A TEXTUAL STRUCTURE OF CONFUSION: PROBLEMS WITH THE FEDERAL RULES GOVERNING IMPEACHMENT BY EVIDENCE OF CRIMINAL CONVICTION

I. INTRODUCTION

Canadian novelist Gilbert Parker once wrote, "[t]he spirits of our foolish deeds haunt us, with or without repentance."[1] While this may be true in everyday life, the Federal Rules of Evidence demand that this not be the case in American courts. Generally, Rule 404 clarifies that "[e]vidence of a person's character . . . is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait."[2] Specifically, "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."[3] The Advisory Committee commented that Rule 404 is meant to avoid allowing "the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened."[4] Thus, the Federal Rules of Evidence provide that one's past mistakes cannot come back to haunt her as evidence of her bad character.

Notwithstanding this prohibition of general character evidence, evidence of prior acts may be let in under other pretenses. One such exception takes effect when evidence of prior acts or crimes is offered for the sole purpose of impeaching a witness in a criminal or civil proceeding.[5] Under Rules 608 and 609, evidence of prior acts may be offered to attack "the witness's reputation for having a character for truthfulness."[6] The Federal Rules of Evidence paint a black and white picture of the admissibility of evidence of prior acts. In practice, however, the line between acceptable and unacceptable character evidence is often blurry and inconsistent. Furthermore, even the relationship between the rules that govern the offering of evidence for impeachment, Rules 608 and 609, is unclear.

The easiest way to see the confusion caused by Rules 608 and 609 is to look at the results of cases with similar facts that were decided by different courts. In *United States v. Hernandez*,[7] the Seventh Circuit upheld the Eastern District of Wisconsin's decision to admit evidence of a prior conviction for possession of cocaine and marijuana to impeach a defendant on trial for a drug-related kidnapping. The court recognized that the similarity between the past crime and the crime at hand raised the "possibility of the jury's inferring guilt on a ground not permissible under

1. GILBERT PARKER, MRS. FALCHION 170 (1898).
2. FED. R. EVID. 404(a)(1).
3. *Id.* at 404(b)(1).
4. *Id.* at advisory committee's note to subdivision (a).
5. FED. R. EVID. 608; FED. R. EVID. 609.
6. FED. R. EVID. 608(a); FED. R. EVID. 609.
7. 106 F.3d 737 (7th Cir. 1997).

Rule 404(b)" but still deferred to the lower court's judgment due to the "importance of the credibility" in the case.[8]

Conversely, in *United States v. Vasquez*,[9] the Eastern District of New York refused to admit evidence of a controlled substance distribution charge to impeach a defendant on trial for a felony firearm violation. The court acknowledged that the impeachment value for the distribution charges was "higher than that for mere drug possession"[10] but still denied the evidence because of "the moderately low impeachment value of the drug convictions" and "the considerable prejudice associated with introducing three prior drug convictions in a gun possession case."[11]

The results of *Hernandez* and *Vasquez* are peculiar in that the case that dealt with the evidence that was the most probative of truthfulness and the least prejudicial ended with a denial, while the case that dealt with the less probative and more prejudicial evidence ended with an admission. The court in *Vazquez* admitted that a distribution conviction was more probative of truthfulness than possession, which was the charge in *Hernande*z.[12] Furthermore, the court in *Hernandez* noted that the prior conviction was somewhat prejudicial because the case at hand was drug related.[13] Conversely, there was no indication that the firearm charge in *Vazquez* was drug related.[14] In a logically consistent world, one would think that if the outcome of these cases differed at all, then the court in *Hernandez* would have been the one rejecting the impeachment evidence.

A similarly confusing pattern emerges in the cases involving prior convictions for a violent crime, such as assault. In *United States v. Brewer*,[15] the Eastern District of Tennessee ruled that the defendant's prior conviction for aggravated assault was admissible to impeach the defendant-witness who was on trial for kidnapping and transporting a stolen vehicle. This decision to admit was made despite the court's recognition that precedent had established that acts of violence "generally have little or no direct bearing on honesty and veracity."[16]

Reaching an opposite conclusion, in *United States v. Grove*,[17] the District Court of Utah held that an aggravated assault conviction was not allowed to be used to impeach a defendant on trial for a drug trafficking

8. *Id.* at 740.
9. 840 F. Supp. 2d 564 (E.D.N.Y. 2011).
10. *Id.* at 569.
11. *Id.* at 573.
12. *Id.* at 569.
13. *Hernandez*, 106 F.3d at 740.
14. *See Vasquez*, 840 F. Supp. 2d 564.
15. 451 F. Supp. 50 (E.D. Tenn. 1978).
16. *Id.* at 53 (quoting Gordon v. United States, 383 F.2d 936, 940 (D.C. Cir. 1967)).
17. 844 F. Supp. 1495, 1497 (D. Utah 1994).

offense. Like the court in *Brewer*, the court in Grove noted that an assault conviction "has very little bearing on defendant's credibility."[18] The decision to exclude the evidence was also influenced by the fact that "the conviction being for a crime of violence would cast the defendant in a general negative light."[19]

A. Thesis

The abundance of impeachment case law exhibiting contrary decisions under nearly identical facts suggests that Rule 609 merits further investigation. Courts making different decisions is not necessarily problematic. However, in many cases involving 609, courts are reading the same rules but employing completely different standards en route to these different outcomes. The interplay between Rules 608 and 609 contains so many complexities and policy choices that a true exhaustive exploration of it would fill multiple volumes. This Note aims to contribute to the broader scholarship dealing with these rules by focusing specifically on the text of the rules. This Note will not question legislative judgments made clear by the rules but will simply highlight the issues where legislative determinations are vague or the rules do not successfully communicate legislative intent. While other scholars have broadly focused on how impeachment should be governed in principal,[20] this Note defers to legislative judgment but explores how the legislature is failing to properly convey its judgment.

This Note will work its way through four analytical steps in exploring this topic. First, it will trace the development of Rules 608 and 609 in order to fully communicate how the current textual structure of the rules came to exist. Second, it will highlight the specific confusions caused by this current structure. Third, it will address why these confusions are problematic and need to be remedied. Last, it will posit general framework and guidelines that the legislature can use to make Rules 608 and 609 more clear and instructive regarding impeachment by conviction.

II. HISTORY AND CURRENT TEXTUAL STRUCTURE OF THE IMPEACHMENT BY CONVICTION RULE

Before diving into the rules that govern impeachment by evidence of prior acts and convictions, one must first understand the bar on general

18. *Id.*

19. *Id.*

20. *See* Donald H. Zeigler, *Harmonizing Rules 609 and 608(B) of the Federal Rules of Evidence*, 2003 UTAH L. REV. 635 (2003); Robert D. Okun, *Character and Credibility: A Proposal to Realign Federal Rules of Evidence 608 and 609*, 37 VILL. L. REV. 533 (1992).

character evidence in order to appreciate the importance of clearly defining the impeachment exceptions. As noted above, the rule itself provides that evidence of prior acts or crimes to prove a person's character is not admissible to prove that a person acted in accordance with the character in the matter at hand. The advisory committee notes explain the rationale behind Rule 404.[21] The committee notes that evidence of character is generally banned because it "is of slight probative value and may be very prejudicial."[22] Furthermore, the committee notes that such evidence "tends to distract the trier of fact from the main question of what actually happened on the particular occasion."[23]

In order to have prior act evidence admitted, the offeror must successfully argue that it is being offered for some purpose other than proving a general propensity to act in a certain way. For example, in *United States v. Miller*,[24] the Seventh Circuit reversed a lower court's decision to admit a defendant's prior drug conviction as evidence pertaining to a new drug charge. The court stressed that the evidence was inadmissible because the offeror failed to argue that it was meant to show "'intent, or another of the 404(b) categories, discrete from a showing of mere propensity.'"[25] The fallback position of inadmissibility for crimes and other acts evidence incentivizes the creation of clear guidelines for determining what uses of such evidence are acceptable.

Rule 608(a) notes that "[a] witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character."[26] However, under 608(b), "[e]xcept for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack."[27] Under 608, the court is allowed to inquire into specific instances on cross-examination "if they are probative of the character for truthfulness or untruthfulness."[28]

Furthermore, the advisory committee notes posit that "[r]ule 608(b) bars any reference to the consequences that a witness might have suffered as a result of an alleged bad act."[29] Although the advisory committee failed

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21. *See* FED. R. EVID. 404 advisory committee's note.
22. *Id.*
23. *Id.*
24. 673 F.3d 688 (7th Cir. 2012).
25. *Id.* at 699 (quoting United States v. Chavis, 429 F.3d 662, 673 (7th Cir 2005) (Cudahy, J., concurring)).
26. FED. R. EVID. 608(a).
27. *Id.* at 608(b).
28. *Id.*
29. *Id*. at committee's note on rules to 2003 amendment.

to qualify this statement with an exception for crimes, the felony categorization parameters of 609 effectively inform the jury that the witness has suffered felony-type penal consequences for her prior act.[30] In a case involving attempted impeachment with prior acts of lying, the Third Circuit held that "the government cannot make reference to [the witness's] forty-four day suspension or that Internal Affairs found that he lied."[31] This desire to keep the potentially prejudicial consequences of bad acts away from the jury is seemingly forgotten in application of rule 609(a)(1) where a jury member familiar with felony sentencing could immediately deduce that the admitted evidence relates to a crime that was punishable by "death or by imprisonment for more than one year."[32] From the implementation of 609 alone, the jury will know that the witness suffered the punishment of a felon.

Pertaining to Rule 609, the advisory committee noted that "evidence of conviction of crime is significant only because it stands as proof of the commission of the underlying criminal act."[33] Despite this clear commonality between impeachment by criminal conviction and impeachment by prior acts, 609 places criminal conviction evidence under an entirely separate rule from other kinds of impeachment evidence. Rule 609(a)(1) mandates that evidence of a crime "punishable by death or by imprisonment for more than one year" must be admitted in a civil or criminal case in which the witness is not a defendant and must be admitted in a criminal case in which the witness is a defendant "if the probative value of the evidence outweighs its prejudicial effect."[34] In contrast, 609(a)(2) mandates the admission of criminal act evidence regardless of punishment if the court can "readily determine" elements of the crime involve "a dishonest act or false statement."[35] The rule also imposes a general limit on using criminal conviction evidence if the conviction is more than ten years old. In that case, its probative value must "substantially outweigh" its prejudicial effect.[36]

The rule itself only briefly acknowledged its ultimate direction toward propensity for truthfulness. Though the first sentence of section (a) explicitly says "[t]he following rules apply to attacking a witness's character for truthfulness," the section (a)(1) sentence-based admission mandate makes no mention of a specific connection to character for

30. *See* FED. R. EVID. 609.
31. United States v. Davis, 183 F.3d 231, 257 n.12 (3d Cir. 1999).
32. FED. R. EVID. 609(a)(1).
33. *Id*. at advisory committee's note.
34. *Id*. at 609(a)(1), 609(a)(1)(B).
35. *Id.* at 609(a)(2).
36. *Id.* at 609(b)(1).

truthfulness.[37] Since 404 bans general propensity evidence, admission under (a)(1) necessarily depends on whether certain crimes have a link to a tendency to be truthful.[38] On the other hand, the (a)(2) dishonest element route to admission is more obviously anchored to the general goal of impeachment.[39] Furthermore, the phrase "readily determine" suggests that the connection to untruthful tendencies must be relatively clear.

The current structure of Rule 609 can be traced to its legislative history. The ultimate rule stands as a compromise between the House and the Senate who wanted different parameters for the admission of this kind of evidence.[40] The House Committee proposed impeachment by criminal conviction on a narrow basis.[41] The committee thought that "because of the danger of unfair prejudice in such practice and the deterrent effect upon an accused who might wish to testify, and even upon a witness who was not the accused, cross-examination by evidence of prior conviction should be limited to those kinds of convictions bearing directly on credibility."[42] Thus, the House wanted to allow impeachment only by crimes involving dishonesty or false statement.[43] Furthermore, the House Committee wanted a categorical ban on evidence of all convictions that are over ten years old.[44]

The Senate Committee, on the other hand, proposed impeachment by criminal conviction on a much wider scale.[45] The Senate's proposed version of 609 would allow admission "if the crime was a felony or a misdemeanor if the misdemeanor involved dishonesty or false statement."[46] The key word in that proposal is the "or." Thus, under the Senate version, any crime that is a felony could be used to impeach and any non-felony could be used that has dishonesty as an element. In basic terms, while the House only wanted felonies that involved dishonesty to be admissible to impeach a criminal defendant, the Senate wanted all felonies to be admissible.

The difference in the scope of these proposed rules is striking. The Senate's version would allow evidence of hundreds of felonies that the House version would not allow. In the cases mentioned above involving assault, for example, the Senate would likely admit evidence of a felony

37. *See id.* at 609(a).
38. *See* FED. R. EVID. 404.
39. FED. R. EVID. 609.
40. *See* Zeigler, *supra* note 20, at 651.
41. *See* H.R. REP. No 93–650 (1973).
42. *Id.* at 7084–85.
43. *See id.*
44. *Id.* at 7085.
45. *See* S. REP. No. 93–1277 (1974).
46. *Id.* at 7060–61.

assault to impeach a defendant, while the House would likely rule the evidence inadmissible because the crime does not bear directly on credibility.

Although commentators almost universally address the final version of 609 as a compromise,[47] the attempt to strike a balance between these two approaches produced a vague codification. The wording of the adopted rule presents such ambiguity that "federal judges could continue to permit whatever sort of impeachment they had allowed before the Federal Rules of Evidence were enacted, no matter what their position on the impeachment spectrum."[48]

The rule itself admits the evidence that would have been admitted under the House preferred version under 609(a)(2).[49] However, in (a)(1) the rule includes a provision for the admission of general felonies, which is in line with the Senate version. The key departure from the Senate version is in (a)(1)(B) where the rules require a heightened balancing test before criminal evidence can be let in to impeach a defendant. Thus, while allowing felonies without dishonest components to impeach like the Senate wanted, the rules curb such admission with a balancing test to try and address the House's concern that felonies that do not directly involve dishonesty may not be a strong indicator of character for truthfulness. Ideally, the balancing test in (a)(1)(B) simply allows the court to determine whether a felony without a dishonest element should be admitted to impeach a criminal defendant.[50] In reality, however, this structure leads to confusion.

III. SPECIFIC AREAS OF TEXTUAL CONFUSION THAT LEAD TO INCONSISTENT APPLICATION

A. Courts Forget that 609 Is About Truthfulness

The separation of impeachment by criminal conviction from other types of impeachment has resulted in a consistent lack of recognition that 609 is ultimately still anchored in "character for truthfulness" rather than character in general. This lack of recognition is clearly evident in the common use of the "*Luck-Gordon*" test.[51]

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47. *See* Zeigler, *supra* note 20, at 651.

48. *Id.*

49. *See* FED. R. EVID. 609.

50. In reality, however, courts often use the facade of the (b)(2) balancing test to justify admission or denial to achieve whatever result it would prefer anyway. *See* Zeigler, *supra* note 20, at 651.

51. *See* Luck v. United States, 348 F.2d 763, 768 (D.C. Cir. 1965); Gordon v. United States, 383 F.2d 936, 939–41 (D.C. Cir. 1967).

Luck and *Gordon* were the cases in which the D.C. Circuit carved out its approach to the probative–prejudicial balancing test for 609(a)(1)(B) criminal defendants.[52] This approach, known as the *Luck-Gordon* test, has become the dominant approach used by state and federal courts in assessing whether the probative value of a defendant's prior conviction outweighs the prejudicial effect of letting in that conviction.[53] This test outlines five factors to be considered as part of the probative–prejudicial balancing: "(1) the nature of the crime; (2) the time of conviction and the witness' subsequent history; (3) similarity between the past crime and the charged crime; (4) importance of defendant's testimony; and (5) the centrality of the credibility issue."[54]

The way that some courts apply the first factor, "the nature of the crime," shows that they lose sight of the fact that all impeachment evidence is about "character for truthfulness."[55] In explaining this factor, the court in *Gordon* opined that "[a] 'rule of thumb' thus should be that convictions which rest on dishonest conduct relate to credibility whereas those of violent or assaultive crimes generally do not; traffic violations, however serious, are in the same category."[56] While this reasoning seems perfectly in line with the "character for truthfulness" aspiration of 609, courts sometimes apply this factor in a way that shifts the focus away from this central concept. Instead of seeing veracity as the ultimate focus, courts sometimes treat the veracity-specific probative value of a crime as a non-dispositive item on a checklist.

For example, in *Brewer*, the Eastern District of Tennessee performed a step-by-step *Luck-Gordon* analysis and concluded that felony convictions for rape, aggravated assault, and assault with a deadly weapon could all be used to impeach a defendant on trial for an alleged kidnapping.[57] In applying the "nature of the crime" factor, the court cited the instruction from *Gordon* and concluded that since "[a]cts of violence . . . have little or no direct bearing on honesty,"[58] the nature of the three crimes was "a factor against admitting them for impeachment purposes."[59] Nonetheless, the court looked at the other *Luck-Gordon* factors and decided to admit the evidence anyway.[60] Thus, the court blatantly acknowledged that the nature

52. See *Gordon*, 383 F.2d at 941.

53. Ted Sampsell-Jones, *Minnesota's Distortion of Rule 609*, 31 HAMLINE L. REV. 405, 408 (2008) (declaring that *Luck-Gordon* is "the dominant framework used by state and federal courts interpreting Rule 609(a)(1)").

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

55. *See id.*

56. *Gordon*, 383 F.2d at 940.

57. *See Brewer*, 451 F. Supp. at 53–54.

58. *Id.* at 53 (quoting Gordon v. United States, 383 F.2d 936, 940 (D.C. Cir. 1967)).

59. *Id.*

60. *Id.* at 53–54.

of the crimes was not related to veracity but still proceeded to allow the evidence under 609. By treating the nature of the crimes as an item on a checklist, the court distances 609 from the exclusive focus on "character for truthfulness" that the legislature meant for it to have.

Even more shockingly, in *United States v. Causey*,[61] the Seventh Circuit performed a *Luck-Gordon* analysis and held that a conviction for a felon in possession of a firearm charge could be used as evidence to impeach a defendant on trial for possession of a sawed-off shotgun. As in *Brewer*, the court expressly discredited the impeachment value of the prior charge, saying that the "felon in possession conviction clearly did not have the impeachment value of a crime involving dishonesty."[62] Also as in *Brewer*, the court treated this lack of impeachment value as only one non-dispositive item on a checklist of five.[63] The court also noted that the third factor of the *Luck-Gordon* test cautioned against letting in this type of evidence.[64] The defendant was on trial for a firearm charge and the prior conviction was also a firearm charge. Despite the lack of probative value for impeachment and the prejudicial similarity of the two charges, the Seventh Circuit upheld the district court's decision to let in the evidence since it passed the other three *Luck-Gordon* factors.[65]

Curiously, the court used the fourth factor to argue that the evidence should be admitted since "credibility would be centrally important" in this trial.[66] One would think that when credibility is of the utmost importance, the court would be less, rather than more, willing to admit prejudicial evidence with a low veracity component.

Some courts that apply the *Luck-Gordon* factors to 609 determinations do in fact keep their focus on veracity and hold that the "nature of the crime" can be dispositive in a decision to deny admission. In *United States v. Mahone*,[67] the District Court of Maine denied the admission of aggravated assault and possession of controlled substance convictions solely based on the first *Luck-Gordon* factor. Despite the fact that "the convictions occurred close in time to the instant charges, and though the convictions are sufficiently dissimilar to the instant charge that it is unlikely a jury would consider this propensity evidence," the court still denied admission solely because the convictions did not "relate to the Defendant's propensity to testify truthfully."[68] This move away from the

61. 9 F.3d 1341 (7th Cir. 1993).
62. *Id.* at 1344.
63. *See id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. 328 F. Supp. 2d 77 (D. Me. 2004), *aff'd*, 453 F.3d 68 (1st Cir. 2006).
68. *Id.* at 85.

checklist approach and toward a stance that the nature of the crime can be dispositive is more logically consistent with the veracity-centered philosophy underlying the concept of impeachment.[69]

Similarly, in *United States v. Grove*,[70] the District Court of Utah emphasized the "nature of the crime" when refusing to allow the admission of an aggravated assault to impeach a drug trafficking defendant.[71] The court noted that the assault conviction had "very little bearing on defendant's credibility except to suggest that she did a bad and dangerous thing in her past."[72] More generally, the court also stressed that "[a]ssaultive crimes have a limited utility in assessing credibility."[73] By using this strong language and also noting that the Tenth Circuit had never allowed a purely assaultive crime to be admissible under 609, the court seems to have hinted that such crimes are categorically banned from 609(a)(2) due to the their nature.

The different ways that courts apply the *Luck-Gordon* factors is more important than a simple jurisdictional difference. The courts who treat the "nature of the crime" as a non-dispositive part of a checklist run the risk of allowing evidence that does not primarily reflect the witness's character for truthfulness. As the court pointed out in *Grove*, when the nature of the prior conviction is not strongly related to veracity, "it is more likely a jury would consider the prior conviction of defendant as evidence of general bad character rather than evidence of a lack of credibility."[74] Thus, an implementation of 609 that fails to be directly focused on veracity runs the risk of impinging on the individual rights granted by the general ban on character evidence in Rule 404.

B. Courts Have No Idea How to Assess the Probative Value for Veracity of Prior Convictions

Even when courts do keep in mind the inherent connection of 609 to character for truthfulness, the rule provides them virtually no guidance in terms of how to assess the value of a piece of evidence in terms of showing untruthful tendencies. As Professor Zeigler has pointed out, "federal courts disagree about the admissibility of convictions for drug dealing, petit larceny, burglary, assault, robbery, weapons violations, murder, and

69. *See* FED. R. EVID. 609(a) ("The following rules apply to attacking a witness's character for truthfulness . . . .").

70. 844 F. Supp. 1495 (D. Utah 1994).

71. *Id.* at 1497 (quoting United States v. Sides, 944 F.2d 1554, 1560 (10th Cir. 1991)).

72. *Id.*

73. *Id.*

74. *Id.* at 1498.

arson."[75] Neither the rule itself nor its advisory committee notes provide courts with instruction regarding what factors to consider when deciding whether to admit crimes such as these.[76] Consequently, courts are all over the map in terms of the reasoning used to justify the admission or exclusion of 609 evidence.

Some courts simply reason that all felony convictions are substantially probative of character for truthfulness. In *United States v. Barnes*,[77] the Fifth Circuit upheld the admission of evidence of a prior heroin possession conviction to impeach a defendant on trial for theft. The court's explanation of the 609(a)(1)(B) balancing test suggests that it would have admitted any conviction that met the minimum sentencing requirements as long as it was not especially prejudicial.[78] The only explanation offered by the court regarding the probative value was that "[t]he conviction was relevant as evidence of the defendant's criminal nature from which the jury could infer a propensity to falsify testimony."[79] The reasoning from *Barnes* could be used to argue for the admittance of any crime. In basic terms, the court's chain of reasoning was: conviction→ evidence of a crime→ evidence of criminal nature→ probative of truthfulness. The very existence of limitations within Rule 609 shows that this kind of reasoning is contrary to legislative intent.[80] The emphasis on veracity within the rules only supports: conviction→ evidence of a crime→ admissible for impeachment if crime is probative of truthfulness and not overly prejudicial.

Not all courts automatically assume that all felony convictions call credibility into question. In fact, the Ninth Circuit has clearly acknowledged that "prior felony convictions which do not in themselves implicate the veracity of a witness may have little impact on credibility."[81] If all courts implemented that sort of reasoning, then criminal defendant impeachment arguments under 609(a)(1)(B) should presumptively fail unless the offering party could show some special connection to truthfulness. In *Bagley*, the Ninth Circuit applied the above general principle and noted that "the question of the truth or falsity of a witness's statement generally is not advanced in any material way by a showing of his prior conviction of the crime of burglary or theft, unless issues of credibility are otherwise directly involved."[82]

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75. Zeigler, *supra* note 20, at 662–63 (footnotes omitted) (for specific cases demonstrating these differences, see the footnotes accompanying the cited pages).

76. *See* FED. R. EVID. 609; *id*. at advisory committee's note.

77. 622 F.2d 107 (5th Cir. 1980).

78. *Id.* at 109.

79. *Id.*

80. *See* FED. R. EVID. 609.

81. United States v. Bagley, 772 F.2d 482, 487 (9th Cir. 1985).

82. *Id.*

However, even courts that do not assume that all crimes are probative of veracity often make seemingly arbitrary categorical rules about what kinds of convictions qualify for admission under 609(a)(1)(B). For example, in *United States v. Hayes*,[83] the Second Circuit held that a conviction for importation of cocaine "ranks relatively high on the scale of veracity-related crimes."[84] The court offered no reasoning to support this conclusory statement. The court also, in a similarly conclusory manner, postulated that such a conviction "has more probative value on credibility than, for example, a conviction for mere narcotics possession, or for a violent crime."[85] Consequently, the court implied that we should, for some reason, trust the murderer more than the importer of cocaine.

C. The "Back Dooring" Ambiguity

The limitations of Rule 609 combine with the similar propensity for truthfulness focus of 608 to create the technical possibility of "back dooring" evidence of a prior crime through Rule 608 when evidence of the conviction of that crime would be disqualified from admission under the limitations of 609. Under the plain language of the Rules, nothing logically prevents a court from allowing evidence of the events underlying a conviction although it has already deemed that the conviction itself is not admissible to impeach. A hypothetical offered by Professor Zeigler nicely illustrates the type of situation in which back dooring could arise.[86] He asks the reader to imagine a scenario where an individual is on trial for robbery and the court denies the prosecution's bid to impeach with a prior conviction of robbery through 609 due to the prejudice brought on by the fact that the prior conviction is of the same crime.[87] If the court would allow back dooring, then the prosecutor may be able ask a question such as, "[i]sn't it true that on the evening of October 10, 2001, at the corner of Broadway and Worth, you stole $150 from John Jones?"[88]

The possibility of back dooring is elevated by the different probative–prejudicial balancing tests that apply to 608 and 609. While the evidence of the conviction might not pass the "probative value of the evidence outweighs its prejudicial effect" test of 609, the question on cross-examination could pass the more lenient "probative value is substantially outweighed" 403 test that would be applicable to impeachment evidence

83. 553 F.2d 824 (2d Cir. 1977).

84. *Id.* at 828.

85. *Id.* (footnote omitted).

86. Donald H. Zeigler, *The Confusing Relationship Between Rules 608(b) and 609 of the Federal Rules of Evidence*, 46 N.Y.L. SCH. L. REV. 527, 532–33 (2003).

87. *Id.*

88. *Id.*

under 608(b).[89] Thus, if a 609 rejection was a close decision where the probative and prejudicial values were evenly balanced, then back dooring would be common if it were universally allowed.

More than just allowing the admission of evidence of a crime when the conviction itself is too prejudicial to be admitted, back dooring could also be able to overcome the other technical limits of 609, such as the stricter standards for convictions older than ten years and juvenile adjudications. If back dooring were universally allowed, then the events underlying these specially treated convictions could slide into cross-examination under the more friendly standards of 608.

With the potential to create such a massive loophole, one would think that federal courts would adopt a universal stance toward the "back door" issue. However, a 1993 survey of United State District Court judges revealed that federal courts have no such universal stance and that there is no consensus regarding the permissibility of "back dooring" failed 609 evidence.[90] The survey asked these judges whether, after the court has disallowed evidence of a conviction under 609, the judges would ever potentially allow evidence of the specific acts underlying the conviction for the purposes of impeachment under 608(b).[91] Forty-two judges responded they would never allow evidence of the specific underlying acts even if they were probative of veracity (so no back dooring).[92] Nineteen judges responded that they would "sometimes" allow back dooring.[93] Nineteen other judges indicated that back dooring is not prohibited because "Rule 608 is independent of Rule 609."[94] This data demonstrates that the structure and language of the Federal Rules of Evidence creates an ambiguity

89. *See* FED. R. EVID. 609(a)(1)(B); FED. R. EVID. 403; FED. R. EVID. 608.

90. H. Richard Uviller, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale*, 42 DUKE L.J. 776, 815–16 (1993) (Professor Uviller describing the methodology used in the survey and its significance: "I surveyed three hundred judges of the United States District Courts, with at least three years of bench time in the federal courts, calling for their interpretation of and practice with respect to these Rules. Essentially, I asked them about three aspects of the rules: (1) the ingredients of prejudice requiring exclusion of evidence of a witness's prior convictions; (2) finding probative value in prior convictions, both in the dishonest and the honest varieties; and (3) the problem of allowing evidence of specific conduct suggesting an honest or dishonest character. I received sixty-eight replies, a response rate of almost twenty-three percent, for which I am grateful in view of the fact (as several judges informed me) that judges are inundated with questionnaires and most habitually decline to participate in surveys. I do not promulgate these results as statistically representative of the understanding or inclinations of the federal trial bench as a whole. They are only what they are: the thoughts of a significant number of experienced district court judges who cared enough about the project to submit data. The results, however, are sufficiently dramatic to be instructive on the issue: Do the Federal Rules provide a rational and uniform scheme for the rulings by trial judges on important evidentiary questions affecting credibility?" (footnotes omitted)).

91. *See id.*

92. *Id.* at 821.

93. *Id.*

94. *Id.*

regarding back dooring and the nature of the relationship between Rule 608 and evidence that falls within the consideration parameters of Rule 609.

The most recent case to involve an in depth discussion about backdooring was *United States v. Osazuwa*.[95] In that case, the government sought to impeach a defendant-witness on trial for assaulting a prison guard by using evidence relating to the defendant's prior conviction for bank fraud.[96] The government wanted to "back door" the impeachment evidence through Rule 608(b) so that it could introduce the collateral details of the fraud crime, such as how the fraud was perpetrated and the fact that the defendant used fake identification.[97] The trial court allowed impeachment, but the circuit court reversed and announced a categorical no backdooring rule.[98] The Ninth Circuit reversed after acknowledging that both constructions of the rule are "plausible" but pointing out that it would be unfair to allow the government to circumvent the limitations imposed by 609.[99]

As shown by the judicial survey, however, *Osazuwa* does not reflect a unanimous rule. In *United States v. Hurst*,[100] the Sixth Circuit ruled that it is appropriate in some circumstances for the details of a conviction to be explored through Rule 608(b). In that case, the court allowed the government to question the defendant-witness about the details underlying his prior conviction for obstruction of justice.[101] In allowing the inquiry into the details of the conviction, the court explained that "[w]hether a specific conduct is probative of the truth and honesty of a witness under Rule 608(b) is a matter within the discretion of the trial court."[102]

IV. WHY ARE THE INCONSISTENCIES IN APPLICATION PROBLEMATIC?

Before diving into any proposed changes to Rules 608 and 609 that would address the aforementioned inconsistencies, one must first understand why the inconsistent application of 609 is problematic. An endorser of the current layout of the Rules could argue that uniform application is not something that the Rules require and that they are simply meant to provide a framework that courts may implement in their own unique ways. However, the text of the Federal Rules of Evidence, along with the legislative history behind the original implementation of the Rules,

95. 564 F.3d 1169 (9th Cir. 2009).
96. *Id.* at 1175.
97. *See id.*
98. *Id.* at 1170.
99. *Id.* at 1173.
100. 951 F.2d 1490, 1501 (6th Cir. 1991).
101. *See id.* at 1500–01.
102. *Id.* at 1501.

show that uniformity and consistent application are necessary to achieving the purposes and goals that brought about the enactment of the Rules.

Both the Senate and House Reports discussing the implementation of the Rules reveal that clarity and consistency were intended goals. In the Senate Report, Senator Hruska, one of the sponsors of the Senate's version of the Federal Rules of Evidence bill, remarked that there was a "real need for a comprehensive code of evidence intended to govern the admissibility of proof in all trials before the Federal courts because of the lack of uniformity and clarity in the present law of evidence."[103] The House Report about the Federal Rules of Evidence reflects similar concerns.[104] When discussing the need for the Federal Rules of Evidence, that report quoted Judge Albert Maris[105] in stressing that the Rules would represent a "significant milestone on the road to the better administration of justice in the Federal courts, by providing clear, precise, and readily available rules for trial judges and trial lawyers to follow, which will be uniformly applicable."[106] With this emphasis on consistency and clarity in mind, the aforementioned inconsistencies in the application of Rule 609 and Rule 608 back dooring are not what the legislators had in mind when initially enacting the rules.

Furthermore, the text of the finished Rules also suggests that the inconsistent application of 609 and back dooring is problematic. Rule 102 states the "Purpose" of the rules.[107] It establishes that the rules "should be construed so as to administer every proceeding fairly . . . to the end of ascertaining the truth and securing a just determination."[108] This goal of fairness is undermined by the inconsistent implementation of Rules 608 and 609. Generally, a rule is not automatically unfair simply because it is administered differently by different courts. Rules 608 and 609 are unique, however, in that they deal with impeachment by evidence of bad acts. Inconsistent application of rules dealing with this specific subject matter is unfair on multiple grounds.

This unfairness can be traced in part to the doctrine of "attribution theory."[109] "Attribution theory" is a well-established psychological theory holding that "negative information is likely to be more important than positive information when people form perceptions about people they do

103. S. REP. No. 93-1277, at 8 (1974).

104. *See* H.R. REP. No 93-650 (1973).

105. Judge Maris was "Chairman of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States" at the time of making this statement. *See id.* at 1.

106. *Id.*

107. *See* FED. R. EVID. 102.

108. *Id.*

109. *See* Okun, *supra* note 20, at 547–50.

not otherwise know."[110] In theory, this "halo effect" would be particularly strong in a courtroom setting where a group of complete strangers are judging one who is already charged with perpetrating criminal activity.[111] In fact, the applicability of attribution theory to trial settings has been confirmed through the results of multiple studies.[112] Since impeachment evidence can be especially prejudicial or effective, admitting too much or too little has a clear bearing on whether each side gets to "fairly" present its case. Unlike some other jurisdictional differences such as those dealing with minor procedure, attribution theory shows that the different implementation of Rules 608 and 609 has a very powerful psychological impact on the people who will decide the fate of the defendant. Rules 608 and 609 represent the legislature's judgment about how courts should limit this powerful evidence so as to preserve "fairness." The problem with the current rule structure is that courts are unsure exactly what value judgment Congress made. Since courts across the country impose different limits on such evidence, some courts are necessarily imposing limits that do not correspond with the limits of "fairness," a central goal of the Federal Rules.[113]

The inconsistent application of 609 also raises special issues of fairness due to numerous social justice problems that are unique to the impeachment-by-conviction process. There is a substantial body of discourse uncovering and exploring such issues, and any attempt to give these serious issues due consideration within a minor part of this Note would be futile.[114] Scholarship in this area points to inequities, such as disparities in law enforcement by race and the fact that those with fewer resources are more likely to accept a plea bargain, to show that the simple notion of introducing convictions for impeachment will have disparate consequences for those with diverse racial or socioeconomic identities.[115] Due to the complexity of these social justice issues, this Note will simply acknowledge that great systematic changes need to be made and leave the specific nature of those changes to the body of discourse dealing with those

110. *Id.* at 550.

111. *Id.* at 551.

112. *See* HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 159–60 (1966) (famous juror study in Chicago in which the defendant was acquitted 42% of the time when the jury was told that the defendant had no prior convictions but only 25% of the time when told about prior convictions or not told anything); Okun, *supra* note 20, at 552–53 (detailing that two other studies, one conducted in Toronto and one in Boston, have replicated the results from the Chicago study).

113. *See* FED. R. EVID. 102.

114. For an introduction to the social justice issues underlying the use of convictions for impeachment, see Montré D. Carodine, *Keeping It Real: Reforming the "Untried Conviction" Impeachment Rule*, 69 MD. L. REV. 501 (2010), Montré D. Carodine, "*The Mis-Characterization of the Negro": A Race Critique of the Prior Conviction Impeachment Rule*, 84 IND. L.J. 521 (2009), and Anna Roberts, *Impeachment by Unreliable Conviction*, 55 B.C. L. REV. 563, 563 (2014).

115. *See* Roberts, *supra* note 114, at 580–91.

issues. The changes proposed in this Note will focus on correcting the problems that stem from inconsistent application of Rules 608 and 609, and leave proposals that target the inherent problems with using convictions to impeach in the first place to other more qualified scholars. However, the very existence of this body of discourse shows that jurisdictional variations regarding impeachment by conviction are not harmless and that the consequences of choosing to allow more or less evidence through Rule 609 are serious. This seriousness makes it all the more important to remodel the Rules to reflect exactly how courts should treat such evidence.

V. POTENTIAL STRUCTURAL CHANGES TO THE TEXT

The current structure of Rules 608 and 609 is clearly not allowing courts to properly discern and implement the intent of the legislature. There are a wide variety of potential changes to the Rules that have been suggested by other discourse or implemented by states that have similar rules. Admittedly, the Rules themselves could remain as written and judges across the country could collaborate to implement the Rules in a manner that solves the aforementioned inconsistency problems.[116] However, a change of implementation strategy would require spontaneous collective movement away from impeachment principles that have been employed in some courts for decades. Mass changes in interpretation of the current rules would likely come at a slower pace than a legislative augmentation of the Rules themselves and may not accurately reflect legislative intent. Furthermore, the courts would still be susceptible to backsliding into their old ways of interpreting the Rules since these old methods would be technically consistent with the Rules. With the goal of maximizing clarity of the Rules in the shortest amount of time, this Note will look at potential textual changes to the Rules themselves that could refashion the Rules so as to avoid the confusion as to how courts should implement them. Also, with the ultimate "fairness" objective in mind, the Rules themselves need to indicate exactly how they will be implemented in order to give witnesses and defendants an idea of what skeletons may escape from their closet if they decide to take the witness stand.

116. For an example of how this might work, see Sampsell-Jones, *supra* note 53, at 411–16 (documenting Minnesota's treatment of its state evidentiary rules). Minnesota ignores the textual indications that impeachment by conviction issues are a balancing process and instead implements the parameters of Rule 609 in a strictly mechanical way that nearly always favors admission. *Id*.

A. Bedrock Principles that the Change Must Reflect

Before examining any specific potential textual changes to Rules 608 and 609, one must first understand the principles that dictate whether such a change is successful. First, the change must re-anchor impeachment by criminal conviction to the foundation of propensity for truthfulness. As noted above, many courts have focused so intently on the restrictions announced in 609 and the *Luck-Gordon* factors that they have lost sight of the fact that impeachment by criminal conviction is still aimed toward character for truthfulness rather than character in general.[117] Second, the new rule must provide more guidance for the courts to help them assess to what degree evidence of a prior conviction is probative of truthfulness. As also noted above, courts across the country often currently look at nearly identical facts but decide differently on the issue of admissibility.[118] Third, the new rule must give guidance to the courts in terms of whether "back dooring" is admissible.

Additionally, one must realize that presently, any proposal for a rule change will be incomplete until the legislature resolves some of the aforementioned ambiguities that arise from the current structure of the text. This Note is meant to explore changes to Rules 608 and 609 that could more accurately reflect legislative intent. Other scholarship may take up the task of arguing that the legislature's intended meaning is wrong in principal.[119] This Note is not meant to suggest exactly how the legislature should resolve the ambiguities that currently exist within the Rule. For example, the current text fails to resolve whether the details underlying a criminal conviction can be "backdoored" through Rule 608. To achieve the purposes of clarity and fairness, the legislature must make their opinion on this matter clear. This Note merely suggests a framework through which the legislature can issue a more clear directive and not whether the legislature should determine that back dooring is permissible or impermissible. The proposed changes aim to display and explain legislative intent rather than redefine it.

117. *See* United States v. Causey, 9 F.3d 1341 (7th Cir. 1993); United States v. Brewer, 451 F. Supp. 50 (E.D. Tenn.1978).

118. *Compare* United States v. Hernandez, 106 F.3d 737 (7th Cir. 1997), *with* United States v. Vasquez, 840 F. Supp. 2d 564 (E.D.N.Y. 2011).

119. *See* Zeigler, *supra* note 20; Okun, *supra* note 20.

B. Recommended Changes to Foster Clarity and Uniformity

1. Combine Rules 608 and 609: One Rule, One Focus

Although the language of truthfulness is littered throughout both of these rules and their comments, many courts lose sight of the fact that Rule 609 is aimed at the same function as Rule 608, which is to raise issues about a witness's propensity to be truthful. The failure to keep Rule 609 directed toward truthfulness comes despite the fact that its first sentence says "attacking a witness's character for truthfulness."[120] Since this clear language is not enough to consistently remind courts of the inherent connection between Rules 608 and 609, the legislature should combine the two rules into one long rule about witness impeachment. Consequently, courts and interested citizens looking at the new "modified Rule 608" would immediately recognize that the processes described in Rules 608 and 609 are both aimed at uncovering the witness's "character for truthfulness."

2. Re-word the Probative–Prejudicial Balancing Tests of Rule 609

The clarity of Rule 609 would also be improved by changing the textual descriptions of the probative–prejudicial balancing tests associated with Rule 609. Both the balancing tests in subsection (a) and subsection (b) should say something about the evidence being "probative of the character for truthfulness or untruthfulness" rather than simply "probative." Currently, Rule 608(b) allows cross-examination about specific instances of conduct when the instances are "probative of the character for truthfulness or untruthfulness" while the two balancing tests in 609 simply say to consider "probative value."[121] After this proposed change, the balancing test used in Rule 609(b) could read "if the evidence is more probative of the witness's character for truthfulness or untruthfulness than it is generally prejudicial to that defendant" instead of "if the probative value of the evidence outweighs its prejudicial effect to that defendant." Changing the wording of these tests would cement the anchoring of the 609 processes to "truthfulness" as opposed to character in general. The addition of these qualifying descriptions would also serve to clear up the confusion over how to properly apply the *Luck-Gordon* factors that a majority of courts now use to weigh 609 decisions.[122] The new rule would imply to

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

121. FED. R. EVID. 608(b); FED. R. EVID. 609(a)(1)(B).

122. *See* Gordon v. United States, 383 F.2d 936, 939–41 (D.C. Cir. 1967); Luck v. United States, 348 F.2d 763, 768 (D.C. Cir. 1965).

courts that the *Luck-Gordon* analysis ends immediately if the "nature of the crime" has nothing to do with character for truthfulness or untruthfulness.

3. Develop a List of Crimes that Qualify Under Rule 609(a)(2)

The current version of Rule 609 commands the automatic admission of impeachment evidence if "establishing the elements of the crime required proving . . . a dishonest act or false statement" but fails to give courts sufficient guidance regarding exactly what sort of crimes and elements meet this criteria.[123] Consequently, as noted above, courts use this Rule in very different ways.[124] To resolve this inconsistency, Professor Zeigler suggests that the legislature could develop a list of crimes and elements that meet the dishonest element criteria and publish that list along with the rules.[125] Due to the lengthy nature of such a list, it would likely be more practical for the legislature to include it in the official comments accompanying the newly modified Rule 608. The comments could even specify the types of crimes and elements that are not considered to require proving an element of dishonesty. These changes would allow courts to finally see exactly what the legislature had in mind in the enactment of this rule section. For the sake of clarity and consistency, the new rule would mandate strict adherence to this list of crimes and elements and the automatic admission clause would not apply to any crimes that were not explicitly listed (or equivalent to a crime that was) or contained none of the listed elements. Courts may object to this strict adherence to the list on the ground that the legislature could not possibly conceive of every crime or general type of element that would meet the proof standard to trigger the automatic admission against a witness-defendant. However, if a felony conviction that had special probative value for truthfulness were not on this list, then it could still be admitted under what is currently 609(a)(1)(B). The only convictions that would "fall through the cracks" would be those for crimes punishable by less than one year that were not among those listed by the legislature (which are likely less probative to begin with).[126] The legislature would already list the most obviously probative of these petty crimes anyway.

123. FED. R. EVID. 609.

124. *See* United States v. Bagley, 772 F.2d 482, 487–88 (9th Cir. 1985); United States v. Barnes, 622 F.2d 107, 109 (5th Cir. 1980).

125. Zeigler, *supra* note 20, at 698.

126. *See* FED. R. EVID. 609.

4. Incorporate a Clear Answer to the "Back Dooring" Ambiguity

As evident by the differences among judges regarding whether evidence underlying a prior conviction may be back doored through 609,[127] the legislature needs to provide a clear explanation regarding the relationship between prior convictions and Rule 608(b). The specific content of this explanation will depend on the legislature's clarification on a number of current ambiguities. For the sake of consistency, this explanation needs to enable courts and concerned citizens to determine details such as: (1) whether evidence of a prior conviction or the surrounding circumstances is ever admissible under 608(b); (2) whether one may inquire about a conviction under 608(b) if that conviction did not meet the admission criteria of what is now Rule 609; and (3) whether 608(b) can be used to explore the details surrounding a conviction that was introduced under what is now 609. No matter the answer to these questions, the clarity of the legislature's explanation will be improved by combining the Rules 608 and 609 to make one rule. In the unified rule, if back dooring is allowed, then the section about impeachment by conviction would simply be worded as a third route to impeachment and all of the listed routes could apply to any situation. If, on the other hand, back dooring is never allowed, then the third section of the rule can be formulated as a categorical exception to the rest of the rule. The clear designation of a categorical exception within the same rule would make it clear to courts and citizens that convictions and underlying events are subject to special treatment.

The explanation of the legislature's back dooring stance should also be aided by the addition of phrases to the pre-existing 608 sections to clarify whether conviction evidence applies. For example, if back dooring were not allowed, then the legislature could add an exclusionary clause to the "Specific Instances of Conduct" section of the current Rule 608 and explicitly say "excluding evidence of a conviction or the events underlying it."[128] While such a clause may seem redundant given the clear explanation that will be featured in the "impeachment by conviction" section of the new rule, its extra reinforcement will be useful to diffuse the longstanding confusion over this issue.

VI. CONCLUSION

Since the enactment of the Federal Rules of Evidence, the imprecise textual structure of Rules 608 and 609 have turned impeachment into a

127. *See* Uviller, *supra* note 90, at 815–16.

128. Compare with current version of FED. R. EVID. 608.

"wild west" where courts can almost always find a way to let in evidence of a prior felony conviction for the purpose of impeachment. This Note has identified specific areas of confusion in which courts not only come up with decisions that are seemingly at odds but also apply completely different standards en route to these decisions. The confusion surrounding impeachment by evidence of conviction undermines some of the basic principles that led to the enactment of the Federal Rules of Evidence in the first place. This discourse serves as a call to the legislature to rethink the structure of Rules 608 and 609 to foster these basic principles. Hopefully, the analysis offered in this Note will provide valuable insight and consideration to the larger body of discourse discussing the much broader range of issues surrounding the impeachment process.

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