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Evidence - Application of Rule 609(a) in Civil Contexts: A Sensible Approach- Green v. Bock Laundry Machine Co.

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EVIDENCE—APPLICATION OF RULE 609(a) IN CIVIL CONTEXTS: A SENSIBLE APPROACH?

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

I. INTRODUCTION

As a result of the Supreme Court's decision in *Green v. Bock Laundry Machine Co.*,[1] a civil plaintiff may now be impeached with evidence of his prior felony convictions without regard for the prejudice to his civil claim. The Court's holding that Federal Rule of Evidence 609(a)[2] requires a judge to allow impeachment of a civil witness's credibility with evidence of that witness's prior felony convictions resolved a split in the circuits as to whether application of rule 609(a) in the civil context required automatic admissibility or balancing under rule 609 or rule 403.

Basing its decision on the construction of the rule's plain language[3] and on an investigation of the rule's legislative history,[4] the Court opted for automatic admissibility and rejected both 609 and 609/403 balancing. The Court first determined that rule 609(a) overrides a judge's general discretionary authority under rule 403[5] to balance the probative value of impeachment evidence against its prejudicial effect except as to criminal defendants.[6] The Court then held that rule 609(a) does require a judge to allow evidence of a civil witness's prior felony convictions for impeachment purposes without any regard for resulting prejudice to the party who offers the testimony or to the witness.[7]

This note first examines the *Green* decision in light of the Supreme Court's investigation into the rule's legislative history, prior judicial interpretation of rule 609(a), and the Court's construction of the rule's language. The effects of the Court's denial of judicial discretion in weighing the probative value of impeachment evidence against its prejudicial effects except as to criminal defendants are then discussed.

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1. 109 S. Ct. 1981 (1989).

2. FED. R. EVID. 609. Rule 609(a)(1) reads as follows:
For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant . . . .
Id. See also Green, 109 S. Ct. at 1984.

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

4. *Id.* at 1986-92.

5. FED. R. EVID. 403. Rule 403 reads in relevant part as follows: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . . " *Green*, 109 S. Ct. at 1983 n.2.

6. *Green*, 109 S. Ct. at 1992-93.

7. *Id.* at 1993.

II. FACTS

Paul Green,[8] a nineteen-year-old[9] inmate at a county prison, was employed at a car wash in a prison work-release program.[10] Green's job entailed wiping cars dry after they had been washed, but he was also required to launder the towels used in the car wash.[11] This second duty involved his operating a centrifugal water extractor manufactured by Bock Laundry Machine Co. (Bock).[12] Six days after he had begun working at the car wash,[13] Green wrapped a towel around his hand and reached inside the machine to slow it down.[14] Apparently, the towel became entangled in the drum,[15] and Green's right arm was torn off.[16] Green brought a products liability action against Bock, the manufacturer of the machine, claiming that he had not been adequately instructed in the machine's operation or adequately informed about its dangerousness.[17]

At the time of the trial, Green, then twenty-two, had a record of convictions for corruption of the morals of a minor, statutory rape, criminal trespass, burglary, and conspiracy to commit burglary, all of which were punishable by imprisonment for more than one year.[18] In response to Green's motion in limine requesting that his prior criminal record be excluded,[19] the trial court ruled that, except for the corruption of the morals of a minor charge, the convictions could be used for the purposes of impeachment.[20]

To impeach Green's credibility, at trial Bock elicited admissions that Green had been convicted of the felonies of burglary and conspiracy to commit burglary.[21] After the jury returned a verdict for Bock, Green appealed, arguing that the denial of his pretrial motion to exclude the impeaching evidence of his prior criminal record constituted error.[22] Following circuit court of appeals' precedent and concluding that rule 609(a)(1) mandates admission for impeachment purposes of a civil plaintiff's prior felony convictions, the Court of Appeals for the Third Circuit affirmed the ruling of the district court.[23]

In order to resolve a split in the circuits as to the application of rule 609(a)(1) regarding discretionary balancing, the United States Supreme Court granted certiorari[24] and affirmed the judgment of the court of appeals.[25]

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8. Green was the petitioner in this action.

9. Brief for the Petitioner at 5, Green v. Bock Laundry Mach. Co., 845 F.2d 1011 (3d Cir. 1988) (No. 87-1816), *aff'd*, 109 S. Ct. 1981 (1989).

10. *Green*, 109 S. Ct. at 1982-83.

11. Brief for the Petitioner at 5.

12. *Id.*

13. *Green*, 109 S. Ct. at 1983.

14. Brief for the Petitioner at 7.

15. *Id.*

16. *Green*, 109 S. Ct. at 1983.

17. *Id.*

18. Brief for the Respondent at 4, Green v. Bock Laundry Mach. Co., 845 F.2d 1011 (3d Cir. 1988) (No. 87-1816), *aff'd*, 109 S. Ct. 1981 (1989).

19. *Id.*

20. *Id.* at 5.

21. *Green*, 109 S. Ct. at 1983.

22. *Id.*

23. *Id.*

24. 108 S. Ct. 2843 (1988).

25. *Green*, 109 S. Ct. at 1994.

III. HISTORY AND BACKGROUND

A. Common Law

The practice of allowing impeachment by evidence of a witness's criminal convictions can be traced to common law beginnings. At common law a person convicted of treason, a felony, or an offense involving fraud or deceit, was considered "unworthy of belief" and therefore incompetent as a witness.[26] However, over a period of time this absolute interdiction was abandoned by the courts and replaced with a rule that allowed a witness to testify subject to impeachment of his credibility by admission of evidence of prior convictions.[27]

The courts' adoption of this rule was predicated upon the necessity of providing the jury with all evidence that reflected upon the credibility of the witness.[28] However, the practical effect of the rule was that a criminal defendant became fearful that evidence of prior convictions would operate as an implication of guilt in the crime charged. As a result, a defendant was less than eager to testify on his own behalf.[29]

Recognizing the effects of automatic admissibility of prior conviction evidence, the United States Court of Appeals for the District of Columbia Circuit held in *Luck v. United States*[30] that a trial judge had discretion to exclude prior conviction evidence if the evidence was offered to impeach a defendant-witness.[31] While it acknowledged that the exclusion of such evidence in order to avoid prejudice to a criminal defendant could also result in the exclusion of evidence relevant to the witness's credibility, the *Luck* court nonetheless emphasized that " 'it is more important to the search for truth in a particular case for the jury to hear the defendant's story than to know of a prior conviction.' "[32]

In *Gordon v. United States*,[33] the District of Columbia Circuit refined the *Luck* doctrine. Circuit Judge Burger suggested a number of factors that a court should consider in applying discretionary balancing for the purpose of determining the admissibility of prior conviction evidence for impeaching a defendant-witness: (1) the nature of the crime, (2) the time of conviction and the witness's subsequent history, (3) similarity between the past crime and the charged crime, (4) the importance of the defendant's testimony, and (5) the centrality of the credibility issue.[34]

Not only were *Luck* discretionary balancing and the factors proposed in *Gordon* the predecessors of rule 609—they were also its prototype.[35] With the enactment of the Federal Rules of Evidence came rule 609(a), which bore little resemblance to either of its common law predecessors, but which did establish a statutory delineation of the circumstances

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26. 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 609[02], at 609-58 (1985) [hereinafter WEINSTEIN'S EVIDENCE].

27. *Id.* *See* Note, *Evidence—Diggs v. Lyons: The Use of Prior Criminal Convictions to Impeach Credibility in Civil Actions Under Rule 609(a)*, 60 TUL. L. REV. 863, 864 & n.7 (1986) [hereinafter *Use of Prior Criminal Convictions to Impeach Credibility*].

28. Note, *Balancing Prejudice in Admitting Prior Felony Convictions in Civil Actions: Resolving the 609(a)(1)-403 Conflict*, 63 NOTRE DAME L. REV. 333, 335 (1988) [hereinafter *Balancing Prejudice*].

29. *Id.* at 336.

30. 348 F.2d 763 (D.C. Cir. 1965).

31. *Balancing Prejudice*, *supra* note 28, at 336.

32. *Id.* (quoting Luck v. United States, 348 F.2d 763, 769 (D.C. Cir. 1965)).

33. 383 F.2d 936 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968).

34. WEINSTEIN'S EVIDENCE, *supra* note 26, at 609-66 to 609-72 (citing Gordon v. United States, 383 F.2d 936, 940-41 (D.C. Cir. 1967)).

35. WEINSTEIN'S EVIDENCE, *supra* note 26, at 609-65.

under which evidence of a witness's prior criminal conviction may be admitted for the purpose of impeaching his credibility. Rule 609(a) states specific requirements: First, such evidence must be "elicited from the witness or established by public record during cross-examination." Second, evidence of a prior conviction is admissible *only if* the crime "was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted." Third, in addition to the requirement that the conviction must have been for a felony, is the necessity for the court to "determine[ ] that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant." Finally, the rule stipulates that evidence of conviction for any crime "involv[ing] dishonesty or false statement . . . shall be admitted . . . , regardless of the punishment" and without the exercise of judicial balancing.[36]

Because the federal courts had been following a variety of rules with respect to admissibility of prior conviction evidence[37]—some allowing discretionary balancing and others requiring automatic admission—Congress was faced with no easy task—to construct a rule that would resolve the conflict between the two approaches.

B. Legislative History

From the time that it was originally drafted[38] until the time that it was finally enacted,[39] rule 609(a) underwent an extensive formulation process. The original version of the rule required admission of impeaching evidence without balancing of probative value against prejudicial effect and provided:

> For the purposes of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (2) involved dishonesty or false statement regardless of the punishment.[40]

The House rejected this version and proposed a rule that would only allow admission of impeaching evidence "of convictions bearing directly on credibility":[41] "For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible only if the crime involved dishonesty or false statement."[42]

When this proposed rule was sent to the Senate, the Senate considered a version that would have allowed "[w]ith respect to defendants, only convictions of crimen falsi [to] be used,"[43] but "[w]ith respect to other witnesses, convictions of felonies . . . subject to the balancing test."[44] The Senate-proposed rule would also have limited the admissibility of impeaching evidence to that "elicited from [the witness] or established by public record

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

37. WEINSTEIN'S EVIDENCE, *supra* note 26, at 609-64.

38. The Advisory Committee on Rules of Evidence of the Judicial Conference of the United States drafted three different versions of rule 609—one in 1969, a second in 1971, and the third in 1972. *Id.* at 609-15 to 609-16.

39. Act of Jan. 2, 1975, Pub. L. No. 93-595, § 1, 88 Stat. 1935 (1975).

40. H.R. REP. No. 650, 93d Cong., 1st Sess. 11, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7075, 7084 [hereinafter H.R. REP. No. 650].

41. *Id.* at 7085.

42. 120 CONG. REC. 2374 (1974).

43. Diggs v. Lyons, 741 F.2d 577, 580 (3d Cir. 1984), *cert. denied*, 471 U.S. 1078 (1985).

44. *Id.*

during cross-examination."[45] However, the amendment that the Senate finally adopted provided for "admission of all felonies and crimen falsi with no balancing test."[46]

The Conference Committee proposed a compromise between the House and Senate versions which incorporated "the Senate amendment with an amendment"[47] and authorized impeachment of a defendant by evidence of a felony conviction only after judicial balancing of the evidence's probative value against its prejudicial effect.[48] Once adopted by both houses, that compromise version became what is now Federal Rule of Evidence 609(a).[49] Relative to judicial discretion and crimes involving dishonesty and false statement, the conferees stated: "The admission of prior convictions involving dishonesty and false statement is not within the discretion of the Court. Such convictions are peculiarly probative of credibility and, under this rule, are always to be admitted."[50] As to judicial discretion and felony convictions, the conferees stressed that the prejudice to be considered was only prejudice to the *defendant.*[51]

While the conferees did consider prejudicial dangers to witnesses other than the defendant,[52] they determined that such prejudice is merely one element that can be weighed in the determination of admissibility[53] and that the trier of fact's need for all possible evidence relevant to the issue of credibility outweighs the danger of prejudice to any witness besides the defendant.[54] The conferees concluded that prior conviction evidence should "only be excluded where it presents a danger of improperly influencing the outcome of the trial by persuading the trier-of-fact *to convict* the *defendant* on the basis of his prior criminal record."[55]

The Conference Report use of "to convict" in conjunction with "defendant" seems to limit the applicability of rule 609(a)(1)'s balancing test to the criminal context;[56] however, at least four Congressmen—Representatives Hogan,[57] Dennis,[58] Wiggins,[59] and Lott[60]—recognized that rule 609(a) could be applied in both civil and criminal cases.[61]

Since the language of 609(a) does not specifically indicate whether both civil and criminal cases implicate the rule, there has been little consistency in the rule's application.

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45. 120 CONG. REC. 37076 (1974).

46. *Diggs*, 741 F.2d at 580.

47. CONF. REP. NO. 1597, 93d Cong., 2d Sess. 9, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7098, 7102 [hereinafter CONF. REP. NO. 1597].

48. *Id.*

49. *Diggs*, 741 F.2d at 580.

50. CONF. REP. NO. 1597, *supra* note 47, at 7103.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* (emphasis added).

56. *Diggs*, 741 F.2d at 580.

57. 120 CONG. REC. 2376 (1974).

58. *Id.* at 2377.

59. *Id.* at 2379.

60. *Id.* at 2381.

61. *Diggs*, 741 F.2d at 581.

C. Judicial Interpretation

Since the enactment of the Federal Rules of Evidence in 1975,[62] courts have disagreed on the proper application of rule 609(a)(1).[63] One commentator has suggested that "[t]his confusion among the courts emphasizes the need for amendment if the use of prior convictions to impeach civil witnesses is to continue."[64] Two cases—one from the Eighth Circuit,[65] the other from the Third Circuit,[66] both brought pursuant to 42 U.S.C. § 1983—are representative of the dichotomy among the courts relative to allowing discretionary judicial balancing or requiring automatic admission of evidence of prior felony convictions for impeachment purposes in civil cases.

John Czajka, the plaintiff in *Czajka v. Hickman*,[67] claimed that he had been beaten by jailers after he was caught attempting to escape.[68] Appealing a jury verdict for the defendants, Czajka asserted as error the trial court's allowing him to be cross-examined about prior rape and sexual assault convictions.[69] Czajka argued that the trial court under rule 403 must balance the evidence's probative value against its prejudicial effect. The basis of his argument was that "rape is a crime which shows only propensity to engage in criminal behavior, not propensity to lie."[70] The defendants answered these arguments with a contention that rule 609(a) expressly allows admission of felony conviction evidence for impeachment purposes.[71]

As a preface to its conclusion that the district court's failure to balance prejudicial effect against probative value constituted harmless error,[72] the Eighth Circuit Court of Appeals analyzed the relationship between Federal Rules of Evidence 403 and 609(a). The Eighth Circuit agreed with the Fifth Circuit that "Rule 403 is 'a rule of exclusion that cuts across the rules of evidence' "[73] but further stated that "it *must be applied* in civil cases when a party seeks to cross-examine another about criminal convictions."[74] Although it recognized the argument made by some commentators that rule 609(a)(1) balancing does not apply in civil cases, the court chose not to address that particular issue, concluding that rule 609 does not operate to foreclose the court's responsibility for conducting discretionary balancing when the admission of evidence of prior criminal convictions would result in unfair prejudice.[75] The court reinforced this observation that the operation of one rule does not exclude operation of the other by concluding: "Even if the intended focus of Rule

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62. January 2, 1975, was the enactment date; July 1, 1975, was the effective date of Pub. L. No. 93-595, 88 Stat. 1926 (1975).

63. For an extensive treatment of the varying positions, see Foster, *Rule 609(a) in the Civil Context: A Recommendation for Reform*, 57 FORDHAM L. REV. 1, 12-15 (1988) [hereinafter *Rule 609(a) in the Civil Context*]; Note, *Prior Convictions Offered for Impeachment in Civil Trials: The Interaction of Federal Rules of Evidence 609(a) and 403*, 54 FORDHAM L. REV. 1063, 1063-64 n.3 (1984) [hereinafter *The Interaction of Federal Rules of Evidence 609(a) and 403*].

64. *Rule 609(a) in the Civil Context*, *supra* note 63, at 12.

65. Czajka v. Hickman, 703 F.2d 317 (8th Cir. 1983).

66. Diggs v. Lyons, 741 F.2d 577 (3d Cir. 1984).

67. 703 F.2d 317 (8th Cir. 1983).

68. *Id.* at 318.

69. The foregoing facts were taken from *Czajka*, 703 F.2d at 318.

70. *Id.* at 318-19.

71. *Id.* at 319.

72. *Id.*

73. *Id.* (quoting Shows v. M/V Red Eagle, 695 F.2d 114, 118 (5th Cir. 1983)).

74. *Czajka*, 703 F.2d at 319 (emphasis added).

75. *Id.* (emphasis added) (citing *Shows*, 695 F.2d at 118).

609 is avoidance of prejudice to criminal defendants, the Rule does not mandate a 'mechanical and restrictive result when the party facing the potential prejudice is one other than a criminal defendant.' "[76] This conclusion indicates the Eighth Circuit's willingness to conduct discretionary balancing even in a civil context, should 609 apply.

A year later in *Diggs v. Lyons*[77] the Third Circuit also addressed the issue of the exercise of judicial discretion in balancing the prejudicial effect against probative value but reached an entirely different conclusion. As had John Czajka, Charles Diggs brought suit under 42 U.S.C. § 1983. Diggs alleged that the defendants had used excessive force to prevent his escape from prison. On appeal from judgment for the defendants, Diggs argued that he was entitled to a new trial because the trial judge had erroneously relied on rule 609(a) and admitted impeaching evidence of Diggs' prior criminal convictions for murder, bank robbery, attempted prison escape, and criminal conspiracy.[78]

Following an extensive consideration of rule 609(a)'s legislative history,[79] the court emphasized that the "mandatory terms"[80] of rule 609 requiring admission of evidence of felony convictions for impeachment purposes had been "thoroughly threshed out in the Congress."[81] The court recognized that Congress did not intend to allow judicial discretion in admitting evidence of either felony convictions or crimen falsi, regardless of whether the case was civil or criminal.[82]

Consistent with these conclusions, the Third Circuit affirmed the judgment of the district court, agreeing with it that rule 609(a) required automatic admission of impeaching evidence of felony convictions and that rule 403 discretionary balancing "did [not] operate to modify rule 609(a)"[83] because rule 403 "was not designed to override specific rules, such as Rule 609, but rather to provide a guide for handling situations for which no specific rules have been formulated."[84]

It was in *Brown v. Flury*,[85] another section 1983 case, that the Eleventh Circuit Court of Appeals specifically identified three legal issues relative to rule 609(a) upon which the circuits have been split.[86] First is the issue of whether 609(a) balancing of probative value with prejudicial effect applies in civil as well as criminal cases.[87] Second is the issue of whether the balancing test is to be applied to plaintiffs and non-party witnesses or just to defendants.[88] Third is the issue of whether rule 403 discretionary balancing applies even if such balancing is not required by 609(a).[89]

Although it enumerated these three issues, the *Brown* court did not itself address any of them. Instead, it affirmed the district court's judgment, holding that "the facts in [the]

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76. *Czajka*, 703 F.2d at 319 (quoting Tussel v. Witco Chem. Corp., 555 F. Supp. 979, 983 (W.D. Pa. 1983)).
77. 741 F.2d 577 (3d Cir. 1984).
78. The foregoing facts were taken from *Diggs*, 741 F.2d at 578.
79. *Id.* at 579-81.
80. *Id.* at 581.
81. *Id.* at 582.
82. *Id.*
83. *Id.*
84. *Id.* at 579.
85. 848 F.2d 158 (11th Cir. 1988).
86. *Id.* at 159.
87. *Id.*
88. *Id.*
89. *Id.*

case render[ed] the requirement of a balancing test superfluous."[90] The inconsistency among the circuits as to the application of 609(a) is apparent in civil cases other than those brought pursuant to 42 U.S.C. § 1983. Three months after its decision in *Czajka v. Hickman*[91] that rule 403 balancing was appropriate even if rule 609(a)(1) was not intended to protect a civil plaintiff from prejudice resulting from admission of felony conviction evidence,[92] the Eighth Circuit Court of Appeals was again faced with a rule 609(a)(1) question. *Radtke v. Cessna Aircraft Co.*[93] was a products liability action brought by the passengers of a Cessna-manufactured aircraft for injuries they received when the aircraft crashed during takeoff. Cessna advanced a defense of pilot error to the Radtkes' claim that the pilot had lost control of the plane when his seat came unlatched. The jury returned a verdict for Cessna, and the Radtkes appealed. They claimed that the district court had erred in allowing cross-examination of the pilot about his conviction on a drug charge.[94]

Since the pilot was a witness for the plaintiffs, and not a party to the suit, the Eighth Circuit was called upon to decide an issue slightly different from the one decided by the *Czajka* court – whether rules 403 and 609(a) applied to a civil witness.[95] After its determination that both rules do apply to a witness in a civil case,[96] the *Radtke* court affirmed the judgment of the district court,[97] holding that the district court had not "abused its discretion under rules 403 and 609 by permitting cross examination of [the pilot] on [his] drug conviction."[98]

In *Linsky v. Hecker,*[99] a 1985 personal injury action, the First Circuit Court of Appeals agreed with the district court that rule 609 does not apply in civil cases.[100] However, the *Linsky* court stopped short of agreeing with the Eighth Circuit that a court has discretionary power to conduct rule 403 balancing and to exclude evidence of prior criminal convictions if prejudicial effect substantially outweighs probative value.[101]

The *Linsky* suit was brought by the mother of a fourteen-year-old boy who had been injured in an accident involving his bicycle and a tractor trailer.[102] Following a jury verdict for the defendant, the plaintiff appealed. She contended that the district court had erred by admitting evidence of the boy's fourteen criminal convictions in order to impeach his testimony.[103]

Concluding that Congress intended rule 609 balancing to apply only to criminal defendants, the First Circuit determined that the district court was not required by 609(a)(1) to consider whether prejudice would result from admission of the prior felony convictions

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90. *Id.*
91. 703 F.2d 317 (8th Cir. 1983).
92. *Id.* at 319.
93. 707 F.2d 999 (8th Cir. 1983).
94. The foregoing facts were taken from *Radtke*, 707 F.2d at 1000.
95. *Id.*
96. *Id.* at 1001.
97. *Id.* at 1002.
98. *Id.* at 1001.
99. 753 F.2d 199 (1st Cir. 1985).
100. *Id.* at 202.
101. *Id.*
102. *Id.* at 200.
103. *Id.* at 201.

evidence.[104] Although the *Linsky* court did not address the issue of whether "the district court retained discretion to exclude evidence of . . . prior . . . convictions,"[105] it affirmed the judgment of the district court, holding that no error had been committed by admitting the impeaching evidence.[106]

In *Petty v. Ideco, Division of Dresser Industries, Inc.*,[107] another case decided in 1985, the Fifth Circuit Court of Appeals held that rule 609(a)(1) balancing applies to plaintiffs in civil cases.[108] Charles Petty brought a products liability action against Ideco for injuries he received while operating a piece of equipment manufactured by Ideco. Petty alleged that defective design and failure to instruct on the safe operation of the equipment resulted in his left arm's being torn off when it became entangled in a rope attached to a winch. Ideco answered that Petty's injury had been caused by his negligent use of the machine. After the court entered judgment on the jury's verdict that Petty take nothing, Petty appealed,[109] asserting as error the trial court's admission of Petty's prior conviction for armed kidnapping.[110]

In affirming the district court judgment, the Fifth Circuit adhered to a prior determination that a trial court has broad discretion on whether to admit impeaching conviction evidence after balancing probative value against prejudicial effect.[111] The *Petty* court closed its analysis of the issue of 609(a)(1)'s applicability to a civil plaintiff with the conclusion that "the district court [had not] abused its broad discretion in admitting evidence of [Petty's] kidnapping conviction" after conducting 609(a)(1) balancing.[112]

From the foregoing survey of circuit cases, a number of conflicting conclusions may be drawn:

1. Rule 609(a) only allows consideration of prejudice to a criminal defendant. In a civil case, 609(a) requires automatic admission of felony conviction evidence for impeachment purposes.[113]

2. Whether or not rule 609 balancing applies only to criminal defendants, rule 403 requires that probative value of felony conviction evidence be balanced against its prejudicial effect to the civil plaintiff.[114]

3. No balancing test is to be applied if the witness is a civil plaintiff.[115]

4. A trial court has discretion under both rule 403 and rule 609(a) to weigh prejudice to a non-party witness in a civil case.[116]

5. The 609(a) balancing test applies to a civil plaintiff.[117]

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104. *Id.*

105. *Id.* at 202.

106. *Id.*

107. 761 F.2d 1146 (5th Cir. 1985).

108. *Id.* at 1152.

109. The foregoing facts were taken from *Petty*, 761 F.2d at 1149.

110. *Id.* at 1152.

111. *Id.* (citing Howard v. Gonzales, 658 F.2d 352, 358-59 (5th Cir. 1981)).

112. *Petty*, 761 F.2d at 1152.

113. Brown v. Flury, 848 F.2d 158, 159 (11th Cir. 1988). *See* Campbell v. Greer, 831 F.2d 700 (7th Cir. 1987); Linsky v. Hecker, *supra* note 99 and accompanying text.

114. *Brown*, 848 F.2d at 158. *See* Czajka v. Hickman, *supra* note 67 and accompanying text.

115. *Brown*, 848 F.2d at 158. *See* Diggs v. Lyons, *supra* note 77 and accompanying text.

116. Radtke v. Cessna Aircraft Co., *supra* note 93 and accompanying text.

117. *Brown*, 848 F.2d at 158. *See* Petty v. Ideco, *supra* note 107 and accompanying text.

Green v. Bock Laundry Machine was not the first civil case to bring rule 609(a) to the attention of the Supreme Court. When it was petitioned for certiorari to *Diggs v. Lyons*,[118] the Supreme Court had the opportunity to address the issues raised by the ambiguous language of rule 609(a) and to resolve the conflict among the circuits as to the rule's proper application.

In a memorandum decision[119] Justice White, joined by Justices Brennan and Marshall, dissented from the Court's denial of certiorari to *Diggs v. Lyons*.[120] Forming the basis of the dissent was White's recognition that disagreement as to the role of discretionary balancing in a civil context had already affected litigants in the First, Third, and Eighth Circuit Courts of Appeals.[121] Because he foresaw the same conflicts arising elsewhere with respect to what he called a "fundamental evidentiary rule,"[122] White would have granted certiorari in order to settle the issue of whether rule 609(a) allows discretionary balancing or requires automatic admission of prior convictions evidence against a "plaintiff witness in a civil case."[123]

In *Diggs*, the Third Circuit closed its analysis of 609(a) in the civil context with a recognition that "the mandatory admission of all felony convictions on the issue of credibility may in some cases produce unjust and even bizarre results."[124] It also issued a challenge: "[I]f the rule is to be amended to eliminate these possibilities of injustice, it must be done by those who have the authority to amend the rules, the Supreme Court and the Congress. We, therefore, leave the problem to them."[125]

It was in this atmosphere of judicial confusion and challenge that the United States Supreme Court granted certiorari to another Third Circuit case, *Green v. Bock Laundry Machine Co.*[126]

IV. INSTANT CASE

In *Green v. Bock Laundry Machine Co.*,[127] the United States Supreme Court addressed for the first time the issue of whether Federal Rule of Evidence 609(a)(1) requires a judge to allow impeachment of a civil witness's credibility with evidence of the witness's prior felony convictions.[128] The Court began its inquiry by recognizing that its "task in deciding this case [was] not to fashion the rule [it] deem[ed] desirable but to identify the rule that Congress fashioned."[129] In order to "identify the rule," the Court looked first to the text of rule 609[130] and then to its legislative history[131] to determine whether "[the] Rule's plain language commands weighing of prejudice to a defendant in a civil trial as well as in a crim-

118. 741 F.2d 577 (3d Cir. 1984).
119. Diggs v. Lyons, 471 U.S. 1078 (1985), *denying cert.* (mem.).
120. 741 F.2d 577 (3d Cir. 1984).
121. *Diggs*, 471 U.S. 1078, 1079.
122. *Id.* at 1080.
123. *Id.*
124. *Diggs*, 741 F.2d at 582.
125. *Id.*
126. 108 S. Ct. 2843 (1988).
127. 109 S. Ct. 1981 (1989).
128. *Id.* at 1982.
129. *Id.* at 1984.
130. *Id.* at 1984-85.
131. *Id.* at 1985-92.

inal trial."[132] The Court concluded that the balancing language used in the rule indicates Congressional intent that only *criminal* defendants should be protected from prejudice by judicial balancing of probative value against prejudicial effect.[133] The Court based its conclusion that rule 609(a)(1) " 'can't mean what it says' "[134] on its recognition that if weighing of prejudice to a civil defendant were required by the rule, a number of anomalous results would ensue. First, convictions would always be admissible against civil plaintiffs but not necessarily against civil defendants.[135] Second, civil plaintiffs would be denied the right to impeach that is available to civil defendants;[136] and, third, only civil plaintiffs would be subject to a risk that admission of evidence of prior criminal convictions for impeachment purposes would shift jury focus "from the worthiness of the litigant's position to the moral worth of the litigant himself."[137]

Having decided that 609(a)(1)'s balancing test is to be applied only with respect to criminal defendants, the Court directed its attention to a consideration of whether the specific reference to the criminal defendant in rule 609(a)(1) permits rule 403 balancing in the civil context.[138] Pointing out that courts have used the balancing test of rule 403 in civil cases "without resolving the applicability of Rule 609(a)(1),"[139] the Court nonetheless asserted that "[i]ndeed [this] may be . . . a 'sensible approach.' "[140]

Perhaps to reinforce its opening remark that its "task" was not "to fashion the rule [it] deem[ed] desirable,"[141] the Court stated: "Prodigious scholarship highlighting the irrationality and unfairness of impeaching credibility with evidence of felonies unrelated to veracity indicates that judicial exercise of discretion is in order,"[142] but in spite of its acknowledgement that exercise of judicial discretion is clearly appropriate in some circumstances, the Court carefully stressed that "[i]f Congress intended otherwise . . . judges must adhere to its decision."[143]

The Court based its analysis of the applicability of 403 balancing in civil cases on the premise that "[a] general statutory rule usually does not govern unless there is no more specific rule."[144] Determining that since rule 403 is the more general of the two rules, rule 403 discretionary balancing would be appropriate only if rule 609 does not operate in a civil context,[145] the Court again turned to the language of 609 to resolve the issue. Since rule 609(a) specifically states that "impeaching convictions evidence 'shall be admitted,' "[146] since "this imperative, coupled with the absence of any balancing language, bars exercise of judicial discretion pursuant to Rule 403,"[147] and since rule 609(a) contains its own

132. *Id.* at 1984.
133. *Id.* at 1992.
134. *Id.* at 1985 (quoting Campbell v. Greer, 831 F.2d 700, 703 (7th Cir. 1987)).
135. *Green*, 109 S. Ct. at 1985.
136. *Id.*
137. *Id.*
138. *Id.* at 1992.
139. *Id.* at n.30.
140. *Id.* at 1992 (quoting Diggs v. Lyons, 741 F.2d 577, 583 (3d Cir. 1984), *cert. denied*, 471 U.S. 1978 (1985)).
141. *See supra* note 3 and accompanying text.
142. *Green*, 109 S. Ct. at 1992.
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.* at 1993.
147. *Id.*

weighing language, the Court concluded that exclusion of civil witnesses from the weighing language of rule 609(a)(1) mandates admission of evidence of prior criminal convictions for impeachment purposes and overrides the discretionary authority accorded a judge by rule 403.[148] The Court ended its analysis of the relationship between rules 403 and 609(a) as it had begun it—with a reference to the courts that "rely[ ] on Rule 403 to balance probative value against prejudice to civil witnesses."[149] But it also added an admonition that courts so doing "depart from the mandatory language of Rule 609."[150]

Justice Scalia concurred in the judgment but objected to the Court's extensive analysis of the historical and legislative material relative to a determination of the rule's meaning.[151] Scalia suggested that the meaning of "defendant" could more appropriately have been determined on the basis of its ordinary usage and according to the meaning "most compatible with the surrounding body of law into which the provision must be integrated."[152] Applying these standards, Scalia arrived at the same conclusion as the majority—"defendant" means "criminal defendant."[153]

Justice Blackmun, joined by Justices Brennan and Marshall, urged the application of the balancing provisions of rule 609(a)(1) to all parties rather than just to a criminal defendant[154] and suggested that trial courts have the ability "to weigh the risk of prejudice to any party before admitting evidence of a prior felony for purposes of impeachment."[155]

V. ANALYSIS

With its holding in *Green* the Court acknowledges Congressional intent to protect criminal defendants from the prejudice which may result from admission of evidence of prior convictions[156] but at the same time places parties and witnesses in civil actions in exactly the jeopardy against which the rule is arguably designed to protect. The Justices were "persuad[ed] . . . that the Rule was meant to authorize a judge to weigh prejudice against no one other than a criminal defendant."[157] The Court supports its conclusion with several conclusory statements: "Had the conferees desired to protect other parties or witnesses, they could have done so easily,"[158] and "[a]lternatively, [they] could have amended their own draft to include other parties,"[159] but they did not do so "for the simple reason that they intended that only the accused in a criminal case should be protected from unfair prejudice by the balance set out in Rule 609(a)(1)."[160]

The Court agreed with the Seventh Circuit that, insofar as it may be applied in the civil context, rule 609(a)(1) " 'can't mean what it says.' "[161] The Court also recognized that "evidence that a litigant or his witness is a convicted felon tends to shift a jury's focus from the

148. *Id.*
149. *Id.*
150. *Id.*
151. *Green*, 109 S. Ct. at 1994 (Scalia, J., concurring).
152. *Id.* at 1994-95.
153. *Id.* at 1994.
154. *Green*, 109 S. Ct. at 1995 (Blackmun, J., dissenting).
155. *Id.* at 1995-96.
156. *Id.* at 1990.
157. *Id.* at 1991.
158. *Id.*
159. *Id.* at 1992.
160. *Id.*
161. *Id.* at 1985 (quoting Campbell v. Greer, 831 F.2d 700, 703 (7th. Cir. 1987)).

worthiness of the litigant's position to the moral worth of the litigant himself."[162] Its agreement with the Seventh Circuit, in conjunction with its recognition of the likelihood of prejudice, seemed to promise that the Court was prepared to answer the Third Circuit challenge to "eliminate . . . possibilities of injustice."[163] However, under the guise of "identify[ing] the rule that Congress fashioned,"[164] the Court has judicially condoned use of rule 609(a)(1) in such a way that more often than not will result in prejudice from admission of impeaching evidence of a criminal conviction having little or no relevance to the issue being civilly litigated and perhaps even less relevance to the witness's credibility.

In his dissenting opinion,[165] Justice Blackmun offered an alternative interpretation of the word "defendant" not encompassed by the majority holding but nonetheless answering the challenge of the Third Circuit.[166] Blackmun disagreed with the majority holding that "defendant" should be read "criminal defendant."[167] He also disagreed with its conclusion that only a criminal defendant is to be accorded the protection of 609(a)(1) balancing.[168] Blackmun would instead "allow the trial court to consider the risk of prejudice faced by any party, not just a criminal defendant."[169] He concluded with a strongly worded admonishment: "Applying the balancing provisions of Rule 609(a)(1) to all parties would have prevented the admission of unnecessary and inflammatory evidence in [Green] . . . , and will prevent other similar unjust results until Rule 609(a) is repaired, *as it must be.*"[170]

In apparent agreement that the rule must be "repaired," on January 26, 1990, the Supreme Court adopted an amendment to rule 609(a)[171] which allows balancing of probative value against prejudicial effect in civil cases. The amendment, which has been submitted to Congress,[172] provides:

> For the purpose of attacking the credibility of a witness, (1) evidence 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 . . . .[173]

If enacted in the form submitted by the Supreme Court, rule 609(a)(1) will resolve any ambiguity with respect to the proper application of discretionary balancing in the civil context. However, the proposed effective date for the amended rule is not until December 1, 1990.[174] This delayed effective date allows Congress sufficient time to act should it deter-

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162. *Green*, 109 S. Ct. at 1985.

163. Diggs v. Lyons, 741 F.2d 577, 582 (3d Cir. 1984).

164. *Green*, 109 S. Ct. at 1984.

165. *Id.* at 1995-98.

166. *Id.* at 1995.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* (emphasis added).

171. *Amendments to Rule 609(a)(1) and (2)*, U.S.L.W.D. (BNA) at 2 (Feb. 1, 1990).

172. *Amendment to Federal Rules of Evidence Submitted to Congress* (Feb. 13, 1990) (Westlaw Bulletin).

173. *Amendments to Rule 609(a)(1) and (2)*, U.S.L.W.D. (BNA) at 2-3 (Feb. 1, 1990).

174. *Id.* at 3.

mine that the Supreme Court amendment is not in accordance with the legislative intent that the Court so scrupulously analyzed in *Green*.[175]

Until the Supreme Court's amended rule 609(a)(1) becomes effective as proposed, *Green* remains good law and requires that felony conviction evidence for impeachment purposes be automatically admitted in a civil case.[176] But if, as the *Green* Court determined, Congress intended that only a criminal defendant be protected by the balancing of probative value against prejudicial effect so that Congress therefore rejects the proposed changes and amends rule 609(a)(1) to continue to allow balancing to protect only a criminal defendant from possible prejudice, the effects of the legislated amendment and the *Green* decision will be the same – evidence of a felony conviction will be automatically admissible to impeach the credibility of a civil witness.[177] As a result, the *Green* decision has significant implications, especially for those attorneys practicing in the civil arena, but even more especially for those attorneys practicing in circuits that, prior to *Green*, had considered the possibility of prejudice prior to admitting felony conviction evidence for impeachment purposes.

In conclusion, denied the protection of either 403 or 609(a)(1) balancing, a post-*Green* civil litigant, whether plaintiff or defendant, dare not take the stand in a civil suit unless he is willing to risk being considered "unworthy of belief"[178] because he has been convicted of a felony.

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175. *See supra* notes 129-148 and accompanying text.

176. *See supra* note 148 and accompanying text.

177. *See supra* note 133 and accompanying text.

178. WEINSTEIN'S EVIDENCE, *supra* note 26, at 609-58.