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## Balancing Prejudice in Admitting Prior Felony Convictions in Civil Actions: Resolving the 609(a)(1) - 403 Conflict

Rule 403 of the Federal Rules of Evidence grants a trial judge several grounds for exercising discretion in excluding otherwise relevant evidence from admissibility.<sup>1</sup> The rule was adopted to preserve the broad levels of discretion given trial judges by previously-developed case law.<sup>2</sup> Congress believed that the trial judge could best interpret and respond to the evidentiary problems that develop in an individual case;<sup>3</sup> hence, Rule 403 was adopted to provide guidance to the judge in fulfilling her judicial obligations<sup>4</sup> by allowing for a balancing of trial concerns against probative value.

Although Rule 403 is generally interpreted to be a rule of exclusion that "cuts across the rules of evidence,"<sup>5</sup> the rule was "designed as a

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<sup>1</sup> Rule 403 provides:

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.

The rule was designed to guard against the admission of evidence that creates jury prejudice. See generally Gold, *Federal Rule of Evidence 403: Observations On the Nature of Unfairly Prejudicial Evidence*, 58 WASH. L. REV. 477 (1983). Prejudicial evidence is believed to "cause the jury to regard the [person against whom the evidence is offered] as a bad person . . . and to conclude that he should be punished." Sharpe, *Two-Step Balancing and the Admissibility of Other Crimes Evidence: A Sliding Scale of Proof*, 59 NOTRE DAME L. REV. 556, 561 (1984).

<sup>2</sup> See S. SALTZBURG & K. REDDEN, *FEDERAL RULES OF EVIDENCE MANUAL* 138 (4th ed. 1986) (hereinafter referred to as SALTZBURG & REDDEN) (Rule 403 states the common law powers of the trial judge "as explicitly as they have ever been stated.") See also C. McCORMICK, *McCORMICK ON EVIDENCE* § 185 at 545 (3d ed. 1984); *United States v. Brown*, 547 F.2d 1264, 1265 (5th Cir. 1977).

<sup>3</sup> Appellate courts show great deference to a trial judge's decision under Rule 403, and the trial judge's weighing of evidence against the Rule 403 criteria may not be disturbed on appeal unless the judge clearly abused his discretion. See, e.g., *United States v. Medina*, 755 F.2d 1269, 1274 (7th Cir. 1985); *United States v. Michaels*, 726 F.2d 1307, 1315 (8th Cir. 1984), cert. denied, 469 U.S. 820 (1984); and *United States v. Johnson*, 558 F.2d 744, 746 (5th Cir. 1977), cert. denied, 434 U.S. 1065 (1978).

<sup>4</sup> The trial judge has a general obligation under Federal Rule 102 to ensure the fair administration of justice. Rule 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.

FED. R. EVID. 102.

At the same time, the trial court has an obligation to protect witnesses from harassment and undue embarrassment under Rule 611(a), which provides:

(a) CONTROL BY COURT. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

FED. R. EVID. 611(a). See generally *United States v. Toney*, 615 F.2d 277, 283 (5th Cir.) (indicating that the flexibility allowed the trial judge under Rule 403 "is essential in any set of procedural or evidentiary rules"), cert. denied, 449 U.S. 985 (1980).

<sup>5</sup> Shows v. M/V Red Eagle, 695 F.2d 114, 118 (5th Cir. 1983), citing *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1347 (5th Cir. 1978) (holding that evidence admissible under Rule 803 should prop-

guide for the handling of situations for which no specific rules have been formulated."<sup>6</sup> Thus, courts do not apply Rule 403 where a more specific rule of admissibility would apply.<sup>7</sup> However, courts have had problems in defining whether a particular rule of evidence is "more specific" so as to preempt application of the balancing test prescribed under Rule 403. Rule 609, which deals with the admissibility of prior conviction evidence for impeachment purposes,<sup>8</sup> has stirred particular controversy.<sup>9</sup>

Part I of this Note briefly describes the development of admitting prior conviction evidence for impeachment purposes. Part II considers the interpretive problems encountered with the adoption of the language in Rule 609(a). Part III then examines the current dilemma between

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erly have been excluded under Rule 403). The *Shows* court seems to advocate applying Rule 403 anytime a court is faced with determining the admissibility of evidence under the Federal Rules. See *id.* However, most courts generally adopt the position that Rule 403 should be applied only when a more specific evidentiary rule does not exist. See *infra* note 7. For a discussion of *Shows* on the 609(a) - 403 issue, see text accompanying notes 116-119, *infra*.

6 FED. R. EVID. 403 advisory committee's note.

7 See *United States v. Wong*, 703 F.2d 65 (3d Cir.) (indicating that Rule 403 cannot override a more specific rule such as 609(a)(2)), *cert. denied*, 464 U.S. 842 (1983). In addition, because Rule 403 is accepted as a rule of exclusion rather than admission, when another rule bars the admission of evidence in a trial, the trial judge has no discretion under Rule 403 or any other rule to admit it. See *SALTZBURG & REDDEN*, *supra* note 2, at 141. The rule does not even need to be one of the Federal Rules of Evidence. See, e.g., *Sheehy v. Southern Pacific Transp.*, 631 F.2d 649, 652 (9th Cir. 1980) (indicating that Rule 403 cannot be used to admit evidence of disability payments in FELA actions).

8 Federal Rule of Evidence 609 provides:

(a) GENERAL RULE. For purpose of attacking 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 the evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) TIME LIMIT. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) EFFECT OF PARDON, ANNULMENT, OR CERTIFICATE OF REHABILITATION. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) JUVENILE ADJUDICATIONS. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) PENDENCY OF APPEAL. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

FED. R. EVID. 609.

9 See *infra* notes 84-132 and accompanying text for a discussion of the 609(a) controversy as is evidenced by inconsistent court interpretation and treatment. See also ABA LITIGATION SECTION, EMERGING PROBLEMS UNDER FEDERAL RULES OF EVIDENCE 159-73 (1983) for additional discussion of the controversy at the circuit court level.

Rules 609(a) and 403, as illustrated by the inconsistent treatment courts and commentators have given prior conviction evidence in civil cases. Part IV discusses the policy implications of interpreting Rule 609(a) to require blanket admissibility, without the discretionary balancing of trial concerns mandated under Rule 403. Finally, Part V proposes a legislative amendment to resolve the 609(a)(1)-403 conflict in civil cases. This Note concludes that, until amendment, the conflict should be resolved by viewing Rule 403 as underlying all of the Federal Rules of Evidence and applying to all questions of admissibility unless another, more specific rule applies in its stead. Since Rule 609(a)(1) does not preempt Rule 403 either by its language or by its congressional intent, Rule 403 should be applied in the civil context.

### I. The Development of the Use of Prior Conviction Evidence for Impeachment in Civil Trials

At early common law, a person with a prior conviction was incompetent to testify at trial.<sup>10</sup> Such disqualification was originally viewed as part of the punishment for the previous crime,<sup>11</sup> but a theory soon developed that viewed a person with a prior conviction as unworthy of telling the truth. Under this theory, convicted criminals were viewed as "so destitute of moral honesty that truth could not within them dwell."<sup>12</sup> Subsequently, however, courts adopted a rule which permitted a witness with a prior conviction to testify, but which also allowed evidence of the witness' prior conviction to be admitted to impeach his or her credibility.<sup>13</sup> The purpose behind this rule was to provide the jury with all available information that could affect a witness' credibility.<sup>14</sup>

10 The rationale for this view was that illegal behavior demonstrates readiness to do evil, which thereby infers a general readiness to lie. See *State v. Ennis*, 142 Ariz. 311, 689 P.2d 570, 575 (Ct. App. 1984). This was particularly true of "infamous crimes," which involved a felony, treason or *crimen falsi*. Ladd, *Credibility Tests—Current Trends*, 89 U. Pa. L. Rev. 166, 174 (1940). *Crimen falsi* is a crime involving deceit, untruthfulness or interference with the court's ascertainment of truth. See *United States v. Smith*, 551 F.2d 348, 362 n.26 (D.C. Cir. 1976) (explaining the development of the term *crimen falsi*). See also McCORMICK, *supra* note 2, § 43 at 93 (describing disqualification because of prior conviction as "primitive absolutism").

11 See 2 J. WIGMORE, EVIDENCE § 519 (Chadbourn rev. ed. 1979).

12 *Williams v. United States*, 3 F.2d 129, 130 (8th Cir. 1924). See generally Note, *State v. Martin: Denial of Advance Rulings on Admissibility of Prior Convictions for Impeachment Purposes: Chilling Effect on Defendant's Right to Testify?*, 52 UMKC L. Rev. 477, 480 (1984); 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, 910 (1980).

13 *Williams*, 3 F.2d at 130. See also Ladd, *supra* note 10, at 174-84; Bridge, *Burdens Within Burdens at a Trial Within a Trial*, 23 B.C.L. Rev. 927, 950 (1982).

14 See generally 3 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE §§ 314-15 (1979) (hereinafter referred to as LOUISELL & MUELLER). See also *State v. Duke*, 100 N.H. 292, 123 A.2d 745 (1956), where the court stated:

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. . . . 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.

*Id.* at 293; 123 A.2d at 746.

However, today it is generally recognized that a single act, particularly one which is remote in time or circumstance, may be atypical of a witness' character. See 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE 609[02], at 609-60 (1987) (hereinafter referred to as WEINSTEIN & BERGER).

Since prior conviction evidence was automatically admissible, without discretion, to impeach a witness' credibility under this rule, criminal defendants became reluctant to testify on their own behalf for fear that the introduction of a prior conviction would implicate their guilt in the crime charged.<sup>15</sup> Recognizing the criminal defendant's dilemma, in 1965 the United States Court of Appeals for the District of Columbia Circuit, in *Luck v. United States*,<sup>16</sup> held that it was within the discretion of the trial judge to exclude evidence of a prior conviction of a defendant-witness if the evidence was offered for impeachment purposes.<sup>17</sup> The court reasoned that because the District's impeachment statute used permissive rather than mandatory language in allowing evidence of a witness' prior criminal conviction to be admitted on the issue of his or her credibility as a witness,<sup>18</sup> the trial court still had discretion to exclude such evidence when introduced.<sup>19</sup>

The view expounded in *Luck* emphasized avoiding prejudice to a criminal defendant even at the cost of excluding otherwise relevant evidence. The court stressed that "[i]t is more important to the search for truth in a particular case for the jury to hear the defendant's story than to know of a prior conviction."<sup>20</sup> In a subsequent case,<sup>21</sup> the District of Columbia Circuit elaborated that even if the probative value outweighs the prejudicial effect, evidence of prior convictions should be excluded if the trial court determines it would be better to have the accused testify "than to have the accused remain silent due to his fear of being impeached with evidence of a prior conviction."<sup>22</sup>

15 See LOUISELL & MUELLER, *supra* note 14, § 315 at 317-18. Defendant-witnesses also may refuse to take the stand to avoid embarrassing public disclosure of past antisocial behavior. See *Hearings on H.R. 5463 Before the Senate Judiciary Comm.*, 93d Cong., 2d Sess. 13 (1974) (statement of Rep. Dennis). In fact, several jury studies indicate that conviction rates for defendants whose prior convictions are admitted at a subsequent criminal trial are statistically higher than for defendants whose prior convictions were never introduced. See generally H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 179-80, 389-90 (1966). Nonparties, too, may be discouraged from testifying because of their fear of such impeachment, especially when the convictions are embarrassing. See G. JOSEPH & S. SALTZBURG, 43 *EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES* 9 (1987) (hereinafter referred to as JOSEPH & SALTZBURG).

16 348 F.2d 763 (D.C. Cir. 1965).

17 *Id.* at 768. The *Luck* court in part justified granting such discretion to exclude prior conviction evidence upon its belief that a witness' decision not to testify is detrimental to the judicial system's interest in discovering truth. *Id.* at 769.

18 The statute provided that evidence of a witness' prior conviction "may be given in evidence to affect his credibility as a witness. . . ." D.C. CODE ANN. § 14-305 (1961) (current version at D.C. CODE ANN. § 14-305(b) (1973)).

19 348 F.2d at 767-68.

20 *Id.* at 769.

21 See *Brown v. United States*, 370 F.2d 242 (D.C. Cir. 1966).

22 *Id.* at 245. The next year, the District of Columbia Circuit further clarified the *Luck* doctrine by describing several factors for a court to consider in determining the admissibility of prior conviction evidence. See *Gordon v. United States*, 383 F.2d 936 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968). These factors included: (1) the nature of the prior offense; (2) its similarity to the offense charged (i.e., evidence of a prior conviction should be admitted "sparingly" if the prior crime was the same crime as that with which the accused is presently charged; *id.* at 940-41); and (3) the remoteness of time between the prior conviction and the present trial, *id.* at 940; see also *Luck*, 348 F.2d at 769. The court also stressed that the accused bears the burden of persuading the trial judge that

In spite of the *Luck* doctrine, the majority of courts continued to admit prior felony<sup>23</sup> conviction evidence automatically, and Congress reinstated the majority rule in the District of Columbia by revising the District of Columbia Code. The revision replaced the former discretionary language in the statute with language that mandated the admission of prior conviction evidence for impeachment purposes.<sup>24</sup>

In 1973, with the introduction of the Federal Rules of Evidence, tension again mounted between the legal philosophies espoused by the majority and by the *Luck* doctrine. The first draft of Rule 609(a) proposed the majority position, allowing for blanket admissibility of prior felony convictions and crimes involving dishonesty or false statements.<sup>25</sup> The second draft two years later, however, proposed judicial discretion similar to *Luck*, requiring that the probative value of the evidence be greater than its prejudicial effect to be admissible.<sup>26</sup> Ultimately, the House of Representatives passed a version of Rule 609(a) which totally excluded evidence of a prior conviction that did not involve dishonesty or false statement for impeachment purposes.<sup>27</sup> The Senate amended the House version to adopt a position which again reflected the blanket admissibility position of the majority.<sup>28</sup> Both houses of Congress eventually approved

the prejudicial effect of the prior conviction far outweighs its probative value. *Gordon*, 383 F.2d at 939-40.

Several states have adopted a slightly different list of factors for a court to consider in exercising its discretion to exclude a prior conviction, including (1) the nature of the impeaching crime; (2) if the witness is a party, the similarity of the crime with which the party is charged; (3) the impeachment value of the prior conviction; (4) its remoteness or proximity in time; (5) the witness' subsequent history, including the length of his or her criminal record; (6) the importance of the witness' testimony; and (7) the centrality of the credibility issue. See *State v. Edwards*, 380 N.W.2d 503 (Minn. App. 1986); *State v. Boucher*, 144 Vt. 276, 478 A.2d 218 (1984).

23 Under federal law, a felony is "[a]ny offense punishable by death or imprisonment for a term exceeding one year . . . ." 18 U.S.C. § 1(1) (1982).

24 See D.C. CODE ANN. § 14-305 (1973) (providing for the admission of evidence of prior criminal convictions if the offense "(A) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (B) involved dishonesty or false statement (regardless of the punishment)").

25 The first draft of FED. R. EVID. 609(a) provided:

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).

26 The second draft read as follows:

GENERAL RULE. For the purposes 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. 315, 391 (1971).

27 The House version read: "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 crime involved dishonesty or false statement." H.R. REP. NO. 93-65, 93d Cong., 1st Sess. 11 (1973).

28 The Senate amendment provided that a witness' credibility may be attacked if the crime (1) was punishable by death or imprisonment in excess of one year under the law which he was convicted, or (2) involved dishonesty or false statement, regardless of the punishment. See H.R. CONF. REP. NO. 1597, 93d Cong., 2d Sess. 9 (1974), reprinted in 1974 U.S. CODE CONG. & ADMIN.

a compromise of the two positions, represented by the current language of Rule 609(a).<sup>29</sup>

## II. The Language of Rule 609(a): The Foundation for Interpretive Problems and the Resulting Conflict with Rule 403

Federal Rule of Evidence 609(a) guides courts deciding whether to admit prior conviction evidence for impeachment purposes. Two categories of crimes may be used to impeach a witness under Rule 609(a): (1) any felony, as defined by federal law,<sup>30</sup> and (2) any crime involving dishonesty or false statement.<sup>31</sup> Crimes which involve dishonesty or false statement are not subject to exclusion on the grounds of unfair prejudice due to their particularly probative nature in establishing credibility.<sup>32</sup>

NEWS 7098, 7102. See *infra* notes 61-63 for discussion of the Senate amendment and adopted version of Rule 609(a).

29 A House-Senate Conference Committee was formed, which agreed on a compromise reflected in the present language of FED. R. EVID. 609(a). In December 1974, the House and Senate each approved Rule 609(a) as it emerged from that committee. See 120 CONG. REC. H40896 (daily ed. Dec. 18, 1974) (House adoption); 120 CONG. REC. S40070 (daily ed. Dec. 16, 1974) (Senate adoption). For the adoption of the Federal Rules of Evidence generally, see Pub. L. 93-595 § 1, 88 Stat. 1299 (1975). For a more detailed explanation of the Conference Committee's role in the Rule 609 deliberations, see *infra* notes 64-83 and accompanying text.

30 See *supra* note 23 for the federal definition of a felony.

31 See *supra* note 10 for definition and explanation of *crimen falsi* crimes. However, it is important to note that crimes which are *crimen falsi* in one jurisdiction may not be *crimen falsi* crimes in another. Representative Hogan indicated that the common law definition of *crimen falsi* is "any crime which may injuriously affect the administration of justice, by the introduction of falsehood or fraud." 120 CONG. REC. H2375-2376 (daily ed. Feb. 6, 1974) (statement of Rep. Hogan). He elaborated:

This definition has been held to include forgery, perjury, subornation or perjury, suppression of testimony by bribery, conspiracy to procure the absence of a witness or to accuse of a crime, obtaining money under false pretenses, stealing, moral turpitude, shoplifting, intoxication, petit larceny, jury tampering, embezzlement and filing a false estate tax return.

*Id.*

However, the traditional definition, "crimes involving dishonesty or false statement," was likely intended by Congress, as there was no debate on the subject, *id.* at 2380 (statement of Rep. Danielson), and the Conference Committee's Report indicated that "[T]he Congress means crimes . . . the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully." H.R. CONF. REP. NO. 1597, 93d Cong., 2d Sess. 9 (1974), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7098, 7103.

32 The Conference Report explained that convictions involving dishonesty and false statement are "peculiarly probative of credibility and, under this rule are always to be admitted. Thus judicial discretion granted with respect to the admissibility of other prior convictions [i.e., under 609(a)(1)] is not applicable to those involving dishonesty or false statement." *Id.*

Courts have adopted the Conference Committee's view of *crimen falsi* crimes in their interpretation of Rule 609(a)(2), holding a prior conviction of a *crimen falsi* crime automatically admissible in both civil and criminal cases, with no prejudicial balancing under Rule 403. See *United States v. Wong*, 703 F.2d 65, 68 (3d Cir.) (general balancing of Rule 403 does not apply to impeachment by *crimen falsi* convictions), *cert. denied*, 464 U.S. 842 (1983). See also *United States v. Kiendra*, 663 F.2d 349 (1st Cir. 1981); *United States v. Leyva*, 659 F.2d 118 (9th Cir. 1981), *cert. denied*, 454 U.S. 1156 (1982); *United States v. Coats*, 652 F.2d 1002 (D.C. Cir. 1981).

Additionally, the court in *United States v. Toney*, 615 F.2d 277 (5th Cir.), *cert. denied*, 449 U.S. 985 (1980), quoted the Conference Committee's language in deciding that Rule 609(a)(2) is outside the scope of Rule 403. See 615 F.2d at 279. See also *United States v. Phillips*, 488 F. Supp. 508 (W.D. Mo. 1980), and 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. CINN. L. REV. 381, 386-876 (1981) for a good discussion of the *Toney* and *Phillips* decisions.

However, it is important to note that argument has been made that reliance on the language of the Conference Committee Report is misplaced, and that Rule 403 should still underlie the admission of prior *crimen falsi* convictions. See Comment, *supra*, at 391-92. This argument focuses on the

However, because felonies may or may not be probative of credibility, Rule 609(a)(1) gives the trial judge discretion to balance the probative value of admitting the prior felony conviction evidence against "its prejudicial effect to the defendant."<sup>33</sup>

Because Rule 609(a)(1) is silent as to the admissibility of prior convictions to impeach a nondefendant witness, a controversy has developed as to whether Rule 609(a)(1) controls so as to preempt the application of Rule 403 in civil cases, or whether prior conviction evidence in civil litigation is still subject to Rule 403's balancing of prejudicial effect with probative value.<sup>34</sup> To determine congressional intent on the issue, the plain meaning of Rule 609(a)(1) and its legislative history are considered next.

### A. The "Plain" Meaning of Rule 609(a)(1)'s Language

If the plain meaning of Rule 609(a)(1) mandated the exclusion of prior conviction evidence, Rule 403 would clearly be inapplicable.<sup>35</sup> Likewise, if the language of the rule clearly and unequivocally provided guidelines for the admissibility of prior conviction evidence in all situations, Rule 403 would arguably be inapplicable.<sup>36</sup> However, the language of Rule 609(a)(1) neither addresses that rule's applicability to civil cases nor expressly precludes the application of Rule 403 in such actions.<sup>37</sup>

The congressional intent behind Rule 609(a)(1)'s proper application to civil litigants is unclear because of the rule's switch in focus from "witness" to "defendant." The rule states that "[f]or the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness. . . ."<sup>38</sup> The plain meaning of this language suggests that it may be used in both civil and criminal cases. However, the rule goes on to qualify such admissibility, and in the qualification language that follows it adopts what is arguably

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"under this rule" language in the Report, arguing that such language does not mean that the discretion of Rule 403, which is not "under this rule," does not underlie Rule 609(a)(2) and apply to *crimen falsi* crimes. *Id.* at 392. Because this argument does not consider the full context of the Conference Committee Report, as a legislative intent argument it is less than persuasive and has not influenced any courts which have considered the Rule 609(a)(2) - 403 issue.

33 FED. R. EVID. 609(a)(1) (emphasis added). A controversy over how to handle possible derivative prejudice to a criminal defendant who himself does not testify has also arisen. Although the House recognized that the prior conviction of a defense witness may have a prejudicial effect to the defendant, see 120 CONG. REC. H40891 (daily ed. Dec. 18, 1974) (statement of Rep. Hungate), the adopted language of Rule 609(a) does not clearly reflect congressional intent in dealing with the derivative prejudice issue. Thus, courts are not in total agreement as to whether Rule 609(a)'s prejudicial balancing standard applies only when the defendant himself is to testify and evidence of his own prior conviction could cause prejudice against him, or whether it also applies when the prior conviction of another witness who was called upon to testify could similarly cause prejudice to the defendant. Consideration of the derivative prejudice issue, however, is beyond the scope of this Note. See LOUISELL & MUELLER, *supra* note 14, § 316 at 326 (briefly discussing treatment of the spillover effect).

34 For the adopted language of Rule 403, see *supra* note 1. For a discussion of the developed controversy, see *infra* notes 84-132 and accompanying text.

35 Rule 403 is a rule of exclusion, not of admission. See *supra* note 7.

36 A more specific rule overrides Rule 403's application. See *supra* note 7.

37 For the adopted language of Rule 609(a), see *supra* note 8.

38 FED. R. EVID. 609(a).



an application solely to criminal cases. The rule provides that prior conviction evidence is admissible "... but only if the crime (1) was punishable by death or imprisonment in excess of one year . . . and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant. . . ." <sup>39</sup>

The advisory committee's note to Rule 609 is similarly ambiguous, stating, "[t]he proposed rule incorporates certain basic safeguards, in terms *applicable to all witnesses but of particular significance* to an accused who elects to testify."<sup>40</sup> It is unclear as to whether the "all witnesses" language used here refers to all witnesses in a criminal trial or all witnesses in general, in either criminal or civil actions. The committee's general notes for Rule 609 fail to suggest whether a trial judge should also apply the prejudicial balancing standard described in 609(a)(1) to civil parties, whether the prejudicial balancing formula described in Rule 403 should be used instead, or whether no balancing for prejudicial effect to civil litigants should take place at all. The advisory committee's note pertaining specifically to subdivision (a) of Rule 609 likewise makes no mention of the rule's applicability to civil situations.<sup>41</sup> Thus, the plain meaning of the 609 language, as described in the actual text of 609(a)(1) and in the advisory committee's note regarding the rule, provides little guidance of congressional intent as to Rule 403 preemption in civil cases.

### B. *The Ambiguous Legislative History of Rule 609(a)(1)*

The congressional intent behind Rule 609(a)(1) is likewise not readily discernible from the legislative history of Rule 609(a).<sup>42</sup> Although Congress has clearly recognized that admitting evidence of a prior conviction may prejudice civil parties,<sup>43</sup> it still failed to mention the standard for exclusion of such evidence in Rule 609. In considering the rule, legislators in both houses of Congress and the Conference Committee focused almost exclusively upon criminal proceedings.

#### 1. Consideration of Rule 609 in the House of Representatives

As noted previously,<sup>44</sup> the first draft of Rule 609(a) from the Advisory Committee reflected the common-law rule of automatically admitting evidence of prior convictions if the convictions were for felony or

39 *Id.* at 609(a)(1).

40 *Id.* at 609 advisory committee's note (emphasis added).

41 *Id.*

42 See H.R. CONF. REP. NO. 1597, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7098; S. REP. NO. 1277, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7051; H.R. REP. NO. 650, 93d Cong., 1st Sess. (1973), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7075. See generally 10 J. MOORE & H. BENDIX, MOORE'S FEDERAL PRACTICE § 609.01 (2d ed. 1987) (hereinafter MOORE & BENDIX).

43 For example, in civil trials character evidence, which includes evidence of prior convictions, is inadmissible to show action "in conformity therewith." FED. R. EVID. 404(a). This is because of the danger of resulting prejudice from such evidence. See *id.* at 404 advisory committee's note. In addition, courts have recognized the possible danger in admitting character evidence in section 1983 actions. Both a plaintiff's prison disciplinary record, *Lataille v. Ponte*, 754 F.2d 33 (1st Cir. 1985), and a defendant's record of past abuse of authority, *Tigges v. Cataldo*, 611 F.2d 936 (1st Cir. 1979), are inadmissible in such actions under Rules 404 and 403.

44 See *supra* note 25 and accompanying text.

false statement crimes.<sup>45</sup> However, after reconsidering the dangers of prejudice, the Advisory Committee revised its original proposal to include a balancing standard similar to that of Rule 403.<sup>46</sup> This proposal received strong criticism,<sup>47</sup> and the Committee subsequently reverted to its first draft,<sup>48</sup> which then went to the House Special Subcommittee on Reform of Federal Criminal Laws for consideration.

The House Special Subcommittee amended the Advisory Committee's version to again allow judges to balance the probative value of a conviction against whatever unfair prejudice might stem from its admission.<sup>49</sup> However, when the Subcommittee's version went to the House Committee on the Judiciary, it was again amended—this time, to allow admissibility only of convictions of *crimen falsi* crimes.<sup>50</sup> Following debate on an amendment that would have restored the Subcommittee's discretionary balancing version,<sup>51</sup> the House voted to accept the Judiciary Committee's proposal.<sup>52</sup>

There was only one indication of an intent to apply the House-adopted Rule 609(a) to civil as well as to criminal actions. This reference consisted of a few statements made by representatives in the early stages of drafting,<sup>53</sup> when the House was considering the blanket rules of ad-

45 The first draft of the rule gave judges no discretion to exclude prior convictions. The Advisory Committee maintained that although there are inherent dangers in the use of such evidence, exclusion was not justified, since the "[d]angers of unfair prejudice . . . tend to disappear or diminish." Rule 609(a) advisory committee's note, 46 F.R.D. 161, 296-97 (1969).

46 See *supra* note 26 for the actual language of the Advisory Committee's second draft. See also Rule 609(a) advisory committee's note, 51 F.R.D. 315, 391-92 (1971), indicating that the Advisory Committee incorporated basic safeguards into the rule, "in terms applicable to all witnesses but of particular significance to the accused who elects to testify."

47 For example, Senator McClellan, who was then chairman of the Judiciary Committee, called the proposal "a direct assault on the will of Congress as recently expressed" by the rejection of the *Luck* doctrine the year before. See 117 CONG. REC. S29894 (daily ed. Aug. 5, 1971).

48 See 56 F.R.D. 183, 269-70 (1972).

49 See H.R. REP. NO. 650, 93d Cong., 1st Sess. 11 (1973), reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7075, 7084.

50 The Committee believed that because of the danger of unfair prejudice and the possible deterrent effect of allowing a witness to be impeached by prior felony convictions in general, cross-examination by evidence of prior conviction should be limited to those types of convictions bearing directly on credibility, i.e. crimes involving dishonesty or false statement. *Id.* at 12, reprinted at 7084-85.

51 This amendment was offered by Rep. Smith as a substitute for an earlier amendment introduced by Rep. Hogan. The Hogan amendment provided that prior conviction evidence was admissible to attack the credibility of a witness if the crime was either a felony or involved dishonesty or false statement. Rep. Smith substituted an amendment that still allowed prior convictions of crimes involving dishonesty or false statement to be admissible, but which qualified the admissibility of prior felony convictions. Under the Smith amendment, prior felony convictions were admissible "unless the court determines that the danger of unfair prejudice outweighs the probative value of the evidence of the conviction." See 120 CONG. REC. H2377 (daily ed. Feb. 6, 1974).

52 The final vote in the House was 377 in favor, 13 against, and 39 not voting. *Id.* at H2393-94.

53 See 120 CONG. REC. H2376 (daily ed. Feb. 6, 1974) (statement of Rep. Hogan) (indicating that "the committee's version of the rule applies to all witnesses, not only defendant witnesses, and it applies to civil as well as criminal cases"); *id.* at H2377 (statement of Rep. Dennis) (emphasizing that "it does not apply only to a man who is a defendant in a criminal case, but it applies to any witness"); *id.* at H2379 (statement of Rep. Hogan) (noting "[t]his applies in civil cases as well as criminal cases to all witnesses"); *id.* (statement of Rep. Wiggins) (urging that "further draftsmanship is necessary to spin off criminal cases from civil cases, to separate the nonparty witness problem from the party witness problem"); *id.* at H2381 (statement of Rep. Lott) (stressing that "it is essential to recognize that this is a rule that would have application in both civil and criminal cases, and which would apply not only to witnesses for the defense, but witnesses for the plaintiff or the prosecution as well"). For

mission and exclusion.<sup>54</sup> The Conference Committee rejected these blanket rules seven years later when it drafted the present rule, making no mention of the rule's applicability in civil trials.<sup>55</sup> Thus, the statements made by representatives in the House provide little support for the position that Congress intended Rule 609 to apply to civil as well as to criminal actions.<sup>56</sup>

## 2. Senate Consideration

The Senate Judiciary Committee rejected the House version of Rule 609(a) because it thought the dangers of unfair prejudice were greatest when the witness was also a criminal defendant.<sup>57</sup> The Committee proposed a rule whereby criminal defendants could be impeached only by prior convictions of crimes involving dishonesty or false statement.<sup>58</sup> Prior convictions would be admissible to impeach all other witnesses, including witnesses in civil actions, only when the probative value of the evidence outweighed its prejudicial effect.<sup>59</sup> When the Committee's proposal was debated on the Senate floor, however, the civil case scenario again went unmentioned, with the debate focusing exclusively on the effect of prior conviction impeachment in criminal cases.<sup>60</sup>

The Senate rejected the Judiciary Committee's proposal and passed an amendment that applied the common-law view: all evidence of prior convictions was admissible automatically.<sup>61</sup> However, the Senate was not in full agreement on this amendment,<sup>62</sup> and several members strongly argued that discretion was needed at the trial court level.<sup>63</sup> Ultimately,

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a detailed contextual analysis of these statements, see Smith, *Impeaching the Merits: Rule 609(a)(1) and Civil Plaintiffs*, 13 N. KY. L. REV. 441, 447-52 (1987).

54 Both of these proposed rules created one standard for the admission of all prior felony convictions at all trials. See generally H.R. REP. NO. 650, 93d Cong., 1st Sess. 11 (1973) and 120 CONG. REC. H2375-76 (daily ed. Feb. 6, 1974).

55 H.R. CONF. REP. NO. 1597, 93d Cong., 2d Sess. (1974).

56 See SALTZBURG & REDDEN, *supra* note 2, at 520, for an argument that courts tend to place too much emphasis on individual remarks of the legislators.

57 In the committee's view, the danger of prejudice was greater when the accused, as opposed to other witnesses, testifies because the jury may be prejudiced both on the question of credibility and on the ultimate question of guilt or innocence. See S. REP. NO. 1277, 93d Cong., 2d Sess. 14 (1974), reprinted in 1974 U.S. CONG. CODE & ADMIN. NEWS 7051, 7060-61.

58 The Senate Judiciary Committee thus agreed with the House limitation that only offenses involving false statement or dishonesty could be used. See *id.* at 14, reprinted at 7061. By "crimes involving false statement or dishonesty," the committee meant crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement or false pretense, or "any other offense, in the nature of crimes false the commission of which involves some element of untruthfulness, deceit, or falsification bearing on the accused's propensity to testify truthfully." *Id.*

59 *Id.*

60 See 120 CONG. REC. S37076-80 (daily ed. Nov. 22, 1974).

61 This amendment was known as the McClellan amendment. See 120 CONG. REC. S37083 (daily ed. Nov. 22, 1974). A similar version of Rule 609 had been submitted to Congress by the Supreme Court. *Id.* at S37075-76, S37083.

62 The final vote of approval was 38 Senators in favor to 33 against, with 29 Senators not present for the vote. *Id.* at S37083.

63 Senator Burdick, for example, indicated that "[w]e just cannot say that we should use all prior behavior or no prior behavior. . . . It seems to me that the solution here . . . is to leave it to the sound discretion of the trial judge." *Id.* at S37077 (statement of Sen. Burdick). Senator Biden similarly criticized the McClellan amendment, indicating that under that amendment, "if you have once committed a crime, . . . you have lost your credibility forever. . . ." *Id.* at S37082 (statement of Sen. Biden).

the versions of Rule 609(a) emerging from both the House and the Senate were submitted for consideration by the Conference Committee.

### 3. The Conference Committee's Solution: Ambiguous Compromise

A Conference Committee was formed to resolve the differences between the House and Senate versions of Rule 609 and all of the Federal Rules of Evidence.<sup>64</sup> Obviously, compromises occurred between House and Senate versions of the various rules, including Rule 609.<sup>65</sup> Senator McClellan indicated that "[n]either side [House or Senate] . . . got all they wanted,"<sup>66</sup> and the Chairman of the Conference Committee, Representative Hungate, noted "[t]he conference rule 609(a) strikes a middle ground between the [House and Senate] versions. . . ."<sup>67</sup>

Several legislators on the Conference Committee focused their remarks exclusively on the rule's applicability in criminal cases.<sup>68</sup> The Committee itself used language related to criminal trials in their Committee Report, and even specified that the prejudicial effect to be weighed against the probative value of the prior conviction evidence was "specifically the prejudicial effect to the defendant."<sup>69</sup> The committee found that the need for the jury to have information about the credibility of a *nondefendant* witness outweighed the danger of unfair prejudice.<sup>70</sup> The report indicates specifically that "[t]he 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. . . ."<sup>71</sup> However, this reference to nondefendant witnesses taken in context does not refer to civil parties, but rather only to prosecution witnesses in criminal trials.<sup>72</sup>

Additionally, although Representative Hungate indicated that the adopted Rule 609(a) was "as close or closer to the House version than to the Senate's,"<sup>73</sup> this view is at variance with indications made in the Conference Committee Report which suggest that the Senate version was ultimately the version adopted.<sup>74</sup> Thus, it is likely that "those who voted to

64 120 CONG. REC. H40890 (daily ed. Dec. 18, 1974) (statement of Rep. Hungate). Members of the Conference Committee included Senators Eastland, McClellan, Hart, Ervin, Burdick, Hruska, Thurmond, and Scott and Representatives Hungate, Kastenmeier, Edwards, Smith, and Dennis. H.R. CONF. REP. NO. 1597, 93d Cong., 2d Sess. 4, (1974) *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7098, 7107.

65 *Id.* See *United States v. Lipscomb*, 702 F.2d 1049 (D.C. 1983), for a court's summary of the legislative history of Rule 609.

66 120 CONG. REC. S40069 (daily ed. Dec. 16, 1974) (statement of Sen. McClellan).

67 120 CONG. REC. H40891 (daily ed. Dec. 18, 1974) (statement of Rep. Hungate).

68 See 120 CONG. REC. S37077-79 (daily ed. Nov. 22, 1974) (statements of Senators McClellan, Hart, Hruska, and Burdick). See also 120 CONG. REC. H40891, H40894 (daily ed. Dec. 18, 1974) (statements of Representatives Hungate and Dennis).

69 H.R. CONF. REP. NO. 1597, 93d Cong., 2d Sess. 9, 10, (1974) *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7098, 7103.

70 *Id.*

71 H.R. CONF. REP. NO. 1597, 93d Cong., 2d Sess. 9-10 (1974), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7098, 7103.

72 *Id.*, *reprinted at* 7051.

73 120 CONG. REC. H40890, H40891 (daily ed. Dec. 18, 1974) (statement of Rep. Hungate).

74 The Senate Judiciary amended the House version which permitted prior convictions only if the offense, whether felony or misdemeanor, involved dishonesty or false statement. The modified version maintained that prior conviction evidence of *crimen falsi* crimes could be admitted against a

accept the compromise version read into it their own concerns, exemptions, and interpretations."<sup>75</sup>

Moreover, amending the Conference Committee version to clarify legislative intent was not even an option once the rules came back to Congress. The rules were proposed to both legislative bodies with the understanding that any compromises already made should not be upset and that the rules should be passed as one body of law, whether or not there was agreement on all the specific aspects therein.<sup>76</sup> Significantly, however, both houses agreed that even though the language of the rules was disputed in the legislature, the rules should be interpreted in accordance with the overriding Congressional purpose of securing fairness in administration.<sup>77</sup> Thus, the common-law rule allowing for blanket admissibility of prior conviction evidence in civil trials was arguably rejected by both legislative bodies in favor of allowing judicial discretion where necessary to "secure fairness."<sup>78</sup>

The difficulty in applying Rule 609(a) results from imprecise drafting,<sup>79</sup> from a confusing legislative history,<sup>80</sup> and from the conflicting policies underlying the rule.<sup>81</sup> The rule is designed to prevent undue prejudice and to reduce the deterrent effect that prior conviction evidence has on a defendant-witness' decision to testify.<sup>82</sup> At the same time, it is intended to give the jury all available information about the witness so the jury may determine his or her credibility.<sup>83</sup> It is the subjective balancing of these conflicting policies that has led the circuit courts to a hopeless split in their treatment of admitting prior conviction evidence in civil trials.

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criminal defendant, while other witnesses could be impeached by non-crime prior conviction when the probative value of such evidence outweighed its prejudicial effect against the party offering the witness. See H.R. CONF. REP. NO. 1597, 93d Cong., 2d Sess. 9-10, (1974) reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7051, 7061. See also *supra* notes 57-63 and accompanying text for further discussion of the Senate's consideration and treatment of Rule 609(a).

<sup>75</sup> Smith, *supra* note 53, at 455.

<sup>76</sup> See 120 CONG. REC. H40896 (daily ed. Dec. 18, 1974) (statement of Rep. Smith); 120 CONG. REC. S40069 (daily ed. Dec. 16, 1974) (statement of Sen. McClellan).

<sup>77</sup> See 120 CONG. REC. S40069 (daily ed. Dec. 16, 1974) (statement of Sen. Hruska) (stressing the importance of serving the purpose of the Federal Rules), and 120 CONG. REC. H40896 (daily ed. Dec. 18, 1974) (statement of Rep. Smith) (indicating that the federal courts are "well-designed" to meet the purpose of the Federal Rules as stated in Rule 102). For the adopted language of the Congressional purpose provisions, see FED. R. EVID. 102 and 611(a), quoted *supra* note 4.

<sup>78</sup> See generally Smith, *supra* note 53, at 455. It is also important to note that only ten Representatives, see 120 CONG. REC. H2381 (daily ed. Feb. 6, 1974), and only slightly more than one-third of the Senators, see 120 CONG. REC. S37083 (daily ed. Nov. 22, 1974), endorsed the common-law rule of mandating admission of all prior convictions.

<sup>79</sup> See *Moore v. Volkswagenwerk, A.G.*, 575 F. Supp. 919, 921 n.1 (D. Md. 1983) (adopted language of Rule 609(a)(1) was the result of a legislative oversight).

<sup>80</sup> See *supra* notes 42-78 and accompanying text.

<sup>81</sup> See generally WEINSTEIN & BERGER, *supra* note 14, 609[01] at 609-49 to -50. See also *United States v. Jackson*, 405 F. Supp. 938, 942 (E.D.N.Y. 1975) (courts must reconcile competing policies of (1) encouraging defendants to testify by protecting them against unfair prejudice, with (2) protecting the government's case against unfair misrepresentation of non-criminality).

<sup>82</sup> See *supra* note 15 and accompanying text.

<sup>83</sup> See *supra* note 14 and accompanying text.

### III. Current Treatment of Prior Conviction Evidence in Civil Cases: Analysis of the 609(a)(1) - 403 Dilemma

#### A. Court Treatment of Admissibility Under Rule 609(a)(1)

Rule 609(a)(1) does not explicitly define the scope of admissible prior conviction evidence.<sup>84</sup> However, courts have traditionally admitted only the name of the crime, its classification, when and where it took place, and the corresponding punishment received, regardless of the witness testifying.<sup>85</sup> But while the courts are in agreement as to the extent of the admissible prior conviction evidence, there is great disparity among the courts as to when and under what authority such evidence is admissible in civil cases.

#### 1. Automatic Admissibility Against Civil Parties

The Third Circuit has held that prior convictions offered for impeachment purposes are automatically admissible for impeachment purposes against civil plaintiffs. In *Diggs v. Lyons*,<sup>86</sup> since the affected party was a civil plaintiff rather than a "defendant," the court held that it was Congress' intent that "except in cases of possible prejudice to the defendant, judges were to have no more discretion in admitting evidence of felony convictions than evidence of *crimen falsi*. . . ."<sup>87</sup> The majority's justification for its reading stemmed from its determination that the "specific" language of Rule 609(a)(1) preempted the "general" language of Rule 403 in civil cases.<sup>88</sup>

The court's emphasis on the fact that the party affected by this issue in *Diggs* was a civil *plaintiff* and not merely a civil *party* and the fact that the court relied on the literal, plain meaning language of Rule 609(a)(1) in reaching its decision,<sup>89</sup> suggests that the Third Circuit may not necessarily favor blanket admissibility with regard to a civil defendant.<sup>90</sup> The

84 See *supra* note 8 and accompanying advisory committee's note.

85 See generally 98 C.J.S. *Witnesses* § 507(c) (1957 & Supp. 1987); LOUISELL & MUELLER, *supra* note 14, § 319 at 349-52. See also Note, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 YALE L.J. 763, 776 (1961). However, the witness is often allowed to make a brief denial of guilt. See McCORMICK, *supra* note 2, § 43 at 99.

86 741 F.2d 577 (3d Cir. 1984), *cert. denied*, 471 U.S. 1078 (1985).

87 *Id.* at 582. The Third Circuit noted that courts have upheld the mandatory admissibility of prior felony convictions against prosecution witnesses in criminal cases, and stated, "[t]heir rationale applies equally to the treatment under Rule 609(a) of *plaintiff's* witnesses in a civil case." *Id.* (emphasis added).

88 The Third Circuit cited its *Wong* determination that Rule 403 was not designed to override more specific rules, and that "Rule 609(a) is such a specific rule." *Id.* at 581 (citing *United States v. Wong*, 703 F.2d 65, 67 (3d Cir. 1983)). The court went on to stress that no distinction should be made between civil and criminal cases under Rule 609(a). See *id.* at 582. For an additional discussion of *Diggs*, see Note, *Diggs v. Lyons: The Use of Prior Criminal Convictions To Impeach Credibility in Civil Actions Under Rule 609(a)*, 60 TUL. L. REV. 863 (1986).

89 Rule 609(a)(1) provides balancing for prejudice only to the "defendant;" it does not distinguish between criminal and civil defendants in the plain language of the rule. See *supra* note 8 for the full text of Rule 609(a). The Third Circuit indicated its reliance on the plain meaning by stating, "We have felt compelled to give the rule the effect which the plain meaning of its language and the legislative history require." 741 F.2d at 582.

90 The question of whether prior convictions are also automatically admissible against civil defendants was not directly resolved by the *Diggs* court. 741 F.2d at 578-82. Indeed, the court at one place in its opinion implied that its holding was limited to civil plaintiffs. See *supra* note 87.

court even recognized that blanket admissibility of all felony convictions for impeachment purposes "may in some cases produce unjust and even bizarre results."<sup>91</sup> Yet, it justified its holding by placing the responsibility of amendment on the legislature rather than on the courts.<sup>92</sup>

Even if *Diggs* did not go so far as to apply a standard of automatic admissibility of prior conviction evidence offered to impeach *all* civil witnesses, it appears several other courts have. The most recent of this line of cases, and in fact the most recent ruling on the 609 - 403 issue in general, is the Seventh Circuit's decision in *Campbell v. Greer*.<sup>93</sup> Because *Campbell* represents a significant departure from the Seventh Circuit's previous treatment of the issue,<sup>94</sup> a more detailed analysis of this decision will be provided here.

In *Campbell*, a State inmate brought a civil rights action against prison officials, alleging cruel and unusual punishment when the officials failed to "deadlock" his cell after he had requested they do so in order to protect him from a targeted "hit" by other inmates.<sup>95</sup> As a result, "hit men" (fellow prisoners) entered his cell and stabbed him repeatedly. The jury found for the defendants, and Campbell appealed in part on the ground that the defendants' counsel should not have been allowed to introduce evidence of the rape conviction for which he was then serving time.<sup>96</sup>

The Seventh Circuit, in an opinion written by Judge Posner, first evaluated the application of Rule 609(a)(1)'s prejudicial balancing standard to civil actions, and then examined the possible application of balancing under Rule 403. The court relied on the language of Rule 609(a)

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91 741 F.2d at 582.

92 The majority in *Diggs* stressed:

But if the rule is to be amended to eliminate these possibilities of injustice, it must be done by those who have the authority to amend the rules, the Supreme Court and the Congress. We therefore leave the problem to them. It is not for us as enforcers of the rule to amend it under the guise of construing it.

*Id.* Still, the majority received criticism for adopting a rule of blanket admissibility and for excusing itself for so doing by charging Congress with the responsibility to change the rule. The dissent emphasized:

That result, placing use of such evidence outside the reach of the district court's discretion under Fed. R. Evid. 403, makes no sense whatever, for it mandates admission of such evidence against totally disinterested witnesses testifying, for example, about whether a light at an intersection was red or green.

...

No matter which way these ambiguous rules are interpreted, Congress is free to change the interpretation by legislation. . . . Meanwhile, in those circuits which have interpreted the two rules so as to achieve a reasonable accommodation in civil cases, that reasonable accommodation will stand. In this circuit, on the other hand, concededly bizarre results will be mandated by our rigid application of Rule 609(a) in civil cases which were not of real concern to Congress.

*Id.* at 583 (Gibbons, J., dissenting).

93 831 F.2d 700 (7th Cir. 1987).

94 The Seventh Circuit had considered the prior conviction controversy in civil cases twice before. In *Christmas v. Sanders*, 759 F.2d 1284 (7th Cir. 1985), it recognized the Rule 609 - 403 issue, but expressly refused to resolve it. *Id.* at 1289-93. In *Lenard v. Argento*, 699 F.2d 874 (7th Cir.), *cert. denied*, 464 U.S. 815 (1983), the court affirmed the civil trial court's exclusion of the plaintiff's manslaughter conviction when offered to impeach credibility. *Id.* at 894-95.

95 831 F.2d at 701.

96 *Id.*

and on the rule's legislative history<sup>97</sup> to conclude that the balancing provision of Rule 609(a) does not apply to civil witnesses or parties. It noted, "[t]he only prejudicial effect that the judge is to consider [under Rule 609(a)(1)] in ruling on the admissibility of a prior conviction is the prejudicial effect on the defendant in a criminal trial; as to *all other witnesses*, prior convictions are admissible for purposes of impeachment without any balancing test."<sup>98</sup>

Additionally, the Seventh Circuit considered Rule 609(a)(1)'s possible preemption of Rule 403 in dealing with prior conviction evidence. The court observed that if Congress and the Advisory Committee intended to deal exhaustively with using prior convictions to impeach a witness' testimony in Rule 609, Rule 403 would not apply.<sup>99</sup> The court then reasoned:

If [Rule 403] overrides the express statement in Rule 609(a)(1) that evidence of prior convictions shall be admissible unless prejudice to the defendant outweighs the probative value of the evidence, then it overrides the express statement in rule 609(a)(2) that evidence of prior convictions involving dishonesty or false statement is admissible regardless of prejudice to the defendant or anyone else. Yet Congress plainly decided that such evidence should be admissible regardless of its prejudicial effect, even against a criminal defendant; and if it is admissible against a person facing the loss of his liberty and the humiliation of a criminal conviction it must also be admissible against a civil plaintiff or other witness in a civil case.<sup>100</sup>

The Seventh Circuit viewed this as the "clinching argument" against the applicability of Rule 403,<sup>101</sup> concluding that Congress did not intend Rule 403 to be used to undo the common-law rule of blanket admissibility.<sup>102</sup> Thus, the majority held that Rule 403 does not apply to the use of prior convictions to impeach a witness' testimony in either a criminal or a civil case.<sup>103</sup>

97 In particular, the Seventh Circuit relied upon the Conference Committee's consideration and eventual rejection of the danger of prejudice to a nondefendant witness as a factor to be weighed in determining admissibility. *Id.* at 704. For an additional discussion of the portion of the Conference Report cited in *Campbell*, see *supra* notes 69-72 and accompanying text.

98 831 F.2d at 704 (emphasis added). Because the court addressed such admissibility with respect to "all other witnesses," the *Campbell* decision, in contrast to *Diggs*, can be read to express the Seventh Circuit's view on prior conviction evidence as it pertains to all civil parties even though the facts of that case concerned only the admissibility of a civil plaintiff's prior conviction.

99 *Id.* at 705. The court labelled Rule 403 as a "catch-all," noting that it "was not meant to overlap, supplant, or contradict the policy premises of more specific rules such as Rule 609." *Id.*

100 *Id.* at 705-6.

101 *Id.* at 705.

102 *Id.* at 706.

103 *Id.* at 706. The court rejected the Fifth Circuit's decision in *Shows v. M/V Red Eagle*, 695 F.2d 114 (5th Cir. 1983), which treated Rule 403 as "cutting across" Rule 609 and the other rules of evidence. For additional discussion of the *Shows* decision, see *infra* notes 116-119 and accompanying text. The Seventh Circuit in *Campbell* criticized *Shows*, indicating that *Shows* "failed to note the comment of the Advisory Committee that Rule 403 is inapplicable where another rule has dealt exhaustively with the admissibility of a particular class of evidence." *Campbell*, 831 F.2d at 706.

It is important to note, however, that Judge Posner received strong criticism for his resolution of the Rule 609(a) - 403 conflict from one of the other two judges hearing the *Campbell* case, Senior District Judge Will, who was sitting on the case by designation. See 831 F.2d at 708 (Will, J., concurring). Judge Will objected that:



## 2. Applying the 609(a)(1) Prejudicial Balancing Standard to Civil Parties as well as to Criminal Defendants

Several courts have applied the balancing test of Rule 609(a) to all witnesses in both criminal and civil proceedings, without discussing the possible application of Rule 403. For example the Sixth Circuit, in *Calhoun v. Baylor*,<sup>104</sup> affirmed the admission of a civil defendant's prior felony conviction for impeachment purposes, but justified the ruling by omitting the words "to the defendant" from the balancing standard of Rule 609(a)(1).<sup>105</sup>

Additionally, the Fifth Circuit has indicated that the determination of whether to allow or disallow the use of a prior conviction based upon whether its probative value outweighs its prejudicial effect in civil actions is within the trial court's broad discretion.<sup>106</sup> That circuit has endorsed

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If Rule 609(a) is read, through judicial patchwork, to apply only to criminal cases, I find it illogical, as well as unnecessary, to conclude that Rule 403 is never applicable to prior conviction evidence in civil cases. That conclusion is inconsistent with what some members of Congress clearly intended as Judge Posner's opinion points out, as well as a number of prior decisions. . . .

I find it an "unacceptable implication" that so narrow a specific rule should be generalized to foreclose application of the broad provisions of Rule 403 in all cases. Rather, the only acceptable implication for me is that Rule 609 forecloses application of Rule 403 only to those specific circumstances to which Rule 609 is applicable.

*Id.* at 708-09.

In addition to the Seventh Circuit, two federal district courts have chosen to apply the automatic admissibility rule with no prejudicial balancing whatsoever in civil cases. See *Ball v. Woods*, 402 F. Supp. 803, 811 (N.D. Ala. 1975) (dictum), *aff'd mem. sub. nom.*, *Ball v. Shamblin*, 529 F.2d 520 (5th Cir.), *cert. denied*, 426 U.S. 940 (1976); *Garnett v. Kepner*, 541 F. Supp. 241, 244 (M.D. Pa. 1982), *superseded by Diggs*, discussed *supra* notes 86-92 and accompanying text. However, when considering *Woods* it is important to note that Alabama moved from being a part of the Fifth Circuit to become part of the Eleventh Circuit in October, 1981. Act of October 14, 1980, P.L. No. 96-452, 94 Stat. 1994. Currently *Shows, infra* notes 116-119 and accompanying text, controls in the Fifth Circuit. The Eleventh Circuit has not yet considered the issue; thus, the districts in that circuit would seemingly be bound by Fifth Circuit precedent which was developed before the split, i.e., *Woods*. However, because the federal district court in that case only discussed the 609(a)(1) - 403 issue in dictum, and because the court of appeals affirmed the district court's decision without opinion, *Woods* arguably represents persuasive authority at best in the Eleventh Circuit. For additional discussion of these decisions, see LOUISELL & MUELLER, *supra* note 14, § 316 at 324.

The district courts applying the automatic admissibility rule relied on the Conference Report's indication that the danger of prejudice to a nondefendant witness is outweighed by the jury's need to have as much relevant evidence on the issue of credibility as possible. See *Woods*, 402 F. Supp. at 811; *Garnett*, 541 F. Supp. at 244. However, such reliance was apparently placed without consideration of the context in which this Conference Report language appears; that is, by "nondefendant" witness, the Conference Committee was referring to a prosecution witness in a criminal trial rather than to a witness in a criminal trial rather than to a witness or party in a civil action. See *supra* notes 71-72 and accompanying text.

Moreover, several states have adopted state rules of evidence which deal with the admissibility of prior convictions but which allow for no balancing of probative value against prejudice whatsoever, for either civil or criminal parties. Florida, Nebraska, Nevada, North Carolina, Ohio, and Oregon have adopted such versions of the Federal Rule 609(a). See JOSEPH & SALTZBURG, *supra* note 15, at 16-35. However, the Staff Note to Ohio's version of Rule 609(a) indicates that Rule 403 still applies when determining the admissibility of prior conviction evidence in that state. *Id.* at 3, n.6. 104 646 F.2d 1158 (6th Cir. 1981).

105 The court interpreted Rule 609(a) to mean that a prior felony conviction is admissible if "its probative value outweighs its prejudicial effect." *Id.* at 1163. It is important to note also that the *Calhoun* court stressed discretion at the trial court level by both broadly applying Rule 609(a)'s prejudicial balancing standard and labeling prior conviction evidence as "admissible" instead of mandatorily "to be admitted." *Id.*

106 *Howard v. Gonzales*, 658 F.2d 352, 358-59 (5th Cir. 1981).

such a balancing test for civil parties under both the Rule 609(a)(1)<sup>107</sup> and the Rule 403<sup>108</sup> standard. Moreover the Seventh Circuit, which also had initially ignored the criminal language in the rule when faced with its application to civil parties,<sup>109</sup> has reconsidered the issue and reached a different result in *Campbell*.<sup>110</sup>

At both the federal district court and the circuit court level, courts recently considering the prior conviction issue in civil cases have refused to apply Rule 609(a)(1)'s standard to civil parties. Thus, although *Calhoun* is still controlling in the Sixth Circuit, this approach seems somewhat outdated.<sup>111</sup>

### 3. Applying the 403 Prejudicial Balancing Standard to Civil Parties

The First, Fourth, Fifth and Eighth circuits have applied Rule 403 in all civil cases, regardless of how the ambiguities of Rule 609(a) are interpreted. In *Wierstak v. Heffernan*<sup>112</sup> the First Circuit labeled as "certainly appropriate" the trial judge's application of the Rule 403 balancing test to determine the admissibility of the civil plaintiff's prior conviction.<sup>113</sup>

<sup>107</sup> See *Gonzales*, 658 F.2d at 359 (finding no abuse of discretion in the trial court's application of Rule 609(a)(1)'s balancing test to civil parties). See also *Petty v. Ideco*, 761 F.2d 1146, 1152 (5th Cir. 1985) (calling "unfounded" the contention that Rule 609(a)(1) does not apply to plaintiffs in civil cases).

<sup>108</sup> See *Shows v. M/V Red Eagle*, 695 F.2d 114, 119 (5th Cir. 1983), discussed *infra* notes 116-119 and accompanying text.

<sup>109</sup> The Seventh Circuit had previously paraphrased Rule 609(a) to omit the words "to the defendant," thereby applying 609(a)'s balancing standard to a civil plaintiff as well as to a criminal defendant. See *Lenard v. Argento*, 699 F.2d 874, 895 (7th Cir.), *cert. denied*, 464 U.S. 815 (1983).

<sup>110</sup> *Campbell v. Greer*, 831 F.2d 700 (7th Cir. 1987), discussed *supra* notes 93-103 and accompanying text.

<sup>111</sup> See Note, *Prior Convictions Offered for Impeachment in Civil Trials: The Interaction of Federal Rules of Evidence 609(a) and 403*, 54 *FORDHAM L. REV.* 1063, 1063 n.2 (1986).

However, the United States District Court for the Eastern District of Pennsylvania has suggested that the prejudicial balancing standard provided in Rule 609(a)(1) applies to both criminal and civil parties. See *Green v. Shearson Lehman/American Express, Inc.*, 625 F. Supp. 382 (E.D. Pa. 1985). Although that court was bound by the Third Circuit's *Diggs* ruling, see text accompanying notes 86-87, *supra*, the court indicated that were it not for the *Diggs* holding, it would analyze Rule 609(a)(1) as follows:

Rule 609(a) expressly provides that previous felony convictions are not admissible for purposes of impeachment unless "the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant;" the words "to the defendant" refer to the person who was the defendant in the criminal case resulting in the felony conviction; therefore, the [609(a)(1)] balancing test, and the exercise of discretion, is mandated in all cases, civil or criminal.

625 F. Supp. at 383 (emphasis added). Such interpretation is of little persuasive value today, however, because of the *Diggs* ruling for mandatory admissibility against civil plaintiffs in that circuit and because no other circuit or federal district court has favored such an interpretation.

In addition, a number of states have adopted versions of Rule 609(a) which explicitly provide for the balancing standard of 609(a)(1), i.e., balancing probative value against prejudicial effect, to be applied to civil as well as to criminal parties. Arizona, Arkansas, Delaware, Idaho, Iowa, Michigan, Minnesota, South Dakota, Texas, and Vermont use such a standard uniformly across witnesses, while West Virginia applies such balancing against prejudice solely to witnesses other than a criminal defendant. See JOSEPH & SALTZBURG, *supra* note 15, at 3, 16-35. However, these states have revised the Federal Rule 609(a) to reflect universal application; they have not merely applied the present, criminally-focused 609(a)(1) standard to civil parties as the Sixth Circuit has in *Calhoun*.

<sup>112</sup> 789 F.2d 968 (1st Cir. 1986).

<sup>113</sup> *Id.* at 972. The court found the argument that Rule 609 mandates admission of prior convictions in a civil trial to be unpersuasive. Prior to *Wierstak*, the First Circuit had refused to resolve the Rule 609(a)(1) - 403 issue on two previous occasions. In *Furtado v. Bishop*, 604 F.2d 80 (1st Cir.

The Fourth Circuit, in *Abshire v. Walls*,<sup>114</sup> referred to the district court's exclusion of a civil plaintiff's prior conviction under Rule 609's balancing standard, but went on to affirm that court's decision under Rule 403.<sup>115</sup> Similarly, in *Shows v. M/V Red Eagle*,<sup>116</sup> the Fifth Circuit maintained that Rule 403 "is a rule of exclusion that cuts across the rules of evidence,"<sup>117</sup> and that Rule 403 consequently pervades Rule 609(a)(1) and implicitly the other federal rules, whether or not Rule 609(a)(1) applies to civil litigants.<sup>118</sup> The court went on to affirm the notion that great deference should be given to a trial judge's weighing of evidence using the Rule 403 criteria.<sup>119</sup>

Likewise, first in *Czajka v. Hickman*,<sup>120</sup> citing *Shows*, and then three months later in *Radtko v. Cessna Aircraft Co.*,<sup>121</sup> the Eighth Circuit Court of Appeals has held that Rule 609 does not foreclose the district court's duty under Rule 403 to weigh the probative value of the evidence against the danger of unfair prejudice.<sup>122</sup> However, the court expressly refused in those cases to address the issue of whether Rule 609(a)(1)'s balancing test was intended to protect only criminal defendants and not civil litigants.<sup>123</sup> The court deemed that resolving such an issue was simply unnecessary once it had determined that Rule 403 must be applied in civil cases when a party seeks to cross-examine another about prior criminal convictions.<sup>124</sup>

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1979), the court noted the 609(a)(1) - 403 conflict, but declined to use its opportunity to resolve it, holding that whatever error there may have been in excluding the prior convictions in that case was harmless. *Id.* at 93. Similarly, six years later that circuit passed up another opportunity to interpret Rule 609(a)(1)'s applicability to civil litigants, in *Linskey v. Hecker*, 753 F.2d 199 (1st Cir. 1985). The court in *Linskey* merely gave deference to the trial court on the prior conviction issue, and held that "the court in its discretion under Rule 403," could exclude prior conviction evidence. *Id.* at 202. The First Circuit refused to specifically determine whether the district court retained Rule 403 discretion in these matters until *Wierstak*.

114 830 F.2d 1277 (4th Cir. 1987).

115 The court in *Abshire* never resolved Rule 609's applicability in a civil proceeding. The court explained:

The district court reasoned that *Abshire's* prior convictions should be excluded because their prejudicial effect outweighed their probative value. This reasoning, however, is also pertinent to excluding evidence under Rule 403. . . . We, therefore, need not resolve Rule 609's applicability in a civil proceeding if *Abshire's* prior criminal record would be properly excluded under Rule 403.

*Id.* at 1281.

116 695 F.2d 114 (5th Cir. 1983).

117 *Id.* at 118.

118 *Id.* at 119.

119 *Id.* at 118.

120 703 F.2d 317 (8th Cir. 1983).

121 707 F.2d 999 (8th Cir. 1983).

122 See *Czajka*, 703 F.2d at 319; *Radtko*, 707 F.2d at 1000. The Eighth Circuit in *Czajka* stressed particularly that even if the intended focus of Rule 609 is avoidance of prejudice to criminal defendants, it does not mandate a "mechanical and restrictive result when the party facing the potential prejudice is one other than a criminal defendant." 703 F.2d at 319 (citing *Tussel v. Witco Chemical Corp.*, 555 F. Supp. 979, 983 (W.D. Pa. 1983). For additional consideration of the *Tussel* court's treatment of the 609(a)(1) - 403 issue, see *infra* note 124).

123 *Czajka*, 703 F.2d at 319; *Radtko*, 707 F.2d at 1000.

124 See *Czajka*, 703 F.2d at 319. One additional circuit has thus far hinted at its solution to the Rule 609(a)(1) - 403 conflict in civil cases. The Ninth Circuit, in *U.S. v. Dixon*, 547 F.2d 1079 (9th Cir. 1976), considered the admissibility of prior conviction evidence in criminal cases, but noted in dictum 403's possible applicability in a civil action. The court indicated that it is "conceivable" that Rule 403 might afford a trial judge discretion to exclude evidence of a prior conviction "even where

## B. Commentators' Views on the Prior Felony Conviction Issue

Courts which have used the balancing standard of Rule 403 to exclude prior conviction evidence sometimes cite to Professors Saltzburg and Redden for authority.<sup>125</sup> Saltzburg & Redden have argued that since Rule 609(a)(1) does not cover use of all convictions or prejudice to all parties, it does not preempt application of Rule 403.<sup>126</sup> They also sug-

the defendant in a criminal case might not be the party prejudiced." *Id.* at 1083. The court in *Dixon* additionally addressed the trial court's treatment of stale convictions and the interrelationship of Rules 609(a) and (b). *See id.* at 1082-84. For a brief further discussion of *Dixon*, *see* Recent Decision, 22 DUQ. L. REV. 535, 547 (1984).

In addition to the First, Fourth, Fifth, Eighth, and perhaps Ninth circuits, several federal district courts have applied the Rule 403 balancing standard in determining the admissibility of prior conviction evidence in civil cases. The United States District Court for the District of Minnesota found in *Boyer v. Chicago & North Western Transportation Co.*, 603 F. Supp. 132 (D. Minn. 1985), was bound by the Eighth Circuit's *Czajka* and *Radtke* ruling and likewise chose to avoid making any decision on whether the Rule 403 or the 609(a) balancing test specifically controls in a civil case. The *Boyer* court did hold, however, that the plaintiff's prior conviction must be excluded "even under the less stringent Rule 403 balancing test. . . ." *Id.* at 134. It is important to note also that Rule 403 is commonly applied by the trial judge when the prior conviction evidence is being offered for purposes other than impeachment. *See, e.g.,* *Roshan v. Fard*, 705 F.2d 102, 104 (4th Cir. 1983) (where prior conviction evidence is offered primarily to demonstrate motive and only incidentally to attack credibility, the evidence may properly be admitted under Rule 404(b), and is properly analyzed under Rule 403)).

Similarly to *Boyer*, in *Moore v. Volkswagenwerk, A.G.*, 575 F. Supp. 919 (D. Md. 1983), the United States District Court for the District of Maryland refused to examine the admissibility of a prior conviction under Rule 609(a)(1), and instead applied Rule 403's balancing standard. The court reasoned that "[t]he language of [Rule 609(a)(1)] does not require that it be applied in civil cases . . .," *id.* at 921, and that "Rule 403 applies to any situation unless another rule absolutely bars certain evidence or sets up a decision-making procedure that preempts any 403 weighing." *Id.* at 922. The *Moore* decision represented the first consideration of the 609(a)(1) - 403 controversy in the Fourth Circuit; *Abshire* followed suit and now controls in that circuit.

The United States District Court for the Western District of Pennsylvania also refused to find that Rule 609(a)(1) preempts Rule 403 in *Tussel v. Witco Chemical Corp.*, 555 F. Supp. 979 (W.D. Pa. 1983). That court explained:

[W]e are not convinced that the language of Rule 609(a)(1) and its legislative history mandate a mechanical and restrictive result when the party facing potential prejudice is one other than a criminal defendant. This is particularly true in a civil case . . . where questions regarding the plaintiff's prior criminal conviction possess the likelihood of being tangential if not clearly irrelevant.

*Id.* at 983. For a more detailed discussion of *Tussel*, *see* Recent Decision, *supra*. However, *Diggs* now controls in the Third Circuit. *See supra* notes 86-92 and accompanying text.

Additionally, one state, Wisconsin, has selected Rule 403 balancing over the 609(a)(1) standard in its adopted version of Federal Rule 609(a). The Wisconsin statute provides that prior conviction evidence is admissible for impeachment purposes, but may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *See* WIS. STAT. ANN. § 906.09(1), (2). Similarly, although New Mexico has adopted Federal Rule 609(a) without modification, it applies Rule 403 balancing in assessing the admissibility of *crimen falsi* convictions under 609(a)(2). *See* *State v. Day*, 94 N.M. 753, 617 P.2d 142, 148, *cert. denied*, 449 U.S. 860 (1980). Alaska, Iowa, Maine, Ohio, and South Dakota have similarly viewed 403 as underlying their respective State Rules of Evidence regarding prior conviction evidence. For a detailed discussion of state treatment of the admissibility of prior conviction evidence, *see generally* JOSEPH & SALTZBURG, *supra* note 15, at 1-35; WEINSTEIN & BERGER, *supra* note 14, 609[12] at 609-132 to -194.

125 SALTZBURG & REDDEN, *supra* note 2. *See also* Smith, *supra* note 53, at 459.

126 Saltzburg & Redden indicate:

[I]f Rule 609(a)(1) does not cover use of all convictions and prejudice to all parties, nothing in this Rule explicitly states that it overrides other Rules . . . and no good reason appears to allow the government or civil litigants to be unfairly prejudiced. Hence, Rule 403 may be available to protect parties other than criminal defendants from unfair impeachment. . . . In our view the special protection of Rule 609(a)(1) against use of prior convictions . . . was intended to protect only criminal defendants, whereas the general notion [of Rule 403] . . . was intended to reach . . . all parties. . . .

gest that the use of the word "shall" to describe admissibility in Rule 609(a)(1) was unintentional; therefore, trial judges should retain discretion in admitting the evidence of a prior conviction.<sup>127</sup>

The Saltzburg & Redden position has generally not been adopted by other commentators. The support upon which Saltzburg & Redden rely in forming the basis of their position has been criticized,<sup>128</sup> and the predominant view seems to be that Rule 609(a)(1) applies to both criminal and civil cases. The Weinstein,<sup>129</sup> Louisell & Mueller,<sup>130</sup> and McCormick<sup>131</sup> evidence treatises each stand behind this broad interpretation. The scholars Wright and Graham have also emphasized that Rule 609(a) applies to all actions such that the admissibility of prior conviction evidence is beyond the scope of Rule 403.<sup>132</sup>

#### IV. Turning to Policy: The Argument for Interpreting Rule 403 to Underlie Rule 609(a)(1) in Civil Cases

Because the plain meaning of Rule 609(a)(1)'s language and the rule's legislative history do not clearly define congressional intent as to whether the rule should apply in civil cases,<sup>133</sup> courts should look to the policies underlying Rule 609(a)(1), Rule 403, and the Federal Rules in general to resolve the 609(a)(1) - 403 conflict. If applying Rule 403 to prior conviction evidence in civil trials would be at odds with the policy of a more specific rule, it should not be used.<sup>134</sup> However, if application would not clearly defeat a contrary policy, Rule 403 should be used as a "safety net," to ensure that the purposes of the Rules in general are met.<sup>135</sup>

SALTZBURG & REDDEN, *supra* note 2, at 520.

127 See *id.*, at 521. The suggestion that the phrase "shall be admitted" in Rule 609(a) was unintentional is perhaps supported by the fact that the other Federal Rules of Evidence seem to favor discretionary rather than mandatory admissibility language. For example, relevant evidence "is admissible," FED. R. EVID. 402, and leading questions on cross-examination "should be permitted," *id.* at 611(c), while evidence of other crimes, wrongs, or acts "may . . . be admissible," for certain purposes, *id.* at 404(b), and specific instances of conduct going to a witness' credibility "may be inquired into" on cross-examination, *id.* at 608(b). Certainly the exclusive use of discretionary language in the other Rules which deal with admission of a witness' prior conduct implies that the mandatory 609(a) language could well be a legislative oversight. For additional support of this proposition, see H.R. CONF. REP. NO. 1597, 93d Cong., 2d Sess. 9 (1974) (Conference Committee used the word "may" rather than "shall" when paraphrasing Rule 609(a)(1)). But cf. Smith, *supra* note 53, at 460 (indicating that Saltzburg & Redden erred in viewing the "shall be admitted" language as legislative error).

128 See generally Smith, *supra* note 53, at 459-61.

129 WEINSTEIN & BERGER, *supra* note 14, at 609[06].

130 LOISELL & MUELLER, *supra* note 14, § 316 at 324-35.

131 MCCORMICK, *supra* note 2, § 43 at 94.

132 22 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5214, at 263 (1978).

133 See *supra* notes 35-83 and accompanying text for a discussion of the ambiguities surrounding Rule 609(a)'s adopted language and legislative history. See also, e.g., Bread Political Action Comm. v. Fed. Election Comm'n, 455 U.S. 577 (1982), and Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572 (1980) for illustrations of other legislative histories the Supreme Court has found to be ambiguous.

134 See Note, *The Place for Prior Conviction Evidence in Civil Actions*, 86 COLUM. L. REV. 1267, 1279 (1986) (stressing that "if the application of Rule 403 defeats the policy underlying a specific rule, the general rule cannot be utilized.").

135 See FED. R. EVID. 102 and 611, discussed *supra* note 4, for the expressed purposes of the Federal Rules. In addition, the House and Senate agreed the overall purposes of the Federal Rules would control in matters of judicial controversy. See also *supra* notes 77-78 and accompanying text.

The key inquiry in determining Rule 403's applicability lies in establishing whether there is a more specific rule that preempts that rule in the civil context.<sup>136</sup> As was previously discussed, the Rule 609(a)(1) balancing test applies only to criminal defendants;<sup>137</sup> the rule offers no standard for the admission of prior conviction evidence in civil cases. Since it is unclear just how Rule 609(a)(1) pertains to civil parties, the rule cannot be said to be "more specific" so that it would preempt Rule 403 in that context. Arguments to the contrary have merely focused on the area of evidence which Rule 609(a)(1) addresses, i.e., prior convictions, rather than on its contextual application.<sup>138</sup>

Allowing a judge to use Rule 403 to exclude prior conviction evidence in a civil trial would not interfere with the congressional policy affording a criminal defendant protection under Rule 609(a)(1).<sup>139</sup> The balancing test of Rule 403 is significantly different from that of Rule 609(a)(1). Under Rule 403, the party arguing for exclusion of the conviction must persuade the trial judge that the danger of prejudice substantially outweighs the probative value of the evidence.<sup>140</sup> To the contrary, under Rule 609(a)(1), the party arguing for admission of the evidence has the burden of persuading the court that the prior conviction evidence is more probative than prejudicial.<sup>141</sup> Thus, the prior convictions of a criminal defendant will generally be excluded under Rule 609(a)(1),

136 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. See generally 1A N. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 23.16, at 373-74 (C. Sands 4th rev. ed. 1985).

137 See *supra* notes 68-72 and accompanying text for a discussion of the application of the Rule 609(a)(1) balancing test.

138 For example, the Third Circuit first determined that Rule 609(a) was "more specific" and therefore preempted Rule 403 "insofar as [Rule 609(a)] required the admission of prior convictions of crimen falsi of a defendant who testified in his criminal trial," in *United States v. Wong*, 703 F.2d 65, at 67 (3d. Cir. 1983). That circuit later applied the finding that Rule 609(a) was a "more specific" rule to the civil scenario in *Diggs*, see *Diggs*, 741 F.2d 577, at 581 & 582, discussed *supra* note 88 and accompanying text, even though *Wong* considered a contextual situation which was specifically addressed in the rule, i.e., the admissibility of a prior crimen falsi conviction against a criminal defendant, while *Diggs* involved a contextual situation which clearly was not, i.e., the admissibility of a felony conviction against a civil plaintiff.

The Seventh Circuit, in *Campbell*, discussed *supra* notes 93-103 and accompanying text, also generalized Rule 609(a) as "a specific rule governing the admissibility of convictions to impeach a witness' testimony." *Campbell*, 831 F.2d 700, at 705 (7th Cir. 1987). That circuit, like the Third Circuit in *Diggs*, did not consider the contextual distinction between the criminal language in Rule 609(a) and the civil proceeding at hand in establishing Rule 609(a) as such a "specific" rule.

In addition, the court in *Garnett v. Kepner*, 541 F. Supp. 241 (M.D. Pa. 1982), discussed *supra* note 103, justified its determination that Rule 609(a) is a more specific provision which consequently preempts Rule 403 on the generic premise that "Congress wrestled with the problems raised by the use of prior convictions [in Rule 609(a)]." *Garnett*, 541 F. Supp. at 244. The *Garnett* court exclusively emphasized the fact that prior conviction evidence is categorically dealt with in Rule 609 in establishing Rule 609(a)(1)'s application to civil and well as to criminal cases. See *id.*

139 See Note, *supra* note 134, at 1281. Rule 609(a)(1) was intended to protect only criminal defendants, while the general notion of balancing harm against helpfulness under Rule 403 was intended to protect all parties against undue prejudice. See SALTZBURG & REDDEN, *supra* note 2, at 520.

140 FED. R. EVID. 403, quoted *supra* note 1; see also *Christmas v. Sanders*, 759 F.2d 1284, 1292 (7th Cir. 1985).

141 FED. R. EVID. 609(a)(1), quoted *supra* note 8. See also 120 CONG. REC. H40891 (daily ed. Dec. 18, 1974) (statement of Rep. Hungate) (Conference Committee placed "the burden on the proponent of such evidence to show that . . . the probative value of the conviction outweighs its prejudicial effect."), and *United States v. Hayes*, 553 F.2d 824, 828 (2d Cir.), *cert. denied*, 434 U.S. 867 (1977).

while the convictions of a civil party under Rule 403 will generally be admitted.<sup>142</sup> Using the balancing test of Rule 609(a)(1) in criminal actions and the balancing test of Rule 403 in civil actions would reflect both the exceptional protection Congress intended for the criminal defendant and the general congressional recognition that a civil party should receive at least some level of protection from unfair prejudice.<sup>143</sup>

In addition to not interfering with the policy basis of Rule 609(a)(1), applying Rule 403 in civil cases would best conform with the policies underlying the Federal Rules as a whole.<sup>144</sup> The Rules espouse a strong presumption that probative evidence should not be excluded absent compelling reasons,<sup>145</sup> and applying Rule 403 to the admission of prior conviction evidence would ensure that any such compelling reasons were considered. Moreover, as the *Diggs* court indicated, failing to allow Rule 403's balancing for trial concerns could allow "unjust and even bizarre results."<sup>146</sup> Without this balancing, prior conviction evidence which has only little relevance to credibility in the case at hand could be admitted,<sup>147</sup> regardless of the unfair embarrassment or prejudice to the civil witness or party. By preventing such undue prejudice and the possible deterrent effect upon even civil parties and witnesses resulting from the fear of embarrassment and prejudice, application of Rule 403 will further advance the purposes of the Federal Rules: justice, accuracy, and fairness through judicial discretion and flexibility.<sup>148</sup>

## V. The Optimal Solution: Revising Rule 609(a)

Although Rules 609(a)(1) and 403 can be interpreted so as to ensure the fair administration of justice in civil cases, the optimal solution to the 609(a)(1) - 403 conflict lies in amending Rule 609(a) to better reflect congressional intent towards admitting prior conviction evidence in both criminal and civil contexts. Indeed, commentators<sup>149</sup> and judges<sup>150</sup> that

142 See *Christmas*, 759 F.2d at 1292 (indicating that Rule 609(a)(1) "leans heavily toward exclusion, while Rule 403 leans heavily toward admissibility"). Although the court has considerable discretion in applying Rule 403, that discretion should be used sparingly. 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). See also *SALTZBURG & REDDEN*, *supra* note 2, at 139 (courts should balance maximum probative value against the likely prejudicial effect of the evidence).

143 Note, *supra* note 134, at 1281. Congress has shown such recognition through its provisions regarding character evidence. See *supra* note 43.

144 FED. R. EVID. 102. See also *Gold*, *supra* note 1, at 499 (Rule 403 intended to advance accuracy and fairness through judicial flexibility).

145 See *Barefoot v. Estelle*, 463 U.S. 880, 898 (1983); *United States v. Dennis*, 625 F.2d 782, 796-97 (8th Cir. 1980) (in weighing probative value against the dangers and considerations enumerated in Rule 403, the general rule is that the balance should be struck in favor of admission).

146 *Diggs*, 741 F.2d at 582.

147 The *Diggs* court noted in contemplating the unjust results of mandatory admission of all felony convictions, that "[e]vidence that a witness has in the past been convicted of manslaughter by automobile, for example, can have but little relevance to his credibility as a witness in a totally different matter." *Id.*

148 See FED. R. EVID. 102. See also Note, *supra* note 111, at 1078.

149 For example, Professor Irving Younger indicated that revision should take on a Rule 403 flavor: "[I] dare hope that Congress will someday amend Rule 609 along these lines: Any witness may be impeached with convictions, subject to the judge's discretion under Rule 403." Younger, *Three Essays on Character and Credibility Under the Federal Rules of Evidence*, 5 HOFSTRA L. REV. 7, 12

have considered the 609(a)(1) - 403 issue have stressed that Rule 609(a)(1) as written needs revision.

One possible revision of Federal Rule 609(a)(1) that would clarify its intended application to civil as well as to criminal parties and that should be examined in amending the current rule is reflected in Uniform Rule of Evidence 609. The Uniform Rule allows for balancing prejudicial effect to "a party or the witness" rather than merely "to the defendant" as under the Federal Rule.<sup>151</sup> However, this would provide the same level of protection from prejudice to civil parties and witnesses as is currently provided to criminal defendants,<sup>152</sup> and such was clearly not Congress' intent in adopting the original prior conviction rule.<sup>153</sup> Arguably, civil parties and witnesses in both civil and criminal trials should receive only the level of protection from prejudice provided in the "substantially outweighs" standard of Rule 403, while criminal defendants should receive the heightened protection currently provided in Rule 609(a)(1). In addition, it is questionable whether prior conviction evidence should be excluded because of its prejudicial effect to a witness who is not even affected by the outcome of the litigation.<sup>154</sup>

Another possible version of Rule 609(a), adopted at the state level, would require a showing of relevancy of the prior conviction evidence towards the issue of credibility, as well as a determination that the probative value of the evidence outweighs its prejudicial effect to the party of-

(1976). Moore & Bendix also argue that "the Conference Report and subsection (a)(1) is deficient in that it cannot be sensibly applied in civil cases," MOORE & BENDIX, *supra* note 42, § 609.14[4] at VI-148.

150 Judge Henry J. Friendly noted the language problems in Rule 609(a)(1) from the very beginning of the adoption of the Federal Rules of Evidence, as he used the inconsistency between Rules 403 and 609(a) as an illustration of some of the problems with the rules. See *Proposed Rules of Evidence: Hearings Before the Special Subcommittee on Reform of Federal Criminal Laws of the House Committee on the Judiciary*, 93d Cong., 1st Sess. 246, 251 (1973) (testimony of Chief Judge Henry J. Friendly), reprinted in WEINSTEIN & BERGER, *supra* note 14 at 609-11 to -12. More recently, Judge Posner has recognized that "Rule 609(a) can't mean what it says," in determining that the rule was in need of some "judicial patchwork." See *Campbell*, 831 F.2d at 703. Senior District Judge Will, designated to hear *Campbell* along with Posner in the Seventh Circuit, urged the rule be amended. *Id.* at 709 (Will, J., concurring).

151 See Uniform Rule of Evidence 609(a), which 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 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 a party or the witness, or (2) involved dishonesty or false statement, regardless of the punishment.

UNIF. R. EVID. 609(a) (1974). For the adopted language of Federal Rule 609(a), see *supra* note 8.

152 Under current interpretation of Rule 609(a)(1), that rule's balancing standard is applied to criminal defendants, and Rule 403's standard or no balancing standard whatsoever is generally applied to civil parties and witnesses. See *supra* notes 84-124 and accompanying text for the courts' current treatment of the prejudicial balancing issue; see *supra* notes 139-143 and accompanying text for the implications and differences in applying the 609(a)(1) versus the 403 standard.

153 Congress intended criminal defendants to enjoy elevated protection from the prejudice of prior conviction evidence. See *supra* text accompanying notes 69-71.

154 When a party is impeached with prior conviction evidence, there is always a danger that the jury will treat such evidence as character evidence. However, this danger is not generally present when nonparty witnesses are impeached, since their propensities to act in certain ways are not relevant. See JOSEPH & SALTZBURG, *supra* note 15, at 8. In addition, prejudice to a witness stemming from revelation of his or her prior conviction was rejected by Congress as a factor to be considered by the courts. See *supra* notes 70-72 and accompanying text.



fering the witness.<sup>155</sup> Such a rule would provide a uniform standard for prior convictions of both felony and *crimen falsi* crimes.<sup>156</sup> However, congressional intent to presume the relevancy of prior conviction evidence for impeachment purposes and to provide a lower level of protection for civil parties and witnesses than for criminal defendants would again be thwarted under this version.<sup>157</sup>

To best meet the policies which underlie Rule 609(a) and the Federal Rules of Evidence in general, the amended version of Rule 609(a) should read as follows:<sup>158</sup>

- (a) GENERAL RULE. For the purpose of attacking the credibility of a witness, evidence of the fact that the witness has been convicted of a crime and the nature of the crime shall be admitted if elicited from him or established by public record during cross-examination, but only if:
- (1)(a) the crime was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and
  - (b) the court determines in a hearing outside the presence of the jury that, regarding the admission of a prior conviction of the defendant or a defendant's witness in a criminal trial, the probative value of admitting the witness' prior conviction outweighs its prejudicial effect to the criminal defendant, and such a determination appears on the record;<sup>159</sup> or, regarding the admission of a prior conviction of a prosecution witness in a criminal trial, or of any witness in a civil trial, the probative value is not substantially outweighed by the prejudicial effect to the party offering the witness;<sup>160</sup> or

155 Idaho has adopted such a rule, which provides:

(a) GENERAL RULE. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a felony and the nature of the felony shall be admitted if elicited from him during cross-examination or established by public record, but only if the court determines in a hearing outside the presence of the jury that the fact of the prior conviction or the nature of the prior conviction, or both, are relevant to his credibility and that the probative value of admitting this evidence outweighs its prejudicial effect to the party offering the witness. If the evidence of the fact of a prior felony conviction, but not the nature of the conviction, is admitted for the purpose of impeachment of a party to the action or proceeding, he shall have the option to present evidence for the nature of the conviction, but evidence of the circumstances of the conviction shall not be admissible.

IDAHO R. EVID. 609(a).

156 Under the language of the Idaho rule, *crimen falsi* convictions could be excluded as a result of prejudicial balancing, contrary to present policy of blanket admissibility for such crimes. See *supra* note 32 for the current treatment of *crimen falsi* crimes under Rule 609(a)(2).

157 Congressional intent that prior convictions are presumptively probative of credibility is reflected in both the mandatory, "shall be admitted" language of the rule, see FED. R. EVID. 609(a), *supra* note 8, and in subsequent court interpretation of the rule, see, e.g., *United States v. Lipscomb*, 702 F.2d 1049, 1056 (D.C. Cir. 1983) (indicating that "Rule 609, on its face, strongly implies that a prior conviction is per se probative of credibility for certain kinds of crimes").

158 This proposed version of Rule 609(a) is modeled, in part and with some exception, after the present Federal Rule of Evidence 609(a), *supra* note 8, the Uniform Rule of Evidence 609(a), *supra* note 151, and the Idaho State Rule of Evidence 609(a), *supra* note 155.

159 Balancing for prejudicial effect to the defendant in a criminal case, regardless of whether the defendant himself or the defendant's witness is testifying, eliminates the danger of derivative prejudice. For additional explanation of the derivative prejudice issue, see *supra* note 33.

160 The revised Rule 609(a) should apply Rule 403's prejudicial balancing standard to prosecution witnesses and witnesses in civil trials. However, whereas Professor Younger advocated direct reference to Rule 403 in the revised, civil context language of the rule, see *supra* note 149, indirect reference to Rule 403's standard through the adoption of unambiguous language may be a more effective resolution, given the presumed probative value of prior conviction evidence when offered for impeachment purposes, see *supra* note 157. Spelling out Rule 403's balancing standard and ex-

- (2) the crime involved dishonesty or false statement, regardless of the punishment.

## VI. Conclusion

An analysis of the plain meaning of the language of Rule 609(a)(1) reveals no clear congressional intent mandating courts to apply the rule to civil parties or civil witnesses. Likewise, an analysis of the legislative history of that rule reveals no clear congressional intent that it be so applied. Consequently, Rule 609(a)(1) is not a "more specific" rule as it applies to civil litigation, and therefore does not preempt application of Rule 403 in the civil context.

Until Rule 609(a) is amended to clarify its application in civil actions, courts should look to the policies underlying that rule and the other Federal Rules of Evidence to resolve the 609(a)(1) - 403 conflict. Reading Rule 403 as a "safety net" that underlies Rule 609(a)(1) and all Federal Rules which are not clearly more specific in dealing with the admissibility of a particular type of evidence in a particular context ensures that the overall objectives of the Federal Rules will be met in each cause of action.

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pressly limiting the standard's application to unfair prejudice would eliminate the potential for excluding a prior conviction on the basis of less compelling trial concern grounds which are also considered in Rule 403. For the adopted language of Rule 403, *see supra* note 1.