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## WHAT WENT WRONG WITH FRE RULE 609: A LOOK AT HOW JURORS REALLY MISUSE PRIOR CONVICTION EVIDENCE

ROBERT D. DODSON\*

### I. INTRODUCTION

Lawyers are a tricky group. We talk in a language all our own using catch phrases such as “summary judgment,” “proximate cause” and “rule against perpetuities” as if these terms had some magical, mystical meaning. We have elaborate systems of rules and procedures which guide the everyday operation of the legal system. The rules are often so difficult and complex that many lawyers and judges do not even fully understand them. Problems arise in our system when we ask ordinary people to come into our world and use our language and rules to resolve conflicts. Jurors with no legal training may not understand the myriad of rules and language we throw at them during the course of a trial. Moreover, jurors may not agree with these rules and may ignore a judge’s instructions in order to reach a verdict they feel is more fair and just. Such is the case with Rule 609 of the Federal Rules of Evidence (“FRE”).

The current version of Rule 609 provides that evidence showing a criminal defendant has been convicted of prior crimes is generally admissible to attack the defendant’s credibility when he or she testifies.<sup>1</sup> There are three major exceptions limiting the use of prior convictions to impeach a witness.<sup>2</sup> First, a court may not allow such prior conviction evidence if the prejudicial effect of the evidence outweighs its probative value.<sup>3</sup> Second, only convictions within the last ten years

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1. See FED. R. EVID. 609(a) (allowing prior conviction evidence to be used against any witness in either civil or criminal cases). This paper discusses only how the rule applies in criminal cases to impeach the defendant when he or she takes the stand.

2. The rule also provides other exceptions. Evidence of conviction cannot be used when a pardon, annulment, or certificate of rehabilitation is given. FED. R. EVID. 609(c). Evidence of a conviction in a juvenile court is generally not admissible. See FED. R. EVID. 609(d).

3. FED. R. EVID. 609(a). This is not required when the prior crimes involved dishonesty or false statements. *Id.*

may be used to impeach the defendant's credibility.<sup>4</sup> Third, only misdemeanor convictions which involved dishonesty or false statements or felony convictions may be used.<sup>5</sup> Various states have adopted evidence rules which have similar effects with some important differences.<sup>6</sup>

A number of important goals and policies underlie Rule 609. Traditionally, it was argued that prior convictions were probative of a witness's credibility.<sup>7</sup> Without hearing such evidence a jury might conclude a criminal defendant led a blameless, honest life and was unlikely to lie on the witness stand.<sup>8</sup> If a criminal defendant has prior convictions a jury should know about these convictions in order to more accurately weigh the testimony given.<sup>9</sup> These concerns are balanced against the defendant's right to a fair trial. Whenever prior conviction evidence is allowed the jury may misuse this evidence and conclude that the defendant's propensity to commit crimes means he or she must have committed the present crime with which he or she is charged.<sup>10</sup> Thus, when the prosecution uses the evidence only as it reflects on the defendant's credibility, such evidence should not be used to infer the defendant's propensity to commit crimes makes it probable he or she committed this crime.<sup>11</sup> Nevertheless, such limiting instructions are not likely to have any effect on jurors.<sup>12</sup> It is widely accepted that in all likelihood a jury will consider the evidence for improper purposes.<sup>13</sup> Because of the potential for unfair prejudice many criminal defendants choose not to testify.<sup>14</sup> Such a decision may also have a negative impact on the jury.<sup>15</sup>

It is these competing and largely contradictory concerns that have been at the heart of the debate over the admissibility of prior convictions in criminal cases. This article examines how various courts and legislatures have attempted to balance these concerns. I begin, in Part II, by examining the common law rules used in the Federal courts

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

5. FED. R. EVID. 606(a) and (b).

6. See discussion *infra* notes 88-236 and accompanying text.

7. See JOHN H. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 519 (1979).

8. See Victor Gold, *Impeachment by Conviction Evidence: Judicial Discretion and the Politics of Rule 609*, 15 CARDOZO L. REV. 2295, 2297 (1994).

9. *Id.*

10. See Note, *Rule 609: Impeachment By Evidence of Conviction of Crime*, 12 TOURO L. REV. 495, 496 n.3 (1996).

11. See MICHAEL R. Fontham, *TRIAL TECHNIQUE AND EVIDENCE*, § 7-27 (1995).

12. *Id.*

13. *Id.* Professor Fontham states "The restriction of purpose is illusory, because a jury is likely to consider the evidence in determining guilt as well as credibility." *Id.*

14. *Id.*

15. See H. Richard Uviller, *Credence, Character, and the Rules of Evidence Seeing Through the Liar's Tale*, 42 DUKE L.J. 776 (1993).

before the enactment of the FRE. I then discuss the debate in Congress over the FRE and look at the approach taken by the drafters of the FRE both before and after the 1990 Amendment to the FRE. Part III of this article examines various state approaches to the problem. Specifically, this article concentrates on North Carolina, Hawaii, Pennsylvania, Kansas, Georgia, Montana, and California, as each of these states depart from the FRE and have taken different approaches to the problem. In Part IV, I consider the English approach which varies significantly from the American approach at both the state and federal levels. Part V attacks the assumptions behind Rule 609. Finally, Part VI reveals what is wrong with allowing prior conviction evidence in a criminal case.

I conclude by arguing that the various American approaches to the admission of prior convictions are largely inconsistent with bedrock principles ingrained in American criminal law. The current rules allowing prior convictions to be admitted should be dropped in favor of a categorical rule barring the admission of prior convictions for impeachment. Current rules, generally allowing prior conviction evidence, place a premium on efficiently convicting people. Moreover, the current approach is based on unfounded and false assumptions about jury behavior. Good reasons exist to abandon the approach in FRE in favor of a rule barring the use of prior conviction evidence much like the rules adopted in England, Hawaii and a handful of other jurisdictions.

## II. THE FEDERAL APPROACH TO IMPEACHMENT WITH PRIOR CONVICTIONS

Under the common law, a criminal defendant was not allowed to testify on his or her own behalf.<sup>16</sup> However, in the United States it has long been recognized that the Constitution gives a criminal defendant the right to participate in his or her defense and take the stand if he or she chooses.<sup>17</sup> The Court has also recognized that evidence of prior convictions may not be used to prove that the defendant has a propensity to commit crimes nor that he or she therefore committed the crime with which he or she is currently charged.<sup>18</sup> However, there is no constitutional requirement restricting the use of prior conviction evidence to impeach a criminal defendant's credibility as a witness.<sup>19</sup>

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16. See *infra* note 237.

17. See *Lewis v. United States*, 146 U.S. 370 (1892).

18. See *Michelson v. United States*, 335 U.S. 469, 475-76 (1948).

19. *Id.*

The current version of FRE Rule 609 was developed from this constitutional backdrop. Prior to 1965, circuit courts used various rules to determine if prior conviction evidence should be admissible, but the general rule was that most prior conviction evidence was admissible to impeach criminal defendants.<sup>20</sup> In 1965, the D.C. Circuit handed down *Luck v. United States*, which significantly influenced the way circuit courts viewed prior conviction evidence.<sup>21</sup> The decision in *Luck* had significant influence on the drafters of the FRE.<sup>22</sup> In *Luck*, the D.C. Circuit interpreted an evidence statute which provided in relevant part: "No person shall be incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of a crime, but such fact may be given in evidence to affect his credit as a witness, either by cross-examination of the witness or by evidence."<sup>23</sup>

The D.C. Circuit Court interpreted the statute as giving the trial court judge the discretion to exclude relevant evidence if the prejudicial effect substantially outweighed the probative value of the evidence.<sup>24</sup> The court also noted the dilemma to a criminal defendant when impeachment is allowed through prior conviction evidence.<sup>25</sup> Nevertheless, the Circuit Court held that such evidence is ordinarily admissible, but it warned that it is more important for a jury to "hear the defendant's story" than to know of a prior conviction.<sup>26</sup> The court's approach in *Luck* was a compromise.<sup>27</sup> The court neither allowed nor excluded *per se* prior conviction evidence offered to impeach.<sup>28</sup> Instead, the court adopted a balancing approach that gave significant discretion to trial judges in determining whether prior conviction evidence should be admitted or excluded.<sup>29</sup> The *Luck* case was significant because it marked one of the first times an American court was willing to acknowledge the prejudicial effect of prior conviction evidence, and it empowered trial judges to exclude such evidence in certain cases.

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20. See C. McCORMICK, *McCORMICK ON EVIDENCE*, § 43 (3d. ed. 1983).

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

22. See Gold, *supra* note 8, at 2299-2301.

23. D.C. CODE ANN. § 14-305 (1998).

24. *Luck*, 348 F.2d at 767-68.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 769. See also Leslie L. Hayes, *Prior Conviction Impeachment in the District of Columbia: What Happened When the Courts Ran Out of Luck?*, 35 CATH. U. L. REV. 1157, 1159-1160 (1986) (stating the court's interests in adopting an approach which neither automatically included nor excluded prior conviction evidence).

29. *Luck*, 348 F.2d at 767-68.

Following *Luck*, other circuit courts began to use the *Luck* balancing approach.<sup>30</sup> In 1970, Congress changed the evidence rule interpreted in *Luck* and removed all discretion from courts to exclude prior conviction evidence for impeachment.<sup>31</sup> Nevertheless, the *Luck* doctrine remained important throughout the drafting of the FRE. The preliminary draft of Rule 609 rejected the reasoning in *Luck* and did not rely on the *Luck* doctrine.<sup>32</sup> Under this initial draft, trial judges had no discretion to exclude admissible prior conviction evidence for impeachment.<sup>33</sup>

After hearing criticism on the initial draft<sup>34</sup>, a second version of FRE Rule 609(a) was completed in 1971.<sup>35</sup> The second draft was essentially the same as the first draft, but specifically incorporated the doctrine in *Luck*. This draft allowed discretion to exclude otherwise admissible prior conviction evidence if "the judge determines that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice."<sup>36</sup> Following the second draft of the FRE and Rule 609 the drafters received more criticism.<sup>37</sup> The drafters eventually submitted a draft of FRE Rule 609 to Congress which did not incorporate the doctrine in *Luck* and provided for no discretionary review of prior conviction evidence by trial judges.<sup>38</sup> After debate and substantial revision by the House Judiciary Committee, a version of FRE Rule 609 was drafted which allowed impeachment with prior

30. See, e.g., *United States v. Greenberg*, 419 F.2d 808, 809 (3d Cir. 1969); *United States v. Allison*, 414 F.2d. 407, 411-12 (9th Cir. 1969).

31. See D.C. CODE ANN. § 14-305. Section 14-305 mandates that all prior conviction evidence be admitted for impeachment purposes. *Id.*

32. Preliminary Draft of Proposed Rules of Evidence for United States District Courts and Magistrates, 46 F.R.D. 161, 295-296 (1969). In relevant part, Rule 609(a) provided:

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

*Id.*

33. *Id.* at 296-99 (advisory committee notes).

34. See Gold, *supra* note 8, at 2299-2301.

35. Revised draft of Proposed Rules of Evidence for the United States Courts and Magistrates, 51 F.R.D. 315, 391 (1971) (revised draft). In relevant part, the rule provides:

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

*Id.*

36. *Id.*

37. See Gold, *supra* note 8, at 2301-02.

38. RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES, 56 F.R.D. 183, 269 (1972).

convictions "only if the crime involved dishonesty or false statement." This draft was submitted to the full House for debate.<sup>39</sup>

A review of the House debate is revealing. Representatives expressed many concerns over issues of fairness to both the prosecution and to the defendant.<sup>40</sup> Two amendments were eventually offered.<sup>41</sup> The First Amendment sought to expand the types of prior conviction evidence that could be used to include most crimes not just those which showed dishonesty or false statement.<sup>42</sup> Proponents of this amendment justified it on the ground that all prior crimes were relevant to a jury in evaluating a witness's credibility.<sup>43</sup> Proponents of this amendment argued that any prior criminal record evidenced a poor character that a jury should know about in its evaluation of the witness's testimony.<sup>44</sup> These proponents showed little concern for the rights of criminal defendants and down played the prejudicial effect of prior conviction evidence.<sup>45</sup>

A second amendment incorporated the *Luck* doctrine by giving judges the discretion to exclude unduly prejudicial prior conviction evidence.<sup>46</sup> The primary purpose of the second amendment was to insure that a trial judge could exclude evidence of prior convictions that were unfairly prejudicial to the criminal defendant.<sup>47</sup> Proponents showed considerable concern for the rights of criminal defendants.<sup>48</sup>

39. See Gold, *supra* note 8, at 2302-03.

40. See 120 CONG. REC. 1414-15, 2375-2381 (daily ed. Jan. 30, 1974 & Feb. 6, 1974). Comments by House Representatives included:

I am in sympathy with what the gentleman is trying to do, but this troubles me to no end because what we are doing on the one hand is supposedly giving something to a defendant, and with the way the prosecutions are going today, taking a lot away from him by not being able to discredit government witnesses except within a very limited scope.

*Id.* at 2378 (daily ed. Feb. 6, 1974) (statement by Rep. Brasco).

41. *Id.* at 2375-81.

42. *Id.* at 1414-15.

43. *Id.* at 2376. Comments by Rep. Hogan are revealing. He stated *inter alia*:

Should a witness with an antisocial background be allowed to stand on the same basis of believability before juries as law-abiding citizens with unblemished records? I think not. . . This is not to say that people with criminal records necessarily lie, but is to say that juries should weigh the criminal record in determining credibility. . . Personally I am more concerned about the moral worth of individuals capable of engaging in such outrageous acts as adversely reflecting on a witness' character than I am of thieves and that comparison justifies any amendment. . . .

*Id.* (statement of Rep. Hogan).

44. *Id.*

45. *Id.*

46. *Id.* at 2377. The amendment provided that only if a crime was punishable death or year or more and the "court determines that the danger of unfair prejudice outweighs the probative value of the evidence of the conviction" would it be allowed. *Id.*

47. *Id.* at 2377-79.

48. *Id.* at 2375-81. Referring to rule which allowed judicial discretion and expanded those convictions which could be used to impeach, Rep. Dennis stated:

Now Mr. Chairman, that is one of the most unfair rules of law that we have. . . I spent 4 years as a prosecuting attorney in the State of Indiana, prosecuting on behalf of the State. I

Representative Wiggins suggested that because of the potential for unfair prejudice to the criminal defendant, a separate rule should be drafted which pertained only to criminal defendants.<sup>49</sup> Eventually, both amendments failed and the original version of the bill passed in the House.<sup>50</sup> Impeachment by prior conviction evidence became not only a popular topic in the law reviews but was a political debate unto itself. Professor Gold points out that the House debate on Rule 609 alone consumed more pages in the Congressional Record than the debate over the rest of the FRE rules combined.<sup>51</sup>

A similar debate ensued in the Senate. After substantial debate and discussion in the Senate Judiciary Committee<sup>52</sup>, a revised version of FRE Rule 609 was adopted.<sup>53</sup> The revised version of the bill made all crimes showing dishonesty or false statement admissible.<sup>54</sup> The version also allowed a criminal defendant to be impeached with prior conviction evidence if the crime was punishable by death or imprisonment for over a year and the probative value of the evidence outweighed its prejudicial effect.<sup>55</sup> An amendment was offered which would have removed the discretion of the courts to exclude prior conviction evidence and which would have allowed all prior conviction evidence punishable by death or imprisonment for over a year.<sup>56</sup> A sharp debate ensued on the Senate floor.<sup>57</sup> Most of the comments centered around the need to protect society and balance the rights of criminal defendants.<sup>58</sup> There was also considerable debate concerning

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spent another year in the Army as a judge advocate officer, prosecuting for the Government, and I have defended a lot of defendants in criminal cases since. My experience is that, from either side of the table, this is utterly unfair. . . Studies have shown that the one single reason, the one greatest reason, for miscarriages of justice is faulty eyewitness testimony. However, about the next highest is this very rule, because people are either frightened off the stand, and do not tell their story, or else they take the stand and are crucified by being asked about entirely irrelevant offenses. . . All we are doing here is holding those questions down to crimes which do in fact bear on credibility [referring to the original rule from the judiciary committee] which is the theory of asking him anything at all, and we are preventing prosecution just because the man has a bad character.

*Id.* at 2377 (statement of Rep. Dennis).

49. *Id.* at 2379. Rep. Wiggins stated *inter alia*:

The difficulty here is we are dealing with a complex problem and are trying to fashion a single rule adequate to take care of the problem. It suggests to me further draftsmanship is necessary to spin off criminal cases from civil cases. . . But let us not underestimate for one moment the prejudicial impact of permitting an inquiry into unrelated prior crimes by a man who is a party defendant in a criminal trial.

*Id.* (statement by Rep. Wiggins).

50. *Id.* at 2394.

51. See Gold, *supra* note 8, 2302-03.

52. *Id.* at 2304-05.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. See 120 CONG. REC. 37076-83 (daily ed. Nov. 22, 1974).

58. *Id.* Senator McClellan stated:



a judge's limiting instruction and whether these instructions would have any real effect.<sup>59</sup>

Eventually, the amended version of FRE 609(a) passed by a narrow margin.<sup>60</sup> Because the Senate and House version of FRE Rule 609(a) varied significantly, the Conference Committee had the task of reconciling the two versions.<sup>61</sup> The text of the reconciled version of FRE Rule 609 provided:

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.<sup>62</sup>

The reconciled version of FRE Rule 609 was a compromise between the House and Senate version.<sup>63</sup> The Committee's rule allowed prior conviction evidence of all felonies, but also incorporated the *Luck* doctrine giving the trial judge discretion to exclude the evidence if the prejudicial effect outweighed the probative value.<sup>64</sup> Crimes evidenc-

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Does not society deserve the kind of protection that will allow the jury to have these facts – so that it can properly choose between the man who says, "I saw him there; I saw him commit the crime," and the man who says, "I did not do it?" Are we going to once again say to society, "You have no protection any more?" Why do we keep going so far? The further we go in loosening up the law, the more and more crime increases. Will we never learn? Everything today is being done to find some way to protect the criminal, while society is forgotten.

*Id.* at 37081 (statement by Sen. McClellan). Senator Kennedy stated:

Mr. President, all authorities agree that the greatest source of prejudice to a defendant is a prior felony conviction. Thus many innocent defendants will not take the stand to testify in their own defense, if a prior felony conviction can be used against them. Jurors may conclude that the defendant is guilty because he has not taken the stand. On the other hand, if the defendant does not testify, the jury may base its verdict on his prior conviction, rather than solely on the evidence before it.

*Id.* at 37080 (statement by Sen. Kennedy).

59. *Id.* Senator Hruska stated:

There may be some prejudice to the defendant, I recognize, in admitting evidence that the defendant has previously been convicted of a felony. But to a substantial degree, this prejudice can be instigated by an instruction to the jury that the prior convictions are admitted only for the purpose of impeaching the credibility of the witness and not to prove any propensity on the part of the defendant to be a felon.

*Id.* at 37077 (statement by Sen. Hruska). Senator Hart responded:

[D]oes anyone really seriously think that a careful instruction to the jury will serve to remove from the minds of the jurors the existence of the prior conviction? I do not think one has to have spent a lifetime in criminal litigation to know that we are kidding ourselves if we think that the instruction removes the poison.

*Id.* at 37078 (statement by Sen. Hart).

60. *Id.* at 37083. The vote was 38 to 33 with 29 Senators not voting. *Id.*

61. See Gold, *supra* note 8, at 2303-03.

62. FED. R. EVID. 609(a).

63. See Gold, *supra* note 8, at 2307.

64. FED. R. EVID. 609(a).

ing dishonesty or false statement were automatically admissible and the trial judge had no discretion to exclude the evidence regardless of its prejudicial effect.<sup>65</sup> This compromised version of FRE Rule 609 passed both the House and Senate and became effective in 1975.<sup>66</sup>

While FRE Rule 609 attempted to strike a compromise between the need to admit prior conviction evidence to impeach a witness and the accused's right to a fair trial, those favoring greater admission of prior conviction evidence got the better end of the compromise. Statistical studies have shown that the supposed safeguards of FRE Rule 609 have provided little, if any, real protection to criminal defendants.<sup>67</sup> Despite the rule's effect, the 1975 version of FRE Rule 609 remained the law until 1990 when a new version of FRE Rule 609 was enacted.<sup>68</sup>

The new version of FRE Rule 609 was sparked by a controversial Supreme Court decision, *Green v. Bock Laundry Machine Co.*<sup>69</sup> *Green* involved a civil plaintiff who was severely injured when his arm was caught in a large dryer and severed.<sup>70</sup> The defense used prior conviction evidence to impeach the plaintiff.<sup>71</sup> The jury awarded no damages apparently because of the prior conviction evidence.<sup>72</sup> The court noted that reading FRE Rule 609 literally, it provided discretion to trial judges to exclude prejudicial evidence only when evidence affects the defendant.<sup>73</sup> The rule literally provided no protection to civil plaintiffs but would afford protection to civil defendants.<sup>74</sup> The Court reasoned that Congress could not have intended such a result because it made no sense to allow impeachment of a civil defendant and not a civil plaintiff.<sup>75</sup> Relying on the rule's legislative history, the Court concluded when Congress used the word "defendant" in FRE Rule 609 it must have intended this to mean only a criminal defendant.<sup>76</sup> Accordingly, the Court held that FRE Rule 609 gave trial courts no discretion to exclude otherwise admissible prior conviction evidence in civil cases.<sup>77</sup>

In amending FRE Rule 609, Congress sought to overrule the Court's decision in *Green* and give trial courts the discretion to ex-

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65. *Id.*

66. *Id.*

67. See discussion *infra* notes 279-382 and accompanying text.

68. See 129 F.R.D. 347 (1990)(amendments to the FED R. EVID. 609).

69. *Green v. Bock Laundry Machine Co.*, 490 U.S. 504 (1989).

70. *Id.* at 506.

71. *Id.*

72. *Id.*

73. *Green*, 490 U.S. at 527 (Scalia, J., Concurring).

74. *Id.* at 510-11.

75. *Id.* at 522-27.

76. *Id.* at 527.

77. *Id.*

cluded prior conviction evidence in civil cases.<sup>78</sup> Despite a mountain of evidence showing prejudicial effect of prior conviction evidence in criminal cases,<sup>79</sup> the amended version of FRE Rule 609 had little effect on criminal cases.<sup>80</sup> The amended version of the rule provides in relevant part:

For the purposes of attacking the credibility of a witness, (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; or (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.<sup>81</sup>

Despite mounting evidence that impeachment with prior conviction evidence against criminal defendants is highly prejudicial and cannot be cured by a judge's limiting instruction,<sup>82</sup> the drafters and Congress showed no concern for changing the rule as it pertained to criminal defendants. The current version of FRE Rule 609 has the same effect on criminal defendants as the 1975 version of the rule.<sup>83</sup> Crimes of dishonesty or false statement are automatically admissible regardless of punishment.<sup>84</sup> A trial judge does not have discretion to exclude impeachment by these types of crimes.<sup>85</sup> Any crime punishable by death or imprisonment for 1 year or more is admissible.<sup>86</sup> However, a trial judge may exclude this type of evidence when the prejudicial value of the evidence outweighs the probative value of the evidence.<sup>87</sup>

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78. See 129 F.R.D. at 353.

79. See discussion *infra* notes 279-382 and accompanying text.

80. See generally 129 F.R.D. at 353 (committee note explaining the new rule on cross-examination).

81. FED. R. EVID. 609(a).

82. See discussion *infra* notes 279-382 and accompanying text.

83. FED. R. EVID. 609(a).

84. *Id.*

85. *Id.*

86. *Id.*

87. FED. R. EVID. 609(a)(advisory committee notes).

### III. STATE APPROACHES TO IMPEACHMENT WITH PRIOR CONVICTIONS

#### A. *Expanding the Use of Prior Conviction Evidence: The North Carolina Approach*

North Carolina adopted the FRE with certain exceptions.<sup>88</sup> The North Carolina version of Rule 609 gives prosecutors more leeway than the FRE version of Rule 609.<sup>89</sup> North Carolina's version of Rule 609 provides in relevant part: "For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime punishable by more than sixty days confinement shall be admitted if elicited from him or established by public record during cross-examination."<sup>90</sup>

The North Carolina rule departs from the FRE in a number of important respects. First, the North Carolina rule expands the types of convictions that can be used for impeachment by including all convictions punishable by more than sixty days.<sup>91</sup> In contrast, FRE Rule 609 restricts prior convictions to those that are punishable by death or imprisonment for more than a year.<sup>92</sup> Second, unlike the FRE, there is no requirement in North Carolina that misdemeanor crimes evidence dishonesty, false statement, or deceit.<sup>93</sup> The only requirement is that the crime be punishable for more than sixty days.<sup>94</sup> Finally, prior conviction evidence is *per se* admissible in North Carolina.<sup>95</sup> North Carolina removes the trial court's discretion to exclude impeachment evidence of prior convictions if its prejudicial effect outweighs the probative value of the evidence.<sup>96</sup> The political compromise that was purportedly reached when Congress adopted the FRE in 1975<sup>97</sup> was not reached in North Carolina. The result is the rule that heavily favors prosecutors while giving criminal defendants little protection.

The current version of North Carolina Rule 609 is more restrictive than an earlier version of the rule.<sup>98</sup> Prior to 1983, there was no restriction on how far back a prosecutor could go to drag in prior conviction evidence.<sup>99</sup> In 1983, the rule was changed and the legislature adopted the ten-year period which is also applied in the federal

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88. N.C. R. EVID. 609(a).

89. *Id.*

90. *Id.*

91. *Id.*

92. FED. R. EVID. 609(a).

93. N.C. R. EVID. 609(a).

94. *Id.*

95. *Id.*

96. *Id.*

97. See discussion *supra* notes 40-66 and accompanying text.

98. See *Alston v. Herrick*, 76 N.C. App. 246, 251, 332 S.E.2d 720, 723-24 (1985).

99. *Id.*

rule.<sup>100</sup> Moreover, before 1983 North Carolina followed the common law and admitted all conviction evidence regardless of the offense or punishment.<sup>101</sup>

Despite changes to the rule, North Carolina's version of Rule 609 remains one of the broadest in the country. Most states which departed from the FRE have adopted rules which allow prosecutors to use prior conviction evidence to a more limited extent than allowed under the federal rule. North Carolina is one of only a handful of states which has expanded the use of prior conviction evidence.<sup>102</sup>

**B. *Disallowing Impeachment With Prior Conviction Evidence: The Approach in Hawaii, Pennsylvania, Kansas, Georgia and Montana***

Most states have adopted some version of the FRE but states have taken a number of alternative approaches to impeachment with prior conviction evidence. Hawaii was the first state to adopt a version of Rule 609 which departed from the FRE and disallowed the use of prior conviction evidence to impeach a criminal defendant.<sup>103</sup>

Hawaii's current limitation developed in the early 1970's and predated the adoption of a modified version of the FRE. In 1970, the Hawaii Rules of Evidence allowed for impeachment of a witness with evidence of "felonies, or of misdemeanors involving moral turpitude." The Hawaii Supreme Court showed concern for the rule noting that many criminal convictions had little if any probative value on a witness's credibility.<sup>104</sup> In *State v. Santiago*, the Hawaii Court addressed the constitutionality of impeaching a criminal defendant with prior conviction evidence, and ruled the practice unconstitutional based on the state constitution.<sup>105</sup> Citing *Bruton v. United States*<sup>106</sup> the Hawaii Court noted that there were some contexts in which a jury

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100. *Id.*

101. *Id.*

102. See generally MASS. GEN. LAWS ANN. ch. 233, § 21 (West 1997) (allowing impeachment with some misdemeanors not involving dishonesty); MO. ANN. STAT. § 491.050 (West 1997) (allowing impeachment with any criminal conviction); N.J. STAT. ANN. § 609 (West 1997) (allowing impeachment with any criminal conviction unless remote or for other cause); WIS. STAT. ANN. § 906.09 (West 1997) (allowing impeachment with any criminal conviction).

103. See *State v. Santiago*, 492 P.2d 657, 662 (Haw. 1971).

104. See *Asato v. Furtado*, 474 P.2d 288, 294 (Haw. 1970). The Court wrote "We think that there are a great many criminal offenses the conviction of which has no bearing whatsoever upon the witness's propensity for lying or truth telling, and that such convictions out not to be admitted for purposes of impeachment." *Id.*

105. *Santiago*, 492 P.2d at 657 (Haw. 1971).

106. *Bruton v. United States*, 391 U.S. 123, 135 (1968). The Court wrote "[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Id.*

was incapable of obeying a trial court's limiting instruction.<sup>107</sup> The court went on to argue that jurors would infer that because of his or her prior convictions the defendant must have committed the crime with which he or she was charged.<sup>108</sup> While a defendant always has a right to testify he would feel unduly restrained from doing so if he had prior convictions.<sup>109</sup> The court concluded that this fact would unconstitutionally penalize a defendant for exercising his or her right to testify and it held that the Hawaii evidence rules could not be read to impose such unconstitutional burdens on a defendant.<sup>110</sup> The court also believed prior conviction evidence provided little assistance to the jury in weighing the defendant's credibility as a witness.<sup>111</sup> It argued the prosecution had other available means by which to impeach a defendant or to show that his or her testimony should not be believed by jurors.<sup>112</sup>

Nothing in the Hawaiian constitution or the Hawaiian evidence code mandated the court's decision.<sup>113</sup> However, the court concluded that the rule allowing impeachment by prior conviction evidence did not afford a criminal defendant sufficient protection from unfair prejudice.<sup>114</sup> In reaching this conclusion, the Hawaiian court made a number of assumptions about how jurors reason without evidentiary support for these assumptions.<sup>115</sup> First, the court assumed a jury would use the information in an impermissible way, inferring from the fact that the defendant had a criminal record he or she must have a propensity to commit crimes and that he or she therefore committed the crime with which he is charged.<sup>116</sup> Second, the court assumed a jury could not or would not follow a judge's limiting instruction.<sup>117</sup> At the time *Santiago* was decided, some scientific evidence existed supporting these assumptions.<sup>118</sup> However, the Hawaii Supreme Court did not cite to this evidence and did not seem aware of it when they handed down their decision.<sup>119</sup> Today, however, scientific evidence

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107. *Santiago*, 492 P.2d at 660.

108. *Id.*

109. *Id.* The court stated "While technically the defendant with prior convictions may still be free to testify, the admission of prior convictions to impeach credibility 'is a penalty imposed by courts for exercising a constitutional privilege.' " *Id.* (citing *Griffin v. California*, 380 U.S. 609, 614 (1965)).

110. *Id.* at 660-61.

111. *Id.* at 661.

112. *Id.*

113. *Id.*

114. *Id.* at 660-61.

115. *Id.*

116. *Id.*

117. *Id.*

118. See discussion *infra* notes 279-316 and accompanying text.

119. *Santiago*, 492 P.2d at 660-61.

shows quite convincingly the court's assumptions were well-founded. Juries, in fact, ignore judges' limiting instructions and juries do use prior conviction evidence for impermissible purposes.<sup>120</sup>

Since the *Santiago* decision, Hawaii has adopted a version of the FRE which departs from the federal approach in Rule 609.<sup>121</sup> Consistent with *Santiago*, the current version does not allow a criminal defendant to be impeached with prior conviction evidence.<sup>122</sup> Like the English rule,<sup>123</sup> Hawaii allows a prosecutor to impeach a defendant with prior conviction evidence if the defendant brings his or her character into question.<sup>124</sup> In essence, the rule protects a criminal defendant so long as he or she does not try to bolster his or her credibility by misleading jurors or testifying in some way to a blameless life.<sup>125</sup>

Following Hawaii's lead, Pennsylvania adopted rules of evidence which prohibit impeachment by prior conviction evidence.<sup>126</sup> However, Pennsylvania courts have wavered as to how strictly the rule must be enforced. In *Commonwealth v. Gray*, the Pennsylvania Superior Court attempted to provide a criminal defendant with maximum protection under the Pennsylvania impeachment rule.<sup>127</sup> *Gray* involved a defendant who was charged with burglary for allegedly breaking into a store and stealing a television and some scales.<sup>128</sup> At trial the prosecutor asked the defendant about prior convictions but the defense attorney did not object.<sup>129</sup> The defendant was convicted

120. See discussion *infra* notes 279-382 and accompanying text.

121. See HAW. REV. STAT. § 626-1 (1998). The Hawaii version of 609(a) provides:

For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is inadmissible except when the crime is one involving dishonesty. However, in a criminal case where the defendant takes the stand, the defendant shall not be questioned or evidence introduced as to whether the defendant has been convicted of a crime, for the sole purpose of attacking credibility, unless the defendant has oneself introduced testimony for the purpose of establishing the defendant's credibility as a witness in which case the defendant shall be treated as any other witness as provided in this rule.

*Id.*

122. *Id.*

123. See discussion *infra* notes 237-275 and accompanying text.

124. HAW. REV. STAT. § 626-1.

125. *Id.*

126. See 42 PA. CONS. STAT. ANN. § 5918 (West 1997). The statute provides:

No person charged with any crime and called as a witness in his own behalf, shall be asked, or if asked, shall be required to answer, any question tending to show that he has committed, or been charged with, or been convicted of any offense other than the one wherewith he shall then be charged, or tending to show that he has been of bad character or reputation unless:

- (1) he shall have at such trial, personally or by counsel, asked questions of the witness for the prosecution with a view to establish his own good reputation or character, or has given evidence tending to prove his own good character or reputation; or
- (2) he shall have testified at such trial against a codefendant, charged with the same offense.

*Id.*

127. *Commonwealth v. Gray*, 443 A.2d 330 (Pa. Super. Ct. 1982).

128. *Id.* at 331-32.

129. *Id.* at 332.

and appealed his conviction on the ground his attorney was ineffective because he did not object to the use of prior conviction evidence.<sup>130</sup> The state conceded that the questioning at trial was improper, but argued the conviction should stand because the questioning was harmless error.<sup>131</sup> The state noted the evidence of guilt was strong and the case was tried before a judge, not a jury.<sup>132</sup> The superior court rejected the state's argument.<sup>133</sup> It held the evidence rule disallowing impeachment with prior conviction evidence applied regardless of who the trier of fact was.<sup>134</sup> The appellate court could not conclude that the failure to object was ineffective assistance of counsel. However, the court vacated the sentence and remanded the case to determine if the counsel's failure to object constituted ineffective assistance of counsel.<sup>135</sup>

Other Pennsylvania courts have been more reluctant in protecting criminal defendants. In *Commonwealth v. Kears*, a defendant on trial for robbery defended himself by testifying he was home sick the day of the robbery.<sup>136</sup> The defendant also produced two witnesses to verify his alibi.<sup>137</sup> Neither witness could testify to the exact day of the defendant's illness.<sup>138</sup> The trial court allowed prior conviction evidence because it believed the credibility of the defendant was a significant part of the state's case and it found the prejudicial effect of the prior conviction evidence minimal.<sup>139</sup> The defendant was convicted and appealed arguing that the trial court erred in allowing the prior conviction evidence.<sup>140</sup> The appellate court rejected this argument.<sup>141</sup> It held admission of prior conviction evidence was "within the sound discretion" of the trial court.<sup>142</sup> The court argued the trial judge properly weighed the competing interests and the appellate court could not conclude the judge abused his discretion.<sup>143</sup> Accordingly, it affirmed the conviction.<sup>144</sup> The Pennsylvania courts' use of a balancing test is odd given the plain language of the statute disallowing prior conviction evidence to impeach a criminal defendant. Nowhere in the stat-

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130. *Id.*

131. *Id.*

132. *Id.* at 332-33.

133. *Id.* at 333.

134. *Id.*

135. *Id.*

136. *Commonwealth v. Kears*, 473 A.2d 577, 578-79 (Pa. Super. Ct. 1984).

137. *Id.*

138. *Id.*

139. *Id.* at 579.

140. *Id.* at 578.

141. *Id.* at 582.

142. *Id.* at 579.

143. *Id.* at 580.

144. *Id.* at 582.



ute does the legislature provide for any balancing test, but Pennsylvania courts have consistently used such a test. Nevertheless, the rule in Pennsylvania provides criminal defendants with considerably more protection than Rule 609 of the FRE and similar state rules.

A similar approach was adopted in Kansas. The rule in Kansas provides:

If the witness be the accused in a criminal proceeding, no evidence of his or her conviction of a crime shall be admissible for the sole purpose of impairing his or her credibility unless the witness has first introduced evidence admissible solely for the purpose of supporting his or her credibility.<sup>145</sup>

Kansas courts have viewed the rule strictly and have afforded defendants protection only when there is no bolstering of credibility. Any assertion of good character by a defendant or his or her witness makes impeachment with prior conviction evidence appropriate. For example, in *State v. Johnson*, the defendant took the stand in a robbery case.<sup>146</sup> The defendant testified he was "presently telling the truth" and the trial court admitted prior convictions to impeach his credibility.<sup>147</sup> The court reasoned this statement was an attempt to emphasize his credibility and by making this statement, the defendant opened the door to impeachment with prior conviction evidence.<sup>148</sup> On appeal, the Court of Appeals of Kansas affirmed the holding and stated that any statement bolstering credibility opened the door to impeachment with prior conviction evidence.<sup>149</sup>

Other states with similar rules have afforded criminal defendants more protection. Georgia followed Hawaii's lead and enacted an evidence rule similar to that in Hawaii.<sup>150</sup>

In relevant part, the Georgia statute provides:

If a defendant testifies, he shall be sworn as any other witness and may be examined and cross-examined as any other witness, except that no evidence of general bad character or prior convictions shall be admissible unless and until the defendant shall have first put his character in issue.<sup>151</sup>

Unlike the rule under the FRE and in most states, Georgia law does not provide that a criminal defendant puts his or her character in issue merely by testifying at his or her own trial.<sup>152</sup> Instead, the defendant

145. KAN. CIV. PROC. CODE ANN. § 60-421 (West 1997).

146. *State v. Johnson*, 907 P.2d 144, 146 (Kan. Ct. App. 1995).

147. *Id.*

148. *Id.*

149. *Id.* at 146-147.

150. See GA. CODE ANN. § 24-9-20 (Harrison 1996).

151. *Id.*

152. See, e.g., *Height v. State*, 448 S.E.2d 726, 728 (Ga. Ct. App. 1994); *Wilkey v. State*, 450 S.E.2d 846, 847 (Ga. Ct. App. 1994).

must testify to his or her own good character, making misleading statements about his or her prior record or elicit testimony from other witnesses about his or her good reputation before a prosecutor may introduce prior conviction evidence.<sup>153</sup>

The Georgia rule gives the defendant considerably more protection from unfair prejudice than Federal Rule 609. It also provides greater protection than the rule in Pennsylvania or Kansas as interpreted by those states' courts. However, the Georgia rule affords a defendant protection only as long as he or she does not attempt to mislead a jury by bolstering his or her reputation.<sup>154</sup> When a defendant testifies as to his or her good character the prosecutor is free to use prior conviction evidence to impeach the defendant's credibility.<sup>155</sup> The Georgia Court of Appeals explained the bolstering exception in *King v. State*.<sup>156</sup> In *King*, the defendant was arrested for trafficking cocaine.<sup>157</sup> At trial, the defendant took the stand and testified on his own behalf.<sup>158</sup> On cross-examination the prosecutor asked the defendant if he knew the price of crack cocaine.<sup>159</sup> The defendant responded, "I don't smoke marijuana. I don't snort, shoot, or base no cocaine."<sup>160</sup> At that point the trial court determined the defendant had put his character in issue and the court allowed the prosecutor to present prior conviction evidence regarding other drug-related crimes.<sup>161</sup> The defendant was eventually convicted and appealed the conviction.<sup>162</sup>

On appeal, the court held the use of prior conviction evidence was proper.<sup>163</sup> It reasoned that because the defendant had previously been convicted of drug related charges, his answer to the prosecutor's question was deceptive and misleading.<sup>164</sup> The prosecutor's use of prior conviction evidence was proper because it showed directly that the defendant was untruthful.<sup>165</sup> By volunteering information that was misleading, the court held the defendant had put his character in issue and was no longer protected by the Georgia evidence law.<sup>166</sup>

Georgia courts have recognized other exceptions to the rule disallowing impeachment by prior conviction evidence against criminal de-

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153. See *Wilkey*, 450 S.E.2d at 847.

154. See, e.g., *King v. State*, 416 S.E.2d 842, 844 (Ga. Ct. App. 1992).

155. *Id.*

156. *Id.*

157. *Id.* at 843.

158. *Id.*

159. *Id.* at 844.

160. *Id.*

161. *Id.*

162. *Id.* at 843.

163. *Id.* at 844.

164. *Id.*

165. *Id.*

166. *Id.*

fendants.<sup>167</sup> These other exceptions basically follow those outlined in Rule 404(b) of the FRE. Rule 404(b) generally allows the prosecutor to use prior conviction evidence, regardless of whether the defendant testifies, when the evidence is offered to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. For the most part, Georgia law follows these exceptions.

Montana has gone further than any other state in disallowing impeachment with prior conviction evidence. The rule in Montana provides; "For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is not admissible."<sup>168</sup> The Montana rule is broad as it applies to all witnesses in civil and criminal cases. Moreover, the plain language of the rule appears to allow any witness, including a criminal defendant, to bolster his or her credibility. However, the courts in Montana have carved out exceptions to the rule. Most importantly, the courts have not allowed witnesses to bolster their credibility by making false statements about past convictions.<sup>169</sup> Thus, when a criminal defendant testifies that he or she is not the kind of person who could commit the crime with which he or she is currently charged, the courts have allowed prosecutors to impeach such witnesses with prior conviction evidence.<sup>170</sup> In addition, Montana courts have allowed prosecutors more latitude in bringing out the details of prior convictions without asking if the witness was convicted.<sup>171</sup> For example, in *State v. Martin*, the defendant was charged with various sex crimes against minors and called his wife to testify on his behalf.<sup>172</sup> In a previous case, the wife had perjured herself by corroborating an alibi and was convicted of perjury.<sup>173</sup> The trial court allowed the prosecutor to ask the defendant's wife if she had ever given false testimony in a case, but it did not allow the prosecutor to ask if she had been convicted for perjury or any other offense.<sup>174</sup> The Montana Supreme Court affirmed this decision holding the trial court's decision was proper under Montana evidence law.<sup>175</sup>

Despite these exceptions, the Montana courts have afforded criminal defendants considerable protection from the prejudicial effects of prior conviction evidence. However, the approach adopted by Ha-

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167. See, e.g., *Kilgore v. State*, 305 S.E.2d 82 (Ga. 1983) (allowing prior conviction evidence of similar crime to show identity); *Lord v. State*, 406 S.E.2d 137 (Ga. Ct. App. 1991) (allowing evidence of previous robbery to show identity of defendant).

168. MONT. REV. R. EVID. 609.

169. See, e.g., *State v. Austad*, 641 P.2d 1373 (Mont. 1982).

170. *Id.* at 1383-84.

171. See *State v. Martin*, 926 P.2d 1380, 1388-89 (Mont. 1996).

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

waii, Pennsylvania, Kansas, Georgia and Montana remains a minority view in the United States. Other than these five states, evidence rules in other states allow impeachment of a criminal defendant with prior conviction evidence to one degree or another.<sup>176</sup> The approaches in these five states have also received little support from law professors or legal scholars. Of the numerous law review articles written on FRE Rule 609 and similar state rules, few have considered evidence laws from these states.<sup>177</sup>

C. *Departing From the Federal Approach: California's Law on Impeachment With Prior Conviction Evidence*

Prior to 1982, section 788 of the California Evidence Code was similar to the current FRE approach taken in Rule 609. Section 788 allowed prosecutors to impeach a criminal defendant with prior conviction evidence.<sup>178</sup> The evidence code limited prior conviction impeachment to felonies.<sup>179</sup> In *People v. Beagle*, the California Supreme Court held that prior convictions were not admissible *per se* but were subject to a balancing test.<sup>180</sup> Section 352 of the California Evidence Code provides that otherwise admissible evidence may be excluded in the trial court's discretion "if its probative value is substantially outweighed by the probability that its admission will. . . create substantial danger of unfair prejudice. . . ." <sup>181</sup> Overruling a long line of decisions by the California courts of appeal, the court held

176. See ALA. R. EVID. 609; ARK. R. EVID. 609; ARIZ. R. EVID. 609; COLO. STAT. § 13-90-101; CONN. R. CMT. 609; DEL. CT. C.P.R. 609; FLA. ST. § 90.610; IDAHO R. REV. 609; ILL. ST. CH. 735 § 5/8-101; IND. ST. REV. 609; IOWA R. REV. 609; KY. REV. STAT. § 609; LA. C. E. ANN. art. 609.1; ME CODE R. § 609; MASS. GEN. LAWS ch. 233 § 21; MD R. EVID. 609; MICH. R. REV. MRE 609; MINN. ST. REV. Rule 609; MISS. REV. Rule 609; MONT. ST. 491.050; NEB. R. REV. ST. § 27-609; NEV. ST. 50.095; N.H. R. REV. Rule 609; N.J. R.E. 609; N.M. R. REV. Rule 11-609; N.Y. CRIM. PROC. § 60.40; N.D. R. REV. Rule 609; OHIO ST. REV. Rule 609; OKLA. ST. T. 12 § 2609; OR. R. REV. Rule 609; R.I. R. REV. Rule 609; S.C. R. REV. Rule 609; S.D. ST. § 19-14-12; TENN. R. REV. Rule 609; TEX. R. REV. Rule 609; UTAH R. REV. Rule 609; VT. R. REV. Rule 609; VA. ST. § 19.2-269; W. VA. R. REV. Rule 609; WASH. R. REV. E.R. 609; WIS. ST. 906.09; WYO. R. REV. Rule 609.

177. See Robert Banks, Jr., *Some Comparisons Between the New Tennessee Rules of Evidence and the Federal Rules of Evidence Part II*, 20 MEMPHIS ST. L. REV. 499 (1990); Steven L. Friedlander, *Using Prior Corporate Convictions to Impeach*, 78 CAL. L. REV. 1313 (1990); Gold, *supra* note 8; Edward J. Imwinkelried & Miguel A. Mendez, *Resurrecting California's Old Law on Character Evidence*, 23 PAC. L.J. 1005 (1992); Abraham P. Ordovery, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b) and 609(a)*, 38 EMORY L.J. 135 (1989); Thomas J. Reed, *Admission of Other Criminal Act Evidence After Adoption of the Federal Rules of Evidence*, 53 U. CIN. L. REV. 113 (1984); Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845 (1982).

178. See CAL. EVID. CODE § 788 (1966). In relevant part the code provides "For the purpose of attacking the credibility of a witness, it may be shown by the examination of the witness or by the record of the judgment that he has been convicted of a felony. . . ." *Id.*

179. *Id.*

180. *People v. Beagle*, 492 P.2d 1 (Cal. 1972)

181. *Id.* at 7.

section 788 was subject to the balancing test articulated in section 352.<sup>182</sup> The balancing test was similar to the one adopted by the D.C. Circuit in *Luck v. United States*<sup>183</sup> which the California court cited.<sup>184</sup>

*Beagle* involved a criminal defendant on trial for arson.<sup>185</sup> The trial court allowed the impeachment of Mr. Beagle with a prior conviction for writing bad checks.<sup>186</sup> The California Supreme Court affirmed the conviction.<sup>187</sup> The court reasoned that issuing bad checks tended to reflect poorly on Mr. Beagle's character and was relevant for that purpose.<sup>188</sup> In addition, the conviction was not remote as it was less than four years old.<sup>189</sup> On the other side of the scale, the court found little to indicate that admission of the conviction would prejudice Mr. Beagle since the nature of the prior offense was not one likely to inflame the jury.<sup>190</sup> The court provided guidance to trial courts weighing the probative value of prior conviction evidence against the prejudicial effect.<sup>191</sup> Citing *Luck v. United States*,<sup>192</sup> the court noted that crimes which involved deceit, such as fraud or stealing, reflect on the honesty of a witness.<sup>193</sup> However, acts of violence generally show little about a witness' honesty and are irrelevant for impeachment purposes.<sup>194</sup> The court also noted there were strong reasons for excluding prior conviction evidence when the conviction was for the same offense with which the defendant is currently charged.<sup>195</sup> Such evidence would very likely lead jurors to conclude that because a defendant committed the same crime in the past he must have also committed the one for which he is charged.<sup>196</sup> *Beagle* also made clear that even when prior conviction evidence is relevant to impeach a defendant, a trial court may exclude the evidence if it believes that admission of the evidence would persuade a defendant not to testify.<sup>197</sup> In reasoning similar to that used by the Hawaii Supreme Court to disallow such evidence on state constitutional grounds,<sup>198</sup> the California court noted that the defendant's version of what happened may be so im-

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182. *Id.*

183. See discussion *supra* notes 21-62 and accompanying text.

184. *Beagle*, 492 P.2d at 7.

185. *Id.* at 4.

186. *Id.* at 6.

187. *Id.* at 13.

188. *Id.* at 9.

189. *Id.* at 4, 6, 9.

190. *Id.* at 9.

191. *Id.* at 7-9.

192. See discussion *supra* notes 21-62 and accompanying text.

193. *Beagle*, 492 P.2d at 8.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. See discussion *supra* notes 103-125 and accompanying text.

portant that a judge should exclude the evidence so the defendant does not remain silent in fear of impeachment with prior convictions.<sup>199</sup> The court made clear that every case varied and discretion rested with the trial court in determining whether prior conviction evidence should be excluded.<sup>200</sup>

Following *Beagle*, cases continued to limit the use of prior conviction evidence.<sup>201</sup> In *People v. Antick*, the California Supreme Court overturned convictions for theft, burglary, assault with a deadly weapon and murder.<sup>202</sup> The court found the trial court abused its discretion in admitting prior conviction evidence against the defendant for two forgery convictions that were seventeen and nineteen years old.<sup>203</sup> The court noted that prior convictions provided "at best very weak evidence" of the defendant witness' credibility.<sup>204</sup> Writing for the court, Justice Sullivan concluded that the potential for jury abuse was great, especially in close factual situations.<sup>205</sup>

After *Beagle* and *Antick*, the California Supreme Court continued to adhere to its holdings in those cases.<sup>206</sup> Trial courts and intermediate appellate courts were reluctant in applying the rules and standards articulated in *Beagle*.<sup>207</sup> Nevertheless, the California Supreme Court

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199. *Beagle*, 492 P.2d at 8.

200. *Id.* at 7.

201. See Hank M. Goldberg, *The Impact of Proposition 8 on Prior Misconduct Impeachment Evidence in California Criminal Cases*, LOY. L.A. L. REV. 621, 623 n.16 (1991).

202. *People v. Antick*, 539 P.2d 43 (Cal. 1975).

203. *Id.* at 54-56.

204. *Id.* at 55.

205. *Id.* at 55-56.

206. See *People v. Barrick*, 654 P.2d 1243 (Cal. 1982) (holding defendant improperly impeached with evidence of prior conviction for same offense); *People v. Spearman*, 599 P.2d 74 (Cal. 1979) (holding defendant was improperly impeached with prior conviction evidence of narcotics sale because selling narcotics does involve element of dishonesty or deceit); *People v. Fries*, 594 P.2d 19 (Cal. 1979) (holding trial court erred in allowing impeachment with prior conviction for same offense as that charged); *People v. Woodard*, 590 P.2d 391 (Cal. 1979) (holding trial court abused discretion in allowing impeachment with prior manslaughter and possession of a gun because those crimes do not involve dishonesty and showed violence but deceit and attempts at mitigating prejudicial effect were inadequate); *People v. Rist*, 545 P.2d 833 (Cal. 1976) (holding trial court erred admitting prior convictions because convictions were too remote to be sufficiently probative of truthfulness).

207. See *People v. Rist*, 545 P.2d 833, 840 (Cal. 1976). The court stated that "*Beagle* has not been adhered to in a number of reported decisions." *Id.* The court went on to list several appellate decisions which it saw itself as overruling. *Id.* See also *People v. Rollo*, 569 P.2d 771, 774 (Cal. 1977). The court stated:

Twice in the past two years we have reviewed the origin and purpose of [the *Beagle*] rule, provided elaborate guidance in its application, and reaffirmed its mandate by reversing judgments of conviction on the ground that failure to exclude such evidence constituted a prejudicial abuse of discretion in the circumstances of each case . . . Surely we do not need to repeat that discussion so soon. By now it should be clear to all that when a defendant makes a timely objection to the introduction of evidence of a prior felony conviction for the purpose of impeaching his testimony, the trial court is under a duty (1) to determine the probative value of that evidence on the issue of the defendant's credibility as a witness, to appraise the degree of prejudice which the defendant would suffer from admission of the

continued to uphold its previous rulings and expanded on the doctrines expounded upon in *Beagle* and *Antick*.

In *People v. Fries*, the court ruled that it was reversible error for a trial court to permit a prosecutor to impeach a defendant with prior conviction evidence of the same or of a similar type of crime.<sup>208</sup> Writing for the majority, Chief Justice Bird reasoned that the potential for prejudice was acute since a jury would likely use the evidence to conclude that because the defendant committed the crime previously he committed the same offense again.<sup>209</sup> The Chief Justice wrote again for the California court in *People v. Spearman*.<sup>210</sup> Joined by all but two members of the court, Chief Justice Bird concluded that only felonies which contain a necessary element with the intent to "deceive, defraud, lie, cheat, steal . . ." are admissible.<sup>211</sup> Any other offenses would merely show the defendant had a propensity for violence, law breaking, etc., and such characteristics are not relevant to a jury in weighing a witness' credibility.<sup>212</sup>

In 1982, California enacted Proposition Eight popularly known as the "Victim's Bill of Rights."<sup>213</sup> This amendment to the California Constitution makes "any prior felony conviction" admissible for impeachment "without limitation."<sup>214</sup> On its face the amendment would appear to have negated the importance of *Beagle* and the line of cases which followed it.<sup>215</sup> Despite the wording of the amendment, the California Supreme Court has held that a trial court still has discretion to exclude prior conviction evidence when its prejudicial effect outweighs its probative value.<sup>216</sup>

In *People v. Castro*, the California court focused on § 28(d) of Proposition Eight.<sup>217</sup> Section 28(d) provides "Nothing in this section shall

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evidence, and (3) to weigh the foregoing two factors against each other and exclude the evidence "if its probative value (on the issue of credibility) is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice."

*Id.* The court then went on to criticize the trial judge for failing to properly apply the correct standard. *Id.*

208. *People v. Fries*, 594 P.2d 19 (Cal. 1979).

209. *Id.* at 23. In a later case, *People v. Barrick*, 654 P.2d 1243 (Cal. 1982), the court expanded this ruling. *Barrick* involved a defendant charged with auto theft. The defendant had prior convictions and the court held that admission of such evidence could not be "sanitized" by a trial court's refusal to allow the prosecutor to go into details of the crime. *Id.*

210. *People v. Spearman*, 599 P.2d 74 (Cal. 1979).

211. *Id.* at 78.

212. *Id.* See also *People v. Woodard*, 590 P.2d 391 (Cal. 1979) (holding that the *Beagle* standard applied when deciding whether impeachment with a prior conviction was appropriate when the witness was not the defendant).

213. See Goldberg, *supra* note 201, at 621.

214. CAL CONST. art. I, § 28(d) (enacted by Proposition 8).

215. See Goldberg, *supra* note 201, at 640.

216. *People v. Castro*, 696 P.2d 111, 117 (Cal. 1985).

217. *Id.*

affect any existing statutory rule of evidence relating to privilege or hearsay or Evidence code sections 352, 782, or 1103.”<sup>218</sup> From this provision, the California court reasoned that voters had not intended to deprive courts of the discretion to exclude prior conviction evidence.<sup>219</sup> The California court believed that to do so would present due process problems.<sup>220</sup> However, the court failed to explain why depriving courts of their discretion would violate the U.S. Constitution’s Due Process Clause.<sup>221</sup> In essence, the court affirmed the holding in *Beagle*.<sup>222</sup> The court argued that what voters intended when they enacted Proposition Eight was to abolish the *per se* exclusion rules developed in the line of post-*Beagle* cases.<sup>223</sup>

The *Castro* court also formulated a new test for admission of prior conviction evidence.<sup>224</sup> The court ruled that only prior convictions which evidenced “moral turpitude” were admissible.<sup>225</sup> Crimes which evidence moral turpitude are those which show “a readiness to do evil” by the defendant or show the defendant’s “bad character.”<sup>226</sup> The California court noted that this included offenses of moral depravity such as child abuse or molestation, torture and sometimes crimes of violence.<sup>227</sup> The court argued that although such offenses may not show untruthfulness or deceit, a juror could conclude from such offenses that a witness is “unworthy of credit” and should not be believed.<sup>228</sup>

Proponents of Proposition Eight were disappointed with the *Castro* decision.<sup>229</sup> Nevertheless, the passage of Proposition Eight greatly expanded the use of prior conviction evidence for impeachment.<sup>230</sup> Today, California courts have interpreted the California Constitution and *Castro* to allow impeachment of criminal defendants with prior convictions for assault and similar crimes,<sup>231</sup> escape,<sup>232</sup> child molesta-

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218. CAL. CONST. art I, § 28(d) (enacted by Proposition 8).

219. *Castro*, 696 P.2d at 117.

220. *Id.* at 118.

221. *Id.* The California Court’s reference to constitutional problems is odd considering that FRE 609 deprives the trial court of discretion in admitting prior convictions which involve dishonesty or deceit. Under FRE 609, such convictions are not subject to the normal balancing test and a trial court has no discretion to exclude such prior conviction. *Id.*

222. *Id.* at 114-117.

223. *Id.* at 117.

224. *Id.* at 118.

225. *Id.* at 118-19.

226. *Id.* at 119.

227. *Id.* at 119-20 n. 10.

228. *Id.* at 119.

229. See Jeff Brown, *Proposition 8 Origins and Impact – A Public Defender’s Perspective*, 23 PAC. L.J. 881, 903 (1992).

230. *Id.*

231. See, e.g., *People v. Armendariz*, 220 Cal. Rptr. 229, 232-33 (Cal. Ct. App. 1985).

232. See, e.g., *People v. Lang*, 782 P.2d 627, 639-40 (Cal. 1989).



tion,<sup>233</sup> statutory rape<sup>234</sup> and voluntary manslaughter.<sup>235</sup> The California rule has also expanded the use of prior convictions for impeachment over what is allowed under the FRE.<sup>236</sup>

#### IV. THE ENGLISH APPROACH TO IMPEACHMENT WITH PRIOR CONVICTIONS

Prior to 1898, a criminal defendant in England was considered incompetent and could not testify on his or her own behalf.<sup>237</sup> In 1898, the Criminal Evidence Act was enacted giving criminal defendants the right to testify.<sup>238</sup> This Act specifically disallowed prosecutors from impeaching criminal defendants by using prior convictions.<sup>239</sup> In relevant part, the Act provides:

A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence [sic] other than that wherewith he is then charged.<sup>240</sup>

In applying the rule, English courts have been rigid and have disallowed any questions which would lead a reasonable juror to believe that the defendant committed other offenses.<sup>241</sup> Prosecutors may not use a series of questions to elicit such information.<sup>242</sup> Nor may a prosecutor ask questions tending to show the defendant spent time in jail or prison.<sup>243</sup> If a prior conviction is disclosed, even accidentally, it is grounds to discharge the jury.<sup>244</sup>

Despite the strong policy objectives underlying the English rule on impeachment through prior convictions, there are a number of important exceptions. Most significantly, the English rules permit the defendant to be impeached with evidence of prior convictions when he or she puts his character in issue.<sup>245</sup> Prior conviction evidence may only be used in attacking the witness's credibility and cannot be used

233. See, e.g., *People v. Massey*, 237 Cal. Rptr. 734, 736-37 (Cal. Ct. App. 1987).

234. See, e.g., *People v. Flutcher*, 236 Cal. Rptr. 845, 848 (Cal. Ct. App. 1987).

235. See, e.g., *People v. Foster*, 246 Cal. Rptr 855, 857-58 (Cal. Ct. App. 1988).

236. James R. Adams, *Victims, Truth, and Detention - The People Spoke*, 23 PAC. L.J. 973, 998 (1992).

237. M.N. HOWARD ET AL., *PHIPSON ON EVIDENCE* § 18-16 (14<sup>th</sup> ed. 1990).

238. *Id.*

239. Criminal Evidence Act, 1898, 61 & 62 Vict., ch. 36 § 1.

240. *Id.* at § 1(f).

241. See HOWARD ET AL., *supra* note 237, at § 18-16.

242. *Id.*

243. *Id.*

244. *Id.*

245. See Criminal Evidence Act, 1898, 61 & 62, Vict., ch. 36 § 1(f)(ii). In relevant part the provision provides that a criminal defendant may be asked about character if:

[H]e has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character,

for any improper purpose.<sup>246</sup> In effect, the rule's exception still affords a criminal defendant protection so long as he or she does not actively attempt to mislead the jury into believing that he or she has a spotless record.<sup>247</sup> In addition, the defendant cannot attempt to bolster his or her own testimony by introducing prior conviction evidence against a state witness. If a defendant decides to attack the state's witness with prior conviction evidence, the English rule permits the prosecutor to impeach the defendant with prior conviction evidence.<sup>248</sup>

There are other exceptions to the English rule. Evidence of prior convictions may also be used to prove a similar fact.<sup>249</sup> For example in *Jones v. Dir. Public Prosecutions*, the defendant was accused of raping and killing a girl.<sup>250</sup> About three months prior to the murder trial, he had been convicted of raping and assaulting a different girl.<sup>251</sup> Evidence from the first trial showed that the rape was committed in an almost identical fashion to the rape at issue in the second trial.<sup>252</sup> The trial court allowed the prosecutor to use evidence from the first trial in the second trial.<sup>253</sup> The House of Lords sustained the conviction on the ground that the prior conviction evidence was not introduced to show the defendant's propensity to rape, but was offered to show similar facts.<sup>254</sup>

Prior conviction evidence is also admissible to prove part of a subsequent offense.<sup>255</sup> For example, evidence that a defendant was convicted of burglary would be admissible in a subsequent trial for loitering with the intent to commit a felony.<sup>256</sup> Finally, prior conviction evidence is admissible when a criminal penalty is enhanced for prior convictions.<sup>257</sup> Similar rules exist in the United States allowing prosecutors to use prior conviction evidence to prove motive, oppor-

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or the nature or conduct of the defence [sic] is such as to involve imputations of the character of the prosecutor or the witnesses for the prosecution. *Id.*

246. See HOWARD ET AL., *supra* note 237, at § 18-16.

247. See G.D. NOKES, *AN INTRODUCTION TO EVIDENCE*, 138, 141 (4<sup>th</sup> ed. 1967).

248. *Id.* at 139.

249. *Id.* at 18-25.

250. *Jones v. Dir. Public Prosecutions*, 1962 App. Cas. 635, 635-641 (appeal taken from Eng.).

251. *Id.* at 636-641.

252. *Id.* at 640-41. The House of Lords did not explain exactly how the two crimes were similar. It stated "There were significant similarities between the two cases which it is unnecessary to set out in detail. It is sufficient to say that in the opinion of the court they were such as would have rendered admissible." *Id.*

253. *Id.* at 636-38.

254. *Id.* at 636-39.

255. *Id.* at 639.

256. *Id.*

257. See generally HOWARD ET AL., *supra* note 237, at §§ 18-16 – 18-58 (referring generally to the Criminal Evidence Act of 1898 § 1(f), *supra* note 239).

tunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.<sup>258</sup>

The rationale and policy behind the English rule is clear from various statutory provisions and case law. English courts applying the rule have noted such evidence should not be allowed because a jury might be misled into thinking the defendant has a propensity to commit crimes, and therefore must have committed the crime with which he or she is charged.<sup>259</sup>

In *The King v. Ellis*, the defendant was on trial for fraud.<sup>260</sup> He had prior convictions for fraud and had also been held liable in civil court.<sup>261</sup> During cross-examination the prosecutor elicited information concerning these prior acts.<sup>262</sup> Defense counsel objected, but by the time the objection was made the jury had already heard inadmissible evidence.<sup>263</sup> The trial court did not discharge the jury which eventually convicted the defendant for fraud.<sup>264</sup> On review in the Court of Criminal Appeals, the court noted that there was sufficient evidence which would support the jury's verdict.<sup>265</sup> The court, nevertheless, quashed the conviction.<sup>266</sup> The court ruled that the prejudicial effect of the inadmissible evidence was so great the defendant was not insured a fair trial.<sup>267</sup> While the trial judge admonished the jury not to consider the evidence, the appeals court concluded that the prejudicial effect of the evidence could not be overcome with this instruction.<sup>268</sup> As the appeals court stated "We feel bound, therefore, to say not only that the jury may have been influenced but that they must have been influenced."<sup>269</sup>

Other courts have reached similar conclusions.<sup>270</sup> In *The King v. Butterwasse*, the King's Bench quashed a conviction because prior conviction evidence was used to impeach the defendant.<sup>271</sup> The court held that the prejudicial nature of the evidence mandated a new

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258. See FED. R. EVID. 404(b).

259. See *Maxwell v. Dir. Public Prosecutions*, 1935 App. Cas. 309, 321 (appeal taken from Eng.). The court stated "[T]he questions whether a man has been convicted. . . ought not to be admitted, if there is any risk of the jury being misled into thinking that it goes not to credibility, but to the probability of his having committed the offense with which he is charged." *Id.*

260. *The King v. Ellis*, 2 K.B. 746, 748 (1910).

261. *Id.* at 749-750.

262. *Id.*

263. *Id.* at 763.

264. *Id.* at 751.

265. *Id.* at 751-52.

266. *Id.* at 765.

267. *Id.* at 764-65.

268. *Id.* at 764-65.

269. *Id.* at 765.

270. See *The King v. Butterwasse*, 1 K.B. 4 (1947).

271. *Id.* at 6.

trial.<sup>272</sup> The court believed that given the prejudicial nature of the evidence, it was impossible to determine if the jury would reach the same verdict absent the prior conviction evidence.<sup>273</sup>

Most courts in England have not gone so far as to articulate a *per se* rule reversing convictions when prior conviction evidence is admitted.<sup>274</sup> Generally, the defendant must show that the entire cross-examination was prejudicial in nature or was tainted by the questions concerning prior conviction evidence.<sup>275</sup> However, the plain language of the Criminal Evidence Act and judicial recognition of the prejudicial effect of prior convictions have eliminated impeachment by prior conviction evidence in England.

## V. UNDERMINING THE ASSUMPTIONS BEHIND RULE 609

The American rule, adopted by a majority of jurisdictions, permits the use of prior conviction evidence to impeach a criminal defendant. The rule is based on unfounded assumptions which have no factual basis for support.<sup>276</sup> Drafters of the rule assumed that jurors are capable of understanding a judge's limiting instruction.<sup>277</sup> In addition, the drafters assumed that jurors will actually obey the instruction.<sup>278</sup> Numerous studies conducted over the last forty years have shown that these assumptions are unfounded fictions and are simply wrong. Jurors do use prior conviction evidence to infer criminal propensity and jurors frequently ignore or fail to understand limiting instructions. Moreover, even if jurors understood and attempted to follow a judge's limiting instruction, it is not clear that even the most levelheaded juror would be able to completely eliminate the prejudicial effect of hearing such evidence.

One of the first relevant studies was conducted at the University of Chicago.<sup>279</sup> The subjects were people called to jury duty.<sup>280</sup> They were asked to listen to a tape of a civil trial involving an automobile accident in order to determine damages.<sup>281</sup> One group was told that the defendant, who was clearly liable, was covered by insurance.<sup>282</sup> Half of this group was then instructed to ignore this fact in determin-

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272. *Id.*

273. *Id.*

274. See HOWARD ET AL., *supra* note 237, at § 18-16.

275. *Id.*

276. See Ordovery, *supra* note 177, at 173-187.

277. *Id.*

278. *Id.*

279. See Dale W. Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744, 753-754 (1959).

280. *Id.* at 753.

281. *Id.* at 753-54.

282. *Id.*

ing damages.<sup>283</sup> The other group was asked to determine damages without having any knowledge of the insurance policy.<sup>284</sup> The results of the study are revealing.<sup>285</sup> The group which did not have any knowledge of the insurance policy, returned an average award of \$33,000.<sup>286</sup> The group that knew of the policy, but was not instructed to ignore the policy in determining damages, returned an average award of \$37,000.<sup>287</sup> Surprisingly, the group which knew of the policy, and was instructed to ignore it, awarded damages of \$46,000 on average.<sup>288</sup> Contrary to the underlying assumptions of the American rule, the University of Chicago's study was one of the first indications that jurors may not readily comprehend limiting instructions. Even when such instructions are understood, the jury may ignore them.<sup>289</sup>

In 1966, Harry Kalven and Hans Zeisel published an influential book on jury behavior.<sup>290</sup> The authors undertook a number of studies in which they observed how jurors reacted to types of evidence, trial techniques, etc.<sup>291</sup> The book was subject to varying and contradictory interpretations by the Supreme Court. In *Spencer v. Texas*, the Court held that a Texas statute which allowed prior conviction evidence to be used to enhance a sentence, was constitutional when the jury was given notice of the prior conviction before determining guilt or innocence on the facts being tried.<sup>292</sup> The majority cited Kalven and Zeisel for support of the proposition that jurors were likely to obey a judge's limiting instruction.<sup>293</sup> The Court's reliance on this study is odd. Conviction rates were actually much higher when a defendant's record was known.<sup>294</sup> The dissent also found the Court's proposition

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283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.* at 754.

287. *Id.*

288. *Id.*

289. *Id.*

290. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966).

291. *Id.*

292. *Spencer v. Texas*, 385 U.S. 554 (1967).

293. *See id.* at 565 n.8. The majority footnote provided:

Indeed the most recent scholarly study of jury behavior does not sustain the premise that juries are especially prone to prejudice when prior-crime evidence is admitted as to credibility. Kalven & Zeisel, *The American Jury* (1966). The study contrasts the effect of such evidence on judges and juries and concludes that "Neither the one nor the other can be said to be distinctively gullible or skeptical."

*Id.* (citing KALVEN & ZEISEL, *supra* note 290, at 180).

294. *See* KALVEN & ZEISEL, *supra* note 290, at 179. Extrapolating the data in table 56 shows that juries convicted roughly 64% of the time when the defendant had no record and took the stand. When the jury knew of the defendant's criminal record and the defendant did not take the stand the conviction rate was only 41%. *Id.* *See also* Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide Guilt*, 9 L. & HUM. BEHAV. 37 (1985). The authors state that conviction rates were 27% higher when jurors knew of prior conviction evidence. *Id.* at 38.

odd and cited the same pages for its proposition that jurors ignore a judge's limiting instruction.<sup>295</sup> Following the decision the authors noted in a second edition that the dissent's interpretation of the data was correct.<sup>296</sup> The authors' study did in fact suggest that limiting instructions were ignored.

Following the second edition of *The American Jury* in 1971, researchers in Canada studied the effect of prior conviction evidence in criminal cases.<sup>297</sup> Like the American rule, the Canadian evidence rule, in effect, allowed prosecutors to impeach a criminal defendant with prior conviction evidence.<sup>298</sup> The researchers studied forty-eight people who were divided into four groups.<sup>299</sup> Each of the groups read evidence about a defendant who was accused of breaking and entering.<sup>300</sup> One group was instructed to give a verdict without any knowledge about the defendant's prior record.<sup>301</sup> The second group was told the defendant did not testify because he had nothing to add to his defense.<sup>302</sup> The third group was told that the defendant had five convictions for armed robbery.<sup>303</sup> The fourth group was told the defendant took the stand but had nothing important to add to his defense.<sup>304</sup> Additionally, this group was informed of the five convictions but was given a standard limiting instruction.<sup>305</sup> Since the defendant had nothing to add to the case the prior convictions should have had no effect on the jurors. However, that was not the case.<sup>306</sup> The last two groups indicated much stronger tendencies to convict than the first two groups.<sup>307</sup> Based on these results, the researchers concluded that prior conviction evidence was used in ways impermissible under Canadian evidence rules and that a judge's limiting instruction would not change this fact.<sup>308</sup>

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295. Spencer, 385 U.S. at 575 (Warren, C.J., dissenting).

296. See HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* vi (2<sup>nd</sup> ed. 1971). In the preface to the second edition the authors stated "We note with mixed reaction that *The American Jury* has thus joined that distinctive group of books that can be quoted on both sides of the issue. In this particular instance we would say that Justice Warren, who cites the technical passages, not just a sentence, had us right. *Id.*"

297. See A.N. Doob & H.M. Kirshenbaum, *Some Empirical Evidence on the Effect of s. 12 of the Canada Evidence Act Upon an Accused*, 15 CRIM. L. Q. 88, 91-93 (1972).

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.* at 93-96. The researchers wrote "It is clear that the presence of the criminal record had a dramatic effect while none of the other instructions had a significant effect." *Id.* at 93. The researchers also noted that the limiting instruction had no effect on results. "The 'judge's in-

These results were supported the following year by another study which showed the prejudicial effect of inadmissible evidence at a criminal trial.<sup>309</sup> In the experiment, mock jurors read evidence of a robbery and murder.<sup>310</sup> In addition to the evidence in the cases, two groups of jurors heard a tape recording of the defendant.<sup>311</sup> In the recording, the defendant told his bookmaker that he finally had the money to pay him and that he could read about it in the paper.<sup>312</sup> One group who heard the tape recording were given a limiting instruction to ignore the evidence.<sup>313</sup> If the limiting instruction had the effect the drafters of the FRE and state evidence codes assumed, one would expect that the conviction rates would be relatively equal between the two groups.<sup>314</sup> When the evidence against the defendant was strong, the jurors did not rely on the tape recording and conviction rates were roughly equal.<sup>315</sup> However, when the evidence against the defendant was weak, there was a thirty-five percent difference in conviction rates between the two groups.<sup>316</sup> The study implies that in close factual cases, inadmissible evidence or evidence used improperly by a jury may tilt the scales in favor of conviction when the jury would otherwise acquit. Thus, the potential for prejudice is greatest in close cases.

One criticism lodged against such studies is that the higher conviction rates are the result of jurors using the evidence to determine that the defendant's credibility is weak.<sup>317</sup> Accordingly, jurors tend not to believe the defendant who undermines his own defense.<sup>318</sup> In 1975, another study was published answering this criticism and further undermining the assumptions behind Rule 609.<sup>319</sup> Each subject read a

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structions' had no effect whatsoever on the decisions by the subjects." *Id.* at 95. The researchers concluded:

In conclusion it seems to us, as psychologists looking at s. 12(1) of the Canada Evidence Act, that on the basis of psychological knowledge and empirical data this section strongly works against the accused person even when the jury is instructed (or when the judge "instructs himself") to disregard the previous convictions when determining guilt or innocence.

*Id.* at 96.

309. See Stanley Sue, Robert Smith & Cathy Caldwell, *Effects of Inadmissible Evidence on the Decisions of Simulated Jurors: A Moral Dilemma*, 3-4 J. APPLIED SOC. PSYCHOL. 347, 347-354 (1973) (finding that in simulation, when there is little evidence on which to base a decision, jurors often use evidence the judge instructs them to disregard).

310. *Id.* at 347-49.

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.* at 350.

315. *Id.*

316. *Id.*

317. See Ordovery, *supra* note 177 at 176.

318. *Id.*

319. Valerie P. Hans & Anthony N. Doob, *Section 12 of the Canada Evidence Act and Deliberations of Simulated Juries*, 18 CRIM. L.Q. 235 (1975-76). This experiment was designed to assess the effects of a defendant's criminal record on both individual and group verdicts of his guilt.

description of hypothetical case about a man accused of burglary.<sup>320</sup> Half of the subjects were told that the accused had been previously convicted of burglary.<sup>321</sup> They were also given an instruction that the prior record should be used only to determine the defendant's credibility and not to determine the defendant's guilt or innocence.<sup>322</sup>

The juries which had the prior record information were significantly more likely to convict the defendant than juries without the information.<sup>323</sup> Forty percent of the guilty verdicts were given by groups that had prior record information, while the groups that did not have the prior record information did not return any guilty verdicts.<sup>324</sup> The presence of a prior record did not seem to make much difference in the percentage of guilty verdicts when the verdicts were given individually.<sup>325</sup> According to the researchers, in the group verdict situation there is more time for the defendant's prior record to "sink-in" during deliberations and possibly affect the group verdict.<sup>326</sup> Thus, the presence of prior records "appear to reliably increase the probability that a defendant will be found guilty by a jury, regardless of the evidence."<sup>327</sup>

The researchers also discovered that those groups with the prior record information were significantly more likely to state that the evidence against the defendant was strong.<sup>328</sup> These groups also stated that the evidence tended to bring up more frequently those facts that were most damaging to the defendant.<sup>329</sup> However, there were many distortions of fact made by the jurors in the course of deliberations.<sup>330</sup> Forty-one percent of the distortions of fact were corrected by other group members.<sup>331</sup> It is notable that the groups with prior record information were somewhat more likely to correct such distortions than the groups without the prior record information.<sup>332</sup> According to the researchers, this may imply that those jurors who had prior record information were "alerted to the possible biases they themselves or

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There were twenty persons in the individual verdict conditions and fifteen groups of four persons in each of the group verdict conditions. *Id.* at 238-39.

320. *Id.* at 239.

321. *Id.* at 240.

322. *Id.*

323. *Id.* at 242.

324. *Id.* at 243 (from the table).

325. *Id.* at 242. Forty-five percent of the guilty verdicts were given by individuals who had the prior record information, while forty percent of the guilty verdicts were given by individuals who did not have the prior record information. *Id.* at 243.

326. *Id.* at 243.

327. *Id.*

328. *Id.* at 244.

329. *Id.*

330. *Id.* at 250. Among the 30 groups, there were a total of 51 errors in recalling facts. *Id.*

331. *Id.*

332. *Id.*



other group members have had towards distorting the case because of the defendant's record."<sup>333</sup> However, there is no direct evidence to support this interpretation.<sup>334</sup>

In 1983, a study was conducted to determine the effects of inadmissible evidence on jurors.<sup>335</sup> The subjects in this study read a description of an armed robbery of a grocery store that resulted in the deaths of two individuals.<sup>336</sup> All of the subjects received trial summaries of the case, but the researchers varied the strength of the prosecution's case against the defendant by manipulating the specific contents of the summaries.<sup>337</sup> The researchers also gave some groups wiretapping evidence, introduced by the prosecution, in which the defendant bragged to a bookmaker that he had recently acquired some money in a dangerous way.<sup>338</sup> Other groups received wiretapping evidence, introduced by the defense, in which the grocery store clerk who witnessed the robbery bragged to the bookmaker that he recently acquired money in a dangerous way.<sup>339</sup> The wiretapping evidence was ruled admissible or inadmissible by the judge; an inadmissible ruling was based on the notion that such evidence would only be used against the bookmaker and not against any of his clients.<sup>340</sup>

The researchers found that the subjects that received inadmissible wiretapping evidence, introduced by the prosecution, almost always had more negative reactions toward the defendant than did the control subjects.<sup>341</sup> Subjects that received inadmissible evidence, introduced by the defense, also tended to have more positive reactions towards the defendant than the control subjects.<sup>342</sup> These results suggest that the subjects "made at least some use of inadmissible evidence in deciding whether inadmissible the defendant was guilty or innocent."<sup>343</sup> The subjects who had received inadmissible wiretapping evidence spoke about it openly during group deliberations, particu-

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333. *Id.*

334. *Id.*

335. See Thomas R. Carretta & Richard L. Moreland, *The Direct and Indirect Effects of Inadmissible Evidence*, 13 J. APPLIED SOC. PSYCHOL. 291 (1983); see also Sharon Wolf and David A. Montgomery, *Effects of Inadmissible Evidence and Level of Judicial Admonishment to Disregard on the Judgments of Mock Jurors*, 3 J. APPLIED SOC. PSYCHOL. 205 (1977) (supporting the claim that jurors do not obey limiting instructions).

336. See Carretta & Moreland, *supra* note 335, at 294.

337. *Id.* at 295. Subjects were thus presented with either a weak, moderate, or strong case against the defendant.

338. *Id.*

339. *Id.* There was a control group which did not receive any wiretapping information.

340. *Id.*

341. *Id.* at 305.

342. *Id.* The subjects reactions were not as strong as they would have been had such evidence been ruled admissible.

343. *Id.*

larly when such evidence favored the prosecution.<sup>344</sup> However, whenever a group member mentioned such evidence, another member would often remind the group about the judge's ruling regarding the evidence's inadmissibility.<sup>345</sup> This monitoring of group discussions was less common when the inadmissible evidence favored the prosecution rather than the defense.<sup>346</sup>

A 1985 study also revealed the inefficacy of limiting instructions.<sup>347</sup> Subjects were given descriptions of two hypothetical cases, one involving auto theft and one involving murder.<sup>348</sup> The cases were designed in such a way that the defendant's guilt or innocence was ambiguous.<sup>349</sup> One of the following four variations of prior record convictions accompanied each case: no prior convictions, previous conviction for the same crime, previous conviction for a different crime, or previous conviction for perjury.<sup>350</sup> The latter three conditions were also accompanied by instructions by the judge that the subjects were not to consider evidence of the defendant's prior record as indicative of his criminal tendencies or disposition, but to use this evidence solely to assess his credibility.<sup>351</sup>

The researchers found that the defendant's credibility was not significantly higher when there were no prior convictions nor significantly lower with a prior perjury conviction, thus indicating that the evidence of prior convictions did not affect ratings of the defendant's credibility.<sup>352</sup> However, when looking at conviction rates, defendants with no prior convictions had a significantly lower conviction rate than defendants with any type of prior conviction.<sup>353</sup> Defendants convicted of the same crime had a significantly higher conviction rate than those convicted of a different crime or perjury.<sup>354</sup> Finally, fifty-six percent of the subjects felt that prior conviction evidence increased the likelihood that the defendant was guilty, while thirty-eight percent stated that it did not influence the likelihood of the defendant's guilt.<sup>355</sup>

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344. *Id.* at 306.

345. *Id.* at 306-07. Overall, this phenomenon occurred about fifty-six percent of the time among groups that received inadmissible wiretapping evidence. *Id.* at 307. When such evidence favored the prosecution, it occurred forty-nine percent of the time and when the evidence favored the defense, it occurred eighty-three percent. *Id.*

346. *Id.* at 307.

347. See Wissler & Saks, *supra* note 294, at 37.

348. *Id.* at 40.

349. *Id.*

350. *Id.*

351. *Id.*

352. *Id.* at 41.

353. *Id.*

354. *Id.* at 41-42.

355. *Id.* at 42.

According to the rationale behind FRE Rule 609, a defendant's criminal record is admitted into evidence for the limited purpose of impeaching his credibility and should thus "influence verdicts only to the extent that it decreases the believability of the defendant's testimony."<sup>356</sup> The subjects in this study, however, did not appear to use evidence of prior convictions to assess the defendant's credibility.<sup>357</sup> It appears that subjects used the prior conviction evidence to gauge the likelihood that the defendant committed the crime charged.<sup>358</sup> It is notable that the subjects admitted that such evidence increased the likelihood that the defendant's guilt and was the reason they found him guilty, even though they had been instructed not to use the evidence for that purpose.<sup>359</sup> In conclusion, the researcher stated that:

The presentation of the defendant's criminal record does not affect the defendant's credibility, but does increase the likelihood of conviction, and the judge's limiting instructions do not appear to correct that error. People's decision processes do not employ the prior-conviction evidence in the way the law wishes them to use it.<sup>360</sup>

A 1988 study that examined the effects of impeachment evidence in civil cases revealed that such evidence produced permissible as well as impermissible influences.<sup>361</sup> Subjects in this study were divided into three groups.<sup>362</sup> One group was told that the defendant had no prior convictions.<sup>363</sup> Another group was told that the defendant was previously convicted of perjury and the last group was told that the defendant was previously convicted of perjury, but was given a limiting instruction that such evidence was to be used solely for the purpose of judging the defendant's credibility, not liability.<sup>364</sup>

The researchers found that the perjury convictions lowered the defendant's perceived credibility as well as increased the defendant's propensity towards harm and future negligence.<sup>365</sup> If the limiting instruction had worked as intended, they should have restricted inferences to the issue of the defendant's credibility.<sup>366</sup> Instead, any

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356. *Id.* at 43.

357. *Id.*

358. *Id.* at 44.

359. *Id.*

360. *Id.* at 47. See also David Landy & Elliot Aronson, *The influence of the Character of the Criminal and His Victim on the Decisions of Simulated Jurors*, 5 J. EXPERIMENTAL SOC. PSYCHOL. 141 (1969) (researchers confirmed that the more "attractive" a defendant the more likely jurors were to acquit). Thus, an unattractive defendant with prior convictions is less likely to be acquitted. *Id.*

361. Sarah Tanford & Michele Cox, *The Effects of Impeachment Evidence and Limiting Instructions on Individual and Group Decision Making*, 12 LAW & HUM. BEHAV. 477 (1988).

362. *Id.* at 482.

363. *Id.*

364. *Id.*

365. *Id.* at 494.

366. *Id.*

information regarding a prior perjury conviction produced higher propensity ratings both with and without a limiting instruction.<sup>367</sup>

A 1995 study conducted by researchers Edith Greene and Mary Dodge examined the impact of prior acquittal evidence as well as prior conviction evidence on juror decision making.<sup>368</sup> Six versions of an armed robbery transcript were produced in which the type of evidence (prior acquittal, prior conviction, or no information about a prior record) and the presence or absence of limiting instructions were manipulated.<sup>369</sup> Researchers found that the subjects who heard evidence of prior acquittal were no more likely to convict the defendant than those who had no information about a prior record.<sup>370</sup> Those who learned that the defendant had been previously convicted were significantly more likely to convict him than subjects without this information.<sup>371</sup> The use of limiting instruction had little effect on the subjects' use of prior record evidence.<sup>372</sup> This can be seen for the verdicts returned from these groups which were no different than those verdicts returned from the groups which did not have such instructions.<sup>373</sup>

These results were confirmed the same year in a study which used several experiments to determine if jurors could follow instructions to disregard prior conviction evidence and hearsay.<sup>374</sup> In one experiment jurors heard evidence of prior convictions but were admonished to ignore this evidence.<sup>375</sup> A second group heard the same evidence, was admonished to ignore the evidence and was given a legal explanation as to why the information should be ignored.<sup>376</sup> These two groups showed higher conviction rates than a third group which was not given any information regarding prior conviction evidence.<sup>377</sup> In fact, the second group had the highest conviction rate among the three groups.<sup>378</sup> In a second experiment, mock jurors heard hearsay evidence and were instructed to disregard that evidence.<sup>379</sup> A second group heard the same evidence, was told to ignore it and was told the

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367. *Id.*

368. Edith Greene & Mary Dodge, *The Influence of Prior Record Evidence on Juror Decision Making*, 19 *LAW & HUM. BEHAV.* 67 (1995).

369. *Id.* at 71.

370. *Id.* at 76.

371. *Id.*

372. *Id.*

373. *Id.*

374. Kerri L. Pickel, *Inducing Jurors to Disregard Inadmissible Evidence Legal Explanation Does Not Help*, 19 *LAW & HUM. BEHAV.* 407 (1995).

375. *Id.* at 411-13.

376. *Id.*

377. *Id.* at 411-15.

378. *Id.* at 415.

379. *Id.* at 415-17.

reasons why the hearsay should be ignored.<sup>380</sup> A third group heard the same evidence, but not the hearsay.<sup>381</sup> The three groups had similar convictions rates and the differences were not statistically significant.<sup>382</sup> The fact that jurors were able to ignore hearsay evidence but not prior conviction evidence indicates the prejudicial effect of prior conviction evidence even when it has no bearing on the defendant's credibility as a witness.

Indeed, it is readily accepted by psychologists and social scientists that prior conviction evidence is misused by jurors who do not understand the Rules of Evidence.<sup>383</sup> It has been argued that the Rules of Evidence which permit prior convictions to be presented, particularly Rule 609, should be re-examined.<sup>384</sup> Such pleas have fallen on deaf ears largely because the research showing the prejudicial effect of prior conviction evidence has been published outside of law reviews, law journals and other traditional legal forums. Unfortunately for criminal defendants and the American justice system, scientific data showing how prior conviction evidence is misused by jurors has gone unnoticed by lawyers, judges, and courts.

However, the conclusion these scientists have reached simply confirm what lawyers, judges, and courts have known all along: jurors will use evidence of prior convictions for impermissible purposes and a judge's limiting instruction will have little or no effect on jurors. As Justice Jackson stated, "[t]he naïve assumption that prejudicial effects can be overcome by instructions to the jury. . . all practicing lawyers know to be unmitigated fiction."<sup>385</sup> Justice Jackson's statement is supported by a survey in which 98% of lawyers believed that jurors were not able to follow instructions to consider prior conviction evidence only for impeachment purposes.<sup>386</sup> Indeed, it is widely recognized and

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380. *Id.*

381. *Id.*

382. *Id.* at 417-20.

383. See, e.g., Green & Dodge, *supra* note 368, at 69 ("Given the number of studies that show that jurors are clearly influenced by evidence of previous convictions . . ."); Edmund S. Howe, *Judged Likelihood of Different Second Crimes Function of Judged Similarity*, 21 J. APPLIED SOC. PSYCHOL. 697 (1991) (finding numerous studies have concluded that the judged probability of conviction for a crime is higher when information concerning a prior conviction is disclosed).

384. See Tanford & Cox, *supra* note 361, at 496. The authors wrote:

Given the fact that the evidence [of prior convictions] does have harmful effects that current legal safeguards do not eliminate, one suggestion to legal policy makers would be to establish stricter guidelines for admitting impeachment evidence. . . . Based on our current knowledge, it appears that it may be more effective to prevent the harmful effects of impeachment and other character-related evidence from occurring in the first place, by limiting the admissibility of the evidence itself, rather than asking jurors to limit its use.

*Id.*

385. *Krulewicz v. U.S.*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring).

386. See Note, *To Take the Stand or Not To Take the Stand: The Dilemma of the Defendant With a Criminal Record*, 4 COLUM. J.L. & SOC. PROBS. 215, 218 (1968).

accepted among criminal defense attorneys that putting a criminal defendant on the stand who has prior convictions is a risky move.<sup>387</sup> Even conservative judges have taken notice that jurors will use evidence of prior convictions to draw impermissible inferences. Moreover, a judge's limiting instruction is not likely to have any effect. Judge Easterbrook noted that telling jurors to consider prior convictions only to weigh the defendant's credibility is like telling jurors to ignore a hippopotamus.<sup>388</sup> Likewise, Learned Hand wrote that asking jurors to follow a limiting instruction was "a mental gymnastic which is beyond, not only their powers, but anybody's."<sup>389</sup>

In short, jurors draw impermissible inferences from prior conviction evidence. When jurors hear that the defendant has committed some crime in the past, particularly the same crime, they conclude that the defendant must have committed the crime with which he is currently charged. A judge's limiting instruction is of little help to the criminal defendant, since jurors typically do not understand the limiting instruction or choose to ignore it. The instruction may damage the defendant's case because the jurors may resent the instruction. Even jurors who attempt to faithfully adhere to a judge's limiting instruction are likely to view the defendant with contempt because of prior conviction evidence. The fact that prior conviction evidence is highly prejudicial can no longer be ignored.

## VI. WHAT'S WRONG WITH ALLOWING PRIOR CONVICTION EVIDENCE IN CRIMINAL CASES?

There is little doubt that the admission of prior conviction evidence makes both the prosecutor's and jurors' jobs easier. That is exactly the problem with admitting such evidence.

Prior conviction evidence gives prosecutors an extra advantage and jurors extra evidence to convict when jurors may otherwise find rea-

387. See Fontham, *supra* note 11, at § 7-27.

388. *U.S. v. DeCastris*, 798 F.2d 261, 264 (7<sup>th</sup> Cir. 1986). Judge Easterbrook wrote:

The "bad character" inference is inseparable from the "bad intent" inference. We do not pretend that a jury can keep one inference in mind without thinking about the other. An instruction told the jury to do this, but this is like telling someone not to think about a hippopotamus. To tell someone not to think about the beast is to assure at least a fleeting mental image. So it is here. Each juror must have had both the legitimate and the forbidden considerations somewhere in Mind, if only in the subconscious.

*Id.* at 264-65.

389. *Nash v. U.S.*, 54 F.2d 1006, 1007 (2d Cir. 1932). Judge Hand expressed similar concerns in other cases. In *U.S. v. Gottfried*, 165 F.2d 360, 367 (2d Cir. 1948), he stated "Nobody can indeed fail to doubt whether the caution is effective, or whether usually the practical result is not to let in hearsay." See also *U.S. v. Delli Paoli*, 2219 F.2d 319, 321 (2d Cir. 1956) (continuing to voice the same concerns for jurors, Judge Hand noted "[i]t is indeed very hard to believe that a jury will, or for that matter can, in practice observe the admonition . . . [R]elatively few persons have any such power, involving as it does a violence to all our habitual ways of thinking.").

sonable doubt that the defendant committed the crime with which he or she is charged. This problem is only exacerbated when the case is close.<sup>390</sup> In this way, the current American rule denies the criminal defendant all the rights to which he or she is entitled.

Our criminal justice system sacrifices accuracy in order to afford protection to criminal defendants.<sup>391</sup> Few people have openly criticized the statement that "it is far worse to convict an innocent man than to let a guilty man go free."<sup>392</sup> While our system is concerned with jurors reaching the truth, the courts in this country are recognizing that truth and a juror's fact-finding abilities may need to be sacrificed in order to protect other core values. Our system excludes all kinds of evidence which may help a jury to discover the truth, such as: privileged communications, hearsay exclusions, and exclusions because evidence was obtained in violation of the Fourth or Fifth Amendments of the Constitution.<sup>393</sup>

The current version of Rule 609 sacrifices individual rights and turns traditional notions of American criminal law on its head. The goal has been to increase convictions and get criminals off the street, but what has been forgotten are the underlying social goals and policies behind American criminal law. It has long been recognized that a person should not suffer criminal sanctions because he is a bad person or has done bad things in the past. Criminal justice in this country is premised on the assumption of punishing only specific acts which the state can prove beyond a reasonable doubt.

Proponents of Rule 609 and similar state rules have been careful to cloak their true intentions in the rhetoric of either "victim's rights"<sup>394</sup> or "not allowing criminals to escape justice."<sup>395</sup> The true intention is clear: get convictions and get criminals off the street. Based on California's enactment of Proposition 8 (which had a far greater impact on criminal law than the evidence rules discussed in this article), it is questionable whether the rule had the intended effect.<sup>396</sup> Studies of California's crime rates indicate that crime in California is as bad as it was before Proposition 8 was passed.<sup>397</sup> Nevertheless, the rule is still

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390. See discussion *supra* notes 279-389 and accompanying text.

391. See, e.g., President's Commission On Law Enforcement and the Administration of Justice: The Challenge of Crime in a Free Society (1967). In relevant part, the report stated "[o]ur system of justice deliberately sacrifices much in efficiency and even in effectiveness in order to preserve local autonomy and to protect the individual . . . ." *Id.*

392. In re Samuel Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

393. 2 SIMON H. RIFKIND, THE LAWYER'S ROLE AND RESPONSIBILITY IN MODERN SOCIETY 515, 527-528 (Adam Bellow & William Keens eds., 1986).

394. See discussion *supra* notes 103-176 and accompanying text.

395. 120 CONG. REC. 37076 (1974) (comment by Sen. McClellan).

396. See Brown, *supra* note 229, at 973.

397. *Id.*

on the books and proponents of the rule probably still believe that it has done some good on the "war against crime."

In this regard, Senator Hruska's supporting remarks of conviction evidence are revealing. In the Senate debate, he explained his motive by giving an example:

Suppose a defendant being tried for loansharking has previously been convicted of several other charges of loansharking. And suppose he gets on the stand and says that he was not loansharking this particular time. Should not the jury know that the defendant has previously been convicted of loansharking several other times . . . .<sup>398</sup>

Senator Hruska's comments reveal that he not only misunderstands the stated purpose behind Rule 609, but he would also have the rule be used to show that the criminal defendant has a propensity to commit crime.<sup>399</sup> This interpretation is clearly not the way the drafters of the FRE and similar state rules intended that prior conviction evidence be used.<sup>400</sup> The Senator's comments aside, one must realize that is exactly how jurors use the evidence. When jurors hear that a defendant did a particular act before, they conclude he or she must have done that same act again. If jurors hear that the defendant has a criminal record, they conclude that if he or she broke one law he or she would have no problem breaking the law again. Criminal defense attorneys, thus, have been reluctant to put their clients on the stand.<sup>401</sup>

A criminal defendant who does not take the stand suffers in at least two important ways. First, the defendant does not participate fully in his or her own defense. It has long been recognized that criminal defendants have the right to participate in their trial and testify in their own defense.<sup>402</sup> However, these rights mean little if the Rules of Procedure and Evidence severely deter participation because of unfair prejudice.

Proponents of Rule 609 and similar state evidence rules have defended Rule 609 on the ground that jurors need the information in order to weigh the credibility of the defendant.<sup>403</sup> Without such information, jurors would believe that the defendant is just as credible as

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398. 120 CONG. REC. 37077 (1974) (remarks of Mr. Hruska).

399. *Id.*

400. See FED. R. EVID. 404(b). In relevant part, the rule provides "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." *Id.*

401. See Fontham, *supra* note 11, at § 7-27.

402. See discussion *supra* notes 17-19 and accompanying text.

403. See, e.g., 120 CONG. REC. 37077 (1974). Senator Hruska stated:

Mr. President I am a firm believer in the jury system. I am of the conviction that the *triers of fact* have a need for all the relevant evidence that will assist them in judging the credibility of a witness. One of these pieces of evidence is the fact that the defendant has been convicted of prior felonies.

*Id.* at 37077 (emphasis added). Senator McClellan stated:



the next witness because it would appear to them that he or she had led a blameless life.<sup>404</sup> The thrust of this argument is that the jury should be given as much information as possible to determine the credibility of the defendant and arrive at the truth in the matter. Proponents point out that rules of evidence ought to increase the amount of relevant information a jury hears.

Ironically, Rule 609 has had the opposite effect. Instead of increasing the amount of relevant information jurors have, Rule 609 has decreased what jurors hear. The fear of being impeached with prior conviction evidence has led many criminal defendants to remain silent and not take the stand. In these cases jurors have been deprived of hearing the defendant testify. No one knows better than the defendant if he or she committed the crime with which he or she is charged. Thus, a jury ought to hear this testimony. However, given the harsh reality of Rule 609, many defendants have remained silent, thus possibly depriving the jury of the most critical piece of testimony available to them.

Second, a jury is likely to draw a negative inference from the fact the defendant did not testify.<sup>405</sup> This is particularly troubling in the majority of criminal cases where the defense is simply one that asserts that the defendant did not do it. Jurors are likely to wonder why a defendant who is innocent did not take the stand and testify to his or her innocence.

With the inherent problems of allowing impeachment of a criminal defendant who has prior conviction evidence, it has been argued that impeachment should be limited to crimes involving dishonesty or deceit. Representative Dennis argued for such a rule when the Federal Rules of Evidence were drafted.<sup>406</sup> A handful of states have also adopted this approach.<sup>407</sup> The argument in support of such a rule is that crimes such as perjury and embezzlement are inherently deceitful and directly relevant to a defendant's credibility. This argument has some initial plausibility. If a defendant witness perjured himself in a prior case, that fact would certainly give a jury an important piece of information it might use in weighing his credibility.

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If the jury is to be permitted to correctly determine what the true facts are in a particular case, it must be permitted to have all the evidence before it that will enable it to judge the credibility of witnesses who have given testimony on the material facts reflecting guilt or innocence. The jury must be able to correctly choose who is to be believed. To make that determination they should have access to all available information that bears on the credibility of witnesses who testify . . . .

*Id.* at 37076.

404. *Id.*

405. See Fontham, *supra* note 11, at § 7-27.

406. See, e.g., 120 CONG. REC. 2377 (1974) (remarks of Rep. Dennis).

407. See ARK. REV. R. 609; MICH REV. R. EVID. 609; W. VA. REV. R. EVID. 609.

However, such an approach to prior conviction evidence is problematic. First, it is difficult to define exactly what crimes involve dishonesty and deceit.<sup>408</sup> Some states have attempted to solve this problem by specifically listing the crimes which may be used to impeach a criminal defendant.<sup>409</sup> Listing crimes may be useful to trial court judges, but it does not fully solve the problem. On the floor of the House, Representative Hogan explained the problem.<sup>410</sup> He argued that theft might ordinarily be considered deceptive and deceitful such that prior convictions for theft would be admissible to prove untruthfulness. Then he argued that all thefts were not necessarily deceitful.<sup>411</sup> For example, a college student who stole a car to go "joy riding" as part of a fraternity initiation was hardly being dishonest, deceptive or deceitful. One can think of many similar examples. The point is that whether a crime is deceptive, deceitful, or shows untruthfulness, depends to a large extent on the factual circumstances surrounding the commission of the crime. Simply listing crimes which are deceitful and deceptive fails to account for all the circumstances surrounding the crimes.

A rule allowing impeachment of a criminal defendant with prior conviction evidence is also problematic because of the assumptions underlying such a rule. Proponents of such a rule assume that crimes involving dishonesty or deceit (whatever crimes those may be) are the only crimes relevant to proving truthfulness.<sup>412</sup> Certainly, crimes involving dishonesty do bear on the credibility of a witness, but it is not necessary to stop there. One could argue that breaking any law reflects on truthfulness. If a witness is willing to break a law, then one could argue that the witness would certainly have no problem being untruthful in court. It is not necessary to draw such conclusions, but it is not unreasonable to conclude that one who breaks the law would also lie in open court. The point is simply that other crimes may well bear on a defendant's truthfulness irrespective of the nature of the crime.

Regardless of which crimes bear on a defendant's credibility, the real problem with allowing impeachment with prior conviction evidence is the unfair prejudice which results. Proponents of Rule 609 have argued that any prejudicial effect created when jurors hear such evidence can be cured, or at least mitigated, by a judge's limiting instruction.<sup>413</sup> This is simply not true.<sup>414</sup> Jurors do not understand limit-

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408. See 120 CONG. REC. 2376 (1974) (remarks by Rep. Hogan).

409. See IND. REV. R. EVID. 609; MICH. REV. R. EVID. 609.

410. See *supra* note 408.

411. *Id.*

412. *Id.* at 2377 (remarks by Rep. Dennis).

413. See *supra* note 398. Senator Hruska stated:

ing instructions in the civil or criminal context.<sup>415</sup> The results are particularly troubling in the criminal context. When the jury hears that the defendant broke the law before, they conclude he or she must have broken the law again. The presumption of innocence is reversed and a criminal defendant is left with little chance of acquittal, even when the evidence against him or her may be fairly weak. Of course, it is in close cases that the jury is especially likely to misuse the prior conviction evidence and convict the defendant because of his or her prior convictions.<sup>416</sup>

The prejudicial effect of prior conviction evidence is not limited to crimes which do not involve dishonesty or deceit. If it were true that jurors actually used the information only to weigh the credibility of the witness, then the argument that a prosecutor should be allowed to impeach a defendant with prior convictions involving dishonesty would have much more force than it does. The simple fact is that jurors use such evidence to infer that the defendant had a propensity to commit crime and, therefore, committed the crime with which he or she is charged.<sup>417</sup> Such assumptions are made even when the prior conviction evidence is for crimes involving dishonesty.

Proponents of Rule 609 have been quite adamant about the need for the jury to have such evidence.<sup>418</sup> Apparently there is an underlying belief that without such information, the jury might just take the defendant at his or her word. Social science shows this is false.<sup>419</sup> Jurors do not take the defendant at his or her word.<sup>420</sup> Jurors are aware that a defendant has much to lose if he or she is convicted. They are also aware that if the defendant committed a crime, he or she would certainly lie about committing that crime.<sup>421</sup> The study by Wissler and Saks showed that jurors were skeptical about a defendant's credi-

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There may be some prejudice to the defendant, I recognize, in admitting evidence that the defendant has previously been convicted of a felony. But to a substantial degree, this prejudice can be instigated by an introduction to the jury that the prior convictions are admitted only for purposes of impeaching the credibility of the witness and not to prove any propensity on the part of the defendant to be a felon.

*Id.* at 37077. Senator McClellan stated:

[Disallowing prior conviction evidence] is premised on the fear that the use of prior convictions to establish a lack of credibility of the witness will tempt juries to convict the defendant simply on the basis of his prior criminal record rather than base their verdict on the facts relating to the charges on which the defendant is being tried. *The court's instructions, of course, preclude the jury from using prior convictions in this way.*

*Id.* at 37076 (emphasis added).

414. See discussion *supra* notes 279-360 and accompanying text.

415. See discussion *supra* notes 279-360 and accompanying text.

416. See discussion *supra* notes 328-346 and accompanying text.

417. See discussion *supra* notes 385-389 and accompanying text.

418. See *supra* note 415.

419. See Wissler & Saks, *supra* note 294, at 43.

420. *Id.*

421. *Id.*

bility even when they were unaware of his or her prior conviction evidence.<sup>422</sup> Wissler and Saks wrote:

The defendant's credibility is already so much lower than that of the other witnesses (because it obviously is in the defendant's self-interest to give testimony which favors his or her position) that the admission of prior convictions does not reduce the credibility of the defendant further.<sup>423</sup>

Moreover, there is no reason why a prosecutor cannot argue in closing that the defendant is not credible because of his or her self-interest in the outcome of the trial. In short, the assertion by proponents of Rule 609 that juries need information of prior convictions to properly weigh a defendant's credibility has no basis in fact.

It is odd that proponents of Rule 609 assume jurors are incapable of determining that the defendant has everything to gain and nothing to lose by lying. At the same time, proponents assume that jurors are capable of understanding and following a legal instruction to consider prior conviction evidence only as it weights on a defendant's credibility. Ironically, proponents of Rule 609 assume jurors know little about human nature, but at the same time they assume that jurors will be able to follow a complex legal instruction. Studies show that neither of these assumptions are correct. Jurors do realize that a defendant has every reason to lie on the stand. However, jurors seldom understand and follow a judge's limiting instruction.

The only way to cure the prejudicial effects of prior conviction evidence at criminal trials is to disallow such evidence altogether. The "risk of prejudice to the defense is greater than the unrealized potential benefit to the prosecution. A change of the rules to exclude evidence of prior convictions for defendants would protect defendants while not disabling the prosecutor."<sup>424</sup> Even commentators opposed to limiting the information a jury hears have recognized the need to exclude evidence of prior convictions from the jurors' ears.<sup>425</sup> One group of commentators argued that blindfolding jurors by excluding certain types of evidence, such as auto insurance coverage, was unwise because it was based on unfounded assumptions.<sup>426</sup> These commentators argued that if jurors were not informed about laws, such as mandatory insurance for drivers, jurors would base decisions on their own personal knowledge of the law instead of the judge's instruc-

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422. *Id.*

423. *Id.*

424. See Wissler & Saks, *supra* note 294, at 47.

425. See Shari Seidman Diamond & Jonathan D. Casper, *Blindfolding the Jury*, 52 L. & CONTEMP. PROBS. 247, 247-267 (1989).

426. *Id.* at 248-49.

tion.<sup>427</sup> They argued jurors should be informed about information, such as insurance, which has traditionally been excluded at trial.<sup>428</sup> The group recognized, however, that the prejudice to criminal defendants was well-proven, and that the only way to prevent this prejudice was to blindfold the jury and preclude prior conviction evidence altogether.<sup>429</sup>

## VII. CONCLUSION

Given the numerous problems with Rule 609 and similar state rules, a *per se* rule disallowing prior conviction evidence should be adopted. Such a rule would protect criminal defendants and be consistent with the underlying policies of the Constitution and American criminal law. It is doubtful such a rule would have a negative impact on conviction rates, and it would better insure that jurors convict for the right reasons. Jurors would not be tempted to convict simply because they believed that the defendant had a propensity to commit crimes or was a bad person. Rather, jurors would have to evaluate the specific facts of the case and determine if the State has met its burden of proof. Such a rule would afford defendants a way out of the dilemma created by the current rule. The proposed rule would have the added benefit of promoting criminal defendants to testify. This would provide the jurors with more information to make an informed decision about a verdict. Such a rule would not severely limit the prosecution. While prosecutors would not be allowed to bring in prior conviction evidence, they would still be allowed full cross-examination. Also, prosecutors would still be allowed to argue to the jury that the defendant is not believable because he or she in fact committed the crime and now has every reason to lie about it.

Hawaii, Pennsylvania, Kansas, Georgia, Montana and England have adopted such a rule, but all have recognized exceptions to the rule when the defendant actively misleads the jury. In such cases, each of these jurisdictions have allowed the use of prior conviction evidence to impeach. When a defendant with prior convictions tries to bolster his or her credibility in this way, impeachment by prior conviction evidence should be allowed. Case law from jurisdictions ordinarily preventing the use of prior conviction evidence would be useful in providing state and federal courts guidance in the application of the proposed rule.

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427. *Id.* at 249-52.

428. *Id.* at 267.

429. *Id.* at 261-62.