

## NOTES

### IMPEACHMENT WITH PRIOR CONVICTIONS UNDER FEDERAL RULE OF EVIDENCE 609(a)(1): A PLEA FOR BALANCE

At a time when criminal law reform is at a peak, Congress should reconsider the unfair advantage given to criminal defendants under Federal Rule of Evidence 609(a)(1),<sup>1</sup> governing the admissibility of prior convictions. Consider the following hypothetical: A defendant, on trial for kidnapping and murder, raises the defense of alibi, to which the accused and her witnesses will testify. All have prior felony convictions, and the prosecutor plans to use certified records of these judgments for impeachment purposes. The Government's case relies heavily on the testimony of a witness who can refute the alibi. This witness, however, also has a prior felony conviction, and defense counsel plans to use this evidence to impeach.<sup>2</sup>

Under Federal Rule of Evidence 609(a)(1), the court must submit the defendant's prior conviction, if not a *crimen falsi*,<sup>3</sup> to a balancing test, weighing the probative value of the conviction against any prejudicial effect to the defendant.<sup>4</sup> The admission of a defense witness' prior convictions often turns on the judge's interpretation of the legislative intent

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1. Rule 609(a)(1) of the Federal Rules of Evidence 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, . . .

Several states have adopted identical or substantially similar versions of the Federal Rules of Evidence. See 3 J. WEINSTEIN & BERGER, WEINSTEIN'S EVIDENCE ¶ 609[12] (1982).

2. The court may exclude from evidence prior convictions that are neither felonies nor *crimen falsi*, see *infra* notes 3 & 64, are the subject of a pardon, or are the result of a juvenile adjudication. FED. R. EVID. 609.

3. The term "*crimen falsi*" refers to "crimes in the nature of perjury or subornation of perjury, false statement, criminal fraud, embezzlement, false pretense, or any other offense which involves deceitfulness, untruthfulness, or falsification bearing on the witness' propensity to testify truthfully." BLACK'S LAW DICTIONARY 335 (5th ed. 1979).

Prior convictions for felonies that are *crimen falsi* are automatically admissible pursuant to rule 609(b). See *infra* note 47.

4. FED. R. EVID. 609(a)(1).

underlying rule 609(a)(1).<sup>5</sup> Most courts hold that the prior convictions of a prosecution witness are automatically admissible.<sup>6</sup>

Rule 609(a)(1) creates a serious evidentiary imbalance, particularly in cases in which parties rely heavily upon witnesses' credibility. The defense may automatically impeach a government witness and yet conceal the defendant's convictions and possibly those of the defense witnesses. Prosecutors are at an obvious disadvantage.

Part I of this Note discusses the historical development of prior conviction impeachment.<sup>7</sup> Part II reviews decisions construing rule 609(a)(1) as either granting or denying the accused an automatic right to impeach.<sup>8</sup> Part III analyzes possible alternatives to the present rule and offers an amendment to accommodate the significant policies implicated by prior conviction impeachment.<sup>9</sup> Finally, this Note concludes that Congress should strike a fair balance between the accused's rights and society's interest in law and order.<sup>10</sup>

## I. THE EVOLUTION OF PRIOR CONVICTION IMPEACHMENT

### A. *Prior Convictions: From Disqualifying to Impeaching*

Early common law forbade persons convicted of "infamous crimes" from testifying in court.<sup>11</sup> The common-law disqualification constituted part of the punishment for the crime and also reflected the belief that an ex-convict lacked credibility.<sup>12</sup> Absolute disqualification and the consequent loss of evidence proved too impractical. Gradually, legislators and judges reshaped the rule.<sup>13</sup>

In 1918, the Supreme Court in *Rosen v. United States*<sup>14</sup> abolished the common-law rule that a prior felony conviction disqualified a witness from testifying. In *Rosen*, a convicted felon testified against his co-con-

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5. See *infra* notes 54-64 and accompanying text.

6. See *infra* note 50 and accompanying text. But see *infra* notes 68-77 and accompanying text (admission not automatic).

7. See *infra* notes 11-53 and accompanying text.

8. See *infra* notes 54-81 and accompanying text.

9. See *infra* notes 82-109 and accompanying text.

10. See *infra* note 110 and accompanying text.

11. C. McCORMICK, *McCORMICK ON EVIDENCE* 93 (3d ed. 1984). "Infamous crimes" include treason, any felony, obstruction of justice, or any misdemeanor involving dishonesty. *Id.*

12. See WEINSTEIN, *supra* note 1, at ¶ 600-54.

13. See generally 2 J. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 488 (Chadbourn rev. 1979) (collecting statutes dealing with witness qualifications).

14. 245 U.S. 467 (1918).

spirator.<sup>15</sup> The Court reasoned that anyone with relevant information should testify, allowing the fact-finder to determine the witness' credibility and the weight of his testimony.<sup>16</sup> Under the theory espoused in *Rosen*, a witness' prior convictions do not bear on competency, but rather on credibility.

The use of prior convictions to impeach a witness' credibility has not gained universal approval. Courts and commentators argue that proof of past criminal conduct is not probative of a witness' honesty.<sup>17</sup> Moreover, prior criminal conviction evidence may be highly prejudicial to the defendant as a witness because the jury might convict him partly on the basis of his past behavior.<sup>18</sup> A defendant with relevant information therefore may be reluctant to testify.<sup>19</sup>

Others argue that prior convictions serve as effective impeachment devices. Justice Holmes provides the most frequently advanced rationale for admitting prior crimes into evidence. A prior conviction, Justice Holmes explained, displays a "general readiness to do evil," from which the jury may "infer a readiness to lie in a particular case."<sup>20</sup> Another rationale for admitting prior convictions is that the jury has the right to know a witness' background.<sup>21</sup> Notwithstanding the arguments for and against admitting prior convictions, this impeachment method remains "firmly entrenched" in American law.<sup>22</sup>

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15. *Id.* at 468-69.

16. *Id.* The Court believed that the common-law rule barring witnesses, made applicable to federal courts by the Judiciary Act of 1789, was already "seriously shaken" by two earlier decisions. *Id.* at 460 (citing *Logan v. United States*, 144 U.S. 263 (1892) and *Benson v. United States*, 146 U.S. 325 (1892)). In addition, the Court noted that the Federal Criminal Code of 1909 changed the common-law rule by allowing persons convicted of perjury to testify. 245 U.S. at 471.

17. See *State v. Boucher*, 478 A.2d 218, 220 (Vt. 1984) ("the probative value of prior crimes for evaluating credibility is suspect at best"); see also Nichol, *Prior Crime Impeachment of Criminal Defendants: A Constitutional Analysis of Rule 609*, 89 W. VA. L. REV. 391, 407 (1980); Spector, *Rule 609: A Last Plea for Its Withdrawal*, 32 OKLA. L. REV. 334, 345 (1979).

18. See, e.g., 3 D. LOUISELL & C. MUELLER, *FEDERAL EVIDENCE* 317-18 (1979); MCCORMICK, *supra* note 11, at 99; Note, *To Take the Stand or Not to Take the Stand: The Dilemma of the Defendant with a Criminal Record*, 4 COLUM. J.L. & SOC. PROBS. 215 (1968) (generally discussing the problems faced by an accused with a criminal record who wants to testify in his own behalf).

19. See MCCORMICK, *supra* note 11, at 557; Ladd, *Credibility Tests—Current Trends*, 89 U. PA. L. REV. 166, 184 (1940).

20. *Gertz v. Fichtburg R.R.*, 137 Mass. 77, 78 (1884).

21. See, e.g., *United States v. Garber*, 471 F.2d 212, 215 (5th Cir. 1972) ("the jury should be informed about the character of a witness who asks the jury to believe his testimony"); *State v. Duke*, 100 N.H. 292, 293, 123 A.2d 745, 746 (1956) (same).

22. See Note, *supra* note 18, at 219.

### B. Enter Judicial Discretion

Until 1975, federal common law, following the Supreme Court's guidance in *Rosen*, determined the admissibility of prior convictions in all federal circuits except the District of Columbia.<sup>23</sup> Although federal courts disagreed which convictions were admissible,<sup>24</sup> all agreed that if the conviction fell within a designated class, a court had no discretion to exclude the prior conviction evidence.<sup>25</sup> Automatic admissibility received harsh criticism because of concern for prejudice to the defendant-witness.<sup>26</sup> Two District of Columbia Circuit decisions responded to the criticism.

In *Luck v. United States*,<sup>27</sup> the defendant appealed his housebreaking and larceny convictions, arguing that the trial court erred by automatically admitting his earlier juvenile conviction for grand larceny. The prosecution asserted an automatic right to use the prior conviction.<sup>28</sup> The Court of Appeals for the District of Columbia, however, found that the statute left room for "sound judicial discretion."<sup>29</sup> The court sug-

23. See, e.g., *Henderson v. United States*, 202 F.2d 400, 405-06 (6th Cir. 1953) (noting that except when Congress or the Rules of Criminal Procedure provides otherwise, admissibility of evidence shall be governed by the principles of common law).

In the District of Columbia, the statute governing prior crime impeachment read as follows:

No person shall be incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of crime, but such fact 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 shall not be concluded by his answers as to such matters. . . .

14 D.C. CODE ANN. § 305 (1961).

24. See Comment, *Prior Conviction Evidence and Defendant Witnesses*, 53 N.Y.U.L. REV. 1290, 1295-96 (1978). Almost all federal courts admitted prior felony convictions for impeachment. *Id.* at 1295. The major disagreement centered over which misdemeanors, if any, were admissible. The Ninth Circuit, for example, excluded all misdemeanors, while other circuits admitted them if they involved moral turpitude or acts of dishonesty. *Id.*

25. *Id.* at 1296; see also FED. R. EVID. 609 advisory committee note ("The weight of traditional authority has been to allow use of felonies generally, without regard to the nature of the particular offense, and of *crimen falsi* without regard to the grade of the offense.").

26. See Comment, *supra* note 24, at 1296-97.

27. 348 F.2d 763, 764 (D.C. Cir. 1965).

28. *Id.* at 767. The prosecution in *Luck* offered a juvenile, rather than an adult, conviction to impeach the defendant. The court first addressed the issue of whether a juvenile conviction was admissible in this case before reaching the prosecution's claim of automatic admission. Writing for the majority, Judge McGowan concluded that Congress did not withdraw juvenile offenses from the choice of permissible impeachment devices. *Id.* at 766-67.

For the current attitude of Congress toward the use of juvenile offenses as a method of impeachment, see FED. R. EVID. 609(d) ("generally not admissible").

29. 348 F.2d at 768. Judge McGowan examined the District of Columbia's impeachment statute, see *supra* note 23, and decided that the word "may" authorized discretion to "play upon the

gested several factors for the trial court to consider on remand in deciding whether to admit a prior conviction,<sup>30</sup> concluding that the trial court should “strike a reasonable balance between the interests of the defendant and of the public.”<sup>31</sup>

In *Gordon v. United States*,<sup>32</sup> the District of Columbia Circuit again elaborated on prior conviction impeachment. The defendant claimed that while it was proper for him to impeach a government witness with a prior conviction, it was improper for the government to impeach him with his own criminal background.<sup>33</sup> Writing for the court, then Judge Burger found no plain error and refused to hold that the trial judge abused his discretion, thus affirming the conviction.<sup>34</sup> Relying on *Luck*, Judge Burger suggested that the following factors govern admissibility of prior conviction impeachment: (1) the nature of the prior crime; (2) the age of the crime; (3) the similarity between the prior crime and the present charge; and (4) the importance of the defendant’s testimony.<sup>35</sup> Because the decision in *Gordon* ultimately turned on the credibility of two witnesses, the defendant and the complainant, admission of the prior convictions was necessary to give the jury a balanced view of the evidence.<sup>36</sup>

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circumstances as they unfold in a particular case.” *Id.* at 768. The court also reasoned that a trial judge traditionally exercised discretion with respect to other areas of evidence. *See id.* at 768 n.8 (emphasizing that the Supreme Court, other jurisdictions, and model codes of evidence place great weight on the trial court’s discretion).

30. *Id.* at 769. Judge McGowan suggested that the following factors “might be relevant” in considering the admission of a prior conviction: the nature of the prior crime; the number of convictions; the age and circumstances of the defendant; and most importantly, the need for the defendant’s testimony. *Id.*

Subsequent decisions adopted these factors as the test for prior crime impeachment. *See infra* notes 35 & 37 and accompanying text. Even after the Federal Rules of Evidence went into force, the *Luck* factors continued to provide guidance for impeachment under rule 609(a)(1). *See infra* note 66.

31. 348 F.2d at 769-72. Dissenting in part, Judge Daneher reasoned that a party did not have to use a conviction to impeach if there was one. In his opinion, however, if the conviction is offered into evidence, “it is to be received,” and the trial judge may not exclude the evidence. *Id.* at 771.

32. 383 F.2d 936 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968).

33. *Id.* at 938-39.

34. *Id.* The defendant sought to exclude the prior convictions because they were not within the statutory meaning of “crimes.” Because the trial judge “fully explored” this issue, the court concluded that he did not abuse his discretion. *Id.* at 938 n.21.

35. *Id.* at 940-41. For a detailed analysis of each of the *Gordon* factors, see WEINSTEIN, *supra* note 1, at 609[3] (1982). Despite the abandonment of the *Luck-Gordon* discretionary approach to prior conviction impeachment, *see infra* notes 43 & 44 and accompanying text, courts still refer to these factors when applying the balancing test in rule 609(a)(1). *See infra* note 49.

36. 383 F.2d at 941. The court stressed that the admission of both witnesses’ convictions was

In less than fifty years, prior conviction evidence in federal courts progressed from grounds for disqualification to grounds for impeachment, and from automatically admissible to admissible at the court's discretion. Nearly every circuit followed the *Luck-Gordon* approach, approving the use of discretion in the absence of any statutory command.<sup>37</sup> Congress chose to repudiate the *Luck-Gordon* legacy, however, when it considered rule 609(a)(1).<sup>38</sup>

### C. Rule 609(a)(1) and its "Tortured Path"

In 1961, under the auspices of the Judicial Conference of the United States, Chief Justice Warren appointed a special committee to examine the possibility of codifying evidentiary rules for federal courts.<sup>39</sup> The committee determined that uniform rules were "advisable and feasible."<sup>40</sup> An Advisory Committee began drafting two years later.

Drafts of rule 609(a)(1), governing the admissibility of prior convictions, stirred enormous controversy. Following the pre-*Luck-Gordon* approach, the first draft of rule 609(a)(1) left no room for judicial discretion, admitting felonies or *crimen falsi* against any witness.<sup>41</sup> Sharply criticized for neglecting to consider prejudice to an accused with a criminal record, the Committee offered a second draft that included

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essential because the case was a "credibility contest," and not because of any "eye for an eye" attitude toward impeachment. *Id.* at 938 n.2a & 941. Although the court did not point to the centrality of credibility as a factor in its test, some commentators suggest that such centrality is a fifth factor in the *Gordon* test. See WEINSTEIN, *supra* note 1, at 609-68 to -69; 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, 929-30, 939-40 (1980).

37. See Comment, *Impeachment Through Introduction of Prior Criminal Record—The Pennsylvania Rule v. Federal Rule of Evidence 609(a)*, 16 DUQ. L. REV. 73, 82-83 (1977) (collecting cases following the *Luck-Gordon* approach).

38. See *infra* note 43 and accompanying text. For a thorough examination of prior conviction impeachment from *Luck* to the House hearings on rule 609, see Tobias, *Impeachment of the Accused by Prior Conviction and the Proposed Federal Rules: The Tortured Path of Rule 609: Hearings on H.R. 5463 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93rd Cong., 1st Sess. 105-14 (1973) (Supp.) [hereinafter cited as *Hearings*].

39. S. REP. NO. 1277, 93rd Cong., 2d Sess. 4, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7051 [hereinafter cited as SENATE REPORT].

40. See SENATE REPORT, *supra* note 39, at 5.

41. The Advisory Committee's first version of rule 609(a) read as follows:

(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. at 295-96 (1969).

judicial discretion.<sup>42</sup> The inclusion of judicial discretion disturbed Congress, however, because it claimed that a revision of the statute construed in *Luck* repudiated the *Luck-Gordon* approach and its progeny.<sup>43</sup> Accordingly, under enormous pressure the Advisory Committee submitted its original proposal to Congress for approval.<sup>44</sup>

In Congress, rule 609(a)(1) again faced considerable controversy. The House, like the Advisory Committee, rejected judicial discretion, but also limited impeachment to *crimen falsi*.<sup>45</sup> The Senate's approach was

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42. See Comment, *The Interaction of 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, 383-84 (1981). The Advisory Committee was aware of the dilemma of an accused with a record but concluded that there existed no "acceptable alternative" to the pre-*Luck-Gordon* approach of wide-open impeachment by prior crimes. See 46 F.R.D. at 299.

The Committee injected judicial discretion into a separate subsection to the rule. In full, the new draft of rule 609(a) 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.

Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates, 51 F.R.D. 315, 391 (1971). In a note to this proposal, the Advisory Committee made explicit reference to *Luck* and *Gordon* as guides for applying the rule's discretionary standard. *Id.* at 393.

43. In response to civil disorder in Washington, D.C. during the 1960s, Congress passed the District of Columbia Court Reform and Criminal Procedure Act of 1960, Pub. L. No. 91-358, 84 Stat. 473. This act revised, among other things, the statute upon which *Luck* and *Gordon* based their decision. Unlike the earlier provision that a prior crime "may be given" for impeachment purposes, see *supra* note 23, the statute now stated that the crime "shall be admitted." See WEINSTEIN, *supra* note 1, at 609-50 (citing the amended statute); see also Comment, *supra* note 42, at 382-83 (describing the reasons for and effects of this amendment).

Congress' modification of the word "may" to "shall" removed any discretion previously claimed by the District of Columbia Circuit. This change of course had no binding effect on other circuits, as they were free to formulate their own common-law rules of impeachment until the Federal Rules of Evidence appeared.

44. After the Advisory Committee submitted its second draft of rule 609, embracing the *Luck-Gordon* discretionary approach, Sen. McClellan proposed an amendment to the Rules Enabling Act, 28 U.S.C. § 2078, that would have limited the Committee's rulemaking power. See WEINSTEIN, *supra* note 1, at 609-48 to -52. The Committee apparently took this congressional hint and resubmitted its original draft. See *Hearings, supra* note 38, at 110.

For the final version of rule 609(a) that the Advisory Committee presented to Congress, see *supra* note 41. In a note to the rule, the Committee explicitly rejected *Luck* and explained that the new version "accord[ed] with the Congressional policy manifested" in the earlier amendment to the District of Columbia impeachment statute. Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 269, 270 (1972).

45. The House initially amended the Advisory Committee's proposal to restore judicial discretion when the offered conviction was a felony. See H.R. REP. NO. 650, 93rd Cong., 1st Sess. 11,

broader, admitting *crimen falsi* and any felony.<sup>46</sup> Eventually the Conference Committee resolved the conflict.

The Conference Committee agreed to exclude judicial discretion in cases involving *crimen falsi*.<sup>47</sup> This agreement resulted in rule

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reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7051, 7084 [hereinafter cited as HOUSE REPORT]. The subcommittee's amendment read as follows:

For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible only if the crime (1) was punishable by death or imprisonment in excess of one year, unless the court determines that the danger of unfair prejudice outweighs the probative value of the evidence of the conviction, or (2) involved dishonesty or false statement.

*Id.*

The full committee believed that the "danger of unfair prejudice" to the accused and to a witness who was not the accused justified limiting impeachment only to crimes "bearing directly on credibility." See *id.* at 11. The House's final version of rule 609(a) read as follows:

Rule 609(a) *General Rule*. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible only if the crimes involved dishonesty or false statement.

120 CONG. REC. 1414 (1974).

46. The Senate Judiciary Committee, like the House, also proposed including judicial discretion in its first draft. Rule 609(a), as submitted by the Judiciary Committee, provided:

(a) *General rule*.—For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime may be elicited from him or established by public record during cross-examination but only if the crime (1) involved dishonesty or false statement or (2) in the case of witnesses other than the accused, was punishable by death or imprisonment in excess of one year under the law under which he was convicted, but only if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect.

120 CONG. REC. 37,076 (1974).

The Senate Judiciary Committee agreed with the House that the accused deserved special protection. With other witnesses, however, the Committee believed that any felony should be admissible, subject to judicial discretion to exclude the felony in cases of prejudice to the party offering the witness. See SENATE REPORT, *supra* note 39, at 14. The Senate proposed the following amendment to the rule:

*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 1 year under the law under which he was convicted or (2) involved dishonesty or false statement, regardless of the punishment.

120 CONG. REC. 37,076 (1974) (emphasis added).

47. H.R. REP. NO. 1597, 93d Cong., 2d Sess. 9, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7051, 7102-3 [hereinafter cited as CONFERENCE REPORT]. The Conference Committee explained that *crimen falsi* "are particularly probative of credibility and, under this rule are always to be admitted. Thus, judicial discretion . . . is not applicable to those [crimes] involving dishonesty or false statement." *Id.*

According to the Conference Committee, a crime involving "dishonesty or false statement," included "perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other . . . crimen falsi, the commission of which involves some element of deceit, untruthfulness or falsification . . ." *Id.*

609(a)(2).<sup>48</sup> With respect to non-*crimen falsi* felonies, the Committee chose a modified discretionary approach that focused on the “prejudicial effect to the defendant.”<sup>49</sup> Rule 609(a)(1) incorporates this modification. The Committee explained that rule 609(a)(1) permits a defendant to impeach a prosecution witness at any time, but requires a balancing test whenever the defendant is the witness.<sup>50</sup> In other words, the accused has an automatic right to impeach with a prior conviction, but the prosecution does not. Moreover, the Committee suggested that impeachment of a defense witness may prejudice the defendant, in which case the balancing test would also apply.<sup>51</sup>

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48. In pertinent part, rule 609(a)(2) provides: “For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime *shall be* admitted if the crime . . . (2) involved dishonesty or false statement, regardless of the punishment.” FED. R. EVID. 609(a)(2) (emphasis added).

49. See CONFERENCE REPORT, *supra* note 47, at 9-10. The Conference Committee explained that only the prejudicial effect to the defendant warranted consideration. Prejudice to other witnesses did not overcome the countervailing need for the fact-finder to have as much evidence as possible. *Id.*

The Committee failed to explain, however, what factors were relevant in applying the balancing test in rule 609(a)(1). Courts construing the rule have had no problem finding applicable factors. They simply continue to examine those suggested by *Luck* and *Gordon*, see *supra* notes 30, 35-37 and accompanying text. See, e.g., *United States v. Jackson*, 627 F.2d 1198, 1209 (D.C. Cir. 1980); *United States v. Hayes*, 553 F.2d 824, 828 (2d Cir. 1977).

50. The Committee’s draft of rule 609(a)(1) seems to grant the accused an automatic right to impeach with a prior conviction. The prosecution, however, does not have a similar right. Discussing rule 609(a)(1), Rep. Hungate explained that “in practical effect, . . . 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 witness.” 120 CONG. REC. 40,891 (1974). The prosecution, according to Rep. Hungate, has the burden of showing that the probative value of the conviction outweighs any prejudice to the defendant. *Id.*

Rep. Dennis had similar views. He emphasized that the rule’s balancing test contemplates only “damage or prejudice to the defendant alone.” *Id.* at 40,894. “[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 any way.” *Id.* Rep. Dennis explained another, even more negative effect of rule 609(a)(1): “Only the Government is going to be limited.” *Id.*

51. *Id.* at 40,891. *But see* CONFERENCE REPORT, *supra* note 47, at 9 (“The danger of prejudice to a witness other than the defendant . . . was considered and rejected by the Conference as an element to be weighed in determining admissibility.”).

Although no court has expressly found rule 609(a)(1) to require balancing the prior conviction of a defendant’s witness, some courts have suggested that the phrase “prejudicial effect to the defendant” might include prior crimes of the defendant’s witnesses. See, e.g., *United States v. Lipscomb*, 702 F.2d 1049, 1063 (D.C. Cir. 1983) (en banc) (“The jury may, however, still presume guilt or lack of credibility of the defendant by association or may unduly discount the defense witness’ testimony.”); *Moore v. Volkswagenwerk, A.G.*, 575 F. Supp. 919, 921 (D. Md. 1983) (rule 609(a)(1), in criminal trials, “protects criminal defendant[s] from prejudicial impeachment of defendant and defense witnesses.”).

At least two policies appear throughout the evolution of rule 609(a)(1). First, Congress wanted to encourage the testimony of an accused with a criminal background, who might refuse to take the stand for fear of damaging his case.<sup>52</sup> Second, Congress believed that the judiciary must have limited discretion to oversee the use of prior conviction impeachment.<sup>53</sup> With these policies and its vacillating history, rule 609(a)(1) went into force in 1975. Application of rule 609(a)(1), however, has been inconsistent.

## II. JUDICIAL DEVELOPMENT OF RULE 609(a)(1)

### A. *The Defendant's Automatic Right*

In *United States v. Smith*,<sup>54</sup> the Court of Appeals for the District of Columbia reversed a defendant's conviction because the trial judge failed to apply the balancing test required under rule 609(a)(1). Focusing on the changes caused by the rule, *Smith* became the first decision to declare that an accused may automatically impeach prosecution witnesses with prior convictions.<sup>55</sup> The court implied, however, that the automatic right to impeach could be modified, noting that at least one court has rejected automatic impeachment.<sup>56</sup> Nevertheless, courts continue to cite *Smith* as authority for the defendant's automatic right to impeach with prior convictions.<sup>57</sup>

Two decisions in the Ninth Circuit have been particularly important in fleshing out rule 609(a)(1). In *United States v. Dixon*,<sup>58</sup> a conspiracy

52. See *supra* note 42.

53. See *supra* note 45 and accompanying text; see also *infra* note 92 and accompanying text (discussing Congress' general view toward judicial discretion, as manifested throughout the Federal Rules of Evidence).

54. 551 F.2d 348, 356-57 (D.C. Cir. 1976).

55. *Id.* at 359 n.21. Describing the changes in prior crime impeachment brought about by rule 609, the *Smith* court claimed that the rule "reflects a deliberate choice to regulate impeachment by prior conviction *only* where the defendant's interests might be damaged . . . and *not* where the prosecution might suffer. . . ." *Id.* at 359. See *supra* note 50 and accompanying text.

The court contrasted rule 609(a)(1) with the *Luck* approach, noting that under *Luck*, the "discretionary standard was equally applicable to all witnesses and parties." *Id.*

56. Footnote 21 of the *Smith* court's opinion acknowledges that *United States v. Jackson*, 405 F. Supp. 938 (E.D.N.Y. 1975) "fashioned a significant modification" of the rule that a defendant may automatically impeach with a prior crime. 551 F.2d at 359 n.21.

57. See, e.g., *United States v. Martin*, 562 F.2d 673, 680-81 n.16 (D.C. Cir. 1977). Recently, the District of Columbia Circuit reaffirmed its position that under rule 609(a)(1) the defendant has an automatic right to impeach with prior crimes. *United States v. Lipscomb*, 702 F.2d 1049, 1058 n.37 (D.C. Cir. 1983).

58. 547 F.2d 1079, 1081-83 (9th Cir. 1976). The defendants called a government informant,

trial, the defendants offered to impeach a government informant with four prior convictions. The judge admitted only one.<sup>59</sup> On appeal, the court reversed the defendant's convictions, reasoning that the trial court had no discretion to apply rule 609(a)(1)'s balancing test when the defendant, rather than the prosecution, sought to impeach a witness with prior convictions.<sup>60</sup>

In *United States v. Nevitt*,<sup>61</sup> the defendant sought to impeach a prosecution witness with prior convictions, but the trial judge excluded the evidence. The Ninth Circuit reversed the defendant's conviction, emphasizing the "rule" of automatic admission.<sup>62</sup> The court added that the defendant's right to impeach a prosecution witness is protected by the confrontation clause of the sixth amendment.<sup>63</sup> The *Nevitt* court implied that no "confrontation problems" will arise as long as the accused enjoys

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Porter, who had not been called by the prosecution. During a pretrial conference, the defense counsel notified the court that he planned to introduce Porter's prior convictions for robbery, two forgeries and a drug offense, for impeachment. *Id.* at 1081.

59. *Id.* The trial court admitted only the narcotics conviction. Despite the fact that all of the prior convictions were less than ten years old, the trial court excluded the robbery and one forgery conviction, claiming they were too old. *Id.*

60. *Id.* at 1083. The *Dixon* court framed its rule 609(a)(1) argument around the robbery conviction only, choosing to discuss the forgery convictions within the framework of rule 609(a)(2). *Id.* at 1083-84. Addressing the exclusion of the robbery conviction, the court first noted that because the conviction was less than ten years old, rule 609(b) did not apply. *Id.* at 1083. The effect of introducing this evidence "could only have benefited the defendants." *Id.* The Government tried to argue that the exclusions were harmless error. The *Dixon* court disagreed, explained how the impeachment might have developed, and then concluded that the "prejudice in not permitting [defendants] to exercise their undoubted right to impeach is therefore established." *Id.* at 1084.

The *Dixon* court suggested that a prior conviction of a non-defendant witness might be excluded under rule 403. *Id.* at 1083 n.4. *But see infra* note 67 (explaining inapplicability of rule 403 to criminal cases involving prior crime impeachment).

The hesitancy with which both *Smith* and *Dixon* acknowledge the defendant's automatic right to impeach under rule 609(a)(1) suggests that the courts were aware of the potential imbalance created by rule 609(a)(1).

61. 563 F.2d 406, 408 (9th Cir. 1977), *cert. denied*, 444 U.S. 847 (1979). In his trial for securities violations, Nevitt wanted to impeach the Government's only witness with a prior conviction. The trial judge refused to admit the proffered conviction because the conviction did not "go to falsity" and Nevitt's counsel did not produce a copy of the conviction. *Id.*

62. *Id.* at 408-09 ("The defendant may always use prior felony convictions of a prosecution witness."). The *Nevitt* court, however, made no reference to legislative history for the defendant's right to impeach. Instead, the court focused solely on the rule's plain language. The court concluded that rule 609(a)(1) "limits the balancing test to determining prejudicial effect to the defendant." *Id.* at 409.

63. *Id.* at 408-09. The constitutional dimension suggested by the *Nevitt* court has its roots in the confrontation clause of the sixth amendment, which provides that "[in] all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." U.S. CONST. amend. VI. *See infra* notes 102 & 103 and accompanying text.

an absolute right to impeach.<sup>64</sup>

Most courts follow the *Smith*, *Dixon*, and *Nevitt* trilogy, holding that rule 609(a)(1) gives a court no discretion to exclude crimes falling under rule 609 that are offered by the accused for impeachment purposes.<sup>65</sup> The majority view, however, creates an imbalance inadequately considered by Congress when it formulated rule 609(a)(1). In "credibility contests," the defendant enjoys a significant advantage because the convictions of the prosecution's witness are automatically admissible, yet the defendant's conviction must go through a balancing test already weighted in his favor.<sup>66</sup> Courts have recognized the potential for inequity.<sup>67</sup>

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64. 563 F.2d at 408.

65. See, e.g., *United States v. Lipscomb*, 702 F.2d 1049, 1058 & n.37 (D.C. Cir. 1983) (en banc); *Government of the Virgin Islands v. Carino*, 631 F.2d 226, 229-30 (3d Cir. 1980); *United States v. Martin*, 562 F.2d 673, 680-81 n.16 (D.C. Cir. 1977); *United States v. Ortega*, 561 F.2d 803, 806 (9th Cir. 1977). See *supra* note 2 (discussing rule 609 requirements).

Many commentators agree that rule 609(a)(1) affords no discretion to exclude qualifying crimes offered by the accused for impeachment purposes. See, e.g., M. GRAHAM, *HANDBOOK OF FEDERAL EVIDENCE* 476-77 (1981); MCCORMICK, *supra* note 11, at 91; 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, 921 n.57 (1980); Note, *Impeachment by Prior Conviction: Adjusting to Federal Rule of Evidence 609*, 64 CORNELL L. REV. 416, 423 (1979); Comment, *Impeachment Through Introduction of Prior Criminal Record—The Pennsylvania Rule v. Federal Rule of Evidence 609(a)*, 16 DUQ. L. REV. 73, 91 (1977); Note, *Protection of Defendants Under Federal Rule of Evidence 609(a): Is the Rule an Endangered Species?*, 31 RUTGERS L. REV. 908, 927 (1979).

66. The imbalance created by the protection afforded an accused by rule 609(a)(1) is obvious when compared with rule 403. Rule 403 also contains a balancing test giving the court discretion to exclude prejudicial evidence. The rule provides for exclusion when the evidence's "probative value is substantially outweighed by the danger of unfair prejudice. . . ." FED. R. EVID. 403. In other words, rule 403 favors admission of evidence, excluding it only when prejudice "substantially outweighs" the probative value. In rule 609(a)(1), however, the balancing test is reversed, favoring exclusion of the prior crime unless its probative value outweighs any prejudice to the defendant. See *supra* note 1 (text of rule 609(a)(1)). Because this reverse test applies only to a defendant, and because any other witness' prior crime is either automatically admitted by rule 609 or will likely come in under rule 403, an accused has a definite trial advantage from the outset.

67. For example, in *United States v. McCray*, 15 M.J. 1086 (A.C.M.R. 1983), a military court held that the trial judge did not err by refusing to permit impeachment of prosecution witnesses with prior crimes. Because all of the witnesses had prior convictions, *id.* at 1088 n.2, the review court believed that there existed a "danger of confusing the issues and misleading the members [of the court-martial panel] by adventuring into a comparison of the relative heinousness of the witnesses' crimes . . ." *Id.* at 1089. The court concluded that "impeachment of the government's witnesses was properly restricted in this case under Rule 403." *Id.*

Other courts similarly have suggested that rule 403 could operate to exclude prior crimes of witnesses other than the accused. See, e.g., *United States v. Toney*, 615 F.2d 277, 283-84 (5th Cir.) (Tuttle, J., dissenting), *cert. denied*, 449 U.S. 985 (1980); *United States v. Dixon*, 547 F.2d 1079, 1083 n.4 (9th Cir. 1976); *Tussel v. Witco Chem. Corp.*, 555 F. Supp. 979, 984 (W.D. Pa. 1983). *But*

### B. Restoring the Balance: Conditioning Automatic Admissibility

In *United States v. Jackson*,<sup>68</sup> the District Court for the Eastern District of New York granted a motion *in limine* by the defendant, on trial for armed robbery, to exclude evidence of a prior assault conviction. Writing for the court, Judge Weinstein, in an exhaustive analysis of rule 609(a)(1), balanced the competing policies underlying the admissibility of prior conviction evidence.<sup>69</sup> According to Judge Weinstein, a court should attempt to reconcile the desire for a defendant to testify, despite the defendant's criminal record,<sup>70</sup> with the policy of "protecting the government's case against unfair misrepresentation of an accused's non-criminality."<sup>71</sup> Implying a dislike of prior conviction impeachment, Judge Weinstein issued a preliminary ruling excluding the defendant's prior assault conviction.<sup>72</sup>

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see *Diggs v. Lyons*, 741 F.2d 577, 582 (3d Cir. 1984) (rule 403 does not modify the mandatory provisions of rule 609(a)(1)); cf. *United States v. Toney*, 615 F.2d 277, ;280 (5th Cir.) ("Rule 403 simply has no application where impeachment is sought through a *crimen falsi*."), cert. denied, 449 U.S. 985 (1980).

*McCray* and other courts are correct in recognizing that rule 609(a)(1) is overly restrictive in requiring the automatic admission of prior crimes of non-defendant witnesses. Their use of rule 403 to remedy this problem, however, is incorrect. As the Advisory Committee explains, rule 403 "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. Rule 609(a)(1) is a "specific rule" stating that a prior crime, if admissible, "shall be admitted," thus giving the court discretion to exclude prior crimes *only* if they will prejudice the defendant.

68. 405 F. Supp. 938, 939 (E.D.N.Y. 1975).

69. *Id.* at 939-42; see also *id.* at 940-41 (carefully reviewing legislative history).

70. *Id.* at 942.

71. *Id.* Concern for the government's case, articulated here by Judge Weinstein, was a minor factor in Congress' formulation of the Federal Rules of Evidence. It *should* have been an important concern. Only Rep. Hogan appears to have foreseen the present imbalance: "The rules of evidence should not permit a witness to testify on behalf of a criminal defendant with the appearance of an unblemished citizen, whereas in fact that witness has been convicted of felonies." 120 CONG. REC. 2376 (1974) (Rep. Hogan).

72. 405 F. Supp. at 942. Judge Weinstein explained that "in the abstract, prior assaultive conduct would seem to have little bearing on the likelihood that one will tell the truth." *Id.* He also remarked that a prior conviction could not be offered simply to show that the defendant has a "bad" character and therefore probably is guilty of the present charge. *Id.* (citing FED. R. EVID. 404(b), prohibiting the introduction of specific acts evidence merely to show conduct "in conformity therewith").

Other evidence introduced by the prosecution included photographs of a male resembling Jackson at the bank and witnesses who would testify that the bank robbery involved a male resembling Jackson. *Id.* Some of Jackson's co-conspirators also agreed to testify for the prosecution, although Judge Weinstein noted that at least one of these possible government witnesses had a criminal record.

Had there not been additional evidence and had the case come down to a "credibility contest,"

Judge Weinstein conditioned the inadmissibility of the defendant's prior conviction, however, on two distinct nonoccurrences. First, he warned that any suggestion by the defendant of an unblemished past might warrant the subsequent admission of his prior conviction.<sup>73</sup> Second, Judge Weinstein instructed the defense counsel to refrain from impeaching the Government's witnesses with any prior convictions without the court's prior approval.<sup>74</sup> Judge Weinstein's unique modification of a defendant's traditionally automatic right to impeach with prior convictions ensured that the jury would receive a balanced presentation of the evidence. The defendant thus was unable to take "unfair advantage" of the rule's protection.<sup>75</sup> Judge Weinstein also argued that rule 102 allowed creative interpretation of the Federal Rules of Evidence.<sup>76</sup> In short, he concluded, both conditions "promote growth and development in the law of evidence in the interests of justice and reliable fact-finding."<sup>77</sup>

Judge Weinstein's approach in *Jackson* received mixed reactions.<sup>78</sup> Occasionally, courts cite *Jackson* for the proposition that a balanced

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Judge Weinstein might have faced a dilemma. Before rule 609(a)(1), he could have analogized to *Gordon* and admitted the convictions of *all* witnesses. After rule 609(a)(1), however, this approach is inapposite.

73. The suggestion of an innocent background, Judge Weinstein reasoned, might warrant admission of the defendant's prior conviction to remedy the "unfair trial advantage" wrongly obtained by the defendant. 405 F. Supp. at 943. Essentially, the prior convictions would become admissible because the "probative value" of the convictions would outweigh any "prejudicial effect to the defendant." Judge Weinstein phrases his conclusion in the language of rule 609(a)(1), *see supra* note 1, to show how the "probative significance" of Jackson's conviction could cause the balancing test to weigh in favor of admission. *Id.*

74. *Id.*

75. *Id.* This second condition ensured that the jury would receive a balanced presentation of the evidence: "Proof that the government's witnesses have criminal records may cause the jury to underestimate their credibility relative to the defendant's, again on the basis of incomplete or distorted information." *Id.* The second condition also represented the fairest way to apportion the "impact of the loss of evidence" caused by the exclusion of Jackson's prior conviction. *Id.*

76. FED. R. EVID. 102 provides: "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."

77. 405 F. Supp. at 943. Judge Weinstein acknowledged that rule 609(a)(1) protects defendants rather than the government. He asserted, however, that courts have a major role in balancing these competing interests. *Id.*

78. Compare Curran, *Federal Rule of Evidence 609(a)*, 49 TEMP. L.Q. 890, 896-97 (1976) (approving *Jackson*); Note, *Impeachment by Prior Criminal Conviction—Federal Rule of Evidence 609*, 27 DRAKE L. REV. 326, 345 (1977) (same); and Comment, *Proposed Rule of Evidence 609: Impeachment of Criminal Defendants by Prior Convictions*, 54 WASH. L. REV. 117, 129-30 (1978) (same) with *United States v. Brown*, 409 F. Supp. 890, 892 (W.D.N.Y. 1976) ("I consider . . . *Jackson* to be astray").

presentation of the evidence is crucial for a fair trial.<sup>79</sup> Although reaching a commendable result, *Jackson* is unprecedented. Moreover, Judge Weinstein's reliance on rule 102 was inappropriate. Rule 102 permits judicial innovation only in "new and unanticipated situations."<sup>80</sup> Rule 609(a)(1) directly addresses the evidentiary issues in *Jackson*. Accordingly, the court was compelled to abide by the express language, however ill-considered, of rule 609(a)(1).<sup>81</sup>

*Jackson* nevertheless highlights an important policy inadequately considered by Congress: protecting the prosecutor's case. Rule 609(a)(1), as enacted, frustrates this policy. The deficiency of rule 609(a)(1) should be resolved by an appropriate amendment.

### III. THE "TORTURED PATH" REVISITED

Several approaches to prior conviction impeachment are possible, as the history of rule 609(a)(1) demonstrates.<sup>82</sup> The remainder of this Note examines some of these approaches and offers, as an alternative, an amendment to rule 609(a)(1) that attempts to harmonize the competing policies underlying prior conviction impeachment.

#### A. Absolute Exclusion of Any Convictions

Some jurisdictions impose an absolute bar against using prior convictions to impeach a criminal defendant.<sup>83</sup> An absolute bar, however, is

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79. See, e.g., *United States v. Ortiz*, 553 F.2d 782, 785 (2d Cir.), cert. denied, 434 U.S. 897 (1977); *United States v. McCray*, 15 M.J. 1086, 1090 (A.C.M.R. 1983); cf. *United States v. Dixon*, 547 F.2d 1079, 1083 nn.3 & 4 (9th Cir. 1976) (citing *Jackson* in one footnote and remarking in the other footnote that rule 403 might exclude the conviction of a witness other than the defendant).

80. See HEARINGS, *supra* note 49, at 4 (letter by Edward W. Cleary, Reporter to the Advisory Committee on Rules of Evidence); see also WEINSTEIN, *supra* note 1, at 102-12 (rule 102 provides flexibility to problems not explicitly covered by the rules).

It is ironic that in *Jackson*, Judge Weinstein seems to ignore his own admonition about rule 102 that he includes in his treatise on evidence. See WEINSTEIN, *supra* note 1, at ¶ 609[06]. Even more ironic, however, is that in his treatise Judge Weinstein fails to cite *Jackson* for the proposition that the defendant's right to impeach under rule 609 is not absolute. Instead, Judge Weinstein asserts that prior convictions are always admissible against a prosecution witness. *Id.*

81. Judge Weinstein cites the Conference Report, see *supra* note 47, but ignores the language referring to the defendant's right to impeach. 405 F. Supp. at 941.

82. See *supra* notes 41-51 and accompanying text.

83. See MCCORMICK, *supra* note 11, at 100 nn.48 & 49 (collecting statutes); see, e.g., KAN. CIV. PROC. CODE ANN. § 60-421 (Vernon 1965): "If the witness be the accused in a criminal proceeding, no evidence of his conviction of a crime shall be admissible for the sole purpose of impairing his credibility unless he has first introduced evidence admissible solely for the purpose of supporting his credibility."

more unfair to the prosecution's case than the current federal rule. At least under rule 609(a)(1), admissibility of the defendant's prior conviction depends on the balance of several considerations. An absolute bar against admitting the defendant's convictions gives the jury a one-sided view of the evidence.

Another alternative would exclude prior convictions against all witnesses.<sup>84</sup> An absolute bar for all witnesses would be an even-handed and manageable approach and would also encourage the testimony of an accused with a criminal past. Such an approach, however, would deprive the jury of potentially relevant evidence about the credibility of the accused or any other witness.<sup>85</sup>

### B. Admissibility of *Crimen Falsi* Only

Similar to the previous approach, a rule admitting only *crimen falsi* would be easy to apply.<sup>86</sup> The problem with this approach is defining which offenses are *crimen falsi*. Despite the congressional definition of *crimen falsi* as crimes involving "dishonesty or false statement," courts freely admit crimes not within this definition.<sup>87</sup> Also, some crimes outside the strict meaning of *crimen falsi* will be excluded despite their probative value of the witness' credibility. For instance, assault may not implicate a person's honesty directly, but it still reveals a disregard for the law, thereby diminishing the witness' overall credibility.<sup>88</sup>

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84. See *supra* text accompanying note 12 (discussing common-law rule of disqualification of ex-convicts). Arguably, the Federal Rules of Evidence follow an approach that excludes all prior convictions. Rule 404(b) prohibits the use of specific acts "to prove the character of a person in order to show that he acted in conformity therewith." FED. R. EVID. 404(b). See generally Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777, 796-803 (1981) (discussing rule 404(b)). By introducing a prior conviction for impeachment, a party is asking the fact-finder, in effect, to conclude that the witness is of bad character and therefore is lying on the stand. See *supra* text accompanying note 18. Thus, either the Rules are inconsistent on this point, or rule 609(a) creates an exception to rule 404(b). See Nichol, *supra* note 17, at 406-7.

85. See HEARINGS, *supra* note 38, at 96 (statement by Edward W. Cleary).

86. See MCCORMICK, *supra* note 11, at 93-94. Congress considered, but rejected, this approach as a general rule. See *supra* note 45. Instead, Congress codified this approach as rule 609(a)(2). See *supra* note 48.

87. Compare the Conference Committee's definition of crimes "involving dishonesty or false statement," *supra* note 47, with, e.g., *United States v. Brown*, 603 F.2d 1022, 1029 (1st Cir. 1979) (burglary and petit larceny); *United States v. Apuzzo*, 555 F.2d 306, 307 (2d Cir. 1977) (misdemeanor conviction for possession and transportation of untaxed cigarettes), *cert. denied*, 435 U.S. 916 (1978); and *United States v. Bianco*, 419 F. Supp. 507, 509 (E.D. Pa. 1976) (armed robbery and breaking and entering), *aff'd*, 547 F.2d 1164 (5th Cir. 1977).

88. See HEARINGS, *supra* note 38, at 96; see also *Brown v. United States*, 370 F.2d 242, 244 (D.C. Cir. 1966) (anti-social conduct probative of character trait of honesty); E. IMWINKELRIED,

### C. *Unmodified Judicial Discretion*

Before the enactment of rule 609(a)(1), the *Luck-Gordon* approach entrusted prior conviction impeachment to the trial judge's sound discretion.<sup>89</sup> A case-by-case determination, however, affords little certainty to parties hoping to impeach with prior convictions.<sup>90</sup> In fact, Congress specifically curtailed the use of judicial discretion in rule 609(1) to accommodate the need for certainty.<sup>91</sup> On the other hand, Congress generously provided for judicial discretion throughout the Federal Rules of Evidence.<sup>92</sup> Unmodified judicial discretion therefore fails to balance the need for certainty with the desirability of judicial discretion.

### D. *A Proposed Amendment*

The following proposed version of rule 609(a)(1) would accommodate the significant policies underlying prior conviction impeachment:<sup>93</sup>

(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 (A) *outweighs any prejudice to the accused*, or (B) *outweighs any unfair prejudice to the prosecution*, . . . .

The proposed amendment addresses Congress' major concerns when it

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EVIDENTIARY FOUNDATIONS 39-40 (1980) (willingness to disobey social norms strengthens inference that witness is violating another norm by lying on the stand). During the debates on rule 609(a) in Congress, Sen. McClellan adamantly insisted that non-*crimen falsi* felonies bore upon a person's honesty. See 120 CONG. REC. 37,076-77 (1974).

89. See *supra* notes 27-38 and accompanying text.

90. See 120 CONG. REC. 2380 (1974) (remarks by Rep. Hogan) (criticizing the *Luck* approach and offering, instead, an amendment that would have removed any discretion in rule 609).

91. Cf. S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 1-5 (1982) (desire for certainty was a major impetus behind the push for codifying evidentiary rules); MCCORMICK, *supra* note 11, at 99 (introduction of prior convictions based solely on judicial discretion has "the disadvantage of uncertainty").

92. For examples of judicial discretion in the Rules, see FED. R. EVID. 102 (purpose and construction of the Rules); FED. R. EVID. 201(c) (judicial notice); FED. R. EVID. 403 (excluding evidence for prejudice, confusion, or waste of time); FED. R. EVID. 412(3) (evidence in rape cases); FED. R. EVID. 611 (mode and order of interrogating witnesses and presenting evidence); FED. R. EVID. 614(a) (calling of witnesses by the court); FED. R. EVID. 706 (court-appointed experts); FED. R. EVID. 803(24) (catch-all hearsay exception); and FED. R. EVID. 804(b)(5) (same).

93. The proposed amendment would leave unchanged rule 609(a)(2), dealing with *crimen falsi*, because this part of rule 609 applies evenly to all parties.

drafted rule 609(a)(1): protecting the accused and encouraging testimony.<sup>94</sup> Subpart (1)(A) of the proposed amendment bolsters concern for the accused by substituting the word "accused" for "defendant."<sup>95</sup> Subpart (1)(B) serves the equally important interest of promoting an evidentiary balance between the accused and the prosecution<sup>96</sup> by giving the court discretion to consider prejudice to the prosecution's case. At the same time, subpart (1)(B) protects the rights of the accused by requiring the prosecution to prove *unfair* prejudice as opposed to *any* prejudice.

Consideration of prejudice to the prosecution undoubtedly conflicts with Congress' position in rule 609(a)(1),<sup>97</sup> but is consistent with Congress' liberal grant of discretion elsewhere in the Rules.<sup>98</sup> The proposed amendment also is consistent with language in the Rules specifically addressing prosecutorial concerns.<sup>99</sup> Subpart (1)(B) reduces the uncertainty that broader discretion might produce by using the words "unfair prejudice."<sup>100</sup> Judges and attorneys should already be familiar with the type of balancing required by this phrase, because rules 403 and 412(3) contain identical language.<sup>101</sup>

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94. For an example of a rule embodying a similar, balanced approach towards impeachment by non-*crimen falsi* felonies, see UNIFORM RULE OF EVIDENCE 609(a)(1)(court may consider prejudice to "a party or the witness").

95. Cf. MILITARY R. EVID. 609(a)(1) (substituting "accused" for "defendant"); see also *supra* note 83 (statute specifically using the word "accused" rather than "defendant" in affording protection to the accused).

The substitution of the word "accused" will also reduce uncertainty over rule 609(a)'s application to civil as well as criminal defendants. See, e.g., *Tussel v. Witco Chem. Corp.*, 555 F. Supp. 979, 983 (W.D. Pa. 1983) (intended focus of rule 609(a)(1) was the concern for prejudice to *criminal* defendants).

96. See *supra* note 71 and accompanying text.

97. See *supra* notes 49 & 50 and accompanying text.

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

99. If an accused offers witnesses who testify that he is of good character, he "opens the door" to attacks upon his character from the prosecution. FED. R. EVID. 404(a)(1). Similarly, if the accused suggests that his alleged victim was of bad character or alleges self-defense in a homicide case, the prosecution may introduce contrary evidence about the victim's character. FED. R. EVID. 404(a)(2). Also, while public policy usually requires excluding evidence of compromise or offers to compromise a claim, the Rules allow the prosecution to introduce such evidence to prove "an effort to obstruct a criminal investigation or prosecution." FED. R. EVID. 408; see also *infra* note 101 (rule 412 accommodates the prosecution by allowing courts to exclude certain evidence in rape trials).

100. See *supra* note 91 and accompanying text. The Advisory Committee used this language when it included judicial discretion in the second draft of rule 609(a). See *supra* note 42. The House Subcommittee on Reform of Criminal Laws also used "unfair prejudice" in its draft of the rule. See *supra* note 45.

101. In rape cases, for example, the court has discretion to admit past sexual behavior of the victim, offered by the accused, if it determines that "the probative value of such evidence outweighs the danger of *unfair prejudice*." FED. R. EVID. 412(3) (emphasis added). Although the main pur-

Some courts might be reluctant to limit impeachment for fear of violating the accused's right to confrontation.<sup>102</sup> The Supreme Court has stated that the "right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process."<sup>103</sup> Society has a "legitimate interest" in an even-handed administration of criminal justice.<sup>104</sup> A balanced presentation of evidence, as proposed in the amendment, promotes this interest. Thus, under general constitutional principles, the amendment does not violate the confrontation clause.

In *Davis v. Alaska*,<sup>105</sup> the Supreme Court specifically dealt with the use of prior convictions, finding that the State violated an accused's right to confrontation when it denied him the opportunity to prove a witness' bias by introducing a prior juvenile conviction.<sup>106</sup> Although *Davis* dealt

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pose of rule 412 is to protect the rape victim from unnecessary disclosure of her private life, Congress recognized that "society's interest in a fair trial" requires excluding an accused's evidence in some cases. See 124 CONG. REC. 34,913 (1973) (remarks by Rep. Mann); see also *supra* note 66 (citing relevant text of rule 403). For examples of how courts construe the phrase "unfair prejudice," see J. COTCHETT & A. ELKIND, FEDERAL COURTROOM EVIDENCE 45-46 (1983); GRAHAM, *supra* note 65, at 183-84 (collecting cases).

A note to the proposed amendment should include an approving reference to *Jackson*, discussed *supra* notes 68-81, giving judges a sound example of the rule's application.

102. See *supra* notes 63 & 64 and accompanying text (claiming the right to impeach is constitutionally compelled).

103. *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973).

104. See *United States v. Morrison*, 449 U.S. 361, 364 (1981) ("[W]e have implicitly recognized the necessity for preserving society's interest in the administration of criminal justice."); see also *Rushen v. Spain*, 104 S. Ct. 453, 455 (1983) (citing *Morrison* for the same proposition). In *United States v. Lipscomb*, 702 F.2d 1049 (D.C. Cir. 1983), Judge MacKinnon rendered a thoughtful opinion on prior crime impeachment:

Fairness is not a one-way street and in the search for truth it is a legitimate concern that one who testifies should not be allowed to appear as credible when his criminal record of major crimes suggests that he is not. . . . [Advocates of fair play for the criminal] lose sight entirely of society's right to have major criminals convicted and of the necessity that witnesses, both for the prosecution and the defendant, not be permitted to appear as credible when in fact they may not be. They also completely lose sight of the fact that our criminal law, when viewed as a whole, already affords the accused far more rights than do the laws of any other nation.

*Id.* at 1077-78 (MacKinnon, J., concurring); cf. CAL. CONST. art. I, § 28(f) (California voters, by initiative measure, amended the state constitution to include "The Victims' Bill of Rights," that provides, *inter alia*, that "[a]ny prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used without limitation for purposes of impeachment. . . .").

105. 415 U.S. 308 (1974).

106. *Id.* at 320. At his trial for burglary and grand larceny, *Davis* sought to introduce the juvenile record of a prosecution witness to establish bias. *Id.* at 319. *Davis'* theory was that evidence of the prior record might create an inference that the witness was under pressure to testify for the

with bias impeachment rather than conviction impeachment, Chief Justice Burger explained that a prior conviction could provide either a "general" attack on a witness' credibility or, as in *Davis*, a more "particular" attack directed toward revealing bias, prejudice, or ulterior motives.<sup>107</sup> Although a prior conviction used for a "particular" attack is always relevant and admissible, the same is not true for a "general" attack.<sup>108</sup>

Amended rule 609(a)(1) will operate within the constitutional framework that *Davis* created. If the accused offers a prior crime for a "particular" attack, a court must follow *Davis* and admit the evidence. If the crime is offered for a "general" credibility attack, a court is free to exercise its discretion within the confines of the amended rule. At least two decisions since *Davis* have used the "general-particular" distinction to limit an accused's examination of a witness with prior convictions and arrests.<sup>109</sup> Thus, the proposed amendment not only accommodates all of the major interests at stake, but also should survive constitutional scrutiny.

#### IV. CONCLUSION

Impeachment is a two-way street.<sup>110</sup> Congress, in drafting rule

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prosecution because of his probationary status. *Id.* at 317-18. The trial court excluded the evidence. *Id.* at 311. The Alaska Supreme Court affirmed *Davis*' conviction, asserting the state's interest in protecting the anonymity of juvenile offenders. *Id.* at 314-15.

107. *Id.* at 316.

108. *Id.* After explaining the "general-particular" distinction, Chief Justice Burger concluded: "[P]artiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.' . . . We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Id.* at 316-17 (citations omitted).

Justice Stewart wrote, "I would emphasize that the Court neither holds nor suggests that the Constitution confers a right in every case to impeach the general credibility of a witness through cross-examination about his past delinquency adjudications or criminal convictions." 415 U.S. 308, 321 (1974) (Stewart, J., concurring). Justice Stewart's language provides express support for the proposed amendment. Moreover, decisions not allowing the accused to impeach a witness with a prior conviction have referred to Justice Stewart's concurrence in *Davis* for additional support. *See infra* note 109.

109. *See People v. Batista*, 115 Misc.2d 1048, 1053-54, 454 N.Y.S.2d 1009, 1013 (N.Y. Sup. Ct. 1982) (denying the accused's use of the complainant's arrest record for impeachment and commenting on the permissibility of limiting cross-examination relating to prior convictions); *People v. Conyers*, 86 Misc.2d 752, 754, 758-62, 382 N.Y.S.2d 437, 441-44 (Sup. Ct. 1976), *aff'd*, 405 N.Y.S.2d 409 (App. Div. 1978) (denying the accused's use of the complainant's prior prostitution convictions for impeachment in a rape trial).

110. SALTZBURG & REDDEN, *supra* note 72, at 365; *see also supra* note 103 (discussing *Lipscomb*).

609(a)(1), went too far and granted the accused an evidentiary windfall to the detriment of the prosecutor.<sup>111</sup> Even if the rights of the accused outweigh society's interest in punishing criminals, both policies can still operate simultaneously. Rule 609(a)(1) and its history, however, leave courts powerless to safeguard the societal interest. The amendment proposed in this Note offers a necessary and workable solution to this imbalance.

*Christian A. Bourgeacq*

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111. See Curran, *supra* note 78, at 895; Note, *supra* note 78, at 345.

