PEPPERDINE UNIVERSITY

Pepperdine Law Review

Volume 49 | Issue 1 Article 2

12-15-2021

The "Unfairness" Proof: Exposing the Fatal Flaw Hidden in the Rule Governing the Use of Criminal Convictions To Impeach Character for Truthfulness

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The "Unfairness" Proof: Exposing the Fatal Flaw Hidden in the Rule Governing the Use of Criminal Convictions To Impeach Character for Truthfulness

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Abstract

Federal Rule of Evidence 609 (adopted by various states as well) allows for the introduction of certain convictions at trial to impeach the credibility—i.e., character for truthfulness—of any witness. The rule bifurcates its requirements between those that apply to criminal defendants—who, in theory, are afforded greater protection throughout the law than are all other participants in trials—and all remaining witnesses. The most important distinction between the standards that apply to these two classes of witnesses is that for prior crimes of criminal defendants to be introduced to impeach their credibility, those wrongdoings must survive a special balancing test spelled out within Rule 609. In contrast, evidence of prior crimes used to assess the character for truthfulness of non-criminal-defendant witnesses is subject to the well-known balancing test found in Rule 403.

Critically, commentators, scholars, and courts alike (with one notable judicial distinction) have paid virtually no attention to the actual language of Rule 609's key operating provision applicable to criminal defendants. As written, the rule is not merely more favorable to criminal defendants, as many have easily concluded; it is manifestly inoperable. This crucial flaw in the

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rule has largely been overlooked.

After detailing the historical and legislative development of Rule 609, this Article, for the first time: (1) shows that courts have been routinely applying a similitude of Rule 609 that contravenes the express language enacted by Congress, (2) demonstrates, through a Euclidean mathematical proof, that Rule 609, as written, is inoperable against criminal defendants, and (3) evaluates several methods to address this longstanding, overlooked problem with the rule.

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I. INTRODUCTION

Federal Rule of Evidence 609 (Rule 609), which is mirrored in many states' evidence codes,[1] allows for the introduction of certain convictions at trial to impeach the credibility—i.e., character for truthfulness—of any witness.[2] The rule bifurcates its requirements between those that apply to criminal defendants—who, in theory, are afforded greater protection throughout the law than are all other participants in trials—and all remaining witnesses.[3]

Although Rule 609 has been called "the most maligned of any Federal Rule of Evidence,"[4] commentators, scholars, and courts (with one notable judicial distinction discussed below) alike have paid little attention to the actual language of its key operating provision.[5] As written, the rule is not merely more favorable to criminal defendants, as it should be; it's manifestly inoperable.[6] That notwithstanding, courts generally have been unconsciously applying a judicially created version of the rule that is wholly inconsistent with the language Congress (and many state legislatures)[7] actually enacted.[8]

After detailing the development of Rule 609,[9] this Article will, for the first time ever: (1) show that courts have been routinely applying a similitude of Rule 609 that contravenes the express language enacted by Congress,[10] (2) demonstrate, through a Euclidean mathematical proof, that Rule 609, as

1. *See* Anna Roberts, *Conviction by Prior Impeachment*, 96 B.U. L. REV. 1977, 1987 (2016) ("Forty-seven states, along with the District of Columbia, follow the federal government in permitting impeachment of criminal defendants with their criminal records, but of those only seventeen states follow FRE 609 either exactly or very closely.").

2. FED. R. EVID. 609 ("The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction . . . .").

3. *See id.*

4. Ric Simmons, *An Empirical Study of Rule 609 and Suggestions for Practical Reform*, 59 B.C. L. REV. 993, 995 (2018) (presenting data on how Rule 609 operates in practice); *see also* Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions*, 42 U.C. DAVIS L. REV. 289, 292 & n.4 (2008) (explaining the controversy behind Rule 609 and the practice of impeaching testifying defendants with prior convictions).

5. *See infra* Section II.D; *see, e.g.*, Simmons, *supra* note 4, at 1035 (emphasis added) ("Rule 609(a)(1)(B) already contains a balancing test, which is ostensibly very favorable to the defendant: prior convictions are only supposed to be admitted if their probative value outweighs their *unfair prejudice*.").

6. *See infra* Section II.C.

7. *See supra* note 1.

8. *See infra* Section II.D.

9. *See infra* Section II.B.

10. *See infra* Section II.D.

written, is inoperable against criminal defendants,[11] and (3) evaluate several methods to address this until-now overlooked dilemma that has resulted in a near-universal misapplication of the rule, as well as an unrevealed circuit split.[12]

I conclude by suggesting that the best solution is one that respects the textualist approach to interpretation: having Congress rewrite the law or live with the consequences of the current version.[13]

II. DISCUSSION

Rule 609 is based on the questionable premise—discussed in somewhat greater detail below—that, in considering the credibility (i.e., the general character for truthfulness) of a witness, a jury is entitled to hear about at least some of that witness's prior convictions (if there are any, of course).[14] The philosophical underpinnings of the rule, however, are not the main province of this Article. Rather, the discussion herein is an economic analysis (in the broad sense) of the theoretical application of the rule to criminal defendants.[15]

Rule 609 reads, in relevant portion, as follows:

> (a) In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction: (1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence: (A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and (B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its *prejudicial effect* to that defendant . . . .[16]

As illustrated, Rule 609 incorporates a balancing test external to it—from Rule 403—for use when determining whether the prior crimes of a witness

11. *See infra* Section II.C.
12. *See infra* Section II.E.
13. *See infra* Part III.
14. *See* Bellin, *supra* note 4, at 292.
15. *See infra* Section II.C.
16. FED. R. EVID. 609(a)(1)(A)–(B) (emphasis added).

who is not a criminal defendant should be admitted at trial.[17] Rule 403 states: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: *unfair prejudice*, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[18]

In contrast, Rule 609 presents its own (internal) balancing test for criminal defendants.[19] Critically, that internal balancing test simply refers to "prejudic[e]," while Rule 403 refers to "unfair prejudice."[20] Thus, under Rule 609's terms, the probative value of impeachment evidence regarding a criminal defendant is balanced against *all* prejudice, while the probative value of impeachment evidence regarding all other witnesses is balanced against *unfair* prejudice.[21] Subtlety of the linguistic distinction notwithstanding, that difference is dramatic.[22]

A. Statutory Interpretation

While colloquially "prejudice" equates with "unfairness"—to say the least—like in the context of racism, concluding inconsequential the difference between "prejudice" and "unfair prejudice" in the *Federal Rules of Evidence* (which most states have also adopted)[23] would be quite wrong. In the law of evidence, "prejudice" has a far more specific meaning than in common parlance. Evidence is prejudicial to a party if it simply harms that party's case (and complementarily helps the opposing party's case).[24] Thus, crucially,

17. *Id.*

18. FED. R. EVID. 403 (emphasis added).

19. *See* FED. R. EVID. 609(a)(1)(B).

20. *Compare* FED. R. EVID. 609(a)(1)(B) ("[F]or a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence . . . must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant . . . ."), *with* FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice . . . .").

21. *See* Bellin, *supra* note 4, at 311. Bellin notes the lack of the modifier "unfair" in Rule 609 but does not argue, as this Article does, that the language excludes prior convictions of a criminal defendant, no matter how probative. *Id.*

22. *See infra* Sections II.A–C.

23. *See* Kenneth W. Graham, *State Adaptation of the Federal Rules: The Pros and Cons*, 43 OKLA. L. REV. 293, 293 (1990) ("A majority of the states . . . have adopted . . . statutes or court rules that purport to codify the law of evidence along the lines of the Federal Rules.").

24. *See* United States v. Rodriguez-Estrada, 877 F.2d 153, 156 (1st Cir. 1989) ("By design, all evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided.").

prejudice can be proper or improper, fair or unfair, and legitimate or illegitimate.[25] This point cannot be overstated and requires careful attention, as the objective definition of this term alone will largely determine the operation of the entire body of evidence law.[26]

1. Defining the Terms

The archetype of fair prejudice is the "smoking gun," which is aptly damning to the criminal defendant.[27] In this case, the prejudice that the defendant incurs is exactly that which we expect and want.[28] On the other hand, close-up pictures of a victim's bullet-ridden corpse are likely *unfairly* prejudicial, because they offer little additional useful information to a jury beyond the already-known death, while likely inflammatory in a way that could cause jurors to convict the defendant simply because he is the one before them.[29]

As detailed below, the two balancing tests compared herein are, in fact, radically different.[30] First, facially, Rule 609's internal balancing test, required for criminal defendants, gives more weight to the harm to the defendant—i.e., it excludes from the jury's purview more convictions—than does Rule 403's balancing test, which is applicable to all other witnesses.[31] The former excludes a criminal defendant's prior convictions if they exhibit even a scintilla more of the prohibited prejudice than probativeness; the latter excludes the prior convictions of a witness other than a criminal defendant *only if* the convictions exhibit *substantially more* of the prohibited prejudice than probativeness.[32]

25. *See, e.g.*, 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 403.04[1] (2021).

26. *See* Hon. Joseph A. Greenaway, Jr., *The Evidence Rules Every New Trial Lawyer Should Know*, 45 LITIGATION 8, 11 (2019) ("Rule 403 is, next to hearsay, the most often cited rule of evidence.").

27. *See* William Safire, *The Way We Live Now: 1-26-03: On Language; Smoking Gun*, N.Y. TIMES (Jan. 26, 2003), https://www.nytimes.com/2003/01/26/magazine/the-way-we-live-now-1-26-03-on-language-smoking-gun.html (repeating ellipses within original quotation) ("[The] figure of speech meaning 'incontrovertible incrimination' . . . [derives from] an 1893 Sherlock Holmes story, 'The Gloria Scott'[:] . . . 'We rushed into the captain's cabin . . . there he lay with his brains smeared over the chart of the Atlantic . . . while the chaplain stood with a smoking pistol in his hand at his elbow.'").

28. *See id.*; Greenaway, *supra* note 26; WEINSTEIN & BERGER, *supra* note 25.

29. *See* Greenaway, *supra* note 26.

30. *See infra* Section II.C.

31. *See* Simmons, *supra* note 4, at 1001.

32. *See id.*; *see also* Bellin, *supra* note 4, at 309.

Second—and the primary subject of this Article—the specific articulation of the balancing test regarding criminal defendants considers *all* prejudice in the balancing test, rather than just *unfair* prejudice.[33] This articulation, however, produces a result whereby *no* credibility evidence survives the screen of the prejudice filter, making the rule, in fact, nugatory.[34] Adding to this confusion, or more likely because courts have unconsciously recognized this confounding dilemma, federal courts *mostly* have ignored the express language of the rule—choosing to rewrite Congress's words without offering any explanation for this usurpation of the legislative function.[35]

The First Circuit alone has recognized the actual balancing test in Rule 609 as it is written.[36] Thus, Rule 609 should apply correctly in Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island.[37] Consequently, there is an unrecognized circuit split between the First Circuit and all other circuits, albeit, as discussed below, the First Circuit opinion has not even impressed lower courts within its own jurisdiction.[38]

2. Giving Meaning to All Words

In considering whether we should view the *Federal Rules of Evidence*'s use of "unfair prejudice" and "prejudicial effect" as referring to the same or different constructs, we must employ core rules of construction used in statutory, constitutional, and other textual interpretation.[39] Two basic maxims apply: First:

> Each part or section of a statute should be construed in

33. *See* Bellin, *supra* note 4, at 311.

34. *See infra* Section II.C.

35. *See infra* Section II.D.

36. *See* United States v. Tse, 375 F.3d 148, 160 (1st Cir. 2004).

37. *About the Court*, U.S. CT. APPEALS FOR FIRST CIR., https://www.ca1.uscourts.gov/about-court (last visited Sep. 11, 2021).

38. *See infra* Section II.D. To add even further confusion to the issue, if that is possible, the First Circuit case never applied Rule 609 to the facts of the case, as the issue on appeal didn't so warrant, and therefore, the understanding of the First Circuit seems not to have percolated down to the district courts therein. *See infra* Section II.D.2.

39. *See* VALERIE C. BRANNON, CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 25 (2018) (citation omitted) ("Often, a statutory dispute will turn on the meaning of only a few words. Courts will interpret those words, though, in light of the full statutory context . . . . Over time, courts have created the 'canons of construction' to serve as guiding principles for interpreting statutes.").

> connection with every other part or section to produce a harmonious whole . . . . A leading British case found that: To discover the true construction of any particular clause of a statute, the first thing to be attended to, no doubt, is the actual language of the clause itself, as introduced by the preamble; second, the words or expressions which obviously are by design omitted; third, the connection of the clause with other clauses in the same statute, and the conclusions which on comparison with other clauses, may reasonably and obviously be drawn. . . . If the comparison of one clause with the rest of the statute makes a certain proposition clear and undoubted the act must be construed accordingly and ought to be so construed as to make it a consistent whole. If after all it turns out that that cannot be done, the construction that produces the greatest harmony and the least inconsistency is that which ought to prevail. . . . A statutory subsection may not be considered in a vacuum[] but must be considered in reference to the statute as a whole and in reference to statutes dealing with the same general subject matter . . . . Courts strive both to implement the legislature's policy and harmonize all a statute's provisions.[40]

Second:

> It is an elementary rule of construction that effect must be given, if possible, to every word, clause[,] and sentence of a statute. Courts construe a statute to give effect to all its provisions, so that no part is inoperative or superfluous, void or insignificant, and so that one section does not destroy another, unless a provision is the result of obvious mistake or error. Courts assume that every word, phrase, and clause in a legislative enactment is intended and has some meaning and that none was inserted accidentally. . . . When the legislature uses a term or phrase in one statute or provision but excludes it from another, courts do not imply an intent to include the missing term in that statute or provision where

40. 2A NORMAN J. SINGER & SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46:5 (7th ed. 2018) (footnotes omitted).

> the term or phrase is excluded. Instead, omission of the same provision from a similar section is significant to show different legislative intent for the two sections. Courts may disregard words and clauses present in a statute only through inadvertence if such words and clauses, on the basis of other indicia, are repugnant to legislative intent.[41]

Fifth Circuit Judge James Ho, a noted textualist, aptly articulated the seemingly simple but oft-ignored notion that "respect for text forbids us from ignoring text."[42] And creating "surplusage" language violates the most compelling maxims of interpretation elucidated above—that each word in a statute should be read as having meaning,[43] and text must be read as a whole.[44]

The foundational concept underlying these tenets is that the democratic branches make laws and the judicial branch members have no role in imposing their personal policy preferences on outcomes under the guise of interpreting the law.[45] Relatedly, the text itself dictates the outcomes of cases, not the

41. *Id.* at § 46:6 (footnotes omitted).

42. Hewitt v. Helix Energy Sols. Grp., Inc., 983 F.3d 789, 791–92 (5th Cir. 2020), *reh'g en banc granted, opinion vacated*, 989 F.3d 418 (5th Cir. 2021); *id.* at 796 ("[I]t should go without saying that we are governed by the text . . . .").

43. *Id.* at 798 (Ho, J., concurring).

44. *Id.* at 799 (second alteration in original) ("[I]t is a bedrock principle of statutory interpretation that 'text[s] must be construed as a whole.'" (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 167 (2012) ("Perhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts.")).

45. *See id.* at 797 (quoting Barnhart v. Sigmon Coal Co., 534 U.S. 438, 462 (2002)). Notwithstanding Judge Wiener's dissenting opinion's claimed fidelity to textualism, he seems to show his true colors when he highlights his policy concerns with the majority and concurring opinions: "I fear that the result of the panel majority's opinion will have lasting, negative repercussions, not just on the petroleum industry, but on all industries in this region and in any region that finds the panel majority's opinion persuasive." *Id.* at 803 (Wiener, J., dissenting). Perhaps Judge Wiener's reasoning is related to the fact that he "practiced mineral law for decades," no doubt for the industry that would allegedly suffer the "negative repercussions" of the majority's opinion. *Id.* at 802–03. Indeed, the history of the case is even more curious: Judge Weiner, who dissented from Judge Ho's most recent opinion, initially

> side[d] with the majority on these issues. [He] once agreed [with the majority's interpretation of the law]. But now the dissent calls for rehearing en banc. So what's changed? . . . The only change I'm aware of is that an armada of oil industry amici[—the industry for which Judge Wiener had once worked—] now urges us to take this case en banc . . . . [Judge Wiener] openly echoes amici's themes—speaking on behalf of "[t]hose of us who were born, bred, and educated in the 'oil patch.'"

Id. at 801 (Ho, J., concurring) (citations omitted). If professional pedigree and personal upbringing

illusory enterprise of seeking to divine the oxymoronic "collective intent" of an assemblage of disparate legislators and an executive.[46]

A fidelity to judicial modesty through the practice of textualism, embodying the interpretive maxims discussed above, effectively eliminates the idea that "prejudice" and "unfair prejudice" can have the same meaning.[47] Indeed, although initially counterintuitive, these two phrases are perhaps the most separate they could be because the construction of one clause as a modified version of another almost invariably means that one is a subset of the other.[48] As such, unlike synonyms, these two phrases demand some distinction.[49] For example, if all asphalt is black, then "black asphalt" doesn't make sense. It's like "wet water." As opposed to what? If all prejudice is "unfair," then what's "unfair prejudice" in Rule 403?[50]

Consider Salisbury's well-known, albeit often truncated, words on this point from *The Life and Death of King John*:

> *Pem.* This 'once again,' but that your highness pleased,
> Was once superfluous; you were crown'd before,
> And that high royalty was ne'er pluck'd off,
> The faiths of men ne'er stainèd with revolt;
> Fresh expectation troubled not the land With any long'd-for
> change or better state.

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imbued our unelected federal judiciary, or a subset thereof, with the legitimacy and *authority* to determine the lawfulness of legislation *based upon* a soothsayer-like determination of the law's future negative repercussions, as well as a monk-like *a priori* knowledge of an unassailable normative code—irrespective of both the role and actions of democratically elected legislators—then it seems likely that courts would strike down far more laws than they do today, as there remain, no doubt, many highly educated jurists who view their policy preferences superior to those of the elected officials who actually create law. *Id.* at 802. As Judge Ho appropriately noted: "If the industry [some of whom apparently were Judge Wiener's former clients,] does not like that result, its complaint lies not with Hewitt—or this court—but with Congress." *Id.* at 797.

46. *See id.* at 800 ("The majority disavows . . . purposivist arguments (echoed by the dissent) . . . .").

47. *See* discussion *infra* Section II.E.2.

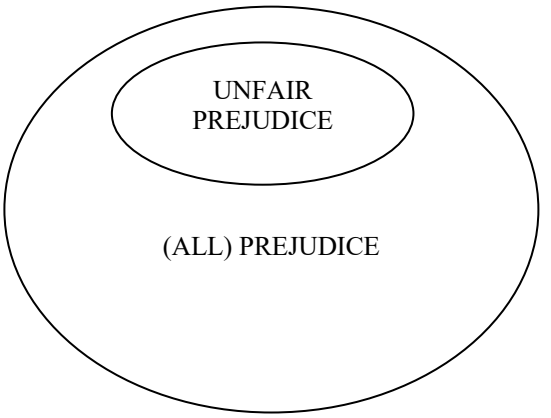
48. *See, e.g.*, Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 930–33 (2013) (describing canons of statutory textual construction, including the *noscitur a sociis* canon, *ejusdem generis* canon, and *expressio unius* canon); *see also* Phillip A. Rubin, *War of the Words: How Courts Can Use Dictionaries Consistent with Textualist Principles*, 60 DUKE L.J. 167, 171 n.30 (2010) (discussing "the Supreme Court's increasing reliance on dictionaries in construing statutes and constitutional provisions").

49. *See* discussion *infra* Section II.E.2.

50. *See infra* Section II.D.

> *Sal.* Therefore, to be possest with double pomp,
> To gard a title that was rich before,
> To gild refinèd gold, to paint the lily,
> To throw a perfume on the violet,
> To smooth the ice, or add another hue
> Unto the rainbow, or with taper-light
> To seek the beauteous eye of heav'n to garnish,
> Is wasteful and ridiculous excess.[51]

This concept is easily displayed in Venn diagram terms as:



Moreover, equating the subset with the whole results in the term "unfair" in Rule 403 becoming meaningless.[52] Thus, an attempt to save Rule 609 with a tortured understanding of "prejudice" necessarily results in abandoning the clear meaning of Rule 403.[53] The alternative "solution," as it were, would be to have the same terms engender radically different meanings in the same rules. This decidedly antitextualist approach—violating both of the core maxims discussed above—would effectively permit judges to impose their preferences on legislation, albeit likely under the claim that they are searching for

51. WILLIAM SHAKESPEARE, THE LIFE AND DEATH OF KING JOHN act 4, sc. 2, l. 3–16.
52. *See infra* Section II.C.
53. *See infra* Section II.D.

the ever-elusive Holy Grail of understanding—legislative intent.[54]

B. The Development of Character for Truthfulness Impeachment Through Convictions

1. Early Law

At common law, both felons and those guilty of crimes of falsehood were barred from testifying in court.[55] Over time, many jurisdictions concluded it beneficial to the administration of justice to have all possible witnesses testify at trial and changed their laws to allow felons to testify—though these jurisdictions almost always followed this advancement with permitting opposing parties to impeach witnesses' character for truthfulness with prior convictions.[56] Usually, the evidence was to be admitted in all circumstances, but there were some exceptions.[57] This trend was recognized and adopted by the Supreme Court in 1918.[58]

This started to change, however, with a D.C. Circuit Court of Appeals case in 1965.[59] In *Luck v. United States*, the ironically named defendant was arrested on charges of housebreaking and larceny.[60] At trial, on cross-examination, the prosecution brought up Luck's previous guilty plea to a grand larceny charge in order to impeach his credibility.[61] Luck's attorney objected that this charge could not be admitted into evidence since Luck had been a juvenile at the time.[62] The trial court overruled the objection, and the prior

54. *See infra* Section II.D.

55. ROGER PARK & TOM LININGER, THE NEW WIGMORE A TREATISE ON EVIDENCE: IMPEACHMENT AND REHABILITATION § 3.4.1, at 128 (1st ed. 2015); *see also* Bellin, *supra* note 4, at 296 (discussing the historical roots of barring defendants from testifying because of past convictions); Simmons, *supra* note 4, at 999 ("Historically, under the common law, a prior criminal conviction could preclude a witness from testifying altogether.").

56. Bellin, *supra* note 4, at 296–97; *see also* James McMahon, *Prior Convictions Offered for Impeachment in Civil Trials: The Interaction of Federal Rules of Evidence 609(a) and 403*, 54 FORDHAM L. REV. 1063, 1065 n.8 (1986) (discussing the balancing provisions regarding allowing prior convictions as evidence to impeach).

57. *See* Bellin, *supra* note 4, at 296; *see also* McMahon, *supra* note 56, at 1065 n.8.

58. *See* Rosen v. United States, 245 U.S. 467, 471 (1918) (finding government witness was not disqualified from testifying because of his forgery conviction).

59. PARK & LININGER, *supra* note 55, at § 3.4.3.

60. Luck v. United States, 348 F.2d 763, 764 (D.C. Cir. 1965).

61. *Id.* at 766.

62. *Id.*

conviction was admitted as credibility evidence.[63] On appeal, Luck argued that this evidence should have been barred under the *District of Columbia Code*, which, at the time, prevented previous convictions as a juvenile from being used in court.[64] However, as the circuit court noted, this section was written for the juvenile court itself and not for the district court, where Luck was tried.[65] The court in *Luck* noted that there was no absolute bar at the district court level on credibility evidence of a juvenile conviction.[66] Instead, this case was governed by the portion of the *District of Columbia Code* that stated at that time "the conviction 'may,' as opposed to 'shall,' be admitted."[67] The court interpreted this to mean that each trial court must exercise its discretion as to whether the evidence should be admitted.[68]

The circuit court suggested a balancing test to determine whether previous convictions should be admitted as credibility evidence.[69] In the court's estimation, trial court judges should weigh

> the nature of the prior crimes, the length of the criminal record, the age and circumstances of the defendant, and, above all, the extent to which it 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.[70]

The court held that in the case of Mr. Luck, it had no reason to question the district judge's exercise of discretion.[71]

63. *Id.*
64. *Id.* at 766–67; *see also* 16 D.C. CODE § 2308(d) (1963). This section of the code is quoted in full in the *Luck* decision. 348 F.2d at 767 n.4.
65. *Luck*, 348 F.2d at 767.
66. *Id.*
67. *Id.* at 768 (quoting 14 D.C. CODE § 305 (1961)).
68. *Id.*
69. *Id.* at 768–69.
70. *Id.* at 769 (footnote omitted).
71. *Id.*

2. The Modern Rule

a. The Origin Story

In the years following *Luck*, many jurisdictions began to adopt similar holdings.[72] However, Congress soon intervened, passing legislation that overruled *Luck*, allowing in all felonies and *crimen falsi*[73] as impeachment evidence.[74] The Supreme Court Advisory Committee on Federal Rules of Evidence took this as a sign that Congress wanted character for truthfulness evidence handled in this fashion in all federal cases, not just those in the District of Columbia.[75] As such, when drafting proposed changes to the *Federal Rules of Evidence*, the committee proposed Rule 609, with their draft specifying that all felony convictions for a criminal defendant could be admitted as character for truthfulness evidence.[76]

Congress, however, did not accept this version of Rule 609.[77] The House felt that the proposed rule was too broad, instead passing a version that barred impeachment based on prior convictions except those involving crimes of falsehood.[78] The Senate disagreed with the House, passing a version not

72. United States v. Lipscomb, 702 F.2d 1049, 1059 (D.C. Cir. 1982) (citing 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 609[03], at 609–60 n.2 (1981) (collecting cases)).

73. *See, e.g.*, PARK & LININGER, *supra* note 55, § 3.4.1 ("'Crimen falsi' referred to crimes of fraud and deceit, as well as crimes that generally fell under the category of obstruction of justice."); HON. JOSEPH M. MCLAUGHLIN, 3 FEDERAL EVIDENCE PRACTICE GUIDE § 15.04(1)(b)(i)(B) (2020) ("Historically, offenses classified as crim[en] falsi have included only those crimes in which the ultimate criminal act was itself an act of deceit.").

74. *Lipscomb*, 702 F.2d at 1059; *see* D.C. CODE § 14-305(b)(1) (emphasis added) ("[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 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)."); *see also* Victor Gold, *Impeachment by Conviction Evidence: Judicial Discretion and the Politics of Rule 609*, 15 CARDOZO L. REV. 2295, 2300–01 (1994) (discussing the timeline of the stages of development of Rule 609).

75. Bellin, *supra* note 4, at 305–06; *see also Lipscomb*, 702 F.2d at 1059.

76. Bellin, *supra* note 4, at 305 ("Proposed Rule 609 directed trial courts to admit convictions for all crimes 'punishable by death or imprisonment in excess of one year' (i.e., felonies) as well as all crimes (felony or misdemeanor) involving 'dishonesty or false statement regardless of the punishment' for 'the purpose of attacking the credibility of a witness.'"); *see also Lipscomb*, 702 F.2d at 1059 (detailing the legislative history of Rule 609).

77. Bellin, *supra* note 4, at 306 (explaining Congress's change of opinion regarding this draft of Rule 609).

78. *Id.*; *see also* Gold, *supra* note 74, at 2302–04 (noting the debate in the House over which convictions would be admissible).

restricted to *crimen falsi* convictions.[79] In conference, the two houses compromised—passing a version that automatically admitted prior convictions for crimes of falsehood and set up a balancing test for felonies, requiring admission of the evidence if the "probative value of admitting this evidence outweighs its prejudicial effect to the defendant."[80] The legislative history shows that the word "unfair," which was included in the drafts of the rule from the Supreme Court's Advisory Committee on Federal Rules of Evidence and early drafts in the House, was dropped by the Senate and was not reintroduced in conference committee.[81]

b. The Circuitous Path

The legislative process began when Representative William L. Hungate (D-MO) introduced the Advisory Committee on Rules of Evidence's proposed draft of the Federal Rules of Evidence in the House of Representatives on March 12, 1973.[82] This original version, drafted to mirror Congress's rejection of the *Luck* case,[83] read in relevant part:

> 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.[84]

As one can see, this first version did not contain any sort of balancing test, letting in all felonies and *crimen falsi*.[85] Thus, there was no cause to reference prejudice, unfair or otherwise, as all convictions came in.[86]

The House referred the bill to the House Committee on the Judiciary,

79. Bellin, *supra* note 4, at 306.

80. *Id.* at 306–07; *see also* Simmons, *supra* note 4, at 1000 (explaining the path to compromise taken by the House and the Senate).

81. *Lipscomb*, 702 F.2d at 1059–62.

82. H.R. 5463, 93d Cong. (1973).

83. 120 CONG. REC. 37,076 (1974) (statement of John L. McClellan); *see also Lipscomb*, 702 F.2d at 1059 (providing historical context of the debates and drafts of Rule 609).

84. H.R. 5463, 93d Cong. (1973).

85. *Id.*

86. *Id.*

which in turn referred the bill to its Subcommittee on Criminal Justice.[87] The Subcommittee rejected the blanket admission of all felonies, opting instead for a balancing test for those convictions while preserving the automatic admission of *crimen falsi*.[88] The Subcommittee's version, therefore, read:

> 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.[89]

Thus, the modifier "unfair" entered Rule 609's lexicon through the Subcommittee on Criminal Justice.[90] This version of the rule used the "outweighs" language in reference to probativeness present to this day in the rule, rather than Rule 403's "substantially" outweighs.[91]

When the bill went to the full Judiciary Committee, legislators further restricted it.[92] The Committee amended Rule 609 so that only convictions for *crimen falsi* were admissible for impeachment evidence.[93] The Committee felt that "the danger of *unfair prejudice* . . . and the deterrent effect upon an accused who might wish to testify" was so great that impeachment evidence should be limited to crimes "bearing directly on credibility, [i.e.], crimes involving dishonesty or false statement."[94] Of course, there's logic in this position, as a prior conviction inherently implicating lying bears far more upon a witness's overall character *for truthfulness* than does a felony not relating to, well, truthfulness.[95]

When the bill went to the full House of Representatives, several

87. H.R REP. NO. 93-650, at 2 (1973); *see also Lipscomb*, 702 F.2d at 1059–60 (detailing the debates and revisions between House committees over Rule 609).

88. H.R REP. No. 93-650 at 11; *see also Lipscomb*, 702 F.2d at 1059–60; Gold, *supra* note 74, at 2301–02.

89. H.R. REP. NO. 93-650, at 11.

90. *Id.* (noting the inclusion of the modifier "unfair").

91. *See generally* FED. R. EVID. 609; FED. R. EVID. 403.

92. *See* Gold, *supra* note 74, at 2302–03.

93. H.R. REP. NO. 93-650, at 11 (1973); *see also Lipscomb*, 702 F.2d at 1060.

94. H.R. REP. NO. 93-650, at 11.

95. *See* McMahon, *supra* note 56, at 1065–66 (exploring the connection between prior convictions and a witness's veracity).

legislators proposed additional amendments.[96] Representative Lawrence Hogan (R-MD) proposed reverting back to the Advisory Committee's version, automatically admitting all felonies and *crimen falsi* for impeachment.[97] Representative Henry P. Smith (R-NY) proposed an alternative: reverting back to the balancing test from the Subcommittee on Criminal Justice version, including the "unfair prejudice" language.[98] After significant debate, the House rejected both ideas and sent to the Senate the version that only allowed for admitting *crimen falsi* to impeach credibility.[99]

The Senate then referred the bill to its own Committee on the Judiciary.[100] The Committee amended the bill, keeping the prohibition on admitting non-*crimen falsi* felony convictions for defendants themselves but allowing them to be introduced against all other witnesses as long as "the probative value of such evidence outweighs its *prejudicial effect*."[101] The Committee reasoned that this would allow in more relevant evidence for other witnesses, while still affording extra protections to criminal defendants.[102] The Committee statement, however, referenced "the danger of *unfair prejudice* [as being] far greater when the accused, as opposed to other witnesses, testifies."[103]

Nevertheless, this was not the final Senate version of Rule 609.[104] When the bill went to the full Senate, Senator John L. McClellan (D-AR) proposed an amendment to strip the balancing test completely and revert back to the version from the Supreme Court Advisory Committee on Federal Rules of Evidence, allowing in all felonies and *crimen falsi* for all witnesses, including the accused.[105] In his testimony rejecting a balancing test, Senator McClellan used the term "unfair prejudice" in reference to the Senate Judiciary Committee version of the bill, despite the fact that the bill only contained the term "prejudicial effect."[106] Senator McClellan said: "[T]he reasoning behind the rule now being proposed . . . is based upon the erroneous belief that the use of prior convictions to impeach a witness should be restricted in order to avoid

96. *See Lipscomb*, 702 F.2d at 1060–61.
97. 120 CONG. REC. 2376–77 (1974) (remarks of Lawrence Hogan).
98. *Id.* at 2377–78 (statement of Henry P. Smith).
99. *Id.* at 2381; *see also Lipscomb*, 702 F.2d at 1060.
100. S. REP. NO. 93-1277, at 1 (1974).
101. *Id.* at 14 (emphasis added).
102. *Id.*
103. *Id.* (emphasis added); *see also Lipscomb*, 702 F.2d at 1060.
104. 120 CONG. REC. 37,075–76 (1974).
105. *Id.* (statement of Sen. John L. McClellan).
106. *Id.* at 37,076.

alleged *unfair prejudice* to defendants."[107] The Senator argued, instead, that the jury should have all possible evidence bearing on credibility, and jury instructions would provide sufficient protection for criminal defendants.[108]

Some of those opposed to Senator McClellan's amendment also conflated unfair prejudice with prejudice.[109] In a memorandum placed into the Senate Record, Senator Philip Hart (D-MI) argued for the Senate Judiciary Committee version since "[i]t concentrates on the crucial question of *unfair prejudice* to the defendant if he takes the stand."[110] He also argued that "[b]oth the Common Law rule[111] and the *Luck* rule[112] simply provide inadequate protection against this *unfair prejudice* to a defendant. In the case of a witness, not the defendant himself, the *prejudice* danger is still there, but [it is] less devastating."[113]

The first vote on Senator McClellan's amendment ended in a tie.[114] After a successful motion to reconsider the amendment, the final count was thirty-eight for and thirty-three against.[115] With that, the final Senate version of Rule 609 again dropped the balancing test in favor of allowing all prior felonies and *crimen falsi* convictions as impeachment evidence.[116] After passing through the Senate, the bill went to conference committee, for the two houses to create a single bill.[117] The conference committee accepted the Senate wording but, critically, again reintroduced a balancing test, which also did not include "unfair."[118] This became the final version of the bill.[119] Thus, we see that "prejudice" rather than "unfair prejudice" was affirmatively adopted on several discrete occasions in separate congressional committee, Senate, and

107. *Id.* (emphasis added).
108. *Id.*
109. 120 CONG. REC. 37,078 (1974) (statement of Sen. Philip Hart).
110. *Id.* (emphasis added).
111. The common law rule barred all felons from testifying. *Id.*
112. Luck v. United States, 348 F.2d 763, 768 (D.C. Cir., 1965) (using a factor balancing test weighing "the nature of the prior crimes, the length of the criminal record, the age and circumstances of the defendant, and[] above all, the extent to which it 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").
113. 120 CONG. REC. 37,078 (emphasis added).
114. *Id.* at 37,080.
115. *Id.* at 37,083.
116. *See* United States v. Lipscomb, 702 F.2d 1049, 1060 (D.C. Cir. 1983); Simmons, *supra* note 4, at 1000.
117. H.R. REP. NO. 93-1597, at 1 (1974) (Conf. Rep.); *see also Lipscomb*, 702 F.2d at 1061.
118. H.R. REP. NO. 93-1597, at 9 (1974); *see also Lipscomb*, 702 F.2d at 1061.
119. *See* 120 CONG. REC. 40,069–70, 40,890–97 (1974).

House votes.[120] Whatever "motivated" this change (more below), it was neither last minute nor not subject to significant ratification thereafter.[121]

This version stated that a *crimen falsi* conviction would be admissible automatically, but any other felony would only be admitted when "the court determines that the probative value of the conviction outweighs its prejudicial effect to the defendant."[122] The conference committee stated that *crimen falsi* were "peculiarly probative" and should be admitted automatically.[123] It also wrote that the danger of prejudice against witnesses other than the defendant did not outweigh the need for the jury to have as much evidence as possible; this evidence was automatically admissible without any balancing test.[124] The conference committee said that prior conviction 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."[125]

The Senate passed the bill with no further debate.[126] There was some debate over Rule 609 in the House, but the overwhelming support was in favor of the conference committee's version.[127] In this debate, no legislator used the term "unfair prejudice," sticking with "prejudice" or "prejudicial effect."[128] After the Senate passed the bill, President Gerald Ford signed it into law.[129]

As originally enacted, the balancing test of Rule 609 only weighed the "prejudicial effect to the *defendant*."[130] The incorporation of Rule 403's balancing test for offering prior convictions against all other witnesses was yet to be adopted.[131] Courts and academics were split over the meaning of the

120. *See* Simmons, *supra* note 4, at 999–1002.
121. *Id.*
122. H.R. REP. NO. 93-1597, at 9.
123. *Id.*
124. *Id.* This was later amended. *See infra* note 171 and accompanying text.
125. H.R. REP. NO. 93-1597, at 9–10.
126. 120 CONG. REC. 40,069–70 (1974).
127. *Id.* at 40,480, 40,891, 40,893–95.
128. *Id.*
129. *Actions Overview*, CONGRESS.GOV, https://www.congress.gov/bill/93rd-congress/house-bill/5463/all-info (providing history of actions taken for H.R.5463 during the 93rd Congress (1973–1974)).
130. H.R. REP. NO. 93-1597, at 9 (emphasis added).
131. *See* Simmons, *supra* note 4, at 1000–01.

word "defendant."[132] The main ambiguity was whether the word referred to any defendant or only criminal defendants—as defendant can be used to mean either, depending on the context.[133] The Supreme Court wrestled with this ambiguity in *Green v. Bock Laundry Machine Co.*[134]

In *Green*, the petitioner was a prisoner who had been employed at a local carwash through a work release program.[135] While at work, his right arm was torn off by a rotating drum on one of the dryers.[136] He filed a products liability tort claim against respondent, Bock Laundry Machine Co.[137] When Green took the stand at trial, Bock introduced evidence of Green's felony convictions for burglary and conspiracy to commit burglary as credibility impeachment evidence.[138] Green filed a pretrial motion to exclude this evidence, claiming the benefit of Rule 609's balancing test notwithstanding that he was a *plaintiff*; the district court denied his motion.[139] The jury ultimately found for Bock, and upon Green's appeal, the Third Circuit affirmed.[140]

Justice Stevens, writing for the Court, began by acknowledging the textual ambiguity in Rule 609.[141] He noted three different interpretations of the word "defendant" taken by lower courts.[142] Oddly, these lower-court interpretations did not include one of the obvious choices: defendants in both criminal and civil cases.[143] Justice Stevens described that some courts had held that the word meant only criminal defendants, others that it meant any party offering a witness, and others said that it referred to any witness, whether or not a party to the suit.[144]

Justice Stevens held that reading Rule 609 to apply to both civil and

132. *See* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 507–08, 511 (1983).
133. *See id.*
134. *Id.*
135. *Id.* at 506.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.* (citing Green v. Bock Laundry Mach. Co., 845 F.2d 1011 (3d Cir. 1988)).
141. *Id.* at 508*; see also id.* at 527 (Scalia, J., concurring) (discussing the question before the Court regarding the meaning of "defendant").
142. *Id.* at 511 (majority opinion).
143. *Id.* at 509.
144. *Id.* at 511. "The word might be interpreted to encompass all witnesses, civil and criminal, parties or not. It might be read to connote any party offering a witness, in which event Rule 609(a)(1)'s balance would apply to civil, as well as criminal, cases. Finally, 'defendant' may refer only to the defendant in a criminal case." *Id.* (internal citations omitted).

criminal defendants, and only to them, would create an "absurd" result.[145] He reasoned that, unlike in criminal cases, the designation of one party as "defendant" or "plaintiff" in a civil case "is often happenstance based on which party filed first or on the nature of the suit."[146]

Moreover, civil parties are not constitutionally protected against self-incrimination and are very likely to be compelled to the stand at trial.[147] In light of this, granting civil defendants the benefit of a balancing test on prior convictions while automatically admitting the same kind of evidence against a civil plaintiff would be a violation of the due process rights of plaintiffs.[148]

Having concluded that exclusively applying Rule 609's balancing test to civil and criminal defendants would be unacceptable based upon a combination of constitutional concerns and his purposivist judicial preferences, Justice Stevens delved into the legislative history of Rule 609 in order to divine a more acceptable meaning for the word "defendant."[149] He noted that Congress, in its final draft of the rule, rejected earlier versions that explicitly applied Rule 609's prejudicial effect balancing test to all parties offering witnesses.[150] Besides this, Justice Stevens noted that there were several comments by legislators in debate and in committee reports indicating that they only envisioned Rule 609 applying to criminal defendants.[151] From this legislative history, Justice Stevens held that Congress only *intended* Rule 609's balancing test to apply to criminal defendants.[152]

This left open the question of whether Rule 403's balancing test could be applied to the prior convictions of other witnesses.[153] Justice Stevens dealt with this argument fairly quickly.[154] He noted that general rules, like Rule 403, only apply if a more specific rule does not preempt them.[155] In this case, Rule 609 is a more specific rule, stating that, absent the applicability of Rule 609's own balancing test (now only relevant to criminal defendants), prior

145. *Id.* at 509.
146. *Id.* at 510.
147. *Id.*
148. *Id.* at 509–10.
149. *Id.* at 511–21. This paper has already covered Rule 609's history in detail, so it will not be recounted again here. *See supra* Section II.B.
150. *Green*, 490 U.S. at 523–24.
151. *Id.* at 520–21; *see also id.* at 521 n.26.
152. *Id.* at 523–24.
153. *Id.* at 524.
154. *Id.* at 524–26.
155. *Id.* (citing D. Ginsberg & Sons, Inc. v. Popkin, 285 U.S. 204, 208 (1932)).

felony convictions "shall be admitted."[156] This language precludes the use of a Rule 403 balancing test on prior convictions for impeachment evidence, he held.[157] This meant that a prior conviction could only be excluded if it prejudiced a criminal defendant; a prior conviction of any party in a civil trial or of a prosecution witness would be admitted automatically regardless of prejudice.[158]

Justice Scalia wrote a separate concurring opinion.[159] Though he agreed with the Court's ruling, he felt that Justice Stevens's method of statutory interpretation was deeply flawed.[160] While Justice Scalia did not reject the usefulness of legislative history entirely, he criticized Justice Stevens's heavy reliance upon it.[161] Justice Scalia instead advocated for the originalist method of statutory interpretation, stating that:

> 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 [m]embers 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 . . . . I would not permit any of the historical and legislative material discussed by the Court, or all of it combined, to lead me to a result different from the one that these factors suggest.[162]

Using this framework, Justice Scalia first concluded that the word "defendant" in Rule 609 could not apply to both civil and criminal defendants on constitutional grounds.[163] He reasoned, very similarly to Justice Stevens, that allowing civil defendants the benefit of Rule 609's balancing test, while

156. *Id.* at 525–26 (quoting FED. R. EVID. 609(a)).
157. *Id.* at 526.
158. *Id.* at 526–27.
159. *See id.* at 527 (Scalia, J., concurring).
160. *Id.* at 527–29.
161. *Id.*
162. *Id.* at 528.
163. *Id.* at 528–29.

denying all balancing to civil plaintiffs, was probably unconstitutional.[164] Justice Scalia concluded that understanding "defendant" as *criminal defendant* was one common legal understanding of "defendant," while the others adopted by lower courts would require the Court to force "defendant" to refer to "prosecutor" or "plaintiff," definitions that the word and text "simply will not bear."[165] Justice Scalia also noted that the Rules of Evidence overall grant special protections to criminal defendants.[166] Interpreting Rule 609 to apply only to criminal defendants would thus be consistent with its "surrounding body of law."[167] Justice Scalia felt it important to emphasize that legislative history is not law; the statutory language as finally enacted by Congress is.[168] In his view, legislative history should only be examined as supplemental to the text of the law.[169]

The Supreme Court Advisory Committee proposed a substantial amendment to Rule 609 in 1990.[170] This amendment kept the Rule 609(a)(1) balancing test for criminal defendants but stated that prior felony convictions of all other witnesses "must be admitted, subject to Rule 403."[171] Crimes of falsehood remained automatically admissible against all witnesses.[172] Congress made no changes to the Committee's proposed amendment and allowed it to become law.[173] This is how Rule 609's balancing test reads today.[174]

The Advisory Committee explained that the 1990 amendment "reflect[ed] the view that it is desirable to protect all litigants from the unfair use of prior

164. *Id*. at 527–29.
165. *Id.* at 529.
166. *Id.*
167. *Id.* at 528–29.
168. *Id.* at 529–30.
169. *Id.*
170. Simmons, *supra* note 4, at 1001.
171. *See* FED. R. EVID. 609; *see also* Gold, *supra* note 74, at 2309.
172. FED. R. EVID. 609 advisory committee's notes on 1990 Amendment; *see also* Gold, *supra* note 74, at 2309.
173. Gold, *supra* note 74, at 2309. Gold states, regarding Rule 609:

> [T]he Supreme Court's version was submitted with the understanding that it would become effective December 1, 1990[,] unless Congress provided otherwise. Without any public debate, Congress made no effort to defer the effective date of the amendment even though the amendment made important changes to a law over which Congress had waged a vigorous and protracted struggle less than a generation before.

Id. (footnotes omitted).
174. *See* Simmons, *supra* note 4, at 1001. While the Advisory Committee did substantively amend Rule 609 again in 2006, this amendment left the balancing test alone, focusing instead on crimes of falsehood automatically admissible under Rule 609(a)(2). *Id.*

convictions."[175] The amendment addressed the textual ambiguity that the *Green* Court dealt with, keeping Rule 609's heightened balancing test for criminal defendants, while applying Rule 403's balancing test to the convictions of all other witnesses.[176] It also clarified the procedure regarding prior convictions of a criminal defense witness other than the accused.[177]

The Committee note repeatedly referenced Rule 609's protection against "unfair" or "undu[e]" prejudice, notwithstanding the language to the contrary.[178] It also stated that the amendment would extend Rule 609's protection against "*unfair* impeachment" to witnesses other than the accused through its incorporation of Rule 403, which *does* seek to limit *unfair* prejudice.[179] But then, perhaps highlighting the danger of granting too much weight to committee notes—often written by staff—and other oft-*asserted* legislative history, the Committee substituted Rule 609's "prejudicial effect" language into its discussion of Rule 403, stating: "Rule 403 . . . provides that evidence shall not be excluded unless its *prejudicial effect* substantially outweighs its probative value,"[180] notwithstanding, of course, that Rule 403 critically does contain the term "unfair."[181]

C. Euclidean Proof of the Inoperability of Rule 609 to Criminal Defendants

In addition to the two substantive differences between balancing tests applicable to Rule 403 and Rule 609 discussed so far, two other subsidiary differences compound the difficulty in comparing the tests.

First, as thoroughly discussed, the two substantive differences between the balancing tests present as follows: Rule 403 allows courts to exclude evidence if the "probative value is *substantially* outweighed by . . . *unfair* prejudice."[182] Rule 609's internal test only refers to "prejudicial effect," *and* that must merely "outweigh[]" probativeness to exclude the evidence, rather than "substantially outweigh[]."[183]

175. FED. R. EVID. 609 advisory committee's notes on 1990 amendment.
176. *See id.*
177. *See id.*
178. *Id.*
179. *Id.* (emphasis added).
180. *Id.* (emphasis added).
181. FED. R. EVID. 403.
182. FED. R. EVID. 403 (emphasis added).
183. FED. R. EVID. 609; FED. R. EVID. 403; *see also* Greenaway, *supra* note 26, at 14.

In addition, a subsidiary difference reveals itself when examining the "direction" of the two equations that represent the respective balancing tests. Rule 609 is written in the positive, describing what must be *included*, and Rule 403 is written in the negative, describing what may be *excluded*.[184] So, we must rationalize these equations to compare them.[185] Under the comparison method for solving algebraic equations, we reorder equations that we're comparing to isolate the same variables.[186]

Let's look at the balancing tests in mathematical terms, where

T = probaTiveness

J = preJudice

*u*J = unfair prejudice

*f*J = fair prejudice

J = *u*J + *f*J

>> = substantially greater than[187]

Rule 403 considers evidence admissible *unless* *u*J >> T.[188]

Rule 609 (for criminal defendants) requires admission *if* T > J.[189]

Given that these two equations are presented in different directions, we need to reorder them.[190] Putting the equations in the same direction produces the following:

Rule 403 considers evidence admissible *unless* *u*J >> T.

Rule 609 (for criminal defendants) requires admission *unless* J ≥ T.

184. FED. R. EVID. 609; FED. R. EVID. 403.

185. *See The Difference Between Solving an Equation and Solving an Inequality*, TUTAPOINT.COM, https://www.tutapoint.com/knowledge-center/view/the-difference- between-solving-an-equation-and-solving-an-inequality (last visited Aug. 20, 2021) (explaining that since "unless" is an exclusionary term and "if" is an inclusive term, they operate as negative and positive; therefore, rationalizing the variables leads to changing the inequality signs).

186. *See id.*; *Isolating a Variable*, BRILLIANT, https://brilliant.org/wiki/change-the- subject-of-a-formula/ (last visited Aug. 20, 2021) (describing the process of isolating a variable).

187. *See* FED. R. EVID. 403; FED. R. EVID. 609.

188. *See* FED. R. EVID. 403.

189. *See* FED. R. EVID. 609.

190. *See The Difference Between Solving an Equation and Solving an Inequality*, *supra* note 185; *Isolating a Variable*, *supra* note 186.

Now that these equations are reduced, we can easily see that the Rule 609 balancing test is much more exclusionary than that of Rule 403.[191] Rule 403 has a strong bias towards admissibility.[192] Rule 609 does not.[193] Rule 609's internal test is much more protective towards criminal defendants.[194]

Next, what is considered in determining "probativeness" differs between the two rules.[195] Both rules evaluate the probativeness of evidence in relation to why it's offered.[196] For Rule 403, the evidence can be directly offered towards the overarching issue of liability or guilt or towards some subsidiary issue.[197] In contrast, Rule 609, on its terms, only considers probativeness as to the issue of truthfulness of the witness.[198]

Prejudicial information is anything that negatively bears on a party.[199] For an example outside the context of Rule 609, a video of a defendant driving through a red light at a high speed is undoubtedly prejudicial to his claim that he didn't commit negligent homicide.[200] Likely, it's highly prejudicial.[201] Of course, it's also highly probative, as it shows the defendant actually committing the crime.[202] No longer will he have a realistic chance of arguing that the

191. *See generally* Aviva Orenstein*, Insisting That Judges Employ a Balancing Test Before Admitting the Accused's Convictions Under Federal Rule of Evidence 609(a)(2)*, 75 BROOK. L. REV. 1291, 1293 (2010) ("Rule 403 is a balancing test applied by the judge as a limited rule of exclusion, favoring admission of evidence; Rule 609, by contrast, is more restrictive.").

192. *See* Lauren Tallent, *Through the Lens of Federal Evidence Rule 403: An Examination of Eyewitness Identification Expert Testimony Admissibility in the Federal Circuit Courts*, 68 WASH. & LEE L. REV. 765, 777–78 (2011) ("Rule 403 is meant to be a liberal rule . . . . Congress intended that judges would invoke this 'drastic remedy' infrequently and only when absolutely necessary.").

193. *See* Orenstein, *supra* note 191, at 1293–94.

194. *See id.*

195. *Compare* FED. R. EVID. 403 (containing no limiting language on applicability), *with* FED. R. EVID. 609 ("The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction."), *and* 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEISTEIN'S FEDERAL EVIDENCE § 609.02[2] (Joseph M. McLaughlin ed., 2d ed. 2008).

196. FED. R. EVID. 403; FED. R. EVID. 609.

197. *See* FED. R. EVID. 401. For purposes of Rule 403, evidence is considered "relevant" if it helps to determine if any consequential fact is more or less probable. *Id.*

198. *See* FED. R. EVID. 609 ("The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction."); WEINSTEIN & BERGER, *supra* note 195.

199. *See* United States v. Tse, 375 F.3d 148, 163 (1st Cir. 2004) (citing United States v. Rodriguez-Estrada, 877 F.2d 153, 156 (1st Cir. 1989) ("By design, all evidence is meant to be prejudicial . . . ."); United States v. Smith, 292 F.3d 90, 99 (1st Cir. 2002)).

200. *See id.*

201. *Id.*

202. *Id.*

crime didn't occur or that he wasn't its perpetrator.[203] Indeed, the evidence very well might be more prejudicial than probative, in that juries give great weight to video evidence these days, and a jury might not look beyond it for exculpatory evidence or defenses.[204] I doubt many, if any, judges would exclude it under Rule 403's "unfair prejudice" standard.[205] And that is correct, as the purpose of Rule 403 isn't to create a Harrison Bergeron-like[206] balance between the parties but, rather, to ensure that juries don't overweigh certain evidence[207] or otherwise improperly consider evidence (e.g., wrongly viewing as substantive evidence prior inconsistent statements offered under Rule 613 of the *Federal Rules of Evidence*).[208]

Recall that the reason a witness's prior convictions are admitted under

203. *Id.*

204. *See* Yael Granot, Emily Balcetis, Neal Feigenson & Tom Tyler, *In the Eyes of the Law: Perception Versus Reality in Appraisals of Video Evidence*, 24 PSYCH. PUB. POL'Y & L. 93, 97 (2018) (analyzing how juries view video evidence).

205. *See Tse*, 375 F.3d at 163 ("[W]hile a court must weigh all potential 'prejudicial effect' to the defendant when deciding whether to admit a prior conviction of the accused, it must weigh only the kind of prejudice that can be deemed 'unfair' . . . .").

206. *See generally* Kurt Vonnegut, Jr., *Harrison Bergeron, in* ANIMAL FARM AND RELATED READINGS 130 (1997) ("The year was 2081, and everybody was finally equal. They weren't only equal before God and the law. They were equal every which way."); PGA Tour, Inc. v. Martin, 532 U.S. 661, 705 (2001) (Scalia, J., dissenting) (quoting from K. Vonnegut, *Harrison Bergeron*, *in* ANIMAL FARM AND RELATED READINGS, 129 (1997)).

207. *See* Greenaway, *supra* note 26 (giving support and a factual scenario for the above assertion).

208. *See, e.g.*, FED. R. EVID. 613. Non-substantive evidence of prior inconsistent statements is solely offered to show that a witness has said something contrary to his current testimony. John A. Bourdeau, Annotation, *Use of Prior Inconsistent Statements for Impeachment of Testimony of Witnesses Under Rule 613, Federal Rules of Evidence*, 152 A.L.R. FED. 375 § 3 (1999). It is offered not to attack the witness's general character for truthfulness but, rather, to show that on the particular topic, the witness's testimony should not be trusted. *Id.* When offered for this limited basis, the so-called "impeachment" evidence may not be considered by the jury for a purpose beyond undermining the believability of the witness's specific testimony. *See, e.g.*, State v. Spadafore, 159 W. Va 236, 246 (1975) ("The orthodox rule with regard to prior inconsistent statements is that such statements cannot be accorded any value as substantive evidence."). For example, if a witness testifies that the traffic light at the scene of an accident was red but previously told his neighbor that the same light was green, the jury is permitted to consider the neighbor's testimony recounting the prior witness's statement only to undermine the reliability of the testimony that the light was red. *Id.* However, the jury (and judge on a directed verdict motion) may not use the neighbor's statement as substantive evidence that the light was, in fact, green. *See* GEORGE FISHER, EVIDENCE 435–44 (3d ed. 2013) (excerpting United States v. Barret, 539 F.2d 244 (1st Cir. 1976)). The neighbor's testimony should be understood only as saying that the prior witness previously said something inconsistent with his current testimony, but the jury may not consider what that inconsistency is. *Id.* Of course, juries (no less law students, judges, and lawyers) often have considerable difficulty parsing this remarkably fine distinction. *See* Joel V. Williamson, *Evidence--Prior Inconsistent Statements--Court Reverses Long Line of Decisions*, 58 KY. L.J. 112, 115 (1969).

Rule 609 is to "attack[] [the] witness's character for truthfulness."[209] Thus, when the Rule speaks of the probative value of a prior conviction, it's addressing how probative that felony is of the witness's penchant for telling the truth.[210] It's hard to say what felony evidence is particularly probative of truthfulness beyond the separate category of crimes of dishonesty (which we are not concerned about here because they are automatically admitted under a different section of Rule 609).[211] Crimes of brute violence are less probative of character for truthfulness.[212] Perhaps a complex theft case that's not technically a crime of dishonesty would qualify as particularly probative of truthfulness.[213] Even if that past crime is highly probative, however, it's also surely just as prejudicial. And here's the rub: it's likely more prejudicial than probative.[214] Understanding why is crucial in evaluating whether the absence of the "unfairness" term is critical to understanding the meaning of the rule.[215]

While evidence of lack of truthfulness demonstrated through a felony conviction provides the jury with the very insight Rule 609 seeks to offer, it doesn't tell us a lot about the defendant's actual truthfulness in the instant case.[216] Even the best non-crime-of-dishonesty felony evidence on character for truthfulness is only somewhat telling, i.e., probative, of truthfulness.[217] So, what we view as the "best" Rule 609 non-crime-of-dishonesty felony evidence maxes out on a probativeness scale at, say, eight out of ten due to the inherent disconnect—i.e., lack of perfect correlation—between a witness's

209. FED. R. EVID. 609.

210. PARK & LININGER, *supra* note 55, at § 3.1; *see also* Bellin, *supra* note 4, at 310 n.80.

211. *See* Tarleton David Williams, Jr., *Witness Impeachment by Evidence of Prior Felony Convictions: The Time Has Come for the Federal Rules of Evidence To Put on the New Man and Forgive the Felon*, 65 TEMP. L. REV. 893, 895 (1992) (suggesting revisions to Rule 609 regarding "non-dishonesty felony convictions"); FED. R. EVID. 609.

212. PARK & LININGER, *supra* note 55, at § 3.4.4.1.1.1 (discussing the impeachment value of the prior crime).

213. *See* People v. Segovia, 196 P.3d 1126, 1132 (Colo. 2008) (en banc) (concluding that "theft is probative of truthfulness or dishonesty").

214. *See* Bellin, *supra* note 4, at 310 ("[F]or the vast run of criminal convictions, the probative value of a conviction as impeachment is minimal.").

215. *See, e.g.*, United States v. Tse, 375 F.3 148, 163 (explaining why the lack of the "unfairness" term in Rule 609 creates a heightened standard for admission of evidence).

216. *See* Bellin, *supra* note 4, at 292. "Commentators have long criticized the practice of impeaching testifying defendants with prior convictions, citing the questionable relevance of past crimes to witness credibility . . . ." *Id.*

217. *Segovia*, 196 P.3d at 1132 ("We note that a prior act of shoplifting does not always mean a witness will testify untruthfully.").

actual character for truthfulness and his prior felony conviction.[218] But that non-crime-of-dishonesty felony evidence on character for truthfulness is more prejudicial because the level of overall prejudice (without any modifier), i.e., total harm to the defendant, should, as a matter of logic, be at least as strong as its probativeness to the prosecution *plus* whatever *unfair* weight that a jury gives to the character evidence by improperly concluding *criminal* propensity (rather than propensity towards untruthfulness).[219] And while there may be some other unfair prejudice to consider, the archetype of unfair prejudice in the context of Rule 609 evidence is that recognized in Federal Rule of Evidence 404 (Rule 404).[220]

In a remarkable emphasis found nowhere else in the *Federal Rules of Evidence*, in fact, Rule 404 repeats its core philosophical concept twice—once in Rule 404(a) and again in 404(b)—stating (with only slight differences in wording): "Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."[221] The idea is simple: parties shouldn't be judged based on their general character—irrespective of how bad they are, parties should be evaluated on whether they actually engaged in the wrongdoing at issue.[222] Indeed, even though one's bad character in many instances increases the odds that the individual engaged in the particular bad behavior under review, that likelihood evidence (i.e., propensity evidence) is beyond the scope of evaluation by the trier of fact because of the fear that such evidence will be overweighed—i.e., *unfairly* considered.[223] "[When] prior convictions are used to impeach the testifying defendant, [he] faces a unique risk of prejudice—[i.e.], the danger that convictions [otherwise] excluded

218. *See id.*

219. *See, e.g.*, Bellin, *supra* note 4, at 291 (beginning article by explaining how juries may improperly consider prior convictions as an indication of criminal propensity).

220. FED. R. EVID. 404 ("Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.").

221. FED. R. EVID. 404(b); *see also* FED. R. EVID. 404(a).

222. *See* FED. R. EVID. 404 advisory committee's notes on the 1972 proposed rules.

> Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.

Id. (internal citation omitted).

223. *Id.*

under [Fed. Rule] 404 will be misused by a jury as propensity evidence despite their introduction solely for impeachment purposes."[224]

Understanding these considerations leading to the prejudice calculation is essential. Take, for example, the evidence of guilt discussed above: video evidence.[225] The value of its probativeness is equal to its *fair* prejudice.[226] That is, the jury is aptly informed of the defendant's wrongdoing (probativeness) at least at the same level that the defendant is viewed as guilty (prejudiced) in the eyes of the jury.[227] The jury might overweigh the evidence because video evidence can be overly convincing.[228] So, it might be more prejudicial overall than probative.[229]

Now, contemplate how helpful (probative) non-crime-of-dishonesty felony evidence is to a jury on the issue of character for truthfulness. The answer is: *kind of* because, as discussed, a felony only somewhat enlightens on *actual* character for truthfulness. In contrast, the felony conviction is likely held against (prejudices) the defendant in two ways—one legitimate (fair) and one illegitimate (unfair).[230] The fair prejudice is necessarily the mirror of the probativeness. As much as the jury is informed as to the defendant's untruthfulness by the prior felony (i.e., probativeness), the jury also holds that negative implication on character for truthfulness against the defendant (i.e., prejudice). This is the inherent symmetry, or "normal force" in physics terms, of probativeness and fair prejudice.[231] This alone entirely prohibits the introduction of the Rule 609 evidence against the defendant if Rule 609 is read as written, as Rule 609 requires the probativeness of the evidence to *outweigh*

224. FED. R. EVID. 609 advisory committee's notes on 1990 Amendment; *see also* United States v. Caldwell, 760 F.3d 267, 281–85 (3d Cir. 2014) (giving a good analysis of how evidence excluded by Rule 404 could be misused as propensity evidence); *id.* at 286 (discussing the danger of admitting convictions under Rule 609 that are similar to the crime charged and quoting 28 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 6134, at 253: "[T]he danger of unfair prejudice is enhanced if the witness is the accused and the crime was similar to the crime now charged[] since this increases the risk that the jury will draw an impermissible inference under Rule 404(a).").

225. *See supra* notes 200–08 and accompanying text.

226. *See supra* notes 200–08 and accompanying text.

227. *See supra* notes 200–08 and accompanying text.

228. *See* Granot et al., *supra* note 204.

229. *See id.*

230. *See infra* notes 244–45 and accompanying text.

231. *See* United States v. Rodriguez-Estrada, 877 F.2d 153, 156 (1st Cir. 1989) ("By design, all evidence is meant to be prejudicial . . . .").

the prejudice.[232]

In addition, there is almost always some unfair prejudice to a defendant in offering a prior felony conviction for a jury to consider in evaluating character for truthfulness because of the inherent risk that the jury will engage in improper propensity reasoning prohibited by Rule 404.[233] As recognized therein, juries are *at least* somewhat more likely to conclude, *inter alia*, that a defendant is currently guilty simply because he committed a prior felony.[234] So, the enacted language of Rule 609 invariably leads to the exclusion of *all* felony evidence against a criminal defendant because the Rule 609 evidence is less probative than it is prejudicial.[235] As such, the rule becomes nugatory. To be clear, the evidence is not more *unfairly* prejudicial than it is probative, as that measure *removes* the fair prejudice that inherently mirrors the probativeness (which is intrinsically fair).[236] Consider this in the following mathematical analysis.[237]

Recall the terms:

T = probaTiveness

J = preJudice

*u*J = unfair prejudice

*f*J = fair prejudice

J = *u*J + *f*J

>> = substantially greater

232. FED. R. EVID. 609(a)(1)(B).

233. FED. R. EVID. 404(a). Rule 404(a) provides that "[e]vidence of a person's character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." *Id.*

234. *Id.* Rule 404(b), however, makes clear that the same evidence is admissible for other purposes, such as in Rule 609. FED. R. EVID. 404(b).

235. FED. R. EVID. 609. *Compare* Bellin, *supra* note 4, at 312 (explaining Congress's choice of language in Rule 609 places probative value and prejudice "on equal footing in the relative balance"), *with supra* notes 191–94 and accompanying text.

236. *See* Bellin, *supra* note 4, at 310–11.

237. *See* discussion of mathematical proof *supra* notes 184–94 and accompanying text.

Under Rule 403:
The evidence is admissible unless:

$uJ >> T$[238]

Corollaries to this rule are:
The evidence is admissible if:

$T > J$ (which can also be written as $T > uJ + fJ$)

and

$T = J$ (which also can be written as $T = uJ + fJ$)

And the most important corollary is the conclusion that:
The evidence is admissible if:

$T = uJ$[239]

Under Rule 609 with *unfair* read into the language, we see a similar—albeit not identical—set of equations:
Admit unless:

$uJ > T$[240]

Corollaries to this rule are:
The evidence is admissible if:

$T > J$ (which can also be written as $T > uJ + fJ$)

$T = J$ (which also can be written as $T = uJ + fJ$)

But the important distinction with Rule 609, for a criminal defendant—the subject of discussion here—is:
The evidence is *inadmissible* if:

238. FED. R. EVID. 403.
239. *See* discussion *supra* notes 199–208 and accompanying text.
240. FED. R. EVID. 609.

$$T = uJ$$[241]

Under Rule 609 without *unfair* read into the language, we see an entirely different set of equations:

Admit unless:

$$J \geq T$$[242]

As discussed, however, the following equation should always be true: $T = fJ$ because the probativeness of the prior conviction on character for truthfulness should equal the fair prejudice it causes the defendant in terms of how much the jury discounts the value of the defendant's testimony.[243]

Given that $T = fJ$, then $J \geq T$.

Thus, any prior conviction is automatically excluded under Rule 609 due to the lack of "unfair" modifying "prejudice."

D. How "Prejudice" Is Interpreted by the Courts

Most jurisdictions apply Rule 609 as if "prejudicial effect" is the same as "unfair prejudice," thereby ignoring the express language of the statute.[244] Of course, even when courts treat Rule 609's "prejudicial effect" language as if it means "unfair prejudice," they recognize that their version of Rule 609 still provides greater protection for criminal defendants than Rule 403, as discussed above.[245]

1. Second, Third, and Eighth Circuits

In *United States v. Caldwell*, the defendant was on trial for possession of a firearm as a felon.[246] At trial, Caldwell took the stand and stated that the gun was not his.[247] The prosecution sought to introduce evidence of

241. FED. R. EVID. 609.
242. *Id.*
243. *See* discussion *supra* notes 230–32 and accompanying text.
244. *See* Bellin, *supra* note 4, at 239 (stating the federal courts' approach to Rule 609 is "patently inconsistent" with the language of Rule 609 and congressional intent).
245. United States v. Caldwell, 760 F.3d 267, 286–89 (3d Cir. 2014).
246. *Id.* at 271.
247. *Id.* at 272. Caldwell took the stand at his first trial, which ended in a mistrial when the jury did not reach a verdict, as did his second, on which this appeal is based. *Id.*

Caldwell's two prior convictions for unlawful firearms possession.[248] They argued that these prior convictions were admissible either under Rule 404 "to show 'knowledge and absence of mistake or accident,'" or under Rule 609 as impeachment evidence.[249] Sadly for anyone with an understanding of, or fidelity to, Rule 404, the district court admitted the evidence thereunder—not a rare enough evidentiary blunder by a district court judge.[250] However, on appeal, the Third Circuit aptly overturned the admission under Rule 404.[251] In deciding the Rule 609 issue, the court correctly quoted Rule 609's "prejudicial effect language."[252] However, it later uncritically cited sources using the "unfair prejudice" language.[253]

Despite treating Rule 609 as if "prejudicial effect" and "unfair prejudice" are interchangeable, the court correctly recognized that even the incorrect reading of Rule 609 provides a higher bar to admission of evidence than Rule 403.[254] After quoting the text of Rule 609, the court stated the following:

> This reflects a heightened balancing test and a reversal of the standard for admission under Rule 403. Commentators have observed that structuring the balancing in this manner creates a "predisposition toward exclusion. An exception is made only where the prosecution shows that the evidence makes a tangible contribution to the evaluation of credibility and that the usual high risk of unfair prejudice is not present."[255]

The Second Circuit treats Rule 609 in much the same way. In *United States v. Mustafa*, for example, the Second Circuit quoted directly from Rule 609, including the "prejudicial effect" language.[256] It then uncritically noted that the lower court found "that the probative value of Mustafa's United

248. *Id.* at 273.
249. *Id.*
250. *Id.*
251. *Id.* at 283.
252. *Id.* at 286.
253. *Id.* at 286–87.
254. *Id.* at 286.
255. *Id.* (emphasis added) (internal citations omitted) (quoting CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 6134, at 268 (2d ed. 2012)).
256. United States v. Mustafa, 753 Fed. Appx. 22, 38 (2d Cir. 2018).

Kingdom convictions outweighed their potential for *unfair prejudice*."[257] The Second Circuit adopted the lower court's reasoning with no correction.[258]

Further, in *United States v. Brown*,[259] a district court for the Second Circuit used the "prejudicial effect" language of Rule 609 occasionally but repeatedly referenced "unfair prejudice."[260] For example, the court decided to bar admission of one of the defendant's prior convictions in large part because "[t]he similarity between [the prior conviction] and the . . . offense for which Brown [was] charged . . . create[d] a high risk of *unfair* prejudice as 'the jury may [have] infer[red] *unfairly* that Brown ha[d] a propensity to commit firearms offenses.'"[261] It seems that this circuit makes no distinction between "prejudicial effect" and "unfair prejudice."

In *United States v. Chauncey*, the Eighth Circuit quoted Rule 609 directly, including its use of the phrase "prejudicial effect" rather than "unfair prejudice."[262] Despite this, the court applied "unfair prejudice" later in its analysis.[263] The court stated, "Here, the prior conviction already was admitted under Rule 404(b), and the danger of *unfair prejudice* by repetition of the evidence was negligible,"[264] and that "[w]eighed against the minimal danger of *unfair prejudice*, it was reasonable for the district court to conclude that the probative value justified use of the evidence for impeachment."[265] The court, thus, treats the two phrases interchangeably, as well.[266]

2. First Circuit

The only circuit to comprehensively address the absence of the word "unfair" in Rule 609's internal balancing test is the First Circuit in *United States*

257. *Id.* at 38–39 (emphasis added).
258. *Id.* at 39.
259. United States v. Brown, 606 F. Supp. 2d 306, 311–12, 314 (E.D.N.Y. 2009).
260. *Id*.
261. *Id*. at 314 (alteration in original) (emphasis added) (quoting United States v. Joe, No. 07 Cr.734 (JFK), 2008 U.S. Dist. LEXIS 55036 at *11 (S.D.N.Y. July 21, 2008)).
262. United States v. Chauncey, 420 F.3d 864, 874 (8th Cir. 2005).
263. *Id*.
264. *Id*. (emphasis added).
265. *Id*. (emphasis added).
266. United States v. Tse, 375 F.3d 148, 164 (1st Cir. 2004) (contrasting Rule 609, under which a court may admit a conviction of the defendant if the probative value outweighs its "prejudicial effect," and Rule 403, under which a court may admit a conviction of a government witness if the probative value is "substantially outweighed by the danger of unfair prejudice").

v. Tse.[267] The court dealt with the distinction in the application of subsection (a) of the rule—the section under discussion here, covering prior felonies.[268] This case treats the distinction between Rule 403's "unfair prejudice" and Rule 609's "prejudice" as important rather than ignoring it.[269] Not too many years later, disappointingly, the First Circuit—with the alacrity of a golden retriever upon its initiation into lake swimming—later muddied the very waters to which it supplied a shimmer of clarity in its discussion of Rule 609(b), the section dealing with the effect of convictions being older than ten years.[270]

a. "Unfair" and Rule 609(a)

In 1998, Clyde Tse was the target of a Drug Enforcement Administration (DEA) sting using cooperating witness, Stephen Williams.[271] The DEA agents gave Williams $450 to use to purchase cocaine from Tse and equipped Williams with a wireless microphone so the agents could record Williams's conversation.[272] However, the feed to Williams's microphone was lost when he and Tse drove off in Williams's car.[273] Williams testified that the two drove to a nearby house where Tse entered and returned therefrom with a bag of cocaine.[274] Although surveillance teams were in the area, none were able to establish Williams's account.[275] Lab tests confirmed that the bag Williams handed DEA agents contained cocaine.[276]

Agents set a second sting for Tse, again using Williams as a cooperating witness.[277] This time, the microphone functioned, and agents were able to record the entire transaction between Williams and Tse for sixty-two grams of cocaine.[278] Tse was subsequently charged by a grand jury with two counts of distributing a controlled substance, one for each of the encounters.[279] Tse

267. *Id.*
268. *See* FED. R. EVID. 609(a).
269. *Tse*, 375 F.3d at 164.
270. *See* FED. R. EVID. 609(b).
271. *Tse*, 375 F.3d at 152.
272. *Id.*
273. *Id.*
274. *Id.* at 152–53.
275. *See id.*
276. *Id.* at 153.
277. *Id.*
278. *Id.*
279. *Id.*

pled guilty to the sting where the microphone worked, but he opted to go to trial for the unrecorded incident.[280]

Because of the equipment malfunction, the prosecution was forced to rely on Williams's testimony.[281] Tse capitalized on Williams's spotty past, making sure the jury knew that

> Williams had used and sold drugs in the past, had been convicted of at least one crime, had made inaccurate statements to the grand jury about his prior involvement with drugs, had received substantial compensation for his work as a DEA informant, and had purchased a new car shortly after receiving payments from the DEA.[282]

The jury, nonetheless, found Tse guilty.[283] He was sentenced to 120 months in prison for both convictions.[284]

On appeal to the First Circuit, Tse asserted that "the district court erred . . . by preventing [Tse] from . . . impeaching Williams's credibility [with] evidence that Williams had been convicted of assault and battery against a police officer."[285] On this issue, the district court was first going to admit the evidence but reexamined that position when the issue of Tse's own previous conviction for assault and battery of a police officer came up during a sidebar conference.[286] Though the court noted that there was some difference in the language of Rule 609 between evidence of a defendant's priors and another witness's priors, the district court felt (without legal basis) that if one should be admitted, then so should the other.[287] The district court chose to bar both convictions from evidence.[288]

On appeal, the First Circuit soundly disagreed with the district court's interpretation of Rule 609, holding, instead, that there is a significant difference between the analysis required for defendant witnesses and all other witnesses.[289] The court further noted that Rule 609 requires a Rule 403 analysis

280. *Id.*
281. *Id.*
282. *Id.* (footnote omitted).
283. *Id.*
284. *Id.*
285. *Id.*
286. *Id.* at 159.
287. *Id.* at 160.
288. *Id.*
289. *Id.*

for credibility evidence offered regarding other witnesses, whereas the internal Rule 609(a)(1)(B) analysis is applied to the accused.[290] The court stated:

> Rule 609 distinguishes between the accused and mere witnesses. A court may admit a conviction of the accused only if the probative value "outweighs its prejudicial effect to the accused." By contrast, a court shall admit a conviction of a government witness unless that conviction should be excluded under Rule 403. The burden under Rule 403 is . . . that the probative value "is substantially outweighed by the danger of unfair prejudice."[291]

The court recognized that, in contrast, Rule 609(a)(1)(B) states that evidence of a defendant's prior convictions will be admitted "if the probative value of the evidence outweighs its prejudicial effect to that defendant."[292] The First Circuit not only recognized the lack of the word "unfair" in Rule 609 but also interpreted it as an important distinction of law.[293] Thus, a defendant's prior conviction can only be admitted if the probative value outweighs any prejudicial effect whatsoever.[294] According to the First Circuit, this is meant to give the accused a higher level of protection from impeachment due to a previous conviction than any other witness.[295]

The importance of the First Circuit's analysis cannot be overstated. First, it demonstrates an unrecognized circuit split, which necessitates eventual resolution.[296] Second, it highlights that the crucial language of the rule, discussed herein, articulates a real distinction that must be accounted for in both analyzing and applying the rule.[297]

While the First Circuit's insight is striking given the remaining circuits' blind spot to the actual language of Rule 609, the court, nonetheless, was never actually confronted with fully applying its correct understanding of the rule, because the trial court kept the prior convictions of *both* the defendant and

290. *Id.*
291. *Id.* at 164 (emphasis omitted).
292. FED. R. EVID. 609(a)(1)(B).
293. *Tse*, 375 F.3d at 164.
294. *See id.* (noting that a defendant's conviction can be admitted only if the probative value "outweighs its prejudicial effect to the [defendant]").
295. *See id.* at 163–64.
296. *See infra* Section II.E.
297. *See Tse*, 375 F.3d at 163 ("[T]he standard for the admission of prior convictions of the accused is stricter than the standard for the admission of prior convictions of a government witness.").

another witness from the jury—having incorrectly concluded that the same standard applied in both contexts.[298] Thus, after analyzing the rule and delivering its apt understanding of the key phrase discussed herein, the appellate court merely determined that the district court erred in employing the same standard for the admission of prior crimes against a criminal defendant versus other witnesses,[299] a correct holding regardless of whether or not a court reads "unfair" into the rule.[300]

Moreover, no remand was ordered, as the appellate court unsurprisingly (descriptively, not normatively) concluded that the trial court's dramatic misunderstanding of the rule—irrespective of the "unfairness" issue—was, nonetheless, "harmless."[301] So, neither the circuit nor the district court ever applied the uniquely correct reading of Rule 609 by any federal court.[302]

Notwithstanding the First Circuit's singular recognition of the explicit language of Rule 609, the application of the rule by the district courts in the First Circuit has proven at least somewhat disappointing. In *United States v. Mahone*, the defendant filed a motion *in limine*, asking the United States District Court for the District of Maine to decide whether several of his prior convictions would be admissible under Rule 609 should he take the stand.[303] Mahone hoped to exclude prior convictions for forgery, theft by receiving, aggravated assault, and possession of a controlled substance.[304]

Since forgery is a crime of dishonesty, the court held that this conviction was automatically admitted under Rule 609(a)(2).[305] The court also held that the convictions for aggravated assault and possession of a controlled substance were not crimes of dishonesty and were also inadmissible under the Rule 609(a)(1) balancing test since they held virtually no probative value for truthfulness.[306] The court noted that there was some controversy over whether theft by receiving is a crime of dishonesty but found that it did not matter as

298. *Id.* at 153–54.

299. *Id.* at 164.

300. *See* FED. R. EVID. 609(a) (stating the requirements needed to admit evidence against a defendant versus a witness, which highlights their differences).

301. *Tse*, 375 F.3d at 164.

302. *See id.* at 164–65 (highlighting that although there is a difference in interpretation that should be accounted for, in this specific case the district court's error was harmless).

303. 328 F. Supp. 2d 77, 81 (D. Me. 2004).

304. *Id.* In addition, Mahone sought to exclude evidence of some past acts under Rule 404, as well as some expert testimony. *Id.* These are not relevant for our purposes, however.

305. *Id.* at 82–83.

306. *Id.* at 83–85.

this conviction would be admissible under the Rule 609(a)(1) balancing test.[307] The court ruled:

> The probative value of the Defendant's conviction for theft by receiving stolen property outweighs any prejudicial effect of admitting the evidence. The nature of the crime reflects on the Defendant's credibility and veracity; the conviction occurred in 2000[,] and the Defendant was on probation from the conviction when arrested on the instant charges; and the difference between possessing a stolen credit card and robbing a bank is sufficient that a jury will not likely consider it "propensity" evidence. While the Defendant's credibility may be a central issue at trial if he chooses to testify, the possibility that admission of this evidence will discourage him from taking the stand is not sufficient to outweigh its probative value.[308]

While the court's focus on "propensity evidence"[309] effectively reflects an analysis of unfair prejudice, that attention doesn't inform us as to whether the court was *only* evaluating unfair prejudice or was considering it as part of a broader analysis of all prejudice.[310] And notwithstanding that a proper application of the rule would have led to an exclusion of any defendant's prior convictions, we do not know whether the court implicitly read Rule 609 to mean "unfair prejudice" rather than "prejudicial effect" or simply misapplied the rule as written.[311] Though Mahone was convicted in this case and appealed to the First Circuit, he did not raise the Rule 609 issue on appeal; so, the First Circuit did not have a chance to address this issue.[312]

307. *Id.* at 83.

308. *Id.* at 84.

309. *Id.*

310. *See id.* at 84–85 (discussing "propensity evidence" and how it is unclear whether it refers to just unfair prejudice or all prejudice).

311. *See id.* at 85.

312. *See* United States v. Mahone, 453 F.3d 68, 69 (1st Cir. 2006). Though not mentioned in the case, it is likely that Mahone chose not to take the stand after the district court held that his prior convictions would be admissible as impeachment evidence. *Mahone*, 328 F. Supp. 2d at 77.

b. "Unfair" in Rule 609(b)

The First Circuit did not extend its proper reading of Rule 609(a) to Rule 609(b)—the section generally barring evidence of prior convictions older than ten years.[313] Rule 609(b) states that convictions of any witness older than ten years are not admissible unless the "probative value . . . substantially outweighs its *prejudicial effect*."[314]

Unfortunately, in *United States v. Nguyen*, the First Circuit used "prejudicial effect" and "unfair prejudice" interchangeably, just like the other circuits do for Rule 609(a), even though this case was decided after the First Circuit's own decision in *United States v. Tse*.[315] In *Nguyen*, the appellant-defendant Quoc Nguyen had been charged along with three others for beating Tommy Nguyen over an unpaid gambling debt.[316] The jury convicted Quoc Nguyen.[317] He appealed, claiming that the lower court improperly barred him from impeaching Tommy Nguyen's character with a previous felony conviction received on May 23, 1996, which did not result in incarceration, for auto entry.[318] Since the trial began on June 14, 2006, the conviction fell just outside the ten-year window presumptively allowed by Rule 609(b).[319] Therefore, the only way Tommy Nguyen's conviction could have been allowed in was if the court found "that the probative value of the conviction supported by specific facts and circumstances *substantially* outweigh[ed] its prejudicial effect."[320] The trial court excluded Tommy Nguyen's conviction, noting that Quoc Nguyen did not provide "any specific facts or circumstances showing that the probative value of Tommy Nguyen's earlier conviction overbalanced its *unfairly* prejudicial effect."[321]

The First Circuit affirmed.[322] Importantly, the First Circuit did not challenge the lower court's use of "unfair" in reference to Rule 609(b); in fact, the appellate court used the same language itself.[323] After quoting directly from

313. FED. R. EVID. 609(b).
314. *Id.* (emphasis added).
315. United States v. Nguyen, 542 F.3d 275, 278 (1st Cir. 2008).
316. *Id.* at 276.
317. *Id.* at 277–78.
318. *Id.* at 278.
319. *Id.* (quoting FED. R. EVID. 609(b)).
320. *Id.* (emphasis added) (noting that this rule lacks the word "unfair," just like Rule 609(a)).
321. *Id.* at 279 (emphasis added).
322. *Id.* at 281.
323. *Id.* at 278, 281.

Rule 609(b), the court said, "In short, Rule 609(b) is a rule of exclusion that bars the admission of a stale felony conviction for impeachment purposes in the absence of a particularized showing that its probative value substantially outweighs its potential for *unfair prejudice*."[324] Later in its analysis, the court reverted back to the "prejudicial effect" language.[325] And even later, the court stated that the district court "considered all the pertinent factors, did not seize on any improper factors, and reached a plausible conclusion as to the balance of probative worth and *unfairly* prejudicial effect."[326] Even though Rule 609(b) has the same language of "prejudicial effect" that Rule 609(a) has, the First Circuit acted as if "unfair prejudice" and "prejudicial effect" are interchangeable.[327] Needless to say, the court did not give any reason for this divergence from its prior singular opinion.[328]

E. Modern Textualism as a Normative Process

The question that is presented is whether courts should hew strictly to the language of Rule 609 or follow some other interpretive technique. Justice Elena Kagan famously stated that "we're all textualists now."[329] This transformation in judicial philosophy was due in no small part to the influence and legacy of the late Justice Antonin Scalia.[330] In his time on the bench, Justice Scalia changed the way we talk and write about constitutional law and statutory interpretation.[331] As Stanford Law Professor Bernadette Meyler put it, "The florid rhetoric of his opinions, especially his dissents, addressed not only

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324. *Id.* at 278 (emphasis added) (citing United States v. Meserve, 271 F.3d 314, 322 (1st Cir. 2001); United States v. Orlando-Figueroa, 229 F.3d 33, 46 (1st Cir. 2000)).

325. *Id.* at 280. "The qualitative requirement for 'specific facts and circumstances' and the quantitative requirement that probative value be shown 'substantially' to outweigh prejudicial effect combine to make the barrier to admissibility of stale convictions under Rule 609(b) much higher than the barrier for the admissibility of recent convictions under Rule 609(a)." *Id.*

326. *Id.* at 281 (emphasis added).

327. *Compare id.* at 278, 281 (conflating "unfair prejudice" and "prejudicial effect"), *with* United States v. Tse, 375 F.3d 148, 164 (1st Cir. 2004) (stating that applying a "uniform standard of exclusion" would be an error of law).

328. *Nguyen*, 542 F.3d at 280.

329. Harvard Law School, *The 2015 Scalia Lecture | A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015) https://youtu.be/dpEtszFT0Tg?t=501.

330. Judge Diarmuid F. O'Scannlain, *"We Are All Textualists Now": The Legacy of Justice Antonin Scalia*, 91 ST. JOHNS L. REV. 303, 304, 313 (2017) (reflecting on the influence of Justice Scalia).

331. Bernadette Meyler, *Stanford Law Faculty on Justice Scalia's Legacy*, SLS BLOGS: LEGAL AGGREGATE (Feb. 15, 2016) https://law.stanford.edu/2016/02/15/stanford-law-faculty-on-justice-scalia/.

his fellow justices and lower courts but also a constituency within the nation. His interpretive theory of originalism reached out and captured that nation."[332] Justice Scalia's approach to constitutional and statutory interpretation was heavily influenced by a literary technique called New Criticism, which calls for readers to stick to the "four corners" of a writing whenever possible, rather than using outside sources to interpret it.[333] Ideally, the intent, or perceived intent, of the authors should not be an interpretive factor.[334]

One way to think about this approach is to relate it to viewing images in clouds. Often, we see identifiable figures; children make a game of spotting them.[335] As these are generally understood to result from random meteorological events, we don't talk about the "intent" behind the impressions.[336] Yet the images are manifest irrespective of the absence of intent in their creation.[337] While nobody doubts that legislation results from conscious efforts of many people—so, intentions exist, indeed various ones—legislators have their own individual understandings and intents (or no individual understanding and intent at all) in the drafting process. Notwithstanding this disparity of intentions, in the end, there's only one piece of legislation that was adopted by at least a majority of legislators, including those who voted for it as a bitter pill.[338] As such, the legislation is like the cloud: it is to be interpreted alone, without reference to any ephemeral "intentions" behind it.

In other words, how do we take that amalgam of disparate and conflicting intentions, as well as the absence of any specific intent of those with an equal vote in the legislative process, and derive a cohesive meaning therefrom?[339]

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332. *Id.*

333. *Id.*

334. *Id.*

335. *See generally* Jeremy Deaton, *Marshmallows or Elvis? What You See in the Clouds Might Say Something About You*, WASHINGTON POST (Nov. 6, 2019), http://www.washingtonpost.com/weather/2019/11/06marshmallows-or-michael-jackson-what-you-see-clouds-might-say-something-about-you/ (discussing the concept of "pareidolia," which is the tendency to see images in the clouds).

336. *See generally id.*

337. *Id.*

338. *See* John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 424 (2005) (explaining how textualists assert that "raw policy" impulses never make it into final legislation because legislators must adapt and cater their individual intentions to overcome approval obstacles such as "threatened filibusters," "conference committees," and "veto threats").

339. *Id.* at 431–32 (explaining the inherent problems of interpreting legislation through "intentions" when the drafting legislators have vastly different opinions from one another and "compromise because they want some other objective" or introduce unrelated and arbitrary provisions to strategically pass bills).

Equally, how do we ascribe intentions to those various legislators in the several states that enacted a copy of Rule 609?[340] Do the ascribed intentions of federal legislators travel with the explicit language adopted at the state level?[341] In textualism, we do not try to answer these unsolvable riddles.[342] Rather, we look at the words and structure of the provision under review.[343] Legislators' statements can be useful to understand what ambiguous words mean—as those elected officials are people of the time using the contemporary vernacular—but to be clear, so are myriad other sources.[344] In the context of Rule 609, in fact, we saw this occur with respect to the meaning of "defendant."[345] "Defendant" can mean only a criminal defendant or both a criminal and a civil defendant in both common vernacular and technical legal writing.[346] So, the Supreme Court looked at, *inter alia*, the structure of the *Federal Rules of Evidence* to determine *which* definition applies.[347] As discussed, however, using that same objective method of interpretation doesn't allow for "prejudice" to have two drastically different meanings *within* the same law, no less one wholly inconsistent with the term's understood meaning in evidence law.[348]

A key virtue of textualism is that it not only minimizes the ability of

340. *See* L. Kinvin Wroth, *The Federal Rules of Evidence in the States: A Ten-Year Perspective*, 30 VILL. L. REV. 1315, 1315–39 (1985) (illustrating how within ten years after implementation, nine states adopted Rule 609 either outright or nearly verbatim and many others adopted substantially similar versions).

341. *Id.*

342. *See* Anton Melitsky, *The Roberts Court and the New Textualism*, 38 CARDOZO L. REV. 671, 675 (2016) (quoting Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992)) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'").

343. *See id.* at 684 (citing Yates v. United States, 135 S. Ct. 1074, 1091 (2015) (Kagan, J., dissenting)) (emphasis added) (showing how Justice Kagan, in her dissent, disregarded the intended purpose of the Sarbanes-Oxley Act to prevent destruction of "objects" of evidence in financial fraud cases and asserted that defendant should have been charged for "destroying" the "object" of an illegally caught undersized fish).

344. *See* Ryan D. Doerfler, *Can a Statute Have More Than One Meaning?*, 94 N.Y.U. L. REV. 213, 223–24 (2019) (discussing how dictionary definitions, "ordinary" meaning, and meaning intended by Congress can be incompatible).

345. *See* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 511 (1989) (recognizing how the word "defendant" in Rule 609(a)(1) is ambiguous and could be interpreted to encompass a civil defendant, a criminal defendant, or both).

346. *See id.*

347. *Id.* at 508–10.

348. *See supra* Section II.A.1.

judges to smuggle in their personal-policy preferences but also offers predictability in the interpretation of the law in general, providing for greater legitimacy in a system that ultimately rests on popular support for its perpetuation.[349] Thus, ambiguities aren't resolved by the use of idiosyncratic explanations by legislators (or their staff) in the drafting process but, rather, through an examination of the common understanding of language—as that is what is most universal to drafters and, more importantly, those subject to the new laws.[350] All of this is an attempt, posited as the best, to give reasonable meaning to a process inherently filled with indeterminacy, as words themselves always have some ambiguity.[351] Language is a near-magical means to convey ideas—as well as the medium through which ideas are both limited and enhanced at the same time; thus, we better understand a notion when we create key terminology to explain it, but the absence of unlimited linguistic options cabins our ability to imagine, no less explore, concepts beyond our current grasp.[352] Thus understood, the enterprise of looking behind the curtain

349. *See, e.g.*, Hewitt v. Helix Energy Sols. Grp., 983 F.3d 789 (5th Cir. 2020) (Ho, J., concurring) (emphasis added) (citation omitted) ("Perhaps strangest of all, the dissent quotes a snippet of legislative history from 1997 to support its contention that overtime pay just shouldn't apply to high earners. The dissent neglects to mention that the sentiment it imputes to 'Congress' is nothing more than a floor statement by a lone House member, in support of a proposed FLSA amendment that never got so much as a vote. This is not even good purposivism, let alone good textualism."), *vacated*, 989 F.3d 418 (5th Cir. 2021). *Compare id.* at 802–03 (Wiener, J., dissenting) (emphasis added) ("Those of us who were born, bred, and educated in the 'oil patch,' and who practiced mineral law for decades, are quite familiar with the levels of personnel who work the various on-shore and off-shore oil rigs and platforms. . . . I fear that the result of the panel majority's opinion will have lasting, negative repercussions, not just on the petroleum industry, but on all industries in this region and in any region that finds the panel majority's opinion persuasive."), *vacated*, 989 F.3d 418 (5th Cir. 2021), *with id.* (Ho, J., concurring) (emphasis added) (citations omitted) ("Those of us who were born, bred, and educated in textualism are unfamiliar with the 'bad for business' theory of statutory interpretation offered by the dissent under the purported flag of textualism. No one of course doubts the importance of the energy industry to the health and prosperity of our nation. But these are policy arguments that should be presented to Congress and the Secretary, not the judiciary. 'These are battles that should be fought among the political branches and the industry[—]not . . . by appeal to the Judicial Branch.' I remain, as always, willing—indeed, duty bound—to go wherever the text leads. For it is the text enacted by the political branches that leads—and the judiciary that follows."), *vacated*, 989 F.3d 418 (5th Cir. 2021).

350. *See* Jonathan Skrmetti, *Symposium: The Triumph of Textualism: "Only the Written Word Is the Law,"* SCOTUSBLOG (June 15, 2020, 9:04 pm), https:www.scotusblog.com/2020/06/symposium-the-triumph-of-textualism-only-the-written-word-is-the-law/ (discussing how Justice Kavanaugh asserts that "interpretation contrary to ordinary meaning undermines the rule of law and democratic accountability").

351. *See id.*

352. *See generally* Vyvyan Evans, *What Do We Use Language For?*, PSYCH TODAY (Dec. 14, 2014), https://www.psychologytoday.com/us/blog/language-in-the-mind/201412/what-do-we-use-

of language to capture intent reveals itself as far more fantastical than proponents propound.[353]

Justice Scalia applied the textualist method to constitutional interpretation, stressing the "original public meaning" rather than the intent of the authors.[354] Conservative scholars argue that this is more "democratically legitimate" since it relies on how most people at the time understood the words in the document rather than any subjective, no less questionable, authorial intent.[355] Justice Clarence Thomas once described how textualism mandated that Justice Scalia and others on the Court overturn the conviction of an undoubtedly unsympathetic defendant in *Crawford v. Washington*—not because the justices wanted that outcome in the case, but because the text of the Constitution mandated it.[356]

Justice Gorsuch further outlines the textualist approach in another case in which the outcome at least facially seems contrary to the authoring justice's personal political preferences.[357] In the majority opinion, holding that Title VII's prohibition on sex discrimination also encompasses acts of bias against homosexuals,[358] Justice Gorsuch states that the Supreme Court "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment"[359] since the actual text of the statute, and no other sources, is what was actually enacted.[360] Allowing judges to bring in other sources is dangerous, Justice Gorsuch says, because it opens the possibility of judicial amendment of statutes through reinterpretation.[361] It would also mean that the meaning of a law would be constantly subject to change, leaving

language ("[L]anguage allows quick and effective expression[] and provides a well-developed means of encoding and transmitting complex and subtle ideas.").

353. *See id.*

354. *See* O'Scannlain, *supra* note 330 (discussing the "original public meaning").

355. *See generally* Skrmetti, *supra* note 350.

356. 541 U.S. 36 (2004). For a discussion of this case by Justice Clarence Thomas, see Clarence Thomas, Assoc. Just. of the U.S. Sup. Ct., Keynote Speech at the Nineteenth Annual Banquet of the Texas Review of Law & Politics (Apr. 9, 2016).

357. Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (showing Justice Gorsuch's commitment to analyzing Title VII provisions through a textualist approach and outlining the potential slippery slope presented by judicial reinterpretation).

358. *Id.* (illustrating the Court's textualist approach in interpreting Title VII's prohibition on sex discrimination).

359. *Id*. at 1738.

360. *Id.*

361. *Id.*

citizens unsure whether they can rely on it in their daily lives.[362]

Justice Gorsuch points out that the Supreme Court has repeatedly ruled that courts have no further role when a statute's meaning is "plain."[363] The public should not have to worry that the courts could suddenly "disregard [the statute's] plain terms" in favor of some other source.[364] Justice Gorsuch allows for extratextual sources to clear up ambiguities in textual language.[365] This is perfectly acceptable, he says, when kept to this limited task (and not used to mask a search for "legislative intent").[366] As the Supreme Court stated previously, "Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it."[367] Justice Gorsuch holds that when the text is clear, no legislative history can change its meaning—even if the broad, general applications of the language were not clear to the original drafters.[368] Justice Gorsuch emphasizes the fact that the actual text of the law governs, not "the principal concerns of our legislators."[369]

At the same time, legislative histories and other sources can be useful for courts in applying the correct governing meaning of a statute's terms: the "ordinary meaning at the time of enactment."[370] Since meanings and nuances of words can change over time, courts must be sure to apply the statute's original meaning, as that is what was actually enacted.[371] Also, statutory language can often be different than the meaning of words "when viewed individually or literally."[372] For this purpose, legislative history is useful for determining the contemporary and contextual definition of terms but, as such, is clearly "not always conclusive."[373]

Justice Gorsuch offers as an example the 1931 case wherein the Court found that the 1919 National Motor Vehicle Theft Act governed only land vehicles and not air or water vehicles since "contextual clues" in the law

362. *Id.*
363. *Id.* at 1749.
364. *Id.* (citing Carcieri v. Salazar, 555 U.S. 379, 387 (2009); Conn. Nat. Bank v. Germain, 503 U.S. 249, 253–54 (1992); Rubin v. United States, 449 U.S. 424, 430 (1981)).
365. *Id.*
366. *Id.*
367. *Id.* (quoting Milner v. Dep't of Navy, 562 U.S. 562, 574 (2011)).
368. *Id.*
369. *Id.*
370. *Id.* at 1750.
371. *Id.*
372. *Id.*
373. *Id.*

pointed that way and the "everyday speech" in 1919 used the term "vehicle" to only mean motor vehicles.[374] In another case, the Court held that the term "contract[] of employment" referred to both independent contractors and employee contracts since that was the prevailing meaning at the time the relevant law was passed.[375]

Justice Gorsuch draws a contrast between a claim that "statutory language bears some other *meaning*" and whether legislators at the time of enactment "expected today's result."[376] Justice Gorsuch rejects the latter as an interpretive tool[377]: "When a new application emerges that is both unexpected and important, [some] would seemingly have us merely point out the question, refer the subject back to Congress, and decline to enforce the plain terms of the law in the meantime."[378]

Justice Gorsuch further eschews any meaningful distinction between the "expected application[]" of a law and "legislative intent," the latter of which the Court has said is irrelevant for unambiguous statutes.[379] Looking to "expected applications" achieves the same result as looking at legislative intent: limiting the application of a statute to only the principal concern of certain vocal legislators while ignoring the more general application of the statute's actual plain language.[380] This framework, says Justice Gorsuch, would "impermissibly . . . displace the plain meaning of the law in favor of something lying beyond it."[381]

The Supreme Court had previously ruled that when a statute is unambiguous, "whether a specific application was anticipated by Congress 'is irrelevant.'"[382] Justice Gorsuch argues that "applying protective laws to groups that were politically unpopular at the time of the law's passage—whether prisoners in the 1990s[383] or homosexual and transgender employees in the 1960s—often may be seen as unexpected."[384] However, this is no reason not to enforce

374. *Id.* (citing McBoyle v. United States, 283 U.S. 25, 26 (1931)).
375. *Id.* (quoting New Prime Inc. v. Oliveira, 139 S. Ct. 532, 536–37 (2019)).
376. *Id.* (emphasis added).
377. *Id.*
378. *Id.*
379. *Id.*
380. *Id.*
381. *Id.*
382. *Id.* at 1751 (quoting Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 212 (1998)).
383. *See generally* Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 212 (1998) (holding Title II of the ADA extends to prisoners).
384. *Bostock*, 140 S. Ct. at 1751.

the law as written.[385] To do so would unjustly benefit "the strong or popular" and deny equal benefit of the law.[386]

Justice Gorsuch further opines that should any law only apply to individuals that some "(yet-to-be-determined) group" intended it to apply to, rather than to all implied by the statute's language, then "we'd have more than a little law to overturn."[387] For example, cases extending protection to male employees, especially protecting male employees from harassment by other males, were quite likely unforeseen by the original drafters of Title VII[388]: "As we acknowledged at the time, 'male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII.'"[389]

And this would only be the beginning, according to Justice Gorsuch.[390] The words of various enactments have long been recognized as "difficult to . . . control."[391] In the context of Title VII, this is likely due in no small part to the intentions (pun recognized) of Representative Howard Smith, the legislator who introduced the original language of Title VII regarding sex discrimination as a poison pill.[392] Smith offered the language, "[n]ot necessarily because he was interested in rooting out sex discrimination in all its forms, but because he . . . thought that adding language covering sex discrimination would serve as a poison pill [for the whole Civil Rights Act]."[393] Nonetheless, that language is part of the enacted statute.

Since the statutory language is so broad, Justice Gorsuch pointed out in *Bostock* that "many, maybe most, applications of Title VII's sex provision were 'unanticipated'" when it was adopted.[394] Many of these applications seem perfectly obvious to us now but were highly controversial in the early

385. *Id.*
386. *Id.*
387. *Id.*
388. *Id.*
389. *Id.* (quoting Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 79 (1998)).
390. *Id.*
391. *Id.* (citing Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1338 (2012) (quoting *Federal Mediation Service To Play Role in Implementing Title VII*, [1965–1968 Transfer Binder] Empl. Prac. Dec. (CCH) ¶ 8046, at 6074 (Feb. 7, 1996))).
392. *Id.*
393. *Id.* at 1752 (citing CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 11518 (1985)).
394. *Id.*

days of the law.[395] For example, the Equal Employment Opportunity Commission originally held that having separate listings for men and women "was simply helpful rather than discriminatory."[396] It was not deemed illegal in some jurisdictions for an employer to fire "an employee for refusing his sexual advances," or to refuse to hire mothers of young children without a similar policy toward fathers.[397]

Over time, the broad, general nature of Title VII's sex discrimination prohibition became undeniable, Justice Gorsuch pointed out.[398] The EEOC changed course on job postings before the end of the 1960s—the Court ruled in 1971 that women with children could not be treated differently than men with children—and the Court was increasingly moving toward recognizing sexual harassment as sex discrimination by the end of the same decade.[399] Justice Gorsuch pointed out that, while these seem to be perfectly natural applications of Title VII's sex provision to us now, they were not considered so in the early days of the law and were hotly debated.[400]

Justice Gorsuch rejected "naked policy appeals."[401] That is not statutory interpretation at all; rather, it amounts to legislating from the bench, replacing Congress's words with judicial policy making, said Justice Gorsuch.[402] The judiciary, he said, should avoid doing this at all costs.[403] He continued: Congress alone should pass new laws "or address unwanted consequences of old legislation";[404] courts can only apply the law as written;[405] courts have no legal, moral, or expert authority to change policies enacted by the people through their elected representatives beyond the limitations of the Constitution.[406] The courts can no more limit the scope of the law, said Justice

395. *Id.*
396. *Id.* (citing Franklin, *supra* note 391, at 1340 (citing Press Release, Equal Emp't Opportunity Comm'n (Sept. 22, 1965) (on file with the EEOC Library, Washington D.C.))).
397. *Id.* (citing Barnes v. Train, No. 1828–73, 1974 WL 10628, *1 (D.D.C. Aug. 9, 1974) (unreported); Phillips v. Martin Marietta Corp., 411 F.2d 1 (5th Cir. 1969), *rev'd*, 400 U.S. 542 (1971) (*per curiam*)).
398. *Id.*
399. *Id.*
400. *Id.*
401. *Id.* at 1753.
402. *Id.*
403. *Id.*
404. *Id.*
405. *Id.*
406. *Id.* at 1738.

Gorsuch, than they can add to it.[407]

Justice Gorsuch's analysis aptly foretold the proper interpretation of Rule 609: since Congress enacted language that bars all character for truthfulness evidence against criminal defendants—albeit in a circuitous fashion—confused statements of several legislators cannot change the unadorned dictates of the law.[408] As Justice Gorsuch acknowledged, the "expected application[]" of the law doesn't trump the enacted language.[409] Appeals to either "expected applications" or "legislative intent" ignore the rule's actual plain language.[410] Before fully embracing this analysis, however, two interpretative principles must be considered: the scrivener's error and the absurdity doctrine.[411]

1. Scrivener's Error

Courts often follow the maxim that they may correct legislative drafting mistakes, known as scriveners' errors.[412] This is a narrow rule, however, applying only if the mistakes are patently clear.[413] If the language is merely likely a mistake, but not definitively one, then courts will apply the plain text rather than attempt to fix the perceived issue.[414] The rationale for this limitation is the same as what underlies textualism itself: courts should be interpreting the words given them by the legislature, not providing their own judgment on policy in place of elected representatives, intentionally or otherwise.[415]

This doctrine is usually relegated to fixing only "internal textual inconsistenc[ies] or . . . obvious error[s] of grammar, punctuation, or English usage."[416] Is the lack of "unfair" in Rule 609 a conscious word choice or an

407. *Id.* at 1753.

408. *See supra* Section II.B.2.b.

409. *Id.*

410. *Id.* at 1752.

411. Ryan D. Doerfler, *The Scrivener's Error*, 110 NW. U. L. REV. 811, 816–17 (2016) (defining "scrivener's error" as a term of art referring to a legislative mistake of transcription).

412. *Id.* at 811.

413. *Id.* at 812 (citing United States v. X-Citement Video, Inc., 513 U.S. 64, 82 (1994) (Scalia, J., dissenting)).

414. *Id.* (citing Demarest v. Manspeaker, 498 U.S. 184, 190 (1991)).

415. *See* United States v. X-Citement Video, Inc., 513 U.S.64, 82 (Scalia, J., dissenting). "For the *sine qua non* of any 'scrivener's error' doctrine, it seems to me, is that the meaning genuinely intended but inadequately expressed must be absolutely clear; otherwise we might be rewriting the statute rather than correcting a technical mistake. That condition is not met here." *Id.*

416. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2460 n.265 (2003) (critiquing the absurdity doctrine).

obvious error in grammar, meaning, or transposition?[417] To conclude that "unfair" was inadvertently omitted in a final printing or the like is belied by the detailed history described above.[418] "Unfair" was removed midway during the deliberative process.[419] Notwithstanding that several legislators spoke about the bill indicating that they were seemingly unaware of the change, critically, the change preceded various intermediate ratifications.[420] Thus, regardless of what some legislators thought, various versions of the bill—along with the final language—were repeatedly ratified by each body that considered it with the locution on full display.[421] The scrivener's error doctrine is not designed to correct bad legislating, it's designed to correct process oversights.[422] This was no process mistake.

2. Absurdity Doctrine

A related maxim of interpretation is the absurdity doctrine, alluded to above, which states that courts will interpret statutes in contravention of their plain meaning if the result of doing otherwise would be absurd.[423] The Supreme Court phrased the doctrine this way in *Griffin v. Oceanic Contractors*: "[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."[424] The classic example of this doctrine comes from medieval Italy, where a doctor who assisted a patient in the public street was exempted "from a law punishing 'whoever drew blood in the streets.'"[425] In that instance, the law had been intended to stop violence, and the court reasoned that

417. *See id.* ("This premise arguably distinguishes a genuine scrivener's error doctrine from the absurdity doctrine, which focuses on putative mistakes of policy expression and therefore risks disturbing a legislative bargain over the precise way a given statutory policy should be articulated.").

418. *See supra* Section II.B.2.

419. *See supra* Section II.B.2.

420. *See supra* Section II.B.2.

421. Doerfler, *supra* note 411 (clarifying that a scrivener's error is where legislative text diverges from what Congress meant to say, not what Congress should have said).

422. Manning, *supra* note 416, at 2388 (defining the absurdity doctrine as the idea that judges may deviate from statutory text when a given application would otherwise produce an absurd result).

423. *See id.*

424. Griffin v. Oceanic Contractors, 458 U.S. 564, 575 (1982) (emphasis added) (citing United States v. American Trucking Ass'ns, 310 U.S. 534, 542–43 (1940); Haggar Co. v. Helvering, 308 U.S. 389, 394 (1940)).

425. Glen Staszewski, *Avoiding Absurdity*, 81 IND. L.J. 1001, 1007 (2006) (defending the absurdity doctrine by illustrating its promotion of fairness).

applying it to a physician performing emergency care would not accomplish the law's intended purpose and would be harmful to the public good.[426] In a more recent case, the Supreme Court ruled in 1868 that a sheriff and his posse, who arrested an on-duty mail carrier wanted for murder, did not violate the law against impeding the delivery of mail, even though they had by a literal reading of the statute.[427]

The rule stems from the notion that since Congress is incapable of foreseeing every possible outcome, it crafts general rules.[428] When an unforeseen absurd result would occur from the application of a general rule to a specific, unique case, the judiciary will interpret the rule so as to avoid that absurdity.[429] As traditionally understood, this is "a normal function of the interpretive process," rather than a judicial rewriting of the law.[430]

While this doctrine has existed for quite some time in American courts,[431] it is not without its apt critics.[432] Some new textualists, most notably John Manning in his article *The Absurdity Doctrine*, object that the doctrine could destabilize the separation of powers between the legislative and judicial branches, among other undesirable consequences.[433] New textualists like Manning are skeptical that the absurdity doctrine isn't anything more than just a dressed-up version of purposivism.[434] As Manning states:

> [T]he precise lines drawn by any statute may reflect unrecorded compromises among interest groups, unknowable strategic behavior, or even an implicit legislative decision to forgo costly bargaining over greater textual precision. So understood, the legislative process is simply too complex and too opaque to permit judges to get inside Congress's "mind."[435]

Under this conception that equates the maxim with a search for legislative

426. *Id.* at 1026.
427. *Id.* at 1006–07; *see also* United States v. Kirby, 74 U.S. 482, 486 (1868).
428. Staszewski, *supra* note 425, at 1012.
429. *Id.*
430. *Id.* (citing Sorrells v. United States, 287 U.S. 435, 450 (1932); Kirby, 74 U.S. at 486–87).
431. Manning, *supra* note 416, at 2388.
432. *Id.* at 2391.
433. *Id.*; *see also* Staszewski, *supra* note 425, at 1008–12.
434. Manning, *supra* note 416, at 2390.
435. *Id.*

intent, courts risk acting on their own personal wills and preferences if they do anything other than apply the words of the statute as written.[436] The "actual commands" of the final law are more important than "the apparent background intent" of lawmakers.[437] Since the absurdity doctrine calls for courts to apply laws contrary to their written letter to avoid "absurd" results, the doctrine conflicts with new textualist philosophy on the role of the judiciary and the proper method of legal interpretation.[438] In their eyes, the absurdity doctrine undermines the separation of powers by letting courts modify statutes beyond the express terms passed by Congress.[439]

Manning and other new textualists are also concerned that the absurdity doctrine could be used to circumvent the rational basis test used to review the constitutionality of legislation.[440] This test states that "a judge may not disturb a statutory classification simply because it produces seemingly unwise, improvident, or inequitable results" if the "legislation has any conceivable rational basis."[441] Manning believes that courts could invalidate a law that would pass the rational basis test by declaring the results "absurd."[442]

Manning argues that courts could significantly cut down on the number of cases that implicate the absurdity doctrine by adopting the modern textualists' context-dependent method of interpretation.[443] By this, he does not mean the subjective intent of the author, which he refers to as the "speaker's meaning."[444] Rather, he means "how 'a skilled, objectively reasonable user of words' would have understood the statutory text, as applied to the problem before the judge."[445] Also referred to as "objectified intent,"[446] this context-dependent method of interpretation requires an interpreter to go beyond the dictionary definition of a word to common cultural and legal connotations of

436. *Id.*
437. *Id.*
438. *Id.* at 2390, 2408–31; *see also* Staszewski, *supra* note 425, at 1008.
439. Manning, *supra* note 416, at 2391; *see also* Staszewski, *supra* note 425, at 1008–09.
440. Manning, *supra* note 416, at 2391.
441. *Id.*
442. *Id.*
443. *Id.* at 2455.
444. *Id.* at 2457.
445. *Id.* at 2458 (quoting Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y, 59, 65 (1988)).
446. *See, e.g.*, Andrew S. Gold, *Absurd Results, Scrivener's Errors, and Statutory Interpretation*, 75 U. CIN. L. REV. 25, 29, 33 (2006) (defining "objectified intent" as authorial intent which seems to be the intent behind statutes if no subjective legislative intent exists).

that word in a particular context.[447]

As an example of this method of interpretation, Manning quotes from Justice Scalia's dissent in *Smith v. United States*.[448] In that case, the issue before the court was whether the defendant had "used" a firearm during a drug deal when he traded the firearm for drugs but never employed it as a weapon.[449] The majority said that he did, but Justice Scalia disagreed—producing a decidedly prodefendant outcome, contrary to Scalia's known political preferences.[450] Justice Scalia noted that

> [t]o use an instrumentality ordinarily means to use it for its intended purpose. When someone asks, "Do you use a cane?," he is not inquiring whether you have your grandfather's silver-handled walking stick on display in the hall; he wants to know whether you *walk* with a cane. Similarly, to speak of "using a firearm" is to speak of using it for its distinctive purpose, [i.e.], as a weapon.[451]

To demonstrate how Justice Scalia's approach would greatly limit the number of absurdity doctrine inquiries, Manning goes back to the classic example of the doctor who draws blood in the street.[452] While the phrase "draw blood" could abstractly refer either to an act of violence or a medical procedure, it would be understood by the reasonable reader in the context of the statute under review to mean an act of violence since the law in that case was part of a criminal code rather than a health code.[453] Given the contextual meaning of the phrase, the doctor would not be guilty of violating the law.[454] Using this method of textual analysis, the court would not need to apply the absurdity doctrine at all, since the absurd result would never arise in the first

447. Manning, *supra* note 416, at 2458–60.

448. *Id.* at 2460 (quoting Smith v. United States, 508 U.S. 223, 242 (1993)).

449. *Id.*

450. *See* Joanmarie Ilaria Davoli, *Justice Scalia for the Defense?*, 40 U. BALT. L. REV. 687, 687 (2011) (noting that Justice Scalia was "[w]idely considered to be one of the most politically conservative Justices on the United States Supreme Court").

451. Smith v. United States, 508 U.S. 223, 242 (1993). This is one of several cases in which Justice Scalia interpreted a statute in a fashion likely inconsistent with his political preferences. *See* Davoli, *supra* note 450.

452. Manning, *supra* note 416, at 2461.

453. *Id.*

454. *Id.* at 2460–61.

place.[455] This concept applies both to accepted cultural nuances as well as commonly understood legal terms of art.[456]

Regarding those cases where the context-dependent method of interpretation does not negate the absurd result, Manning and new textualists suggest that most, if not all, can be dealt with by recognizing the background legal conventions that would have been assumed during a statute's drafting.[457] For example, in the case of the sheriff who arrested the murderous mail carrier, the common law defense of justification would absolve him for impeding the delivery of mail without resorting to the absurdity doctrine.[458] Or if, say, a prisoner escaped from jail to avoid a fire (another oft-cited example from an old English case), there would be no need to resort to the absurdity doctrine to avoid punishing him when the common law defense of necessity is available.[459] Both of these doctrines don't change the meaning of a statute; they provide for *exceptions* to the law's application, respecting the role of the legislature in enacting laws.[460]

The application of the absurdity doctrine to Rule 609 is a stretch. Unlike the multiple legitimate legal definitions of one term, "defendant," discussed in *Green*, in Rule 609, we're confronted with the opposite: the *Federal Rules of Evidence* has two separate terms, "unfair prejudice" and "prejudicial effect," with two distinct understandings in the law, as recognized by the First Circuit, that courts have routinely treated as one.[461] That's not to say that many legislators involved in drafting Rule 609 didn't seem ignorant of, or at least unconcerned with, the important definitional differences.[462] They did. This alone, however, seems insufficient to trump the objective meaning of the logically separate terms.

Moreover, the would-be asserted absurdity is *not* the result of the application of a general rule to a specific, uncontemplated circumstance.[463] Rather, the absurdity would be either that Congress left out a word—reverting back to the scrivener's error—or that the rule never permits Rule 609 evidence

455. *Id.*
456. *Id.* at 2464–65.
457. *Id.* at 2466.
458. *Id.* at 2468–69.
459. *Id.* at 2469.
460. *See* Staszewski, *supra* note 425, at 1014.
461. *See* Green v. Block Laundry Mach. Co., 490 U.S. 504, 507–08 (1989).
462. *See supra* Section II.B.
463. *See* Manning, *supra* note 416 (explaining that part of the rationale behind the absurdity doctrine is that legislators draft statutes with limited foresight).

against an accused.[464] Thus, it's not specific and unique at all.[465] The alleged absurdity is universal.[466] And eviscerating the distinction between two different terms, one encompassing the other, contravenes English-language structure and interpretative maxims, as discussed above, leaving us with words that have no meaning in the same rule.[467] That's a hard pill to swallow if trying to maintain fidelity to the text of the rule.[468]

Thus, the best way to address the problem is for Congress to correct it.[469] This achieves two goals: First, it gives preeminence to the enacted words, regardless of their wisdom, or even lack thereof. Second, it reinforces the incentive for Congress to capably do its job, because when it doesn't, it won't have another branch of government providing legislative janitorial services.[470] In addition, the various states that have uncritically adopted Rule 609 would likely follow suit.[471]

III. CONCLUSION

While Federal Rule of Evidence 609 allows for the introduction at trial of certain convictions to impeach the credibility of any witness, only the aspect of the rule that applies to criminal defendants subjects propounded evidence to an internal balancing test that weighs probativeness against prejudice.[472] The test applicable to all other witnesses is that found in Federal Rule of Evidence 403, which states: "The court may exclude relevant evidence if its probative value is substantially outweighed by . . . *unfair* prejudice."[473] Thus, the specific articulation of the balancing test regarding criminal defendants considers *all* prejudice in the balancing test rather than just *unfair* prejudice. This language produces a result whereby *no* credibility evidence survives the

464. *Id.* at 2390.
465. *See supra* Section II.C.
466. *See supra* Section II.C.
467. Manning, *supra* note 416, at 2390.
468. *See* FED. R. EVID. 609.
469. *See* John F. Manning, *Without the Pretense of Legislative Intent*, 130 HARV. L. REV. 2397, 2426 (2017) (describing one of the benefits of textualism as satisfying the demand of legislative supremacy in its ability to address problems).
470. *Id.*
471. *Id.*
472. FED. R. EVID. 609.
473. FED. R. EVID. 403 (emphasis added).

screen of the prejudice filter, making the rule nugatory.[474] Adding to this confusion, or more likely because courts have unconsciously recognized this confounding dilemma, federal courts *mostly* have ignored the express language of the rule—choosing to rewrite Congress's words without offering any explanation for that usurpation of the legislative function.[475] Rather than having courts play legislators, judges should model the humility inherent to their constitutional role.[476] This gives preeminence to the words enacted by Congress and bolsters the motivation for Congress to capably do its job.[477]

474. *See supra* Section II.C.
475. *See supra* Section II.D.
476. *See* U.S. CONST. art. 3, § 1.
477. *See supra* Section II.E.

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