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Impeachable Offenses?: Why Civil Parties in Quasi-Criminal Cases Should be Treated Like Criminal Defendants Under the Felony Impeachment Rule

Colin Miller*

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I. INTRODUCTION

In *Saunders v. City of Chicago*, Tyrone Saunders brought a section 1983 action against the City of Chicago and some of its officers, claiming that the officers used excessive force while arresting him for alleged domestic battery.¹ Before trial, Saunders moved to preclude the defendants from impeaching him through his prior felony convictions for domestic battery, violating an order of protection, and possession of a controlled substance.² In a curt opinion that neither weighed the probative value and prejudicial effect of the convictions, nor listed the convictions by name, the United States District Court for the Northern District of Illinois permitted the defendants to impeach Saunders through his convictions in the event that he chose to testify, concluding that “such convictions are routinely admitted to impeach.”³

If Saunders were instead a defendant in a criminal case, the court likely would have reached a different conclusion and almost certainly would have engaged in a more rigorous analysis of the admissibility of his convictions. To wit, in *United States v. Smith*,⁴ the state charged Louis Stills with conspiracy to distribute cocaine, distribution of cocaine, distribution of cocaine within 1000 feet of a school, and possession of a firearm by a convicted felon.⁵ Stills had three prior felony convictions, but the prosecution only attempted to use one of the convictions to impeach him in the event that he chose to testify—his 2004 conviction for simple assault.⁶

In resolving Stills’s motion to preclude the prosecution from impeaching him through this conviction, the United States District Court for the Eastern District of Pennsylvania engaged in a detailed balancing of the conviction’s probative value and its prejudicial effect based upon four factors: the nature of the prior crime, the age of the prior conviction, the importance of Stills’ testimony, and the importance of Stills’s credibility.⁷ After this analysis, the court found that two factors supported admitting the conviction while two factors weighed against admission, forcing the court to exclude the conviction because its probative value did not outweigh its prejudicial effect.⁸

Smith is by no means anomalous. Courts in criminal cases typically find that defendants’ convictions for crimes of violence are inadmissible for

1. *Saunders v. City of Chicago*, 320 F. Supp. 2d 735 (N.D. Ill. 2004).

2. *Id.* at 738.

3. *Id.*

4. 2006 WL 618843 (E.D. Pa. Mar. 13, 2006).

5. *Id.*

6. *Id.* at *1.

7. *Id.* at *2.

8. *Id.* at *2–3.

impeachment purposes because such crimes “have little or no direct bearing on honesty” and are instead thought to result “from a short temper, a combative nature, extreme provocation, or other causes.”⁹ So, how can the exclusion of Stills’s conviction for a crime of violence be squared with the admission of Saunders’s conviction for a crime of violence—domestic battery—as well as the admission of his conviction for possession of a controlled substance, a crime which is also thought to have little necessary bearing on veracity?¹⁰

The answer can be found in Federal Rule of Evidence 609(a)(1): the felony impeachment rule. Rule 609(a)(1) states that a judge shall admit a felony conviction against a criminal defendant for impeachment purposes only upon finding that the probative value of the conviction outweighs its prejudicial effect, whereas it states that a judge shall admit a felony conviction against any other witness, including a civil party, as long as the probative value of the conviction is not substantially outweighed by considerations such as the danger of unfair prejudice—the balancing test prescribed by Federal Rule of Evidence 403.¹¹

What do these distinctions mean? It is important to note that neither the defendants in *Saunders* nor the prosecution in *Smith* were trying to use the convictions at issue as propensity character evidence, whose admission is generally proscribed by both Federal Rule of Evidence 404(a) and state counterparts.¹² In other words, the defendants in *Saunders* were not attempting to use Saunders’s prior domestic battery conviction to prove that he had a propensity to engage in acts of domestic violence and that he thus was likely acting in conformity with that propensity by committing domestic battery at the time that he was arrested;¹³ indeed, the state subsequently dropped the domestic violence charges resulting from the incident which precipitated Saunders’s arrest and lawsuit.¹⁴ Instead, the defendants and the prosecution were attempting to use the convictions to impeach Saunders and Stills, respectively.

9. *United States v. Cueso*, 506 F. Supp. 9, 13 (W.D. Okla. 1979) (citing *Gordon v. United States*, 383 F.2d 936 (D.C. Cir. 1967)).

10. *United States v. Puco*, 453 F.2d 539, 542–43 (2d Cir. 1971).

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

12. *See* FED. R. EVID. 404(a).

13. *See Saunders*, 320 F. Supp. 2d at 738. Nor was the prosecution trying to use Saunders’s prior domestic battery conviction more generally to prove that he had a propensity to act violently and that he thus was likely acting in conformity with that propensity by resisting arrest. *See id.*

14. *Id.* Saunders was, however, convicted of misdemeanor resisting arrest in connection with the incident. *See id.*

What this means is that the sole probative value that these courts were weighing was the probative value that these convictions had for impeachment purposes, i.e., how much bearing the convictions had on the honesty and veracity of Saunders and Smith as witnesses.¹⁵ Conversely, the main prejudice these courts balanced against this probative value was the danger that the jury would misuse these convictions “as propensity evidence despite their introduction solely for impeachment purposes.”¹⁶

Applying this analysis to Saunders’s conviction for domestic battery, we see that because Saunders was a civil plaintiff, the court was required to admit that conviction for impeachment purposes unless the court found that its bearing on his honesty and veracity—its probative value—was substantially outweighed by the danger that the jury would use the conviction to conclude, “[o]nce a domestic batterer, always a domestic batterer” or “[o]nce a violent criminal, always a violent criminal”—its unfairly prejudicial effect. Essentially, the court had to admit the conviction if its probative value and prejudicial effect were roughly commensurate or even if the conviction’s unfairly prejudicial effect outweighed its probative value, but not to a substantial degree. If, however, Saunders was a criminal defendant charged with domestic battery, the court could have admitted his prior domestic battery conviction only if it found that its probative value outweighed its prejudicial effect. If the conviction’s prejudicial effect outweighed its probative value by any degree or even if its probative value matched its prejudicial effect, the court would have been required to exclude it, as the *Smith* court did.

These disparate balancing tests, however, do not constitute the sole manner in which courts treat criminal defendants differently from civil parties under Rule 609(a)(1).¹⁷ *Smith* is a paradigmatic case of a court deciding the admissibility of a criminal defendant’s conviction for impeachment purposes by conducting an on-the-record, rigorous balancing of probative value and prejudicial effect, while *Saunders* is typical of the matador-style judging that occurs in cases deciding the admissibility of a conviction by other witnesses, including civil parties. Moreover, courts typically place the burden of proof firmly on the prosecution to establish that a conviction is admissible to impeach a criminal defendant while they concurrently place the same burden on civil parties to exclude such convictions.¹⁸

If, however, Saunders were not attempting to preclude his impeachment but were instead attempting to present opinion or reputation evidence about

15. See FED. R. EVID. 609 advisory committee’s note to the 1990 amendment.

16. *Id.*

17. See FED. R. EVID. 609(a)(1).

18. See *infra* notes 399–400.

his character for non-violence or his arresting officers' character for violence, he would have faced a similar dichotomy. While, as noted, propensity character evidence is generally inadmissible under Federal Rule of Evidence 404(a), Rules 404(a)(1) and (2) permit a criminal defendant to inject the issue of character into his trial under the so-called "mercy rule" while a similar luxury is not afforded to a civil party.¹⁹ Such a bright line distinction, however, was not always in place in all courts. For decades, a substantial minority of courts gave this same dispensation to parties in quasi-criminal cases; i.e., civil proceedings where a judgment rendered against the party seeking to introduce character evidence necessitated a finding that the party committed a particular act that was also punishable under criminal law. Congress finally shut the door to this practice in 2006, at least in cases governed by the Federal Rules of Evidence, by amending Rules 404(a)(1) and 404(a)(2) to explicitly make them solely applicable in criminal cases based upon the serious risks of prejudice, confusion, and delay that propensity character evidence engenders.²⁰

Surprisingly, despite courts largely ignoring the plain language of various provisions of Rule 609, no court has ever followed suit and treated civil parties in quasi-criminal cases the same as criminal defendants for Rule 609(a)(1) purposes. This article argues that courts should treat civil parties in quasi-criminal cases the same as criminal defendants under the felony impeachment rule because the same factor leading Congress to preclude the application of the "mercy rule" in quasi-criminal cases—the reluctance to admit character evidence—cuts sharply in favor of parallel treatment. Indeed, as things stand, Rule 609(a)(1) is the sole aberration in the constellation of Federal Rules of Evidence dealing with propensity character evidence or evidence which can be misused as propensity character evidence,²¹ with every other Rule making it either: (a) *as difficult* to admit such evidence in civil trials as it is in criminal trials, or (b) *more difficult* to admit such evidence in civil trials than it is in criminal trials.

Part II of this article traces the ban on the admission of propensity character evidence, as well as its exceptions and qualifications, from the Norman conquest of England to the American common law and the enactment of the Federal Rules of Evidence.²² Part II pays particular attention to the split among courts as to whether the "mercy rule" applies

19. See FED. R. EVID. 404(a)(1)–(2).

20. See *infra* Part II.C.2.ii.3.

21. See FED. R. EVID. 609(a)(1).

22. See *infra* notes 26–215.

solely in quasi-criminal cases and the reasons why Congress finally circumscribed its use to criminal cases in 2006.²³ Part III deals with the development and refinement of the rules regarding the impeachment of witnesses through convictions, with an emphasis on the tortured development and refinement of the felony impeachment rule.²⁴ Finally Part IV concludes that courts should correct the anomaly and treat civil parties in quasi-criminal cases the same as criminal defendants under the felony impeachment rule because the same factor supporting the exclusion of the “mercy rule” in quasi-criminal trials—limiting the introduction of character evidence—supports such parallel treatment.²⁵

II. THE BAN ON PROPENSITY CHARACTER EVIDENCE AND ITS EXCEPTIONS AND QUALIFICATIONS

A. *A Definition of Propensity Character Evidence*

“Propensity character evidence” can generally be defined as the use of evidence of a person’s character or trait of character to prove that he has a propensity to act in a specific manner and thus that he likely acted in conformity with that propensity at the time of an alleged pre-trial wrong.²⁶ Alternatively, it can be defined more simply as evidence whose probative value depends upon the aphorism, “[o]nce a criminal, always a criminal,” such as evidence that a person on trial for assault had committed assault before or had a reputation for being violent.²⁷

B. *The Star Chamber and the Origins of the Character Evidence Proscription*

In England, prior to the seventeenth century, courts admitted almost any type of evidence, with the only limitation being rules deeming certain categories of individuals “incompetent” to testify at trial.²⁸ All other forms of evidence were admissible under the inquisitorial system, which had

23. See *infra* notes 26–215.

24. See *infra* notes 216–427.

25. See *infra* notes 428–462.

26. See Aviva Orenstein, *No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials*, 49 HASTINGS L.J. 663, 668 (1998) (“The traditional rule prohibits circumstantial use of character evidence, known as ‘propensity’ evidence, whereby evidence of a person’s particular characteristic or trait is offered to argue that the person acted in conformity with that trait or characteristic.”).

27. Cf. *United States v. Rubio-Estrada*, 857 F.2d 845, 852 (1st Cir. 1988) (noting that Rule 404(b) allows for the admission of non-propensity character evidence whose “probative value does not rely on the aphorism ‘once a criminal, always a criminal’”).

28. Thomas J. Reed, *Trial by Propensity: Admission of Other Criminal Acts Evidenced in Federal Criminal Trials*, 50 U. CIN. L. REV. 713, 716 (1981).

reigned in England since the Norman conquest and which found an evidentiary code unnecessary.²⁹ Under this system, “it was not considered irregular to call witnesses to prove a prisoner’s bad character in order to raise a presumption of his guilt.”³⁰

This open door policy with regard to propensity character evidence could be explained by the inquisitorial system’s assumption that the accused committed a crime and the concomitant requirement that he affirmatively prove his innocence.³¹ One of the most conspicuous consumers of propensity character evidence, and ultimately the harbinger of its death, was The Court of Star Chamber.³² Established in 1487,³³ the Star Chamber was an expeditious way for the Tudors and Stuarts to exorcise political and religious dissenters of the monarchy while masquerading as a court conducting treason trials.³⁴ The Star Chamber was the Crown’s “organ of terror, renown[ed] among the citizenry for its arbitrary and cruel decisions,”³⁵ and one of its most capricious practices was the deluge of character evidence it admitted,³⁶ resulting in defendants being punished for their sordid character rather than their culpable conduct.³⁷

29. See Mason Ladd, *A Modern Code of Evidence*, 27 IOWA L. REV. 213, 216–17 (1942). “After the Norman conquest, the inquisitorial system of trial developed in England An evidentiary system remained unnecessary because the jury of inquisitors was composed of those who knew the facts and therefore they did not rely upon the presentation of evidence for information.” Glen Weissenberger, *Making Sense of Extrinsic Act Evidence: Federal Rule of Evidence 404(b)*, 70 IOWA L. REV. 579, 583 n.17 (1985).

30. JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 190–91 (2003) (quoting 1 JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 368 (1883)).

31. Reed, *supra* note 28, at 716–17.

32. See Andrew King-Ries, *True to Character: Honoring the Intellectual Foundations of the Character Evidence Rule in Domestic Violence Prosecutions*, 23 ST. LOUIS U. PUB. L. REV. 313, 345 n.182 (2004) (“Some scholars have observed that the ban on character evidence originated as a direct procedural response to the inquisitorial practices of the Star Chamber.”).

33. William W. Greenhalgh & Mark J. Yost, *In Defense of the “Per Se” Rule: Justice Stewart’s Struggle to Preserve the Fourth Amendment’s Warrant Clause*, 31 AM. CRIM. L. REV. 1013, 1022 n.34 (1994).

34. Reed, *supra* note 28, at 716–17.

35. Cheryl Swack, *Safeguarding Artistic Creation and the Cultural Heritage: A Comparison of Droit Moral Between France and the United States*, 22 COLUM.-VLA J.L. & ARTS 361, 381 n.135 (1998).

36. See Jason M. Brauser, *Intrinsic or Extrinsic?: The Confusing Distinction Between Inextricably Intertwined Evidence and Other Crimes Evidence Under Rule 404(b)*, 88 NW. U. L. REV. 1582, 1591–92 (1994) (noting that the use of character evidence was “one of the most arbitrary practices of the Star Chamber”).

37. Mark A. Sheft, Comment, *Federal Rule of Evidence 413: A Dangerous New Frontier*, 33 AM. CRIM. L. REV. 57, 86–87 (1995).

The Star Chamber engendered widespread animosity in the citizenry in the years preceding the English Civil War, eventually prompting the revolutionary Long Parliament to abolish it in 1641.³⁸ At the close of the Civil War, the Restoration, and the Glorious Revolution the same dissidents who were subjected to the monarchy's organ of terror had wrested control of the Parliament but still felt the sting of the Star Chamber.³⁹ In an effort to prevent the ills of the past from infecting the future, these new power wielders passed the Treason Act of 1695,⁴⁰ which, *inter alia*, contained a provision proscribing prosecutors from proving at trial any overt acts by the defendant which were not charged in the indictment, thus precluding the admission of propensity character evidence.⁴¹ While this prohibition on propensity character evidence was initially limited to treason trials,⁴² it soon permeated all criminal trials, with courts and commentators recognizing that the use of such evidence violated the right to due process of law guaranteed by the Magna Carta.⁴³

C. *Across the Pond: The American Adoption of the Propensity Character Evidence Proscription*

1. American Common Law

i. *The General Ban on Propensity Character Evidence*

Eventually, the English ban on propensity character evidence carried across the pond, with American courts in both civil and criminal cases adopting a similar exclusionary rule in the middle of the nineteenth century, "directly influenced by the Treason Act of 1695 and other English authorities."⁴⁴ Indeed, in holding in 1892 that a trial court erred in admitting evidence indicating that two defendants on trial for murder had previously committed robberies, the United States Supreme Court forcefully stated that:

38. David B. Kopel & Joseph Olson, *Preventing a Reign of Terror: Civil Liberties Implications of Terrorism Litigation*, 21 OKLA. CITY U. L. REV. 247, 331–32 (1996).

39. See Brauser, *supra* note 36, at 1591 ("Following the Civil Wars, the Restoration, and the Glorious Revolution, many of the dissidents whom the Court of Star Chamber had persecuted found themselves in power.").

40. See Jennifer Y. Schuster, *Uncharged Misconduct Under Rule 404(b): The Admissibility of Inextricably Intertwined Evidence*, 42 U. MIAMI L. REV. 947, 951 (1988) ("Parliament passed the Treason Act in reaction to the repressive practices of the Court of the Star Chamber, which admitted evidence of the defendant's prior misconduct as proof of guilt of the crime charged.").

41. Weissenberger, *supra* note 29, at 579, 603 n.75.

42. Reed, *supra* note 28, at 717.

43. Schuster, *supra* note 40, at 952 ("The Treason Act inevitably prompted the development of the character rule in all criminal trials.").

44. Weissenberger, *supra* note 29, at 602 n.75.

Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death. . . . However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offence charged.⁴⁵

While this quotation accurately describes the common law judicial proscription on the introduction of propensity character evidence, there were also circumstances in which courts allowed for the admission of such evidence as well as situations in which character evidence was admissible for reasons other than proving propensity or conformity.

ii. *Pandora's Box: The Mercy Rule for Criminal Defendants (and Others?)*

Under the so-called "mercy rule," a criminal defendant could inject the issue of character into his trial and present pertinent propensity evidence concerning his good character and the alleged victim's bad character.⁴⁶ Accordingly, a defendant charged with assault could have witnesses testify that he was a peaceable person, and, if he were claiming self-defense, he could call witnesses to testify that the alleged victim was a violent person.⁴⁷ Only at that point could the prosecution call witnesses to testify that the defendant was violent or that the alleged victim was peaceable.⁴⁸ But if the defendant did not want propensity character evidence to pervade his trial, all he needed to do was refrain from presenting his own character witnesses, and the state would be precluded from presenting its own. Thus Pandora's Box remained firmly in the criminal defendant's hands.

In most cases, courts did not extend a similar luxury to defendants and plaintiffs in civil cases, but some courts treated civil parties the same as criminal defendants if they were parties in quasi-criminal cases, i.e., civil proceedings where a judgment rendered against the party seeking to

45. *Boyd v. United States*, 142 U.S. 450, 458 (1892).

46. FED. R. EVID. 404 advisory committee's note to the 2006 amendment.

47. *Id.*

48. *Id.*

introduce character evidence necessitated a finding that he committed a particular act that was also punishable under criminal law.⁴⁹ For instance, in *Mourikas v. Vardianos*, the plaintiff brought an action against the defendants, Gus, Rebecca, Pete, and Tom Mourikas, alleging that they converted \$15,400 of his property to their own use.⁵⁰ After the trial court entered a judgment against the defendants, they appealed, claiming, *inter alia*, that the trial judge erred by permitting the plaintiff to present evidence of Tom's bad character.⁵¹

In its 1949 opinion affirming the trial court's judgment, the Fourth Circuit noted that this evidence was not presented until defense counsel introduced evidence concerning the good character of each of the defendants.⁵² The court then found that while the case at hand was not a criminal case, the defendants' good character evidence was properly received because the "plaintiff's proof tended to show the commission of a crime by the defendants, and a finding for the plaintiff would really be tantamount to a finding that defendants had committed a crime."⁵³ It then noted that because the defendants had thus properly introduced good character evidence about Tom, this in turn opened the door for the plaintiff to present bad character evidence about Tom "for all purposes."⁵⁴

iii. *The Non-Marital Sexual Act Exception in Sex Crime Cases*

There was one other type of case in which courts typically allowed for the introduction of propensity character evidence—sex crime cases. Many courts found that defendants charged with rape (or similar crimes) were permitted to inquire into any non-marital sexual acts in which their complainants had engaged to prove their propensity to consent to such sexual relations and their likely conformity with this propensity, and thus consent, at the time of the alleged rape.⁵⁵ In most cases, however, such inquiry was only permitted if the complainant was a woman.⁵⁶ The Supreme Court of Missouri applied this chauvinistic interpretation of evidence law in *State v. Sibley*, where it fatuously concluded that "[i]t is a matter of common knowledge that the bad character of a man for chastity does not even in the

49. See Katherine J. Alprin, Comment, *Character Evidence in the Quasi-Criminal Trial: An Argument for Admissibility*, 73 TUL. L. REV. 2073, 2075 n.3 (1999).

50. 169 F.2d 53, 54 (4th Cir. 1948).

51. *Id.* at 58.

52. *Id.* at 59.

53. *Id.*

54. *Id.*

55. Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 765–66 (1986).

56. *Id.* at 787.

remotest degree affect his character for truth, when based upon that alone, while it does that of a woman.”⁵⁷

iv. Practiced in the Art of Seduction: Character “In Issue”

In either civil or criminal cases where courts determined that character was “in issue,” they also allowed for the admission of character evidence, not for propensity or conformity purposes, but because character itself was an (essential) element of a claim or defense. To wit, under the common law tort of seduction, a man could be sued for having persuaded a chaste woman to have sexual intercourse with him based upon a promise of marriage.⁵⁸ Thus, an element of a defense in such a case was that the alleged victim was not in fact chaste, permitting the presentation of evidence that she had a lascivious character or had engaged in prior acts of sexual intercourse.⁵⁹

This type of case provides a nice illustration of why character evidence in such cases did not require a propensity/conformity analysis. In a seduction case, the defendant would not be using evidence of the alleged victim’s lascivious character and past acts of sexual intercourse to prove that she had a propensity to engage in sexual acts and that she likely acted in conformity with this propensity at the time of the alleged seduction; indeed, his defense might be that no sexual act occurred between the victim and himself. Instead, the defendant would be using the evidence to prove that the alleged victim was not chaste and thus could not be a victim of seduction.⁶⁰

v. Other Purposes

In any civil or criminal case, a party could also introduce character evidence, not to prove propensity/conformity, but instead, for “other purposes” such as proving:

- (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more

57. State v. Sibley, 33 S.W. 167, 171 (Mo. 1895).

58. John H. Arnold, *Clergy Sexual Malpractice*, 8 U. FLA. J.L. & PUB. POL’Y 25, 41 (1996).

59. FED. R. EVID. 404 advisory committee’s note; see David Torrance, *Evidence of Character in Civil and Criminal Proceedings*, 12 YALE L.J. 352, 355 (1903).

60. Colin Miller, *Killed on the Fourth of July: July 4th Murder Case Helps Explain Federal Rule of Evidence 405(b)*, EVIDENCE PROF BLOG, July 4, 2008, <http://lawprofessors.typepad.com/evidence-prof/2008/07/killed-on-the-f.html>.

crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial.⁶¹

Character evidence offered to prove these “other purposes” was not, however, *per se* admissible. Courts typically indicated that even after determining that “other act” evidence was relevant to prove a permissible purpose, they still had to balance its probative value against the risk of unfair prejudice before admitting such evidence.⁶²

For instance, in the 1969 case, *People v. Sam*, the defendant was convicted of involuntary manslaughter in connection with the death of Salvador Dominguez.⁶³ The defendant admitted that he threw Dominguez down and stomped on his stomach but claimed that he was acting in self-defense because Dominguez, a self-proclaimed karate expert, assumed a karate stance and leaped at him.⁶⁴ The Supreme Court of California reversed, finding that the trial court erred in admitting evidence that the defendant had “(1) kicked his mistress during a drunken quarrel a month before the fight with Dominguez, and (2) kicked another man during a brawl more than two years earlier.”⁶⁵ The court found that the State’s argument that this evidence was admissible to prove the defendant’s criminal intent and negate his claim of self-defense was attenuated and outweighed by its prejudicial effect.⁶⁶ Thus, it deemed the evidence inadmissible because the possibility that the jury might misuse the evidence as an indication that the defendant had a propensity to act violently and thus likely acted in conformity with that propensity by violently attacking Dominguez outweighed any probative value that the evidence had for establishing criminal intent.⁶⁷

Finally, even when courts determined that character evidence successfully navigated this probative value and prejudicial effect tightrope, they still only admitted such evidence under the “limited admissibility doctrine,” meaning that it was only admitted for the particular permissible purpose, such as proving intent.⁶⁸ Accordingly, the party against whom such character evidence was offered could ask for and receive a limiting instruction informing the jury that the evidence was to be considered solely

61. *People v. Molineux*, 61 N.E. 286, 293 (N.Y. 1901).

62. *People v. Gay*, 28 Cal. App. 3d 661, 669 (App. 1972).

63. 454 P.2d 700, 701 (Cal. 1969).

64. *Id.* at 702.

65. *Id.* at 706.

66. *Id.* at 706–07.

67. *Id.*

68. *Gay*, 28 Cal. App. 3d at 669.

as evidence of a permissible purpose such as intent and not as propensity character evidence.⁶⁹

vi. Impeachment

In either a civil or criminal case, a testifying party or other witness could be impeached through character evidence bearing upon his honesty or veracity.⁷⁰ Impeachment evidence was, in one sense, propensity character evidence because it asked the jury to conduct a propensity/conformity analysis. But the analysis to be performed was not the analysis proscribed by the propensity character evidence ban: that a witness had a propensity to act in specific manner and thus that he likely acted in conformity with that propensity at the time of an alleged *pre-trial* wrong. Instead, impeachment evidence was solely to be used by jurors as evidence that a witness had a propensity to act dishonestly and that he thus likely acted in conformity with this propensity by testifying dishonestly *at trial*.⁷¹

Because of this purpose behind impeachment, courts only allowed witnesses and testifying parties to be impeached through reputation or opinion evidence concerning their truth, veracity, and possibly morality.⁷² Moreover, evidence that a testifying defendant had a reputation for committing the same class of crimes as the one for which he was charged was inadmissible based upon the fear that it would be misused by the jury as propensity character evidence rather than as evidence casting doubt on the truthfulness of his testimony.⁷³ Courts also deemed evidence inadmissible if it indicated that an individual had committed a specific crime or bad act, such as adultery, as opposed to evidence about his general reputation for committing such crimes.⁷⁴ The only exception to this proscription was that courts would allow for the admission of evidence that a witness or testifying

69. See, e.g., *State v. Scown*, 312 S.W.2d 782, 789 (Mo. 1958) (“[T]he objecting party may, if he desires, request a limiting instruction.”).

70. See, e.g., *State v. Wellman*, 161 S.W. 795, 800 (Mo. 1913).

71. See *id.* (“Evidence of bad character on the part of defendant was not evidence of his guilt, but in this case was admitted solely to impeach and discredit his testimony as a witness.”).

72. See, e.g., *State v. Baird*, 195 S.W. 1010, 1013 (Mo. 1917) (“[S]o alone the question of their reputations for truth and veracity was involved, or at most this phase of reputation and that of morality.”).

73. See, e.g., *Wellman*, 161 S.W. at 799 (finding that the trial court’s admission of testimony about whether the “defendant had the reputation of committing the class of crimes for which he was then on trial” was erroneous).

74. *Id.*

party had been *convicted* of a specific crime under certain circumstances.⁷⁵ Moreover, under the common law “voucher rule,” parties were precluded from impeaching witnesses whom they had called based upon the presumption “that the calling party vouched for the witness’[s] credibility.”⁷⁶ A party also could not bolster his witness’s credibility until after the opposing party impeached his credibility.⁷⁷ Finally, the party against whom impeachment evidence was offered could ask for and receive a limiting instruction informing the jury that evidence was to be considered solely for its bearing on the witness’s credibility and not as propensity character evidence.⁷⁸

2. Federal Rules of Evidence

When the Supreme Court enacted the Federal Rules of Evidence in 1975, it adopted the common law prohibition on propensity character evidence as well as each of the aforementioned exceptions and qualifications.⁷⁹

i. Federal Rule of Evidence 404(a)

Federal Rule of Evidence 404(a) continued the general proscription on the introduction of propensity character evidence, as it stated that “[e]vidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion.”⁸⁰ Thus, Rule 404(a) deemed inadmissible “evidence of a violent disposition to prove that the person was the aggressor in an affray, or evidence of honesty in disproof of a charge of theft.”⁸¹ Rule 404(a) has never been amended, and its exclusion applies equally in both civil and criminal cases.⁸²

75. See *infra* note 231 and accompanying text.

76. John A. Carr, *The Admissibility of Polygraph Evidence in Court-Martial Proceedings: Does the Constitution Mandate the Gatekeeper?*, 43 A.F. L. REV. 1, 22 n.126 (1997).

77. Edward J. Imwinkelried, *Federal Rule of Evidence 402: The Second Revolution*, 6 REV. LITIG. 129, 144–45 (1987).

78. Stanley A. Goldman, *Guilt by Intuition: The Insufficiency of Prior Inconsistent Statements to Convict*, 65 N.C. L. REV. 1, 7 n.36 (1986).

79. FED. R. EVID. 404(a).

80. *Id.*

81. FED. R. EVID. 404(a) advisory committee’s note.

82. See *Carson v. Polley*, 689 F.2d 562, 575 (5th Cir. 1982) (“The rule’s exclusion of such evidence applies to both criminal and civil cases.”).

ii. Mercy Rule

Federal Rules of Evidence 404(a)(1) and (2) maintained the common law “mercy rule.”⁸³ These Rules provided an exception to the general proscription on propensity character evidence for:

- (1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same
- (2) Character of alleged victim. Evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor.⁸⁴

Thus, under Rules 404(a)(1) and (2), a criminal defendant could still prevent propensity character evidence from tainting his trial by not presenting such evidence on his own behalf—except in homicide cases where the prosecution could present evidence of the alleged victim’s peacefulness after the defendant presented evidence that the alleged victim was the first aggressor, even if this evidence did not consist of character evidence.⁸⁵ However, if a criminal defendant so chose, under Rule 404(a)(1) he could present pertinent propensity evidence concerning his good character, which would allow the prosecution to repost with evidence of his bad character for the same trait.⁸⁶ For instance, in *United States v. Green*, the prosecution presented the testimony of a police officer who claimed that the defendant, an officer facing charges of harboring a fugitive, had a reputation in the workplace for not being trustworthy.⁸⁷ The Fifth Circuit later rejected the defendant’s argument on appeal that this testimony was improperly received, finding that it was proper rebuttal testimony presented only after the defendant presented his own witnesses who testified about his good reputation for truthfulness.⁸⁸

Also, if the defendant chose to, under Rule 404(a)(2), he could present pertinent propensity evidence concerning the alleged victim’s bad character,

83. FED.R. EVID. 404(a)(1)–(2).

84. *Id.*

85. *See* FED.R. EVID. 404(a)(2).

86. *See* FED.R. EVID. 404(a)(1).

87. 180 F.3d 216, 224 (5th Cir. 1999).

88. *Id.*

thus, allowing the state to counter with evidence of the alleged victim's good character for the same trait.⁸⁹ As under Rule 404(a)(1), however, the only permissible method of proof in such cases was reputation and opinion testimony, not specific act evidence.⁹⁰ The explanation for this dichotomy can be found in Federal Rule of Evidence 405(a), which indicated then and still indicates that "[i]n all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony [only] as to reputation or by testimony in the form of an opinion."⁹¹ As an example, in *United States v. Keiser*, the Ninth Circuit found that the trial court properly permitted a defendant, who claimed that he shot the alleged victim to defend his brother, to present reputation and opinion testimony concerning the violent character of the alleged victim while properly precluding him from presenting evidence that the alleged victim had committed specific acts of violence.⁹²

Rule 405(a), however, provides that "[o]n cross-examination, inquiry is allowable into relevant specific instances of conduct."⁹³ The purpose of this qualification is not for the jury to use these specific instances of misconduct as propensity character evidence.⁹⁴ The Rules merely allow for the asking of such a question on cross-examination, while precluding the introduction of extrinsic evidence in the event that the witness provides an unsatisfactory answer.⁹⁵ Such questioning is allowed under the theory that the cross-examiner was probing the testimonial qualifications of the witness.⁹⁶ For example, the prosecution in a murder case might ask a witness who testified as to defendant's reputation within the community for being non-violent, "Have you heard that the defendant committed a murder three years ago?"⁹⁷ The effect courts want such a question to have on jurors is as follows:

If the witness has not heard of [the murder], then an implication is created that he is not sufficiently qualified to attest to the defendant's reputation in the community. If the witness has heard about the specific act, and still testifies to the defendant's good reputation in the community, then an implication is created that the

89. See FED.R. EVID. 404(a)(2).

90. See FED.R. EVID. 405(a).

91. *Id.*

92. 57 F.3d 847, 855 (9th Cir. 1995).

93. FED. R. EVID. 405(a).

94. See *id.*

95. See, e.g., *United States v. Bendetto*, 571 F.2d 1246, 1250 (2d Cir. 1978) ("Furthermore, while a character witness may be asked on *cross-examination* about 'specific instances of conduct,' such acts may not be proved by extrinsic evidence of the sort offered here.").

96. See, e.g., *United States v. Haldeman*, 559 F.2d 31, 91 n.160 (D.C. Cir. 1976).

97. See generally *United States v. Kinsella*, 545 F. Supp. 2d 158, 162 (D. Me. 2008).

community itself is suspect, or that the witness is lying about the good reputation.⁹⁸

Courts did not, however, want jurors in such cases to conclude, “[o]nce a murderer, always a murderer,” and thus would typically give a limiting instruction informing jurors that they should use the question and response solely to evaluate the character witness’s qualifications and not as propensity character evidence.⁹⁹ And, of course, the party seeking to ask such a question on cross-examination first had to demonstrate a good faith basis for believing the incident at issue actually occurred.¹⁰⁰

The Advisory Committee noted that it was maintaining the “mercy rule” in criminal cases because it was “so deeply imbedded in our jurisprudence as to assume almost constitutional proportions and to override doubts of the basic relevancy of the evidence.”¹⁰¹ The Committee also flagged the argument that “circumstantial use of character ought to be allowed in civil cases to the same extent as in criminal cases.”¹⁰² It found, however, that while the criminal/civil dichotomy had its basis “more in history and experience than in logic an underlying justification can fairly be found in terms of the relative presence and absence of prejudice in the various situations.”¹⁰³

As support for this proposition, the Committee relied upon an article by Judson F. Falknor.¹⁰⁴ However, Falknor’s defense of the criminal/civil dichotomy, if it could even be called that, was equivocal to the point of being unlikely to stand up to a stiff breeze. According to Falknor:

The only conceivable basis for the [dichotomy] is the notion that the party has more at stake in the criminal action. But this is very thin, since a party may have a tremendous amount at stake in a civil action also; not only his money or property but, when charged with criminal or immoral acts, his honor and reputation as well.¹⁰⁵

98. *Id.* (quoting *SEC v. Peters*, 978 F.2d 1162, 1170 (10th Cir. 1992)).

99. *See id.*

100. *Id.*

101. FED. R. EVID. 404 advisory committee’s note.

102. *Id.*

103. *Id.*

104. *Id.* (quoting Judson F. Falknor, *Extrinsic Policies Affecting Admissibility*, 10 RUTGERS L. REV. 574 (1956)).

105. Falknor, *supra* note 104, at 582.

Nonetheless, the Committee relied upon Falknor's words in finding that "those espousing change have not met the burden of persuasion."¹⁰⁶

What the Advisory Committee failed to address, however, was that, while Falknor offered a possible rationalization for maintaining the criminal and civil dichotomy, he also found that the "mercy rule" should extend to quasi-criminal trials. According to Falknor:

[I]f evidence of good character is able to free itself from the claim that it comes with too much "dangerous baggage" of prejudice, distraction from the issues, time-consumption, and hazard of surprise when offered for the accused in a criminal action, there is no sufficient basis upon which to keep it out in a civil action involving a charge of criminal conduct.¹⁰⁷

Thus, while it was clear that the drafters intended for there to be a criminal/civil dichotomy with regard to application of the "mercy rule" generally, it seemed to be an open question whether they also intended to preclude courts from allowing parties to introduce propensity character evidence in quasi-criminal cases, as the Fourth Circuit had done in *Mourikas v. Vardianos*.¹⁰⁸ A substantial minority of courts answered this question in the negative.¹⁰⁹

(1) Courts Extending the "Mercy Rule" To Quasi-Criminal Cases

After the Federal Rules of Evidence took effect in 1975, several courts applied Rules 404(a)(1) and (2) to civil parties in quasi-criminal cases. Federal courts applying the rules in this manner included the United States Court of Appeals for the Fifth Circuit,¹¹⁰ the Seventh Circuit,¹¹¹ and the Tenth Circuit.¹¹² Some states also allowed parties in certain types of quasi-criminal cases to use the "mercy rule."¹¹³ The Fifth Circuit's opinion in

106. FED. R. EVID. 404 advisory committee's note.

107. Falknor, *supra* note 104, at 582–83.

108. 169 F.2d 53, 54 (4th Cir. 1948).

109. See *infra* notes 110–125 and accompanying text.

110. See *Carson v. Polley*, 689 F.2d 562, 576 (5th Cir. 1982) ("Here, however, we believe that the assault and battery with which the defendants in this suit are charged falls 'close to one of a criminal nature.'").

111. *Palmquist v. Selvik*, 111 F.3d 1332, 1340 (7th Cir. 1997) ("For purposes of analysis . . . we can presume that this exception could apply to an excessive force case such as this.").

112. *Perrin v. Anderson*, 784 F.2d 1040, 1044 (10th Cir. 1986) ("Although the literal language of the exceptions to Rule 404(a) applies only to criminal cases, we agree with the district court here that, when the central issue involved in a civil case is in nature criminal, the defendant may invoke the exceptions to Rule 404(a).").

113. See, e.g., OR. REV. STAT. § 40.170(2)(d) (2007) ("Evidence of the character of a party for violent behavior offered in a civil assault and battery case when self-defense is pleaded and there is

*Crumpton v. Confederation Life Insurance Co.*¹¹⁴ is representative of state and federal opinions coming to such conclusions.

In *Crumpton*, Vicki Crumpton was the beneficiary on an accidental death policy which covered her father, Titus.¹¹⁵ After her father died, Crumpton brought a lawsuit against the insurer, Confederation Life Insurance, when it refused to pay her the proceeds of the policy.¹¹⁶ Confederation's defense was that Titus was shot by his neighbor, Joanne Petton, after he raped her, rendering his death non-accidental and the policy ineffectual.¹¹⁷ To rebut this claim, Crumpton presented several character witnesses.¹¹⁸

After the jury entered a verdict in Crumpton's favor, Confederation appealed, claiming, among other things, that the trial court erred in allowing Crumpton to present this propensity character evidence.¹¹⁹ The Fifth Circuit disagreed, finding that while the Rule 404(a) exceptions generally only apply "to criminal cases, the unusual circumstances here place the case very close to one of a criminal nature."¹²⁰ The court found that "[t]he focus of the civil suit on the insurance policy was the issue of rape, and the resulting trial was in most respects similar to a criminal case for rape."¹²¹ It thus concluded that the character evidence was admissible because "[h]ad there been a criminal case against [Titus], evidence of his character that was pertinent would have been admissible."¹²²

The Fifth Circuit then proceeded to indicate that it did "not view the notes of the Advisory Committee as contravening this interpretation."¹²³ The court found: "While the Committee's notes reject[ed] the expanded use of character evidence in civil cases, we do not view this as determinative of the circumstances of this case, which while actually civil, in character is akin to a criminal case."¹²⁴ Instead, it reasoned, "[W]hen evidence would be admissible under Rule 404(a) in a criminal case, we think that it should also be admissible in a civil suit where the focus is on essentially criminal

evidence to support such defense.").

114. 672 F.2d 1248 (5th Cir. 1982)

115. *Id.* at 1250.

116. *Id.* at 1250-51.

117. *Id.*

118. *Id.* at 1251.

119. *Id.* at 1252.

120. *Id.* at 1253.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 1253 n.7.

aspects, and the evidence is relevant, probative, and not unduly prejudicial.”¹²⁵

(2) Courts Precluding the Use of the “Mercy Rule” in Quasi-Criminal Cases

While several courts thus allowed civil parties in quasi-criminal trials to take advantage of Rules 404(a)(1) and (2) and present propensity character evidence, the majority of courts found that those Rules were solely applicable to criminal cases and *per se* inapplicable in civil cases.¹²⁶ These courts largely adhered to this bright line dichotomy because they felt duty-bound to adhere to the plain meaning and intent behind these Rules. The opinion of the United States District Court for the Southern District of New York in *SEC v. Towers Financial Corp.*¹²⁷ most clearly illustrates the reasoning behind this majority line of precedent.

In *Towers Financial Corp.*, the SEC civilly sued Mitchell Brater and others, alleging, *inter alia*, that Brater made false representations in furtherance of an elaborate Ponzi scheme.¹²⁸ In Brater’s proposed pretrial order, he listed numerous character witnesses who would testify to his good character pursuant to Rule 404(a)(1), but the SEC moved to preclude the admission of any character evidence in the civil action.¹²⁹ The SEC noted that Rule 404(a)(1) allowed for the admission of propensity character evidence “offered by an accused.”¹³⁰ The Commission then proceeded to argue that there is no “accused” outside of a criminal action, making Rule 404(a)(1) inapplicable in civil actions.¹³¹ Brater countered that the court should apply “a more flexible definition of ‘accused’ that includes a defendant in a ‘quasi-criminal’ civil proceeding, such as SEC action.”¹³² The district court sided with the SEC, citing definitions from Black’s Law Dictionary and Webster’s New World Dictionary which defined an “accused” as a criminal defendant.¹³³ It thus concluded that “the plain meaning of Rule 404(a)(1)’s language limit[ed] the exception to criminal cases, making it unavailable in [a] civil case.”¹³⁴

125. *Id.*

126. See Alprin, *supra* note 49, at 2073.

127. 966 F. Supp. 203 (S.D.N.Y. 1997).

128. *Id.* at 204.

129. *Id.* at 204.

130. *Id.* at 204 (quoting FED. R. EVID. 404(a)(1)) (internal quotations omitted).

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

Meanwhile, other courts relied upon the Advisory Committee's Note. For instance, in *Ginter v. Northwestern Mutual Life Insurance Co.*, the United States District Court for the Eastern District of Kentucky relied upon the language of the Advisory Committee's Note indicating that those advocating the application of the "mercy rule" to civil cases had not met their burden of proof in finding that it was "beyond peradventure of doubt" that the mercy rule was only applicable in criminal cases.¹³⁵ It is important to note, however, that while these courts found that propensity character evidence was generally inadmissible in civil cases, many equivocated in dicta, suggesting that they might apply the minority rule in an appropriate quasi-criminal case. For example, after finding the Rule 404(a) exceptions inapplicable in the civil securities fraud suit before it, the district court in *Towers Financial Corp.* acknowledged and surveyed the minority line of cases, including *Perrin v. Anderson*,¹³⁶ a Tenth Circuit case where the court found that character evidence was admissible in a section 1983 wrongful death action brought by the administratrix of the estate of a man killed by police while they were investigating a traffic accident.¹³⁷ Then, far from rejecting this line of cases out of hand, the court hedged, meekly concluding, "[w]hatever the validity of allowing evidence of the victim's character under Rule 404(a)(2) in a wrongful death claim, the Court is not convinced that [the minority rule] should extend to admission of evidence concerning the defendant's [wrongful] character under Rule 404(a)(1) in a civil securities fraud suit."¹³⁸

(3) 2006 Amendment

This dispute finally ended when Congress, without such equivocation, amended Federal Rules of Evidence 404(a)(1) and 404(a)(2) in 2006.¹³⁹ Amended Rule 404(a)(1) now states that:

In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is

135. 576 F. Supp. 627, 630 (E.D. Ky. 1984).

136. 784 F.2d 1040 (10th Cir. 1986)

137. *Towers Fin. Corp.*, 966 F. Supp. at 205.

138. *Id.* at 206.

139. See Eileen A. Scallen, *Proceeding with Caution: Making and Amending the Federal Rules of Evidence*, 36 SW. U. L. REV. 601, 610 (2008) (noting that Congress amended Federal Rule of Evidence 404(a) in 2006).

offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused¹⁴⁰ offered by the prosecution.¹⁴¹

Meanwhile, amended Rule 404(a)(2) now provides:

In a criminal case, and subject to the limitations imposed by Rule 412,¹⁴² evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor.¹⁴³

These amended Rules clearly circumscribed the use of propensity character evidence in quasi-criminal cases, limiting its use to “criminal case[s].”¹⁴⁴ The Advisory Committee’s Note indicated that these Rules were “amended to clarify that in a civil case evidence of a person’s character is never admissible to prove that the person acted in conformity with the character trait.”¹⁴⁵ More specifically, the Note stated that the amendments were made to “[resolve] the dispute in the case law over whether the exceptions in subdivisions (a)(1) and (2) permit the circumstantial use of character evidence in civil cases.”¹⁴⁶

The Advisory Committee noted that propensity character evidence is generally inadmissible at trial “because it carries serious risks of prejudice, confusion and delay.”¹⁴⁷ It indicated, however, that “[i]n criminal cases, the so-called ‘mercy rule’ permits a criminal defendant to introduce evidence of pertinent character traits of the defendant and the victim.”¹⁴⁸ The Committee found, though, that this dispensation is afforded to criminal defendants “because the accused, whose liberty is at stake, may need ‘a counterweight against the strong investigative and prosecutorial resources of the

140. This language, allowing prosecutors to counter bad character evidence offered against the accused with evidence of the victim’s bad character for the same trait, was added in 2000. *See* FED. R. EVID. 404 advisory committee’s note to the 2000 amendment.

141. FED. R. EVID. 404(a)(1).

142. The clause referring to Rule 412, the “rape shield” rule, was added to clarify “that evidence otherwise admissible under Rule 404(a)(2) may nonetheless be excluded in a criminal case involving sexual misconduct.” FED. R. EVID. 404(a) advisory committee’s note to 2006 amendment.

143. FED. R. EVID. 404(a)(2).

144. FED. R. EVID. 404 advisory committee’s note to the 2006 amendment.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

government.”¹⁴⁹ Put another way, the “mercy rule” exists “to allow the criminal defendant with so much at stake and so little available in the way of conventional proof to have special dispensation to tell the factfinder just what sort of person he really is.”¹⁵⁰

iii. Rape Shield

In response to the anti-rape movement, an offshoot of the civil rights movement of the 1960s and 1970s, states began enacting “rape shield” laws, and the Supreme Court followed suit by creating Federal Rule of Evidence 412, the federal “rape shield” rule.¹⁵¹ As amended in 1994, Rule 412(a) now provides, “The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c): (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior. (2) Evidence offered to prove any alleged victim’s sexual predisposition.”¹⁵²

So, under Rule 412(a)(1), evidence of other sexual behavior by alleged victims is now inadmissible to prove their propensity to consent to such sexual relations and their likely conformity with this propensity, and thus consent, at the time of alleged rapes or similar crimes.¹⁵³ Moreover, evidence of the sexual predisposition of alleged victims, such as their sexual orientation, is inadmissible for the same purpose.¹⁵⁴ Thus, for instance, evidence that an alleged victim of homosexual rape had previously engaged in homosexual acts is inadmissible to prove his propensity to consent to such acts and his likely conformity with this propensity at the time of the alleged rape.¹⁵⁵

Federal Rule of Evidence 412(b)(1), however, provides certain exceptions to this rule in criminal cases. It provides that:

149. *Id.* (quoting CHRISTOPHER MUELLER & LAIRD KIRKPATRICK, *EVIDENCE: PRACTICE UNDER THE RULES*, 264–65 (2d ed. 1999)).

150. *Id.* (quoting Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 855 (1982)).

151. Izabelle Barraquiel Reyes, *The Epidemic of Injustice in Rape Law: Mandatory Sentencing as a Partial Remedy*, 12 UCLA WOMEN’S L.J. 355, 361–62 (2003).

152. FED. R. EVID. 412(a).

153. *See, e.g., Ledesma v. Gov’t of the Virgin Is.*, 159 F. Supp. 2d 863, 871 n.10 (D.V.I. 2001) (“Evidence of prior sexual activity has been ruled inadmissible where there was no logical link or relevance between the acts shown.”).

154. FED. R. EVID. 412(a).

155. *See, e.g., People v. Murphy*, 919 P.2d 191, 197–98 (Colo. 1996) (finding such evidence inadmissible under Colorado’s counterpart to Federal Rule of Evidence 412).

- (1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:
 - (A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;
 - (B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and
 - (C) evidence the exclusion of which would violate the constitutional rights of the defendant.¹⁵⁶

An example of a court applying the exception contained in Rule 412(b)(1)(A) can be found in *United States v. Begay*, where the trial court refused to allow the defendant, who was charged with aggravated sexual abuse, to present evidence that the eight year-old alleged victim had been sexually assaulted on several occasions in the months preceding the crime at issue.¹⁵⁷ On the defendant's appeal, the Tenth Circuit reversed, finding that the prosecutor presented evidence about the alleged victim's enlarged hymenal opening and a vaginal abrasion; consequently, evidence of the other sexual assaults was admissible, not to prove propensity and conformity, but to prove that those assaults, rather than the defendant's alleged crime, could have caused her injuries.¹⁵⁸

Under Rule 412(b)(1)(B), evidence of previous sexual acts between the alleged victim and the defendant are admissible to prove that there are specific reasons to believe that the alleged victim may have consented to sexual relations with the defendant at the time of an alleged rape or sexual assault.¹⁵⁹ Finally, Rule 412(b)(1)(C) is a catch-all exception, which allows for the admission of an alleged victim's sexual history and predisposition for purposes other than those covered by Rule 412(b)(1)(A) and (B) when its exclusion would violate the Due Process or Confrontation Clause rights of a criminal defendant.¹⁶⁰ The case cited by the Advisory Committee in support of this exception involved a criminal defendant seeking to impeach his alleged victim by showing that an extramarital affair gave her a motive to

156. FED. R. EVID. 412(b)(1).

157. 937 F.2d 515, 520–21 (10th Cir. 1991).

158. *Id.* at 522.

159. *See, e.g., United States v. Saunders*, 943 F.2d 388, 392 (4th Cir. 1991) (“When consent is the issue, however, section (b)(1)(B) permits only evidence of the defendant's past experience with the victim.”).

160. *Rule 412: Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Disposition*, 12 *TOURO L. REV.* 457, 462–63 (1996).

lie,¹⁶¹ and the exception has since most commonly been used in impeachment cases.¹⁶²

Meanwhile, Federal Rule of Evidence 412(b)(2) provides an exception to the Rape Shield Rule in civil cases:

In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.¹⁶³

The Advisory Committee Note indicated that this exception was intended to be similar in effect to the criminal exception but that “[i]t employs a balancing test rather than the specific exceptions stated in subdivision (b)(1) in recognition of the difficulty of foreseeing future developments in the law,” particularly with regard to “evolving causes of action such as claims for sexual harassment.”¹⁶⁴ No case, however, has applied Rule 412(b)(2) to allow for the admission of evidence concerning an alleged victim's sexual history or predisposition to prove a purpose not covered by Rule 412(b)(1).

Indeed, as the Advisory Committee's Note made clear, Rule 412(b)(2) was drafted to make it more difficult to admit evidence concerning an alleged victim's sexual history or predisposition in civil cases than it was in criminal cases.¹⁶⁵ This is because evidence satisfying a Rule 412(b)(1) exception is admissible as long as it does not violate Federal Rule of Evidence 403, which “tilts the balance in favor of admission”¹⁶⁶ of evidence by providing that relevant evidence may only “be excluded if its probative value is substantially outweighed” by concerns such as “the danger of unfair

161. FED. R. EVID. 412 advisory committee's note to the 1994 amendment (citing *Olden v. Kentucky*, 488 U.S. 227 (1988)).

162. See, e.g., *United States v. White Buffalo*, 84 F.3d 1052, 1054 (8th Cir. 1996) (finding Rule 412(b)(1)(C) did not allow for evidence of the alleged victim's sexual history for impeachment purposes).

163. FED. R. EVID. 412(b)(2).

164. FED. R. EVID. 412 advisory committee's note to the 1994 Amendment.

165. *Id.*

166. *United States v. Rivera*, 83 F.3d 542, 545 (1st Cir. 1996).

prejudice.”¹⁶⁷ In such cases, relevant evidence will likely be admitted because the burden is upon the party opposing the admission of evidence to prove affirmatively that its probative value is substantially outweighed by the danger of unfair prejudice.¹⁶⁸

Consider a hypothetical in which the prosecution charges the defendant with rape and presents evidence that the alleged victim had scratches on her wrists. The defendant might seek, pursuant to Rule 412(b)(1)(A), to present evidence of the alleged victim’s other sexual acts committed in the days before and after the alleged rape to prove that they could have caused her injuries. For the judge to exclude this evidence, the prosecutor would need to prove affirmatively that its probative value for establishing that these other acts could have caused her injuries was substantially outweighed by the danger that the jury would misuse this evidence as an indication that the alleged victim had a propensity to consent to sexual acts and thus likely consented to the sexual act at issue—its unfairly prejudicial effect.¹⁶⁹

In contrast, by stating that similar evidence offered in civil cases is admissible only if its probative value substantially outweighs its unfairly prejudicial effect, as well as “harm to any victim,” Rule 412(b)(2) “reverses the usual approach”¹⁷⁰ and tilts the balance toward inadmissibility in three regards.¹⁷¹ First, it “raises the threshold for admission by requiring that the probative value of the evidence *substantially* outweigh the specified dangers.”¹⁷² Second, it “shift[s] the burden to the proponent to demonstrate admissibility rather than making the opponent justify exclusion of the evidence.”¹⁷³ Third, it puts “harm to the victim” “on the scale in addition to prejudice to the parties.”¹⁷⁴

Thus, if we tweak the facts of the above hypothetical to make it a civil rape trial, it drastically alters the issue of admissibility. Now, for the judge to admit the “other sexual act” evidence, defense counsel would need to prove affirmatively that its probative value substantially outweighs (1) the danger that the jury could misuse this evidence as an indication that the alleged victim had a propensity to consent to sexual acts and thus likely consented to the sexual act at issue (its unfairly prejudicial effect); as well as (2) the harm to the victim, including the invasion of her privacy, her

167. FED. R. EVID. 403.

168. *United States v. Tse*, 375 F.3d 148, 164 (1st Cir. 2004).

169. See Jane H. Aiken, *Protecting Plaintiffs’ Sexual Pasts: Coping with Preconceptions Through Discretion*, 51 EMORY L.J. 559, 570–82 (2002).

170. *Rodriguez-Hernandez v. Miranda-Velez*, 132 F.3d 848, 856 (1st Cir. 1998).

171. Chris William Sanchirico, *Character Evidence and the Object of Trial*, 101 COLUM. L. REV. 1227, 1295 n.164 (2001).

172. FED. R. EVID. 412 advisory committee’s note to the 1994 Amendment (emphasis added).

173. *Id.*

174. *Id.*

potential embarrassment, and the potential for the jury to engage in stereotypical thinking with regard to her.¹⁷⁵

Federal Rule of Evidence 412(c) contains procedures for providing notice and determining the admissibility of evidence offered in criminal cases pursuant to Rules 412(b)(1)(A)(B) or (C).¹⁷⁶ The purpose of this Rule is to give notice to the opposing party in a criminal case to a similar degree as the notice that Federal Rule of Civil Procedure 26 affords to civil litigants as part of the discovery process.¹⁷⁷

iv. Sex Crime Propensity Evidence

In 1994, Congress added three new sex crime-related rules of evidence as part of the Violent Crime Control and Law Enforcement Act of 1994.¹⁷⁸ This Act created Federal Rules of Evidence 413–415.¹⁷⁹ Federal Rule of Evidence 413 states that in a criminal case in which the defendant is accused of an offense of sexual assault, evidence that he committed other offenses of sexual assault is admissible “and may be considered for its bearing on any matter to which it is relevant.”¹⁸⁰ Federal Rule of Evidence 414 does the same in cases in which the defendant in a criminal case is accused of an offense of child molestation, allowing for the admission of evidence that he committed other offenses of child molestation.¹⁸¹ Meanwhile, Federal Rule of Evidence 415 achieves the same result in civil cases allowing for evidence of a party’s commission of other offenses of sexual assault and child molestation when the opposing party’s claim for damages or relief is predicated on the party’s “alleged commission of conduct constituting an offense of sexual assault or child molestation,” respectively.¹⁸²

Congress enacted these Rules with the belief that they were “critical to the protection of the public from rapists and child molesters, and . . . justified by the distinctive characteristics of the cases [they would]

175. *Id.* The Rule also indicates that “[e]vidence of an alleged victim’s reputation is admissible only if it has been placed in controversy by the alleged victim,” a restriction on admissibility not contained in the criminal exceptions. FED. R. EVID. 412(b)(2).

176. FED. R. EVID. 412(c).

177. See John G. Douglass, *Balancing Hearsay and Criminal Discovery*, 68 FORDHAM L. REV. 2097, 2142 n.194 (2000).

178. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 120005(a), 108 Stat. 1796 (1994).

179. *Id.*

180. FED. R. EVID. 413(a).

181. FED. R. EVID. 414.

182. FED. R. EVID. 415.

affect.”¹⁸³ And while they have borne the brunt of much scholarly criticism,¹⁸⁴ all three Rules remain in effect today, ensuring that this type of propensity character evidence is equally admissible in both civil and criminal cases.¹⁸⁵

v. *Character “In Issue”*

Federal Rule of Evidence 405(b) retained the common law qualification allowing for the admission of character evidence when character was deemed “in issue.”¹⁸⁶ It stated that “[i]n cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person’s conduct.”¹⁸⁷ Courts narrowly construed Rule 405(b) and found that it was “limited to issues such as defamation, negligent hiring or entrustment, determining the best interests of a child in a child custody hearing, and possibly entrapment when raised as a criminal defense.”¹⁸⁸

So, for instance, in *Longmire v. Alabama State University*, the court dealt with, *inter alia*, a counterclaim by Dr. Leon Howard, who alleged that his former employee, Venus Longmire, “defamed him by accusing him of having attempted to rape her.”¹⁸⁹ Longmire argued that based upon this counterclaim, she should have been allowed to present evidence relating to Dr. Howard’s past sexual activities, including an alleged extra-marital affair.¹⁹⁰ The United States District Court of the Middle District of Alabama agreed, finding that “[b]ecause Dr. Howard ha[d] placed his character ‘in issue’ by filing a defamation action, his good or bad character may be proven by specific instances of his conduct.”¹⁹¹ This evidence, however, could not be used to prove that Dr. Howard had a propensity to engage in certain types of sexual acts and that he thus likely acted in conformity with this propensity at the time in question.¹⁹² Instead, it was offered to prove that Dr. Howard already had a bad reputation for sexual misconduct,

183. 140 CONG. REC. H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari).

184. See, e.g., Rosanna Cavallaro, *Federal Rules of Evidence 413–415 and the Struggle for Rulemaking Preeminence*, 98 J. CRIM. L. & CRIMINOLOGY 31 (2007).

185. Compare FED. R. EVID. 413–14 (allowing propensity character evidence in criminal cases), with FED. R. EVID. 415 (allowing propensity character evidence in civil cases).

186. FED. R. EVID. 405(b).

187. *Id.*

188. James A. Adams, *Admissibility of Proof of an Assault Victim’s Specific Instances of Conduct as an Essential Element of a Self-Defense Claim Under Iowa Rule of Evidence 405*, 39 DRAKE L. REV. 401, 415 (1989–1990).

189. 151 F.R.D. 414, 416 (M.D. Ala. 1992).

190. *Id.* at 419.

191. *Id.*

192. *Id.*

meaning that Longmire either was not liable for defamation or that any damages against her should be minimal.¹⁹³

Rule 405(b) has never been amended and applies equally in civil and criminal cases.¹⁹⁴

vi. Other Purposes

Federal Rule of Evidence 404(b) continued to allow for the admission of character evidence to prove certain purposes other than propensity and conformity. Under Rule 404(b), while evidence of other crimes, wrongs, or acts was not admissible as propensity character evidence, it was “admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”¹⁹⁵

(1) Permissible “Other Purposes”

Thus, Rule 404(b) was consistent with the common law cases finding “other act evidence” admissible to prove motive,¹⁹⁶ intent or absence of mistake or accident,¹⁹⁷ common scheme, plan, modus operandi, signature crime,¹⁹⁸ and identity.¹⁹⁹ Rule 404(b) also added other permissible purposes: opportunity or ability, preparation, and knowledge.²⁰⁰ Additionally, courts have found that Rule 404(b)’s list of permissible purposes is non-exhaustive

193. *Id.*

194. See Miguel A. Méndez, *VII. Relevance: Definition and Limitations—Conforming the California Evidence Code to the Federal Rules of Evidence*, 42 U.S.F. L. REV. 329, 343 (2007) (“Whenever a character trait is an element of a criminal or civil cause of action, Rule 405(b) and Code section 1101 allow the use of relevant evidence to prove the trait.”).

195. FED. R. EVID. 404(b).

196. See, e.g., *United States v. Williams*, 95 F.3d 723, 731 (8th Cir. 1996) (finding evidence that the defendant was apprehended with drugs was admissible to prove his motive to kidnap a rival drug dealer).

197. See, e.g., *United States v. Hurn*, 496 F.3d 784, 787 (7th Cir. 2007) (finding that the defendant’s prior conviction for cocaine distribution was admissible to prove intent in his prosecution for possession of cocaine with intent to distribute).

198. See, e.g., *United States v. Trenkler*, 61 F.3d 45, 54–56 (1st Cir. 1995) (finding evidence that the defendant had previously constructed a remote-controlled bomb was admissible to prove *modus operandi* in his trial for constructing a similar bomb that killed one Boston police officer and severely injured another).

199. See, e.g., *United States v. Gibson*, 170 F.3d 673, 679 (7th Cir. 1999) (“Gibson’s statements to the FBI . . . helped establish that Agent Banks dealt with Gibson, not his brother, in the charged 1996 drug transactions even though Gibson did not confess to the specific undercover sales in this case.”).

200. FED. R. EVID. 404(b).

and that character evidence can also be used for other purposes, such as rebutting a duress defense.²⁰¹

As in the common law cases, courts in post-Rule 404(b) cases continued to balance probative value and prejudicial effect even after determining that character evidence was relevant to prove some permissible purpose, with the balancing test being “the same for both criminal and civil cases.”²⁰² Rule 404(b) also continued to allow the party against whom such character evidence was offered to ask for and receive a limiting instruction informing the jury that the evidence was to be considered solely as evidence of a permissible purpose, such as intent, and not as propensity character evidence.²⁰³

(2) 1991 Amendment

Only one change has been made to Rule 404(b) since its introduction, the addition of a clause at the end of its second sentence. As amended in 1991, the Rule now provides in relevant part that “other act” evidence is admissible for:

[O]ther purposes . . . provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.²⁰⁴

The Committee clearly articulated, however, that the amendment was not “intended to redefine what evidence would otherwise be admissible under Rule 404(b).”²⁰⁵ Instead, as with the aforementioned Rule 412(c), the purpose of this Rule is to give notice to the opposing party in a criminal case to a similar degree as the notice that Federal Rule of Civil Procedure 26 affords to civil litigants as part of the discovery process.²⁰⁶

201. See, e.g., *United States v. Verduzco*, 373 F.3d 1022, 1029 (9th Cir. 2004).

202. Marc T. Treadwell, *Survey Articles: Evidence*, 49 *MERCER L. REV.* 1027, 1035 (1997–1998).

203. See, e.g., *United States v. Gaddy*, 532 F.3d 783, 789–90 (8th Cir. 2008).

204. *FED. R. EVID.* 404(b).

205. *FED. R. EVID.* 404(b) advisory committee’s note.

206. See *Douglass*, *supra* note 177, at 2142 n.194.

vii. Impeachment

Federal Rule of Evidence 404(a)(3) continued to allow for impeachment by permitting the admission of “[e]vidence of the character of a witness, as provided in Rules 607, 608, and 609,” the Rules governing impeachment.²⁰⁷

(1) Rule 607

Federal Rule of Evidence 607 eliminated the common law “voucher rule” by stating that “[t]he credibility of a witness may be attacked by any party, including the party calling the witness.”²⁰⁸ The Advisory Committee’s Note accompanying the Rule indicated that the voucher rule was based upon “false premises” because “[a] party does not hold out his witnesses as worthy of belief, since he rarely has a free choice in selecting them.”²⁰⁹ Rule 607 has never been amended and applies equally to criminal and civil cases.²¹⁰

(2) Rule 608

While Rule 607 thus dismantled the “voucher rule,” Federal Rule of Evidence 608 retained the remainder of the common law rules regarding impeachment of witnesses through opinion and reputation evidence concerning honesty and veracity. Under Rule 608(a), parties could impeach witnesses through opinion and reputation evidence and could still only bolster the credibility of a witness after his or her character for truthfulness was attacked.²¹¹ As in the Rule 404(b) context, the party against whom such impeachment evidence was offered could ask for and receive a limiting instruction informing the jury that the evidence was to be considered solely as evidence bearing upon his credibility as a witness and not as propensity character evidence.²¹² Additionally, as under Rule 405(a), Federal Rule of Evidence 608(b) only allowed parties to inquire into specific instances of dishonesty on cross-examination to gauge the testimonial qualifications of the witness, with such inquiry requiring a good faith belief that the instances

207. FED. R. EVID. 404(a)(3).

208. FED. R. EVID. 607.

209. FED. R. EVID. 607 advisory committee’s note.

210. See Thomas Black, *Article VI: Witnesses*, 30 HOUS. L. REV. 673, 717 (1993) (noting that the Texas counterpart to Federal Rule of Evidence 607 is identical to it and applies in both civil and criminal cases).

211. FED. R. EVID. 608(a).

212. See, e.g., *United States v. Taylor*, 728 F.2d 864, 873 (7th Cir. 1984).

occurred and without resort to extrinsic evidence in the event of an unsatisfactory answer.²¹³ Besides a clarifying amendment in 2003,²¹⁴ Rule 608 has not been amended, and it applies equally in both criminal and civil cases.²¹⁵

III. RULE 609(a)(1) IMPEACHMENT

A. *Disqualification for Infamy and the Common Law Origins of Conviction-Based Impeachment*

In the common law days, the doctrine of disqualification for infamy deemed an individual who had been convicted of a felony or a crime of *crimen falsi* incompetent to testify at trial.²¹⁶ At the time, felony convictions were generally defined as convictions for crimes punishable by incarceration for more than one year²¹⁷ while “[c]rimes falsi referred to crimes of fraud and deceit, as well as crimes that generally fell under the category of obstruction of justice.”²¹⁸ The “infamy rule” was part of a patchwork of rules deeming certain categories of individuals incompetent to testify at trial.²¹⁹ For instance, spouses were incompetent to testify under the doctrine of coverture and atheists were incompetent to testify on the grounds of irreligion.²²⁰ Eventually, statutory reforms replaced these incompetence rules.²²¹ One such reform replaced the doctrine of disqualification for infamy with a rule permitting convicted individuals to testify, but allowing for the automatic admission of evidence of their felony and *crimen falsi* convictions for impeachment purposes.²²² Subsequently, most courts relented in the face of scholarly criticism of such automatic admission and shifted “toward a more flexible approach” under which they balanced a

213. FED. R. EVID. 608(b).

214. See FED. R. EVID. 608 advisory committee’s note to the 2003 amendment (“The Rule has been amended to clarify that the absolute prohibition on extrinsic evidence applies only when the sole reason for proffering that evidence is to attack or support the witness[s] character for truthfulness.”).

215. See Margaret Meriwether Cordray, *Evidence Rule 806 and the Problem of Impeaching the Nontestifying Declarant*, 56 OHIO ST. L.J. 495, 519 n.80 (1995) (“Impeachment pursuant to Rule 608 is permissible in both civil and criminal cases.”).

216. See Roger C. Park, *Impeachment with Evidence of Prior Convictions*, 36 SW. U. L. REV. 793, 793 (2008) (“The usual list of disqualifying crimes included all felonies and all crimes of ‘crimen falsi.’”).

217. See, e.g., George C. Thomas III, *The Criminal Procedure Road Not Taken: Due Process and the Protection of Innocence*, 3 OHIO ST. J. CRIM. L. 169, 183 (2005).

218. Park, *supra* note 216, at 793.

219. Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1369 n.35 (1985).

220. *Id.*

221. Park, *supra* note 216, at 793–94.

222. *Id.*

conviction's probative value against its prejudicial effect before admitting it.²²³

B. Federal Rule of Evidence 609—The Judicial Scylla

Congress eventually codified this common law into Federal Rule of Evidence 609, which was “[s]ewn together using disparate parts and contradictory theories.”²²⁴ Those who wanted convictions deemed per se admissible to impeach witnesses were pitted against those who urged that strict limits be placed on conviction-based impeachment, with each and every opinion in between finding voice in one of the panoply of its drafts.²²⁵ Rule 609 sparked more controversy than any other provision of the Federal Rules of Evidence by a significant margin, with the debate so fierce that it eventually “threatened the entire project to create a Federal Rules of Evidence” as the debate exploded from a narrow discussion of impeachment into a broad referendum “on how to balance the rights of an accused against the rights of society to defend itself from criminals.”²²⁶ And the bulk of that debate centered around Rule 609(a), with its discussion consuming nine pages of the Congressional record compared to the five page consideration of the entirety of Article Eight, which encompassed “highly controversial changes to traditional hearsay doctrine.”²²⁷ As finally enacted, Rule 609 was thus a “creature born of legislative compromise”²²⁸—a judicial Scylla of sorts—“incorporating no less than three balancing tests, two references to fairness, one to justice, and several other undefined terms”²²⁹ which “wreak[ed] a sort of judicial vengeance on those unfortunate enough to have to apply it.”²³⁰

223. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 512–13 (1989).

224. Mark Voigtmann, Note, *The Short History of a Rule of Evidence That Failed (Federal Rule of Evidence 609, Green v. Bock Laundry Machine Co. and the New Amendment)*, 23 IND. L. REV. 927, 929 (1990).

225. Irving Younger, *Three Essays on Character and Credibility Under the Federal Rules of Evidence*, 5 HOFSTRA L. REV. 7, 11 (1976).

226. Victor Gold, *Impeachment by Conviction Evidence: Judicial Discretion and the Politics of Rule 609*, 15 CARDOZO L. REV. 2295, 2295, 2301 (1994).

227. *Id.* at 2303 n.45.

228. Voigtmann, *supra* note 224, at 929.

229. Gold, *supra* note 226, at 2296.

230. Voigtmann, *supra* note 224, at 929.

C. Structure of Rule 609: Navigating the Jabberwocky

1. Rule 609(a)

When a party attempted to impeach a witness or testifying party through evidence of a conviction, courts had to begin their inquiry under Rule 609(a), which indicated that, “[f]or the purpose of attacking the credibility of a witness . . . evidence that a witness other than the accused 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 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 accused,” or if the crime “involved dishonesty or false statement, regardless of the punishment.”²³¹

There were thus several requirements a party had to satisfy before it could impeach a witness through evidence of a conviction. The first was that the impeachment could only be done “during cross-examination,” meaning that a party could not impeach its own witness.²³² This was a limitation, however, which “virtually every circuit found to be inapplicable.”²³³ Instead, it soon became common practice for courts to allow attorneys to reveal their witness’s convictions during direct examination “to ‘remove the sting’ of the impeachment.”²³⁴ Second, a party could only establish that a witness had an impeachable conviction through the public record or the witness’s admission.²³⁵ Many courts, however, similarly ignored this requirement and allowed parties to prove convictions through other methods, such as “rap sheets.”²³⁶ Third, the conviction at issue either had to be a conviction for a crime involving dishonesty or false statement or a crime punishable by death or imprisonment in excess of one year—the Congressional definition of a felony conviction.²³⁷ The next two subsections briefly address this last requirement.

2. Rule 609(a)(1): Felony Conviction Impeachment

Under Rule 609(a)(1), parties could impeach witnesses and testifying parties through felony convictions for any type of crime.²³⁸ As the language

231. FED. R. EVID. 609(a).

232. *Id.*

233. FED. R. EVID. 609 advisory committee’s notes to the 1990 amendment.

234. *Id.*

235. FED. R. EVID. 609(a).

236. *United States v. Scott*, 592 F.2d 1139, 1143 (10th Cir. 1979).

237. FED. R. EVID. 609; *see* FED. R. EVID. 609 advisory committee’s note.

238. FED. R. EVID. 609(a)(1).

of the rule indicated, in determining whether a conviction was a felony conviction, courts were to consider whether the crime for which the witness was convicted was *punishable*, and not whether it was actually *punished*, by imprisonment in excess of one year or death.²³⁹ Thus, for instance, in *United States v. Harris*, the Ninth Circuit found that Rule 609(a)(1) applied to a testifying defendant's conviction for cocaine possession, which was punishable in California by incarceration for up to three years, despite the fact that the defendant was only sentenced to probation with 270 days in jail.²⁴⁰ Assuming that a court found that a witness indeed had a felony conviction, Rule 609(a)(1) laid out a balancing test, but, in one of the Rule's bag of tricks, courts were not to apply it until after considering Rules 609(c), 609(b), and 609(d).²⁴¹

3. Rule 609(a)(2): *Crimen Falsi* Impeachment

Meanwhile, under Rule 609(a)(2), parties could impeach witnesses and testifying parties through evidence of convictions for crimes of "dishonesty or false statement," meaning that convictions falling under its auspices could be of either the felony or misdemeanor variety.²⁴² But what convictions fell under its auspices? The Advisory Committee's note to Rule 609 made clear that the Committee intended Rule 609(a)(2) to cover convictions for the same crimes deemed *crimen falsi* under the common law.²⁴³ Specifically, the Committee stated that the phrase "dishonesty or false statement" was meant to cover "crimes such as perjury, or subordination of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully."²⁴⁴ Assuming that a court found that a witness indeed had a conviction for a *crimen falsi* crime, Rule 609(a)(2) provided that the conviction was per se admissible for impeachment purposes in either a criminal or civil case,²⁴⁵ but, again, only after consideration of Rules 609(c), 609(b), and 609(d).

239. *Id.*

240. 1992 WL 72868, No. 90-50658 at *2 n.2 (9th Cir. Apr. 10, 1992).

241. *See id.*

242. *United States v. Mahone*, 328 F. Supp. 2d 77, 82 (D. Me. 2004).

243. FED. R. EVID. 609 advisory committee's note.

244. *Id.*

245. FED. R. EVID. 609(a)(2).

4. 609(c): Pardon the Interruption

Rule 609(c) set forth two situations where a witness's convictions were per se inadmissible to impeach his testimony. First, under Rule 609(c)(1), a party could not impeach a witness through a conviction if:

[T]he conviction ha[d] been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person ha[d] not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year.²⁴⁶

Second, pursuant to Rule 609(c)(2), a party could not impeach a witness through a conviction if “the conviction ha[d] been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.”²⁴⁷

The Rule thus enumerated a few procedures which potentially triggered a Rule 609(c) analysis. One enumerated procedure was the pardon, in which the President, governor, or an agency such as a pardon or parole board releases an offender from the consequences of his offense.²⁴⁸ In such a situation, the pardoner delivers the pardon to the pardonee, and the pardon is “not communicated officially to the court.”²⁴⁹ Conversely, a convict typically receives an annulment from a court by filing a petition of annulment with the sentencing court pursuant to a procedure set forth in a statute.²⁵⁰ Meanwhile, the “‘certificate of rehabilitation,’ is something similar to an annulment or a pardon, constituting an exceptional determination that the defendant has been fully reintegrated into society.”²⁵¹

A pardon or annulment can be based on a finding of innocence. For instance, one study found that between 1989 and 2003, there were forty-two cases where executive officers issued pardons based upon evidence of defendants' innocence, which often consisted of DNA evidence.²⁵² Because the exonerated individuals in such cases were deemed innocent of the subject crimes, their convictions could not be used to impeach them, even if they were subsequently convicted of other crimes.²⁵³

246. FED. R. EVID. 609(c)(1).

247. FED. R. EVID. 609(c)(2).

248. *Osborn v. United States*, 91 U.S. 474, 477 (1875).

249. *United States v. Wilson*, 32 U.S. 150, 161 (1833).

250. *See, e.g.*, N.H. REV. STAT. § 651:5 (setting forth the procedure under which certain convicts can file a petition of annulment with the sentencing court).

251. *United States v. Berger*, No. 94-30128, 1995 WL 110097 at *2 (9th Cir. Mar. 15, 1995).

252. Samuel R. Gross, *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 524 (2005).

253. FED. R. EVID. 609(c) advisory committee's note.

Like the certificate of rehabilitation, pardons and annulments can also be based upon a finding that the convicted person was rehabilitated. As an example, in *Brown v. Frey*, the plaintiff John Brown, an inmate at the Missouri Eastern Correctional Center (MECC), brought a lawsuit alleging that various MECC employees deprived him of numerous constitutional rights.²⁵⁴ At trial, the district court precluded Brown from cross-examining MECC Investigator Captain Ron Kennedy regarding a prior perjury conviction.²⁵⁵ Upon Brown's cross-appeal, the Eighth Circuit found that the district court properly precluded such cross-examination, noting that Captain Kennedy's conviction was pardoned based on a finding of rehabilitation.²⁵⁶ The Eighth Circuit thus concluded that the district court properly precluded cross-examination because Rule 609(c)(1) provided "without enumerated exception[,] that the evidence of conviction is not admissible when the witness has received a pardon based upon rehabilitation."²⁵⁷

Despite the Eighth Circuit's claim that Rule 609(c)(1) was "without enumerated exception," there was indeed a stated exception when the witness to be impeached had been "convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year."²⁵⁸ The reasoning behind this exception was that Rule 609(c)(1) prevented impeachment on the ground "that a rehabilitated person should no longer be associated with his conviction."²⁵⁹ When, however, a witness was "subsequently convicted of a felony, he . . . demonstrated that he [wa]s not truly rehabilitated."²⁶⁰ The United States District Court for the District of Columbia used this qualification in *United States v. Morrow*, when it allowed defense counsel to impeach a witness for the prosecution through a felony weapons conviction, which had been set aside due to rehabilitation because the witness was subsequently convicted of felony theft.²⁶¹

By its language, Rule 609(c) also precluded conviction-based impeachment when the conviction was subjected to an "equivalent procedure," with the dispositive question being whether the procedure was based upon a finding of rehabilitation or innocence of the person

254. 889 F.2d 159, 161 (8th Cir. 1989).

255. *Id.* at 162.

256. *Id.* at 171.

257. *Id.*

258. FED. R. EVID. 609(c)(1).

259. Chandra S. Menon, Comment, *Impeaching Witnesses in Criminal Cases with Evidence of Convictions: Putting Louisiana's Rule in Context*, 79 TUL. L. REV. 701, 709 (2005).

260. *Id.*

261. 2005 WL 1017827, No. CRIM.A. 04-355(CKK) at *2 (D.D.C. May 2, 2005).

convicted.²⁶² An example where a court found this question answered in the affirmative can be found in *United States v. Pagan*, where the Second Circuit determined that the district court committed reversible error by allowing the prosecution to impeach the defendant through his conviction for interstate transportation of a stolen vehicle because that conviction was vacated pursuant to the set-aside provision of an act which required a finding that the offender's rehabilitation had been accomplished.²⁶³ Conversely, in *U.S. Xpress Enterprises, Inc. v. J.B. Hunt Transport, Inc.*, a district court denied the motion of a co-defendant to preclude the plaintiff from impeaching its driver through convictions under Canadian law for possession of stolen property and conspiracy.²⁶⁴ On appeal, the Eighth Circuit found that the district court's decision was not an abuse of discretion because the driver's convictions were absolved under Canadian law, not based upon a finding of innocence or rehabilitation, but because the driver paid \$5,000 and complied with his six-month probation term.²⁶⁵

Of course, pardons or annulments can also be issued without a finding of innocence or rehabilitation, as is the case with automatic pardons issued to restore the civil rights lost by an incarcerated individual by virtue of his conviction.²⁶⁶ Moreover, when a conviction was pardoned, annulled, or otherwise expunged based upon a desire to encourage rehabilitation, as opposed to a finding of rehabilitation, Rule 609(c) did not preclude impeachment.²⁶⁷

Nonetheless, a few courts flatly rejected Rule 609(c) and refused to require a finding of innocence or rehabilitation. For instance, in *United States v. Hamilton*, criminal defendants sought to use a conviction to impeach a witness for the prosecution who had been pardoned by the governor, but not based upon a finding of innocence or rehabilitation.²⁶⁸ Despite the language of Rule 609(c), the United States District Court for the Southern District of Texas precluded such impeachment, finding that "a pardon is a pardon" and that "[t]he federal evidentiary rule and supporting case law are logically deficient."²⁶⁹

262. *United States v. Wood*, 943 F.2d 1048, 1055 (9th Cir. 1991).

263. 721 F.2d 24, 30 (2d Cir. 1983).

264. 320 F.3d 809, 816 (8th Cir. 2003).

265. *Id.*

266. FED. R. EVID. 609 advisory committee's note ("A pardon or its equivalent granted solely for the purpose of restoring civil rights lost by virtue of a conviction has no relevance to an inquiry into character.").

267. *Wood*, 943 F.2d at 1055 ("Rehabilitative motivation alone, however, is insufficient to trigger Rule 609(c).").

268. 827 F. Supp. 424, 424 (S.D. Tex. 1993).

269. *Id.* at 425.

Rule 609(c) has never been amended, and it applies equally in both criminal and civil cases.²⁷⁰

5. 609(b): Ten Years Have Got Behind You

If a felony or *crimen falsi* conviction was not the subject of a Rule 609(c) procedure, but if it was more than ten years old, Rule 609(b) prescribed a balancing test that would replace Rule 609(a)(1)'s balancing test or the per se admissibility laid out in Rule 609(a)(2).²⁷¹ Rule 609(b) stated in relevant part that:

Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.²⁷²

As Rule 609(b) indicated, the ten year clock began with the date of the prior conviction or the date of release, *whichever was later*.²⁷³ So, if a witness was convicted of a crime more than ten years before trial but was not released from confinement for that crime until ten years or less before trial, Rule 609(b) would not cover the conviction, with the date of release being the “determinative date.”²⁷⁴ Conversely, if a witness was convicted of a crime and sentenced to time served or not sentenced to incarceration, the date of conviction was the determinative date.²⁷⁵

As under Rule 412(b)(2)—the rape shield exception for civil cases—when convictions were more than ten years old, Rule 609(b) provided a balancing test that flipped Rule 403 on its head and required that the proponent establish that the conviction’s probative value substantially

270. Compare *Brown v. Frey*, 889 F.2d 159, 161 (8th Cir. 1989) (precluding the use of a pardoned conviction for impeachment purposes in a civil case), with *United States v. Pagan*, 721 F.2d 24, 30 (2d Cir. 1983) (precluding the use of a set-aside conviction for impeachment purposes in a criminal case).

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

272. *Id.*

273. *Id.*

274. *United States v. Brewer*, 451 F. Supp. 50, 52 (E.D. Tenn. 1978).

275. See, e.g., *United States v. Lopez*, 979 F.2d 1024, 1033 (5th Cir. 1992) (“[B]ecause Lopez was given probation and was not confined, the date of the conviction controls.”).

outweighed its prejudicial effect.²⁷⁶ The Advisory Committee Note indicated that Rule 609(b) tipped the scales in favor of inadmissibility because “convictions over ten years old generally do not have much probative value.”²⁷⁷ Nonetheless, Rule 609(b) left the door open for the admission of some remote convictions for impeachment purposes because there “may be exceptional circumstances under which the conviction substantially bears on the credibility of the witness.”²⁷⁸ The Rule, however, only left the door open a crack, with the Advisory Committee indicating that its intention was for remote convictions to “be admitted very rarely and only in exceptional circumstances.”²⁷⁹

Some courts, however, ignored the language of Rule 609(b) and allowed for the admission of convictions falling under its auspices without finding that their probative value substantially outweighed their prejudicial effect.²⁸⁰ Rule 609(b) has never been amended, and it applies equally in both criminal and civil cases.²⁸¹

6. 609(d): Youthful Indiscretions

Finally, if the “conviction” at issue was in fact a juvenile adjudication, courts had to apply Federal Rule of Evidence 609(d), which stated that:

Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.²⁸²

The upshot of Rule 609(d) was that, for impeachment purposes, evidence of juvenile adjudications was per se inadmissible in civil cases²⁸³

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

277. FED. R. EVID. 609(b) advisory committee’s note.

278. *Id.*

279. *Id.*

280. *See, e.g.,* United States v. Scott, 592 F.2d 1139 (10th Cir. 1979).

281. *See* Thomas J. Reed, *The Re-Birth of the Delaware Rules of Evidence: A Summary of the 2002 Changes in the Delaware Uniform Rules of Evidence*, 5 DEL. L. REV. 155, 186 n.65 (2002) (noting that Delaware’s counterpart to Fed. R. Evid. 609(d) applies equally in civil and criminal trials).

282. FED. R. EVID. 609(d).

283. *See* Powell v. Levit, 640 F.2d 239, 241 (9th Cir. 1981) (“The trial court has no discretion to admit such evidence in a civil proceeding.”).

and per se inadmissible when offered against a criminal defendant.²⁸⁴ Some of the main rationales undergirding this disfavoring of impeachment through juvenile adjudications were “policy considerations much akin to those which dictate exclusion of adult convictions after rehabilitation has been established.”²⁸⁵ Indeed, before the passage of the Federal Rules of Evidence, “[t]he prevailing view ha[d] been that a juvenile adjudication [wa]s not usable for impeachment.”²⁸⁶ The drafters of Rule 609(d) decided to take a different route by not categorically excluding the use of juvenile adjudications in criminal cases to impeach witnesses other than defendants. The Advisory Committee’s Note to Rule 609 indicated that this deviation was premised on the grounds that “the rehabilitative process may in a given case be a demonstrated failure, or the strategic importance of a given witness may be so great as to require the overriding of general policy in the interests of particular justice.”²⁸⁷

As support for this contention, the Advisory Committee cited to the Supreme Court’s opinion in *Giles v. Maryland*.²⁸⁸ In *Giles*, two brothers convicted of raping a sixteen year-old girl filed a petition for post-conviction relief, which claimed, *inter alia*, that the prosecution denied them due process of law under the Fourteenth Amendment by suppressing evidence favorable to them, including evidence about the results of two juvenile court proceedings against the alleged victim.²⁸⁹ The case eventually reached the Supreme Court, which found that the prosecutor’s failure to disclose material facts to the defense violated their right to a fair trial under the Due Process Clause of the Fourteenth Amendment.²⁹⁰

This Supreme Court case underpinning Rule 609(d)’s deviation from the prevailing view implied that the Rule was intended to allow only criminal defendants to impeach witnesses in cases where holding otherwise would violate their constitutional rights.²⁹¹ Notwithstanding this fact, the broad language of Rule 609(d) ostensibly allowed both criminal defendants and the prosecution to use juvenile adjudications to impeach.²⁹² The rule clearly

284. See *United States v. Pretlow*, 770 F. Supp. 239, 243 (D.N.J. 1991) (“Federal Rule of Evidence 609(d) simply does not permit the use of such evidence against a [criminal] defendant.”).

285. FED. R. EVID. 609(d) advisory committee’s note.

286. *Id.*

287. *Id.*

288. 386 U.S. 66 (1967).

289. *Id.* at 69.

290. *Id.*

291. See *id.*

292. See FED. R. EVID. 609(d).

allowed for impeachment through evidence of juvenile adjudications when such impeachment was “necessary for a fair determination of the issue of *guilt or innocence*.”²⁹³ In other words, when impeachment through juvenile adjudications was necessary for a defendant to prove that he was innocent, he could use Rule 609(d) to impeach; when such impeachment was necessary to prove that the defendant was guilty, the prosecution could use Rule 609(d) to impeach.²⁹⁴

When, however, was such impeachment “necessary for a fair determination of the issue of guilt or innocence?”²⁹⁵ In making this determination, courts considered factors such as whether the “juvenile court adjudication could shed light on the credibility of a key witness,” and “whether in the particular case the rehabilitative purposes of the juvenile system ha[d] failed.”²⁹⁶ Only if the party seeking to impeach a witness through a juvenile adjudication could make a strong showing on these factors could he overcome the “presumption that evidence of juvenile adjudications is generally *not* admissible.”²⁹⁷

Even upon making such a showing, however, a party still needed to prove under Rule 609(d) that an adult conviction for the same offense leading to the juvenile adjudication would have been “admissible to attack the credibility of an adult.”²⁹⁸ Therefore, if the analysis reached this stage of Rule 609(d) (which has never been amended) the court had to default back to Rule 609(a) to determine whether the offense underlying the juvenile adjudication was a crime of dishonesty or false statement or a crime punishable by death or imprisonment in excess of one year.²⁹⁹

Only at this point, or if none of Rules 609(b), 609(c), and 609(d) applied, would courts (1) *per se* permit impeachment of witnesses through evidence of convictions for crimes of dishonesty or false statement under Rule 609(a)(2), or (2) apply Rule 609(a)(1) when parties sought to impeach witnesses through evidence of felony convictions. This takes us back to our consideration of Rule 609(a)(1).

293. *Id.* (emphasis added).

294. *See, e.g.*, Col. Francis A. Gilligan, *Credibility of Witnesses Under the Military Rules of Evidence*, 46 OHIO ST. L.J. 595, 608 (1985) (“Since Rule 609(d) also allows the judge to permit impeachment of a defense witness, *Davis v. Alaska* acts as a two-way street.”).

295. FED. R. EVID. 609(d).

296. John E.B. Myers, *The Child Witness: Techniques for Direct Examination, Cross-Examination, and Impeachment*, 18 PAC. L.J. 801, 932 (1987).

297. *United States v. Williams*, 963 F.2d 1337, 1341 (10th Cir. 1992).

298. FED. R. EVID. 609(d).

299. *See* FED. R. EVID. 609(a).

7. 609(a)(1) Revisited

As noted, Rule 609(a)(1) permitted impeachment through evidence of a felony conviction, but only “if the court determine[d] that the probative value of admitting this evidence outweigh[ed] its prejudicial effect to the [defendant].”³⁰⁰

8. Criminal Defendants

There was only one scenario in which courts read this “special balancing test” in roughly the same manner: the scenario in which the prosecution sought to impeach a testifying criminal defendant. In this scenario, courts always gave criminal defendants the benefit of this test, typically considering five factors in their analyses. These factors, which were first articulated by the Seventh Circuit in *United States v. Mahone*, consisted of:

- (1) The impeachment value of the prior crime.
- (2) The point in time of the conviction and the witness’[s] subsequent history.
- (3) The similarity between the past crime and the charged crime.
- (4) The importance of the defendant’s testimony.
- (5) The centrality of the credibility issue.³⁰¹

Meanwhile, a minority of courts phrased this five factor test as a four factor test, with the third factor analyzed as part of the first factor. These courts considered:

- (1) the kind of crime involved
- (2) when the conviction occurred
- (3) the importance of the witness’s testimony to the case
- (4) the importance of the credibility of the defendant.³⁰²

Under the first factor of both tests, courts considered how much bearing the crime underlying the prior conviction had on the issue of the defendant’s honesty and veracity; “the greater the impeachment value, the higher the

300. FED. R. EVID. 609(a)(1).

301. *United States v. Mahone*, 537 F.2d 922, 929 (7th Cir. 1976) (construing *Gordon v. United States*, 383 F.2d 936, 940 (1967)).

302. *United States v. D’Agata*, 646 F. Supp. 390, 391 (E.D. Pa. 1986).

probative value.”³⁰³ Courts found that crimes of violence have low probative value because such crimes “have little or no direct bearing on honesty” and are instead thought to result “from a short temper, a combative nature, extreme provocation, or other causes.”³⁰⁴ While possession of a controlled substance was thought to have little necessary bearing on veracity,³⁰⁵ “[p]rior drug-trafficking crimes [we]re generally viewed as having some bearing on veracity.”³⁰⁶ Meanwhile, courts determined that “[b]urglary and petit larceny have a definite bearing on honesty which is directly related to credibility.”³⁰⁷

Under the second factor of both tests, “convictions ha[d] more probative value as they bec[a]me more recent,”³⁰⁸ “the older the conviction, the less probative it [wa]s on the credibility issue.”³⁰⁹ The theory behind this sliding scale approach was that the further a defendant was removed from a conviction, the more likely it became that he was rehabilitated, meaning that the conviction now told the court less about his current honesty.³¹⁰ Under the second factor, courts also considered the defendant’s subsequent history.³¹¹ When a defendant had “continued conflict with the law,” as demonstrated by subsequent convictions, his behavior demonstrated that he was not truly rehabilitated, increasing the probative value of his older convictions.³¹²

Under the third factor of the majority test, which courts applying the four factor test analyzed as part of the first factor,³¹³ the similarity between the crime underlying the defendant’s previous conviction and the crime with which he was charged was directly related to the conviction’s prejudicial effect: The more similar the two crimes, the more prejudicial the prior conviction; the less similar, the less prejudicial.³¹⁴ While this relationship may at first appear counterintuitive, it made sense because, again, the conviction was being used solely for its bearing on the credibility of the defendant’s testimony and not being used as propensity character evidence,

303. *Id.* (discussing the *Mahone* court’s analysis of the first factor).

304. *United States v. Cueto*, 506 F. Supp. 9, 13 (W.D. Okla. 1979).

305. *United States v. Puco*, 453 F.2d 539, 543 (2d Cir. 1971).

306. *United States v. Brito*, 427 F.3d 53, 64 (1st Cir. 2005).

307. *United States v. Brown*, 603 F.2d 1022, 1029 (1st Cir. 1979).

308. *United States v. Hayes*, 553 F.2d 824, 828 (2d Cir. 1977).

309. *United States v. Cook*, 608 F.2d 1175, 1194 (9th Cir. 1979).

310. *United States v. Brewer*, 451 F. Supp. 50, 53 (E.D. Tenn. 1978).

311. *See supra* note 301 and accompanying text.

312. *Brewer*, 451 F. Supp. at 53 (“The Court is of the opinion that that the defendant’s continued conflict with the law, even while on parole, is a factor supporting admission of the convictions for impeachment purposes.”).

313. *United States v. Greenidge*, 495 F.3d 85, 97 (3d Cir. 2007) (analyzing similarity under the first factor of the four factor test).

314. *United States v. D’Agata*, 646 F. Supp. 390, 391 (E.D. Pa. 1986).

which was precluded under Federal Rule of Evidence 404.³¹⁵ Because the “[a]dmission of evidence of a similar offense often does little to impeach the credibility of a testifying defendant while undoubtedly prejudicing him . . . [t]he generally accepted view . . . [wa]s that evidence of similar offenses for impeachment purposes under Rule 609 should be admitted sparingly if at all.”³¹⁶

Under the fourth factor of the majority test and the third factor of the minority test, courts considered the evidentiary need for the defendant’s testimony and thus the extent to which he would be deterred from testifying if the prosecution was entitled to impeach him through prior convictions.³¹⁷ As the defendant’s testimony became less important to his trial, the approved use of his prior convictions for impeachment purposes became less prejudicial because the defendant might have had reasonable bases to decide not to testify independent of the jury misusing the conviction as propensity character evidence.³¹⁸ Thus, when the defendant’s state of mind, or, indeed, even his actions, were not at issue and/or where the defendant’s testimony would have been substantially the same as that of other witnesses, there was little need for him to testify and slight prejudicial effect in the approved use of his prior convictions for impeachment purposes.³¹⁹

For instance, in *United States v. Causey*, Michael Causey appealed to the Seventh Circuit from his weapons-related convictions on the grounds that the trial court erred by denying his motion to suppress weapons and drugs recovered from his residence and permitting the prosecution to impeach him through a prior felony conviction.³²⁰ His argument on the former ground was that the weapons and drugs were seized pursuant to a search warrant which was based upon information from a confidential informant and yet which “materially misstated the confidential informant’s true identity” and did not even indicate that he was a paid confidential informant.³²¹ The Seventh Circuit found this argument to be without merit and then, in concluding that the trial court properly allowed the prosecution

315. See FED. R. EVID. 609 advisory committee’s note to the 1990 amendment.

316. *United States v. Beahm*, 664 F.2d 414, 418–19 (4th Cir. 1981).

317. *United States v. Causey*, 9 F.3d 1341, 1344–45 (7th Cir. 1993) (“Causey did not obviously need to testify to raise his various defenses—several other witnesses for Causey reiterated Causey’s testimony. Therefore, Causey could have decided not to testify and risk impeachment.”).

318. 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE, ¶ 609.05[3][e] (Joseph M. McLaughlin, ed., Mathew Bender 2d ed. 2008).

319. *Id.*

320. *United States v. Causey*, 9 F.3d 1341, 1342–43 (7th Cir. 1993).

321. *Id.* at 1343.

to impeach Causey, found that his testimony was not terribly important to his trial.³²² Beyond the obvious fact that Causey's trial solely hinged on the behavior of the government and its confidential informant and not Causey's actions or state of mind, the court found that "Causey did not obviously need to testify to raise his various defenses [because] several other witnesses for Causey reiterated Causey's testimony."³²³

Conversely, when "inferences founded upon unexplained acts [we]re likely to be heavily operative, there [wa]s a manifest need for the defendant to testify, making the approved use of his prior convictions for impeachment purposes more prejudicial."³²⁴ This was true because the defendant's state of mind—something only he could know—was likely the central issue in such cases. For instance, in *United States v. Paige*, the defendant was charged with knowing receipt and concealment of stolen securities, and the prosecution sought to impeach him through a prior felony conviction in the event that he testified.³²⁵ In addressing the importance of the defendant's testimony, the court concluded that he needed to be able to testify to rebut the inference of guilt the jury might otherwise draw from his possession of the stolen securities.³²⁶

Under the fifth factor of the majority test and the fourth factor of the minority test, courts considered how central the issue of the defendant's credibility was to the resolution of his case.³²⁷ As the credibility issue became more central to the resolution of the case, the probative value of the conviction for impeachment purposes increased; the less central the credibility issue, the less probative the conviction.³²⁸ When, as in most trials, the case came down to the word of the defendant against the word of prosecution witnesses, credibility was deemed "extremely important," rendering the conviction extremely probative.³²⁹ This was especially true in trials "based substantially on witness testimony, not necessarily physical evidence."³³⁰ In some cases, however, the defendant's credibility was deemed non-central to the resolution of a case, rendering the conviction less probative. Thus, for instance, in *THK America, Inc. v. NSK, Ltd.*, the court found that the credibility of the defendant was not especially important to a

322. *See id.* at 1344.

323. *Id.*

324. WEINSTEIN, *supra* note 318.

325. 464 F. Supp. 99,100 (E.D. Pa. 1978).

326. *Id.* at 100–01.

327. *E.g.*, *United States v. Brewer*, 451 F. Supp. 50, 53 (E.D. Tenn. 1978).

328. *See id.* at 54 ("[H]is credibility may be a central issue in the case, a factor favoring admission.").

329. *United States v. Rein*, 848 F.2d 777, 783 (7th Cir. 1988).

330. *Malone v. State*, 829 So. 2d 1253, 1260 (Miss. App. 2002).

patent case in which the main issues were validity, infringement, and damages.³³¹

Courts noted that these final two factors often counterbalanced.³³² As the defendant's testimony became more important, thus increasing the conviction's prejudicial effect, his credibility typically became more central, thus increasing the probative value of the conviction.³³³ In some cases, however, courts found that both of the last two factors favored admission by misconstruing the fourth factor of the majority test and the third factor of the minority test—the importance of the defendant's testimony—as being directly related to the conviction's probative value, not its prejudicial effect.³³⁴

It is important to note, though, courts did not consider these factors to be an exhaustive list of what they could consider in weighing probative value and prejudicial effect under Rule 609(a)(1).³³⁵ For instance, another factor courts frequently weighed was “the government's need for the impeaching evidence,” with a conviction's probative value increasing as the conviction increased in importance.³³⁶

9. Other Witnesses

This left the question of what balancing test courts should apply when the witness to be impeached through a felony conviction was anyone other than a testifying criminal defendant. In this regard, courts applied a plethora of approaches. Because Rule 609(a)(1) permitted impeachment through evidence of a felony conviction, but only if “the court determine[d] that the probative value of admitting this evidence outweigh[ed] its prejudicial effect to the [defendant],”³³⁷ some courts gave criminal defendants “the benefit of the special balancing test when defense witnesses other than the defendant

331. 917 F. Supp. 563, 570–71 (N.D. Ill. 1996).

332. See, e.g., *Brewer*, 451 F. Supp. at 53.

333. See, e.g., *id.* at 54 (“Factors four and five seem to counterbalance each other in this case. While Defendant's testimony may be of some importance, a factor favoring nonadmission, at the same time his credibility may be a central issue in this case, a factor favoring admission.”).

334. *United States v. Ball*, 547 F. Supp. 929, 934 (E.D. Tenn. 1981) (“Testimony of Mr. Coffey was denied *in toto* by Mr. Ball, so that his testimony has assumed gigantic proportions and the issue of the respective credibilities of Messrs. Ball and Coffey occupies a place of extreme centrality in the determination of the guilt or innocence of Mr. Ball.”).

335. *Scalissi v. State*, 759 N.E.2d 618, 625 (Ind. 2001) (noting that the list of five Rule 609(a)(1) factors “is not exclusive”).

336. *United States v. Pritchard*, 973 F.2d 905, 909 (11th Cir. 1992).

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

were called to testify.”³³⁸ Conversely, other courts routinely admitted the felony convictions of criminal defense witnesses without mentioning this special balancing test, and sometimes without even mentioning the traditional Rule 403 balancing test applied to most evidence.³³⁹

And what did courts do with witnesses for the prosecution? Because, as noted, the special balancing test only mentioned “prejudicial effect to the defendant,” “[s]ome courts . . . read Rule 609(a)[(1)] as giving the government no protection for its witnesses.”³⁴⁰ The “practical effect” of such rulings was that felony convictions of witnesses for the prosecution were per se admissible for impeachment purposes, without regard for Rule 609(a)(1)’s special balancing test or Rule 403.³⁴¹ Meanwhile, while other courts found that Rule 609(a)(1)’s special balancing test did not apply to felony convictions used to impeach witnesses for the prosecution, they found that they could deem such evidence inadmissible if “the less protective balancing test of Rule 403 . . . require[d] an exclusion of the evidence.”³⁴²

Courts faced similar problems in civil cases, alternatively: (1) applying Rule 609(a)(1)’s special balancing test to civil defendants but not civil plaintiffs;³⁴³ (2) using “Rule 403 to provide the discretionary leverage necessary to keep out prior convictions when their inclusion would be unjust;” and (3) finding that the Rule 609(a)(1) “balancing test was never meant to apply to civil cases at all, thereby making previous convictions in this setting automatically admissible under the Rule’s ‘shall be admitted’ language.”³⁴⁴

One influential opinion applying this last approach was the Seventh Circuit’s opinion in *Campbell v. Greer*.³⁴⁵ In *Greer*, Rudolph V. Campbell, Jr. brought a section 1983 action against Illinois prison officials and guards, claiming that they deprived him of his right to be free from cruel and unusual punishments.³⁴⁶ The jury eventually entered a verdict in favor of the

338. FED. R. EVID. 609 advisory committee’s note to the 1990 amendment (emphasis added).

339. See, e.g., *United States v. Moore*, 735 F.2d 289, 292–93 (8th Cir. 1984) (admitting evidence of a defense witness’s prior felony conviction without mentioning the special balancing test or Rule 403).

340. FED. R. EVID. 609 advisory committee’s note to the 1990 amendment (emphasis added).

341. *United States v. Thorne*, 547 F.2d 56, 59 (8th Cir. 1976) (quoting 120 Cong. Rec. 30, 40,891 (1974) (statement of Rep. Hungate)).

342. See, e.g., *United States v. McCray*, 15 M.J. 1086, 1089–90 (A.C.M.R. 1983).

343. See *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 510 n.6 (1989) (“Courts considering admissibility of impeachment harmful to a civil defendant occasionally have allowed balancing without questioning Rule 609(a)’s asymmetry when applied to the civil context.”).

344. Voigtmann, *supra* note 224, at 930; see *Shows v. M/V Red Eagle*, 695 F.2d 114, 119 (5th Cir. 1983).

345. 831 F.2d 700 (7th Cir. 1987).

346. *Id.* at 701.

defendant, no doubt influenced by defense counsel's impeachment of Campbell through evidence of his conviction for rape.³⁴⁷

On appeal, Campbell claimed that the trial judge erred by admitting evidence of this conviction without first balancing its probative value against its prejudicial effect.³⁴⁸ The Seventh Circuit disagreed, preliminarily finding that Rule 609(a)(1) "requires such balancing only when there is prejudicial effect 'to the defendant,'" not a plaintiff such as Campbell.³⁴⁹ The court, however, took heed of Campbell's argument "that it would be absurd to read the rule literally, for that would allow a defendant in a civil case, but not a plaintiff, to complain about the use of his criminal record to impeach."³⁵⁰ The Seventh Circuit agreed that a literal reading of the Rule "would indeed be absurd" and found that "Rule 609(a) can't mean what it says."³⁵¹ The court also found, however, that Rule 609(a)(1) could not mean what Campbell said and instead found that the Rule's balancing test only applied to criminal defendants and that qualifying convictions were per se admissible in civil cases, without even the failsafe of Rule 403.³⁵²

Perhaps the most influential opinion³⁵³ applying Rule 609(a)(1) to the civil context was the Third Circuit's opinion in *Diggs v. Lyon*.³⁵⁴ In *Diggs*, four inmates brought a section 1983 action which alleged that prison officials used excessive force in preventing their escape from a Philadelphia prison and denied them access to legal assistance.³⁵⁵ After the trial court entered a verdict in favor of the defendants, one of the plaintiffs appealed, claiming, *inter alia*, that the trial court erred in allowing the prosecution to impeach him through evidence of his felony convictions for murder, bank robbery, attempted prison escape, and criminal conspiracy.³⁵⁶ The Third Circuit disagreed, finding that the convictions were per se admissible for impeachment purposes because the special balancing test of Rule 609(a)(1) did not apply to civil plaintiffs and because "Rule 403 did not give discretionary authority to exclude them as prejudicial to the witness."³⁵⁷

347. *Id.* at 701–02.

348. *Id.* at 703.

349. *Id.*

350. *Id.*

351. *Id.*

352. *Id.* at 703–05.

353. See Voigtmann, *supra* note 224, at 931 ("The roller coaster took another dip in the influential case of *Diggs v. Lyons*.").

354. 741 F.2d 577 (3d Cir. 1984).

355. *Id.* at 578.

356. *Id.*

357. *Id.* at 582.

The Third Circuit, however, recognized that it was sacrificing reason at the altar of the text of Rule 609(a)(1). The court specifically acknowledged that its construction of the rule “may in some cases produce unjust and even bizarre results.”³⁵⁸ To wit, the majority noted that “[e]vidence that a witness has in the past been convicted of manslaughter by automobile, for example, can have but little relevance to his credibility as a witness in a totally different matter.”³⁵⁹ Indeed, noting that the majority’s construction of Rule 609(a)(1) would breed “concededly bizarre results,” Judge Gibbons dissented, joining those courts which had created the “reasonable accommodation” of applying Rule 403 to convictions sought to be used for impeachment purposes in civil cases.³⁶⁰ Nonetheless, the majority felt powerless to alter the language of the Rule, concluding that such an amendment had to “be done by those who have the authority to amend the rules, the Supreme Court and the Congress.”³⁶¹ The Supreme Court, however, failed to take the bait, denying certiorari³⁶² and waiting six years before finally addressing the issue of how Rule 609(a)(1) applied in civil cases.

The case in which the Supreme Court finally decided “the question [of] whether Rule 609(a)(1) . . . require[d] a judge to let a civil litigant impeach an adversary’s credibility with evidence of the adversary’s prior felony convictions” was *Green v. Bock Laundry Machine Co.*³⁶³ In *Bock Laundry*, the rotating drum of a dryer tore off the right arm of inmate Paul Green during his work-release job at a car wash, and he later sued the manufacturer of the machine.³⁶⁴ During the ensuing trial, defense counsel impeached Green through his admissions that he had been convicted of conspiracy to commit burglary and burglary.³⁶⁵

After the jury returned a verdict for the defendant, Green appealed, claiming that the trial judge misapplied Rule 609(a)(1).³⁶⁶ His appeal eventually reached the Supreme Court, which affirmed, concluding that Rule 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.”³⁶⁷ In doing so, the Supreme Court rejected a construction of Rule 609(a)(1) which would have given

358. *Id.*

359. *Id.*

360. *Diggs*, 741 F.2d at 582–83 (Gibbons, J., dissenting).

361. *Id.* at 582.

362. *Diggs v. Lyons*, 471 U.S. 1078 (1985).

363. 490 U.S. 504, 505 (1989).

364. *Id.* at 506.

365. *Id.*

366. *Id.*

367. *Id.* at 527.

civil defendants, but not civil plaintiffs, the benefit of either the Rule's special balancing test or the Rule 403 balancing test.³⁶⁸ Instead, the Court agreed with the Seventh Circuit that while the plain language of the Rule would support such a result, "as far as civil trials are concerned, Rule 609(a)(1) 'can't mean what it says.'"³⁶⁹

Meanwhile, in a concurring opinion that essentially mirrored the majority opinion,³⁷⁰ Justice Scalia highlighted the fact that he was "correcting" Rule 609(a)(1) under the rule of absurdity,³⁷¹ which indicates "that if a literal reading would produce an absurd result the interpreter is free . . . to depart in the direction of sense."³⁷² According to Scalia, Rule 609(a)(1) was "a statute which, if interpreted literally, produces an absurd, and perhaps unconstitutional, result."³⁷³ Scalia thus saw it as his task "to give some alternative meaning to the word 'defendant' in Federal Rule of Evidence 609(a)(1)" and found that interpreting the word "defendant" to mean "criminal defendant" did the least violence to the Rule's text, leading to the same conclusion as the majority.³⁷⁴

Finally, in a strongly worded dissenting opinion joined by Justices Brennan and Marshall, Justice Blackmun argued that "a better interpretation of . . . Rule [609(a)(1)] would allow the trial court to consider the risk of prejudice faced by any party, not just a criminal defendant," before admitting a felony conviction for impeachment purposes.³⁷⁵ Blackmun contended that the majority's construction of the Rule "endorse[d] 'the irrationality and unfairness' of denying the trial court the ability to weigh the risk of prejudice to any party before admitting evidence of a prior felony for purposes of impeachment."³⁷⁶ He then concluded by indicating that his "hope [wa]s that Rule 609(a)(1) will be corrected without delay, preferably into a form that allows judicial oversight over, at the least, the use of any

368. *Id.* at 510.

369. *Id.* at 511 (quoting *Campbell v. Greer*, 831 F.2d 700, 703 (1987)).

370. *Id.* at 529 (Scalia, J., concurring) ("I am frankly not sure that, despite its lengthy discussion of ideological evolution and legislative history, the Court's reasons for both aspects of its decision are much different from mine.").

371. *Id.* at 527.

372. *Cent. States, Se. and Sw. Areas Pension Fund v. Lady Baltimore Foods, Inc.*, 960 F.2d 1339, 1345 (7th Cir. 1992).

373. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (Scalia, J., concurring).

374. *Id.* at 527-29.

375. *Id.* at 530 (Blackmun, J., dissenting).

376. *Id.* at 531 (internal citation omitted).

felony conviction that does not bear directly on a witness's honesty."³⁷⁷ The next year, his prayer was answered.

10. 1990 Amendment

In 1990, Congress amended Rule 609(a)(1). Amended Rule 609(a)(1) now reads:

[E]vidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused.³⁷⁸

The amendment thus eliminated the two requirements of the Rule which, as noted, courts had routinely ignored.³⁷⁹ First, the amendment removed "from the rule the limitation that the conviction may only be elicited during cross-examination, a limitation that virtually every circuit court ha[d] found to be inapplicable."³⁸⁰ Instead, the Advisory Committee affirmed the "common" practice of parties revealing their witness's convictions on direct examination "to 'remove the sting' of the impeachment."³⁸¹ Second, the amendment removed the requirement that a party could only establish that a witness had an impeachable conviction through the public record or the witness's admission, in effect approving the many decisions of courts that permitted parties to prove convictions through other methods, such as "rap sheets."³⁸²

The amendment, however, was mainly directed at the task left to it by the Supreme Court in *Bock Laundry*³⁸³—resolving the "ambiguity as to the relationship of Rules 609 and 403 with respect to the impeachment of witnesses other than the criminal defendant."³⁸⁴ The Committee began by noting that the amendment did not "disturb the special balancing test for the

377. *Id.* at 535.

378. FED. R. EVID. 609(a)(1).

379. *See supra* notes 232–233 and accompanying text.

380. FED. R. EVID. 609 advisory committee's note to the 1990 amendment.

381. *Id.* (citing *United States v. Bad Cob*, 560 F.2d 877 (8th Cir. 1977)).

382. *See supra* note 233 and accompanying text.

383. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 508 (1989).

384. FED. R. EVID. 609 advisory committee's note to the 1990 amendment.

criminal defendant who chooses to testify.”³⁸⁵ According to the Note, this non-interference was based upon the recognition that:

[I]n virtually every case in which prior convictions are used to impeach the testifying defendant, the defendant faces a unique risk of prejudice—i.e., the danger that convictions that would be excluded under Fed. R. Evid. 404 will be misused by a jury as propensity evidence despite their introduction solely for impeachment purposes.³⁸⁶

The Committee then strongly implied that the burden of proof is on the prosecution in such cases by stating that the Rule “requires that the government show that the probative value of convictions as impeachment evidence outweighs their prejudicial effect.”³⁸⁷

It next addressed those courts which had applied the special balancing test not only to criminal defendants but also to any witnesses that they called.³⁸⁸ The Committee bluntly rejected this practice, finding that “the concern about unfairness to the [criminal] defendant is most acute when the defendant’s own convictions are offered as evidence.”³⁸⁹ Nonetheless, the Committee recognized that “[t]here are cases in which a [criminal] defendant might be prejudiced when a defense witness is impeached” such as when “the witness bears a special relationship to the defendant such that the defendant is likely to suffer some spill-over effect from impeachment of the witness.”³⁹⁰ According to the Note, though, the amendment did “not deprive the [criminal] defendant of any meaningful protection, since Rule 403 now clearly protects against unfair impeachment of any defense witness other than the defendant.”³⁹¹

Indeed, both the text of the amended Rule and the Advisory Committee Note made clear that the “ordinary balancing test of Rule 403” applies not only to convictions offered to impeach a witness called by a criminal defendant, but also to convictions offered to impeach civil plaintiffs and defendants, the witnesses they call, and prosecution witnesses, i.e., the

385. *Id.*

386. *Id.*

387. *Id.*

388. *Id.*

389. *Id.*

390. FED. R. EVID. 609 advisory committee’s note to the 1990 amendment.

391. *Id.*

convictions of “any witness other than a criminal defendant.”³⁹² Thus, a court shall admit a felony conviction to impeach any witness besides a criminal defendant unless it finds that “its prejudicial effect substantially outweighs its probative value.” The Advisory Committee’s Note stated that the purpose of this Rule 403 failsafe for all non-criminal defendant witnesses was the same as the one articulated in the case of the witness called by the criminal defendant: “Although the danger that prior convictions will be misused as character evidence is particularly acute when the [criminal] defendant is impeached, the danger exists in other situations as well.”³⁹³

11. Disparate Treatment

Courts now treat testifying criminal defendants and civil parties (and all other witnesses besides criminal defendants) in substantially different regards, giving the former substantially more protection before admitting their convictions under the amended Rule 609(a)(1). The first difference is that courts continue to consider the aforementioned four³⁹⁴ or five³⁹⁵ factors before admitting convictions under Rule 609(a)(1) against a testifying criminal defendant. Indeed, most appellate courts have found that if a trial court does not make an explicit, on-the-record balancing of probative value and prejudicial effect in such a criminal case, the case must be reversed or remanded, absent a finding of harmless error.³⁹⁶ Conversely, courts almost never consider these or other factors before allowing for the admission of felony convictions against civil parties.³⁹⁷ Instead, most courts merely mention that convictions are admissible under Rule 609(a)(1) to impeach civil parties subject to the Rule 403 and then curtly proclaim that its balancing test has been satisfied without any analysis.³⁹⁸

392. *Id.*

393. *Id.*

394. *See supra* note 302 and accompanying text.

395. *See supra* note 301 and accompanying text.

396. *See, e.g.,* United States v. Myers, 952 F.2d 914, 916–17 (6th Cir. 1992) (“[I]n order to admit impeaching evidence of a prior conviction under Rule 609, a court must make an on-the-record finding based on the facts that the conviction’s probative value substantially outweighs its prejudicial impact.”).

397. *See, e.g.,* Smith v. Wal-Mart Stores East, L.P., 2006 WL 2644963 (E.D. Ky. 2006); *but cf.* Simpson v. Thomas, 528 F.3d 685, 691 n.3 (9th Cir. 2008) (“Although we have never held that such factors should be considered in a civil case, and do not do so here, we think that, under the circumstances of this case, consideration of these factors by the district court on remand would be appropriate.”).

398. *See Smith*, 2006 WL 2644963 at *2 (“Because this Court finds that evidence of Plaintiff’s conviction and incarceration is relevant and that the probative value of the effect of Plaintiff’s conviction on her credibility is not substantially outweighed by the danger of unfair prejudice, as prohibited by Fed. R. Evid. 403, it shall be admitted pursuant to Fed. R. Evid. 609.”).

Second, under Rule 609(a)(1) courts typically place the burden of proof firmly on the prosecution to prove that a testifying criminal defendant's felony conviction is admissible against him for impeachment purposes.³⁹⁹ On the other hand, courts place the same burden on civil parties to prove that their felony convictions should be deemed inadmissible to impeach them under Rule 609(a)(1).⁴⁰⁰

As was noted in the introduction, though, what is even more important than who bears the burden of proof in these two situations is what that party needs to prove. Under Rule 609(a)(1), when the prosecution seeks to impeach a testifying criminal defendant through evidence of a qualifying conviction, it must prove that the "probative value of admitting this evidence outweighs its prejudicial effect to the accused."⁴⁰¹ Therefore, the prosecution can only use a qualifying conviction to impeach a testifying criminal defendant under Rule 609(a)(1) if the conviction's bearing on his honesty and veracity—its probative value—outweighs the danger that the jury could use the conviction to conclude, "[o]nce a criminal, always a criminal"—its unfairly prejudicial effect. If a conviction's prejudicial effect outweighs its probative value by any degree or even if its probative value matches its prejudicial effect, a court is required to exclude it.⁴⁰²

Based upon this framework, courts using four factors in this balancing test exclude testifying criminal defendants' prior convictions under Rule 609(a)(1) even when two factors support admission and two factors weigh against admission, as in *United States v. Smith*⁴⁰³ and similar cases.⁴⁰⁴ Meanwhile, courts using five factors alternatively require the prosecution to prove that three or four of the factors weigh in favor of admissibility of the

399. See, e.g., *United States v. Grove*, 844 F. Supp. 1495, 1496 (D. Utah 1994) ("The burden is on the prosecution.").

400. See, e.g., *United States v. Tse*, 375 F.3d 148, 164 (1st Cir. 2004) (noting that while the prosecution bears the burden of proof when it seeks to use a criminal defendant's felony conviction to impeach him under Rule 609(a)(1), a civil party bears a similar burden in seeking to exclude such evidence).

401. FED. R. EVID. 609(a)(1).

402. See, e.g., *Tussel v. Witco Chem. Corp.*, 555 F. Supp. 979, 983 (W.D. Pa. 1983) (contrasting the "heightened protection" of the special balancing test of Rule 609(a)(1) with the more limited protection afforded by Rule 403).

403. See *supra* Part I.

404. See, e.g., *United States v. Graves*, No. 06-95, 01, 2006 WL 1997378, at *3 (E.D. Pa. July 12, 2006) ("Of the four factors to consider in admitting a conviction under Rule 609(a)(1), two weigh in favor of admission in this case, and two weigh strongly against. Faced with this balance, the Court concludes that the Government has not met its burden of showing that the probative value of the 1993 conviction outweighs its prejudicial effect.").

conviction, with the difference frequently depending on the probative value of the conviction.⁴⁰⁵

For instance, in *United States v. Mahone*, the defendant was charged with attempted bank robbery and interstate transport of a stolen vehicle, and the prosecution sought, *inter alia*, to impeach him through evidence of his convictions for possession of a controlled substance and robbery reduced to aggravated assault.⁴⁰⁶ The United States District Court for the District of Maine implicitly found that the fourth and fifth factors counterbalanced and explicitly found that the second and third factors supported admission of these convictions because they occurred close in time to the subject charges and were sufficiently dissimilar from those charges.⁴⁰⁷ Nonetheless, because the convictions had little to no bearing on the defendant's honesty and veracity, the court precluded the prosecution from using them to impeach him, despite three of the five factors supporting admissibility.⁴⁰⁸

Similarly, in *United States v. Smith*, the defendant was charged with making counterfeit currency, and the prosecution sought, *inter alia*, to impeach him through evidence of his conviction for drug possession.⁴⁰⁹ The United States District Court for the Northern District of Illinois found that the fourth and fifth factors counterbalanced and that the second and third factors supported admission of the conviction because it occurred close in time to the subject charges and was sufficiently dissimilar from that charge.⁴¹⁰ Despite these facts, because the court found that convictions for drug possession have little to no bearing on an individual's honesty and veracity, the court precluded the prosecution from using the conviction to impeach the defendant.⁴¹¹

On the other side of the coin is the First Circuit's opinion in *United States v. Brito*, in which the defendant was charged with firearm-related crimes and the prosecution sought to impeach him through evidence of his three drug-trafficking convictions.⁴¹² The First Circuit found that: (1) the fourth and fifth factors counterbalanced; (2) the second factor weighed against admission because the prior convictions were remote in time; (3) the third factor supported admission because the offenses underlying the prior convictions were not similar to the subject charges; and (4) the first factor favored admission because drug-trafficking crimes have some bearing on

405. See, eg., *United States v. Mahone*, 328 F. Supp. 2d 77, 77 (D. Me. 2004).

406. *Id.* at 81.

407. *Id.* at 84–85.

408. *Id.*

409. 181 F. Supp. 2d 904, 906, 908 (N.D. Ill. 2002).

410. *Id.* at 909–10.

411. *Id.*

412. 427 F.3d 53, 55–57 (1st Cir. 2005).

veracity.⁴¹³ Unlike in the previous two cases, these factors were sufficient despite the mere three–two split in favor of admissibility because of the strong probative value of the prior convictions.⁴¹⁴

However, when a party seeks to impeach a party in a civil case, the analysis is reversed. Under Rule 609(a)(1), when a civil party seeks to preclude the other party from impeaching him through evidence of a qualifying conviction, the objecting party must establish under Rule 403 that the conviction’s bearing on his honesty and veracity—its probative value—is substantially outweighed by the danger that the jury could use the conviction to conclude, “[o]nce a criminal, always a criminal”—its unfairly prejudicial effect.⁴¹⁵ Thus, a court has to admit such a conviction if its probative value and prejudicial effect are roughly commensurate or even if the conviction’s unfairly prejudicial effect outweighs its probative value, but not to a substantial degree.⁴¹⁶

Accordingly, courts’ analyses of the admissibility of qualifying convictions of civil parties under Rule 609(a)(1) look quite different from their analyses when the party to be impeached is a criminal defendant. In most civil cases, courts allow for the admission of qualifying convictions with a conclusory claim that Rule 403 has been satisfied and without any actual balancing of probative value and unfairly prejudicial effect.⁴¹⁷ For instance, in *Smith v. Wal-Mart Stores, East, L.P.*, a plaintiff civilly sued Wal-Mart for injuries she allegedly sustained while she was shopping and moved to preclude the superstore from impeaching her through evidence of her conviction for distributing cocaine.⁴¹⁸ The United States District Court for the Eastern District of Kentucky quickly disposed of her motion, with the only sentence of its opinion mentioning Rule 403, probative value, or prejudicial effect stating:

Because this Court finds that evidence of Plaintiff’s conviction and incarceration is relevant and that the probative value of the effect of Plaintiff’s conviction on her credibility is not substantially

413. *Id.* at 64.

414. *Id.*

415. See FED. R. EVID. 609(a)(1).

416. See, e.g., *United States v. McBride*, No. 93-3218, 1994 WL 64679 at *8 n.3 (6th Cir. Mar. 1, 1994) (“Under this test, a district court may admit evidence where the probative value is equal to, or even a bit less than, its prejudicial effect.”).

417. See, e.g., *Smith v. Wal-Mart Stores E., L.P.*, No. 5:05-224-JMH, 2006 WL 2644963 (E.D. Ky. Sept. 14, 2006).

418. *Id.* at *2.

outweighed by the danger of unfair prejudice, as prohibited by Fed. R. Evid. 403, it shall be admitted pursuant to Fed. R. Evid. 609.⁴¹⁹

And while the plaintiff's conviction for distributing cocaine in *Smith* was at least for a crime thought to have some bearing on veracity,⁴²⁰ courts also frequently admit evidence of qualifying convictions against civil parties under Rule 609(a)(1) even when those convictions are based upon crimes thought to have little to no bearing on witness credibility, as in *Saunders*.⁴²¹ Courts in civil cases also seem relatively unimpressed with the fact that a civil party's prior conviction is for the same type of crime as the crime for which he is charged, frequently admitting these types of convictions for impeachment purposes despite their inevitable unfairly prejudicial effect.⁴²² Indeed, felony "convictions are routinely admitted to impeach" civil plaintiffs under Rule 609(a)(1).⁴²³

12. Addendum: Amended Rule 609(a)(2) and Rule 609(e)

By 2006, courts had taken at least four different approaches in determining which crimes qualified as crimes of "dishonesty or false statement" under Rule 609(a)(2), including one approach which "essentially read the word 'dishonesty' out of the Rule" and another which classified "virtually any crime . . . as a crime of 'dishonesty.'"⁴²⁴ In 2006, Congress amended the Rule to preclude these pro-admissibility approaches such that "Rule 609(a)(2) [now] mandates the admission of evidence of a conviction only when the conviction required the proof of . . . an act of dishonesty or false statement."⁴²⁵ As was the case before the amendment, the Rule applies equally in both criminal and civil cases.⁴²⁶ Meanwhile, Federal Rule of Evidence 609(e) states that in either a civil or criminal case the pendency of an appeal does not render evidence of a conviction inadmissible but that "[e]vidence of the pendency of an appeal is admissible."⁴²⁷

419. *Id.*

420. See *supra* note 411 and accompanying text.

421. See *supra* Part I.

422. See, e.g., *Hickson, Corp. v. Norfolk So. Ry. Co.*, 227 F. Supp. 2d 903, 903–04 (E.D. Tenn. 2002) (allowing for the defendant to be impeached through evidence of its felony conviction for improper disposal of paint at rail yard in its trial for damages allegedly incurred as result of chemical spill).

423. *Saunders v. City of Chicago*, 320 F. Supp. 2d 735, 738 (N.D. Ill. 2004).

424. Stuart P. Green, *Deceit and the Classification of Crimes: Federal Rule of Evidence 609(a)(2) and the Origins of Crimen Falsi*, 90 J. CRIM. L. & CRIMINOLOGY 1087, 1116–19 (2000).

425. FED. R. EVID. 609(a)(2) advisory committee's note to the 2006 amendment.

426. E.g., Marlene B. Hanson, Note, *Balancing Prejudice in Admitting Prior Felony Convictions in Civil Actions: Resolving the 609(a)(1)–403 Conflict*, 63 NOTRE DAME L. REV. 333, 338 n.32 (1988).

427. FED. R. EVID. 609(e).

IV. COURTS SHOULD TREAT CIVIL PARTIES THE SAME AS CRIMINAL DEFENDANTS UNDER THE FELONY IMPEACHMENT RULE

As noted, a substantial minority of federal courts before 2006 allowed, and some states still allow, parties in quasi-criminal cases to use the “mercy rule” to the same extent as criminal defendants.⁴²⁸ The rationale these courts used for extending the “mercy rule” to civil parties in quasi-criminal cases was that these cases were in enough respects similar to criminal cases, justifying parallel treatment.⁴²⁹ This rationale is equally applicable when a party seeks to impeach the opposing party in a quasi-criminal case through a conviction under Rule 609(a)(1), which supports treating civil parties in quasi-criminal cases the same as criminal defendants under the Rule. Nonetheless, despite courts largely ignoring the plain language of most provisions of Rule 609, no court has ever followed suit and treated civil parties in quasi-criminal cases the same as criminal defendants under Rule 609(a)(1).⁴³⁰ There are only three possible obstacles to such parallel treatment: (1) the argument that the same reasons supporting the decision to limit the “mercy rule” to criminal cases apply in the Rule 609(a)(1) context; (2) the argument that the Rule’s criminal defendant protections are uniquely suited to criminal defendants; and (3) the argument that courts should respect the text of Rule 609(a)(1), which expressly limits the special balancing test to criminal defendants.

A. *Possible Substantive Objections to the Extension*

1. The Reasons Behind the Amendment

As previously noted, the rationale behind the decisions extending the “mercy rule” to civil parties in quasi-criminal cases was that these cases were in most respects similar to criminal cases, justifying parallel treatment.⁴³¹ The courts rejecting this minority line of precedent did so not because of substantive objections but because they felt duty bound to adhere to the plain text of Rules 404(a)(1) & (2). In 2006, Congress proscribed this

428. See *supra* Part II.C.2.ii(1).

429. See *supra* Part II.C.2.ii(2).

430. Before this article, it appears that no court or scholar has addressed the issue of whether courts should treat civil parties in quasi-criminal cases the same as criminal defendants under Rule 609(a)(1).

431. See *supra* notes 121–122 and accompanying text.

minority practice by amending Rules 404(a)(1) and (2) so that they only applied in criminal cases.⁴³²

The Advisory Committee's first reason was the fact that "[t]he circumstantial use of character evidence is generally discouraged because it carries serious risks of prejudice, confusion, and delay."⁴³³ And while the Advisory Committee found that certain considerations trumped this reluctance to admit propensity character evidence when it was the criminal defendant who sought to admit it, the Committee could not justify extending the same "mercy rule" to the civil arena.⁴³⁴

This rationale is consistent with the other Federal Rules of Evidence dealing with propensity character evidence or evidence which can be misused as propensity character evidence. As detailed above, with one notable exception, every Federal Rule of Evidence that deals with propensity character evidence or evidence which can be misused as propensity character evidence makes it either: (a) *as difficult* to admit such evidence in civil trials as it is in criminal trials, or (b) *more difficult* to admit such evidence in civil trials than it is in criminal trials.

Under Federal Rules of Evidence 404(a),⁴³⁵ 404(b),⁴³⁶ 405(a) & (b),⁴³⁷ 412(a),⁴³⁸ 413–415,⁴³⁹ 607,⁴⁴⁰ 608(a) & (b),⁴⁴¹ 609(a)(2), (b), (c), and (e),⁴⁴² it is just as difficult to admit character evidence in civil cases as it is in criminal cases. Meanwhile, Rule 412(b)(2) makes it much more difficult for civil defendants to get character evidence through the rape shield than it is for criminal defendants to breach its protections under Rules 412(b)(1)(A), (B), and (C).⁴⁴³ And Rule 609(d) per se precludes evidence of juvenile adjudications from being admitted in civil trials for impeachment purposes while it allows for their admission in some criminal trials for the same purpose when offered by either the defendant or the prosecution.⁴⁴⁴ Ostensibly, the decision to prevent courts from applying the "mercy rule" in quasi-criminal cases reflected the judgment that Rules 404(a)(1) and (2) should fall into the latter, rather than the former, category, making it more

432. See *supra* Part II.C.2.ii(3).

433. FED. R. EVID. 404 advisory committee's note to the 2006 amendments.

434. See *infra* notes 435–457.

435. See *supra* notes 80–82 and accompanying text.

436. See *supra* note 202 and accompanying text.

437. See *supra* notes 91, 194 and accompanying text.

438. See *supra* note 152 and accompanying text.

439. See *supra* note 185 and accompanying text.

440. See *supra* note 210 and accompanying text.

441. See *supra* note 215 and accompanying text.

442. See *supra* notes 245, 271, 281, 427 and accompanying text.

443. See *supra* notes 166–175 and accompanying text.

444. See *supra* notes 283, 294 and accompanying text.

difficult, indeed impossible, to admit this type of propensity character evidence in all civil trials.

This constellation of Rules and the aversion toward admitting evidence that can be misused as propensity character evidence, however, points toward treating civil parties in quasi-criminal cases the same as criminal defendants under Rule 609(a)(1). The proverbial sore thumb mentioned above is Rule 609(a)(1), which makes it significantly *easier* to admit evidence which can be misused as propensity character evidence in civil trials than it is in criminal trials. As noted above, (1) Rule 609(a)(1)'s special balancing test for criminal defendants, (2) the requirement of on-the-record balancing of probative value and prejudicial effect for criminal defendants' convictions, and (3) the burden of proof on the prosecution (the party seeking to admit the conviction) all make the exclusion of a testifying criminal defendant's felony convictions much more likely than the exclusion of a civil party's convictions.⁴⁴⁵ Moreover, the Advisory Committee itself recognized that the admission of any witness's convictions for impeachment purposes risks "the danger that prior convictions will be misused as character evidence."⁴⁴⁶ Because Rule 609(a)(1) evidence is clearly evidence that can be misused as propensity character evidence in quasi-criminal trials, the first reason behind the decision to preclude the application of the "mercy rule" in civil cases thus strongly supports treating civil parties in quasi-criminal cases the same as criminal defendants.

The second reason behind the Advisory Committee's decision at first appears more problematic. The Committee found that the "mercy rule" uniquely applies to criminal defendants and allows them to overcome the dangers inherent in admitting propensity character evidence "because the accused, whose liberty is at stake, may need 'a counterweight against the strong investigative and prosecutorial resources of the government.'"⁴⁴⁷ In other words, the "mercy rule" exists "'to allow the criminal defendant with so much at stake and so little available in the way of conventional proof to have special dispensation to tell the factfinder just what sort of person he really is.'"⁴⁴⁸

Perhaps, then, one could argue that these same factors justify the disparate treatment that criminal defendants and civil parties receive under Rule 609(a)(1). One relevant retort to such an argument is that the Advisory

445. See *supra* notes 394–423 and accompanying text.

446. See *supra* note 393 and accompanying text.

447. See *supra* note 149 and accompanying text.

448. See *supra* note 150 and accompanying text.

Committee's analysis was flatly fallacious or at least drew a false dichotomy. Many criminal defendants do not have their liberty at stake and merely face fines if convicted⁴⁴⁹ while individuals in certain civil trials, such as civil confinement cases, can face the loss of their liberty.⁴⁵⁰ Moreover, it is at least arguable that a civil party facing millions of dollars in damages or a determination that he caused the wrongful death of another has more at stake than certain criminal defendants, such as those facing possible incarceration measured in months, not years. Finally, many white collar criminals likely have stronger resources than the prosecution while a large percentage of the civil parties in quasi-criminal cases seeking to preclude the admission of their felony convictions for impeachment purposes are either (1) inmates bringing section 1983 actions against the state⁴⁵¹ or (2) individuals defending actions brought against them by governmental entities,⁴⁵² mirroring the typical power disparity present in many criminal trials.

A second, stronger retort to such an argument is that criminal defendants would still have an advantage vis-à-vis civil plaintiffs and a counterweight against the prosecution's resources even if Rule 609(a)(1)'s criminal defendant protections are extended to civil parties in quasi-criminal cases. Currently, at a quasi-criminal trial, if a judgment against either the plaintiff or the defendant would necessitate a finding that they committed a particular act that was also punishable under criminal law, such as an assault case where the defendant claims self-defense, they can each impeach the other through a qualifying conviction unless such impeachment would violate Rule 403.⁴⁵³ Affording both parties the benefit of Rule 609(a)(1)'s special balancing test, placing the burden of proof on the party seeking to admit the conviction, and requiring an on-the-record balancing of probative value and prejudicial effect would give neither civil party any advantage; it would simply make it more difficult for either to impeach the other through evidence of a felony conviction.

Conversely, criminal defendants enjoy such an advantage over the prosecution. The prosecution can only impeach a testifying criminal defendant under Rule 609(a)(1) by establishing that the probative value of his felony conviction outweighs its prejudicial effect while a criminal defendant can impeach witnesses for the prosecution unless the prosecution can establish that such impeachment violates Rule 403, with its more liberal

449. *See, e.g.*, OR. REV. STAT. § 475.992(4)(f).

450. *See, e.g.*, *Detention of Marshall v. State*, 125 P.3d 111 (Wash. 2005).

451. *See Voigtmann, supra* note 224, at 946.

452. *See, e.g., supra* notes 127–134 and accompanying text.

453. *E.g., Bustamante v. Thedford*, No. 89 C 3471, 1995 WL 76900, at *1–2 (N.D. Ill. Feb. 23, 1995).

standard of admissibility.⁴⁵⁴ Thus, Rule 609(a)(1) already tips the scales toward the criminal defendant, and extending its criminal defendant protections to civil plaintiffs and defendants in quasi-criminal cases would not tip the scale toward either side. Consequently, the Advisory Committee's reasons for restricting the "mercy rule" to criminal defendants do not support restricting Rule 609(a)(1)'s protections to criminal defendants, especially when doing so makes the admission of evidence that can be misused as propensity character evidence significantly *easier* in civil trials than it is in criminal trials, in contravention to all other Federal Rules of Evidence on the subject.

2. The "Uniquely Suited" Argument

The second potential objection to extending Rule 609(a)(1)'s criminal defendant protections to civil plaintiffs in quasi-criminal cases is that those protections are uniquely suited to criminal defendants because they have the right to decide whether to testify, and too readily admitting evidence of their felony convictions for impeachment purposes unfairly burdens their right to testify.⁴⁵⁵ Indeed, many commentators have noted that even with Rule 609(a)(1)'s criminal defendant protections, courts provisionally approve the admission of enough felony convictions for impeachment purposes to deter even many innocent criminal defendants from testifying.⁴⁵⁶

Nonetheless, while these factors undoubtedly make the Rule's criminal defendant protections proper, a different concern justifies applying those same protections to civil parties in quasi-criminal cases. Rule 609(a)(1)'s rulings that deter criminal defendants from testifying are harmful because they prevent the jury from hearing their testimony; that said, it is still the defendant who makes this choice, and by doing so, he prevents the jury from misusing his conviction(s) as propensity character evidence. Conversely, civil parties can be forced to testify, making them, "like any other witness, subject to impeachment under the Federal Rules."⁴⁵⁷ Thus, while criminal defendants with felony convictions face the Solomonic choice of deciding

454. See *supra* notes 385, 392 and accompanying text.

455. Cf. Gold, *supra* note 226, at 2313–14.

456. See, e.g., Jeffrey Bellin, *Improving the Reliability of Criminal Trials Through Legal Rules That Encourage Defendants to Testify*, 76 U. CIN. L. REV. 851, 865 (2008) ("Given the general prohibition of evidence of a defendant's prior convictions as substantive evidence, however, a rule permitting the use of that evidence to impeach a testifying defendant assumes great significance in deterring even innocent defendants from testifying.")

457. Alprin, *supra* note 49, at 2090.

whether or not to testify, civil parties in quasi-criminal cases with such convictions have no choice and must have their criminal pasts aired out in the courtroom, unless those convictions fail the probative value/prejudicial tigh trope. Based upon these facts, this tigh trope should not be the liberal Rule 403 balancing test applied to non-party witnesses, but the special balancing test applied to criminal defendants. Nor should these parties have the burden of establishing that their convictions are irrelevant or have to suffer judicial opinions admitting those without any detailed balancing of probative value and prejudicial effect.

B. The Text of Rule 609(a)(1)

The second obstacle to treating civil parties in quasi-criminal cases the same as criminal defendants under Rule 609(a)(1) is that the Rule singles out “the accused” for special treatment.⁴⁵⁸ Of course, despite the fact that Rules 404(a)(1) and 404(a)(2) similarly stated that the “mercy rule” solely protected “the accused,” a substantial minority of courts ignored this language for decades and extended its reach to civil parties in quasi-criminal cases.⁴⁵⁹ Nonetheless, Congress rebuked this practice in 2006, and the majority of courts always felt duty bound to adhere to the plain meaning and intent behind these Rules. Why then, should courts ignore the plain text of Rule 609(a)(1)?

As indicated above, while there is a long standing and respected tradition of limiting the admission of propensity character evidence,⁴⁶⁰ courts have paid no similar reverence to Rule 609. Instead, many courts have flatly rejected the plain text of several of its provisions, with the most frequent target of this insouciance being Rule 609(a) and its subsections.⁴⁶¹ Indeed, courts have viewed Rule 609 as giving them “license to exercise virtually unrestricted discretion” and “improperly rewrite[ten] both the history and language of [Rule 609(a)].”⁴⁶² Given this judicial irreverence, indeed scorn, toward the plain text of Rule 609 generally and Rule 609(a) specifically, the fact that Rule 609(a)(1) singles out “the accused” for special treatment should not preclude courts from extending its protections to civil plaintiffs in quasi-criminal trials.

458. FED. R. EVID. 609(a)(1).

459. See *supra* notes 110–138 and accompanying text.

460. See *supra* notes 28–45 and accompanying text.

461. See *supra* notes 234–236, 268–269, 280–281, 340–377, 424 and accompanying text.

462. See Gold, *supra* note 226, at 2296, 2328.

VI. CONCLUSION

With one exception, every Federal Rule of Evidence dealing with propensity character evidence or evidence which can be misused as propensity character evidence makes it either: (a) *as difficult* to admit such evidence in civil trials as it is in criminal trials, or (b) *more difficult* to admit such evidence in civil trials than it is in criminal trials. The “mercy rule” falls into this latter category as it allows criminal defendants to inject the issue of character into their trials while a similar luxury is not afforded to civil parties. Before 2006, however, a substantial minority of courts extended the “mercy rule” to civil parties in quasi-criminal cases because they were in most respects similar to criminal cases. Congress finally shut the door to this practice based upon the serious risks of prejudice, confusion, and delay that propensity character evidence engenders.

These same risks, however, support treating civil parties in quasi-criminal cases the same as criminal defendants under Rule 609(a), the felony impeachment rule. That Rule makes it much more difficult for courts to exclude the felony convictions of civil parties than it is for them to exclude the felony convictions of testifying criminal defendants. It is thus the only Federal Rule of Evidence which makes it *easier* to admit evidence which can be misused as propensity character evidence in civil trials than it is in criminal trials. Courts should correct this anomaly by treating civil parties in quasi-criminal cases the same as criminal defendants under the Rule, and their persistent lack of reverence for various provisions of Rule 609 means that there is no obstacle to such parallel treatment.

