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NOTES

PRIOR CONVICTIONS OFFERED FOR IMPEACHMENT IN CIVIL TRIALS: THE INTERACTION OF FEDERAL RULES OF EVIDENCE 609(a) AND 403

INTRODUCTION

Federal Rule of Evidence 609(a) admits evidence of a witness' prior convictions for felonies other than those involving dishonesty1 for impeachment purposes only if the probative value of the evidence outweighs its prejudicial effect to the defendant.2 The qualifier "to the defendant" has created considerable confusion in civil cases.3 Courts disagree on

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1. Crimes involving dishonesty, commonly referred to as crimen falsi, involve some element of deceit, untruthfulness or falsification bearing on a witness' credibility. Exactly which crimes fall under this definition is subject to disagreement. See 3 J. Weinstein & M. Berger, Weinstein's Evidence § 609[04], at 609-71 (1982).

2. Fed. R. Evid. 609(a) provides:
   (a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him 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 he 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.

3. Courts and commentators have taken several positions on the proper application of Rule 609(a)(1). The first line of cases applies the balancing test of Rule 609(a) to all witnesses in both criminal and civil proceedings with no discussion of the possible application of Rule 403. See, e.g., Lenard v. Argento, 699 F.2d 874, 894-95 (7th Cir.) (affirming civil trial court's exclusion of plaintiff's manslaughter conviction that had been offered by defendants to impeach credibility), cert. denied, 464 U.S. 815 (1983); Howard v. Gonzales, 658 F.2d 352, 358-59 (5th Cir. 1981) (civil trial court's exclusion of plaintiff's felony theft conviction affirmed as within trial court's "broad discretion under Rule 609(a)(1)"); Calhoun v. Baylor, 646 F.2d 1158, 1163 (6th Cir. 1981) (admission of defendant's prior felony conviction for impeachment purposes in civil case affirmed). Interestingly, when these courts paraphrase Rule 609(a), they almost always omit the words "to the defendant" in the balancing process. See, e.g., Lenard, 699 F.2d at 895; Howard, 658 F.2d at 359; Calhoun, 646 F.2d at 1163. This approach now seems outdated. The Fifth Circuit has since reconsidered the issue and reached a different result. Shows v. M/V Red Eagle, 695 F.2d 114, 118-19 (5th Cir. 1983) (Rule 403 applicable in all cases). The Seventh Circuit has recognized the issue, but expressly refused to decide it. Christmas v. Sanders, 759 F.2d 1284, 1289-93 (7th Cir. 1985).

The second line of cases applies Rule 403 in all civil cases regardless of how the balancing process of Rule 609 is interpreted. See, e.g., Radtke v. Cessna Aircraft Co., 707 F.2d 999, 1000 (8th Cir. 1983); Czajka v. Hickman, 703 F.2d 317, 319 (8th Cir. 1983); Shows v. M/V Red Eagle, 695 F.2d 114, 118 (5th Cir. 1983). These cases expressly avoided deciding whether the balancing provision of Rule 609(a)(1) applies only to criminal defendants because exclusion was always possible under the less exclusionary balancing of Rule 403. See, e.g., Czajka, 703 F.2d at 319; Shows, 695 F.2d at 119.

A third position taken is that the balancing provision of Rule 609(a)(1) applies only to criminal defendants, and so does not preempt Rule 403 when prior convictions are offered to impeach other types of witnesses. See Moore v. Volkswagenwerk, A.G., 575 F. Supp. 919, 921-22 (D. Md. 1983); Tussel v. Witco Chem. Corp., 555 F. Supp. 979, 982-85

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whether the balancing provision of Rule 609(a) was intended to apply to prior conviction impeachment evidence in civil cases. Courts that hold it applies in civil cases disagree on whether the Rule 609(a) balancing provision applies only to the defendant or to both parties. Courts also disagree on whether, in civil cases, Rule 609(a)(1)'s balancing provision preempts the more general balance of Federal Rule of Evidence 403 with respect to unfair prejudice.


The Third Circuit has reached a fourth position on this issue. See Diggs v. Lyons, 741 F.2d 577, 578-82 (3d Cir. 1984), cert. denied, 105 S. Ct. 2157 (1985). The Third Circuit held that despite the deficiencies of Rule 609(a), its legislative history and plain language requires that prior convictions offered for impeachment purposes be automatically admitted against civil plaintiffs. See Diggs, 741 F.2d at 579-82. Rule 403 cannot be applied to prior convictions offered for impeachment purposes, because it is preempted by the more specific Rule 609(a). See id. at 578-82. Whether prior convictions are also automatically admissible against civil defendants was not resolved. See id.

A related line of cases held that the balancing provision of Rule 609(a)(1) applies only to criminal defendants, and that prior conviction evidence is automatically admitted to impeach all witnesses in civil cases. See, e.g., Garnett v. Kepner, 541 F. Supp. 241, 244-45 (M.D. Pa. 1982) (Rule 403 was not applied on the ground that it is preempted by Rule 609(a)), superseded by Diggs v. Lyons, 741 F.2d 577 (3d Cir. 1984), cert. denied, 105 S. Ct. 2157 (1985); Ball v. Woods, 402 F. Supp. 803, 811 n.19 (N.D. Ala. 1975) (dictum) (recall that Shows is now controlling in the Fifth Circuit and that Alabama became part of the Eleventh Circuit in 1981), aff'd mem. sub. nom. Ball v. Shamblin, 529 F.2d 520 (5th Cir.), cert. denied, 426 U.S. 940 (1976); see also 3 D. Louisell & C. Mueller, Federal Evidence § 316, at 324 (1979); C. McCormick, McCormick on Evidence § 43, at 94 (3d ed. 1984).

Another case states that the phrase “to the defendant” in Rule 609(a) refers to the witness to be impeached, as he was the defendant in the prior criminal case in which he was convicted. As such, the balancing provision of Rule 609(a) is applicable to all witnesses. Green v. Shearson Lehman/Am. Express Inc., No. 85-1368 (E. D. Pa. Dec. 9, 1985) (available Dec. 10, 1985, on LEXIS, Genfed library, Dist file) (dictum).


5. Compare Lenard v. Argento, 699 F.2d 874, 894-95 (7th Cir.) (Rule 609(a)(1) balancing provision applied to prior conviction of civil plaintiff witness), cert. denied, 464 U.S. 815 (1983) and Calhoun v. Baylor, 646 F.2d 1158, 1163 (6th Cir. 1981) (Rule 609(a)(1) balancing provision applies to prior convictions offered to impeach civil defendant) with Diggs v. Lyons, 741 F.2d 577, 578-82 (3d Cir. 1984) (Rule 609(a)(1) balancing provision not applicable to impeach civil plaintiff; opinion unclear on whether Rule 609(a)(1) could exclude prior convictions of civil defendant), cert. denied, 105 S. Ct. 2157 (1985).

6. 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.

Fed. R. Evid. 403.

Part I of this Note reviews the problems inherent in the use of prior conviction evidence. Part II examines the legislative history of Rule 609(a) and demonstrates that Congress intended the balancing provision of Rule 609(a) to apply only to prior conviction evidence offered to impeach a criminal defendant. Part III discusses the practical aspects of applying Rule 609(a) in civil cases and the relationship of this Rule to Rule 403. Part IV considers the proper application of Rule 403 to prior conviction evidence offered for impeachment in civil cases. This Note concludes that Rule 609(a)'s balancing test should apply only in criminal cases, and that the general balancing test of Rule 403 should apply to prior conviction evidence offered in civil cases.

I. PROBLEMS INHERENT IN IMPEACHMENT THROUGH PRIOR CONVICTION

In most jurisdictions, a witness' credibility may be impeached by admitting evidence of the witness' prior convictions for felonies or crimen falsi to give the fact-finder additional information with which to evaluate a witness' testimony. This practice rests on the arguably tenuous theory that prior criminal activity relates to veracity.

by Rule 609(a) to impeach in civil cases, because Rule 609(a)(1) balancing process applies only to criminal defendants).


9. See Gordon v. United States, 383 F.2d 936, 940 (D.C. Cir. 1967) (purpose of impeachment is not to show accused has bad character), cert. denied, 390 U.S. 1029 (1968). Automatic disqualification of a witness at early common law may have been justified partly on the ground that it would serve as an additional punishment for the crime. See 2 J. Wigmore, supra note 8, § 519, at 726.

10. See 10 J. Moore, Federal Practice § 609.13[1], at VI-141 (1985); 3 J. Weinstein & M. Berger, supra note 1, § 609[02], at 609-55; cf. 3 D. Louisell & C. Mueller, supra note 3, § 315, at 316-17 ("widely disparate views as to the kinds of convictions which bear upon truthful disposition").

11. 3 J. Weinstein & M. Berger, supra note 1, § 609[02], at 609-55; see, e.g., 3 D. Louisell & C. Mueller, supra note 3, § 315, at 315-16; 2 C. Wright, Federal Practice and Procedure § 416, at 549 (1982); Surrratt, 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, 910 (1980). The relevance of prior criminal activity to veracity rests on assumptions about psychological truths on which we customarily base decisions. 3 J. Weinstein & M. Berger, supra note 1, § 609[2], at 609-54 to -55.
A person’s prior history of violence does not necessarily prove he is untruthful and a single act, especially one remote in time or circumstance, may be atypical of a witness’ character. Nevertheless, a person who has committed a crime may have less of a general propensity for truthfulness than a person with no prior criminal record, and is considered less likely to respect the witness’ oath. Although prior conviction evidence is not conclusive, a jury should be allowed to consider its impact on the witness’ credibility unless it is likely to be unduly prejudicial.

The use of prior conviction evidence, however, has the potential to create several problems, particularly unfair prejudice, which exists when evidence arouses irrational emotions out of proportion to its probative value. The jury may misuse this evidence by giving it undue weight or by using it for a purpose other than evaluation of credibility. A limiting instruction is often insufficient to combat improper use of inflammatory evidence by the jury.

The potential for undue prejudice is especially disturbing in criminal

12. See 3 D. Louisell & C. Mueller, supra note 3, § 315, at 316-17; J. Weinstein & M. Berger, supra note 1, § 609[02], at 609-55.
13. See 3 J. Weinstein & M. Berger, supra note 1, § 609[02], at 609-56.
14. See 2 C. Wright, supra note 11, § 416, at 549.

The object of a trial is not solely to surround an accused with legal safeguards but also to discover the truth. What a person is often determines whether he should be believed. When a defendant voluntarily testifies in a criminal case, he asks the jury to accept his word. No sufficient reason appears why the jury should not be informed what sort of person is asking them to take his word. In transactions of everyday life this is probably the first thing that they would wish to know.

State v. Duke, 100 N.H. 292, 293, 123 A.2d 745, 746 (1956); see Surratt, supra note 11, at 910-11.
17. See United States v. Field, 625 F.2d 862, 871 (9th Cir. 1980) (any prior conviction evidence is prejudicial); 3 J. Weinstein & M. Berger, supra note 1, § 609[02], at 609-56 to -57.
18. See 3 J. Weinstein & M. Berger, supra note 1, § 609[02], at 609-56 to -57.
21. If asked, the trial judge should instruct the jury that prior convictions should be considered only in connection with the witness’ credibility. See United States v. Lipscomb, 702 F.2d 1049, 1062 (D.C. Cir. 1983); Fed. R. Evid. 105; C. McCormick, supra note 3, § 59, at 151-52; see also 2 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions § 73.05, at 619-20 (3d ed. 1977) (evidence of prior conviction to be considered only in evaluating witness’ credibility).

We accept much self-deception on this. We say that the evidence of the prior convictions is admissible only to impeach the defendant’s 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
cases when the defendant testifies.\(^23\) Evidence of a defendant's prior conviction may detract from a jury's dispassionate consideration of the evidence.\(^24\) The jury may convict the defendant solely because it believes he is of bad character rather than on the merits of the case.\(^25\) Impeachment of a defense witness by prior convictions raises the possibility of the establishment of guilt by association.\(^26\)

The potential for undue prejudice resulting from prior conviction evidence also presents problems in civil cases. If a party or witness associated with a litigant is impeached by proof of a prior conviction, the jury may improperly believe the litigant is undeserving of justice.\(^27\)

A further problem with using prior conviction evidence in both criminal and civil cases is the deterrent effect that impeachment may have on a witness' decision to testify.\(^28\) The threat of undue prejudice may deter party witnesses from offering their testimony.\(^29\) Witnesses may refuse to testify to avoid embarrassing public disclosure of past antisocial behavior.\(^30\) The criminal defendant faces a "grievous dilemma."\(^31\) If he stays off the stand, the jury may believe that he is hiding something and there-

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\(^{23}\) Id.; see C. McCormick, supra note 3, § 59, at 151-52. Even with a limiting instruction, improper use of circumstantial evidence, such as prior convictions, has been cited as one of the most likely causes of conviction of an innocent person. E. Borchard, Convicting the Innocent xiv-xvi (1970).

\(^{24}\) See 3 D. Louisell & C. Mueller, supra note 3, § 315, at 317-18; C. McCormick, supra note 3, § 43, at 99. Criminal defendants who testify are subject to impeachment just as any other witness. Fitzpatrick v. United States, 178 U.S. 304, 316 (1900); 3A J. Wigmore, supra note 8, §§ 890-891, at 654-57; 2 C. Wright, supra note 11, § 416, at 559-61. Evidence of prior convictions of a criminal defendant is especially prejudicial when the prior crime is similar to the crime charged. See Brown v. United States, 370 F.2d 242, 243-44 (D.C. Cir. 1966).


\(^{27}\) United States v. Palumbo, 401 F.2d 270, 272-73 (2d Cir. 1968), cert. denied, 394 U.S. 947 (1969); Richards v. United States, 192 F.2d 602, 605 (D.C. Cir. 1951), cert. denied, 342 U.S. 946 (1952); 3 D. Louisell & C. Mueller, supra note 3, § 315, at 317; see also Mills v. Estelle, 552 F.2d 119, 120 (5th Cir.) (jury will be less reluctant to convict a person whom they know to have been convicted of other crimes), cert. denied, 434 U.S. 871 (1977).


\(^{30}\) See supra note 28.


\(^{32}\) C. McCormick, supra note 3, § 43, at 99.
fore presume him guilty. If he testifies, however, he faces the dangers of impeachment. Regardless of the reason, a witness' decision not to testify is detrimental to the judicial system's interest in finding the truth.

II. DEVELOPING THE RULE: THE TRADITIONAL APPROACH TO IMPEACHMENT BY PRIOR CONVICTION AND THE LEGISLATIVE HISTORY OF RULE 609(a)

A. Impeachment by Prior Conviction Prior to Rule 609(a)

Judicial treatment of prior conviction evidence before the adoption of Rule 609(a) was inadequate. The traditional rule of impeachment by prior conviction admits evidence of convictions of felonies and crimen falsi in both civil and criminal cases. This rule fails to resolve the problems inherent in prior conviction impeachment.

The approach that first dealt effectively with the problems inherent in prior conviction impeachment was the balancing test enunciated by the Court of Appeals for the District of Columbia Circuit in Luck v. United

32. See id. A criminal defendant faces the additional problem of testifying to preserve his right to appeal the trial court's determination of the admissibility of his prior conviction. See Luce v. United States, 105 S. Ct. 460, 464 (1984).


34. See Fed. R. Evid. 609 advisory committee note; see, e.g. Fla. Stat. Ann. § 90.610 (West 1979); Md. Cts. & Jud. Proc. Code Ann. § 10-905 (1984); N.Y. Civ. Prac. Law § 4513 (McKinney 1963); Va. Code § 19.2-269 (1975). The scope of the evidence admitted under the traditional rule is restricted to the conviction, its time, and place. Note, Other Crimes Evidence at Trial: Of Balancing and Other Matters, 70 Yale L.J. 763, 776 (1961). The witness is often allowed to make a brief denial of guilt. C. McCormick, supra note 3, § 43, at 99; 4 J. Wigmore, supra note 8, § 1117, at 251 ("a harmless charity"). This approach fails to resolve the problems inherent to impeachment by prior conviction. See supra notes 10-13 and accompanying text. Since prior convictions are automatically admissible, no mechanism enables judges to control the risk of undue prejudice and the possibility of an improper verdict. Furthermore, the jury may be denied the opportunity to hear potentially valuable evidence due to the deterrent effect of potential impeachment described above. See supra notes 28-33 and accompanying text. Although it is possible to exclude the prior conviction if it is similar to the crime charged, this is only a partial solution. See infra notes 41, 95 and accompanying text.

Other approaches are much more limiting. One method often proposed is to admit only prior convictions of crimen falsi. See 3 D. Louisell & C. Mueller, supra note 3, § 315, at 319-20. Proponents of this approach argue that convictions other than those for crimen falsi have no logical relationship to veracity and that their admission too often results in undue prejudice. Id. This rule, however, is too restrictive. Prior convictions for offenses other than crimen falsi may also be probative of credibility. See supra notes 11, 14-15 and accompanying text. An absolute restriction keeps probative evidence from the jury on the assumption that they will always misuse it. It also often allows a witness to appear to have no prior record when the facts are to the contrary.

Some variations of this rule are even more limiting. The American Law Institute Model Code of Evidence takes the same view, see Model Code of Evidence Rule 106 (1942), but also excludes any evidence where its probative value is outweighed by the risk of substantial danger of undue prejudice. Model Code of Evidence Rule 303(b) (1942). These proposals have not been widely accepted, probably because they may exclude even prior convictions of crimen falsi, which are generally regarded as relevant to the witness' credibility. See supra notes 8-13 and accompanying text.

35. See supra notes 10-33 and accompanying text.
Although ultimately rejected by Congress,\(^{37}\) the *Luck* approach significantly influenced the formulation of Rule 609(a).\(^{38}\) In interpreting a District of Columbia statute,\(^{39}\) the *Luck* court held that the judge could exclude prior conviction evidence when the prejudicial effect of impeachment far outweighed the relevance of the prior conviction to the issue of credibility.\(^{40}\) Factors considered in the balance included the nature of the offense and its relevance to the witness' credibility, the remoteness in time of the offense and the similarity of the offense to the crime charged.\(^{41}\)

The court placed the burden of proof on the opponent of the evidence to show reasons warranting exclusion.\(^{42}\) Admission of such evidence was favored,\(^{43}\) but exclusion was possible when the cost of admitting the evidence exceeded its benefits.\(^{44}\) Thus, the problems of undue prejudice and the deterrent effect on witnesses could be minimized. By 1970, most federal courts had adopted the *Luck* approach\(^{45}\) despite arguments that the

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36. 348 F.2d 763 (D.C. Cir. 1965).
37. See District of Columbia Court Reform and Criminal Procedure Act, Pub. L. No. 91-358, § 133, 84 Stat. 473, 550-51 (1970) (prior conviction evidence "may" be admitted changed to "shall" be admitted, thus mandating admission); see also United States v. Hairston, 495 F.2d 1046, 1049-51 (D.C. Cir. 1974) (same); 10 J. Moore, *supra* note 10, § 609.01[1.-7], at VI-111.
39. The statute provided, in relevant part:
   
   A person is not incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of [a] crime. The fact of conviction may be given in evidence to affect his credibility as a witness, either upon the cross-examination of the witness or by evidence aliunde; and the party cross-examining him is not bound by his answers as to such matters.
   
40. *Luck*, 348 F.2d at 768. *Luck* and its progeny held that the potential for prejudice was high with the use of prior conviction evidence, particularly where the conviction is similar to the crime charged. Gordon v. United States, 383 F.2d 936, 940 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968). The *Luck* majority also recognized the potential problems created by the deterrent effect of potential impeachment, particularly when the witness is a criminal defendant. The court held that the cause of truth may be helped more by letting the jury hear the defendant rather than the defendant foregoing that opportunity due to fear of prejudice founded on a prior conviction. *Luck*, 348 F.2d at 768-69; see Brown v. United States, 370 F.2d 242, 244 (D.C. Cir. 1966).
   
   For an example of a defendant foregoing the opportunity to testify due to fear of undue prejudice from a prior conviction, see United States v. Palumbo, 401 F.2d 270, 272 (2d Cir. 1968), *cert. denied*, 394 U.S. 947 (1969).
43. See id. at 939.
44. Id. See *supra* notes 40-41 and accompanying text.
Luck test excluded probative evidence\(^46\) and that there were no meaningful criteria to guide the trial court's exercise of discretion.\(^47\) In the face of heavy opposition to Luck,\(^48\) Congress amended the District of Columbia statute in 1970 to mandate impeachment by prior conviction.\(^49\)

B. Legislative History of Rule 609(a)

Rule 609(a) provoked extensive legislative controversy.\(^50\) The rule that was finally adopted was the result of a compromise. The ambiguity of Rule 609(a) stems from a legislative oversight caused by an almost exclusive focus on criminal trials, particularly in the Conference Committee that drafted the existing version of Rule 609(a).\(^51\)

The first draft of the Advisory Committee reflected the traditional rule.\(^52\) The Committee soon issued a new draft with a balancing standard resembling that of Rule 403.\(^53\) This proposal was criticized as contrary to the intent Congress expressed the year before when it amended

\(^{46}\) See 10 J. Moore, supra note 10, ¶ 609.01[1.-7], at VI-111 (citing Crime in the National Capital, Part 4: Hearings Before the Senate Comm. on the District of Columbia, 91st Cong., 1st Sess. 1396-97 (1969)).


\(^{48}\) The Luck balancing approach was opposed by the Department of Justice and the District of Columbia Bar Association. 10 J. Moore, supra note 10, ¶ 609.01[1.-7], at VI-110 to -12.

\(^{49}\) See supra note 37 and accompanying text.

\(^{50}\) See Garnett v. Kepner, 541 F. Supp. 241, 244 (M.D. Pa. 1982); 3 D. Louisell & C. Mueller, supra note 3, ¶ 314, at 284; 10 J. Moore, supra note 10, ¶ 609.02, at VI-134; S. Saltzburg & K. Redden, supra note 8, at 364.

\(^{51}\) See infra notes 74-81 and accompanying text.

\(^{52}\) (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 the punishment.

\(^{46}\) F.R.D. 161, 295-96 (1969). The proposed rule gave judges no discretion to exclude prior convictions. Although the Advisory Committee recognized the dangers inherent in the use of such evidence, particularly when a criminal defendant is impeached, it felt that exclusion was not justified, as the “[d]angers of unfair prejudice . . . tend to disappear or diminish.” See Rule 609(a) advisory committee note, 46 F.R.D. 161, 296-97 (1969). Arguments that convictions for offenses other than crimine falsi are irrelevant to credibility were considered unconvincing. See id.

\(^{53}\) The Advisory Committee reconsidered the dangers it had previously found immaterial, and issued a new draft. See Rule 609(a) advisory committee note, 51 F.R.D. 315, 391-92 (1971) (“With these objections in mind, the Advisory Committee has incorporated in the proposed rule basic safeguards, in terms applicable to all witnesses but of particular significance to the accused who elects to testify.”). The new draft provided:

(a) General Rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime, except on a plea of nolo contendere, 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 the punishment, unless (3), in either case, the judge determines that the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice.

\(^{51}\) F.R.D. at 391.
the District of Columbia statute.54 Under heavy criticism,55 the Committee reissued its original proposal,56 as it would have been impolitic for the Supreme Court to suggest Luck's revival.57

The House Special Subcommittee on Reform of Federal Criminal Laws amended the bill to admit prior conviction evidence for impeachment unless the dangers of unfair prejudice outweighed the probative value of the conviction.58 However, citing concerns of relevance, undue prejudice and the deterrent effect, particularly when a criminal defendant is impeached, the House Committee on the Judiciary amended the bill to permit admission only of prior convictions of crimen falsi.59

Although some Representatives recognized that the rule as adopted would apply in both civil and criminal cases,60 the extensive floor debate in the House focused almost entirely on criminal cases.61 Examples given to illustrate concepts in the debates were mostly in the context of criminal cases.62 The proposed rule's impact on criminal defendants was the chief concern of both the proponents and opponents of the Commit-

54. Senator McClellan, then chairman of the Judiciary Committee, stated that the proposal was "in fact a direct assault on the will of Congress as recently expressed" by the rejection of Luck the year before. See 117 Cong. Rec. 29,894 (1971).
55. See id. The Advisory Committee claimed that it had been more guilty of oversight than of disrespect of Congress because it was unaware of Congress' rejection of Luck. See Rules of Evidence: Hearings Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary, 93d Cong., 1st Sess., on Proposed Rules of Evidence, Ser. No. 2, 29 (1973) (testimony of Prof. Cleary).
56. See 56 F.R.D. 183, 269-70 (1972). Thus, the proposal submitted to Congress was the traditional rule as encompassed in the Advisory Committee's original draft. See supra note 52 and accompanying text.
61. See id. at 2375-82. The debates were concerned mainly with the relevance of past criminal activity to credibility, and the current proposal's effect on criminal trials. The proponents of the proposal were led by Representative Dennis. They argued that the undue prejudice resulting from the admission of irrelevant prior convictions conflicted with the principle that a criminal defendant should not be convicted solely because he is of bad character. See id. at 2377 (remarks of Rep. Dennis). Representative Dennis argued that a significant proportion of miscarriages of justice occur due to undue prejudice or the deterrent effect. See id. Opponents of the Committee's view focused their concerns almost exclusively on the proposal's impact on criminal trials. Led by Representative Hogan, they argued that the Committee's rule excluded evidence that was probative of credibility. See id. at 2376, 2381 (remarks of Reps. Hogan & Lott). In addition, they believed that the rule could allow a criminal defendant with a prior criminal history to appear to have an unblemished record. See id. at 2376 (remarks of Rep. Hogan). They also argued that the proposal denied a criminal defendant the opportunity to impeach a government witness. See id. Furthermore, the proposal rejected the prevailing view, the Advisory Committee's view and the mandate of Congress that had been expressed in the rejection of Luck. Id. at 2376-77 (remarks of Rep. Hogan).
62. See supra note 61.
Following the debate and the rejection of an amendment that would have restored the Subcommittee's version, the House voted to accept the Committee's version.

In the Senate Judiciary Committee hearings, there was some discussion of the use of impeachment evidence in civil cases, which could be interpreted as a recognition that the rule as developed would apply in all cases. The Judiciary Committee rejected the House version of the bill because it thought the dangers of unfair prejudice were far greater when the witness was a criminal defendant. The Committee proposed a rule whereby criminal defendants could be impeached only by prior convictions of crimen falsi. Prior convictions were admissible to impeach all other witnesses only when the probative value of the evidence outweighed its prejudicial effect.

The distinction between criminal defendants and other witnesses made in the Committee's proposal apparently was not recognized during debates on the Senate floor. Civil cases, and the impact of the various proposed rules on those cases, went unmentioned. As in the House, the debate focused on the effect of impeachment on criminal cases. The Senate did not accept the recommendation of the Judiciary Committee and instead adopted the version of the rule that the Supreme Court had submitted to Congress.

This almost exclusive concern with criminal cases was equally apparent in the Conference Committee. Although no record preserves the Committee's deliberations, several clues support this conclusion. A significant number of the legislators on the Conference Committee had made statements that illustrated their apparent focus on the proposed rule's application in criminal cases. In addition, the Committee report

63. See id.
64. Id. at 2375, 2381.
65. See id. at 2393-94.
70. See 120 Cong. Rec. 37,076-80 (1974).
71. See id. Senator McClellan stated:
   We have gone pretty far already in trying to protect criminals and granting every advantage to them against society. . . . [This rule would deny the jury] the right or the opportunity to weigh the testimony of the defendant in light of the fact that the defendant is a convicted felon.
   Id. at 37,076.
72. See id. at 37,075-76, 37,083.
73. See id.
75. In discussing the balancing provision of the final version of Rule 609(a)(1), Repre-
used words common to criminal trials, such as "defendant" instead of "party," and the verb "convict." The Conference Committee determined that the prejudicial effect to be weighed against the probative value of the conviction is "specifically the prejudicial effect to the defendant." Other dangers, such as embarrassment of witnesses, were not believed sufficient to warrant exclusion. The Conference Committee stated that the need for the trier of fact to have information about the credibility of a nondefendant witness outweighed the danger of unfair prejudice. This reference to nondefendant witnesses apparently referred to prosecution witnesses in criminal trials.

Although it was recognized that the rule as drafted would apply to both civil and criminal cases, it is clear that the balancing provision of Rule 609(a) was intended only for criminal defendants.

sentative Hungate stated, "The rule, in practical effect, means that in a criminal case the prior felony conviction of a prosecution witness may always be used. There can be no prejudicial effect to the defendant if he, the defendant, impeaches the credibility of a prosecution [sic] witness." 120 Cong. Rec. 40,891 (1974). Representative Dennis discussed the balancing provision of the final version of Rule 609(a)(1) by stating:

... [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; and now the Government is going to have the burden of proof if it want's to go beyond cross-examination about the type of crime which does in fact bear strictly on credibility.

Id. at 40,894. For additional statements of Representative Dennis, see supra notes 60-61. For relevant statements of Senator McClellan, see 120 Cong. Rec. 37,077 (1974) ("The fact that a person has committed such a serious offense in the past clearly bears on whether he would lie under oath where his life or liberty was in jeopardy."). See supra note 71. Senator Hart's concerns focused on the criminal defendant's grievous dilemma. See 120 Cong. Rec. 37,078-79 (1974). See supra notes 31-32 and accompanying text. The remarks of Senators Hruska and Burdick also focused on criminal trials. See 120 Cong. Rec. 37,077, 37,079 (1974).

77. See id. at 9-10, reprinted in 1974 U.S. Code Cong. & Ad. News at 7098, 7102-03. ("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.").
80. See id. at 10, reprinted in 1974 U.S. Code Cong. & Ad. News at 7103. ("It was the judgment of the Conference that the danger of prejudice to a non defendant witness is outweighed by the need for the trier of fact to have as much relevant evidence on the issue of credibility as possible.").
81. See 120 Cong. Rec. 40,891 (1974) (remarks of Rep. Hungate) ("[t]he rule . . . means that in a criminal case the prior felony convictions of a prosecution witness may always be used"); id. at 40,894 (remarks of Rep. Dennis) ("now a defendant can cross examine a government witness about any of his previous felony convictions; he can always do it").
82. See supra notes 58, 66.
III. APPLICATION OF RULE 609(a)

The application of Rule 609(a)(1) in civil cases presents several problems. The complexity of applying Rule 609(a) results not only from the Conference Committee's poor drafting,\(^8\) but also from the conflicting goals of the Rule.\(^9\) Rule 609(a) is designed to protect the innocent by preventing undue prejudice\(^6\) and by reducing the deterrent effect that discourages party witnesses from testifying.\(^7\) At the same time, Rule 609(a) is intended to protect the opposing party's case from misrepresentation that a convicted witness has no prior record and that he can be trusted.\(^8\) The result of these conflicting goals and the Conference Committee's poor drafting is that the Rule cannot be applied sensibly in civil cases.\(^9\)

With the exception of the balancing provision, the entirety of Rule 609 applies to all witnesses in all proceedings in federal courts when evidence of prior convictions is offered to impeach a witness' credibility.\(^7\) When prior convictions are offered for purposes other than impeachment,\(^9\) admission is governed by the general balancing provisions of Rule 403.\(^9\) Rule 403 also governs the scope of the evidence admitted under Rule 609(a).\(^9\)

Unlike the traditional rule and Rule 403, the burden of proof under

\(^8\) See Moore v. Volkswagenwerk, A.G., 575 F. Supp. 919, 921 n.1 (D. Md. 1983) (difficulty in applying Rule 609(a)(1) in civil cases may be result of legislative oversight). The drafters of the Uniform Rules of Evidence apparently recognized the deficiency of Rule 609. Compare Fed. R. Evid. 609(a)(1) with Unif. R. Evid. 609(a)(1) ("to the defendant" replaced with "to a party or witness").


\(^10\) See supra notes 17-27 and accompanying text.

\(^11\) See supra notes 28-33 and accompanying text.

\(^12\) See supra notes 14-16 and accompanying text.

\(^13\) See C. McCormick, supra note 3, § 43, at 94; 10 J. Moore, supra note 10, § 609.03, at VI-135-36.

\(^14\) Other purposes for admitting prior convictions include motive, identification and corroboration of testimony. See, e.g., Roshan v. Fard, 705 F.2d 102, 104 (4th Cir. 1983) (motive); Bowden v. McKenna, 600 F.2d 282, 284 (1st Cir.) (identification), cert. denied, 444 U.S. 899 (1979); Rozier v. Ford Motor Co., 573 F.2d 1332, 1346-47 (5th Cir. 1978) (corroboration of testimony).

\(^15\) Roshan v. Fard, 705 F.2d 102, 104 (4th Cir. 1983); Bowden v. McKenna, 600 F.2d 282, 284 (1st Cir.), cert. denied, 444 U.S. 899 (1979); Rozier v. Ford Motor Co., 573 F.2d 1332, 1346-47 (5th Cir. 1978).

Rule 609 is on the proponent of the evidence to demonstrate that its probative value exceeds its prejudicial effect. The court has broad discretion in its determination under the balancing test, and can be reversed only for abuse of that discretion.

Rule 609(a) distinguishes between both the types of offered convictions and types of witnesses. For all witnesses, crimen falsi are automatically admissible for impeachment purposes. The court has no discretion to exclude the evidence under either Rule 609(a) or Rule 403.

In criminal cases, convictions for felonies other than crimen falsi

94. See United States v. Hendershot, 614 F.2d 648, 653 (9th Cir. 1980); 10 J. Moore, supra note 10, § 609.14[3], at VI-147 to -48.


96. United States v. Field, 625 F.2d 862, 871-72 (9th Cir. 1980); United States v. Preston, 608 F.2d 626, 639 (5th Cir. 1979), cert. denied, 446 U.S. 940 (1980). An in limine hearing will also encourage a witness to testify by allowing him to know in advance whether he will be impeached. See United States v. Jackson, 405 F. Supp. 938, 942 (E.D.N.Y. 1975). The trial judge must determine on the record whether the probative value of the proffered evidence outweighs the prejudicial effect before admitting the evidence. This ensures that he has taken the relevant considerations into account. See Preston, 608 F.2d at 639.

97. The distinction is between crimes involving dishonesty, Fed. R. Evid. 609(a)(2), and felonies, Fed. R. Evid. 609(a)(1).

98. The plain language of Rule 609(a) distinguishes between defendants and other witnesses. Fed. R. Evid. 609(a). Prosecution witnesses are always subject to impeachment. See infra note 104 and accompanying text.


101. See United States v. Kuecker, 740 F.2d 496, 502 (7th Cir. 1984); United States v. Wong, 703 F.2d 65, 67-68 (3d Cir.) (per curiam), cert. denied, 464 U.S. 842 (1983); United States v. Kiendra, 663 F.2d 349, 354 (1st Cir. 1981); United States v. Leyva, 659...
are admissible subject to the balancing test of Rule 609(a). This balancing test may also be employed to exclude a conviction of a defense witness in a criminal case when the balance indicates it is appropriate. Prior convictions offered to impeach prosecution witnesses may never be excluded under Rule 609(a) because no prejudice to the defendant would result. To be admitted, however, these convictions must satisfy the other subdivisions of Rule 609.

Both the legislative history of Rule 609(a) and an analysis of its application reveal that the balancing provision of Rule 609(a) was intended only for criminal defendants. The balancing test of Rule 609(a) is much more exclusionary than that of Rule 403. This departure from the general balancing test of Rule 403 can be justified only by the special needs of criminal defendants. A stringent balancing test effectively reduces undue prejudice from prior conviction evidence.

In addition, literal application of the Rule in civil cases would result in a differentiation between the parties. Although it has been held that the plain language of Rule 609(a) requires the balancing test to be applied in all cases, logic dictates the opposite. The words "to the defendant" suggest reference to a criminal defendant. As contrasted with criminal trials, there is no reason to differentiate between the parties.

F.2d 118, 122 (9th Cir. 1981), cert. denied, 454 U.S. 1156 (1982); United States v. Toney, 615 F.2d 277, 279-80 (5th Cir.), cert. denied, 449 U.S. 985 (1980). But see United States v. Dixon, 547 F.2d 1079, 1083 n.4 (9th Cir. 1976) (dictum) (in some cases, trial court may have discretion to exclude prior conviction evidence under Rule 403).

103. See S. Saltzburg & K. Redden, supra note 8, at 520; 3 J. Weinstein & M. Berger, supra note 1, § 609[05], at 609-81.
105. The other subdivisions of Rule 609 refer to a ten-year age limit in proffered prior convictions, see Fed. R. Evid. 609(b), the effect of pardon or annulment, see Fed. R. Evid. 609(c), the handling of juvenile adjudications, see Fed. R. Evid. 609(d), and convictions subject to a pending appeal, see Fed. R. Evid. 609(e).
106. Compare Fed. R. Evid. 609(a)(1) (evidence admitted only if its probative value outweighs its prejudicial effect to the defendant) with Fed. R. Evid. 403 (evidence may be excluded if its probative value is substantially outweighed by its prejudicial effect). Thus, the burden of proof in the Rule 609(a) balancing is on the proponent of the impeachment evidence, while the burden in the Rule 403 balancing is placed on the opponent of the evidence. C. McCormick, supra note 3, § 43, at 94 n.9.
108. See 3 D. Louisell & C. Mueller, supra note 3, § 316, at 324 n.26; see also S. Saltzburg & K. Redden, supra note 8, at 520 ("impeachment has always been a two way street").
in civil cases. One court held that unless amended, Rule 609(a) should be applied literally in civil cases, despite possible "bizarre results" in future cases. Congress intended the balancing provision to apply in criminal trials only. Therefore, the proper treatment of prior convictions offered to impeach witnesses in civil cases must be determined. This requires analysis of whether such convictions are automatically admissible or whether the general balancing provision of Rule 403 applies when a civil party offers prior convictions to impeach its opponent's witnesses.

IV. APPLICATION OF RULE 403 TO CIVIL TRIALS

The central issue in determining whether Rule 403 can be applied in civil cases is whether the more specific Rule 609 preempts Rule 403 in the civil context. Courts disagree on this issue. A statutory provision that applies to a specific situation will usually preempt a more general rule that would otherwise apply. Thus Rule 403 should apply when no specific rule covers the issue under consideration. As discussed above, the Rule 609(a) balancing test applies only to criminal defendants. Because Rule 609 offers no test for balancing probative value against prejudicial effect in civil cases, Rule 403 should be applied to prevent possible unfair prejudice.

Moreover, examination of the principles governing the application of Rule 403 demonstrates that its balancing test is better suited for civil

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111. 3 D. Louisell & C. Mueller, supra note 3, § 316, at 324 n.26.
112. Diggs v. Lyons, 741 F.2d 577, 582 (3d Cir. 1984), cert. denied, 105 S. Ct. 2157 (1985) ("mandatory admission of all felony convictions ... may in some cases produce unjust and even bizarre results"). Diggs involved prior convictions offered to impeach a civil plaintiff. The question of whether prior convictions offered to impeach a civil defendant would be subject to the Rule 609(a)(1) balancing process was not resolved. See id. at 577-82. Literal application of Rule 609(a) in civil cases would also produce even more bizarre results. Prior convictions offered to impeach a civil defendant would be subject to the balancing process, while those convictions offered against civil plaintiffs would be automatically admitted. See Fed. R. Evid. 609(a)(1).
113. See supra notes 50-83 and accompanying text.
114. Most of the courts that have addressed this issue have framed their inquiry in terms of whether Rule 403 can be used. See cases discussed supra note 3.
115. See cases discussed supra note 3.
116. See supra note 7.
118. See id. The Advisory Committee note to Rule 403 provides that:

The rules which follow in this Article are concrete applications evolved for particular situations. However, they reflect the policies underlying the present rule, which is designed as a guide for the handling of situations for which no specific rules have been formulated.

Fed. R. Evid. 403 advisory committee note. This quote apparently refers only to the rules in Article IV. However, the Advisory Committee note has been cited for this point in connection with the relationship of Rule 403 to Rule 609(a). See United States v. Kiendra, 663 F.2d 349, 354 (1st Cir. 1981).
119. See supra notes 50-83 and accompanying text.
trials than the balancing test of Rule 609(a). The added protection afforded to criminal defendants in Rule 609(a) is unnecessary in civil trials.\(^{120}\) Rule 403 favors admission of relevant evidence.\(^{121}\) Although the court has considerable discretion in the application of Rule 403,\(^{122}\) that discretion should be used sparingly.\(^{123}\) Before relevant evidence is excluded, other alternatives, such as limiting instructions, should be considered.\(^{124}\)

Applying Rule 403 in civil cases conforms with the principles of the Federal Rules of Evidence.\(^{125}\) The thrust of the Rules is that probative evidence should not be excluded absent compelling reasons.\(^{126}\) When exclusion is necessary, Rule 403 can be used to exclude unduly prejudicial prior conviction evidence in a civil case. By preventing undue prejudice, and the possible deterrent effect resulting from fear of undue prejudice, this application of Rule 403 will further the cause of justice in civil cases by advancing accuracy and fairness through judicial flexibility.\(^{127}\)

**CONCLUSION**

An analysis of both the legislative history and practical application of Rule 609(a)(1) demonstrates that the Rule's balancing provision was intended to apply only to criminal defendants. In civil cases, the admission of prior conviction evidence offered for impeachment should be governed

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\(^{120}\) See S. Saltzburg & K. Redden, *supra* note 8, at 520 (special protection of Rule 609(a)(1) intended to protect only criminal defendant).

\(^{121}\) See 10 J. Moore, *supra* note 10, § 403.02[3], at IV-69 to -73; S. Saltzburg & K. Redden, *supra* note 8, at 138, *see also* 1 J. Weinstein & M. Berger, *supra* note 1, § 403[2], at 403-17 ("Rule 403 should be applied infrequently and cautiously by trial judges"); 1 J. Wigmore, Evidence § 10A, at 680 (P. Tillers rev. ed. 1983) (need for exclusion must be clear as exclusion is a drastic remedy).


\(^{123}\) See Wilson v. Attaway, 757 F.2d 1227, 1242 (11th Cir. 1985); Ebanks v. Great Lakes Dredge & Dock Co., 688 F.2d 716, 722-23 (11th Cir. 1982), cert. denied, 460 U.S. 1083 (1983); 2 S. Saltzburg & K. Redden, *supra* note 8, at 139 (balance maximum probative value against likely prejudical effect); 1 J. Weinstein & M. Berger, *supra* note 1, § 403[01], at 403-7.

\(^{124}\) Fed. R. Evid. 403 advisory committee note; 1 J. Weinstein & M. Berger, *supra* note 1, § 403[01], at 403-8.


\(^{127}\) See Fed. R. Evid. 102 ("These rules shall be construed to secure fairness in administration . . . and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."). See *supra* note 125.
by the less exclusionary balancing provision of Rule 403. This approach excludes prior conviction evidence that is probative of credibility only when there is a substantial likelihood of undue prejudice. This result comports with the principles of the Federal Rules of Evidence and the intent of Congress.

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