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Donald H. Zeigler

New York Law School, donald.ziegler@nyls.edu

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Harmonizing Rules 609 and 608(b) of the Federal Rules of Evidence

Donald H. Zeigler*

I. INTRODUCTION

Testimony by live witnesses in open court forms the basis of the American trial. Today, almost anyone having relevant information is competent to testify.¹ Fact-finders know, however, that not all testimony should be given the same weight. A witness may have failed to perceive events clearly or have forgotten important details. A witness may give ambiguous testimony or simply be lying. Cross-examination is the tool designed to reveal these defects.

Cross-examiners can use several different means to suggest a witness is lying. Two of the most important are to show a witness has a criminal conviction² or committed a bad act sometime in the past.³ In both instances the questioner wants the fact-finder to infer the witness is not a law-abiding or moral person and therefore cannot be trusted to tell the truth.

People have long disagreed about the probative value and prejudicial effect of these forms of impeachment. People disagree about what kinds of convictions and bad acts bear on credibility and about whether unfair prejudice occurs when jurors learn of the misconduct. Some believe that virtually any misconduct bears on credibility, while others think wrongdoing tells us nothing about a person's character for truthfulness unless it directly involves deception or false statement. Some believe evidence of misconduct is enormously prejudicial, particularly if the witness is a criminal defendant. As then-Chief Judge Cardozo of the New York Court of Appeals stated:

*Professor of Law, New York Law School. A.B., Amherst College; J.D. Columbia University. The author wishes to thank Eugene Cerruti, Brannon Heath, Randolph Jonakait, and Tanina Rostain for their helpful comments on a draft of this Article. The author also gratefully acknowledges the research assistance of Alina Gail Bjerke and John Kutner.

¹See FED. R. EVID. 601 ("Every person is competent to be a witness except as otherwise provided in these rules."). The Advisory Committee's note makes clear that Rule 601 is a "general ground-clearing" that abolishes such traditional grounds of incompetency as religious belief, conviction of a crime, and connection with the litigation as a party or interested person. *Id.* (advisory committee's note).

²*Id.* 609.

³*Id.* 608(b) Other methods of impeaching credibility are to show that the witness has a bad reputation for truthfulness, *id.* 608(a), made a prior statement inconsistent with the trial testimony, *id.* 613, or is biased, *United States v. Abel*, 469 U.S. 45, 51 (1984). A party may also present evidence contradicting the witness's testimony FED. R. EVID. 611(b).

The natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge.⁴

Others think the danger of unfair prejudice is overstated and can be cured by proper instructions to the jury or that the probative value of misconduct evidence is so high it should be admitted regardless of prejudice.

Courts have responded to the different views by articulating a wide range of standards and applying them inconsistently. The Advisory Committee and Congress were unable to resolve the disagreements when they enacted Rules 609 and 608(b) of the Federal Rules of Evidence, which govern impeachment by convictions and specific instances of conduct, respectively. Stymied, Congress enacted the rules with such vague, ambiguous language that judges could continue to allow whatever sort of impeachment they had allowed before the rules were enacted. To make matters worse, Congress enacted the rules separately and made little attempt to harmonize them, thus increasing the inconsistency between the two impeachment methods. Predictably, the elastic standards of Rules 609 and 608(b) led to inconsistent decisions. Some federal courts construe the rules to allow impeachment with a broad range of crimes and misconduct while others are much more restrictive.

The extraordinary inconsistency in this area of the law causes serious problems in the administration of justice. My thesis is that courts should attempt to harmonize practice both between the rules and within each rule. I suggest several ways to achieve these goals.

The Article has three parts. Part II traces the history of impeachment by convictions and bad acts. It documents the enormous disparities in standards and their application that have marred this area of the law since the 1700s. Part II also reviews the disappointing performance of the Advisory Committee and Congress in enacting Rules 609 and 608(b) and the resulting inconsistent modern practice.

Part III discusses the many significant problems caused by the current cacophony. Litigants are denied equal protection of the laws. The law is unpredictable, which makes planning difficult. Parties are unfairly prejudiced. Judges exercise virtually unbridled discretion. Finally, some judges follow the unseemly practice of admitting misconduct under Rule 608(b) that they have excluded under Rule 609 as unduly prejudicial, and vice versa.

Part IV sets forth my suggestions for change. I propose several ways to lessen inconsistencies between the rules. The proposals are based on the premise

⁴People v. Zackowitz, 254 N.Y. 192, 198 (1930) (quoting 1 JOHN H. WIGMORE, EVIDENCE, § 194).

that with both forms of impeachment, it is the underlying misconduct that reflects on a witness's credibility. A conviction merely makes it somewhat more likely the misconduct occurred; it does not enhance the probity of the misconduct.⁵ Specifically, I propose courts read several of the protections of Rule 609 into Rule 608(b), allow impeachment with the same criminal misconduct under Rule 609(a) and 608(b), apply the *Huddleston v. United States*⁶ prima facie case standard for determining whether the prior misconduct occurred, and harmonize application of Rules 609(a)(2) and 608(b) by construing Rule 609(a)(2) narrowly so only convictions directly involving lying or deception are admitted automatically. As to the inconsistencies within each rule, I see little point in advocating a broad or narrow approach to either form of impeachment because judges' views are largely set.⁷ Instead, I propose a process for working toward a genuine compromise that might lessen the inconsistencies in practice.

II. THE MANY APPROACHES TO IMPEACHMENT BY CONVICTIONS AND BAD ACTS

A. *Early History*

As long as there have been witnesses, courts have struggled to set appropriate standards for impeaching witness credibility. Courts allowed very broad attacks historically. As late as the 1700s, English courts allowed impeachment by the testimony of others as to a witness's general bad character.⁸ Courts reasoned that a general bad character necessarily raised questions about a witness's willingness to obey an oath to tell the truth. As Wigmore succinctly stated, "to show general moral degeneration is to show an inevitable degeneration in veracity."⁹ Courts

⁵The arguments for and against this premise are discussed in detail *infra* notes 245–50 and accompanying text.

⁶485 U.S. 681, 685 (1988).

⁷See *infra* notes 333–37 and accompanying text.

⁸3A JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 923, at 728 (James H. Chadbourn, ed., rev. ed. 1970). Early American cases also admitted such evidence. See, e.g., *Carter v. Cavanaugh*, 1 Greene 171, 173 (Iowa 1848) (noting broad view of some courts that "inquiry may be, as to the general moral character of the witness, for the purpose of impeaching him"); *State v. Boswell*, 13 N.C. (2 Dev. Eq.) 209, 210 (1829) (stating that in 1804 state adopted rule "that to discredit a witness you might prove him to be of *bad moral character*; and the question was not confined to his character for veracity" (emphasis added)).

⁹3A WIGMORE, *supra* note 8, § 922, at 726.

also allowed character witnesses to detail the bases for their opinions.¹⁰ Witnesses were quite freely attacked with testimony as to their past life and misdeeds.¹¹

In time, certain restrictions developed on character testimony. Judges questioned whether general bad character necessarily indicated a lack of veracity.¹² They also sought to protect witnesses from undue harassment.¹³ Consequently, character witnesses were eventually limited to testifying about the impeached witness's character for *veracity*¹⁴ and were no longer permitted to recount specific bad acts.¹⁵

These limitations did not necessarily keep jurors from learning about the misconduct of witnesses, however, because witnesses themselves could still be asked about the misconduct on cross-examination. As Wigmore states, during the 1700s "exploiting of the witness' life and associations, however discreditable, was freely allowed. The orthodox rule came to be that 'any question tending to discredit' might be asked; and only rarely was there any interference from the court."¹⁶ Courts did not allow the misconduct to be proven by extrinsic evidence, and thus the questioner was bound by the witness's denial.¹⁷ This rule avoided the confusion and inefficiency of mini-trials on whether the witness had committed the bad act.

The rules governing bad act impeachment proved much more resistant to change than the rules regulating the testimony of character witnesses. Wigmore reports that England maintained "this practically unlimited license of cross-examination" into the late 1800s.¹⁸ During this period, practice in the United States varied because judges stubbornly disagreed about what kinds of bad acts

¹⁰*Id.* § 979, at 823 (explaining that because witness could give his personal judgment of impeached witness's character based on his acquaintance with him, it was "an easy concession to allow the impeaching witness to describe among his reasons such specific conduct, good or bad, as might have become known to him").

¹¹*Id.*

¹²*See id.* § 922, at 727–28 (citing examples).

¹³*Id.* § 922, at 727 ("[T]he incidental unpleasant features of the witness-box are largely increased when the way is opened to this broad and loose method of abusing those who are called as witnesses.").

¹⁴*See id.* § 923, at 729–34 n.2 (presenting exhaustive state-by-state review showing this to be rule in majority of American jurisdictions).

¹⁵*Id.* § 979, at 823. Wigmore points to two policy reasons for this limitation. First, testimony pro and con about whether a witness has engaged in particular misconduct tended to distract judge and jury from the central issues in a case. *Id.* at 826. Second, witnesses were unfairly surprised: "A witness cannot be expected to be prepared to *disprove every alleged act* of his life." *Id.* at 827.

¹⁶*Id.* § 986, at 857; *see also* 1 MCCORMICK ON EVIDENCE § 41 (John W. Strong ed., 5th ed. 1999) ("[T]he English common law tradition of 'cross-examination to credit' permits counsel to inquire into the witness's associations and personal history including any misconduct tending to discredit his character . . .").

¹⁷*See* 3A WIGMORE, *supra* note 8, § 986, at 855–56 (citing examples in note 2).

¹⁸*Id.* at 858.

were probative of credibility.¹⁹ Some courts admitted virtually any kind of witness misconduct to impeach,²⁰ while others were much more restrictive and excluded bad acts that did not bear on credibility directly.²¹

Impeachment of witnesses with a criminal conviction developed later than impeachment with bad acts because most people convicted of a crime were deemed incompetent to testify.²² During the nineteenth century, most American jurisdictions abrogated this rule. Persons convicted of a crime were allowed to testify, but the conviction could be used to impeach their credibility.²³ As with bad

¹⁹See 1 MCCORMICK ON EVIDENCE, *supra* note 16, § 41 (“In this country, there is a confusing variety of decisions[concerning impeachment by misconduct], occasionally even in the same jurisdiction.”).

²⁰3A WIGMORE, *supra* note 8, § 983, at 840; *see, e.g.*, *Tla-Koo-Yel-Lee v. United States*, 167 U.S. 274, 276–77 (1897) (allowing impeachment by questioning state’s witness as to whether she lived with man not her husband); *Louisville & N.R. Co. v. Bizzell*, 30 So. 777, 780 (Ala. 1901) (allowing cross-examination of defendant’s witness about habits of profanity and drinking); *McAlister v. State*, 139 S.W. 684, 689 (Ark. 1911) (allowing defendant’s witness to be cross-examined as to former act of assassination); *State v. Ward*, 49 Conn. 429, 433, 442 (1881) (permitting prosecution to ask defense witness whether he lived with woman who kept house of ill-fame); *State v. Watson*, 72 N.W. 283, 284 (Iowa 1897) (permitting questioning of defendant about using assumed name); *State v. Wells*, 37 P. 1005, 1008 (Kan. 1894) (allowing accused to be cross-examined about prior acts of violence); *People v. Casey*, 72 N.Y. 393, 398 (1878) (permitting defendant to be cross-examined about other quarrels and assaults); *Lohman v. People*, 1 N.Y. 379, 382, 385 (1848) (allowing questions about whether state’s witness had committed fornication and contracted venereal disease); *State v. Ekanger*, 80 N.W. 482, 483 (N.D. 1899) (allowing defendant to be asked whether he was professional gambler).

²¹3A WIGMORE, *supra* note 8, § 938, at 840; *see, e.g.*, *Lee v. State*, 50 S.W. 516, 517 (Ark. 1899) (refusing to allow question about whether witness was not mother of certain criminals); *Dore v. Babcock*, 50 A. 1016, 1018 (Conn. 1902) (refusing to allow questions of defendant’s witness about divorce for desertion because subject did not “affect the character of the witness for veracity”); *Wallace v. State*, 26 So. 713, 722 (Fla. 1899) (explaining that questions concerning “past life and history” were left to trial court’s discretion while matters that do not affect credit should not be admitted); *Whitney v. State*, 57 N.E. 398, 400 (Ind. 1900) (refusing to allow questions as to whether witness committed frequent acts of assault with gang); *Nolan v. Brooklyn City & Newton R.R. Co.*, 87 N.Y. 63, 68 (1881) (holding cross-examination as to whether defendant’s witness had been expelled from fire department improper as irrelevant to discrediting).

²²*Green v. Bock Laundry*, 490 U.S. 504, 511 (1989); 2 WIGMORE, *supra* note 8, § 519, at 725–26 (1979); 1 MCCORMICK ON EVIDENCE, *supra* note 16, § 42. The disqualification was not absolute; it generally barred testimony only by persons convicted of felonies or *crimen falsi*. 2 WIGMORE, *supra* note 8, § 519, at 729 (citing SIMON GREENLEAF, EVIDENCE § 373 (1842)). Not surprisingly, there was disagreement about what crimes should be classed as *crimen falsi*. *See id.* at 730 (“But the extent and meaning of the term, ‘*crimen falsi*,’ in our law, is nowhere laid down with precision.”). In addition, the disqualification sometimes applied only in the jurisdiction where the conviction occurred. *See id.* at 732 (citing examples in note 3). Thus, a conviction in one state did not necessarily render a person incompetent to testify in the courts of another state or in federal court. *Id.* In such cases, the conviction “might be shown in diminution of the credit due to his testimony.” *Id.*

²³*Green*, 490 U.S. at 511; 2 WIGMORE, *supra* note 8, § 519 at 727; 1 MCCORMICK ON EVIDENCE, *supra* note 16, § 42.

acts, courts disagreed about what kinds of convictions could be used to impeach.²⁴ Some courts allowed impeachment only with crimes that would formerly have disqualified the witness from testifying.²⁵ Other courts limited impeachment to felonies,²⁶ or to crimes of infamy,²⁷ or to crimes of infamy and *crimen falsi*.²⁸ In some jurisdictions all crimes could be used to impeach, including misdemeanors,²⁹ although some courts excluded misdemeanors that did not involve moral turpitude.³⁰ Unlike bad acts, convictions could be proven with extrinsic evidence.³¹

²⁴1 MCCORMICK ON EVIDENCE, *supra* note 16, § 42 ("Just as the common law definition of disqualifying crimes was not very precise, the abrogating statutes and rules suffer from indefiniteness. In particular, the definitions of crimes for which a conviction shall be ground of impeachment vary widely among the states . . .").

²⁵*See, e.g.*, *Solomon v. United States* 297 F. 82, 92 (1st Cir. 1924) (holding admissible crime that would formerly have disqualified witness); *State v. Randolph*, 24 Conn. 362, 364 (1856) (same); *Bartholomew v. People*, 104 Ill. 601, 607 (1882) (same).

²⁶*See, e.g.*, *Hanners v. McClelland*, 37 N.W. 389, 391 (Iowa 1888) (holding that plaintiff's witness may be interrogated as to his previous conviction for felony); *Young Men's Christian Ass'n v. Rawlings*, 83 N.W. 175, 175 (Neb. 1900) (refusing to allow impeachment of defendant with offenses below felony under statute).

²⁷*See, e.g.*, *Bartholomew v. People*, 104 Ill. 601, 607 (1882) (holding that infamous offense is provable); *Wilbur v. Flood*, 16 Mich. 40, 44 (1867) (holding that defendant's convictions of "infamous crimes" can be used to impeach).

²⁸*E.g.*, *State v. Randolph*, 24 Conn. 363, 364 (1856); *Matzenbaugh v. People ex rel. Galloway*, 62 N.E. 546, 548 (Ill. 1901).

²⁹*See, e.g.*, *Ball v. United States*, 147 F. 32, 38–39 (9th Cir. 1906) (holding misdemeanors admissible under Alaska law even if committed in another jurisdiction); *Pierson v. State*, 123 N.E. 118, 120 (Ind. 1919) (allowing cross-examination as to fornication conviction); *State v. Manuel*, 63 So. 174, 176 (La. 1913) (stating that cross-examination is not limited to felonies and allowing questions about fence cutting); *State v. Griggsby*, 42 So. 497, 498 (La. 1906) (admitting defendant's conviction in city court); *State v. Sauer*, 44 N.W. 115, 116 (Minn. 1890) (holding that "crimes" are not restricted to those that caused common law disqualification but also include misdemeanors); *State v. Henson*, 50 A. 468, 469 (N.J. 1901) (stating that crime of any kind may be used to impeach); *Roop v. State*, 34 A. 749, 749–50 (N.J. 1896) (admitting evidence that defendant kept disorderly house).

³⁰*See, e.g.*, *Lovinger v. State*, 146 S.E. 346, 347 (Ga. Ct. App. 1929) (holding conviction for misdemeanor not involving moral turpitude inadmissible).

³¹*See, e.g.*, *State v. Price*, 160 N.W. 677, 681 (Minn. 1916) (holding defendant's prior conviction provable "either by the record or by his cross-examination"); *Wilbur v. Flood*, 16 Mich. 40, 44 (1867) (stating that defendant "may be proved by record evidence to have been convicted of infamous crimes"). Wigmore gives two reasons why convictions may be proven with extrinsic evidence while prior bad acts may not. 3A WIGMORE, *supra* note 8, § 980, at 828. First, there is rarely confusion of issues by creating mini-trials as to whether the prior conduct resulting in conviction happened, both because the number of prior convictions usually is small and because the record usually provides conclusive proof. *Id.* Second, the witness is unlikely to be unfairly surprised, both because he is presumed to know that his prior convictions may be used to impeach his credibility, and because he typically would not be allowed to submit proof that he was innocent of the crime. *Id.*

In sum, during the eighteenth and nineteenth centuries, courts were inconsistent *within* each method of impeachment. The permissible scope of cross-examination about both bad acts and convictions varied so greatly because judges held a broad range of views as to what kinds of misconduct bore on credibility.³² There was less inconsistency, however, *between* the two methods of impeachment. In deciding whether to allow impeachment, judges appeared to focus more on the nature of the prior misconduct than on whether the witness had been convicted of it. For example, if a judge believed that robbery was probative of untruthfulness, the judge would likely allow a witness to be cross-examined about a robbery whether or not it resulted in a conviction. The overlap was not complete because impeachment by bad acts encompassed more kinds of wrongdoing than impeachment by conviction. Bad acts include noncriminal as well as criminal conduct, while convictions are limited to criminal misconduct. Nonetheless, as to criminal misconduct, individual judges were more likely to be consistent between the two methods of impeachment, either allowing the cross-examination or not depending on their views as to what kind of misconduct bore on credibility.³³

³²See *supra* notes 20–21 and accompanying text.

³³*Territory v. Chavez*, 45 P. 1107 (N.M. 1896), provides an example of a court treating bad acts and convictions in a very similar manner. See *id.* at 1107. The court barely distinguished between the two, holding that both could be used to impeach credibility. *Id.* Chavez was charged with the murder of Gabriel Sandoval. *Id.* The only witnesses whose testimony directly connected the defendant with the crime were, by their own accounts, accomplices in the crime. *Id.* at 1107–08. The witnesses also were notorious outlaws. *Id.* at 1108. One had been convicted of larceny and had pled guilty to the murder of another man, Patricio Maes. *Id.* Another witness allegedly was involved in the Maes murder and also had been charged with robbing a store and post office and cow-stealing although he had not been prosecuted for any of these crimes, apparently in exchange for his testimony against the defendant. *Id.* at 1109. The trial court forbade cross-examination of the witnesses as to any of these matters. *Id.* at 1108–09. The territorial supreme court reversed. *Id.* at 1110. The court drew a distinction between cross-examination as to trivial matters intended to embarrass a witness, which might properly be denied, and cross-examination as to more serious wrongdoing, which should be allowed:

Assaults upon a witness by cross-examination into collateral matters cannot be allowed to gratify the caprice or the displeasure of those against whom he testifies; and intrusions into private affairs, which are calculated merely to wound the feelings, humiliate, or embarrass the witness, will not be permitted But a clear distinction is to be taken between those matters . . . and . . . matters, on the other hand, which are calculated, in an important and material respect, to influence the credit to be given to his testimony. As to the latter class, the witness cannot be shielded from disclosing his own character on cross-examination, and for this purpose he may be interrogated upon specific acts and transactions of his past life; and if they are not too remote in time, and clearly relate to the credit of the witness, in an important and material respect, it would be error to exclude them.

Id. at 1108 (citations omitted). The court did not distinguish between the witnesses' misconduct that resulted in convictions and that which did not, holding both admissible. *Id.* at 1109. The court stated: "[W]e think that the court committed serious error in so sustaining these objections we have

Inconsistency within each method of impeachment continued in the twentieth century during the years before the enactment of the Federal Rules of Evidence in 1975. American courts, both state and federal, articulated a remarkably wide range of ever-more nuanced standards for admission of both bad acts and convictions.³⁴ Not surprisingly, state and federal courts routinely issued conflicting decisions as to whether particular misconduct or convictions could be used to impeach.³⁵

Some state courts articulated a very permissive standard of admissibility for bad acts. In South Carolina, for example, a witness could be questioned about “specific acts which tend to discredit the witness or impeach his moral character;”³⁶ in Tennessee, about acts “involving moral turpitude, which disclose his conduct, antecedents and character . . . ‘whether they relate to domestic relations or other habits;’”³⁷ and in New York, about “‘any vicious or criminal act of his life’ that has a bearing on his credibility as a witness.”³⁸ Bad acts affected credibility, according to the New York Court of Appeals, if they “revealed a willingness or disposition . . . voluntarily to place the advancement of [a witness’s] individual self-interest ahead of principle or of the interests of society.”³⁹

Other state courts articulated narrower standards. For example, the Connecticut Supreme Court required that bad acts show “a lack of veracity and not merely general bad character”⁴⁰ and that the acts must “have a logical tendency to indicate a lack of veracity.”⁴¹ Decisions in Kansas and North Carolina

mentioned; We think it quite clear that the matters sought affected in an important degree the credit of the witnesses, and it was entirely competent to attack their credibility in this way upon cross-examination. . . .” *Id.*

³⁴See 2A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 416, at 162 (3d ed. 2000) (“Before 1975 . . . there had been an astonishing variety of views among the federal courts, as among American courts generally, on the impeachment of a witness by inquiry about prior criminal convictions.”).

³⁵See *infra* notes 54–68 and accompanying text.

³⁶*Schreiberg v. So. Coating & Chem. Co.*, 97 S.E.2d 214, 216 (S.C. 1957) (citation omitted).

³⁷*State v. Jones*, 385 S.W.2d 80, 83 (Tenn. 1964) (quoting treatise and *Zanone v. State*, 36 S.W. 711, 715 (Tenn. 1896)). Arkansas also allowed a witness to be questioned “about his personal habits and associates.” *Adams v. State*, 318 S.W.2d 599, 601 (Ark. 1958).

³⁸*People v. Sorge*, 93 N.E.2d 637, 638 (N.Y. 1950) (quotation omitted).

³⁹*People v. Sandoval*, 314 N.E.2d 413, 417 (N.Y. 1974).

⁴⁰*Vogel v. Sylvester*, 174 A.2d 122, 127 (Conn. 1961); see also *State v. Schutte*, 117 A. 508, 512 (Conn. 1922) (“[C]ross-examination of a witness [sic] acts of misconduct tending merely to show bad moral character in general are not admissible.”)

⁴¹*Vogel*, 174 A.2d at 127.

appeared to limit questions to criminal conduct, although the violations of law plainly did not have to be serious.⁴²

Federal courts also applied a wide range of standards for bad act impeachment.⁴³ Some federal courts did not allow impeachment unless the misconduct resulted in a conviction.⁴⁴ Others allowed questioning as to misconduct that would constitute a felony or a misdemeanor amounting to *crimen falsi* if prosecuted.⁴⁵ Some courts allowed questioning about bad acts to impeach only if the acts were not collateral; that is, if the proponent would be entitled to prove the acts as a part of his or her case in chief.⁴⁶ Finally, some federal courts allowed very broad impeachment.⁴⁷

Standards for impeachment by convictions also varied greatly among both state and federal courts. The Utah Supreme Court provided a summary of the different state approaches in *State v. Johnson*.⁴⁸ Some jurisdictions allowed impeachment with felonies, infamous crimes, and crimes involving moral turpitude, but not with misdemeanors or minor offenses not involving infamy or

⁴²See, e.g., *State v. Killion*, 148 P. 643, 645 (Kan. 1915) (stating that witness “may be interrogated . . . in regard to his past conduct and character, to any altercations or offenses, and to his having used dangerous weapons at other times”); *State v. Neal*, 23 S.E.2d 911, 912 (N.C. 1943) (holding that defendant could be questioned “as to her various infractions of law, including cutting affrays, larceny, vagrancy, nuisance, and violation of the prohibition law”).

⁴³See, e.g., *United States v. Klass*, 166 F.2d 373, 376 (3d Cir. 1948) (“There is, indeed, a conflict as to whether acts of misconduct not resulting in conviction are the proper subject of cross-examination to impeach a witness.”).

⁴⁴See, e.g., *Ingram v. United States*, 106 F.2d 683, 684 (9th Cir. 1939) (recognizing similar ruling); *Homan v. United States*, 279 F.2d 767, 771 (8th Cir. 1960) (“[A]cts of prior misconduct on the part of a witness not resulting in his conviction of a crime may not be delved into on cross-examination, in an attempt to impeach the credibility of his testimony.”); *McKune v. United States*, 296 F. 480, 481 (9th Cir. 1924) (recognizing similar ruling).

⁴⁵See, e.g., *United States v. Klass*, 166 F.2d 373, 376 (3d Cir. 1948). The court saw “no reason why the standard should be less exacting where no conviction is involved.” *Id.*

⁴⁶See, e.g., *Gideon v. United States*, 52 F.2d 427, 430 (8th Cir. 1931) (prohibiting questioning about bad acts to impeach because acts were not subject of direct examination).

⁴⁷The Tenth Circuit, for example, articulated the following standard:

[Q]uestions asked on cross-examination for the purposes of impeachment should be confined to acts or conduct which reflect upon [the witness’s] integrity or truthfulness, or so “pertain to his personal turpitude, such as to indicate such moral depravity or degeneracy on his part as would likely render him insensible to the obligations of an oath to speak the truth.”

Coulston v. United States, 51 F.2d 178, 181 (10th Cir. 1931) (quoting *Miller v. Territory of Oklahoma*, 149 F. 330, 338 (8th Cir. 1906)); see also *Barnard v. Wabash R.R. Co.*, 208 F.2d 489, 497 (8th Cir. 1953) (permitting witness to be asked “whether he has committed particular wrongful or immoral acts” (citations omitted)); *Simon v. United States*, 123 F.2d 80, 85 (4th Cir. 1941) (permitting witness to be questioned “as to misconduct, even as to collateral matters, which has a tendency to show his lack of honesty or truthfulness”).

⁴⁸287 P. 909 (Utah 1930).

moral turpitude.⁴⁹ Some states limited impeachment to felonies, while others admitted all grades of offenses, or any crime involving moral turpitude.⁵⁰ Finally, some courts limited impeachment to the traditional categories of “treason, felony, and *crimen falsi*.”⁵¹ Different federal court approaches are summarized by Charles A. Wright as follows:

Support could have been found in the federal cases for each of the following positions: a witness may be impeached by inquiry about any conviction of crime, whether felony or misdemeanor; felonies may be shown but misdemeanors may not; only crimes involving moral turpitude may be shown; any felony may be shown but misdemeanors only if they involve moral turpitude; all felonies and those misdemeanors amounting to *crimen falsi*; or that only crimes resting on dishonest conduct may be shown.⁵²

Although the diverse standards in federal courts for impeachment by both convictions and bad acts doubtless reflected genuine differences of opinion among federal judges, in many cases the diversity was due to the fact that federal courts applied state law. Thus, the state diversity was mirrored at the federal level.

With such a wide range of standards, it is not surprising that courts issued flatly inconsistent rulings about the admissibility of specific bad acts and convictions. As to bad acts, courts disagreed about cross-examination about acts

⁴⁹*Id.* at 913.

⁵⁰*Id.* In states where statutes permitted “conviction of crime” to be admitted, some courts construed “crime” to include felonies and misdemeanors while others included only felonies and nonfelonies “involving moral turpitude or depravity, or infamous in [their] nature.” *Id.* at 914.

⁵¹*Kornreich v. Indus. Fire Ins. Co.*, 5 N.E.2d 153, 158 (Ohio 1936).

⁵²2A WRIGHT ET AL., *supra* note 34, § 416, at 162–65 (citations omitted).

of unchastity,⁵³ marital infidelity,⁵⁴ gambling,⁵⁵ vagrancy,⁵⁶ prostitution,⁵⁷ assault,⁵⁸ theft of property,⁵⁹ having illegitimate children,⁶⁰ having unsavory associates,⁶¹ and liquor offenses.⁶² As to convictions, courts disagreed about the

⁵³*Compare* *Williams v. State*, 2 S.W.2d 36, 40 (Ark. 1927) (allowing cross-examination about prior acts of unchastity), *State v. Brooks*, 165 N.W. 194, 198 (Iowa 1917) (same), *State v. McCombs*, 181 P.2d 473, 477 (Kan. 1947) (same), and *People v. Cutler*, 163 N.W. 493, 495–96 (Mich. 1917) (same), with *Sage v. State*, 195 P. 533, 537 (Ariz. 1921) (prohibiting cross-examination about prior acts of unchastity), *State v. Knox*, 18 N.W.2d 716, 720 (Iowa 1945) (same), *Annarina v. Boland*, 111 A. 84, 89 (Md. 1920) (same), and *Sherrick v. State*, 61 N.W.2d 358, 361, 366 (Neb. 1953) (same).

⁵⁴*Compare* *People v. Hunter*, 160 N.E. 192, 193 (Ill. 1928) (allowing questions about marital infidelity), and *Vogel v. Sylvester*, 174 A.2d 122, 127–28 (Conn. 1961) (same), with *Ingram v. United States*, 106 F.2d 683, 684 (9th Cir. 1939) (refusing to permit questions about marital infidelity), *State v. Schutte*, 117 A. 508, 512 (Conn. 1922) (same), *Kremis v. Kremis*, 161 A. 255, 257 (Md. 1932) (same), and *United States v. Stone*, 472 F.2d 909, 916 (5th Cir. 1973) (same).

⁵⁵*Compare* *State v. Fowler*, 373 S.W.2d 460, 466 (Tenn. 1963) (permitting cross-examination about crooked gambling activities), with *People v. Blockburger*, 188 N.E. 440, 444 (Ill. 1933) (holding cross-examination about betting on horses improper).

⁵⁶*Compare* *State v. Neal*, 23 S.E.2d 911, 912 (N.C. 1943) (allowing question about vagrancy), with *Wardrope v. State*, 340 S.W.2d 498, 499 (Tex. Crim. App. 1960) (prohibiting question about prior drunk and disorderly conduct).

⁵⁷*Compare* *State v. Allen*, 435 S.W.2d 375, 377 (Mo. 1968) (allowing women to be asked whether they are prostitutes), *State v. Jones*, 385 S.W.2d 80, 83 (Tenn. 1964) (same), and *Campbell v. State*, 230 S.W. 695, 696 (Tex. Crim. App. 1921) (same), with *McKune v. United States*, 296 F. 480, 481 (9th Cir. 1924) (holding improper cross-examination of government witness as to being prostitute).

⁵⁸*Compare* *State v. Killion*, 148 P. 643, 645 (Kan. 1915) (allowing witness to be questioned about prior assault), *State v. Pfeifer*, 56 P.2d 442, 444 (Kan. 1935) (same), *State v. Flowers*, 114 N.W.2d 78, 82 (Minn. 1962) (same), and *State v. Neal*, 23 S.E.2d 911, 912 (N.C. 1943) (same), with *Adams v. State*, 318 S.W.2d 599, 601 (Ark. 1958) (prohibiting questions about prior assaults).

⁵⁹*Compare* *State v. Neal*, 23 S.E.2d 911, 912 (N.C. 1943) (permitting question about larceny), with *State v. Miller*, 22 S.W.2d 642, 644 (Mo. 1929) (prohibiting cross-examination of state witness about prior recent theft of car).

⁶⁰*Compare State ex rel. Emery v. Christensen*, 294 P. 892, 894 (Kan. 1931) (allowing cross-examination about having children out of wedlock), *State v. Cruz*, 285 P. 500, 500 (N.M. 1930) (same), and *Mobley v. State*, 232 S.W. 531, 535–36 (Tex. Crim. App. 1921) (same), with *Smiley v. State*, 118 S.E. 713, 714 (Ga. 1923) (prohibiting questions about having illegitimate children), and *Moore v. United States*, 394 F.2d 818, 819 (5th Cir. 1968) (same).

⁶¹*Compare* *State v. Quinn*, 243 N.W. 70, 74 (Minn. 1932) (allowing cross-examination as to defendant's life history, including gang connections), with *Sights v. State*, 166 P. 458, 460 (Okla. Crim. App. 1917) (holding cross-examination of witness as being associate of prostitutes and bootleggers improper).

⁶²*Compare* *Denny v. State*, 129 N.E. 308, 309 (Ind. 1921) (allowing cross-examination about liquor offenses), *State v. Sherry*, 64 S.W.2d 238, 240 (Mo. 1933) (same), *State v. Colson*, 139 S.E. 230, 231 (N.C. 1927) (same), and *Strickland v. State*, 284 P. 651, 653 (Okla. Crim. App. 1930) (same), with *State v. Umphalbaugh*, 228 N.W. 266, 267 (Iowa 1929) (forbidding questioning about liquor offenses), *State v. Ross*, 267 S.W. 853, 854 (Mo. 1924) (same), *Wisdom v. State*, 193 P. 1003, 1004 (Okla. Crim. App. 1920) (same), and *Schreiberg v. S. Coatings & Chem. Co.*, 97 S.E.2d 214, 216–17 (S.C. 1957) (same).

admissibility of convictions for speeding and other traffic offenses,⁶³ driving while intoxicated,⁶⁴ disorderly conduct (and drunkenness),⁶⁵ assault,⁶⁶ and larceny.⁶⁷

As in earlier times, there was more consistency *between* the methods of impeachment than there was *within* each method. Judges taking a broad view allowed cross-examiners to raise any act or conviction that involved moral turpitude or generally was viewed as wrong or unsavory.⁶⁸ Judges taking a more restrictive view tended to exclude relatively minor misconduct and less serious convictions.⁶⁹ Almost all courts allowed impeachment with serious criminal misconduct, whether it resulted in a conviction⁷⁰ or not.⁷¹ Finally, courts

⁶³*Compare* *Way v. State*, 66 N.E.2d 608, 610 (Ind. 1946) (allowing cross-examination about conviction for speeding), *and* *State v. Cox*, 333 S.W.2d 25, 29 (Mo. 1960) (allowing cross-examination about conviction for driving without license), *with* *Dixie Culvert Mfg. Co. v. Richardson*, 236 S.W.2d 713, 714 (Ark. 1951) (refusing to admit conviction for speeding), *and* *Nesbit v. Cumberland Contracting Co.*, 75 A.2d 339, 341 (Md. 1950) (refusing to allow cross-examination of plaintiff about convictions for traffic offenses).

⁶⁴*Compare* *McMullen v. Cannon*, 150 N.E.2d 765, 766 (Ind. Ct. App. 1958) (allowing questions about conviction for driving while intoxicated), *with* *Souden v. Johnson*, 125 N.W.2d 742 (Minn. 1963) (disallowing questions about convictions for drunk driving), *and* *Thomas v. Devine*, 140 A. 324, 325 (N.J. 1928) (same).

⁶⁵*Compare* *Way v. State*, 66 N.E.2d 608, 610 (Ind. 1946) (allowing impeachment with disorderly conduct conviction), *and* *State v. Lafferty*, 415 S.W.2d 792, 795 (Mo. 1967) (admitting conviction for drunkenness), *with* *People v. Beard*, 214 N.E.2d 577, 579 (Ill. App. Ct. 1966) (holding conviction for disorderly conduct not admissible because not infamous crime), *State v. Block*, 196 A. 225, 229 (N.J. 1938) (holding conviction as disorderly person inadmissible), *and* *State v. Johnson*, 287 P. 909, 914 (Utah 1930) (holding conviction for drunkenness not admissible because only misdemeanor).

⁶⁶*Compare* *State v. Rodia*, 39 A.2d 484, 486 (N.J. 1944) (allowing impeachment with prior assault convictions), *and* *State v. Reese*, 192 N.E.2d 791, 794 (Ohio Ct. App. 1962) (same), *with* *Green v. State*, 155 A. 164, 168 (Md. 1931) (holding assault conviction properly excluded).

⁶⁷*Compare* *Caldwell v. State*, 213 So.2d 919, 926 (Ala. 1968) (admitting prior larceny conviction for impeachment), *State v. Lafferty*, 415 S.W.2d 792, 795 (Mo. 1967) (same), *and* *Commonwealth v. Gold*, 38 A.2d 486, 489 (Pa. Super. Ct. 1944) (same), *with* *Sibley v. Jeffreys*, 264 P.2d 831, 834 (Ariz. 1953) (refusing to allow impeachment with prior larceny conviction), *and* *People v. Birdette*, 177 N.E.2d 170, 172-73 (Ill. 1961) (same).

⁶⁸*See supra* notes 53-62 and accompanying text.

⁶⁹*See supra* notes 53-62 and accompanying text.

⁷⁰*See, e.g.,* *People v. Davis*, 107 N.E.2d 607, 612 (Ill. 1952) (admitting conviction for armed robbery); *Taylor v. State*, 174 A.2d 573, 575 (Md. 1961) (allowing defendant to be cross-examined about conviction for assault with deadly weapon); *Green v. State*, 155 A. 164, 167 (Md. 1931) (admitting evidence of prior rape conviction).

⁷¹*See, e.g.,* *Barnard v. Wabash R.R. Co.*, 208 F.2d 489, 497 (8th Cir. 1953); *Gaines v. State*, 186 S.W.2d 154, 157 (Ark. 1945) (allowing cross-examination about whether defendant had shot two persons on another occasion); *State v. Archer*, 255 P. 396, 400 (N.M. 1927) (permitting questioning about prior shooting); *Janeway v. State*, 71 P.2d 130, 134-35 (Okla. Crim. App. 1937) (allowing cross-examination about witness's prior robberies).

continued to follow the rule that prior convictions could be proven with extrinsic evidence, if necessary,⁷² while prior bad acts could not.⁷³

B. Early Attempts at Codification

Amidst the common law discord, reformers suggested limits on impeachment with convictions. The Model Code of Evidence, issued by the American Law Institute in 1942, provided that an accused could not be impeached with a conviction unless he first introduced evidence “for the sole purpose of supporting his credibility.”⁷⁴ This provision allowed an accused to avoid the “harsh dilemma”⁷⁵ of testifying and seeing his prior record “doom his defense”⁷⁶ or not testifying and being seen as a guilty person with something to hide.⁷⁷ Witnesses other than an accused, by contrast, could be broadly impeached on cross-examination or by extrinsic evidence “concerning any conduct by him and any other matter relevant upon the issue of his credibility as a witness.”⁷⁸

⁷²See, e.g., *Coulston v. United States*, 51 F.2d 178, 181-82 (10th Cir. 1931) (permitting prior conviction to be proven by extrinsic evidence); *Oklahoma ex rel. Nesbitt v. Allied Materials Corp.*, 312 F. Supp. 130, 132 (W.D. Okla. 1968) (same); *State v. Price*, 160 N.W. 677, 681 (Minn. 1916) (same); *People v. Sorge*, 93 N.E.2d 637, 639 (N.Y. 1950) (same); *State v. Johnson*, 287 P. 909, 913 (Utah 1930) (same).

⁷³See, e.g., *United States v. Sweeney*, 262 F.2d 272, 276 (3d Cir. 1959) (stating that prior bad act may not be proven with extrinsic evidence); *Simon v. United States*, 123 F.2d 80, 85 (4th Cir. 1941) (same); *Gideon v. United States*, 52 F.2d 427, 430 (8th Cir. 1931) (same); *People v. Sorge*, 93 N.E.2d 637, 639 (N.Y. 1950) (same); *State v. Jones*, 385 S.W.2d 80, 83 (Tenn. 1964) (same).

⁷⁴See MODEL CODE OF EVID. R. 106(3) (1942). The rule read: “If an accused who testifies at the trial introduces no evidence for the sole purpose of supporting his credibility, no evidence concerning his commission or conviction of crime shall, for the sole purpose of impairing his credibility, be elicited on his cross-examination or be otherwise introduced against him . . .” *Id.*

⁷⁵1 MCCORMICK ON EVIDENCE, *supra* note 16, § 42.

⁷⁶*Id.*

⁷⁷MODEL CODE OF EVID. R. 106 cmt., at 128-29.

⁷⁸*Id.* R. 106(1). The only exception, oddly enough, was that extrinsic evidence was not admissible to prove any conviction not involving dishonesty or false statement. See *id.* R. 106(1)(b). The relevant portion of the rule read:

[F]or the purpose of impairing or supporting the credibility of a witness, any party . . . may examine him and introduce extrinsic evidence concerning any conduct by him and any other matter relevant upon the issue of his credibility as a witness . . . except that extrinsic evidence shall be inadmissible . . . (b) [to prove] his conviction of crime not involving dishonesty or false statement.

Id. The rule allowed cross-examination of a witness other than an accused regarding his conviction for any crime, so long as the court believed it was “relevant upon the issue of his credibility,” and allowed extrinsic evidence to be admitted to prove a *crimen falsi* conviction. *Id.*

There is some indication in the comments to Rule 106 that the authors believed they were limiting impeachment of witnesses other than an accused to convictions that involved dishonesty or false statement. For example, the comments state that “[Clause] (b) of Paragraph (1) definitely confine[s] evidence of crime to matters having to do rather directly with credibility.” *Id.* cmt., at

In language similar to the Model Code, Rule 20 of the Uniform Rules of Evidence⁷⁹ permitted broad impeachment of a witness either upon cross-examination or with extrinsic evidence as to any conduct a court deemed relevant to credibility.⁸⁰ Subsequent provisions carved out exceptions. Rule 21 provided that an accused could not be impeached with any prior conviction unless the accused first introduced evidence solely to support credibility.⁸¹ Rule 21 also appeared to bar impeachment of witnesses other than an accused with convictions that did not involve dishonesty or false statement.⁸² The Model Code and the Uniform Rules marked the beginning of the modern practice of distinguishing more sharply between the methods of impeachment. Although restricting impeachment with convictions, both the Model Code and the Uniform Rules allowed any witness, including a criminal defendant, to be asked on cross-examination about any misconduct relevant to credibility.⁸³ It is surprising no

119. The comments also state that "Clause (b) of Paragraph (1) limit[s] . . . [t]he type of crime evidence of the conviction of which is admissible to impair the credibility of any witness [to] that which involves dishonesty or false statement." *Id.* at 122. Unfortunately, this language is ambiguous. It is unclear whether the authors meant only to prohibit the use of extrinsic evidence except for *crimen falsi* convictions or whether they meant to bar cross-examination concerning non-*crimen falsi* convictions as well. In any event, regardless of what the authors of the rule meant to say, what they said is as set forth above.

⁷⁹The Uniform rules were drafted by the National Conference of Commissioners on Uniform State Laws and approved at its Annual Conference in 1953.

⁸⁰UNIF. R. EVID. 20 (1953) (superseded 1974). The rule read: "[F]or the purpose of impairing or supporting the credibility of a witness, any party . . . may examine him and introduce extrinsic evidence concerning any conduct by him and any other matter relevant upon the issues of credibility." The language is nearly identical to the language of Model Rule 106(1). *See supra* note 78.

⁸¹*See* UNIF. R. EVID. 21 (1953) (superseded 1974), which read in part: "If the witness be the accused in a criminal proceeding, no evidence of his conviction of a crime shall be admissible for the sole purpose of impairing his credibility unless he has first introduced evidence admissible solely for the purpose of supporting his credibility."

⁸²Rule 21 provided that "Evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissible for the purpose of impairing his credibility." *Id.* While this language might be read to prohibit both cross-examination and introduction of extrinsic evidence concerning non-*crimen falsi* convictions of witnesses other than the accused, the comment to the rule raises some doubt. It reads: "This rule is the same as the Model Code." *Id.* cmt., at 175. Rule 106(b) (1) of the Model Code merely prohibited introduction of extrinsic evidence to prove non-*crimen falsi* convictions of witnesses other than the accused and did not bar cross-examination about such crimes. *See supra* notes 74–78 and accompanying text. And, as noted above, the comments to Rule 106(b)(1) were ambiguous on this point. *See supra* note 78.

⁸³The Model Code provided that a witness could be examined "concerning any conduct by him and any other matter relevant upon the issue of his credibility as a witness." MODEL CODE OF EVID. R. 106(1). The Code did forbid prior conduct to be proven by extrinsic evidence. *See id.* R.106(1)(c). The Uniform Rules contained very similar language, allowing a witness to be examined "concerning any conduct by him and any other matter relevant upon the issues of credibility." UNIF. R. EVID. 20. The Uniform Rules also appeared to disallow proof of bad acts with extrinsic evidence. *See id.* 22(d). The language of Rule 22(d) might be read somewhat more broadly

attempt was made to restrict impeachment with bad acts because bad acts pose the same dangers of unfair prejudice as convictions.

The Model Code of Evidence was not adopted by any jurisdiction,⁸⁴ and only a few states adopted modified versions of the Uniform Rules.⁸⁵ Nonetheless, these reform efforts influenced subsequent developments. For example, Rule 106 of the Model Code and Uniform Rule 21 were cited with approval in the influential case of *Luck v. United States*.⁸⁶ A District of Columbia Code provision stated that a witness's prior conviction "may be given in evidence to affect his credibility as a witness."⁸⁷ *Luck* interpreted the provision to give trial courts discretion to bar impeachment where the danger of unfair prejudice outweighed probative value or where an accused would be deterred from testifying.⁸⁸ *Gordon v. United States*⁸⁹ refined *Luck* by detailing the factors a trial judge should consider in exercising discretion. The factors were: (1) whether the prior conviction rested directly on dishonest conduct; (2) whether the conviction was remote or recent; (3) whether the conviction and the crime charged were similar; (4) the need for

to restrict cross-examination as to bad acts as well. The rule reads: "[E]vidence of specific instances of [a witness's] conduct relevant only as tending to prove a trait of his character, shall be inadmissible." *Id.* Because the immediately preceding clause in Rule 22(c) specifically refers to character for honesty or veracity as one trait of a person's character, *see id.* 22(c), and because "evidence" might be a question on cross-examination in addition to extrinsic evidence, the rule might be read to ban bad act impeachment of witnesses. It seems unlikely, however, that this result was intended. The comment to Rule 22(d) reads: "Clause (d), as contrasted to Rule 46, prohibits proof of specific instances of conduct to prove a character trait where the purpose is impeachment." *Id.* 22(d) cmt. This language appears to restate the traditional rule that extrinsic evidence of bad acts is not admissible to prove the witness has a poor character for truthfulness, i.e., to impeach credibility. Rule 46 of the Uniform Rules, like Federal Rule 405(b), allows admission of specific instances of conduct in the relatively rare cases where a trait of character is an essential element of a charge, claim, or defense. *Id.* 46. In such cases, of course, the evidence will usually be extrinsic because it is not being brought out through cross-examination of a witness but as a part of a party's case-in-chief. In any event, it seems unlikely that the authors of the Uniform Rules intended to overturn hundreds of years of practice allowing more or less impeachment by acts without some clear statement to that effect.

⁸⁴See John R. Schmertz, Jr., *The First Decade Under Article VI of the Federal Rules of Evidence: Some Suggested Amendments to Fill Gaps and Cure Confusion*, 30 VILL. L. REV. 1367, 1368 n.2 (1985); Robert G. Spector, *Impeaching the Defendant by His Prior Convictions and the Proposed Federal Rules of Evidence: A Half Step Forward and Three Steps Backward*, 1 LOY. U. CHI. L.J. 247, 252 (1970).

⁸⁵Schmertz, *supra* note 84, at 1368 n.2; Spector, *supra* note 84, at 252.

⁸⁶348 F.2d 763, 768 n.8 (D.C. Cir. 1965); *see also* *United States v. Sternback*, 402 F.2d 353, 356 (7th Cir. 1968) (stating, in individual opinion, that Uniform Rule 21 "is sound policy and ought to be adopted by legislation or exercise of judicial rule making power"); *United States v. Palumbo*, 401 F.2d 270, 272 (2d Cir. 1968) (mentioning but declining to adopt standards of Model Code Rule 106 and Uniform Rule 21).

⁸⁷See Act of Dec. 23, 1963, ch. 3, § 14-305, 77 Stat. 519.

⁸⁸*Luck*, 348 F.2d at 767-68.

⁸⁹383 F.2d 936, 940 (D.C. Cir. 1967).

the defendant's testimony; and (5) the importance of the issue of credibility.⁹⁰ Although Congress subsequently amended the District of Columbia Code to overrule *Luck* and *Gordon*,⁹¹ several other circuits accepted *Luck-Gordon's* discretionary approach.⁹²

C. Enactment of the Federal Rules of Evidence

The impulse to codify continued despite the unhappy fate of the Model Code and the Uniform Rules.⁹³ A Special Committee appointed by Chief Justice Earl Warren concluded that uniform evidence rules for the federal courts were "advisable and feasible."⁹⁴ Subsequently, the Judicial Conference recommended that the Chief Justice appoint an Advisory Committee to draft rules.⁹⁵ On March 8, 1965, the Committee was appointed.⁹⁶

The Advisory Committee faced a daunting task, and no problem was more difficult than articulating generally acceptable standards for impeachment by convictions and bad acts. Given the widely disparate views concerning both methods of impeachment that had existed for over 200 years, it is hardly surprising that the rule-makers, and, subsequently, legislators, were unable to agree upon a specific set of standards. Commentators almost universally

⁹⁰*Id.* at 940-41.

⁹¹See Act of July 29, 1970, Pub. L. No. 91-358, § 133, 84 Stat. 473, 550-51.

⁹²See, e.g., *United States v. Palumbo*, 401 F.2d 270, 273 (2d Cir. 1968) (holding that trial judge may bar use of prior convictions to impeach defendant if judge "finds that a prior conviction negates credibility only slightly but creates a substantial chance of unfair prejudice, taking into account such factors as the nature of the conviction, its bearing on veracity, its age, and its propensity to influence the minds of the jurors improperly"); *United States v. Hildreth*, 387 F.2d 328, 329 (4th Cir. 1967) (stating that "court may impose limits on the cross-examination of a witness, especially a defendant, when there is reason to apprehend that the prejudicial effect of the earlier convictions sought to be adduced will outweigh their possible probative force in impeaching credibility"); see also *Sears v. United States*, 490 F.2d 150, 154 (8th Cir. 1974) (citing *Palumbo* factors with approval).

⁹³See Preliminary Study of the Advisability and Feasibility of Developing Uniform Rules of Evidence for the Federal Courts, 30 F.R.D. 73, 81-82 (1962) [hereinafter Preliminary Study], for a review of the recommendations of various official bodies that uniform evidence rules be adopted for the federal courts.

⁹⁴Preliminary Study, *supra* note 93, at 77.

⁹⁵1963 REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 20. The Judicial Conference acted upon the recommendation of its Standing Committee on Rules of Practice and Procedure.

⁹⁶21 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5006, at 98 (1977). Albert E. Jenner, Jr., a distinguished practitioner, was appointed Chairman, and Professor Edward W. Cleary, a leading expert on evidence law, was appointed Reporter. *Id.*

characterize the final versions of Rules 608(b) and 609 as compromises.⁹⁷ This is a very charitable characterization. Congress didn't compromise; it copped out. A compromise is an agreement upon an intermediate position between conflicting claims or principles.⁹⁸ Congress did not agree upon a specific intermediate position between those favoring wide-open impeachment and those favoring little or no impeachment, nor did Congress define what misconduct or crimes bear on credibility. Instead, Congress adopted rules with such general standards that federal judges could continue to permit whatever sort of impeachment they had allowed before the Federal Rules of Evidence were enacted, no matter what their position on the impeachment spectrum.

Disagreements surfaced early. Rule 6-09(a) of the Preliminary Draft of the Federal Rules made admissible all felony convictions and all convictions for crimes involving dishonesty or false statement.⁹⁹ Stung by criticism that Rule

⁹⁷See, e.g., Edward E. Gainor, *Character Evidence by Any Other Name . . . : A Proposal to Limit Impeachment by Prior Conviction Under Rule 609*, 58 GEO. WASH. L. REV. 762, 763 (1990) (characterizing Rule 609 as "the product of hard-fought political compromise"); Victor Gold, *Impeachment by Conviction Evidence: Judicial Discretion and the Politics of Rule 609*, 15 CARDOZO L. REV. 2295, 2296 (1994) (stating that Rule 609 "strikes a compromise between sharply conflicting policies"); Robert D. Okun, *Character and Credibility: A Proposal to Realign Federal Rules of Evidence 608 and 609*, 37 VILL. L. REV. 533, 541 (1992) (stating that "the Rule as originally enacted was a 'political compromise' between the discretionary approach embodied in *Luck* and the mandatory admissibility prevalent in the federal and state courts"); R. Michael Smith, *Impeaching the Merits: Rule 609(a)(1) and Civil Plaintiffs*, 13 N. KY. L. REV. 441, 444 (1987) ("[T]he version of Rule 609(a) that emerged from the Conference Committee was the result of a compromise within the legislature."); Roderick Surratt, *Prior-Conviction Impeachment Under the Federal Rules of Evidence: A Suggested Approach to Applying the "Balancing" Provision of Rule 609(a)*, 31 SYRACUSE L. REV. 907, 917 (1980) (stating that in final version of Rule 609, Congress "consciously and deliberately struck a 'political compromise' between two widely divergent positions"); Irving Younger, *Three Essays on Character and Credibility Under the Federal Rules of Evidence*, 5 HOFSTRA L. REV. 7, 11 (1976) (stating that Federal Rules of Evidence struck political compromise); see also *United States v. Smith*, 551 F.2d 348, 360–61 (D.C. Cir. 1976) (stating that "current language of the Rule is unquestionably the product of careful deliberation and compromise").

⁹⁸RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 421 (2d ed. 1987).

⁹⁹Comm. on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 295–96 (1969) [hereinafter Preliminary Draft]. The draft rule stated:

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

Id. Neither the text of this rule nor the Advisory Committee's Note made clear whether a court had discretion to prohibit impeachment with a conviction that fit within the terms of the rule. The rule says only that evidence "is admissible," not that it must be admitted. See *id.* The Advisory Committee's Note set forth various alternatives it had considered in drafting Rule 6-09(a), one of which was to "[l]eave the matter to the discretion of the trial judge." *Id.* at 299. The Note cited *Luck-Gordon* in support of this approach, but then stated that subsequent decisions attempting to set

609(a) did not provide for exclusion of convictions to avoid unfair prejudice, the Advisory Committee obligingly added such a provision¹⁰⁰ and enthusiastically endorsed the *Luck-Gordon* approach in a revised Note.¹⁰¹ This change evoked an angry response from Senator McClellan, who saw it as “a direct assault on the will of Congress”¹⁰² as expressed in the recent amendment to the District of Columbia Code explicitly rejecting *Luck-Gordon*.¹⁰³ Chastened, the Advisory Committee quickly retreated to the original version of the rule,¹⁰⁴ and it was this version the Supreme Court submitted to Congress.¹⁰⁵

While the Advisory Committee may have been intimidated by Senator McClellan, the House Judiciary Committee plainly was not. A subcommittee added a provision to Rule 609(a) giving a court discretion to exclude a felony conviction if the court determined that “the danger of unfair prejudice outweighs the probative value of the evidence of the conviction.”¹⁰⁶ The full Committee went

guidelines were “subject to . . . deficiencies.” *Id.* This language could be read to prohibit a court from exercising discretion to exclude a conviction.

¹⁰⁰See Comm. 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) [hereinafter Revised Draft]. The revised rule stated:

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

¹⁰¹*Id.* at 392–93.

¹⁰²See 117 CONG. REC. 29,894 (1971) (statement of Sen. McClellan).

¹⁰³See *supra* note 91 and accompanying text. Senator McClellan stated:

I find it incredible that within less than 8 months after the Congress fully considered and decisively rejected the Luck rule for the District of Columbia, . . . the Standing Committee on Rules of Practice and Procedure is now proposing that the Luck rule be adopted as the law of the land and applied in every Federal district court in the country. Apparently, the committee paid no attention to the congressional judgment on this matter.

Id. at 29,895. The Senator was so angry that he proposed legislation to restrict the delegation of power to the Supreme Court to prescribe rules of procedure. *Id.* at 29,894.

¹⁰⁴28 CHARLES A. WRIGHT & VICTOR J. GOLD, FEDERAL PRACTICE AND PROCEDURE § 6131, at 149 (1993).

¹⁰⁵See Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 269 (1972) [hereinafter Supreme Court Draft].

¹⁰⁶*Proposed Rules of Evidence: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary* 93d Cong., 1st Sess. 165 (1973) [hereinafter House Hearings]. The subcommittee’s note made clear its intent that this discretion only extended to felonies and not to crimes involving dishonesty or false statement. *Id.*

even further, allowing impeachment only by crimes involving dishonesty or false statement.¹⁰⁷

The debate of Rule 609(a) on the House floor reflected different views. Issue was joined when Representative Hogan offered an amendment substituting the Supreme Court version of Rule 609(a) for the Judiciary Committee version.¹⁰⁸ In support, he made the traditional argument in favor of wide-open impeachment:

Obviously, the character of a witness is material circumstantial evidence on the question of the veracity of the witness. Prior criminal conduct, including all prior felony convictions, is relevant evidence of such character. . . .

. . . .

. . . Should a witness with an antisocial background be allowed to stand on the same basis of believability before juries as law-abiding citizens with unblemished records? I think not.

. . . .

“A demonstrated instance of willingness to engage in conduct in disregard of accepted patterns is translatable into willingness to give false testimony.”¹⁰⁹

Representative Dennis argued the contrary view. He stressed the “grievous dilemma”¹¹⁰ faced by a criminal defendant¹¹¹ and accused the amendment’s supporters of “want[ing] to try people just because you think they are bad actors, and you ought to throw them in jail just on general principles”¹¹² Ultimately the House defeated the Hogan amendment and adopted Rule 609(a) as proposed by the Judiciary Committee.¹¹³

Disagreement about Rule 609(a) continued in the Senate. The Senate Judiciary Committee proposed that an accused be impeachable only with convictions involving dishonesty or false statement and that other witnesses could be impeached with any felony, unless the court determined that prejudice

¹⁰⁷See 120 CONG. REC. 2,374 (1974). The rule was revised to 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.”

¹⁰⁸*Id.* at 2,375–77.

¹⁰⁹*Id.* at 2,376 (quoting first draft of Advisory Committee’s Note on Rule 609). Representative Lott made a similar argument. *See id.* at 2,381.

¹¹⁰See *supra* note 107 and accompanying text.

¹¹¹“[P]eople are either frightened off the stand, and do not tell their story, or else they take the stand and are crucified by being asked about entirely irrelevant offenses.” 120 CONG. REC. at 2,377.

¹¹²*Id.*

¹¹³*Id.* at 2,381.

outweighed probity.¹¹⁴ Senator McClellan offered an amendment on the Senate floor making all felonies and any crime involving dishonesty or false statement admissible against any witness, including an accused, and deleting any reference to exclusion for unfair prejudice.¹¹⁵ During the floor debate, Senators made the familiar arguments for and against impeachment with prior convictions. Senator McClellan argued that serious crimes bear directly on a witness's willingness to lie;¹¹⁶ others countered by pointing to an accused's grievous dilemma¹¹⁷ and the futility of instructions directing jurors to consider the prior crime only as bearing on credibility.¹¹⁸ McClellan's amendment was accepted by a very close margin.¹¹⁹

The Conference Committee faced "the task of reconciling the two versions of Rule 609(a) which, from all those proposed, defined the scope of admissibility most narrowly and most broadly."¹²⁰ The Committee responded by proposing a

¹¹⁴See S. REP. NO. 93-1277, at 3 (1974). The proposed rule read:

(a) General rule.—For the purpose of attacking the credibility of a witness evidence that he has been convicted of a crime may be elicited from him or established by public record during cross-examination but only if the crime (1) involved dishonesty or false statement or (2) in the case of witnesses other than the accused, was punishable by death or imprisonment in excess of one year under the law under which he was convicted, but only if the court determines that the probative value of admitting the evidence outweighs its prejudicial effect.

Id.

¹¹⁵120 CONG. REC. at 37,075–76 (statement of Sen. McClellan). The proposed revision read:

(a) General rule.—For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted . . . if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which he was convicted or (2) involved dishonesty or false statement, regardless of the punishment.

Id. The Rule as submitted by the Supreme Court stated that "evidence that he has been convicted of a crime *is admissible*," 56 F.R.D. at 269 (emphasis added), while Senator McClellan's amendment stated that "evidence that he has been convicted of a crime *shall be admitted*," 120 CONG. REC. at 37,075 (emphasis added). This change suggests that the Senator wanted to eliminate discretion to exclude prior convictions.

¹¹⁶The Senator stated:

Surely a person who has committed a serious crime—a felony—will just as readily lie under oath as someone who has committed a misdemeanor involving lying. . . . The fact that a person has committed such a serious offense in the past clearly bears on whether he would lie under oath where his life or liberty was in jeopardy.

120 CONG. REC. at 37,076–77 (statement of Sen. McClellan).

¹¹⁷Senators Kennedy and Abourezk made this argument. *Id.* at 37,080–82 (statements of Sen. Kennedy & Sen. Abourezk).

¹¹⁸See *id.* at 37,078 (statement of Sen. Hart) ("I do not think one has to have spent a lifetime in criminal litigation to know that we are kidding ourselves if we think that the instruction removes the poison.").

¹¹⁹*Id.* at 37,083 (reporting 38 yes, 33 no, and 29 not voting).

¹²⁰WRIGHT & GOLD, *supra* note 104, § 6131, at 165.

rule that essentially left the entire matter in the discretion of trial courts,¹²¹ and this version ultimately was enacted by Congress. The rule read as follows:

For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.¹²²

This language is very vague and general; several perplexing issues are unresolved. Most obviously, the rule gives no guidance for deciding whether the probative value of a conviction outweighs its prejudicial effect.¹²³ What factors should a court consider in making that determination? Should it consider the *Luck-Gordon* factors¹²⁴ or some other factors? Are some felonies more probative of truthfulness than others, or are all felony convictions probative of truthfulness? The rule does not answer these questions.¹²⁵

In addition, it is unclear who may invoke the probity/prejudice balancing. The rule says a court must determine that “the probative value of admitting this evidence outweighs its prejudicial effect to the defendant,”¹²⁶ but it does not specify whether “defendant” is limited to an accused or also includes the defendant in a civil case.¹²⁷ Nor does the rule indicate whether witnesses or parties

¹²¹See H.R. REP. NO. 93-1597, at 9-10 (1974).

¹²²FED. R. EVID. 609(a) (1975) (amended 1990).

¹²³See Gainor, *supra* note 97, at 779 (“Neither Rule 609 nor its legislative history provide courts with any guidance in *how* to determine whether the probative value of a prior conviction introduced in evidence for impeachment outweighs its prejudicial effect to the defendant.”).

¹²⁴See *supra* notes 86, 89, 90 and accompanying text.

¹²⁵Other sections of Rule 609 provide some guidance on ancillary issues. Section (d) states that evidence of juvenile adjudications generally is inadmissible; however, a court has discretion in a criminal case to admit a juvenile adjudication to impeach a witness other than the accused “if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.” FED. R. EVID. 609(d) (1975). Section (b) states that evidence of a conviction is not admissible if more than ten years have elapsed from the date of conviction or the date of release from prison, but even here, a court has discretion to admit the conviction if it determines, “in the interest of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.” *Id.* 609(b).

¹²⁶*Id.* 609(a).

¹²⁷The Conference Report contains a hint that the Conference Committee meant to limit probity/prejudice weighing to defendants in criminal cases. At the end of a long paragraph talking about prejudice to the defendant without specifying whether “defendant” includes civil as well as

other than a defendant may block impeachment by invoking Rule 403, which allows relevant evidence to 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.”¹²⁸

Finally, the rule fails to specify which crimes involve dishonesty or false statement. The issue is important because the rule allows impeachment with felonies *and* misdemeanors in this category and because the Conference Report makes clear that such crimes are automatically admissible against any witness without any probity/prejudice balancing.¹²⁹ The Conference Report, however, does not adequately explain which crimes qualify. While the Report specifies several crimes that involve dishonesty or false statement,¹³⁰ it also includes a general catch-all of “any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused’s propensity to testify truthfully.”¹³¹ Historically, there has been little agreement on which crimes are *crimen falsi*.¹³² Consequently, by failing to define the term, Congress left the federal courts to choose among the diverse common law views.¹³³

criminal defendants, the Report states: “Such evidence should only be excluded where it presents a danger of improperly influencing the outcome of the trial by persuading the trier of fact to *convict* the defendant on the basis of his prior criminal record.” H.R. REP. NO. 93-1597, at 9–10 (1974) (emphasis added).

¹²⁸FED. R. EVID. 403.

¹²⁹H.R. REP. NO. 93-1597, at 9–10 (1974). On this point, at least, the Conference Report is clear. It states:

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 to the admissibility of other prior convictions is not applicable to those involving dishonesty or false statement.

Id. Neither the text of the rule nor the Conference Report, however, address whether Rule 403 may be invoked to bar use of a conviction involving dishonesty or false statement.

¹³⁰The Conference Report included the crimes of “perjury or subornation of perjury, false statement, criminal fraud, embezzlement, [and] false pretense.” *Id.*

¹³¹*Id.*

¹³²See *supra* note 22.

¹³³Representative Hogan described the range of views on this issue during the House floor debate on Rule 609:

What, really, is dishonesty or false statement in judicial or legal terms? Unless one practices in a jurisdiction which has statutorily defined *crimen falsi*, the common law definition of “any crime which may injuriously affect the administration of justice, by the introduction of falsehood and fraud” is applicable. This definition has been held to include forgery, perjury, subornation of perjury, suppression of testimony by bribery, conspiracy to procure the absence of a witness or to accuse of crime, obtaining money under false pretenses, stealing, moral turpitude, shoplifting, intoxication, petit larceny, jury tampering, embezzlement and filing a false estate tax return. In other jurisdictions,

Faced with the vague and ambiguous standards of Rule 609(a), federal judges could in good faith continue to follow whatever approach they had followed before the rule was enacted. A judge who believed that virtually any criminal conviction is highly probative of credibility and should be admissible to impeach any witness, including a criminal defendant, could continue to allow such impeachment in almost all cases. As to an accused, the judge could simply find that probative value outweighed prejudicial effect. As to all other witnesses, the judge could reasonably read the rule to mandate admission of any prior felony conviction by interpreting “defendant” to mean only a criminal defendant and by construing the phrase “shall be admitted” to bar use of Rule 403 by any party or witness other than an accused. Finally, the judge could allow impeachment with many misdemeanors by broadly interpreting “dishonesty and false statement,” although a judge would stretch the limits of good faith by allowing impeachment with misdemeanors that involved little premeditation, such as assault.

By contrast, a judge who believed that few criminal convictions are probative of credibility and that the danger of unfair prejudice to parties and witnesses is high could easily continue to prohibit impeachment in almost all cases. As to an accused, the judge could routinely decide that probity did not outweigh prejudice. The judge could reasonably apply the same balancing to a defendant in a civil case or could grant all witnesses other than an accused the protections of Rule 403. Finally, the judge could limit the definition of crimes involving dishonesty or false statement to the short list in the Conference Report¹³⁴ and allow automatic impeachment only with those relatively rare crimes and deny admission of almost all misdemeanors.

Rule 608(b) also provoked controversy, although not as much as Rule 609.¹³⁵ The conflicting viewpoints on the proper scope of bad act impeachment resulted in a rule with even fewer standards than Rule 609(a). Rule 608(b) leaves this form of impeachment entirely to the trial judge’s discretion. Some commentators contend that the drafters and legislators intended Rule 608(b) to be narrowly construed.¹³⁶ There is, however, virtually no support for this view in either the

some of these same offenses have been found not to fit the *crimen falsi* definition. 120 CONG. REC. 2,376 (1974) (statement of Rep. Hogan).

¹³⁴The list included perjury, subornation of perjury, false statement, criminal fraud, embezzlement, and false pretense. *See id.*

¹³⁵*See* Okun, *supra* note 97, at 544 (1992) (asserting that “Rule 608(b) was the subject of much less debate than Rule 609”); Schmertz, *supra* note 84, at 1425 (stating that “rule 609 received a far greater share of time and attention by Congress than did rule 608(b)”).

¹³⁶*See, e.g.,* 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE § 608.22(2)(c)(i), at 608-56 (Joseph M. McLaughlin ed., 2d ed. 1997) (asserting that “Rule 608(b) is intended to be restrictive” and “restrictively interpreted by trial courts”); 1 MCCORMICK ON EVIDENCE, *supra* note 16, § 41 (suggesting that particular acts of conduct satisfying Rule 608(b) will normally involve dishonesty and false statement as under Rule 609(a)(2)); Okun, *supra* note 97, at 545 (asserting that Rule 608(b) “limits impeachment by specific instances of misconduct to

language or legislative history of Rule 608(b). There were attempts to tighten up the language of the rule, but the attempts failed due to pressure from the Justice Department and the opposition of legislators.

The Preliminary Draft of Rule 608(b)¹³⁷ allowed wide-open impeachment by prior bad acts.¹³⁸ Any specific instances of a witness's conduct could be raised as long as they were "relevant to truthfulness."¹³⁹ If one took the broad view of conduct that bears on credibility,¹⁴⁰ all manner of past conduct could be raised.¹⁴¹ The proposed rule did contain the traditional limitation that the bad acts could not be proved by extrinsic evidence, and it made specific reference to Rules 4-03 and 6-11, both of which gave courts discretion to exclude evidence.¹⁴²

Perhaps due to concerns of unfair prejudice,¹⁴³ the Revised Draft added the requirement that the misconduct be "clearly probative of truthfulness or

instances that are directly relevant to the witness' character for truthfulness," while Rule 609(a)(1) allows impeachment with convictions "that bear only a marginal relationship to the witness' veracity").

¹³⁷Rule 608(b) was designated as Rule 6-08(c) in the Preliminary Draft. See Preliminary Draft, *supra* note 99, at 293.

¹³⁸The draft rule stated:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 6-09, may not be proved by extrinsic evidence. They may, however, if relevant to truthfulness, be inquired into on cross-examination of the witness himself or on cross-examination of a witness who testifies to an opinion of his character for truthfulness or untruthfulness, subject to the general limitations upon relevant evidence in Rule 4-03 and the limitations upon interrogation in Rule 6-11.

Id.

¹³⁹*Id.*

¹⁴⁰The New York courts, for example, allow questioning about any act that reveals "a willingness or disposition . . . voluntarily to place the advancement of . . . individual self-interest ahead of principle or the interests of society," *People v. Sandoval*, 34 N.Y.2d 371, 377 (1974), and the Tennessee courts allow questions about acts "involving moral turpitude, which disclose [a witness's] antecedents and character . . . whether they relate to domestic relations or other habits," *State v. Jones*, 385 S.W.2d 80, 83 (Tenn. 1964).

¹⁴¹See *supra* notes 130, 133 and accompanying text (citing cases that allow questions as to unchastity, marital infidelity, gambling, vagrancy, prostitution, assault, theft of property, having illegitimate children, keeping bad company, and liquor offenses).

¹⁴²Preliminary Draft, *supra* note 99, at 293. The Advisory Committee's Note spoke only briefly about the provision for impeachment by bad acts. The Note recognized that "the possibilities of abuse are substantial" and purported to erect "safeguards." *Id.* at 295. The only safeguards mentioned, however, are the requirement that the misconduct be relevant to truthfulness and the protections of Rules 4-03 and 6-11. *Id.* Rules 4-03 and 6-11 gave a court broad discretion to exclude evidence and limit questioning, but only if a judge believed that the danger of unfair prejudice substantially outweighed probative value or that questioning was taking too much time or would subject a witness to harassment or undue embarrassment. See *id.* Thus, these supposed safeguards did little to limit cross-examination by prior bad acts if a judge sincerely believed a broad range of prior conduct is relevant to credibility and that jurors need this information to reach a just verdict.

¹⁴³See WRIGHT & GOLD, *supra* note 104, § 6111, at 13-14.

untruthfulness and not remote in time.”¹⁴⁴ Although the explicit reference to Rules 403 and 611 was dropped, the Advisory Committee Note made plain that these rules still applied.¹⁴⁵ The Revised Draft also added the last sentence of Rule 608(b) stating that giving testimony does not waive the right against self-incrimination when a witness is questioned about matters relating only to credibility.¹⁴⁶

Deputy Attorney General Richard Kleindienst and Senator McClellan both sent letters criticizing the new provision that prior misconduct must be “clearly probative of truthfulness or untruthfulness and not remote in time.”¹⁴⁷ Both argued the provision conflicted with the long-accepted standard that conduct need only be relevant to truthfulness. They also suggested that timeliness questions were best left to the discretion of the trial court.¹⁴⁸ The Judicial Conference Draft responded by dropping the word “clearly” from the new provision.¹⁴⁹ Deputy Attorney General Kleindienst wrote Chief Justice Burger objecting to the requirement that the misconduct be “not remote in time,”¹⁵⁰ but the Court rebuffed the objection and sent Rule 608 to Congress as proposed in the Judicial Conference Draft.¹⁵¹

The Subcommittee of the House Judiciary Committee was aware of the objections of Deputy Attorney General Kleindienst and Senator McClellan,¹⁵² and it made some changes to the Supreme Court Draft. First, the Subcommittee

¹⁴⁴Revised Draft, *supra* note 100, at 389.

¹⁴⁵*See id.* at 390 (referring to in Advisory Committee’s Note the “overriding protection” of Rules 403 and 611). Wright and Gold surmise that the drafters made this change to avoid implying that by not mentioning Rules 403 and 611 in the text of other rules, the drafters intended that they not apply to other rules. WRIGHT & GOLD, *supra* note 104 § 6111, at 14.

¹⁴⁶*See* Revised Draft, *supra* note 100, at 389. The sentence reads: “The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused’s or the witness’ privilege against self-incrimination when examined with respect to matters which relate only to credibility.” *See id.* This language was not changed by Congress. WRIGHT & GOLD, *supra* note 104, § 6111, at 14 n.17.

¹⁴⁷117 Cong. Rec. 33,655 (1971) (letter from Deputy Attorney General Richard G. Kleindienst) [hereinafter Kleindienst Letter]; *id.* at 33,645 (letter from Sen. John L. McClellan) [hereinafter McClellan Letter].

¹⁴⁸*See* Kleindienst Letter, *supra* note 147, at 33,649; McClellan Letter, *supra* note 147, at 33,645.

¹⁴⁹WRIGHT & GOLD, *supra* note 104, § 6111, at 17. This version of Rule 608(b) then read: “Specific instances of the conduct of a witness . . . may . . . if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness himself . . .” *Id.*

¹⁵⁰*Proposed Rules of Evidence: Hearings Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 42, 45, 47 (1973) (letter from Deputy Attorney General Richard G. Kleindienst to Chief Justice Warren E. Burger).

¹⁵¹*See* Supreme Court Draft, *supra* note 105, at 267.

¹⁵²WRIGHT & GOLD, *supra* note 104, § 6111, at 22 n.31.

dropped the language barring past misconduct that was remote in time.¹⁵³ Second, it added the phrase “in the discretion of the court,” so the second sentence of Rule 608(b) now reads: “[Specific instances of conduct] may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination.”¹⁵⁴

Jack Weinstein and Margaret Berger contend these changes show Congress wanted trial courts to interpret Rule 608(b) restrictively.¹⁵⁵ This contention, however, is very difficult to sustain. An amendment that merely gives a court discretion to admit evidence does not make a rule more restrictive unless the evidence was considered automatically, or at least presumptively, admissible before the amendment. The repeated references to Rules 403 and 611 in the early drafts of 608(b), however, show the drafters intended all along that courts could bar impeachment by bad acts when the danger of unfair prejudice substantially outweighed probity or cross-examination would unduly harass or embarrass a witness. Moreover, because of the potential for bad act impeachment to get out of hand, the traditional American rule was that such impeachment was in the discretion of the trial judge.¹⁵⁶ Thus, it is more reasonable to infer that the addition

¹⁵³House Hearings, *supra* note 106, at 164–65 (First Committee Print, Rule 608(b)).

¹⁵⁴*Id.* The Subcommittee also attempted to clarify language that allowed a questioner to ask a character witness testifying under Rule 608(a) about bad acts of the person as to whose character for truthfulness the witness was testifying. The Supreme Court Draft allowed specific instances of conduct to be inquired into “on cross-examination of the witness himself or on cross-examination of a witness who testifies to his character for truthfulness or untruthfulness.” Supreme Court Draft, *supra* note 105, at 267. The Subcommittee substituted language, which, as Wright and Gold correctly point out, is “nearly incomprehensible.” WRIGHT & GOLD, *supra* note 104, § 6111, at 23. The language read as follows: “Specific instances of conduct . . . may . . . be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.” House Hearings, *supra* note 106, at 164–65 (First Committee Print, Rule 608(b)).

¹⁵⁵WEINSTEIN & BERGER, *supra* note 136, § 608.22(2)(c)(i) at 608–56. They state that “the original rule was amended by Congress to ensure that it would be restrictively interpreted by trial courts,” *Id.* (referring in note 27 to section 608App.01(3) of their treatise, where they explain the amendment in detail).

¹⁵⁶Cases had consistently applied this rule for at least 135 years. *See, e.g.*, *United States v. Sweeney*, 262 F.2d 272, 277 (3d Cir. 1959) (stating that impeachment by prior bad acts is “within the sound discretion of the trial court”); *Touhy v. United States*, 88 F.2d 930, 935 (8th Cir. 1937) (same); *State v. Schutte*, 117 A. 508, 512 (Conn. 1922) (“If facts of misconduct which indicate a lack of veracity are inquired into on cross-examination, it is within the discretion of the trial court whether or not to permit such examination.”); *State v. Killion*, 148 P. 643, 645 (Kan. 1915) (“[H]ow far the inquiry [into bad acts] may go is largely a matter of discretion with the trial court.”); *Territory v. Chavez*, 45 P. 1107, 1108 (N.M. 1896) (“The extent to which cross-examination will be permitted is no doubt, in a large measure, in the discretion of the trial court.”); *Third Great W. Tpk. Co. v. Loomis*, 32 N.Y. 127, 132 (1865) (“It has heretofore been understood that the range of irrelevant inquiry for the purpose of degrading a witness was subject to the control of the presiding judge.”).

of “in the discretion of the court” was meant merely to reiterate existing law, not to make a significant change in the law.¹⁵⁷ Finally, the Subcommittee Note to Rule 608(b) reveals that the new language was added primarily to compensate for deletion of the phrase “and not remote in time.” The Note read:

The Subcommittee redrafted the second sentence to emphasize the discretionary role of the court in permitting such testimony and deleted the reference to remoteness in time as being unnecessary and confusing (remoteness from time of trial or remoteness from the incident involved?). The Subcommittee is of the view that explicitly referring to the discretion of the court and deleting the reference to remoteness is a more practical way to deal with the subject.¹⁵⁸

This language suggests that by adding “in the discretion of the court” Congress was not issuing a general direction to courts to interpret Rule 608(b) restrictively.¹⁵⁹

Although the Justice Department filed new objections with the Subcommittee to the self-incrimination provision added in the Revised Draft, neither the Subcommittee nor the full Judiciary Committee changed that provision.¹⁶⁰ No further changes were made to Rule 608(b) in either the House or the Senate.

Like Rule 609(a), the final version of 608(b) is virtually without standards and leaves the impeachment decision entirely to the discretion of trial judges. Because the rule does not specify what sort of misconduct is probative of truthfulness,¹⁶¹ federal judges could in good faith continue to follow whatever approach to impeachment by bad acts they had followed before Rule 608(b) was

¹⁵⁷Because the new language was placed just before the clause “if probative of truthfulness or untruthfulness,” House Hearings, *supra* note 106, at 164–65 (First Committee Print, Rule 608(b)), the Subcommittee may have intended to indicate that a trial judge should have discretion to determine what conduct was probative of truthfulness or untruthfulness.

¹⁵⁸*Id.*

¹⁵⁹The Report of the full Judiciary Committee deleted the second sentence quoted above without any explanation. See H.R. REP. NO. 93-650, at 10 (1973). Perhaps the full Committee did not want to appear to limit the exercise of discretion to the remoteness issue only. Even if this is true, however, there is no reason to conclude from either the language of the rule or the first sentence in the Judiciary Committee Report quoted above that the Committee or Congress intended the rule to be restrictively interpreted.

¹⁶⁰House Hearings, *supra* note 106, at 342, 348 (letter from Acting Deputy Attorney General William D. Ruckelshaus).

¹⁶¹David P. Leonard, *Appellate Review of Evidentiary Rulings*, 70 N.C. L. Rev. 1155, 1166 (1992) (noting that “there is some question about the precise rule invoked by the drafters of the Federal Rules of Evidence” regarding which acts of misconduct bear on a witness’s “character for truthfulness rather than general bad moral character”).

enacted.¹⁶² A judge who followed the New York approach that any act placing “the advancement of . . . individual self-interest ahead of principle or the interests of society” is probative of truthfulness¹⁶³ could obviously allow questioning about a nearly limitless range of misconduct. On the other hand, a judge who believed that virtually no impeachment by bad acts should be allowed could ban almost all such impeachment by limiting questions to acts directly involving false statement or deceit and by routinely invoking the protections of Rules 403 and 611.

D. Practice Under the Rules

Given the longstanding, widespread disagreements as to witness impeachment, it was inevitable the elastic standards of Rules 609(a) and 608(b) would lead to inconsistent decisions about whether particular crimes or misconduct could be used to impeach. Some federal courts allow impeachment with a broad range of crimes and misconduct while others are much more restrictive.¹⁶⁴

In applying Rule 609(a)(1), federal courts disagree about the admissibility of convictions for drug dealing,¹⁶⁵ petit larceny,¹⁶⁶ burglary,¹⁶⁷ assault,¹⁶⁸

¹⁶²Professors Mueller and Kirkpatrick have expressed frustration at the ambiguity of Rule 608(b). See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, MODERN EVIDENCE: DOCTRINE AND PRACTICE § 6.40, at 819 (1995). They identify three views of what conduct bears on truthfulness—a broad view, a focused view, and a middle view. *Id.* Under the broad view, virtually any conduct indicating bad character bears on truthfulness. *Id.* Under the focused view, behavior bears on truthfulness “only if it actually involves falsehood or deception.” *Id.* Under the middle view, conduct taking advantage of others in violation of their rights would qualify, but “personal” forms of wrongdoing, such as taking drugs, would not. *Id.* Although Professors Mueller and Kirkpatrick would like Rule 608(b) to be interpreted to embrace the focused view and to reject the broad view, they admit that “this reading seems uncertain because everyone agrees that truthfulness is the issue, and the question is whether conduct embraced by the middle and broader views bears on truthfulness.” *Id.* at 820. They read the Advisory Committee’s Note as rejecting the broad view, but, unfortunately, as having “nothing to say about the middle view.” *Id.*

¹⁶³*People v. Sandoval*, 34 N.Y.2d 371, 377 (1974).

¹⁶⁴State courts also continue to vary greatly in applying impeachment standards. Judges in states adopting the Federal Rules of Evidence must deal with the same vague and ambiguous language as federal judges. Moreover, when adopting the Federal Rules, many states chose to modify the impeachment provisions. WRIGHT & GOLD, *supra* note 104, § 6131, at 175. As a result, “[m]ost state versions of Rule 609 differ significantly from the federal rule.” *Id.* Rule 608, by contrast, was more often adopted verbatim, although some jurisdictions made substantive changes. *Id.* § 6111 at 27–28. For a detailed discussion of the state standards, see *id.* § 6111, at 27–30; *id.* § 6131, at 175–89.

¹⁶⁵*Compare* *United States v. Trejo-Zambrano*, 582 F.2d 460, 465–66 (9th Cir. 1978) (allowing prosecutor in drug prosecution to cross-examine defendant about prior drug dealing conviction), *United States v. Hayes*, 553 F.2d 824, 828 (2d Cir. 1977) (allowing impeachment with convictions for smuggling cocaine), and *United States v. Ortiz*, 553 F.2d 782, 784 (2d Cir. 1977) (stating that prior convictions for selling heroin show “a narcotics trafficker lives a life of secrecy and dissembling in the course of that activity, being prepared to say whatever is required by the

robbery,¹⁶⁹ weapons violations,¹⁷⁰ murder,¹⁷¹ and arson.¹⁷² Some courts allow an

demands of the moment, whether the truth or a lie”), *with* *United States v. Wallace*, 848 F.2d 1464, 1473 (9th Cir. 1988) (holding admission of prior conviction for trafficking in heroin improper), *and* *United States v. Williams*, 587 F.2d 1, 1–2 (6th Cir. 1978) (holding in counterfeiting prosecution that defendant’s prior conviction for selling marijuana should not be admitted).

¹⁶⁶*Compare* *United States v. Brown*, 603 F.2d 1022, 1029 (1st Cir. 1979) (stating that “petit larceny [has] a definite bearing on honesty which is related to credibility”), *and* *United States v. Carr*, 418 F.2d 1184, 1185–86 (D.C. Cir. 1969) (stating that petit larceny conviction shows poor character and dishonesty), *with* *United States v. Musliu*, 872 F.2d 431, 436 (9th Cir. 1989) (holding in cocaine prosecution that prior convictions for petit larceny were inadmissible), *and* *United States v. Fearwell*, 595 F.2d 771, 776–77 (D.C. Cir. 1978) (stating that petit larceny has no bearing on the “accused’s propensity to testify truthfully,” and thus a prior conviction for that crime may not be admitted).

¹⁶⁷*Compare* *United States v. Hatchett*, 31 F.3d 1411, 1425 (7th Cir. 1994) (allowing cross-examination of defendant about burglary conviction in drug prosecution), *Lewis v. Sheriff’s Dep’t*, 817 F.2d 465, 466 (8th Cir. 1987) (allowing defendant in civil action by prisoner for beating by guards, to cross-examine plaintiff about his convictions for burglary), *United States v. Portillo*, 633 F.2d 1313, 1322–23 (9th Cir. 1980) (admitting burglary conviction), *United States v. Brown*, 603 F.2d 1022, 1029 (1st Cir. 1979) (stating that burglary has “a definite bearing on honesty, which is directly related to credibility”), *and* *United States v. Seamster*, 568 F.2d 188, 191 (10th Cir. 1978) (allowing defendant charged with burglary to be cross-examined about burglary conviction), *with* *United States v. Begay*, 144 F.3d 1336, 1338 (10th Cir. 1998) (holding burglary conviction inadmissible to impeach in prosecution for robbery), *and* *United States v. Rodriguez-Andrade*, 62 F.3d 948, 952 (7th Cir. 1995) (holding burglary conviction inadmissible to impeach witness).

¹⁶⁸*Compare* *United States v. Toney*, 27 F.3d 1245, 1253 (7th Cir. 1994) (admitting conviction for aggravated battery in trial for possession of firearm), *United States v. Reed*, 572 F.2d 412, 426 (2d Cir. 1978) (holding assault conviction admissible), *and* *United States v. Brewer*, 451 F. Supp. 50, 54 (E.D. Tenn. 1978) (allowing cross-examination about conviction for aggravated assault in kidnapping case), *with* *United States v. Sanders*, 964 F.2d 295, 298–99 (4th Cir. 1992) (rejecting impeachment with convictions for assault and possession of contraband in prosecution for assault with dangerous weapon), *United States v. Grove*, 844 F. Supp. 1495, 1496–98 (D. Utah 1994) (excluding conviction for aggravated assault in drug and firearm prosecution), *and* *Lewis v. Velez*, 149 F.R.D. 474, 482 (S.D.N.Y. 1993) (holding in civil rights action against prison guards that plaintiff’s assault conviction was inadmissible to impeach his credibility).

¹⁶⁹*Compare* *United States v. Alexander*, 48 F.3d 1477, 1488 (9th Cir. 1995) (allowing impeachment with robbery convictions), *and* *United States v. Moore*, 917 F.2d 215, 235 (6th Cir. 1990) (allowing prior conviction on robbery charge for impeachment), *with* *United States v. Bagley*, 772 F.2d 482, 488 (9th Cir. 1985) (stating that bank robbery conviction in prosecution for bank robbery probably should have been excluded).

¹⁷⁰*Compare* *United States v. Tracey*, 36 F.3d 187, 191–94 (1st Cir. 1994) (allowing defendant charged with firearm possession to be impeached with convictions for illegal weapons possession), *United States v. Rattigan*, 996 F.2d 1218, 1223 (6th Cir. 1993) (allowing evidence concerning defendant’s felony gun possession convictions in prosecution for firearms violations), *and* *United States v. Booker*, 706 F.2d 860, 862 (8th Cir. 1983) (allowing defendant charged with violation of federal firearms statutes to be impeached with three convictions for similar crimes), *with* *United States v. Cameron*, 814 F.2d 403, 405–06 (7th Cir. 1987) (upholding exclusion of conviction for carrying switchblade knife).

accused to be impeached with convictions that are identical or very similar to the crime charged, despite the obvious prejudice,¹⁷³ while other courts exclude such convictions.¹⁷⁴ Some of the inconsistency in applying Rule 609(a)(1) may be explained by the specific circumstances of individual cases or by the different standard of admissibility for an accused.¹⁷⁵ Nonetheless, the inconsistency in decisions is striking.

The federal courts also are inconsistent in applying Rule 609(a)(2), which mandates automatic admission of any crime, felony or misdemeanor, involving "dishonesty or false statement."¹⁷⁶ Although courts generally admit convictions

¹⁷¹*Compare* *Wilson v. City of Chicago*, 6 F.3d 1233, 1236–37 (7th Cir. 1993) (allowing civil rights plaintiff in action charging torture to extract confession to be impeached with murder convictions), *with* *Eng v. Scully*, 146 F.R.D. 74, 78 (S.D.N.Y. 1993) (excluding evidence of plaintiff's murder conviction in action against correction officials).

¹⁷²*Compare* *United States v. Walker*, 817 F.2d 461, 463–64 (8th Cir. 1987) (upholding admission of arson conviction), *with* *United States v. Nachamie*, 101 F. Supp. 2d 134, 145–46 (S.D.N.Y. 2000) (excluding evidence of attempted arson conviction).

¹⁷³*See, e.g.*, *United States v. Perkins*, 937 F.2d 1397, 1406 (9th Cir. 1991) (allowing defendant charged with robbery to be impeached with convictions of robberies); *United States v. Moore*, 917 F.2d 215, 235 (6th Cir. 1990) (same), *United States v. Browne*, 829 F.2d 760, 764 (9th Cir. 1987) (same), *United States v. Charmley*, 764 F.2d 675, 677 (9th Cir. 1985) (same), *see also* *United States v. Ortiz*, 857 F.2d 900, 902 (2d Cir. 1988) (allowing narcotic-related convictions to be used to impeach defendant facing narcotics charges); *United States v. Thompson*, 806 F.2d 1332, 1339 (7th Cir. 1986) (allowing defendant charged with tax evasion to be impeached with conviction for tax evasion); *United States v. Levine*, 700 F.2d 1176, 1182 (8th Cir. 1983) (allowing defendant charged with theft from the mails to be impeached with a similar conviction), *United States v. Fountain*, 642 F.2d 1083, 1091–92 (7th Cir. 1981) (allowing defendant on trial for murder to be impeached with murder conviction).

¹⁷⁴*See, e.g.*, *United States v. Sanders*, 964 F.2d 295, 298–99 (4th Cir. 1992) (holding it proper to exclude similar conviction in case charging assault with knife); *United States v. Wallace*, 848 F.2d 1464, 1473 (9th Cir. 1988) (holding it prejudicial to admit conviction for heroin trafficking in prosecution for possession of heroin with intent to distribute); *United States v. Bagley*, 772 F.2d 482, 488 (9th Cir. 1985) (holding that although error was harmless, district court may have abused discretion in allowing impeachment with robbery convictions in prosecution for bank robbery); *United States v. Hans*, 738 F.2d 88, 94–95 (3d Cir. 1984) (holding that defendant's conviction for assault with intent to commit armed robbery was properly excluded in bank robbery prosecution as too similar).

¹⁷⁵On the other hand, as the cases cited *supra* notes 165–74 demonstrate, many federal courts show no particular solicitude for criminal defendants.

¹⁷⁶*See* *Gainor*, *supra* note 97, at 777 ("[T]he determination of which crimes involve dishonesty or false statement for purposes of Rule 609(a)(2) has been the subject of considerable judicial disagreement."). Courts are virtually unanimous on one point: If a prior conviction is held to involve dishonesty or false statement, any witness, including a criminal defendant, may be asked about it, and the party opposing impeachment may not seek recourse to Rule 403 to bar impeachment. *See, e.g.*, *United States v. Morrow*, 977 F.2d 222, 228 (6th Cir. 1992) (holding impeachment automatic); *Diggs v. Lyons*, 741 F.2d 577, 578–82 (3d Cir. 1984) (holding impeachment automatic and not performing 403 balancing); *United States v. Kuecker*, 740 F.2d 496, 501–02 (7th Cir. 1984) (same); *United States v. Leyva*, 659 F.2d 118, 122 (9th Cir. 1981) (same). The Supreme Court appeared to

that directly involve lying or deceit, such as perjury,¹⁷⁷ forgery,¹⁷⁸ and various kinds of fraud,¹⁷⁹ and exclude convictions for assault,¹⁸⁰ traffic violations,¹⁸¹ weapons offenses,¹⁸² drunkenness,¹⁸³ and sex offenses,¹⁸⁴ they disagree about many other convictions that fall in the middle range, such as robbery,¹⁸⁵ drug offenses,¹⁸⁶ larceny,¹⁸⁷ and burglary.¹⁸⁸ Sometimes convictions that would not

approve this position in *Green v. Bock Laundry*, 490 U.S. 504, 526 (1989) (noting that “it is widely agreed” that Rule 609 “bars exercise of judicial discretion pursuant to Rule 403” for *crimen falsi* convictions under (a)(2)).

¹⁷⁷See, e.g., *United States v. Payton*, 159 F.3d 49, 57 (2d Cir. 1998) (stating that crime of making sworn false statement to government official is “obviously” crime of dishonesty and false statement); *United States v. Wallace*, 848 F.2d 1464, 1472 n.11 (9th Cir. 1988) (noting that admissibility of prior perjury conviction was not raised by defendant on appeal).

¹⁷⁸See, e.g., *Wagner v. Firestone Tire & Rubber Co.*, 890 F.2d 652, 655 n.3, 656 (3d Cir. 1989) (allowing prior convictions to impeach plaintiff in civil suit); *United States v. Jackson*, 696 F.2d 578, 589 (8th Cir. 1982) (allowing admission of conviction for transporting forged securities).

¹⁷⁹See, e.g., *United States v. McClintock*, 748 F.2d 1278, 1289 (9th Cir. 1984) (mail fraud); *United States v. Wong*, 703 F.2d 65, 67 (3d Cir. 1983) (Medicare fraud); *United States v. Whitman*, 665 F.2d 313, 319–20 (10th Cir. 1981) (land fraud).

¹⁸⁰See, e.g., *United States v. Harvey*, 588 F.2d 1201, 1203 (8th Cir. 1978) (“An assault conviction does not involve dishonesty or false statements”); *Carlsen v. Javurek*, 526 F.2d 202, 210 (8th Cir. 1975) (holding misdemeanors not relating to veracity not admissible).

¹⁸¹See, e.g., *United States v. Jones*, 965 F.2d 1507, 1513–14 (8th Cir. 1992) (outstanding traffic tickets); *United States v. Lossiah*, 537 F.2d 1250, 1252 (4th Cir. 1976) (drunk driving).

¹⁸²See, e.g., *United States v. Hayward*, 6 F.3d 1241, 1254 (7th Cir. 1993) (unlawful use of weapon); *United States v. Millings*, 535 F.2d 121, 123 (D.C. Cir. 1976) (carrying pistol without license).

¹⁸³See, e.g., *Reyes v. Missouri Pac. R. Co.*, 589 F.2d 791, 795 (5th Cir. 1979) (holding public intoxication convictions “obviously inadmissible”); *United States v. Lossiah*, 537 F.2d 1250, 1252 (4th Cir. 1976) (public drunkenness).

¹⁸⁴See, e.g., *United States v. Walker*, 613 F.2d 1349, 1354 (5th Cir. 1980) (prostitution); *United States v. Cox*, 536 F.2d 65, 71 (5th Cir. 1976) (same).

¹⁸⁵Compare *United States v. Begay*, 144 F.3d 1336, 1338–39 (10th Cir. 1998) (holding that there was no automatic admission for robbery conviction), and *United States v. Smith*, 551 F.2d 348, 362 (D.C. Cir. 1976) (holding that attempted robbery was not within (a)(2)), with *United States v. Kinslow*, 860 F.2d 963, 968 (9th Cir. 1988) (holding that armed robbery involves “dishonesty”), and *United States v. Wilson*, 536 F.2d 883, 885 (9th Cir. 1976) (holding that attempted robbery conviction was admissible under (a)(2)).

¹⁸⁶Compare *Gust v. Jones*, 162 F.3d 587, 595 (10th Cir. 1998) (holding that conviction for smuggling drugs into penitentiary was not admissible under (a)(2)), *United States v. Mehrmanesh*, 689 F.2d 822, 833 (9th Cir. 1982) (holding that conviction for smuggling hashish should not be given (a)(2) admission), and *United States v. Thompson*, 559 F.2d 552, 554 (9th Cir. 1977) (denying automatic admission to misdemeanor conviction for marijuana possession), with *United States v. Ortiz*, 553 F.2d 782, 784 (2d Cir. 1977) (stating that narcotics conviction would be admissible under (a)(2) if trafficker engaged in secrecy or dissembling).

¹⁸⁷Compare *Gov’t of Virgin Islands v. Toqto*, 529 F.2d 278, 281–82 (3d Cir. 1976) (stating that petit larceny does not involve dishonesty or false statement), *United States v. Dorsey*, 591 F.2d 922, 935–36 (D.C. Cir. 1978) (holding that shoplifting is not a crime of dishonesty under (a)(2)), and *United States v. Ashley*, 569 F.2d 975, 978–79 (5th Cir. 1978) (same), with *McHenry v.*

ordinarily fall under Rule 609(a)(2) are placed there if the crime involved elements of deceit or secrecy.¹⁸⁹

Courts are similarly inconsistent in applying Rule 608(b). Commentators point out that courts take three different approaches.¹⁹⁰ Courts taking the broad approach believe that “virtually any conduct indicating bad character also indicates untruthfulness.”¹⁹¹ Under the narrow approach, misconduct bears on truthfulness only if it directly involves lying or deception.¹⁹² Finally, under the middle approach, “behavior seeking personal advantage by taking from others in violation of their rights” is seen as bearing on truthfulness.¹⁹³ These different positions have led courts to inconsistent rulings on the admissibility of such

Chadwick, 896 F.2d 184, 188–89 (6th Cir. 1990) (holding shoplifting involves dishonesty), *United States v. Del Toro Soto*, 676 F.2d 13, 18 (1st Cir. 1982) (holding grand larceny conviction certainly admissible under (a) (2)), and *United States v. Carden*, 529 F.2d 443, 446 (5th Cir. 1976) (holding petit larceny to be crime involving dishonesty).

¹⁸⁸*Compare* *United States v. Glenn*, 667 F.2d 1269, 1273 (9th Cir. 1982) (holding conviction for burglary, absent fraud or deceit, not admissible under (a)(2)), with *United States v. Brown*, 603 F.2d 1022, 1029 (1st Cir. 1979) (holding that burglary conviction has “definite bearing on honesty which is directly related to credibility”).

¹⁸⁹*See, e.g.*, *United States v. Ortiz*, 553 F.2d 782, 784 (2d Cir. 1977) (stating that narcotics conviction may be admissible under (a)(2) if trafficker engaged in secrecy and dissembling); *United States v. Grandmont*, 680 F.2d 867, 871 (1st Cir. 1982) (holding that robbery may be crime of dishonesty within (a)(2) if it is committed by fraudulent or deceitful means); *United States v. Mejia-Alarcon*, 995 F.2d 982, 989–90 (10th Cir. 1993) (stating that “trial court may look beyond the elements of an offense that is not considered a per se crime of dishonesty to determine whether the particular conviction rested upon facts establishing dishonesty or false statement”). Wright and Gold criticize this practice on the ground that convictions for just about any crime might be admitted under this approach. *See* WRIGHT & GOLD, *supra* note 104, § 6135, at 252. This plainly seems true of drug offenses. Because drugs are illegal, smuggling, sale, and use of drugs are done in secret. Virtually all drug crimes involve hiding and deception and thus might reasonably be classed under Rule 609(a)(2).

¹⁹⁰*See* WEINSTEIN & BERGER, *supra* note 136, § 608.22[2][c], at 608-57 to -58; MUELLER & KIRKPATRICK, *supra* note 162, § 6.40, at 819; *see also* *United States v. Manske*, 186 F.3d 770, 774–75 (7th Cir. 1999) (acknowledging commentators’ view of three approaches).

¹⁹¹MUELLER & KIRKPATRICK, *supra* note 162, § 6.40, at 819; *see also* WEINSTEIN & BERGER, *supra* note 136, § 608.22[2][c], at 608-57 (“[U]nder a broad view, virtually any conduct indicating bad character relates to untruthfulness.”).

¹⁹²MUELLER & KIRKPATRICK, *supra* note 162, § 6.40, at 819; WEINSTEIN & BERGER, *supra* note 136, § 608.22[2][c], at 608-57.

¹⁹³WEINSTEIN & BERGER, *supra* note 136, § 608.22[2][c], at 608-57 (quoting *Manske*, 186 F.3d at 774–75).

misconduct as theft,¹⁹⁴ drug use,¹⁹⁵ prostitution,¹⁹⁶ bribery,¹⁹⁷ fraud,¹⁹⁸ and the use of excessive force.¹⁹⁹

¹⁹⁴*Compare* United States v. Zizzo, 120 F.3d 1338, 1355 (7th Cir. 1997) (allowing cross-examination about defendant's receipt of stolen tires), United States v. Smith, 80 F.3d 1188, 1193 (7th Cir. 1996) (allowing witness to be cross-examined about prior thefts because "acts of theft . . . are, like acts of fraud or deceit, probative of a witness's truthfulness or untruthfulness"), and Varhol v. Nat'l R.R. Passenger Corp., 909 F.2d 1557, 1566-67 (7th Cir. 1990) (en banc) (holding that plaintiff could be questioned about buying stolen railroad tickets because stealing (and receiving and using stolen property) are generally seen as acts that reflect negatively on credibility), with United States v. Novaton, 271 F.3d 968, 1004-07 (11th Cir. 2001) (upholding district court's refusal to allow defendant to cross-examine law enforcement agent about charges that he had stolen drugs); United States v. Farmer, 923 F.2d 1557, 1567 (11th Cir. 1991) (holding that district court correctly prohibited defendant from being questioned about pending charges for theft), and Wanke v. Lynn's Transp. Co., 836 F. Supp. 587, 597 (N.D. Ind. 1993) (holding possession of stolen property inadmissible unless it involved intent to deceive).

¹⁹⁵*Compare* United States v. Campbell, 49 F.3d 1079, 1083-84 (5th Cir. 1995) (upholding questioning about witness's drug use), and United States v. Crutchfield, 26 F.3d 1098, 1102 (11th Cir. 1994) (stating that questions about witness's personal use of marijuana may have been proper on cross-examination), with United States v. McDonald, 905 F.2d 871, 875 (5th Cir. 1990) (finding error in cross-examination of defendant about his drug use), Jarrett v. United States, 822 F.2d 1438, 1446 (7th Cir. 1987) (holding that witness's "use of drugs may not be used to attack his or her general credibility"), Bennett v. Longacre, 774 F.2d 1024, 1026-27 (10th Cir. 1985) (holding inadmissible defendant's use of alcohol and illicit drugs), and United States v. Rubin, 733 F.2d 837, 841-42 (11th Cir. 1984) (holding that instances of drug use are not probative of truthfulness for purposes of Rule 608(b)).

¹⁹⁶*Compare* United States v. Burch, 490 F.2d 1300, 1301-04 (8th Cir. 1974) (holding that Rule 608(b) did not preclude asking woman about solicitation for prostitution and then robbing victim because deception bore on credibility), with United States v. Mansaw, 714 F.2d 785, 789 (8th Cir. 1983) (refusing to allow questions about engaging in prostitution).

¹⁹⁷*Compare* United States v. Waldrip, 981 F.2d 799, 803-05 (5th Cir. 1993) (holding evidence of defendant's bribery probative of character for truthfulness and thus admissible to impeach), and United States v. Hurst, 951 F.2d 1490, 1500-01 (6th Cir. 1991) (holding details underlying prior bribery conviction admissible under Rule 608(b)), with United v. Simonelli, 237 F.3d 19, 24 (1st Cir. 2001) (holding that district court should not have permitted government to cross-examine defendant about his violation of company's gratuity policy), and United States v. Vinson, 606 F.2d 149, 156 (6th Cir. 1979) (holding evidence of bribery inadmissible).

¹⁹⁸*Compare* United States v. Rosa, 891 F.2d 1063, 1069 (3d Cir. 1989) (allowing cross-examination about insurance fraud), and United States v. Girdner, 773 F.2d 257, 261 (10th Cir. 1985) (allowing cross-examination about ballot fraud), with United States v. Tillem, 906 F.2d 814, 827 (2d Cir. 1990) (upholding refusal to allow defendant to cross-examine government witness about his illegal engagement in structured transactions to avoid current transaction reporting requirements), United States v. Clemente, 640 F.2d 1069, 1083 (2d Cir. 1981) (refusing to allow evidence of fraudulent loan application to impeach witness), and Romero v. Boyd Bros. Transp. Co., 1994 WL 287434, at 3 (W.D. Va. June 14, 1994) (holding that district court did not abuse discretion in refusing to allow cross-examination about defendant's fraudulent documents stating he was citizen when he really was illegal alien).

¹⁹⁹*Compare* United States v. Rios Ruiz, 579 F.2d 670, 671-74 (1st Cir. 1978) (upholding cross-examination of fellow officers called as defense witnesses in police brutality prosecution as to whether they had been suspended for use of excessive force), with United States v. Lawes, 292

Additional conflicts and inconsistencies *between* Rules 609(a) and 608(b) exacerbated problems in applying them. Following the approach of the Model Code and Uniform Rules,²⁰⁰ the drafters and legislators appear to have considered each rule separately and made little attempt to harmonize their provisions. Rules 609(a) and 608(b), as enacted, were inconsistent in important ways, despite the substantial overlap in impeachment by convictions and bad acts. The inconsistencies were not addressed in 1990 when Rule 609(a) was amended. Unfortunately, no corresponding changes were made in Rule 608(b).

As originally enacted, Rule 609(a) stated that for the purpose of impeaching the credibility of a witness, evidence the witness had been convicted of a crime “shall be admitted . . . but only if the crime (1) [was a felony] and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.”²⁰¹ Rule 608(b) read: “Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ credibility . . . may . . . in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness’ character for truthfulness or untruthfulness”²⁰² These provisions are inconsistent in at least two important ways. First, Rule 609(a)(1) grants special protection to defendants while Rule 608(b) does not. Under 609(a)(1), a party seeking to use a prior felony conviction to impeach a defendant (or, perhaps, a witness associated with a defendant) has the burden to demonstrate “that the probative value of this evidence outweighs its prejudicial effect to the defendant.”²⁰³ Under Rule 608(b), by contrast, all witnesses, including defendants, may be impeached with specific instances of conduct if the conduct is probative of untruthfulness, and the burden is clearly on the party *opposing* impeachment to block it under Rules 403 or 611. Second, by using the phrase “shall be admitted,”²⁰⁴ Rule 609(a) appears to call for automatic admission of felony convictions of witnesses other than defendants (and, perhaps, witnesses associated with defendants) as well as felony or misdemeanor convictions of any witness, including a defendant, if the conviction involved dishonesty or false statement. Under Rule 608(b), by contrast, impeachment is always “in the discretion of the

F.3d 123, 131–32 (2d Cir. 2002) (upholding decision precluding cross-examination of arresting police officer about his citation by Civilian Complaint Review Board for use of excessive force against arrestee in unrelated case).

²⁰⁰See *supra* notes 74–84 and accompanying text.

²⁰¹FED. R. EVID. 609(a) (1975).

²⁰²*Id.* 608(b).

²⁰³*Id.* 609(a).

²⁰⁴*Id.*

court.”²⁰⁵ Why Rules 609(a) and 608(b) are inconsistent in these ways is not explained in either the Advisory Committee’s Notes or the legislative history.

Another important inconsistency between the two rules concerns time limits. Rule 609(b) generally forbids impeachment under 609(a)(1) “if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from confinement imposed for that conviction, whichever is the later date.”²⁰⁶ Older convictions can be admitted 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.”²⁰⁷ Rule 608(b), by contrast, imposes no time limit on bad acts. As noted above, Congress was not unconcerned with the time problem. The phrase “in the discretion of the court” was added to Rule 608(b) in part as a substitute for deleted language requiring that bad acts be “not remote in time.”²⁰⁸ Without a specific deadline, however, courts obviously can allow impeachment with bad acts occurring more than ten years in the past.²⁰⁹

Other troubling ambiguities in Rule 609(a)(1) split the circuits until finally resolved by the United States Supreme Court in 1989 in *Green v. Bock Laundry*.²¹⁰ One question concerned whether the reference to “the defendant” in Rule 609(a)(1) included only criminal defendants or also encompassed defendants in civil cases.²¹¹ Another question was whether the phrase “shall be admitted” required mandatory admission under Rule 609(a)(1) of convictions to impeach witnesses other than the defendant (or, perhaps, witnesses associated with the defendant), thus precluding resort to Rule 403 balancing for other witnesses.²¹² As to the first question, the Court held that Rule 609(a)(1) gave special protection

²⁰⁵*Id.* 608(b). Moreover, the legislative history of Rule 608(b) makes clear that impeachment may be blocked under Rules 403 and 611. *See supra* notes 141–45 and accompanying text.

²⁰⁶FED R. EVID. 609(b).

²⁰⁷*Id.*

²⁰⁸*See supra* notes 153–59 and accompanying text.

²⁰⁹Rules 609 and 608(b) also are inconsistent as to the admissibility of juvenile adjudications. Under Rule 609, evidence of juvenile adjudications is not admissible, except that in criminal cases a court may allow a witness other than an accused to be impeached with a juvenile offense if the court determines that admission of the evidence “is necessary for a fair determination of the issue of guilt or innocence.” FED. R. EVID. 609(d). Rule 608(b) does not contain such a provision. The effect of this inconsistency may be lessened somewhat by the language of Rule 608(b) making admission of prior misconduct discretionary because courts can be expected to exclude misconduct that occurred when a witness was young. Nonetheless, Rule 609(d) contains a specific limitation not present in Rule 608(b).

One final inconsistency between the rules is supported by history. Under Rule 609(a), prior convictions may be proven by extrinsic evidence. *Id.* 608(a). Under Rule 608(b), however, extrinsic evidence is not allowed. *Id.* 608(b).

²¹⁰490 U.S. 504 (1989).

²¹¹*Id.* at 508–09.

²¹²*Id.* at 524.

only to defendants in criminal cases.²¹³ To have held otherwise would have led to the absurd conclusion that defendants in civil cases had greater protections than plaintiffs from impeachment by prior convictions.²¹⁴ As to the second question, the court held the mandatory language required judges in civil cases to allow impeachment of any witness with evidence of prior felony convictions, “regardless of ensuant unfair prejudice to the witness or the party offering the testimony.”²¹⁵ Other language in the opinion strongly suggested the same standard would apply to prosecution witnesses in criminal cases.²¹⁶

In 1990, the Advisory Committee and Congress responded to *Green* by amending Rule 609(a).²¹⁷ Section (a)(1) as amended retains the special protection for criminal defendants but specifically abrogates the *Green* holding automatically admitting felony convictions to impeach witnesses other than an accused. Under the amended rule, a party opposing impeachment of any witness other than an accused may now seek to block impeachment under Rule 403. Thus, a prosecutor or any party in a civil proceeding may argue that impeachment should not be allowed because the danger of unfair prejudice substantially outweighs the probative value of impeachment. In addition, the stark separation of witnesses—the accused versus any other witness—means that defense counsel may no longer seek the special protection previously available to witnesses

²¹³*Id.* at 521.

²¹⁴*Id.* at 508–11. The Court strongly implied that to differentiate between civil litigants in this way would violate the Fifth Amendment’s Due Process Clause. *Id.* at 510. The Court explicitly agreed with the Seventh Circuit’s observation that in civil cases, Rule 609(a)(1) “‘can’t mean what it says.’” *Id.* at 511 (quoting *Campbell v. Greer*, 831 F.2d 700, 703 (7th Cir. 1987)).

²¹⁵*Id.* at 527.

²¹⁶The Court noted that the Conference Committee, which wrote the version of Rule 609(a)(1) finally enacted by Congress, meant the rule to “shield the accused but not the prosecution.” *Id.* at 520. The Court also concluded that the conferees “intended that only the accused in a criminal case should be protected from unfair prejudice by the balance set out in Rule 609(a)(1).” *Id.* at 523–24. Finally, the Court’s reasoning in forbidding resort to Rule 403 to bar impeachment of witnesses in civil cases applies equally to impeachment of prosecution witnesses in criminal cases. The Court points out that as a matter of construction, the phrase “shall be admitted” applies to both (a)(2) and (a)(1), subject only to the exception in (a)(1) for defendants in criminal cases. *Id.* at 525–26. If the mandatory language applies to subpart (a)(1), and only criminal defendants are excepted, it follows that prosecution witnesses should not be.

²¹⁷The amendment is as follows:

(a) General rule. For the purpose of attacking the credibility of a witness, (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such 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.

Amendments to Federal Rules of Evidence—Rule 609, 129 F.R.D. 347, 352 (1990).

associated with the accused.²¹⁸ Finally, section (a)(2) was amended to clarify that any witness, including an accused, may be impeached with a prior conviction involving honesty or false statement without any Rule 403 balancing.²¹⁹

No corresponding amendments were made to Rule 608(b) in 1990. Nonetheless, the amendments to Rule 609(a) reduce the inconsistency between Rules 609(a) and 608(b) in one significant way. After *Green* and before the amendments, felony convictions automatically could be used under Rule 609(a)(1) to impeach any witness other than an accused (or a witness associated with an accused), although Rule 403 was available to block impeachment by similar misconduct under Rule 608(b). After the amendment, Rule 403 can be invoked to block impeachment with a prior felony conviction of witnesses other than the accused under Rule 609(a)(1) as well as to block impeachment under Rule 608(b) with similar misconduct not resulting in a conviction. The other major inconsistencies—special treatment for an accused under Rule 609(a)(1) but not Rule 608(b), and automatic admission of all crimes involving dishonesty or false statement under Rule 609(a)(2) but not under Rule 608(b)—remain.

In addition to the textual differences between Rules 609(a) and 608(b), there also appears to be some inconsistency in the application of the two rules. Although I cannot verify this assertion empirically, it is my impression from reading hundreds of cases that many courts tend to be more liberal in allowing impeachment under Rule 609(a)(1) than under Rule 608(b).²²⁰ Many courts are more likely to allow impeachment with a bad act if the misconduct resulted in a conviction than if it did not. This inconsistency is most noticeable with

²¹⁸*Id.* at 353. The amendment to Rule 609(a)(1) also eliminated the requirement that the prior conviction be elicited from the witness or established by public record during cross-examination, thus approving the common practice of revealing the conviction on direct examination of a witness to remove its “sting” and allowing proof of the prior conviction with any appropriate extrinsic evidence, not only a “public record.” *See id.*

²¹⁹*Id.* at 352.

²²⁰Perhaps courts are responding to the many scholars who have opined that Rule 608(b) should be restrictively interpreted. *See supra* note 155 and accompanying text.

misconduct considered to have only a small or medium bearing on credibility, such as robbery,²²¹ drug use,²²² theft,²²³ and assault.²²⁴

Courts also are inconsistent as to the amount of detail about misconduct they admit under Rules 609(a) and 608(b). Many courts restrict inquiry under Rule 609(a) to the name of the crime, the date of conviction, and the sentence.²²⁵ With bad acts, by contrast, courts often must allow a broader inquiry into the factual details. Without a conviction, there is not always a convenient label to characterize the wrongdoing. Thus, under Rule 609(a) a court might limit a cross-examiner to asking, "Isn't it true that you were convicted of robbery in June of 1995 and sentenced to six years in jail?" but under Rule 608(b) allow a cross-examiner to ask, "Isn't it true that in June of 1995, at the corner of Broadway and 53rd street, you stopped Ms. X at gunpoint and demanded that she give you all of her money, and when she hesitated, you tore her purse from her hands and ran?" The result is that bad act impeachment sometimes may be more prejudicial than impeachment with a conviction even though the underlying acts are the same.²²⁶

²²¹*Compare* *United States v. Alexander*, 48 F.3d 1477, 1488 (9th Cir. 1995) (allowing impeachment under Rule 609(a)(1) with prior robbery conviction), *and* *United States v. Moore*, 917 F.2d 215, 235 (6th Cir. 1990) (same), *with* *United States v. Hastings*, 577 F.2d 38, 40–41 (8th Cir. 1978) (upholding district court decision to exclude evidence, under Rule 608(b), of witness's involvement in bank robberies).

²²²*Compare* *United States v. Hernandez*, 106 F.3d 737, 739–40 (7th Cir. 1997) (allowing impeachment under Rule 609(a)(1) for prior narcotics-related conviction), *and* *United States v. George*, 752 F.2d 749, 756 (1st Cir. 1985) (same), *with* *United States v. Sellers*, 906 F.2d 597, 602 (11th Cir. 1990) (approving exclusion of prior drug use to impeach under Rule 608(b)), *and* *United States v. McDonald*, 905 F.2d 871, 875 (5th Cir. 1990) (same).

²²³*Compare* *United States v. Brown*, 603 F.2d 1022, 1029 (1st Cir. 1979) (allowing impeachment under 609(a)(1) with convictions for burglary and petit larceny), *with* *Sellers*, 906 F.2d at 603 (holding prior unrelated theft not admissible under Rule 608(b)).

²²⁴*Compare* *United States v. Toney*, 27 F.3d 1245, 1253 (7th Cir. 1994) (admitting prior conviction for aggravated assault in trial for possession of firearm), *with* *United States v. Parker*, 133 F.3d 322, 327 (5th Cir. 1998) (stating that violent crimes are not relevant to witness's character for truthfulness under Rule 608(b)).

²²⁵*See, e.g.*, *United States v. Robinson*, 8 F.3d 398, 409–10 (7th Cir. 1993) (stating that criminal defendant may be questioned only about whether he was previously convicted of felony, its name, and when conviction was obtained); *United States v. Morrow*, 977 F.2d 222, 228 (6th Cir. 1992) (permitting examination only as to fact of prior conviction and prohibiting further probing by prosecutor); *United States v. Breckenridge*, 782 F.2d 1317, 1323 (5th Cir. 1986) (holding that trial court properly limited questions about facts underlying conviction). *But see* *United States v. Hurst*, 951 F.2d 1490, 1501 (6th Cir. 1991) (stating that statutory name of crime may give insufficient information and that some details of offense should be brought out).

²²⁶Courts also may allow broader inquiry into underlying details under Rule 608(b) because of the rule forbidding a cross-examiner to prove the misconduct with extrinsic evidence. If the questioner was limited to asking, "Isn't it true you robbed someone?" and the witness answered, "No," the witness might be seen to have an unfair advantage over the questioner. Follow-up questions about the underlying details allow the cross-examiner to suggest that the misconduct actually occurred.

In sum, the history of impeachment by convictions and bad acts is marked by extraordinary inconsistency. Judges, rulemakers, and legislators have been unable to agree on what the standards should be or how they should be applied. This inconsistency has high costs. These costs are explained in the next section.

III. THE PROBLEMS WITH CACOPHONY

The language of Rules 609(a) and 608(b) has proven to be extremely elastic. Indeed, it is difficult to think of another area of the law where disagreement about the appropriate standards and their application is so wide-spread. The inconsistent application of each rule and the inconsistencies between the rules create substantial problems in the administration of justice.

Ideally, federal law should be uniform because it is one government's law. State evidentiary rules may vary from the federal rules and from each other, but the federal rules should mean the same thing in Idaho and in Alabama, and from one federal courtroom to the next.²²⁷ Local differences may justify different results in particular cases, but, to the extent possible, the basic meaning of the Federal Rules of Evidence should be the same nationwide.

Several important policies are compromised by inconsistent interpretation of federal evidence rules. First, litigants are denied equal protection of the laws. Treating like cases alike is basic to the American notion of fairness.²²⁸ When one judge decides that a particular conviction or bad act may be used to impeach a witness, and another judge decides exactly the opposite, the law is not protecting the witnesses and the litigants equally. Second, when the law is unpredictable, people cannot plan their affairs or rely on the law with confidence.²²⁹ For litigation to proceed rationally, the parties must identify potential witnesses relatively early in a lawsuit and determine how their testimony will fit into the plaintiff's or the defendant's theory of the case. Revelation of a conviction or a bad act can devastate a witness's credibility. Not only may the jurors conclude the witness has a bad character for truthfulness, they may conclude the witness has a bad character, period. The "bad person" inference is particularly damaging when

²²⁷The Supreme Court has long recognized the importance of the uniform interpretation of federal law. *See, e.g.,* Tafflin v. Levitt, 493 U.S. 455, 465 (1990) ("[P]etitioners' concern with the need for uniformity and consistency of federal criminal law is well taken . . ."); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943) (stating that use of diverse state laws governing federal commercial paper "would subject the rights and duties of the United States to exceptional uncertainty . . . [and] lead to great diversity in results . . . [thus making the] desirability of a uniform [federal] rule . . . plain"); *Dodge v. Woolsey*, 59 U.S. (18 How.) 331, 350 (1855) (noting that country "would be incomplete and altogether insufficient for the great ends contemplated, unless a constitutional arbiter was provided to give certainty and uniformity, in all of the States, to the interpretation of the constitution and the legislation of congress"); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347-48 (1816) (stressing "the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution").

²²⁸Evan Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 852 (1994).

²²⁹*See* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 597 (1987) (arguing that "[t]he ability to predict what a decisionmaker will do helps us plan our lives, have some degree of repose, and avoid the paralysis of foreseeing only the unknown").

the witness is a party because the jury may decide the case on that basis, rather than on the evidence presented.²³⁰ Case preparation may be paralyzed if counsel is unable to make any prediction about whether impeachment will be allowed. If the witness subject to impeachment is a party or is otherwise central to the case, counsel literally may not know whether to proceed, abandon the suit, or settle. Counsel for a criminal defendant often will not know if the defendant can testify. Counsel thus must muddle through, trying to plan alternate strategies.

The problems of planning and prejudice may be lessened if the judge assigned to the case has an impeachment track record. If the judge generally allows wide-open impeachment or limits it sharply, some of the uncertainty can be avoided. In addition, parties can seek a pretrial ruling on impeachment questions.²³¹ But the problems may remain. The vague, ambiguous language of Rules 609(a) and 608(b) make decisions necessarily subjective and ad hoc. Thus, a judge may be inconsistent from one ruling to another. A judge also may decline to make a final determination on impeachment until after a witness testifies because properly weighing probity and prejudice may require hearing the witness's testimony.²³² Finally, pretrial rulings generally are made on the eve of trial, and counsel still will be hampered by not being able to make a prediction about impeachment in the earlier stages of the case.

A third problem is that Rules 609(a) and 608(b) allow judges virtually unbridled discretion.²³³ One purpose of an evidence code is to define standards of admissibility in specific, recurring situations and thus to limit judicial discretion. At several points during the codification process the drafters and Congress intentionally cabined courts rather than giving them free rein.²³⁴ Language

²³⁰Justice Souter has noted that unfair prejudice can result from "generalizing a defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged (or, worse, as calling for preventive conviction even if he should happen to be innocent momentarily)." *Old Chief v. United States*, 519 U.S. 172, 180–81 (1997).

²³¹Courts clearly have the discretion to decide whether impeachment will be allowed before the trial starts. *WRIGHT & GOLD*, *supra* note 104, § 6141, at 291. Weinstein and Berger state that this is preferable practice with both convictions and bad acts. *WEINSTEIN & BERGER*, *supra* note 136, § 609.22, at 609-62 to -63. The Supreme Court raised the stakes for criminal defendants by requiring that an accused testify in order to preserve the impeachment issue for appeal. *Luce v. United States*, 469 U.S. 38, 42–43 (1984).

²³²*See United States v. Burkhead*, 646 F.2d 1283, 1285 (8th Cir. 1981) (stating that district court has "discretion to refuse to rule in advance of trial on the admissibility of impeachment evidence"); *United States v. Oakes*, 565 F.2d 170, 173 (1st Cir. 1977) (encouraging but not requiring pretrial rulings).

²³³*See Gold*, *supra* note 97, at 2296 (stating that judges "[t]oo often . . . make the mistake of assuming that the uncertainties of the Rule's text provide license to exercise virtually unrestricted discretion").

²³⁴For example, the Advisory Committee rejected the suggestion that the system of class exceptions to the hearsay rule be abandoned in favor of assessing admissibility of hearsay on a case-by-case basis with procedural safeguards. Preliminary Draft, *supra* note 99, at 327. According to

limiting discretion is conspicuously absent from Rules 609(a) and 608(b). Inconsistent and unpredictable decisions result.

The inconsistencies between the two rules create further problems. Often, the same criminal misconduct is admissible under one rule but not the other or vice versa. This makes little sense. As Professors Mueller and Kirkpatrick point out, the two rules proceed on "a single theory of impeachment," namely, that "prior behavior bears on disposition toward truthfulness."²³⁵ In one instance the criminal behavior resulted in a conviction; in the other it did not. In both instances, however, "it is the acts themselves that reflect on veracity," not whether a conviction occurred.²³⁶

This "back-door" admission occurs in several different ways. The first instance arises from the different standards for impeaching a criminal defendant under 609(a)(1) and 608(b). An accused may be impeached with a prior felony conviction only if the prosecutor can demonstrate that the probative value of the conviction outweighs its prejudicial effect.²³⁷ An accused may be impeached with a bad act, however, unless the accused can show that the danger of unfair prejudice substantially outweighs the probative value.²³⁸ If probity and prejudice are fairly evenly balanced, a prosecutor may be precluded from mentioning the conviction but allowed to question the defendant about the acts underlying the conviction. For example, assume an accused is charged with robbery and has a nine year-old burglary conviction. A judge might reasonably conclude probity does not outweigh prejudice and therefore bar impeachment with the burglary conviction under Rule 609(a)(1). Assume further that the judge thinks the decision was close. The judge then might allow cross-examination about the burglary itself under Rule 608(b) because the accused cannot show that the danger of unfair prejudice substantially outweighs the probative value.

the suggestion, admissibility would be determined by weighing probity and prejudice, considering waste of time, and assessing the availability of more satisfactory evidence. *Id.* The procedural safeguards would consist of notice that a party intended to use hearsay, giving the judge freedom to comment on the weight of the evidence and more authority at both the trial and appellate level to weigh evidence. *Id.* The Advisory Committee saw this approach as "involving too great a measure of judicial discretion, minimizing the predictability of rulings, enhancing the difficulties of preparation for trial, adding a further element to the already over-complicated congeries of pretrial procedures, and requiring substantially different rules for civil and criminal cases." *Id.*

Similarly, Congress rejected the version of Rule 611(b) submitted by the Supreme Court. That version allowed a witness to be cross-examined on any issue relevant to the case, unless, in the exercise of discretion, the court limited examination to matters testified about on direct. Both the House and Senate Judiciary Committees decided to adopt the traditional rule limiting cross-examination to the scope of the direct. See H.R. REP. NO. 93-650, at 12 (1973); S. REP. NO. 93-1277, at 25 (1974).

²³⁵MUELLER & KIRKPATRICK, *supra* note 162, § 6.49, at 856.

²³⁶*Id.*

²³⁷FED. R. EVID. 609(a)(1).

²³⁸*Id.* 608(b).

Because the misconduct that forms the basis of the impeachment is exactly the same, it plainly seems unfair to forbid impeachment under Rule 609(a)(1) but allow the defendant to be questioned about the underlying acts under Rule 608(b). Nonetheless, many courts allow this gambit.²³⁹ Professor Richard Uviller surveyed federal judges on this point in 1993, and approximately one-third of the respondents said they sometimes allow this form of back-door impeachment, apparently on the theory that Rule 608 is independent of Rule 609.²⁴⁰

Similar back-door impeachment can occur if a witness has a misdemeanor conviction. Under Rule 609(a)(1), only felony convictions can be used to impeach, but Rule 608(b) has no such limitation. Thus, a court may forbid questions about the misdemeanor conviction but allow the witness to be cross-examined about the acts underlying the conviction.

A third instance of back-door impeachment arises from the different time limits of the two rules. Under Rule 609(b), convictions more than ten years old are admissible only if the party seeking to impeach can satisfy a heavy burden of persuasion.²⁴¹ Rule 608(b) does not have a specific time limit. Although Congress was concerned about impeachment with stale bad acts,²⁴² by failing to include a specific time limit, it left the way open for courts to allow such impeachment. Consequently, a court might bar questions about a twelve- or fifteen-year-old conviction under Rule 609(b) but allow the witness to be asked about the acts underlying the conviction under Rule 608(b).

In some cases misconduct admissible under Rule 609(a) may be excluded under Rule 608(b). If a prior conviction involves dishonesty or false statement, it is automatically admissible under Rule 609(a)(2) against any witness, including a criminal defendant, and no balancing under Rule 403 is allowed.²⁴³ Under Rule 608(b), however, the same misconduct might be excluded under Rule 403 if the party opposing impeachment can demonstrate that the danger of unfair prejudice substantially outweighs probative value.²⁴⁴ For example, assume a criminal defendant has a prior misdemeanor conviction for petit larceny and the judge

²³⁹See, e.g., *United States v. Wilkerson*, 251 F.3d 273, 279–80 (1st Cir. 2001) (noting that district judge would have let in evidence of prior receipt of stolen property under Rule 608(b) even though evidence was excluded under Rule 609).

²⁴⁰H. Richard Uviller, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale*, 42 DUKE L.J. 776, 821, 835 (1993). The other two-thirds of the respondents agreed with the statement: "I do not think FRE 608 should be used as a back door when the front door of FRE 609 has been shut." *Id.* at 835.

²⁴¹The proponent must convince the court, "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).

²⁴²See *supra* notes 144, 147–53 and accompanying text.

²⁴³See the cases cited *supra* note 176.

²⁴⁴See *supra* notes 156–59 and accompanying text.

believes the conviction involved dishonesty.²⁴⁵ The judge must allow questioning about the conviction under Rule 609(a)(2). On the other hand, if the defendant had committed the very same petit larceny but had not been convicted of it, the judge could exercise discretion under Rule 608(b) to preclude impeachment.

All of these instances of backdoor impeachment are plainly unfair. The misconduct in each instance is exactly the same; the purpose of admitting it is the same. Why should impeachment be forbidden under one rule and allowed under the other? If revealing the conduct is thought to be too prejudicial under one rule, why is it not considered just as prejudicial under the other? There is no ready explanation for these inconsistencies.

IV. TOWARD HARMONIZATION OF IMPEACHMENT BY CONVICTIONS AND BAD ACTS

The law of impeachment by convictions and bad acts is in chaos. The language of Rules 609 and 608(b) allows judges unfettered discretion. Decisions applying the rules are wildly inconsistent, resulting in a denial of equal protection, unpredictability, and unfairness. The further inconsistencies between the rules lead to the unseemly practice of allowing misconduct barred under one rule as unduly prejudicial to be admitted under the other. This Part makes suggestions for harmonizing the two methods of impeachment. First, I suggest ways to lessen the inconsistencies between the rules. Second, I suggest a process for reaching a genuine compromise as to what kinds of misconduct may properly be used to impeach credibility under each rule.

A. Toward Harmony Between the Rules

Historically, there was less inconsistency between the two methods of impeachment than there is today.²⁴⁶ Although complete consistency is neither possible nor desirable, several specific steps can be taken to achieve more consistency.

²⁴⁵Some judges so hold. *See supra* note 187 and accompanying text.

²⁴⁶*See supra* note 32 and accompanying text.

1. Read Some of the Protections of Rule 609 into Rule 608

Courts should read three Rule 609 protections into Rule 608(b). First, the enhanced protection criminal defendants receive under Rule 609(a)(1) should be extended to impeachment by bad acts.²⁴⁷ Second, courts should apply the felony limitation of Rule 609(a)(1) to bad acts that are criminal in nature but do not directly involve dishonesty or false statement. Third, courts should apply the ten year time limit of Rule 609(b) to Rule 608(b) and also require that a party seeking to impeach with a bad act more than ten years old satisfy the heavy burden of Rule 609(b). It would be best if these changes were made by amending Rule 608(b). Courts could reasonably accomplish these changes themselves, however, because Rule 608(b) makes all prior bad act impeachment “in the discretion of the court.”²⁴⁸

(a) Enhancing Protection for an Accused

A criminal defendant can be impeached with a conviction under Rule 609(a)(1) only if the prosecution can satisfy its burden of showing that the probative value of the conviction outweighs prejudicial effect.²⁴⁹ Under Rule 608(b), by contrast, any witness, including an accused, can be impeached with bad acts unless the party opposing impeachment can satisfy the Rule 403 burden of showing that the danger of unfair prejudice substantially outweighs probative value.²⁵⁰ This difference creates the back-door admissibility practice whereby a prosecutor may be barred from asking an accused about a conviction but allowed to ask about the facts underlying the conviction.

The case for reading the Rule 609(a)(1) protection for an accused into Rule 608(b) and ending the offensive back-door practice is straightforward.²⁵¹ In both instances it is the criminal misconduct that impeaches the defendant’s credibility. What happened or didn’t happen in the criminal justice system after the act occurred is irrelevant to credibility. A conviction simply makes it somewhat more likely the defendant committed the misconduct; it does not enhance the probity of the misconduct. In addition, the prejudicial effect is basically the same whether the accused is asked about the conviction or the act. The jury is not likely to distinguish between the questions “Isn’t it true that you were convicted of robbing Ms. Jones at knife-point on September 1?” and “Isn’t it true that you robbed Ms.

²⁴⁷Professor Ordoover suggested something very like this proposal in 1989 before Rule 609(a) was amended. See Abraham P. Ordoover, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b), and 609(a)*, 38 EMORY L.J. 135, 137–38 (1989).

²⁴⁸FED. R. EVID. 608(b).

²⁴⁹*Id.* 609(a)(1).

²⁵⁰See *supra* notes 156–59 and accompanying text.

²⁵¹Possible counterarguments are addressed *infra* notes 271–90 and accompanying text.

Jones at knife-point on September 1?" In both instances the jury probably will draw the forbidden inference about the defendant's character and may presume that he acted in conformity with that character in the present case.²⁵² Since the probative value and the prejudicial effect of the misconduct are precisely the same with both methods of impeachment, it makes no sense to grant the defendant less protection under Rule 608(b) than under Rule 609(a)(1).²⁵³ Thus, courts should require prosecutors to satisfy the Rule 609(a)(1) burden of showing that probative value outweighs prejudicial effect when cross-examining an accused about bad acts.²⁵⁴

(b) Limiting Impeachment with Criminal Bad Acts to Serious Wrongdoing

For similar reasons, courts should limit cross-examination about bad acts that are criminal in nature but do not directly involve dishonesty or false statement to misconduct that would constitute a felony if the witness had been convicted. Under Rule 609(a)(1), impeachment with convictions that do not directly involve dishonesty or false statement is limited to crimes "punishable by death or imprisonment in excess of one year."²⁵⁵ Rule 608(b), however, contains no such limitation. Thus, while a cross-examiner cannot use the front door to ask about a misdemeanor conviction, the cross-examiner can use the back door to ask about the acts underlying the conviction. Congress determined only felonies have sufficient bearing on credibility unless a conviction directly involves dishonesty or false statement. Again, because it is the misconduct rather than the conviction that is the relevant datum, it makes no sense to bar questions about the conviction but allow questions about the underlying acts.

One problem with applying the felony limitation to Rule 608(b) is that it will not always be clear whether the bad acts were sufficiently serious to constitute a

²⁵²FED. R. EVID. 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith . . .").

²⁵³As Professor Ordoover points out, one purpose of granting the defendant enhanced protection is to prod him to testify. *See Ordoover, supra* note 247, at 144–45. This goal is undermined if the prosecutor is allowed to ask about the facts underlying a conviction under Rule 608(b).

²⁵⁴Professors Mueller and Kirkpatrick recognized that "[c]oordinating the mandates of FRE 608 and 609 is surprisingly difficult" and have addressed the back-door problem. *See MUELLER & KIRKPATRICK, supra* note 162, § 6.49, at 855. They suggest two approaches to improve coordination. One would give the cross-examiner a choice of proceeding either under 608(b) or 609 but not both. *Id.* The other approach would hold that Rule 609 provides the governing standards whenever misconduct has resulted in a conviction, and Rule 608(b) could thus be used only for misconduct not resulting in a conviction. *Id.* at 856. The first approach would work little change in current practice and would not resolve the back-door problem. The second approach would not resolve the inconsistency between the two rules. Broader impeachment would be allowed if a defendant was not convicted than if the defendant was, despite the fact that the probity and prejudice are the same.

²⁵⁵FED. R. EVID. 609(a)(1).

felony. Court should apply their best judgment in close cases. Although courts will sometimes err, the inconsistency between the rules would be reduced.

(c) Applying a Ten Year Time Limit to Rule 608(b)

The case for applying the ten year time limit of Rule 609(b) to impeachment under Rule 608(b), and thus ending yet another of the back-door practices, is similar to the argument for reading the limitations of Rule 609(a) (1) into Rule 608(b). It is the misconduct that is probative and prejudicial under both rules, and the probity and prejudice are the same whether the misconduct resulted in a conviction or not. Congress made evidence of convictions more than ten years old inadmissible unless the proponent of impeachment can satisfy the heavy burden of showing that “the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.”²⁵⁶ It makes no sense to require a party wishing to impeach a witness with an eleven year old conviction to show that probity substantially outweighs prejudice but allow the party to question the witness about the misconduct underlying the conviction unless the opponent of impeachment can show that prejudice substantially outweighs probity.

2. Allow Impeachment with the Same Criminal Misconduct Under Rules 609(a) and 608(b)

In addition to reading several of the specific protections of Rule 609 into Rule 608(b), courts generally should permit impeachment with the same sort of misconduct under both rules. The reason is the one stressed above; namely, that it is the misconduct that is probative and prejudicial, not whether the misconduct resulted in a conviction. Complete consistency plainly is not possible. The scope of misconduct admissible under Rule 608(b) necessarily exceeds that of Rule 609(a) because Rule 609(a) is limited to misconduct that resulted in a criminal conviction. Rule 608(b) encompasses not only conduct resulting in a criminal conviction but also criminal conduct not resulting in a conviction and some noncriminal conduct that bears on credibility.²⁵⁷ Nonetheless, there is substantial overlap. Prior misconduct that is criminal in nature should be equally admissible under both rules. While judges may disagree about what kinds of criminal

²⁵⁶*Id.* 609(b).

²⁵⁷Rule 609 can be seen as governing a subset of misconduct; namely, that resulting in a criminal conviction, or, as Professor Uviller puts it, “a special case of impeachment by prior misconduct.” *See Uviller, supra* note 234, at 795. In addition, strong policy reasons support the rule that prior convictions may be proven with extrinsic evidence while prior bad acts may not. A conviction is relatively easy to prove with a single piece of paper. Bad acts are not so easy to prove. Allowing extrinsic evidence would likely lead to mini-trials about whether the bad act occurred.

misconduct is probative of credibility, individual judges should apply their judgment on that issue consistently between the two rules.

Arguments that one or the other of the rules should be construed more narrowly are unpersuasive. It might be argued that Rule 609(a) should be construed more narrowly because of the potentially explosive impact of a criminal conviction on the jury, particularly if the witness is a criminal defendant. Under this view, a conviction indicates the wrongdoing was particularly reprehensible because the authorities chose to devote sufficient resources to secure a conviction. If criminal misconduct did not result in a conviction, it probably was because the wrongdoing did not seem bad enough to warrant full-scale prosecution. A fear that convictions are more prejudicial than bad acts not resulting in conviction may underlie the decisions of many courts to restrict inquiry about convictions to the name of the crime, the date of conviction, and the sentence, while allowing broader inquiry into the facts underlying misconduct not resulting in a conviction.²⁵⁸

This argument for a more restrictive reading of Rule 609(a), however, is based on several assumptions that are not necessarily true and that jurors may not make. Cases involving the “worst” robberies, assaults or thefts are not always the ones prosecuted to conclusion. Many other factors influence prosecution decisions. Backlogs,²⁵⁹ proof problems, the policy choices of prosecutors, and the financial resources of defendants²⁶⁰ influence whether a case is prosecuted

²⁵⁸See *supra* note 219 and accompanying text.

²⁵⁹As early as 1967, the President’s Commission on Law Enforcement and Administration of Justice concluded: “America’s system of criminal justice is . . . overworked, undermanned, [and] underfinanced . . .” See PRESIDENT’S COMM’N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 12 (1967). Criminal courts are buried in cases and have been for decades, particularly in large urban centers. See, e.g., WILSON R. PALACIOS, ET AL., CRIME AND JUSTICE IN AMERICA 29–30 (2d ed. 2002) (discussing near collapse of Philadelphia criminal courts in 1990 when backlog jumped from 12,129 to 32,880 because defendants failed to appear). This problem has been regularly reported in the press. See, e.g., E.J. Dionne, Jr., *Justice System in State Found Nearing Chaos, Study Panel Asserts It Is “Choking on Numbers,”* N.Y. TIMES, Dec. 18, 1981, at B1 (reporting backlog problems of New York state courts); Irving R. Kaufman, *The Judicial System, Ailing, Needs Help,* N.Y. TIMES, June 11, 1984, at A19 (noting that “poorly compensated judges stagger under the burden of case loads”); E.R. Shipp, *City’s Courts Clogged by Increase in Cases and Lack of Judges,* N.Y. TIMES, Nov. 27, 1982, at A1 (observing that “criminal courts in New York City are overwhelmed”); Michael Slackman, *Full Court Pressure,* NEWSDAY, Jan. 9, 1990, at 5 (discussing backlog problem in Suffolk County system in New York).

²⁶⁰No one would seriously assert that rich and poor receive the same treatment in the criminal justice system. Donald H. Zeigler, *Federal Court Reform of State Criminal Justice Systems: A Reassessment of the Younger Doctrine from a Modern Perspective,* 19 U.C. DAVIS L. REV. 31, 40 (1985); see also Carl Kenney, *Tomorrow, All Eyes on the County Courthouse,* HERALD SUN (Durham, N.C.), July 23, 2000, at A17 (asserting that profit is motivation of legal system and only people with money have fair chance in court); *Paying for Justice,* CHI. TRIB., Jan. 16, 2000, at 18 (stating that failure to give poor adequate representation results in unfairness and higher conviction rate for poor defendants). For discussions of the different treatment accorded rich and poor

vigorously at least as much as the seriousness of one robbery or assault compared to another. In addition, whether it is true or not, many people appear to believe that criminals are let off on technicalities. This message is reinforced constantly through the media.²⁶¹ Consequently, many jurors may assume that a witness is guilty of criminal acts asked about on cross-examination even though the acts didn't result in a conviction. Finally, most jurors probably presume the judge wouldn't allow a witness to be asked about bad acts that didn't occur,²⁶² thus further equalizing the impact of bad acts and convictions.

If it is the misconduct that impeaches rather than the conviction, courts should allow the same amount of detail to reach the jury whether the misconduct resulted in a conviction or not.²⁶³ The practice of some courts in restricting cross-examination under Rule 609 to the name of crime, the date of conviction, and the sentence, and refusing to allow questions about the underlying details,²⁶⁴ may deprive jurors of crucial information about the witness's credibility and may confuse or mislead them. The name of a crime may not indicate clearly what the crime is, particularly if the witness violated a complex federal criminal statute.²⁶⁵ Moreover, jurors may not know the elements even of common crimes.²⁶⁶ Thus,

defendants, see generally, LEWIS R. KATZ, ET AL., *JUSTICE IS THE CRIME, PRETRIAL DELAY IN FELONY CASES* (1972) (arguing that poor defendants are more likely to be victims of pretrial delay); PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, *TASK FORCE REPORT: THE COURTS* 51 (1967) [hereinafter *TASK FORCE REPORT*] (noting that poor defendants often lack resources necessary to mount effective defense); PAUL WICE, *FREEDOM FOR SALE* (1974) (observing that poor defendants are less likely to receive pretrial release).

²⁶¹See, e.g., David R. Dow, *Feeding the Public's Fear; When Newspapers Say a Conviction Was "Reversed on a Technicality," They Insult Our Constitution and Judicial System*, TEX. LAW., Mar. 11, 1996, at 22 (arguing that media often cheapen law and policy by latching on word 'technicality'); Frank Main & Abdon M. Pallasch, *Follow "Dirty Money,"* CHIC. SUN-TIMES, Aug. 8, 2001, at 7 (quoting Attorney General John Ashcroft as saying, "Judicial restraint means judges refusing to create on their own a criminal justice system that lets clearly guilty criminals off on a technicality."); Richard J. Meislin, *The Crime Without Punishment Crisis*, N.Y. TIMES, Aug. 10, 1981, at B1 (citing financial difficulties as one reason New York state "flushes all but the most serious cases through the system as quick as possible").

²⁶²Unfortunately, this assumption often is untrue because courts apply an extremely lax standard for determining whether bad acts actually occurred. This issue is addressed *infra* notes 301-27 and accompanying text.

²⁶³See Uviller, *supra* note 240, at 803-08 (arguing for this result).

²⁶⁴See *supra* note 219 and accompanying text.

²⁶⁵For example, jurors would not really know what the witness did wrong if the court limited the prosecutor to asking, "Isn't it true that you were convicted of violating 29 U.S.C. § 501 making it a crime to violate your fiduciary responsibilities as an officer of a labor organization?" or to asking, "Isn't it true that you were convicted of violating § 1962 of the Racketeer Influenced and Corrupt Organizations Act making it a crime unlawfully to receive income from a pattern of racketeering activity?"

²⁶⁶It seems unlikely, for example, that lay jurors would readily know the differences between robbery, larceny, and burglary. Robbery is generally defined as the "[f]elonious taking of personal property in the possession of another, from his person or immediate presence, and against his will,

jurors often will not know precisely what the witness did wrong unless they are given some details about the underlying acts.

It might be argued credibility is impeached simply by the fact a serious crime was committed, and the details are unimportant. But not all felonies have the same probative value or present the same possibility of prejudice.²⁶⁷ In addition, even if the court tells the jurors the elements of the impeaching crime, they still may not have all of the information that bears on credibility. Context may be crucial. As Charles A. Wright and Victor J. Gold point out:

Given the proper circumstances, virtually any kind of misconduct can be probative of untruthfulness. Acts of violence can be depraved to the point that they suggest the actor rejects all societal norms, including the duty to testify truthfully. Acts of sexual immorality can be at the center of a web of deceit.²⁶⁸

The point of allowing questioning about a conviction is to impeach a witness's credibility. Jurors should be given the facts that specifically bear on that issue.²⁶⁹

*United States v. Hurst*²⁷⁰ provides an example of a court allowing an appropriate inquiry into underlying details. One of the defendants had a prior conviction for attempting to obstruct justice, and defense counsel brought this out on direct examination.²⁷¹ When the government sought to ask about the details on cross-examination, the defense objected.²⁷² The trial court overruled the objection.²⁷³ The attempted obstruction of justice was offering a bribe to a police officer to file a false paper to create an alibi for another person in a bank robbery

accomplished by means of force or fear." BLACK'S LAW DICTIONARY 1492 (4th ed. 1951). Larceny, by contrast, is simply the "[f]elonious stealing [of] . . . another's personalty . . . with intent to convert it or to deprive the owner thereof." *Id.* at 1023. Burglary is "[t]he breaking and entering the house of another in the nighttime, with intent to commit a felony therein, whether the felony be actually committed or not." *Id.* at 247.

²⁶⁷See WRIGHT & GOLD, *supra* note 104, § 6134, at 224.

²⁶⁸*Id.* § 6118, at 104.

²⁶⁹See *People v. Sorge*, 93 N.E. 2d 637, 639 (N.Y. 1950) ("Since a witness may be examined properly with respect to criminal acts that have escaped prosecution, there is no reason why indictment followed by conviction should proscribe inquiry as to what those acts were. A knowledge of these acts casts light upon the degree of turpitude involved and assists the jury in evaluating the witness' credibility." (internal citations omitted)).

²⁷⁰951 F.2d 1490 (6th Cir. 1991).

²⁷¹*Id.* at 1500.

²⁷²*Id.*

²⁷³*Id.*

case.²⁷⁴ The court concluded that the specific conduct was directly relevant to the defendant's credibility.²⁷⁵

The *Hurst* court also allowed the prosecutor to ask very detailed questions about the attempt to bribe the police officer.²⁷⁶ Such questioning should be allowed under both Rules 609(a) and 608(b) as long as the facts are not unduly prejudicial. Undue prejudice might occur if the questioner is allowed to ask about inflammatory information not directly relevant to credibility. In *Hurst*, questions about the name of the officer, the time and place of the attempted bribe, and the amount of the bribe were not unduly prejudicial.²⁷⁷

Some commentators contend that Rule 608(b) should be construed to permit impeachment with fewer kinds of misconduct than Rule 609(a)(1).²⁷⁸ Two main arguments are offered in support. Neither argument is persuasive.

The first argument is that the wording of Rule 609(a)(1) is broader than the wording of Rule 608(b). Rule 609(a)(1) allows any felony to be admitted "[f]or

²⁷⁴*Id.*

²⁷⁵*Id.* The district court apparently reached this result by combining Rule 609(a) and Rule 608(b), allowing the details underlying the conviction to be admitted under 608(b). While the result might have been reached solely under Rule 609(a), the court was correct in harmonizing the application of the Rules.

²⁷⁶*Id.* The prosecutor's questioning was as follows:

And at that time in 1982, sir, you were charged in the Western District of Tennessee, were you not, with attempting to obstruct justice by offering Jerry Wyatt, chief of police of Brownsville, Tennessee, a payment of up to \$10,000 to Jerry Wyatt if Jerry Wyatt would place a false document in the Brownsville Police Department records showing that David Eugene Graham had been in the Haywood County, Tennessee area on August the 7th of 1979 between nine o'clock and nine-twenty a.m. The purpose of that false document was to create an alibi for David Eugene Graham who was to go on trial two days later on September the 8th of 1982 in the United States District Court in the Eastern District of Tennessee, that is in Chattanooga, in which David Graham had been charged with bank robbery which had occurred on August the 7th, 1979. And that was the basis for your obstruction of justice charge, wasn't it, sir?

Id.

²⁷⁷*Id.* *United States v. Abel*, 469 U.S. 45 (1984), also is instructive in deciding which details of prior misconduct should be revealed. *Abel* concerned the use of prior bad acts to show bias. *See id.* at 47. Mills, a defense witness, testified that Ehle, a government witness, told Mills he planned to implicate the defendant falsely for government favors. *Id.* The prosecutor wished to question Mills about whether he, Ehle, and the defendant all belonged to a secret prison organization named the Aryan Brotherhood "that required its members always to deny the existence of the organization and to commit perjury, theft, and murder on each member's behalf." *Id.* The Court held that the tenets of the organization were properly admissible to show bias and that the trial court correctly forbade the prosecutor from using the name because it was unduly prejudicial. *Id.* at 54-55.

²⁷⁸*See, e.g.,* WRIGHT & GOLD, *supra* note 104, § 6118, at 102-04 (arguing for narrower interpretation of Rule 608(b)); Gold, *supra* note 97, at 2310 n.77 (same); Okun, *supra* note 97, at 545 (same); *see also* WEINSTEIN & BERGER, *supra* note 136, § 608.22[2][c], at 608-56 to -57 (making same argument implicitly).

the purpose of attacking the credibility of a witness.”²⁷⁹ Rule 608(b), by contrast, says that “[s]pecific instances of the conduct of a witness . . . may . . . if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness’ character for truthfulness or untruthfulness”²⁸⁰ Because credibility is a broader concept than character for truthfulness, Rule 608(b) should be construed to limit questions to conduct directly involving lying or deception, while Rule 609(a) may be construed to allow questions about more kinds of felonious misconduct.²⁸¹

This argument is unpersuasive for several reasons. First, as explained in Part II, there is no evidence in the legislative history of Rule 608(b) that Congress intended to choose the narrow view over the broad view as to what kinds of misconduct bears on one’s character for truthfulness.²⁸² Second, credibility and character for truthfulness overlap in meaning. Credibility is “that quality in a witness which renders his evidence worthy of belief.”²⁸³ “Character” is “[t]he aggregate of the moral qualities which belong to and distinguish an individual person.”²⁸⁴ “Truthfulness” is the moral quality of “telling the truth, esp. habitually.”²⁸⁵ Not surprisingly, commentators generally use credibility and character for truthfulness interchangeably.²⁸⁶ Third, Rule 608(b) as originally enacted appears to equate credibility and character for truthfulness. It reads: “Specific instances of the conduct of a witness, *for the purpose of attacking or supporting the witness’ credibility* . . . may not be proved by extrinsic evidence. They may, however, . . . be inquired into on cross examination of the witness (1) concerning the witness’ character for truthfulness or untruthfulness”²⁸⁷ Although the words “credibility” and “character for truthfulness” are in different sentences, they appear to be used to mean the same thing.

²⁷⁹FED. R. EVID. 609(a)(1).

²⁸⁰*Id.* 608(b).

²⁸¹See WRIGHT & GOLD, *supra* note 104, § 6118, at 102–03 (criticizing courts that interpret “probative of truthfulness or untruthfulness” to “mean[] merely that the evidence is probative on the question of credibility,” and contending that “truthfulness or untruthfulness” “refers to the general character of the witness for veracity, not whether specific testimony of the witness is correct”); Okun, *supra* note 97, at 545 (“Rule 608(b) limits impeachment by specific instances of misconduct to instances that are directly relevant to the witness’ character for truthfulness Rule 609(a) allows impeachment with conviction for crimes that bear only a marginal relationship to the witness’ veracity.”).

²⁸²See *supra* notes 136–54 and accompanying text.

²⁸³BLACK’S LAW DICTIONARY 440 (4th ed. 1951).

²⁸⁴*Id.* at 294.

²⁸⁵RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 2031 (2d ed. 1987).

²⁸⁶See, e.g., WEINSTEIN & BERGER, *supra* note 136, § 608.22[2][b], at 608-53 (“[M]isconduct need not be punishable as a crime to be relevant to a witness’s credibility, so long as it is probative of truthfulness.”).

²⁸⁷FED. R. EVID. 608(b) (emphasis added).

One might argue that credibility is broader than character for truthfulness because credibility can be impeached in many different ways, such as by contradicting a witness, showing the witness made a prior statement inconsistent with trial testimony, or showing a witness is biased. Arguably, these ways of impeaching credibility may not directly implicate a witness's character for lying or telling the truth. For example, a prosecutor might ask, "Isn't it true you are the defendant's mother?" The question doesn't necessarily suggest that the mother is not a truthful person. Rather, she may so fear for her son that she will shade her testimony, perhaps without intending to, in order to protect him. This argument gains some support from the recent proposal to replace the word "credibility" with the phrase "character for truthfulness" in the first sentence of Rule 608(b). The sentence as amended would read: "Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence."²⁸⁸ According to the Advisory Committee's Note, some courts interpreted the original rule to bar the use of extrinsic evidence to show contradiction, a prior inconsistent statement, or bias, which was not the intent of the drafters.²⁸⁹ The Advisory Committee called use of the word credibility "overbroad," suggesting, at least implicitly, that the phrase "character for truthfulness" has a somewhat narrower scope.²⁹⁰

It is true that traditionally each method of impeachment has had its own rules on the use of extrinsic evidence.²⁹¹ These rules are based not on the nature of the impeachment *per se*, but rather on practical concerns such as keeping the trial from veering off into collateral matters.²⁹² The extrinsic evidence issue aside, it is difficult to see why "specific instances of conduct" under 608(b)—that is, bad acts, often criminal in nature—go to a witness's character for truthfulness, while evidence of contradiction, a prior inconsistent statement, or bias do not, and instead go only to some broader issue of credibility. If evidence is presented contradicting a witness's testimony, surely that evidence suggests the witness has a bad character for truthfulness. Evidence that a witness made a prior inconsistent statement suggests the same thing.

²⁸⁸Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy, Civil and Criminal Procedure and Rules of Evidence, 201 F.R.D. 560, 735–36 (2001). [ed. note: This amendment took effect on December 1, 2003.]

²⁸⁹*Id.* at 736–37.

²⁹⁰*See id.* at 737.

²⁹¹Convictions and bias, for example, traditionally have been provable using extrinsic evidence. *See United States v. Abel*, 469 U.S. 45, 51 (1984).

²⁹²For example, extrinsic evidence may only be used to prove a prior inconsistent statement if the questioner could have introduced the prior statement as a part his or her direct case. *See Denver City Tramway Co. v. Lomovt*, 126 P. 276 (Colo. 1912).

Even evidence of bias may suggest a bad character for truthfulness in some instances. Character for truthfulness does not include only a willingness to fabricate consciously. People may misstate without meaning to or because they cannot help themselves. Everyone has at least one friend for whom “I wish I had” becomes “I did.” Moreover, bias is defined as “a particular tendency or inclination . . . that prevents unprejudiced consideration of a question.”²⁹³ This sounds much like a character trait that interferes with one’s ability to tell the truth. Bias may be more limited in scope than character for truthfulness—the mother might lie for her son but not lie generally. On the other hand, some bias, like racial or ethnic bias, can affect one’s willingness or ability to be objective in many different contexts.²⁹⁴

Finally, even if credibility is broader than character for truthfulness, credibility should not be read more broadly in the context of impeachment by convictions and bad acts. A conviction does not impeach credibility by showing contradiction (unless the witness denies it), a prior inconsistent statement, or bias. Instead, a conviction impeaches credibility in exactly the same way as a criminal bad act. Both suggest the witness is not a law-abiding, moral person, and therefore is not worthy of belief. In sum, although “credibility” and “character for truthfulness” may not mean exactly the same thing, the overlap is substantial in the context of bad act and conviction impeachment. Consequently, use of the word credibility in Rule 609 should not be interpreted as a signal to allow impeachment with more kinds of misconduct than are admissible under Rule 608(b) as bearing on character for truthfulness.

Wright and Gold offer the second argument for a narrower reading of Rule 608(b). They contend that courts should construe Rule 608(b) to allow impeachment with fewer kinds of misconduct than Rule 609(a)(1) because it is less certain that misconduct not resulting in conviction occurred:

Evidence admitted under Rule 609 relates to witness misconduct that is almost certain to have occurred since it was the subject of a criminal conviction. Evidence of misconduct offered under Rule 608 need not pass the “beyond the reasonable doubt” standard. It can be offered so long as one witness is willing to allege that the misconduct occurred. In this respect, evidence offered under Rule 608 has less probative value than Rule 609 evidence. In order to balance this factor, it may make

²⁹³RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 202 (2d ed. 1987).

²⁹⁴One other method of impeachment seems directly aimed at revealing a witness’s character for truthfulness. Reputation and opinion evidence offered to impeach under Rule 608(a) is specifically limited to testimony about a witness’s character for truthfulness or untruthfulness. See FED. R. EVID. 608(a).

sense to demand a closer connection to truthfulness or untruthfulness from evidence offered under Rule 608.²⁹⁵

There are two flaws in this argument. First, it wrongly assumes we actually know the misconduct resulting in a criminal conviction occurred beyond a reasonable doubt. This is true only for the very small percentage of criminal convictions obtained after a trial. In some jurisdictions 95 percent or more of all convictions are obtained by guilty plea.²⁹⁶ Defendants plead guilty for many reasons not related to guilt,²⁹⁷ and the charge pled to may not be the crime actually committed.²⁹⁸ Consequently, a conviction for a particular crime rarely tells us what misconduct occurred beyond a reasonable doubt; indeed, it may affirmatively misrepresent the witness's prior misconduct.

Second, Wright and Gold's argument improperly mixes together the nature of the misconduct with how certain it is that the misconduct occurred. These are

²⁹⁵WRIGHT & GOLD, *supra* note 104, § 6118, at 103–04 n.50; *see also* Richard Friedman, *Character Impeachment Evidence: Psycho-Bayesian [!?] Analysis and a Proposed Overhaul*, 38 UCLA L. REV. 637, 644 (1991) (asserting that “a criminal conviction represents a determination by the judicial system, after its most painstaking type of proceeding, that a given fact—the defendant’s guilt of a crime—is true”). Wright and Gold subsequently qualified this argument somewhat by recognizing that some convictions produce unreliable decisions. *See* WRIGHT & GOLD, *supra* note 104, § 6140, at 284–90 (discussing inadmissibility of “tainted” convictions); Gold, *supra* note 97, at 2310 n.77 (stating that “serious barriers to admissibility may exist where a conviction was obtained without providing defendant with assistance of counsel or in a jurisdiction that does not adhere to other conventional notions of due process”).

²⁹⁶*See* Bill Johnson, *Do Forfeiture Cases Place Justice on Sale?*, DETROIT NEWS, June 28, 2002, at 2 (stating that 97% of all criminal cases are plea-bargained); AM. BAR ASS’N, AMERICAN BAR ASSOCIATION STANDARDS ON CRIMINAL JUSTICE § 14.4 (1986) (noting that in some localities, 90% or more of convictions are obtained by guilty plea); Greg Stohr, *Top U.S. Court to Weigh Prosecution Duty to Disclose Evidence*, BLOOMBERG NEWS, Jan. 4, 2002 (noting that federal courts convict 95% of defendants by plea bargain).

²⁹⁷*See* Richard Birke, *Reconciling Loss Aversion and Guilty Pleas*, 1999 UTAH L. REV. 205, 207, 216–19 (noting that defendants often plead guilty to obtain specific sentence rather than gambling on longer sentence if convicted at trial). Guilty pleas may be coerced by threatening lengthy incarceration or high bail if a defendant asserts her innocence, while offering a short sentence or even probation if the defendant pleads guilty. *See* TASK FORCE REPORT, *supra* note 260, at 30; *see also* N.Y. STATE COMM’N ON ATTICA, ATTICA, THE OFFICIAL REPORT OF THE NEW YORK STATE SPECIAL COMMISSION ON ATTICA 30–31 (1972) (noting that plea bargaining system is characterized by deception and hypocrisy).

²⁹⁸*See* United States v. Hurst, 951 F.2d 1490, 1501 (6th Cir. 1991) (“In this day in which most pleas are products of plea bargaining, and usually charge bargaining, the statutory name of the offense to which a defendant pleads guilty is rarely informative, and often misinformative, about the nature of the offense to which guilt is acknowledged as the plea allocation.”); Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1342–43 (1997) (noting that defendants sometimes plead guilty to lesser charges not because they are guilty of those charges but to avoid danger of being tried on more serious charges).

independent variables that should be assessed separately. The first inquiry under both rules is whether the alleged prior misconduct is probative of credibility. That depends on the nature of the act. The second inquiry is whether the prior misconduct occurred. If it did, then it tells us whatever it tells us about the witness's credibility. If it did not occur, it tells us nothing, and it should be excluded. It makes no sense to allow impeachment when there is little evidence the prior misconduct occurred and then try to regulate or monitor the unfair prejudice by restricting the kind of misconduct asked about. Conversely, it makes no sense to allow impeachment with misconduct having little or no bearing on credibility merely because we are very sure it occurred. Thus, under both rules, a court should allow the same kind of misconduct to be used to impeach whether it resulted in a conviction or not. A court should not be more restrictive under Rule 608(b). Also under both rules, court should require an appropriate level of assurance that the misconduct occurred. What that level of assurance should be is discussed in the next subsection.

3. *Apply the Huddleston Prima Facie Case Standard for Determining Whether the Prior Misconduct Occurred*

*Huddleston v. United States*²⁹⁹ addressed the question of how much evidence should be required to admit crimes, wrongs, or acts for substantive purposes under Fed. R. Evid. 404(b).³⁰⁰ The Court required a prima facie case; that is, enough evidence from which a jury might reasonably conclude by a preponderance of the evidence that the prior misconduct occurred.³⁰¹ The Court's reasoning in *Huddleston* is directly applicable to the use of misconduct for impeachment.³⁰² Consequently, courts should apply the *Huddleston* standard in determining the admissibility of misconduct under Rules 609 and 608(b) to ensure that witnesses are not unjustly impeached with convictions or bad acts they did not commit.

Under Rule 404(b), evidence of crimes or other misconduct is not admissible "to prove the character of a person in order to show action in conformity therewith."³⁰³ Such evidence may, however, be admissible for other purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident"³⁰⁴ In *Huddleston*, the defendant was charged with selling stolen blank videocassette tapes in interstate

²⁹⁹485 U.S. 681 (1988).

³⁰⁰*Id.* at 685.

³⁰¹*Id.* at 689–90.

³⁰²Surprisingly, research has disclosed no cases applying the *Huddleston* rule in the impeachment context.

³⁰³FED. R. EVID. 404(b).

³⁰⁴*Id.*

commerce.³⁰⁵ Defendant claimed he did not know the tapes were stolen, thus putting knowledge in issue.³⁰⁶ The prosecutor sought to introduce evidence the defendant sold stolen merchandise on two other occasions as tending to show that defendant knew the tapes were stolen.³⁰⁷

The defendant argued the government should be required to prove, by a preponderance of the evidence, that the merchandise from the other sales was stolen before evidence of those sales could be admitted.³⁰⁸ The Court rejected this argument, finding “it is inconsistent with the structure of the Rules of Evidence and with the plain language of Rule 404(b).”³⁰⁹ The Court noted Rule 404(b) contains no intimation that any preliminary showing must be made before bad acts can be introduced for a permissible purpose.³¹⁰ In addition, the legislative history did not show Congress intended to impose any particular standard of proof.³¹¹ Thus, other crimes, wrongs, or acts are admissible under Rule 404(b) as long as they are relevant under Rule 402 and not unfairly prejudicial under Rule 403.³¹²

The Court stressed, however, that it was not authorizing the government to “parade past the jury a litany of potentially prejudicial similar acts that have been established or connected to the defendant only by unsubstantiated innuendo.”³¹³ The Court based this limitation on Rule 402’s relevance requirement.³¹⁴ Evidence is admissible only if it is relevant, and in the Rule 404(b) context, “evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor.”³¹⁵ Thus, evidence of misconduct is admissible only if the proponent offers enough proof for a jury reasonably to conclude by a preponderance that the defendant committed the misconduct.³¹⁶ In *Huddleston* itself the Court concluded the government submitted sufficient evidence the defendant sold stolen merchandise on the other occasions to satisfy this burden.³¹⁷

The Court’s analysis in *Huddleston* is directly applicable to the admissibility of convictions and bad acts under Rules 609(a) and 608(b). The same standard of proof should be required for exactly the same reasons. As with Rule 404(b), Rules

³⁰⁵485 U.S. at 682.

³⁰⁶*Id.* at 684.

³⁰⁷*Id.* at 683.

³⁰⁸*Id.* at 687 n.5.

³⁰⁹*Id.* at 687.

³¹⁰*Id.* at 687–88. Rule 404(b) says simply that “evidence of other crimes, wrongs, or acts” is not admissible to prove character but may be admissible for other purposes without specifying any specific amount of evidence that must be submitted. FED. R. EVID. 404(b).

³¹¹*Huddleston*, 485 U.S. at 688–89.

³¹²*Id.*

³¹³*Id.* at 689.

³¹⁴*Id.* at 688–89.

³¹⁵*Id.* at 689.

³¹⁶*Id.* at 689–90.

³¹⁷*Id.* at 690–91.

609(a) and 608(b) do not require any particular quantum of proof the prior misconduct occurred. Rule 609(a) says “evidence” that a witness has been convicted of a crime shall be admitted to impeach credibility if the various burdens and other requirements of the rule are satisfied.³¹⁸ Rule 608(b) likewise says that “[s]pecific instances of the conduct of a witness . . . may . . . be inquired into on cross-examination” if the court believes they are probative of truthfulness or untruthfulness.³¹⁹ In addition, as with Rule 404(b), there is no indication in the legislative history that the Advisory Committee or Congress meant to require any particular amount of proof that misconduct occurred to use it for impeachment under Rules 609 or 608(b).³²⁰ Rules 609(a) and 608(b) also are subject to the general relevance requirements of Rule 402. Under Rule 402, “[e]vidence which is not relevant is not admissible.”³²¹ Evidence of prior misconduct is relevant for impeachment purposes “only if the jury can reasonably conclude that the act occurred and that the [witness] was the actor.”³²² If no juror could reasonably conclude the witness committed the misconduct, then the evidence is irrelevant and inadmissible. Consequently, courts should not admit evidence of misconduct for impeachment purposes under either Rule 609(a) or Rule 608(b) unless the *Huddleston* standard is satisfied; that is, unless there is enough evidence for a jury reasonably to conclude by a preponderance the prior misconduct occurred.

The *Huddleston* standard would require courts to evaluate evidence of wrongdoing more carefully before admitting it under Rules 609(a) or 608(b). As noted above, some commentators naively assert that a conviction gives sufficient assurance some particular misconduct occurred.³²³ This is only true of convictions after a trial. Because a guilty plea may affirmatively misrepresent a defendant’s wrongdoing,³²⁴ courts should require additional proof of what a witness actually did wrong beyond a court record or rap sheet that merely lists the charge pled to. Unless a witness admits the facts underlying a conviction obtained by guilty plea, a court should require additional information from court or prosecution files, such as a sworn complaint by the victim of the crime or statements by witnesses confirming the specific misconduct the witness engaged in.³²⁵

³¹⁸FED. R. EVID. 609(a).

³¹⁹*Id.* 608(b).

³²⁰*See supra* notes 93–160 and accompanying text.

³²¹FED. R. EVID. 402.

³²²*Huddleston*, 485 U.S. at 689.

³²³*See supra* note 287 and accompanying text.

³²⁴*See supra* notes 288–90 and accompanying text.

³²⁵Requiring more than a simple court record of a conviction might run afoul of FED. R. EVID. 803(22). With certain limitations, Rule 803(22) makes an exception to the rule excluding hearsay for evidence of a felony conviction, whether after a trial or upon a guilty plea. *See id.* The rules exclude hearsay because it is unreliable. Exceptions are made for more reliable kinds of hearsay. *See id.* 803. By making an exception for a record of conviction, *id.* 803(22), the rulemakers plainly indicated they thought such records to be reliable. Perhaps Rule 803(22) should be amended

Moreover, courts should not rely on rap sheets for impeachment information. Rap sheets are notoriously unreliable. They typically contain incomplete, inaccurate, and ambiguous information. For example, an audit of New York State's computerized criminal history information system revealed that disposition information was simply missing in 45 percent of the cases sampled and was inaccurate or ambiguous in another 19 percent of the cases.³²⁶ A national survey of district attorneys, defense agencies, and state planning agencies showed similar problems of incompleteness and ambiguity.³²⁷ As the court correctly concluded in *United States v. Constant*,³²⁸ "to ask a defendant whether he has had criminal convictions, without possessing a certified copy of the record, is fraught with possibilities of error."³²⁹ Courts should allow questioning about prior convictions only when reliable information is used to establish the prima facie case.

The prima facie case standard also should be applied in place of the good faith basis test currently used under Rule 608(b) for assessing the admissibility of criminal conduct not resulting in a conviction or misconduct not criminal in nature.³³⁰ No one knows what constitutes a good faith basis. It might be anything

because, as argued above, a record of a guilty plea often does not reliably indicate what the defendant did wrong. See *supra* note 287 and accompanying text. Alternatively, courts might exclude court records under Rules 403 and 611 unless additional details are provided for convictions upon guilty pleas.

³²⁶See Donald L. Doernberg & Donald H. Zeigler, *Due Process Versus Data Processing: An Analysis of Computerized Criminal History Information Systems*, 55 N.Y.U. L. REV. 1110, 1159 tbl.1 (1980). The study included four types of inaccurate entries: (1) the basic disposition was incorrect (conviction listed for dismissal or vice versa), (2) multiple listings indicated a plea to more than one count when there was a plea only to a single count, (3) sentences were recorded incorrectly, and (4) the original conviction was listed but a reversal on appeal was not shown. *Id.* at 1159 n.264.

³²⁷*Id.* at 1164-73.

³²⁸501 F.2d 1284 (5th Cir. 1974).

³²⁹*Id.* at 1288 (quoting *Ciravolo v. United States*, 384 F.2d 54, 55 (1st Cir. 1967)). But see *United States v. Scott*, 592 F.2d 1139, 1143 (10th Cir. 1979) ("Although the 'rap sheet' is not admissible as public record of the conviction, we have long held use of that record to cross-examine upon prior convictions is proper conduct.").

³³⁰Courts have continued to apply the good faith basis test in Rule 608(b) cases post-*Huddleston*. See, e.g., *United States v. Simonelli*, 237 F.3d 19, 22-23 (1st Cir. 2001) (applying good faith basis test); *Hynes v. Coughlin*, 79 F.3d 285, 294 (2d Cir. 1996) (same); *United States v. Bustamante*, 45 F.3d 933, 946 (5th Cir. 1995) (same); *United States v. Williams*, 986 F.2d 86, 89 (4th Cir. 1993) (same).

from proof by a preponderance to third-hand hearsay and innuendo.³³¹ Commentators rightly criticize this standard as so vague it invites abuse.³³²

Professors Mueller and Kirkpatrick suggest “[p]robably the mere fact of arrest provides a reasonable basis to ask whether the witness did the deed, at least in the absence of some further indication that the arrest was a mistake or abuse of some kind.”³³³ Courts, however, should be particularly cautious in relying upon rap sheet arrest information unaccompanied by a disposition to establish a *prima facie* case because the information often substantially overstates the actual wrongdoing. Police officers routinely overcharge, assuming that the charges will be reduced in the plea bargaining process. The audit of the New York State rap sheet system revealed that arrest charges are often superceded by the District Attorney.³³⁴ When there is a change, the charge is almost always reduced.³³⁵ In the cases sampled, between 17 and 25 percent of felony arrest charges were reduced by the time formal charges were filed.³³⁶ Moreover, the reduction in the level of charges from arrest to disposition is even more dramatic. The data showed that nearly all felony arrests resulted either in a favorable disposition or in the conviction of a lower charge, frequently a misdemeanor.³³⁷ The frequent failure of rap sheets to show dispositions results in a substantial exaggeration of

³³¹Professor John R. Schmertz suggests three possible standards, any of which might rationally be used:

(1) that counsel must have credible and admissible evidence at hand to prove the occurrence of misconduct; (2) that counsel must be aware of the existence of admissible evidence but need not have such ready to introduce into evidence; or (3) that counsel must be able to show the court that he or she learned of the misconduct from reasonably reliable sources whether or not they qualify for admission under the Federal Rules.

Schmertz, *supra* note 84, at 1437. Professor Schmertz further states that the reported decisions “are few and inconsistent as to what constitutes a ‘good faith basis.’” *Id.*

³³²*See, e.g.,* Ordover, *supra* note 247, at 145 (“This standard lacks uniform application and can have a threshold so low as to be nonexistent.”); Schmertz, *supra* note 84, at 1436 (noting problem of “the impeaching question that rests on a flimsy or speculative basis, such as multiple hearsay or unconfirmed rumor”). Abuse is reported in some cases. *See, e.g.,* United States v. Crutchfield, 26 F.3d 1098, 1102 (11th Cir. 1994) (holding that government questions attempting to implicate witness as large scale buyer or distributor of marijuana lacked even good faith basis); United States v. DeGeratto, 876 F.2d 576, 584 (7th Cir. 1989) (calling questions suggesting defendant knowingly helped prostitution operation “an unworthy attempt by the government”).

³³³MUELLER & KIRKPATRICK, *supra* note 162, § 6.40, at 824.

³³⁴Doernberg & Zeigler, *supra* note 326, at 1162. Prosecutors also have an incentive to overcharge so they have room to plea bargain.

³³⁵*Id.*

³³⁶*Id.*

³³⁷*Id.* at 1163–64.

defendants' criminal records.³³⁸ Thus, courts should not allow questioning about a bad act based solely on an arrest charge.

Although the *Huddleston* prima facie case standard should govern the admissibility of convictions and bad acts for impeachment as well as for substantive Rule 404(b) purposes, slightly different procedures would be required with bad acts because of the rule banning extrinsic evidence to prove them. *Huddleston* treated the admissibility of crimes or acts under Rule 404(b) as an issue of conditional relevance governed by Rule 104(b); that is, evidence of misconduct is admissible "upon, or subject to, the introduction of evidence sufficient to support a finding" that the misconduct occurred.³³⁹ Once the threshold determination is made by the court, the jury ultimately decides whether the misconduct occurred by a preponderance of the evidence. With bad act impeachment, however, a cross-examiner is not allowed to introduce extrinsic evidence that the misconduct occurred. Consequently, the jury is not able to make the ultimate factual determination.

This problem could be solved by requiring the cross-examiner in a sidebar to convince the trial judge that the misconduct occurred by a preponderance of the evidence before the cross-examiner may ask about it. This solution, however, would establish a different standard of proof for convictions and bad acts. The problem could be at least partly solved by requiring the cross-examiner to make a prima facie case to the judge. While not entirely satisfactory, this requirement would eliminate the worst abuses under the "good faith basis" standard.

4. *Harmonize Rules 609(a)(2) and 608(b) in Practice.*

My final suggestion for achieving greater consistency of application between the rules is to harmonize Rules 609(a)(2) and 608(b) in practice. Under Rule 609(a)(2), evidence that any witness has been convicted is automatically admissible if the crime involved dishonesty or false statement.³⁴⁰ Rule 608(b), by contrast, makes all bad act impeachment discretionary.³⁴¹ Therefore, a court can exclude exactly the same misconduct under Rule 608(b) that it must admit under Rule 609(a)(2) if the conduct resulted in a conviction. Harmonizing the application of these two rules in practice would largely eliminate this final back-door problem.

³³⁸In the New York audit, in 45 percent of the cases for which dispositions could be found in court records, the rap sheets did not report disposition charges at all—they were blank! *Id.* at 1158–59 tbl.1. The national survey showed that a problem of missing dispositions of similar magnitude exists nationwide. *Id.* at 1167–68.

³³⁹*Huddleston*, 485 U.S. at 689–90 (citing FED. R. EVID. 104(b)).

³⁴⁰FED. R. EVID. 609(a)(2).

³⁴¹*Id.* 608(b).

There are several possible ways to resolve the inconsistency between the rules. Rule 608(b) could be amended to make bad acts that involve dishonesty or false statement automatically admissible. Alternatively, Rule 609(a)(2) could be amended to replace automatic admission with Rule 403 balancing. The problem with the first suggestion is that it conflicts with Congress's clear intent in enacting Rule 608(b) to make all prior bad act impeachment discretionary.³⁴² The problem with the second suggestion is that it conflicts with the near-universal holding that Congress rejected Rule 403 balancing for Rule 609(a)(2) convictions.³⁴³

A third possibility is to harmonize the rules in practice without amending them. To accomplish this, courts should construe Rule 609(a)(2) narrowly so that only convictions directly involving lying or deception are admitted automatically. Courts should no longer admit convictions that fall in the middle of the credibility spectrum, such as robbery, drug offenses, larceny, and burglary, as some courts do at present.³⁴⁴ This is a good idea in any event because the Conference Committee probably intended that Rule 609(a)(2) be narrowly construed.³⁴⁵ If Rule 609(a)(2) is so construed, it is unlikely that the same underlying act not resulting in conviction would be excluded under Rule 608(b). If the misconduct directly involved lying or deceit, the party opposing impeachment would rarely be able to satisfy the heavy burden of demonstrating that the danger of unfair prejudice substantially outweighs probative value because the probative value of such misconduct on the issue of credibility is extremely high. Thus, even though admission is automatic under one rule and discretionary under the other, as a practical matter the same misconduct would be admitted and excluded under both Rules 609(a)(2) and 608(b).

B. Toward Harmony Within Each Rule

Achieving harmony in the application of each rule is a formidable task. As Part II clearly demonstrates, courts and legislators disagree about the kinds of convictions and bad acts that are relevant to credibility and about the proper weighing of probity and prejudice. The disagreements are deep-seated and long-standing. People cling tenaciously to their own point of view. If Congress was

³⁴²See *supra* notes 135–63 and accompanying text.

³⁴³See *supra* note 176 and accompanying text.

³⁴⁴See *supra* notes 165–69 and accompanying text.

³⁴⁵Although the Conference Report did not specify exactly which crimes would be admissible under Rule 609(a)(2), the examples given mostly involved deceit or falsification. See *supra* notes 129–33 and accompanying text.

In addition, excluding a conviction under (a)(2) does not necessarily mean it cannot be used to impeach. The conviction may still be admissible under (a)(1) if the standards of that subsection are satisfied. See FED. R. EVID. 609(a)(1). Because those standards are so vague, federal judges favoring broad impeachment could continue to allow the conviction into evidence in almost all cases. See *supra* notes 214–18 and accompanying text.

unable to reach any meaningful compromise in enacting Rules 609 and 608, how might a compromise be reached for the twenty-first century?

There is little point in advocating that courts take a broad view or a narrow view or in suggesting a specific list of crimes and misconduct that should be admissible or inadmissible. Commentators have made such suggestions in the past only to be ignored by any judge that does not already agree with their proposals.³⁴⁶ Judges are fully familiar with the arguments for and against the broad and narrow views. They have made up their minds, and no amount of exhortation is likely to change their views.

Instead of proposing the specific elements of a compromise, I propose a process for working toward a compromise. The first step in the process is to convince people holding different views that a compromise is a good idea. Hopefully, Parts II and III of this Article will convince readers that the present state of affairs is untenable. But why should individual members of the Advisory Committee, Congress, or the Judiciary be willing to accept rules with which they in part disagree? One reason is compromise would curb what each side sees as the worst abuses. People favoring restrictive rules presumably are horrified when a judge allows a criminal defendant charged with a serious crime to be impeached with a conviction for the same crime or similar bad acts despite the enormously unfair prejudice that inevitably occurs. Conversely, people favoring wide-open impeachment presumably are just as horrified when a judge refuses to allow impeachment with convictions for serious crimes or criminal acts that show a total disregard for the rule of law on the ground the misconduct does not bear directly on credibility. While one judge may feel that appropriate impeachment is taking place in his or her own courtroom, the judge in the next courtroom may be applying standards that first judge thinks are anathema (and vice versa!). Once rule-makers, legislators, and judges have accepted the idea that a genuine compromise might help curb “terrible” abuses, they must recognize that in order to get something, each side must give something up. That is what compromise

³⁴⁶See, e.g., Friedman, *supra* note 295, at 638 (suggesting that “character impeachment of a criminal defendant who takes the witness stand ought to be abolished in all of its forms—opinion and reputation, specific bad acts, and prior convictions”); Gainor, *supra* note 97, at 769–70 (proposing that Rule 609(a) “be revised to strictly limit the use of evidence of prior convictions for impeachment purposes to those crimes that bear directly on the criminal defendant’s credibility, and to establish a clear, uniformly applicable test of probative value versus prejudicial effect”); Okun, *supra* note 97, at 537 (urging that impeachment under Rules 608 and 609 “be limited to those situations where a defendant affirmatively places his or her character for truthful or law-abiding behavior in issue”); Ordover, *supra* note 247, at 137 (arguing that “extrinsic crime evidence has become so overused that cases in which it is introduced have the ethos of a presumption of guilt rather than innocence” and proposing means of reducing use of such evidence); Robert G. Spector, *Rule 609: A Last Plea for Its Withdrawal*, 32 OKLA. L. REV. 334, 343 (1979) (contending that no prior convictions should be admitted).

means: it is an agreement upon an intermediate position between conflicting positions.³⁴⁷

The next step is to identify common ground and thus narrow the areas of disagreement. Convictions and bad acts fall on a credibility spectrum. At one end is conduct that is particularly probative of credibility. At the other end is conduct that seems largely unrelated to credibility. It should be possible to reach a tentative agreement on the kinds of misconduct at each end of the spectrum. For example, while agreement is not universal, most people agree that misconduct directly involving lying or deceit, such as perjury, forgery, and various kinds of fraud, is particularly probative of credibility and thus should be admissible to impeach. Conversely, most people also agree that spontaneous violent conduct, such as assault,³⁴⁸ has little bearing on credibility. Perhaps it could be agreed that a short list of misconduct directly involving lying or deceit would be automatically admissible, as is currently the case for convictions involving dishonesty or false statement under Rule 609(a)(2),³⁴⁹ and that another short list of criminal conduct either wholly or only marginally related to credibility would be inadmissible.

The list of automatically admissible conduct probably would be shorter than the list of crimes currently admitted under Rule 609(a)(2) because some judges define crimes involving "dishonesty" very broadly.³⁵⁰ If proponents of broad impeachment balk at making any crimes automatically inadmissible, perhaps opponents of broad impeachment would accept a standard similar to that of Rule 609(b), which bars convictions more than ten years old unless "the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect."³⁵¹ In any event, the conflicting sides ought to be able to agree upon short lists of conduct at either end of the spectrum that would always, or almost always, be admissible or inadmissible.

Now the hard work begins. The heart of the disagreement concerns the kinds of misconduct in the middle range of the spectrum, such as theft offenses, robbery, premeditated violent crimes, and drug dealing. The next step in the compromise process is to consider possible options. One option is to draw up lists of misconduct and then make each kind either admissible or inadmissible. Negotiators would trade back and forth and try to make the two lists even. While

³⁴⁷See *supra* note 98 and accompanying text.

³⁴⁸See the cases cited *supra* notes 169–74, 180; see also *United States v. Parker*, 133 F.3d 322, 327 (5th Cir. 1998) (stating that violent crimes are irrelevant to witness's character for truthfulness); *United States v. Schatzle*, 901 F.2d 252, 253–54, 256 (2d Cir. 1990) (holding prior altercation of witness inadmissible to attack his credibility).

³⁴⁹FED. R. EVID. 609(a)(2).

³⁵⁰See *supra* notes 165–89 and accompanying text.

³⁵¹FED. R. EVID. 609(b).

this approach has the benefit of limiting judicial discretion, it probably is too crude and arbitrary. A second option is to begin with an open mind and then look to see whether the facts and circumstances of the misconduct involve deception, conscious dishonesty, cheating, or lying. If they do, impeachment would be allowed; if they do not, impeachment would not be allowed. While this approach has the advantage of avoiding some of the arbitrariness of the first option, it is very open-ended and subjective and thus does little to limit judicial discretion. This option probably would replicate present practice because judges disagree about what conduct is probative of credibility.

In between the approaches of no discretion or maximum discretion are approaches that grant some discretion but seek to limit and guide it. The main tools for cabining discretion are burdens, presumptions, and criteria. Burdens can be light or heavy. Presumptions can be simple or strong and rebuttable or irrebuttable. Criteria can be general or specific. Middle approaches to impeachment would involve the use of some or all of these tools.

Rules 608(b) and 609 already make some use of burdens, presumptions, and criteria. For example, Rule 609(a)(1) imposes a relatively light burden on the prosecutor to demonstrate that the probative value of a felony conviction on an accused's credibility outweighs its prejudicial effect. Rule 609(b) imposes a heavier burden on a party proposing impeachment with a conviction more than ten years old to show that probative value substantially outweighs prejudicial effect. In addition, under Rule 608(b), a party opposing impeachment has the heavy Rule 403 burden of showing that the danger of unfair prejudice substantially outweighs probative value. As to presumptions, Rule 609(a)(2) creates an irrebuttable presumption of admissibility of convictions involving dishonesty or false statement. As to criteria, a conviction must be felony grade to be admissible under Rule 609(a)(1), and a bad act must be probative of truthfulness or untruthfulness to be admitted under Rule 608(b).

Although the rules currently make some use of all three tools for limiting and guiding discretion, they plainly do not make sufficient use of them. There are few presumptions, and the criteria are general and vague. Moreover, courts often ignore the burdens or get them wrong.³⁵² Professor Uviller has expressed doubt

³⁵²*See, e.g.,* *United States v. Stoecker*, 215 F.3d 788, 790 (7th Cir. 2000) (stating incorrectly that bad act impeachment under Rule 608(b) is permissible only if probative value outweighs prejudicial effect); *United States v. Saunders*, 166 F.3d 907, 920 (7th Cir. 1999) (stating incorrectly that bad act impeachment under Rule 608(b) is permissible only if probative value outweighs prejudicial effect); *United States v. Williams*, 822 F.2d 512, 516–17 (5th Cir. 1987) (stating that prior misconduct can be excluded under Rule 403 if its prejudicial effect outweighs probative value). *But see* *King v. Ahrens*, 16 F.3d 265, 269–70 (8th Cir. 1994) (applying correct Rule 403 burden on party opposing Rule 608(b) impeachment); *Bennett v. Longacre*, 774 F.2d 1024, 1027 (10th Cir. 1985) (same); *United States v. Lewis*, 626 F.2d 940, 947–49 (D.C. Cir. 1980) (noting that trial court erroneously concluded there was presumption of admissibility of prior convictions under Rule 609(a)); *United States v. Vanderbosch*, 610 F.2d 95, 98 (2d Cir. 1979) (stating incorrectly that

as to whether judges meaningfully can apply the different standards for impeachment of criminal defendants and all other witnesses under Rule 609(a)(1). He states: "[T]he perceived distinction may be consistent with our general policy of special sensitivity to the hazards of defense, but the practical possibility of such fine calibration of the danger of prejudice is dubious."³⁵³

A better approach might be to impose a general presumption of admissibility or inadmissibility of misconduct that is rebuttable if the underlying facts either do or do not involve deception or lying. It would be very difficult, of course, to reach agreement on which way the presumption should run. It might be possible to have the presumption run one way for some kinds of misconduct and the opposite way for other kinds of misconduct. Such an approach, however, runs the risk of making the rules too complex and, again, it would be difficult to achieve agreement on what kinds of misconduct belonged in each category.

It might be easier to insert more meaningful criteria into the rules. One obvious source of possible criteria is *Gordon v. United States*,³⁵⁴ which sets forth factors to consider in deciding whether to admit convictions to impeach an accused.³⁵⁵ Modified to include impeachment by bad acts and of any witness, the criteria are as follows: (1) whether the misconduct directly involved dishonesty; (2) whether the misconduct was remote or recent; (3) if the witness is a party, whether the misconduct is similar to the misconduct the party is currently charged with committing; (4) the need for the party's or witness's testimony; and (5) the importance of the issue of credibility.³⁵⁶

Congress did legislatively overrule *Gordon* and its criteria were not written into Rule 609(a).³⁵⁷ Perhaps the Advisory Committee and Congress would be willing to reconsider adopting these criteria for Rules 608(b) and 609 given the disastrous experience with the rules since their adoption.

As noted at the outset of this Section, it is not an easy task to achieve harmony in the application of each rule. I hope that my suggestions about the process for seeking a compromise might prompt some reexamination of the problem and provide a framework for discussion.

"defendant is required to show that the prejudicial effect outweighs probative value at the time the motion is made to suppress the prior conviction"); *United States v. Hastings*, 577 F.2d 38, 41 (8th Cir. 1978) (holding that district court did not abuse discretion in excluding evidence that prosecution witness had committed robberies because probative value did not outweigh prejudice).

³⁵³Uviller, *supra* note 240, at 800; see also MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 609.2, at 479 (3d ed. 1991) (stating that it is "extremely doubtful" that shifting burden to prosecutor will result in fewer convictions being admitted when witness to be impeached with conviction is accused).

³⁵⁴383 F.2d 936 (D.C. Cir. 1967).

³⁵⁵*Id.* at 940-41.

³⁵⁶*Id.*

³⁵⁷See *supra* notes 99-133 and accompanying text.

V. CONCLUSION

The law governing impeachment by convictions and bad acts is in disarray and has been for a very long time. The inconsistencies between rules 609 and 608(b) and within each rule cause substantial problems in the administration of justice. This Article makes several specific proposals to lessen inconsistency between the rules and suggests a process for addressing the inconsistencies within each rule. In law, as in music, harmony is greatly preferable to cacophony.

