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# Honoring Margaret Berger with a Sensible Idea

## INSISTING THAT JUDGES EMPLOY A BALANCING TEST BEFORE ADMITTING THE ACCUSED'S CONVICTIONS UNDER FEDERAL RULE OF EVIDENCE 609(a)(2)

*Aviva Orenstein*<sup>†</sup>

### INTRODUCTION

Impeachment of witnesses, though potentially edifying for the jury,<sup>1</sup> can create a host of problems that undermine the fairness or accuracy of a trial. Certainly, the finder-of-fact (judge or jury) must be made aware of potential deficits in a witness's credibility. The witness with poor eyesight who reports what she saw, the witness who has made a deal with the prosecutor, the witness with a reputation as a liar – all need to be impeached to reveal possible problems with their testimony. If the impeachment causes the jury to distrust the witness more than warranted, however, or, worse, to dislike the witness, valuable information may be inappropriately discounted. This problem is most acute when the witness in

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<sup>†</sup> Professor of Law, Indiana University Maurer School of Law. I want to express my deep regard for Margaret Berger as a generous colleague, wonderful teacher, and role model. I would like to thank Robin Ballard, Joshua Fix, Martha Marion, and Judy Reckelhoff for excellent research help. Thanks also to Seth Lahn, Hannah Buxbaum, Leandra Lederman, Sylvia Orenstein, William Popkin, Michael Risinger, Ted Sampsell-Jones, Eileen Scallen, and David Szonyi for their insights, even though and especially because they do not all agree with my conclusions. All mistakes are my own.

<sup>1</sup> I focus on jurors because they tend not to be repeat players in the justice system and hence will have more difficulty with counterintuitive evidence principles. Jurors are more susceptible to certain types of visceral reactions and unfair prejudice than trained and experienced lawyers and judges, which is not to say that concerns about bias and irrationality are limited to juries alone. Finally, because judges have to rule on the admissibility of the evidence, the practical effect of exclusion (asking them to forget inadmissible evidence) is more questionable than in the case of jurors who are deprived of the evidence entirely.

question is also the accused in a criminal case. Impeachment that causes the jury to think of the accused as a bad person or someone who should still be in jail for prior crimes undermines the basic fairness of the trial.

This essay addresses a controversial form of impeachment: the use of prior convictions to impeach a witness's character for truthfulness. It focuses on issues raised when the witness is the accused because in that instance, the rule is most interesting and its consequences most troubling.<sup>2</sup> Under Federal Rule of Evidence 609(a), which was amended in 2006, any witness in a criminal or civil case may be impeached by her criminal convictions.<sup>3</sup> Rule 609 divides the type of prior crimes with which a witness may be impeached into two categories: (1) felonies, and (2) any crimes involving dishonesty or false statement.<sup>4</sup> Rule 609(a)(1) clearly provides a special

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<sup>2</sup> The "risk of unfair prejudice to a party in the use of [convictions] to impeach the ordinary witness is so minimal as scarcely to be a subject of comment." Proposed FED. R. EVID. 609 advisory committee's note, 51 F.R.D. 315, 392 (1971).

<sup>3</sup> FED. R. EVID. 609(a).

<sup>4</sup> The following is the text of Rule 609 reflecting the 2006 amendments. Crossed out material represents deletions; underlined material represents new language.

#### 609. Impeachment by Evidence of Conviction of Crime

##### (a) General rule.

For the purpose of attacking the ~~credibility~~ character for truthfulness of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and (2) evidence that any witness has been convicted of a crime shall be admitted ~~if it involved dishonesty or false statement~~, regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.

FED. R. EVID. 609(a).

Aspects of Rule 609(a) reflect major changes in the legal landscape over the past three centuries. Until the late nineteenth century, people accused of crimes were not permitted to testify at all under the party-witness rule. Our rule against self-incriminating is actually half of a larger rule that the accused in a criminal matter was not allowed to testify either to incriminate or exculpate herself. Any rule for impeaching witnesses, therefore, did not apply to the accused, who was barred from taking the witness stand.

In a similar vein, historically, felons did not present impeachment conundrums; under the old English law, felonies were punishable by death, so all but those receiving pardons were unavailable to testify. Once some felonies became non-capital cases, the law had to decide what to do with convicted felons on the witness

balancing test that the judge must apply before admitting felonies to impeach a witness, with more stringent screening if the witness is the accused. This essay proposes that, even for convictions that involve dishonesty and false statement, the judge must screen for unfair prejudice before allowing such prior crimes to impeach the accused. In making this argument, this essay stakes a position that opposes the current interpretation of Rule 609 by federal courts, most state courts, and academia. It presents not merely a policy critique of Rule 609(a)(2), which many might agree with, but advocates that trial courts adopt a new interpretation and more limited application of this rule. In addition, perhaps this essay will persuade state legislatures to incorporate an explicit balancing test into state versions of their Rules of Evidence.

#### I. IMPEACHMENT OF THE ACCUSED WITH A PRIOR FELONY CONVICTION

Understanding how Rule 609 treats impeachment with crimes involving dishonesty or false statement requires that one first look at how the Rule treats felony convictions. Therefore, this essay first examines Rule 609(a)(1), which admits evidence of a felony conviction by the accused only if the probative value of the impeachment outweighs the prejudicial effect to the accused.<sup>5</sup> Although this sounds very similar to Federal Rule of Evidence 403,<sup>6</sup> which also employs language of probative value and prejudice, the balancing test for the accused imbedded in Rule 609(a) accomplishes something different. Rule 403 is a balancing test applied by the judge as a limited rule of exclusion, favoring admission of evidence; Rule 609, by contrast, is more restrictive. Further, under Rule 609(a)(1), the burden is on the prosecution to prove that such

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stand. The trend in evidence has moved from treating felons as entirely incompetent to testify to allowing them to testify with the impediment of disclosure of their prior crimes. *See Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 511-12 (1989) (“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.”).

<sup>5</sup> FED. R. EVID. 609(a)(1).

<sup>6</sup> FED. R. EVID. 403 provides: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

impeachment is more probative than prejudicial to the accused.<sup>7</sup>

How exactly does a prior felony conviction impeach a witness? Ostensibly, by hearing about a fairly recent prior felony, the jury learns something about the character for truthfulness of a witness.<sup>8</sup> The theory is that someone who would flout social norms by committing felonies might also be more likely to lie; the same anti-social tendency that led to felonious conduct could lead to perjury.<sup>9</sup> At the best of times, such an implication is weak.<sup>10</sup>

At the same time, information about the accused's previous felony has tremendous potential to make the trial unfair to the accused who takes the stand. The jurors will likely overvalue that information or otherwise misuse it. The mischief caused by evidence of the accused's convictions transcends the mere imputation of criminality.

The harm is magnified if the prior crime being used to impeach the testifying accused and the actual crime charged are similar. The jury may jump to the wrong type of propensity inference. Drawing an example from Rule 609(a)(1), imagine that someone is charged with armed robbery and takes the stand to deny her participation in the crime. She has a prior

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<sup>7</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."). Also, all of Rule 609(a) applies only to crimes that occurred less than ten years from the "date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date." FED. R. EVID. 609(b).

<sup>8</sup> Rule 609 used to refer to credibility but was changed in 2006 to refer to "character for truthfulness." See FED. R. EVID. 609 advisory committee's note to 2006 amendments.

<sup>9</sup> This theory was articulated by Oliver Wendell Holmes, who as a Justice on the Supreme Judicial Court of Massachusetts, wrote in a civil case:

[W]hen it is proved that a witness has been convicted of a crime, the only ground for disbelieving him which such proof affords is the general readiness to do evil which the conviction may be supposed to show. It is from that general disposition alone 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 no tendency to prove that he was mistaken, but only that he has perjured himself, and it reaches that conclusion solely through the general proposition that he is of bad character and unworthy of credit.

Gertz v. Fitchburg R.R., 137 Mass. 77, 78 (1884).

<sup>10</sup> See generally Richard D. Friedman, *Character Impeachment Evidence: Psycho-Bayesian [!?] Analysis and a Proposed Overhaul*, 38 UCLA L. REV. 637 (1991) (arguing that impeachment for character for truthfulness or prior convictions should never be allowed against a criminal defendant and explaining the limited probative value of such impeachment where the accused is the witness).

felony conviction, so the appropriate, if highly attenuated, implication from her prior conviction is that it casts light on her character for truthfulness. But what if the prior felony is for armed robbery? Even (or especially) with a limiting instruction,<sup>11</sup> the jury is likely to gravitate to an impermissible inference—that the accused tends to commit armed robbery. This latter type of propensity evidence (as opposed to character for truthfulness) is clearly banned by the Evidence Rules.<sup>12</sup> It is hard, however, to imagine how a jury could decline the unspoken invitation to think of the accused as a violent recidivist. Even if the evidence about the crime charged were weak,<sup>13</sup> the jurors may unconsciously soften the burden of proof; they may be less scrupulous in weighing the evidence because the accused deserves punishment for past wrongs. In addition, they may wonder why the accused is at liberty if she has in the past committed armed assaults, believing that the accused is deserving of further punishment and preventive detention.

Given the low probative value of prior felony evidence, the extreme prejudice to the accused, and the fact that 609(a)(1) includes a special balancing test whereby felony convictions of the accused will be admissible only if the probative value of the prior felony outweighs the prejudicial effect to the accused,<sup>14</sup> one might suppose that such evidence is rarely admitted. In fact, however, admission under Rule 609(a)(1) is a major factor in criminal trials, and troubling evidence exists that many accuseds do not take the stand primarily to avoid triggering this form of impeachment.<sup>15</sup> In answering the common-sense (but devoid of the presumption of

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<sup>11</sup> See *infra* note 50 and accompanying text.

<sup>12</sup> Rule 404(a) expressly excludes “evidence of a person’s character or trait of character” in order to prove “action in conformity therewith on a particular occasion.” FED. R. EVID. 404(a). Relatedly, Rule 404(b) provides: “Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” FED. R. EVID. 404(b).

<sup>13</sup> This might very well be so where the police may have first come to suspect the accused because of her priors, and not because of any strong evidence linking her directly to the crime charged.

<sup>14</sup> Witnesses other than the accused will have their felony convictions subjected to the more ubiquitous and permissive Rule 403 balancing test.

<sup>15</sup> See John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL LEGAL STUD. 477, 491 (2008) (documenting that of the factually innocent accused in his data set who failed to take the witness stand, 91% had prior convictions and “[i]n almost all instances . . . counsel for the wrongfully convicted defendant indicated that avoiding impeachment was the principal reason the defendant did not take the stand”); see also Jeffery Bellin, *Circumventing Congress: How The Federal Courts Opened The Door To Impeaching Criminal Defendants With Prior Convictions*, 42 U.C. DAVIS L. REV. 289, 293 (2008).

innocence) question why an innocent accused would not take the witness stand in her own defense, one reason is that the accused is afraid of the effects of being impeached by a prior conviction.

As a functional matter, courts regularly misapply Rule 609(a)(1) by allowing prosecutors to impeach the accused with felonies in ways that conflict directly with the letter, spirit, and history of the Rule.<sup>16</sup> In one subset of cases, however, admission-happy courts tend to exercise caution and restraint. Courts tend to take seriously the factor concerning the similarity between the past conviction and the charged crime, and exclude evidence of prior felonies to the extent that they resemble the crime charged.<sup>17</sup> Courts recognize that the chances of jury confusion and unfair prejudice are particularly egregious in such cases. Under the dominant interpretation of Rule 609(a)(2), however, courts currently have no opportunity to consider this prejudice. The next Part presents Rule 609(a)(2) and sets the stage for a discussion whether impeachment for crimes involving dishonesty or false statement under Rule 609(a)(2) is subject to Rule 403 balancing.

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<sup>16</sup> Recently, Jeffrey Bellin criticized the federal courts' "routine admission of defendants' prior convictions" under Rule 609(a)(1) as contravening congressional intent. Bellin, *supra* note 15, at 293. Such a framework is the intellectual descendant of the old, English common law tradition barring felons from testifying at all. *See id.* at 296-97 nn. 21, 23-24. Bellin outlined the "decidedly pro-impeachment," five-factor analytical framework that "places an almost insurmountable burden on defendants attempting to exclude prior convictions." *Id.* at 293.

<sup>17</sup> *See* 28 CHARLES A. WRIGHT & VICTOR J. GOLD, FEDERAL PRACTICE & PROCEDURE § 6134 (1993) ("[T]he danger of prejudice is enhanced if the witness is the accused and the crime was similar to the crime now charged, since this increases the risk that the jury will draw an impermissible inference under Rule 404(a)."). *See, e.g.,* United States v. Bagley, 772 F.2d 482, 488 (9th Cir. 1985) (prior conviction for bank robbery excluded as impeachment of accused in current bank robbery charge because "there is a substantial risk that all exculpatory evidence will be overwhelmed by a jury's fixation on the human tendency to draw a conclusion which is impermissible in law: because he did it before, he must have done it again"); United States v. Joe, 07 Cr. 734 (JFK), 2008 U.S. Dist. LEXIS 55036, at \*11 (S.D.N.Y. July 21, 2008) (excluding prior conviction because "the prior conviction for firearms possession is nearly identical to the conduct charged in Count One, [thus] the jury may infer unfairly that Defendant has a propensity to commit firearms offenses"); United States v. Jaramillo, No. 1:05-CR-13, 2007 U.S. Dist. LEXIS 38016, at \*7-8 (D. Utah May 24, 2007) (accused's prior convictions for possession of controlled substances would not be admissible because their probative value "would be outweighed by their prejudicial effect because the jury may consider them to be evidence that he committed the possession crimes charged rather than merely probative of his character for truthfulness").

## II. IMPEACHMENT FOR CRIMES INVOLVING DISHONESTY OR FALSE STATEMENT

Rule 609(a)(2), last amended in 2006, provides that “evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.”<sup>18</sup> Historically, these types of crimes, labeled by the common law as *crimen falsi*, were considered particularly probative for impeachment purposes;<sup>19</sup> because the prior convictions actually have something to do with dishonesty, the inference that they reflect on the character for truthfulness of the accused seems reasonable.

Rule 609(a)(2), however, presents some interesting variations: it makes no distinction between felonies and misdemeanors; it does not differentiate the accused from other witnesses; and, most importantly for this essay, it makes no mention of any balancing test.

Although there is textual, historical, doctrinal, and policy evidence for the proposition that Rule 609(a)(2) allows for no balancing, this essay advocates that this orthodoxy be reconsidered. It presents the arguments favoring the position that Rule 609(a)(2) permits no balancing, and then offers countervailing reasons that demonstrate why balancing is not only permissible, but necessary.

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<sup>18</sup> FED. R. EVID. 609(a)(2).

<sup>19</sup> Scholars, rulemakers, and courts have disagreed about what types of crimes fall into this special category regarding dishonesty and false statement, with theft and receipt of stolen property being areas of contention. *Compare* *United States v. Gunter*, 551 F.3d 472, 483 (6th Cir. 2009) (appellate court refused to consider trial court ruling “that because theft is an offense involving dishonesty under Tennessee state law, the convictions could be used for impeachment purposes under Rule 609(a)(2)” where the defendant chose not to testify in light of the trial court’s ruling and therefore waived his right to appeal the ruling), *and* *U.S. Xpress Enters. v. J.B. Hunt Transp.*, 320 F.3d 809, 816-17 (8th Cir. 2003) (trial court did not abuse discretion in finding that receiving stolen property was a crime involving dishonesty within the meaning of Rule 609(a)(2)), *with* *United States v. Glenn*, 667 F.2d 1269, 1273 (9th Cir. 1982) (“Generally, crimes of violence, theft crimes, and crimes of stealth do not involve ‘dishonesty or false statement’ within the meaning of rule 609(a)(2).”), *and* *United States v. Foster*, 227 F.3d 1096, 1100 (9th Cir. 2000) (“We therefore hold that receipt of stolen property is not per se a crime of dishonesty for purposes of Rule 609(a)(2), and conclude that the district court erred in treating it as such.”).

The 2006 amendment was intended to “give effect to the legislative intent to limit the convictions that are to be automatically admitted under subdivision (a)(2)” to such cases where the act of falsity or dishonesty is obvious from the nature of the crime charged. FED. R. EVID. 609 advisory committee’s note to 2006 amendments.



## III. TRADITIONAL ARGUMENTS IN FAVOR OF NO BALANCING

A. *A Plain Reading Analysis Indicates No Rule 403 Balancing*

The text of Rule 609(a)(2) currently states that convictions for crimes of dishonesty or false statement by the witness “shall” be admitted.<sup>20</sup> They are not “admissible,” nor is the word “may” used, but instead the imperative “shall” is employed.<sup>21</sup>

Nowhere does the text of Rule 609(a)(2) call for any balancing. Given the fact that other parts of Rule 609 include three different balancing tests,<sup>22</sup> it seems unlikely that Congress’s failure to add a balancing test to Rule 609(a)(2) was a mere inadvertent omission.<sup>23</sup>

Using another canon of construction, one could argue that Rule 403 is a general rule that must give way to the more particular Rule 609. In *United States v. Kiendra*, the First Circuit explained:

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<sup>20</sup> FED. R. EVID. 609(a)(2).

<sup>21</sup> “Shall” is inherently ambiguous—in that it can mean “must,” but also can mean “should” or “will.” For that reason, in its recent restyling of the Federal Rules of Civil Procedure, the word shall was excised entirely, and the proposed “restyled” Rule 609(a)(2) substitutes the word “must” for “shall.” See ADVISORY COMMITTEE ON EVIDENCE RULES, AGENDA FOR COMMITTEE MEETING 136 (Oct. 23-24, 2008), available at <http://federalevidence.com/pdf/2009/01-Jan/RestyleFRE501-706.pdf>. It is fair to say even before the proposed amendment that courts have read Rule’s 609(a)(2)’s “shall” as an imperative. The switch to “must” for restyling purposes, even if it does go through, is not fatal to the argument of this essay. The restyling of the rules cannot introduce substantive changes, so if the argument that balancing is permissible and should be encouraged is correct under the current rule, nothing should change with the restyling. The template Committee Note to each of the restyled rules reads: “The language of Rule [ ] has been amended as part of the restyling of the [ ] Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.” Memorandum from Robert L. Hinkle, Chair, Advisory Comm. on Evidence Rules, to Hon. Lee H. Rosenthal, Chair, Standing Comm. on Rules of Practice & Procedure 3 (May 12, 2008), available at <http://federalevidence.com/pdf/2008/07-July/ECRpt%20May%202008-1.pdf>. To qualify as a substantial change, a revision “changes the structure of a rule so as to alter the way in which courts and litigants have thought about, and argued about, questions of admissibility.” *Id.* at 2. The change to “must” confirms, however, that my proposed reading of Rule 609(a)(2) is unorthodox.

<sup>22</sup> The three tests are: (1) the special balance for the accused in Rule 609(a)(1); (2) Rule 403 balance for all other witnesses in Rule 609(a)(1); and (3) the high hurdle for admission balance under 609(b) whereby the court may admit a stale conviction only if 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.” FED. R. EVID. 609(b).

<sup>23</sup> This is the *expressio unius* doctrine. See *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83 (1991).

Rule 403 is a general provision intended to govern a wide landscape of evidentiary concerns; Rule 609 is a narrow provision intended to regulate the impeachment of witnesses who have been convicted of prior crimes . . . “Specific terms prevail over the general in the same or another statute which otherwise might be controlling.”<sup>24</sup>

Thus, it is argued that Rule 403 was not designed to override the more specific Rule 609; rather it was “designed as a guide for the handling of situations for which no specific rules have been formulated.”<sup>25</sup>

*B. No Balance Is Necessary Because Crimes Under 609(a)(2) Are Particularly Probative*

Historically, crimes involving false statement or dishonesty best represent the policy underlying impeachment for character for truthfulness.<sup>26</sup> One might argue that balancing is least necessary for these types of crimes because the probative value of crimes involving false statement or dishonesty is very high.<sup>27</sup> Unlike garden-variety felonies, which merely show the witness’s anti-social tendencies, convictions contemplated by 609(a)(2) demonstrate that the accused is willing to lie and deceive. Additionally, advocates of employing Rule 609(a)(2) without any balancing test note that the recent amendment further narrowed the scope of this Rule, limiting it to the types of convictions in which falsity and dishonesty would be readily apparent from the elements of the crime. Hence, it is argued, such cases are increasingly few and more tailored to the core concern of Rule 609—imputing character for untruthfulness.

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<sup>24</sup> United States v. Kiendra, 663 F.2d 349, 354 (1st Cir. 1981) (quoting Ginsberg & Sons v. Popkin, 285 U.S. 204, 208 (1932)).

<sup>25</sup> *Id.* (quoting FED. R. EVID. 403 advisory committee’s note); see also Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220 (Fla. 2000); FED. R. EVID. 403 advisory committee’s note.

<sup>26</sup> In the original debates over Rule 609, the United States House of Representatives advocated a version of the Rule that limited such impeachment to convictions involving proof or admission of an act of dishonesty or false statement. See Diggs v. Lyons, 741 F.2d 577, 580 (3d Cir. 1984) (reviewing the legislative history of Rule 609) (citing 120 Cong. Rec. 2381).

<sup>27</sup> Cf. Emerald Ref., Inc. v. Kandiliotis, No. 93-1442, 1994 WL 71301, at \*1 (E.D. La. Mar. 1, 1994) (“Admissibility of past crimes of dishonesty for impeachment go to the issue of the seriousness with which the witness takes the oath.”).

C. *The Legislative History Indicates that the Drafters of Rule 609(a)(2) Never Anticipated Balancing*

Rule 609 was hotly debated in Congress. An earlier draft of Rule 609 included subsection 609(a)(3), which would have allowed the court to exclude any type of conviction if the probative value was substantially outweighed by its prejudicial effect.<sup>28</sup> This subsection was severely criticized and apparently rejected.<sup>29</sup> Another school of thought advocated no balancing whatsoever for any prior crimes.<sup>30</sup> Therefore, those who believe there is no balancing under Rule 609(a)(2) argue that the Rule represents a purposeful decision not to engage in such balancing.

Those who insist on applying Rule 609 without a balancing test point out that the Rule was “the product of extensive Congressional attention and considerable legislative compromise, clearly reflecting a decision that judges were to have no discretion to exclude *crimen falsi*.”<sup>31</sup> After an extensive review of the legislative history, the Court in *United States v. Wong* concluded that Rule 609(a)(2) “unambiguously demonstrates that a judge has no authority to prohibit the government’s effort to impeach the credibility of a witness by questions concerning a prior *crimen falsi* conviction.”<sup>32</sup>

This view is supported by the Conference Report on Rule 609, which explained:

The admission of prior convictions involving dishonesty and false statement is not within the discretion of the Court. Such convictions are peculiarly probative of credibility and, under this rule, are always to be admitted. Thus, judicial discretion granted with respect

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<sup>28</sup> Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates, 51 F.R.D. 315, 391 (1971). Subsection (a)(3) was described as a particularized application of Rule 403. *Id.* at 393.

<sup>29</sup> 117 CONG. REC. 29, 894-95 (1971). When the Supreme Court officially promulgated the Federal Rules of Evidence and transmitted them to the Congress, section 609(a)(3) had disappeared. *See United States v. Wong*, 703 F.2d. 65, 67 (3d Cir. 1983).

<sup>30</sup> *See Diggs*, 741 F.2d at 579 (reviewing legislative history).

<sup>31</sup> *Id.* at 581 (quoting *United States v. Kiendra*, 663 F.2d 349, 355 (1st Cir. 1981); *United States v. Wong*, 703 F.2d 65 (3d Cir. 1983); *United States v. Toney*, 615 F.2d 277, 278, 280 (5th Cir. 1980) (“Congress thoroughly considered the pros and cons of the mandatory admissibility of limited types of prior crimes evidence and determined that in certain cases it was to be the rule. Rule 403 simply has no application where impeachment is sought through a *crimen falsi*.”).

<sup>32</sup> 703 F.2d 65, 68 (3d Cir. 1983).

to the admissibility of other prior convictions is not applicable to those involving dishonest or false statement.<sup>33</sup>

*D. Courts Are Unanimous in Ruling that Rule 609(a)(2) Allows for No Balancing*

In *Green v. Bock Laundry Machine Co.*, the Supreme Court observed of Rule 609(a), in dicta: “With regard to subpart (2), which governs impeachment by *crimen falsi* convictions, it is widely agreed that this imperative, coupled with the absence of any balancing language, bars exercise of judicial discretion pursuant to Rule 403.”<sup>34</sup> All circuits have also come to this same conclusion,<sup>35</sup> though they debate the parameters of the rule.<sup>36</sup>

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<sup>33</sup> H.R. REP. No. 1597, at 9 (1974), reprinted in 1974 U.S.C.C.A.N. 7098, 7102. Similarly, the original advisory committee’s note explained that the “admission of prior convictions involving dishonesty and false statement is not within the discretion of the court. Such convictions are peculiarly probative of credibility and, under this rule, are always to be admitted.” FED. R. EVID. 609 advisory committee’s note.

<sup>34</sup> 490 U.S. 504, 525-26 (1989), *superseded on other grounds by* 1990 amendment to FED. R. EVID. 609(a).

<sup>35</sup> See, e.g., *SEC v. Sargent*, 229 F.3d 68, 80 (1st Cir. 2000) (“[W]e have plainly held that district courts do not have discretion to exclude prior convictions involving dishonesty or false statements.”); *United States v. Estrada*, 430 F.3d 606, 615-16 (2d Cir. 2005) (“[C]rimes involving ‘dishonesty or false statement,’ whether felonies or misdemeanors, *must* be admitted under Rule 609(a)(2) as being per se probative of credibility.”); *Walker v. Horn*, 385 F.3d 321, 333 (3d Cir. 2004) (“[I]f the prior conviction involved dishonesty or false statements, the conviction is automatically admissible insofar as the district court is without discretion to weigh the prejudicial effect of the proffered evidence against its probative value.”) (internal citation omitted); *United States v. Kelly*, 510 F.3d 433 (4th Cir. 2007), *cert. denied Kelly v. United States*, 552 U.S. 1329 (2008) (“A trial judge has no discretion to exclude evidence that qualifies under this rule (609(a)(2)).”) (internal citation omitted); *United States v. Harper*, 527 F.3d 396 (5th Cir. 2008) (“Crimes qualifying for admission under Rule 609 (a)(2) are not subject to Rule 403 balancing and must be admitted.”); *United States v. Morrow*, 977 F.2d 222, 228 (6th Cir. 1992) (en banc) (“Rule 609(a)(2) . . . clearly limits the discretion of the court by mandating the admission of crimes involving dishonesty or false statements.”); *Kunz v. DeFelice*, 538 F.3d 667, 675 (7th Cir. 2008) (“Rule 609(a)(2) . . . does not incorporate Rule 403.”); *United States v. Collier*, 527 F.3d 695 (8th Cir. 2008) (“Evidence of a conviction requiring proof or admission of an act of dishonesty or false statement is automatically admissible and not subject to Rule 403 balancing by the court.”) (internal citations omitted); *United States v. Harris*, 738 F.2d 1068, 1073 (9th Cir. 1984) (“[C]rimes involving dishonesty and fraud are automatically admissible for impeachment purposes under Fed. R. Evid. 609(a)(2).”) (internal citations omitted); *United States v. Begay*, 144 F.3d 1336, 1338 (10th Cir. 1998) (“Rule 403 balancing applies unless the prior crime involves dishonesty or false statements.”). Although I could find no current case in the Eleventh Circuit, a Fifth Circuit case before the circuit split would seem to apply. See *United States v. Williams*, 642 F.2d 136, 140 (5th Cir. 1981) (“[B]ribery is a *crimen falsi* in that it involves dishonesty. Hence, it is automatically admissible.”) (internal citation omitted).

<sup>36</sup> There were certainly debates in the common law surrounding Rule 609(a)(2), but they concerned the scope of *crimen falsi*. Historically, some courts extended Rule 609(a)(2) to crimes such as drug use or robbery, crimes in which the aspect of false statement or dishonesty was highly questionable. Even before the 2006

The treatise writers also agree.<sup>37</sup> This unanimity was not always the case under the prior common law,<sup>38</sup> and a number of courts considered the question open during the late 1970s.<sup>39</sup> Before the codification of the evidence rules, the common law, while favoring the use of impeachment for crimes of dishonesty and false statement, did not deprive judges of discretion to disallow such evidence.<sup>40</sup>

*E. The Fact of Recent Amendment Indicates that Judicial Interpretations of Rule 609(a)(2) Were Acceptable*

The Federal Rules of Evidence are an odd hybrid of statutes passed by Congress, and rules and amendments promulgated via the Rules Enabling Act process.<sup>41</sup> In 2006, Rule 609 was amended via the rulemaking process, and included important changes to Rule 609(a)(2), yet nothing was altered concerning the apparent absence of balancing. Given the unanimous judicial authority indicating no balancing for Rule 609(a)(2), this would seem like an endorsement of those judicial

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amendment, the modern trend had been to limit the types of crimes admissible under this rule, precisely because there was perceived to be no opportunity for balancing. *See, e.g., United States v. Foster*, 227 F.3d 1096, 1100 (9th Cir. 2000) (holding that receipt of stolen property is not per se a crime of dishonesty); *cf. Cree v. Hatcher*, 969 F.2d 34, 37 (3d Cir. 1992) (“Because the district court lacks the discretion to engage in balancing, 609(a)(2) must be interpreted narrowly to apply to only those crimes that, in the words of the Conference Committee, bear on a witness’s propensity to testify truthfully.”). The 2006 amendment limits the types of crimes even further. Courts also debate the level of detail that could be presented about the conviction. *United States v. Sine*, 493 F.3d 1021, 1036 n.14 (9th Cir. 2007) (noting that convictions admitted for impeachment may not include collateral details). *Cf. Commerce Funding v. Comprehensive Habilitation Servs.*, 01 Civ. 3796, 2005 U.S. Dist. LEXIS 7902, at \*26-27 (May 2, 2005) (in a civil case, admitting prior crime under 609(a)(2) but limiting the underlying facts using Rule 403).

<sup>37</sup> *See* WRIGHT & GOLD, *supra* note 17, at § 6135 (“[S]ubdivision (a)(2) neither requires nor permits balancing under Rule 403 or any other test.”); *see also infra* note 78.

<sup>38</sup> *See United States v. Toney*, 615 F.2d 277 (5th Cir. 1980) (Tuttle, J., dissenting); *Gordon v. United States*, 383 F.2d 936, 940-41 (D.C. Cir. 1967) (allowing balancing for all prior convictions of the accused).

<sup>39</sup> *See, e.g., United States v. Smith*, 551 F.2d 348, 358 n.20 (D.C. Cir. 1976); *see also* Daniel R. Swetnam, Comment, *The Interaction of Rules 609(a)(2) and 403 of the Federal Rules of Evidence: Can Evidence of A Prior Conviction which Falls within the Ambit of Rule 609(a)(2) be Excluded by Rule 403?*, 50 U. CIN. L. REV. 380 (1981) (arguing that Rule 403 balancing does apply).

<sup>40</sup> *See, e.g., Gordon*, 383 F.2d at 939-40 (setting out criteria for the admission of prior crimes, but applying no absolute rules concerning crimes of dishonest or false statement).

<sup>41</sup> Congress rejected the Evidence Rules as promulgated in 1975 and instead codified its own version as statutes. Other amendments have been made as statutory additions to the Evidence Rules. *See, e.g., FED. R. EVID.* 413-415.

interpretations, albeit by a body different from the original legislature that enacted Rule 609.<sup>42</sup>

#### IV. WHY THERE MUST BE SOME BALANCING IN APPLYING RULE 609(a)(2)

Given the consensus among judges and academics supported by a plain reading of the text, dicta from the United States Supreme Court, and the Conference Report on Rule 609 that Rule 609(a)(2) does not allow balancing, what is the justification for the contrary view? The counter-arguments reflect concerns for basic fairness and the structural integrity of the administration of evidence rules. Although subjecting Rule 609(a)(2) to Rule 403 balancing is not the most natural interpretation of the plain meaning, it is a reasonable one that must be preferred to guarantee due process.

##### A. *Without Balancing, There Is Potential for Intolerable Unfairness to the Accused*

Although one could aptly criticize courts' balancing for felony convictions under 609(a)(1), courts do tend to follow one protective principle: the exclusion of prior felony convictions where the accused is charged with a similar crime.<sup>43</sup> By contrast, under the current interpretation of Rule 609(a)(2), no such consideration, no matter how extreme the potential prejudice, is entertained.

Where the crime charged and the prior conviction are the same, the prejudice is overwhelming. For instance, in *United States v. Wilson*,<sup>44</sup> the accused was charged with conspiring to defraud the United States government of tax revenue and was impeached with his prior conviction for failure to file tax returns. No Rule 403 balancing test was

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<sup>42</sup> Cf. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 156 (2000) ("Congress' tobacco-specific legislation has effectively ratified the FDA's previous position that it lacks jurisdiction to regulate tobacco.").

<sup>43</sup> See *supra* note 17 and accompanying text; see also 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 609.05[3][d] (Joseph M. McLaughlin ed., Matthew Bender 2d ed. 1997) ("When a prior crime committed by the accused is similar to the one with which the accused is charged, the prejudicial effect of a prior conviction admitted for impeachment may well outweigh its probative value. Consequently, prior convictions for the same or similar crimes are admitted sparingly.").

<sup>44</sup> 985 F.2d 348, 350-51 (7th Cir. 1993).

allowed or conducted.<sup>45</sup> The permitted chain of inference, that since the accused evaded taxes before, he is probably a liar who is not telling the truth about evading taxes now, is preposterously obscure and ultimately toxic. Realistically, such impeachment invited the jury to think of the accused as a recidivistic tax dodger.<sup>46</sup> Other cases, such as a bank fraud case where the accused's prior conviction for bank larceny was admitted,<sup>47</sup> mail fraud where the accused's prior mail fraud was admitted,<sup>48</sup> and counterfeiting where the accused's prior conviction for counterfeiting was admitted,<sup>49</sup> similarly fit this template. In none of these, however, did the court apply a Rule 403 balancing test.

The potential for extreme unfairness stems from two factors: (1) the effect on the jury; and (2) the consequent strategic decision, which many of the accuseds will make, not to testify at all. The presumption of innocence is a hard principle to effectuate even under the best of circumstances. The jurors already will have a tough time remembering that the person sitting at the defense table, whom the police have arrested and the government is prosecuting, must be presumed innocent until proven otherwise. This presumption becomes much more difficult when the jurors learn that the accused has a criminal past and, in fact, a record for doing the exact same thing. The jurors will label the accused as a criminal with a specialty crime, and not limit their skepticism to just the question of the accused's character for truthfulness.<sup>50</sup>

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<sup>45</sup> *Id.* at 351 (citations omitted).

<sup>46</sup> This is also the fact pattern in *United States v. Tanaka*, 204 Fed. Appx. 705, 706 (9th Cir. 2006). The accused was charged with structuring transactions to evade currency reporting requirements and willful failure to file a tax return. The court admitted his prior tax conviction under Rule 609(a)(2). The court explained: "Failure to file a tax return is a crime involving dishonesty or false statement, and crimes involving dishonesty are automatically admissible for impeachment purposes under Federal Rule of Evidence 609(a)(2), and no balancing of prejudice is required." *Id.*

<sup>47</sup> *United States v. Carroll*, 663 F. Supp. 210, 211-12, 214 (D. Md. 1986).

<sup>48</sup> *United States v. Kuecker*, 740 F.2d 496, 498, 502 (7th Cir. 1984); *United States v. Toney*, 615 F.2d 277, 278, 280 (5th Cir. 1980) ("Congress meant what it said in rule 609(a)(2) that the fact of a prior conviction for an offense such as mail fraud is always admissible for impeachment purposes.").

<sup>49</sup> *United States v. Noble*, 754 F.2d 1324, 1326 (7th Cir. 1985); *United States v. Smith*, 181 F. Supp. 2d 904, 909 (N.D. Ill. 2002) (forgery conviction admitted in counterfeiting case).

<sup>50</sup> Limiting instructions will not solve the problem. A limiting instruction would theoretically focus the jury on the appropriate inference of character for truthfulness. The following is typical: "Th[e] [defendant's] earlier conviction was brought to your attention only as one way of helping you decide how believable his

Furthermore, the jury may soften the standard of proof. Once jurors hear that the accused has been convicted of forgery, mail fraud, or tax evasion in the past, the jurors' concern about making a mistake declines significantly. Even if the accused did not commit the crime this time, it is not as if she is without blame for some similar activity in the past, so an erroneous conviction would not be a tragedy of an innocent person falsely convicted. Finally, if the prior conviction reflects conduct more heinous than the charged crime, the jury could be distracted or seek to punish the accused further.

This line of thinking is thoroughly predictable; therefore, the accused must consider the nature of the impeachment she will experience if she takes the stand in her own defense. If the judge has no power to exclude the accused's prior crime involving dishonesty or false statement, no matter how prejudicial, the accused may simply decline to exercise her right to testify and avoid impeachment altogether. Thus, the accused is presented with an impossible dilemma. If she testifies, the jury will form negative assessments of her criminality generally and her propensity to commit certain crimes. On the other hand, failure to take the stand also presents a huge, unfair burden on the accused because jurors tend to believe that criminal defendants who do not testify are more likely to be guilty.<sup>51</sup>

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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 (5th ed. 2007) (listing this instruction from Sixth Circuit and providing other examples by Circuit) (cited in Bellin, *supra* note 15, at 300 n.37). Scholars have long noted the ineffectiveness of limiting instructions; in fact, such instructions tend to draw attention to the evidence and may inadvertently increase the unfairness of its use. Joel Lieberman, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures to Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCHOL. PUB. POL'Y. & L., 677, 677-86, (2000) (empirical research has demonstrated that judicial admonitions to ignore evidence are relatively ineffective and sometimes produce a backfire effect, resulting in jurors being more likely to rely on inadmissible information after they have been specifically instructed to disregard it); J. Alexander Tanford, *Thinking About Elephants: Admonitions, Empirical Research and Legal Policy*, 60 UMKC L. REV. 645, 651 (1992) (discussing the psychological futility of limiting instructions).

<sup>51</sup> See David Shaffer & Thomas Case, *On the Decision to Testify in One's Own Behalf: Effects of Withheld Evidence, Defendant's Sexual Preferences, and Juror Dogmatism on Juridic Decisions*, 42 J. PERSONALITY & SOC. PSYCHOL. 335 (1982) (indicating that defendants who invoked the Fifth Amendment (either on the stand or by declining to take the stand) were judged more likely to be guilty and more deserving of conviction than their counterparts who took the stand and answered all questions. "It appears as if many of our subject-jurors chose to disregard that judge's instructions and act on an impression that an innocent person who had nothing to hide would surely not resort to such legal chicanery as a Fifth Amendment plea.").



Although the accused often faces the dilemma of whether to testify and be impeached with a former crime or to forgo the opportunity to testify altogether, that decision, when it involves felonies under 609(a)(1), is made in light of a judge's belief that the prior conviction was more probative than prejudicial. Without introducing Rule 403 as a judicial screening device, prior crimes that are highly prejudicial would be admitted with no such check. This is a loss not only for the accused, but also for the whole justice system because the criminal defendant likely has valuable information that will increase trial accuracy.<sup>52</sup>

*B. The Probative Value of Any Prior Conviction Is Diminished in the Case of the Accused*

Assuming, arguendo, that prior convictions for dishonesty or false statement are generally probative of a witness's character for truthfulness, the probative value of such impeachment declines significantly when the witness is the accused.<sup>53</sup> Jurors are probably already skeptical of the testimony of a defendant who claims that she did not commit the charged crime. It is natural to suppose that the accused might lie about her conduct to avoid punishment.<sup>54</sup> Therefore, the added information that the accused actually has committed a prior crime of dishonesty or false statement adds significant

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<sup>52</sup> See Ted Sampsel-Jones, *Making Defendants Speak*, 93 MINN. L. REV. 1327, 1328-29 (2009) (proposing changes in evidence law to encourage the accused to take the witness stand).

<sup>53</sup> Theoretically, it is possible to believe an accused's denials slightly less when one hears that the accused who denied moving survey markers on federal land committed perjury in the past, *United States v. Caudle*, 48 F.3d 433, 435 (9th Cir. 1995), or the accused who is on trial for bank fraud was convicted of tampering with an odometer. *United States v. Harris*, 512 F. Supp. 1174, 1175-78 (D. Conn. 1981).

<sup>54</sup> See Friedman, *supra* note 10 at 638, 659 (arguing that prior bad acts of the accused are "almost certain to yield no significant new information about his truth-telling inclination in the specific case" because "a rational jury usually will conclude, even without character impeachment, that the accused has a strong interest in lying and little compunction against doing so. Character impeachment evidence is overkill"); Gene R. Nichol, Jr., *Prior Crime Impeachment of Criminal Defendants: A Constitutional Analysis of Rule 609*, 82 W. VA. L. REV. 391, 408 (1980) ("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.") (quoted in Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions*, 42 U.C. DAVIS L. REV. 289, 289 n.32 (2008)); Sampsel-Jones, *Making Defendants Speak*, *supra* note 52, at 1367 ("[I]n every criminal case, a defendant's interest in the outcome is obvious, therefore lessening the need for other impeachment evidence.") (citing 1 MCCORMICK ON EVIDENCE § 39, at 173 (Kenneth S. Brown ed., 6th ed. 2006)).

prejudice without adding any additional probative value or promoting a more informed verdict.<sup>55</sup>

*C. From a Linguistic Perspective, Rule 609(a)(2) Could Be Read as Subject to Rule 403*

Although Rule 609(a)(2) says that crimes of falsity and dishonesty “shall be admitted,” it is nevertheless still possible to read that form of impeachment as being subject to the pervasive balance of Rule 403. Even with the transition to “must” in the restyled rules,<sup>56</sup> one could argue that it must be admitted subject to Rule 403. To read Rule 609(a)(2) as outside the reach of Rule 403 would mean that it is an evidence rule in a category all its own, the only one entirely insulated from judicial intervention on basic fairness grounds. Given that unusual status, the presumption should be that all rules are subject to Rule 403 unless the balance is affirmatively rejected or another balance is proposed in its place. “Although one must be somewhat of an interpretative funambulist to walk between the conflicting demands of these Rules in order to arrive at a resolution,”<sup>57</sup> this is a credible, if strained reading that will effectuate vital evidence policy and address the due process concerns raised below.<sup>58</sup>

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<sup>55</sup> Some states that otherwise have adopted the Federal Rules of Evidence as their own deviate from the template of Rule 609. Examples include: Arizona, ARIZ. R. EVID. 609(a) (which applies the same test to felonies and crimes involving dishonesty or false statement); Tennessee, TENN. R. EVID. 609(a)(3) (“If the witness to be impeached is the accused in a criminal prosecution . . . the court upon request must determine that the conviction’s probative value on credibility outweighs its unfair prejudicial effect on the substantive issues.”); and Hawaii, HAW. R. EVID. 609(a) (limiting all impeachment to convictions involving dishonesty and false statements, but only allowing such impeachment against the accused when the accused has first presented evidence supporting her credibility). Montana allows no impeachment by conviction at all. MONT. R. EVID. 609.

<sup>56</sup> See *supra* note 21.

<sup>57</sup> *Bourjaily v. United States*, 483 U.S. 171, 194 (1987) (Blackmun, J., dissenting).

<sup>58</sup> The Supreme Court of Iowa has taken this policy a step further, and requires more stringent 609(a)(1) balancing of 609(a)(2) convictions, despite the fact that Iowa’s rules of evidence read identically to the pre-2006 federal rules for the purposes of Rule 609(a). See *State v. Axiotis*, 569 N.W.2d 813, 815 (Iowa 1997) (“Iowa rule of evidence 609, subsection 609(a)(2) provides concerning impeachment that ‘evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement . . . .’ The trial court also must determine ‘that the probative value of admitting this evidence outweighs its prejudicial effect to the accused.’”).

*D. There is Precedent in the Evidence Rules for Acknowledging the Potential Due Process Problems with Similar Act Character Evidence of the Accused and for Applying Rule 403 Despite the Absolutist Language*

A more recent debate about the applicability of Rule 403 to another set of Evidence Rules offers insight into how Rule 609(a)(2) should be interpreted. Federal Rules of Evidence 413-414, enacted by statute in 1995, have been subject to Rule 403 balancing even though Rule 403 is not mentioned in those Rules. The language of Rule 413 commands that “[i]n a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant’s commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.”<sup>59</sup> Arguably, the language “is admissible” represents an unmodified command to admit the evidence, prohibiting judges from exercising their discretion to balance between probative value and unfair prejudice. However, every court that has considered the question has held that Rule 403 applies.<sup>60</sup>

Admittedly, Rules 413-414 do not present a perfect analogy. The phrase “is admissible” is less absolute than the command of Rule 609(a)(2) “shall be admitted.”<sup>61</sup> At least part of the legislative history of Rules 413-414 anticipated the use of Rule 403 balancing, even though Rule 403 itself is not mentioned in the text of Rules 413-414.<sup>62</sup> And, no variation of

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<sup>59</sup> FED. R. EVID. 413. The language of Rule 414 is identical, except that Rule 413 is for sex; Rule 414 is for child molestation. FED. R. EVID. 414. The restyled rules, perhaps in light of the jurisprudence surrounding Rules 413-414 read: the court may admit evidence that the defendant committed any other sexual assault.

<sup>60</sup> See Aviva Orenstein, *Deviance, Due Process, and the False Promise of Federal Rule of Evidence 403*, 90 CORNELL L. REV. 1487, 1517-19 (2005) (noting the courts’ holdings that Rule 403 applies but expressing concern that courts do not apply the balancing test in a meaningful fashion, but instead engage in Rule “403-lite”).

<sup>61</sup> See *United States v. Sumner*, 119 F.3d 658, 661-62 (8th Cir. 1997).

<sup>62</sup> Then representative Kyl explicitly noted that “[t]he trial court retains the total discretion to include or exclude this type of evidence.” 140 CONG. REC. H5437-03, H5438 (daily ed. June 29, 1994) (statement of Rep. Kyl) (quoted in *United States v. Enjady*, 134 F.3d 1427, 1431 (10th Cir. 1998)); see also *United States v. Sumner*, 119 F.3d 658, 662 (8th Cir. 1997) (quoting a statement by Rep. Molinari: “In other respects, the general standards of the rules of evidence will continue to apply, including . . . the court’s authority under Evidence Rule 403 to exclude evidence whose probative value is substantially outweighed by its prejudicial effect.” Floor Statement of the Principal House Sponsor, Representative Susan Molinari, Concerning the Prior Crimes Rules for Sexual Assault and Child Molestation Cases, 103 CONG. REC. H8991-92 (daily ed. Aug. 21, 1994)). Others were not so sure. See JUDICIAL CONFERENCE OF THE U.S., REPORTS

Rule 403 appears in other sections of Rules 413-414, as occurs with Rule 609. Nevertheless, courts unanimously read Rule 403 into the text of Rules where it seemingly does not apply, and do so for reasons of basic fairness. As the Tenth Circuit explained in *United States v. Enjady*,<sup>63</sup> the adoption of Rules 413-414 “without any exclusion of or amendment to Rule 403 makes Rule 403 applicable, as it is to others of the rules of evidence.”<sup>64</sup> There is no exclusion of Rule 403 in the text of Rule 609(a)(2), and the principle applies equally to it.

The courts that wrestled with Rules 413-414 made clear that their application of Rule 403 was rooted in due process considerations. Criminal defendants opposing the new rules argued persuasively that the highly prejudicial evidence of prior sex crimes violated fundamental fairness. The courts acknowledged a serious problem, but noted that the Supreme Court had left open whether violations of historical character evidence protections constituted a due process violation, and were not necessarily convinced that the unfairness fell within the limited category of infractions that violate fundamental fairness. However, even the courts that acknowledged a due process problem were satisfied that the discretionary power of the judge under Rule 403 addressed any due process concerns. These cases clarified that Rule 403 served as a guarantor of due process.<sup>65</sup>

The potential prejudice in 609(a)(2) cases where the prior conviction is similar to the crime charged is equally extreme and undermines the basic fairness of the trial. The remedy, application of Rule 403, should be the same.

*E. Respect for the District Court’s Function Mandates that Judges Retain the Authority to Engage in Some Balancing, Even Regarding Convictions Involving Dishonesty or Falsehood*

Oftentimes, a conviction for falsity or dishonesty will seem probative, maybe even highly probative, of the accused’s

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OF THE JUDICIAL CONFERENCE ON ADMISSION OF CHARACTER EVIDENCE IN CERTAIN SEXUAL MISCONDUCT CASES (1995), reprinted in 56 CRIM. L. REP 2139 (recommending rejecting of the rules in part because applicability of Rule 403 was uncertain).

<sup>63</sup> 134 F.3d 1427 (10th Cir. 1998).

<sup>64</sup> *Id.* at 143 (citations omitted).

<sup>65</sup> See, e.g., *United States v. Catstillo*, 140 F.3d 874, 883 (10th Cir. 1998) (“[A]pplication of Rule 403 to Rule 414 evidence eliminates the due process concerns posed by Rule 414.”); see generally *supra* note 60, at 1517-18.

credibility; but that does not mean the consideration is over. The trial court must have the discretion to examine the other side of the Rule 403 balance—the nature and extent of unfair prejudice. Traditionally, the district court judge serves a vital role as evidence screener. The trial court is in the best position to make the context and fact-driven determination of how probative versus how prejudicial the prior conviction will be. As argued above, requiring the admission of prior convictions and disallowing any judicial oversight is unfair to the accused. In addition, it strips the trial court of a major judicial function.

This concern with the judge's role was the basis of Judge Tuttle's dissent in *United States v. Toney*,<sup>66</sup> which explained that, "the purpose of rule 403 was to provide judges some flexibility in cases where the possibility of prejudice is extremely great."<sup>67</sup> In analyzing the facts of the case Judge Tuttle observed:

It would be hard to imagine evidence more prejudicial, in a trial for mail fraud, than [sic] the defendant's prior conviction for mail fraud. I would suggest that the probative value of a conviction involving dishonesty is substantially outweighed by the danger of unfair prejudice to the defendant, when the prior conviction concerns the same kind of offense as that for which the defendant is being tried.<sup>68</sup>

He therefore concluded that "[a] judge should not be prohibited from excluding this evidence by a rigid holding that rule 403 can never be applied to rule 609(a)(2)."<sup>69</sup>

Allowing a Rule 403 balance reflects the natural function of the trial judge who will probably be holding various hearings to rule on evidence anyway. It requires no special extra administrative energy, but reinforces the quintessential role of the judge as screener and gatekeeper. As the Supreme Court explained in *United States v. Abel*,<sup>70</sup> "[a] district court is accorded a wide discretion in determining the admissibility of evidence under the Federal Rules. Assessing the probative value of [the proffered evidence], and weighing any factors counseling against admissibility is a matter first for the district court's sound judgment under Rules 401 and 403. . . ." <sup>71</sup> That discretion is central to and inherent in the judicial role, and it

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<sup>66</sup> 615 F.2d 277 (5th Cir. 1980) (Tuttle, J., dissenting).

<sup>67</sup> *Id.* at 283.

<sup>68</sup> *Id.* at 283-84.

<sup>69</sup> *Id.*

<sup>70</sup> 469 U.S. 45 (1984).

<sup>71</sup> *Id.* at 54.

appears in many aspects of the judge's labors.<sup>72</sup> The judicial duty to secure a fair trial devoid of substantial and unnecessary unfair prejudice can be fulfilled with a creative reading of Rule 609(a)(2).

#### V. JUDICIAL CONTROL OF THE EXTENT OF IMPEACHMENT UNDER RULE 609(a)(2)

For reasons of fairness, respect for the structure of the rules, and the power of the judge, Rule 403 balancing must apply to Rule 609(a)(2). If this argument buckles under the weight of the authority opposed to it, however, the very least trial judges can do is limit the way the impeachment is proved. If, indeed, a judge must allow the prosecutor to impeach an accused charged with a prior conviction for wire fraud, then perhaps the damage can be limited by prohibiting the admission of the specific nature of the prior crime. The jury could be informed that the accused had been convicted of a crime involving dishonesty, but not exactly what that crime was. Some states have done just that, allowing the fact of a prior conviction, but not the details of the prior crime.<sup>73</sup>

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<sup>72</sup> There is a long tradition of the judge as gatekeeper. Judges perform that role in screening expert testimony. *See* Gen. Elec. Co. v. Joiner, 522 U.S. 136, 148 (1997) (Breyer, J., concurring) (“[N]either the difficulty of the task nor any comparative lack of expertise can excuse the judge from exercising the ‘gatekeeper’ duties that the Federal Rules . . . impose—determining, for example, whether particular expert testimony is reliable and ‘will assist the trier of fact,’ Fed. Rule Evid. 702, or whether the ‘probative value’ of testimony is substantially outweighed by risks of prejudice, confusion or waste of time, Fed. Rule Evid. 403.”). Even where the rules of evidence do not apply, the judge retains a gatekeeper role. Judges act as gatekeepers under the Federal Death Penalty Act. *See* United States v. Pepin, 514 F.3d 193, 204 (2d Cir. 2008) (“[U]nder the FDPA [s]tandard, judges continue their role as evidentiary gatekeepers and, pursuant to the balancing test set forth in § 3593(c), retain the discretion to exclude any type of unreliable or prejudicial evidence that might render a trial fundamentally unfair.”); *United States v. Roman*, 371 F. Supp. 2d 36, 43 (D.P.R. 2005) (“Although capital sentencing proceedings are released from the strictures of the Federal Rules of Evidence, see 18 U.S.C. § 3593(c), the trial judge retains his traditional role as gatekeeper of constitutionally permissible information, and must accordingly exclude any unreliable or prejudicial information that might render a trial fundamentally unfair.”).

<sup>73</sup> *See* *State v. Geyer*, 194 Conn. 1, 16 (1984) (“The defendant’s character, from which the jury might draw an inference of dishonesty, would thus be sufficiently impugned without the extraordinary prejudice that sometimes follows when the prior crime is specifically named.”); *State v. Shepherd*, 94 Idaho 227, 230 (1971) (requiring balancing by the judge to admit the specific nature of the prior conviction); *cf.* *State v. Brunson*, 132 N.J. 377, 391 (1993) (limiting evidence of conviction to “the degree of the crime and the date of the offense but excluding any evidence of the specific crime of which defendant was convicted”); *State v. White*, 43 Wash. App. 580, 586 (Ct. App. 1986) (citing *State v. Jones*, 101 Wash. 2d 113, 121 (1984)) (placing the decision whether to allow specifics about the prior crime in the hands of the district court). *But*

From where would the judge, bound by the current text of 609(a)(2), derive authority to follow these state courts' lead? If the answer is Rule 403,<sup>74</sup> we would seemingly be right back where we started, and this proposal could not serve as a next-best method to avoid the intolerable unfairness of impeaching the accused with evidence of a similar prior crime. However, it cannot be true that *no* part of Rule 403 applies to admission of impeachment for a prior crime of dishonesty. Certainly, the prosecutor cannot, in the course of proving a prior conviction involving dishonesty or false statement, make outrageous comments about "bloodsucking hucksters who prey on the elderly" or call weepy victims to prove the prior fraud. Such tactics would be prohibited even if the specific nature of the crime is admissible. Hence, some residual power vested in the court under Rule 403 and Rule 611,<sup>75</sup> which controls the order and mode of proof, support the inherent ability of the trial court judge to manage the evidence. Limiting the prior conviction for an act of dishonesty to the fact of such conviction, without naming or describing the exact crime, would mitigate the immense prejudice against the accused. In addition, this

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*see* *People v. Van Dorsten*, 298 N.W.2d 421, 421 (Mich. 1980) ("It is improper to impeach defendant by telling jury only of existence of unnamed prior felony convictions, without providing names of the offenses, since it is the nature, rather than the fact, of prior felony conviction which jury is to use in its evaluation of credibility.").

<sup>74</sup> *State v. White*, 43 Wash. App. 580, 586 (Ct. App. 1986) (citing *State v. Jones*, 101 Wash. 2d 113, 121 (1984)) ("[T]he determination of whether to name or not name the prior convictions introduced for the purposes of impeachment should rest with the discretion of the trial judge as an additional aspect of the ultimate determination that the prejudicial effect of the evidence on the defendant does not outweigh its probative value.").

<sup>75</sup> Rule 611, entitled "Mode and Order of Interrogation and Presentation" in section (a) provides: "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." The advisory committee note explains:

[Rule 611] restates in broad terms the power and obligation of the judge as developed under common law principles. It covers such concerns as whether testimony shall be in the form of a free narrative or responses to specific questions, the order of calling witnesses and presenting evidence, the use of demonstrative evidence, and the many other questions arising during the course of a trial which can be solved only by the judge's common sense and fairness in view of the particular circumstances.

FED. R. EVID. 611 advisory committee's note (citations omitted).

*Cf.* 4 WEINSTEIN'S FEDERAL EVIDENCE, *supra* note 43, § 611.03[4](A), at 611-42.2 (explaining that under Rule 611, a district court balances "the factors of prejudice, confusion, and delay against the probative value of the testimony" in deciding whether to limit cross examination).

proposed limitation fits the pattern of *Old Chief v. United States*,<sup>76</sup> where the Court held that in a prosecution for being a felon in possession of a gun, a prosecutor was not entitled to admit details of a prior felony if the accused would stipulate to his status as a felon. Although *Old Chief* arose in the context of proving a status, it is similar in posture to the Rule 609(a)(2) scenario where the proof of a fact is collateral to the underlying accusation and presents the danger of inviting the jury to make an impermissible propensity inference. *Old Chief* can operate by analogy only because, of course, it was a Rule 403 case. Nevertheless, its focus on the process of proving an admissible fact for a collateral purpose is instructive.

#### CONCLUSION

My sensible proposal is that all evidence must be screened for unfair prejudice, and where the unfair prejudice substantially outweighs the probative value of such evidence, the trial court must, out of fairness for the accused and respect for the trial court, possess the discretion to disallow it. This principle applies even to impeachment under Rule 609(a)(2) for felonies of dishonesty and false statement. I do not propose any special, more favorable tests for the accused (as appears in Rule 609(a)(1)), but argue that a basic Rule 403 balance, which tends to admit all but the most unfairly prejudicial evidence, is absolutely fundamental to due process. Indeed, in other contexts, it has been heralded as the guarantor of due process. Although courts will doubtlessly conclude that most convictions regarding dishonesty and false statement are highly probative and do pass the balancing test of Rule 403,<sup>77</sup> there are clearly some cases where such a test cannot be passed, especially where the accused is the witness. In such cases, the fairness of the trial is put in question without a Rule 403 balance.

Given that there is currently no balancing, and hence no point in making a motion in limine to exclude evidence of convictions for dishonesty or false statement, it is impossible to know how many of the accused forgo their right to take the stand in their own defense. This discouragement from taking the stand is seriously troubling because the accused could

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<sup>76</sup> 529 U.S. 172, 201 (1997).

<sup>77</sup> See *United States v. Toney*, 615 F.2d 277, 283 (5th Cir. 1980) (Tuttle, J., dissenting) (“[C]onvictions involving dishonesty could be excluded only upon a strong showing of overwhelming prejudice to the defendant.”).



present useful information and juries tend to be more conviction-prone if the accused does not testify.

Finally, why did I choose this sensible idea to honor Margaret Berger? Professor Berger is justly famous for her work on scientific evidence and expert testimony, but has not written extensively on character evidence. However, in her immensely important treatise and her various *Science for Judges* articles Professor Berger, undoubtedly influenced by the model of her teacher and collaborator, Judge Jack Weinstein, evinces faith in the trial judge and the importance of the judicial “gatekeeper” role. The tenor of Professor Berger’s remarkable career reflects a genuine trust in the capacity and good sense of trial judges, and she has invested her time and talent into educating them. Where judges are wrong-headed, Professor Berger has never shied away from challenging mistaken rulings. In her writings on evidentiary error, the confrontation clause, and expert testimony, Professor Berger also has championed the rights of the accused. Even though I am challenging a statement in her own treatise,<sup>78</sup> what better way to honor her than to propose a reinterpretation of a rule that restores discretion to judges to preserve fairness for criminal defendants?

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<sup>78</sup> 2 WEINSTEIN’S FEDERAL EVIDENCE, *supra* note 43, § 403.02[01][a], at 403-6 (“The one instance in which Rule 403 does not apply is in ruling on the admissibility of convictions pursuant to Rule 609(a)(2).”).