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### Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants With Prior Convictions

Jeffrey Bellin\*

*This Article spotlights the flawed analytical framework at the heart of the federal courts' approach to one of the most controversial trial practices in American criminal jurisprudence — the admission of prior convictions to impeach the credibility of defendants who testify. As the Article explains, the flawed approach is a byproduct of the courts' reliance on a five-factor analytical framework to implement the governing legal standard enacted by Congress in Federal Rule of Evidence 609. Tracing the evolution of the five-factor framework from its roots in pre-Rule 609 case law, the Article demonstrates that the courts' reinterpretation of the framework in recent years has, by judicial fiat, transformed Rule 609. Rather than the obstacle*

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\* Senior Appellate Attorney, California Courts of Appeal; former Assistant United States Attorney; J.D., Stanford Law School, 1999. E-mail: jeffrey.bellin@gmail.com. I would like to thank George Fisher and Robert Huie for their helpful comments on an early draft of this article.

to the admission of prior convictions that Congress intended, Rule 609 has become a conduit for their routine admission.

The Article concludes by proposing an alternative analytical framework designed to realign the federal case law on this critical subject with the governing congressional intent. In the absence of such a reform, the federal courts' erroneous analysis will continue to alter the course of countless criminal trials by unnecessarily deterring defendants from testifying and improperly penalizing those who do take the witness stand.

#### TABLE OF CONTENTS

INTRODUCTION .....	291
I. THE SIGNIFICANCE OF PRIOR CONVICTION IMPEACHMENT OF CRIMINAL DEFENDANTS .....	294
II. CONGRESS SPEAKS ON IMPEACHMENT: FEDERAL RULE OF EVIDENCE 609 .....	303
A. <i>The Compromise Embodied in Rule 609</i> .....	304
B. <i>Reading Between the Lines: The Anti-Impeachment Tenor             of Rule 609</i> .....	307
III. IMPLEMENTING RULE 609'S BALANCING TEST: THE FIVE- FACTOR FRAMEWORK .....	312
A. <i>United States v. Mahone Establishes the Five-Factor             Framework</i> .....	312
B. <i>The District of Columbia Circuit's Pre-Rule 609 Case             Law</i> .....	313
C. <i>The Implications of Mahone's Reliance on Gordon</i> .....	315
D. <i>An Inherent Flaw in the Mahone Framework</i> .....	318
IV. MODERN APPLICATION OF THE FIVE-FACTOR FRAMEWORK.....	319
A. <i>Luce v. United States Transforms Appellate Review of             Impeachment Rulings</i> .....	320
B. <i>The Fourth and Fifth Mahone Factors Escape From             Equipoise</i> .....	322
C. <i>Post-Luce Application of the Fourth and Fifth Mahone             Factors</i> .....	324
D. <i>Implications of the Modern Application of the Five-Factor             Framework</i> .....	330
V. AN ALTERNATIVE ANALYTICAL FRAMEWORK FOR APPLYING RULE 609 .....	335
CONCLUSION.....	340

## INTRODUCTION

One of the most significant rulings in a criminal case is the determination that a defendant who intends to take the witness stand may (or may not) be impeached with a prior conviction.<sup>1</sup> Indeed, when prior conviction<sup>2</sup> impeachment is permitted, defendants often decline to testify at all, fearing that once the jury is aware of their criminal record, it will conclude the defendant “is the kind of [person] who would commit the crime” or, even worse, “that he ought to be put away without too much concern with present guilt.”<sup>3</sup>

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<sup>1</sup> See Richard D. Friedman, *Character Impeachment Evidence: Psycho-Bayesian [!?!] Analysis and a Proposed Overhaul*, 38 UCLA L. REV. 637, 639 (1991) (recognizing that “prosecutors offer . . . [prior conviction impeachment] evidence very frequently, and both sides recognize its potency and often litigate its admissibility with great vigor”); Victor Gold, *Impeachment by Conviction Evidence: Judicial Discretion and the Politics of Rule 609*, 15 CARDOZO L. REV. 2295, 2297, 2310 n.74 (1994) (ascribing “the extraordinary amount of congressional interest” in federal rule governing impeachment of testifying defendants to fact that impeachment decision “significantly affects the outcome of criminal trials”); Alan D. Hornstein, *Between Rock and a Hard Place: The Right to Testify and Impeachment by Prior Conviction*, 42 VILL. L. REV. 1, 1-2 (1997) (noting that “[i]f the jury learns that a defendant previously has been convicted of a crime, the probability of conviction increases dramatically”); L. Timothy Perrin, *Pricking Boils, Preserving Error: On The Horns of a Dilemma After Ohler v. United States*, 34 UC DAVIS L. REV. 615, 651-52 (2001) (noting that “[t]he available empirical data demonstrate that the admission of a prior conviction has an explosive impact on the jury, substantially increasing the likelihood that the jury will convict the defendant of the charged crime,” and consequently “the admission at trial of a criminal defendant’s prior convictions often spells doom for a criminal defendant”).

<sup>2</sup> The phrase “prior conviction” has been criticized as redundant in this context because any potentially admissible conviction will necessarily have occurred *prior* to a witness’s testimony. See James Duane, *Prior Convictions and Tuna Fish*, 7 SCRIBES J. LEGAL WRITING 160, 161 (2000). While there is some merit to this criticism, this Article sacrifices potential style points for clarity in utilizing the arguably redundant phrasing, which is, after all, “lodged in our legal lexicon.” *Id.* at 162. The standard formulation, while at times rhetorical overkill, eliminates ambiguity that might arise when a qualifier (e.g., “prior,” “felony,” or “criminal”) is omitted. For example, a Quaker on trial for heresy or a sociopath attempting to avoid the death penalty would wisely endeavor to suppress evidence of their “convictions” (i.e., fixed or strong beliefs, see AMERICAN HERITAGE DICTIONARY 292 (New College ed. 1976)), despite not having any criminal record.

<sup>3</sup> *Loper v. Beto*, 405 U.S. 473, 482 n.11 (1972) (quoting 1 MCCORMICK ON EVIDENCE § 43, at 93 (1954)); see also Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: Here I Go Down That Wrong Road Again*, 74 N.C. L. REV. 1559, 1632 (1996) (“The principal reason why defendants refuse to take the stand is that they fear impeachment with prior convictions — a fear with strong support from the empirical evidence.”); R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15, 58 (1981) (arguing that “innocent

Commentators have long criticized the practice of impeaching testifying defendants with prior convictions, citing the questionable relevance of past crimes to witness credibility and the virtual certainty that their admission will lead to unfair prejudice.<sup>4</sup> This chorus of disapproval has had little practical effect, however. The admission of prior convictions is now a well established and virtually routine part of federal (and most state) criminal proceedings in which a defendant with a criminal record takes the witness stand.<sup>5</sup>

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defendants in many American jurisdictions are deterred from testifying by the unjust practice of allowing prior convictions to be routinely admitted to impeach a defendant's credibility"); Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 482 (1992) (noting that "[t]he threat of felony conviction impeachment can be a powerful deterrent to taking the witness stand" and citing empirical evidence that "a defendant [i]s almost three times more likely to refuse to testify if he ha[s] a criminal record than if not"); cf. *Ohler v. United States*, 529 U.S. 753, 759 (2000) (recognizing that potential use of prior convictions as impeachment "may deter a defendant from taking the stand").

<sup>4</sup> See James Beaver & Steven Marques, *A Proposal to Modify the Rule on Criminal Conviction Impeachment*, 58 TEMP. L.Q. 585, 604 (1985); Tere E. Foster, *Rule 609(A) in the Civil Context: A Recommendation for Reform*, 57 FORDHAM L. REV. 1, 1-2 (1988) (stating that "[n]o rule of evidence has provoked commentary so passionate or profuse as that which permits impeachment of a testifying witness in a criminal case by introducing that witness' previous convictions"); Gold, *supra* note 1, at 2295-96 ("No provision of the Federal Rules of Evidence has sparked more controversy than Rule 609, which deals with the admissibility of convictions to impeach a witness."); Hornstein, *supra* note 1, at 10; Gene R. Nichol, Jr., *Prior Crime Impeachment of Criminal Defendants: A Constitutional Analysis of Rule 609*, 82 W. VA. L. REV. 391, 394 (1980) (recognizing practice of impeaching criminal defendant with prior conviction as "one of the most seriously debated issues of evidence law"); Perrin, *supra* note 1, at 652; discussion *infra* Part I. The Supreme Court has identified Dean Ladd's 1940 article criticizing the impeachment of criminal defendants (and other witnesses) with prior convictions as a "seminal article" in this area. See *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 512 n.11 (1989) (citing Mason Ladd, *Credibility Tests — Current Trends*, 89 U. PA. L. REV. 166, 176, 191 (1940)).

<sup>5</sup> See Beaver & Marques, *supra* note 4, at 591 (stating that despite passage of Federal Rules, "[p]rior crime impeachment of criminal defendant-witnesses continues essentially unabated" and noting famed study by Harry Kalven, Jr. and Hans Zeisel that "nationwide, juries learn of defendants' criminal records in seventy-two percent of the cases in which defendants testify in their own behalf"); John Blume, *The Dilemma of the Criminal Defendant with a Prior Record — Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL LEGAL STUD. 477, 484-86 n.28 (forthcoming 2008), available at <http://ssrn.com/abstract=1014181> (explaining that state and federal rules limiting prior conviction impeachment are "honored in the breach" and that any required balancing of probative value versus prejudice "is routinely struck in favor of impeachment"); Mirjan R. Damaska, *Propensity Evidence in Continental Legal Systems*, 70 CHI.-KENT L. REV. 55, 59 (1994) (contrasting continental European jurisdictions with "common law jurisdictions . . . where prior convictions are routinely used to impeach the accused who decides to testify in his own defense"); Greenawalt, *supra*

As this Article explains, the federal courts are not merely out of step with commentators on this issue, but have also diverged from the intent of Congress. The now-prevailing practice is patently inconsistent with the controlling legal standard — Federal Rule of Evidence 609. On its face, Rule 609 is unflinchingly hostile to the use of prior convictions as impeachment of criminal defendants. The Rule allows the introduction of most convictions only if “the [trial] court determines that the probative value of admitting this evidence outweighs its prejudicial effect.”<sup>6</sup> This prerequisite to admissibility, an unweighted balancing of prejudice versus probative value, should favor the defense in the overwhelming majority of cases.<sup>7</sup> Instead, a reflexive approach to admitting defendants’ prior convictions has become the norm.<sup>8</sup>

This Article attempts to explain the pronounced divergence between the federal courts’ routine admission of defendants’ prior convictions and the congressional intent underlying Rule 609 that such evidence be strictly limited.<sup>9</sup> The Article traces this phenomenon to a three-decade-long trend in the federal courts toward replacing the facially anti-impeachment text of the Rule with a decidedly pro-impeachment, five-factor analytical framework that places an almost insurmountable burden on defendants attempting to exclude prior convictions.<sup>10</sup> In

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note 3, at 58 (decrying “the unjust practice” in American jurisdictions “of allowing prior convictions to be routinely admitted to impeach a defendant’s credibility”); Hornstein, *supra* note 1, at 4-5 (recognizing that “the lower courts more or less routinely admit[] [prior convictions] for impeachment” of testifying criminal defendants); Nichol, *supra* note 4, at 394, 399 (stating that despite “academic fervor” criticizing practice of prior conviction impeachment of criminal defendants has been “largely unabated under the provisions of the Federal Rules of Evidence”); *infra* Part IV (canvassing federal case law applying Rule 609).

<sup>6</sup> FED. R. EVID. 609(a)(1).

<sup>7</sup> See *infra* Part II.B.

<sup>8</sup> See *infra* Part IV.C; *infra* note 162.

<sup>9</sup> See FED. R. EVID. 609 (indicating congressional intent that prior convictions should only be used in limited circumstances); *infra* Part II.

<sup>10</sup> As discussed in greater detail below, the federal appellate courts instruct district courts as follows:

[I]n determining whether the probative value of admitting a prior conviction outweighs its prejudicial effect, the court should consider: ‘(1) the impeachment value of the prior crime; (2) the point in time of the conviction and the defendant’s subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant’s testimony; and (5) the centrality of the credibility issue.’

United States v. Gant, 396 F.3d 906, 909 (7th Cir. 2005); see also *infra* Part III (discussing this five-factor framework); cases cited *infra* note 110 (cataloging use of

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effect, this judge-created framework designed to interpret Rule 609 has instead supplanted it. As a consequence, the federal approach to prior conviction impeachment has become the opposite of what Congress intended.

Part I of the Article provides the context for the analysis to follow, demonstrating the broad significance of prior conviction impeachment rulings — one of only a handful of potentially dispositive evidentiary rulings governing criminal trials. Part II sketches the legislative history of Rule 609, depicting Congress's intent that the Rule, as finally enacted, strictly curtail admission of defendants' prior convictions. Part III documents how the federal courts have strayed from congressional intent by relying on a fundamentally flawed, judicially crafted five-factor framework to apply the Rule. Part IV demonstrates that the framework, as currently applied, leads to the virtually automatic admissibility of prior convictions as impeachment. Finally, Part V proposes an alternative analytical approach to the application of Rule 609 that is designed to realign the federal case law with the controlling congressional intent.

#### I. THE SIGNIFICANCE OF PRIOR CONVICTION IMPEACHMENT OF CRIMINAL DEFENDANTS

It has long been established in the vast majority of American jurisdictions that criminal defendants who take the witness stand, like all other witnesses, are subject to general credibility impeachment through the introduction of evidence of their prior convictions.<sup>11</sup> This

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this framework in federal circuits).

<sup>11</sup> See *United States v. Martinez*, 555 F.2d 1273, 1275 (5th Cir. 1977) (recognizing “criticism” of practice of impeaching criminal defendants with prior convictions, but noting that it “is firmly entrenched in our jurisprudence”); *United States v. Garber*, 471 F.2d 212, 215-16 (5th Cir. 1972) (emphasizing that although prior conviction impeachment has been “persistently criticized” it is “firmly entrenched in criminal justice procedures” and “generally accepted as fair and proper”); 1 MCCORMICK ON EVIDENCE § 42, at 198 (Kenneth S. Broun et al. eds., 6th ed. 2006) (noting argument that impeachment of accused must be permitted because “it is misleading to permit the accused to appear as a witness of blameless life” has “prevailed widely”); Nichol, *supra* note 4, at 391 (recognizing practice as “time-honored tenet of our evidentiary jurisprudence”).

The Supreme Court of Hawaii holds a contrary view and has ruled that “to convict a criminal defendant where prior crimes have been introduced to impeach his credibility as a witness violates the accused’s constitutional right to testify in his own defense.” *State v. Santiago*, 492 P.2d 657, 661 (Haw. 1971). A handful of states have adopted Hawaii’s approach in generally barring impeachment of testifying defendants with prior convictions. See Robert D. Dodson, *What Went Wrong with Federal Rule Of Evidence 609: A Look at How Jurors Really Misuse Prior Conviction Evidence*, 48 DRAKE

practice of impeaching the credibility of criminal defendants with prior convictions has been aptly characterized as “one of the most controversial in the law of evidence.”<sup>12</sup> The controversy stems from the fact that, while the rationale behind the practice is far from compelling, all sides agree that it has a devastating effect on defendants who testify (or decline to do so to avoid impeachment).

Prosecutors routinely fight to preserve their ability to introduce a defendant’s prior convictions as impeachment evidence.<sup>13</sup> In response, criminal defense attorneys endeavor to moot the potential impeachment by convincing defendants with a criminal record to refrain from testifying.<sup>14</sup> These tactical positions reflect the “overwhelming consensus”<sup>15</sup> of legal commentators and practitioners that prior conviction impeachment has an “explosive impact on the jury,” “significantly affect[ing] the outcome of criminal trials,”<sup>16</sup> and often “spell[ing] doom for a criminal defendant.”<sup>17</sup> The available empirical data support this consensus, demonstrating that admission of a defendant’s prior convictions “substantially increase[s] the likelihood that the jury will convict the defendant of the charged crime.”<sup>18</sup>

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L. REV. 1, 51 (1999) (citing Hawaii, Pennsylvania, Kansas, Georgia, and Montana as sole jurisdictions that depart from general rule permitting such impeachment).

<sup>12</sup> See Foster, *supra* note 4, at 1-2.

<sup>13</sup> See 1 MCCORMICK ON EVIDENCE, *supra* note 11, § 42, at 198 (noting that “[m]ost prosecutors argue” that impeachment should be permitted because “it is misleading to permit the accused to appear as a witness of blameless life”); Friedman, *supra* note 1, at 639 (recognizing that “prosecutors offer . . . [prior conviction impeachment] evidence very frequently, and both sides recognize its potency and often litigate its admissibility with great vigor”); Mason Ladd, *Credibility Tests — Current Trends*, 89 U. PA. L. REV. 166, 190 (1940) (asserting that potential to introduce defendant’s criminal record as impeachment “is something never missed by the prosecuting attorney”).

<sup>14</sup> See Beaver & Marques, *supra* note 4, at 606 (reporting survey of defense attorneys finding that 98% “believed that it was impossible for the limiting instruction” requiring juries to consider prior convictions solely as impeachment “to be effective”); Van Kessel, *supra* note 3, at 482 (noting that defendants with criminal record are almost three times more likely to refuse to testify).

<sup>15</sup> Beaver & Marques, *supra* note 4, at 604.

<sup>16</sup> See Gold, *supra* note 1, at 2297 n.74.

<sup>17</sup> Perrin, *supra* note 1, at 651; see also Hornstein, *supra* note 1, at 1-2 (“If the jury learns that a defendant previously has been convicted of a crime, the probability of conviction increases dramatically.”); Ladd, *supra* note 13, at 186 (arguing that admission of prior conviction “may be the turning point of the case to the untrained mind”).

<sup>18</sup> Perrin, *supra* note 1, at 651-52; see also Beaver & Marques, *supra* note 4, at 604-06 (summarizing juror studies and concluding that “[e]mpirical data . . . indicate that the admission of evidence of prior crimes is so highly prejudicial that it often may be decisive in determining the jury’s verdict”).

Scholarly commentary in the modern era has resolutely derided prior conviction impeachment as a mean-spirited penalty imposed on criminal defendants — nothing more than a thinly veiled effort by prosecutors (condoned by “law and order” courts and legislators) to introduce otherwise prohibited evidence of a defendant’s criminal propensities through the back door of credibility impeachment.<sup>19</sup> In light of this strident and often one-sided characterization of prior conviction impeachment,<sup>20</sup> it is necessary to situate the practice in its historical context to develop a meaningful appreciation of its place in American jurisprudence.

The roots of the practice of impeachment with prior convictions can be traced to English common law, which categorically barred witnesses previously convicted of a felony (or other “infamous crime”) from testifying.<sup>21</sup> Throughout the late nineteenth and early twentieth centuries, these and other disqualifications of witness classes gradually disappeared in American jurisdictions. This trend culminated in the Supreme Court’s pronouncement in 1918, as “the conviction of [the] time,” that “the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury.”<sup>22</sup>

The statutory reforms that abolished the testimonial disqualification of felons and other classes of witnesses nevertheless retained some of the spirit of the common law tradition by permitting the credibility of

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<sup>19</sup> See, e.g., Beaver & Marques, *supra* note 4, at 607, 619 (arguing that permitting impeachment “effectively allows the government to influence the jury on the issue of guilt with evidence that is inadmissible as a matter of law” and advocating abolition of practice); Nichol, *supra* note 4, at 403, 409 (noting perception that “prosecutors often use past conviction evidence hoping that jurors will be unable to follow the instructions of the court” and contending that “[p]rior crime impeachment . . . serves no legitimate interest in the conduct of federal criminal trials”); H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 868 (1982) (suggesting that “the impeachment rubric is a hoax, merely a cover for the admission of evidence bearing on propensity — which is what the rule’s defenders are probably seeking”).

<sup>20</sup> Even some commentators who generally believe that criminal defendants are “surrounded with excessive safeguards” and “treat[ed] . . . too leniently” find the practice of impeachment with prior convictions “insupportable.” Beaver & Marques, *supra* note 4, at 587.

<sup>21</sup> See *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 511 (1989) (“At common law a person who had been convicted of a felony was not competent to testify as a witness.”); Ladd, *supra* note 13, at 174 (explaining that common law precluded testimony from persons convicted of “infamous crimes under the laws of England, generally enumerated as treason, felony and the *crimen falsi*”).

<sup>22</sup> *Rosen v. United States*, 245 U.S. 467, 471 (1918).



previously disqualified witnesses to be impeached with the once disqualifying factors. In the case of felons, this meant impeachment with their prior convictions.<sup>23</sup> Thus, the practice of impeaching testifying witnesses with prior convictions was not, at least originally, intended to penalize defendants. Instead, it was a byproduct of a progressive reform that removed rather than added to the obstacles facing convicts (including, of course, many criminal defendants) who sought to testify.<sup>24</sup>

While this history is sufficient to explain the current practice of impeachment with felony convictions, it is not a particularly compelling justification for it. The “conviction of [the present] time”<sup>25</sup> leaves little room for admiring the relative liberality of modern practice as contrasted with seemingly archaic witness class disqualifications of English common law. Instead, modern proponents of prior conviction impeachment must rely on its intrinsic merits — that knowledge of a witness’s prior conviction(s) provides insight to the jury in evaluating credibility.<sup>26</sup>

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<sup>23</sup> See *Green*, 490 U.S. at 511-12 (“As the law evolved, th[e] absolute bar gradually was replaced by a rule that allowed such witnesses to testify in both civil and criminal cases, but also to be impeached by evidence of a prior felony conviction or a *crimen falsi* misdemeanor conviction.”); *Rogers v. Balt. & Ohio R.R. Co.*, 325 F.2d 134, 137 (6th Cir. 1963) (recognizing admissibility of prior conviction impeachment as “a carry-over from the common law”); Hornstein, *supra* note 1, at 22 (noting that “[t]ypically, when a jurisdiction abolished the disqualification of witnesses who had been convicted of a crime, it permitted the conviction to be used to impeach the testimony of the witness” and that “[n]o distinction was made between the garden variety witness and the criminal defendant testifying in her own behalf, despite what now seems the obviously greater prejudicial impact on the latter”).

<sup>24</sup> Indeed, criminal defendants were among the classes of witnesses wholly disqualified from testifying under the common law tradition. See *Nix v. Whiteside*, 475 U.S. 157, 164 (1986) (“Until the latter part of the preceding century, criminal defendants in this country, as at common law, were considered to be disqualified from giving sworn testimony at their own trial by reason of their interest as a party to the case.”). Of course, with respect to criminal defendants and other interested parties, the fact of their interest needed no specific authorization to be admissible as impeachment once the statutory disqualifications were repealed. See FED. R. EVID. 601 advisory committee’s note (commenting with respect to abolition of witness disqualifications that “[i]nterest in the outcome of litigation and mental capacity are, of course, highly relevant to credibility and require no special treatment to render them admissible along with other matters bearing upon the perception, memory, and narration of witnesses”).

<sup>25</sup> *Rosen*, 245 U.S. at 471.

<sup>26</sup> See *People v. Castro*, 696 P.2d 111, 118 (Cal. 1985) (recognizing that “while the historical basis for felony impeachment may well be the common law rule that a person convicted of any felony was totally incompetent as a witness . . . , the modern justification for the practice must be that prior felony convictions may, somehow, be

Indeed, just as the complete disqualification of felons as witnesses seemed sensible to those who crafted the common law, the logic of impeaching witnesses with prior convictions remains plausible today. A jury may draw *some* useful information from the fact that a witness has a criminal record, particularly, although not exclusively, when a prior crime involved a measure of dishonesty.<sup>27</sup> As famously explained by Justice Holmes, evidence that a witness has been convicted of a serious crime suggests a “general readiness to do evil.”<sup>28</sup>

It is from that general disposition . . . that the jury is asked to infer a readiness to lie in the particular case, and thence that he has lied in fact. The evidence has [a] tendency to prove that . . . he has perjured himself, and it reaches that conclusion . . . through the general proposition that he is of bad character and unworthy of credit.<sup>29</sup>

The same argument has been stated more colloquially, as follows:

[C]onvicted felons are *not* generally permitted to stand pristine before a jury with the same credibility as that of a Mother Superior. Fairness is not a one-way street and in the search for the truth it is a legitimate concern that one who testifies should not be allowed to appear as credible when his criminal record of major crimes suggests that he is not.<sup>30</sup>

The justification for impeachment that is embodied in the preceding quotations becomes less forceful, however, when the witness is the accused in a criminal case. Unlike any other witness, “[a] testifying defendant’s credibility is impeached by his interest in the trial’s outcome even before he utters a word.”<sup>31</sup> Not only is every defendant

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relevant to the witness’ veracity”).

<sup>27</sup> FED. R. EVID. 609 advisory committee’s note to 1972 Proposed Rules (“There is little dissent from the general proposition that at least some crimes are relevant to credibility.”).

<sup>28</sup> *Gertz v. Fitchburg R.R. Co.*, 137 Mass. 77, 78 (1884); *see also Green*, 490 U.S. at 508 n.4; Ladd, *supra* note 13, at 176.

<sup>29</sup> *Gertz*, 137 Mass. at 78; *see also Green*, 490 U.S. at 508 n.4.

<sup>30</sup> *United States v. Lipscomb*, 702 F.2d 1049, 1077 (D.C. Cir. 1983); *see also* 1 MCCORMICK ON EVIDENCE, *supra* note 11, § 42, at 198 (“Most prosecutors argue forcefully that it is misleading to permit the accused to appear as a witness of blameless life, and this argument has prevailed widely.”).

<sup>31</sup> James L. Kainen, *The Impeachment Exception to the Exclusionary Rules: Policies, Principles, and Politics*, 44 STAN. L. REV. 1301, 1313 (1992); *see also United States v. Gaines*, 457 F.3d 238, 248 (2d Cir. 2006) (saying “[n]othing could be more obvious, and less in need of mention to a jury, than the defendant’s profound interest in the verdict”); Hornstein, *supra* note 1, at 62-63 (explaining “whatever probative value

(felon or not) subject to this form of impeachment, but the impeachment is quite powerful. Jurors, who generally have little sympathy for a person charged with a crime, are well aware that even otherwise honest defendants have a strong incentive to shade their trial testimony in favor of acquittal.<sup>32</sup>

The inherently cumulative nature of impeaching criminal defendants with prior convictions is demonstrated by the common law roots of the modern statutory framework. At common law, a criminal defendant with a prior felony conviction was disqualified from testifying not only as a felon, but also as an interested party — a separate and independent common law ground for disqualification.<sup>33</sup> It stands to reason, then, that because only one ground for disqualification was considered sufficient to *bar* a witness from testifying at common law, only one ground for impeachment (felon or interested party) should now be necessary to substantially *discredit* a defendant's testimony.

The case for admitting prior convictions as impeachment of criminal defendants is further complicated by the fact that jurors will be tempted to consider a defendant's past criminal acts not just for impeachment, but also as evidence of substantive guilt.<sup>34</sup> This is, after

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prior conviction evidence may have on the believability of a defendant's testimony, it is likely to pale in the face of the defendant's obvious interest in the outcome of the case, an interest that will cause the jury to be cautious in its assessment of the defendant's testimony"); *cf.* *Brown v. United States*, 370 F.2d 242, 244 (D.C. Cir. 1966) (emphasizing that "[o]ne need not look for prior convictions to find motivation to falsify, for certainly that motive inheres in any case, whether or not the defendant has a prior record"); Gold, *supra* note 1, at 2326 (arguing that prior convictions generally have little probative value because, on question of defendant credibility, they tell jurors "nothing they do not already know").

<sup>32</sup> *Brown*, 370 F.2d at 244 ("We can expect jurors to be naturally wary of the defendant's testimony, even though they may be unaware of his past conduct."); Michael E. Antonio & Nicole E. Arone, *Damned if They Do, Damned if They Don't: Jurors' Reaction to Defendant Testimony or Silence During a Capital Trial*, 89 JUDICATURE 60, 66 (Sept.-Oct. 2005) (reporting results of juror interviews showing that jurors generally view defendant testimony as untrustworthy); Beaver & Marques, *supra* note 4, at 614 (recognizing "natural distrust that members of a jury undoubtedly have for one who is charged with a criminal offense"); Nichol, *supra* note 4, at 408 ("Greater incentive to deceive can hardly be imagined [than a defendant's interest in acquittal] and this motive and propensity are well understood and recognized by each member of the jury.").

<sup>33</sup> See *Nix v. Whiteside*, 475 U.S. 157, 164 (1986).

<sup>34</sup> See *Loper v. Beto*, 405 U.S. 473, 482 n.11 (1972) ("The sharpest and most prejudicial impact of the practice of impeachment by conviction . . . is upon one particular type of witness, namely, the accused in a criminal case who elects to take the stand").

all, the reason that when a defendant *does not* testify, the prosecution is generally barred from introducing a “defendant’s prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime.”<sup>35</sup> As the Supreme Court has explained, this prohibition exists not because the evidence is irrelevant; “on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.”<sup>36</sup>

To resolve the tension between the general prohibition of evidence of a defendant’s criminal past and the routine admission of such evidence as *impeachment* of the accused, the courts rely on a so-called “limiting” instruction. Trial courts instruct juries to disregard any inference regarding the defendant’s criminal propensities and to instead limit their consideration of the defendant’s prior record to the narrow issue of credibility.<sup>37</sup> The courts assume juries will do so.<sup>38</sup>

Unfortunately, empirical studies and common sense suggest that a limiting instruction offers little protection against the prejudice inherent in prior conviction impeachment.<sup>39</sup> This sentiment is

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<sup>35</sup> *Michelson v. United States*, 335 U.S. 469, 475 (1948); see FED. R. EVID. 404(b) (“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.”).

<sup>36</sup> *Michelson*, 335 U.S. at 476; Ladd, *supra* note 13, at 186 (arguing that introduction of past offenses “helps the jury to be satisfied with much less proof than they otherwise would demand for conviction” and “makes them less critical in their effort to be sure that they have rightly convicted, finding solace from the possibility of error in the fact that after all the defendant is a bad man”).

<sup>37</sup> A typical instruction reads: “Th[e] [defendant’s] earlier conviction was brought to your attention only as one way of helping you decide how believable his testimony was. You cannot use it for any other purpose. It is not evidence that he is guilty of the crime that he is on trial for now.” O’MALLEY, GRENIG & LEE, 1A FEDERAL JURY PRACTICE & INSTRUCTIONS § 15.08, at 427 (5th ed. 2007) (listing this instruction from Sixth Circuit and providing other examples by Circuit).

<sup>38</sup> See, e.g., *United States v. Castillo*, 140 F.3d 874, 884 (10th Cir. 1998) (“A central assumption of our jurisprudence is that juries follow the instructions they receive.”); cf. *Richardson v. Marsh*, 481 U.S. 200, 207 (1987) (noting reliance on related instructions in various contexts, including that “evidence of the defendant’s prior criminal convictions could be introduced for the purpose of sentence enhancement, so long as the jury was instructed it could not be used for purposes of determining guilt”).

<sup>39</sup> See Beaver & Marques, *supra* note 4, at 602, 607 (arguing that despite limiting instruction, “[f]ew academicians believe . . . that jurors consider past crimes solely for impeachment purposes and not as proof of the defendant’s likelihood of having committed the charged offense” and reporting empirical data that suggest that juries

reflected in the sheer number of defendants who simply refrain from testifying rather than rely on the instruction.<sup>40</sup> The limited effectiveness of a jury instruction in this context is due, in part, to the similarity of the relevant logical paths, or inferential chains, by which a defendant's prior conviction is translated into either permissible impeachment or prohibited propensity evidence. As explained by Justice Holmes, the permitted inferential chain is as follows: (i) a felon has exhibited a character flaw that demonstrates a "general readiness to do evil;"<sup>41</sup> (ii) a failure to testify truthfully is a species of

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do not, in fact, follow instruction); Dodson, *supra* note 11, at 31, 32 (reporting results of juror studies revealing that "jurors do use prior conviction evidence to infer criminal propensity and frequently ignore or fail to understand limiting instructions"); Nichol, *supra* note 4, at 403 ("Practicing attorneys almost universally concede that the limiting instruction fails to achieve its goal."); *see also* Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) ("The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.") (citations omitted); United States v. Lipscomb, 702 F.2d 1049, 1062 (D.C. Cir. 1983) ("Limiting instructions of this type require the jury to perform 'a mental gymnastic which is beyond, not only their powers, but anybody's else.'") (quoting Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932)); Gordon v. United States, 383 F.2d 936, 939 (D.C. Cir. 1967) (recognizing that when prior conviction evidence is admitted "it is admittedly difficult to restrict its impact, by cautionary instructions, to the issue of credibility").

<sup>40</sup> The empirical evidence suggests that up to half of all criminal defendants decline to testify in their defense. *See* Blume, *supra* note 5, at 16 & n.49 (noting that "available evidence indicates that approximately one half of all criminal defendants testify at their trials" and citing supporting studies); Stephen J. Schulhofer, *Some Kind Words for the Privilege Against Self-Incrimination*, 26 VAL. U. L. REV. 311, 329-30 (1991) (describing study of trials in Philadelphia in 1980s revealing that 49% of felony defendants and 57% of misdemeanor defendants chose not to testify); Gordon Van Kessel, *Quieting the Guilty and Acquitting the Innocent: A Close Look at a New Twist on the Right to Silence*, 35 IND. L. REV. 925, 950-51 (2002) (summarizing studies dating back to 1920s and concluding that "with increasing frequency defendants are not taking the stand at trial as they once did" and "the extent of refusals to testify varies from one-third to well over one-half [of defendants] in some jurisdictions"). While it is impossible to discern from these numbers exactly why any particular defendant chooses not to testify, "[t]he primary factor . . . in the decision not to take the stand is undoubtedly fear of the use of prior crimes to impeach." Nichol, *supra* note 4, at 400; *see also* Blume, *supra* note 5, at 17-19 (analyzing data regarding defendants cleared by post-conviction DNA testing and determining that 39% of apparently innocent defendants did not testify and 91% of those who did not testify had prior convictions); Dripps, *supra* note 3, at 1632 (postulating "[t]he principal reason why defendants refuse to take the stand is that they fear impeachment with prior convictions — a fear with strong support from the empirical evidence"); Van Kessel, *supra* note 3, at 482 (citing empirical evidence that "a defendant [i]s almost three times more likely to refuse to testify if he ha[s] a criminal record than if not").

<sup>41</sup> Gertz v. Fitchburg R.R. Co., 137 Mass. 77, 78 (1884).

“evil;”<sup>42</sup> (iii) a person with a general readiness to do evil is more likely to testify falsely than an average witness.<sup>43</sup>

Whatever the merits of the permitted inferential chain,<sup>44</sup> it is readily apparent that the links in that chain are almost identical to those in the prohibited inferential chain.<sup>45</sup> A person beset by a “general readiness to do evil” is not only more likely to commit the evil of perjury, but also more likely to have committed the evil of the charged offense — particularly to the extent the past crime diverges from the crime of perjury and converges on the charged offense.<sup>46</sup> For example, a

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<sup>42</sup> Cf. FED. R. EVID. 603 (requiring “every witness” to “declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness’ conscience and impress the witness’ mind with the duty to do so”).

<sup>43</sup> See *United States v. Headbird*, 461 F.3d 1074, 1078 (8th Cir. 2006) (holding that prior convictions are “highly probative of . . . credibility ‘because of the common sense proposition that one who has transgressed society’s norms by committing a felony is less likely than most to be deterred from lying under oath’”); *Lipscomb*, 702 F.2d at 1061 (quoting Senate Judiciary Committee as explaining that “prior conviction[s] for . . . serious crimes are not *totally irrelevant* as to whether the witness is telling the truth, since they do reflect his attitude toward the rules of the game”); *Gertz*, 137 Mass. at 78; see also FED. R. EVID. 609 advisory committee’s note, *reprinted in* 46 F.R.D. 161, 297 (1969) (“A demonstrated instance of willingness to engage in conduct in disregard of accepted patterns is translatable into willingness to give false testimony.”).

<sup>44</sup> See Ladd, *supra* note 13, at 178 (questioning on “logical grounds” contention that “convictions-at-large of crimes-at-large satisfy the needs of relevancy to the task which they are assigned to perform”). Ladd provides an oft-cited example of a man convicted of murder after dueling with another who called him a liar: “The man prefers death to the imputation of a lie — and the inference of the law is, that he cannot open his mouth but lies will issue from it.” *Id.* at 178-79.

<sup>45</sup> See CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, 28 FEDERAL PRACTICE & PROCEDURE EVIDENCE § 6134, at 243-44 (2007) (emphasizing that “before the jury can draw the permitted inference concerning lack of truthfulness, it must first conclude that the accused’s character is that of a law breaker” which “is the same inference that leads juries to improperly conclude that an accused is a bad person who probably committed the offense charged or who deserves to be punished in any case”); cf. *United States v. Harding*, 525 F.2d 84, 89 (7th Cir. 1975) (“The fact that the defendant has sinned in the past implies that he is more likely to give false testimony than other witnesses; it also implies that he is more likely to have committed the offense for which he is being tried than if he had previously led a blameless life. The law approves of the former inference but not the latter.”).

<sup>46</sup> See *United States v. Barnes*, 622 F.2d 107, 109 (5th Cir. 1980) (recognizing that impeaching conviction is relevant as “evidence of the defendant’s criminal nature from which the jury could infer a propensity to falsify testimony” and consequently “there is a danger the jury will consider that same criminal nature as evidence that the defendant acted illegally on the occasion in question”); Hornstein, *supra* note 1, at 13 (noting that inference “from character to conduct” required to support relevance of prior conviction as impeachment “is precisely the inference the law of evidence forbids” with respect to defendant’s underlying guilt).

defendant's conviction for vehicular manslaughter introduced in a drunk driving prosecution says little about the defendant's propensity to lie, but speaks volumes about his propensity to drive drunk.<sup>47</sup> An instruction to ignore the more obvious inference while relying on the more obscure one requires "mental gymnastics" with an astounding degree of difficulty.<sup>48</sup> The typical juror would have to be forgiven if she felt the legal system is essentially winking at her as the instruction is read.

Finally, the dilemma described above tells only part of the story because it assumes that the jury hears the defendant's testimony and resulting impeachment. In fact, defendants recognize the devastating impact of prior conviction impeachment, and have a trump card to play. By declining to testify at all, a defendant can, and commonly will, eliminate the relevance and admissibility of any proffered impeachment. The cost, however, is high. To play this card, defendants must give up their constitutional right to testify, forfeiting their opportunity to be heard, and depriving jurors of potentially useful information on the ultimate question of the defendant's guilt.<sup>49</sup>

## II. CONGRESS SPEAKS ON IMPEACHMENT: FEDERAL RULE OF EVIDENCE 609

The policy considerations underlying prior conviction impeachment described in the preceding section received a full airing in Congress in the early 1970s when legislators "hotly" debated the legal standard that would govern the admissibility of the accused's prior convictions in the federal courts.<sup>50</sup> As discussed below, this debate resulted in a

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<sup>47</sup> Nichol, *supra* note 4, at 398 (criticizing current state of federal law where juries are "able to consider past offenses for heroin distribution for purposes of determining whether the defendant is a liar, but not whether he is a heroin distributor").

<sup>48</sup> *Lipscomb*, 702 F.2d at 1062; *United States v. Franicevich*, 471 F.2d 427, 430 (5th Cir. 1973) (Goldberg, J., dissenting).

<sup>49</sup> See Jeffrey Bellin, *Improving the Reliability of Criminal Trials Through Legal Rules that Encourage Defendants to Testify*, 76 U. CIN. L. REV. 851, 854-59, 881 (2008) (arguing that criminal justice system suffers not only when juries are deprived of defendants' truthful direct examination testimony, but also when they are deprived of false defendant testimony that is tested, and exposed, by cross-examination and rebuttal evidence); Hornstein, *supra* note 1, at 1-2, 20 (noting that "[t]ypically, the defendant may keep the jury from learning of prior convictions only by waiving the right to testify" and, consequently, "important evidence will be sacrificed by the refusal of the witness to submit to such impeachment").

<sup>50</sup> *United States v. Smith*, 551 F.2d 348, 360-61 (D.C. Cir. 1976) (describing "[t]he labyrinthine history of Rule 609" and stating that "Rule 609 was one of the most hotly contested provisions in the Federal Rules of Evidence" and "unquestionably the product of careful deliberation and compromise"); Gold, *supra* note 1, at 2297, 2310 n.74 (highlighting "extraordinary amount of congressional

legislative compromise that was significantly more favorable to criminal defendants than the legal standard previously recognized in federal law and, as will be discussed in Part IV, considerably more favorable than the judicially crafted approach to prior conviction impeachment that prevails in the federal courts today.

A. *The Compromise Embodied in Rule 609*

After the statutory abolition of the common law bar to the testimony of felons (and interested parties), courts generally permitted, without reservation, felony conviction impeachment of all witnesses, including criminal defendants.<sup>51</sup> The first notable sign of dissent from this practice came in the 1965 case of *Luck v. United States*.<sup>52</sup>

In *Luck*, the District of Columbia Circuit interpreted a statutory provision governing proceedings within the District to allow trial courts to exclude an accused's prior convictions due to their potential

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interest" in rule governing impeachment of testifying defendants); Nichol, *supra* note 4, at 392 (describing Rule 609 as "one of the most vigorously debated sections of the federal evidence code").

<sup>51</sup> See Advisory Committee Comments to Proposed Rule 609, 51 F.R.D. 315, 393 (1971) (recognizing that prior to 1965, "slight latitude was recognized for balancing probative value against prejudice" of prior convictions in federal system "though some authority allowed or required the trial judge to exclude convictions remote in point of time"); Advisory Committee's Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 299 (1969) (proposing that all felony convictions be admissible as impeachment and explaining that proposed "rule adheres to the traditional practice of allowing the witness-accused to be impeached by evidence of conviction of crime, like other witnesses"); Ladd, *supra* note 13, at 187 (recognizing in 1940 that "the right of the state to prove convictions of a crime is almost universally admitted as a test of veracity"); see, e.g., *United States v. Villegas*, 487 F.2d 882, 883 (9th Cir. 1973) ("To date, this court has shown no disposition to abandon its long-standing rule that proof of any prior felony conviction may be given by the adversary to impeach any witness, including a defendant who elects to testify in a criminal trial."); *Schwab v. United States*, 327 F.2d 11, 16 (8th Cir. 1964) (noting that when defendant "took the stand he voluntarily put his character in issue and, for impeachment purposes, could then be asked questions about prior convictions"); *United States v. Pennix*, 313 F.2d 524, 529 (4th Cir. 1963) ("[I]t is settled that when a defendant tenders himself as a witness, his credibility, like that of any other witness, may be questioned by asking him as to previous convictions."); *United States v. Ziemer*, 291 F.2d 100, 102 (7th Cir. 1961) (recognizing introduction of defendant's past conviction as "a well-established method of impeachment"); *Taylor v. United States*, 279 F.2d 10, 12 (5th Cir. 1960) (noting that when defendant "took the stand he voluntarily put his character in issue and, for impeachment purposes, could then be asked questions about prior convictions"); *United States v. Howell*, 240 F.2d 149, 158 (3d Cir. 1956) (same).

<sup>52</sup> *Luck v. United States*, 348 F.2d 763 (D.C. Cir. 1965).



“prejudicial effect.”<sup>53</sup> *Luck*’s deviation from the accepted practice of automatic admission of prior conviction impeachment was short lived, however. Soon after the decision, Congress amended the District of Columbia statute, nullifying *Luck*’s holding.<sup>54</sup>

The Advisory Committee on the Federal Rules of Evidence took notice of Congress’s action and shortly thereafter drafted a proposed evidentiary rule to govern prior conviction impeachment in the federal courts.<sup>55</sup> The Supreme Court forwarded the rule to Congress in 1972 as proposed Federal Rule of Evidence 609.<sup>56</sup> Proposed Rule 609 directed trial courts to admit convictions for all crimes “punishable by death or imprisonment in excess of one year” (i.e., felonies) as well as all crimes (felony or misdemeanor) involving “dishonesty or false statement regardless of the punishment” for “the purpose of attacking the credibility of a witness.”<sup>57</sup> In earlier drafts of the Rule, the Advisory Committee recognized the “troublesome aspect of impeachment by evidence of conviction” when “the witness is himself the accused in a criminal case.”<sup>58</sup> In the commentary accompanying its final proposal, however, the Committee explained that, “[w]hatever may be the merits” of limits on the impeachment of criminal

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<sup>53</sup> *Id.* at 768; Lewis F. Powell, Jr., *In Memoriam: Judge Carl McGowan*, 56 GEO. WASH. L. REV. 681, 681 (1988) (noting that Judge McGowan’s 1965 opinion in *Luck* was first substantial challenge to “the fairness of impeachment of criminal defendants who testified by automatically introducing evidence of their prior crimes” that “generally was the rule throughout the nation”).

<sup>54</sup> See *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 514 (1989) (stating that “in 1970 Congress amended the District of Columbia Code to provide that both prior felony and *crimen falsi* impeaching evidence ‘shall be admitted’” as opposed to “may” be admitted as statute read when *Luck* was decided). Interestingly, while Congress later limited the admissibility of prior convictions in the federal courts, it did not amend the statute governing criminal proceedings in the courts of the District of Columbia, which continues to mandate admission of prior convictions without balancing. See D.C. CODE § 14-305(b)(1) (2008); Leslie Lawlor Hayes, Comment, *Prior Conviction Impeachment in the District of Columbia: What Happened When the Courts Ran Out of Luck?*, 35 CATH. U. L. REV. 1157, 1163-64 (1986).

<sup>55</sup> *Green*, 490 U.S. at 517 (chronicling legislative history of Rule 609).

<sup>56</sup> *Id.*

<sup>57</sup> Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 269 (1973). Exceptions were made for convictions where 10 years had passed since the later of the witness’s release from prison or expiration of the period of probation or parole on “his most recent conviction,” certain juvenile convictions, and convictions for which the witness received a pardon or equivalent post-conviction relief. *Id.* at 269-70.

<sup>58</sup> Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates, 51 F.R.D. 315, 393 (1971). An earlier draft of proposed Rule 609 included as its “most significant feature” a balancing test precluding such impeachment if “the judge determines that its probative value is outweighed by the danger of unfair prejudice.” *Id.*

defendants, the Rule was drafted in accordance with the perceived congressional policy preference (demonstrated by the legislative rejection of *Luck*) of broadly encouraging prior conviction impeachment.<sup>59</sup>

As the Advisory Committee reporter later noted, “[a]pparently Congress had a change of heart on the matter.”<sup>60</sup> Upon receipt of the Advisory Committee’s draft Rule 609, Congress prohibited the Rule from taking effect and enacted an alternative Rule 609.<sup>61</sup> As enacted, Rule 609 not only accepted the limitations placed on prior conviction impeachment in *Luck* (a decision the legislators had only recently rejected), but limited such impeachment to an even greater degree than even the *Luck* court contemplated.

Congress was not of one mind on the question, however. The Rule as finally enacted, and currently in force, embodies a compromise between “two diametrically opposed positions”<sup>62</sup>: the position of the Senate (circa 1974) that all felony convictions should be admissible to impeach testifying defendants; and that of the House of Representatives that impeachment should be limited to the narrow subset of so-called *crimen falsi* convictions, crimes involving “proof or admission of an act of dishonesty or false statement.”<sup>63</sup>

The Conference Committee that drafted the final text of the Rule bridged the broad gap between the two chambers by retaining the general principle that all felonies could *potentially* be admissible as impeachment. It mandated, however, that any felony outside the

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<sup>59</sup> Advisory Committee Notes to Proposed Rule 609, 56 F.R.D. 183, 270 (1973).

<sup>60</sup> 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE § 609App.01[4], at 12.1 (Joseph M. McLaughlin ed., 2d ed. 2008) (quoting Advisory Committee reporter, Professor Daniel Capra).

<sup>61</sup> FED. R. EVID. 609; see *Green*, 490 U.S. at 517.

<sup>62</sup> See Roderick Surratt, *Prior-Conviction Impeachment Under the Federal Rules of Evidence: A Suggested Approach to Applying the ‘Balancing’ Provision of Rule 609(a)*, 31 SYRACUSE L. REV. 907, 920 (1980) (discussing diametrically opposed positions); see also Gold, *supra* note 1, at 2296 (“Ultimately, no one side in this legislative battle prevailed entirely; the Rule strikes a compromise between sharply conflicting policies.”); Irving Younger, *Three Essays on Character and Credibility Under the Federal Rules of Evidence*, 5 HOFSTRA L. REV. 7, 11 (1976) (describing Rule 609(a) as “political compromise” between “those who argued for unlimited use of convictions to impeach” and “those who urged strict limits” on such impeachment); cf. *Green*, 490 U.S. at 520 (chronicling legislative history of Rule 609); *United States v. Kiendra*, 663 F.2d 349, 355 (1st Cir. 1981) (“Rule 609(a) received extensive scrutiny in both chambers of Congress and underwent many modifications before the final compromise was struck in Conference Committee.”).

<sup>63</sup> FED. R. EVID. 609(a)(1); *Green*, 490 U.S. at 509; Surratt, *supra* note 62, at 917-20.

“narrow spectrum” of *crimen falsi* convictions<sup>64</sup> would be admissible only if “the [trial] court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant.”<sup>65</sup>

B. *Reading Between the Lines: The Anti-Impeachment Tenor of Rule 609*

While on its face appearing to occupy something of a middle ground between the anti-impeachment House and pro-impeachment Senate positions, the balancing test incorporated into the final version of Rule 609 distinctly favors criminal defendants (and thus the House position). As a preliminary matter, the Rule represents a sweeping departure from prior federal law, unequivocally rejecting the automatic admissibility of felony convictions that had previously been

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<sup>64</sup> This “narrow spectrum of crimes” (felony or misdemeanor) subject to automatic admissibility under Rule 609(a)(2) includes only crimes such as “perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretenses.” Surratt, *supra* note 62, at 922; *see also* FED. R. EVID. 609 advisory committee’s note to 1990 and 2006 amendments. Significantly, this category does not include property crimes such as theft, or crimes that do not inherently involve dishonesty (e.g., murder), even if the specific facts of the crime evidenced dishonest acts on the part of the defendant. *See United States v. Glenn*, 667 F.2d 1269, 1273 (9th Cir. 1982) (recognizing that “crimes of violence, theft crimes, and crimes of stealth do not involve ‘dishonesty or false statement’ within the meaning of rule 609(a)(2)”); 4 WEINSTEIN & BERGER, *supra* note 60, §§ 609.04[2][b] to -[3][c], at 24.1.

<sup>65</sup> FED. R. EVID. 609(a)(1); Surratt, *supra* note 62, at 922. As originally enacted, Rule 609(a) stated:

For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted . . . 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.

*See* Surratt, *supra* note 62, at 907 n.1, 919 n.54. This rhetorical formulation was later altered so that the “but only” phrasing was removed; in notes to the amendment, the Advisory Committee emphasized, however, that “[t]he amendment does not disturb the special balancing test for the criminal defendant who chooses to testify.” FED. R. EVID. 609 advisory committee’s note to 1990 Amendments. As amended, the Rule also replaced the term “the defendant” with “the accused,” the pronoun “he” with the gender neutral phrase “the witness,” and clarified the language of subsection (a)(2) so as “to give effect to the [original] legislative intent” as expressed in the Conference Report that the subsection be construed narrowly. *See* FED. R. EVID. 609 advisory committee’s note to 1990 and 2006 Amendments; *see also Green*, 490 U.S. at 509.

the federal norm.<sup>66</sup> Instead, Congress, like the *Luck* court before it, granted trial courts broad authority to exclude the vast majority of prior convictions offered as impeachment.<sup>67</sup> Congress's action constituted a sharp deviation from "the prevailing doctrine in the federal courts" that was intended to mitigate the "unfair prejudice" caused by prior conviction impeachment and the "deterrent effect" of the practice "upon an accused who might wish to testify."<sup>68</sup>

Of even greater significance, Congress, while choosing to embrace the general approach suggested by *Luck*, was not satisfied with *Luck*'s fairly permissive standard for admitting prior convictions. Instead, the legislators moved beyond *Luck* in fashioning a significantly more restrictive standard for the bulk of potentially admissible convictions.<sup>69</sup>

*Luck* held that a trial court could exclude a prior conviction where "the prejudicial effect of impeachment *far* outweighs the probative relevance of the prior conviction to the issue of credibility"<sup>70</sup> — a formulation that mirrors the catch-all evidentiary provision of Federal Rule of Evidence 403.<sup>71</sup> Congress, while later incorporating a Rule 403

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<sup>66</sup> See sources cited *supra* note 51.

<sup>67</sup> FED. R. EVID. 609(a)(1) (establishing statutory authority for trial courts' use of discretionary balancing test, similar to that used in *Luck*).

<sup>68</sup> H.R. REP. NO. 93-650, at 11 (1973); see, e.g., 4 WEINSTEIN & BERGER, *supra* note 60, § 609App.01[3], at 10 (recognizing that House Judiciary Committee's changes to rule were motivated by concern that existing text did not "adequately protect[] an accused who wished to testify").

<sup>69</sup> Prior to Rule 609's enactment, even commentators who advocated complete abolition of prior conviction impeachment accepted that, as more significant restrictions on the practice were not a "realistic possibility," "[t]he *Luck* approach . . . seems to be the most effective means of reform." Robert G. Spector, *Impeachment Through Past Convictions: A Time for Reform*, 18 DEPAUL L. REV. 1, 23 (1968); see also Ladd, *supra* note 13, at 178 (advocating abolition of prior crime impeachment of criminal defendants, but noting that "this method of impeachment is so generally recognized that it will probably be difficult to change in the future").

<sup>70</sup> *Luck v. United States*, 348 F.2d 763, 768 (D.C. Cir. 1965) (emphasis added). Similarly, in following *Luck* (prior to its abrogation by Congress), the Advisory Committee promulgated an early draft of proposed Rule 609 that included, as its "most significant feature," a "particularized application of [Federal Rule of Evidence] 403(a)." Advisory Committee Comments to Proposed Rule 609, 51 F.R.D. 315, 393 (1971). This early draft (which was never forwarded to Congress) permitted exclusion of a defendant's prior convictions if "the judge determines that the probative value of the evidence of the crime is *substantially* outweighed by the danger of unfair prejudice." *Id.* at 391 (emphasis added); see *Green*, 490 U.S. at 515-16 (1989).

<sup>71</sup> FED. R. EVID. 403 (permitting exclusion of relevant evidence where danger of unfair prejudice "substantially outweigh[s]" probative value). *Luck* and Rule 403, thus, would support exclusion of relatively few convictions. In fact, *Luck* itself concerned an unusually prejudicial prior offense that was identical to the charged

balancing test into Rule 609 with respect to the admission of the felony convictions of all other witnesses,<sup>72</sup> implicitly rejected that test as too permissive to govern the convictions of the accused. Thus, while Rule 403 calls for the exclusion of otherwise relevant evidence if the danger of unfair prejudice “substantially outweigh[s]” probative value,<sup>73</sup> “the special balancing test for the criminal defendant who chooses to testify”<sup>74</sup> in Rule 609 mandates the exclusion of a felony conviction if its prejudicial effect merely “outweighs” probative value.<sup>75</sup>

Congress also incorporated a second significant deviation from a Rule 403-type formulation into the Rule 609 balancing test. Under Rule 403 (as well as under the rule announced in *Luck*), the burden of persuasion of establishing that relevant evidence should be excluded falls on the opponent of the evidence.<sup>76</sup> Under Rule 609(a)(1), however, Congress placed the burden of demonstrating the admissibility of a defendant’s convictions on the prosecution.<sup>77</sup> As

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offense and minimally probative (because it was a juvenile adjudication), but the District of Columbia Circuit nevertheless ruled that it could not find “reversible error in permitting this appellant to be asked about his prior conviction.” *Luck*, 348 F.2d at 769; see FED. R. EVID. 609(d) (barring admission of juvenile adjudications as impeachment of accused). The *Luck* court stated only that, because the case would be remanded on another issue, the trial judge should “feel free to approach the problem . . . as one to be decided according to his best judgment” in the event of a new trial. *Luck*, 348 F.2d at 769.

<sup>72</sup> See FED. R. EVID. 609(a)(1) (as amended 1990).

<sup>73</sup> FED. R. EVID. 403 (emphasis added).

<sup>74</sup> FED. R. EVID. 609 advisory committee’s note to 1990 Amendments.

<sup>75</sup> In fact, the Rule also mandates exclusion even if probative value and prejudicial effect are equally balanced. See FED. R. EVID. 609(a)(1) (counseling exclusion of convictions unless “probative value . . . outweighs . . . prejudicial effect”); *United States v. De La Cruz*, 902 F.2d 121, 123 (1st Cir. 1990) (recognizing that “internalized balancing test” in Rule 609(a)(1) “is somewhat stricter” than balancing test in Rule 403); *United States v. Ross*, 44 M.J. 534, 535-36 (A.F. Ct. Crim. App. 1996) (conveying same recognition of stricter balancing test in Rule 609).

<sup>76</sup> *United States v. Tse*, 375 F.3d 148, 164 (1st Cir. 2004) (noting that “[t]he burden under Rule 403 is on the party opposing admission”); *Gordon v. United States*, 383 F.2d 936, 939 (D.C. Cir. 1967) (determining prior to Rule 609 that “[t]he burden of persuasion [under *Luck*] . . . is on the accused”); *Surratt*, *supra* note 62, at 923 (explaining “[u]nder the *Luck* doctrine, the burden of persuasion was on the defendant”).

<sup>77</sup> See FED. R. EVID. 609 advisory committee’s note to 1990 Amendments (“Although the rule does not forbid all use of convictions to impeach a defendant, it requires that the government show that the probative value of convictions as impeachment evidence outweighs their prejudicial effect.”); *United States v. Smith*, 551 F.2d 348, 359 (D.C. Cir. 1976) (“[T]he language of Rule 609(a)(1), as enacted, manifests an intent to shift the burden of persuasion with respect to admission of prior conviction evidence for impeachment.”); *cf.* *United States v.*

other commentators have noted, this shifting of the burden of persuasion “indicates an intent on the part of [Congress] that ‘close cases’ should be decided in favor of the defendant.”<sup>78</sup>

These two critical departures from the Rule 403/*Luck* formula in shaping the *balance* to be utilized by the trial court become particularly significant when considered in concert with the terminology chosen by Congress with regard to what was to be *weighed*: “probative value” and “prejudicial effect.”<sup>79</sup> As discussed in Part I, for the vast run of criminal convictions, the probative value of a conviction as impeachment is minimal.<sup>80</sup> This is because, as the Supreme Court has explained in a related context, the probative value of proffered evidence (as distinct from its relevance) requires a comparison of “evidentiary alternatives” and must be “discount[ed]” when there exists an alternative means of proof with “substantially the same or greater probative value but a lower danger of unfair prejudice.”<sup>81</sup> Thus, while prior convictions may generally be *relevant* to impeach trial witnesses, this evidence will usually have minimal *probative value* when the witness is the accused.<sup>82</sup> Even if precluded from introducing prior convictions, prosecutors always have a significantly more compelling and less prejudicial alternative means of

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Alexander, 48 F.3d 1477, 1488 (9th Cir. 1995) (same); *United States v. Mahone*, 537 F.2d 922, 929 (7th Cir. 1976) (“Rule 609 places the burden of proof on the government.”).

<sup>78</sup> Surratt, *supra* note 62, at 924 n.64. Congress’s appreciation of the significance of shifting the burden to the prosecution is evidenced by comments of the legislators during debate. Gold, *supra* note 1, at 2324; Surratt, *supra* note 62, at 924 n.64. .

<sup>79</sup> FED. R. EVID. 609.

<sup>80</sup> A prior conviction may be probative on other points (for example as evidence of a criminal propensity). Nevertheless, “probative value” under Rule 609 speaks solely to the conviction’s relevance as impeachment — its use “[f]or the purpose of attacking the character for truthfulness of a witness.” FED. R. EVID. 609(a); FED. R. EVID. 609 advisory committee’s note to 1990 Amendments (explaining that “it was unnecessary to add to the rule language stating that, when a prior conviction is offered under Rule 609, the trial court is to consider the probative value of the prior conviction *for impeachment*, not for other purposes” because proposition was inescapable from “the title of the rule, its first sentence, and its placement among the impeachment rules”) (emphasis added); *see also* *United States v. Valencia*, 61 F.3d 616, 619 (8th Cir. 1995) (emphasizing that “[t]he probative character of evidence under Rule 609 has to do with credibility of a witness”); *United States v. Martinez*, 555 F.2d 1273, 1276 (5th Cir. 1977) (explaining that “the probative value of . . . prior conviction evidence” is “the tendency of the . . . evidence to persuade the jury that defendant [i]s not a credible person”).

<sup>81</sup> *Old Chief v. United States*, 519 U.S. 172, 184 (1997) (contrasting “probative value” with “relevance” as used in Federal Rules of Evidence).

<sup>82</sup> *See* sources cited *supra* note 31.

discrediting the defendant's testimony — the defendant's abiding interest in the outcome of the case.

Congress's selection of the phrase "prejudicial effect to the accused" for the other side of the balance is also telling, particularly in concert with its omission of any qualifier such as "unfair" (as in Rule 403)<sup>83</sup> from the "prejudicial effect" the Rule seeks to avoid.<sup>84</sup> As discussed in Part I, the introduction of a criminal defendant's prior felony offenses will virtually always have a significant "prejudicial effect to the accused." This proposition is nothing less than a tenet of American evidentiary jurisprudence, which emphasizes, in other contexts, that an accused's prior record will invariably "weigh too much with the jur[ors]" and "overpersuade" them on the question of guilt.<sup>85</sup> As one court has explained, "[w]hen the defendant is impeached by a prior conviction, the question of prejudice, as Congress well knew, is not *if*, but *how much*."<sup>86</sup>

In sum, the legislators' "concerns about the deterrent effect upon an accused who might wish to testify and the danger of unfair prejudice,"<sup>87</sup> resulted in a Rule that seeks to strictly limit prior

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<sup>83</sup> FED. R. EVID. 403 (permitting exclusion of evidence where probative value is substantially outweighed by danger of "unfair prejudice").

<sup>84</sup> *See id.*; FED. R. EVID. 609; *see also* United States v. Tse, 375 F.3d 148, 163 (1st Cir. 2004) (observing that "while a court must weigh all potential 'prejudicial effect' to the defendant when deciding whether to admit a prior conviction of the accused, it must weigh only the kind of prejudice that can be deemed 'unfair' when deciding whether to admit the prior conviction of a government witness" under Rule 403); 4 WEINSTEIN & BERGER, *supra* note 60, § 609.05[3][a], at 609-36 (emphasizing "contrast" between Rule 403 and Rule 609(a)(1)). The significance of the absence of the "unfair" qualifier itself, while certainly consistent with a congressional intent to favor the defense side of the balance, should not be overstated. Congress could not have meant by this omission that the courts should consider even the intended prejudicial effect (the harm done to the defendant's credibility) as this intended prejudice will always be exactly equal to the probative value of the evidence and would, consequently, render the balancing exercise meaningless. *See* WRIGHT & GOLD, *supra* note 45, § 6134, at 39 (Supp. 2008) (noting absence of qualifier "unfair" but acknowledging that "the phrase 'prejudicial effect' as employed in Rule 609(a)(1) must be referring to prejudice that is 'unfair' in the same sense intended by Rule 403").

<sup>85</sup> FED. R. EVID. 404; *Michelson v. United States*, 335 U.S. 469, 475-76 (1948); *supra* note 35.

<sup>86</sup> *United States v. Lipscomb*, 702 F.2d 1049, 1062 (D.C. Cir. 1983); *see* WRIGHT & GOLD, *supra* note 45, § 6134, at 243 (stating "conviction evidence offered against an accused will almost always cause prejudice"); *supra* Part I.

<sup>87</sup> *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 518 (1989) (quoting from House Judiciary Committee Report); *United States v. Smith*, 551 F.2d 348, 361 (D.C. Cir. 1976) (noting that in "forging a consensus," Conference Committee that drafted rule was "aware of the substantial sentiment in both chambers for limiting impeachment by prior conviction, especially in the criminal defendant-as-witness

conviction impeachment of criminal defendants. By virtue of the legal terminology chosen by Congress (“probative value” and “prejudicial effect”), the placement of these concepts on equal footing in the relevant balance, and the assignment of the burden of persuasion to the prosecution, Rule 609 sets up a contest that is really no contest at all, strongly favoring the defense in most cases.<sup>88</sup> Consequently, much of the modern scholarly criticism of the perceived unfair prejudice of prior conviction impeachment of testifying defendants should be unnecessary. The critics have already won the policy battle. Rule 609 responds to the charge that prior conviction impeachment of testifying defendants is generally minimally probative and greatly prejudicial by unequivocally requiring the exclusion of the impeachment in any case where this criticism proves true.

### III. IMPLEMENTING RULE 609’S BALANCING TEST: THE FIVE-FACTOR FRAMEWORK

While strongly favorable to criminal defendants, Rule 609’s general directive that the criminal record of the accused should be excluded unless its probative value outweighs its prejudicial effect is not self-executing. Instead, the Rule relies on trial judges to strike the appropriate balance in particular cases by weighing the “probative value” and “prejudicial effect” of each proffered conviction.

In an apparent attempt to foster uniformity in the district courts, the federal appellate courts crafted a multi-factor analytical framework to govern Rule 609 balancing.<sup>89</sup> This section explores the origins of that framework and highlights its inherent flaws, which would eventually sabotage the courts’ implementation of Rule 609.

#### A. *United States v. Mahone Establishes the Five-Factor Framework*

The effort to fill the discretionary void created by Rule 609’s balancing test was spearheaded by the Seventh Circuit. Shortly after

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context”).

<sup>88</sup> See WRIGHT & GOLD, *supra* note 45, § 6134, at 243 (“Where conviction evidence is offered against an accused, a serious effort to balance in light of the burden assigned to the prosecution usually should lead to the conclusion that the evidence is inadmissible.”); *Impeachment Under Rule 609(a): Suggestions for Confining and Guiding Trial Court Discretion*, 71 NW. U. L. REV. 655, 661 (1977) [hereinafter *Impeachment*] (recognizing in text of Rule “a bias against the restraining and destructive nature of impeachment evidence”).

<sup>89</sup> See *Impeachment*, *supra* note 88, at 661 (contending shortly after enactment of Rule that federal courts “have been unable to ascertain what criteria to use in balancing probative value against unfair prejudice”).



Rule 609's enactment, that court, in *United States v. Mahone*, proposed a five-factor analytical framework to govern district courts' evaluation of probative value and prejudicial effect.<sup>90</sup>

Apparently failing to recognize the future reach of its opinion, the totality of *Mahone's* discussion of the relevant considerations for Rule 609 balancing is as follows:

Some of the factors which the judge should take into account in making [the Rule 609] determination were articulated by then Judge Burger in *Gordon v. United States*[:]

- (1) The impeachment value of the prior crime.
- (2) The point in time of the conviction and the witness' subsequent history.
- (3) The similarity between the past crime and the charged crime.
- (4) The importance of the defendant's testimony.
- (5) The centrality of the credibility issue.<sup>91</sup>

Although explicitly enumerating criteria to be applied under Rule 609, *Mahone* looked to pre-Rule 609 case law and particularly the District of Columbia Circuit case of *Gordon v. United States*<sup>92</sup> for the relevant considerations.<sup>93</sup> Analysis of the *Mahone* factors, which would soon permeate the federal case law, thus requires a further step backward to the pre-Rule 609 case law from which the factors are derived.

#### B. *The District of Columbia Circuit's Pre-Rule 609 Case Law*

*Gordon v. United States*, an opinion authored by then-Circuit Judge (later Chief Justice) Burger, represents the apogee of the landmark pre-Rule 609 jurisprudence of the District of Columbia Circuit. Its analysis, however, built upon the District of Columbia Circuit's earlier discussion of prior conviction impeachment contained in *Luck v. United States*.<sup>94</sup>

In *Luck*, in addition to the groundbreaking suggestion that trial courts possess some discretion to exclude prior convictions,<sup>95</sup> the

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<sup>90</sup> *United States v. Mahone*, 537 F.2d 922, 929 (7th Cir. 1976).

<sup>91</sup> *Id.*

<sup>92</sup> 383 F.2d 936, 941 (D.C. Cir. 1967).

<sup>93</sup> *Mahone*, 537 F.2d at 929 (citing *Gordon*, 383 F.2d at 940).

<sup>94</sup> 348 F.2d 763, 766 (D.C. Cir. 1965).

<sup>95</sup> See *supra* Part II.A.

District of Columbia Circuit set out a concise list of potentially pertinent considerations for exercising that discretion:

the nature of the prior crimes, the length of the criminal record, the age and circumstances of the defendant, and, above all, the extent to which it is more important to the search for truth in a particular case for the jury to hear the defendant's story than to know of a prior conviction.<sup>96</sup>

The *Luck* court emphasized this last consideration, stating that “[t]he goal of a criminal trial is the disposition of the charge in accordance with the truth” and “[t]he possibility of a rehearsal of the defendant's criminal record in a given case, especially if it means that the jury will be left without one version of the truth, may or may not contribute to that objective.”<sup>97</sup>

*Gordon v. United States* expanded *Luck*'s discussion by providing further “guidelines” in the form of an exposition intended to help courts weigh the propriety of prior conviction impeachment.<sup>98</sup> The five considerations discussed in *Gordon* (considerations that would later become the five *Mahone* factors) echo those mentioned in *Luck*. The first three considerations address the probative value of the prior conviction as impeachment and its potential prejudicial effect, specifically: (i) the nature of the prior conviction, that is, whether the conviction “rest[s] on dishonest conduct”; (ii) its “nearness or remoteness” in time; and (iii) whether “the prior conviction is for the same or substantially the same conduct for which the accused is on trial.”<sup>99</sup>

*Gordon* next discussed two other considerations that are less clearly tied to the probative-prejudice dichotomy. With respect to what would become the fourth *Mahone* factor, “the importance of the defendant's testimony,” *Gordon* states, citing *Luck*, that: “One important consideration is what the effect will be if the defendant does not testify out of fear of being prejudiced because of impeachment by prior convictions.”<sup>100</sup> The court explained, “[e]ven though a judge might find that the prior convictions are relevant to credibility and the risk of prejudice to the defendant does not warrant their exclusion, he may nevertheless conclude that it is more important that the jury have

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<sup>96</sup> *Luck*, 348 F.2d at 769.

<sup>97</sup> *Id.*

<sup>98</sup> *Gordon v. United States*, 383 F.2d 936, 939 (D.C. Cir. 1967) (citing *Luck*, 348 F.2d at 768).

<sup>99</sup> *Id.* at 940.

<sup>100</sup> *Id.* (citing *Luck*, 348 F.2d at 768).

the benefit of the defendant's version of the case than to have the defendant remain silent out of fear of impeachment."<sup>101</sup>

The *Gordon* opinion next posited a final consideration that would later be distilled into the fifth *Mahone* factor, "the centrality of the credibility issue."<sup>102</sup> The court stated that where the trial "had narrowed to the credibility of two persons, the accused and his accuser," the defendant's record becomes particularly significant.<sup>103</sup> In such circumstances, the *Gordon* court explained there was a "compelling" need to "explor[e] all avenues which would shed light on which of the two witnesses was to be believed."<sup>104</sup>

### C. *The Implications of Mahone's Reliance on Gordon*

The first three factors *Mahone* draws from the *Gordon* opinion warrant little analysis as those factors simply reflect the probative-prejudice dichotomy set forth in Rule 609. The more striking facet of the *Mahone* framework is its unquestioned acceptance of the fourth and fifth considerations enumerated in *Gordon*, factors that are not explicitly anticipated by the text of Rule 609.<sup>105</sup>

Under Rule 609, evidence of a felony conviction is admissible as impeachment if "the probative value of admitting this evidence outweighs its prejudicial effect to the accused."<sup>106</sup> This formulation speaks, at least explicitly, solely to the initial aspect of the calculus

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<sup>101</sup> *Id.* The *Gordon* court reiterated this consideration in a footnote, stating that the trial court must consider "whether the defendant's testimony is so important that he should not be forced to elect between staying silent — risking prejudice due to the jury's going without one version of the facts — and testifying — risking prejudice through exposure of his criminal past." *Id.* at 941 n.11; *see also Luck*, 348 F.2d at 769 (requiring trial courts to consider "above all, the extent to which it is more important to the search for truth in a particular case for the jury to hear the defendant's story than to know of a prior conviction").

<sup>102</sup> *United States v. Mahone*, 537 F.2d 922, 929 (7th Cir. 1976).

<sup>103</sup> *Gordon*, 383 F.2d at 940.

<sup>104</sup> *Id.* at 941.

<sup>105</sup> This is, of course, a more significant criticism of the *Mahone* decision, which was ostensibly interpreting Rule 609, than it is a criticism of the *Gordon* decision, which predated the Rule. The District of Columbia Circuit has, both before and after *Mahone*, recognized that "the inquiry to be conducted by the trial court under Rule 609(a) differs significantly from that mandated by *Luck* and its progeny." *United States v. Crawford*, 613 F.2d 1045, 1052 (D.C. Cir. 1979); *United States v. Smith*, 551 F.2d 348, 357 (D.C. Cir. 1976) (recognizing that "[d]espite substantial surface similarity," inquiry established by *Luck/Gordon* line of cases predated the adoption of Rule 609 and remanding, with respect to one defendant, for further proceedings based on trial court's reliance on pre-Rule 609 case law to determine admissibility of prior conviction).

<sup>106</sup> FED. R. EVID. 609(a)(1).

considered in *Gordon* (i.e., the first three *Mahone* factors) — probative value versus prejudice. There is little in the text of the Rule to suggest that in addition to this balancing, a court should consider whether: (i) permitting impeachment might deleteriously deprive the factfinder of the defendant’s testimony (*Mahone*’s fourth factor);<sup>107</sup> or (ii) otherwise improper impeachment should be admitted because of the central role of “credibility” in the case (*Mahone*’s fifth factor). Indeed, one commentator has argued that these last two factors do not address case-specific considerations at all, but rather “embody general concepts” that are “merely restatements of the conflicting interest that Congress balanced in adopting the rule.”<sup>108</sup>

Were it not for the intervention of *Mahone*, then, the District of Columbia Circuit’s pre-Rule 609 exploration of the proper analytical framework for evaluating whether to permit prior conviction impeachment of a testifying defendant (and particularly *Gordon*’s fourth and fifth considerations) would likely have become a mere historical curiosity. *Gordon*’s exposition on prior conviction impeachment would properly have been subsumed by the enactment of Rule 609 and Congress’s implicit decision to impose stricter limits on the admission of prior convictions than the *Luck-Gordon* line of cases suggested. Instead, *Mahone* immortalized *Gordon* in two subtle ways. First, it established (albeit without analysis or explanation) that this pre-Rule 609 case law regarding the admissibility of prior

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<sup>107</sup> In fact, at the outset of the *Luck* opinion, the D.C. Circuit set this factor out as a consideration distinct from the balancing of probative value against prejudice, stating:

[1] There may well be cases where the trial judge might think that the cause of truth would be helped more by letting the jury hear the defendant’s story than by the defendant’s foregoing that opportunity because of the fear of prejudice founded upon a prior conviction. [(2)] There may well be *other cases* where the trial judge believes the prejudicial effect of impeachment far outweighs the probative relevance of the prior conviction to the issue of credibility.

*Luck v. United States*, 348 F.2d 763, 768 (D.C. Cir. 1965) (emphasis added).

<sup>108</sup> Surratt, *supra* note 62, at 943; *see also* Jackson v. State, 668 A.2d 8, 16 (Md. 1995) (“Factors four and five are restatements of the considerations that underlie the Rule.”). Interestingly, the Advisory Committee Notes to the proposed Rule 609 summarized *Gordon* without reference to either the fourth or fifth factor, stating: “Judge, now Chief Justice, Burger suggested in *Gordon* various factors to be considered in making the determination: the nature of the crime, nearness or remoteness, the subsequent career of the person, and whether the crime was similar to the one charged.” Advisory Committee Notes to Proposed Rule 609, 51 F.R.D. 315, 393 (1971); *see also* Surratt, *supra* note 62, at 918 (chronicling legislative history of Rule 609 and noting concerns regarding “deterrent effect [of prior convictions] upon an accused who might wish to testify”).

convictions survived the enactment of Rule 609. Second, it distilled the case law, and particularly *Gordon's* lengthy discussion of the pertinent considerations, into a citation-friendly, albeit facially ambiguous, framework (again without analysis).

Despite its flaws, the *Mahone* decision was broadly influential. The opinion represents ground zero in a subsequent outbreak of the deceptively simple five-factor framework throughout the federal courts and in numerous state courts.<sup>109</sup> Perhaps largely due to the absence of any competing formulation, the *Mahone* framework (in various iterations) continues to function today as the primary means of evaluating the admissibility of prior conviction impeachment in virtually every federal jurisdiction and numerous state jurisdictions as well.<sup>110</sup>

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<sup>109</sup> See, e.g., *United States v. Hernandez*, 106 F.3d 737, 739 (7th Cir. 1997) (citing *Mahone* for “five-part test to guide the district court in the exercise of its discretion in determining whether the probative value of the conviction outweighs its prejudicial effect”); *United States v. Cook*, 608 F.2d 1175, 1185 n.8 (9th Cir. 1979) (en banc) (citing *Mahone* for five factors “to assist district judges confronted with a request for a ruling”); *United States v. Sims*, 588 F.2d 1145, 1149 (6th Cir. 1978) (discussing *Mahone* and listing five factors as restated in *Mahone*, but crediting *Gordon*); *Theus v. State*, 845 S.W.2d 874, 880 (Tex. Crim. App. 1992) (relying on *Mahone* factors in applying state impeachment rule); see also Abraham P. Ordovery, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b) and 609(a)*, 38 EMORY L.J. 135, 197-98 (1989) (“The standards usually set forth in 609(a)(1) cases are laid down in *United States v. Mahone*.”); cf. cases cited *infra* note 110. The courts also rely on the *Mahone* factors in interpreting the related balancing test set forth in Rule 609(b). See 4 WEINSTEIN & BERGER, *supra* note 60, § 609.06[1], at 609-45 to -46.1.

<sup>110</sup> *Mahone's* five-factor framework, or a close variant, governs review of impeachment rulings in 10 of the 12 federal circuits that consider criminal appeals, excepting only the Fourth and Eighth Circuits. For representative cases from each federal circuit (except those noted above), see the following: First Circuit, *United States v. Brito*, 427 F.3d 53, 64 (1st Cir. 2005); Second Circuit, *United States v. Hawley*, 554 F.2d 50, 53 n.5 (2d Cir. 1977); *Haynes v. Kanaitis*, No. Civ.A.3:99CV2551, 2004 WL 717115, at \*2 (D. Conn. Mar. 3, 2004); Third Circuit, *Gov't of V.I. v. Bedford*, 671 F.2d 758, 761 n.4 (3d Cir. 1982); *United States v. Davis*, 235 F.R.D. 292, 296 (W.D. Pa. 2006); *United States v. Butch*, 48 F. Supp. 2d 453, 464 (D.N.J. 1999); Fifth Circuit, *United States v. Acosta*, 763 F.2d 671, 695 n.30 (5th Cir. 1985); *United States v. Preston*, 608 F.2d 626, 639 n.17 (5th Cir. 1979); Sixth Circuit, *United States v. Moore*, 917 F.2d 215, 234 (6th Cir. 1990); *United States v. Sims*, 588 F.2d 1145, 1149 (6th Cir. 1978); Seventh Circuit, *United States v. Montgomery*, 390 F.3d 1013, 1015 (7th Cir. 2004); Ninth Circuit, *United States v. Martinez-Martinez*, 369 F.3d 1076, 1088 (9th Cir. 2004); *United States v. Alexander*, 48 F.3d 1477, 1488 (9th Cir. 1995); *United States v. Cook*, 608 F.2d 1175, 1185 n.8 (9th Cir. 1979) (en banc); Tenth Circuit, *United States v. Sides*, 944 F.2d 1554, 1560 (10th Cir. 1991); *United States v. Cueto*, 506 F. Supp. 9, 13 (W.D. Okla. 1979); *United States v. Brewer*, 451 F. Supp. 50, 53 (E.D. Tenn. 1978); Eleventh Circuit, *United States v. Pritchard*, 973 F.2d 905, 909 (11th Cir. 1992); D.C. Circuit, *United States v. Jackson*, 627 F.2d 1198, 1209 (D.C. Cir. 1980); and *United States v. Pettiford*, 238 F.R.D. 33, 41 (D.D.C. 2006); see also 1

D. *An Inherent Flaw in the Mahone Framework*

Soon after *Mahone* was decided, a handful of commentators identified an apparent flaw in the five-factor framework that, while initially amounting to little more than an intellectual curiosity, ultimately would have a significant negative impact on the federal courts' application of Rule 609. Commentators noted that *Mahone's* fourth and fifth factors, "the importance of the defendant's testimony" and "the centrality of the credibility issue," not only lacked explicit legislative authorization,<sup>111</sup> but also could not be applied in a "principled" manner. In essence, the factors cancel each other out.<sup>112</sup> To the extent a defendant's testimony is "important" (for example, if the defendant is the key defense witness), his credibility becomes "central" in equal degree, leading to a curious equipoise. If the defendant's testimony is less important (for example, where other witnesses could provide similar testimony), his credibility becomes less significant, again creating a standstill with respect to the fourth and fifth factors. Thus, the fourth and fifth *Mahone* factors seemed to have no practical significance at all, existing in a rough state of equipoise that prevented either factor from impacting the

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MCCORMICK ON EVIDENCE, *supra* note 11, § 42, at 187 n.10; 4 WEINSTEIN & BERGER, *supra* note 60, § 609.05[3][a], at 609-36 to -39. Because the United States Court of Appeals for the Federal Circuit does not review criminal cases, there is no case law regarding impeachment of criminal defendants in that circuit.

Similar or identical five-factor tests are also applied in many state jurisdictions that are governed by evidentiary analogues to Rule 609. See, e.g., *Jackson v. State*, 668 A.2d 8, 14 (Md. 1995) (highlighting *Mahone* factors as "a useful aid to trial courts in performing the balancing exercise mandated by" Maryland law); *Settles v. State*, 584 So. 2d 1260, 1264 n.2 (Miss. 1991) (noting adoption under Mississippi law of "five factor list enunciated by the federal courts for Rule 609 determinations"); *State v. Lucero*, 648 P.2d 350, 352-53 (N.M. Ct. App. 1982) (relying on *Mahone* and *Luck* for factors to apply under New Mexico law, leading to so-called *State v. Lucero* factors); *State v. McClure*, 692 P.2d 579, 590-91 (Or. 1984) (applying *Mahone* factors in review of evidentiary ruling under Oregon law); *Theus v. State*, 845 S.W.2d 874, 880 (Tex. Crim. App. 1992) (reciting *Mahone* factors for analysis under Texas law, leading to so-called *Theus* factors).

<sup>111</sup> See *supra* Part III.C.

<sup>112</sup> Ordover, *supra* note 109, at 199 (noting that fourth and fifth factor "are linked"; "[w]here the defendant has important factual information to give, he should be encouraged to testify . . . [h]is credibility then, of course, becomes a major issue."); Surratt, *supra* note 62, at 943, 945 (observing that "it appears that as one of these factors increases in importance in a particular case, so does the other" and "there appears to be no principled way to determine which factor should prevail"); *Impeachment*, *supra* note 88, at 662 (recognizing that fourth and fifth factors give no clear answer in any case "where the witness is the defendant in a criminal trial" because "the more important the defendant's testimony, the more apt credibility will be central to the resolution of the issues").

overall impeachment calculus.<sup>113</sup> Although this conundrum has been recognized by two state courts in jurisdictions that adopted the *Mahone* framework,<sup>114</sup> it has yet to be acknowledged in the federal courts.<sup>115</sup>

#### IV. MODERN APPLICATION OF THE FIVE-FACTOR FRAMEWORK

At the same time that the federal courts were assimilating the *Mahone* framework as the primary rubric for evaluating the admissibility of prior conviction impeachment, the Supreme Court sent shockwaves through the procedural landscape to which the framework applied. As discussed below, it was the procedural ruling of *Luce v. United States*<sup>116</sup> that, by exacerbating the flaws in the *Mahone* framework, ultimately severed the already attenuated connection between the framework and the congressional intent (embodied in Rule 609) that the framework purported to apply.

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<sup>113</sup> See Surratt, *supra* note 62, at 942-45.

<sup>114</sup> See *Settles*, 584 So. 2d at 1264 (asserting that fourth and fifth factors “tend to offset each other” because “as the importance of the witness’ testimony tends to rise so does the centrality of the credibility issue”); *McClure*, 692 P.2d at 591 (recognizing that “factors (4) and (5) . . . usually offset”). California state courts, relying directly on *Gordon*, developed a *four* factor framework that omits the fifth *Mahone* factor, and downplays the importance of the fourth, which the courts characterize as “what effect admission would have on the defendant’s decision to testify.” See *People v. Castro*, 696 P.2d 111, 118 (Cal. 1985); *People v. Beagle*, 492 P.2d 1, 8 (Cal. 1972) (emphasizing that trial courts should use “caution” in relying on fourth factor so that defendant cannot “blackmail” court in order to obtain “a false aura of veracity”). It appears that the drafters of the Oregon Evidence Code similarly merged the fourth and fifth *Mahone* factor into one factor favoring exclusion of impeachment in providing commentary to that Code, but the Oregon courts have deemed this commentary to be “in error” and rely on *Mahone* for the traditional five-factor framework. See *McClure*, 692 P.2d at 585 (noting that “the commentary, referring to a four-factor test contained in *Gordon v. United States* . . . is partially in error” because “[i]n *Gordon*, Judge Burger set forth five factors to be considered by trial courts in admitting evidence” and reciting and applying factors as set forth in *Mahone*).

<sup>115</sup> There are, however, at least two federal district courts that have explicitly recognized that, in the case being considered (“in this case”), the factors cancelled out. See *Cueto*, 506 F. Supp. at 14 (“Factors four and five seem to counterbalance each other in this case. While Defendant’s testimony may be of some importance, a factor favoring nonadmission, at the same time his credibility may be a central issue in this case, a factor favoring admission.”); *Brewer*, 451 F. Supp. at 54 (same).

<sup>116</sup> 469 U.S. 38 (1984).

A. *Luce v. United States Transforms Appellate Review of Impeachment Rulings*

The Supreme Court's 1984 decision in *Luce v. United States* concerned a mere question of appellate procedure that, ostensibly, had nothing to do with the substantive application of Rule 609. In a brief, almost cursory, opinion, the Court held that henceforth, "to raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify."<sup>117</sup> The Court based this ruling (an exercise of its supervisory authority over the federal judiciary) on practicality, contending that: (i) if the defendant did not testify, it is impossible to properly evaluate the district court's *in limine* (i.e., pretrial)<sup>118</sup> impeachment ruling because to do so, a "court must know the precise nature of the defendant's testimony"; (ii) an *in limine* ruling is, by definition, an interim, not a final, ruling that can be changed at any time (e.g., after the defendant testifies on direct examination) or be rendered moot (e.g., by the defendant's decision not take the witness stand or by the prosecution's decision to forgo the contested impeachment); and (iii) there is no way for a reviewing court to determine if the trial court's ruling, if erroneous, constituted "harmless error" when a defendant does not testify because "a reviewing court cannot assume that the adverse ruling motivated a defendant's decision not to testify."<sup>119</sup>

Although barely touched on by the Supreme Court in its opinion, the holding of *Luce* had two implications for the impeachment of testifying defendants, one widely recognized, and the other seemingly unnoticed. The obvious implication was that *Luce* insulated from review a broad set of impeachment rulings — those where the defendant declined to testify after an adverse *in limine* ruling. Thus, the very cases that constituted the paradigm concern of pre-Rule 609 District of Columbia Circuit case law and the resulting fourth *Mahone* factor, where the district court's ruling deprived "the jury [of] the benefit of the defendant's version of the case,"<sup>120</sup> became unreviewable after *Luce*.<sup>121</sup>

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<sup>117</sup> *Id.* at 43.

<sup>118</sup> An "*in limine*" ruling is more precisely a ruling on a "motion, whether made before or during trial, to exclude anticipated prejudicial evidence" (or to permit potentially objectionable evidence) "before the evidence is actually offered." *Id.* at 40 n.2. The term *in limine* itself simply means "[o]n or at the threshold; at the very beginning; preliminarily." *Id.* (citing BLACK'S LAW DICTIONARY 708 (5th ed. 1979)).

<sup>119</sup> *Id.* at 41-43.

<sup>120</sup> *Gordon v. United States*, 383 F.2d 936, 940-41 (D.C. Cir. 1967); *Luck v. United States*, 348 F.2d 763, 769 (D.C. Cir. 1965) (emphasizing that in deciding whether to



The second, unheralded implication of the *Luce* decision was that it subtly but irrevocably altered the context of appellate Rule 609 challenges. Prior to *Luce*, appellate courts regularly considered the propriety of impeachment evidence in the context of challenges to pretrial *in limine* rulings.<sup>122</sup> After *Luce*, appellate courts could no longer entertain such challenges. Appellate evaluation of *in limine* impeachment rulings became improper (even when not procedurally barred) because, as the Supreme Court emphasized in *Luce*, the *in limine* ruling: (i) is not the final word on impeachment,<sup>123</sup> and (ii) takes place before the trial court is presented with crucial information in the form of the defendant's direct examination testimony.<sup>124</sup> Thus,

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permit impeachment, district court must consider "above all, [the] extent to which it is more important to the search for truth in a particular case for the jury to hear the defendant's story than to know of a prior conviction").

<sup>121</sup> Interestingly, although Chief Justice Burger had, as a circuit judge, authored *Gordon*, his five-page opinion in *Luce* fails to reference any of the themes recognized in that case or the other D.C. Circuit cases regarding the problematic nature of prior conviction impeachment of an accused.

<sup>122</sup> At the time the Supreme Court decided *Luce*, all but one of the federal circuits that had addressed the issue (six explicitly and four implicitly) had determined that *in limine* rulings on the admissibility of prior convictions were reviewable on appeal even if the defendant did not testify. See *United States v. Washington*, 746 F.2d 104, 106 n.2 (2d Cir. 1984) (collecting cases); cf. *Luce*, 469 U.S. at 40 & n.3 (recognizing that "[s]ome other Circuits have permitted review in similar situations"). The sole exception was the Sixth Circuit in a case that the Supreme Court ultimately reviewed, resulting in the *Luce* decision. See *Washington*, 746 F.2d at 106 n.2.

<sup>123</sup> *Ohler v. United States*, 529 U.S. 753, 758 n.3 (2000) (noting that "*in limine* rulings are not binding on the trial judge, and the judge may always change his mind during the course of a trial"); *Luce*, 469 U.S. at 41-42 ("Even if nothing unexpected happens at trial, the district judge is free, in the exercise of sound judicial discretion, to alter a previous *in limine* ruling."); *United States v. Turner*, 960 F.2d 461, 465 (5th Cir. 1992) (affirming district court's admission of prior convictions as impeachment despite earlier *in limine* ruling excluding convictions).

Justice Brennan, concurring in *Luce*, emphasized that the opinion did not resolve the "broader questions of appealability *vel non* of *in limine* rulings that do not involve Rule 609(a)." *Luce*, 469 U.S. at 44 (Brennan, J., concurring). *But see* *United States v. Bond*, 87 F.3d 695, 700 (5th Cir. 1996) (noting that "courts have refused to limit *Luce* to Rule 609(a) cases and have instead applied its principles to analogous contexts").

<sup>124</sup> *Ohler*, 529 U.S. at 758 (emphasizing that prosecution need not "make its choice" as to whether to impeach defendant "until the defendant has elected whether or not to take the stand in her own behalf and after the Government has heard the defendant testify"); *Luce*, 469 U.S. at 41 & n.5 (emphasizing that trial court's impeachment ruling depends on "the precise nature of the defendant's testimony," which cannot be obtained from mere "proffer of testimony" because "trial testimony could, for any number of reasons, differ from the proffer"); *United States v. Williams*, 939 F.2d 721, 724 (9th Cir. 1991) (reflecting that "*Luce* teaches that the admissibility of a prior conviction for impeachment depends to a great extent on the

even when a defendant testifies and subsequent appellate review of an impeachment ruling is permitted, it is not the pretrial *in limine* ruling (if any)<sup>125</sup> that is at issue. Rather, the question on appeal is the propriety of the trial court's ruling *during the defendant's cross-examination*. It is only then, after sitting through the defendant's direct examination testimony and learning "the precise nature of th[at] testimony," that the court makes its final dispositive ruling either permitting or precluding a prosecutor's effort to impeach the defendant with prior convictions.<sup>126</sup>

B. *The Fourth and Fifth Mahone Factors Escape From Equipoise*

Although not recognized in the *Luce* opinion (or any subsequent federal court opinions), the Supreme Court's shift of the salient decision point for prior conviction impeachment rulings was not merely procedural. Rather, it had far reaching implications for the substantive application of the *Mahone* framework.

By transferring the appellate courts' focus from pretrial *in limine* decisions to midtrial cross-examination rulings, *Luce* had the most

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nature of the defendant's testimony").

<sup>125</sup> See *United States v. Martinez*, 76 F.3d 1145, 1151-52 (10th Cir. 1996) (holding that trial court could properly decline to rule on admissibility of defendant's prior conviction until after hearing defendant's testimony).

<sup>126</sup> *Luce*, 469 U.S. at 41 (stating that had defendant "testified and been impeached by evidence of a prior conviction, the District Court's decision to admit the impeachment evidence would have been reviewable on appeal" because reviewing court "would then have . . . a complete record detailing the nature of [the defendant's] testimony, the scope of the cross-examination, and the possible impact of the impeachment on the jury's verdict"); *United States v. Griffin*, Nos. 85-1992, 85-2003, 1988 WL 9164, at \*2 (6th Cir. Feb. 9, 1988) (refusing to review trial court's *in limine* ruling because defense introduced prior conviction on defendant's direct examination and "the trial court was entitled to evaluate the probative value and prejudicial effect of the prior conviction under the actual circumstances which developed at trial"); cf. *United States v. Mejia-Alarcon*, 995 F.2d 982, 987 n.2 (10th Cir. 1993) (holding that defendant must renew objection raised in *in limine* motion when impeachment is actually offered at trial or objection is forfeited, because "any final determination as to admissibility under Rule 609(a)(1) rests on a balancing . . . that could only properly be performed after an assessment of the evidence that had come in up to the point of its admission").

The Supreme Court's extension of *Luce* in *Ohler* is consistent with this analysis. In *Ohler*, the Court held that a defendant also cannot challenge the admission of prior conviction impeachment if, after an adverse *in limine* ruling, the defense introduces the evidence itself on direct examination to "remove the sting" of the impeachment. *Ohler*, 529 U.S. at 758, 760. In such circumstances, the district court is deprived of the opportunity to rule on the admissibility of the impeachment during the defendant's cross-examination, and no appellate review is permitted.

direct impact on the fourth *Mahone* factor — “the importance of the defendant’s testimony.” This factor, as originally intended, is rendered meaningless in the wake of *Luce*. At the time of the trial court’s cross-examination ruling, the defendant has *already* testified on direct examination and the question underlying the fourth factor as posited in *Gordon* — “what the effect will be if the defendant does not testify out of fear of being prejudiced because of impeachment by prior convictions”<sup>127</sup> — is moot.<sup>128</sup> Even if the trial court considers the defendant’s testimony to be of critical importance to the jury, it no longer follows that impeachment should be rejected on that ground. The jury will hear the defendant’s testimony (in fact, has already heard that testimony) regardless of whether the trial court admits the impeachment for use in cross-examination.

*Luce*’s impact on the *Mahone* framework is not limited to its neutralization of the previously anti-impeachment fourth factor. As discussed in Part III.D, *supra*, before *Luce* the fourth *Mahone* factor served the dual purpose of a generic anti-impeachment consideration and a check on the fifth *Mahone* factor — “the centrality of the credibility issue.” By neutralizing the fourth factor, the *Luce* decision freed the fifth factor from this countervailing force.

In fact, as subsequent federal case law would demonstrate, *Luce*’s procedural holding not only released the fifth *Mahone* factor from equipoise but also pushed it to center stage. After *Luce*, the now-controlling impeachment ruling comes at a time (the defendant’s cross-examination) when the “credibility issue” always appears

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<sup>127</sup> *Gordon v. United States*, 383 F.2d 936, 940-41 (D.C. Cir. 1967).

<sup>128</sup> See WRIGHT & GOLD, *supra* note 45, § 6134, at 234 n.67 (recognizing that “[t]he Supreme Court’s decision in *Luce v. U.S.*, . . . logically precludes future consideration” of fourth *Mahone* factor because “the federal courts cannot consider the loss of evidence if the defendant does not testify since the issue of admissibility cannot be raised unless he takes the stand”). In fact, the *Luce* decision only limits *appellate review* of district court rulings, theoretically leaving the *lower courts*’ impeachment analysis unaffected. Thus, a district court is free, after *Luce*, to indulge a defendant with an *in limine* impeachment ruling and, in so ruling, could also apply the fourth *Mahone* factor as originally intended — considering the potential detriment to the jury’s effort to determine the facts if the defendant is deterred from testifying. However, this is increasingly unlikely because, as discussed in Part IV.B, *infra*, the appellate courts have not simply discarded the fourth *Mahone* factor in response to *Luce*, but reinterpreted it. Inevitably, then, in applying the fourth factor going forward, district courts will adopt the meaning given to that factor in the appellate opinions that bind them, even though the district courts are not themselves constrained by the procedural ruling (*Luce*) that animates the appellate courts’ analysis. See cases cited *infra* note 159 (listing cases that illustrate district courts’ adoption of fourth factor as reinterpreted by appellate courts).

paramount. By taking the witness stand, the defendant has “place[d] himself at the very heart of the trial process,”<sup>129</sup> transforming the trial into a “credibility contest” with the jury required to choose between the defendant’s version of the facts and that of the prosecution witnesses.<sup>130</sup> The prosecution can forcefully argue in such circumstances that the fifth *Mahone* factor virtually dictates admission of the defendant’s prior convictions so that the jury is allowed, in the words of the *Gordon* court, to “explor[e] all avenues which would shed light on which of the . . . witnesses was to be believed.”<sup>131</sup>

In sum, *Luce*’s subtle alteration of the context for appellate review of impeachment rulings had a remarkably unsubtle effect on the *Mahone* framework. *Luce* replaced the preexisting standoff between the fourth and fifth factors with an inherent, pro-impeachment imbalance.

### C. *Post-Luce Application of the Fourth and Fifth Mahone Factors*

The procedural ruling in *Luce* provided a perfect opportunity for the federal courts to revisit the aging *Mahone* framework. At the very least, the courts could have explained how a framework designed to evaluate pretrial rulings could continue to function in light of *Luce*’s procedural change. The federal courts, however, declined to avail themselves of this opportunity. To date, they have failed to articulate any resolution of the tension between *Luce* and the *Mahone* framework.

In fact, in a case decided shortly after *Luce*, the Seventh Circuit was directly confronted with, but failed to address, the inherent contradiction between *Luce* and *Mahone*’s fourth factor.<sup>132</sup> In that case, *United States v. Doyle*, the defendant declined to testify after an *in limine* ruling that he could be impeached with prior burglary, attempted murder, and federal weapons offenses.<sup>133</sup> On appeal, the defendant contended that “because of [the trial court’s] ruling he did not testify at trial, fearing the prejudicial results his . . . felony convictions would have on the jury,” and that the trial court erred “by failing to take into account the importance of the defendant’s testimony [(*Mahone*’s fourth factor)] when permitting the use of the prior convictions.”<sup>134</sup> The Seventh Circuit summarily rejected the defendant’s argument, without

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<sup>129</sup> *Perry v. Leeke*, 488 U.S. 272, 283 (1989).

<sup>130</sup> *Gordon*, 383 F.2d at 938.

<sup>131</sup> *Id.* at 941.

<sup>132</sup> *United States v. Doyle*, 771 F.2d 250, 251 (7th Cir. 1985).

<sup>133</sup> *Id.* at 254.

<sup>134</sup> *Id.*

reference to the *Mahone* framework, on the ground that it “flies in the face of [*Luce*] and therefore must fail.”<sup>135</sup>

*Doyle*’s refusal to take on the inconsistency between *Luce* and *Mahone* foreshadowed the federal courts’ ultimate approach to this issue. Rather than altering or abandoning the *Mahone* framework in response to *Luce*, the courts, without fanfare or explanation, simply sidestepped the shockwaves of the Supreme Court’s ruling. To accomplish this, the courts retained the venerable *Mahone* framework but reinterpreted the fourth and fifth *Mahone* factors to fit within a post-*Luce* procedural reality.

The most striking aspect of the federal courts’ post-*Luce* reinterpretation of the *Mahone* framework is their transformation of the fourth *Mahone* factor, “the importance of the defendant’s testimony.” Relying on the latent ambiguity of the factor’s phrasing, and hamstrung by the post-*Luce* procedural context in which prior conviction impeachment challenges now arise, the federal courts simply reversed the fourth factor’s meaning.

Prior to *Luce*, the importance of a defendant’s testimony favored exclusion of impeachment. As explained in *Gordon*, prior convictions could be excluded whenever “it is more important that the jury have the benefit of the defendant’s version of the case than to have the defendant remain silent out of fear of impeachment.”<sup>136</sup> After *Luce*, however, the federal courts began to apply this fourth *Mahone* factor not to preclude impeachment, but to support its admission. In a bizarre and as yet unexplained reversal, the courts began to emphasize the necessity for prior conviction impeachment *precisely because* the defendant’s direct examination testimony was “important,” “crucial,” “central,” “critical” or, most poignantly, “of utmost importance.”<sup>137</sup> Thus, in *United States v. Montgomery*, the Seventh Circuit defended the district court’s admission of the defendant’s six prior convictions by asserting that the court “correctly recognized that even if some of the

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<sup>135</sup> *Id.* (“The defendant’s argument flies in the face of the Supreme Court’s most recent decision on the use of Federal Rule of Evidence 609(a), and therefore must fail.” (citing *Luce v. United States*, 469 U.S. 38 (1984))).

<sup>136</sup> *Gordon*, 383 F.2d at 940; see 4 WEINSTEIN & BERGER, *supra* note 60, § 609.05[3][e], at 609-43 to -44; *supra* Part III.B.

<sup>137</sup> See *United States v. Montgomery*, 390 F.3d 1013, 1016 (7th Cir. 2004) (“central role of [defendant’s] testimony”); *United States v. Smith*, 131 F.3d 685, 687 (7th Cir. 1997) (“crucial”); *United States v. Toney*, 27 F.3d 1245, 1253 (7th Cir. 1994) (“of utmost importance”); *United States v. Nururdin*, 8 F.3d 1187, 1192 (7th Cir. 1993) (“critical”); *United States v. Sides*, 944 F.2d 1554, 1560 (10th Cir. 1991) (“important”); *United States v. Perkins*, 937 F.2d 1397, 1406 (9th Cir. 1991) (“central”).

*Mahone* factors were neutral or favored exclusion, the central role of [the defendant's] testimony and the importance of his credibility strongly favored the admission of his prior convictions."<sup>138</sup> Similarly, the Seventh Circuit, in *United States v. Nururidin*, affirmed the admission of a defendant's prior convictions "in light of the critical nature of [the defendant's] testimony and credibility";<sup>139</sup> declared, in *United States v. Smith*, that impeachment was proper because "the defendant's testimony was a crucial part of the case";<sup>140</sup> and emphasized, in *United States v. Toney*, the propriety of impeachment on the ground that "[t]he defendant's testimony was of utmost importance."<sup>141</sup> The same sentiment controlled in *United States v. Sides*, where the Tenth Circuit asserted that the admission of the defendant's prior convictions was supported by the fact that "both the defendant's testimony and credibility were important";<sup>142</sup> and also in *United States v. Perkins*, where the Ninth Circuit affirmed the admission of prior conviction impeachment because the "defendant's credibility and testimony were central to the case, as [he] took the stand and testified that he did not commit the robbery."<sup>143</sup>

This transformation of the fourth *Mahone* factor from an anti- to a pro-impeachment consideration is perhaps most strikingly demonstrated in *United States v. Alexander*.<sup>144</sup> In *Alexander*, the defendant ineptly attempted to convince the Ninth Circuit that his convictions should have been excluded because "his [own] trial testimony was not particularly important."<sup>145</sup> Failing to acknowledge the irony of this contention coming from a defendant who proclaimed his innocence at trial, the Ninth Circuit summarily rejected it, stating that when "a defendant takes the stand and denies having committed the charged offense, he places his credibility directly at issue," thus triggering "the *related* fourth and fifth [*Mahone*] factors" in favor of admitting the impeachment.<sup>146</sup>

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<sup>138</sup> *Montgomery*, 390 F.3d at 1016.

<sup>139</sup> *Nururidin*, 8 F.3d at 1192.

<sup>140</sup> *Smith*, 131 F.3d at 687.

<sup>141</sup> *Toney*, 27 F.3d at 1253.

<sup>142</sup> *Sides*, 944 F.2d at 1560.

<sup>143</sup> *United States v. Perkins*, 937 F.2d 1397, 1406 (9th Cir. 1991).

<sup>144</sup> 48 F.3d 1477, 1489 (9th Cir. 1995).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* (emphasis added); see also *United States v. Thomas*, 79 F. App'x 908, 914 (7th Cir. 2003) (rejecting defendant's contention "that the fourth and fifth factors weigh against admissibility because his testimony was unimportant and his credibility was not at issue" on ground that defendant's "denial that he robbed the banks was directly contradicted by the testimony of numerous eyewitnesses identifying him as

As illustrated by these cases and numerous others,<sup>147</sup> the federal courts continue post-*Luce* to rely on *Mahone*'s fourth factor — whether the defendant's testimony is "important" to the jury. Now, however, they rely on the fourth factor to support *admission* of prior convictions rather than *exclusion*.<sup>148</sup> Of course, interpreting the fourth factor in

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the robber" and "[t]he government therefore was entitled to impeach his veracity with the fact that he is a convicted felon").

<sup>147</sup> See, e.g., *United States v. Martinez-Martinez*, 369 F.3d 1076, 1088 (9th Cir. 2004) (affirming district court ruling permitting impeachment with prior conviction even though trial court "did little more than 'recognize[] the centrality of the credibility issue and the defendant's testimony'" in justifying its ruling (quoting *United States v. Jimenez*, 214 F.3d 1095, 1098 (9th Cir. 2000))); *United States v. Cuevas*, 82 F. App'x 546, 547 (9th Cir. 2003) (holding that defendant's prior "conviction was . . . admissible under Rule 609(a)(1) because it reflects on [his] veracity and is dissimilar to the charged conduct, and because [his] testimony and credibility were critical at trial"); *Thomas*, 79 F. App'x at 914 (holding that fourth and fifth factors did not prevent government's use of prior convictions to impeach defendant's testimony denying guilt in bank robbery); *United States v. Cannady*, No. 95-50207, 1995 WL 216942, at \*2 (9th Cir. Apr. 11, 1995) (affirming district court's admission of defendant's convictions because "the only factor weighing against admission of the two prior convictions was the similarity factor" and emphasizing that defendant's "credibility and testimony were central to the case on such issues as motive to commit the robbery"); *United States v. Coon*, No. 89-1489, 1991 WL 37830, at \*6 (6th Cir. Mar. 19, 1991) (emphasizing propriety of impeachment because defendant's "testimony, if believed, constituted a complete defense to the charge"); *United States v. Rein*, 848 F.2d 777, 783 (7th Cir. 1988) (district court's findings that "the defendant's testimony was important" and "the defendant's credibility was 'extremely important'" supported admission of prior drug trafficking conviction despite similarity of prior offense to charges at trial); *United States v. Browne*, 829 F.2d 760, 764 (9th Cir. 1987) (emphasizing "the importance of the defendant's testimony" in upholding admission of prior convictions for impeachment); see also cases cited *infra* note 160.

<sup>148</sup> See Blume, *supra* note 5, at 11 (criticizing federal courts "[e]ngaging in what would seem to be complete anti-logic" by treating importance of defendant's testimony as factor favoring impeachment); Ordovery, *supra* note 109, at 199-200 ("Where the defendant's testimony is crucial to the defendant, one might expect that the courts would give serious attention to the Rule 609(a)(1) balancing test that places the burden on the prosecution and favors the defense. Yet, what seems to occur is that courts will acknowledge that the defendant's evidence is important; that credibility is the central issue; and, therefore, the prior conviction must be admitted to impeach the defendant's credibility. This is the opposite of the policy expressed by the line of authority that led to the adoption of Rule 609(a)."); Ed Gainor, Note, *Character Evidence by Any Other Name . . . : A Proposal to Limit Impeachment by Prior Conviction Under Rule 609*, 58 GEO. WASH. L. REV. 762, 783 (1990) (noting that there "appears to be confusion among some courts regarding the weight to be given to the importance of the defendant's testimony in the balancing process," and "some courts appear to have weighed the importance of the defendant's testimony in favor of admissibility of prior conviction evidence").

this manner is indefensible in light of its opposite meaning in the case law from which it is derived.<sup>149</sup>

In addition, while fitting neatly into the post-*Luce* procedural paradigm, the retooled fourth factor is essentially meaningless as an analytical consideration. Under the post-*Luce* federal case law, the courts are engaging in a tautological two-step: (i) whenever a defendant testifies and (as is to be expected) either contradicts government witnesses or denies guilt, his testimony is deemed “important”; and (ii) the importance of this testimony *ipso facto* justifies prior conviction impeachment. The rhetorical force of this reasoning appears to have blinded the courts to the fact that it represents a generally applicable *policy* argument rather than a means of evaluating the probative value and prejudicial effect under Rule 609 of a particular conviction in a particular case. The courts’ strained logic dictates that the fourth *Mahone* factor will *always* apply when a defendant testifies (or seeks to testify) and *always* favors impeachment. In effect, the courts have taken what was once a factor to be applied in weighing the admissibility of proffered impeachment and used it to transform the Rule 609 balance itself.

Not all the federal courts have been able to swallow the rhetorical reversal of the fourth factor exemplified by the *Alexander* decision. Some have adopted a more subtle approach to post-*Luce* interpretation of the *Mahone* framework that avoids the awkwardness of a complete reversal of the fourth *Mahone* factor, but results in essentially the same judicial tinkering with the Rule 609 balance. The courts following this alternative generally list the five *Mahone* factors in setting forth the familiar framework for review of impeachment rulings, but then decline to apply the fourth factor, implicitly assuming that it is inapplicable on the facts of the case (as it is, if properly construed, in every post-*Luce* appeal). These courts then highlight the fifth factor (“the centrality of the credibility issue”) as the primary consideration in the analysis, without acknowledging that this factor, as now interpreted, will always support the admission of prior convictions.<sup>150</sup>

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<sup>149</sup> See *United States v. Mahone*, 537 F.2d 922, 929 (7th Cir. 1976) (citing *Gordon* as source of fourth factor); *Gordon v. United States*, 383 F.2d 936, 940-41, 941 n.11 (D.C. Cir. 1967) (announcing that trial court should consider “what the effect will be if the defendant does not testify out of fear of being prejudiced because of impeachment by prior convictions” and “whether the defendant’s testimony is so important” that otherwise admissible impeachment should be foregone to encourage its presentation to jury); *supra* Part III.B.

<sup>150</sup> For examples of this approach, see discussion in text, *infra* Part IV.C. and *United States v. Arhebamen*, 197 F. App’x 461, 467 (6th Cir. 2006) (listing *Mahone* factors, and then affirming ruling that, despite availability of four other convictions as



For example, in *United States v. Brito*,<sup>151</sup> after briefly discussing the first three *Mahone* factors, the First Circuit bypassed the fourth factor to seize on the fifth as justification for admitting the defendant's three prior convictions. The court explained that “[p]erhaps most important, this case hinged on a credibility choice; the jury had to decide whether to believe the appellant or the police officers” and consequently “[t]he salience of the credibility issue weigh[ed] in favor of admitting the prior convictions.”<sup>152</sup> This analysis produces the same effect as in *Alexander* — essentially combining the fourth and fifth factors into one predominant factor present in every case that will always favor the admission of impeachment.

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impeachment under 609(a)(2), conviction for “absconding” was admissible because “even though it was similar to the charged crime of failure to appear for sentencing,” conviction “was highly probative because Defendant’s credibility was a central issue at trial”); *United States v. Ramirez-Krotky*, 177 F. App’x 746, 749 (9th Cir. 2006) (affirming admission of impeachment on principal ground that defendant’s “credibility was a central question”); *United States v. Gant*, 396 F.3d 906, 909-10 (7th Cir. 2005) (recognizing “the importance of the defendant’s testimony” as *Mahone*’s fourth factor, but ignoring it in application and ruling that because defendant’s “testimony that he possessed a pipe, not a firearm, directly contradicted the testimony of [the] government witnesses,” defendant’s “credibility was a crucial part of the trial” and thus “[t]he district court did not abuse its discretion in admitting [the] prior conviction for impeachment purposes”); *United States v. Hernandez*, 106 F.3d 737, 740 (7th Cir. 1997) (reciting five *Mahone* factors and affirming without reference to fourth factor despite similarity of prior crime to charged offense “given the importance of the credibility issue in this case”); *United States v. Blackburn*, No. 92-1131, 1993 WL 204241, at \*2 (6th Cir. June 8, 1993) (listing factors and affirming admission of prior conviction where “district court dealt with several of these factors” but not fourth factor and “[a] central issue at trial was which witness to believe, the defendant or [a] prosecution witness”); and *United States v. Moore*, 917 F.2d 215, 234-35 (6th Cir. 1990) (reciting five *Mahone* factors, but ignoring fourth factor and affirming admission of prior armed robbery conviction based on trial court’s findings that “the probative value of the nine-year conviction outweighed any prejudicial effect since [the defendant’s] credibility was ‘very much in contention’” and because “[t]he prior conviction went to credibility, and had impeachment value”); see also *Rodriguez v. United States*, 286 F.3d 972, 984 (7th Cir. 2002) (determining by reference to *Mahone* factors that defense counsel reasonably advised defendant his prior convictions would be admissible if he took stand, and emphasizing – while ignoring fourth factor – that prior conviction was “an important factor in determining [the defendant’s] credibility if he took the stand” and thus “the prior conviction’s probative value for determining credibility would outweigh its prejudicial value for his propensity to commit the charged crime”).

<sup>151</sup> 427 F.3d 53, 64 (1st Cir. 2005).

<sup>152</sup> *Id.* at 64.

D. *Implications of the Modern Application of the Five-Factor Framework*

As the preceding discussion makes clear, it is not the congressional policy directive that the *Mahone* framework purports to implement, but rather the *Mahone* framework itself that best explains why courts applying Rule 609 routinely permit prior conviction impeachment of criminal defendants. Regardless of the facts of the case or the nature of the prior conviction(s), support for the admission of impeachment can always be found by reference to the “related” fourth and fifth *Mahone* factors.<sup>153</sup> In effect, these last two judicial factors establish a legal presumption of the admissibility of a testifying defendant’s prior convictions, despite the fact that the text of Rule 609 supports, if anything, the opposite presumption.<sup>154</sup>

This pro-impeachment presumption (i.e., the presence of two always applicable, one-sided considerations in every impeachment calculus) is

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<sup>153</sup> See, e.g., *Brito*, 427 F.3d at 64 (ignoring fourth factor and highlighting fifth as “[p]erhaps most important” of court’s considerations in affirming admission of impeachment); *United States v. Martinez-Martinez*, 369 F.3d 1076, 1088 (9th Cir. 2004) (affirming district court ruling permitting impeachment with prior conviction even though trial court “did little more than ‘recognize[] the centrality of the credibility issue and the defendant’s testimony’” in justifying its ruling).

There is an almost imperceptible ripple against this tide in the federal case law as evidenced by a handful of cases addressing the exclusion of convictions under Rule 609(b) — a provision of the Rule that prohibits impeachment with a prior conviction over 10 years old unless the probative value of the conviction “substantially outweighs” its prejudicial effect — but this contrary sentiment has not yet triggered any recognition of the flaws in the modern interpretation of the *Mahone* framework. See *United States v. Bensimon*, 172 F.3d 1121, 1126-27 (9th Cir. 1999) (recognizing that “this and other courts have held that the probative value of impeachment evidence is enhanced where the defendant’s testimony is pitted against that of the government witnesses, thereby making the credibility of the defendant an important issue,” but ruling that “while [the defendant’s] credibility was certainly an important issue to the government’s case, this fact does not change the probative value of [his] seventeen-year-old conviction for mail fraud”); *Am. Home Assurance Co. v. Am. President Lines, Ltd.*, 44 F.3d 774, 779 (9th Cir. 1994) (rejecting challenge to exclusion of prior conviction impeachment of witness in civil case despite assertion that witness’s credibility was “critical” to case, because “the probative value of [the witness’s] conviction is measured by how well it demonstrates his lack of trustworthiness, not how badly [the other side] wants to impeach him”); *United States v. Acosta*, 763 F.2d 671, 695 (5th Cir. 1985) (acknowledging in 609(b) context that “the mere fact that the defendant’s credibility is in issue” is weak justification for permitting impeachment because it is “a circumstance that occurs whenever the defendant takes the stand”).

<sup>154</sup> See *United States v. Lipscomb*, 702 F.2d 1049, 1063 (D.C. Cir. 1983) (stressing that “there can be no legal presumption of admissibility”; “[t]o the contrary, . . . the burden is on the government to show that the probative value of a conviction outweighs its prejudicial effect to the defendant”); discussion *supra* Part II.B.

particularly powerful because the balance of the *Mahone* factors will rarely be decisive. The courts have long accepted that all felony convictions are *somewhat* probative of dishonesty (factor one),<sup>155</sup> and need only have occurred within roughly the past decade to “satisfy” the remoteness criteria (factor two).<sup>156</sup> Thus, these first two factors are essentially place holders in the impeachment analysis — mere checkboxes that the courts tick off on their way to an almost inevitable conclusion. The sole significant obstacle to admissibility, then, is the third *Mahone* factor, in the circumstance where the prior offense and pending charge are the same or substantially similar. This obstacle, even when present, however, is easily overcome. The case law is replete with statements to the effect that such similarity is “not dispositive.”<sup>157</sup> Consequently, factors four and five, which are essentially merged into a conglomerate super-factor representing “the importance of the defendant’s credibility,” hold great

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<sup>155</sup> *Brito*, 427 F.3d at 64 (asserting that all felony convictions “have some probative value for impeachment purposes”); *Lipscomb*, 702 F.2d at 1062 (“[A]ll felony convictions are probative of credibility to some degree.”); *see also supra* Part I.

<sup>156</sup> *See* *United States v. Alexander*, 48 F.3d 1477, 1488 (9th Cir. 1995) (recognizing that second factor was “satisf[ied]” because 10-year period from release had not elapsed as per Rule 609(b)); *United States v. Pritchard*, 973 F.2d 905, 909 (11th Cir. 1992) (affirming district court’s admission of 13-year-old burglary conviction despite similarity to charged crime based on “the government’s need for the impeaching evidence” and fact that “crux of this case was a credibility issue”); *United States v. Walker*, 817 F.2d 461, 464 (8th Cir. 1987) (evaluating remoteness of prior conviction by stating that it “was within the ten-year time limit prescribed by this rule”); *see also* FED. R. EVID. 609(b) (prescribing stricter balancing test with respect to impeachment of any witness “if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction” (whichever is later); admission is prohibited “unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect”).

<sup>157</sup> *See, e.g., United States v. Hernandez*, 106 F.3d 737, 740 (7th Cir. 1997) (acknowledging that similarity of prior conviction to charged offense was “a factor that requires caution” but concluding that it was outweighed by “the importance of the credibility issue in this case”); *Alexander*, 48 F.3d at 1488 (stating prior conviction was “not inadmissible per se, merely because the offense involved was identical to that for which [the defendant] was on trial,” rather “[w]hat matters is the balance of all five factors”); *United States v. Cannady*, No. 95-50207, 1995 WL 216942, at \*2 (9th Cir. Apr. 11, 1995) (affirming admission of two prior convictions despite fact that “similarity factor” “weigh[ed] against admission,” because defendant’s “credibility and testimony were central to the case”); *United States v. Causey*, 9 F.3d 1341, 1344 (7th Cir. 1993) (noting that substantial similarity of prior conviction to charged offense and limited impeachment value while “important factors” were “not dispositive”); *Beaver & Marques, supra* note 4, at 616 (noting prevalence of rulings allowing defendants to be impeached with crimes similar to charged offense).

sway as ready-made and rhetorically compelling considerations favoring the admission of impeachment in every case.<sup>158</sup>

While the prospects for criminal defendants seeking to exclude prior convictions under the current case law are bleak in the trial court,<sup>159</sup>

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<sup>158</sup> This point is neatly summed up by *United States v. Perkins*, 937 F.2d 1397, 1406 (9th Cir. 1991), which explains that “the admission under Rule 609 of a bank robbery conviction in a bank robbery trial is not an abuse of discretion when the conviction serves a proper impeachment purpose, such as when the defendant’s testimony and credibility are central to the case.” See also *Martinez-Martinez*, 369 F.3d at 1088 (affirming district court ruling permitting impeachment with prior conviction even though trial court “did little more than ‘recognize[ ] the centrality of the credibility issue and the defendant’s testimony’” in justifying its ruling).

<sup>159</sup> In line with the natural passage of legal principles from the appellate courts to the trial courts, it is no surprise that the federal district courts have adopted the flawed analysis that first emerged in post-*Luce* Rule 609 appellate case law. See, e.g., *United States v. Dismuke*, No. 07-81, slip op. at 2 (E.D. Wis. Nov. 7, 2007) (applying *Mahone* factors in written ruling on *in limine* motion, and ruling four prior convictions admissible, in part, because “defendant’s testimony and credibility would be important in this case” and consequently jury will “be called upon to make a determination of his credibility, which may be the critical issue in the case”); *United States v. Hearn*, No. 06-30040, slip op. at 2 (C.D. Ill. Aug. 4, 2006) (concluding based on substance of defendant’s proposed testimony that “fourth factor weighs in favor of admitting evidence of the drug convictions” for impeachment); *United States v. Grimes*, No. 05-30161, slip op. at 2 (S.D. Ill. June 2, 2006) (“agree[ing] with the Government’s assertions as to the importance of [the defendant’s] testimony and the centrality of the credibility issues” and that these factors favor admission of impeachment because his “testimony will likely become a central issue in this case”); *United States v. Vargas*, No. 05-20007, slip op. at 5 (C.D. Ill. May 31, 2006) (reciting five *Mahone* factors and ruling that impeachment was proper because, *inter alia*, “there is no dispute that Defendant’s testimony will be important in this case and that Defendant’s credibility will be the central issue if Defendant elects to testify”); *Commonwealth v. Taitano*, No. 01-017, slip op. at 7 (N. Mar. I. Dec. 14, 2005) (“The fourth and fifth factors are the importance of appellant’s testimony and his credibility. If a defendant’s credibility is the central issue of a case, ‘a greater case can be made for admitting the impeachment evidence, because the need for the evidence is greater.’”); *United States v. Chesteen*, No. 03-20036, slip op. at 4-5 (W.D. Tenn. June 23, 2003) (discussing *in limine* ruling permitting impeachment where, after listing five factors, court notes that “[f]rom all indications . . . [defendant] will deny knowledge of the drug manufacturing activities in his house if he takes the stand” and consequently “[e]vidence of [defendant’s] prior drug convictions would be particularly relevant and probative as impeachment evidence”); *Crocker v. Dretke*, No. 7:01-087-R, slip op. at 6 (N.D. Tex. Oct. 16, 2003) (concluding in evaluating petition for writ of habeas corpus that “the fourth and fifth factors would have weighed in favor of admitting the . . . prior convictions” because when defendant “profess[es] his innocence” “importance of the defendant’s testimony and his credibility escalates as does the need for the State to be afforded the opportunity to impeach his credibility”); *United States v. Jackson*, No. 95-155, slip op. at 2 (N.D. Ill. May 31, 1995) (concluding in *in limine* ruling that “the importance of [the defendant’s] testimony makes the issue of his credibility equally critical and supports the admission of potentially impeaching evidence”); see

they become even less promising on appeal. Appellate courts review impeachment rulings under the deferential “abuse of discretion” standard<sup>160</sup> and, as noted above, the *Mahone* framework itself guarantees that any ruling permitting impeachment will be supported by at least two of the five *Mahone* factors. Thus, even when review is available,<sup>161</sup> appellate courts rarely side with the defendant.<sup>162</sup> At both

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*also supra* note 128.

<sup>160</sup> See *Lipscomb*, 702 F.2d at 1068 n.69 (“[A]ll [circuits] agree that the ultimate standard of review under Rule 609(a)(1) is whether the district court has abused its discretion.”).

<sup>161</sup> As discussed in Part IV.A, *supra*, the *Luce* decision precludes review, much less reversal, whenever the defendant is deterred from testifying by potential impeachment.

<sup>162</sup> A rough survey of appellate case law evaluating post-*Luce* district court rulings admitting defendants’ prior convictions under Rule 609(a) reveals *only one case* (a particularly extreme case at that) during the 13-year span in which a federal appeals court concluded that a district court abused its discretion by admitting a prior conviction. See *United States v. Wallace*, 848 F.2d 1464, 1473 (9th Cir. 1988) (holding trial court abused its discretion in admitting remote conviction for heroin trafficking in heroin trafficking prosecution where defendant could be alternatively impeached with prior *perjury* conviction and trial court “considered expressly only two of the five factors” and “[a]s to one of the factors it considered, the district court incorrectly assumed that the similarity of the prior conviction and the present charges weighed in favor of admissibility”). I was able to locate 47 reported post-*Luce* appellate opinions that reached the merits of such trial rulings. In 45 of the cases, the appeals courts concluded that the trial court did not abuse its discretion in admitting challenged convictions. In one other case, the appeals court found no error in the admission of the defendant’s conviction, but nevertheless concluded that the district court erred when it made a bungled effort to “sanitize” the conviction by ordering it referred to as a “felony involving a *firearm*.” *United States v. Jimenez*, 214 F.3d 1095, 1096, 1099 (9th Cir. 2000) (reversing because trial court’s “attempt to ameliorate the prejudice of the assault with a deadly weapon conviction” by referring to it as “felony involving a *firearm*” had “the reverse effect”; court’s “ruling inadvertently exacerbated [the prejudice] by gratuitously informing the jury that the ‘deadly weapon’ involved in the defendant’s prior conviction was, indeed, a firearm”; and “the main issue in the present case was whether or not the defendant possessed a firearm”); see also 4 WEINSTEIN & BERGER, *supra* note 60, § 609.23, at 609-65 (noting that appellate courts “generally affirm the trial court’s determination as long as there is some indication that the trial court exercised its discretion by weighing the probative value of the prior conviction against its prejudicial effect”); WRIGHT & GOLD, *supra* note 45, § 6134, at 241 (emphasizing that in most cases, where trial courts “at least claimed” to have “considered both probative value and prejudice” “appellate courts usually defer to the decision of the trial court if there is any way to rationalize the balance struck”); Nichol, *supra* note 4, at 397 (arguing that “appellate review of” rulings permitting credibility impeachment “has been limited to cursory determinations that no abuse of discretion has occurred”); Perrin, *supra* note 1, at 656 (asserting that under federal case law, defendants challenging “the admission of [a] prior conviction on appeal” are often “met with a narrow, half-hearted application of Rule 609(a)(1) and a near certain affirmance”); Gainor, *supra* note 148, at 780 (arguing that “[f]ederal courts of

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the trial and appellate level, the *Mahone* framework is now better understood as a means of justifying the admission of impeachment, rather than as a mechanism for determining whether that impeachment is proper in the first place.

One of the more surprising aspects of the federal courts' failure to faithfully implement the congressional policy directive embodied in Rule 609 is the absence of dissent. The sweeping judicial transformation of prior conviction impeachment law, most appreciable in the post-*Luce* era, has engendered little controversy in either appellate opinions or scholarly literature. Instead, the federal courts and most commentators have simply accepted the post-*Luce* approaches to the *Mahone* framework without comment. This creates an anomalous circumstance where the courts continue to apply a body of case law that not only cannot be defended, but for which no one (scholar or judge) has even bothered to articulate a rationale.

From a separation of powers perspective, the courts' modern prior conviction impeachment case law represents the fruit of a perfect (institutional) crime. Despite congressional action in the 1970s to require federal courts to severely restrict prior conviction impeachment of the accused, the courts have steered persistently back toward their traditional pro-impeachment jurisprudence. Now, with a fortuitous assist from the Supreme Court's procedural ruling in *Luce*, the federal courts have arrived, full circle, back at the law in effect prior to the enactment of Rule 609.<sup>163</sup> But for the occasional citation to Rule 609 itself, one would suspect that the Rule had been rescinded.<sup>164</sup>

This *de facto* invasion of the legislative sphere is not merely a matter of intellectual concern, but has grave real world implications. The unavoidable result of federal case law that now essentially dictates admission of prior convictions is twofold. First, defendants in criminal courts across the country are deterred from testifying based

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appeals have rarely reversed a trial judge's decision to admit evidence of prior convictions for impeachment").

<sup>163</sup> Cf. Gold, *supra* note 1, at 2298, 2325 (contending that in interpreting Rule 609, "the courts have substituted their own political judgments for those of Congress" and because of careful congressional consideration received by Rule 609, this improper judicial application of Rule "not only distorts the notion of judicial discretion but also inappropriately intrudes upon legislative domain").

<sup>164</sup> Beaver & Marques, *supra* note 4, at 591 (arguing that despite passage of Federal Rules, "[p]rior crime impeachment of criminal defendants continues essentially unabated"); Nichol, *supra* note 4, at 394, 399 (stating that despite "academic fervor" criticizing practice, prior conviction impeachment of criminal defendants has been "largely unabated under the provisions of the Federal Rules of Evidence").

on erroneous rulings (or anticipated rulings) as to the admissibility of their prior convictions. Second, many of those who do testify suffer devastating prejudice from the introduction of past crimes that Rule 609 should exclude.

These consequences of the federal courts' over-admission of prior convictions do not inhere solely to criminal defendants, but serve, in particular cases, to undermine the reliability and legitimacy of the criminal justice system itself.<sup>165</sup> As the District of Columbia Circuit recognized decades ago, the cause of justice suffers when defendants with important stories to tell are deterred by the prospect of impeachment from presenting their testimony to the jury.<sup>166</sup> Further, the recent wave of post-conviction, DNA-based exonerations has laid to rest any claim that American jury trials are immune to serious error.<sup>167</sup> This reality counsels that courts should decrease, not increase, their reliance on a form of evidence that American jurisprudence has long recognized as exacerbating the potential for wrongful convictions.<sup>168</sup> Of course, these concerns for the proper functioning of the criminal justice system motivated Congress to enact Rule 609 in the first instance. Thus, it is no surprise to see the same concerns resurface when the courts, in essence, put the Rule out to pasture.

#### V. AN ALTERNATIVE ANALYTICAL FRAMEWORK FOR APPLYING RULE 609

The silver lining in the rather glum assessment of the federal case law described in Parts III and IV is that unlike many criminal procedure dilemmas, the solution, or at least an interim solution, is readily apparent: the federal courts can simply discard *Mahone's*

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<sup>165</sup> See Bellin, *supra* note 49, at 854-59 (discussing how criminal justice system suffers when large numbers of defendants decline to testify); Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1450-51 (2005) (explaining that defendant testimony "has personal, dignitary, and democratic import beyond its instrumental role within the criminal case" as well as "systemic implications for the integrity of the justice process").

<sup>166</sup> *Gordon v. United States*, 383 F.2d 936, 940 & n.11 (D.C. Cir. 1967).

<sup>167</sup> See, e.g., Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 56 (2008) (reporting results of empirical study of 200 post-conviction DNA exonerations in rape and murder cases, and noting that these results provide strong counterpoint to famous suggestion of Judge Learned Hand that "the ghost of the innocent man convicted" is an "unreal dream").

<sup>168</sup> See *Loper v. Beto*, 405 U.S. 473, 482 n.11 (1972); Blume, *supra* note 5, at 17-19 (analyzing data regarding defendants cleared by post-conviction DNA testing and determining that in 39% of those cases defendant did not testify, and 43% of those who did testify were subject to impeachment with prior convictions); *supra* Part I.

antiquated five-factor framework. Replacement of the five-factor inquiry with a direct focus on the legislative history and text of Rule 609 is easily preferable to the status quo.

The creation of an alternative analytical framework to govern the application of Rule 609 is a more complicated issue. While it is tempting to conclude that the federal courts' erroneous interpretation of Rule 609 can be remedied by simply lopping off the fourth and fifth *Mahone* factors, that solution would likely result in only incremental change.<sup>169</sup> The federal courts' failure to faithfully interpret Rule 609 may stem not only from flaws in the fourth and fifth *Mahone* factors, but also from a methodological flaw inherent in the courts' reliance on a malleable, multi-factored analytical framework. Stated another way, it may be that simply by shifting the focus from the straightforward balancing test set forth in Rule 609(a)(1) to an amorphous litany of non-specific factors, the analytic exercise devolved, almost inevitably, into something of a Rorschach test. The federal courts, steeped in a long pre-Rule 609 tradition of automatically admitting the felony convictions of testifying witnesses, were generally able to locate support for admission of impeachment somewhere in the multi-factored analysis, even when Congress would have intended the opposite result. Thus, while there are undoubtedly serious substantive flaws in the fourth and fifth *Mahone* factors, the excision of these factors would leave more subtle underlying flaws untouched. A three-factor *Mahone* framework, like its five-factored antecedent, would permit the courts to revert to a pattern of routinely admitting prior convictions regardless of the ultimate balance of probative value and prejudicial effect.

A more promising avenue for reintroducing the courts to the text of Rule 609 is to set aside *Mahone's* multi-factor analysis entirely. Starting on a clean slate unencumbered by the *Mahone* factors, a trial court, evaluating the admissibility of a defendant's prior convictions as impeachment, could focus on the task at hand: identifying the aspects of each conviction and the facts of the particular case that could potentially justify the counterintuitive conclusion that a prior conviction's "probative value" as impeachment outweighs its "prejudicial effect to the accused."<sup>170</sup>

First, focusing on a conviction's probative value, the trial court must recognize that the defendant's credibility as a witness is always minimal, even without impeachment evidence. Consequently, the first question

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<sup>169</sup> This is the approach suggested by one early commentator. See Surratt, *supra* note 62, at 950-51.

<sup>170</sup> FED. R. EVID. 609(a)(1).



under Rule 609 is not whether a prior conviction has *some* relevance as impeachment, but rather: *what will the introduction of the defendant's prior conviction add to the jury's evaluation of the defendant's testimony?* For a conviction to be considered more than marginally probative under this analysis, its evidentiary significance must be based on something more than a speculative "readiness to do evil." That consideration is easily subsumed by the more compelling fact of the defendant's abiding interest in acquittal. Rather, the analysis must rest on the specific facts of the case or of the conviction itself. For example, a conviction would be more than marginally probative when the defendant, on direct examination, attempts to create an impression of having led a law abiding life (i.e., trying to appear as "a Mother Superior");<sup>171</sup> makes some claim that is directly inconsistent with the existence of a prior conviction (e.g., "I have never seen drugs before in my life," or "I am not a crook"); or where the defense utilizes prior convictions to impeach government witnesses, creating a false contrast between the defendant and his accusers.<sup>172</sup>

With respect to the prejudice inquiry, the trial court should ask a similar case-specific question, recognizing that the admission of the defendant's prior offenses as impeachment will virtually always result in some "prejudicial effect to the accused."<sup>173</sup> Specifically, the court must inquire: *why is the prejudicial effect of the prior conviction diminished (or enhanced) in this case?* A diminished risk of prejudice might be present when a relatively minor conviction (e.g., theft) is offered to impeach a defendant charged with a dissimilar and significantly more serious crime (e.g., murder); where the evidence introduced at trial has already identified the defendant as a prior offender (e.g., a crime committed in prison); or where the defendant's prior conviction will be admitted for other purposes (e.g., to establish an element of the offense). In contrast, in circumstances where prejudicial effect is unusually high, such as where a prior conviction is for an identical or particularly infamous crime (e.g., child molestation), the trial court must begin with a presumption of inadmissibility under Rule 609 due to the sheer

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<sup>171</sup> *United States v. Lipscomb*, 702 F.2d 1049, 1077 (D.C. Cir. 1983) (MacKinnon, J., concurring specially); 1 MCCORMICK ON EVIDENCE, *supra* note 11, § 42, at 198 ("Most prosecutors argue forcefully that it is misleading to permit the accused to appear as a witness of blameless life, and this argument has prevailed widely.").

<sup>172</sup> The defense had, in fact, impeached a key government witness with a prior conviction in *Gordon*, perhaps triggering the amorphous reasoning in that case that led to the centrality of the credibility issue factor. *Gordon v. United States*, 383 F.2d 936, 938-39 (D.C. Cir. 1967); *see also* *United States v. Mahone*, 537 F.2d 922, 929 (7th Cir. 1976) (funneling *Gordon's* analysis into five-factor framework).

<sup>173</sup> FED. R. EVID. 609(a)(1).

implausibility that the probative value of such evidence could ever outweigh its prejudicial effect.<sup>174</sup>

In the vast run of cases, where the above analysis does not reveal any case-specific factors that enhance a proffered felony conviction's probative value and diminish its prejudicial effect, Rule 609 dictates exclusion. A straight comparison of: (i) the prejudicial effect of the jury's learning of a defendant's criminal past; against (ii) the probative value of informing the jury that the defendant has *slightly less* credibility than his status as an interested party already suggests, strongly favors exclusion, particularly in light of the fact that the burden of persuasion lies with the prosecution.<sup>175</sup>

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<sup>174</sup> Application of this presumption would dictate that the severe prejudice inherent in a prior conviction of this type could not be overcome by weak countervailing considerations such as that the conviction is recent or because the defendant's credibility is important. See, e.g., *United States v. Hernandez*, 106 F.3d 737, 740 (7th Cir. 1997) (recognizing that similarity of prior conviction to charged offense was "a factor that requires caution," but concluding that factor was outweighed by "the importance of the credibility issue in this case"); *United States v. Walker*, 817 F.2d 461, 464 (8th Cir. 1987) (concluding that prior arson conviction was admissible because it "was within the ten-year time limit prescribed by this rule, and [the defendant's] credibility was an important factor in the case"); see also *WRIGHT & GOLD*, *supra* note 45, § 6134, at 232 (noting that prejudice will be high "[i]f the crime involved particularly depraved and offensive acts, such as wanton violence or sexual immorality").

Similar or infamous offenses could be rendered less prejudicial as impeachment if "sanitized" so that they are referred to at trial in a generic fashion (e.g., a "prior felony" rather than a "prior child molestation conviction"). Sanitizing convictions to render them admissible is not contemplated by the text of Rule 609, however. See *United States v. Estrada*, 430 F.3d 606, 616 (2d Cir. 2005) (recognizing "overwhelming weight of authority" for proposition that under Rule 609, "inquiry into the 'essential facts' of the conviction, including the nature or statutory name of each offense, its date, and the sentence imposed is presumptively required" although "subject to balancing under Rule 403"); *WRIGHT & GOLD*, *supra* note 45, § 6134, at 224 (noting that admitting only "mere fact" of generic felony conviction is difficult to reconcile "with the language and structure of Rule 609"); see also *FED. R. EVID.* 609(a) (referencing Rule 403 with respect to admission of convictions for all witnesses except criminal defendants). Consequently, sanitizing a conviction to omit its nature or statutory name (absent agreement of the parties) is more properly viewed as an application of Rule 403 (not Rule 609) and, as such, should be undertaken only after a trial court determination that the conviction is admissible under Rule 609.

<sup>175</sup> In addition, the trial courts may, under Rule 609, consider the fourth *Mahone* factor (in its original incarnation) — the significance to the trier of fact if the defendant is deterred from testifying by the prospect of impeachment. The "prejudicial effect" in such cases is the notable absence of the defendant's side of the story from the evidence presented at trial. See *United States v. Oakes*, 565 F.2d 170, 173 (1st Cir. 1977) (analyzing legislative history of Rule 609, and concluding that "Congress plainly felt that justice in certain cases would be advanced if the defendant was not demoralized from taking the stand by fear that a prior conviction would

While it is miles from the current state of the federal case law, the analytical approach emphasized here is by no means revolutionary. Soon after the enactment of Rule 609, an analogous approach was suggested by the en banc Ninth Circuit, which stated, in long-since discarded dicta, that “[n]ormally the court should err on the side of excluding a challenged prior conviction, with a warning to the defendant that any misrepresentation of his background on the stand will lead to admission of the conviction for impeachment purposes.”<sup>176</sup>

While the case-specific analysis suggested above (much like the Ninth Circuit’s now quaint sounding dicta) may seem to tilt the balance against the admission of impeachment of the vast bulk of criminal defendants’ convictions, this is merely a reflection of the text of Rule 609. The Rule requires exclusion of most convictions (i.e., those not rendered automatically admissible as *crimen falsi*) when their prejudicial effect is equivalent to or infinitesimally greater than probative value, and places the burden on the prosecution to establish

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overshadow the positive aspects of his testimony”); Bellin, *supra* note 49, at 890-96 (arguing that district courts should consider value of defendant’s testimony to factfinder in ruling on, *inter alia*, admission of prior conviction impeachment, and contending that courts possess authority under existing law to exclude impeachment on this ground). Of course, this final consideration is solely relevant at the pretrial stage of the proceedings (where the defendant has not yet testified) and thus would not come into play in cases where a trial court reserves ruling until the defendant’s cross-examination, and will also be inapplicable (per *Luce*) on appeal. For a discussion of how the significance of this factor would vary based on the defendant’s proposed testimony in any particular case, see Bellin, *supra* note 49, at 895.

<sup>176</sup> *United States v. Cook*, 608 F.2d 1175, 1187 (9th Cir. 1979) (en banc), *disapproved on other grounds by* *Luce v. United States*, 469 U.S. 38, 40 n.3 (1984) (recognizing that where defendant intended to “palm himself off as a peace-loving member of the American Friends Service Committee with interest in prison reform and social protest,” trial court was understandably unwilling to force “the government to sit silently by, looking at a criminal record which, if made known, would give the jury a more comprehensive view of the trustworthiness of the defendant as a witness”); see also *United States v. Bagley*, 772 F.2d 482, 488 (9th Cir. 1985) (ruling that district court abused its discretion in admitting impeachment (pre-*Luce*) because, in part, “the record is devoid of any evidence that [the defendant] intended to misrepresent his character or to testify falsely as to his prior criminal record” and “[t]hus, the impeachment value of [the] prior robbery convictions was quite low”). The relatively anti-impeachment *Cook* decision, which was decided five years prior to *Luce*, presents a vivid contrast with the Ninth Circuit’s more recent pro-impeachment rulings. See *United States v. Martinez-Martinez*, 369 F.3d 1076, 1088 (9th Cir. 2004); *United States v. Alexander*, 48 F.3d 1477, 1489 (9th Cir. 1995). The last federal citation to the *Cook* dicta quoted in the text appears in a 1981 (pre-*Luce*) case in the Seventh Circuit. See *United States v. Fountain*, 642 F.2d 1083, 1092 (7th Cir. 1981) (citing *Cook* for “general rule” that “a court should err on the side of excluding a challenged prior conviction”).

the counterintuitive proposition that this balance favors admission in particular cases. The analysis proposed above recognizes this reality; the federal courts' current analytical framework does not.

#### CONCLUSION

While reasonable people can disagree (and have for decades) about the policy merits of the practice of impeaching criminal defendants with prior convictions, there can be no dispute, given the tremendous significance of such impeachment, that federal courts must scrupulously adhere to the policy ultimately chosen by Congress. Unfortunately, this has not been the case. Instead, the modern federal case law lends a prophetic air to the District of Columbia Circuit's warning, in a case decided shortly after Rule 609's enactment, that judicial balancing under the Rule "must not become a ritual leading inexorably to admitting the prior conviction into evidence."<sup>177</sup> That is precisely what has occurred. A flawed, judicially created analytical framework has supplanted the text of Rule 609 as the governing legal standard for prior conviction impeachment and, in so doing, has decisively skewed the impeachment calculus in favor of admitting prior convictions.

Despite this indictment of the modern federal case law, there are no villains in this story. The courts do not appear to have consciously undermined Congress based on a competing policy preference. Instead, judges simply succumbed to the incurious application of a long-established body of case law that, over time, came to rest on a decayed foundation. Indeed, it is likely that the exceedingly gradual decay of the *Mahone* framework's underpinnings contributed to its remarkable ability to avoid both judicial and scholarly scrutiny.<sup>178</sup>

Motives aside, once the requisite analytical scrutiny is applied, it becomes clear that the five-factor *Mahone* framework can no longer be justified in light of the vast chasm separating that framework from the

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<sup>177</sup> *United States v. Lipscomb*, 702 F.2d 1049, 1063 (D.C. Cir. 1983).

<sup>178</sup> An analogous unintentional, but nevertheless flawed, evolution of federal case law is depicted in Richard Posner's book, *How Judges Think*. Judge Posner chronicles the evolution of an erroneous formula employed by numerous federal courts in interpreting the Fair Labor Standards Act. Posner explains that "[b]ecause so many cases had recited" the formula it became "natural for lawyers and judges to treat it as gospel"; the phrases used by earlier courts were "garbled," the "garbled form repeated, and the original meaning forgotten." RICHARD POSNER, *HOW JUDGES THINK* 243-44 (2008). Posner goes on to urge that judges remain "alert to the possibility that a current legal doctrine may be a mere vestige of historical circumstances and should be discarded." *Id.* at 247-48.

legislative intent it purports to implement.<sup>179</sup> By circumventing Rule 609, application of the *Mahone* framework constitutes a raw exercise of judicial power that has improperly altered, and continues to alter, the course of countless criminal trials.<sup>180</sup> To stanch the bleeding, the federal courts must recognize the flaws in their current approach to Rule 609 and devise a new way forward. The first, and by far the easiest, step on this path is to abandon the antiquated *Mahone* framework. The courts must then develop a new analytical framework derived, not from the pre-Rule 609 case law, but, as suggested in Part V, *supra*, from the text of the Rule itself.

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<sup>179</sup> Cf. *supra* Part II (summarizing legislative intent); *supra* Parts III-IV (critiquing framework).

<sup>180</sup> See *supra* Part IV.