Impeachment by Prior Conviction: Adjusting to Federal Rule of Evidence 609

Bruce P. Garren

Follow this and additional works at: http://scholarship.law.cornell.edu/clr

Part of the Law Commons

Recommended Citation
Bruce P. Garren, Impeachment by Prior Conviction: Adjusting to Federal Rule of Evidence 609, 64 Cornell L. Rev. 416 (1979)
Available at: http://scholarship.law.cornell.edu/clr/vol64/iss2/6

This Note is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.
NOTE

IMPEACHMENT BY PRIOR CONVICTION:
ADJUSTING TO FEDERAL RULE OF EVIDENCE 609

INTRODUCTION

Charles W. Cavender’s 1976 arrest on federal weapons charges was not his first encounter with the law. His record included prior convictions for sodomy in 1951, violation of probation in 1955, and forgery in 1961. Anxious to testify in his own defense but concerned that the government would then introduce his record to impeach him, Cavender moved to exclude his prior convictions under Federal Rule of Evidence 609(b). Rule 609(b) prohibits the use of convictions more than ten years old to impeach a witness “unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.” The trial court denied the motion and Cavender declined the stand. When the jury found him guilty, Cavender appealed. Viewing the issue as “the proper application of [rule 609(b)],” the Fourth Circuit, in United States v. Cavender, reversed and remanded for a new trial.

United States v. Cavender and its Second Circuit counterpart, United States v. Mahler, represent the latest procedural and substantive refinements of rule 609(b), highlighting anew the controversy over impeachment by prior convictions. The decisions

1 United States v. Cavender, 578 F.2d 528, 529 (4th Cir. 1978).
2 Id. at 535 & n.1 (concurring opinion).
3 Id. at 529.
4 A defendant who does not testify cannot be impeached. Rule 404 allows evidence of a defendant’s prior convictions where relevant to prove what Judge Weinstein calls “a proper consequential fact” in the case at hand (Fed. R. Evid. 404(b); 2 J. Weinstein & M. Berger, Weinstein’s Evidence ¶ 404[08], at 404-42 (1977) [hereinafter cited as Weinstein]), or where the defendant has put his character in issue. Fed. R. Evid. 404(a)(1). Cavender’s prior convictions lacked the requisite relevance to warrant admission under rule 404(b). Nor did Cavender first introduce evidence of his character. Thus, the court’s rule 609 determination would affect Cavender’s willingness to testify.
5 578 F.2d at 529-30.
6 Id. at 530.
7 Id.
8 579 F.2d 730 (2d Cir. 1978).
read the rule to require explicit findings when a court admits remote" prior convictions to impeach any witness. By so doing, the cases indirectly encourage on-the-record findings under rule 609(a)(1), which governs the admissibility of certain recent prior convictions. Finally, Cavender invites a closer analysis of how rule 609(b)'s balancing test should apply to the criminal defendant.

I

FEDERAL RULE OF EVIDENCE 609: RESTRICTING PRIOR CONVICTION IMPEACHMENT

The House-Senate Conference Committee that convened in late 1974 faced a thankless job: reconciling two widely divergent approaches to the use of prior convictions for impeachment. The debate over rule 609 was sustained and strident. The House eliminated impeachment by all prior convictions unless recent and directly related to veracity. The Senate, on the other

9 In the context of the Federal Rules of Evidence, "remote" prior convictions are those for which "a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date." FED. R. EVID. 609(b). Those prior convictions that do not yet qualify under this definition are "recent." Some uncertainty exists concerning how courts should measure the ten-year period. The Eighth Circuit, in United States v. Little, 567 F.2d 346, 350 n.4 (8th Cir. 1977), cert. denied, 435 U.S. 969 (1978), questioned, but did not resolve, whether the date of indictment or the date of trial governs the time computation. Because the evidence must be used only to attack credibility, the ten-year rule should probably run from the time the witness takes the stand. The Fifth Circuit added a twist to the rule, holding that a "defendant's voluntary flight tolled the ten-year limitation" because "[b]y his voluntary wrongful act, he cannot gain the protection of Rule 609(b)." United States v. Mullins, 562 F.2d 999, 1000 (5th Cir. 1977), cert. denied, 435 U.S. 906 (1978).

10 Weinstein observes that prior-conviction impeachment involves two, sometimes conflicting, ends of the criminal law—safeguarding the innocent and punishing the guilty. Permitting unlimited use of defendant's criminal past for impeachment undoubtedly results in more convictions; it also increases the likelihood that a person will be found guilty who, this time at least, has not committed a crime. Limiting the use of convictions for impeachment provides more protection for the innocent, but it also raises the spectre of the guilty out on the streets because the jury has been denied information helpful in evaluating the credibility of witnesses.

11 See, e.g., United States v. Smith, 551 F.2d. 348, 360 (D.C. Cir. 1976) ("Rule 609 was one of the most hotly contested provisions in the Federal Rules of Evidence"); K. REDDEN & S. SALTBURG, FEDERAL RULES OF EVIDENCE MANUAL 181 (1975) ("Probably no single Rule provoked as much controversy as Rule 609"); 3 WEINSTEIN, supra note 4, ¶ 609[03a], at 609-73 ("Congress considered the prior conviction to impeach issue more fully than any other single rule and the compromise it reached should be respected by the courts."). For a general discussion of the legislative history, see id. at 609-2 to 609-42.

hand, made all recent veracity-related convictions and felony convictions automatically admissible and provided for the limited admission of remote prior convictions. The creative compromise that emerged had its origins in the District of Columbia evidence law, the only previous congressional expression on prior-conviction impeachment.

The District of Columbia statute had stated that a witness’ prior conviction “may be given in evidence to affect [his] credibility.” This straightforward rule paralleled the law of most jurisdictions, where evidence of recent prior convictions was freely admissible against all witnesses, including defendants in criminal proceedings. In 1965, however, the District of Columbia Circuit gave the statute a new reading. Judge McGowan said in Luck v. United States that trial courts were “not required to allow impeachment by prior conviction every time a defendant takes the stand in his own defense. The statute, in our view, leaves room for the operation of a sound judicial discretion to play upon the circumstances as they unfold in a particular case.” By 1970, most federal courts had accepted the Luck discretionary approach.

The popularity of the Luck doctrine was attributable more to its sound policy base than to its statutory analysis (which, even if

---

16 McCormick’s Handbook of the Law of Evidence § 48, at 89-90 (2d ed. E. Cleary 1972). At common law, many prior convictions rendered a person incompetent to testify. This “primitive absolutism” has yielded to the almost universal practice today of using prior convictions not to bar testimony, but to impeach credibility. Id. at 84-85.
17 In fact, the court interpreted not the 1963 statute quoted in text accompanying note 15 supra, but its 1961 codification. See Luck v. United States, 348 F.2d 763, 767-68 (D.C. Cir. 1965).
18 348 F.2d 763 (D.C. Cir. 1965).
19 Id. at 768 (first emphasis in original, second emphasis added).
valid, did not apply outside the District of Columbia). Courts and commentators have claimed that the prior-conviction impeachment device interferes with defendants' fair trial rights by either discouraging them from taking the stand or unfairly prejudicing them when they do. By the time the federal rules were being drafted, reformers both in and out of Congress had asked for severe limitations, if not an outright ban, on the use of prior convictions for impeachment. They viewed Luck as a small step

---

22 In seeking a statutory basis for judicial discretion, the Luck majority emphasized that the statute said conviction evidence "may be given in evidence" rather than "shall be given in evidence." 348 F.2d at 768 (emphasis added). Judge Danaher, however, read the language not as authorizing judicial discretion, but simply as indicating that "a party is not bound . . . to impeach a witness." Id. at 771 (concurring in part, dissenting in part).


Some critics have raised constitutional objections to prior-conviction impeachment based on the fifth amendment privilege against self-incrimination, the sixth amendment right to trial by an impartial jury, and due process and equal protection. See, e.g., Note, Constitutional Problems Inherent in the Admissibility of Prior Record Conviction Evidence for the Purpose of Impeaching the Credibility of the Defendant Witness, 37 U. Cin. L. Rev. 168 (1968). These claims have largely been unsuccessful in the courts. See, e.g., Spencer v. Texas, 385 U.S. 554, 561 (1967) ("the conceded possibility of prejudice is believed to be outweighed by the validity of the State's purpose in permitting introduction") (dictum); United States v. Bailey, 426 F.2d 1236, 1242 (D.C. Cir. 1970) ("the Spencer decision . . . is a barrier against a decision by us that [prior conviction impeachment] . . . is violative of appellants' [sic] constitutional rights"). The D.C. Circuit upheld the constitutionality of this provision even after D.C. law removed judicial discretion and mandated admission of prior-conviction evidence. See United States v. Belt, 514 F.2d 837, 849-50 (D.C. Cir. 1975). The Supreme Court, however, has ruled unconstitutional the use of invalid prior convictions to impeach a defendant. Loper v. Beto, 405 U.S. 473, 483 (1972).

One Congressman, explaining his efforts to limit the prior-conviction impeachment device, stated that most of the research on the subject indicates that a very large proportion of the miscarriages of justice which occur are in those cases where either we prejudice the man because he does take the witness stand in his own defense, or we scare him off and he does not tell his story because of that rule.


24 Both the Uniform Rules of Evidence and the Model Code of Evidence adopted provisions that prohibited prior-conviction impeachment of the accused unless the accused first introduced evidence "supporting his credibility." These provisions also permitted prior-conviction impeachment of any other witness only when the crime involved "dishonesty or false statement." Uniform Rule of Evidence 21 (superseded 1974); Model Code of Evidence rule 106 (1942). Commentators joined the effort to limit prior-conviction impeachment. See, e.g., Note, Procedural Protections of the Criminal Defendant—A Reevaluation of the Privilege Against Self-Incrimination and the Rule Excluding Evidence of Propensity to Commit
in that direction.25

Those who opposed the reformers argued that unrestricted prior-conviction impeachment was vital to the judicial quest for truth.26 They denounced the Luck doctrine as a dangerous change in the statute.27 In 1970, Congress rewrote the District of Columbia law, rejecting Luck.28 The new statute eliminated judicial discretion and, at the same time, restricted the use of prior-conviction evidence. All recent felonies and any recent misdemeanors "involv[ing] dishonesty or false statement" were now automatically admissible; convictions older than ten years, however, were completely inadmissible. This congressional skirmish over prior-conviction impeachment foreshadowed the larger battle ahead.

After years of effort by its Advisory Committee, the Supreme Court in 1972 sent to Congress the proposed Federal Rules of Crime, 78 Harv. L. Rev. 426, 450 (1964) (impeachment should be limited to veracity-related evidence or, preferably, excluded altogether); Note, Impeachment of the Defendant-Witness by Prior Convictions, 12 St. Louis U.L.J. 277, 286 (1968) (suggesting outright ban). Congressional reform proposals were generally less drastic. See Rules of Evidence: Hearings Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary, 93d Cong., 1st Sess. 251 (1973) [hereinafter cited as House Hearings] (impeachment should be limited to "offenses that have some logical bearing on credibility, such as perjury") (statement of Rep. Dennis). For a detailed discussion of the congressional reform efforts, see text accompanying notes 31-49 infra.


In its notes to the first draft of rule 609, the Advisory Committee summarized this view: "A demonstrated instance of willingness to engage in conduct in disregard of accepted patterns is translatable into willingness to give false testimony." Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 297 (1969). This statement was quoted in the House debate against adoption of a rule that would limit prior-conviction impeachment to crimen falsi convictions. 120 Cong. Rec. 1414 (1974) (remarks of Rep. Hogan).


For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a criminal offense shall be admitted . . . but only if the criminal offense (A) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, or (B) involved dishonesty or false statement (regardless of punishment). . . .

In addition, no evidence of any conviction of a witness is admissible under this section if a period of more than ten years has elapsed since the later of (i) the date of the release of the witness from confinement imposed for his most recent conviction of any criminal offense, or (ii) the expiration of the period of his parole, probation, or sentence granted or imposed with respect to his most recent conviction of any criminal offense.

Evidence. Given Congress' clear rejection of *Luck* for the District of Columbia, it would have been impolitic for the Court to suggest its revival. Rule 609, as Congress received it, was modeled after the new District of Columbia law. Like that law, it painted in black and white, granting no discretion to trial courts. This inflexibility invited amendment, and the rule began an intriguing metamorphosis.

The reformers conceded the admissibility of certain recent prior convictions, such as perjury or fraud, directly related to the veracity of the witness (*crimen falsi*). They mounted a strong attack, however, against the admissibility of felony convictions not directly related to veracity. The reformers amended this aspect of the rule repeatedly, taking three basic approaches to the admissibility of recent non-*crimen falsi* impeachment evidence: (1) a *Luck*-type discretion empowering the court to exclude where “the danger of unfair prejudice outweighs the probative value”; (2) automatic exclusion as to the accused, with judicial discretion as to nonaccused witnesses; and (3) automatic exclusion as to all witnesses. The reformers' sentiments dominated the House of Representatives, which decided that evidence of non-*crimen falsi*

---

30 Earlier, the Standing Committee on Rules of Practice and Procedure had suggested a reform measure which partially resurrected *Luck* discretion by allowing a judge to exclude a recent conviction if he found “that the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice.” Proposed Fed. R. Evid. 609(a)(3), 51 F.R.D. 315, 391 (1971). The Committee's efforts earned a sharp rebuke from Senator McClellan, who concluded that “[a]pparently, the committee paid no attention to the Congressional judgment on this matter.” 117 Cong. Rec. 29895 (1971).
31 Even the House Judiciary Committee, which authored the most reform-minded amendment, concentrated exclusively on non-*crimen falsi*: “cross-examination by evidence of prior conviction should be limited to those kinds of convictions bearing directly on credibility, i.e., crimes involving dishonesty or false statement.” H.R. Rep. No. 650, 93d Cong., 1st Sess. 11 (1973), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7075, 7085.

The definition of *crimen falsi* has itself been the source of considerable discussion. The category of crimes subsumed under this term has expanded since its origins in Roman law, where it referred primarily to documentary fraud. See United States v. Smith, 551 F.2d 348, 362 n.26 (D.C. Cir. 1976). For Congress' definition of the phrase “dishonesty and false statement,” which includes the term “*crimen falsi*,” see note 44 infra.
A page from a legal document discussing the admissibility of prior convictions in court. The text explains that recent convictions should be automatically excluded as to all witnesses. The Senate took the opposite tack, however, and adopted the approach of the Supreme Court's proposed rule, requiring that recent non-crimen falsi convictions be automatically admitted. The conference committee fashioned a masterful compromise. Rule 609(a)(1) renders recent non-crimen falsi felonies admissible only where "the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant." This language is generally read to shift the burden on the admissibility question from the accused, where it resided under Luck, to the government. This al-

---

35 Id.
36 See note 13 supra.
38 Although rule 609(a) never uses the words "misdemeanor" or "felony," it distinguishes between crimes that are "punishable by death or imprisonment in excess of one year" and those that are not. This language parallels the definitions of "felony" and "misdemeanor" contained in 18 U.S.C. § 1 (1976). States may differ in their characterizations of crimes, but this Note uses these terms as convenient shorthand.
39 Fed. R. Evid. 609(a)(1).
40 See Gordon v. United States, 383 F.2d 936, 939 (D.C. Cir. 1967) (under Luck, burden on accused to show that prejudice "far outweighs" probative value), cert. denied, 390 U.S. 1029 (1968).
41 See United States v. Hayes, 553 F.2d 824, 828 (2d Cir.) ("Unlike the rule that prevailed before Rule 609 . . . the Government has the burden of showing that probative value outweighs prejudice."), cert. denied, 434 U.S. 867 (1977); United States v. Smith, 551 F.2d 348, 359 (D.C. Cir. 1976) ("Rule 609(a)(1) . . . manifests an intent to shift the burden of persuasion with respect to admission of prior conviction evidence for impeachment."). The legislative history gives clear support to this view. See 120 CONG. REC. 40894 (1974) ("the burden is on the government, which is an important change in the law.") (remarks of Rep. Dennis).

The Luck discretion to exclude evidence of prior convictions was simply a special application of the general rule that judges may exclude unfairly prejudicial evidence, even if relevant. Luck v. United States, 348 F.2d 763, 768 & n.8 (D.C. Cir. 1965) (prior-conviction balancing test "a standard which trial judges apply every day in other contexts; and we think it has both utility and applicability in this field"). This principle is embodied in Federal Rule 403, allowing for the exclusion of relevant evidence on the grounds of prejudice, confusion, or waste of time: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. Under this scheme, courts would admit prior-conviction evidence absent a showing that "its probative value is substantially outweighed by the danger of unfair prejudice." Rule 609 reverses this process. Under rule 609(a)(1), the judge must now exclude prior-conviction evidence unless the government demonstrates that it possesses sufficient probative value.

Some courts have been slow to adjust to the new language. Ironically, Cavender itself provides two examples of linguistic confusion on this point. The concurring opinion
location significantly limits the prior-conviction impeachment of defendants. Rule 609(a)(1) does not protect nondefendant witnesses; their convictions are automatically admissible unless prejudicial to the defendant. The compromise wording leaves unscathed the automatic admissibility of recent crimen falsi.

The reformers lost one important battle. Rule 609(b) of the House version contained an automatic exclusion of convictions exhibits a lack of sensitivity to the burden-shifting issue, characterizing an earlier version of rule 609 as "essentially the same wording . . . with emphasis perhaps slightly changed" (578 F.2d at 536 (Widener, J.)) when, in fact, the burden was reversed. The majority's error is potentially worse. Judge Russell stated that "[u]nder 609(a)(1), the felony conviction is admissible unless the District Court finds its prejudicial effect outweighs its probative value" (id. at 532 n.9 (emphasis in original)) when, in fact, a prior conviction is inadmissible unless the court finds that its "probative value . . . outweighs its prejudicial effect." Fed. R. Evid. 609(a)(1) (emphasis added). Despite the majority's imprecise use of language, it recognized that "the burden . . . is imposed on the Government." 578 F.2d at 530.

42 See, e.g., United States v. Stewart, 581 F.2d 973, 974 (D.C. Cir. 1978) ("rule 609 was intended, at least as far as convictions not involving crimen falsi are concerned, to afford the criminal defendant some additional protection"). Stewart's reference to "criminal defendant" is too narrow; rule 609 applies to civil as well as criminal actions. Fed. R. Evid. 1101(b). For a discussion of the problems that rule 609 raises in civil actions, see Savikas, New Concepts in Impeachment: Rule 609(a), Federal Rules of Evidence, 57 Chi. B. Rec. 76 (1975). This Note treats the rule only in its criminal setting, and therefore uses "defendant" and "the accused" interchangeably.

43 Rule 609(a)(1) directs the balancing court to examine the "prejudicial effect to the defendant" (emphasis added). Section (b) speaks only of "prejudicial effect," without limiting the court's focus to the accused. Under rule 609(a)(1), recent non-crimen falsi convictions are automatically admissible to impeach prosecution witnesses, because such convictions cannot prejudice defendants. The D.C. Circuit explained:

The addition of the phrase "to the defendant" at the end of Rule 609(a)(1) reflects a deliberate choice to regulate impeachment by prior conviction only where the defendant's interests might be damaged by admission of evidence of past crimes, and not where the prosecution might suffer, or where a non-defendant witness complains of possible loss of reputation in the community. United States v. Smith, 551 F.2d 348, 359 (D.C. Cir. 1976) (emphasis in original) (footnote omitted).

44 Fed. R. Evid. 609(a)(2). The conference committee defined the class of convictions admissible under rule 609(a)(2):

By the phrase "dishonesty and [sic] false statement" the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully.

more than ten years old. The Senate, however, perceived a need to admit remote convictions under special circumstances. The conference committee accepted the Senate version. Congress approved the conference wording of rule 609, and on July 1, 1975, the Federal Rules of Evidence became law. Federal Rule of Evidence 609, as adopted, reads in pertinent part:

(a) General rule. 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, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

46 S. REP. No. 1277, 93d Cong., 2d Sess. 15 (1974), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7051, 7061 ("Although convictions over ten years old generally do not have much probative value, there may be exceptional circumstances under which the conviction substantially bears on the credibility of the witness.").
47 H.R. REP. No. 1597, 93d Cong., 2d Sess. 10 (1974), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7098, 7103. The conference committee did add a notice requirement, anticipating "that a written notice, in order to give the adversary a fair opportunity to contest the use of the evidence, will ordinarily include such information as the date of the conviction, the jurisdiction, and the offense or statute involved." Id.
49 The following chart illustrates the operation of rule 609(a) and (b):
II

PROCEDURAL IMPACT: ON-THE-RECORD FINDINGS

A. On-the-Record Findings Under Rule 609(b): Fairness and Judicial Accountability

The procedural holdings of United States v. Cavender and United States v. Mahler are straightforward and virtually identical: under rule 609(b) the trial court must support its admission of remote prior convictions with on-the-record findings. The Fourth and Second Circuits draw ample support from the rule's language, legislative history, and underlying policy considerations.

When the lower court denied Cavender's rule 609(b) motions, it gave no hint of its reasoning. Judge Russell, writing for a majority of the panel, reversed because he was "convinced that [rule 609(b)] did envision [an] 'explicit proceeding with full find-

<table>
<thead>
<tr>
<th>Conviction Ten Years Old or Less</th>
<th>Conviction More Than Ten Years Old</th>
</tr>
</thead>
<tbody>
<tr>
<td>Crimen Falsi</td>
<td>Automatically Admissible</td>
</tr>
<tr>
<td>Non-Crimen Falsi</td>
<td>Automatically Admissible</td>
</tr>
<tr>
<td>Felony (impeaching prosecution witness)</td>
<td>Balance (609(b))</td>
</tr>
<tr>
<td>Non-Crimen Falsi</td>
<td>Balance (609(a)(1))</td>
</tr>
<tr>
<td>Felony (impeaching defense witness)</td>
<td>Balance (609(b))</td>
</tr>
<tr>
<td>Non-Crimen Falsi</td>
<td>Inadmissible</td>
</tr>
<tr>
<td>Misdemeanor</td>
<td>Inadmissible</td>
</tr>
</tbody>
</table>

Not all commentators welcome rule 609's schematization. Professor Irving Younger calls the rule "a mockery of the form one expects of a statutory rule of evidence" and condemns "complexity so impenetrable as this." He "dare[s] to hope that Congress will some day amend Rule 609 along these lines: Any witness may be impeached with convictions, subject to the judge's discretion under Rule 403." Younger, Three Essays on Character and Credibility Under the Federal Rules of Evidence, 5 Hofstra L. Rev. 7, 11-12 (1976) (footnotes omitted). Judge Friendly, testifying before the House Subcommittee, probably spoke for many trial judges when he stated: "I would rather have [the admission of prior convictions] developed on a case by case basis rather than lay down any arbitrary rules." House Hearings, supra note 24, at 251.

50 578 F.2d 528, 532 (4th Cir. 1978).
51 579 F.2d 730, 734 (2d Cir. 1978).
52 According to the majority, "the District Court made no express finding . . . ; it simply denied the motions. . . . without any real argument on the impeachment value of the several crimes." 578 F.2d 528, 531 (4th Cir. 1978). Judge Widener's concurring opinion contests this assessment: "[T]he district judge heard the defense attorney on more than one occasion on this matter, and it was argued at least at length." Id. at 538.
ings’ ... as a basis for the District Court’s exercise of discretion.’ Judge Russell called rule 609(b) “plain and unambiguous.” and pointed out that it “requir[es] a finding based on ‘specific facts and circumstances.’” Courts, he said, should read “specific” as “articulated.” Judge Widener, concurring, would require explicit findings only “if requested,” as they were by Cavender’s attorney.

In Mahler, a trial court had refused to exclude prior convictions, relying solely on another judge’s denial of the defendant’s same motion at an earlier trial. The trial court had failed to notice that, in the interim, the convictions had aged beyond ten years and were subject to rule 609(b). Judge Oakes of the Second Circuit ruled that the lower court erred because “the language of the Rule clearly suggests ... an on-the-record determination, ... ‘supported by specific facts and circumstances.’” If this language does not require “carefully spelled out” findings, he said, then it is “mere surplusage, totally devoid of meaning.”

Both courts found even stronger support for their holdings in the rule’s legislative history. According to Cavender, judicial discretion under rule 609(b) is “narrow and limited.” To support this contention, both decisions rely on the Senate Report, which predicted that courts would admit remote convictions very rarely and only in exceptional circumstances. The rules provide that the decision be supported by specific facts and circumstances thus requiring the court to make specific findings on the record as to the particular facts and circumstances it has considered in determining that the probative value of the conviction substantially outweighs its prejudicial impact.

53 Id. at 533 (emphasis in original) (quoting United States v. Cohen, 544 F.2d 781, 786 (5th Cir.) (dictum), cert. denied, 431 U.S. 914 (1977), discussed in notes 67-73 and accompanying text infra).
54 578 F.2d at 531.
55 Id.
56 Id. at 530.
57 Id. at 538 n. 5.
58 Id. at 538.
59 579 F.2d at 734.
60 Id. Unlike Cavender, however, the Mahler court found the error harmless, because the prior conviction had been “properly introduced for a different purpose.” Id. at 736. The court had admitted the prior convictions “under Rule 404(b), for the limited purpose of proving knowledge and intent.” Id. at 733-34.
61 578 F.2d at 532.
The need for rule 609(b) findings, as perceived by the Caven-
der court, stems from the desirability of effective judicial review. Without specific findings supporting the trial court's decision, "appellate review . . . would be a 'meaningless gesture.'” 63 The Mahler court noted this consideration, 64 but also stressed the policy of fairness to the defendant. 65 In requiring support from "specific facts and circumstances," Congress guaranteed that trial courts would consider relevant facts and be fully accountable on appeal. 66

The case law reveals a gradual acceptance of rule 609(b)’s requirement of on-the-record findings. The first appellate decision to confront the issue directly was United States v. Cohen. 67 Thirteen years before his trial for tax fraud, Cohen had finished serving approximately one year for mail fraud. 68 Noting the nature of the prior crime, its similarity to the later crime, and that all relevant events occurred within ten years of Cohen’s release from confinement for the earlier conviction, 69 the district judge ruled that he would admit the prior-conviction evidence if the defendant testified. 70

The judge neither explicitly examined the possibility of prejudice to the defendant, nor applied the language of rule 609(b). 71 Recognizing this, the Fifth Circuit conceded that “Rule 609(b) may envision a more explicit proceeding with full findings setting forth the quality and nature of any possible prejudice to the defendant.” 72 Nevertheless, the court let the conviction

63 578 F.2d at 532.
64 579 F.2d at 736.
65 "The House believed that convictions more than ten years old have very little or no probative value. . . . Yet the risk of convicting a defendant for his past transgressions always exists; consequently they should be used only 'very rarely and . . . in exceptional circumstances.' ” Id. The Advisory Committee’s Note to proposed rule 609(b) supports this view: “practical considerations of fairness and relevancy demand that some [time] boundary be recognized.” Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 271 (1972), reprinted in Fed. R. Evid. 609 note (1972) (Advisory Committee).
66 The difficulty some courts have had in applying rule 609(b) demonstrates the need for caution. See, e.g., United States v. Little, 567 F.2d 346, 350 & n.4 (8th Cir. 1977) (affirming admission of remote prior conviction but omitting “substantially” from rule 609(b)’s “substantially outweighed” test), cert. denied, 435 U.S. 969 (1978); United States v. Johnston, 543 F.2d 55 (8th Cir. 1976) (approving broad use of remote prior conviction to impeach defendant-witness but citing pre-rule 609 authority).
68 Id. at 782-85.
69 Id. at 785.
70 Id. at 784-85.
71 Id. at 785.
72 Id. at 785-86.
stand, pointing out that "[s]ufficient evidence in the record indicates that the trial judge made a thorough and thoughtful analysis of the issue and based his conclusion upon various factors which were then before him." 73 It was but a short step from Cohen to Cavender and Mahler.

Judicial reluctance to accept rule 609(b)'s procedural restrictions is understandable. Mandatory on-the-record findings increase a trial judge's burdens while tightening the reins on his discretionary authority. But as Cavender and Mahler demonstrate, the rule's clear command and its compelling policies offer the judge no alternative.

B. On-the-Record Findings Under Rule 609(a): Protecting the Defendant

Rule 609(a)(1) permits the admission of the defendant's recent felony conviction not involving "dishonesty or false statement" only if its "probative value . . . outweighs its prejudicial effect." Unlike rule 609(b), illuminated in Cavender and Mahler, rule 609(a)(1)'s language and history do not support a requirement of findings. Rule 609(b)'s command that determinations be "supported by specific facts and circumstances" is conspicuously absent from rule 609(a)(1). The legislative history calling for findings under rule 609(b) is keyed to this command; 74 Congress never intimated a similar requirement under the differently phrased rule 609(a)(1).

Although they have not required trial courts to make explicit findings under rule 609(a)(1), appellate courts do not like to be left entirely in the dark. Even in the days of Luck, trial courts were advised to put findings on the record. 75 Rule 609(a)(1), as a descendant of Luck, may have inherited Luck's legacy. 76 For example, in United States v. Mahone, 77 the Seventh Circuit reviewed a rule 609(a)(1) determination which lacked specific findings. Although the trial judge's ruling indicated implicitly that "he

73 Id. at 785.
74 See notes 61-66 and accompanying text supra.
75 In Gordon v. United States, 383 F.2d 936, 939 (D.C. Cir. 1967), cert. denied, 390 U.S. 1029 (1968), then-Circuit Judge Burger commented that "Luck . . . contemplated an on-the-record consideration by the trial judge."
76 See, e.g., United States v. Jackson, 405 F. Supp. 938, 941-42 (E.D.N.Y. 1975) ("[i]n its present form, Rule 609(a) codifies a trend of federal cases epitomized by Luck").
77 537 F.2d 922 (7th Cir.), cert. denied, 429 U.S. 1025 (1976).
weighed the prejudicial effect against the probative value of the evidence," the court urged trial judges "[i]n the future ... to _explicitly_ find that the prejudicial effect ... will be outweighed by its probative value."

*United States v. Smith* cites Mahone's advice with approval and adds its own: "it must be obvious to any careful trial judge that an explicit finding in the terms of the Rule can be of great utility, if indeed not required, on appellate review ... and some indication of the reasons for the finding can be very helpful."

Ample policies support Smith's dictum. A mandate of discretion imbues a trial judge not only with authority, but also with responsibility. By forcing the trial judge to follow the evidentiary formula, and by allowing the appellate court to review the basis for his ultimate determination, findings help ensure that the judge wields his power fairly.

---

78 Id. at 929.
79 Id. (emphasis added). On its face, the Mahone dictum merely advises trial courts to state baldly that the probative value of an admitted conviction outweighs its prejudicial effect. Such simplicity arguably encourages a trial court to apply rule 609(a)(1) properly without burdening the court with detailing its reasons. The Cavender court, however, interpreted Mahone as advocating explication of the facts and circumstances supporting the trial court's determination. 578 F.2d at 532 n.11. If Cavender is correct, the dicta of Mahone and of United States v. Smith, 551 F.2d 348 (D.C. Cir. 1976), discussed in text accompanying notes 80-81 infra, parallel each other. This Note uses the term "findings" to include statements of specific facts and circumstances, not mere conclusions.

80 551 F.2d 348 (D.C. Cir. 1976).
81 Id. at 357 n.17. Other cases offer similar encouragement. See, e.g., United States v. Stewart, 581 F.2d 973, 974 (D.C. Cir. 1978) ("Where the trial court has failed to address the balancing test required by Rule 609, reversal may be proper."); United States v. Lamb, 575 F.2d 1310, 1314 (10th Cir. 1978) (no abuse of discretion where "record demonstrates that the court carefully weighed" probative value and prejudicial impact); United States v. Seamster, 568 F.2d 188, 191 n.3 (10th Cir. 1978) (quoting with approval Mahone); United States v. Oakes, 565 F.2d 170, 173 n.12 (1st Cir. 1977) ("the district court's explicit statements in the record revealing its knowledge of Rule 609(a) and the basis for its resolution of the balancing required by it are most helpful to this court in carrying out our review"); United States v. Hawley, 554 F.2d 50, 53 (2d Cir. 1977) (trial judge apparently aware of balancing factors although he did not make "specific statement"); United States v. Hayes, 553 F.2d 824, 828 (2d Cir.) ("court below was not as explicit as it could have been in identifying and weighing the relevant indicia of probative value and prejudice"), _cert. denied_, 434 U.S. 867 (1977).

82 _FED. R. EVID._ 403 contains a similarly constructed test for the exclusion of relevant evidence on the grounds of prejudice, confusion, or waste of time. In United States v. Dwyer, 539 F.2d 924 (2d Cir. 1976), the Second Circuit stated that "[i]n the trial judge's refusal, despite repeated requests, to put his reasons for exclusion on the record substantially impair our ability to ascertain the source of the 'prejudice' to which he referred in his ruling. Although Rule 403 has placed great discretion in the trial judge, discretion does not mean immunity from accountability." Id. at 928. See 1 _WEINSTEIN_, _supra_ note 4,
Accountability is important to the protection of defendants' rights under rule 609(a)(1)'s grant of discretion. Many non-crimen falsi felonies, such as rape and murder, have tremendous potential for prejudicing juries and only limited probative worth on credibility. Concededly, rule 609 embodies Congress' determination that probative value is affected more by remoteness than by the type of crime. All remote convictions, even crimen falsi, face a stiffer test under section (b) than recent non-crimen falsi face under section (a). And only section (b) requires explicit findings. However, the general assumption underlying this dichotomy falters near the extremes. For example, an eleven-year-old tax fraud conviction is probably more probative and less prejudicial than a nine-year-old sodomy conviction. Rule 609 allows a judge to admit the latter, under section (a)'s easier balancing test, without explicit findings. Nevertheless, because all non-crimen falsi felonies are questionable impeachment tools, trial courts should routinely go beyond the minimum required of them and provide on-the-record findings when admitting rule 609(a)(1) evidence.

Finally, appellate decisions informed by explicit findings create more meaningful precedent than those that must speculate

\[\text{\[120\] CONG. REC. 2376 (1974) (remarks of Rep. Hogan), quoted in 3 WEINSTEIN, supra note 4, at 609-20.} \]

\[\text{\[83\] The Senate Report summed up congressional opinion on remote convictions: "convictions over ten years old generally do not have much probative value." S. REP. No. 1277, 93d Cong., 2d Sess. 15 (1974), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7051, 7061. There was no serious opposition to this view. In contrast, a proposal for exclusion of non-crimen falsi convictions met strong resistance. One Congressman stated:} \]

\[\text{\[N\]o one can object to permitting a witness to be held up to a jury as unworthy of belief because he or she had been convicted for cheating or stealing, but that surely does not exhaust the subject matter. How credible is a witness who has been convicted, let us say, for kidnapping, or for espionage, or for inciting civil disorders, or for aircraft piracy, or for assassination, or for any of a number of other crimes . . . . Are we really that suspect of acts of dishonesty while willing to keep from juries the information, for example, that a witness had been convicted for making explosive or incendiary devices with the intent to detonate them in public buildings. Personally I am more concerned about the moral worth of individuals capable of engaging in such outrageous acts as adversely reflecting on a witness' character than I am of thieves, and that comparison justifies my amendment.} \]

\[\text{\[84\] To be admitted under rule 609(a)(1), a prior conviction's probative value must out-\}

\[\text{\[85\] See notes 53-74 and accompanying text supra.} \]
on the lower court's rationale. Whether the appellate court affirms or reverses, its analysis of explicit findings provides detailed guidance for future trial decisions, reducing the uncertainty inherent in any balancing test. Findings thus promote consistency within each jurisdiction and, to a lesser extent, among jurisdictions. Furthermore, explicit findings under rule 609(a)(1) will encourage harmonious construction with the rule 609(b) companion provision. The rule 609(b) balancing test, although differently weighted, requires examination of precisely the same factors indicating probative value and prejudicial effect. Since no other federal rule requires consideration of these factors, application of each of these provisions relies heavily on the precedent of the other.

Thus, on-the-record findings, although not required by rule 609(a)(1), are essential for judicial accountability and certainty in the law. In light of the high stakes involved in prior-conviction impeachment of defendants, courts should err on the side of caution and place specific findings on the record when admitting evidence of recent non-crimen falsi felonies.

III

SUBSTANTIVE IMPACT: THE CALCULUS OF THE NEW BALANCING TEST

The majority opinion in Cavender contains an intriguing alternative holding: even if the lower court were innocent of procedural sins, it committed a "manifest abuse of discretion" in admitting Cavender's twenty-five-year-old sodomy conviction. In his concurring opinion, Judge Widener called this conclusion

86 For a list of these factors, see note 20 supra.

87 One court described the "stakes" well.

[T]he Rule necessarily embodies both the policy of encouraging defendants to testify by protecting them against unfair prejudice and the policy of protecting the government's case against unfair misrepresentation of an accused's non-criminality. It is incumbent upon the courts, in administering Rule 609(a), to reconcile these competing goals to the extent possible.


88 3 WEINSTEIN, supra note 4, ¶ 609[03a], at 609-79. For an excellent example of on-the-record findings, see United States v. Brewer, 451 F. Supp. 50, 53-54 (E.D. Tenn. 1978).

89 578 F.2d at 334.
“overbroad”\textsuperscript{90} and questioned the majority’s reading of the rule’s legislative history.\textsuperscript{91} The majority took the better view, but offered little elaboration.

Rule 609(b) does not specify which factors the court should weigh in its balancing test, or how much importance it should attach to each.\textsuperscript{92} The pre-rule case law and the legislative history help fill this void. The Cavender majority looked primarily to the case law, relying on \textit{Gordon v. United States}\textsuperscript{93} to show the inadmissibility of the sodomy conviction. In \textit{Gordon}, the most articulate pre-rule opinion addressing the question, then-Circuit Judge Burger stated that

\begin{quote}
the legitimate purpose of impeachment ... is ... not to show that the accused who takes the stand is a "bad" person but rather to show background facts which bear directly on whether jurors ought to believe him ... 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 ...\textsuperscript{94}
\end{quote}

The Cavender majority cited \textit{Gordon}'s "rule of thumb" for the proposition that "the pivotal issue of the probative value of a conviction turns largely on a consideration of the nature of the conviction itself."\textsuperscript{95} On a bare record, said the majority, it would be "difficult, if not impossible" to find a twenty-five-year-old sodomy conviction sufficiently probative.\textsuperscript{96}

Despite Judge Widener’s objection that the majority went too far,\textsuperscript{97} the interplay between sections (a) and (b) of rule 609 indi-
cates that they could properly have gone further. Rule 609(a)'s basic premise is that convictions involving “dishonesty or false statement” have more probative value on credibility than do non-

\textit{crimen falsi}.\textsuperscript{98} Rule 609(b) rests on the premise that the probative value of prior convictions diminishes with the passage of time.\textsuperscript{99} Where the defendant's prior conviction is a remote non-\textit{crimen falsi}—a twenty-five-year-old sodomy conviction, for example—the policies underlying (a) and (b) combine to make admission difficult to justify. Although the \textit{Cavender} majority appeared only to recognize in these policies a strong presumption against admissibility, a per se exclusion of remote non-\textit{crimen falsi} would be justified.\textsuperscript{100} Where probative value will rarely, if ever, “substantially outweigh” prejudicial effect, automatic exclusion is an appropriate means of promoting certainty, uniformity, and judicial economy, and preventing capricious determinations by trial judges.

Remote non-\textit{crimen falsi} evidence is not the only candidate for automatic exclusion under rule 609(b). Courts and commentators agree that prior convictions similar or identical to the crime for which the accused is charged are abnormally prejudicial.\textsuperscript{101} The

\textsuperscript{98} Congress called this class of prior convictions “peculiarly probative” (H.R. Rep. No. 1597, 93d Cong., 2d Sess. 9 (1974), reprinted in [1974] U.S. Code Cong. & Ad. News 7098, 7103) and made them automatically admissible if recent. Fed. R. Evid. 609(a)(2). On the other hand, Congress made non-\textit{crimen falsi} convictions inadmissible unless the proponent meets the burden of showing that “probative value ... outweighs ... prejudicial effect.” Fed. R. Evid. 609(a)(1).

\textsuperscript{99} See cases cited in note 107 infra.

\textsuperscript{100} Antitrust law provides analogous support for developing a per se rule under a congressional grant of discretion. Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976), as interpreted in Standard Oil Co. v. United States, 221 U.S. 1 (1910), prohibits agreements “unreasonably” restraining trade. The Supreme Court has found whole categories of agreements to be per se “unreasonable.” See, e.g., United States v. Trenton Potteries Co., 273 U.S. 392 (1927). As the Court explained in United States v. Northern Pacific Ry., 356 U.S. 1 (1958),

This principle of \textit{per se} unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.

\textit{Id.} at 4. Because Congress may not have considered the combined force of the policies behind sections (a) and (b) of rule 609, a per se exclusion of remote non-\textit{crimen falsi} appears to do no violence to legislative intent.

\textsuperscript{101} See, e.g., United States v. Shapiro, 565 F.2d 479, 481 (7th Cir. 1977); United States v. Harding, 525 F.2d 84, 90 (7th Cir. 1975); United States v. Brewer, 451 F. Supp. 50, 54 (E.D. Tenn. 1978); Note, supra note 23, 70 YALE L.J. at 773. \textit{But cf.} United States v. Cohen, 544 F.2d 781, 785 (5th Cir.) (in case involving similar \textit{crimen falsi} offenses, defendant's
Gordon court recommended that similar prior convictions be admitted "sparingly," even under the liberal admission standards of Luck.\textsuperscript{102} This mode of impeachment, the court reasoned, places upon jurors "inevitable pressure . . . to believe that 'if he did it before he probably did so this time.'"\textsuperscript{103} Limiting instructions, intended to prevent jurors from making such impermissible inferences, are notoriously ineffective in this regard.\textsuperscript{104} Courts should hold that close similarity to the crime charged automatically disqualifies a remote prior conviction under rule 609(b).\textsuperscript{105} Such per se exclusion would be consistent with congressional intent to admit a defendant's remote prior conviction only where its probative value is high and its prejudicial impact is low.\textsuperscript{106}

The Cavender facts raise other important balancing issues not fully addressed by the opinion. Rule 609(b)'s time limit is a congressional expression that after ten years a prior conviction's prejudicial impact will normally outweigh its probative value.\textsuperscript{107} This implies that, over time, probative value diminishes more rapidly

\begin{itemize}
\item \textsuperscript{102} 383 F.2d at 940.
\item \textsuperscript{103} Id.
\item \textsuperscript{104} Judge Learned Hand described a related limiting instruction as "the recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else." Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932).
\item \textsuperscript{105} An appropriate test of fatal similarity would be whether the prior conviction and the crime charged are similar enough in the eyes of a reasonable juror to suggest that the accused has repeated his particular prior criminal conduct. Compare United States v. Shapiro, 565 F.2d 479, 481 (7th Cir. 1977) (lower court improperly admitted evidence of remote prior convictions—bankruptcy fraud and income tax evasion—that were too similar to crime charged—misapplication of bank funds by check-kiting) with United States v. Little, 567 F.2d 346, 348-51 (8th Cir. 1977) (affirming admission of remote prior conviction for fraud in sale of oil and gas leases without mentioning similarity to crime charged—check-kiting);\textsuperscript{106} cert denied, U.S. 969 (1978). Although these are difficult cases, Shapiro's exclusion of the prior-conviction evidence is the better approach. The jury would quite probably, in both cases, view check-kiting as a repetition of the defendant's particular prior criminal conduct.
\item \textsuperscript{106} This per se rule, which would exclude remote, similar convictions, even if crimen falsi, may seem inconsistent with rule 609(a)(2), which automatically admits crimen falsi convictions less than ten years old, even if similar. The similarity factor would be dispositive on one side of the ten year line and irrelevant on the other. This inconsistency, however, is less an argument against the per se rule than it is a demonstration that rule 609(a)(2) was drafted too inflexibly.
\item \textsuperscript{107} Cf. United States v. Shapiro, 565 F.2d 479, 481 (7th Cir. 1977) (probative value of prior conviction on issue of credibility decreases with passage of time); United States v. Hayes, 553 F.2d 824, 828 (2d Cir.) (same),\textsuperscript{108} cert. denied, 434 U.S. 867 (1977); United States v. Harding, 525 F.2d 84, 89 (7th Cir. 1975) (same). But see United States v. Brown, 409 F. Supp. 890, 894 (W.D.N.Y. 1976) ("prejudice to a defendant-witness decreases with age at least as greatly as does its pertinency to credibility").
\end{itemize}
than prejudicial impact. It would be unrealistic to assume that this phenomenon ceases after ten years. Thus, the older the remote conviction, the less appropriate its admission under rule 609(b)'s balancing test. The Cavender court, faced with a twenty-five-year-old conviction, could have ruled on this point alone.\textsuperscript{108}

Finally, Judge Widener suggested that courts should more readily admit a remote conviction if it is part of a "string of felonies."\textsuperscript{109} The Cavender majority, however, believed that "each conviction is to be considered separately."\textsuperscript{110} Although rule 609(b) appears to allow consideration of the "string" factor,\textsuperscript{111} courts should give it little weight. Judge Widener correctly concluded "that the commission of a string of felonies would more likely show a tendency to lie than would an isolated incident."\textsuperscript{112} He failed to note, however, that a felony string may increase potential prejudice to an equal or greater degree. In addition, where recent convictions are available for impeachment, the need for the remote end of a felony string is diminished; the recent convictions alone may suffice. These considerations, together with rule 609(b)'s strong presumption against admissibility,\textsuperscript{113} indicate that the "string of felonies" factor should not upset the per se rules this Note proposes.\textsuperscript{114}

\textsuperscript{108} This same factor should be weighed under rule 609(a)(1)'s balancing test; courts should assign more probative value to a two-year-old conviction than to one that is nine years old. \textit{See}, e.g., United States v. Dixon, 547 F.2d 1079, 1083 (9th Cir. 1976) (nine-year-old conviction not excludable under rule 609(a)(1) "unless the remoteness of the conviction caused its prejudicial effect to the defendants to outweigh its probative value").

\textsuperscript{109} 578 F.2d at 539-40.

\textsuperscript{110} \textit{Id.} at 531 n.6.

\textsuperscript{111} According to Judge Widener, the evolution of rule 609(b) confused the majority. \textit{See generally} 578 F.2d at 539-40. An earlier version of the rule compelled the admission of remote convictions where the witness' most recent conviction was less than ten years old. Rule 609 automatically admits only those convictions under ten years old. Although the "string" factor is no longer dispositive, courts may still consider it in rule 609(b)'s balancing test.

\textsuperscript{112} 578 F.2d at 539.

\textsuperscript{113} \textit{See} notes 61-62 and accompanying text \textit{supra}.

\textsuperscript{114} Gordon v. United States, 383 F.2d 956 (D.C. Cir. 1967), \textit{cert. denied}, 390 U.S. 1029 (1968), cited two additional factors to be weighed under the \textit{Luck} doctrine: the need for the defendant's testimony and the importance of the credibility issue. \textit{See} note 20 \textit{supra}. These two factors usually negate each other; as the need for the defendant's testimony becomes more critical, so does the credibility issue. \textit{See}, e.g., United States v. Brewer, 451 F. Supp. 50, 54 (E.D. Tenn. 1978) (these "[f]actors ... seem to counterbalance each other in this case"). This was true in \textit{Cavender}, where "[t]he Government's case ... was purely circumstantial .... Only the appellant was in a position to offer any explanation with reference to those circumstances." 578 F.2d at 534.

Under the approach suggested in this Note, the court could have excluded Cavender's 25-year-old sodomy conviction on either of two grounds. The conviction was a remote
Federal Rule of Evidence 609 commemorates a pitched congressional battle over the use of prior-conviction impeachment evidence. Rule 609(b), as amplified in United States v. Cavender and United States v. Mahler, requires trial courts to make explicit findings when admitting remote prior convictions to impeach any witness. Trial courts admitting recent prior convictions under rule 609(a)(1) are not required to make such findings. Nevertheless, these courts too should place findings on the record to protect criminal defendants from the dangers of prejudice inherent in prior-conviction impeachment. Further, courts should give full effect to the policies underlying rule 609(b) by establishing per se rules excluding remote non-crimen falsi convictions and remote convictions similar to the crime charged.

Bruce P. Garren