April 1990


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INTRODUCTION

Upon cross-examination, common law practice allowed counsel to impeach an adverse witness "by proof of bias, mental incapacity, contradiction, prior inconsistent statements, bad character including convictions, and religious opinions or beliefs." This rule was based upon the belief that the trier of fact should have available all evidence which might be useful in determining whether a witness is lying or telling the truth. This liberal impeachment practice created a widespread concern that juries were convicting innocent persons on the basis of past criminal records. In an attempt to mitigate the prejudice caused by admission of prior convictions, Congress enacted Rule 609.

1. 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 607[02], at 607-24 (1988) [hereinafter, WEINSTEIN'S EVIDENCE].
2. Id.
4. As amended in 1987, Federal Rule of Evidence 609 provides in part:
   (a) General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.
   (b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 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 oppor-
Rule 609(a)(1) addresses the admission of prior felony convictions. The language of this subsection requires that the trial court weigh the probative value and prejudicial effect such evidence may have upon the defendant. Prior to the United States Supreme Court’s decision in Green v. Bock Laundry Machine Co., the effect of this provision upon civil litigation was not clear. The circuit courts disagreed with respect to a trial judge’s discretion to exclude prior convictions evidence in civil proceedings. In Green, the Supreme Court resolved this dispute. The Court held that Rule 609 requires the trial court to admit evidence of prior felony convictions offered to impeach civil litigants.

This Note has four objectives. First, the Note examines the facts presented to the Green Court. Second, the Note surveys Rule 609’s history and the divergent pre-Green views regarding Rule 609’s application in the civil arena. Third, the Note examines Green’s analysis and the Supreme Court’s conclusion that Rule 609 forecloses any judicial discretion in admitting or excluding prior convictions evidence. And, finally, the Note concludes that North Carolina’s Rule 609 should also be interpreted as requiring trial judges to admit prior convictions evidence regardless of unfair prejudice.

The Case

Paul Green instituted a products liability action against the manufacturer of a large commercial dryer. Green alleged that the machine’s defective design or manufacture caused him to lose his arm when he reached in to stop the dryer. Prior to trial, Green

5. 3 Weinstein’s Evidence, supra note 1, ¶ 609[01], at 609-50. As stated in the Advisory Committee’s note, Rule 609 was drafted using the federal definition of felony, “subject to imprisonment in excess of one year,” rather than trying to encompass all of the states’ felony offenses. Fed. R. Evid. 609 advisory committee’s note.


8. Id. at 1982.

9. Id.

10. Id. at 1993.

11. Id.

12. Id. at 1983.

filed a *motion in limine* to exclude evidence of his criminal record.\(^{14}\) The judge denied the motion and ruled that Green's convictions of criminal trespass, statutory rape, burglary and conspiracy to commit burglary could be used to impeach Green's testimony.\(^{16}\) At trial, counsel for the defendant manufacturer questioned Green regarding his prior convictions of burglary and conspiracy to commit burglary.\(^{16}\) Green admitted he had previously been convicted of conspiracy to commit burglary and burglary.\(^{17}\) The jury returned a verdict for the defendant manufacturer and Green appealed.\(^{18}\) The Third Circuit Court of Appeals summarily affirmed the district court.\(^{19}\) Green petitioned the United States Supreme Court for writ of certiorari.\(^{20}\) Green contended that he did not receive a fair trial because he was impeached by his prior felony convictions.\(^{21}\) The United States Supreme Court affirmed the Third Circuit Court of Appeals and *held* that prior felony convictions are automatically admissible to impeach witnesses in civil proceedings.\(^{22}\) The Court declared that a trial judge must "permit impeachment of a civil witness with evidence of prior felony convictions regardless of ensuant unfair prejudice to the witness or the party offering the testimony."\(^{23}\)

**BACKGROUND**

**A. History of Impeachment by Prior Convictions**

At common law, the courts considered a person convicted of a felony incompetent to testify as a witness.\(^{24}\) This rule was later

14. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
23. *Id.*
24. 3 *WEINSTEIN's EVIDENCE,* *supra* note 1, ¶ 609[02], at 609-58; 2 J. Wigmore, *EVIDENCE* § 519 (J. Chadburn rev. 1979).

The underlying rationale for this "disqualification arose as part of the punishment for the crime, only later being rationalized on the basis that such a person was unworthy of belief." 3 *WEINSTEIN's EVIDENCE,* *supra* note 1, ¶ 609[02], at 609-58 (citing 2 Wigmore, *EVIDENCE* § 519 (3d ed. 1940)).
changed to allow convicted felons to testify. However, the courts generally held that a witness's testimony could be impeached by evidence of a prior felony conviction or evidence of a crimen falsi misdemeanor conviction.

Luck v. United States provided the first significant departure from the rule that prior felony convictions are automatically admissible. In Luck, the defendant appealed convictions of housebreaking and larceny. The defendant challenged the district court's admission of a previous grand larceny conviction. At issue in Luck was a District of Columbia statute which provided that evidence of a witness's prior convictions "may be given in evidence to affect his credit as a witness. . . ." The District of Columbia Court of Appeals interpreted this statute and held that admission of the prior conviction was not required.

The Luck court stressed the fact that the statute provided that prior convictions evidence may (rather than shall) be admitted. The Luck court reasoned that Congress intended that the trial judge exercise discretion in determining whether to admit or exclude convictions evidence. Five years after Luck, Congress re-

25. Id.
26. Crimen falsi is generally described as being conduct which involves dishonesty. 3 WEINSTEIN'S EVIDENCE, supra note 1, ¶ 609[04], at 609-74 to -75.

The Courts have generally held that crimes involving dishonesty or false statement include perjury, false statement, criminal fraud, embezzlement, false pretense, mail fraud, and forgery but do not include prostitution, assault and narcotics convictions. The courts are not in agreement, however, whether "stealing-type" offenses such as robbery, burglary, petit larceny and receiving stolen property involve crimen falsi. See Annotation, Construction and Application of Rule 609(a) of the Federal Rules of Evidence Permitting Impeachment of Witnesses by Evidence of Prior Conviction of Crime, 39 A.L.R. FED. 570 (1978).

27. 3 WEINSTEIN'S EVIDENCE, supra note 1, ¶ 609[04], at 609-74 to -75.
28. 348 F.2d 763 (D.C. Cir. 1965).
29. 3 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 314, at 287 (1979) [hereinafter LOUISELL & MUELLER].
30. Luck, 348 F.2d at 764.
31. Id.
32. The District of Columbia statute at issue in Luck provided: "No person shall be incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of crime, but such fact may be given in evidence to affect his credit as a witness, either upon the cross-examination of the witness or evidence aliunde. . . ." D.C. CODE ANN. § 14-305 (1961).
33. Luck, 348 F.2d at 768.
34. Id.
35. Id.
instated the prevailing view. In 1970, Congress amended the District of Columbia statute to provide that prior conviction evidence "shall be admitted." 

B. Enactment of Rule 609

In March, 1969, the Advisory Committee on Rules of Practice and Procedure submitted its initial draft of the proposed rules of evidence. The Advisory Committee's first draft of Rule 609 rejected Luck's discretionary standard. The proposed draft provided that evidence of felony convictions and evidence of even misdemeanor convictions involving dishonesty or false statements were admissible to attack the credibility of a witness. Rule 609 was revised numerous times prior to the adoption of its final form in 1975. The final form came as a compromise of the House bill


36. Congress amended the District of Columbia Statute to read as follows: [F]or the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a criminal offense shall be admitted if offered, ... but only if the criminal 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 punishment). [emphasis added].

37. Id.


39. Id. at 299.

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


41. The Advisory Committee's second draft adopted the Luck approach by allowing exclusion of evidence of prior felony convictions and crimes involving dishonesty or false statement if the probative value was "substantially outweighed by the danger of unfair prejudice." Proposed Rules of Evidence (II), 51 F.R.D. 315, 391 (1971).

After the second draft met resistance, the Advisory Committee retreated to its first draft. See Proposed Rules of Evidence (III), 56 F.R.D. 183, 269-70 (1973).

The House Judiciary Committee rejected the proposed rule and prepared a draft which provided that only evidence of prior convictions involving dishonesty
and the Senate bill. The House version provided for impeachment only by *crimen falsi* convictions. The Senate bill, on the other hand, required admission of both felony and *crimen falsi* convictions.

C. Pre-Green Interpretations of Rule 609

As finally enacted, Rule 609 divides prior convictions into two categories. Rule 609(a)(1) provides for impeachment by felony crimes regardless of the nature of the crime. Rule 609(a)(2) deals with crimes involving dishonesty or false statement regardless of the punishment.

or false statement would be admissible. See 120 Cong. Rec. 2374 (1974).

Like the House Judiciary Committee, the Senate Judiciary Committee recommended that evidence of convictions of crimes involving dishonesty or false statement be admissible to impeach a witness. The Senate Judiciary Committee's version differed from the House Judiciary Committee's draft by allowing admission of non-dishonesty felony convictions where the court found that the probative value of the evidence outweighed the prejudicial effect upon the party for whom the witness was testifying. See 120 Cong. Rec. 37076 (1974).

The full Senate rejected the Committee's recommendations and instead retained the Advisory Committee's version which provided for automatic admissibility of prior convictions. See 120 Cong. Rec. 37076, 37083 (1974).

42. See 120 Cong. Rec. 40894 (1974) (remarks of Rep. Dennis) ("[I]n conference, we came up with a compromise. . . . It is the best we thought we could do . . . ").

43. The House bill provided: "(a) General Rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible only if the crime involved dishonesty or false statement." 120 Cong. Rec. 2374 (1974).

44. The Senate bill provided:

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


45. 2 G. JOSEPH & S. SALTZBURG, EVIDENCE IN AMERICA § 43.3, at 6 (1987) [hereinafter JOSEPH & SALTZBURG].

46. As stated in the Advisory Committee's note, Rule 609 was drafted using the federal definition of *felony*, "subject to imprisonment in excess of one year," rather than trying to encompass all of the states' felony offenses. Fed. R. Evid. 609 advisory committee's note.

47. 2 JOSEPH & SALTZBURG, supra note 45 § 43.3, at 6.

48. Id.
1. Admissibility of Crimen Falsi Convictions

The courts generally interpret Rule 609(a)(2) as requiring admission of evidence of crimes involving dishonesty or false statement in order to impeach a witness’s testimony. Historically, prior convictions evidence has been admitted in order to demonstrate a witness’s willingness to lie. Rule 609(a)(2) follows the traditional belief that evidence that a witness lied in the past is evidence that the witness may lie again.

2. Admissibility of Felony Convictions

The admissibility of prior felony convictions not involving dishonesty or false statement has created confusion among the courts. Rule 609(a)(1) sets forth a restriction (commonly referred to as the Rule 609(a)(1) balancing test) which has created great controversy. Rule 609(a)(1) provides that evidence of prior felony convictions may be excluded if the probative value of the evidence “outweighs its prejudicial effect to the defendant.”

a. Application of Rule 609(a)(1) to Criminal Trials

With respect to criminal trials, the circuit courts have generally held that evidence of prior felony convictions is automatically admissible to impeach the testimony of the prosecution’s wit-
nesses. But, when the prosecution intends to use prior felony convictions to impeach the defendant or the defendant's witness, Rule 609(a)(1)'s balancing provision applies. The court is then required to weigh the probative value of the conviction evidence against the prejudicial effect the prior convictions may have upon the defendant. If the court determines that the probative value outweighs the prejudicial effect, then the court must admit the evidence.

b. Application of Rule 609(a)(1) to Civil Proceedings

Prior to Green, the effect of Rule 609 upon civil trials was not as clear. A strict interpretation of Rule 609(a)(1) requires the court to conduct a balancing of prejudice and probative value in order to determine whether to admit or exclude a civil defendant's prior felony convictions. Yet, the plain meaning of Rule 609 directs that the court admit evidence of a civil plaintiff's prior felony convictions regardless of prejudice.

The courts agree that such a strict application of the rule would be unfair to plaintiffs. However, prior to the Supreme

55. United States v. Dixon, 547 F.2d 1079 (9th Cir. 1976) (district court erred in excluding evidence of government informant's previous forgery convictions); 3 LOUISELL & MUELLER, supra note 29, § 316, at 325.
56. 3 LOUISELL & MUELLER, supra note 29, § 316, at 325.
57. Gordon v. United States, 383 F.2d 936 (D.C. Cir. 1967), cert. denied, 390 U.S. 1029 (1968), set forth the factors to be considered in exercising discretion to admit or exclude prior felony convictions for the purpose of impeaching a defendant witness. These factors are as follows:
(1) "nature of the crime";
(2) "time of conviction and witness' subsequent history";
(3) "similarity between past crime and charged crime";
(4) "importance of defendant's testimony"; and
(5) "centrality of the credibility issue."
3 WEINSTEIN'S EVIDENCE, supra note 1, ¶ 609[03], at 609-66 to -72 (1988) (citing Gordon, 383 F.2d at 940-41; See also 3 LOUISELL & MUELLER, supra note 29, § 315, at 227-32.

Note, however, that the balancing of prejudice and probative value is not required if the prior conviction may also be classified as a crimen falsi conviction which is automatically admissible under Rule 609(a)(2). 3 LOUISELL & MUELLER, supra note 29 § 316, at 324-25.
58. 3 LOUISELL & MUELLER, supra note 29, § 316, at 324-25.
59. See infra notes 67-71 and accompanying text.
61. Id.
62. Id. (denying a civil plaintiff the same right to impeach an adverse witness
Court's decision in Green, the courts disagreed on how to avoid this unfairness.63

c. The Interplay of Rule 403

Two questions have created a controversy among the circuit courts.64 First, the courts do not agree whether the Rule 609(a)(1) balancing test applies in civil as well as criminal cases.65 Second, the courts dispute whether the Rule 609(a)(1) balancing test pre-empts the balancing provision contained in Federal Rule of Evidence 403.66

The views enunciated by the courts prior to Green may generally be categorized into four different positions:67

63. See infra notes 67-71 and accompanying text.
64. Green, 109 S. Ct. at 1984.
65. Compare Petty v. IdecO, 761 F.2d 1146 (5th Cir. 1985) (Rule 609(a)(1) balancing test applies in civil cases) with Donald v. Wilson, 847 F.2d 1191 (6th Cir. 1988) (“Rule 609(a)(1) was never intended to deal with the case of impeachment of a plaintiff in a civil case . . .”).
66. Federal Rule of Evidence 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.

Both Rules 609 and 403 contain provisions requiring the court to balance the prejudice and probative value of evidence in certain cases. The subtle distinctions in the rules’ language presents some cases where the question of which balancing test applies may be critical. This question may be important for two reasons. Generally, evidence may be more easily excluded under Rule 609 than under Rule 403. Rule 403’s language tends to favor admission of the evidence because evidence may be excluded only if its probative value is “substantially outweighed” by its prejudicial effect. Rule 609’s balancing test favors exclusion of prior convictions evidence because such evidence may only be admitted if its probative value outweighs its prejudicial effect.

Futhermore, the burden of persuasion differs under Rules 403 and 609. Rule 403 places the burden of persuasion upon the party seeking exclusion of the evidence. Rule 609 places the burden upon the party seeking to impeach a witness. See Campbell v. Greer, 831 F.2d 700, 705 (7th Cir. 1987).
67. Although seemingly complex, the positions differ due to the courts’ differing treatment of two factors: (1) the party for whom the witness testifies; and (2) the type of proceeding (i.e., whether a civil or criminal proceeding).
(1) When a witness testifies for a civil or criminal defendant, the Rule 609 balancing test applies. When a witness testifies for a civil plaintiff, the Rule 403 balancing provision applies. 68

(2) When any witness testifies in a civil or criminal proceeding, the Rule 609(a)(1) balancing test applies. Rule 403 does not apply. 69

(3) When any witness testifies in a civil proceeding, the Rule 403 balancing provision applies. 70

(4) When a witness testifies on behalf of a criminal defendant, the Rule 609(a)(1) balancing test applies. When the witness testifies on behalf of a civil plaintiff, civil defendant or the prosecution, the evidence is automatically admissible. 71

ANALYSIS

In the Green decision, Justice Stevens acknowledged that a number of courts and commentators have greatly criticized the practice of automatically admitting prior convictions evidence to impeach witnesses. 72 However, the Court realized that its task was

68. See Abshire v. Walls, 830 F.2d 1277 (4th Cir. 1987) (court reserved for later determination whether Rule 403 applied to civil defendants); Wierstak v. Heffernan, 789 F.2d 968 (1st Cir. 1986) (Rule 403 applicable to exclude evidence of civil plaintiff’s prior felony convictions); Accord Donald v. Wilson, 847 F.2d 1191 (6th Cir. 1988).

69. See Petty v. Ideco, 761 F.2d 1146 (5th Cir. 1985) (holding Rule 609(a)(1) balancing test applies to civil litigants); Ososky v. J. Ray McDermott & Co., 725 F.2d 1057 (2d Cir. 1984) (without analyzing the applicability of Rule 609(a)(1), the court determined that the district court properly excluded evidence of plaintiff’s prior felony convictions under Rule 609(a)(1)).

70. Courts following this view totally ignore the Rule 609(a)(1) balancing test since evidence is more easily excluded under the Rule 403 balancing test. See Jones v. Bd. of Police Comm’rs., 844 F.2d 500, 505 (8th Cir. 1988), cert. denied, 109 S. Ct. 2434 (1989) (court declined to decide whether Rule 609 applied to civil cases stating, “[a]ssuming arguendo that the Rule does apply — and we are not convinced that it does ... evidence of prior convictions admissible under Rule 609 without any balancing test could be excluded under the balancing test of Rule 403.” [Emphasis supplied]); Shows v. M/V Red Eagle, 695 F.2d 114 (5th Cir. 1983) (court implied that Rule 403 balancing test might be applied in criminal cases; the fifth circuit appears to have since changed its course by applying the Rule 609(a)(1) balancing test. See, e.g., Petty v. Ideco, 761 F.2d 1146 (5th Cir. 1985)).

71. Under this view, which was adopted by the Green court, evidence of prior felony convictions is automatically admissible in civil actions. See 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); Green, 109 S. Ct. at 1984.
not to "fashion the rule" to produce the most desirable result, but "to identify the rule that Congress fashioned." The Court rejected an interpretation based upon the rule's strict language. The Court stated that such an interpretation may amount to a violation of a plaintiff's due process rights. Furthermore, the Court determined that granting a civil defendant greater rights than a civil plaintiff would be an unsound practice. A civil party's status as plaintiff or defendant is often based merely upon who filed the action or upon the nature of the cause of action. The Court found Rule 609's language ambiguous with respect to admissibility of prior convictions in civil cases. Then, the Court proceeded to determine whether Congress intended Rule 609 to apply to civil cases.

A. Rule 609(a)(1) Balancing in Civil Actions

The Court began its analysis by considering whether Congress intended the Rule 609(a)(1) balancing test to apply to civil litigants. After a complete examination of Rule 609's history, the Court determined that Congress did not intend the Rule 609(a)(1) balancing test to apply to civil litigants. The Court based its conclusion upon three findings. First, the Court noted that prior to the enactment of the Federal Rules of Evidence, courts generally admitted prior convictions to impeach a witness's testimony. Furthermore, the congressional debates involving Rule 609 centered around the prejudicial impact upon criminal defendants. Therefore, the Court concluded that it should not assume "that Congress intended silently to overhaul the law of impeachment in the civil context." Second, the Court determined that the proposed drafts of

73. Id.
74. Id.
75. Id. at 1985.
76. Id.
77. Id.
78. Id. at 1984.
79. Id.
80. Id. at 1984-92.
81. Id. at 1992.
82. Id. at 1988-92.
83. Id. at 1988.
84. Id. at 1991.
85. Id.
Rule 609 distinguished civil and criminal cases only to "mitigate prejudice to criminal defendants."\textsuperscript{86} The Conference Committee considered and rejected the fact that such evidence might prejudicially affect a witness "other than the accused."\textsuperscript{87} The Conference Committee declared that any prejudicial effect prior convictions evidence might have upon a witness other than the accused was "so minimal as scarcely to be a subject of comment."\textsuperscript{88}

Finally, the Court stated that if the Conference Committee had intended to protect parties or witnesses other than a criminal defendant, the Conference Committee could have easily done so.\textsuperscript{89} As noted by the Court, the Conference Committee had access to all of the proposed drafts of Rule 609.\textsuperscript{90} In fact, the House Subcommittee and the Senate Judiciary Committee possessed both of the proposed drafts which protected civil litigants.\textsuperscript{91} Congress rejected both proposed drafts.\textsuperscript{92} The Court concluded that Rule 609(a)(1)'s balancing test does not apply to civil cases.\textsuperscript{93}

\textbf{B. Pre-emption of Rule 403}

The Court then turned to the second issue — whether, in civil cases, the courts may still exclude evidence of prior felony convictions under Rule 403.\textsuperscript{94} In deciding this question, the Court primarily relied on principles of statutory construction.\textsuperscript{95} The Court determined that Congress intended Rule 609 to be the exclusive means of excluding prior convictions evidence.\textsuperscript{96} The Court noted that Rule 609 is a rule which deals specifically with impeachment of witnesses.\textsuperscript{97} Rule 403, on the other hand, is a general rule which excludes evidence when its prejudicial effect substantially outweighs its probative value.\textsuperscript{98} According to cardinal principles of

\textsuperscript{86} Id.
\textsuperscript{87} Id. (citing Proposed Rules of Evidence (II), Rule 609 advisory committee's note, 51 F.R.D. at 392).
\textsuperscript{88} Id.
\textsuperscript{89} Id. at 1991.
\textsuperscript{90} Id.
\textsuperscript{91} Id.
\textsuperscript{92} Id.
\textsuperscript{93} Id. at 1992.
\textsuperscript{94} Id.
\textsuperscript{95} Id. at 1992-93.
\textsuperscript{96} Id.
\textsuperscript{97} Id. at 1992.
\textsuperscript{98} Id.
statutory construction, a specific rule overrides a more general rule.99 Therefore, the Court reasoned that Rule 609 overrides Rule 403.100

The Court also emphasized Rule 609's language — that evidence of prior convictions "shall be admitted."101 This phraseology also appears in Rule 609(a)(2).102 Applying Rule 609(a)(2), the circuit courts agree that the courts must admit crimen falsi conviction evidence.103 According to general rules of construction, language used multiple times in a statute should be interpreted in the same manner throughout the statute.104 Thus, the Court concluded that Rule 609(a)(1) also bars the exercise of discretion in admitting prior felony convictions.105

The Court recognized that other subsections and subparts of Rule 609 contain balancing provisions.106 The balancing provisions contained in these subsections exclude the application of Rule 403 in both civil and criminal cases.107 The Court determined that Rule 403 should not be invoked to modify only one of numerous subsections of a rule.108 Furthermore, the Court stressed the fact that earlier drafts of Rule 609 provided a balancing of probative value and prejudicial effect in civil cases.109 If Congress had intended for Rule 403 to apply, Congress would not have so readily rejected the earlier drafts.110

C. Inherent Problems with Impeachment by Convictions

1. Parties Prejudiced by Convictions

Automatically admitting prior felony convictions may very well prejudice a civil litigant.111 Two major problems may arise when a witness's testimony is impeached by prior felony convic-

99. Id.
100. Id.
101. Id. at 1993.
102. FED. R. EVID. 609(a)(2).
104. Id.
105. Id.
106. Id.
107. Id.
108. Id.
109. Id.
110. Id.
111. 3 LOUISELL & MUELLER, supra note 29, § 315, at 316-18; 2 JOSEPH & SALTZBURG, supra note 45, § 43.3, at 8.
First, the jury may misuse the evidence. Juries may give the evidence undue weight or may use the evidence for an improper purpose, such as determining a witness’s character. The prejudice is particularly severe when the testifying witness is a party to a civil action or a criminal defendant.

For example, Green involved a civil plaintiff who had previously been convicted of rape, burglary, conspiracy to commit burglary and criminal trespass. Green sued the defendant manufacturer for injuries sustained when Green’s arm was amputated by the manufacturer’s allegedly defective machine.

The manufacturer claimed that Green had assumed the risk of injury. The manufacturer produced witnesses who testified that they had instructed Green not to place his arms in the machine until the machine stopped. Green denied these instructions. Because of the conflicting testimony presented, the case did contain a credibility issue. However, the fact remains that the jury may have decided that Green is a bad person and, as such, should not recover for his injuries.

In Green, the potential for misuse of the conviction evidence appears to outweigh the probability that the jury actually used the evidence to determine Green’s credibility. Furthermore, assuming that the jury did not misuse the evidence, the likelihood that the

112. Id.
113. Id.
114. Furthermore, some authorities have suggested that juries do not follow the courts’ instructions that evidence of a witness’s prior convictions may only be used for purposes of assessing the witness’s credibility. 3 LOUISELL & MUELLER, supra note 29, § 315, at 316-18 (citing Note, To Take the Stand or Not to Take the Stand: The Dilemma of the Defendant with a Criminal Record, 4 COLUM. J.L. & SOC. PROBS. 215, 218 (1968)).
115. 2 JOSEPH & SALTZBURG, supra note 45, § 43.3, at 8 (“informing the jury in a rape case that defendant has a prior rape conviction and then instructing the jurors that this evidence can only be used to evaluate credibility is to recommend ‘a mental gymnastic which is beyond, not only their power, but anybody else.’” (quoting Nash v. United States, 54 F.2d 1006, 1007 (2d Cir.), cert. denied, 285 U.S. 556 (1932))).
119. Id. at 3-4.
120. Id.
121. Id.
jury was aided by evidence of Green’s prior convictions seems negligible.

2. Parties Deterred from Testifying

A practice of automatically admitting prior convictions may deter parties from testifying. Disclosure of a past criminal record may embarrass the testifying party. Also, the party faces the risk that prior convictions may unduly prejudice the jury against him. The party may wish to escape these risks by avoiding the witness stand. Yet, the alternative, not testifying, presents the other side of a double-edged sword. A jury may interpret the party’s failure to testify as meaning that the party is hiding something. Greater prejudice may result from suspicion than from disclosure.

D. A Second Look at Green

Notwithstanding the problems of impeachment by prior felony convictions, the Green Court correctly concluded that Rule 609(a)(1) requires that evidence of prior felonies be admitted in civil actions regardless of prejudice. As stated in Green, the Supreme Court’s task was not to redraft Rule 609 to reach an equitable or just result. The Court’s role was merely to construe the

122. See 3 LOUISELL & MUELLER, supra note 29 § 315, at 317.
123. Id.
124. During a Senate Judiciary debate, Senator Hart argued:
    The man with a prior criminal record in this country is far more at
    the mercy of the authorities-police and judicial-than seems to me war-
    ranted. . . . [I]f he is arrested and put on trial, he has two almost hope-
    less alternatives. . . . He can take the stand and deny his participation in
    the crime now charged . . . in which case he is very likely to be convicted.
    Or he can refuse to take the stand . . . in which case he is also very likely
    to be convicted. . . ."
3 LOUISELL & MUELLER, supra note 29 § 314, at 301 (quoting 120 CONG. REC.
(1965))).
125. 3 LOUISELL & MUELLER, supra note 29, § 315, at 317.
126. Id. (citing Note, To Take the Stand or Not to Take the Stand: The
    Dilemma of the Defendant with a Criminal Record, 4 COLUM. J.L. & Soc. PROBS.
215, 221-22 for the proposition that “juries more frequently convict those who do
not testify than those who do”).
127. Id.
rule as Congress intended.\textsuperscript{129} The Advisory Committee which promulgated Rule 609 found that "[a] demonstrated instance of willingness to engage in conduct in disregard of accepted patterns is translatable into willingness to give false testimony."\textsuperscript{130} This finding served as the basis for Rule 609.\textsuperscript{131} However erroneous this belief, Rule 609 is supported by a rational belief which must be given deference by the courts. Amending Rule 609 to grant the courts discretion to exclude prior felony convictions in civil actions is a matter for the joint effort of Congress and the Supreme Court.\textsuperscript{132} The Supreme Court should not attempt such an amendment through an exaggerated interpretation of the rule.

Furthermore, Rule 609's balancing provision differs only slightly from the balancing provision contained in Rule 403.\textsuperscript{133} Rule 609(a)(1) allows admission of prior convictions evidence when the court determines that its probative value outweighs its prejudicial effect.\textsuperscript{134} Rule 403 allows the court to exclude evidence when

\textsuperscript{129} Id.

\textsuperscript{130} Preliminary Draft of Proposed Rules of Evidence (I), 46 F.R.D. 161, 297 (1969). This belief is further demonstrated by Representative Hogan's statements during the Conference Committee debates:

\begin{quote}
Should a witness with an antisocial background be allowed to stand on the same basis of believability before juries as law-abiding citizens with unblemished records? I think not.
\end{quote}

\begin{quote}
Personally I am more concerned about the moral worth of individuals capable of engaging in such outrageous acts as adversely reflecting on a witness' character than I am of thieves. . . .
\end{quote}


\textsuperscript{133} Smith, \textit{Impeaching the Merits: Rule 609(a)(1) and Civil Plaintiffs}, 13 N. Ky. L. REV. 441, 460 n.197 (1987) [hereinafter, Smith]. As noted supra note 66, the subtle distinctions in the language of Rule 609(a)(1) and Rule 403 present some cases where the question of which balancing provision applies may be critical. The argument that Rule 609's balancing provision differs only slightly from the Rule 403 balancing provision does not disregard the distinctions in the rules' language. Rather, this argument assumes that Congress focused upon the effect of the balancing provisions on the majority of cases.

\textsuperscript{134} \textit{Fed. R. Evid.} 609(a)(1).
the danger of prejudice *substantially* outweighs the probative value.\(^{135}\) Arguably, Rule 609 may exclude evidence which is not excludable under Rule 403.\(^{136}\) Yet, this minor "difference [in the rules] hardly merits the congressional agonizing over passage of Rule 609(a)(1)."\(^{137}\) Thus, Congress must have intended for prior felony convictions to be automatically admissible in civil cases.

Another factor not discussed in *Green* may have affected the court's decision. On August 15, 1988 the Advisory Committee on Rules of Practice and Procedure published a preliminary draft of proposed amendments to Rule 609.\(^{138}\) The amendments, if adopted, will provide (1) that Rule 609(a)(1)'s balancing test applies only when a criminal defendant testifies; and (2) that evidence of all other witnesses' prior felony convictions may be excluded by the Rule 403 balancing of prejudice and probative value.\(^{139}\)

Two facts suggest that Congress originally intended that prior felony convictions be automatically admitted but has since considered that a case-by-case analysis might be more appropriate. First,

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136. Smith, *supra* note 133, at 460 n.197.
137. *Id*.
138. The proposed amended Rule 609(a) reads as follows:
   (a) General rule.—For the purpose of attacking the credibility of a witness,
   (1) evidence that a witness other than a criminal defendant has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that a criminal defendant has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant; and
   (2) evidence that a witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.


On January 26, 1990, the United States Supreme Court adopted amendments to Rule 609(a) which are virtually identical to the proposed amendments set forth *supra*. See Amendments to Federal Rules of Evidence — Rule 609, 110 S. Ct. (CXXVIII, CXXX (1990). However, Congress may change or decline to approve these amendments at any time prior to December 1, 1990.

139. *Id*.
the proposed amendments are, in effect, reiterations of previously rejected drafts of Rule 609. Second, the proposed amendments do not merely clarify the existing rule. Under the present Rule 609, a trial court must determine whether evidence of a criminal witness’s prior convictions is prejudicial to the defendant. The proposed amendments, on the other hand, require that the courts conduct a Rule 403 balancing when the prosecution attempts to impeach a criminal witness (other than the defendant).

Rule 403 does not restrict the courts to an examination of prejudice to the defendant. Under Rule 403, a court may exclude evidence for other reasons including prejudice to the witness. The Conference Committee expressly rejected a proposed rule because it allowed the court to consider prejudice to a nondefendant witness. Obviously, then, the proposed amendments constitute a new procedural practice and not merely technical changes in the rule.

IMPACT ON NORTH CAROLINA

A. Background of North Carolina’s Rule 609

In 1983, the North Carolina General Assembly enacted the North Carolina Rules of Evidence. Although the federal rule served as the model for North Carolina’s Rule 609, the North Carolina rule differs substantially from its federal counterpart.

140. The recently proposed amendments require some type of balance of probative value and prejudicial effect in all cases, regardless of the nature of the crime and regardless of the party testifying. With the exception that the proposed amendments favor exclusion of a criminal defendant’s prior convictions, the newly proposed amendments are, in effect, a reiteration of the Advisory Committee’s second draft which allowed evidence of prior convictions unless the probative value of such evidence was “substantially outweighed by the danger of unfair prejudice.” See Proposed Rules of Evidence (II), 51 F.R.D. 315, 391 (1971).

142. See supra note 138.
143. See supra note 66.
144. Id.
145. See Proposed Rules of Evidence (II), advisory committee’s note, 51 F.R.D. 315, 392 (1971) (stating that any prejudice which prior convictions evidence might have on a witness other than the accused is “so minimal as scarcely to be a subject of comment”).
147. North Carolina’s Rule 609 provides, in part: “(a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime punishable by more than 60 days confinement shall be admitted.
North Carolina General Assembly deleted the controversial Rule 609(a)(1) balancing provision contained in the federal rule. Yet, the effect that such deletion may have upon the admissibility of prior felony convictions remains unclear even after the Green decision.

B. Ambiguity in North Carolina’s Rule 609

Although the North Carolina rule seems clear on its face, the rule is subject to two different interpretations. The North Carolina courts might construe Rule 609 as requiring that the courts admit evidence of prior convictions without regard to prejudice. Alternatively, the courts could apply Rule 403 to exclude prejudicial prior convictions. Pursuant to North Carolina’s Rule 403, the courts may exclude evidence otherwise admissible if the probative value of the evidence is “substantially outweighed by the danger of unfair prejudice. . . .” However, Rule 403 is intended as a “guide for the handling of situations for which no specific rules have been formulated.”

The North Carolina Supreme Court has not specifically addressed the question of whether Rule 609 pre-empts Rule 403. The Green court noted that this question arose during a House Subcommittee hearing concerning an earlier draft of the federal rule. During that hearing, Judge Friendly recognized that one
could argue that Rule 403 does not apply.\textsuperscript{153} According to Judge Friendly’s analysis, Rule 403 is a rule of general application which should only apply in the absence of a rule specifically dealing with prior convictions.\textsuperscript{154} Arguably, Rule 609 deals specifically with the admission of prior convictions evidence and, therefore, Rule 609 should control.\textsuperscript{155} A contrary position argues that an evidence rule is not specific in the absence of a specific provision for exclusion.\textsuperscript{156} Therefore, where a rule such as North Carolina’s Rule 609(a) does not contain a specific provision for exclusion, Rule 403 may be utilized to exclude evidence.\textsuperscript{157}

C. Resolving the Ambiguity

In order to resolve the ambiguity inherent in North Carolina’s rule, the draft considered during this debate did not contain a balancing provision. \textit{Id.}

153. During Judge Friendly’s testimony before the House Subcommittee the following discussion developed:

Judge \textit{FRIENDLY}. . . . Of course, there is the overriding rule that the judge can always exclude testimony where probative value he thinks is outweighed by its prejudicial effect and perhaps in the case we are discussing he should do that.

Mr. \textit{HUNGATE}. Would that be true with or without the rules?

Judge \textit{FRIENDLY}. That is true today.

Mr. \textit{HUNGATE}. Would it remain true if these rules became effective?

Judge \textit{FRIENDLY}. I assume they have such a rule in here. I could easily check.

Mr. \textit{DENNIS}. It seems to me if he has to follow this rule he does not have much discretion. Maybe he still could rule something out. I am not sure.

. . . .

Mr. \textit{HUNGATE}. I believe section 403 is the rule to which you are referring. . . .

Judge \textit{FRIENDLY}. I think . . . Congressman [Dennis’] point is a good one. You have the problem: Does that apply when there is a specific rule on the subject? This just says relevant evidence may [sic] excluded if it has this effect. But then somebody is going to argue, this other rule dealt very specifically with the question and rule 403 is out. I don’t know what the answer would be.”

\textit{Id.}

154. \textit{Id.}

155. \textit{Id.}


157. \textit{Id.}
rule, North Carolina courts should follow the *Green* Court’s analysis. The courts should examine the rule and North Carolina’s pre-rule practice in order to ascertain the General Assembly’s intent.¹⁵⁸

1. Analyzing the Language

According to *Green*, the language of North Carolina’s Rule 609 tends to indicate that Rule 403 is not available to exclude evidence of a witness’s prior convictions. First, the language of North Carolina’s Rule 609(a) is mandatory — “evidence . . . shall be admitted.”¹⁵⁹ This language suggests that the General Assembly intended to preclude any judicial inquiry into the probative value and prejudicial effect of the evidence.¹⁶⁰

Second, the commentary to North Carolina’s Rule 609 states that “[t]he current practice in North Carolina is that any sort of criminal offense may be the subject of inquiry for the purpose of attacking credibility.”¹⁶¹ This statement seems to mean that North Carolina’s practice requires that all convictions (regardless of the nature of the crimes) offered to impeach a witness must be admitted.¹⁶²

Furthermore, like federal Rule 609, subparts (b) dealing with old convictions and (d) dealing with juvenile adjudications contain balancing provisions.¹⁶³ Since subpart (a) contains no balancing provision, the courts might conclude that the General Assembly intended to foreclose any judicial discretion in admitting prior convictions.¹⁶⁴

¹⁵⁸ After “[c]oncluding that the text [of Rule 609] is ambiguous with respect to civil cases,” the *Green* court sought “guidance from legislative history and from the rules’ overall structure.” *Green*, 109 S. Ct. 1984.

¹⁵⁹ See 3 LOUISELL & MUELLER, supra note 29, § 314, at 158 (Supp. 1989) (analyzing North Carolina’s Rule 609(a) and stating that the mandatory language of Rule 609(a) — that “evidence . . . shall be admitted” — “suggests the possibility that the intent was to foreclose the exercise of any such discretion”).

¹⁶⁰ *Id.*

¹⁶¹ N.C.R. EVID. 609 commentary.

¹⁶² North Carolina’s Rule 609 does not distinguish between felony convictions and *crimen falsi* convictions. See N.C.R. EVID. 609(a) cited supra note 147.

¹⁶³ North Carolina’s Rule 609(b) provides in part: “Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed . . . unless the court determines, in the interests of justice, that the probative value of the conviction . . . substantially outweighs its prejudicial effect. . . . [Emphasis added].” N.C.R. Evid. 609(b).

2. Examining the Pre-Rule Practice

An examination of North Carolina's impeachment practice prior to the enactment of the North Carolina Rules of Evidence also suggests that the General Assembly intended that evidence of convictions should be admitted irrespective of Rule 403. Prior to North Carolina's Rule 609, counsel could always inquire into a witness's prior convictions. If the witness admitted the convictions, then this evidence was admitted for the purpose of determining the witness's credibility. If, however, the witness denied the conviction, the general rule provided that counsel could not contradict the witness's denial by proving the conviction with extrinsic evidence. As commonly noted, this restriction was often circumvented so that prior convictions evidence could almost always be admitted.

North Carolina's Rule 609 changed the prior practice in several respects. First, Rule 609(a) no longer restricts counsel to proving a witness's prior convictions by eliciting an admission from the witness. Counsel may now establish a witness's prior convictions by introducing the record of his conviction. Second, the rule has restricted the admissibility of prior convictions in North Carolina. Only convictions punishable by more than sixty days' confinement are admissible for impeachment purposes. Subpart (b) also changes North Carolina's pre-rule practice by limiting the admissibility of prior convictions more than ten years old.

165. See N.C.R. EVID. 609 commentary; see also 1 H. Brandis, Jr., Brandis on North Carolina Evidence § 112, at 482-85 (1988) [hereinafter Brandis].
166. See 1 Brandis, supra note 165 § 112, at 482-85.
167. Under the pre-rule practice, a witness's denial could not be contradicted "by introducing the record of his conviction or otherwise proving by other witnesses that he was, in fact, convicted." N.C.R. EVID. 609 commentary; 1 Brandis, supra note 165, § 112, at 483 n.43.
168. For a collection of cases showing how the rule has been circumvented see 1 Brandis, supra note 165; § 112, at 483 n.43.
169. See N.C.R. EVID. 609 commentary; 1 Brandis, supra note 165, § 112, at 484-88.
170. N.C.R. EVID. 609 commentary.
171. Id. See also 1 Brandis, supra note 165, § 112, at 483 n.43.
172. N.C.R. EVID. 609 commentary; 1 Brandis, supra note 165, § 112, at 484-85.
173. Id. Rule 609(b) does not prohibit the admission of convictions more than ten years old. Like its federal counterpart, North Carolina's Rule 609(b) allows admission only if the court determines that the probative value of the conviction outweighs its prejudicial effect.
Furthermore, Rule 609(c) prohibits the admission of pardoned convictions.174

Rule 609 does not clearly establish, however, whether the General Assembly intended to overhaul the pre-rule practice of admitting prior convictions without regard to unfair prejudice. As stated by the Green Court, in the absence of a clear directive, the courts should not interpret a rule in a manner which will overhaul the prior practice.175 This principle seems especially appropriate with respect to the courts' interpretation of North Carolina's Rule 609. The General Assembly did not merely fail to establish a new practice overhauling the prior practice. The General Assembly went one step further when it affirmatively rejected a change in practice suggested by the federal rules. Because the General Assembly rejected the federal balancing provision without providing for the exclusion of prior convictions, the North Carolina courts should interpret North Carolina's Rule 609 in accord with the pre-rule practice by admitting prior convictions irrespective of Rule 403.

CONCLUSION

Green's direct impact upon federal civil trials is quite clear. Under Federal Rule 609(a), a federal judge possesses no discretion to exclude evidence of prior convictions offered to impeach civil witnesses. However, the Green decision leaves several unanswered questions.

Attorneys should consider Green's impact upon the other federal rules of evidence. In Green, the Supreme Court decided that Rule 609 is a specific provision which overrides Rule 403. Did the Court determine that Rule 609 is specific merely because it deals with impeachment by prior convictions? Or, is Rule 609(a) specific because of the balancing provision contained in Rule 609(a)(1)?

If Green's decision was based upon the specific balancing provision contained in Rule 609(a)(1), then Rule 403 may apply to other evidence rules which do not contain balancing provisions (e.g., Rule 704 dealing with testimony of expert witnesses). Additionally, Rule 403 may exclude evidence admissible under rules which do not contain balancing provisions in all subparts of the rules (e.g., Rule 608 dealing with impeachment by character or conduct).

Furthermore, Green's impact upon the interpretation of North

Carolina's Rule 609 is unclear. North Carolina's Rule 609 is an amended version of the federal rule. Because North Carolina's Rule 609 does not contain the federal balancing provision, the North Carolina courts need not decide whether civil litigants should be treated differently from criminal defendants. However, the courts will, inevitably, be forced to decide whether North Carolina's Rule 403 may still be used to exclude prior convictions evidence. In addressing this question, the courts should analyze the rule's language and, more importantly, North Carolina's pre-rule history regarding impeachment by prior convictions. If the courts analyze the rule in this manner, the courts should conclude that North Carolina's Rule 609, like its federal counterpart, requires the courts to admit prior convictions irrespective of Rule 403.

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