. Marshall, Law and Psychology in Conflict (2d ed. 1980); A. Yarmey, The Psychology of Eyewitness Testimony (1979); Levine & Tapp, *The Psychology of Criminal Identification: The Gap From* Wade *To* Kirby, 121 U. Pa. L. Rev. 1079 (1973); Spector & Foster, *Admissibility of Hypnotic Statements: Is the Law of Evidence Susceptible?*, 38 Ohio St. L.J. 567 (1977); Stewart, *Perception, Memory and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence*, 1970 Utah L. Rev. 1; Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 Stan. L. Rev. 969 (1977).

198. *See supra* note 109 and accompanying text.

199. *See supra* notes 111-12 and accompanying text.

In exchange for use of this inept form of credibility determinant, the law heaps upon previously convicted civil litigants and their witnesses powerful disincentives to testify. It rewards a decision to offer testimony with the disclosure of embarrassing, often secret, information and the potential of an adverse verdict.[200] Moreover, Rule 609(a) gives rise to the possibility that a civil litigant will call the opponent, or a person with information useful to the opponent, as an adverse witness, and then reveal the prior conviction under the guise of impeachment, so that even foregoing testimony is not always a safe option.[201]

If existing methods for determining credibility are insufficient, then it is incumbent upon lawmakers to develop more effective devices. Reflexive dependence upon prior convictions as a veracity indicator exacts too high a price in terms of the fairness of the civil litigation process, a price that should no longer be tolerated.

Abrogating judicial discretion to admit prior convictions for impeachment purposes in civil cases is a drastic measure, but the Federal Rules of Evidence rescind inherent judicial discretion by declaring inadmissible many forms of proof where slight probative worth is outweighed by unfair prejudice.[202] Because the appeal of prior convictions evidence is intuitive, reserving any discretion to the trial judge to admit the evidence in some circumstances would yield varying constructions, individualized assessments of probative worth and prejudice, and glaringly inconsistent results.[203] Appellate review of trial court decisions concerning prior con-

200. *See supra* notes 88-99 and accompanying text. Revealing a witness' prior conviction in the course of a civil trial also undermines the societal aspiration that the convicted person, having "paid his debt to society," is free to redeem himself by reforming his conduct and reassuming his place in society. Use of the conviction to impeach the civil witness unnecessarily burdens the witness with the albatross of the past.

201. Fed. R. Evid. 607. *See* Murr v. Stinson, 752 F.2d 233, 235 (6th Cir. 1985) (defendant chose not to testify, but plaintiff called him as an adverse witness and impeached him with two wholly unrelated convictions for conspiracy); *see also* Spell v. McDaniel, 606 F. Supp. 1416, 1420 (E.D.N.C. 1985) (defendant chose not to testify because of possibility of impeachment).

Another systemic effect of using prior convictions to impeach civil witnesses should be noted. In a criminal case, charges will be brought, in all likelihood, even if the prosecutor's witnesses are impeachable as convicted persons. When charges are brought, the criminal defendant will defend the charge, even though he, and/or his witnesses, have previously been convicted. The prior record might encourage the prosecutor and defendant to plea bargain more willingly. In civil cases, especially in civil rights and torts claims where the issue arises most frequently, the question becomes whether the convicted plaintiff will hesitate to file suit, and the convicted defendant will hesitate to defend a claim or whether the terms of any settlement will be dictated or influenced by the prior convictions of either party.

202. *See supra* notes 63-64 and accompanying text. Indeed, Congress did abrogate discretion concerning crimes of dishonesty and false statement. *See* Fed. R. Evid. 609(a)(2).

203. For an example of the multiplicity of judicial positions as to the proper construction of the language of Rule 609(a)(1), see *supra* notes 36-52 and accompanying text. *Compare* Boyer v. Chicago & N.W. Transp. Co., 603 F. Supp. 132 (D. Minn. 1985) (possession of cocaine with intent to distribute not admissible to impeach civil plaintiff) *and* Tussel v. Witco Chem. Corp., 555 F. Supp. 979 (W.D. Pa. 1983) (conspiracy to

victions, generally restricted to correcting abuse of discretion[204] and generous in finding "harmless error,"[205] does little to mitigate these problems.[206]

Congress has shown little concern for the effect of impeachment by prior convictions upon civil litigation[207] and is undisturbed at the prospect of nullifying judicial discretion in order to achieve desired policy goals.[208] At least one state has already abolished the practice of using prior convictions to impeach witnesses, including civil witnesses.[209] Congress should reconsider the realities of the degree to which prior convictions proof is dysfunctional in the civil context, and amend Rule 609 to accord with these realities by abolishing the use of prior convictions in civil cases.

B. *Alternatives to Abolishing Impeachment by Prior Convictions: Rule 609(a)(1)*

Courts have proposed a number of approaches to the problem of construing the current version of Rule 609(a) in the civil context. In demonstrating the insufficiency of each of these approaches, this Article

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import a controlled substance not admissible to impeach civil plaintiff) *with* Murr v. Stinson, 752 F.2d 233 (6th Cir. 1985) (convictions for conspiracy to aid and abet importation and distribution of cocaine admissible to impeach civil defendant) *and* Radtke v. Cessna Aircraft Co., 707 F.2d 999 (8th Cir. 1983) (felony drug conviction admissible to impeach civil witness).

For a discussion of the confusion engendered by courts' disagreement about the extent of discretion allocated to the trial judge under Rule 609(a)(1), see *infra* text accompanying notes 225-26.

Professors Beaver and Marques warn that "[e]ach trial judge's application of the weighing process reflects personal predilections and an individual assessment of local policies." Beaver & Marques, *supra* note 3, at 616 (footnotes omitted).

204. *See, e.g.*, Jones v. Collier, 762 F.2d 71, 72 (8th Cir. 1985); Murr v. Stinson, 752 F.2d 233, 235 (6th Cir. 1985); Calhoun v. Baylor, 646 F.2d 1158, 1163 (6th Cir. 1981).

205. *See, e.g.*, Hannah v. City of Overland, 795 F.2d 1385, 1391-92 (8th Cir. 1986); Czajka v. Hickman, 703 F.2d 317, 318-19 (8th Cir. 1983).

206. Moreover, restricting the scope of proof concerning underlying details of the previous crime does not ameliorate the inherent prejudice of this proof, contrary to the suggestion of some courts. *See, e.g.*, Campbell v. Greer, 831 F.2d 700, 707-08 (7th Cir. 1987); United States v. Sampol, 636 F.2d 621, 670 n.40 (D.C. Cir. 1980). Once the fact of a prior conviction becomes evident, no further details are required to commence the process of moral evaluation of the impeached witness.

Another argument in favor of abrogating judicial discretion concerning prior convictions is that of efficiency—eliminating balancing and discretion obviates the need for pretrial and in-trial hearings. Of course, efficiency in and of itself is a weak reason for nullifying the trial judge's discretionary control over some aspects of the trial process. But, given the enormous problems that permeate the civil trial process as a result of prior convictions evidence, *see supra* notes 61-114, 180-201 and accompanying text, efficiency would be a welcome by-product of abolishing discretionary rulings on this evidence.

207. *See supra* notes 28-31 and accompanying text.

208. *See supra* notes 22-27 and accompanying text.

209. Montana has adopted a rule wholly contrary to Federal Rule 609. Montana's version of this rule provides that "[f]or the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is not admissible." Mont. Code Ann. tit. 26, ch. 10, Rule 609 (1987).

considers the two subsections of Rule 609(a) independently, for each raises different considerations.

1. Per Se Admissibility

Some courts construe Rule 609(a)(1) as requiring admissibility of all felony convictions offered to impeach all civil witnesses.[210] Although this construction is most faithful to the language of the rule, the per se admissibility approach injects unnecessary and positively harmful prejudice into the civil trial process, with no concomitant gain in credibility assessment, and thus should be rejected.

2. Rule 609(a)(1) Balancing

Rule 609(a)(1) articulates a rigorous balancing test to be used in criminal cases; one which, theoretically, should result in exclusion of all but the most probative of felony crimes offered to impeach. The proponent of the impeachment proof must demonstrate that its probative value as a credibility determinant outweighs its prejudicial effect.[211] Some courts have imported this rigorous balancing process into civil litigation.[212] This approach is unavailing for two reasons.

The first difficulty with extending the "probative-value-exceeds-prejudice" balance articulated in Rule 609(a)(1) to civil cases lies in how courts should assess the probative value and prejudice inherent in a particular conviction. Assuming that the *Luck-Gordon* factors[213] provide a framework for Rule 609(a)(1)'s balancing process, the civil litigant, unprotected by constitutional safeguards,[214] and impelled by need to communicate his version of disputed factors to the jurors, will invariably choose to testify. Moreover, the prior crime will seldom be similar to the cause of action at issue in civil litigation, given the negligence or strict liability bases underlying most civil cases.[215] Of the three remaining factors—nature of the crime, remoteness of the prior conviction and the witness' subsequent history, and the importance of the credibility ques-

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210. *See supra* notes 36-38 and accompanying text; *see also* ABA Proposed Draft, *supra* note 12, at 59.

211. *See* Fed. R. Evid. 609(a)(1).

212. *See supra* note 39 and accompanying text.

213. *See supra* note 72 and accompanying text. The list of five factors applicable under the *Luck-Gordon* doctrine must be modified to three factors, because neither the factor of "necessity for the criminal defendant's testimony" nor the factor of "similarity between the past crime and the charged crime" are pertinent to civil adjudication. The three factors that remain applicable are the nature of the crime, the remoteness of the prior conviction and the witness' subsequent history, and the importance of the credibility question.

214. *See supra* note 95 and accompanying text.

215. Of course, exceptions occur when the basis for the civil claim or defense is intentional conduct, or even negligent conduct that has a criminal law analogue, such as that resulting in wrongful death. *See supra* note 184. In these cases, admitting the prior crime to impeach a civil litigant would raise acute problems under Fed. R. Evid. 404(b), and the "similarity" factor would be significant.

tion—only two are viable balancing determinants, because the remoteness question is generally decided automatically as a matter of statutory law.[216]

Rule 609(a)(1) addresses felony convictions that are not so probative of credibility that their admission is mandated under Rule 609(a)(2). Whatever significance these felony convictions have for determining a witness' in-court veracity lies in the inferences of general bad character and consequent tendency to fabricate testimony under oath that stem intuitively from conviction of a felony crime.[217] Despite the tenuousness of these inferences,[218] some courts have indicated a willingness to find probative value even in violent felony crimes, and thus admit these violent crimes for purposes of evaluating veracity.[219]

Even if these two factors are sufficient to assess the probative worth of prior convictions evidence in civil cases, a related difficulty arises in the process of evaluating the prejudicial effect of the evidence.[220] Prejudice goes beyond shame or embarrassment when a non-litigant civil witness is impeached. It adversely affects the party who presented the witness,[221] a factor courts sometimes overlook.[222] This type of prejudice, whether the impeached witness is a party or not, is often difficult to detect and measure.[223] Yet the jury, aided by a limiting instruction, is generally deemed to be capable of properly taking into account even this highly prejudicial data.[224]

A second difficulty of the Rule 609(a)(1) balancing process is how much discretion the rule affords the trial judge in balancing these factors. Courts disagree as to whether the trial judge retains only narrow discretion in view of the congressional mandate for certainty and predictability associated with Rule 609(a)(1),[225] or broad discretion, reviewable only in instances of abuse.[226] This dispute, coupled with judicial disagreement as

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216. *See supra* note 72.

217. *See supra* notes 61-71 and accompanying text.

218. *See supra* notes 72-117 and accompanying text.

219. *See, e.g.*, Jones v. Collier, 762 F.2d 71, 72 n.2 (8th Cir. 1985) (civil plaintiff's burglary and rape convictions admissible); Petty v. Ideco, 761 F.2d 1146, 1152 (5th Cir. 1985) (civil plaintiff impeached by conviction for armed kidnapping, as well as issuing a fraudulent check); United States v. Lipscomb, 702 F.2d 1049, 1062 (D.C. Cir. 1983) ("Congress believed that all felonies have some probative value on the issue of credibility."); NLRB v. Jacob E. Decker & Sons, 569 F.2d 357, 363 (5th Cir. 1978) (same).

220. *Compare supra* notes 79-81 and accompanying text *with supra* note 94 and accompanying text.

221. *See supra* notes 96-97 and accompanying text.

222. *See, e.g.*, Radtke v. Cessna Aircraft Co., 707 F.2d 999 (8th Cir. 1983); Moore v. Volkswagenwerk, A.G., 575 F. Supp. 919 (D. Md. 1983).

223. *See supra* notes 107, 115 and accompanying text.

224. *See supra* notes 100-06 and accompanying text.

225. *See, e.g.*, Christmas v. Sanders, 759 F.2d 1284, 1289-93 (7th Cir. 1985); United States v. Hendershot, 614 F.2d 648, 653 (9th Cir. 1980); United States v. Cook, 608 F.2d 1175, 1187 (9th Cir. 1979), *cert. denied*, 444 U.S. 1034 (1980); *see also* Weinstein's Evidence, *supra* note 18, ¶ 609[06], at 609-109 (judge has limited discretion).

226. *See, e.g.*, United States v. Beltran, 761 F.2d 1 (1st Cir. 1985); United States v. Key, 717 F.2d 1206, 1209 (8th Cir. 1983); United States v. Kiendra, 663 F.2d 349, 353

to whether Rule 609(a)(1) obligates trial judges to articulate their findings concerning the rule's balancing process on the record,[227] leads to unpredictable, uneven results at the trial level.[228] Frequently, appeals from prior convictions rulings are automatically affirmed on appeal because "appellate courts are loath to reverse the court below when the trial judge examined the pertinent factors and applied them to the facts presented."[229]

These difficulties raise dangers, beyond unpredictability, to the fairness of the civil trial process. Overestimating the probative worth of prior convictions has led to wholesale admission of evidence that conveys little about believability, yet is highly prejudicial.[230] There is, in addition, little effective recourse available on appeal because of the degree of discretion residing in the trial judge and flexibility concerning the obligation to articulate findings on the record. Thus judicial accountability has been undermined and this, in turn, has led to unprincipled decisions.[231]

3. Rule 403 Balancing

A number of courts have questioned whether Rule 609(a)(1) is applicable to civil cases, and resort instead to the residual balancing process stated in Rule 403 to determine the admissibility of felony convictions offered to impeach civil witnesses.[232] Unlike Rule 609(a)(1), which burdens the proponent of the evidence to demonstrate that its probative value exceeds its prejudicial effect, Rule 403 burdens the opponent of the evidence to demonstrate that its prejudice substantially exceeds its probative value.[233] Congress' thorough consideration of Rule 609(a)(1)'s effect

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(1st Cir. 1981); Howard v. Gonzales, 658 F.2d 352, 359 (5th Cir. Unit A Oct. 1981); United States v. De La Torre, 639 F.2d 245, 249 (5th Cir. Unit A Mar. 1981); United States v. Field, 625 F.2d 862, 871 (9th Cir. 1980).

227. *Compare* United States v. Alvarez, 833 F.2d 724, 727 (7th Cir. 1987) (so long as trial judge holds a hearing on admissibility of Rule 609(a)(1) proof and properly instructs the jury, no error occurs where judge implicitly balances factors considered yet does not record the findings on the record) *and* United States v. Mahone, 537 F.2d 922, 928-29 (7th Cir.) (same), *cert. denied*, 429 U.S. 1025 (1976) *with* United States v. Hendershot, 614 F.2d 648, 652-53 (9th Cir. 1980) (trial court must clearly articulate the balancing process employed) *and* United States v. Preston, 608 F.2d 626, 639 (5th Cir. 1979) (same), *cert. denied*, 446 U.S. 904 (1980).

228. *See* Note, *Suggestions for Confining and Guiding Trial Court Discretion*, *supra* note 3, at 664-65.

229. *See* Weinstein's Evidence, *supra* note 18, ¶ 609[04], at 609-93.

230. *See* Beaver & Marques, *supra* note 3, at 591 (reporting that level of impeachment by prior convictions of criminal defendants has continued unabated after enactment of Rule 609(a)(1) at a rate of seventy-two percent of all cases in which defendants testify on their own behalf).

231. *See* Surratt, *supra* note 3, at 946-49.

232. *See supra* notes 40-48 and accompanying text. One court relies upon the inherent discretion afforded by Rules 102 and 609(a) to vest flexibility in the trial judge. *See* United States v. Jackson, 405 F. Supp. 938, 940-43 (E.D.N.Y. 1975). This Article rejects this approach for the same reason it rejects the Rule 403 balancing process.

233. *See* Boyer v. Chicago & N.W. Transp. Co., 603 F. Supp. 132, 133-34 (D. Minn. 1985); Moore v. Volkswagenwerk, A.G., 575 F. Supp. 919, 921-22 (D. Md. 1983).

indicates that, in criminal cases at least, this difference in burdens was intentional.[234]

The residual Rule 403 balancing test is the unanimous choice of other commentators who have addressed the applicability of Rule 609(a)(1) to civil cases.[235] However, reliance on Rule 403's minimal balancing process magnifies the difficulties in rejecting the Rule 609(a)(1) approach. The adoption of Rule 403 as the guideline by which convictions are admitted to impeach civil witnesses ignores the extent to which the prejudice inherent in prior convictions evidence undermines the fairness of the civil trial process. Concededly, prior convictions are less inflammatory in civil than in criminal cases. Criminal cases, however, also invoke different balances between the litigants and additional considerations not present in civil cases.[236] The mere fact that this evidence is less inflammatory in civil cases does not render it harmless. Accordingly, a substantially less rigorous standard for admissibility is unwarranted.

The primary difficulty with evaluating admissibility of prior convictions under Rule 403 is that this rule allows the trial judge only meager discretion to exclude prior convictions,[237] and affords litigants virtually no recourse on appeal.[238] As long as the prior conviction is deemed to have even minimal probative value in evaluating veracity, the trial judge is obliged to admit it, and this decision invariably will be affirmed on appeal.[239]

This Article focuses upon the dysfunctional effect of importing the unwarrantedly prejudicial information sanctioned by Rule 609(a)(1) into the civil trial process. In civil cases all energies and resources of litigants and jurors should be concentrated on reconstructing a past event, not a litigant's or witness' character. The law of evidence does not relegate other types of evidence infused with prejudicial potential to the trial judge's discretion; instead, the law declares such proof inadmissible.[240] The nature and extent of prejudice endemic in prior convictions evidence mandates the same result.

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234. *See supra* notes 18-31 and accompanying text.

235. *See* sources cited *supra* note 8.

236. *See supra* note 16.

237. Rule 403 is a rule of inclusion. *See, e.g.*, Wilson v. Attaway, 757 F.2d 1227, 1242 (11th Cir. 1985) (upholding lower court's admission of evidence); Radtke v. Cessna Aircraft Co., 707 F.2d 999, 1001 (8th Cir. 1983) (same); Czajka v. Hickman, 703 F.2d 317, 319 (8th Cir. 1983); Ebanks v. Great Lakes Dredge & Dock Co., 688 F.2d 716, 722-23 (11th Cir. 1982) (Rule 403 is to be used very sparingly to exclude otherwise relevant evidence), *cert. denied*, 460 U.S. 1083 (1983); United States v. Dennis, 625 F.2d 782, 796-97 (8th Cir. 1980) (balance should be struck in favor of admission); Weinstein's Evidence, *supra* note 18, ¶ 403[01], at 403-09 (Rule 403 should be used sparingly).

238. Reversal is warranted only for abuse of discretion. *See* Weinstein's Evidence, *supra* note 18, ¶ 403[01], at 403-09 & n.6.

239. *See, e.g.*, Radtke v. Cessna Aircraft Co., 707 F.2d 999, 1000-01 (8th Cir. 1983); Czajka v. Hickman, 703 F.2d 317, 318-19 (8th Cir. 1983).

240. *See supra* notes 63-64, 195 and accompanying text.

C. *Rule 609(a)(2): Recommendation and Alternatives*

Despite judicial disagreement regarding the proper gauge by which to determine admissibility of Rule 609(a)(1) felony convictions, courts are unanimous in holding that Rule 609(a)(2) is absolute in its requirements of admission of all convictions for crimes characterized as "dishonesty or false statement" offenses.[241] To argue that this nullification of discretion should be cast in the opposite direction, so that even dishonesty and false statement convictions would be excluded as impeachment devices, is concededly more difficult in the face of the legislative history and the uniform judicial application of Rule 609(a)(2) in civil cases.

The rationale for granting automatic admission to all crimes of dishonesty and false statement is that the overwhelming probative value of specific previous acts manifests the witness' propensity to lie under grave circumstances.[242] Yet commentators have occasionally voiced skepticism about the accuracy of this assertion.[243] These doubts are vindicated by the social psychology research previously discussed.[244] Acts of perjury, swindling, or bribery do not illuminate a character trait for lying on the part of the actor. These acts are also virtually worthless as a predictor of future behavior while under oath in court. In fact, the convicted perjurer, fully aware of the consequences of perjury, is arguably less motivated to lie again under oath than is a person who has not previously experienced conviction.

The stunning results of a recent psychological study demonstrate that this dishonesty and false statement type of conviction is unduly prejudicial.[245] Adult subjects were divided into four groups.[246] Each group was given an identical fact pattern detailing the crime with which a hypothetical criminal defendant was charged. One group was further informed that defendant had no previous criminal record. A second group was told that defendant had been previously convicted for perjury. A third group was told that defendant had been previously convicted for a serious but dissimilar crime. A fourth group was informed that defendant had been previously convicted for commission of the same crime. All subjects were instructed specifically to consider the previous conviction only in evaluating defendant's credibility as a witness.

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241. *See* cases cited *supra* note 33. For discussion of courts' characterization of convictions as implicating dishonesty and false statement offenses, see Weinstein's Evidence, *supra* note 18, ¶ 609[04], at 609-77 to -85; Note, *An Analysis of the Phrase "Dishonesty or False Statement" as Used in Rule 609*, 32 Okla. L. Rev. 427 (1979).

242. *See* United States v. Kuecker, 740 F.2d 496, 501-02 (7th Cir. 1984).

243. *See* Beaver & Marques, *supra* note 3, at 611; Spector, *supra* note 4, at 351; Note, *Other Crimes Evidence at Trial*, *supra* note 1, at 778.

244. *See supra* notes 117-48 and accompanying text.

245. *See* Wissler & Saks, *supra* note 107, at 43-47.

246. The experiment used two different crimes, murder and auto theft, and four groups for each, so that eight groups of subjects were actually used. Because results did not vary from case to case, *see* Wissler & Saks, *supra* note 107, at 43, this Article refers only to the division of subjects according to prior criminal record information made known to them for purposes of convenience.

Not surprisingly, the subjects who thought defendant had no previous criminal involvement rated his credibility the highest. The subjects who believed defendant to be a perjurer rated his credibility only slightly lower than did subjects who believed defendant had been convicted for a serious, dissimilar crime. The group informed that defendant had been convicted for the same crime, however, rated his credibility the lowest by a significant measure. Despite contrary instructions, 13 percent of subjects voting to convict stated that the prior conviction was the motivating factor in their decision.[247] The researchers concluded from this data that, regardless of contrary instructions, jurors consider prior convictions data to determine the likelihood of defendant's guilt, and not, as the law assumes, to assess his believability.[248]

The implications of this study, in conjunction with the social psychological research previously discussed, are clear for civil cases. Jurors use the inferences of general bad character available from previous convictions proof as evidence of conduct, not as evidence of veracity. Limiting instructions effective enough to curb this proclivity have not yet been, and may never be, discovered. The only way to forestall the undue prejudice flowing from even dishonesty and false statement convictions is to take the unorthodox, yet not wholly unprecedented, step of absolutely banning their use as impeachment tools.[249]

1. Per Se Admissibility

At least four states have adopted the position that *only* crimes of dishonesty and false statement are admissible to impeach witnesses, including civil witnesses.[250] This per se admissibility approach to convictions for dishonesty and false statement allows the factfinder to consider too much unduly prejudicial evidence of, at best, questionable probative

247. *See id.*

248. *See id.* at 43-47.

249. The State of Montana has statutorily enacted such a ban. *See supra* note 209 and accompanying text.

250. Alaska, Hawaii and Kansas have accomplished this result by rule. *See* Alaska R. of Evid. 609; Haw. R. of Evid. 609; Kan. Stat. Ann. § 60-421 (1983).

The Michigan Supreme Court recently construed its version of Rule 609(a) different than the federal rule in that it refers to crimes of "theft, dishonesty and false statement," Mich. R. of Evid. 609, as establishing bright line distinctions. The court held that crimes containing an element of dishonesty or false statement are automatically admissible; most other felonies are automatically ineligible for impeachment. A balancing test under which, according to Michigan's Rule 609, probative value must exceed prejudice applies to felony theft crimes. Significantly, the court ruled that the need for impeachment evidence due to the centrality of the credibility issue is *not* a factor to be taken into account in balancing probative value against prejudice. *See* People v. Allen, 429 Mich. 558, 594 n.16, 420 N.W.2d 499, 516 n.16 (1988).

On the federal level, one judge noted that "however sensible a nonabsolutist approach may appear to some of us individually, we are driven by the force of explicit statutory language and legislative history to hold that evidence offered under Rule 609(a)(2) is not subject to the general balancing of Rule 403." United States v. Kiendra, 663 F.2d 349, 354 (1st Cir. 1981).

value. If this per se admissibility approach is not rejected, Rule 609(a)(2) must be modified so that the category of crimes of dishonesty and false statement are defined precisely—"those crimes whose statutory elements necessarily involve untruthfulness or falsification."[251]

2. Rule 403 Balancing

Should Rule 609(a)(2) itself prove invulnerable to the myriad of arguments raised against admissibility of even dishonesty and false statement crimes, then the ABA Proposed Draft version of Rule 609(a)(2) should be adopted.[252] This proposal precisely and narrowly restricts the category of evidence admitted as those crimes encompassing untruthfulness or falsification as a statutory element, and affords Rule 403-type balancing discretion to the trial judge. This solution is not ideal, but perhaps abolishing Rule 609(a)(1) in civil cases would make trial judges cognizant that prior convictions proof is not a favored impeachment avenue. The effect might be a more sparing use of discretion to admit prior convictions evidence offered under Rule 609(a)(2), particularly in close cases.

CONCLUSION

The age-old edifice of character proof, although timeworn, still appears impervious to broad-scale revision. The pure intuitive appeal of evidence suggesting that "the leopard does not change its spots" is compelling. Yet this appeal is not inevitably irresistible; it is only because we choose to make it so, and choose to shape the law accordingly.

Urging revision of character impeachment by banning the use of prior convictions in civil litigation may seem drastic, especially where such evidence is concededly less prejudicial than in criminal litigation. Yet civil cases, unhampered by the considerations inherent in criminal cases, present a forum in which the unduly prejudicial and barely probative nature of prior convictions proof is starkly visible. Prior convictions evidence is dysfunctional because of its tendency to induce inferential error. Further judicial construction of Rule 609(a) is futile in terms of curing the rule's drafting imprecisions and, more fundamentally, its erroneous policy premises. Legislative revision is the only effective means to eliminate prior convictions as impeachment proof in civil cases.

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251. ABA Proposed Draft, *supra* note 12, at 56; *see* United States v. Lewis, 626 F.2d 940, 946 (D.C. Cir. 1980); Tussel v. Witco Chem. Corp., 555 F. Supp. 979, 982 (W.D. Pa. 1983).

252. *See supra* note 13.