Admissibility of Prior Theft Convictions to Impeach Criminal Defendants in Washington State

Hossein Nowbar
ADMISSIBILITY OF PRIOR THEFT CONVICTIONS TO IMPEACH CRIMINAL DEFENDANTS IN WASHINGTON STATE

Hossein Nowbar

Abstract: The majority of the federal circuit courts hold that prior theft convictions are not automatically admissible under Evidence Rule 609(a)(2) as crimes of dishonesty or false statement. The Washington Supreme Court departs from this conclusion and holds all theft crimes automatically admissible under ER 609(a)(2) as crimes of dishonesty or false statement. This Comment discusses the inherent problems in Washington's interpretation of the terms "dishonesty or false statement" in ER 609(a)(2) and suggests three possible solutions that may alleviate those problems.

Rules of evidence are an essential element of every courtroom experience. Often they determine the outcome of a case. Although most of the rules of evidence are taken for granted, some are hotly debated. One such rule is Evidence Rule (ER) 609 which permits the impeachment of a witness' credibility through the use of past criminal convictions. ER 609 is one of the most intensely debated rules of evidence in the State of Washington. The Washington Supreme Court has been unable to provide consistent guidance, changing its interpretation of ER 609 four times in the past eight years.

The admission of prior convictions into evidence implicates competing interests. On the one hand, public policy requires that jurors receive all of the information necessary to make accurate decisions. Jurors must base their decisions on the credibility of a witness, and the criminal record of a witness may in some cases be relevant in determining whether that witness is likely to tell the truth.

2. Washington Evidence Rules were adopted by the Washington Supreme Court in 1979. ER 609, Impeachment by Evidence of Conviction of Crime, reads in relevant part:
   (a) General Rule. For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment.
   WASH. R. EVID. 609.
4. Id.
5. Id.
On the other hand, society has a strong interest in maintaining a presumption of innocence. If evidence of prior crimes is admitted to impeach a defendant in a criminal case, jurors will have difficulty considering this evidence solely for the purpose of evaluating the defendant's credibility. Instead, the jury may draw either of two legally impermissible inferences. First, the jury may infer guilt because the defendant has committed a previous crime and thus probably committed the crime presently charged. Second, the jury could infer that the defendant should be convicted because the prior convictions demonstrate that the defendant is a "bad person" who should be incarcerated irrespective of the guilt for the crime presently charged.

The possibility that ER 609 evidence will be admitted leaves the defendant in an unenviable dilemma. Many defendants will be inclined to forego testifying on their own behalf, because they would be prejudiced by the admission of such evidence. If the defendant chooses to keep out the prejudicial evidence by declining to testify, however, jurors will likely infer guilt from silence.

Such inferences by the jury are precisely the dangers which underlay the propensity rule embodied in Federal Rule of Evidence (FRE) 404. The propensity rule states that, subject to certain exceptions, the jury is prohibited from learning of the prior conduct of a person not the subject of the present litigation if the only probative value of that evidence is that it increases the probability that the person acted in a similar way at a material time. One important application of this doctrine is to prohibit the use of evidence of prior crimes to prove that

---

6. 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 (1968) [hereinafter To Take the Stand].
7. See 1 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 194 (3d ed. 1940).
8. Id. §§ 57, 194.
9. "ER 609 evidence" refers to evidence of prior convictions of defendants that can be admitted against the defendants under evidence rule 609(a).
10. To Take the Stand, supra note 6, at 221 (citing statistics gathered by the American Institute of Public Opinion, which showed that 71% of the people questioned specifically on the defendant's failure to take the stand believed use of the privilege was an indication of guilt).
11. JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE § 609[02], at 609-61 (1990); FED. R. EVID. (FRE) 404; ARONSON, supra note 3, at 404-1 (Washington's ER 404 is the same as FRE 404).
12. Three exceptions are given in Rule 404(a): 404(a)(1)—Character of Accused (concerning pertinent traits of the accused offered by the accused), 404(a)(2)—Character of Victim, and 404(a)(3)—Character of Witness (as provided under rules 607, 608, and 609).
Evidence Rule 609(a)(2)

a defendant has a criminal propensity. 14 Any kind of reliance on such evidence by the jury is impermissible. 15

This Comment examines the development of the rules concerning attorneys' use of prior convictions to impeach opposing witnesses in the State of Washington, particularly focusing on Washington's erroneous interpretation of ER 609(a) when prior theft convictions are used to impeach criminal defendants. After discussing fundamental problems with Washington's current approach, this Comment describes three approaches to the admission of prior theft conviction evidence that could remedy Washington's errors.

I. BACKGROUND

A. General History of the Rules Concerning the Admissibility of Prior Convictions

The practice of impeaching a witness through the use of prior convictions originated in common law. 16 In seventeenth century England, courts disqualified persons convicted of crimes from testifying as witnesses. 17 This disqualification originated as an additional punishment for the person's crimes. 18 The disqualification of persons with criminal convictions, however, sometimes deprived an innocent person of the testimony of a key witness. 19 Recognizing this adverse effect, jurists adopted a new justification for excluding the testimony: that convicts were of such poor moral character that they could not be expected to tell the truth. 20 As times changed, however, so did the minds of jurists. 21 England statutorily abolished the common law dis-

15. See, e.g., Kelly, 102 Wash. 2d at 199–200, 685 P.2d at 572; see also ER 404(b) which states that although the use of other crimes is not admissible to show that the defendant acted in conformity therewith, "[the evidence] may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." WASH. R. EVID. 404(b).
18. Id.
19. 2 WIGMORE, supra note 7, § 519, at 609.
20. 2 id.
21. Some experts, such as Wigmore, have credited Jeremy Bentham with changing the minds of the jurists. Bentham vigorously fought the common law rule disqualifying convicts as witnesses and demonstrated the illogic of the rule. See 2 id. at 610–11 (citing 7 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 406 (Bowring's ed. 1827)).
qualification of convicts in 1843. 22 Several jurisdictions in the United States followed suit, including the State of Washington, which abolished the prohibition on testimony by criminal convicts when it adopted the Laws of 1854. 23

B. History of the Admissibility of Impeachment Evidence in the State of Washington

Dissatisfied with the common law rule, Washington authorized the impeachment of witnesses through the use of past criminal convictions by two statutes, Revised Code of Washington (RCW) 5.60.040 and RCW 10.52.030. The former statute governed the admissibility of prior convictions in civil cases, while the latter statute governed criminal cases. 24

The legislature adopted RCW 5.60.040 in 1854 as part of Washington’s Territorial Civil Practice Act. The statute removed convicts from the list of individuals considered incompetent and hence disqualified from testifying in civil cases under common law. 25 RCW 5.60.040 applied to both civil and criminal cases and gave trial judges discretion as to the admissibility of prior convictions. 26 The trial judge permitted the evidence only if the probative value of the evidence outweighed its prejudicial effect. 27 Washington, however, modified the scope of RCW 5.60.040 by adopting RCW 10.52.030 28 in 1909.

22. 2 id.
23. The statute as originally adopted in 1854 read:
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 no person who shall have been convicted of the crime of perjury shall be a competent witness in any case, unless such conviction shall have been reversed, or unless he shall have received a pardon.
26. Mullin, 62 Wash. 2d at 207, 381 P.2d at 974; see also 5 ROBERT MEISENHOLDER, WASHINGTON PRACTICE § 300 (1965 & Supp. 1980); WASH. R. EVID. 105.
27. Mullin, 62 Wash. 2d at 210, 381 P.2d at 976 (referring to what is now known as the ER 403 probative value versus prejudicial effect test).
28. The statute read:
Convict as witness. 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.

164
In 1909, Washington limited RCW 5.60.040 to civil cases by adopting RCW 10.52.030 as part of a comprehensive criminal code.\(^29\) RCW 10.52.030 mandated that the use of RCW 5.60.040 be restricted exclusively to civil cases, where the fear and repercussions of undue prejudice are less significant than in criminal cases.\(^30\) RCW 10.52.030 became the governing statute regulating the impeachment of witnesses through the use of prior convictions in criminal cases. Although RCW 10.52.030 allowed all convicts to testify, it allowed attorneys to automatically introduce into evidence the convicts’ prior convictions for impeachment purposes.

The application of RCW 10.52.030, however, created a dilemma for the innocent defendant with a criminal record. Under the statute, evidence of prior convictions for felonies or misdemeanors was admissible in criminal cases to impeach any witness, including a defendant who took the stand.\(^31\) Furthermore, unlike RCW 5.60.040, trial judges no longer had any discretion to forbid attorneys from introducing evidence of a prior conviction; admission was mandatory, regardless of prejudice, or whether the prior conviction was for a felony or misdemeanor offense.\(^32\) As a result, under Washington’s liberal admission standard, an innocent defendant with a criminal record was left with the choice of either foregoing the constitutional right to testify on one’s own behalf, and allowing the jury to infer guilt, or taking the stand and being labelled a “bad person” deserving of punishment.\(^33\)

C. Federal Rule of Evidence 609

Federal lawmakers, confronting statutes similar to Washington’s, attempted to reformulate their rules of evidence to provide an

---

\(^{29}\) Mullin, 62 Wash. 2d at 207, 381 P.2d at 974.

\(^{30}\) See id.; see also 5 Meisenholder, supra note 26, § 300.

\(^{31}\) See, e.g., State v. Ruzicka, 89 Wash. 2d 217, 570 P.2d 1208 (1977) (felony); State v. Maloney, 135 Wash. 309, 237 P. 726 (1925) (misdemeanor; defendant as witness); State v. Overland, 68 Wash. 566, 123 P. 1011 (1912) (misdemeanors and felonies; defendant as witness).


\(^{33}\) D. Joseph Hurson, Note, Proposed Rule of Evidence 609: Impeachment of Criminal Defendants by Prior Convictions, 54 WASH. L. REV. 117, 120 n.16 (1978); see Harry Kalven, Jr. & Hans Zeisel, The American Jury 160 (1966) (referring to a study of cases at the University of Chicago in which the acquittal rate of a defendant who did not have a record and took the stand was 65%. On the other hand, using the same evidence contradictions, the acquittal rate of the defendant who either had a record or failed to take the stand dropped to 38%); McCormick on Evidence, supra note 16, § 43, at 99–100.

165
approach less prejudicial to defendants. The result, Federal Rule of Evidence (FRE) 609 was a compromise between two diametrically opposed views in Congress. Opponents of admissibility argued that the use of a defendant’s past convictions during cross-examination was inconsistent with the presumption of innocence. They contended that such a practice, if allowed, should be limited to those offenses in the nature of crimen falsi, such as perjury, which had a direct bearing on a witness’ credibility. Those favoring admission of past convictions argued that any illegal conduct was highly indicative of a person’s credibility, and that the exclusion of such evidence would improperly allow a felon to appear as a law-abiding citizen. Hence, they argued, all felony convictions should be admitted as evidence.

The congressional compromise emerging out of these two opposing viewpoints attempted to balance the need to protect the criminal defendant witness with the desire to provide the jury with as much relevant evidence as possible. Congress concluded that crimes involving dishonesty or false statement were inherently probative and should be automatically admitted. This conclusion is reflected in FRE 609(a)(2). Congress intended, however, for the category of “dishonest” crimes in FRE 609(a)(2) to be restrictively construed. Congress placed all other crimes punishable by imprisonment of over one year under the discretion of the trial judge through FRE 609(a)(1). Consequently, the court could exclude evidence of crimes defined under FRE 609(a)(1) if it determined that the evidence presented a risk of improperly influencing the outcome of the trial by persuading a jury to convict the defendant on the basis of the defendant’s prior criminal record.

34. The text of FRE 609 is almost identical to the text of ER 609 provided in supra note 2.
35. GRAHAM, supra note 1, § 609.1, at 463–64.
38. Id.
40. See WEINSTEIN & BERGER, supra note 11, § 609[01], at 609-50; see also Hurson, supra note 33, at 121.
42. See Hurson, supra note 33, at 125-27.
43. Id. at 121.
1. Development of FRE 609(a)(2) in Federal Courts

The majority of the United States Circuit Courts of Appeals abide by an interpretation taken from the federal legislative history of FRE 609(a)(2). Eight circuits strictly define crimes of dishonesty, and hold that theft convictions are not automatically admissible.44 Ten circuits expressly hold that FRE 609(a)(2) excludes general theft crimes and encompasses only those crimes that include an element of deceit, untruthfulness, or false statement.45 Additionally, seven of the ten circuits hold that the trial court may inquire into the underlying facts of a prior conviction in order to determine whether it was a crime involving dishonesty or false statement.46 These courts hold that although theft is not necessarily a crime of “dishonesty or false statement,” it may nevertheless be admissible under FRE 609(a)(2) if the theft at issue was actually committed by fraudulent or deceitful means.47 In these seven circuits, therefore, to impeach a witness using a prior theft conviction, the government must produce facts demonstrating that the prior crime involved fraud or deceit.48 For example, in United States

44. See, e.g., Linskey v. Hecker, 753 F.2d 199 (1st Cir. 1985); United States v. Yeo, 739 F.2d 385 (8th Cir. 1984) (holding that theft is not a crime involving “dishonesty or false statement” under rule 609(a)(2) unless it was committed by fraudulent or deceitful means); United States v. Glenn, 667 F.2d 1269 (9th Cir. 1982); United States v. Ashley, 569 F.2d 975 (5th Cir.), cert. denied, 439 U.S. 853 (1978); United States v. Seamster, 568 F.2d 188 (10th Cir. 1978); United States v. Ortega, 561 F.2d 803 (9th Cir. 1977); United States v. Hayes, 553 F.2d 824, 827 (10th Cir. 1977) (dictum), cert. denied, 434 U.S. 867 (1977); United States v. Smith, 551 F.2d 348 (D.C. Cir. 1976); Government of V.I. v. Toto, 529 F.2d 278 (3d Cir. 1976).

45. See United States v. Grandmont, 680 F.2d 867, 871 (1st Cir. 1982) (holding that evidence of purse snatching is not admissible under FRE 609(a)(2) because there were no facts suggesting that the crimes were perpetrated by fraudulent or deceitful means); United States v. Cunningham, 658 F.2d 696 (4th Cir. 1981); United States v. Hastings, 577 F.2d 38 (8th Cir. 1978); United States v. Ashley, 569 F.2d 975 (5th Cir.), cert. denied, 439 U.S. 853 (1978); United States v. Seamster, 568 F.2d 188 (10th Cir. 1978); United States v. Hawley, 554 F.2d 50 (2d Cir. 1977); Smith, 551 F.2d at 364 n.28 (stating that if an offense involved nothing more than theft, the conviction could not be introduced under [FRE 609(a)(2)]); if on the other hand, the offense involved false written or oral statements, the conviction would qualify for admission as a crime of “dishonesty or false statement”); United States v. Dixon, 547 F.2d 1079 (9th Cir. 1976); United States v. Mahone, 537 F.2d 922 (7th Cir.) (dictum), cert. denied, 429 U.S. 1025 (1976); Government of V.I. v. Toto, 529 F.2d 278 (3d Cir. 1976).

46. United States v. Yeo, 739 F.2d 385 (8th Cir. 1984); United States v. Grandmont, 680 F.2d 867 (1st Cir. 1982); United States v. Glenn, 667 F.2d 1269 (9th Cir. 1982); United States v. Seamster, 568 F.2d 188 (10th Cir. 1978); United States v. Hayes, 553 F.2d 824 (2d Cir.), cert. denied, 434 U.S. 867 (1977); United States v. Smith, 551 F.2d 348 (D.C. Cir. 1976); Toto, 529 F.2d at 281 (absent “special circumstances” conviction of petit larceny is not a crime of crimen falsi).

47. See, e.g., United States v. Glenn, 667 F.2d 1269 (9th Cir. 1982); United States v. Smith, 551 F.2d 348 (D.C. Cir. 1976).

48. See supra note 46.
Washington Law Review

v. Glenn,\textsuperscript{49} the Ninth Circuit held that the defendant’s prior grand theft and burglary convictions were inadmissible, because there was no indication that the crimes were actually committed by fraudulent or deceitful means.\textsuperscript{50}

2. Adoption of ER 609 in Washington State

In 1979, the Washington Supreme Court adopted the Washington Rules of Evidence (ER). Although it altered other parts of the rules, the court adopted verbatim Evidence Rule 609 from the Federal Rule of Evidence (FRE) 609.\textsuperscript{51} This rule superseded both RCW 5.60.040 and RCW 10.52.030.

Just as under the Federal Rules, ER 609(a) provides two instances where criminal convictions may be used to impeach the credibility of a witness. First, under ER 609(a)(1), evidence of convictions punishable by death or imprisonment in excess of one year may be admitted if the trial court determines that the probative value of the conviction outweighs its prejudicial effect.\textsuperscript{52} Second, under ER 609(a)(2), evidence of convictions that involve dishonesty or false statement are automatically admissible. ER 609(a)(2) does not allow the court to consider the severity of the punishment or to weigh the prejudicial effect or the probative value of such evidence.

D. Judicial Development of ER 609(a)(2) in Washington

Although early Washington decisions purported to adopt implicitly the compromise position of FRE 609, subsequent Washington Supreme Court decisions have shown that the state has embarked on a separate path. The first opportunity for the Washington Supreme Court to determine which crimes involve dishonesty for purposes of

\textsuperscript{49} 667 F.2d 1269 (9th Cir. 1982).

\textsuperscript{50} Id. In addition, several federal courts have held that petit larceny and shoplifting are inadmissible under FRE 609(a)(2) because they involve no fraud or deceit. \textit{See}, e.g., United States v. Fearwell, 595 F.2d 771 (D.C. Cir. 1978) (attempted petit larceny inadmissible); United States v. Ashley, 569 F.2d 975 (5th Cir. 1978) (shoplifting conviction inadmissible); United States v. Ortega, 561 F.2d 803 (9th Cir. 1977) (shoplifting conviction inadmissible).


\textsuperscript{52} This balancing approach, probative value versus prejudicial effect, is derived from ER 403. ER 403 provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. WASH. R. EVID. 403. It should be noted, however, that ER 403 presumes that the evidence is admissible unless shown to be prejudicial, \textit{see id.}, while ER 609 presumes that the evidence is inadmissible unless it is shown that the probative value of the evidence outweighs its prejudice. \textit{See supra} note 2, for the text of ER 609.
ER 609(a)(2) was presented in *State v. Burton*. In *Burton*, the defendant's past criminal convictions for petit larceny and shoplifting were admitted against him on cross examination, and he was convicted of first degree robbery of a gas station. The Washington Supreme Court held that Burton's past convictions for stealing did not constitute crimes of dishonesty and should not have been admitted under ER 609(a)(2).

In defining crimes of dishonesty, the *Burton* court looked to and embraced the legislative history surrounding the adoption of FRE 609. The legislative history suggested that Congress defined crimes of dishonesty to include only such crimes "as perjury or subornation of perjury, false statement, criminal fraud, embezzlement or false pretense, or any other offense in the nature of crimen falsi . . . ." Relying on the congressional view, the *Burton* court reasoned that, while in a broad sense theft is always dishonest, crimes of theft in general do not contain the requisite element of untruthfulness. The court therefore held that misdemeanor crimes of theft were generally inadmissible under ER 609(a)(2) unless the details of the crime revealed some element of fraud or deceit.

The *Burton* court also concluded that the admission of prior conviction evidence detrimentally affected defendants' constitutional rights to testify in their own defenses. The court based this conclusion on the premise that "[t]he admission of prior conviction evidence by its very nature is highly prejudicial because of its inherent implication that 'once a criminal, always a criminal.' " The court reasoned that because of this potential prejudice, the definition of what offenses constitute crimes of dishonesty or false statement should be strictly construed. A broad definition, according to the court, would unfairly present the defendant witness with a "Hobson's choice." The defendant could either testify and risk the effects of the inherent prejudice...

---

54. *Id.* at 3, 676 P.2d at 978.
55. *Id.* at 9–10, 676 P.2d at 981.
57. *Burton*, 101 Wash. 2d at 10, 676 P.2d at 981–82.
58. *Id.* at 9, 676 P.2d at 981.
59. *Id.*
60. *Id.* at 10, 676 P.2d at 981.
61. *Id.* at 9, 676 P.2d at 981. Hobson's choice is defined as the necessity of accepting one of two or more equally objectionable things. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1076 (1976).
dice associated with prior conviction evidence, or refuse to testify and risk the effects of not presenting one's side of the story. The *Burton* court adopted a restrictive approach to the admissibility of evidence under ER 609(a)(2) to avoid placing the defendant in such a position.

Though consistent with the federal interpretation, the *Burton* standard lasted only four years. The Washington Supreme Court departed from *Burton* and changed its definition of crimes of dishonesty in *State v. Brown* (*Brown* I). In *Brown* I, the defendant refused to take the stand after the trial court ruled that his prior criminal convictions were admissible against him for impeachment purposes. The jury subsequently convicted the defendant of second degree theft. The defendant's past crimes involved a deceptive scheme in which he offered his victims a television set and a VCR at a greatly reduced price, drove with the victims to a location in Seattle, and then took their money without delivering the merchandise. The dishonest nature of this crime persuaded the court to reverse *Burton* and include crimes of theft as crimes of dishonesty.

In reversing *Burton*, the court held that its previous adoption of the federal legislative history and federal decisional law in defining crimes of dishonesty was misguided. The *Brown* I court wrote that the previous interpretation did not place enough emphasis on the actual language of the rule, specifically on the "ordinary meaning" of the word "dishonest." The court therefore adopted the *Webster's Dictionary* definition of dishonesty, which defined the term "dishonest" to include "the act or practice of telling a lie, or of cheating, deceiving, and steal-

---


63. *Burton*, 101 Wash. 2d at 10, 676 P.2d at 981–82; see also supra notes 57–62 and accompanying text.


66. *Id.* at 129, 761 P.2d at 592.

67. *Id.*

68. *Id.* at 127–28, 761 P.2d at 591.

69. *Id.* at 156, 761 P.2d at 605. In so holding, the court chose not to differentiate among different types of theft. *Id.*

70. *Id.* at 150, 761 P.2d at 603.

71. *Id.* at 152, 761 P.2d at 603.
Evidence Rule 609(a)(2)

The court concluded that because crimes of theft involve stealing, they are clearly encompassed within the term "dishonest." The holding of Brown I was also short lived. In State v. Brown (Brown II), the Washington Supreme Court reconsidered Brown I, and reversed its position again. In a split decision consisting of a plurality and two concurrences, the court held that theft crimes were not per se admissible as crimes involving misrepresentation and false statements. Five justices, in two concurring opinions, rejected the rule that crimes of theft are per se "dishonest" and endorsed the more restrictive definition of "crimes of dishonesty or false statement" presented in Burton. The five justices concluded that only theft crimes involving active deception were admissible under ER 609(a)(2).

The Washington Supreme Court issued its most recent ruling bearing on the overall classification of theft crimes as crimes of dishonesty in State v. Ray. In Ray, the defendant was convicted of first degree incest involving his daughter. The trial court denied defendant's petition to admit evidence of his daughter's past criminal conviction for theft, under the purpose of impeaching her credibility as a witness. The Washington Supreme Court reversed the trial court's ruling and ordered that evidence of the daughter's theft conviction be admitted. In so doing, the court explicitly reversed Burton, and attempted to clarify Brown II by holding that crimes of theft involve dishonesty and should be per se admissible. The Ray court stated that its decision "returned to the basics" and adopted verbatim "the

72. Id. at 154, 761 P.2d at 604 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 650 (1981)).
73. Id. at 154, 761 P.2d at 604.
75. See id. at 558–60, 782 P.2d at 1034–35.
76. The lead opinion in Brown II was signed by only four justices. The other five justices signed concurring opinions. State v. Brown, 113 Wash. 2d 520, 782 P.2d 1013 (1989) (Brown II).
80. Id. at 536, 806 P.2d at 1224.
81. Id. at 543, 806 P.2d at 1227.
82. Id. at 543–44, 806 P.2d at 1227–28.
83. Id. at 545, 806 P.2d at 1228 (quoting State v. Brown, 113 Wash. 2d 520, 551–52, 782 P.2d 1013, 1031 (1989) (Brown II)).
ordinary meaning of the word" rationale used in Brown I and reiterated in Brown II.84

Since Ray, Washington courts have struggled to determine whether "crimes of dishonesty or false statement" extend beyond theft. On the one hand, the courts have expanded the scope of dishonest crimes to include not only theft but also possession of stolen goods.85 Previous convictions for the possession of stolen property are therefore automatically admissible. On the other hand, burglary convictions are not automatically admissible as "crimes of dishonesty or false statement" because burglaries may not always include theft.86 Such conflicting interpretations demonstrate the confusion in Washington State over the definition of "crimes of dishonesty or false statement."

II. THE NEED FOR REFORM IN WASHINGTON

A. Problems with Washington’s Current Approach

Washington’s current approach on the admissibility of prior theft convictions is overinclusive and unfair to criminal defendants. Under current Washington law, all theft crimes are automatically admissible as crimes of “dishonesty or false statement.” Washington’s liberal interpretation of crimes of “dishonesty or false statement” fails to establish a link between past theft crimes and future behavior. This failure makes the discretionary portion of ER 609(a) superfluous. Additionally, Washington’s interpretation forces defendants into the Hobson’s choice described by the Burton court. Moreover, the liberal approach violates the strong judicial interest against propensity evidence. Finally, Washington courts achieve no real benefits to counter these drawbacks.

84. Id.; see supra notes 72-73 and accompanying text.
85. State v. McKinsey, 116 Wash. 2d 911, 810 P.2d 907 (1991). The defendant in McKinsey was charged with first degree trafficking in stolen property and two counts of burglary. Id. at 912, 810 P.2d at 908. The Washington Supreme Court affirmed the trial court’s ruling and reasoned that because the statutory elements of the crime included knowingly receiving, retaining, possessing, concealing or disposing of stolen property, the crime was one of dishonesty under the "ordinary meaning of the word" reasoning of Brown II and Ray. Id. at 913, 810 P.2d at 909.
86. Although McKinsey demonstrates the Washington Supreme Court’s expansionist tendency towards the interpretation of crimes of “dishonesty or false statement,” the Washington Court of Appeals has since established some limits on the supreme court’s liberal interpretation. State v. Watkins, 61 Wash. App. 552, 556-57, 811 P.2d 953, 955-56 (1991) (holding that a burglary conviction was automatically admissible under ER 605(a)(2) only if the record before the trial court showed that the burglary involved theft).
1. Washington's Interpretation Fails to Achieve a Necessary Link Between Past Theft Crimes and Future Behavior

The federal legislative history of FRE 609(a)(2) indicates that the drafters intended for crimes of dishonesty to include only crimes of the nature of crimen falsi. The definition of crimes involving dishonesty or false statements is of critical importance, because the presumption behind automatic admission, that the probative value of crimes of dishonesty or false statement exceeds any prejudicial effect to the defendant, is inappropriate if the term "dishonesty" is defined too broadly. When Washington adopted verbatim the congressional language of Rule 609, it implicitly adopted the compromise position of Congress. This suggests that the Washington Legislature intended that admission under ER 609(a)(2) be limited to crimes of the nature of crimen falsi, as suggested by the congressional compromise. Washington's verbatim adoption of the FRE 609 indicates its acceptance of the interpretation given to that rule by the federal courts and legislature. The current interpretation of ER 609 in Washington, however, distorts that intent.

Washington adopted ER 609 to restrict the all-encompassing reach of RCW 10.52.030, which had forced Washington courts to systematically admit into evidence all previous convictions. As the Washington Supreme Court stated in Burton, the only purpose of allowing impeachment by prior conviction evidence under ER 609 is to shed light on the defendant's credibility as a witness. Prior convictions

88. See ARONSON, supra note 3, at 609-9; see also MCCORMICK ON EVIDENCE, supra note 16, § 43, at 99-100.
89. Burton, 101 Wash. 2d at 6, 676 P.2d at 980 (citing Judicial Council Comment, ER 609, 91 Wash. 2d 1150 (1978)); see, e.g., Eberle v. Sutor, 3 Wash. App. 387, 389, 475 P.2d 564, 566 (1970) (stating that "where a federal rule has been adopted as the state rule, the construction of the former should be applied to the latter"); see Rinke v. Johns-Manville Corp., 47 Wash. App. 222, 225, 734 P.2d 533, 536 (1987) (stating that because the texts of CR 17(a) and its federal counterpart are identical, Washington courts should use the federal court interpretations of the corresponding federal rule as persuasive authority when interpreting the state rule); see also Hurson, supra note 33, at 118 n.4.
90. By stating in Brown I that it is not bound to follow federal interpretation of ER 609, the Washington Supreme Court has ignored a common understanding in Washington courts in order to achieve a desired result. See supra note 89.
91. See supra note 89 and accompanying text.
92. See Burton, 101 Wash. 2d at 3–5, 676 P.2d at 978–79; see also Judicial Council Comment, ER 609, 91 Wash. 2d 1150 (1978); supra notes 31–33 and accompanying text.
93. See supra note 92.
94. Burton, 101 Wash. 2d at 7, 676 P.2d at 980.
admitted for impeachment purposes must therefore have some relevance to the defendant's propensity to tell the truth.\textsuperscript{95}

Theft crimes, however, are generally distinguishable from crimes involving false statement or false testimony. The latter crimes are probative of the credibility of the witness because they demonstrate a direct history of lying, whereas a person's prior theft conviction does not necessarily indicate that the person is likely to lie under oath. If we assume, as our judicial system does, that past actions are predictive of future actions, then a history of lying displays a future possibility of lying. This predictive paradigm, however, breaks down when the past action is not similar to the future action. In this case, using theft to predict lying is a non sequitur. Shoplifting, for example, is often a compulsive act requiring nothing more than the physical action of stealth. Bad as it may be, shoplifting “does not carry with it a tinge of falsification.”\textsuperscript{96} Failure to respect property, however, does not indicate a propensity to lie under oath.\textsuperscript{97} It has little to do with the verbal act of lying required to perjure oneself on the stand.\textsuperscript{98} Simply because a defendant has committed a theft crime in the past does not mean that the defendant will lie when testifying.\textsuperscript{99} Because theft and lying are dissimilar, using theft to discredit a witness is simply a return to the archaic “bad person” standard condemned by Wigmore.\textsuperscript{100}

2. The Discretionary Portion of ER 609(a) Is Superfluous

Washington's overbroad definition of crimes of dishonesty has made the discretionary provisions of ER 609(a)(1) useless and has returned the courts to virtual automatic admission standards. To be admissible under ER 609(a)(1), prior convictions must be punishable by death or imprisonment in excess of one year, and the court must determine that the probative value of the prior convictions outweighs their prejudicial effect.\textsuperscript{101} Many crimes such as robbery, burglary, and kidnapping, may have punishments in excess of a year, but are of little probative

\textsuperscript{95} See United States v. Smith, 551 F.2d 348 (D.C. Cir. 1976).

\textsuperscript{96} United States v. Ortega, 561 F.2d 803, 806 (9th Cir. 1977) (concluding that shoplifting does not demonstrate a propensity to lie on the stand and is therefore inadmissible under FRE 609(a)(2)).

\textsuperscript{97} Id.

\textsuperscript{98} Burton, 101 Wash. 2d at 10, 676 P.2d at 981.

\textsuperscript{99} Id. at 8, 676 P.2d at 980; see also Anthony N. Doob & Hershi M. Kirshenbaum, \textit{Some Empirical Evidence on the Effect of s. 12 of the Canada Evidence Act upon an Accused}, 15 CRIM. L.Q. 88, 88-89 (1972) (stating that a person who has stolen in one situation is not necessarily likely to lie in a second situation).

\textsuperscript{100} See supra note 8 and accompanying text.

\textsuperscript{101} See supra notes 51-52 and accompanying text.
Evidence Rule 609(a)(2)

value as to the defendant’s veracity. When balanced against their prejudicial effect,\(^\text{102}\) evidence of these convictions would be inadmissible under ER 609(a)(1). In Ray, however, the Washington Supreme Court adopted the view that dishonesty inheres in almost any criminal offense other than assaultive felonies.\(^\text{103}\) In so holding, Ray violated at least two canons of statutory construction.

The first canon misconstrued by the Ray interpretation of ER 609 is that words are to be taken in their ordinary meaning and should be so construed as to agree with the evident intention of the statute or to make the statute operative.\(^\text{104}\) The Ray court attempts to give “dishonesty” its ordinary meaning, but its interpretation of ER 609 ignores the intent of the statute as promulgated by its legislative history. This interpretation renders ER 609 inoperative by placing it in an internal conflict.\(^\text{105}\) Critics of this form of textualism, used by Washington, assert that reliance on the dictionary definition of statutory words often results in interpretive blunders.\(^\text{106}\) By placing too much emphasis on the dictionary meaning of the word “dishonesty,” the Ray court is guilty of exactly such a blunder. Because all crimes arguably contain some element of dishonesty, they are automatically admissible under Ray’s interpretation of ER 609(a)(2). Such an interpretation not only ignores the intent of ER 609, but also violates the fundamental prohibition against propensity evidence that runs through the laws of evidence.\(^\text{107}\)

Additionally the Ray interpretation of “dishonesty” violates the cannon of statutory construction requiring courts to read statutes so as to give effect to all parts.\(^\text{108}\) In defining the word “dishonesty” too broadly, the Washington Supreme Court has failed to give effect to all parts of ER 609. The Ray court has made felony and misdemeanor crimes that would have been inadmissible under the ER 609(a)(1) bal-

---


103. In Brown II, 113 Wash. 2d at 553, 782 P.2d at 1031, the court stated that at least assaultive felonies would not fall within ER 609(a)(2) as crimes of dishonesty. In State v. Ray, 116 Wash. 2d 531, 545–46, 806 P.2d 1220, 1228–29 (1991), the court explicitly adopted the reasoning in Brown II.

104. See, e.g., Karl N. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed, 3 Vand. L. Rev. 395, 404 (1950). The stated canon is a combination of two opposing canons mentioned in the Llewellyn article.

105. See supra notes 40–43 and accompanying text; see also supra notes 101–03 and accompanying text.


107. See infra note 119.

108. Llewellyn, supra note 104, at 404.
ancing test automatically admissible under ER 609(a)(2), thereby eliminating the need for the discretionary balancing authority under ER 609(a)(1). By making nearly all prior convictions automatically admissible, the court has rendered ER 609(a)(1) superfluous and has defeated the purpose of adopting ER 609, which was to return discretion to trial judges.

3. The Defendant’s Dilemma Persists

The liberal interpretation of crimes of “dishonesty and false statement” in Ray places the defendant in an unfair dilemma. Besides rendering ER 609(a)(1) superfluous, the court’s interpretation is problematic because prior convictions may readily be misconstrued as evidence of the defendant’s guilt. A jury, upon hearing of the prior conviction, will be tempted to treat the bad act as evidence not only that the defendant is lying from the witness stand, but also that the defendant acted as alleged in the case at hand. Such an inference presents defendants with the same hollow choice they faced under RCW 10.52.030. Defendants must choose between testifying in their own defense and facing the inherent prejudice associated with prior conviction evidence, or foregoing the constitutional right to testify and allowing the jury to infer guilt from their silence.

Scholars advocating the Ray court’s interpretation of crimes of “dishonesty and false statement” argue that safeguards such as limiting instructions issued to the jury setting out the proper use of impeachment evidence alleviate the problem of undue prejudice. As the Washington Supreme Court has recognized, however, such limiting instructions are frequently, if not always, ineffective. In addition, studies have shown that juries customarily ignore limiting instructions.

110. See Judicial Council Comment, ER 609, 91 Wash. 2d 1150 (1978) (The Washington Supreme Court explicitly chose to impose more restrictions on admissibility by adopting ER 609); see supra notes 6-10, 58-63 and accompanying text.
112. See supra note 33.
113. See supra notes 32-33 and accompanying text.
114. See supra notes 32-33 and accompanying text.
115. See State v. Brown, 111 Wash. 2d 124, 133, 761 P.2d 588, 593 (1988) (Brown I) (stating that where the courts admit evidence of prior crimes under ER 609(a) for the purpose of impeaching a witness’ credibility, “an instruction should be given that the conviction is admissible only on the issue of the witness’ credibility, and, where the defendant is the witness impeached, may not be considered on the issue of guilt”).
Evidence Rule 609(a)(2)

and use evidence of prior convictions to draw prejudicial and legally impermissible inferences.\(^\text{117}\)

4. Washington's Current Approach Violates the Strong Judicial Interest Against Propensity Evidence

Allowing the jury to infer current guilt from past crimes\(^\text{118}\) goes directly against the strong judicial interest in prohibiting propensity evidence.\(^\text{119}\) Although impermissible,\(^\text{120}\) Washington's current interpretation of ER 609(a)(2) perpetuates court reliance on propensity evidence.\(^\text{121}\) Even though the purpose of admitting prior conviction evidence is to impeach the witness' credibility, studies show that admission of such evidence significantly increases the chances of a guilty verdict.\(^\text{122}\) The studies attributed their result to juries' tendency to perceive prior convictions as proof not only of the defendant's lack of veracity, but also of the defendant's general propensity to commit crimes.\(^\text{123}\) This combination causes the jury to believe it is more likely that the defendant committed the crime charged.\(^\text{124}\)

Jury examinations conducted by the researchers at the University of Chicago, for example, indicated a widespread inability or unwillingness of jurors to understand or follow the court's instruction on the use of a defendant's prior criminal record for impeachment pur-

---

\(^\text{117. See infra notes 122–26 and accompanying text; see also Doob & Kirshenbaum, supra note 99, at 89 (stating that the assumption that limiting instructions are effective is unsupported in psychological literature).}\)

\(^\text{118. See supra notes 111–14 and accompanying text.}\)

\(^\text{119. See Wash. R. Evid. 404(b) (prohibiting the introduction of "[e]vidence of other crimes, wrongs, or acts to prove the character of a person in order to show that he acted in conformity therewith ...."); see also Note, Procedural Protections of the Criminal Defendant—A Reevaluation of the Privilege Against Self-Incrimination and the Rule Excluding Evidence of Propensity to Commit Crime, 78 Harv. L. Rev. 426, 440 (1964) ("The admission of character evidence for the purpose of impeaching the defendant's credibility seems wholly inconsistent with the principle of the propensity rule.").}\)

\(^\text{120. See supra notes 11–15 and accompanying text.}\)

\(^\text{121. See supra notes 111–14 and accompanying text.}\)

\(^\text{122. See, e.g., James E. Beaver & Steven L. Marques, A Proposal to Modify the Rule on Criminal Conviction Impeachment, 58 Temp. L.Q. 585, 598–600 (1985) (stating that the increased chance of a guilty verdict arising from the admission of prior conviction evidence is too prejudicial because it flies in the face of the presumption of innocence and the Anglo-American notion that we try cases rather than people); W. R. Cornish & A. P. Sealy, Juries and the Rules of Evidence, 1973 Crim. L. Rev. 208 (In an experiment, the number of jurors voting to convict a defendant rose 30%, after being exposed to the impeachment evidence of the defendant's past conviction.); see also supra note 33.}\)

\(^\text{123. See To Take the Stand, supra note 6, at 220.}\)

\(^\text{124. See id.}\)
Jurors almost universally used the defendant's prior convictions to conclude that the defendant was a bad person and therefore was more likely to be guilty of the crime charged. Because the jury is likely to misuse the admission of prior convictions to infer that the defendant has a criminal propensity rather than a propensity to lie on the stand, the crimes admitted under ER 609(a)(2) should be limited.

5. **Automatic Admission of Prior Conviction Evidence Is Not Necessary**

If the automatic admission of prior conviction evidence could be shown to be an indispensable part of the truth-finding process, these problems would be justified. Automatic admission of prior theft convictions, however, adds only negligibly to the truth-finding process. In light of the other protections aimed at aiding the jury in their truth-finding function, the admission of prior conviction evidence is unnecessary to ensure that a jury does not overestimate the veracity of a criminal defendant, for two reasons. First, the jury naturally distrusts a criminal defendant and is suspicious of the defendant's self-interested testimony. Second, the criminal defendant's testimony is subject to rigorous testing in the context of an adversarial proceeding before the jury. The combined effect of the elements of confrontation: physical presence, oath, cross-examination, and jury's observation of the witness' demeanor, serves the purpose of evaluating the credibility of the defendant's testimony. There is very little likelihood that a jury will afford a defendant's testimony more weight than it deserves. The truth-finding mission of the criminal process is thus not furthered by automatic admission of past criminal convictions. The combination of these problems and the dispensability of auto-

---

125. Comment, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 YALE L.J. 763, 777 (1961) (citing letters from Dale W. Broeder, Associate Professor, the University of Nebraska College of Law, and Harry Kalven, Jr., Professor, the University of Chicago Law School, both of whom conducted intensive jury interviews).

126. Id.

127. See Beaver & Marques, *supra* note 122, at 615 ("The jury's ability to determine whether defendants are lying from their demeanor as witnesses and from their reactions to questions on cross-examination eliminates the need for impeachment by evidence of prior convictions.").

128. Id. at 614–15 (citing several studies supporting the dispensability of the use of prior criminal convictions for impeachment purposes).


matic admission standards suggest a need for reforming Washington's current approach.

B. Three Possible Solutions

Washington currently has at least three options available to correct the problems associated with admitting evidence of prior convictions. The first approach would eliminate ER 609(a)(2) and subject the admission of all prior convictions to the balancing approach of ER 609(a)(1). The second approach would rewrite ER 609(a)(2) to expressly define "crimes of dishonesty or false statement." The third approach, as utilized by most federal courts, would allow the trial court to consider the circumstances leading to the past criminal convictions before ruling on their admissibility. Although all three models are viable solutions to Washington's problem, the Washington Supreme Court should adopt the third model because it best balances the competing interests involved in the admission of prior criminal convictions.

1. The Deletion Model: Eliminate ER 609(a)(2)

Eliminating ER 609(a)(2) would subject all prior criminal convictions to the balancing approach of ER 609(a)(1), thereby balancing the probative value of a prior conviction against its prejudicial effect. This approach considers automatic admissibility under ER 609(a)(2) unnecessary because most crimes that involve dishonesty or false statement, and are therefore probative of a defendant's veracity, would be admissible under the balancing approach of ER 609(a)(1). Conversely, all crimes that are not probative of the defendant's truthfulness or are unfairly prejudicial would be excluded. In an example provided by Congressman Dennis during legislative hearings, the prosecution in a case against a labor riot leader may wish to bring up evidence that the defendant was previously convicted of stealing a car. In this instance, the defendant's past criminal conviction would probably have no bearing on the validity of his defense or his propensity to testify honestly. Yet, if admitted, the jury may think that the defendant is a bad person and therefore more likely to be guilty of the crime charged. Accordingly, a court would consider evidence of the prior

---

131. Although most crimes involving dishonesty or false statement would be admissible under ER 609(a)(1), some crimes may be excluded because they would not meet the one year imprisonment requirement. Those few crimes, however, would probably be of little probative value.
132. See supra note 36.
133. See supra note 125.
conviction highly prejudicial with only low probative value and would rule the evidence inadmissible.

One advantage of the deletion model is that it would eliminate the negative aspects of the defendant’s Hobson’s choice. By deleting ER 609(a)(2), a criminal defendant witness would be faced with a “Hobson’s choice” only when past crimes are relevant to the defendant’s credibility. Procedurally under ER 609(a)(1), the trial judge would rule on the admissibility of the potentially prejudicial conviction evidence prior to the commencement of trial. If the prior conviction evidence is too prejudicial, the judge will exclude it using the balancing approach and the defendant will be free to take the stand without being subjected to cross examination regarding prior convictions. If the judge believes the evidence bears on the witness’ veracity, the judge will admit the evidence, and the witness would have a choice. Although the choice is parallel to the “Hobson’s choice,” it is a choice the witness made fair through previous deceit. In this way, the deletion model would advance the truth-finding mission of the trial court.

2. **The Statutory Limitation Model: Rewrite ER 609(a)(2) to Expressly Define Crimes of “Dishonesty or False Statement”**

A second approach would be to amend ER 609(a)(2) to include the exact definition of crimes of “dishonesty or false statement.” The new statute would include an express list of those crimes that would be admissible because they are in the nature of crimen falsi. Using federal legislative history new language would be added to ER 609(a)(2) as follows:

 Crimes of dishonesty or false statement include only 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 untruthfulness, deceit, or falsification bearing on the accused’s propensity to testify truthfully.135

This approach would eliminate the admission of highly prejudicial, yet irrelevant crimes, by significantly limiting the type of crimes

---

134. *But see* State v. Brown, 113 Wash. 2d 520, 533–41, 782 P.2d 1013, 1021–25 (1989) (*Brown II*) (adopting the holding of the United States Supreme Court in *Luce v. United States*, 469 U.S. 38, 43 (1984), that denial of defendants’ motions in limine to exclude evidence of prior convictions for purposes of impeaching their credibility under rule 609(a) cannot be preserved or raised on appeal unless the defendants actually testify).

admissible as evidence to impeach the credibility of a witness. This proposal limits the automatic admission of evidence to those crimes determined to be directly relevant to the witness’ credibility and eliminates the current practice of introducing, under the guise of impeachment, evidence of highly prejudicial crimes that are marginally, if at all, probative of the defendant’s veracity.  

The only crimes admitted against the defendant witness would be crimes expressly defined as possessing the nature of crimen falsi. The courts would not be permitted to deviate from the definition by looking beyond the necessary elements of the offense to determine whether the offense was actually committed in a fraudulent or deceitful manner.

Although this approach alleviates the problem of the admission of nonprobative evidence, it does not prevent all prejudice to the defendant witness. This prejudice, however, is not undue. Crimes of the nature of crimen falsi reflect directly on the defendant witness’ propensity to lie on the stand. Any prejudice caused by their admission is subordinate to the strong public policy of providing the jury with as much relevant evidence as possible. This approach serves the purpose of impeachment evidence by enlightening the jury as to the defendant’s credibility as a witness.

3. **The Federal Model: A Viable Compromise**

Washington should adopt a third approach, using a combination of the Burton analysis and the federal approach, to determine whether a prior conviction actually involved dishonesty or false statements. Under this approach, the Washington courts would narrowly define the scope of crimes of dishonesty, using as their guide federal legislative history and its definition of crimes of dishonesty as ones of the nature of crimen falsi. In addition, Washington courts would adopt and follow the federal approach and allow the trial court to inquire into the underlying facts of a prior conviction in order to determine whether the conviction was for a crime involving false statement or dishonesty. Such an analysis would be consistent with the majority of the federal circuits. This analysis would also comport more

---


137. *See supra* note 40 and accompanying text.


139. *See supra* note 45.
closely with common sense and everyday notions of fairness. It is incomprehensible that a petty theft conviction is admissible to impeach a witness regardless of its prejudicial effect, while a past conviction for murder is only admissible if it survives a balancing test. If either is to be admissible, both categories of crimes should be subject to the balancing approach.

The third solution presents a compromise between the first and second solutions. Under this solution, much like the statutory limitation model, Washington courts would use the narrow definition of dishonest crimes represented by the category of crimes of the nature of crimen falsi. Crimes within the nature of crimen falsi would be automatically admissible without further review by the trial court. Unlike the statutory limitation model, however, the courts would be allowed to look at the facts underlying prior convictions, other than those within the automatic admissibility category, to determine whether the defendants in fact engaged in any dishonest behavior. This approach is also similar to the deletion model because it would require the courts to look at each circumstance individually to determine its admissibility. Unlike the deletion model, however, this approach would be more consistent with the congressional compromise over FRE 609 because it would allow for some crimes that would be per se admissible.

Under the federal model, the problem of the admission of nonprobative evidence would be eliminated. Only crimes with a direct bearing on the accused's propensity to testify truthfully would be admissible. Such crimes would include not only crimes which involve fraud or deceit as an element of the crime (crimes of the nature of crimen falsi), but also crimes that were in fact perpetrated through the use of fraudulent or deceitful means.

This solution would also greatly reduce any undue prejudice to the accused. By looking at the underlying facts of the prior conviction, the court would admit only evidence that was actually indicative of the accused's propensity to lie on the stand. The purpose of impeachment evidence is to enlighten the jury as to the defendant's credibility on the witness stand. If the prior conviction is probative of the defendant's willingness to lie, then any resulting prejudice would be justified.

III. CONCLUSION

Evidence Rule 609(a) has been one of the most intensely debated rules of evidence in the State of Washington. The Washington Supreme Court has changed its interpretation of this rule four times in the past eight years. Its most recent interpretation is plagued with problems. Washington’s current liberal approach to the admission of prior theft convictions fails to establish a necessary link between past theft crimes and future behavior. Furthermore, the interpretation renders the discretionary portion of ER 609(a)(1) superfluous. In addition, the current interpretation is contrary to the judicial interest against propensity evidence and forces the defendant into a Hobson’s choice without providing any substantial counterbalancing benefits. In effect, the current approach places defendant witnesses in the same unfair position they would have been in prior to the adoption of ER 609.

In order to realize the goals of ER 609, Washington should construe the definition of “dishonest” crimes in ER 609(a)(2) more restrictively. The adoption of one of the three approaches proposed here could help Washington achieve this goal. First, Washington could eliminate ER 609(a)(2) and subject all prior convictions to the discretionary test of ER 609(a)(1). Second, Washington could statutorily define crimes of dishonesty or false statement and limit admission to only those crimes. Third, Washington could automatically admit a very limited number of convictions as crimes of dishonesty and also allow trial courts to review the circumstances surrounding the other prior convictions to determine whether the defendant in fact engaged in dishonest behavior. Because the third approach best balances the societal interests of truth-finding and protecting the innocent, it should be adopted by Washington State.