The Short History of a Rule of Evidence That Failed (Federal Rule of Evidence 609, *Green v. Bock Laundry Machine Co.*[1] and the New Amendment)

In 1976, 14-year-old Michael Moore was injured when he accidentally rode his bicycle beneath a tractor-trailor as it turned into a neighbor's driveway. Years later, in the personal injury litigation that followed,[2] a central issue became whether Michael's 1980 and 1982 felony convictions[3] could be used to impeach his credibility as a witness. In a decision affirmed by the First Circuit, the trial court said yes, applying Rule 609(a) of the Federal Rules of Evidence.[4] Although there is no way of knowing the decisiveness of this evidence, the jury rejected Michael's personal injury claim.

Whether the criminal record of a witness is any reflection on his propensity for truthfulness has long been a subject of debate.[5] Yet, as

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1. 109 S. Ct. 1981 (1989).

2. Linskey v. Hecker, 753 F.2d 199 (1st Cir. 1985).

3. Michael's criminal record consisted of seven larcenies, six burglaries, one armed robbery, and one shoplifting conviction. *Id.* at 201.

4. FED. R. EVID. 609(a) provides:

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

On January 26, 1990, in response to concerns which are the subject of this Note, the Supreme Court submitted to Congress an amendment to Rule 609. Unless Congress decides otherwise, this amendment becomes effective December 1, 1990. *See infra* note 110 and accompanying text.

5. As framed by the Federal Rules of Evidence, the issue is really whether a *recent* conviction for a *serious* crime, such as murder or theft, is a reliable indication of a witness's credibility. The necessary implication of Rule 609 is that under some circumstances, at least, it is.

Under the Rule, the seriousness of the crime is defined by the punishment involved (only crimes "punishable by death or imprisonment in excess of one year" are admissible). FED. R. EVID. 609(a). The recentness of the crime is prescribed by a provision saying the conviction is not admissible unless it occurred in the last 10 years (or the witness was released from prison within that time), unless the court decides "in the interests of justice, that the probative value of the conviction . . . outweighs its prejudicial effect." FED. R. EVID. 609(b).

It should also be noted that Rule 609(a)(2) places certain crimes thought to be especially relevant to veracity, usually called *crimen falsi*, in a separate category. These crimes, such as perjury and fraud, are always admissible if they satisfy the recentness

intriguing as that philosophical question is,[6] and despite its troubling implications,[7] federal courts have been far more consumed by a problem that at first glance seems purely technical. For more than a decade, the ambiguous wording of Rule 609(a) has led to widespread confusion over exactly what the Rule is, and how Congress meant for it to apply in the civil litigation context — if it meant anything at all. Almost from its adoption[8] Rule 609 has suffered from contradictory interpretations in different parts of the country. Had Michael Moore brought his personal injury claim in Louisiana instead of Massachusetts, his convictions might never have been a factor in his allegation that a truck driver had been negligent.

Interestingly, the recent Supreme Court decision that was supposed to have resolved the difficulty, *Green v. Bock Laundry Machine Co.*,[9] only muddied the waters even as it created uniformity. Through its endorsement of much-criticized Third[10] and Seventh Circuit[11] schemes of mandatory civil admissibility, the Court instantly transformed talk about amending Rule 609 from a speculative pursuit into a matter of legal necessity. Although it now appears that such an amendment will become law,[12] the debate in a larger sense may have just begun. The developments surrounding *Green* have not only stirred up new interest in the Rule's

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requirement of Rule 609(b).

Even if admissible, courts usually do not allow detailed explanations of crimes, instead confining testimony to "essentials," such "as the name of the crime, the time and place of prosecution, and the punishment imposed." G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 345 (2d ed. 1987). *See also* E. CLEARY, MCCORMICK ON EVIDENCE § 43, at 98 (3d ed. 1984).

6. The problem of "character evidence" is one of the central themes of the Federal Rules. Rule 609 represents the treatment of only one of the character issues. Another is governed by Rule 404, which attempts to resolve the even more ticklish question of when character evidence can be used to prove out of court conduct.

7. *See* Foster, *Rule 609(a) in the Civil Context: A Recommendation for Reform*, 57 FORDHAM L. REV. 1, 38 (1988). Professor Foster writes:

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

8. Act of Jan. 2, 1975, Pub. L. No. 93-595, § 1, 88 Stat. 1935.

9. 109 S. Ct. 1981 (1989).

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

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

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

basic theoretical foundations, but have cast considerable doubt on the benefits of future lower court divinings of legislative intent with respect to the Rules in general. This Note summarizes the Rule 609 controversy with an eye toward the underlying conflicts that best explain the debate, and shows why *Green* not only made imperative the Rule's amendment, but effectively reopened the philosophical issue anew.

I. Years of Indecision

Rule 609 was a creature born of legislative compromise.[13] Sewn together using disparate parts and contradictory theories,[14] it was amended, debated, given life in conference committee, and finally let loose in the courts, ultimately wreaking a sort of judicial vengeance on those unfortunate enough to have to apply it.[15]

The main source of confusion — and litigation — has been the Rule's balancing test language which provides that a conviction is admissible only if "the probative value of admitting this evidence outweighs its prejudicial effect to the defendant."[16] For would-be interpreters, the ambiguity of that phrase could be summed up in three questions. First, did this judicial balancing test affect only the admissibility of a *defendant's* prior conviction, or did it affect the admissibility of *anyone's* prior conviction that might prejudice a defendant's case? Second, did the test apply to both criminal *and civil* defendants? Third, which judicial balancing test, if any, applied to prior convictions that might work to the prejudice of *other parties*, that is, the plaintiff or the government?

The first issue, by apparently wide agreement, was laid aside early. Where guilt by association is a danger, it is generally agreed that the convictions of witnesses other than the accused may be excluded.[17] Answers to the second and third issues, however, have proved to be

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13. Federal Rule of Evidence 609 has been "troublesome throughout its evolution." 10 J. Moore & H. Bendix, Moore's Federal Practice § 609.01[1.-1], at VI-98 (2d ed. 1988).

14. Professor Irving Younger wrote: "On one side were those who argued for unlimited use of convictions to impeach. On the other were those who urged strict limits. To secure the votes of both sides, something was given to each." Younger, *Three Essays on Character and Credibility Under the Federal Rules of Evidence*, 5 Hofstra L. Rev. 7, 11 (1976).

15. Federal Rule of Evidence 609 "has received a considerable amount of attention from the courts." R. McCullough II & J. Underwood, Civil Trial Manual 2, 622 (1980).

16. Fed. R. Evid. 609(a)(1). The balancing test does not apply to *crimen falsi*. *See supra* note 5.

17. 3 D. Louisell & C. Mueller, Federal Evidence § 316, at 326 (1979). The proposed 1990 amendment to Rule 609 changes this approach. *See infra* note 114 and accompanying text.

elusive, producing a body of case law that is at turns both groping and contradictory. Thus, when Bennie Lenard sued police, claiming to have been beaten by two officers after a drunk driving accident in 1977, the trial court excluded from evidence the fact that Lenard had been convicted of voluntary manslaughter years before. In affirming that portion of the trial court's decision,[18] the Seventh Circuit seemed to suggest in dictum that, despite the "to the defendant" language, trial judges were free to use the Rule 609(a)(1) balancing test which weighs "probative value" against "prejudicial effect" to keep out even the prior conviction of a civil plaintiff.[19]

Yet when faced with a similar problem two years later,[20] the Seventh Circuit wavered, apparently uncertain whether to follow its dictum in *Lenard*, or to opt for a new approach. One option was to hold that the Rule 609 balancing test was never meant to apply to civil cases at all, thereby making previous convictions in this setting automatically admissible under the Rule's "shall be admitted" language. A second option was to use another Federal Rule of Evidence, Rule 403, to provide the discretionary leverage necessary to keep out prior convictions when their inclusion would be unjust.[21] Unfortunately, after laying out these possibilities, the court sidestepped the debate and based its decision on other grounds.[22]

Meanwhile, the Rule 403 approach had taken hold in the Fifth Circuit, where Grady Shows had sued for injuries sustained after swinging on a "Tarzan" rope from an offshore platform to a ship. The court admitted into evidence the fact that Shows had once served time for armed robbery. After Shows lost his case and appealed, the Fifth Circuit reversed and held that the prejudicial effect of using the armed robbery conviction substantially outweighed its probative value.[23] The *Shows* court

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18. Lenard v. Argento, 699 F.2d 874 (7th Cir. 1983), *cert. denied*, 464 U.S. 815 (1983).

19. *Id.* at 895.

20. Christmas v. Sanders, 759 F.2d 1284 (7th Cir. 1985).

21. 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.

Note that Rule 403 requires that the probative value be "substantially" outweighed by prejudicial effect before it excludes evidence. Therefore, in theory, more evidence will be admitted under Rule 403 than under Rule 609's balancing test, which omits the word "substantially." G. LILLY, *supra* note 5, at 350.

22. *Christmas*, 759 F.2d at 1293. The Rule 609 issue had not been raised in the lower court, and absent a finding of "extraordinary circumstances," the Seventh Circuit declined to address the controversy.

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

reasoned that even if the "to the defendant" balancing language of Rule 609(a)(1) did not apply to a civil plaintiff, the residual and less protective filter of Rule 403 intervenes.[24] In the Fifth Circuit's view, "Rule 403 . . . is a rule of exclusion that cuts across the rules of evidence."[25]

Nowhere was the lack of consensus about Rule 609's meaning more apparent than in the Third Circuit, where at least three different interpretations found favor with district judges at one time or another, and where the court of appeals ultimately endorsed a view that flew in the face of what other circuits had thus far concluded. In 1982, one trial court decided that Rule 609 was never meant to keep out prior convictions based on prejudice to the plaintiff.[26] The court also reasoned that Rule 403 could not be applied because its general balancing test had been preempted by the specific attention given to the problem by Rule 609.[27] A year later, a sister court, using logic similar to that of *Shows*, decided that Rule 403 could be applied to keep out prior convictions after all.[28]

The roller coaster took another dip in the influential case of *Diggs v. Lyons*.[29] Here, the Third Circuit opted for the stricter of the two interpretations and concluded that because neither Rule 609 nor Rule 403 apply in the civil context, prior convictions are always admissible against civil plaintiffs.[30] Perhaps the best indication that the debate was far from over came a year later[31] when a trial judge grudgingly applied the Circuit's new "always admissible against a civil plaintiff" standard only to openly complain in dictum that if it were up to him, Rule 609's "to the defendant" language would be interpreted as referring to the defendant in the previous conviction under consideration![32]

The *Diggs* approach to Rule 609 gained credence from three factors. First, the author of the opinion, Judge Maris, previously headed the advisory committee which originally proposed a federal code of evidence.[33]

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24. *Id.* at 119.
25. *Id.* at 118.
26. Garnett v. Kepner, 541 F. Supp. 241 (M.D. Pa. 1982).
27. *Id.* at 244.
28. Tussel v. Witco Chem. Corp., 555 F. Supp. 979 (W.D. Pa. 1983).
29. 741 F.2d 577 (3d Cir. 1984), *cert. denied*, 471 U.S. 1078 (1985).
30. *Id.* at 581-82. The question of whether the balancing test applied to civil defendants as well was left unanswered.
31. Green v. Shearson Lehman/Am. Express, Inc., 625 F. Supp. 382 (E.D. Pa. 1985).
32. *Id.* at 383. No other court has adopted this view.
33. This point was not lost on the majority in Green v. Bock Laundry Mach. Co., 109 S. Ct. 1981, 1983 (1989).

Second, the Supreme Court declined to review the case.[34] Finally, in 1987, the Seventh Circuit, after its own years of indecision, endorsed a substantially identical interpretation.[35]

Despite this apparent momentum toward mandatory civil admissibility, most commentators condemned the *Diggs* construction of Rule 609. Many of the commentators either advocated the Rule 403 approach[36] or the exclusion altogether of prior conviction evidence from civil trials on the rationale that it is seldom probative of a person's veracity.[37] As a whole, the criticism was often directed at alleged defects in the *Diggs* logic or its techniques of statutory interpretation.[38] This adverse reaction might be characterized just as accurately, however, as distaste for the sort of judicial results that such a scheme would inevitably produce—a problem the *Diggs* majority itself admitted when it wrote that its interpretation "may in some cases produce unjust and even bizarre results."[39]

In a larger sense, therefore, the ostensibly technical debate over the meaning of Rule 609 concealed an underlying clash of ideologies that had as much to do with psychology and the Constitution as it did with plain meaning or congressional intent. These "ideology clashes" might best be described as follows: First, differing views of a jury's ability to fairly weigh potentially prejudicial matter; second, differing views of the relevance of felony convictions to truthfulness; and third, the traditional and ongoing tension between judicial willingness to supply a missing statutory term versus restraint. Each of these underlying conflicts will now be discussed briefly.

A. Trusting the Jury

Justice Robert Jackson once said it is a "naive assumption" to place much faith in a jury's impartiality in the face of highly prejudicial

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

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

36. *See, e.g.*, Note, *The Place for Prior Conviction Evidence in Civil Actions*, 86 COLUM. L. REV. 1267 (1986); Note, *Prior Convictions Offered for Impeachment in Civil Trials: The Interaction of Federal Rules of Evidence 609(a) and 403*, 54 FORDHAM L. REV. 1063 (1986).

37. *See* Foster, *supra* note 7.

38. *See, e.g.*, Smith, *Impeaching the Merits: Rule 609(a)(1) and Civil Plaintiffs*, 13 N. KY. L. REV. 441, 447-52 (1987) (*Diggs* legislative analysis does not support its interpretation); Note, *Evidence* - Diggs v. Lyons: *The Use of Prior Criminal Convictions to Impeach Credibility in Civil Actions Under Rule 609(a)*, 60 TUL. L. REV. 863, 873 (1986) (*Diggs* mistaken in its reliance upon the plain meaning of Rule 609).

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

evidence.[40] To believe that jury instructions can cure that prejudice, Jackson wrote, is to believe in "unmitigated fiction."[41]

The courts which have sought to "screen" prior conviction evidence, whether by means of Rule 609 or 403, have done so with this danger firmly in mind. Thus, in *Shows*, this questioning of a personal injury plaintiff was labelled reversible error by the Fifth Circuit:

> Q. Mr. Shows, I am somewhat confused, sir. You said that you did other jobs, sandblasting jobs before this, sir?
> A. Yes, sir.
> Q. Mr. Shows, in 1979 you went to work for Coating - for Platform Coating, is that right?
> A. Yes, sir.
> Q. And you got out of prison in November of 1978, didn't you?
> MR. WALDMANN: Your Honor, I would object to any mention of that.[42]

After reviewing this exchange, the Fifth Circuit said it had been "left with the firm belief that this evidence was wafted before the jury to trigger their punitive instincts."[43] Therefore, the panel found that Rule 403 should have been used to keep out such evidence, saying its awareness of the conviction's prejudicial effect came from "the reality of the courtroom by applying rules born of experience not logic, derived intuitively and not mathematically."[44]

Just as often, however, courts in favor of screening prior conviction evidence have come to the same conclusion by engaging in exactly the sort of mathematical approach that the Fifth Circuit avoided. In *People v. Allen*, the Michigan Supreme Court prefaced discussion of its own version of Rule 609 with a detailed look at several studies of jury behavior which seemed to indicate that when a criminal defendant's prior convictions are admitted into evidence, the conviction rate substantially increases.[45] In one study, mock jurors "were willing to state that the prior conviction evidence increased the likelihood of the defendants' guilt and was the reason they found him guilty, even though they had been instructed not to use the information for that purpose."[46]

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40. Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring).
41. *Id.*
42. Shows v. M/V Red Eagle, 695 F.2d 114, 116 (5th Cir. 1983).
43. *Id.* at 119.
44. *Id.*
45. 429 Mich. 558, 568-69 n.8, 420 N.W.2d 499, 504-05 n.8 (1988).
46. *Id.* at 568-69 n.8, 420 N.W.2d at 505 n.8 (quoting Wissler & Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 L. & HUM. BEHAV. 34, 44 (1985)).

Courts which rule in favor of always admitting prior convictions seem to place a greater faith in the jury's ability to evaluate a conviction for its impeachment purpose alone, disregarding any prejudicial "propensity" inference[47] that may come along for the ride. Thus, in *Garnett v. Kepner*, the court decided that it was inexcusable for the jury only to observe "[p]laintiff's youth and her subdued appearance in court" without being able to weigh against her credibility her previous convictions for several violent, but unrelated crimes.[48]

Of course, any discussion of the jury's ability to be objective in the Rule 609 context necessarily raises the question of how much information about a prior conviction should be admitted, provided the evidence is admissible in the first place. What is intriguing about this issue is that there is general agreement that the jury should hear relatively little in the way of detail.[49] At the same time, it is accepted that the trial court should retain the discretion to decide how much detail *it* needs outside the jury's hearing to perform its initial balancing on the question of admissibility in the first place.[50] This suggests two criticisms. First, it is likely that a manslaughter conviction admitted as evidence when potentially mitigating details are not known will have a greater prejudicial effect on a jury than when they are known — an unfair result.[51] Second, there does not seem to be a logical distinction between the jury's presumed trustworthiness in weighing the raw fact of a prior conviction, on the one hand, and the inherent suspicion of a jury's ability to fairly weigh the details and circumstances of a prior conviction, on the other.

B. Differing Views of Relevance

Tacit in any use of a prior felony conviction to impeach the credibility of a witness at trial is the supposition that criminal history has a bearing

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47. *See supra* the quotation in note 7.

48. Garnett v. Kepner, 541 F. Supp. 241, 245 (M.D. Pa. 1982).

49. *See* United States v. Gordon, 780 F.2d 1165, 1175-76 (5th Cir. 1986) (trial judge can bar defendant from inquiring into details of government witness's prior convictions).

50. In United States v. Lipscomb, 702 F.2d 1049, 1076 (D.C. Cir. 1983) (quoting United States v. Boyer, 150 F.2d 595, 596 (D.C. Cir. 1945)), the following approach was endorsed:

> It is generally agreed that in order to save time and avoid confusion of issues, inquiry into a previous crime must be stopped before its logical possibilities are exhausted; the witness cannot call other witnesses to corroborate his story and the opposing party cannot call other witnesses to refute it. The disputed question is whether inquiry into a previous crime should stop (1) with proof of the conviction of the witness or (2) with any reasonably brief "protestations on his own behalf" which he may wish to make. The second alternative will seldom be materially more confusing or time-consuming than the first.

51. Conversely, it can be argued that where facts that *enhance* the severity of a crime are not known to the jury, the impeachment effect is shortchanged.

on truthfulness.[52] The Rule 609 approach is to divide crimes into two categories. The first category includes those crimes that implicitly reflect on "honesty and veracity," the so-called *crimen falsi*.[53] The second category, as set out by Rule 609, includes all other types of serious convictions.[54] Those who helped draft the Rule considered these latter crimes relevant to credibility because they demonstrate "a willingness to engage in conduct which entails substantial injury to and disregard of the rights of other persons or to the public."[55] In the last analysis, however, the two classifications of convictions are theoretically relevant at trial for identical reasons. Each classification makes it more likely that the person on the stand is lying.

That is where the logic breaks down. While ascribing the same philosophical base to the two categories, Rule 609 then proceeds to afford them conflicting treatment: 609(a)(2), which governs *crimen falsi*, contains no provision for any judicial discretion at all, thus making such crimes mandatorily admissible in all situations,[56] while 609(a)(1) applies a probative value versus prejudicial effect balancing test at least as to the accused in a criminal trial.[57] Inferentially, therefore, Rule 609 seems to say there exists no circumstance in which a "crime of dishonesty" can be more prejudicial than probative, a questionable proposition. At the same time, Rule 609 assigns all other felonies to a secondary tier where judicial balancing in some fashion *is* necessary for justice's sake. Add to the equation the significant difficulty of separating exactly which crimes fall into which categories[58] and the court's dilemma is fully revealed: interpreting Rule 609 is not a matter of looking for a root philosophy, but choosing one. It all depends on how the analyst connects, if at all, prior convictions to telling the truth.

C. Supplying the Missing Term

Because Rule 609 by its terms "cannot be sensibly applied in civil cases,"[59] courts interested in solving the problem have been forced to

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52. *See* Campbell v. Greer, 831 F.2d 700, 707 (7th Cir. 1987). "[T]hat crookedness and lying are correlated is the premise of Rule 609(a) . . . ." *Id.*

53. 10 J. Moore & H. Bendix, *supra* note 13, § 609.01[1.-7], at VI-111 (quoting 1971 Dept. of Justice analysis).

54. *See supra* notes 4-5.

55. 10 J. Moore & H. Bendix, *supra* note 13, § 609.01[1.-7], at VI-111.

56. It has taken judicial interpretation to reach this conclusion, but the view is unanimous. For an interesting example of how this issue has been approached by the courts, see United States v. Kuecker, 740 F.2d 496 (7th Cir. 1984) (mail fraud conviction mandatorily admissible under 609(a)(2)).

57. Whether the test applies further than that is the subject of this Note.

58. *See* D. Louisell & C. Mueller, *supra* note 17, § 314, at 296-99, concerning disagreement in Congress over which crimes inherently show dishonesty.

59. 10 J. Moore & H. Bendix, *supra* note 13, § 609.14[4], at VI-148.

choose between supplying what should have been included, had Congress thought about it, and extrapolating a term from some specific or even general congressional intent in the matter. In some of the most influential cases, however, the courts intentionally chose to do nothing at all. The message to Congress in these cases seems to be that if the mess is to be cleaned up, the legislative branch will have to wield the mop.

In the ongoing Rule 609 debate, advocates of these views, which perhaps can be labelled rather loosely as the "judicial activism" and "judicial restraint" positions, have repeatedly confronted each other across the divides separating majority and dissenting opinions. Most notably, in the important case of *Diggs v. Lyons*,[60] the majority concluded that despite Rule 609's shortcomings in the civil litigation arena, it was simply not the judiciary's role to intervene:

> [I]f 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.[61]

In response, the dissenting judge in *Diggs* complained that the only reason Rule 609 did not work in the civil context was because of "a legislative oversight as to the legislation's effect upon civil plaintiffs."[62] Concluding that the judicial extension of the Rule's balancing test to civil litigants was reasonable under such circumstances, the dissent argued that courts should supply missing statutory terms as a matter of expediency, if nothing else, and that in any case, "[n]o matter which way these ambiguous rules are interpreted, Congress is free to change the interpretation by legislation."[63]

Interestingly, the "activism" and "restraint" positions, at least to the extent that they bear on the interpretation of Rule 609, are by no means aligned with one view of the Rule or another. Probably the best illustration of this is the Seventh Circuit decision in *Campbell v. Greer*.[64] Although in result it appears to be a duplicate of the *Diggs* interpretation, its language is exactly the opposite. The antibalancing test majority can be seen suggesting that Rule 609 "needs some judicial patchwork,"[65] even as the probalancing test concurrence argues for restraint by complaining that the majority's activism is "erroneous dictum" and "un-

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60. 741 F.2d 577 (3d Cir. 1984), *cert. denied*, 471 U.S. 1078 (1985).
61. *Id.* at 582.
62. *Id.* at 583 (Gibbons, J., dissenting).
63. *Id.*
64. 831 F.2d 700 (7th Cir. 1987).
65. *Id.* at 703.

necessary to the decision in this case."[66] One possible conclusion is that the ideological clash over the proper role of the courts is at least partly an artifice concealing what simply may be judicial interest in bringing about particular results in isolated cases.

II. *Green v. Bock Laundry Machine Co.*

The seeming momentum of the Third Circuit's "always admissible against a civil plaintiff" standard was finally put to the test in the Supreme Court's decision in *Green v. Bock Laundry Machine Co.*,[67] in which work release prisoner Paul Green argued that his product liability claim against a car wash equipment manufacturer had not been fairly heard. Green had lost his right arm after he reached inside an industrial-sized dryer. The manufacturer used Green's burglary convictions to impeach his credibility.

A. Majority

In the majority opinion delivered by Justice Stevens, the Court affirmed the Third Circuit approach and took the *Diggs* interpretation of Rule 609 a step further.[68] In effect, *Green* says *all* prior convictions except those that adversely affect a criminal defendant are mandatorily admissible; that is, judges have no discretion to weigh the prejudice of prior convictions against civil plaintiffs, civil defendants, or the government in criminal cases.[69] The Court reached this conclusion after subjecting Rule 609 to what by then had become a rather familiar battery of inquiries for those acquainted with the long controversy: a querulous examination of the Rule's plain meaning, or lack thereof;[70] a detailed, but somewhat fruitless tour of the Rule's legislative history and common law basis;[71] culminating in a sort of combination of the two methods, an attempt to derive legislative intent from the Rule's structure and interrelationship with Rule 403.[72]

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66. *Id.* at 708-09 (Will, J., concurring).

67. 109 S. Ct. 1981 (1989).

68. 741 F.2d 577 (3d. Cir. 1984). *Diggs* held that automatic admissibility should apply to civil plaintiffs. *Id.* at 582. The question of civil defendants was not explicitly addressed.

69. 109 S.Ct. at 1993-94. A limitation with continuing vitality in criminal cases, affecting both the government and defense alike, exists where use of such a conviction would have a prejudicial effect on a criminal defendant through guilt by association. *See supra* note 17 and accompanying text.

70. *Green*, 109 S. Ct. at 1984-85.

71. *Id.* at 1985-90.

72. *Id.* at 1992-93.

This synthesis of methods is the fresh coat of paint that the Court applies to the *Diggs* rationale. The majority's argument is that Rule 609's silence on the civil admissibility question should be interpreted not to mean that Congress was sloppy and forgot to deal with the problem, but instead, that Congress specifically wanted to leave in place the common law rule favoring mandatory admissibility of prior convictions in civil trials.[73] In the majority's words, "[t]he unsubstantiated assumption that legislative oversight produced Rule 609(a)(1)'s ambiguity respecting civil trials hardly demonstrates that Congress intended silently to overhaul the law of impeachment in the civil context."[74] Even if this was not what Congress had in mind, the majority reasoned that those "contending that legislative action changed settled law [have] the burden of showing that the legislature intended such a change."[75] The Court's conclusion, contrary to the view of most critics, was that this burden had not been met.

Moreover, in arriving at the opposite conclusion that Congress had left a hole in Rule 609 as a result of "deliberation, not oversight,"[76] the Court identified what it considered an important clue: the fact that the undisputed provision within the second part of Rule 609, the one dealing with obvious crimes of dishonesty, or *crimen falsi*,[77] had without question been designed with mandatory admissibility in mind, and therefore demonstrated congressional attention to exactly the sort of issue critics claimed had not been addressed. The majority's apparent chain of reasoning was this: First, everyone agrees that no judicial balancing test applies to prior *crimen falsi* such as perjury under Rule 609, and those crimes must always be admitted into evidence;[78] second, everyone agrees that the "residual" balancing test in Rule 403 should not be used to keep out crimes of dishonesty, regardless of their prejudicial effect;[79] third, and as a result of this reasoning, Congress gave Rule 609 what amounts to exclusivity in the "impeachment by prior conviction" realm.[80] Factor in the various balancing tests expressly included in Rule 609 that also preempt Rule 403, namely in the field of criminal defendants,[81]

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73. Exactly how this "common law rule" works and whether it can be summed up quite so easily is a subject of doubt.

74. *Green*, 109 S. Ct. at 1991.

75. *Id.*

76. *Id.*

77. FED. R. EVID. 609(a)(2). *See supra* note 4.

78. *Green*, 109 S.Ct. at 1983.

79. *Id.*

80. *Id.*

81. FED. R. EVID. 609(a)(1). This section of the rule applies a balancing test to criminal defendants. Whether it goes further than that is the subject of this Note. *See supra* note 4.

juvenile cases,[82] and older crimes,[83] and the argument gains weight. What the majority is saying is that it simply does not make sense to let Rule 609 balancing defeat Rule 403 balancing in every context but one. The implication that follows, according to the Court, is that had members of Congress wanted to change the protections affecting the civil use of prior convictions, they would have included a provision on that point and "they could have done so easily."[84]

As straightforward as the majority's logic appears to be, vestiges of the same underlying philosophical concerns that circumscribe previous judicial attempts to come to terms with Rule 609 lurk along the way. Early on, the majority inserts a boilerplate disclaimer which in timeworn style sets forth the "judicial restraint" position that the Court's task "is not to fashion the rule we deem desirable but to identify the rule that Congress fashioned."[85] The Court looks askance at the "[p]rodigious scholarship highlighting the irrationality and unfairness" of the Rule's inherent linkage of prior felony convictions to witness truthfulness and, while acknowledging the possibility that this criticism may have merit, shrugs it off because Congress may have "intended otherwise."[86] In other words, the majority's approach to Rule 609, like that of other courts, may be rooted not only in what the Rule says, but in a basic, and sometimes unspoken, philosophical agenda.

B. Dissent

If the *Green* majority is the standard-bearer for the judicial restraint philosophy, supported by a technical analysis that attempts to find congressional deliberation in the face of apparent ambiguity, Justice Blackmun's dissenting opinion is its opposite. Justice Blackmun promotes

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82. FED. R. EVID. 609(d). This section of the rule provides:

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.

83. FED. R. EVID. 609(b). The pertinent part of this section of the rule provides:

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.

84. *Green*, 109 S. Ct. at 1991.

85. *Id.* at 1984.

86. *Id.* at 1992.

judicial activism to respond to the "irrationality and unfairness" protestations the majority acknowledged and chose to ignore.[87] Practically speaking, however, the dissent's method is the same: cloaking whatever philosophical predispositions it may have in the hallowed language of statutory interpretation. Where the majority implies deliberation, the dissent sees only "slipshod drafting" by a conference committee which did not possess "clarity of language" as a virtue.[88] The dissent's argument is that the shards of congressional history cited by the majority and so repeatedly exhumed, classified and put back together by lower courts only demonstrate "why almost all that history is entitled to very little weight."[89]

Nevertheless, as if reconciling itself to an unavoidable evil, the dissent promptly engages in the very practice it has just devalued, piecing together the fragments once again, this time not in search of specific statutory intent, but instead to find an overall congressional "preference." What the dissent concludes is that Congress generally was in favor of "judicial balancing whenever there is a chance that justice shall be denied a party because of the unduly prejudicial nature of a witness' past conviction for a crime that has no direct bearing on the witness' truthfulness."[90] As the dissenting opinion purports to restate it, Congress actually meant prejudice to a party when it said "prejudice to the defendant" in Rule 609.[91] Interestingly, the dissent's view is identical to the Seventh Circuit's early dictum in *Lenard v. Argento*[92] which the same court later rejected[93] and which seemed to suggest that the Rule 609(a)(1) balancing test, despite its defense orientation, should be applied to any party whose case was prejudiced by the use of prior conviction evidence — prosecutor included.

The final prong of the dissent's position is what amounts to a claim of false advertising. The dissent complains that the plain language of Rule 609 encourages unsuspecting lawyers representing civil defendants to put their clients on the stand in the belief that the judge has discretion to keep out prior conviction evidence, when the *Green* majority in fact gives judges no such flexibility. The argument is that the Rule's interpretation at least ought to reflect what the Rule itself promotes. This argument loses force when one considers the widespread availability and

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87. *Id.* at 1995 (Blackmun, J., dissenting) (quoting *id.* at 1992).
88. *Id.* at 1991.
89. *Id.*
90. *Id.* at 1996-97 (Blackmun, J., dissenting).
91. *Id.* at 1997.
92. 699 F.2d 874 (7th Cir. 1983), *cert. denied*, 464 U.S. 815 (1983). *See supra* notes 18-22 and accompanying text.
93. Campbell v. Greer, 831 F.2d 700 (7th Cir. 1987).

use of manuals interpreting the Federal Rules of Evidence in light of the most recent decisions.[94]

C. Scalia's Bone of Contention

Nearly every judicial interpretation of Rule 609 has inevitably traced its reasoning to the array of committee reports, testimony, and floor debates that accompanied the Rule's adoption. Although the odd paucity of meaningful, on-the-record legislative discussion about Rule 609's application to civil trials has created considerable frustration, this problem seems to have been taken up by each succeeding group of judges as a sort of challenge to their moxie as statutory detectives. Thus, the opinions preceding *Green*, with the *Green* majority and dissenting opinions certainly not excluded, have literally stretched the traditional process of legislative extrapolation, with all its convenient fictions, virtually to the breaking point.

It was perhaps only a matter of time before someone seriously questioned this, and Justice Antonin Scalia, who even years before his appointment to the Supreme Court had been among conservatives mounting a vigorous campaign against the alleged illegitimacy of committee reports as primary authority,[95] was an obvious candidate to take hold of the opportunity.[96] In his concurring opinion in *Green*,[97] Justice Scalia endorsed the majority's decision favoring mandatory civil admissibility of prior convictions, while decrying the analytical method used to reach it. To Justice Scalia, the majority's painstaking analysis of the Rule's

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94. The annually published MOORE'S FEDERAL PRACTICE RULES PAMPHLET is an example.

95. A sampling of then-Judge Scalia's activism can be found in a 1985 news account:

> Scalia Questions Routine Deference To Hill Report
>
> Washington - Federal courts should reconsider "routine deference" to the legislative history contained in congressional committee reports when they interpret statutes, Judge Antonin Scalia of the U.S. Circuit Court of Appeals here contended in a recent opinion.
>
> "I frankly doubt that it is ever reasonable to assume that the details, as opposed to the broad outlines of purpose, set forth in a committee report come to the attention of, much less are approved by, the house which enacts the committee's bill," wrote the judge, who often is mentioned as a potential Reagan nominee to the Supreme Court.

The Nat'l L. J., Dec. 9, 1985, at 5, col. 1.

96. Interestingly, a foreshadowing of this argument can be found in the dissent to *Diggs*, in which Judge Gibbons criticizes the undue emphasis given to "snippets of legislative history" involving only four members of Congress. 741 F.2d at 583. Judge Gibbons, however, reaches an opposite conclusion from Justice Scalia on the construction of Rule 609. *See id.*

97. 109 S. Ct. at 1994 (Scalia, J., concurring).

evolution from early versions and case law through committee reports and "the so-called floor debates"[98] to its eventual adoption was a largely irrelevant exercise:

> The meaning of terms on the statute-books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated - a compatibility which, by a benign fiction, we assume Congress always has in mind.[99]

Justice Scalia's argument is compelling, but his recipe for statutory construction is at odds with American judicial orthodoxy. Although the interpretation of statutes is not a science of precision, with differing schools of thought maintaining comparable claims to legitimacy,[100] the Scalia approach does not fit easily within any of them. For instance, it does not comport with what statutory scholar Guido Calabresi and others have labelled "the plain-meaning" school of interpretation,[101] which argues that legislative purpose is only relevant when a statute is ambiguous. That Rule 609 is at least *contextually* ambiguous is hard to question,[102] and therefore, appears to make the scant legislative materials under this approach more valuable, not less.

Nor does Scalia's view comport with long-established federal precedent in favor of the traditional "original legislative intent" model of interpretation.[103] Not only is it widely accepted that the official legislative histories, including reports of standing committees, are integral to statutory construction,[104] but courts have also made it clear that statutory

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98. *Id.*

99. *Id.* (emphasis in original).

100. *See* G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 214 n.30 (1982). Calabresi writes that "[t]here is no consensus on what courts should be doing when they interpret statutes." *Id.*

101. *Id.*

102. In other words, although the plain language of Rule 609 does not plausibly lend itself to more than one meaning, that one meaning just does not make sense when viewed as part of the larger context of the Federal Rules specifically and evidence philosophy in general.

103. *Id.*

104. 2A J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 48.06 (4th ed. 1984). This view, not too coincidentally, has gone hand in hand with efforts by legislative staff members to upgrade the preparation of committee reports.

ambiguity is not a prerequisite to the use of such materials. One court has declared that "the plain meaning rule . . . is not to be used to thwart or distort the intent of Congress by excluding from consideration enlightening material from the legislative files."[105] Thus, the weakness of the Scalia doctrine, if it can be called that, is that it stands by itself philosophically.

On the other hand, the obvious strength of the Scalia doctrine is that it comes from a certain common sense, "emperor has no clothes" skepticism that in Rule 609 may have found the perfect foil. Despite what the theories of legislative interpretation might say, it is all too easy to stand back from the Rule, look at the confusion surrounding its enactment,[106] and as a consequence dismiss the various judicial attempts to reconstruct "what Congress intended" as cardboard fictions. Even if one does not accept the entire philosophy that Justice Scalia recommends as an alternative, it is difficult to avoid the correctness of his main observation that the committee histories in this particular case arguably do not tell anything about congressional intent. If nothing else, Justice Scalia may have advanced the Rule 609 discussion and future discussions like it by clearing away all the interpretive chaff and reducing the civil side of the Rule to its rightful status and lineage: legislative orphan.

III. The New Rule 609

A. The Inevitability of Repair

Green stands at the top of a body of decisional law that is something of a monument to shortsighted legislative draftmanship. It is as if years ago the authors of Rule 609 had posed a complex mathematical question, unaware that those who followed would go to considerable trouble and expense working through its calculations to reach varying results. To add insult to injury, when the final authority spoke, the "answer" was completely unacceptable — something on the order of $2 + 2 = 5$. In other words, what *Green* provides, mandatory admissibility, is obviously not a permanent solution. It was obvious even before the Supreme Court spoke that a new Rule 609 would have to be devised to prevent the sort of difficulties that the *Diggs* court unabashedly predicted when it spoke of "unjust and even bizarre results."[107]

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105. *Id.* at § 48.01 (quoting FCC v. Cohn, 154 F. Supp. 899 (S.D.N.Y. 1957)).

106. In a year in which the Federal Rules of Evidence, including Rule 609, were undergoing almost constant change, one wag's remarks were worth repeating: "The ones I feel sorry for are the ones who paid $150 for the cassette tapes explaining the Federal Rules of Evidence." J. Estes, *The New Federal Rules of Evidence*, 65 F.R.D. 267, 267 (1974).

107. 741 F.2d at 582.

This transient state of affairs was recognized by the *Green* dissent, which suggested that the Court pursue only the limited goal of preventing "unjust results until Rule 609(a) is repaired, as it must be."[108] Still, with all the litigation caused by the Rule's ambiguity over the years, it seems odd that amendment has not occurred before. Even in the first heady moments following the Federal Rules' adoption, Professor Irving Younger was writing that the Rules were "in principle necessary and splendid, in execution something deficient; this many excellences tempered by that many failures; thick with good things but full of infelicities and mistakes. All, someday, will doubtless be corrected and made perfect."[109] Yet revisions to the Rules have been slow in coming. With respect to Rule 609, the wait has been particularly long and frustrating.

B. The Proposed Change

On January 26, 1990, the Supreme Court submitted to Congress a proposed amendment to Rule 609(a) drafted by the Judicial Conference of the United States.[110] Unless Congress acts otherwise, this amendment will become effective December 1, 1990.[111]

The new Rule clears up the balancing test versus mandatory admissibility conflict by expressly providing for Rule 403 balancing of conviction evidence offered to impeach the testimony of a witness other than a criminal defendant. This is the approach recommended by most commentators[112] and notably by the Fifth Circuit in *Shows*.[113] An interesting offshoot of the new Rule's wording is that it eliminates the special protections which federal case law extended to criminal defense witnesses other than the accused. In other words, although criminal

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108. 109 S. Ct. at 1995 (Blackmun, J., dissenting).

109. Younger, *supra* note 14, at 7.

110. Proposed Rule 609(a) reads in pertinent part:

> (a) General rule. For the purpose of attacking the credibility of a witness, (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

110 S. Ct. No. 9 CXXXI (Mar. 1, 1990).

111. The Judicial Conference of the United States suggests rule changes, which, if sent to Congress by the Supreme Court, become law unless vetoed or modified by Congress. *See* 28 U.S.C.A. §§ 331 (West 1968 & West Supp. 1990), 2072-74 (West Supp. 1990).

112. *See supra* note 36.

113. 695 F.2d 114. *See supra* note 23 and accompanying text.

defense witnesses previously found themselves protected by the same strict balancing test contained in Rule 609 that covered the accused,[114] under the new Rule evidence used to impeach such witnesses will be filtered through the less stringent Rule 403 instead.[115]

While this likely amendment takes a big step toward correcting Rule 609's deficiencies, it does not go far enough. A better proposal comes from a committee of the American Bar Association.[116] Its proposal eliminates the current Rule's much litigated phrase, "to the defendant," and therefore has the practical effect of applying the current, stricter Rule 609 balancing test to all witnesses. This is the approach of the *Green* dissent.[117] The ABA proposal then goes further to subject prior *crimen falsi* convictions to a balancing test of their own which is similar to the language of Rule 403.[118] Such a balancing test has the virtue of eliminating the logical inconsistency of both the current Rule and its probable successor, the proposed amendment by the Supreme Court, under which there is no such thing as an overly prejudicial *crimen falsi* conviction offered up for the consideration of the jury. The ABA approach, therefore, is less "tilted" toward the admissibility of prior convictions in general and represents a welcome and much more coherent alternative evidentiary philosophy that up till now could be described best as "legislate first, ask questions later."

Which is, of course, the problem. What has made amending the Rule so difficult is that there has been no consensual foundation upon which to build. To begin with, any reconsideration of the issue of impeachment by prior conviction has quickly found itself at a philo-

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114. *See supra* note 17 and accompanying text.

115. A further change made by the new Rule is an elimination of the requirement that the conviction may only be elicited during cross-examination, "a limitation that virtually every circuit has found to be inapplicable" anyway. Committee Note, 110 S. Ct. No. 9 CXXXIV (March 1, 1990).

116. ABA Comm. on Rules of Criminal Procedure and Evidence, *Federal Rules of Evidence: A Fresh Review and Evaluation*, 120 F.R.D. 299, 356 (1987). The proposed revision states in pertinent part:

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

117. 109 S.Ct. at 1995 (Blackmun, J., dissenting). *See supra* note 91 and accompanying text.

118. FED. R. EVID. 403. To compare the language of Rule 403 with the language of the proposed amendment, see *supra* notes 21 and 116 respectively.

sophical fork in the road which points to judicial discretion in one direction and mandatory admission in the other. Regardless of the fork taken, there is no completely safe route. An arbitrary rule cannot yield to the unusual case, and discretion breeds inconsistency.[119]

Additionally, the guidance that sometimes is offered by general legal trends is lacking in this context. There is no trend. In 1942, Dean Mason Ladd, in an article about the Model Code of Evidence, wrote that the code "takes the modern step of abolishing conviction of a crime to impeach credibility except as to those crimes involving dishonesty and false statement."[120] If such is "the modern step," what accounts for *Green*?

To properly amend or replace Rule 609 outright, the drafters will have to do something that arguably was neglected the first time around. They must think through exactly what it is they believe. This process must start with the Rule's basic purpose, a scrutiny which should, at a minimum, acknowledge all fictions for what they are,[121] and either eliminate them or decide that they must be lived with.

Furthermore, in choosing a philosophy, and thus a Rule, treacherous political waters inevitably must be navigated. Among the problems is the fact that so many of the cases in which the current Rule has proved troublesome are section 1983 cases.[122] Many of the civil plaintiffs who alleged that the use of their criminal records at trial constituted an injustice are not traditional personal injury victims but prison inmates[123] or others involved in confrontations with police.[124] From this perspective the "civil context" which is inadequately handled by Rule 609 can be

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119. *See* G. Lilly, *supra* note 5, at 351.

120. Ladd, *A Modern Code of Evidence*, MODEL CODE OF EVIDENCE 327, 341 (1942).

121. Consider the comments of Dean Griswold, as presented by Senator Hart during the Senate debate of Rule 609:

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

3 D. LOUISELL & C. MUELLER, *supra* note 17, § 314, at 301-02 (1979) (quoting 120 CONG. REC. 37078-79 (1974) (statement of Sen. Hart quoting Griswold, *The Long View*, 51 A.B.A. J. 1017, 1021 (1965))).

122. 42 U.S.C. § 1983 (1982) (recovery for damages against a person acting under color of state law who deprives another of a constitutional right).

123. *See, e.g.*, Campbell v. Greer, 831 F.2d 700 (7th Cir. 1987); Diggs v. Lyons, 741 F.2d 577 (3d Cir. 1984), *cert. denied*, 471 U.S. 1078 (1985); Garnett v. Kepner, 541 F. Supp. 241 (M.D. Pa. 1982).

124. *See, e.g.*, Christmas v. Sanders, 759 F.2d 1284 (7th Cir. 1985); Lenard v. Argento, 699 F.2d 874 (7th Cir. 1983), *cert. denied*, 464 U.S. 815 (1983); Howard v. Gonzales, 658 F.2d 352 (5th Cir. 1981).

viewed as a quasi-criminal one. That more civil plaintiffs are not politically appealing is due to the reality that "conventional" civil litigation simply does not present the prior conviction evidentiary problem very often.[125] So the danger always exists that substantive philosophical consideration of Rule 609 may either be tainted or kept on the back burner by narrow characterization of the problem as a prisoners' rights issue.

If there is a common thread which runs through the probable 1990 amendment to Rule 609,[126] its ABA rival,[127] and indeed through the writings of nearly all recent commentators who have studied the subject,[128] it is the belief that judicial control of some kind should be required over the admissibility of the prior convictions of witnesses based on that evidence's effect on civil plaintiffs, civil defendants, and even the government in criminal cases.[129] It is no coincidence that this is so. As both the ABA and the Judicial Conference have implicitly recognized, a new "judicial discretion" version of Rule 609 is needed, if for no other reason than to reintroduce into the evidentiary process the fundamental concern embodied by a rather basic federal rule that is not discussed much in the cases:[130] Rule 401, which defines the concept of "relevant evidence."[131]

At the least, a new Rule 609 should provide judges with a way to keep out prior convictions which have no obvious relevance to the issue at hand. Balancing tests are nothing but specific applications of this idea. As things stand now in the shadow of *Green*, Rule 609 is unjust and its likely successor, the Supreme Court's proposed amendment, while an improvement, does not do enough to correct the Rule's philosophical frailty.

MARK VOIGTMANN*

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125. D. LOUISELL & C. MUELLER, *supra* note 117, § 316, at 324 n.26.

126. *See supra* note 110.

127. *See supra* note 116.

128. *See supra* note 36.

129. For a third alternative, see the Michigan Supreme Court's revision of Michigan Rule of Evidence 609 in People v. Allen, 429 Mich. 558, 614, 420 N.W.2d 499, 525-26 (1988). It is an intriguing blend of discretionary approaches which also attempts to define the factors a trial judge should consider in deciding whether prior conviction evidence is probative.

130. For an exception, see Tussel v. Witco Chem. Corp., 555 F. Supp. 979, 984 n.13 (W.D. Pa. 1983).

131. FED. R. EVID. 401. This rule provides:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

* B.J., University of Missouri, 1978; J.D. candidate, Indiana University School of Law-Indianapolis, 1990.