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Comment

Impeachment Through Introduction of Prior Criminal Record — The Pennsylvania Rule v. Federal Rule of Evidence 609(a)

Prosecution and defense attorneys have long been aware that impeachment of the opponent’s key witness can be an effective trial tactic.1 If the fact finder doubts the witness’ credibility, much of the value of his testimony is negated. Introducing evidence of a witness’ prior conviction, to the extent it aids in the credibility determination, is a permissible impeachment technique.2 The consequences of this practice, however, may exceed its limited purpose. It can unnecessarily damage the reputation of a witness whose prior crimes have no bearing on the trustworthiness of his testimony.3 Moreover, where the witness is a defendant in a criminal trial, introduction of his criminal record may lead a jury to convict him on the basis of his record rather than examine the evidence presented at trial.4 The potential for prejudice is overwhelming.

Deciding when such evidence is admissible and what type of crimes may be introduced is therefore a delicate evidentiary problem. Both state and federal courts have struggled to formulate rules of admissibility which will reflect an appreciation for both the probative value and prejudicial effect of the criminal record sought to be introduced.5 The federal and Pennsylvania rules contain several differences which are of particular importance to criminal defense counsel. This comment will explore those differences as well as the background and scope of both rules.

3. For a discussion of the potential prejudice that can result from introduction of a prior crime, see Note, To Take the Stand or Not to Take the Stand: The Dilemma of the Defendant with a Criminal Record, 4 Colum. J.L. & Soc. Prob. 215 (1968) [hereinafter cited as Dilemma].
5. See notes 23-62 and accompanying text infra.
I. **HISTORICAL BACKGROUND OF IMPEACHMENT THROUGH USE OF PRIOR CONVICTIONS**

At common law, the admissibility problem confronting courts today was often never presented; conviction for certain crimes — treason, felonies or misdemeanors in the nature of *crimen falsi* — rendered a person incompetent to testify. This disqualification, which began in seventeenth century England and was subsequently adopted in the United States, was originally based on the social mores of England: a criminal was not permitted to freely associate with people who had not been convicted of a crime. Disqualification from serving in court was part of the price one paid for breaking the law.

Despite the persistence of English mores, the judiciary soon realized that disqualifying an otherwise competent witness punished the party who relied on the convict’s testimony rather than the offender. As legal writers began to question the justification for this rule, a more plausible rationale for disqualification was offered. In its search for the truth, a court should not rely on a witness who has broken the law; a person of such moral character was more likely to lie on the witness stand. This moral turpitude theory persuaded

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6. See Commonwealth v. Jones, 334 Pa. 321, 323, 5 A.2d 804, 805 (1939) (*crimen falsi* involves the element of falsehood and includes forgery, perjury, subornation of perjury, suppression of testimony by bribery or conspiracy to produce the absence of a witness, barratry, and the fraudulent making or alteration of a writing to the prejudice of another man’s right).


8. Wigmore, * supra* note 7, § 519 at 608-09.

9. Id. at 608.

10. *Id. See also* Browne v. Crashaw, 2 Bulstr. 154 (1613) (two convicted felons rejected as witnesses by the court because the court believed that a felon was not fit to serve on a jury nor act as a disinterested witness).


12. Id.

13. Chief Justice Gilbert wrote:

> Every plain and honest man offering the truth of any matter under the sanction and solemnity of an oath is entitled to faith and credit . . . but where a man is convicted of falsehood and other crimes against the common principles of honesty and humanity, his oath is of no weight, because he hath not the credit of a witness . . . and he is rather to be intended as a man profligate and abandoned than one under the sentiments and convictions of those principles that teach probity and veracity.

Gilbert, Evidence 139 (1727). See also Swift, Evidence 52 (1810), where the author states: "[P]ersons convicted of crimes evincive of a want of regard for those moral and religious principles that constitute the obligation of an oath are excluded from testifying."
courts to ban witnesses with criminal records, until it was attacked by Jeremy Bentham in 1827. Bentham, whose writings are responsible for the disappearance of disqualification, believed the rules of evidence should be flexible enough to vary the treatment given to potential witnesses with criminal records. Different grades of crimes called for variations in punishment; only those who had committed serious crimes should be disqualified. Furthermore, Bentham exposed the illogic of barring criminals from testifying on the basis of one conviction since one transgression did not necessarily prove a lack of credibility.

By the middle of the nineteenth century, the states were statutorily abolishing disqualification and allowing evidence of prior convictions to be admitted on the question of the witness' credibility. Just as the scope of disqualifying crimes had been uncertain at common law, so was the definition of crimes that would be admissible for purposes of impeachment. But the state courts faced a more important policy issue. The conflict between the need for relevant evidence and the need to safeguard the witness from the likely prejudicial effect of his prior guilt, present when any witness was impeached, became even more acute when the witness was a criminal defendant. The danger of prejudice in such cases could conceivably raise issues of constitutional dimension. The prejudicial effect of the prior conviction evidence might violate the sixth amendment right to a fair trial or constitute a deprivation of due process. Moreover, since the defendant was forced to choose between the right to testify and his privilege against self-incrimination, he could assert that his fifth amendment rights were being violated. While constitutional attacks on the admission of

14. WIGMORE, supra note 7, § 519 at 610.
15. See J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 406 (Bowring's ed. 1827) quoted in WIGMORE, supra note 7, § 519 at 610.
16. Id.
17. See, e.g., the Pennsylvania legislation discussed at note 23 infra.
18. See MCCORMICK, supra note 2. Several states, however, have codified their rules of impeachment. See, e.g., ALA. CODE tit. 7, § 434 (1960) (only crimes involving moral turpitude are admissible to impeach); CAL. EVID. CODE § 788 (West 1966) (any felony can be used to impeach the credibility of a witness); 1909 N.Y. LAWS, ch. 88, § 2444 (repealed 1967) (permitted introduction of any crime for impeachment).
19. See MCCORMICK, supra note 2, § 41.
21. See Note, The Dilemma of a Defendant Witness in New York: The Impeachment
prior convictions for impeachment have not been successful, they highlight the need for a just and rational approach to this balancing problem.

II. THE PENNSYLVANIA IMPEACHMENT RULE

A. History of the Rule

In 1885, the Pennsylvania legislature declared criminals competent to testify. The Pennsylvania courts then held that the criminal, like any other witness, automatically placed his credibility at issue and subjected himself to impeachment by taking the stand. A criminal's prior record was admissible for purposes of assessing credibility just as testimony of prior reputation for veracity was admissible. In abrogating the disqualification rule, however, the Pennsylvania legislature failed to limit the scope of crimes admissible for impeachment. In Commonwealth v. Varano, the court

Problem Half Solved, 51 St. John's L. Rev. 129, 137-40 (1975) [hereinafter cited as Dilemma of a Defendant].


23. See 1885 Pa. Laws No. 26 (defendant with a criminal record has the right to testify on his own behalf); 1887 Pa. Laws No. 89 (removing disability from all potential witnesses who had been convicted of a crime).


26. The statutes abolishing common law disqualification did not limit the scope of admissible crimes. See note 23 supra. Shortly after the turn of the century, the legislature passed the Act of March 15, 1911, P.L. 20, § 1, which provided:

Hereafter any person charged with any crime, and called as a witness in his own behalf, shall not be asked, and, if asked, shall not be required to answer, any question tending to show that he has committed, or been charged with, or been convicted of any offense other than the one wherewith he shall then be charged, or tending to show that he has been of bad character or reputation; unless, [he attempts to establish his good reputation or testifies against a co-defendant].


While this statute expressly prohibits a defendant in a criminal case from being cross-examined as to other crimes he may have committed, case law clearly establishes that the commonwealth can introduce, in rebuttal, evidence of prior convictions to attack the credibility of the defendant who has elected to testify in his own behalf. See Commonwealth v. Bighum, 452 Pa. 554, 563, 307 A.2d 255, 260 (1973). The statute is designed to prevent the
held that a witness could only be questioned about convictions for offenses which affected his credibility. The decision, however, gave the trial court unfettered discretion to decide which crimes fell within this category. Thus, the rule proved to be an ineffective control on impeachment by prior conviction because each court applied different standards.

Despite this shortcoming, the Pennsylvania law of impeachment remained unchanged for nearly thirty years. In the 1955 decision of Keough v. Republic Fuel & Burner Co., the court reiterated its holding that introducing a witness' criminal record was discretionary rather than a matter of right, but suggested new guidelines for exercising the discretion. Under Keough, the trial court was to determine whether evidence of a witness' prior conviction would confuse the jury by unduly attracting its attention away from the primary issues at trial. If so, the evidence was to be excluded. Although stated in clouded terms, the Keough rule improved the existing law by focusing attention on the relative probative value of the evidence sought to be introduced.

Aside from this change, the basic test in Pennsylvania — that only felonies or misdemeanors involving crimen falsi were admissible — was not altered throughout the 1950's and 1960's. In 1965, however, the United States Court of Appeals for the District of Columbia decided Luck v. United States. In construing a provision of the D.C. Code, the court held that a conviction was admissible
for impeachment unless the trial judge decided that the potential prejudicial effect of the evidence outweighed its probative value regarding credibility. Although the decision had no constitutional impact, its lucid approach to the problems of introducing a witness-defendant's criminal record caused most state courts to reexamine their standards of admissibility for impeachment.

B. The Current Status of the Pennsylvania Rule

In 1973, the Supreme Court of Pennsylvania adopted the Luck rule in Commonwealth v. Bighum\textsuperscript{33} and began what was to become a radical change in the commonwealth's rules of impeachment by prior conviction. The Bighum decision clarified the broad test laid down in Varano as to which offenses related to credibility. A defendant who took the stand could be impeached by evidence of a prior conviction only if the crime involved dishonesty or false statement.\textsuperscript{34} Then, incorporating the Luck decision, the Bighum court held that once the trial judge decided the conviction was within this category of potentially admissible crimes, he was required to weigh its probative value against its prejudicial effect before admitting it as evidence.\textsuperscript{35}

In effect, the court determined that convictions for crimes not involving dishonesty or false statement have little probative value in assessing credibility. Since the function of the jury is to decide if a witness is accurately testifying, the jurors should be apprised of any crimes in the witness' past that might indicate a willingness to testify falsely. But to be admitted, these crimes must bear directly on the defendant's veracity.\textsuperscript{36} Only crimes involving deceit indicate the perpetrator's willingness to disregard the truth.\textsuperscript{37} Bighum, how-

\textsuperscript{33} 452 Pa. 554, 307 A.2d 255 (1973) (adopting the Luck rule).
\textsuperscript{34} Id. at 566, 307 A.2d at 262. The potential prejudice is greatest when the defendant takes the stand. The average juror tends to hear evidence of the defendant's prior convictions and decides that he is a criminal and therefore guilty of the crime with which he is charged. See text accompanying notes 35-38 infra.
\textsuperscript{35} 452 Pa. at 556, 307 A.2d at 262-63.
ever, was controlling only where a defendant had taken the stand; the admissibility of prior crimes with respect to impeachment of other witnesses was unclear. Then, in Commonwealth v. Kahley, the Pennsylvania Supreme Court extended the Bighum rule to all witnesses. Thus, Kahley and Bighum, read together with Luck, first limit crimes admissible in Pennsylvania to those involving falsehood or deceit and then require a trial judge to weigh the probative value of the particular crime against its capacity for prejudice.

The first stage of this dual consideration, determining admissibility on the basis of the type of crime committed, is the easier to resolve. Acts of deceit, fraud, or cheating clearly meet the threshold test of admissibility because they indicate a witness' inclination toward dishonesty. Burglary, larceny, receiving stolen goods, forgery, auto theft, passing forged currency, and arson have also been held to pass the initial test established in Bighum and Kahley. Crimes of violence and certain non-violent offenses, on the other hand, often indicate very little about the credibility of those who commit them and as a result are usually summarily excluded. Included in this category have been crimes such as rape, juvenile adjudications for shoplifting and underage drinking, pandering,

38. 467 Pa. 272, 356 A.2d 745 (1976) (regardless of who takes the stand, only crimes involving false statement or dishonesty are admissible), cert. denied, 429 U.S. 1044 (1977).
39. See Gordon v. United States, 383 F.2d 936 (D.C. Cir. 1967), cert. denied, 390 U.S. 1029 (1968). The Gordon decision, elaborating upon Luck, set out a rule of thumb: convictions for crimes involving dishonesty should be admitted because they bear on veracity whereas crimes of violence should not be admitted because they do not indicate a mendacious nature. Id. at 940.
47. See Commonwealth v. Moore, 369 A.2d 862 (Pa. Super. Ct. 1977) (rape does not involve dishonesty and therefore is not admissible to impeach).
48. See Commonwealth v. Katchmer, 453 Pa. 461, 309 A.2d 591 (1973) (juvenile adjudic-
failure to observe medical ethics, operating an illegal tavern, assault on a spouse, reckless driving, fornication, and voluntary manslaughter.

Once the trial judge has decided that the crime is of a type involving dishonesty or false statement, he must then apply the Luck considerations. This balancing approach was designed to exclude evidence of crimes which, because of the circumstances surrounding their commission, are either too prejudicial or of too little probative value to warrant admission. The remoteness of the conviction, the age and circumstances of the witness, and the witness' behavior since he committed the crime are prime considerations. For example, a remote conviction will be excluded as not bearing on the witness' credibility at the time of the trial. Similarly, a conviction for a crime committed while the witness was a juvenile may be excluded. The court must also consider the effect a particular witness' credibility will have on the outcome of the case. When a witness' credibility may be determinative of the issues, the trial judge should be considerably more lenient in admitting the prior

49. See McIntosh v. Pittsburgh Rys., 432 Pa. 123, 247 A.2d 467 (1968) (pandering conviction has no bearing on veracity).

50. See Downey v. Weston, 451 Pa. 259, 301 A.2d 635 (1973) (physician who failed to observe medical ethics on one occasion was no less likely to be a credible witness).


52. Id.


crime evidence. When the witness to be impeached is the defendant, the most critical consideration is whether it is more important for the jury to hear the defendant's story than to know of the prior conviction. The trial court must consider what impact the witness' testimony is likely to have upon the ultimate determination of the issues at trial. If, for example, the defendant is the only defense witness and he could aid his cause by testifying, he may, nevertheless, choose not to take the stand for fear of the prejudice that may result if prior crimes are introduced. The trial judge should then rule at a pre-trial conference that the defendant's prior crimes will be excluded, thus permitting the jury to hear what may be the only first-hand account of the alleged incident. The similarity between the prior conviction and the crime with which the witness-defendant is charged will also influence this decision. In Bighum and Kahley, the court recognized that where multiple convictions for the same crime can be found, the prosecutor may introduce the crimes under a pretext of impeachment. The jury, however, may well use the evidence as proof of the defendant's predisposition to commit the crime and convict him on that basis.

The Pennsylvania rule is designed to allow counsel to discredit a witness without smearing his character. The limitations theoretically focus on credibility and minimize prejudice. While the rule seems to be the correct combination of fairness and flexibility, its actual application becomes more complicated because of the inherent vagueness of the Luck criteria. The specific problems of the Pennsylvania rule will be discussed in Part IV.

III. Federal Rule 609(a)

A. The Influence of Luck v. United States

In Luck, the District of Columbia Court of Appeals vested the

61. The threat of a conviction based on a prior criminal record often forces defense counsel to advise his client not to take the stand even though the defendant's testimony would be important.
62. See notes 136-46 and accompanying text infra.
63. 348 F.2d 763 (D.C. Cir. 1965).
trial judge with discretion to determine the admissibility of a prior conviction for impeachment purposes. Before the trial judge could exclude evidence of a prior conviction, he had to find the potential for prejudice against the witness far outweighed the probative value of the evidence. The intended fairness of the rule was in its flexibility; each case was to be judged on its own merits rather than on a fixed standard.

From 1965, the date of the Luck decision, until 1975, the effective date of the Federal Rules of Evidence, the majority of the circuits either directly cited Luck as controlling or followed a similar rule. The First, Third, Fourth, and Seventh circuits cited Luck or United States v. Gordon, a District of Columbia Court of Appeals decision elaborating the Luck holding. The Second, Eighth, and

64. 348 F.2d at 768-69.
65. For an explanation of the burden of proof, see Gordon v. United States, 383 F.2d 936 (D.C. Cir. 1967), cert. denied, 390 U.S. 1029 (1968). Under the Luck rule, the defendant had the burden of proving to the courts in a pretrial conference that the evidence should not be introduced against him. He was forced to show that the prejudicial effect of the conviction was much greater than its value to the jury in assessing his credibility. Unless he met that burden, the conviction was admissible. Id. at 939-40.
66. Id. The factors to be considered by the trial judge include: the nature of the crime, the time of conviction, the similarity of the crimes, the importance of the defendant's testimony, and the degree to which the witness' credibility will influence the outcome of the trial. Id. See notes 33-62 and accompanying text supra for an explanation of the Luck criteria as adopted by the Pennsylvania Supreme Court in Commonwealth v. Bighum, 452 Pa. 554, 307 A.2d 255 (1973).
68. See, e.g., United States v. Johnson, 412 F.2d 753, 756 (1st Cir. 1969) (court cited Luck in holding that prior conviction can only be considered in regard to credibility), cert. denied, 397 U.S. 944 (1970).
69. See, e.g., United States v. Greenberg, 419 F.2d 808, 809 (3d Cir. 1969) (court cited Gordon in holding that district court has broad discretion in excluding prior crimes).
70. See, e.g., United States v. Hildreth, 387 F.2d 328, 329 (4th Cir. 1967) (court cited Gordon in holding that judge can limit cross-examination, if prejudice will result).
73. See, e.g., United States v. Palumbo, 401 F.2d 270, 273 (2d Cir.) (trial judge may exclude prior conviction if he finds that it negates credibility only slightly but creates substantial prejudice, taking into account such factors as nature of conviction, its bearing on veracity, age of the witness at the time of commission and the evidence's probable impact on the minds of jurors), cert. denied, 394 U.S. 947 (1968).
Tenth circuits followed a rule similar to Luck without citing the decision. Only the Fifth and Ninth circuits operated on a wholly different rule. This widespread influence of the Luck decision was one factor that led to the promulgation of Rule 609(a) of the Federal Rules of Evidence. Congress was determined to eradicate the Luck doctrine from the federal system. Although intended as an improvement over the rigid standard which had preceded it, the decision failed to provide trial judges with meaningful criteria that would enable them to evaluate the evidentiary worth of a prior conviction. Congress believed the Luck rule allowed too much discretion and encouraged inconsistent decisions.

B. Legislative History of Rule 609(a)

While case law is presently sparse, legislative history does much to explain the rule and to demonstrate the countervailing considerations and pressures that led to the final draft. As enacted, rule 609(a) is a compromise between the drafts written by members of the House of Representatives and the Senate and the draft adopted by the Supreme Court of the United States.

For thirteen years prior to the rule’s passage, the drafts proposed by Congress had undergone substantial revision with each session; the heated debates in both houses indicated that revising the existing judicial doctrine was not to be an easy process.

75. See, e.g., Butler v. United States, 408 F.2d 1103, 1104 (10th Cir. 1969) (citing Palumbo).
77. See, e.g., Burg v. United States, 406 F.2d 235 (9th Cir. 1969) (three-judge panel discussed admissibility of prior convictions: one judge accepted Luck (Madden, J.), one favored admitting felonies and misdemeanors involving crimen falsi (Ely, J., concurring), and the other urged that the court en banc examine the question (Hamley, J., concurring).
80. The debates over rule 609(a) were among the longest and most heated of any debates dealing with the Federal Rules of Evidence. See United States v. Smith, 551 F.2d 348, 360 (D.C. Cir. 1976) (discussing legislative history of rule 609(a)); United States v. Jackson, 405 F. Supp. 938, 940 (E.D.N.Y. 1975) (discussing legislative history).
The initial draft of rule 609(a) was written in 1965 by the Advisory Committee on the Rules of Evidence and was a simple restatement of the common law federal rule.\footnote{The draft read:}

\begin{quote}
For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, or (2) involved dishonesty or false statement regardless of the punishment. \textit{Preliminary Draft of Proposed Rules of Evidence, Rule 609(a) (1969), reprinted in 46 F.R.D. 161, 295-96 (1969).}
\end{quote}

It allowed evidence of prior convictions to be introduced for purposes of impeachment if the crime was a felony or a misdemeanor involving dishonesty or false statement.\footnote{The Advisory Committee's note explained that the draft paralleled the most common of the state rules and used as its criteria for admissibility common law grounds of disqualification. The Committee decided to accept this draft because it believed a demonstrated willingness to engage in conduct in disregard of accepted social patterns indicated a willingness to give false testimony. \textit{Id.} at 296-97.}

In selecting this approach, the Advisory Committee rejected several alternatives all of which it found to be unacceptable: (1) prohibiting impeachment by prior convictions when the defendant took the stand in his own behalf,\footnote{Id.} (2) allowing impeachment only if the conviction were for a crime \textit{crimen falsi} in nature,\footnote{Id. at 298 (Advisory Committee Notes).} (3) restricting the introduction of impeachment evidence to cases where the defendant introduced evidence of his character for truthfulness and thus limiting impeachment by prior conviction to rebuttals,\footnote{Conviction for any of several crimes not involving dishonesty is, nonetheless, relevant to credibility. \textit{Id.} at 298-99.} (4) giving the judge full discretion to admit or exclude convictions, allowing maximum flexibility,\footnote{The problem with this approach is that it affords only superficial protection to the accused. By introducing witnesses who will testify to the defendant's dishonest character, a prosecutor offers the accused a Hobson's choice: he can allow the testimony to go unchallenged or he can introduce his own character witnesses who, during cross-examination, may be asked if they have heard that the defendant committed the relevant prior crimes. \textit{Id.} at 299.} and (5) excluding evidence of a prior conviction only if similar to the crime with which the defendant was charged.\footnote{Guides for exercising this discretion are practically impossible to develop. \textit{Id.}}

In failing to adopt any changes to the common law rule, the Advi-
sory Committee was criticized by judges and practitioners for not effectively dealing with the competing interests of prejudice and probative value. To meet the demand for innovation, the rule was revised. In its unpublished version, the revised rule gave the trial judge discretion to exclude evidence of a felony if he believed that the prior conviction would not be useful in the jury's assessment of the witness' credibility. The Committee on Rules of Practice and Procedure struck the wording which gave open discretion to the trial judge and substituted a clause that specifically required judges to weigh the probative value of all prior convictions against the danger of unfair prejudice. With this added clause, the section met with considerable resistance in Congress, because it incorporated the Luck rule, which Congress had previously rejected in formulating


89. The revised draft read:
For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted unless the judge finds that the conviction is lacking in probative value on the issue of credibility, or (2) involved dishonesty or false statement regardless of the punishment.

3 J. WEINSTEIN & M. BERGER, WEINSTEIN's EVIDENCE ¶ 609[01], at 609-48 (1976) (emphasis added) [hereinafter cited as WEINSTEIN].

90. Id.

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

REVISED DRAFT OF PROPOSED RULES OF EVIDENCE, RULE 609(a) (1971), reprinted in 51 F.R.D. 315, 391 (1971). The Advisory Committee intended to leave room for sound judicial discretion and admitted that the rule had its genesis in Luck. Id. at 393 (Advisory Committee Notes).


93. See Crime in the National Capital, Part 4, Hearings Before the Senate Comm. on the District of Columbia, 91st Cong., 1st Sess., 1396-97 (1969), reprinted in WEINSTEIN, supra note 89, ¶ 609[01] at 609-49 to -53 (1976). Congress' decision to reject the Luck rule was at least partially influenced by the Department of Justice. In July, 1969, the Department submitted legislation overruling Luck, explaining that proof of a conviction is the best probative evidence of a willingness to engage in conduct which injures the rights of others. Id.

Congress also noted that the Bar Association of the District of Columbia supported the elimination of the Luck rule and that the rule was inconsistent with the law in almost 90% of the states. Id.
the District of Columbia Court Reform and Criminal Procedure Act of 1970. In that act, Congress mandated the admission of prior convictions of felonies and crimes involving dishonesty, thus returning to a more traditional impeachment code as adopted by the United States Supreme Court.

Swayed by adverse congressional reaction to the added clause, the Committee on Rules of Practice and Procedure remodeled its proposed rule after the District of Columbia Act of 1970. The Supreme Court of the United States adopted this draft and submitted it to the House of Representatives for consideration. In the House, a subcommittee amended the rule by permitting the trial court to balance the danger of prejudice against the probative value before admitting the prior conviction. The House Judiciary Committee further amended this draft, possibly because of the Luck influence, and limited admissibility to crimes involving dishonesty or false statement. The Judiciary Committee's primary concern was that the traditional rule, which admitted all felonies, discouraged defendants with criminal records from testifying. After a long debate,

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95. The Act reads in pertinent part:

"For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a criminal offense shall be admitted . . . but only if the criminal offense (A) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, or (B) involved dishonesty or false statement (regardless of the punishment)."

Id.

96. The recommendation stated: "In light of the fact that Congress specifically rejected the Luck rule . . . it is recommended that the Committee . . . not incorporate the Luck rule into Rule 609. . . . It is recommended that the Committee adopt the rule enacted by Congress for [the District of Columbia]." REPORT OF DEPARTMENT OF JUSTICE 45-49 (1971), reprinted in WEINSTEIN, supra note 89, 609 at 609-49 to -53 (1975). This proposed draft provided:

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

RULES OF EVIDENCE FOR UNITED STATES COURTS, RULE 609(a), reprinted in 56 F.R.D. 183, 269 (1973).

97. The Subcommittee addition read: "[U]nless the court determines that the danger of unfair prejudice outweighs the probative value of the evidence of the conviction . . . ."


98. The amended version read: "(a) General Rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible only if the crime involved dishonesty or false statement." Id.

99. Id.

100. See 120 CONG. REC. 1407-22, 2366-94 (1974). Representative Hogan stated that the
the House of Representatives passed the rule as recommended by the House Judiciary Committee.

In the Senate, rule 609 continued to raise controversy, but for the first time, different treatment for defendants and other witnesses was proposed. The Senate Judiciary Committee members reasoned that the danger of prejudice was much greater when the defendant took the stand, since prior convictions could be used as evidence of guilt as well as of lack of credibility. With respect to the defendant, the committee agreed with the House: only evidence of crimes involving dishonesty or false statement should be admitted. The committee proposed that for purposes of impeaching a witness other than the defendant, evidence of any felony could be used in addition to crimes involving dishonesty, if the court found that the probative value as to credibility outweighed the evidence's prejudicial effect on the witness. Although the rule appeared equitable, the proposal did little to ease Congressional doubts about the inadequacies of a discretionary standard. Senator McClellan offered a draft that restored the rule to the original version adopted by the Supreme Court with some clarifying language. After suffering a defeat by a tie vote, this proposal passed the Senate on a motion to

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rule adopted the worst feature of Luck—unpredictability. By allowing only evidence of crimen falsi crimes to impeach the credibility of the accused, the rule gave the courts broad discretion to determine what crimes are admissible, without useful criteria by which to exercise it. Thus, adoption of the rule would have resulted in uneven treatment of defendants. Id. at 1414.

Representative Dennis believed discretionary freedom was the best choice because it shielded the defendant from the harshness of the traditional rule which allowed admission of all felonies. Under the traditional rule, the defendant either had to remain silent or take the stand and have the convictions introduced. Whatever the defendant's choice, the potential for prejudice would be overwhelming. Dennis believed the rule limiting convictions to dishonesty or false statement was the only way to afford the defendant proper protection. Id. at 1419-20.


103. The Committee defined dishonesty or false statement as including "perjury or subornation of perjury, false statement, criminal fraud, embezzlement or false pretense, or any offense, in the nature of crimen falsi the commission of which involves some element of untruthfulness, deceit or falsification bearing on the accused's propensity to testify truthfully." Id.

104. Id.

105. See note 96 supra.

106. See 120 CONG. REC. 37075-76 (1974).
reconsider.\textsuperscript{107} The differences between the House and Senate versions of rule 609 were finally compromised by the Committee of Conference which proposed the present rule.\textsuperscript{108}

C. Application of Rule 609(a)

Rule 609(a) classifies crimes which are admissible for impeachment purposes as: (1) felonies, without regard to the nature of the crime and (2) crimes involving dishonesty and false statement, without regard to the grade of the offense.\textsuperscript{109} Within the first category, felonies\textsuperscript{110} are admissible if the party offering the conviction can convince the court that knowledge of the crime will aid the jury in its assessment of the defendant's credibility more than it will prejudice him.\textsuperscript{111} Crimes within the second category are automatically admissible regardless of the likelihood of prejudice.\textsuperscript{112} As to these crimes, involving dishonesty or false statement, the court is no longer free to exercise the discretion it had under \textit{Luck}. Congress has substituted its judgment for the discretion of the trial judge by declaring that evidence of such crimes is always sufficiently relevant to credibility to warrant admission regardless of possible prejudice.\textsuperscript{113} Crimes involving dishonesty or false statement have been held to include perjury, subornation, criminal fraud, embezzlement, false pretense\textsuperscript{114} or any offense in the nature of \textit{crimen falsi}.\textsuperscript{115}

\begin{footnotesize}
\begin{enumerate}
\item 107. See id. at 37083.
\item 109. \textit{FED. R. EVID.} 609(a).
\item 110. To evaluate the severity of the crime involved, the court should refer to the congressional measure of a felony rather than to individual state standards. Under federal law, any offense punishable by death or imprisonment for a term exceeding one year is a felony. See \textit{18 U.S.C.} § 1 (1970).
\item 111. See, \textit{e.g.}, United States v. Cohen, 544 F.2d 781 (5th Cir. 1977) (prior conviction cannot be admitted without court determination that the probative value substantially outweighs the prejudicial effect).
\item 112. See, \textit{e.g.}, United States v. Brashier, 548 F.2d 1315 (9th Cir. 1976) (prior conviction automatically admissible because it involved dishonesty); United States v. Dixon, 547 F.2d 1079 (9th Cir. 1976) (crime automatically admissible if it involves dishonesty or false statement).
\item 115. See United States v. Brashier, 548 F.2d 1315, 1326 (9th Cir. 1976).
\end{enumerate}
\end{footnotesize}
Since crimes within the second category of rule 609(a) are automatically admissible for impeachment purposes, no burden of proof questions are raised. The only possible limitation on the admission of crimes involving dishonesty and false statement is Rule 403 of the Federal Rules of Evidence.\textsuperscript{116} Rule 403 allows the trial judge to exclude evidence, although relevant, if its probative value is outweighed by the danger of prejudice, confusion of the issues, misleading the jury, or undue delay.\textsuperscript{117} During the hearings on rule 609(a) in the House of Representatives, it was noted that rule 403 might serve to effectively nullify the automatic admissibility prescribed under rule 609(a)(2) for crimes involving dishonesty or false statement.\textsuperscript{118} To date, however, rule 403 has not been applied to limit rule 609(a)(2), and it probably will not be so used. Congress explicitly rejected judicial balancing when the prior conviction was for a crime involving dishonesty, and the courts should not invoke a general statutory provision, rule 403, to modify a specific provision, rule 609(a).

When the attempt is to impeach by introducing evidence of a felony conviction for a crime not involving dishonesty, the burden of proving that the evidence should be admitted falls upon the offering party.\textsuperscript{119} This is a major change from the rule established in \textit{Luck}\textsuperscript{120} where the defendant was forced to prove that a prior conviction should be excluded. Rule 609(a) shifts the burden to the prosecution in most cases by making admissibility the exception rather than the rule.\textsuperscript{121} A prior felony is not admissible unless its probative

\textsuperscript{116} See United States v. Smith, 551 F.2d 348, 358 n.20 (D.C. Cir. 1976).
\textsuperscript{117} Fed. R. Evid. 403 states: "[R]elevant . . . 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."
\textsuperscript{118} See \textit{Hearings on S. 583, H.R. 4958 and H.R. 5463 Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary}, 93d Cong., 1st Sess., 251-52 (1973) (Judge Friendly remarking that rule 403 might be used to exclude evidence automatically admissible under rule 609(a)(2)).
\textsuperscript{119} See United States v. Smith, 551 F.2d 348, 359-60 (D.C. Cir. 1976) (rule 609(a) shows an intent to place the burden of proof on the party seeking admission of the felony).
\textsuperscript{120} 348 F.2d 763, 768 (D.C. Cir. 1965).
\textsuperscript{121} The \textit{Luck} test was structured to force the defendant to meet the burden; he had to prove to the court that the prejudicial effect of the proposed impeachment far outweighed its probative value. \textit{Id.} Rule 609(a) changed the standard by placing the burden on the prosecuting attorney who now must prove that the probative value of the evidence outweighs its prejudicial effect as to the defendant.
value outweighs its prejudicial effect. By placing the burden on the prosecution, rule 609(a) helps to assure the defendant that a prior felony will not be admitted if it is being used as substantive evidence of his guilt.

Another innovation introduced by rule 609(a) is the establishment of a separate standard to govern the admissibility of a defendant's prior convictions. If the felony conviction is other than for a crime involving dishonesty, the court must determine that the probative value of the evidence outweighs the prejudicial effect, but only with respect to the defendant. Congress considered and rejected the possibility of prejudicing a witness other than the defendant. It felt the danger of prejudice to others is outweighed by the jury's need for as much relevant evidence as possible on the issue of credibility.

Obviously, the discretionary standard is applicable to a criminal accused who takes the stand; but conceivably, a civil defendant has the same protection. In formulating what is now rule 609(a), the Conference Committee did not use the term "accused" as the Senate Judiciary Committee had done, and rule 609(a) therefore literally encompasses civil defendants. It is clear from a reading of the Conference Committee Report, however, that the Committee intended to protect only the rights of an accused in criminal proceedings. Even assuming that rule 609(a) is broadly interpreted, the prejudicial effect on a civil defendant of introducing his prior conviction can not be equated with the damaging impact of introducing

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122. See Fed. R. Evid. 609(a)(1). See also United States v. McMillian, 535 F.2d 1035 (8th Cir. 1976) (conviction admissible if probative value outweighs the prejudicial effect); United States v. Pratt, 531 F.2d 395 (9th Cir. 1976) (prior felony conviction is admissible if probative value is greater than potential prejudice).


125. A witness other than the defendant is damaged by the introduction of prior crimes to impeach him to the extent his reputation in the community is injured.


an accused’s criminal record; the conviction will probably be admitted on the basis that its probative value outweighs its prejudicial effect.

Consideration must also be given to the extent to which rule 609(a) restricts the impeachment by prior conviction of defense witnesses other than the defendant, since such impeachment may also have a “prejudicial effect to the defendant.” The danger of prejudice to the defendant’s case, however, is much less severe where such witnesses are impeached, and the jury’s need for evidence relating to the witnesses’ credibility will in most cases warrant admission. If the same standard of admissibility were applied to both the prior crimes of the defendant and those of his witnesses, an unjustifiable imbalance might be created between the apparent credibility of the prosecutor’s and the defendant’s witnesses. Prior felony convictions of a witness other than the defendant should be excluded, therefore, only when they present a danger of improperly influencing the outcome of the trial by persuading the jury to convict the defendant on the basis of another’s prior record. Since impeachment of a prosecution witness will rarely prejudice the defendant, the only practical limitation on impeachment of a government witness through a prior crime is Rule 611(a)(3) of the Federal Rules of Evidence which protects all witnesses from harassment or undue embarrassment.

Although rule 609(a) has not been in effect long enough to accurately analyze its success, the rule should aid the defendant far more than did the Luck decision. As noted, defense counsel may cross-examine a prosecution witness about all prior felony convictions, as well as crimes involving dishonesty or false statement because the inquiry will not prejudice the defendant, while the prosecution

129. In presenting the conference report to the House, Representative Hungate noted that impeachment of a defense witness by prior conviction may always have a prejudicial effect on the defendant. See 120 Cong. Rec. 40891 (1974).
131. For example, exclusion of the conviction may be proper where the only defense witness is a relative or close friend of the defendant and the possibility exists that the jury might associate the prior criminal record of the witness with the defendant.
132. Fed. R. Evid. 611(a) states: “The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . (3) protect witnesses from harassment or undue embarrassment.”
133. See United States v. Smith, 551 F.2d 348, 359 n.21 (D.C. Cir. 1976) (discussing possibility of using rule 611 (a)(3) to limit rule 609(a)).
134. For an explanation of the ways in which rule 609(a) changes the traditional rule, see
may be limited in what it may ask the defense witnesses. Furthermore, the government has the burden of proving the substantial probative value of introducing the prior felony convictions of the defendant.  

IV. RELATIVE VALUE OF THE PENNSYLVANIA AND FEDERAL RULES

The Pennsylvania rule does not balance the need for evidence against the potential for prejudice as well as Rule 609(a) of the Federal Rules of Evidence. Not only does the federal rule protect the defendant by screening those felonies that may unduly prejudice him, it assures the jury that they will know of the crimes bearing directly on the witness’ credibility by automatically admitting crimes involving dishonesty or false statement.

The premise of the Pennsylvania rule, which admits only convictions involving dishonesty or false statement, is that those crimes are relevant to credibility and all others unduly prejudice the defendant. If the Pennsylvania Supreme Court has decided that crimes involving dishonesty or false statement bear directly on veracity, why give the trial court such broad discretion to exclude them? It would seem that they should be admitted as an acceptable compromise between the dual considerations of prejudice and probative value. In assessing the credibility of a witness, the jury is trying to decide whether he is telling the truth; a conviction for a crime involving dishonesty is virtually always a good indicator. Both the Pennsylvania and federal rules share a problem in this regard in that “dishonesty” is not easily defined by a trial court. But once the decision is made that the crime does involve dishonesty, the federal rule does not burden the court with further considerations. Pennsylvania courts, on the other hand, require that the trial court continue to examine the conviction using the vague criteria of Luck. If a crime is one of dishonesty the jury should be apprised of the conviction in every case.

The factors a Pennsylvania trial judge must consider, as adopted from United States v. Luck, cannot materially aid his decision;

135. See notes 119-121 and accompanying text supra.
137. 348 F.2d 763 (D.C. Cir. 1965).
they are labels without substance. Aside from the difficulty in defining dishonesty, a judge must determine when a conviction is remote. The federal rule has established a ten year limit on admissibility of prior crimes. Rather than adopt the ten year federal limit, a Pennsylvania judge can arbitrarily decide whether or not a prior conviction is too remote and admit or exclude on that basis. A definite time limit should be established.

Considerations such as the probable impact of the witness' testimony and the need for the defendant's testimony also appear to be valid criteria, but as they are so difficult to apply, they are of little use to a trial judge. To properly administer these criteria, the judge must predict the course of the trial in a pretrial conference, yet such variables as the strength or weakness of material witnesses and the effectiveness of trial tactics — considerations necessary to the judge's determination — are almost impossible to accurately forecast.

The federal rule not only requires the admission of crimes involving dishonesty or false statement, it also provides for admission of other relevant felony convictions barred by the Pennsylvania rule. For example, a rule of thumb provides that crimes of violence do not involve dishonesty. Following this guideline, a Pennsylvania judge could not admit a witness' prior conviction for murder in the first degree. Should a convicted murderer be deemed as credible as a witness with an unblemished record? Admittedly, commission of the crime does not involve dishonesty; nevertheless, it re-

138. The real difficulty comes when considering different gradations of the same offense. For example, a judge would probably decide that car theft involves dishonesty. Does joyriding involve the same degree of dishonesty or dishonesty at all?
140. Fed. R. Evid. 609(b) states: "Evidence of a conviction under this rule is not admissible 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 the later date. . . ."
142. Fed. R. Evid. 609(a)(2). See also United States v. Millings, 535 F.2d 121 (D.C. Cir. 1976) (admissibility of crimes involving dishonesty or false statement not within the discretion of the judge).
reflects a character of such moral depravity that dishonesty can be anticipated.

The federal rule opens the possibility of admitting not only murder, but crimes such as kidnapping and air piracy, which arguably do not involve dishonesty per se but would seem to be of value in a juror's assessment of a witness' credibility. This approach is more rational than automatic exclusion of all crimes that do not involve dishonesty or false statement.

The burden of proof adopted by Congress in rule 609(a) also demonstrates the superiority of the federal rule. By forcing the government to prove that a conviction relates to veracity, rule 609(a) would seem to render obsolete the fears of the Pennsylvania Supreme Court that the defendant will be unduly prejudiced if evidence of convictions for crimes not involving dishonesty are admissible. If the government cannot prove that the crime will help the jury to assess the defendant's credibility more than it will prejudice him, it will not be admitted. Federal rule 609(a) is rigid enough to make its application simple, yet flexible enough to provide the jury with as much information relevant to credibility as possible. Furthermore, its structure offers maximum protection to the defendant while not ignoring the need for relevant evidence. Rule 609 has achieved an effective compromise between these competing interests and Pennsylvania courts would be wise to adopt it.

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145. See Fed. R. Evid. 609(a)(1). See also United States v. Smith, 551 F.2d 348 (D.C. Cir. 1976) (if the probative value of prior conviction outweighs the prejudicial effect to the defendant it is admissible regardless of the nature of the conviction).

146. See Fed. R. Evid. 609(a)(1). See also United States v. Dixon, 547 F.2d 1079 (9th Cir. 1976).