Duquesne Law Review

Volume 22 | Number 2 Article 10

1984

Federal Rules of Evidence - Rules 609(A) and 403 - Witnesses - Impeachment by Prior Criminal Conviction

Michael J. Heilman

FEDERAL RULES OF EVIDENCE—RULES 609(A) AND 403—WITNESSES—IMPEACHMENT BY PRIOR CRIMINAL CONVICTION—The Federal District Court for the Western District of Pennsylvania has held that evidence of a prior criminal conviction can not be used to impeach the credibility of a plaintiff in a civil suit.

Tussel v. Witco Chemical Corp., 555 F. Supp. 979 (W.D. Pa. 1983).

Jacob F. Tussel instituted a civil action against Witco Chemical Corporation in the United States District Court for the Western District of Pennsylvania.[1] Tussel, the driver of a tanker truck, claimed that he was injured while unloading carbolic acid due to the negligence of a Witco employee.[2] Prior to trial, Tussel filed a motion *in limine* seeking an order barring Witco from introducing into evidence, for impeachment purposes, Tussel's 1978 guilty plea to a charge of conspiracy to import a controlled substance.[3] Judge Mencer held that evidence of Tussel's prior narcotics conviction was inadmissible in this action.[4]

Judge Mencer noted first that the broad question of admissibility of prior criminal convictions[5] into evidence is covered by Rule 609(a)[6] of the Federal Rules of Evidence (F.R.E.), and began his analysis with F.R.E. 609(a)(2).[7] This section, he explained, allows the introduction of evidence of prior convictions for impeachment purposes if the crimes involved dishonesty or false statement.[8]

---

1. Tussel v. Witco Chemical Corp., 555 F. Supp. 979 (W.D. Pa. 1983).

2. *Id.* at 980.

3. *Id.* The charge to which Tussel pleaded guilty carries with it the potential for imprisonment in excess of one year. *Id. See* Controlled Substances Import and Export Act, 21 U.S.C. §§ 952, 960, 963 (1981).

4. 555 F. Supp. at 985.

5. The court noted that for purposes of impeachment a plea of guilty is equivalent to a conviction. *Id.* at 980 n.2. *See* United States v. Pardo, 636 F.2d 535, 545 n.32 (D.C. Cir. 1980); C. TORCIA, WHARTON'S CRIMINAL PROCEDURE § 339 at 224 and n.18 (12th ed. 1975).

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

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

FED. R. EVID. 609(a).

7. 555 F. Supp at 980.

8. *Id.* at 980-81.

Further, Judge Mencer noted that no judicial discretion is involved in the automatic admission of evidence of prior convictions of such crimes for impeachment purposes.[9] Because of their nature, he continued, these crimes are considered highly probative of one's credibility.[10] For assistance in defining dishonesty and false statement, Judge Mencer turned to the Conference Committee's Report on the Final Compromise Version of the Rule (Conference Committee's Report).[11] He observed that the Conference Committee's Report defined crimes involving dishonesty or false statement as "crimes such as perjury, subornation of perjury, false statement, criminal fraud, embezzlement or false pretense, or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness or falsification bearing on the accused's propensity to testify truthfully."[12]

The court considered the question of whether a narcotics conviction is such a crime.[13] A review of authority from other jurisdictions revealed two opposing views. The court explained that the first view, embraced by the Eighth Circuit in *United States v. Hastings*[14] and the Second Circuit in *United States v. Hayes*,[15] suggests that although a narcotics conviction is not a crime requiring fraud, it may be accompanied by fraud.[16] Under this approach, if the underlying facts of the case show fraud or dishonesty, evidence of a conviction of such a crime falls within the ambit of F.R.E. 609(a)(2) and should be admitted into evidence.[17] The court

---

9. *See id.* at 981 n.3.

10. *Id.* at 981.

11. *Id. See* CONF. REP. No. 1597, 93rd Cong., 2d Sess. 9 (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7098.

12. 555 F. Supp. at 981. *See* CONF. REP. No. 1597, *supra* note 11, at 7103. Judge Mencer quoted BLACK's definition of *crimen falsi:*

> The term involves the element of falsehood, and includes everything which has a tendency to injuriously affect the administration of justice by the introduction of falsehood and fraud. A crime less than a felony that by its nature tends to cast doubt on the veracity of one who commits it. This phrase is also used as a general designation of a class of offenses, including all such as involved deceit or falsification; e.g. forgery, counterfeiting, using false weights or measures, perjury, etc. Includes forgery, perjury, subornation of perjury, and offenses affecting the public administration of justice.

BLACK'S LAW DICTIONARY 446 (rev. 4th ed. 1968).

13. 555 F. Supp. at 981.

14. 577 F.2d 38 (8th Cir. 1978).

15. 553 F.2d 824 (2d Cir. 1976), *cert. denied*, 434 U.S. 867 (1977).

16. 555 F. Supp. at 981-82.

17. *Id.* at 982. The court quoted language from the Second Circuit's decision: "Appellant's conviction was for the importation of cocaine, a crime in the uncertain middle category — neither clearly covered nor clearly excluded by the second prong test [F.R.E. 609(a)(2)]—and thus one to which the Government must present specific facts relating as to

then considered the view adopted by the District of Columbia Circuit in *United States v. Lewis*,[18] which requires that dishonesty or false statement be an element of the crime.[19] The *Lewis* court found that if an offense did not contain an element involving dishonesty, false statement, or fraud, the court would not look for actual dishonesty, false statement or fraud in the underlying facts of the case.[20] Judge Mencer found this to be the better view.[21] According to Judge Mencer, proponents of this approach reason that if the alternative position is carried to its logical end, prior convictions of all intentional crimes would be admissible for impeachment purposes.[22] He found this to be at odds with Congress' intent.[23] Judge Mencer further asserted that Congress clearly stated that only crimes in the nature of crimen falsi should be admissible under F.R.E. 609(a)(2), not all criminal offenses.[24] Congress, he noted, chose a narrow range of crimes which it considered peculiarly probative of credibility.[25] A narrow application of F.R.E. 609(a)(2), such as the District of Columbia Circuit's approach, he submitted, was, therefore, consistent with congressional intent.[26] From an administrative point of view, Judge Mencer also noted that this approach provides the "most practical, efficient and consistent manner in which a trial judge can utilize the rule."[27] Finding that the crime[28] to which Tussel pleaded guilty did not contain an element of dishonesty or false statement, he held that the evidence was inadmissible under F.R.E. 609(a)(2).[29]

Judge Mencer then considered the applicability of F.R.E. 609(a)(1).[30] This section, he explained, allows the admission of evi-

---

dishonesty or false statement." *Id.* (quoting United States v. Hayes, 553 F.2d 824, 827 (2d Cir. 1976), *cert. denied*, 484 U.S. 867 (1977)).

18. 626 F.2d 940 (D.C. Cir. 1980).

19. 555 F. Supp. at 982.

20. *Id. See* 626 F.2d at 946.

21. 555 F. Supp. at 982.

22. *Id.*

23. *Id.* The court quoted with approval the District of Columbia Circuit's interpretation of FED. R. EVID. 609(a)(2): "Although it may be argued that any willful violation of law . . . evinces a lack of character and a disregard for all legal duties, including the obligation of an oath, Congress has not accepted that expansive theory." *Id.* (quoting United States v. Millings, 535 F.2d 121, 123 (D.C. Cir. 1976)).

24. 555 F. Supp. at 982.

25. *Id. See* CONF. REP. No. 1597, *supra* note 11, at 7103.

26. 555 F. Supp. at 982.

27. *Id.*

28. *See* 21 U.S.C. §§ 952 and 963 (1981).

29. 555 F. Supp. at 982.

30. *Id. See supra* note 6.

dence of a prior conviction if the offense which the individual committed was punishable by death or imprisonment in excess of one year under the law under which the individual was convicted. When such conviction is present, the deciding court must then determine whether the probative value of admitting this evidence outweighs its prejudicial effect to the defendant.[31]

Once again, in deciding the instant case, the court's inquiry began with the Conference Committee's Report[32] which stated that the F.R.E. 609(a)(1) balancing standard should be utilized to exclude evidence only when the prejudicial impact upon the defendant warrants exclusion.[33] The court observed that this view has been followed in numerous decisions.[34] Based on its analysis of the Conference Committee's Report and reported decisions, the court concluded that Congress generally favored admission of evidence of prior convictions for impeachment purposes, but intended to limit the special protection of F.R.E. 609(a)(1) exclusively to a single class of witnesses: criminal defendants.[35] The court found no mandate in the language or legislative history of F.R.E. 609(a)(1) which justified a blind or mechanical application of the rule.[36]

The Conference Committee's Report specifically stated that all crimes involving dishonesty or false statement are automatically admissible, and admission of evidence of conviction of other offenses is controlled by the F.R.E. 609(a)(1) balancing standard if a

---

31. 555 F. Supp. at 982.

32. *Id. See supra* note 11.

33. 555 F. Supp. at 982-83. The Conference Committee Report states in relevant part:

> With regard to the discretionary standard established by paragraph (1) of rule 609(a), the Conference determined that the prejudicial effect to be weighed against the probative value of the conviction is specifically the prejudicial effect *to the defendant*. The danger of prejudice to a witness other than the defendant (such as injury to the witness' reputation in his community) was considered and rejected by the Conference as an element to be weighed in determining admissibility. It was the judgment of the Conference that the danger of prejudice to a nondefendant witness is outweighed by the need for the trier of fact to have as much relevant evidence on the issue of credibility as possible. Such evidence should only be excluded where it presents a danger of improperly influencing the outcome of the trial by persuading the trier of fact to convict the defendant on the basis of his prior criminal record.

CONF. REP. No. 1597, *supra* note 11, at 7103.

34. 555 F. Supp. at 983. *See, e.g.*, United States v. Nevitt, 563 F.2d 406 (9th Cir. 1977), *cert. denied*, 444 U.S. 847 (1979) (defendant on trial for conspiring to transport falsely made securities across state lines was entitled to impeach prosecution witnesses by evidence of their prior convictions); United States v. Martin, 562 F.2d 673 (D.C. Cir. 1977) (noting that all prior convictions of prosecution witnesses were admissible for impeachment purposes under FED. R. EVID. 609(a)).

35. 555 F. Supp. at 983-84.

36. *Id.* at 983.

criminal defendant witness is being prejudiced. It is silent as to the standard to be used in other situations.[37] The court determined that F.R.E. 609(a)(1) does not specifically preclude application of F.R.E. 403,[38] and noted that a rigid application of F.R.E. 609(a) is not in the best interests of the judicial system or the parties.[39] The court was unable to find any prior cases which had addressed the precise issue before it: admissibility of evidence of a prior conviction for importation of narcotics to impeach the credibility of a plaintiff in a civil action.[40] Judge Mencer found guidance, however, in criminal cases which have dealt with the admission of evidence of prior convictions of non-defendant witnesses for impeachment purposes.[41] Evidence of prior convictions was excluded in these cases by applying F.R.E. 403.[42] The court found that F.R.E. 609(a)(1) grants special protection to criminal defendants. It then noted that F.R.E. 102 and 611 require a construction of the rules which secures a fair administration of justice and that questioning be conducted so as to ascertain the truth and avoid harassment and embarrassment of witnesses.[43] To meet these ends, the court determined that F.R.E. 403 must be the standard used to determine the admissibility of this evidence.[44]

Judge Mencer then decided whether the evidence should be admitted under the F.R.E. 403 balancing standard.[45] He thus balanced the tendency of the evidence to aid the jury in deciding the case on its merits and the tendency of the evidence to cause the jury to make its "decision on something other than the established propositions in the case."[46] Judge Mencer concluded that this evidence was demonstrably more prejudicial than probative on the issue of credibility and held it inadmissible.[47]

---

37. *Id. See* CONF. REP. No. 1597, *supra* note 11, at 7103.

38. 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.

39. 555 F. Supp. at 984.

40. *Id.*

41. *See* United States v. Dixon, 547 F.2d 1079, 1083 n.4 (9th Cir. 1976) and United States v. Jackson, 405 F. Supp. 938, 943 (E.D.N.Y. 1975).

42. 555 F. Supp. at 984.

43. *Id.*

44. *Id.*

45. *Id. See supra* note 38.

46. 555 F. Supp. at 985 (quoting Carter v. Hewitt, 617 F.2d 961, 972 (3d Cir. 1980)). *See* 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 403[03], at 403-15 to -17 (1978).

47. 555 F. Supp. at 985.

At common law, conviction of any felony or misdemeanor involving dishonesty made that individual incompetent to testify.[48] As the common law developed this changed; all men regardless of their prior criminal acts became competent to testify.[49] Prior convictions, however, could be used to impeach the individual's credibility.[50] The majority rule, followed by the federal courts before the passage of the Federal Rules of Evidence and most state courts at one time or another, allowed the introduction of evidence of prior convictions if the crime was a felony or involved dishonesty or false statement.[51] This rule was tailored to provide the jury with as much evidence as possible on the issue of the witness' credibility.[52]

The first significant departure from this view came in 1965 when the District of Columbia Circuit Court decided *Luck v. United States*.[53] In *Luck*, the court chose to abandon the majority position in the case of criminal defendants who take the stand on their own behalf. The court held that it is within the discretion of the trial judge to exclude evidence of a prior conviction of a defendant-witness if the evidence is offered for impeachment purposes.[54] A new and somewhat conflicting philosophy was at the root of this departure from established law. The majority view placed a premium on giving the jury as much evidence as possible on the issue of credibility, while the *Luck* view placed a premium on avoiding prejudice to criminal defendants, at the expense of excluding some relevant evidence. A criminal defendant could, in fact, choose not to take the stand on his own behalf if the prosecutor could then expose the defendant's prior convictions and seriously prejudice his case. Judge McGowan, writing for the *Luck* court, explained, "[i]t is more important to the search for truth in a particular case for the jury to hear the defendant's story than to know of a prior conviction."[55] This dichotomy was temporarily removed in 1970, when Congress reinstated the majority rule in the District of Columbia by revising the District of Columbia Code.[56]

---

48. McCormick's Handbook of the Law of Evidence, § 64 (E. W. Cleary ed. 1972).
49. *Id.*
50. *Id.* § 43.
51. *Id.*
52. 3 D. Louisell & C. Mueller, Federal Evidence §§ 314-15 (1977).
53. 348 F.2d 763 (D.C. Cir. 1965).
54. *Id.* at 768.
55. *Id.* at 769.
56. *See* D.C. Code Ann. § 14-305 (1973) (this statute provides for the admission of evidence of prior criminal convictions if the offense "(A) was punishable by death or impris-

The introduction of the proposed Federal Rules of Evidence in 1973 renewed the contest of conflicting philosophies: protecting criminal defendants versus providing the jury with as much evidence as possible on the issue of witness credibility. The first draft of F.R.E. 609(a) in March, 1969 followed the majority position and allowed evidence of any conviction of a felony[57] or a crime involving dishonesty or false statement to be introduced for impeachment purposes.[58] The second draft in March, 1971, however, was strongly influenced by *Luck*, and required that the probative value of the evidence be greater than its prejudicial effect for either type of conviction (felony or one involving dishonesty or false statement) to be admitted into evidence.[59] This language was removed in the final draft in December, 1972 and the language of the first draft was reinstated.[60] The House Special Subcommittee on Reform of Federal Criminal Laws of the Committee on the Judiciary revised the rule and gave it a *"Luck"* flavor; the subcommittee allowed the exercise of judicial discretion only when the crime was a felony not involving dishonesty or false statement.[61] The full

---

onment in excess of one year under the law under which he was convicted or (B) involved dishonesty or false statement (regardless of the punishment)"). There were no further amendments to this section between 1970 and 1973.

57. Under federal law a felony is any crime punishable by death or imprisonment for more than one year. *See* 18 U.S.C. § 1(1) (1979).

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

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

2 THE FEDERAL RULES OF EVIDENCE, LEGISLATIVE HISTORIES AND RELATED DOCUMENTS, Doc. 5 at 123 (J. Bailey and O. Trelles, ed. 1980).

59. The second draft provided:

> General Rule. For the purposes of attacking the credibility of a witness, evidence that he has been convicted of a crime, except on a plea of *nolo contendere*, is admissible but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (2) involved dishonesty or false statement regardless of the punishment, unless (3), in either case, the judge determines that the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice.

Id. Doc. 6 at 77.

60. *Id.* Doc. 7 at 21. *See supra* note 58 for text of the first draft.

61. The subcommittee's revision provided:

> 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 (1) was punishable by death or imprisonment in excess of one year, unless the court determines that the danger of unfair prejudice outweighs the probative value of the evidence of the conviction, or (2) involved dishonesty or false statement.

H. REP. No. 93-65, 93d Cong., 1st Sess. 11 (1973).

House Committee on the Judiciary, in turn, eliminated the use of any felony not involving dishonesty or false statement for impeachment purposes.[62] This version was passed by the House of Representatives. The Senate Committee on the Judiciary amended the House-passed version of the rule to allow impeachment of defendant-witnesses only if the probative value of the evidence outweighs its prejudicial effect. Other witnesses received no such protection. A defendant-witness could still be impeached by evidence of crimes involving dishonesty or false statement.[63] On the Senate floor, this special balancing standard was removed, and a version of the rule embracing the majority position was passed.[64] A House-Senate conference committee met and agreed on a compromise which is the present F.R.E. 609(a).[65] Both houses of Congress approved this compromise and the Federal Rules of Evidence were enacted.[66]

The preceding discussion shows that Congress' intent, which was all important to the disposition of *Tussel,* is a very slippery thing. As is often the case, the voice of Congress is not a lone strong baritone, but a confusing cacophony. A careful reading of the legislative history, however, provides some guidance. Several legislators experienced problems defining what was meant by "crimes involving dishonesty or false statement." A debate on the House floor preceding passage of the final compromise version of the rules illustrates this confusion. Views expressed ranged from "crimen falsi" to "moral turpitude" to "criminality."[67] Representative Hogan made the point that even if crimen falsi is accepted as the definition, the issue is not closed. Crimes which are crimen falsi in one jurisdiction may not be crimen falsi in another.[68] Despite this

---

62. *Id.* The full House Committee's version read: "General Rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible only if the crime involved dishonesty or false statement." *Id.*

63. The Senate Judiciary Committee's amended version provided in pertinent part that evidence of a prior conviction is admissible if:

> (2) in the case of a witness other than the accused, [the crime] was punishable by death or imprisonment in excess of one year under the law under which he was convicted, unless the court determines that the prejudicial value of the evidence outweighs its probative value in which case the evidence shall be excluded.

S. REP. No. 1277, 93d Cong., 2d Sess. 14 (1974).

64. CONF. REP. No. 1597, *supra* note 11, at 7102.

65. *See supra* note 6.

66. 28 U.S.C. app. (1976).

67. *See* 120 CONG. REC. H2375-2381 (1974).

68. Representative Hogan commented:

> Unless one practices in a jurisdiction which has statutorily defined crimen falsi, the common law definition of "any crime which may injuriously affect the administration

variety of opinion, there is support for the view that the traditional definition of crimen falsi was intended by Congress as the definition of "crimes involving dishonesty or false statement,"[69] that is, only crimes that require dishonesty or false statement as one of their elements. The Conference Committee's Report seems to support this view.[70] In addition, courts have traditionally refused to allow more than the name of the crime, its classification and the associated punishment to be introduced into evidence when a prior conviction is introduced for impeachment purposes.[71] Although this rule is judicially authored and may be changed at any time, there is a reluctance to allow long discussion of underlying circumstances necessary to show "dishonesty or false statement" when it is not an element of the crime. This is consistent with the general policy of the rules to promote judicial economy.[72]

The intent of Congress is more readily discernible when deciding the question to which witnesses F.R.E. 609(a) applies. There is no doubt that the established law before F.R.E. 609(a) applied to witnesses in civil as well as criminal trials.[73] Clearly, Congress was mainly concerned about prejudice to criminal defendant-witnesses,[74] but there is no indication that it thereby intended to ex-

---

of justice, by the introduction of falsehood or fraud" is applicable. This definition has been held to include forgery, perjury, subornation of perjury, suppression of testimony by bribery, conspiracy to procure the absence of a witness or to accuse of a crime, obtaining money under false pretenses, stealing, moral turpitude, shoplifting, intoxication, petit larceny, jury tampering, embezzlement and filing a false estate tax return. In other jurisdictions, some of these offenses have been found not to fit the crimen falsi definition.

Id. at 2376 (remarks of Rep. Hogan).

69. *Id.* at 2380 (remarks of Rep. Danielson). The Senate appeared to have accepted this definition as there was no debate on the subject. Following debate over the Judiciary Committee's version of the rules, FED. R. EVID. 609(a) was amended to allow *all* felonies to be used for impeachment purposes. The whole question became a moot one. *See* 120 CONG. REC. 37075-37083 (1974).

70. CONF. REP. No. 1597, *supra* note 11, at 7103 (the report states, in relevant part, "[T]he Congress means crimes . . . the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully").

71. *See generally* 98 C.J.S. *Witnesses* § 507(c) (1957 & Supp. 1981); 3 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 319 (1977). *See, e.g.*, United States v. Wolf, 561 F.2d 1376 (10th Cir. 1977); United States v. Dow, 457 F.2d 246 (7th Cir. 1972).

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

73. *See generally* 98 C.J.S. *Witnesses* § 507 (1957 & Supp. 1981). This note refers to civil and criminal cases alike.

74. *See* CONF. REP. No. 1597, *supra* note 11, at 7103.

clude witnesses in civil trials from the reach of F.R.E. 609(a). To the contrary, during the House debate Representative Hogan stated, "[F.R.E. 609(a)] applies in civil cases as well as criminal cases to all witnesses."[75] He was not contradicted by his colleagues. At a different point in the same debate, Representative Wiggins suggested that civil and criminal areas be handled by different rules; he was, however, unsupported by his fellow representatives.[76]

In addition to this legislative authority, commentators have agreed that no distinction was intended. McCormick's Handbook of the Law of Evidence, when discussing F.R.E. 609(a) states, "in civil cases or against prosecution witnesses such crimes (punishable by death or imprisonment in excess of one year) are useable without the weighing process."[77] Judge Weinstein[78] and Louisell and Mueller[79] similarly note in their respective evidence treatises that F.R.E. 609(a) applies to civil cases as well as to criminal cases. Finally, the Fifth Circuit in *Shingleton v. Armor Velvet Corp.*[80] and *Howard v. Gonzales*[81] had no qualms about using F.R.E. 609(a) to decide admissibility, for impeachment purposes in a civil case, of evidence of a prior criminal conviction.

The *Tussel* court seems to have reached a wise and reasonable solution to the problem before it. It is a solution that furthers the modern view that relevancy alone cannot govern admissibility of evidence, but that considerations of fairness must also factor into the decision of admissibility. As the discussion above indicates, however, several members of Congress made clear during the course of the House debate that F.R.E. 609(a) was to apply to civil as well as to criminal trials. The *Tussel* court makes no mention of this in its analysis, and presumably did not have this research before it. Instead, the court determined that Congress meant to exclude civil trials completely from the reach of F.R.E. 609(a).

---

75. 120 CONG. REC. H2379 (daily ed. February 6, 1974) (statement of Rep. Hogan).

76. *Id.* (statement of Rep. Wiggins).

77. MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE, § 43 (E. W. Cleary ed. Supp. 1982).

78. 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 609[07] (1982).

79. 3 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 316 (1977).

80. 621 F.2d 180 (5th Cir. 1980) (in an action for fraudulent misrepresentation and breach of a distributorship contract the court admitted evidence of defendant's prior felony conviction for his part in a false pretenses scheme for impeachment purposes under FED. R. EVID. 609(a)).

81. 658 F.2d 352 (5th Cir. 1981). In an action for damages caused by beating and unlawful arrest, the court of appeals approved the trial court's use of discretion under FED. R. EVID. 609(a) in refusing to allow the defendant to impeach plaintiff's credibility by introducing evidence of plaintiff's 1966 conviction for theft.

From this precarious starting point, the court then determined that F.R.E. 403 was the operative rule.

The *Tussel* court could have reached the same result with a different analysis. An alternative line of argument would begin by recognizing that F.R.E. 609(a) applies to both civil and criminal trials, thereby furthering Congress' expressed intent. The argument would continue by noting that the Federal Rules of Evidence cannot be read as isolated rules; together they form a comprehensive system.[82] The Federal Rules of Evidence may be imagined, in part, as a series of sieves; evidence must pass through each to be admissible. Though evidence may meet the admissibility requirements of one rule, it may not meet the requirements of another rule which speaks to the same issue. In *Tussel,* the sieves through which evidence must pass are F.R.E. 609(a) and F.R.E. 403. The prejudice to a criminal defendant is the only prejudice to be balanced by F.R.E. 609(a)(1), and there is no criminal defendant in a civil trial; therefore, F.R.E. 609(a)(1) will not function as a bar to admissibility in the present case. Presence of a criminal defendant, of course, has no effect on the admissibility of prior convictions under F.R.E. 609(a)(2). Prior convictions are equally admissible in civil and criminal cases under F.R.E. 609(a)(2). Since F.R.E. 609(a) does not present an impediment to the admission of this evidence, the analysis must shift to F.R.E. 403. This evidence may then be excluded under F.R.E. 403, which the *Tussel* court did.[83] This approach furthers the intent of Congress, while reaching essentially the same result as the court in the instant case. In addition, the traditional canons of statutory interpretation are employed by construing the Rules as a whole,[84] and the overall purposes of the Rules, as outlined in F.R.E. 102,[85] are satisfied.

Oddly enough, Congress, the courts and commentators have been silent on the issue of whether the scope of F.R.E. 403 includes F.R.E. 609(a). This issue was raised by Judge Friendly in his testimony before the House Subcommittee, but unfortunately Congress did not discuss the subject further.[86] Though aware of the exis-

---

82. *See* Younger, *Three Essays on Character and Credibility Under the Federal Rules of Evidence,* 5 HOFSTRA L. REV. 7, 18 (1976) ("I should think that a federal judge will take the Federal Rules of Evidence as a system, not as a set of independent provisions to be applied discretely").

83. *See supra* notes 38-47 and accompanying text.

84. 82 C.J.S. *Statutes* § 345 (1957).

85. *See supra* note 72.

86. PROPOSED RULES OF EVIDENCE, SPECIAL SUBCOMMITTEE ON THE REFORM OF THE FEDERAL CRIMINAL LAWS OF THE COMMITTEE ON THE JUDICIARY OF THE HOUSE OF REPRESENTA-

tence of F.R.E. 403, Congress did not draw it into its debate on F.R.E. 609(a). It discussed the applicability of other rules[87]—F.R.E. 404(b) for example.[88] Congress could have said that a prior conviction offered for impeachment purposes is a special type of evidence which is beyond the scope of F.R.E. 403; it did not. Reading an intent to exclude F.R.E. 609(a) from the scope of F.R.E. 403 into Congress' actions, however, arguably runs contrary to the congressionally endorsed policy of F.R.E. 403, that evidence despite its relevance may be excluded on fairness grounds.[89]

F.R.E. 403, on its face, applies to all evidence.[90] The commentators, however, have been reluctant to adopt this view. Such eminent scholars as Wright and Graham express the view that F.R.E. 609(a) is beyond the scope of F.R.E. 403.[91] Louisell and Mueller note that it is "entirely possible" that F.R.E. 403 cannot be used to exclude evidence admissible under F.R.E. 609(a).[92] Judge Weinstein declares this to be an open question in his treatise.[93] Professor Irving Younger, on the other hand, has suggested that what Congress really meant to say is that the F.R.E. 609(a) standard is the same as the F.R.E. 403 standard.[94]

Courts have almost unanimously held that F.R.E. 609(a)(2) is beyond the scope of F.R.E. 403.[95] Authority is less plentiful and

---

TIVES, 93d Cong., 1st Sess. 252 (1973) (testimony of Judge Harry J. Friendly).

87. *See* 120 CONG. REC. S37081 (comments of Sen. Hart) (1974); *Id.* at H2379-2380 (comments of Reps. Holtzman and Danielson).

88. FED. R. EVID. 404(b) provides:

> Other crimes, wrongs or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

FED. R. EVID. 404(b).

89. *See* Advisory Committee Notes to the Federal Rule of Evidence 403, FED. R. EVID. 403.

90. *See supra* note 38.

91. 22 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5214 (1978).

92. 2 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 126 (1977).

93. 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 609[07] (1982).

94. *See* Younger, *supra* note 82, at 12. "Simplicity is a great and underrated virtue, in whose name I dare hope that Congress will some day amend Rule 609 along these lines: Any witness may be impeached with convictions, subject to the judge's discretion under Rule 403." *Id.*

95. *See* United States v. Toney, 615 F.2d 277 (5th Cir. 1980). The court quoted the following language from the Conference Committee's Report in deciding that FED. R. EVID. 609(a)(2) is not within the scope of FED. R. EVID. 403: "[T]hus judicial discretion granted with respect to the admissibility of other prior convictions is not applicable to those involving dishonesty or false statement." 615 F.2d at 279. *See also* United States v. Kiendra, 663 F.2d 349 (1st Cir. 1981); United States v. Leyra, 659 F.2d 118 (9th Cir. 1981); United States

less clear, however, when F.R.E. 609(a)(1) is at issue. The First Circuit in *Furtado v. Bishop*[96] refused to rule on the question of whether the trial judge has discretion to exclude evidence admissible under F.R.E. 609(a)(1) by invoking F.R.E. 403.[97] The Ninth Circuit in *United States v. Dixon*,[98] noted in dictum that it is "conceivable" that in some cases F.R.E. 403 might afford trial courts discretion to exclude evidence of a prior conviction when a criminal defendant is not the one prejudiced.[99] Research reveals no other cases which have addressed this issue.

By no measure is the volume or intensity of precedent and opinion overwhelming. A court following the proposed argument could not cite much authority in its favor, nor would it find strong authority in opposition. Though the proposed argument is not flawless, it has certain advantages including: adherence to the intent of Congress, adherence to the policies, spirit and text of the Federal Rules of Evidence, and an opportunity to contribute to a relatively open area of law. These advantages seem to outweigh the sole apparent disadvantage of a lack of supportive authority and precedent.

Judge Mencer has furthered the role that fairness and prejudice play in determining the admissibility of evidence, consistent with the policies of the Federal Rules of Evidence and modern scholarly thought. Perhaps courts confronted with this question in the future and favoring this result will consider this alternative argument when making their decisions.

Michael J. Heilman

---

v. Coats, 652 F.2d 1002 (D.C. Cir. 1981).

96. 604 F.2d 80 (1st Cir. 1979).

97. The court noted that defendant's argument that FED. R. EVID. 609(a)(1) was beyond the scope of FED. R. EVID. 403 might be legitimate. *Id.* at 8.

98. 547 F.2d 1079 (9th Cir. 1976).

99. *Id.* at 1083 n.4.