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

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I. INTRODUCTION

Lawyers are a tricky group. We talk in a language all our own using catch phrases such as "summary judgment," "proximate cause," and "rule against perpetuities" as if these terms had some magical, mystic meaning. We have elaborate systems of rules and procedures which guide the everyday operation of the legal system. The rules are often so difficult and complex that many lawyers and judges do not fully understand them. Problems arise in our system when we

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ask ordinary people to come into our world and use our language and rules to resolve conflicts. Jurors with no legal training may not understand the myriad of rules and language we throw at them during the course of a trial. Moreover, jurors may not agree with rules and may ignore a judge's instructions in order to reach a verdict they feel is fair and just. Such is the case with Rule 609 of the Federal Rules of Evidence (Rule 609).[1]

The current version of Rule 609 provides evidence that criminal defendants have been convicted of prior crimes is generally admissible to attack the defendants' credibility when they testify.[2] There are three major exceptions limiting the use of prior convictions to impeach a witness.[3] First, a court may not allow such prior conviction evidence if the prejudicial effect of the evidence outweighs its probative value.[4] Second, only convictions within the last ten years may be used to impeach the defendant's credibility.[5] Third, only felony convictions or misdemeanor convictions which involved dishonesty or false statements may be used.[6] Various states have adopted evidence rules which have similar effects with some important differences.[7]

A number of important goals and policies underlie Rule 609. Traditionally, it was argued that prior convictions were probative of a witness's credibility.[8] Without hearing such evidence a jury might conclude a criminal defendant led a blameless, honest life and was unlikely to lie on the witness stand.[9] If a criminal defendant has prior convictions a jury should know about these convictions in order to more accurately weigh the testimony given.[10] These concerns are balanced against the defendant's right to a fair trial. Whenever prior conviction evidence is allowed, the jury may misuse this

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1. FED. R. EVID. 609.

2. *See* FED. R. EVID. 609(a). The rule allows prior conviction evidence to be used against any witness in either civil or criminal cases. *Id.* This Article discusses only how the rule applies in criminal cases to impeach the defendant when she takes the stand.

3. *See infra* notes 4-6. The rule also provides other exceptions. Evidence of conviction cannot be used when a pardon, annulment, or certificate of rehabilitation is given. FED. R. EVID. 609(c). Evidence of a conviction in a juvenile court is generally not admissible. FED. R. EVID. 609(d).

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

5. FED. R. EVID. 609(b).

6. FED. R. EVID. 609(a), (b).

7. *See* discussion *infra* Part III.

8. *See* 2 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 519 (1979).

9. Victor Gold, *Impeachment by Conviction Evidence: Judicial Discretion and the Politics of Rule 609*, 15 CARDOZO L. REV. 2295, 2298 (1994).

10. *Id.*

evidence and conclude that the defendant's propensity to commit crimes means he must have committed the present crime with which he is charged.[11] Thus, when the prosecution uses prior conviction evidence, a defendant is entitled to a limiting instruction, informing jurors to consider the evidence only as it reflects on the defendant's credibility; such evidence should not be used to infer the defendant's propensity to commit crimes makes it probable that the defendant committed this crime.[12] Nevertheless, such limiting instructions are not likely to have any effect on jurors.[13] It is widely accepted that in all likelihood a jury will consider the evidence for improper purposes.[14] Because of the potential for unfair prejudice, many criminal defendants choose not to testify.[15] Such a decision may also have a negative impact on the jury.[16]

It is these competing and largely contradictory concerns that have been at the heart of the debate over the admissibility of prior convictions in criminal cases. This Article examines how various courts and legislatures have attempted to balance these concerns. It begins by examining the common law rules used in the federal courts before the enactment of the Federal Rules of Evidence (FRE). The Article then discusses the debate in Congress over the FRE and looks at the approach taken by the drafters of the FRE before the 1990 amendment to the FRE. Part III of this Article examines the approach of various states to the problem. Specifically, this Article concentrates on North Carolina, Hawaii, Pennsylvania, Kansas, Georgia, Montana, and California, because each of these states depart from the FRE and have taken different approaches to the problem. Finally, this Article considers the English approach, as compared to the American approach at both the state and federal levels which varies significantly from the English rule.

This Article concludes by arguing that the various American approaches to the admission of prior convictions are largely inconsistent with bedrock

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

12. *See generally* MICHAEL R. FONTHAM, TRIAL TECHNIQUE & EVIDENCE § 7-27 (1995) (discussing Federal Rule of Evidence 609 and the use of prior crimes to impeach).

13. *See id.* (stating that "[t]he jury may find it much easier to convict once they visualize the defendant committing a similar criminal act").

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

15. *See id.* (discussing unfair prejudice to a criminal defendant who chooses to "take the stand to deny the crime with which he is accused").

16. *See generally* H. Richard Uviller, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale*, 42 DUKE L.J. 776, 779-80 (1993) (discussing how juries determine witness credibility at trial).

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

II. THE FEDERAL APPROACH TO IMPEACHMENT WITH PRIOR CONVICTIONS

Under the common law a criminal defendant was not allowed to testify on his own behalf.[17] In the United States, it has long been recognized that the Constitution gives criminal defendants the right to participate in their defense and take the stand if they choose.[18] The Court has also recognized evidence of prior convictions may not be used to prove the defendant has a propensity to commit crimes, and therefore, committed the crime with which the defendant is currently charged.[19] However, there is no constitutional requirement restricting the use of prior conviction evidence to impeach a criminal defendant's credibility as a witness.[20]

The current version of Rule 609 developed from this constitutional backdrop. Prior to 1965, circuit courts used various rules to determine if prior conviction evidence should be admissible, but the general rule was that most prior conviction evidence was admissible to impeach criminal defendants.[21] In 1965 the D.C. Circuit handed down *Luck v. United States*,[22] which significantly influenced the way circuit courts viewed prior conviction evidence.[23] The *Luck* decision had significant influence on the drafters of the FRE.[24] In *Luck*, the D.C. Circuit interpreted an evidence statute which provided in relevant part: "'No

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17. *See* M.N. HOWARD ET AL., PHIPSON ON EVIDENCE ¶ 18-19 (14th ed. 1990).

18. *See* Lewis v. United States, 146 U.S. 370, 372-73 (1892).

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

20. *Id.* at 476.

21. *See* CHARLES TILFORD MCCORMICK, MCCORMICK ON EVIDENCE § 43 (Edward W. Cleary ed., 3d. ed. 1984).

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

23. *See* Molovinsky v. Fair Employment Council of Greater Wash., Inc., 683 A.2d 142, 148-49 (D.C. Cir. 1996) (deciding plaintiffs could impeach using prior criminal conviction).

24. *See generally* Gold, *supra* note 9, at 2299-301 (noting some of the proposed changes in the drafting of Rule 609(a) and in the committee notes in order to specifically respond to the *Luck* decision).

person shall be incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of crime, but such fact may be given in evidence to affect his credit as a witness, either upon the cross-examination of the witness or by evidence aliunde . . . ."[25] The D.C. Circuit interpreted the statute as giving the trial court judge discretion to exclude relevant evidence if the prejudicial effect substantially outweighed the probative value of the evidence.[26] The D.C. Circuit noted the dilemma to a criminal defendant when impeachment is allowed through prior conviction evidence.[27] Nevertheless, the court held that such evidence is ordinarily admissible, but it warned it is more important for a "jury [to] hear the defendant's story" than to know of a prior conviction.[28] The court's approach in *Luck* was a compromise.[29] The court neither allowed nor excluded per se prior conviction evidence offered to impeach.[30] Instead, the court adopted a balancing approach that gave significant discretion to trial judges in determining whether prior conviction evidence should be admitted or excluded.[31] *Luck* was significant because it marked one of the first times an American court was willing to acknowledge the prejudicial effect of prior conviction evidence, and it empowered trial judges to exclude such evidence in certain cases.

Following *Luck*, other circuit courts began to use the *Luck* balancing approach.[32] In 1970, Congress changed the evidence rule interpreted in *Luck* and removed all discretion from courts to exclude prior conviction evidence for impeachment.[33] Section 14-305 of the District of Columbia Code mandates that all prior conviction evidence be admitted for impeachment purposes.[34] Nevertheless, the *Luck* doctrine remained important throughout the drafting of the FRE. The preliminary draft of Rule 609 rejected the reasoning of the *Luck*

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25. Luck v. United States, 348 F.2d at 768 n.6 (quoting D.C. CODE ANN. § 14-305 (1961)).

26. *Id.* at 767-68.

27. *Id.*

28. *Id.*

29. *See id.*

30. Note, *Prior Conviction Impeachment in the District of Columbia: What Happened When the Courts Ran Out of* Luck*?*, 35 CATH. U. L. REV. 1157, 1159-60 (1986).

31. *See* Luck v. United States, 348 F.2d at 767-68.

32. *See, e.g.*, United States v. Greenberg, 419 F.2d 808, 809 (3d Cir. 1969) (introducing evidence of prior felony conviction rests in the trial judge's exercise of discretion); United States v. Allison, 414 F.2d 407, 411-12 (9th Cir. 1969) (exercising discretion in balancing probative values against probative dangers).

33. *See* D.C. CODE ANN. § 14-305 (1970).

34. *See id.*

court and did not rely on the *Luck* doctrine.[35] As initially drafted, trial judges had no discretion to exclude admissible prior conviction evidence for impeachment.[36]

After hearing criticism on the initial draft,[37] a second version of Rule 609(a) was completed in 1971.[38] The second draft was essentially the same as the first draft, but it specifically incorporated the *Luck* doctrine and allowed courts discretion to exclude otherwise admissible prior conviction evidence if "the judge determines that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice."[39] Following the second draft of the FRE and Rule 609, the drafters received more criticism.[40] The drafters eventually submitted a draft of Rule 609 to Congress which did not incorporate the *Luck* doctrine and provided for no discretionary review of prior conviction evidence by trial judges.[41] After debate and substantial revision in the House Judiciary Committee, a version of Rule 609 was drafted which allowed impeachment with prior convictions "only if the crime involved dishonesty or false statement."[42] This draft was submitted to the full House for debate.[43]

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35. Preliminary Draft of Proposed Rules of Evidence for United States District Courts and Magistrates, 46 F.R.D. 161, 295-96 (1969). In relevant part, Rule 609(a) provided:

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

Id.

36. *See id.* at 296-99 advisory committee's note.

37. *See* Gold, *supra* note 9, at 2299-301 (arguing the Preliminary Draft prevented discretionary exclusion that would unfairly prejudice the accused).

38. Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates, 51 F.R.D. 315, 391 (1971). In relevant part, Rule 609(a) provided:

> 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 of false statement regardless of the punishment, unless (3), in either case, the judge determines that the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice.

Id.

39. *Id.*

40. *See* Gold, *supra* note 9, at 2301-02.

41. Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 270 (1973).

42. *See* Gold, *supra* note 9, at 2302-03.

43. *Id.*

A review of the House debate is revealing. Representatives expressed many concerns over issues of fairness to both the prosecution and the defendant.[44] Two amendments were eventually offered.[45] The first amendment sought to expand the types of prior conviction evidence that could be used to include most crimes, not just those which showed dishonesty or false statement.[46] Proponents of this amendment justified it on the ground that all prior crimes were relevant to a jury in evaluating a witness's credibility.[47] Proponents of this amendment argued that any prior criminal record evidenced a poor character that a jury should know about in evaluation of the witness's testimony.[48] These proponents showed little concern for the rights of criminal defendants and down played the prejudicial effect of prior conviction evidence.[49]

A second amendment incorporated the *Luck* doctrine by giving judges discretion to exclude unduly prejudicial prior conviction evidence.[50] The primary purpose of the second amendment was to insure a trial judge could exclude evidence of prior convictions that were unfairly prejudicial to the criminal defendant.[51] Proponents showed considerable concern for the rights of

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44. *See* 120 CONG. REC. 1414-15, 2375-81 (1974). One member of the House Representatives commented:

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

Id. at 2378 (statement of Rep. Brasco).

45. *See id.* at 2375-81.

46. *Id.* at 1414-15.

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

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

Id.

48. *Id.*

49. *Id.*

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

51. *See id.* at 2377-79.

criminal defendants.[52] Representative Wiggins suggested that because of the potential for unfair prejudice to the criminal defendant, a separate rule should be drafted which pertained only to criminal defendants.[53] Eventually both amendments failed and the original version of the bill passed in the House.[54] Impeachment by prior conviction evidence became not only a popular topic in the law reviews but was a political debate unto itself. Professor Gold points out, the House debate on Rule 609 alone consumed more pages in the Congressional Record than the debate over the rest of the FRE combined.[55]

In the Senate a similar debate ensued. After substantial debate and discussion in the Senate Judiciary committee,[56] a revised version of Rule 609 was adopted.[57] The revised version of the bill made all crimes showing dishonesty or false statement admissible.[58] This version also allowed a criminal defendant to be impeached with prior conviction evidence if the crime was punishable by death or imprisonment for over a year and the probative value of

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52. *See id.* at 1414-15, 2375-81. Referring to the rule which allowed judicial discretion and expanded those convictions which could be used to impeach, Rep. Dennis stated:

> Now Mr. Chairman, that is one of the most unfair rules of law that we have . . . . I spent 4 years as a prosecuting attorney in the State of Indiana, prosecuting on behalf of the State. I spent another year in the Army as a judge advocate officer, prosecuting for the Government, and I have defended a lot of defendants in criminal cases since. My experience is that, from either side of the table, this is utterly unfair . . . . Studies have shown that the one single reason, the one greatest reason, for miscarriages of justice is faulty eyewitness testimony. However, about the next highest is this very rule, because people are either frightened off the stand, and do not tell their story, or else they take the stand and are crucified by being asked about entirely irrelevant offenses . . . . All we are doing here is holding those questions down to crimes which do in fact bear on credibility [referring to original rule from the judiciary committee], which is the theory of asking him anything at all, and we are preventing prosecution just because the man has a bad character.

Id. at 2377.

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

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

Id.

54. *Id.* at 2394.

55. Gold, *supra* note 9, at 2302-03.

56. *See id.* at 2304-05.

57. *Id.* at 2307.

58. *Id.*

the evidence outweighed its prejudicial effect.[59] An amendment was offered which would have removed the discretion of the courts to exclude prior conviction evidence and which allowed all prior conviction evidence punishable by death or imprisonment for over a year.[60] A sharp debate ensued on the Senate floor.[61] Most of the comments centered around the need to protect society and balance the rights of criminal defendants.[62] There was also considerable debate concerning a judge's limiting instruction and whether these instructions would have any real effect.[63]

Eventually the amended version of Rule 609(a) passed by a narrow margin.[64] Because the Senate and House version of Rule 609(a) varied

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59. *Id.* at 2304-05 n.55.

60. *Id.*

61. *See* 120 CONG. REC. 37,076-83 (1974).

62. *See id.* Senator McClellan stated:

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

Id. at 37,081.

Senator Kennedy stated:

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

Id. at 37,080.

63. *See id.* at 37,076-83. Senator Hruska stated:

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

Id. at 37,077.

Senator Hart responded:

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

Id. at 37,078.

64. *Id.* at 37,083. The vote was 38 to 33 with 29 Senators not voting. *Id.*

significantly, the Conference Committee had the task of reconciling the two versions.[65] The text of the reconciled version of Rule 609 provided:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.[66]

The reconciled version of Rule 609 was a compromise between the House and Senate version.[67] The Committee's rule allowed prior conviction evidence of all felonies but incorporated the *Luck* doctrine, giving the trial judge discretion to exclude the evidence if the prejudicial effect outweighed the probative value.[68] Crimes evidencing dishonesty or false statement were automatically admissible and the trial judge had no discretion to exclude the evidence regardless of its prejudicial effect.[69] This compromised version of Rule 609 passed both the House and Senate and became effective in 1975.[70]

While Rule 609 attempted to strike a compromise between the need to admit prior conviction evidence to impeach a witness and the accused's right to a fair trial, those favoring greater admission of prior conviction evidence got the better end of the compromise. Statistical studies show that the supposed safeguards of Rule 609 provide little, if any, real protection to criminal defendants.[71] Despite the rule's effect, the 1975 version of Rule 609 remained the law until 1990 when a new version of Rule 609 was enacted.[72]

The new version of Rule 609 was sparked by a controversial Supreme Court decision, *Green v. Bock Laundry Machine Co.*[73] *Green* involved a civil plaintiff who was severely injured when his arm was caught in a large dryer and severed.[74] The defense used prior conviction evidence to impeach the plaintiff.[75]

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65. *See* Gold, *supra* note 9, at 2307.
66. FED. R. EVID. 609(a).
67. Gold, *supra* note 9, at 2307.
68. FED. R. EVID. 609(a) (1975) (amended 1990).
69. *Id.*
70. Rules of Evidence, Pub. L. No. 93-595, 88 Stat. 1926 (1974).
71. *See* discussion *infra* Part V.
72. *See* Amendments to Federal Rules of Evidence—Rule 609, 129 F.R.D. 347 (1990).
73. Green v. Boch Laundry Mach. Co., 490 U.S. 504 (1989).
74. *Id.* at 506.

The jury awarded no damages apparently because of the prior conviction evidence.[76] The Court noted that reading Rule 609 literally, it provided discretion to trial judges to exclude prejudicial evidence only when evidence effects the defendant.[77] The rule literally provided no protection to civil plaintiffs but would afford protection to civil defendants.[78] The Court reasoned that Congress could not have intended such a result, because it made no sense to allow impeachment of a civil defendant and not a civil plaintiff.[79] Relying on the rule's legislative history, the Court concluded when Congress used the word "defendant" in Rule 609, it must have intended this to mean only criminal defendant.[80] Accordingly, the Court held Rule 609 gave trial courts no discretion to exclude otherwise admissible prior conviction evidence in civil cases.[81]

In amending Rule 609, Congress sought to overrule the Court's decision in *Green* and give trial courts discretion to exclude prior conviction evidence in civil cases.[82] Despite a mountain of evidence showing the prejudicial effect of prior conviction evidence in criminal cases,[83] the amended version of Rule 609 had little effect on criminal cases.[84] The amended version of the rule provides in relevant part:

> 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

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75. *Id.*

76. *See id.*

77. *Id.* at 526.

78. *Id.* at 510-11.

79. *Id.*

80. *Id.* at 522-24.

81. *Id.* at 527.

82. *See* Amendments to Federal Rules of Evidence—Rule 609, 129 F.R.D. 347, 352-55 (1990).

83. *See* discussion *infra* Part V.

84. Amendments to Federal Rules of Evidence—Rule 609, 129 F.R.D. at 352. The new rule did allow for defense counsel to bring out prior convictions on direct examination in order to "remove the sting" on cross examination. *Id.*

admitted if it involved dishonesty or false statement, regardless of punishment.[85]

Despite mounting evidence that impeachment with prior conviction evidence against criminal defendants is highly prejudicial and cannot be cured by a judge's limiting instruction,[86] the drafters and Congress showed no concern for changing the rule as it pertained to criminal defendants. The current version of Rule 609 has the same effect on criminal defendants as the 1975 version of the Rule.[87] Crimes of dishonesty or false statement are automatically admissible regardless of punishment.[88] A trial judge does not have discretion to exclude impeachment by these types of crimes.[89] Any crime punishable by death or imprisonment for one year or more is admissible.[90] A trial judge may exclude this type of evidence when the probative value of the evidence does not outweigh its prejudicial effect to the accused but such evidence is ordinarily admissible.[91]

III. STATE APPROACHES TO IMPEACHMENT WITH PRIOR CONVICTIONS

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

North Carolina has adopted the FRE with certain exceptions.[92] The North Carolina version of Rule 609 gives prosecutors more leeway than the FRE version of Rule 609.[93] North Carolina's version of Rule 609 provides in relevant part: "For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime punishable by more than [sixty] days confinement shall be admitted if elicited from him or established by public record during cross examination."[94]

The North Carolina rule departs from the FRE in a number of important respects. First, the North Carolina rule expands the types of convictions that can be used for impeachment by including all convictions punishable by more than

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85. FED. R. EVID. 609(a) (1975) (amended 1990).
86. *See* discussion *infra* Part V.
87. FED. R. EVID. 609(a).
88. FED. R. EVID. 609(a)(2).
89. FED. R. EVID. 609.
90. FED. R. EVID. 609(a)(1).
91. *See* FED. R. EVID. 609(a) advisory committee's note.
92. *See* N.C. GEN. STAT. § 8C-1, Rule 609(a) (1999).
93. *Id.*
94. *Id.*

sixty days confinement.[95] In comparison, the FRE version of Rule 609 restricts prior convictions to those crimes punishable by death or imprisonment for more than a year.[96] Second, there is no requirement in North Carolina that misdemeanor crimes evidence dishonesty, false statement, or deceit.[97] The only requirement is that the crime be punishable for more than sixty days.[98] Finally, prior conviction evidence is per se admissible in North Carolina.[99] North Carolina removes the trial court's discretion to exclude impeachment evidence of prior convictions if its prejudicial effect outweighs the probative value of the evidence.[100] The political compromise that was purportedly reached when Congress adopted the FRE in 1975[101] was not reached in North Carolina. The result is a rule that heavily favors prosecutors while giving criminal defendants little protection.

The current version of North Carolina's Rule 609 is more restrictive than an earlier version of the rule.[102] Prior to 1983, there was no restriction on how far back a prosecutor could go to drag in prior conviction evidence.[103] In 1983, the rule was changed and the legislature adopted the ten year period which is also applied in the federal rule.[104] Moreover, before 1983, North Carolina followed the common law and admitted all conviction evidence regardless of the offense or punishment.[105]

Despite changes to the rule, North Carolina's version of Rule 609 remains one of the broadest in the country. Most states that have departed from the federal rule have adopted rules which allow prosecutors to use prior convictions to a more limited extent than is allowed under the federal rule.[106] North Carolina is one of only a handful of states which has expanded the use of prior conviction evidence.[107]

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95. *Id.*
96. FED. R. EVID. 609(a).
97. *See* N.C. GEN. STAT. § 8C-1, Rule 609(a).
98. *Id.*
99. *Id.*
100. *Id.*
101. *See* discussion *supra* pp. 5-10.
102. *See* Alston v. Herrick, 332 S.E.2d 720, 723-24 (N.C. Ct. App. 1985).
103. *Id.* at 723.
104. N.C. GEN. STAT. § 8C-1, Rule 609(b); FED R. EVID. 609(b).
105. *See* Alston v. Herrick, 332 S.E.2d at 723.
106. *See, e.g.*, HAW. R. EVID. 609(a) (1993) (as enacted in HAW. REV. STAT. § 626-1 (1993)).
107. *See* MASS. GEN. LAWS ANN. ch. 233, § 21 (West 1986) (allowing impeachment with some misdemeanors not involving dishonesty); MO. ANN. STAT. § 491.050 (West 1996) (allowing

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

Most states have adopted some version of the Federal Rules of Evidence but have taken a number of approaches to impeachment with prior conviction evidence. Hawaii was the first state to adopt a version of Rule 609 which departed from the federal rule and disallowed the use of prior conviction evidence to impeach a criminal defendant.[108] Hawaii's current limitation developed in the early 1970s and predated the adoption of a modified version of the FRE. In 1970, the statutory law of Hawaii allowed for impeachment of a witness with evidence of a prior felony or of a misdemeanor involving dishonesty or moral turpitude.[109] The Hawaii Supreme Court showed concern for the rule noting that many criminal convictions had little if any probative value on a witness's credibility.[110] In *State v. Santiago*,[111] the Supreme Court of Hawaii addressed the constitutionality of impeaching a criminal defendant with prior conviction evidence and ruled the practice unconstitutional based on the state constitution.[112] Citing *Bruton v. United States*,[113] the court noted that there were some contexts in which a jury was incapable of obeying a trial court's limiting instruction.[114] The court went on to argue that jurors might infer that, because of his prior convictions, the defendant must have committed the crime with which he is charged.[115] While a defendant always has a right to testify, he

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impeachment with any criminal conviction); N.J. STAT. ANN. § 84A, Rule 609 (West 1999) (allowing impeachment with any criminal conviction "unless excluded by the judge as remote or for other causes"); WIS. STAT. ANN. § 906.09 (West 1993 & Supp. 1998) (allowing impeachment with any criminal conviction).

108. *See* State v. Santiago, 492 P.2d 657, 661-62 (Haw. 1971).

109. Asato v. Furtado, 474 P.2d 288, 294-95 (Haw. 1970) (citing HAW. REV. STAT. § 621-22 (1968)).

110. *See id.* at 294. The court wrote, "We think that there are a great many criminal offenses the conviction of which has no bearing whatsoever upon the witness's propensity for lying or truth telling, and that such convictions ought not to be admitted for purposes of impeachment." *Id.*

111. State v. Santiago, 492 P.2d 657 (Haw. 1971).

112. *Id.* at 661-62.

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

114. State v. Santiago, 492 P.2d at 660.

115. *Id.*

would feel unduly restrained from doing so if he had prior convictions.[116] The court concluded this fact would unconstitutionally penalize a defendant for exercising his right to testify, and it held that the Hawaii evidence rules could not be read to impose such unconstitutional burdens on a defendant.[117] The court also believed prior conviction evidence provided little assistance to the jury in weighing the defendant's credibility as a witness.[118] It argued the prosecution had other available means by which to impeach a defendant or show that his testimony should not be believed by jurors.[119]

Nothing in the Hawaii Constitution or the Hawaii Evidence Code mandated the court's decision.[120] But the court felt the rule allowing impeachment by prior conviction evidence did not afford a criminal defendant sufficient protection from unfair prejudice.[121] In reaching this conclusion, the Hawaii court made a number of assumptions about how jurors reason, but it did not support these assumptions with any evidence.[122] First, the court assumed a jury would use the information in an impermissible way, inferring from the fact that the defendant had a criminal record, she must have a propensity to commit crimes, and therefore she committed the crime with which she is charged.[123] Second, the court assumed a jury could not or would not follow a judge's limiting instruction.[124] At the time *Santiago* was decided, some scientific evidence existed supporting these assumptions.[125] But the Hawaii Supreme Court did not cite to this evidence and did not seem aware of it when it handed down the decision.[126] Today, however, scientific evidence shows quite convincingly the court's assumptions were well founded: juries in fact ignore judges' limiting instructions and use prior conviction evidence for impermissible purposes.[127]

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

117. *Id.* at 660-61.

118. *Id.* at 661.

119. *Id.*

120. *See id.*

121. *Id.* at 660-61.

122. *See id.*

123. *Id.* at 660-61.

124. *Id.*

125. *See* discussion *infra* pp. 32-35.

126. *See* State v. Santiago, 492 P.2d at 660-61.

127. *See* discussion *infra* Part V.

Since the *Santiago* decision, Hawaii has adopted a version of the FRE which departs from the federal approach found in Rule 609.[128] Consistent with *Santiago,* the current version does not allow a criminal defendant to be impeached with prior conviction evidence.[129] Like the English rule,[130] Hawaii does allow a prosecutor to impeach a defendant with prior conviction evidence if the defendant brings his character into question.[131] In essence, the rule protects a criminal defendant so long as she does not try to bolster her credibility by misleading jurors or testifying in some way to a blameless life.[132]

Following Hawaii's lead, Pennsylvania adopted rules of evidence which prohibit impeachment by prior conviction evidence.[133] However, Pennsylvania courts have wavered as to how strictly the rule must be enforced. In *Commonwealth v. Gray*,[134] the superior court attempted to provide a criminal defendant with maximum protection under the Pennsylvania impeachment rule.[135] *Gray* involved a defendant who was charged with burglary for allegedly breaking into a store and stealing a television and some scales.[136] At trial, the

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128. *See* HAW. R. EVID. 609(a) (1993) (as enacted in HAW. REV. STAT. § 626-1 (1993)). The Hawaii version of 609(a) provides:

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

Id.

129. *See id.*

130. *See* discussion *infra* Part IV.

131. HAW. R. EVID. 609(a).

132. *See id.*

133. 42 PA. CONS. STAT. ANN. § 5918 (West 1999). The statute provides:

> No person charged with any crime and called as a witness in his own behalf, shall be asked, or if asked, shall be required to answer, any question tending to show that he has committed, or been charged with, or been convicted of any offense other than the one wherewith he shall then be charged, or tending to show that he has been of bad character or reputation unless: (1) he shall have at such trial, personally or by counsel, asked questions of the witness for the prosecution with a view to establish his own good reputation or character, or has given evidence tending to prove his own good character or reputation; or (2) he shall have testified at such trial against a codefendant, charged with the same offense.

Id.

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

135. *Id.* at 332.

136. *Id.* at 331.

prosecutor asked the defendant about prior convictions, but the defense attorney did not object.[137] The defendant was convicted and appealed his conviction on the ground his attorney was ineffective, because he did not object to the use of prior conviction evidence.[138] The state conceded that the questioning at trial was improper but argued the conviction should stand because the questioning was harmless error.[139] The state noted the evidence of guilt was strong and the case was tried before a judge, not a jury.[140] The superior court rejected the state's argument.[141] It held the evidence rule disallowing impeachment with prior conviction evidence applied regardless of who the trier of fact was.[142] The appeals court could not conclude the failure to object was ineffective assistance of counsel, but the court vacated the sentence and remanded the case to determine if defense counsel's failure to object was ineffective assistance of counsel.[143]

Other Pennsylvania courts have been more reluctant in protecting criminal defendants. In *Commonwealth v. Kearse*,[144] a defendant on trial for robbery defended himself by testifying he was home sick the day of the robbery.[145] He also produced two witnesses who testified that around the day of the robbery he was home sick.[146] Neither witness could testify to the exact day of the defendant's illness.[147] The trial court allowed prior conviction evidence because it believed the credibility of the defendant was a significant part of the state's case, and it found the prejudicial effect of the prior conviction evidence minimal.[148] The defendant was convicted and appealed, arguing the trial court erred in allowing the prior conviction evidence.[149] The superior court rejected this argument.[150] It held admission of prior conviction evidence was "within the sound discretion of the trial judge."[151] The court argued the trial judge had

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137. *Id.* at 332.
138. *Id.*
139. *Id.*
140. *Id.* at 332-33.
141. *Id.* at 333.
142. *Id.*
143. *Id.*
144. Commonwealth v. Kearse, 473 A.2d 577 (Pa. Super. Ct. 1984).
145. *Id.* at 578-79.
146. *Id.* at 578.
147. *Id.*
148. *Id.* at 579.
149. *Id.* at 578.
150. *Id.* at 582.
151. *Id.* at 579.

properly weighed the competing interests and the appeals court could not conclude the judge abused his discretion.[152] Accordingly, the court affirmed the conviction.[153]

The Pennsylvania courts' use of a balancing test is odd, given the plain language of the statute disallowing prior conviction evidence to impeach a criminal defendant.[154] Nowhere in the statute does the legislature provide for any balancing test, but Pennsylvania courts have consistently used such a test.[155] Nevertheless, the rule in Pennsylvania provides criminal defendants with considerably more protection than Rule 609 of the FRE and similar state rules.

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

> If the witness be the accused in a criminal proceeding, no evidence of his or her conviction of a crime shall be admissible for the sole purpose of impairing his or her credibility unless the witness has first introduced evidence admissible solely for the purpose of supporting his or her credibility.[156]

Kansas courts have viewed the rule strictly and have afforded defendants protection only when there is no bolstering of credibility.[157] Any assertion of good character by a defendant or a witness makes impeachment with prior conviction evidence appropriate.[158] For example, in *State v. Johnson*,[159] the defendant took the stand in a robbery case.[160] The defendant testified he was presently "telling the truth" and the trial court admitted prior convictions to impeach his credibility.[161] The court reasoned this statement was an attempt to emphasize his credibility, and by making this statement, the defendant opened the door to impeachment with prior conviction evidence.[162] The court of appeals

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152. *Id.* at 582.

153. *Id.*

154. *See* 42 PA. CONS. STAT. ANN. § 5918 (West 1999).

155. *See* Commonwealth v. Roots, 393 A.2d 364, 367 (Pa. 1978) (developing a five part balancing test for determining whether prior conviction evidence is admissible).

156. KAN. STAT. ANN. § 60-421 (1998).

157. *See* State v. Johnson, 907 P.2d 144, 147 (Kan. Ct. App. 1995) (when defendant's testimony was offered for the sole purpose of supporting credibility, the defendant opens the door to cross examination on prior convictions).

158. *Id.* at 146.

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

160. *Id.* at 146.

161. *Id.*

162. *Id.* at 147.

of Kansas affirmed, holding any statement bolstering credibility opened the door to impeachment with prior conviction evidence.[163]

Other states with similar rules have afforded criminal defendants more protection.[164] Georgia followed Hawaii's lead and enacted an evidence rule similar to that in Hawaii.[165] In relevant part the Georgia statute provides:

> If a defendant testifies, he shall be sworn as any other witness and may be examined and cross-examined as any other witness, except that no evidence of general bad character or prior convictions shall be admissible unless and until the defendant shall have first put his character in issue.[166]

Unlike the rule under the FRE and in most states, Georgia law does not provide a criminal defendant to put his character in issue merely by testifying at his own trial.[167] Instead, the defendant must testify to his own good character, make misleading statements about his prior record, or elicit testimony from other witnesses about his good reputation before a prosecutor may introduce prior conviction evidence.[168]

The Georgia rule gives the defendant considerably more protection from unfair prejudice than Rule 609. It also provides greater protection than the rule in Pennsylvania or Kansas, as interpreted by those states courts.[169] However, the Georgia rule affords a defendant protection only so long as he does not attempt to mislead a jury by bolstering his reputation.[170] When a defendant testifies to his good character the prosecutor is free to use prior conviction evidence to impeach the defendant's credibility.[171] The Georgia Court of Appeals explained

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163. *Id.*

164. *See, e.g.*, GA. CODE ANN. § 24-9-20 (Harrison 1998) (stating prior convictions inadmissible evidence unless defendant put his character in issue).

165. *See id.*

166. *Id.*

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

168. *See generally* Wilkey v. State, 450 S.E.2d at 847 (although defendant did not put his character in issue by volunteering he had been incarcerated, when he has, or denied a prior crime, the state is entitled to make "an unbridled attack on the defendant's character or credibility by introducing evidence of past wrongdoing"); Height v. State, 448 S.E.2d at 727-28 (defendant's testimony that it was "not in his nature to hurt anybody" did not constitute testifying of his own good character or putting his character in issue, and it was improper, although harmless error to allow testimony to be impeached on grounds of its "falsity").

169. *See* State v. Johnson, 907 P.2d 144, 147 (Kan. Ct. App. 1995); Commonwealth v. Kearse, 473 A.2d 577, 579-82 (Pa. Super. Ct. 1984).

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

171. *See id.*

the bolstering exception in *King v. State*.[172] In *King*, the defendant was arrested for trafficking in cocaine.[173] At trial the defendant took the stand and testified on his own behalf.[174] On cross examination the prosecutor asked the defendant if he knew the price of crack cocaine.[175] The defendant responded, "I don't smoke marijuana. I don't snort, shoot, or base no cocaine."[176] At that point, the trial court determined the defendant had put his character in issue, and the court allowed the prosecutor to present prior conviction evidence regarding other drug related crimes.[177] The defendant was eventually convicted and appealed the conviction.[178]

On appeal, the court held the use of prior evidence of the defendant's conviction was proper.[179] It reasoned because the defendant had been convicted of drug related charges, his answer to the prosecutor's question was deceptive and misleading.[180] The prosecutor's use of prior conviction evidence was proper because it showed directly that the defendant was untruthful.[181] By volunteering information that was misleading, the court held the defendant had put his character in issue and was no longer protected by the Georgia evidence law.[182]

Georgia courts have recognized other exceptions to the rule disallowing impeachment by prior conviction evidence against criminal defendants.[183] These exceptions basically follow those outlined in Rule 404(b) of the FRE.[184] Rule 404(b) generally allows the prosecutor to use prior conviction evidence, regardless of whether the defendant testifies, when the evidence is offered to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or

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172. King v. State, 416 S.E.2d 842, 842-44 (Ga. Ct. App. 1992).
173. *Id.* at 843.
174. *Id.* at 844.
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.* at 843.
179. *Id.* at 844.
180. *Id.*
181. *See id.*
182. *Id.*
183. *See* Lord v. State, 406 S.E.2d 137, 139 (Ga. Ct. App. 1991) (allowing evidence of previous rape and assault to show identity of defendant); Kilgore v. State, 305 S.E.2d 82, 89 (Ga. 1983) (allowing prior conviction evidence of similar crime to show identity).
184. *See* FED. R. EVID. 404(b).

absence of mistake or accident.[185] For the most part Georgia courts follow these exceptions.[186]

Montana has gone further than any state in disallowing impeachment with prior conviction evidence.[187] The rule in Montana provides: "For purposes of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is not admissible."[188] The Montana rule is broad and applies to all witnesses in civil and criminal cases.[189] Moreover, the plain language of the rule appears to allow any witness, including a criminal defendant, to bolster his credibility.[190] However, the courts in Montana have carved out exceptions to the rule. Most importantly, the courts have not allowed witnesses to bolster their credibility by making false statements about past convictions.[191] Thus, when a criminal defendant testifies that he is not the kind of person who could commit the crime with which he is currently charged, the courts have allowed prosecutors to impeach such witnesses with prior conviction evidence.[192] In addition, Montana courts have allowed prosecutors more latitude in bringing up the details of prior convictions without asking if the witness was convicted.[193] For example, in *State v. Martin*[194] the defendant was charged with various sex crimes against minors and called his wife to testify on his behalf.[195] In a previous case, the wife had perjured herself by corroborating a false alibi and was convicted of perjury.[196] The trial court allowed the prosecutor to ask the defendant's wife if she had ever given false testimony in the case.[197] But it did not allow the prosecutor to ask if she had been convicted for perjury or any other

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185. *Id.*

186. *See, e.g.*, King v. State, 416 S.E.2d at 844 (determining defendant's statement of non-drug use put character in issue, and allowed cross-examination on prior drug conviction); Lord v. State, 406 S.E.2d at 139 (finding evidence of two uncharged incidents sufficiently similar to charged incident to be admissible).

187. *See* MONT. R. REV. Rule 609 (West 1997).

188. *Id.*

189. *Id.*

190. *Id.*

191. *See* State v. Austad, 641 P.2d 1373, 1384 (Mont. 1982).

192. *See id.* at 1383-84.

193. *See* State v. Martin, 926 P.2d 1380, 1388-89 (Mont. 1996); *cf.* State v. Gollehow, 864 P.2d 249, 259 (Mont. 1983) (adhering strictly to evidentiary rule precluding use of witness's prior convictions to impeach witness's credibility).

194. State v. Martin, 926 P.2d 1380 (Mont. 1996).

195. *Id.* at 1388-89.

196. *Id.*

197. *Id.*

offense.[198] The Montana Supreme Court affirmed this decision holding the trial court's decision was proper under Montana evidence law.[199]

Despite these exceptions, the Montana courts have afforded criminal defendants considerable protection from the prejudicial effects of prior conviction evidence.[200] But the approach adopted by Hawaii, Pennsylvania, Kansas, Georgia, and Montana remains a minority view in the United States. Other than these five states, evidence rules in other states allow impeachment of a criminal defendant with prior conviction evidence to one degree or another.[201] The approach in these states has also received little support from law professors or legal scholars. Of the numerous law review articles written on Rule 609 and similar state rules, most have not cited evidence laws from these states.[202]

C. *Departing from the Federal Approach—California's Law on Impeachment with Prior Conviction Evidence*

Prior to 1982, § 788 of the California Evidence Code was similar to the current FRE approach in Rule 609.[203] Section 788 allowed prosecutors to

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198. *Id.* at 1389.

199. *Id.* at 1390.

200. *See id.* at 1389-90.

201. *See* ALA. R. EVID. 609; ALASKA R. EVID. 609; ARIZ. R. EVID. 609; ARK. R. EVID. 609; COLO. R. EVID. § 13-90-101; CONN. R. EVID. 609; DEL. R. EVID. 609; FLA. R. EVID. § 90.610; IDAHO R. EVID. 609; 735 ILL. COMP. STAT. ANN. 5/8-101 (West 1992); IND. R. EVID. 609; IOWA R. EVID. 609; KY. R. EVID. 609; LA. R. EVID. 609.1; ME. R. EVID. 609; MASS. R. EVID. 233, § 21; MD. R. EVID. 5-609; MICH. R. EVID. 609; MINN. R. EVID. 609; MISS. R. EVID. 609; MO. R. EVID. 491.050; NEB. R. EVID. § 27-609; NEV. R. EVID. 50.095; N.H. R. EVID. 609; N.J. R. EVID. 609; N.M. R. EVID. 11-609; N.Y. [CRIM. PROC.] LAW § 60.40 (West 1992); N.D. R. EVID. 609; OHIO R. EVID. 609; OKLA. R. EVID. 12 § 2609; OR. R. EVID. 609; R.I. R. EVID. 609; S.C. R. EVID. 609; S.D. R. EVID. § 19-14-12; TENN. R. EVID. 609; TEX. R. EVID. 609; UTAH R. EVID. 609; VT. R. EVID. 609; VA. R. EVID. § 19.2-269; W. VA. R. EVID. 609 (West 1997); WASH. R. EVID. 609; WIS. R. EVID. 906.09; WYO. R. EVID. 609.

202. *See* Robert Banks, Jr., *Some Comparisons Between the New Tennessee Rules of Evidence and the Federal Rules of Evidence Part II*, 20 MEMPHIS ST. L. REV. 499 (1990); Steven L. Friedlander, *Using Prior Corporate Convictions to Impeach*, 78 CAL. L. REV. 1313 (1990); Gold, *supra* note 9; Edward J. Imwinkelried & Miguel A. Mendez, *Resurrecting California's Old Law on Character Evidence*, 23 PAC. L.J. 1005 (1992); Abraham P. Ordover, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b) and 609(a)*, 38 EMORY L.J. 135 (1989); Thomas J. Reed, *Admission of Other Criminal Act Evidence After Adoption of the Federal Rules of Evidence*, 53 U. CIN. L. REV. 113 (1984); Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845 (1982).

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

impeach a criminal defendant with prior conviction evidence.[204] The evidence code limited prior conviction impeachment to felonies.[205] In *People v. Beagle*,[206] the California Supreme Court held that prior convictions were not admissible per se but were subject to a balancing test.[207] Section 352 of the California Evidence Code provides that otherwise admissible evidence may be excluded at the trial courts discretion "if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice."[208] Overruling a long line of decisions by California Courts of Appeals, the court held § 788 was subject to the balancing test articulated in § 352.[209] The balancing test was similar to the one adopted by the D.C. Circuit in *Luck v. United States*,[210] and the California court cited to *Luck*.[211]

Beagle involved a criminal defendant on trial for arson.[212] The prosecutor questioned Mr. Beagle concerning a prior conviction for writing bad checks, and the trial court allowed the impeachment.[213] The California Supreme Court affirmed the conviction.[214] It reasoned that issuing bad checks tended to reflect poorly on Mr. Beagle's character and was relevant for that purpose.[215] In addition, the conviction was not remote, as it was less than four years old.[216] On the other side of the scale, the court found little to indicate that admission of the conviction would prejudice Mr. Beagle because the nature of the prior offense was not one likely to inflame the jury.[217]

The court provided guidance to trial courts weighing the probative value of prior conviction evidence against the prejudicial effect.[218] Citing *Gordon v. United States*,[219] the court noted that crimes which involve deceit such as fraud

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204. *Id.*
205. *Id.*
206. People v. Beagle, 492 P.2d 1 (Cal. 1972).
207. *Id.* at 8-9.
208. *Id.* at 7 (citation omitted).
209. *Id.*
210. *See* discussion *supra* pp. 4-6.
211. *See* People v. Beagle, 492 P.2d at 7.
212. *Id.* at 4.
213. *Id.* at 6.
214. *Id.* at 13.
215. *Id.* at 9.
216. *Id.* at 6.
217. *Id.* at 9.
218. *See id.* at 7-9.
219. Gordon v. United States, 383 F.2d 936 (D.C. Cir. 1967).

or stealing reflect on the honesty of a witness.[220] But acts of violence generally show little about a witness's honesty and do not relate to credibility for impeachment purposes.[221] The court also noted there were strong reasons for excluding prior conviction evidence when the conviction was for the same offense with which the defendant was currently charged.[222] Such evidence would very likely lead jurors to conclude that because a defendant committed the same crime in the past she must have also committed the one for which she is currently charged.[223] *Beagle* also made clear that even when prior conviction evidence was relevant to impeach a defendant, a trial court may exclude the evidence if it believes that admission of the evidence would persuade a defendant not to testify.[224] In reasoning similar to that used by the Hawaii Supreme Court to disallow such evidence on state constitutional grounds,[225] the California Supreme Court noted the defendant's version of what happened may be so important that a judge should exclude the evidence so the defendant does not remain silent in fear of impeachment with prior convictions.[226]

Following *Beagle*, subsequent cases also limited the use of prior conviction evidence.[227] In *People v. Antick*,[228] the California Supreme Court overturned convictions for theft, burglary, assault with a deadly weapon, and murder.[229] The court found the trial court abused its discretion in admitting prior conviction evidence against the defendant for two forgery convictions which were seventeen and nineteen years old.[230] The court noted that prior convictions provided "at best very weak evidence" of the defendant's credibility as a witness.[231] Writing for the court, Justice Sullivan concluded the potential for jury abuse was great, especially in close factual situations.[232]

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220. People v. Beagle, 492 P.2d at 8.
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.*
225. *See* discussion *supra* pp. 14-15.
226. *See* People v. Beagle, 492 P.2d at 8.
227. *See* Hank M. Goldberg, *The Impact of Proposition 8 on Prior Misconduct Impeachment Evidence in California Criminal Cases*, 24 LOY. L.A. L. REV. 621, 623 & n.16 (1978).
228. People v. Antick, 539 P.2d 43 (Cal. 1975).
229. *Id.* at 56.
230. *Id.* at 54-56.
231. *Id.* at 55.
232. *Id.* at 55-56.

Following *Beagle* and *Antick*, the California Supreme Court continued to adhere to its holdings in those cases.[233] Trial courts and intermediate appellate courts were reluctant in applying the rules and standards articulated in *Beagle*.[234] Nevertheless, the California Supreme Court continued to uphold its previous rulings and expanded on the doctrines expounded in *Beagle* and *Antick*.[235]

In *People v. Fries*,[236] the court ruled that it was reversible error for a trial court to permit a prosecutor to impeach a defendant with prior conviction evidence of the same or of a similar type of crime.[237] Writing for the majority, Chief Justice Bird reasoned that the potential for prejudice was acute, because a jury would likely use the evidence to conclude that because the defendant

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233. *See* People v. Barrick, 654 P.2d 1243, 1250 (Cal. 1982) (defendant was improperly impeached with evidence of prior conviction for same offense); People v. Spearman, 599 P.2d 74, 78 (Cal. 1979) (defendant was improperly impeached with prior conviction evidence of narcotics sale because selling narcotics does not involve element of dishonesty or deceit); People v. Fries, 594 P.2d 19, 27 (Cal. 1979) (trial court erred in allowing impeachment with prior conviction for the same offense as that charged); People v. Woodard, 590 P.2d 391, 398 (Cal. 1979) (trial court abused its discretion in allowing impeachment with prior manslaughter and possession of a gun conviction because those crimes do not involve dishonesty and deceit); People v. Rollo, 569 P.2d 771, 774 (Cal. 1977) (trial court abused its discretion in admitting prior convictions which showed violence, but deceit and attempts at mitigating prejudicial effect were inadequate); People v. Rist, 545 P.2d 833, 839-40 (Cal. 1976) (trial court erred in admitting a prior conviction of robbery because the conviction was too similar to the offense with which the defendant was currently charged).

234. *See* People v. Rist, 545 P.2d at 840. The court stated that "*Beagle* has not been adhered to in a number of reported decisions." *Id.* The court went on to list several appellate decisions which it saw itself as overruling. *Id.* See also *People v. Rollo*, wherein the court stated:

> Twice in the past two years we have reviewed the origin and purpose of [the Beagle] rule, provided elaborate guidance in its application, and reaffirmed its mandate by reversing judgments of conviction on the ground that failure to exclude such evidence constituted prejudicial abuse of discretion in the circumstances of each case. Surely we do not need to repeat that discussion so soon. By now it should be clear to all that when a defendant makes a timely objection to the introduction of evidence of a prior felony conviction for the purpose of impeaching his testimony, the trial court is under a duty (1) to determine the probative value of that evidence on the issue of the defendant's credibility as a witness, (2) to appraise the degree of prejudice which the defendant would suffer from admission of the evidence, and (3) to weigh the foregoing two factors against each other and exclude the evidence "if its probative value [on the issue of credibility] is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice."

People v. Rollo, 569 P.2d 771, 774 (Cal. 1977) (quoting CAL. EVID. CODE § 352 (West 1977)). The court then went on to criticize the trial judge for failing to properly apply the correct standard. *Id.* at 774-75.

235. *See* cases cited *supra* note 233.

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

237. *Id.* at 27.

committed the crime previously, he committed the same offense again.[238] The Chief Justice wrote again for the California court in 1979.[239] Joined by all but two members of the court, Chief Justice Bird concluded that only felonies which contain a necessary element with the intent to deceive, defraud, lie, cheat, or steal are admissible.[240] Any other offenses would merely show the defendant had a propensity for violence or law breaking, and such characteristics are not relevant to a jury in weighing a witness's credibility.[241]

In 1982, California enacted Proposition 8, popularly known as the "Victim's Bill of Rights."[242] This amendment to the California Constitution makes any prior felony conviction admissible for impeachment "without limitation."[243] On its face, the amendment would appear to have negated the importance of *Beagle* and the line of cases which followed it.[244] Despite the wording of the amendment, the California Supreme Court held a trial court still has discretion to exclude prior conviction evidence when its prejudicial effect outweighs its probative value.[245]

In *People v. Castro*[246] the California Supreme Court focused on section 28(d) of Proposition 8.[247] Section 28(d) provides: "Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code sections 352, 782, or 1103."[248] From this provision, the California Supreme Court reasoned that voters had not intended to deprive courts of discretion to exclude prior conviction evidence.[249] To do so, the California Supreme Court believed would present due process problems,[250] though the court

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238. *Id.* at 23. In a later case, *People v. Barrick*, the court expanded this ruling. People v. Barrick, 654 P.2d at 1248. *Barrick* involved a defendant charged with auto theft. *Id.* at 1250. Because the defendant had prior auto theft convictions, the court held that admission of such evidence could not be "sanitized" by a trial court's refusal to allow the prosecutor to go into details of the crime. *Id.*

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

240. *Id.* at 78.

241. *Id.*; *see also* People v. Woodard, 590 P.2d 391, 396 (Cal. 1979) (holding the *Beagle* standard applied when deciding whether impeachment with a prior conviction was appropriate for any witness).

242. *See* Goldberg, *supra* note 227, at 621.

243. CAL. CONST. art. I, § 28(f).

244. *See* Goldberg, *supra* note 227, at 628.

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

246. People v. Castro, 696 P.2d 111 (Cal. 1985).

247. *Id.* at 117.

248. CAL. CONST. art 1, § 28(d) (enacted by Proposition 8).

249. People v. Castro, 696 P.2d at 117.

250. *Id.* at 118.

failed to explain why depriving courts of their discretion would violate the United States Constitution's Due Process Clause.[251] In essence, the court affirmed the essential holding in *Beagle*.[252] The court argued what voters intended when they enacted Proposition 8 was to abolish the per se exclusion rules developed in the line of post-*Beagle* cases.[253]

The *Castro* court also formulated a new test for admission of prior conviction evidence.[254] The court ruled that only prior convictions which evidenced "moral turpitude" were admissible.[255] Crimes that evidence moral turpitude are those which show "a readiness to do evil" by the defendant or show the defendant's "bad character."[256] The California court noted this included offenses of moral depravity, such as child abuse or molestation, torture, and sometimes crimes of violence.[257] The court argued that although such offenses may not show untruthfulness or deceit, a juror could conclude from such offenses that a witness is "unworthy of credit" and should not be believed.[258]

Proponents of Proposition 8 were disappointed with the *Castro* decision.[259] Even so, the passage of Proposition 8 greatly expanded the use of prior conviction evidence for impeachment.[260] Today, California courts have interpreted the California Constitution and *Castro* to allow impeachment of criminal defendants with prior convictions for assault and similar crimes,[261] escape,[262] child molestation,[263] statutory rape,[264] and voluntary manslaughter.[265]

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251. *See id.* The court's reference to constitutional problems is odd considering that Rule 609 deprives the trial court of discretion in admitting prior convictions which involve dishonesty or deceit. Under Rule 609, courts are not subject to the normal balancing test and a trial court does not have the discretion to exclude such prior conviction. *Id.*; *see* FED. R. EVID. 609 (allowing admittance of prior convictions involving dishonesty or deceit).

252. People v. Castro, 696 P.2d at 114-17.

253. *See id.* at 117.

254. *Id.* at 118.

255. *Id.* at 119.

256. *Id.*

257. *Id.*

258. *Id.* at 119.

259. *See* Jeff Brown, *Proposition 8: Origins and Impact—A Public Defender's Perspective*, 23 PAC. L.J. 881, 903 (1992).

260. *See id.*

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

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

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

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

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

The California rule has also expanded the use of prior convictions for impeachment beyond what FRE allows.[266]

IV. THE ENGLISH APPROACH TO IMPEACHMENT WITH PRIOR CONVICTIONS

Prior to 1898, a criminal defendant in England was considered incompetent and could not testify on his own behalf.[267] In 1898, the Criminal Evidence Act was enacted, which gave criminal defendants the right to testify.[268] The Criminal Evidence Act of 1898 specifically disallowed prosecutors from impeaching criminal defendants by using prior convictions.[269] In relevant part the Act provides:

> A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged . . . .[270]

In applying the rule, English courts have been rigid and have disallowed any questions which would lead a reasonable juror to believe the defendant committed other offenses.[271] Prosecutors may not use a series of questions to elicit such information,[272] nor may they ask questions tending to show the defendant spent time in jail or prison.[273] If a prior conviction is disclosed, even accidentally, it is grounds for a mistrial.[274]

Despite the strong policy objectives underlying the English rule on impeachment through prior convictions, there are a number of important exceptions.[275] Most significantly, the English rules permit impeachment through prior conviction evidence when a defendant puts his character in issue.[276] Prior

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

267. HOWARD ET AL., *supra* note 17, ¶ 18-19.

268. *Id.*

269. Criminal Evidence Act, 1898, 61 & 62 Vict., ch. 36, § 1(f) (Eng.).

270. *Id.*

271. *See* HOWARD ET AL., *supra* note 17, ¶ 18-16.

272. *Id.*

273. *Id.*

274. *Id.*

275. *See* Criminal Evidence Act, 1898, 61 & 62 Vict. ch. 36, § 1(f)(i)—1(f)(iii) (Eng.).

276. *Id.* § 1(f)(i). In relevant part, the provision provides a criminal defendant may be asked about character if:

conviction evidence may only be used in attacking the witness's credibility and cannot be used for any improper purpose.[277] In effect, the rule's exception still affords a criminal defendant protection as long as he does not actively attempt to mislead the jury into believing that he has a spotless record.[278] In addition, the defendant can attempt to bolster his own testimony by introducing prior conviction evidence against a state witness.[279] If a defendant decides to attack the state's witness with prior conviction evidence, the English rule permits the prosecutor to impeach the defendant with prior conviction evidence.[280]

There are other exceptions to the English rule. Evidence of prior convictions may also be used to prove a similar fact.[281] For example, in *Jones v. Director of Public Prosecutions*[282] the defendant was accused of raping and killing a girl.[283] Approximately three months prior to the murder trial, he was convicted of raping and assaulting a different girl.[284] Evidence from the first trial showed the rape was committed in an almost identical fashion to the rape at issue in the second trial.[285] The trial court allowed the prosecutor to use evidence from the first trial in the second trial.[286] The House of Lords sustained the conviction on the ground the prior conviction evidence was not introduced to show the defendant's propensity to rape but was offered to show similar facts.[287]

Prior conviction evidence is also admissible to prove part of a subsequent offense.[288] For example, evidence that a defendant was convicted of burglary

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> [H]e has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defense is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution.

Id.

277. HOWARD ET AL., *supra* note 17, ¶ 18-18.

278. *See* G.D. NOKES, AN INTRODUCTION TO EVIDENCE 138-39 (4th ed. 1967).

279. *Id.* at 146.

280. *Id.* at 138-39.

281. HOWARD ET AL., *supra* note 17, ¶ 18-25.

282. Jones v. Director of Pub. Prosecutions, 1962 App. Cas. 635 (appeal taken from Eng.).

283. *Id.* at 636.

284. *Id.* at 636-41.

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

286. *See id.* at 636-38.

287. *Id.* at 636-39.

288. *See id.* at 639.

would be admissible in a subsequent trial for loitering with intent to commit a felony.[289] Finally, prior conviction evidence is admissible when a criminal penalty is enhanced for prior convictions.[290] Similar rules exist in the United States, allowing prosecutors to use prior conviction evidence to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[291]

The rationale and policy behind the English rule is clear from various statutory provisions and case law. English courts, applying the rule, noted such evidence should not be allowed because a jury might be misled into thinking the defendant has a propensity to commit crimes, and therefore she must have committed the crime with which she is charged.[292] In *The King v. Ellis*[293] the defendant was on trial for fraud.[294] He had prior convictions for fraud and had also been held liable in civil court.[295] During cross examination, the prosecutor elicited information concerning these prior acts.[296] Defense counsel objected, but by the time the objection was made, the jury had already heard inadmissible evidence.[297] The trial court did not discharge the jury, which eventually convicted the defendant for fraud.[298] Although there was likely sufficient evidence to support the jury's verdict, the court quashed the conviction.[299] The court ruled the prejudicial effect of the inadmissible evidence was so great, the defendant was not insured a fair trial.[300] While the trial judge admonished the jury not to consider the evidence, the appeals court concluded the prejudicial effect of the evidence could not be overcome with this instruction.[301] As the

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289. *Id.*

290. *See* HOWARD ET AL., *supra* note 17, ¶ 18-59.

291. *See* FED. R. EVID. 404(b).

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

293. The King v. Ellis, [1910] 2 K.B. 746 (Eng. Crim. App.).

294. *Id.* at 748.

295. *Id.* at 749-50.

296. *Id.*

297. *Id.* at 763.

298. *Id. at* 751.

299. *Id.* at 765.

300. *Id.* at 764-65.

301. *Id.*

appeals court stated, "We feel bound, therefore, to say not only that the jury may have been influenced, but that they must have been influenced."[302]

Other courts have reached similar conclusions.[303] In *Rex v. Butterwasser*,[304] the King's Bench quashed a conviction because prior conviction evidence was used to impeach the defendant.[305] The court held the prejudicial nature of the evidence mandated discharging the prisoner.[306] The court implied given the prejudicial nature of the evidence, it was impossible to determine if the jury would reach the same verdict absent the prior conviction evidence.[307]

Most courts in England have not gone so far as to articulate a per se rule reversing convictions when prior conviction evidence is admitted.[308] Generally, the defendant must show the whole cross examination was prejudicial in nature, or was tainted by questions about prior conviction evidence.[309] However, the plain language of the Criminal Evidence Act, and judicial recognition of the prejudicial effect of prior convictions, has eliminated impeachment by prior conviction evidence in England.

V. UNDERMINING THE ASSUMPTIONS BEHIND RULE 609

The majority American rule allowing use of prior conviction evidence to impeach a criminal defendant is based on unfounded assumptions which have no factual basis for support.[310] Drafters of the rule assume that juries are capable of understanding a judge's limiting instruction.[311] In addition the drafters assume that jurors will actually obey the instruction.[312] Numerous studies conducted over the last forty years show these assumptions are unfounded fictions and are simply wrong—jurors do use prior conviction evidence to infer criminal propensity and frequently ignore or fail to understand limiting instructions.[313] Moreover, even if jurors understand and attempt to follow a judge's limiting

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302. *Id.* at 765.
303. *See* Rex v. Butterwasser, [1948] 1 K.B. 4, 9 (Eng. Crim. App.).
304. Rex v. Butterwasser, [1948] 1 K.B. 4 (Eng. Crim. App.).
305. *Id.* at 9.
306. *See id.*
307. *See id.*
308. *See* HOWARD ET AL., *supra* note 17, ¶ 18-16.
309. *See id.* ¶ 18-24.
310. *See generally* Ordover, *supra* note 202, at 173-87 (arguing that limiting instructions do not prevent the presumption of guilt when prior convictions are admitted).
311. *See id.* at 175.
312. *See id.* at 174.
313. *See id.* at 175-78.

instruction, it is not clear that even the most level-headed juror would be able to completely eliminate the prejudicial effect of hearing such evidence.

One of the first relevant studies was conducted at the University of Chicago.[314] Subjects were people called to jury duty.[315] The subjects were asked to listen to a tape of a civil trial, involving an automobile accident, to determine damages.[316] One group was told the defendant, who was clearly liable, was covered by insurance.[317] Half of this group was then asked to ignore this fact in determining damages.[318] The other group was asked to determine damages after being informed the defendant had no insurance policy.[319] The results of the study are revealing.[320] The group who was told the defendant had no insurance policy returned an average award of $33,000.[321] In the other group, the half that knew of the policy but was not instructed to ignore it in determining damages, returned an average award of $37,000.[322] Surprisingly, the half who knew of the policy, and was instructed to ignore it in determining damages, awarded $46,000 on average.[323] Contrary to the underlying assumptions behind the American rule, the University of Chicago study was one of the first indications that jurors may not readily comprehend limiting instructions, and even when such instructions are understood, the jury may ignore them.[324]

In 1966, Harry Kalven and Hans Zeisel published an influential book on jury behavior.[325] The authors undertook a number of studies in which they observed how juries reacted to types of evidence and various trial techniques.[326] The book was subject to varying and contradictory interpretations by the Supreme Court. In *Spencer v. Texas*,[327] the Court held that a Texas statute, which allowed prior conviction evidence to be used to enhance a sentence, was constitutional when the jury was given notice of the prior conviction before

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314. *See* Dale W. Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744 (1959).
315. *Id.* at 753.
316. *Id.* at 753-54.
317. *Id.*
318. *Id.* at 754.
319. *Id.* at 753-54.
320. *Id.* at 754.
321. *Id.*
322. *Id.*
323. *Id.*
324. *See id.*
325. *See* HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY (1966).
326. *Id.* at 121-48.
327. Spencer v. Texas, 385 U.S. 554 (1967).

determining guilt or innocence on the facts being tried.[328] The majority cited Kalven and Zeisel for support of the proposition that juries were likely to obey a judge's limiting instruction.[329] The Court's reliance on this study is odd. Conviction rates were actually much higher when a defendant's record was known.[330] The dissent also found the Court's proposition odd, and cited the same pages for its proposition that jurors ignore a judge's limiting instruction.[331] Following the decision, the authors noted in a second edition that the dissent's interpretation of the data was correct.[332] The authors study did, in fact, suggest that limiting instructions were ignored.[333]

Following the second edition of *The American Jury* in 1971, researchers in Canada studied the effect of prior conviction evidence in criminal cases.[334] Like the American rule, the Canadian evidence rule in effect allowed prosecutors to impeach a criminal defendant with prior conviction evidence.[335] The researchers studied forty-eight people who were divided into four groups.[336] Each of the

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328. *Id.* at 572-75.

329. *Id.* at 565 n.8. The majority provided in the footnote:

> Indeed the most recent scholarly study of jury behavior does not sustain the premise that juries are especially prone to prejudice when prior-crime evidence is admitted as to credibility. The study contrasts the effect of such evidence on judges and juries and concludes that "[n]either the one nor the other can be said to be distinctively gullible or skeptical."

Id. (quoting KALVEN & ZEISEL, *supra* note 325, at 180) (citation omitted).

330. *See* KALVIN & ZEISEL, *supra* note 325, at 179. The extrapolated data in table 56 show that juries convicted roughly 64% of the time when the defendant had no record and took the stand. *See id.* When the jury knew of the defendant's criminal record and the defendant did not take the stand, the conviction rate was only 41%. *Id.*; *see also* Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions When Jurors Use Prior Conviction Evidence to Decide Guilt*, 9 L. & HUM. BEHAV. 37, 47 (1985) (concluding "that the presentation of the defendant's criminal record . . . does increase the likelihood of conviction, and that the judge's limiting instructions do not appear to correct that error"). The authors state that conviction rates were 27% higher when jurors knew of prior conviction evidence. KALVEN & ZEISEL, *supra* note 325, at 38.

331. Spencer v. Texas, 385 U.S. at 575 (Warren, C.J., dissenting).

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

333. *See* KALVEN & ZEISEL, *supra* note 325, at 38.

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

335. *See* CANADA EVIDENCE ACT § 12(1) (1972).

336. Doob & Kirshenbaum, *supra* note 334, at 91-93.

groups read evidence about a defendant who was accused of breaking and entering.[337] One group was instructed to give a verdict without any knowledge about the defendant's prior record.[338] The second group was told the defendant did not testify because he had nothing to add to his defense.[339] The third and fourth groups were told the defendant took the stand but had nothing important to add to his defense.[340] The third group was also told that the defendant had five convictions for armed robbery and two convictions for possession of stolen property.[341] The fourth group was also informed of the seven convictions but was given a standard limiting instruction.[342] Because the defendant had nothing to add to the case, the prior convictions should have had no effect on the jurors. That was not the case.[343] The last two groups indicated much stronger tendencies to convict than the first two groups.[344] Based on these results, researchers concluded that prior conviction evidence was used in impermissible ways under Canadian evidence rules and that a judge's limiting instruction would not change this fact.[345]

These results were supported the next year by another study which showed the prejudicial effect of inadmissible evidence at a criminal trial.[346] In the experiment, mock jurors read evidence of a robbery and murder.[347] Two groups of jurors were presented with a summary of a tape recording of the defendant.[348]

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337. *Id.* at 92.
338. *Id.*
339. *Id.*
340. *Id.*
341. *Id.*
342. *Id.* at 92-93.
343. *See id.* at 93.
344. *Id.* at 93-95.
345. *Id.* at 93-96. The researchers wrote: "It is clear that the presence of the criminal record had a dramatic effect while none of the other instructions had a significant effect." *Id.* at 93. The researchers also noted that the limiting instruction had no effect on results. *Id.* at 94-95. "The 'judge's instructions' had no effect whatsoever on the decisions by the subjects." *Id.* at 95. The researchers concluded:

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

Id. at 96.
346. *See* Stanley Sue et al., *Effects of Inadmissible Evidence on the Decisions of Simulated Jurors: A Moral Dilemma*, 3 J. APPLIED SOC. PSYCHOL. 345 (1973).
347. *Id.* at 347-49.
348. *Id.* at 348.

In the recording, the defendant told his bookmaker he finally had the money to pay him, and that he could read about it in the paper.[349] One group received a summary of the tape recording and was given a limiting instruction to ignore the evidence.[350] If the limiting instruction had the effect the drafters of the FRE and state evidence codes assume, one would expect the conviction rates would be relatively equal between the two groups.[351] When the evidence against the defendant was strong, jurors did not rely on the tape recording and conviction rates were roughly equal.[352] However, when the other evidence against the defendant was weak, there was a thirty-five percent difference in conviction rates between the two groups.[353] The implication of the study is that in close factual cases inadmissible evidence or evidence used improperly by a jury may tilt the scales in favor of a conviction when the jury would otherwise acquit. Thus, the potential for prejudice is greatest in close cases.

One criticism lodged against such studies is that higher conviction rates are the result of juries using the evidence to determine the defendant's credibility as weak, and thus did not merit much weight.[354] Accordingly, juries tend not to believe the defendant, which undermines his defense.[355] In 1975, another study was published answering this criticism and further undermining the assumptions behind Rule 609.[356] In addition to results, researchers also examined jury behavior.[357] The study consisted of thirty groups of people who read a description of a burglary and the evidence in the case.[358] Fifteen groups were told the defendant had prior convictions for burglary.[359] These groups were also given a limiting instruction.[360] Each group was instructed to consider the burglary conviction as it related to the defendant's credibility: the conviction should not be used to infer that simply because he committed a prior burglary he

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349. *Id.*
350. *Id.* at 349.
351. *Id.*
352. *Id.* at 350.
353. *Id.*
354. *See* Ordover, *supra* note 202, at 176. Professor Ordover generally supports the validity of the above mentioned studies, but notes that such criticisms may be raised. *See id.*
355. *See id.*
356. *See* Valerie P. Hans & Anthony N. Doob, *Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries*, 18 CRIM. L.Q. 235 (1975).
357. *Id.* at 238-40.
358. *Id.* at 239-40.
359. *Id.* at 240.
360. *Id.*

must have committed the one for which he was currently charged.[361] When the groups returned the verdicts, each of the fifteen groups which did not hear of the defendant's prior conviction for burglary acquitted him.[362] Six of the fifteen groups that heard of the prior convictions convicted him of the current burglary for which he was charged.[363]

Even more revealing than these results were the researchers' observations. They observed both sets of groups evaluated the defendant witness's credibility in similar ways.[364] The researchers observed the groups with knowledge of the defendant's prior conviction rarely used it in weighing his credibility.[365] What they did use it for was to determine the defendant's guilt or innocence in the case at hand.[366] The researchers concluded:

> The present research leaves little doubt that knowledge of a previous conviction biases a case against the defendant. The likelihood that a jury will convict the defendant is significantly higher if the defendant's record is made known to the jury. The fact that the defendant has a record permeates the entire discussion of the case, and appears to affect the juror's perception and interpretation of the evidence in the case.[367]

The study simply confirmed what courts and commentators had known for years[368] and calls into question the basic assumptions underlying Rule 609.

In 1977, another study was published which supported the claim that jurors do not obey limiting instructions.[369] Subjects were asked to read evidence in a case involving a bar room fight where the victim was cut with a piece of glass.[370] In addition to these basic facts, the subjects in the experimental group read an account by a police undercover agent who claimed he saw the victim turn to walk out of the bar.[371] The agent claimed the victim was on his way out

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361. *Id.*
362. *Id.* at 243.
363. *Id.*
364. *Id.* at 247.
365. *Id.*
366. *See id.* at 241-51.
367. *Id.* at 251.
368. *See* discussion *infra* pp. 42-43.
369. *See* Sharon Wolf & David A. Montgomery, *Effects of Inadmissible Evidence and Level of Judicial Admonishment to Disregard on the Judgments of Mock Jurors*, 7 J. APPLIED SOC. PSYCHOL. 205 (1977).
370. *Id.* at 209-10.
371. *Id.* at 210.

when the defendant cut him.[372] The subjects in the defense experimental group heard evidence from an undercover police detective who claimed the victim pulled a knife on the defendant.[373] Subjects within each experimental group were told the evidence was either admissible or inadmissible and were admonished by the judge not to consider the evidence.[374] Researchers discovered when the mock jurors were admonished not to consider the evidence, they considered it more than those who were simply told the evidence was inadmissible.[375] The study suggested not only may a limiting instruction not work, it may actually backfire and emphasize a point the jury is not to consider, thereby ensuring jurors will consider the point.[376]

In 1983, a study was conducted to determine the effects of inadmissible evidence on jurors.[377] Researchers split 270 mock jurors into several groups.[378] Each group was asked to review evidence and testimony from an armed robbery case that ended in a murder.[379] Researchers varied the strength of the prosecution's case and allowed some of the groups to hear different tape recorded phone conversations.[380] One of the conversations tended to incriminate the defendant, because the defendant told a bookmaker he had recently come across some money in a dangerous way.[381] The other taped conversation was between the same bookmaker and a store clerk who told the bookmaker he had come across money in a dangerous way.[382] Some of the mock jurors who heard one of the tapes were told it was not admissible and should be disregarded.[383] If the rules of evidence worked in the way the drafters intended, there should be little difference between the verdicts. Again, that was not the case. Researchers discovered most of the groups discussed the inadmissible tape.[384] Most of the mock jurors attempted to limit their discussion and follow the judge's limiting

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372. *Id.*
373. *Id.*
374. *Id.* at 211.
375. *Id.* at 216.
376. *See id.* at 216-18.
377. *See* Thomas R. Carretta & Richard L. Moreland, *The Direct and Indirect Effects of Inadmissible Evidence*, 13 J. APPLIED SOC. PSYCHOL. 291 (1983).
378. *Id.* at 294.
379. *Id.*
380. *Id.* at 295.
381. *See id.*
382. *Id.*
383. *See id.*
384. *Id.* at 306.

instruction.[385] However, when the results were tallied, those groups which heard the tape of the defendant were more willing to convict, while those jurors who heard the tape of the store keeper were more willing to acquit.[386] Thus, even when jurors attempt to follow a judge's limiting instruction, it may be difficult, if not impossible, to ignore evidence for an impermissible purpose.[387]

Further studies confirm the results of these studies. In 1985, Roselle Wissler and Michael Saks conducted comprehensive research on several mock jurors to determine the prejudicial effect of Rule 609.[388] Wissler and Saks divided the subjects into eight groups.[389] Four groups heard evidence from a murder case and four groups heard evidence of a car theft.[390] Within each of the four groups, juries were given various criminal records—no mention of prior record, prior conviction for perjury, prior conviction for the same crime, or prior conviction for a different crime.[391] When jurors were presented with evidence of prior convictions, a limiting instruction was given.[392] If the law works the way the drafters of the FRE intended, conviction rates should have been highest when the prior conviction was for perjury.[393] That was not the case.[394] The juries found the defendant guilty seventy-five percent of the time when the prior conviction was for the same offense, but the defendant was found guilty only sixty percent of the time when the conviction was for perjury.[395] The conviction rate when the jury was presented with no prior record was only 42.5%, and when the evidence showed a prior conviction for a dissimilar crime, the rate of conviction was 52.5%.[396] Wissler and Saks concluded:

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385. *Id.* at 307.
386. *Id.* at 305.
387. *See id.* at 307-08.
388. Wissler & Saks, *supra* note 330.
389. *Id.* at 39.
390. *Id.* at 40.
391. *Id.*
392. *Id.*
393. *See id.* at 43.
394. *See id.*
395. *Id.* When the crime presented to the jury was for auto theft and the prior conviction evidence admitted was for a similar crime, the conviction rate was 80%. *Id.* When the crime was murder and the prior conviction was for the same crime the conviction rate was 70%. *Id.* This yields a mean of 75%. *Id.* When jurors knew of a prior perjury conviction, they convicted 70% of the time in auto theft cases and 50% in murder cases, a mean of 60%. *Id.*
396. *Id.* When jurors were not told of any prior convictions, they convicted 35% of the time for auto theft and 50% of the time for murder, a 42.5% mean. *Id.* When jurors were presented with prior conviction evidence of a dissimilar crime, they convicted 70% in the auto theft cases and 35% of the time in murder cases for a mean of 52.5%. *Id.*

> [T]he presentation of the defendant's criminal record does not affect the defendant's credibility, but does increase the likelihood of conviction, and that the judge's limiting instructions do not appear to correct that error. People's decision processes do not employ the prior-conviction evidence in the way the law wishes them to use it.[397]

Numerous other studies have been conducted since the 1985 study by Wissler and Saks,[398] and each confirms that jurors frequently misuse evidence despite a judge's limiting instruction. In 1988, researchers conducted studies to determine the effects of prior conviction evidence in civil cases.[399] Over 400 mock jurors were asked to determine liability in a civil case.[400] Certain groups were allowed to hear prior conviction evidence about a defendant and were instructed to use the evidence only to judge credibility.[401] Researchers observed that while jurors used the evidence in permissible ways, it was also used to conclude the defendant had a propensity for negligent behavior.[402] This was true despite a judge's limiting instruction.[403] While the study pertains only to jurors in civil cases, it nevertheless shows how jurors use prior conviction evidence to draw impermissible inferences.[404]

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397. *Id.* at 47; *see also* David Landy & Elliot Aronson, *The Influence of the Character of the Criminal and His Victim on the Decisions of Simulated Jurors*, 5 J. EXPERIMENTAL SOC. PSYCHOL. 141 (1969). Researchers confirmed that the more "attractive" a defendant, the more likely jurors were to acquit. Wissler & Saks, *supra* note 330, at 47 (examining the potential influence of defender's criminal record on jury decisions). Thus, an unattractive defendant with prior convictions is less likely to be acquitted. *See id.*

398. *See* Sarah Tanford & Michele Cox, *The Effects of Impeachment Evidence and Limiting Instructions on Individual and Group Decision Making*, 12 L. & HUM. BEHAV. 477, 480-94 (1988).

399. *See id.* at 480.

400. *Id.* at 481, 489.

401. *Id.* at 482-83, 489-90.

402. *Id.* at 494-95. The authors wrote:

> [I]n both studies, permissible and impermissible inferences were made. In study 1, perjury convictions produced lower perceived credibility as well as greater propensity towards harm and future negligence. If limiting instructions were working as intended, they should have restricted inferences to the credibility dimension . . . . In study 2, impeachment evidence produced even greater harm, in that both perjury and character produced inferences of credibility, propensity, and character. Thus, jurors' impressions may become even more biased after engaging in deliberations.

Id.

403. *Id.*

404. *See id.* at 494.

A similar study the same year showed how prior conviction evidence prejudiced a criminal defendant when the entrapment defense was invoked.[405] The entrapment defense generally requires the defendant to prove she was induced to break the law by a law enforcement officer, and she would not have broken the law except for the improper inducement by an officer.[406] Jurisdictions vary on exactly what must be proved, but there are two generally accepted standards.[407] The objective standard requires the defendant to prove a reasonable person under the circumstances would have been induced to break the law.[408] The subjective standard requires the government show the defendant was predisposed to commit the crime before the inducement from law enforcement.[409] The Borgida and Park study concentrated on how prior conviction evidence effected verdicts and jury decisions under each standard.[410] The researchers concluded that while prior conviction evidence had little impact on the entrapment defense when the objective standard was used, jurors used prior conviction evidence improperly when the subjective test was used.[411]

Two of the best studies on jurors' use of prior conviction evidence were published in 1995.[412] One of the studies compared verdicts of mock jurors from three groups.[413] Each group heard evidence about an armed robbery.[414] The first group was informed the defendant had been acquitted of a similar robbery.[415] The prosecution argued that, in fact, the defendant had committed the first crime.[416] Evidence was introduced to show the defendant's identity by showing the same person committed both crimes.[417] The mock jury was instructed to use the evidence only to establish identity, or lack of identity, and not to infer a

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405. *See* Eugene Borgida & Roger Park, *The Entrapment Defense: Juror Comprehension and Decision Making*, 12 L. & HUM. BEHAV. 19, 19-21 (1988).

406. *Id.* at 20.

407. *Id.*

408. *Id.*

409. *Id.*

410. *See id.* at 19.

411. *Id.* at 33; *see also* Alan Reifman et. al., *Real Jurors' Understanding of the Law in Real Cases*, 16 L. & HUM. BEHAV. 539, 539 (1992) (showing that jurors comprehend fewer than half of jury instructions).

412. *See* Edith Greene & Mary Dodge, *The Influence of Prior Record Evidence on Juror Decision Making*, 19 L. & HUM. BEHAV. 67 (1995); Kerri L. Pickel, *Inducing Jurors to Disregard Inadmissible Evidence: A Legal Explanation Does Not Help*, 19 L. & HUM. BEHAV. 407 (1995).

413. *See* Greene & Dodge, *supra* note 412, at 70-72.

414. *Id.* at 71.

415. *Id.*

416. *See id.* at 75.

417. *Id.* at 70-72.

propensity to commit crimes.[418] In the second group, the same evidence was offered except for the fact the defendant had been convicted of the first robbery.[419] The third group was not informed about the defendant's criminal record.[420] Researchers observed the group who heard of the prior conviction evidence was significantly more likely to convict over the group who did not hear of the prior conviction evidence.[421] The researchers also observed that limiting instructions did little to cure the prejudicial effect of prior conviction evidence.[422]

These results were confirmed the same year in a separate study.[423] The second study used several experiments to determine if jurors could follow instructions to disregard prior conviction evidence and hearsay.[424] In one experiment, jurors heard evidence of prior convictions but were admonished to ignore this evidence.[425] A second group heard the same evidence, were admonished to ignore it, and were given a legal explanation as to why it should be ignored.[426] These two groups showed higher conviction rates than another group which heard the same case, except for the prior conviction evidence.[427] In fact, the group which was admonished to ignore the evidence and was given a legal explanation as to why the evidence should be ignored had the highest conviction rate among the three groups.[428]

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418. *Id.* at 71.

419. *Id.*

420. *Id.*

421. *Id.* at 76. The authors concluded:

> Mock jurors in our study who heard evidence of a prior acquittal were no more likely to convict the defendant than were jurors who had no information about a prior record. We did find the usual effect of prior conviction information, however: mock jurors who learned that the defendant had been previously *convicted* were significantly more likely to convict him of a subsequent offense than were jurors without this information.

Id.

422. *Id.* The authors stated: "Like many other researchers . . . we found that limiting instructions had little effect on jurors' use of [prior conviction] evidence. Verdicts from mock jurors with instructions about the restricted use of this information were not different from verdicts of jurors without such instruction." *Id.*

423. *See* Pickel, *supra* note 412.

424. *See id.* at 410-22.

425. *Id.* at 412.

426. *Id.*

427. *Id.* at 414-15.

428. *Id.*

In a second experiment, mock jurors heard hearsay evidence and were instructed to disregard that evidence.[429] Like the first experiment, a second group heard the same evidence, were told to ignore it, and were told the reasons why the hearsay should be ignored.[430] A third group heard the same evidence but without the hearsay.[431] The three groups had similar conviction rates and the differences were not statistically significant.[432] The fact that jurors were able to ignore hearsay evidence but not prior conviction evidence indicates just how damaging and prejudicial such evidence is, even when it has no bearing on the defendant's credibility as a witness.

Indeed, it is readily accepted by psychologists and social scientists that prior conviction evidence is misused by jurors who do not understand or do not care about the rules of evidence.[433] For years, these groups have suggested that Rule 609, and the other FRE which allow prior conviction evidence to be used, should be re-examined.[434] Such pleas have fallen on deaf ears, largely because the research showing the prejudicial effect of prior conviction evidence has been published outside of law reviews, law journals, and other traditional legal forums. Unfortunately for criminal defendants and the American justice system, scientific data showing how prior conviction evidence is misused by jurors has gone unnoticed by lawyers, judges, and courts.

However, the conclusion these scientists have reached simply confirms what lawyers, judges, and courts have known all along. Juries will use evidence of prior convictions for impermissible purposes and a judge's limiting

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429. *See id.* at 415-17.

430. *Id.* at 417.

431. *Id.* at 416-17.

432. *See id.* at 418-20. The percentage of guilty verdicts for each group were 65% for the admissible group, 53% for the inadmissible without an explanation group, and 49% for the inadmissible with an explanation group. *Id.*

433. *See, e.g.*, Greene & Dodge, *supra* note 412, at 69 ("[A] number of studies . . . show that jurors are clearly influenced by evidence of previous convictions . . . ."); Edmund S. Howe, *Judged Likelihood of Different Second Crimes: A Function of Judged Similarity*, 21 J. APPLIED. SOC. PSYCHOL. 697, 697 (1991) ("Numerous studies have concluded that the judged probability of conviction for a crime is higher when information concerning a prior conviction is disclosed.").

434. *See* Tanford & Cox, *supra* note 398, at 496. The authors wrote:

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

Id.

instruction will have little or no effect on jurors. As Justice Jackson stated in an often quoted phrase: "The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction."[435] Justice Jackson's statement is supported by a survey in which ninety-eight percent of lawyers believed jurors are not able to follow instructions to consider prior conviction evidence only for impeachment purposes.[436] Indeed, it is recognized among defense attorneys that to put a criminal defendant on the stand who has prior convictions is a risky move.[437] Even conservative judges have taken notice of the fact that juries will use evidence of prior convictions to draw impermissible inferences.[438] Moreover, a judge's limiting instruction is not likely to have any effect.[439] Judge Easterbrook noted that telling jurors not to consider prior convictions for anything but the issue of intent is like telling someone to ignore a hippopotamus.[440] Judge Learned Hand wrote several times on prior conviction evidence and limiting instructions, and stated that asking jurors to follow a limiting instruction was "a mental gymnastic which is beyond, not only their powers, but anybody's else."[441]

In short, jurors draw impermissible inferences from prior conviction evidence. When jurors hear the defendant committed some crime in the past, particularly the same crime, they conclude the defendant must have committed the crime with which he is currently charged. A judge's limiting instruction is of

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435. Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) (citation omitted).

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

437. *See generally* FONTHAM, *supra* note 12 (discussing the use of prior crimes to impeach).

438. *See* United States v. DeCastris, 798 F.2d 261, 264-65 (7th Cir. 1986); Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932).

439. *See supra* note 438.

440. United States v. DeCastris, 798 F.2d at 264. Judge Easterbrook wrote:

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

Id. at 264-65 (footnote omitted).

441. Nash v. United States, 54 F.2d at 1007. Judge Hand expressed similar concerns in *United States v. Gottfried* where he stated: "Nobody can indeed fail to doubt whether the caution is effective, or whether usually the practical result it [sic] not to let in hearsay." United States v. Gottfried, 165 F.2d 360, 367 (2d Cir. 1948); *see also* United States v. Delli Paoli, 229 F.2d 319, 321 (2d Cir. 1956) (expressing further concerns about limiting instructions).

little help to the criminal defendant. Jurors typically do not understand the limiting instruction or ignore the instruction. Such an instruction may even damage the defendant's case because the jury hears the defendant is a criminal for a second time or because they may resent the judge's limiting instruction. Even jurors who attempt to faithfully adhere to a judge's limiting instruction are likely to view the defendant with contempt because of prior conviction evidence. The fact that prior conviction evidence is highly prejudicial can no longer be ignored.

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

There is little doubt that admission of prior conviction evidence makes a prosecutor's job easier. The admission of prior conviction evidence also makes the jury's job easier. That is exactly the problem with admitting such evidence.

Prior conviction evidence gives prosecutors an extra advantage and juries extra evidence to convict when they may otherwise find there is reasonable doubt that the defendant committed the crime with which she is charged. This problem is only exacerbated when the case is close.[442] In this way, the current American rule denies the criminal defendant all the rights to which she is entitled.

Our criminal justice system sacrifices accuracy in order to afford protection to criminal defendants.[443] Few people have openly criticized the often quoted phrase: "[I]t is far worse to convict an innocent man than to let a guilty man go free."[444] While our system is concerned that juries reach the truth, the courts in this country recognize that truth and a jury's fact finding ability may need to be sacrificed in order to protect other core values. Our system excludes all kinds of evidence which may help a jury discover the truth.[445] Privileged communications, hearsay exclusions, and exclusions because evidence was

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442. *See* discussion *supra* pp. 25-31.

443. *See, e.g.*, THE CHALLENGE OF CRIME IN A FREE SOCIETY, PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMIN. OF JUSTICE 7 (1967) (stating: "Our system of justice deliberately sacrifices much in efficiency and even in effectiveness in order to preserve local autonomy and to protect the individual.").

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

445. *See* Simon H. Rifkind, *The Lawyer's Role and Responsibility in Modern Society*, 30 REC. 534, 544-45 (1975) (discussing the differences between the truth arrived at by factfinders and the truth that could be determined if there were no court room filters of information).

obtained in violation of the Fourth or Fifth Amendments of the Constitution are a few examples which come to mind.[446]

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

Proponents of Rule 609 or similar state rules have been careful to cloak its true intentions in the rhetoric of "Victim's Rights"[447] or "not allowing criminals to escape justice."[448] But the true intention is clear—get convictions and get criminals off the street. Based on California's enactment of Proposition 8—which had a far greater impact on the criminal law than the evidence rules discussed in this article—it is questionable whether the rule had the intended effect.[449] Studies of California crime rates indicate that crime in California is every bit as bad as it was before Proposition 8 was passed.[450] Nevertheless, the rule has remained due to proponents probably believing it has done some good on the "war against crime."

In this regard, remarks by Senator Hruska who supported allowing prior conviction evidence are revealing. In the Senate debate he explained his motive by giving this example:

> Suppose a defendant being tried for loansharking has previously been convicted of several other charges of loansharking. And suppose he gets on the stand and says that he was not loansharking this particular time. Should not the jury know that the defendant has previously been convicted of loansharking several other times?[451]

Senator Hruska's comments reveal that he not only misunderstands the stated purpose behind Rule 609, but would also have the rule used to show that the

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446. *Id.*

447. *See* discussion *supra* Part III.C.

448. 120 CONG. REC. 37,076 (1974).

449. *See generally* Jeff Brown, *Proposition 8: Origins and Impact—A Public Defender's Perspective*, 23 PAC. L.J. 881 (1992) (analyzing the Victim's Bill of Rights' purposes and its impact).

450. *Id.* at 934.

451. 120 CONG. REC. 37,077.

criminal defendant has a propensity to commit crime.[452] To use prior convictions in this way is clearly contrary to the way the drafters of the FRE and similar state rules intended.[453] The Senator's comments aside, however, that is exactly how juries use the evidence. When jurors hear the defendant did it before, they conclude he must have done it again. If jurors hear the defendant has a criminal record, they conclude that because he would break the law once, he would have no problem breaking the law again. Criminal defense attorneys, knowing these tendencies, are reluctant to put their clients on the stand.[454] A criminal defendant who does not take the stand suffers in at least two important ways.

First, the defendant does not participate fully in his own defense. It has long been recognized that criminal defendants have the right to participate in their trials and testify in their own defenses.[455] But these rights mean little if the rules of procedure and evidence severely deter participation because of unfair prejudice.

Proponents of Rule 609 and similar state evidence rules have defended Rule 609 on the ground that juries need the information in order to weigh the credibility of the defendant witness.[456] Without such information, jurors would believe the defendant witness is just as credible as the next witness, because it would appear to them that she had led a blameless life.[457] The thrust of this argument is that the jury should be given as much information as possible to determine the credibility of the witness and to arrive at the truth in the matter.

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452. *See id.*

453. *See* FED. R. EVID. 404(b) (1975) (amended 1999). In relevant part, the rule provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." *Id.*

454. *See* FONTHAM, *supra* note 12, § 7-27, at 358-59.

455. *See* discussion *supra* p. 4.

456. *See* 120 CONG REC. 37,076-77. Senator Hruska stated:

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

Id. at 37,077 (emphasis added). Senator McClellan stated:

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

Id. at 37,076.

457. *See id.*

Proponents point out that rules of evidence ought to increase the amount of relevant information a jury hears.

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

A defendant's silence due to Rule 609 presents additional problems. A jury is likely to draw a negative inference from the fact the defendant did not testify.[458] This is particularly troubling in the majority of criminal cases in which the defense is simply one that asserts the defendant did not do it. Juries are likely to wonder why a defendant who is innocent did not take the stand and testify to her innocence.

With the inherent problems of allowing impeachment of a criminal defendant with prior conviction evidence, it has been argued impeachment should be limited to crimes involving dishonesty or deceit. Representative Dennis argued for such a rule when the FRE were drafted.[459] A handful of states have also adopted this approach.[460] The argument in support of such a rule is that crimes such as perjury and embezzlement are inherently deceitful and directly relevant to a defendant's credibility. This argument has some initial plausibility. If a defendant witness perjured himself in a prior case, that fact would certainly give a jury an important piece of information it might use in weighing the witness's credibility.

However, such an approach to prior conviction evidence is problematic. First, it is difficult to define exactly what crimes involve dishonesty and deceit.[461] Some states have attempted to solve this problem by specifically listing the crimes which may be used to impeach a criminal defendant.[462] Listing crimes may be useful to trial court judges, but it does not fully solve the

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458. *See* FONTHAM, *supra* note 12, § 7-27, at 358-59.

459. 120 CONG. REC. 2377 (statement of Rep. Dennis).

460. *See* ALASKA R. EVID. 609; MICH. R. EVID. 609; W. VA. R. EVID. 609 (West 1997).

461. 120 CONG. REC. 2376.

462. *See, e.g.*, IND. R. EVID. 609 (listing "murder, treason, rape, robbery, kidnapping, burglary, arson, criminal confinement or perjury" or "a crime involving dishonesty or false statement").

problem. On the floor of the House, Representative Hogan explained the problem.[463] He argued that theft might ordinarily be considered deceptive and deceitful, such that prior convictions for theft would be admissible to prove untruthfulness, but he also argued all thefts were not necessarily deceitful.[464] For example, a college student who stole a car to go "joy riding" as part of a fraternity initiation was hardly being dishonest, deceptive, or deceitful.[465] One can think of numerous examples such as this. The point is that whether a crime is deceptive, deceitful, or shows untruthfulness depends to a large extent on the factual circumstances surrounding the commission of the crime. Simply listing crimes which are deceitful and deceptive fails to account for all the circumstances surrounding crimes.

A rule allowing impeachment of a criminal defendant with prior conviction evidence is also problematic because of the assumptions which underlie such a rule. Proponents of such a rule assume that crimes involving dishonesty or deceit—whatever crimes those may be—are the only crimes relevant to proving truthfulness.[466] Certainly crimes involving dishonesty do bear on the credibility of a witness, but it is not necessary to stop there. One could well argue that breaking any law reflects on truthfulness. If a witness is willing to break some law, then one could argue the witness would certainly have no problem being untruthful in court. It is not necessary to draw such conclusions, but it is not unreasonable to conclude one who breaks the law would also lie in open court. The point is, simply, other crimes may well bear on a defendant's truthfulness irrespective of the nature of the crime.

Regardless of which crimes bear on a defendant's credibility, the real problem with allowing impeachment with prior conviction evidence is the unfair prejudice which results. Proponents of Rule 609 have argued that any prejudicial effect created when jurors hear such evidence can be cured, or at least mitigated, in an important way by a judge's limiting instruction.[467] This is

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463. 120 CONG. REC. 2376 (statement of Rep. Hogan).

464. *Id.*

465. *See id.*

466. *See id.* at 2377.

467. *See* 120 CONG. REC. 37077. Senator Hruska stated:

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

Id. Senator McClellan stated that disallowing prior conviction evidence:

> is premised on the fear that the use of these prior convictions to establish a lack of credibility of the witness will tempt juries to convict the defendant simply on the

simply not true.[468] Jurors do not understand limiting instructions in the civil or criminal context.[469] The results are particularly troubling in the criminal context. When the jury hears that the defendant broke the law before, they conclude she must have broken the law again. The presumption of innocence is reversed, and a criminal defendant is left with little chance of acquittal even when the evidence against her may be fairly weak. Indeed, it is in close cases where the jury is likely to misuse the prior conviction evidence and convict the defendant because of her prior convictions.[470]

The prejudicial effect of prior conviction evidence is not limited to crimes which do not involve dishonesty or deceit. If it were true that jurors actually used the information only to weigh the credibility of the witness, then the argument that a prosecutor should be allowed to impeach a defendant with prior convictions involving dishonesty would have much more force than it does. The simple fact is jurors use the evidence to infer the defendant had a propensity to commit crime and therefore committed the crime charged.[471] Such assumptions are made even when the prior conviction evidence is for crimes involving dishonesty.

Proponents of Rule 609 have been quite adamant about the need for the jury to have such evidence.[472] Apparently, there is an underlying belief that without such information the jury might just take the defendant witness at his word. Social science shows this is false.[473] Jurors do not take the defendant at his word.[474] Jurors are aware a defendant has much to lose if he is convicted, and they are also aware that if the defendant committed a crime, the defendant would certainly lie about committing that crime.[475] The study by Wissler and Saks showed juries were skeptical about a defendant's credibility even when they were unaware of his prior convictions.[476] Wissler and Saks wrote, "the defendant's credibility is already so much lower than that of the other witnesses

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> basis of his prior criminal record rather than base their verdict on the facts relating to the charges on which the defendant is being tried. ***The court's instructions, of course, preclude the jury from using prior convictions in this way.***

Id. at 37,076 (emphasis added).

468. *See* discussion *supra* Part V.

469. *See* discussion *supra* Part V.

470. *See* discussion *supra* pp. 34-35.

471. *See* discussion *supra* pp. 38-39.

472. *See* 120 CONG. REC. 2377 (statement of Rep. Dennis).

473. *See* Wissler & Saks, *supra* note 330, at 43.

474. *Id.*

475. *Id.*

476. *Id.*

(because it obviously is in the defendant's self-interest to give testimony which favors his or her position) that the admission of prior convictions does not reduce the credibility of the defendant further."[477] Moreover, there is no reason why a prosecutor cannot argue in closing that the defendant is not credible because of his self-interest in the outcome of the trial. In short, the assertion by proponents of Rule 609 that juries need information of prior convictions to properly weigh a defendant's credibility has no basis in fact.

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

The only way to cure the prejudicial effects of prior conviction evidence at criminal trials is to disallow such evidence altogether. Even commentators opposed to limiting the information a jury hears have recognized the need to exclude evidence of prior convictions from the jurors' ears.[478] One group of commentators argued that blindfolding jurors by excluding certain types of evidence, such as auto insurance coverage, was unwise because it was based on unfounded assumptions.[479] These commentators argued if jurors were not informed about laws such as mandatory insurance for drivers, jurors would base decisions on their own personal knowledge of the law instead of the judge's instruction.[480] They argued jurors should be informed about information such as insurance, which has traditionally been excluded at trial.[481] The group recognized, however, the prejudice to criminal defendants was well proved and the only way to prevent this prejudice was to blindfold the jury and preclude prior conviction evidence altogether.[482]

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477. *Id.* (citation omitted).

478. *See* Shari Seidman Diamond et al., *Blindfolding the Jury*, 52 L. & CONTEMP. PROBS., Autumn 1989, at 247, 261-62.

479. *Id.* at 251.

480. *Id.* at 249-52.

481. *Id.* at 267.

482. *Id.* at 261-62.

VII. CONCLUSION

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

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