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Evidence: Rule 609--Automatic Admissibility of Civil Witnesses' Prior Criminal Convictions "Regardless of Ensuant Unfair Prejudice"

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EVIDENCE: RULE 609 — AUTOMATIC ADMISSIBILITY OF CIVIL WITNESSES' PRIOR CRIMINAL CONVICTIONS "REGARDLESS OF ENSUANT UNFAIR PREJUDICE"*

Green v. Bock Laundry Machine Co., 109 S. Ct. 1981 (1989)

Petitioner filed a products liability suit against respondent[1] after a machine that respondent manufactured tore off petitioner's arm.[2] In a pretrial motion petitioner sought to exclude evidence of his prior felony convictions[3] that respondent would offer to impeach petitioner's testimony.[4] The district court denied petitioner's motion. Consequently, respondent impeached petitioner's trial testimony with evidence of petitioner's prior felony convictions.[5] The jury returned a verdict for respondent, and petitioner appealed, contending that the district court erred in admitting the impeachment evidence.[6] The Third Circuit summarily affirmed the district court's ruling.[7] On certiorari, the United States Supreme Court affirmed and HELD, in civil cases Federal Rule of Evidence 609(a)(1)[8] requires trial courts to admit all

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*Dedicated to my family: my grandfather, General Ralph Pastor; my parents, Howard and Gail Sonn; my grandmother, Mary Pastor; and my brothers, Bruce, David, and Jeff. Their love and support have provided continuous encouragement. Special thanks to my advisor, Alexa Pavchinski.

1. Green v. Bock Laundry Mach. Co., 109 S. Ct. 1981, 1983 (1989).

2. *Id.* The petitioner was a prisoner participating in a work-release employment program. He based his product liability action against respondent on the argument that respondent had not adequately instructed him about the dangerous character of the machine that tore his arm off. Therefore, the credibility of petitioner's testimony was crucial. *Id.*

3. *Id.* The petitioner "had been convicted of conspiracy to commit burglary and burglary." *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* The Supreme Court stated that the circuit court followed precedent established in Diggs v. Lyons, 741 F.2d 577 (3d Cir. 1984), *cert. denied*, 471 U.S. 1078 (1985). For a discussion of *Diggs*, see *infra* notes 36-53 and accompanying text.

8. Rule 609(a)(1) states,

> For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime *shall* be admitted if elicited from the witness 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 the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant . . . .

FED. R. EVID. 609(a)(1) (emphasis added).

prior conviction impeachment evidence[9] "regardless of ensuant unfair prejudice to the witness or the party offering the testimony."[10]

Under common law, impeachment of a witness with his or her prior convictions did not present an issue because convicted felons were automatically disqualified as witnesses.[11] One commentator observed that "'the disqualification arose as part of the punishment for the crime, only later being rationalized on the basis that [felons were] unworthy of belief.'"[12] Gradually, legislatures and courts relaxed the common law blanket exclusion and allowed convicted felons to testify at both civil and criminal trials.[13] Parties, however, could always impeach the opposing parties' witnesses' testimonies with evidence of any crimen falsi[14] or prior felony conviction.[15] Beginning in the 1960s many jurisdictions responded to this automatic admissibility of prior conviction impeachment evidence by granting trial judges the discretion to exclude such evidence.[16]

In *Luck v. United States*[17] the District of Columbia Circuit Court adopted this discretionary approach.[18] The defendant in *Luck* was convicted of larceny[19] after the state introduced evidence of his prior, unrelated felony conviction.[20] The *Luck* court could have interpreted

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9. *Green*, 109 S. Ct. at 1993. The Court held that no one except a criminal defendant is entitled to the benefit of the balancing provision found in Rule 609(a)(1). *Id.* at 1992.

10. *Id.* The Court further held that the balancing provision found in Rule 403 does not apply to prior conviction impeachment evidence. *Id.* at 1993. Rule 403 provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

11. *Green*, 109 S. Ct. at 1985 (citing 2 J. WIGMORE, EVIDENCE § 519 (3d ed. 1940)).

12. *Id.* (quoting 3 J. WEINSTEIN & M. BERGER, WEINSTEINS'S EVIDENCE § 609[02], at 609-58 (1988) (citing 2 J. WIGMORE, EVIDENCE § 519 (3d ed. 1940))).

13. *Id.* at 1986; *see* E. CLEARY, MCCORMICK ON EVIDENCE § 43 (3d ed. 1984); *see also* 1 J. WIGMORE, EVIDENCE § 519, at 650 (1st ed. 1904) ("There can be . . . no justification for the disqualification of a person by reason of conviction of crime; and legislation . . . in most jurisdictions . . . [has] abolish[ed] the common law rule.").

14. *Green*, 109 S. Ct. at 1986 n.10. Crimen falsi are "crimes in the nature of perjury . . ., false statement, criminal fraud, embezzlement, false pretense, or any other offense which involves some element of deceitfulness, untruthfulness, or falsification." BLACK'S LAW DICTIONARY 196 (abr. 5th ed. 1983).

15. *Green*, 109 S. Ct. at 1986.

16. *Id.* n.11; *see also* Luck v. United States, 348 F.2d 763, 769 (D.C. Cir. 1965) ("We think Congress has left room for . . . discretion to operate."). For a discussion of other cases holding that Congress intended judicial discretion in this area, see *infra* note 28.

17. 348 F.2d 763 (D.C. Cir. 1965).

18. *Id.* at 769.

19. *Id.* at 764. The defendant was also convicted of housebreaking. *Id.*

20. *Id.* at 766. The defendant's prior conviction was for grand larceny. *Id.*

the relevant District of Columbia evidence statute[21] to require trial court judges to automatically admit prior conviction impeachment evidence.[22] Instead, the *Luck* court held that the trial judge had discretion to exclude evidence of a witness's prior convictions when the prejudicial effect of the evidence far outweighed its probative value.[23]

The *Luck* court reasoned that automatically admitting prior conviction impeachment evidence might discourage witnesses from testifying and thus thwart opportunities to establish the truth.[24] Because judges commonly balanced prejudicial effect with probative value when dealing with other types of evidence,[25] judges could be trusted to decide whether evidence of a witness's prior criminal convictions would further the jury's search for the truth.[26] To assist judges in applying the balancing test when considering the admissibility of prior conviction impeachment evidence, the *Luck* court identified several relevant factors, including the nature of the defendant's criminal convictions, the length of the defendant's criminal record, and the defendant's overall circumstances.[27]

A number of federal courts adopted the *Luck* approach.[28] Moreover, *Luck* had a significant impact on the formulation of Federal Rule of

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21. *See* D.C. CODE ANN. § 305 (1961) (evidence of prior convictions may be admitted to impeach a witness's credibility).

22. *See Luck*, 348 F.2d at 771 (Danaber, J., dissenting) (interpreting D.C. CODE ANN. § 305 (1961) as requiring prior conviction impeachment evidence to be automatically admitted).

23. *Id.* at 768 (majority opinion). This test is basically the same standard found in Rule 403. For the text of Rule 403, see *supra* note 10.

24. The *Luck* court stated,

> There may well be cases where the trial judge might think that the cause of truth would be helped more by letting the jury hear the defendant's story than by the defendant's foregoing that opportunity because of the fear of prejudice founded upon a prior conviction . . . . [T]he goal of a criminal trial is the disposition of the charge in accordance with the truth.

Luck, 348 F.2d at 768-69 (footnotes omitted).

25. *Id.* at 768.

26. *See id.* at 768-69.

27. *See id.* at 769. The court also suggested that a court could look at the defendant's age and the extent to which the jury's search for truth would be aided by hearing the defendant's story without knowledge of his prior convictions. *Id.*

28. *See, e.g.*, United States v. Vigo, 435 F.2d 1347 (5th Cir. 1970) (courts should determine the admissibility of prior conviction impeachment evidence on the basis of how "devastating" it is to the defendant's case), *cert. denied sub nom.* Arenado v. United States, 403 U.S. 908 (1971); United States v. Johnson, 412 F.2d 753, 756 (1st Cir. 1969) (reasoning that the trial court did not "abuse its discretion" by admitting evidence of the defendant's prior conviction), *cert. denied*, 397 U.S. 944 (1970); United States v. Palumbo, 401 F.2d 270, 273 (2d Cir. 1968) (refusing to "accept the broad proposition that a trial judge has no discretion to bar use of prior convictions to impeach a defendant"), *cert. denied*, 394 U.S. 947 (1969).

Evidence 609,[29] which was enacted in 1975.[30] While Rule 609 permits the impeachment of a witness with his or her crimen falsi convictions,[31] the rule also contains a balancing provision similar to the *Luck* court's balancing test. Rule 609(a)(1) provides that evidence of prior criminal convictions is admissible to impeach a witness's credibility if the crime underlying the impeachment evidence is sufficiently severe[32] and more probative of the witness's veracity than prejudicial to the defendant.[33] In its final form, the rule ostensibly grants the judiciary discretion to bar the admission of prior conviction impeachment evidence of serious offenses other than crimen falsi. However, the ambiguous wording of Rule 609[34] caused courts to split over the circumstances under which a judge could exercise this discretion to exclude evidence of prior convictions.[35]

Until the Third Circuit's decision in *Diggs v. Lyons*,[36] many courts had relied on Federal Rule of Evidence 403 to justify the exercise of judicial discretion over the admissibility of prior conviction impeachment evidence.[37] Rule 403 allows courts to exclude relevant evidence

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29. *Green*, 109 S. Ct. at 1988. The second draft of Rule 609(a) provided a discretionary balancing test applicable to all witnesses; it did not discriminate between felony and crimen falsi convictions. *Id.* (citing PROPOSED RULES OF EVIDENCE (II), 51 F.R.D. 315, 391 (1971)); *see also* HOUSE JUD. SUBCOMM., 93d Cong., 2d Sess., 120 CONG. REC. 2374, 2378 (1974) (applying a balancing test to all prior felony convictions except convictions involving dishonesty or false statement). The House Judiciary Subcommittee's proposal allowed impeachment by prior convictions only if the conviction was for a crime of dishonesty or false statements. *Id.* at 2374.

30. Federal Rules of Evidence Act, Pub. L. 93-595, 88 Stat. 1926 (1975).

31. For the text of Rule 609(a)(1), see *supra* note 8.

32. FED. R. EVID. 609(a)(1) (crimes "punishable by death or imprisonment in excess of one year under the law under which the witness was convicted" admissible to impeach a witness).

33. *Id.*

34. *See Green*, 109 S. Ct. at 1985 (the word "defendant" has been interpreted to apply to all party witnesses); *id.* at 1994 (Scalia, J., concurring in the judgment) (unjust and irrational for "defendant" in Rule 609(a)(1) to apply civil defendants and not civil plaintiffs).

35. *Compare* Diggs v. Lyons, 741 F.2d 577, 579 (3d Cir. 1984) (the balancing provision found in Rule 609(a)(1) is available only for the benefit of criminal defendants), *cert. denied*, 471 U.S. 1078 (1985) *with* Howard v. Gonzales, 658 F.2d 352, 358 (5th Cir. 1981) (assuming without analyzing, Rule 609(a)(1) protects civil witnesses from unfair impeachment) *and* Lenard v. Arguento, 699 F.2d 874, 896 (7th Cir. 1983) (no abuse of discretion to exclude evidence of police officer defendant's criminal conduct, when the conduct did not fall within one of the admissibility exceptions of Rule 404(b)), *cert. denied*, 464 U.S. 815 (1983). For civil cases in which courts invoked Rule 403 to exclude prior conviction impeachment evidence, see Shows v. M/V Red Eagle, 695 F.2d 114, 119 (5th Cir. 1983), and Radtke v. Cessna Aircraft Co., 707 F.2d 999, 1000 (8th Cir. 1983).

36. 741 F.2d 577 (3d Cir. 1984).

37. *See Radtke*, 707 F.2d at 1000; Czajka v. Hickman, 703 F.2d 317, 319 (8th Cir. 1983); *Shows*, 695 F.2d at 118; Moore v. Volkswagenwerk, A.G., 575 F. Supp. 919, 921 (D. Md. 1983).

if its prejudicial effect substantially outweighs its probative value.[38] However, the *Diggs* court found that Rule 609 prohibited judges from exercising discretion under Rule 403 to exclude evidence of a witness's prior criminal convictions.[39] The court interpreted Rule 609 to allow judicial discretion only in cases involving prejudice to a criminal defendant. Thus, in the Third Circuit, trial judges presiding over civil cases no longer had discretion to exclude prior conviction impeachment evidence.[40]

The *Diggs* court reasoned that eliminating judicial discretion in the admission of prior conviction impeachment evidence was consistent with congressional intent.[41] The court noted that, although Congress primarily had focused on the criminal defendant in passing Rule 609,[42] excerpts from legislative debates showed that Congress recognized the applicability of Rule 609 to civil cases.[43] Therefore, the *Diggs* court concluded, Congress must have intended for Rule 609 to apply in civil cases.[44] The *Diggs* court then focused on whether Congress intended trial judges to use the discretionary balance test in Rule 403[45] to exclude evidence otherwise admissible under Rule 609.[46] The court

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38. For the text of Rule 403, see *supra* note 10.

39. *Diggs*, 741 F.2d at 582. The court concluded that the balancing provisions in Rule 609(a)(1) did not apply to civil witnesses. *Id. Diggs* was the first court to hold explicitly that Rule 609 bars trial judges from exercising discretion over admission of prior conviction impeachment evidence in civil cases. *Id.* at 583 (Gibbons, J., dissenting) ("The majority opinion creates a split among circuits by holding, for the first time, that in civil cases admission of prior felony convictions for the impeachment of any witness is mandatory.").

40. *Id.* at 582 (majority opinion) ("We have felt compelled to give the rule the effect which the plain meaning of the language and its legislative history requires.").

41. *Id.* at 580. Recognizing that four House Members addressed the applicability of Rule 609 to civil cases, the *Diggs* court found that Congress had not barred explicitly the application of Rule 609 in civil cases. The court thus concluded that Rule 609 applies in civil cases. *Id.* at 581.

42. *Id.* at 579-80 ("From the [House Conference's] report it seems clear that it was the defendant in a criminal case the conferees had particularly in mind as to the balancing test.") (citing H.R. CONF. REP No. 1597, 93d Cong., 2d Sess. (1974) [hereinafter H.R. CONF. REP No. 1597]); *see also* FED. R. EVID. 609 advisory committee's note (referring to balancing the prejudice "to the defendant" to ensure against unfair convictions).

43. *Diggs*, 741 F.2d at 580. Rule 609(b), which excludes convictions greater than 10 years old for impeachment, uses the term "adverse party" in referring to a witness who will be prejudiced. FED. R. EVID. 609(b). This choice of language at least suggests that Congress's use of "defendant" in 609(a) is limited to criminal situations.

44. *Diggs*, 741 F.2d at 581 ("[W]e find no suggestion in the legislative history . . . that Rule 609(a) did not apply to civil cases . . . .").

45. For the text of Rule 403, see *supra* note 10.

46. For the text of Rule 609, see *supra* note 8.

determined that Rule 403 could not apply because Congress intended it to apply only in situations unregulated by another rule.[47]

In dissent Judge Gibbons maintained that the "overwhelming weight of legislative material on Rule 609"[48] suggested that Congress simply overlooked the application of Rule 609 to civil litigants.[49] Because of this congressional oversight, courts were free to apply the discretionary balance test of Rule 403 to prior conviction impeachment evidence in civil cases.[50] Judge Gibbons also argued that fairness and policy dictated that trial judges have discretion to exclude prior conviction impeachment evidence.[51] He reasoned that automatically admitting evidence of prior convictions against totally disinterested witnesses was senseless.[52] Consequently, trial judges should have discretion in deciding whether to exclude such evidence.[53]

The Sixth Circuit in *Donald v. Wilson*[54] followed the rationale of Judge Gibbon's dissent in *Diggs*.[55] The plaintiff in *Donald* sued various government officials under section 1983 of the Federal Tort Claims Act.[56] The defendant in *Donald* impeached the plaintiff's testimony with evidence of the plaintiff's prior rape conviction.[57] After losing at trial, the plaintiff appealed, arguing that the trial court erred in admitting the plaintiff's prior conviction impeachment evidence.[58]

The *Donald* court discussed the inconsistent nature of the federal circuits' interpretations of Rule 609.[59] Most circuit courts unquestion-

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47. *Diggs*, 741 F.2d at 581; *see also* United States v. Wong, 703 F.2d 65, 67 (3d Cir.) ("Rule 403 was not designed to override more specific rules; rather it was 'designed as a guide for the handling of situations for which no specific rules have been formulated.'" (citing United States v. Kiendra, 663 F.2d 349, 354 (1st Cir. 1981) (quoting Fed. R. Evid. 403 advisory committee note))), *cert. denied*, 464 U.S. 894 (1983).

48. *Diggs*, 741 F.2d at 583 (Gibbons, J., dissenting).

49. *Id.* (Gibbons, J., dissenting). Judge Gibbons observed, "The snippets of legislative history in which four Members of Congress anticipated that some court might reach so ridiculous a result, do not persuade me that the result was intended by Congress . . . . The result was, in my view, a legislative oversight as to the legislation's effect upon civil plaintiffs." *Id.* (Gibbons, J., dissenting) (citations omitted).

50. *Id.* (Gibbons, J., dissenting).

51. *Id.* (Gibbons, J., dissenting).

52. *Id.* (Gibbons, J., dissenting).

53. *Id.* (Gibbons, J., dissenting). Judge Gibbons asserted that applying a rigid rule of automatic, nondiscretionary admissibility would cause "patent injustices" to occur. *Id.* (Gibbons, J., dissenting).

54. 847 F.2d 1191 (6th Cir. 1988).

55. *Id.* at 1197.

56. *Id.* at 1193.

57. *Id.* at 1194.

58. *Id.*

59. *Id.* at 1195-97 (quoting Christmas v. Sanders, 759 F.2d 1284 (7th Cir. 1985)).

ingly admitted crimen falsi convictions.[60] Moreover, several federal circuits had assumed the balancing provision in Rule 609(a)(1) applied to all witnesses in civil cases.[61] At least one court, *Diggs*, decided that judges in civil cases had no discretion in deciding whether to admit evidence of prior criminal convictions.[62] Finally, some jurisdictions had held that trial judges could use the balancing provision of Rule 403 to determine whether a civil witness's prior convictions were admissible to impeach the witness's credibility.[63] The *Donald* court agreed with these latter jurisdictions and held that Rule 403 grants a trial court judge the discretion to exclude prior conviction impeachment evidence if its prejudicial effect is substantially greater than its probative value.[64]

Because of the varying interpretations of Rule 609 among the federal circuits, the United States Supreme Court granted certiorari in the instant case.[65] Ultimately, the instant Court rejected the discretionary approaches in *Luck* and *Donald*. The Court instead favored the nondiscretionary approach found in *Diggs*.[66]

The instant Court first examined the consequence of applying the plain language of Rule 609(a)(1) in civil cases. If trial judges applied the discretionary balancing test under Rule 609(a)(1) in civil cases, evidence of a civil plaintiff's prior convictions would always be admissible because such evidence would never be prejudicial "to the defendant."[67] Civil defendants, however, would benefit by the balancing pro-

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60. *Id.* at 1195 (citing United States v. Wong, 703 F.2d 65 (3d Cir.), *cert. denied*, 464 U.S. 842 (1983); United States v. Kiendra, 663 F.2d 349 (1st Cir. 1981); United States v. Leyva, 659 F.2d 118 (9th Cir. 1981), *cert. denied*, 454 U.S. 1156 (1982)). For a discussion of other cases, see *Christmas*, 759 F.2d at 1290-91.

61. *Donald*, 847 F.2d at 1195 (citing Lenard v. Arguento, 699 F.2d 874, 895 (7th Cir.), *cert. denied*, 464 U.S. 815 (1983); Howard v. Gonzales, 658 F.2d 352, 358-59 (5th Cir. 1981); Calhoun v. Baylor, 646 F.2d 1158, 1163 (6th Cir. 1981); Shingleton v. Armor Velvet Corp., 621 F.2d 180, 183 (5th Cir. 1980) (per curiam)).

62. *Id.* (citing *Diggs*, 741 F.2d at 581).

63. *Id.* at 1196 (citing Radtke v. Cessna Aircraft Co., 707 F.2d 999 (8th Cir. 1983); Czajka v. Hickman, 703 F.2d 317 (8th Cir. 1983); Shows v. M/V Red Eagle, 695 F.2d 114 (5th Cir. 1983)).

64. *Id.* at 1197. Although Judge Boyce concurred with the majority's result, he disagreed with the majority's application of Rule 403 to Rule 609. He contended that the advisory committee's note plainly stated that Rule 403 should not govern situations in which a specific rule already predominated. *Id.* at 1199-1200 (Boyce, J., concurring). The majority in *Donald* countered, "[C]ontrary to the suggestion in the dissent, we are not concluding that Rule 403 'overrides' Rule 609 but, rather, that Rule 609(a)(1) was never intended to deal with the case of impeachment of a plaintiff in a civil case, which is the only fact situation we have before us." *Id.* at 1197 n.4.

65. *Green*, 109 S. Ct. at 1982.

66. *Id.* at 1993.

67. *Id.* at 1984-85. The Court reasoned that, assuming a civil plaintiff's witness has prior

vision of Rule 609(a)(1).[68] Because of this disparate treatment, the instant Court concluded that Rule 609(a)(1) "[could] not mean what it said."[69]

The instant Court next looked to legislative history and decided that, although Congress intended Rule 609 to cover both civil and criminal cases,[70] the balancing provision of Rule 609(a)(1) applies only to criminal defendants.[71] The instant Court contended that Congress's silence regarding the application of Rule 609(a)(1) to civil cases meant that Congress intended to follow the great weight of common law, which provided for automatic admissibility of prior conviction impeachment evidence.[72] Furthermore, the instant Court concluded that Congress deliberately failed to grant the judiciary discretion over admissibility of prior conviction impeachment evidence in civil cases.[73] Congress easily could have worded Rule 609(a)(1) so that the balancing provision applied to all witnesses, but it chose not to do so.[74] Thus, Rule 609(a)(1), which provides for automatic admissibility of prior conviction impeachment evidence and which comports with traditional common law notions, should be applied in civil cases.[75]

By determining that Rule 609(a)(1) applies in civil cases, the instant Court rendered Rule 403 inapplicable to prior conviction impeachment evidence.[76] The instant Court emphasized the unreasonableness of applying Rule 403 to a rule that already contains its own balancing provisions.[77] The instant Court further emphasized the inconsistency of applying Rule 403 to part (a)(1) of Rule 609 but not to part (a)(2).[78] Thus, applying Rule 403 to prior conviction impeachment evidence

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criminal convictions and also assuming those prior convictions have at least minimal probative value, allowing those convictions in evidence will never be prejudicial to the defendant. *Id.*

68. *Id.*

69. *Id.* at 1985 n.9 (quoting Campbell v. Greer, 831 F.2d 700, 703 (7th Cir. 1983)). The Court reasoned that this unequal treatment is fundamentally unfair because, given liberal discovery rules, fifth amendment inapplicability, and the need to prove their case, civil plaintiffs will testify in most cases. Moreover, whether a civil litigant will be a plaintiff or defendant many times depends on who arrives at the courthouse steps first. *Id.* at 1985.

70. *Id.* at 1992-93.

71. *Id.* at 1992.

72. *Id.* at 1991.

73. *Id.*

74. *Id.* ("Had the conferees desired to protect other parties or witnesses, they could have done so easily.").

75. *Id.* at 1991-92.

76. *Id.* at 1992-93.

77. *Id.* at 1993. Rule 609 contains three independent balancing provisions: 609(a)(1), 609(b) and 609(d). *See* FED. R. EVID. 609.

78. *Green*, 109 S. Ct. at 1993; *see also* Foster, *Rule 609(a) in the Civil Context: A Recommendation for Reform*, 57 FORD. L. REV. 1, 15 (1988).

was incompatible with the structure and history of Rule 609.[79] The instant Court arrived at its decision "regardless of ensuant unfair prejudice to the witness."[80]

In dissent Justice Blackmun argued that the majority's disregard of unfair prejudice "endorse[d] . . . 'irrationality and unfairness.'"[81] He asserted two reasons why courts should apply a balancing test when prior conviction impeachment evidence is offered against any party.[82] First, the Conference Committee's report on Rule 609 implied that judicial supervision should protect against trials decided by improper influence.[83] Second, the majority's result spurned the mandate of Federal Rule of Evidence 102, which states that the "[r]ules . . . 'shall be construed to secure fairness in administration . . . to the end that the truth may be ascertained and [the] proceedings justly determined' in *all* cases."[84] Ultimately, Justice Blackmun concluded, Congress could not "conceivably . . . have intended" that courts allow prejudicial prior convictions to improperly influence juries' decisions.[85]

Conducting trials free from improper influence and adjudicating issues in harmony with the truth are the judiciary's paramount functions. The instant Court refused to expand the circumstances under which a trial judge may assist a jury in determining whether a witness's prior convictions accurately reflect the witness's veracity.[86] *Luck*, *Diggs*, *Donald*, and the instant case acknowledged that a rigid rule of automatic admissibility of prior conviction impeachment evidence may result in trials decided not by the truth, but by juries' moral judgments of witness character.[87] Nevertheless, the instant

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79. *Green*, 109 S. Ct. at 1993.

80. *Id.*

81. *Id.* at 1995 (Blackmun, J., dissenting) (quoting *id.* at 1992 (Stevens, J., majority opinion)). Justice Brennan and Justice Marshall joined in the dissent. *Id.* (Blackmun, J., dissenting).

82. *Id.* at 1995-98 (Blackmun, J., dissenting).

83. *Id.* at 1996 (Blackmun, J., dissenting) ("I prefer to rely on the underlying reasoning of the [conference] report, rather than on its unfortunate choice of words . . . .").

84. *Id.* at 1997 (Blackmun, J., dissenting) (quoting FED. R. EVID. 102 (emphasis in *Green*)). Justice Brennan vigorously asserted that Rule 102, which dictates that the Federal Rules of Evidence be construed in a fair and just manner, mandates an interpretation of Rule 609 that avoids "'unnecessary hardship.'" *Id.* at 1997-98 (Blackmun, J., dissenting) (quoting Burnet v. Guggenheim, 288 U.S. 280 (1933) ("statute will be construed in such a way to avoid unnecessary hardship when its meaning is uncertain")).

85. *Id.* at 1998 (Blackmun, J., dissenting).

86. *Id.* at 1993 (majority opinion).

87. *Id.* ("Federal Rule of Evidence 609(a)(1) requires a judge to permit impeachment of a civil witness with evidence of prior felony convictions regardless of ensuant unfair prejudice to the witness or the party offering the testimony."); *Donald*, 847 F.2d at 1197 (evidence of a witness's prior criminal convictions, used to impeach the witness, is subject to the balancing

Court approved the automatic admissibility of prior conviction impeachment evidence in civil trials partly because doing so eliminated the unequal treatment of civil litigants.[88]

Although the instant Court's decision eliminated the disparate treatment of civil litigants,[89] it reinforced the common law notion that a witness's prior convictions measures the witness's veracity.[90] Common law automatic admissibility of prior conviction impeachment evidence was predicated on the theory that a witness's prior convictions measures the witness's veracity.[91] However, Congress in passing Rule 609(a)(1) implicitly recognized that a witness's prior convictions and the witness's veracity are often tenuously connected.[92] The balancing provision found in Rule 609(a)(1) provided an escape valve for those situations in which the witness's prior convictions were a poor gauge of the witness's veracity.[93] Yet, the instant Court closed this escape valve by holding that trial judges could not apply the balancing provision of Rule 609(a)(1) in civil cases.[94]

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test set out in Rule 403); *Diggs*, 741 F.2d at 582 ("We recognize that the mandatory admission of all felony conviction on the issue of credibility may in some cases produce unjust and even bizarre results."); *Luck*, 348 F.2d at 768 (defendant, knowing that prior convictions would impeach his or her testimony, would forego testifying in fear that the jury's decision would be prejudiced by the impeaching evidence).

88. *Green*, 109 S. Ct. at 1984-85; *see also supra* note 69 and accompanying text.

89. *Green*, 109 S. Ct. at 1984-85.

90. *See id.* at 1985; *see also supra* notes 11-16 and accompanying text. For an in-depth analysis of the relationship between veracity and prior convictions, see Foster, *supra* note 78. She observed, "Rule 609 is the product of the law's long standing and dogmatic assumptions that criminal convictions reflect character, and that character determines veracity. Although intuitively appealing, this assumption has been thoroughly undermined by social psychology research." *Id.* at 5 (citing Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1, 25-35 (1986)). Professor Foster also suggested that "revealing civil witnesses' previous legal transgressions invites the factfinder to assess the moral worth of witnesses and litigants, and to award or withhold damages accordingly." *Id.* at 7 (footnotes omitted). Professor Foster thus concluded that evidence of witnesses' prior criminal convictions should never be admissible to impeach witnesses in civil cases because of the poor correlation between prior convictions and veracity. As she argued, "[p]rior convictions evidence is dysfunctional because of its tendency to induce inferential error." *Id.* at 49.

91. *See supra* notes 11-16 and accompanying text.

92. By general consensus, some crimes are relevant to credibility; however, much disagreement exists concerning which crimes are relevant to credibility. *See* FED. R. EVID. 609 advisory committee's note; *see also* H.R. CONF. REP. NO. 1597, at 9 (such evidence should be excluded when the danger of an improperly prejudiced jury exists); HOUSE COMM. ON THE JUDICIARY, FED. R. EVID., H.R. REP. NO. 650, 93d Cong., 1st Sess. 11 (1973) ("Committee was of the view that, because of the danger of unfair prejudice . . . evidence of prior conviction[s] should be limited to those kinds of convictions bearing directly on credibility . . . ."); *supra* note 87 and accompanying text.

93. *See* FED. R. EVID. 609(a)(1).

94. *Green*, 109 S. Ct. at 1993.

Precluding civil trial judges from exercising judicial discretion in deciding whether to admit prior conviction impeachment evidence renders such evidence automatically admissible. Automatically admitting such evidence may lead to the unfair prejudice and unjust results alluded to in *Luck*, *Diggs*, *Donald*, and the instant case.[95] Prior conviction impeachment evidence that is tenuously connected with the witness's veracity has low probative value,[96] and, because it is evidence of a witness's prior criminal convictions, it carries a high risk of improperly prejudicing the jury.[97]

Justice Blackmun's dissent in the instant case called for discretionary, rather than mandatory, admissibility because of this potential for improper influence.[98] His dissent, like both the *Donald* and *Luck* opinions, maintained that in some cases trial judges should exclude evidence of a witness's prior convictions. Proper judicial exclusions might prevent the jury from being unjustly prejudiced.[99] In fact, the instant Court itself acknowledged that as a consequence of its decision juries may be unfairly prejudiced.[100]

Despite the potential for unfair prejudice, the instant Court justified its position on the basis of congressional intent.[101] The instant Court determined that Congress tacitly intended Rule 609 to apply to all civil litigants.[102] By finding that Congress intended Rule 609 to apply to civil litigants, the Court foreclosed the possibility that civil litigants would benefit from the balancing provision found in Rule 403. The Court reasoned that Rule 403 could no longer apply because Congress had passed Rule 609 which specifically addressed the admissibility of prior conviction impeachment evidence.[103]

Yet, the instant Court's decision may not have reflected Congress's actual intent. To determine that Congress intended Rule 609(a)(1) to

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95. *See supra* note 87 and accompanying text.

96. *See* Foster, *supra* note 78, at 19 ("Obviously, the probative worth of prior convictions evidence pales if the underlying assumption — that the nature of the underlying offense is so indicative of the in-court veracity of the offender — is undermined.").

97. *Id.*

98. *Green*, 109 S. Ct. at 1995-98 (Blackmun, J., dissenting).

99. *Id.* (Blackmun, J., dissenting).

100. *Id.* at 1993 (majority opinion).

101. *Id.* at 1992. The Court held that Congress intended for only the criminal defendant to gain the benefit derived from the balancing provision found in Rule 609(a)(1). *Id.*

102. *Id.* The Court analyzed the common law and legislative history behind Rule 609 and ultimately found that petitioner had not met his burden of demonstrating that Congress intended to change the common law rule. *Id.* at 1991. The common law weight of authority balanced in favor of automatic admissibility. *Id.* at 1985-86.

103. *Id.* at 1992, 1993 n.35.

apply in civil cases, the instant Court inferred congressional intent from congressional silence, rather than from congressional action.[104] However, inferring Congress's actual intent from Congress's silence is a difficult task. Although the instant Court correctly pointed out that mandatory admissibility of prior conviction impeachment evidence mirrors the common law,[105] the Court ignored the statutory and common law trend of the past twenty years that allowed discretionary exclusion of prior conviction impeachment evidence in civil cases.[106] For example, the instant Court could have interpreted Congress's silence on the application of Rule 609(a)(1) to civil litigation as Congress's acquiescence to the discretionary approaches found in *Luck*, *Donald*, and similar cases.[107] Furthermore, this interpretation is even more likely due to *Luck*'s substantial influence on the formulation of Rule 609. By inserting a balancing provision even more liberal than the one in *Luck*,[108] Congress may have demonstrated an intent to shift towards a discretionary rather than mandatory approach. Yet, the instant Court decided that Congress intended to follow the common law approach that required automatic admissibility.[109]

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104. *Id.* at 1991. The Court reasoned that the party who contends the legislature has changed settled law has the burden of proof. In the instant case, the Court found that petitioner had not proven that Congress changed settled law. *Id.* The Court did address the House debate in which four Members recognized the application of Rule 609 to civil cases. However, the Court cited this debate simply for the proposition that criminal defendants were the only persons entitled to the benefit of the balancing provision found in Rule 609(a)(1). *Id.*

In interpreting legislative intent from congressional silence, the instant Court departed from the *Diggs* court's determination of congressional intent. The *Diggs* court found that Congress did not overlook the application of Rule 609 to civil litigants because four House Members had addressed the issue during House debate. *Diggs*, 747 F.2d at 580-81. The instant Court avoided relying on these four House Members' speeches and instead reasoned that Congress's silence meant that Congress intended to follow the great weight of common law. *See supra* notes 101-03.

105. *See supra* notes 14-15 and accompanying text.

106. *See, e.g.*, United States v. Palumbo, 401 F.2d 270 (2d Cir. 1968); *Luck*, 348 F.2d 763. In the 1980s courts continued to exercise judicial discretion over admissibility of prior criminal impeachment evidence. *See, e.g., Donald*, 847 F.2d 1191; *see also Green*, 109 S. Ct. at 1991 ("[R]ule 609 itself explicitly adds safeguards circumscribing the common-law rule."). For the text of Rule 609(a)(1), see *supra* note 8.

107. For a discussion of two competing legislative inaction theories, compare Maltz, *The Nature of Precedent*, 66 N.C.L. REV. 367, 388 (1988) ("legislative silence suggests the judicial decision correctly reflects the intention of the legislature."), *analyzed in* Note, *Whether to Overrule Statutory Based Civil Rights Precedent: Whose Needs Should Prevail?*, 41 FLA. L. REV. 369, 372-80 (1989) with Eskridge, *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 108 (1988) (urging that this "presumption of correctness should be a weak one").

108. The balancing provision in *Luck* established the standard that the prejudicial effect of impeachment can outweigh the probative relevance of the prior conviction. *Luck*, 348 F.2d at 768; *cf.* FED. R. EVID. 609(a)(1) (evidence is excluded if its prejudicial effect to the defendant outweighs its probative value).

109. *See Green*, 109 S. Ct. at 1991.

The instant decision reinforced the early common law notion that all felony convictions, regardless of their nature, reflect a person's veracity. This notion, however, has been criticized as empirically unsupportable.[110] Furthermore, the instant Court drew much of its rationale from legislative silence. Whether the instant decision accurately interpreted congressional intent is debatable. Interpreting intent from silence is, at best, a questionable method of statutory interpretation. By mandating a rigid rule of automatic admissibility, the instant Court allowed some future jury decisions to be based not on the truth, but on improper influence.

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110. *See supra* note 90.