Proposed Rule of Evidence 609: Impeachment of Criminal Defendants by Prior Convictions

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PROPOSED RULE OF EVIDENCE 609: IMPEACHMENT OF CRIMINAL DEFENDANTS BY PRIOR CONVICTIONS

The Washington Judicial Council has proposed that Federal Rule of Evidence 609 be adopted essentially verbatim.1 The proposed rule departs sharply from present Washington law2 by significantly reducing the right to introduce evidence of prior criminal convictions to impeach the credibility of testifying witnesses. Despite this variance with Washington law, the Washington Supreme Court has expressed its willingness to consider the adoption of a rule similar to Federal Rule 609.3

This comment describes current Washington law on the use of criminal convictions to impeach the testimony of criminal defendants and examines the factors which are relevant to the formation of a more acceptable rule. Adoption of the proposed rule would also affect the rules for impeaching nondefendant witnesses. Only a criminal defendant, however, is in jeopardy of actually being convicted as a result of a jury’s misuse of evidence of prior convictions. Because the interests of the criminal defendant witness will be so drastically affected by the prior conviction rule which the Washington Supreme Court

1. Proposed Rule of Evidence 609 provides in part:
   (a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if 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.

   PROPOSED WASH. R. EVID. 609(a) (approved by the Washington Judicial Council, June 1977).

   Qualifications of this rule appear in Proposed Rule of Evidence 609(b)–609(e) and are discussed in Part V of this comment. The only difference between Federal Rule of Evidence 609 and Proposed Rule of Evidence 609 occurs in Rule 609(d) relating to the admissibility of juvenile adjudications; Rule 609(d) underwent minor modification when the Proposed Washington Rules were amended. See note 75 infra.

2. See notes 5–10 and accompanying text infra (discussion of present Washington law concerning impeachment by prior convictions).

3. In State v. Ruzicka, 89 Wn. 2d 217, 570 P.2d 1208 (1977), the court upheld the Washington rule of mandatory admission of convictions to impeach against arguments that the rule violated due process, equal protection, the right to an impartial jury, and the right to testify on one's own behalf. The court, however, went on to state that “[a]lthough we interpret RCW 10.52.030 as not vesting the trial court with discretion to exclude evidence of a witness' prior convictions offered by a party, we wish to point out this interpretation does not mean we would not consider a court rule vesting the trial court with such discretion.” Id. at 224, 570 P.2d at 1211–12 (footnote omitted).

   The court footnoted this statement with a reference to the Judicial Council's review of, and possible proposal to adopt, Federal Rule of Evidence 609. Id. at 224 n.4, 570 P.2d at 1212 n.4.
ultimately adopts, this comment will focus on how Proposed Rule of Evidence 609 would change such a defendant’s rights. This comment concludes that Proposed Rule 609 is a considerable improvement over the present Washington rule, but that certain modifications would be desirable. Finally, because the Washington Supreme Court’s adoption of Proposed Rule 609 would indicate its intent to adopt existing federal law, a critique of federal cases in which Federal Rule 609 has been applied is offered.

I. PRESENT WASHINGTON LAW

The use of convictions to impeach criminal defendant witnesses is based on R.C.W. § 10.52.030, which allows admission of either felony or misdemeanor convictions. Neither remoteness in time of the

4. In a recent case involving the interpretation of Washington securities law, the Washington Supreme Court stated:

The definition of a security in The Securities Act of Washington is derived substantially from the definition sections of the federal Securities Act of 1933. . . . Thus it is appropriate to look to federal law construing the 1933 act in considering the meaning of the Washington provision.

McClellan v. Sundholm, 89 Wn. 2d 527, 531, 574 P. 2d 371, 373 (1978). The court then applied the federal courts’ interpretation of the federal act to the Washington version because Washington’s adoption of the federal act “is strong evidence that the intent of the legislature was to adopt existing federal law relating to the definition.” Id. at 532, 574 P. 2d at 373. This reasoning is equally applicable to Washington’s proposed adoption of Rule 609.

5. The statute provides:

Every person convicted of a crime shall be a competent witness in any civil or criminal proceeding, but his conviction may be proved for the purpose of affecting the weight of his testimony, either by the record thereof, or a copy of such record duly authenticated by the legal custodian thereof, or by other competent evidence, or by his cross-examination, upon which he shall answer any proper question relevant to that inquiry, and the party cross-examining shall not be concluded by his answer thereto.

WASH. REV. CODE § 10.52.030 (1976).

6. E.g., State v. Ruzicka, 89 Wn. 2d 217, 570 P. 2d 1208 (1977) (felony); State v. Maloney, 135 Wash. 309, 237 P. 726 (1925) (misdemeanor). The use of prior convictions to impeach a witness in a civil case is governed by R.C.W. § 5.60.040:

No person offered as a witness shall be excluded from giving evidence by reason of conviction of crime, but such conviction may be shown to affect his credibility: Provided, that any person who shall have been convicted of the crime of perjury shall not be a competent witness in any case, unless such conviction shall have been reversed, or unless he shall have received a pardon.


Washington courts have interpreted this statute as ordinarily allowing only felony convictions to impeach witnesses in civil cases. E.g., Willey v. Hilltop Assocs., 13 Wn. App. 336, 353 P. 2d 850 (1975). Although neither R.C.W. § 10.52.030 nor R.C.W. § 5.60.040 on its face implies that it is limited to either criminal or civil cases, the Washington Supreme Court has drawn that distinction. E.g., Mullin v. Builders Dev. & Fin. Serv., Inc., 62 Wn. 2d 202, 381 P. 2d 970 (1963).
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impeaching crime\textsuperscript{7} nor similarity between the charged and impeaching crimes\textsuperscript{8} affects admissibility, and the judge has no discretion to forbid the introduction of a conviction despite gravely prejudicial effects for a criminal defendant witness.\textsuperscript{9} The constitutionality of this statutory lack of concern for testifying defendants was recently upheld by the Washington Supreme Court.\textsuperscript{10}

II. COMPETING INTERESTS IN THE USE OF CONVICTIONS TO IMPEACH

The introduction into evidence of a criminal defendant's prior conviction has been claimed to be both probative of his proclivity towards faleshood and prejudicial insofar as a jury may be willing to determine guilt upon past history rather than present evidence. An intense debate rages over whether the prejudice outweighs the relevance.\textsuperscript{11} It has been argued that the use of past convictions during cross-examination of a defendant is inconsistent with the presumption

\textsuperscript{7} State v. Smithers, 67 Wn. 2d 666, 409 P.2d 463 (1965) (convictions 31 and 32 years old).


\textsuperscript{9} State v. Ruzicka, 89 Wn. 2d 217, 222, 570 P.2d 1208, 1210 (1977). In an indecent liberties prosecution, State v. Bergen, 13 Wn. App. 974, 538 P.2d 533 (1974), 24- and 27-year-old indecent liberties convictions were admitted to impeach the defendant. Despite the danger of the jury concluding that the defendant was guilty solely from the admission of the earlier identical convictions and the tenuous relevance of the remote misdemeanor convictions, the judge had no discretion to exclude.

\textsuperscript{10} Jackson v. Denno, 378 U.S. 368 (1964), illustrates that certain tasks are beyond the competence of the jury and should be screened out by judicial decision before admittance into evidence. Under New York law, the jury, rather than the judge, determined whether a confession was coerced or voluntary. But if the jury found that the confession was involuntary, there were no safeguards to ensure that they would not take the confession into consideration.

In those cases where without the confession the evidence is insufficient, the defendant should not be convicted if the jury believes the confession but finds it to be involuntary. The jury, however, may find it difficult to understand the policy forbidding reliance upon a coerced, but true, confession, a policy which has divided this Court in the past . . . and an issue which may be reargued in the jury room. \textit{Id.} at 382.

The Supreme Court determined that the confession's admissibility into evidence was a question for the judge. Where, as under Washington law, all convictions to impeach are mandatorily admissible, some may be so prejudicial to the defendant that the jury bases a conviction on them despite limiting instructions. Currently, Washington has no safeguards to prevent a juror from subconsciously inferring a defendant's guilt from his admission of prior convictions.

\textsuperscript{11} The congressional discussions surrounding the adoption of Federal Rule of Evidence 609 involved this very subject. For an edited version of the legislative debate and commentary on Federal Rule of Evidence 609, see 3 J. \textsc{Weinstein} & M. \textsc{Berger}, \textsc{Weinstein's Evidence} 609-1 to 609-55 (1975) [hereinafter cited as \textsc{Weinstein}].
of innocence\textsuperscript{12} and that such a practice should be limited to those offenses directly related to credibility, \textit{i.e.}, \textit{crimen falsi} such as perjury.\textsuperscript{13} Many felonious crimes involving violence, such as murder or assault, are viewed as irrelevant to the credibility of a witness,\textsuperscript{14} and juries are believed to misuse this evidence inadvertently despite limiting instructions.\textsuperscript{15} Under Washington's current liberal admission standards, an innocent defendant with a criminal record is left with the hollow choice of either taking the stand and being labeled an ex-criminal or refusing to testify and allowing the jury to infer guilt.\textsuperscript{16}

A contrasting view is that illegal conduct is highly indicative of a person's credibility and that suppression of such probative evidence would improperly allow a felon to appear as a law-abiding citizen.\textsuperscript{17}

\textsuperscript{12} This was the view expressed by Congressman David W. Dennis of Indiana in the congressional debates. \textit{Rules of Evidence: Hearings Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary, 93d Cong., 1st Sess., Serial No. 2, at 68 (1973)} [hereinafter cited as \textit{Subcommittee Hearings}]. With evidence of previous wrongdoing before the jury, despite limiting instructions, the temptation is strong to convict the accused without concern for his present guilt because he is a “bad man.” \textit{See} C. McCormick, \textit{Handbook of the Law of Evidence} \textsection 43 (2d ed. E. Cleary 1972). Congressman Dennis agreed that when the accused himself places his character in issue, evidence of prior convictions should be admissible to allow rebuttal of any suggestion that the accused is generally a law-abiding person. \textit{Subcommittee Hearings, supra} at 68.

\textsuperscript{13} \textit{Subcommittee Hearings, supra} note 12, at 251. This would limit criminal impeachment to those convictions of the highest probative worth.

\textsuperscript{14} \textit{Id.} Since many violent crimes are isolated, one-time offenses resulting from passion, instead of calculated instances of misconduct showing deceitful tendencies, their probative worth is limited. As Jeremy Bentham once postulated, one might kill in defense of his highly guarded reputation of veracity. 7 J. BENTHAM, \textit{Rationale of Judicial Evidence} 407 (Brower's ed. 1827), quoted in 2 J. Wigmore, \textit{Evidence} \textsection 519, at 611 (3d ed. 1940), and Ladd, \textit{Credibility Tests—Current Trends}, 89 U. Pa. L. Rev. 166, 178–79 (1940).

\textsuperscript{15} The effectiveness of limiting instructions to confine the evidence to credibility is questionable. Judge Learned Hand characterized their use as “the recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else [sic].” Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932). \textit{Accord}, Bruton v. United States, 391 U.S. 123 (1968) (limiting instruction to confine use of confession of codefendant to his guilt alone involves too substantial a risk to his codefendant and is improper); \textit{Note}, \textit{The Limiting Instruction—Its Effectiveness and Effect}, 51 Minn. L. Rev. 264 (1966).

\textsuperscript{16} The availability of convictions to impeach the defendant who is deterred from taking the stand as well as the one who actually testifies. In a University of Chicago study of cases in which the prosecution's evidence was blemished by contradictions favoring the defendant, the acquittal rate was 65\% when the defendant had no record and took the stand. With the same evidentiary contradictions, if the defendant had a record or failed to take the stand, the acquittal rate dropped to 38\%. H. Kalven & H. Zeisel, \textit{The American Jury} 160 (1966). By not taking the stand, the defendant is doubly prejudiced because his own rendition of the facts is not presented and jurors may presume guilt by his silence. \textit{See Note, To Take the Stand or Not to Take the Stand: The Dilemma of the Defendant With a Criminal Record}, 4 Colum. J.L. & Soc. Prob. 215, 220 (1968).

\textsuperscript{17} Congressman Hogan expressed this view in the congressional debates, 120
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Proponents of this view argue that in order to supply a jury with all information pertinent to a just and accurate decision, it is necessary to admit convictions for all felonies.

III. FEDERAL RULE 609: A COMPROMISE

From congressional debates advancing these two competing philosophies, a compromise emerged. Congress attempted to balance the desire to protect the person most vulnerable to the abuse of criminal conviction impeachment evidence, the criminal defendant witness, with the desire to provide the jury with as much relevant evidence as possible.

Those crimes involving "dishonesty" are placed beyond the trial court's discretion to exclude and are automatically admitted because of their particularly probative nature. On the other hand, the court in its discretion may exclude all other crimes punishable by imprisonment of over one year if they present "a danger of improperly influencing the outcome of the trial by persuading the trier of fact to convict the defendant on the basis of his prior criminal record." In order to facilitate the trier of fact's acquisition of as much relevant evidence as possible, however, no balancing between probative worth and prejudice is permitted when a witness other than the defendant is prejudiced.

IV. ADVISABILITY OF THE FEDERAL SOLUTION

In recent years, many states have revised their evidence codes to conform substantially with the Federal Rules of Evidence.
troversial nature of Federal Rule 609, however, has created a varied state response encompassing the full spectrum of admissibility.22

Presently, Washington has no limitations to protect a criminal defendant witness from being prejudiced by evidence of prior convictions.23 When such evidence is used by the jury as more than an indication of the defendant's credibility, a fair trial is not possible.24 Washington should restrict the admission of prior convictions to instances in which the probative value is greater than the potential for prejudice and misuse. The formula adopted in Federal Rule of Evidence 609 and Washington Proposed Rule of Evidence 609 makes reasonable strides toward achieving that goal.

Proposed Rule 609 attempts to reduce the potential prejudicial effects by giving trial judges discretion to exclude convictions of low probative value.25 For crimes of "dishonesty," however, the existing

from this statement of the Washington Judicial Council:

The Judicial Council Task Force was directed to make wide studies that should not only include the Federal Rules, but other evidence codifications as well. . . .

Throughout its deliberations, however, the Task Force recognized that substantial uniformity of the state and federal rules would make it easier for counsel to try cases in both judicial systems, and early on the attitude arose within the Task Force, that departures should not be made from the federal version unless there were substantial reasons for the departure.


Some states, in fashioning their own conviction admission rules, have mixed liberal and restrictive elements in a somewhat curious manner. See, e.g., Neb. Rev. Stat. § 27–609 (Supp. 1975) (judge may not exclude a conviction by a balancing process, but convictions over ten years old are absolutely forbidden, juvenile adjudications are not admissible to impeach, and the pendency of an appeal renders evidence of a conviction inadmissible). For a more thorough treatment of the adopted state rules, see [3] WEINSTEIN, supra note 11, ¶ 609[08] (Dec. 1977 Supp.).

23. See notes 5–10 and accompanying text supra.


25. Because the weighing of probative value against prejudice is a task which depends upon the circumstances of each case, an informal rule allowing discretion, rather than a formal rule setting specific guidelines, was adopted in Rule 609(a)(1). See generally Aronson, The Federal Rules of Evidence: A Model for Improved Evidentiary Decisionmaking in Washington, 54 Wash. L. Rev. 31, 37–42 (1978). This should be con-
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Washington practice of absolute admissibility would continue. The appropriateness of this absolute standard is highly doubtful when applied to criminal defendant witnesses because the possible result of the jury being prejudiced by the witnesses' prior conviction is so severe. That a crimen falsi conviction, such as criminal fraud, may be especially probative does not preclude the possibility that its admission may cause the jury to convict the defendant on the basis of his blighted past rather than on the strength of the prosecution's present case.

The congressional authors expressed the intention that the category of "dishonest" crimes in Rule 609(a)(2) be restrictively construed. Such a construction would, of course, reduce the number of occasions upon which the jury is exposed to highly prejudicial evidence of a defendant's past crimes. But extending judicial discretion to all instances involving criminal defendants would seem preferable to this absolute admission standard.

26. See notes 35-39 and accompanying text infra. Because crimes involving "dishonesty" are especially probative of a person's tendency to falsify, the drafters adopted a formal rule which contains a mandatory presumption that probative value outweighs prejudice to a witness. An informal rule vesting the judge with discretion to exclude the conviction was thought to be improper because the probative value was believed to be great in a high percentage of cases. See generally Aronson, supra note 25, at 37-42.

Present Washington practice would also continue in that there would be no discretion to exclude convictions which are prejudicial solely to a person who is not a criminal defendant. Although the impact of the resurrection of a prior conviction may be devastating to a reformed felon and potential witnesses may be discouraged from coming forward for fear of having their past convictions aired, see Recent Development, Evidence—Admissibility of the Victim's Past Sexual Behavior Under Washington's Rape Evidence Law, 52 WASH. L. REV. 1011, 1015 (1977), the drafters of the rule opted for a formal approach allowing no judicial discretion.

27. See notes 35-39 and accompanying text infra.

28. Maine has taken exactly this approach: 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 for one year or more under the law under which he was convicted, or (2) involved dishonesty or false statement, regardless of the punishment. In either case admissibility shall depend upon a determination by the court that the probative value of this evidence outweighs the prejudicial effect to the defendant. ME. R. EVID. 609, ME. REV. STAT. ANN. tit. 14 (Supp. 1965-78) (emphasis supplied).

Washington proponents of the view that convictions of crimen falsi are extremely probative may refuse to adopt the discretionary standard across the entire range of crimes. This is what happened to the federal rule. If such resistance is confronted, perhaps a reasonable compromise would be to extend discretionary review to all convictions but decrease the government's burden of showing the relevance of crimen falsi. By excluding crimen falsi only upon a showing that the prejudice to the defendant "substantially outweighs" its probative value, crimen falsi convictions would still carry a presumption of admissibility, but the absolute admission policy, which may cause great
To allow a defendant the opportunity to realize the benefits offered by Rule 609, a pretrial ruling on the admissibility of a prior conviction is necessary. There is little if any justification for forcing the defendant to speculate whether a prosecutor will be allowed to use past convictions to impeach, a fact which may affect the advisability of taking the stand in one's own behalf. Permitting this guessing game defers the admissibility question until a time when an adverse determination catches the defendant on the stand or forces him to make a last minute change in strategy.  

Inclusion of a provision in Rule 609 requiring a pretrial ruling on admissibility would reduce the possibility of prejudice without affecting the probative value of the evidence challenged. Although Proposed Rule 609 does not make pretrial rulings mandatory, several courts interpreting Federal Rule 609 have suggested the usefulness and desirability of advance rulings. As long as a court has ample opportunity and information to make an intelligent decision and reserves the right to change that decision if unexpected evidence is presented, there is no reason that a pretrial ruling should not be required to facilitate the rule's purpose of reducing unfairness to a criminal defendant who wishes to testify.  

Another proposal which would ensure compliance with the rule would be to require the trial court to balance on the record the prejudicial effect of evidence of a past conviction against its probative injustice in a particular instance, would be avoided. This is essentially what the drafters of Federal Rule 609(b) did when they faced the problem of deciding what remoteness in time rendered a conviction more prejudicial than probative. Crimes over 10 years old are presumptively prejudicial unless there is a showing of "substantial" probative value. See Fed. R. Evid. 609(b).  

29. Whether a defendant will be subjected to prejudicial criminal impeachment affects the advisability of taking the stand and hence his whole defense. See Jones v. United States, 402 F.2d 639, 643 (D.C. Cir. 1968). Refusing to allow a defendant to know his fate on this issue perpetuates the prejudicial impact Rule 609 sought to end.  


31. The court in United States v. Oakes, 565 F.2d 170 (1st Cir. 1977), encouraged trial courts to make advance rulings, but did not "have enough of a conviction of the feasibility and fairness of advance rulings in all the situations that arise in trials to impose a per se rule." Id. at 171. Advance disclosure to the judge of the evidence which will be presented at trial should allow an informed ruling from the bench. Hence, no purpose is served by a delay except to protect against the unexpected introduction of evidence affecting the advisability of the ruling. This benefit loses its persuasiveness if the advance ruling is conditioned upon the absence of such an unexpected introduction of evidence.
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value. This simple procedure would benefit the defendant and facilitate appellate review. Inclusion of provisions for pretrial rulings and explicit balancing would require amendments to Proposed Rule 609, but such amendments would be appropriate to effectuate the purposes behind the rule.

V. FEDERAL RULE OF EVIDENCE 609 IN PRACTICE

Adoption of the federal rule would be "strong evidence" of the intent to adopt existing federal law in the area. To understand how Proposed Rule of Evidence 609 will affect Washington law, it is necessary to consider both the general federal rule and its qualifications relating to remoteness in time, effect of a pardon, juvenile adjudications, and pendency of an appeal.

A. The General Rule: Dishonesty or False Statement—609(a)(2)

All crimes involving "dishonesty or false statement" are deemed admissible without regard to prejudicial effect because of their high probative value. Thus, determination of whether a crime may be used to impeach will first involve the application of Rule 609(a)(2). Courts should not too readily characterize a crime as "dishonest," for a broad definition of the term would emasculate the discretionary standard of Rule 609(a)(1) and defeat the compromise rationale of the rule.

32. As the rule now stands, there is almost a presumption that the trial court performed the required balancing prior to admitting convictions to impeach a defendant. See United States v. Cohen, 544 F.2d 781 (5th Cir.), cert. denied, 431 U.S. 914 (1977). The Cohen court found compliance with Rule 609 despite the absence of a balancing analysis by the trial court on the record and despite the fact that the rule "may envision a more explicit proceeding." 544 F.2d at 785–86. Accord, United States v. Mahone, 537 F.2d 922 (7th Cir.), cert. denied, 429 U.S. 1025 (1976). In Mahone the court stated that the trial judge's action "indicates implicitly that, in line with the rule, he weighed the prejudicial effect against the probative value of the evidence." 537 F.2d at 928–29. To prevent lackadaisical application of Rule 609(a)(1) and to ensure that the government actually fulfills its burden of showing that probative value exceeds prejudice to the defendant, the balancing should be made on the record.

33. "This court has recognized both by rule and decision that knowledge of the basis for a trial court's ruling or decision is often essential to enable it to properly dispose of an appeal." State v. Agee, 89 Wn. 2d 416, 420, 573 P.2d 355, 357 (1977).

34. See note 4 supra.

35. The presumption behind mandatory admission, that the probative value of "dishonest" crimes exceeds any prejudicial impact to a defendant, would become inappropriate if "dishonest" were too broadly defined. The need to balance a prior conviction's probative value against its potential to cause prejudice becomes greater as the definition of the term "dishonest" becomes more expansive.
“Dishonest” should not be used in its colloquial meaning, but in a manner reflecting the values expressed by the congressional authors:

By the phrase “dishonesty and false statement” the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully.  

Only convictions of these crimes that are as highly probative of a witness' credibility as crimen falsi deserve admission without allowing judicial discretion. Whether a crime involves “dishonesty” is determined by the state definition of the crime of which the defendant was convicted and not the details of the particular crime committed. Cases decided before the adoption of Rule 609 should also be disregarded insofar as they characterize a crime as “dishonest” because the term at that time did not have the legal significance that it does under Rule 609. Reevaluation under the narrow limits of crimen falsi is

37. “An absence of respect for the property of others is an undesirable character trait, but it is not an indicium of a propensity toward testimonial dishonesty.” United States v. Ortega, 561 F.2d 803, 806 (9th Cir. 1977) (footnote omitted).  
38. 3 WEINSTEIN, supra note 11, ¶ 609 [03a], at 609-73 to 609-74; see United States v. Millings, 535 F.2d 121, 123 (D.C. Cir. 1976) (fraud not an element of firearms or narcotics conviction). This is a necessary rule of convenience and law. It would be both impractical and unjust to scour former convictions for details of misrepresentation or fraud when the components of the state-defined crime are easily ascertainable and comprise the action for which the defendant was convicted. The District of Columbia Circuit has indicated, however, that "where the formal title of an offense leaves room for doubt, automatic admissibility under Rule 609(a)(2) will normally not be permitted, unless the prosecution first demonstrates to the court, outside the jury's hearing that a particular prior conviction rested on facts warranting the dishonesty or false statement description." United States v. Smith, 551 F.2d 348, 364 n.28 (D.C. Cir. 1976).  

It is the “gray areas” of the “dishonesty” controversy that tempt the courts to inappropriately seek guidance from cases which preceded the 1975 effective date of the federal rules. Misdemeanor convictions, such as some drug, firearm, and larceny offenses, are of particular importance in this area because only a “dishonest” characterization will permit misdemeanor admission into evidence under Rule 609. Illustrative of this point is United States v. Carden, 529 F.2d 443, 446 (5th Cir.), cert. denied, 429 U.S. 848 (1976), in which, without discussion of Federal Rule 609(a)(2), the court characterized the crime of petty larceny as “dishonest” on the basis of three pre-1970 cases. Better reasoned decisions disregard early cases and evaluate the convictions in the light of the new rules. See, e.g., United States v. Thompson, 559 F.2d 552, 554 (9th Cir.), cert. denied, 434 U.S. 973 (1977) (drug offense not “dishonest”); United States v. Hayes, 553 F.2d 824, 827 (2d Cir.), cert. denied, 434 U.S. 867 (1977) (crimes of force or stealth not “dishonest”) (dictum); United States v. Millings, 535 F.2d 121, 123-24 (D.C. Cir. 1976) (narcotics and weapons convictions not “dishonest” under legislative history of Rule 609(a)(2)).
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thus necessary before marginally "dishonest" crimes are admitted without judicial balancing under Rule 609(a)(1).

B. The General Rule: Discretionary Balancing—609(a)(1)

1. The proposed rule

If the crime is not "dishonest" under Rule 609(a)(2) and the witness is a criminal defendant, the trial court must determine that the probative value of the evidence outweighs the prejudicial effect to the defendant before a felony conviction may be used to impeach. The discretion allowed here is a modified version of the rule enunciated in Luck v. United States, which recognized the relevance of prior convictions to credibility but also recognized the trial court's discretion to exclude such convictions because of prejudice.

There are, however, two major distinctions between Rule 609 and the Luck approach. First, the discretionary Luck rule applied to all felony convictions and crimen falsi, and to prosecution as well as defense witnesses, whereas Rule 609 admits all convictions of crimen falsi without regard to prejudicial impact. Second, and as important, in Luck there was a presumption of admissibility until the defendant showed that the prejudice far outweighed the probative worth, while Rule 609(a)(1) presumes the evidence not admissible until the government...
ment shows the probative worth outweighs the prejudice to the defendant.\footnote{47}

Although Rule 609 differs from the rule in \textit{Luck} in the two respects mentioned above, the factors considered by the \textit{Luck} court\footnote{48} in determining the admissibility of evidence of prior convictions are relevant to the discretionary decision the trial judge must make about impeachment of a defendant witness under Rule 609(a)(1). These factors were (1) the nature of the crime,\footnote{49} (2) the remoteness in time of the prior conviction,\footnote{50} (3) the similarity between the impeachment crime and the charged crime,\footnote{51} and (4) the necessity of the defendant's testimony and the importance of credibility.\footnote{52} Under the \textit{Luck} rule, in the absence of plain error a trial court will not be found to have abused its discretion if it has balanced the probative value and the prejudicial impact.\footnote{53}

2. \textit{The restrictiveness of the proposed rule}

Under the present rule, if both defense and prosecution witnesses

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\item \textit{United States v. Oakes}, 565 F.2d 170, 172 (1st Cir. 1977); \textit{United States v. Hayes}, 553 F.2d 824, 828 (2d. Cir.), \textit{cert. denied}, 434 U.S. 867 (1977); \textit{United States v. Smith}, 551 F.2d 348, 359–60 (D.C. Cir. 1976). This is a crucial change in the burden of going forward and the burden of proof. \textit{See} 120 \textsc{Cong. Rec.} 40891, 40894 (1974). In effect the defendant's heavy burden of proof to exclude evidence has been changed to a less severe burden of proof on the government to admit prior convictions. Again this reflects the congressional compromise between the concern about possible prejudice to the defendant, and the desire to admit relevant evidence.
\item These factors were also discussed in \textit{Gordon v. United States}, 383 F.2d 936 (D.C. Cir. 1967). For a further discussion of the discretionary considerations, see 3 \textsc{Weinstein}, \textit{supra} note 11, \textit{\$} 609 [03].
\item Impulsive acts of violence as opposed to crimes involving deceit or fraud, "have little or no direct bearing on honesty and veracity." \textit{Gordon v. United States}, 383 F.2d 936, 940 (D.C. Cir. 1967). A judge should not be allowed to expand on what is absolutely admissible under Rule 609(a)(2) by delving into the particulars of the defendant's prior conviction. To do so would be in contravention of the congressional intent to limit the term "dishonest." \textit{See} notes 35–39 and accompanying text \textit{supra}. Reviewing the specific aspects of a crime under Rule 609(a)(1) would, however, enable the judge to make distinctions regarding the discretionary admission of different convictions within broad criminal definitions without contravening congressional intent. \textit{See} 3 \textsc{Weinstein}, \textit{supra} note 11, \textit{\$} 609 [03], at 609–65.
\item \textit{Gordon v. United States}, 383 F.2d 936, 940 (D.C. Cir. 1967). This criterion is explicitly treated in Rule 609(b). \textit{See} notes 60–67 and accompanying text \textit{infra}.
\item \textit{Gordon v. United States}, 383 F.2d 936, 940 (D.C. Cir. 1967). The possible jury presumption of "if he did it once, he'd do it again" is especially prejudicial. Where multiple convictions are available to challenge credibility, it is preferable to limit impeachment to dissimilar crimes.
\item When a defendant's testimony is considered important and the availability of criminal impeachment may deter his taking the stand, a judicial decision to exclude the evidence may be preferable. \textit{Id.} at 940–41.
\item \textit{Id.} at 938. Review would be facilitated by the requirement of specific balancing by the trial court. \textit{See} notes 32–33 and accompanying text \textit{supra}.
\end{itemize}
have formerly been convicted, the trial court has no discretion to exclude the conviction of a prosecution witness as being prejudicial to the government's case. Because convictions of the defense witnesses are the only variables in the admission process, just two results are possible under a literal reading of the rule. Either Rule 609(a)(1) will create an imbalance in credibility by allowing impeachment of prosecution but not defense witnesses, or judges, in order to avoid this imbalance, will not exclude prior convictions of the defense witnesses for impeachment purposes. Neither of these two extremes is satisfactory.

In *United States v. Jackson* a third solution was suggested. In that case both a prosecution witness and the defendant had former convictions. The court forbade governmental use of the defendant's prior conviction to impeach on the condition that the defendant not "take unfair advantage" of the spirit of Rule 609 by asserting a law-abiding image or by impeaching a prosecution witness without court approval. Although certainly not justified by the language of Rule 609, this conditional exclusion of the defendant's prior conviction maintained the balance of credibility between prosecution and defense without prejudicial effect to the defendant. It should be emphasized that this approach is not a qualification of the rights of the defendant under Rule 609(a)(1), but may in practice be an expansion. Only by way of a conditional exclusion may some judges be able to feel justified excluding a prejudicial conviction of a defendant. The

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54. No prejudice "to the defendant," as required by Rule 609(a)(1), could result from the impeachment of a prosecution witness. United States v. Nevitt, 563 F.2d 406, 408 (9th Cir. 1977); see note 20 and accompanying text *supra.*


56. *Id.* at 942-43.


58. A defendant's right to confrontation must not be forgotten. *See* *Davis v. Alaska,* 415 U.S. 308, 319 (1974) (criminal defendant has right to impeach prosecution witness with juvenile conviction). To preserve this constitutional right yet maintain the credibility balance as much as possible, a conditional ruling might forbid a defendant from using all but the most impeaching of crimes committed by a prosecution witness.

59. In *Jackson,* Judge Weinstein was of the opinion that the defendant was deserv-
flexibility of this approach is desirable, but to ensure its availability, Rule 609(a)(1) should be modified to extend judicial power explicitly to conditional exclusions.

C. The Qualifications: Remoteness in Time—609(b)

Under current Washington law, the remoteness in time of a prior conviction has no bearing on its admissibility to impeach; the passage of time affects only the weight given such evidence. Proposed Rule 609(b) excludes convictions for impeachment purposes if ten years have elapsed since the later of either the date of conviction or release from confinement. Because the Rule creates a strong presumption of irrelevance after such time, fairness requires that impeachment evidence be excluded for all witnesses, not just the criminal defendant. Initially, the Rule absolutely excluded all convictions beyond ten years, but it was amended to allow court discretion to

PROPOSED WASH. R. EVID. 609(b).

63. Rule 609(b) applies only to the use of convictions to impeach. When a conviction is used to contradict a position taken by a witness on the stand, the rule does not apply. United States v. Johnson, 542 F.2d 230, 234–35 (5th Cir. 1976).

64. Unlike Rule 609(a)(1), Rule 609(b) is not limited to witnesses who are defendants. However, the “exceptional circumstances” required to rebut the presumption of inadmissibility, see S. Rep. No. 1277, 93d Cong., 2d Sess. 4 (1974), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7051, 7062, are most likely to occur in a sixth amendment confrontation context when a prosecution witness has a “dishonest” conviction over 10 years old. See Davis v. Alaska, 415 U.S. 308, 319 (1974); United States v. Alvarez-Lopez, 559 F.2d 1155 (9th Cir. 1977).

65. This was the approach submitted by the Supreme Court and adopted by the House Committee on the Judiciary. H.R. Doc. No. 46, 93d Cong., 1st Sess. 22 (1973).
admit antiquated convictions in exceptional circumstances when the probative value "substantially outweighs its prejudicial effect" and advance notice is given. This rule protects the defendant's interests without being so formalistic as to exclude particularly probative convictions.

D. The Qualifications: Effect of Pardon, Annulment, or Certificate of Rehabilitation—609(c).

Under existing Washington law, "proof of a prior conviction may be received for the purpose of affecting the credibility of a witness, notwithstanding a pardon." Because a pardon may be issued for any of a number of reasons unrelated to innocence, such a rule appears sound. Proposed Rule 609(c) qualifies this rule by excluding the use of a dismissed conviction if the pardon or equivalent procedure is based on a finding of innocence or rehabilitation of a convicted person who has not been convicted of a "subsequent crime."

66. It should be noted that the standard is "substantially outweighs" and not merely "outweighs" as in Rule 609(a)(1).

67. The notice requirement supports the presumption of inadmissibility by giving the "adversary a fair opportunity to contest the use of the evidence." Conference Report, supra note 18, at 10, reprinted in [1974] U.S. CODE CONG. & AD. NEWS at 7103.


69. Proposed Rule 609(c) provides:

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

PROPOSED WASH. R. EVID. 609(c).

70. "Equivalent procedure" may be subject to a broad application. In United States v. Thorne, 547 F.2d 56, 59 (8th Cir. 1976), one of the questions posed was whether a trial court's finding of rehabilitation, which was not evidenced by a certificate of any nature, . . . was sufficient for the court to exercise its discretion not to permit the cross-examination." The question was answered in the affirmative. Id.

71. The requirement of no subsequent crime applies only when a conviction is inadmissible because of a finding of rehabilitation. If the conviction was pardoned on a finding of innocence, it is not admissible despite a conviction for a subsequent crime.

A "subsequent conviction" should not be confused with a "subsequent crime." If a person is convicted of a "subsequent crime," he may be impeached by way of both convictions. If a person is convicted after a pardon is granted for a crime which occurred prior to the pardon, the wording of the rule would allow only impeachment by the latter conviction and not the pardoned crime. The rationale of the rule, that if a person's conduct following a pardon is exemplary the conviction is no longer probative of a tendency to falsify, also supports this construction. A subsequent conviction is not the conduct with which the rule is concerned.
der the view that any conviction is relevant to a witness’ credibility, this modification is desirable since it restricts attacks on the credibility of persons who have shown they are no longer prone to antisocial conduct and are deserving of belief.

E. The Qualifications: Juvenile Adjudications—609(d)

Under present Washington law, “[a] juvenile commitment . . . is not equivalent to a conviction of a crime”72 because of its lack of real probative value.73 Thus, it is generally not admissible to impeach. When a witness with a juvenile record testifies against a criminal defendant, however, the trial court may determine that the defendant’s constitutional right to confront his accuser requires the opportunity to impeach.74

Proposed Rule 609(d)75 is consistent with present Washington law and allows impeachment in a criminal case of a witness other than the defendant76 “if a conviction of the offense would be admissible to at-

73. The Advisory Committee on the Federal Rules of Evidence identified the lack of probative value as stemming from the informality and lack of precision in juvenile hearings usually not allowed in a criminal conviction. The “growing up” period of youngsters was equated with a certificate of rehabilitation. H.R. Doc. No. 46, 93d Cong., 1st Sess. 103 (1973).
75. The Washington Judicial Council amended Proposed Rule 609(d) to read as follows:

(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a finding of guilt in a juvenile offense proceeding of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

PROPOSED WASH. R. EVID. 609(d) (1978) (emphasis added). The revised proposed rules are in limited circulation; copies are available at the University of Washington Law School library. The substitution of the words “finding of guilt in a juvenile offense proceeding” for “juvenile adjudication” represents the only change from Federal Rule 609 offered by the Judicial Council. The original proposed Washington rule read the same as Federal Rule 609(d). See PROPOSED WASH. R. EVID. 609(d) (1977). Because Rule 609 deals with impeachment by prior conviction, surely “juvenile adjudications” impliedly referred only to juvenile convictions. It is ironic that the only change made by the Judicial Council is of such a trivial nature when the preface to the Proposed Rules indicated that changes would not be made “unless there were substantial reasons for the departure.” See note 21 supra.
76. No discretion to admit is allowed when the witness is the accused in a criminal case. H.R. Doc No. 46, 93d Cong., 1st Sess. 104 (1973).
tack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.” This statement implicitly recognizes the inherently unreliable nature of juvenile adjudications and restricts their admission to situations in which exclusion may excessively prejudice a defendant.

F. The Qualifications: Pendency of Appeal—609(e)

Pendency of appeal has no effect on the admissibility of a conviction to impeach under existing Washington law.77 A presumption of innocence initially exists, but once the jury renders a guilty verdict, the presumption is reversed.78 Once a conviction has been used to impeach a defendant, a later reversal of that conviction on sixth amendment grounds will make its admission reversible error,79 but a subsequent reversal on fourth amendment grounds does not affect admissibility.80 Proposed Rule 609(e)81 follows Washington law but also allows the defendant to raise the fact that an appeal is pending as a mitigating circumstance, a practice as yet untested in Washington.

VI. CONCLUSION

Proposed Rule 609 goes a long way toward solving the inequities of criminal impeachment in Washington. It recognizes the relevancy of prior wrongdoings, yet limits their admissibility when unfair or likely to distract the factfinder from the pertinent issue. To effectuate better the purposes of Proposed Rule 609, however, the suggestions con-

79. Loper v. Beto, 405 U.S. 473, 483 (1972); State v. Murray, 86 Wn. 2d 165, 167, 543 P.2d 332, 334 (1975). A violation of the sixth amendment right to counsel is thought to go to the very integrity of the fact finding process, making the conviction suspect. Id. at 168, 543 P.2d at 334.
80. State v. Murray, 86 Wn. 2d 165, 168, 543 P.2d 332, 334–35 (1975). Because fourth amendment reversals are based on the deterrence of illegal police behavior and not the reliability of the evidence, the probative value of the evidence is not affected. Id.
81. Proposed Rule 609(e) provides: “(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.”

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cerning discretionary balancing with respect to crimes involving dishonesty, pretrial determination of admissibility, explicit balancing of prejudice and probative value on the record, and conditional exclusion of a defendant's conviction should be seriously considered. Just as the common law practice of testimonial incompetence due to a criminal conviction passed from the scene, so, too, is it time for the unjust Washington impeachment practice to pass into history.

D. Joseph Hurson

82. C. McCormick, supra note 12, § 43, at 89–90.