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Impeaching Credibility through Evidence of Prior Convictions: Federal Rule of Evidence 609(a)

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COMMENT

IMPEACHING CREDIBILITY THROUGH EVIDENCE OF PRIOR CONVICTIONS: FEDERAL RULE OF EVIDENCE 609(a)

I. INTRODUCTION

The question whether prior convictions of criminal offenses should be admitted as evidence to impeach the credibility of a witness has long been debated in the courts of the United States.[1] An attempt was made by Congress to end the controversy with the adoption of rule 609(a) of the Federal Rules of Evidence, which makes it clear that impeachment by evidence of prior convictions is permissible in some situations.[2] But, two years after the rule became effective,[3] the controversy continues, now centering on what kind of prior convictions can be used to impeach under the "dishonesty or false statement" clause of rule 609(a)(2).

Rule 609(a) defines two categories of convictions which, when being used to impeach, receive differing treatments.[4] First are convictions for crimes which are punishable by death or imprisonment in excess of one year.[5] These are crimes which, in most jurisdictions, would be considered felonies.

The second category, crimes involving "dishonesty or false statement,"[6] creates a problem for judges. Courts have reached differing decisions as to what crimes constitute "dishonesty or false statement."[7] As a result, in this particular instance, the Rules have

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1. *See* R.G. Spector, *Impeachment Through Past Convictions: A Time for Reform*, 18 DEPAUL L. REV. 1 (1968); M. Ladd, *Credibility Tests—Current Trends*, 89 U. PA. L. REV. 166 (1940).

2. FED. R. EVID. 609(a). Rule 609(a) of the Federal Rules of Evidence provides:

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

3. The Federal Rules of Evidence became effective on July 1, 1975.

4. *See* note 2 *supra.*

5. Before this type of conviction may be admitted into evidence, the court must determine that the probative value of the evidence outweighs any prejudicial effect to the defendant. See note 2 *supra.*

6. FED. R. EVID. 609(a)(2).

7. *Compare* Virgin Islands v. Testamark, 528 F.2d 742 (3rd Cir. 1976) *with* United States v. Carden, 529 F.2d 443 (5th Cir. 1976). The court in the former case held that petty

failed to achieve their objective of uniform application of evidentiary rules in the federal court system.[8]

This comment will assess the impact of rule 609(a) from several perspectives. First, a thorough examination of Congressional records will be made to arrive at the Congressional intent behind the phrase "dishonesty or false statement" in rule 609(a)(2). Secondly, the case law which has developed in the first two years interpreting that clause will be reviewed. Thirdly, other problem areas in rule 609(a) will be discussed.

II. LEGISLATIVE HISTORY

The Federal Rules of Evidence are the product of thirteen years of study by numerous government committees.[9] One of the most vigorously disputed rules was rule 609(a).[10] As originally proposed by the Supreme Court, rule 609(a) permitted impeachment by evidence of convictions for crimes which would be: (1) "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."[11] This proposal was rejected by the Special House of Representatives Subcommittee on Criminal Justice.[12] The Subcommittee amended the Supreme Court Advisory Committee's version by adding to subsection one "unless the court determines that the danger of unfair prejudice outweighs the probative value of the evidence of the conviction."[13]

The proposed rule was then sent to the House Judiciary Committee where it again was amended, this time to permit impeachment of a witness by prior conviction only if the crime involved

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larceny was not a crime which involved "dishonesty or false statement" as used in rule 609(a)(2). The exact opposite decision was made in *Carden*.

8. S. REP. No. 93-1277, 93d Cong., 2d Sess. 4, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7051-52.

9. *Id.*

10. 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE 609-14 (1976).

11. *Id.* at 609-13. For a discussion of the history of the Federal Rules of Evidence prior to the Supreme Court proposal, see S. REP. No. 93-1277, 93d Cong., 2d Sess. 4, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7051-52.

12. H. REP. No. 93-650, 93d Cong., 2d Sess. 4, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7075, 7084. This proposal followed existing case law more closely. *See, e.g.*, Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965); Gordon v. United States, 383 F.2d 936 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968). Under the above cases, the trial court judge was given the discretion to admit evidence of prior convictions after consideration of the (1) nature of the crime; (2) the time of conviction and the witness' subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of defendant's testimony; and (5) the centrality of the credibility issue.

13. H. REP. No. 93-650, 93d Cong., 2d Sess. 4, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7075, 7093.

"dishonesty or false statement."[14] In explaining this major change, the Committee stated that

> because of the danger of unfair prejudice in such practice and the deterrent effect upon an accused who might wish to testify, and even upon a witness who was not the accused, cross-examination by evidence of prior conviction should be limited to those kinds of convictions bearing directly on credibility, i.e., crimes involving dishonesty or false statement.[15]

Although this proposal radically differed from the original recommendation by the Supreme Court, the House passed it on to the Senate.

In the Senate, the bill was referred to the Senate Committee on the Judiciary, where proposed rule 609(a) again underwent a major transition. Agreeing with the House Judiciary Committee's fears of prejudice to the defendant, the Senate advocated a differentiation of defendant witnesses from non-defendant witnesses.[16] As to the former, the Committee allowed impeachment by prior conviction only if the offense involved "dishonesty or false statement."[17] For the first time, however, the phrase "dishonesty or false statement" was defined:

> [T]he committee means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement or false pretense, or any other offense, in the nature of crimen falsi the commission of which involves some element of untruthfulness, deceit or falsification bearing on the accused's propensity to testify truthfully.[18]

But, with respect to non-defendant witnesses, impeachment by prior convictions would be permitted not only by crimes involving "dishonesty or false statement," but also by crimes which were felonies.[19] The Committee added a safeguard by permitting impeachment by felony convictions "if, and only if, the court finds that the probative value of such evidence outweighs its prejudicial effect against the party offering the witness."[20]

Impeachment by any of the above methods was limited, how-

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14. *Id.*
15. *Id.* at 7084-85.
16. *See* S. REP. No. 93-1277, 93d Cong., 2d Sess. 4, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7051, 7061.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* But, the committee concluded that "proof of any prior offense otherwise admissible under rule 404 could still be offered for the purposes sanctioned by that rule." *Id.*

ever, to cross-examination.[21] Thus, if the accused did not testify, evidence of his prior convictions was barred.[22] But, if the defendant chose to testify, misrepresentations made in response to defense counsel's questions or in the course of cross-examination regarding the nature or existence of a prior conviction may be rebutted by evidence of the record of such prior convictions. Also, if the defendant made representations about "attitude toward or willingness to commit a general category of offense," such representations may be rebutted.[23] The Committee concluded, however, that the prosecution may not "circumvent the purpose of this rule by asking questions which elicit such representations from the defendant."[24]

Because of the variations between the rules as passed by the House and those passed by the Senate,[25] the bill was referred to the Joint Conference Committee for reconciliation. Subsequently, the rules were revised and approved, and became law on July 1, 1975.

Specifically, rule 609(a) was revised again, in a compromise measure. The Conference Committee adopted the Senate version, but added an amendment requiring that if the crime was a felony the court must weigh the probative value of the evidence against the prejudicial effect to the defendant.[26] Recognizing that the phrase "dishonesty or false statement" was ambiguous, the Committee's report approved the definition proposed by the Senate Judiciary Committee.[27] When the evidence offered is of a prior conviction for a crime which meets this definition, the court must automatically admit such evidence. There is no judicial discretion allowed under rule 609(a)(2).[28]

If, however, the prior conviction would fall under rule 609(a)(1), "the Conference determined that the prejudicial effect to be weighed against the probative value of the conviction is specifically the prejudicial effect *to the defendant.*"[29] The Committee specifi-

21. *Id.*

22. *Id. But see* comment to note 20 *supra.*

23. *Id.*

24. *Id.*

25. As stated in text, *see* text accompanying note 14 *supra,* the House version of rule 609(a) permitted impeachment only if the prior conviction was for a crime which involved "dishonesty or false statement." The Senate proposal would also allow impeachment if the crime was punishable by death or imprisonment for over one year. *See* text accompanying note 19 *supra.*

26. H. CONF. REP. No. 93-1597, 93d Cong., 2d Sess. 4, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7098, 7102.

27. *See* text accompanying note 18 *supra.*

28. H. CONF. REP. No. 93-1597, 93d Cong., 2d Sess. 4, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7098, 7103.

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

cally rejected considering any prejudicial effect to non-defendant witnesses.

> [T]he danger of prejudice to a non-defendant witness is outweighed by the need for the trier of fact to have as much relevant evidence on the issue of credibility as possible. Such evidence should only be excluded where it presents a danger of improperly influencing the outcome of the trial by persuading the trier of fact to convict the defendant on the basis of his prior criminal record.[30]

Rule 609(a) as finally adopted provides that evidence of a prior conviction for any crime involving "dishonesty or false statement" may always be used to impeach any witness during cross-examination.[31] Evidence of a prior felony conviction for a crime which does not involve "dishonesty or false statement" may be admitted for impeachment purposes only if the court determines that the probative value exceeds the prejudicial effect to the defendant.[32]

The presence of the words "only if the court determine[d]"[33] is a change from the rule as recommended by the House of Representatives Subcommittee. That Committee proposed to admit such evidence "*unless* the court determine[d] that the probative value exceed[ed] the prejudicial effect to the defendant."[34] Thus, under such wording, the court did not have to exercise its discretion to prevent prejudicial effects. The burden of showing a prejudicial effect was on the defendant, even though the evidence would most likely be offered by the prosecution.

The final version of rule 609(a), however, mandates a ruling by the court that the evidence does not have an overriding prejudicial effect. As a result, the proponent of the evidence, usually the prosecution, will have to persuade the court that the probative value outweighs the prejudicial effect to the defendant.[35]

The practical result of rule 609(a) is that, in a criminal case, a prior felony conviction will always be admissible to impeach a prosecution witness because there could not possibly be a prejudicial effect to the defendant.[36]

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30. *Id.*

31. 120 CONG. REC. H12253 (daily ed. Dec. 18, 1974) (Statement by House Subcommittee Chairman, William L. Hungate), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7108, 7110. This is subject to the time limitations imposed by rule 609(b).

32. *Id.*

33. *See* text accompanying note 20 *supra.*

34. *See* note 13 and accompanying text *supra* (emphasis added).

35. 120 CONG. REC. H12253 (daily ed. Dec. 18, 1974) (Statement by House Subcommittee Chairman, William L. Hungate), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7108, 7111.

36. But where the defendant is attempting to impeach a prosecution witness by a

III. JUDICIAL INTERPRETATIONS

Since the adoption of the Federal Rules of Evidence in July, 1975, the Federal Circuit Courts of Appeal have had numerous opportunities to apply rule 609(a)(2). A leading case dealing with the question of what crimes involve "dishonesty or false statement" is *United States v. Smith.*[37] Judge McGowan, in writing for the majority, applied the definition of "dishonesty or false statement" set out in the Joint Conference Committee Report.[38] The court concluded that "attempted robbery is not a crime involving 'dishonesty or false statement' within the meaning of rule 609(a)(2)."[39]

Similarly, the court rejected the government's contention that robbery should be admitted because it is an offense in the nature of "*crimen falsi.*"[40]

> [R]obbery may not be classified legitimately as an 'offense in the nature of crimen falsi.' Congress clearly intended the phrase to denote a fairly narrow subset of criminal activity. Moreoever, research into the derivation of the term 'crimen falsi' indicates that Congress's (sic) restrictive construction comports with historical practice. . . . [T]he expression has never been thought to comprehend robbery or other crimes involving force.[41]

Applying this rationale, the court followed an earlier ruling in *United States v. Millings,*[42] which held that prior convictions for carrying a pistol without a license and possession of heroin, both misdemeanors, did not involve "dishonesty or false statement."[43] In overruling the trial court, Justice Robb asserted that "intent to

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prior misdemeanor conviction, it must meet the definition of "dishonesty or false statement." *See* United States v. Thompson, 559 F.2d 552 (9th Cir. 1977).

37. 551 F.2d 348 (D.C. Cir. 1976).

38. *See* note 26 and accompanying text *supra.*

39. United States v. Smith, 551 F.2d at 362. Although attempted robbery could have been admitted under rule 609(a)(1), the prosecution attempted to get the evidence admitted under rule 609(a)(2) as involving "dishonesty or false statement." In this manner, the prosecution avoided the balancing test of rule 609(a)(1). It is interesting to note that the trial court did not apply the Federal Rules of Evidence, even though they were in effect at that time. 551 F.2d at 357.

40. BLACK'S LAW DICTIONARY 446 (rev. 4th ed. 1968), defines "crimen falsi" as:

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

41. 551 F.2d at 362.

42. 535 F.2d 121 (D.C. Cir. 1976).

43. *Id.* at 123.

deceive or defraud is not an element of either offense."[44] Therefore, these convictions merit the same treatment as a simple assault,[45] since none of the crimes would be peculiarly probative of credibility.

A literal reading of *Millings* would require that an intent to deceive or defraud actually be an element of the crime, not that the crime, in general, would be characterized as involving deceit or fraud.[46] Although the difference may seem purely semantic, the crimes which fit the definition under *Millings* are limited. Only those crimes which, by express statutory statement, require proof of an intent to deceive or defraud could be admitted into evidence under rule 609(a)(2). Not only would this interpretation narrow the field of convictions which may be used, it would also remove all of the uncertainty. Each jurisdiction's criminal statutes would limit impeachment by prior convictions to those crimes which required proof of an intent to deceive or defraud before a conviction could be had. Unfortunately, the *Smith* court did not take notice of that approach used in *Millings*.

Smith and *Millings* have been the only cases dealing with impeachment under rule 609(a) in the Circuit Court of Appeals for the District of Columbia. Although both decisions purport to be applying the definition of "dishonesty or false statement" as set forth in the Conference Committee's Report, there is a slight difference in interpretation. *Millings* would require deceit or fraud as a substantive element of the crime before it would be admitted under rule 609(a)(2). *Smith*, however, puts emphasis on the title of the offense and how it was committed, and if the method used to commit the crime was fraudulent or deceitful, it would be admissible.[47]

Similar decisions were handed down in two cases in the third circuit, both involving prior convictions for petit larceny. The court in *Virgin Islands v. Toto*[48] concluded that petit larceny does not fit into the class of crimes described by "crimen falsi," because it is not a crime "involving, or at least relating to, communicative, often verbal, dishonesty."[49] In a companion case, *Virgin Islands v. Testamark*,[50] decided the same day, the court merely reiterated its decision in *Toto*.

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44. *Id.*
45. *See* United States v. Belt, 514 F.2d 837 (D.C. Cir. 1975); Carlsen v. Javurek, 526 F.2d 202 (8th Cir. 1975).
46. *See* note 43 and accompanying text *supra*.
47. *See* 551 F.2d at 364, note 28.
48. Virgin Islands v. Toto, 529 F.2d 278 (3d Cir. 1976).
49. *Id.* at 281.
50. Virgin Islands v. Testamark, 528 F.2d 742 (3d Cir. 1976).

But, the *Toto* court did recognize that under some circumstances petit larceny could possibly fit the "crimen falsi" category. "It is conceivable that a conviction for petit larceny might subsume a crime in the nature of *crimen falsi,* e.g., 'petit' stealing by false pretenses. There is no indication that the petit larceny involved here was other than ordinary stealing."[51] In that respect, *Smith* and *Toto* are in agreement.

The difficulty of applying rule 609(a) is clearly exemplified by *United States v. Carden,* a Fifth Circuit decision which reached the conclusion opposite from that reached in *Toto.*[52] Treating rule 609(a) very lightly, the court simply stated that "the issue is whether the trial court erred by admitting evidence of a petty larceny conviction of appellant Roy Carden. We believe that this impeachment evidence was admissible since the crime at issue involved dishonesty."[53] Interestingly enough, the *Carden* court cited *Smith* as contradictory authority,[54] but concluded without explanation that even if this were error, it would not constitute grounds for reversal.[55]

A similar conclusion was reached in a Seventh Circuit case, *United States v. Papia.*[56] The defendant was charged with using extortionate means to collect a debt, and when he testified, the prosecution inquired into a prior misdemeanor conviction for theft. Not only did the defendant allege error in the admission into evidence of the conviction for impeachment, but also claimed the prosecution exceeded the permissible scope of questioning.[57] The latter argument was quickly rejected by the court. "We have no doubt that, if it was proper for the Government to cross-examine Basile at all about his prior misdemeanor conviction, no error was committed in eliciting from Basile the type of institution from which he stole the money. . . ."[58]

Applying rule 609(a)(2) to determine whether evidence of the misdemeanor conviction was admissible, the court quoted the Random House College Dictionary definition of dishonesty—"a disposition to lie, cheat or steal."[59] Thus, "a common sense approach to the

51. 529 F.2d at 281, note 3. Because this case came to trial before the Federal Rules of Evidence became effective, the statements concerning rule 609(a) are dicta.
52. 529 F.2d 443 (5th Cir. 1976).
53. *Id.* at 446.
54. *Id.*
55. *Id.*
56. 560 F.2d 827 (7th Cir. 1977).
57. *Id.* at 845.
58. *Id.*
59. *Id.*

language of rule 609(a)(2) would support the conclusion that Basile's prior conviction was admissible because theft is a crime involving 'dishonesty' within the common meaning of that term."[60] Because of the variance between the common meaning of "dishonesty" and that set forth by the Conference Committee, the court concluded that "reasonable men may disagree about whether a witness's (sic) propensity to steal reflects upon his honesty in a manner that bears adversely on his propensity to tell the truth."[61]

Despite the above analysis, the court sidestepped the issue in its ultimate decision. In a conference outside the presence of the jury, the trial judge was informed by the prosecution that the original charge on the prior conviction was forgery, but was plea bargained down to the misdemeanor theft charge.[62] Based upon this information, the court permitted the evidence to be used for the purpose of impeachment.[63]

By contrast, in *United States v. Ortega,* a Ninth Circuit decision, a misdemeanor conviction for shoplifting was not permitted to be used to impeach under rule 609(a)(2).[64] Although the decision quoted the explanation of "dishonesty and false statement" adopted in the Conference Committee's report, the court elected to:

> adopt the views of the Third Circuit in *Toto* because it accords with the expressed intent of the draftsmen of Rule 609, limiting the 'dishonesty and false statement' language to those crimes that involve some element of misrepresentation or other indicium of a propensity to lie and excluding those crimes which, bad though they are, do not carry with them a tinge of falsification.[65]

The cases cited above demonstrate that the paramount problem with rule 609(a)(2) is whether the "dishonesty or false statement" clause should include theft offenses. A number of state courts that have adopted rule 609(a)(2) have also faced the same issue.[66] Of those state courts that have held prior convictions for theft offenses admissible under rule 609(a)(2), most have followed the reasoning in *Toto* and *Papia.*

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60. *Id.* at 846.

61. *Id.* at 846-47.

62. *Id.* at 847. The prior conviction was actually for false statement and forgery on a loan application. *Id.*

63. *Id.* at 848.

64. 561 F.2d 803 (9th Cir. 1977).

65. *Id.* at 806.

66. *See, e.g.,* People v. Ray, 36 Ill. App. 3d 283, 343 N.E.2d 560 (1976) (misdemeanor theft); People v. Dee, 26 Ill. App. 3d 691, 325 N.E.2d 336 (1975) (armed robbery); Fletcher v. State, 340 N.E.2d 771 (Sup. Ct. Ind. 1976) (theft).

> Even the courts that reject the view that stealing, without more, involves "dishonesty" that bears on a witness's (sic) veracity, recognize that modern theft statutes may encompass criminal conduct that does fall within the ambit of Rule 609(a)(2). . . . Accordingly, these courts have adopted the rule that, when the statutory offense of which the witness was convicted does not require proof of fraud or deceit as an essential element of the crime, the prior conviction may yet be admitted under Rule 609(a)(2) if the proponent of the evidence bears the burden of showing that the conviction 'rested on facts warranting the dishonesty or false statement description.'[67]

A careful analysis of this reasoning reveals that it is consistent with the intent of Congress. The Conference Committee's definition merely requires "some element of untruthfulness, deceit, or falsification."[68] If the court, after examining the background of the prior conviction, finds such an element is present, even if not obvious by the description of the offense, it would be proper to admit evidence of that conviction.

This approach, however, is not totally fool-proof. The court must keep in mind that rule 609(a) deals with impeaching the credibility of witnesses by prior conviction—not by the circumstances which led to the prior conviction. In *Papia,* for example, the judge decided to admit evidence of the prior misdemeanor conviction because he was informed that the original charge had been forgery—which is specifically included in the Conference Committee's definition of crimes involving "dishonesty or false statement." But, the prior conviction was for petty theft, not for forgery. As a result, Papia was impeached by evidence of a crime separate and distinct from the crime for which he was convicted.

IV. Practical Requirements of Rule 609(a)

Apart from determining the meaning of "dishonesty or false statement" as used in rule 609(a)(2), courts have had other difficulties applying rule 609(a). One such problem involves the scope of questioning about prior convictions once it is determined that such convictions should be admitted. Two months after the Federal Rules of Evidence became effective, the Seventh Circuit dealt with that issue in *United States v. Harding.*[69] The defendant, on trial for the sale of cocaine, was questioned by the prosecution about a prior conviction for possession of marijuana. Rule 609(a)(1) permits the

67. United States v. Papia, 560 F.2d 827, 847 (7th Cir. 1977), *quoting* United States v. Smith, 551 F.2d 348, 364 at note 28 (D.C. Cir. 1976).

68. *See* note 18 *supra.*

69. 525 F.2d 84 (7th Cir. 1975).

use of evidence of this type after a determination by the court that the probative value of the evidence exceeds the prejudicial effect to the defendant. To avoid possible prejudicial effect, "the scope of the examination is strictly limited."[70] The law is well established that it is error to inquire about the details of prior criminal conduct.[71] The rationale behind this rule is that a prosecutor can convince a jury that the defendant committed the present crime because he has done so in the past:

> When the prior conviction is used to impeach a defendant who elects to take the stand to testify in his own behalf, two inferences, one permissible and the other impermissible, inevitably arise. The fact that the defendant has sinned in the past implies that he is more likely to give false testimony than other witnesses; it also implies that he is more likely to have committed the offense for which he is being tried than if he had previously led a blameless life. The law approves of the former inference but not the latter.[72]

This effect on the jury is even more profound when the prior offense and the present charge are similar. Therefore, when that is the case, the court must strictly control the questioning in order to prevent prejudice. In this regard, the *Harding* court stated, "Both the prosecutor and the court had a duty to minimize the risk that the jury would infer guilt on the cocaine charge from the fact of a recent conviction of a marijuana charge."[73]

Although the court in *Harding* did not define what the limitations upon the prosecution were, the Fifth Circuit Court of Appeals in *United States v. Tumblin* did.[74] The prosecutor in *Tumblin* not only inquired about specific details of the prior conviction, for example, length of confinement, length of time between arrests and defendant's history of unemployment, but also re-emphasized them during his closing argument. In holding the scope of questioning too broad and prejudicial, the court asserted that proper examination would have been confined to the:

> number, date, and nature of previous convictions on cross-examination. . . . The obvious significance of this questioning was not to damage defendant's credibility as a witness—the fact of conviction alone achieved that goal—but instead to suggest, quite impro-

70. *Id.* at 88.

71. United States v. Pennix, 313 F.2d 524 (4th Cir. 1963); United States v. Mitchell, 427 F.2d 644 (3d Cir. 1970); United States v. Dow, 457 F.2d 246 (7th Cir. 1972).

72. 525 F.2d at 89 (7th Cir. 1975).

73. *Id.* at 90.

74. 551 F.2d 1001 (5th Cir. 1977).

perly, that defendant was a man who had spent most of his young life committing and serving time for crimes. . . .[75]

Precisely because of the possibility of a prosecutor's misuse of evidence of a prior felony conviction, rule 609(a)(1) requires the court to balance the probative value of the evidence against the prejudicial effect to the defendant.[76] The rule, however, does not give any guidelines for the court when making this determination. Thus, the question of what is required of the judge was raised in *United States v. Mahone*.[77] The trial judge made a pretrial ruling, after argument by attorneys, that, "[I]f the defendant takes the stand and testifies, the Court will permit, on the basis of the record now before it, impeachment of this defendant in the normal manner by the robbery conviction."[78]

The defendant argued "that the court erred by not making an explicit determination on the record that the probative value of the evidence outweighed its prejudicial effect to the defendant."[79] Although the appellate court did not agree with the appellant's contention, the court did "urge trial judges to make such determinations after a hearing on the record, . . . and to explicitly find that the prejudicial effect of the evidence to the defendant will be outweighed by its probative value."[80]

When making this determination, the court suggested that judges apply the factors articulated by Judge Burger in *Gordon v. United States*.[81] These factors are: (1) the nature of the crime; (2) the time of conviction and the witness' subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of defendant's testimony; and (5) the centrality of the credibility issue.[82]

V. CONCLUSION

The rationale behind rule 609(a) is two-fold. First, it is important that the trier of fact have all possible information before ruling on a defendant's guilt. But, it is highly important that the trier of fact also have the benefit of the defendant's testimony, and the

75. *Id.* at 1004.
76. FED. R. EVID. 509(a)(1).
77. 537 F.2d 922 (7th Cir. 1976).
78. *Id.* at 928.
79. *Id.*
80. *Id.* at 929.
81. 383 F.2d 936 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968).
82. *Id.* For an in-depth discussion of the application of each factor, *see* 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE 609-62 (1976).

testimony of any witnesses for the defendant. Secondly, the jury should also be informed about the character of a witness who asks the jury to believe his testimony.[83]

In attempting to accomplish these goals, rule 609(a) builds on the assumption that a witness' record of prior convictions is indicative of a propensity to testify falsely. "[T]he reason for disbelieving the witness is his supposed readiness to lie inferred from his general readiness to do evil which is predicated upon his former conviction of a crime."[84]

There is considerable debate, however, over whether this is a valid assumption.[85] Indeed, the assumption does not seem to reconcile with one of the goals of this country's criminal justice system—rehabilitation of the criminal. However, it may be that Congress lacks faith in the ability of the present penal system to rehabilitate offenders. It is ironic that after being convicted of a crime, even one as minor as petty theft, and then serving the imposed sentence, the same court system which punished the offender will permit evidence of that conviction to impeach unless the requisites of rules 609(b) or 609(c) are met.[86]

Rule 609(a) also comes dangerously close to contradicting the cornerstone of our criminal justice system—that an accused is presumed innocent until proven guilty. The practical effect of making a defendant choose between testifying, knowing that the jury may be informed of prior convictions, and not testifying, in which case the jury will receive only one side of the story, is to prematurely stamp the defendant guilty. Studies indicate that the introduction of past convictions increases the rate of conviction by twenty-seven per cent. Likewise, failure of the defendant to testify results in a thirty-seven per cent increase in convictions.[87]

With the above facts in mind, it is hard to see the real need for rule 609(a). The most just rule would not permit prior convictions of the defendant to be used as a means of impeachment at all.

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83. United States v. Garber, 471 F.2d 212 (5th Cir. 1972).

84. Ladd, *Credibility Tests—Current Trends*, 89 U. PA. L. REV. 166, 176 (1940).

85. R.G. Spector, *Impeaching The Defendant By His Prior Convictions And The Proposed Federal Rules Of Evidence: A Half Step Forward And Three Steps Backward*, 1 LOY. CHI. L.J. 247 (1970).

86. FED. R. EVID. 609(b) and 609(c). Rule 609(b) provides, in part, that "evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the release of the witness from confinement. . . ." Rule 609(c) provides, in part, that "evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a substantial showing of rehabilitation. . . ."

87. Spector, *supra* note 85, at 249-50.

Although the need to protect society from crime is great, so is the need to protect an accused's right to a fair trial. One should be convicted upon the facts presented by the prosecution, not upon prior convictions. As the studies cited above indicate, evidence of a defendant's prior convictions has an adverse effect on the jury which cannot be overlooked. The probability that a jury will convict a defendant because of the defendant's past criminal activities is so great that the ability of a defendant in such a predicament to obtain a fair trial is suspect.

It does not appear, however, that Congress is willing to adopt the position that evidence of prior convictions should not be admissible to impeach a defendant's credibility. Until such time, rule 609(a) will permit impeachment by evidence of prior conviction for any crime which involves some element of "dishonesty or false statement," as well as by any crime which is punishable by imprisonment in excess of one year, following an explicit ruling by the court that the probative value exceeds the prejudicial effect to the defendant.

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