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## CAMPBELL v. GREER: IMPEACHING WITNESSES WITH PRIOR CONVICTION EVIDENCE IN A CIVIL TRIAL

Congress enacted the Federal Rules of Evidence<sup>1</sup> to assist courts in ascertaining the truth and reaching just outcomes in federal trials.<sup>2</sup> As a means of uncovering the truth, the Federal Rules of Evidence allow any party in a federal trial to attack the credibility of a witness.<sup>3</sup> Attorneys may attack a witness' credibility, for example, by introducing evidence of the witness' prior criminal convictions.<sup>4</sup> Rule 609 of the Federal Rules of Evidence requires courts to admit evidence of certain prior convictions.<sup>5</sup> Rule 403, however, empowers a trial judge to exclude relevant evidence if

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1. 28 U.S.C. app. (1988).

2. FED. R. EVID. 102. Rule 102 mandates that courts construe the Federal Rules of Evidence to secure fairness in trial administration, to eliminate expense and delay, and to develop the law of evidence. *Id.* Rule 102 further provides that courts should construe the Federal Rules of Evidence to ascertain the truth and promote fair determinations of disputes. *Id.*

3. See FED. R. EVID. 607 (stating that any party may attack credibility of witness).

4. See 2 WIGMORE, EVIDENCE § 519 at 726 (J. Chadbourn rev. 1979) (discussing use of prior conviction evidence for impeachment purposes). At common law courts disqualified convicted persons from testifying in court as part of the punishment for previous crimes. *Id.* Later authorities theorized that a court could not trust a convicted person's testimony. *Id.*; 3 J. WEINSTEIN, EVIDENCE 609[02] at 609-58 (1988). Weinstein argues that the theory that prior convictions are relevant to a witness' credibility depends on a two part assumption: first, that a person with a criminal past possesses a bad general character, and second, that a person of such character would disregard the obligation to testify truthfully. *Id.* at 609-59. Weinstein concludes that this two part assumption rests on assumptions about a person's character that people make in everyday life. *Id.*

5. FED. R. EVID. 609(a). Rule 609(a) provides:

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.

*Id.*

Rule 609(a) thereby establishes that a court should balance the probative value of the prior conviction evidence against the prejudicial effect of the evidence to determine whether or not to admit the evidence. *Id.* One commentator asserts that the rule 609(a) balancing test arose out of *Luck v. United States*. 3 J. WEINSTEIN, EVIDENCE 609[01] at 609-52 (1988). See *Luck v. United States*, 348 F.2d 763, 768 (D.C. Cir. 1965) (allowing trial judges to exercise sound discretion under statute permitting admission of prior convictions to impeach witness' credibility). The *Luck* court construed 14 D.C. CODE ANN. § 305 (1961) to permit a trial judge to determine the admissibility of prior conviction evidence based upon the circumstances of the case. *Luck*, 348 F.2d at 768. The *Luck* court argued that the trial judge may exclude prior conviction evidence if the judge believes the prejudicial effect of the evidence far outweighs the probative value of the evidence. *Id.*

the prejudicial effect of the evidence substantially outweighs the probative value of the evidence.<sup>6</sup> Because rule 609 requires courts to admit certain evidence, regardless of prejudicial effect, while rule 403 broadly permits exclusion of highly prejudicial evidence, rules 609 and 403 appear inconsistent.<sup>7</sup> Although some courts have resolved the apparent inconsistency between rules 609 and 403,<sup>8</sup> many courts continue to disagree over the applicability and interaction of these evidentiary rules in civil trials.<sup>9</sup> In *Campbell v. Greer*<sup>10</sup> the United States Court of Appeals for the Seventh Circuit considered whether rule 609(a) or rule 403 allowed the court to exclude evidence of a civil plaintiff's prior criminal conviction that the defendant offered to impeach the plaintiff's credibility.<sup>11</sup>

In *Campbell* Rudolph Campbell, an inmate at an Illinois state prison, sued various prison officials under 42 U.S.C. § 1983.<sup>12</sup> Campbell charged

6. FED. R. EVID. 403. Rule 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

*Id.* The Advisory Committee's Note to rule 403 provides that unfair prejudice, within the context of rule 403, involves an undue tendency to suggest decision on an improper basis. FED. R. EVID. 403 advisory committee's note. The committee suggested that juries often improperly base decisions on emotions. *Id.* Consequently, the committee designed rule 403 to allow a trial judge to exclude otherwise relevant evidence that might lead to an improperly-based jury decision. *Id.*

7. Compare *Diaz v. Cianci*, 737 F.2d 138, 139 (1st Cir. 1984) (holding that trial judge acted properly in excluding potentially prejudicial prior conviction evidence under rule 403) and *Shows v. M/V Red Eagle*, 695 F.2d 114, 119 (5th Cir. 1983) (reversing trial judge who failed to apply rule 403 to exclude prejudicial prior conviction evidence) and *United States v. Dixon*, 547 F.2d 1079, 1083 n.4 (9th Cir. 1976) (noting that in certain cases rule 403 allows trial judge discretion to exclude prior conviction evidence) with *United States v. Kuecker*, 740 F.2d 496, 502 (7th Cir. 1984) (finding that trial court lacks discretion to exclude evidence of prior convictions involving dishonesty or false statement under rule 609(a)(2)) and *United States v. Kiendra*, 663 F.2d 349, 354 (1st Cir. 1981) (ruling that evidence offered under rule 609(a)(2) is not subject to rule 403 balancing test).

8. See, e.g., *Jones v. Board of Police Comm'rs*, 844 F.2d 500, 505 (8th Cir. 1988) (ruling that court using rule 403 balancing test could exclude evidence of prior convictions admissible under rule 609 without rule 609(a) balancing test), *petition for cert. filed*, — U.S.L.W. — (U.S. Aug. 18, 1988) (No. —); *Diggs v. Lyons*, 741 F.2d 577, 582 (3d Cir. 1984) (holding that rule 609 governs admissibility of prior conviction evidence to impeach witness and precludes application of rule 403), *cert. denied*, 471 U.S. 1078 (1985); *Czajka v. Hickman*, 703 F.2d 317, 319 (8th Cir. 1983) (finding that rule 609 does not foreclose trial court's duty to apply rule 403 balancing test); *infra* notes 109-21 and accompanying text (discussing *Diggs* court's holding that rule 609 preempts rule 403 in civil trials).

9. See *infra* notes 109-35 and accompanying text (discussing circuit courts' conflicting holdings on interaction between rule 609 and rule 403).

10. 831 F.2d 700 (7th Cir. 1987).

11. See *Campbell v. Greer*, 831 F.2d 700, 703, 705 (7th Cir. 1987) (considering proper application of rule 609 and rule 403 in civil trial).

12. *Id.* at 701. In *Campbell* the plaintiff, Campbell, brought suit under Section 1 of the Civil Rights Act of 1871, now 42 U.S.C. § 1983, which provides that a citizen may sue a state employee who injures the citizen by depriving the citizen of his legal or constitutional rights. 42 U.S.C. § 1983 (1986).

that prison officials had deprived Campbell of his eighth amendment right to be free from cruel and unusual punishment.<sup>13</sup> Campbell claimed that he specifically had asked the prison guards to deadlock his cell to protect him from certain fellow inmates.<sup>14</sup> Campbell alleged that because the guards failed to deadlock his cell, other inmates were able to enter the cell and stab Campbell repeatedly.<sup>15</sup> The trial court entered judgment for the defendants.<sup>16</sup> Campbell appealed the ruling to the United States Court of Appeals for the Seventh Circuit.<sup>17</sup>

On appeal Campbell argued that the trial court erroneously instructed the jury and improperly admitted evidence of Campbell's prior rape conviction.<sup>18</sup> The Seventh Circuit, however, affirmed the lower court's ruling.<sup>19</sup> Initially the court scrutinized the district court's jury instruction on the eighth amendment issue of cruel and unusual punishment.<sup>20</sup> The court noted that the instruction closely followed judicial precedent in the Seventh Circuit by requiring the plaintiff to prove that the defendants knew of imminent danger to the plaintiff and consciously refused to protect the plaintiff in order to establish cruel and unusual punishment.<sup>21</sup> The *Campbell* court, therefore, concluded that the district court properly instructed the jury on the applicable cruel and unusual punishment standard.<sup>22</sup>

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13. *Campbell*, 831 F.2d at 701. The eighth amendment to the United States Constitution guarantees the right to be free from cruel and unusual punishment. U.S. CONST. amend. VIII. The eighth amendment protects state prisoners through the due process clause of the fourteenth amendment. See *Robinson v. California*, 370 U.S. 660, 667 (holding that California statute that allows cruel and unusual punishment violates fourteenth amendment), *reh'g denied*, 371 U.S. 905 (1962).

14. *Campbell*, 831 F.2d at 701.

15. *Id.* Campbell and his witnesses, all inmates, testified that prior to the stabbing, Campbell learned that he was the target for an attack by other inmates. *Id.* Campbell asked the defendant prison guards to deadlock his cell so that the cell would remain locked when a prison official threw open the master switch. *Id.* The defendants, however, failed to deadlock Campbell's cell, and a few inmates entered Campbell's cell and stabbed Campbell. *Id.* The defendants did not deny that the stabbing occurred but insisted that Campbell never asked any of them to deadlock his cell. *Id.*

16. *Id.* at 701.

17. *Id.*

18. *Id.* at 701-02; see *infra* notes 25-27 and accompanying text (discussing Campbell's three arguments on appeal).

19. *Campbell*, 831 F.2d at 708.

20. *Id.* at 702.

21. *Id.* The United States Court of Appeals for the Seventh Circuit in *Campbell* found that the instruction paralleled the standard for cruel and unusual punishment that the Seventh Circuit outlined in *Duckworth v. Franzen*, 780 F.2d 645 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986). *Campbell*, 831 F.2d at 702. To establish a cruel and unusual punishment claim, the *Duckworth* standard requires the plaintiff to show that prison guards realized that an imminent danger existed and consciously and knowingly refused to take steps to avert the danger. *Duckworth*, 780 F.2d at 653. The *Campbell* court held that the trial judge correctly instructed the jury on the *Duckworth* standard. *Campbell*, 831 F.2d at 703. The *Campbell* court explained, further, that the essence of *Campbell* was witness credibility, not jury instructions. *Id.* The Seventh Circuit concluded that a slightly altered instruction would not have affected the trial verdict. *Id.*

22. *Id.*

After approving the district court's jury instruction, the Seventh Circuit addressed Campbell's claim that the district court improperly allowed the defendants to use Campbell's prior rape conviction at trial to impeach Campbell's credibility as a witness.<sup>23</sup> Campbell advanced three arguments in favor of reversing the lower court's evidentiary ruling.<sup>24</sup> First, Campbell argued that the trial judge should have used a rule 609(a) balancing test to weigh the probative value of the evidence against the prejudicial effect of the evidence.<sup>25</sup> Second, Campbell asserted that the trial judge should have excluded the evidence under rule 403.<sup>26</sup> Finally, Campbell insisted that the lower court should have prevented the defense counsel from eliciting the specific nature of the prior conviction.<sup>27</sup>

Noting that the proper use of a criminal conviction to impeach a witness in a civil case was a question of first impression in the Seventh Circuit,<sup>28</sup> the court initially looked to the text and legislative history of rule 609 for guidance.<sup>29</sup> As a threshold matter the Seventh Circuit asserted that rule 609(a) requires a court to balance the probative value against the prejudicial effect of the prior conviction evidence only where the evidence might prejudice the defendant.<sup>30</sup> Because Campbell was a plaintiff, the court held that Campbell could not ask for a rule 609(a) balancing test with respect

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23. *Id.*

24. *Id.* at 703, 705, 707; see *infra* notes 25-27 and accompanying text (discussing Campbell's three arguments on appeal).

25. *Campbell*, 831 F.2d at 703. Campbell asserted that rule 609(a)(1) required the trial court to balance prejudicial effect against probative value before admitting evidence of Campbell's prior rape conviction. *Id.*

26. *Id.* at 705. Campbell argued that rule 403 required the trial judge to exclude the prior conviction evidence because the unfair prejudice of the evidence substantially outweighed its probative value. *Id.*

27. *Id.* at 707. Campbell argued that the trial court should have allowed into evidence only the fact that Campbell was a convicted felon. *Id.*

28. *Id.* at 703; see *Christmas v. Sanders*, 759 F.2d 1284, 1293 (7th Cir. 1985) (upholding exclusion of plaintiff's prior rape conviction). *Christmas* involved a civil rights action against a police officer. *Id.* at 1286, 1287. The trial court excluded evidence of the plaintiff's prior rape conviction and found for the plaintiff. *Id.* at 1287. On appeal the Seventh Circuit considered whether the trial court's exclusion of the prior conviction evidence was an abuse of discretion. *Id.* at 1289. The court found no abuse of discretion but declined to resolve the issue of whether rule 609 or rule 403 governed the admissibility of a civil plaintiff's prior felony conviction. *Id.* at 1291, 1293. Consequently, the prior conviction issue in *Campbell* was not entirely a question of first impression for the Seventh Circuit. *Campbell*, 831 F.2d at 703.

29. See *id.* at 703-04 (discussing legislative history of rule 609); *supra* note 5 (text of rule 609(a)); *infra* note 67 and accompanying text (discussing legislative history of rule 609).

30. *Campbell*, 831 F.2d at 703. As the *Campbell* court noted, other courts have observed that defendants, but not plaintiffs, can demand a rule 609(a) balancing test. *Id.* at 704; see *Roshan v. Fard*, 705 F.2d 102, 104 (4th Cir. 1983) (ruling balancing test of rule 609(a) applies only in situations involving possible prejudice to defendant); *Garnett v. Kepner*, 541 F. Supp. 241, 244 (M.D. Pa. 1982) (holding that trial court erroneously considered whether plaintiff would suffer prejudice if court admitted evidence of plaintiff's prior convictions). But see *Petty v. Ideco*, 761 F.2d 1146, 1152 (5th Cir. 1985) (holding that rule 609(a) balancing test protects plaintiffs in civil cases).

to his prior conviction.<sup>31</sup> The court acknowledged that restricting the rule 609(a) balancing test to defendants in civil suits would offer an unfair advantage to civil defendants.<sup>32</sup> The court refused, however, to follow Campbell's suggestion that the rule 609(a) balancing test applies in criminal and civil trials to every witness whose testimony an opposing party seeks to impeach with prior conviction evidence.<sup>33</sup> Instead, the Seventh Circuit interpreted rule 609(a) to allow only a criminal defendant who testifies to demand that a court balance the probative value and the prejudicial effect of evidence of the defendant's prior criminal convictions.<sup>34</sup> In support of its interpretation the court examined the legislative history of rule 609.<sup>35</sup> The Seventh Circuit specifically relied on the Conference Report to rule 609 in finding that the legislators intended the rule 609(a) balancing test to protect only criminal defendants.<sup>36</sup> The court asserted that the Conference Report made clear that a judge should only consider the prejudicial effect of prior conviction evidence to a criminal defendant.<sup>37</sup> According to the Seventh Circuit, therefore, an adverse party in a civil trial always may use a witness' prior convictions to impeach that witness.<sup>38</sup>

The *Campbell* court next addressed Campbell's claim that the district court should have applied rule 403 to exclude evidence of Campbell's prior rape conviction.<sup>39</sup> The court noted that rule 403 requires courts to exclude evidence only if the prejudicial effect of the evidence substantially outweighs the probative value of the evidence.<sup>40</sup> The Seventh Circuit further explained that rule 403 applies only to situations that specific rules do not cover.<sup>41</sup> The court stated that rule 609(a) is a specific rule that governs the admissibility of prior conviction evidence offered to impeach a witness.<sup>42</sup> The court concluded, therefore, that the scope of rule 609(a) prevents rule 403

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31. *Campbell*, 831 F.2d at 703.

32. *Id.* The *Campbell* court noted that chance often determines which party is defendant and which party is plaintiff in a civil suit. *Id.* The court concluded, therefore, that allowing civil defendants, but not civil plaintiffs, to object when opposing counsel seeks to introduce criminal records to impeach an opponent's testimony would be unfair. *Id.*

33. *Id.* In *Campbell* Campbell argued that rule 609(a) required a balancing of probative value against prejudicial effect with regard to every witness in every federal criminal and civil trial in which a party seeks to use prior conviction evidence to impeach a witness. *Id.*

34. *Id.* at 704.

35. *Id.* at 703-04; *see infra* note 67 and accompanying text (discussing legislative history of rule 609).

36. *Campbell*, 831 F.2d at 704; *see infra* note 67 and accompanying text (discussing legislative history of rule 609).

37. *Campbell*, 831 F.2d at 704.

38. *Id.*

39. *Id.* at 705; *see supra* note 6 and accompanying text (text of rule 403).

40. *Campbell*, 831 F.2d at 705. The *Campbell* court noted that the party opposing the use of evidence under rule 403 has the burden of persuading the trial judge to exclude the evidence. *Id.*

41. *Id.*; *see infra* note 103 and accompanying text (discussing Advisory Committee's Note which states that rule 403 applies in situations where no other rule specifically applies).

42. *Campbell*, 831 F.2d at 705.

from governing the admissibility of prior conviction evidence in either a criminal or a civil trial.<sup>43</sup> The Seventh Circuit feared that authorizing courts to apply rule 403 to prior conviction evidence would enable future Seventh Circuit courts to use rule 403 to exclude evidence of prior crimes involving dishonesty or false statement.<sup>44</sup> The *Campbell* court stated that using rule 403 to exclude evidence of prior convictions involving dishonesty or false statement impermissibly would override rule 609(a)(2), which demands admission of evidence of convictions involving dishonesty or false statement.<sup>45</sup> Acknowledging that other circuit courts have permitted a civil plaintiff to invoke the rule 403 balancing test when the defendant sought to impeach the plaintiff with prior conviction evidence,<sup>46</sup> the Seventh Circuit argued that these courts have failed to offer a sufficient justification for allowing rule 403 to preempt rule 609(a) in civil cases.<sup>47</sup> The Seventh Circuit concluded, therefore, that a civil plaintiff may not object under either rule 403 or rule 609(a) when opposing counsel seeks to impeach the plaintiff's testimony with evidence of a prior felony conviction.<sup>48</sup>

Finally, the *Campbell* court dismissed Campbell's submission that the district court erred by allowing into evidence the nature of Campbell's prior conviction.<sup>49</sup> Finding no authority for suppressing the nature of a prior felony used to impeach a witness' testimony, the court refused to set a precedent.<sup>50</sup> The Seventh Circuit cautioned, however, that parties may

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43. *Id.* at 706.

44. *Id.* at 705.

45. *Id.* at 705-06. The *Campbell* court considered the potential for using rule 403 to override the express direction under rule 609(a)(2) to admit evidence of prior crimes involving dishonesty or false statement to be the most compelling reason for declining to exclude any prior conviction evidence under rule 403. *Id.*; see *supra* note 5 (text of rule 609(a)).

46. *Campbell*, 831 F.2d at 706; see *infra* notes 122-35 and accompanying text (discussing cases that have applied rule 403 to prior conviction evidence offered in civil trials).

47. See *Campbell*, 831 F.2d at 706 (finding unpersuasive other courts' reasons for allowing civil plaintiff to invoke rule 403 balancing test to exclude prior conviction evidence). The Seventh Circuit argued that *Shows v. M/V Red Eagle*, 695 F.2d 114 (5th Cir. 1983), one of the first cases that allowed a civil plaintiff to demand a rule 403 balancing test when the defendant sought to introduce evidence of plaintiff's prior convictions, stood on weak precedent. *Campbell*, 831 F.2d at 706; see *infra* notes 125-35 and accompanying text (discussing *Shows*). Consequently, the Seventh Circuit in *Campbell* declined to follow *Shows* and held that rule 403 has no application to the use of prior conviction evidence to impeach a witness in a civil trial. *Campbell*, 831 F.2d at 706.

48. *Id.*

49. *Id.* at 707.

50. *Id.* at 707. The *Campbell* court could have relied on *United States v. Wilson*, 556 F.2d 1177, 1178 (4th Cir.), cert. denied, 434 U.S. 986 (1977), for authority to suppress the nature of the prior felony. The court in *Wilson* held that the prosecution could elicit whether defendant had been convicted of a felony but not whether the conviction had been for rape. *Wilson*, 556 F.2d at 1178. See generally Gold, *Sanitizing Prior Conviction Impeachment Evidence to Reduce its Prejudicial Effects*, 27 ARIZ. L. REV. 691 (1985) (asserting that courts should admit evidence of prior felony conviction without admitting evidence of nature of felony). In his article, Gold details the advantages of "sanitization," a procedure by which opposing counsel can inform the jury that the defendant has a prior felony conviction without

introduce only the date and nature of the charged crime and the disposition of the case.<sup>51</sup> The court agreed that defense counsel may have exceeded these limits in *Campbell*, but the court refused to grant a new trial solely because of defense counsel's excesses.<sup>52</sup>

In a concurring opinion in *Campbell*, Judge Will criticized the majority's conclusion that rule 403 never applies to prior conviction evidence in civil actions.<sup>53</sup> Judge Will asserted that rule 609 preempts rule 403 only in those instances to which rule 609 directly applies.<sup>54</sup> The concurring judge stated that rule 609 does not govern prior conviction evidence in all cases and, therefore, does not preempt completely rule 403.<sup>55</sup> Judge Will acknowledged that, at present, the exact scope of rule 609 is unclear.<sup>56</sup> The concurring judge suggested, therefore, that Congress amend rule 609 and rule 403 to clarify the scope of each rule and the interaction between the rules.<sup>57</sup>

The Seventh Circuit correctly determined that rule 609(a) does not require courts to weigh the probative value of prior conviction evidence against the prejudicial effect of the evidence in a civil trial.<sup>58</sup> The language of rule 609(a), the legislative history of the Federal Rules of Evidence, and case law construing rule 609(a) support the *Campbell* court's interpretation of rule 609(a).<sup>59</sup> In subsection (a)(1) of rule 609 the drafters expressly address the potentially prejudicial effect of prior conviction evidence on defendants.<sup>60</sup> Unlike subsection (a)(2), which requires courts to admit evidence of a party's prior conviction of any crime involving dishonesty or false statement, subsection (a)(1) explicitly protects defendants from the prejudicial effect

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specifically identifying the felony. *Id.* at 693. Gold believes that sanitization promotes uniformity in the law of admission of prior conviction evidence, erases any undeserved benefit a defendant might receive from suppression of evidence of a prior conviction, and decreases the likelihood that a conviction will result from an improper use of a defendant's record. *Id.* at 702.

51. *Campbell*, 831 F.2d at 707.

52. *Id.* at 707-08. In *Campbell* defense counsel in his opening statement referred to Campbell as a convicted rapist and, later in the trial, asked Campbell where the rape had occurred. *Id.* at 708.

53. *Id.* In his concurring opinion in *Campbell*, Judge Will found illogical and unnecessary the majority's conclusion that rule 403 never applies to prior conviction evidence in civil cases. *Id.* Judge Will suggested that the majority's decision too severely restricts the use of rule 403 in civil cases. *Id.*

54. *Id.* at 709. In his concurring opinion in *Campbell*, Judge Will asserted that rule 609 should apply only in criminal cases. *Id.*

55. *Id.* at 708-09.

56. *Id.* at 709.

57. *Id.*

58. See *infra* notes 65-70, 91-98 and accompanying text (discussing propriety of Seventh Circuit's holding that rule 609(a) balancing test does not govern admissibility of prior conviction evidence in civil cases).

59. See *infra* notes 65-70, 91-98 and accompanying text (supporting Seventh Circuit's holding that rule 609(a) balancing test does not govern admissibility of prior conviction evidence in civil cases).

60. See *supra* note 5 (text of rule 609(a)).



of admitting evidence of prior criminal convictions.<sup>61</sup> As the Seventh Circuit noted, however, by restricting application of the rule 609(a) balancing test to civil defendants, courts unfairly would favor civil defendants who, unlike civil plaintiffs, could move for the exclusion of evidence of prior criminal conduct.<sup>62</sup> The *Campbell* court argued that the drafters of rule 609(a) could not have intended such an advantage for civil defendants.<sup>63</sup> The court, therefore, looked beyond the text of rule 609(a) to legislative history to determine the rule's scope.<sup>64</sup>

By thoroughly analyzing the legislative history of rule 609, the *Campbell* court appropriately determined that the drafters intended to reserve the protection of subsection (a)(1) for criminal defendants.<sup>65</sup> Although some Congressmen apparently intended rule 609 to apply to civil cases,<sup>66</sup> the Conference Committee Notes to rule 609 and the majority of legislators' remarks show that prejudice to criminal defendants was the primary concern of the rule's drafters.<sup>67</sup> The Conference Committee noted that the probative

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61. See *United States v. Greschner*, 647 F.2d 740, 742 n.1 (7th Cir. 1981) (noting that prior conviction evidence tends to be so prejudicial to defendant that, absent compelling circumstances, courts should not admit prior conviction evidence under rule 609(a)).

62. See *supra* note 32 and accompanying text (discussing *Campbell* court's rationale for denying civil plaintiffs and civil defendants use of rule 609(a) balancing test).

63. *Campbell v. Greer*, 831 F.2d 700, 703 (7th Cir. 1987); see *infra* note 67 and accompanying text (discussing legislative history of rule 609).

64. See *infra* note 67 and accompanying text (discussing legislative history of rule 609).

65. See *Campbell*, 831 F.2d at 703 (holding that only criminal defendant may demand rule 609(a) balancing test with respect to prior conviction evidence).

66. See 120 CONG. REC. 2377, 2379, 2381 (1974) (containing statements of Rep. Dennis, Rep. Hogan, and Rep. Lott). In a congressional debate concerning rule 609, Representative Dennis stated that rule 609 should apply to any witness, not just a criminal defendant. *Id.* at 2377. Representative Hogan said that rule 609 applies to all witnesses in civil as well as criminal cases. *Id.* at 2379. Representative Lott asserted that rule 609 would apply in civil and criminal cases. *Id.* at 2381. See *Diggs v. Lyons*, 741 F.2d 577, 581 (3d Cir. 1984) (relying on Representatives' remarks to support holding that rule 609 applies to govern admissibility of prior conviction evidence in civil trials), *cert. denied*, 471 U.S. 1078 (1985).

67. See H.R. CONF. REP. NO. 1597, 93rd Cong., 2d Sess. 9-10, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7098, 7103 (containing House Conference Committee remarks on rule 609). The House Conference Committee decided that courts should weigh under rule 609(a) the prejudicial effect of prior conviction evidence to the defendant. *Id.* Congress considered but dismissed possible dangers of prejudice to a nondefendant witness, such as injury to the witness's reputation, as elements to be weighed in determining admissibility of prior conviction evidence. *Id.* The Committee concluded that the need of the trier of fact to have as much relevant evidence of witness credibility as possible outweighed any possible prejudice to a nondefendant witness. *Id.*

Most of the Congressmen spoke in terms of rule 609's applicability to criminal trials. See 120 CONG. REC. 2375-82 (1974) (containing statements of Representatives concerning scope of rule 609). Representative Hogan suggested that courts should not allow prosecutors to base their accusations on the testimony of witnesses who are convicted felons but appear to have unblemished records. *Id.* at 2376, 2380. Representative Dennis cautioned that a court should not convict a criminal defendant solely because of the defendant's bad character. *Id.* at 2377. Representative Hungate noted, however, that the prior conviction of a defense witness might

value of prior conviction evidence necessarily outweighs possible prejudice to witnesses other than criminal defendants.<sup>68</sup> The committee, however, perceived several potentially prejudicial consequences of admitting prior conviction evidence against criminal defendants.<sup>69</sup> To provide criminal defendants with heightened protection, therefore, Congress developed the rule 609(a) balancing test.<sup>70</sup>

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have a prejudicial effect on the criminal defendant. 120 CONG. REC. at 40,891.

A few Congressmen emphasized that rule 609 would in no way inhibit a criminal defendant's right to impeach a prosecution witness. *See id.* at 40,891, 40,894 (containing statements of Representatives concerning criminal defendants' right to impeach prosecution witnesses). Representative Dennis commented that a defendant can cross-examine a government witness about any of the witness' prior convictions. *Id.* at 40,894. Representative Hungate asserted that rule 609(a) would permit criminal defendants to impeach prosecution witnesses with prior felony convictions. *Id.* at 40,891.

68. *See supra* note 67 and accompanying text (discussing Conference Committee's belief that jury's need for evidence of witness credibility outweighed any possible prejudice to nondefendant witnesses).

69. *See* 120 CONG. REC. 2377, 2379 (1974) (containing statements of Rep. Dennis and Rep. Wiggins); 3 D. LOUSELL & C. MUELLER, FEDERAL EVIDENCE § 315 at 316-18 (1979) (stating problems with impeachment by prior conviction evidence). Louisell and Mueller state three potential problems with impeachment by prior convictions. *Id.* at 316. First, the prior conviction evidence may be irrelevant to the subsequent case. *Id.* Second, the prior conviction evidence may shock juries and render jurors unable to confine their consideration of the prior conviction to the issue of the witness' veracity. *Id.* at 317. In essence, the jury may conclude that a defendant who committed a crime once will do so again. *Id.*; *see* *United States v. Bagley*, 765 F.2d 836, 841 (9th Cir.) (finding substantial risk that jury will conclude from similar prior conviction that defendant also committed subsequent crime), *vacated*, 772 F.2d 482 (9th Cir. 1985), *cert. denied*, 475 U.S. 1023 (1986); *United States v. Preston*, 608 F.2d 626, 639 (5th Cir. 1979) (recognizing danger that jury will think that criminal forever remains criminal), *cert. denied*, 446 U.S. 940 (1980). *But see* *United States v. Browne*, 829 F.2d 760, 764 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1298 (1988) (upholding admission of defendant's prior bank robbery conviction in trial for armed bank robbery); *United States v. Washington*, 746 F.2d 104, 107 (2d Cir. 1984) (upholding admission of defendant's prior robbery conviction in trial for bank robbery). Third, a defense witness' convictions may harm the credibility of the accused and possibly endanger the right of the accused to a fair trial. 3 D. LOUSELL & C. MUELLER *supra* at 318. Louisell and Mueller warn that defendants should not be subject to guilt by association. *Id.*

70. *See supra* note 5 and accompanying text (text of rule 609). Rule 609(a)(1) directs the trial judge to weigh the potential prejudicial effect to the defendant of admitting the prior conviction evidence against the probative value of the evidence. FED. R. EVID. 609; *see* *United States v. Mahone*, 537 F.2d 922, 929 (7th Cir.) (discussing factors that judges should consider in making rule 609(a) determination), *cert. denied*, 429 U.S. 1025 (1976).

In *Mahone* the trial judge admitted evidence of Mahone's prior robbery conviction. *Id.* at 928. On appeal Mahone argued that the trial judge erred in not making an on-the-record rule 609(a) determination. *Id.* The Seventh Circuit upheld the trial judge's admission of the prior conviction evidence. *Id.* The Seventh Circuit suggested factors that judges should consider in future cases in making a rule 609(a) determination. *Id.* at 929. First, the Seventh Circuit suggested that the judge should consider how valuable the prior crime evidence is for impeaching the witness' testimony. *Id.* Second, the judge should take into account the witness' conduct since the conviction and the age of the conviction. *Id.* Third, the judge should note the similarity between the past crime and the crime charged. *Id.* Fourth, the judge should consider the importance of the defendant's testimony and the likelihood that the case will turn on the

Case law moderately supports the *Campbell* court's holding that civil plaintiffs may not demand a rule 609(a) balancing test to evaluate the admissibility of prior conviction evidence.<sup>71</sup> Although the circuit courts agree that the rule 609(a) balancing test applies to criminal defendants,<sup>72</sup> only the United States Courts of Appeal for the Third and Fifth Circuits have held that the balancing test also protects civil plaintiffs.<sup>73</sup> In *Petty v. Ideco*<sup>74</sup> the plaintiff brought a products liability action to recover damages for injuries that the plaintiff incurred while working on an oil well servicing unit that the defendant manufactured.<sup>75</sup> At trial the defendant, Ideco, introduced evidence of the plaintiff's prior criminal history.<sup>76</sup> The jury returned a verdict for the defendant.<sup>77</sup> On appeal the Fifth Circuit considered the plaintiff's argument that the trial court improperly admitted evidence of the plaintiff's prior criminal history without balancing the probative value of the evidence against the prejudicial effect of the evidence under rule 609(a).<sup>78</sup> The Fifth Circuit dismissed the defendant's contention that the rule 609(a) balancing test does not apply to civil plaintiffs.<sup>79</sup> The Fifth Circuit explained

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credibility of the parties. *Id.*; see also *United States v. Preston*, 608 F.2d 626, 639 (5th Cir. 1979) (remanding to trial court for on-the-record determination that probative value of evidence of prior bank robbery outweighed prejudicial effect), *cert. denied*, 446 U.S. 940 (1980); *United States v. Gross*, 603 F.2d 757, 758-59 (9th Cir. 1979) (per curiam) (holding that trial court abused its discretion in admitting prior narcotics conviction without any explanation). Courts urge judges to make rule 609(a) determinations on the record to allow for effective appellate review. *Preston*, 608 F.2d at 639.

71. See *infra* notes 82-90 and accompanying text (discussing precedent supporting *Campbell* court's rule 609 holding).

72. See, e.g., *United States v. Roenigk*, 810 F.2d 809, 816 (8th Cir. 1987) (finding error in trial court's admitting overly prejudicial and irrelevant evidence of defendant's prior crimes); *United States v. Bagley*, 765 F.2d 836, 842 (9th Cir.) (holding trial court's erroneous rule 609 determination harmless in light of overwhelming evidence of guilt of criminal defendant), *vacated*, 772 F.2d 482 (9th Cir. 1985), *cert. denied*, 475 U.S. 1023 (1986); *United States v. Washington*, 746 F.2d 104, 107 (2d Cir. 1984) (upholding ruling under rule 609(a) that defendant's prior robbery conviction was admissible in present trial on robbery charge); *United States v. Ras*, 713 F.2d 311, 318 (7th Cir. 1983) (agreeing with trial court's explicit findings under rule 609(a) that probative value of admitting evidence of Ras' prior convictions would outweigh any prejudicial effect to Ras).

73. See *Petty v. Ideco*, 761 F.2d 1146, 1152 (5th Cir. 1985) (rejecting defendant's contention that rule 609(a) balancing test did not apply to civil plaintiff); *Diggs v. Lyons*, 741 F.2d 577, 582 (3d Cir. 1984) (holding that trial judge correctly applied rule 609(a) balancing test in admitting Diggs' prior convictions in civil trial), *cert. denied*, 471 U.S. 1078 (1985).

74. 761 F.2d 1146 (5th Cir. 1985).

75. See *Petty v. Ideco*, 761 F.2d 1146, 1149 (5th Cir. 1985) (discussing plaintiff's cause of action). In the course of his work, Petty entangled his arm in line rope that wound around the cathead of defendant manufacturer's oil well servicing unit. *Id.*

76. *Id.* Petty's prior convictions were armed kidnapping in 1974 and issuing a check with the intent to defraud in 1980. *Id.* at 1151-52. Petty violated the conditions of his probation resulting from the kidnapping conviction and, consequently, was in jail until 1977. *Id.* at 1152.

77. *Id.* at 1149.

78. *Id.* at 1152.

79. *Id.* The *Petty* court characterized as unfounded the defendant's contention that the rule 609(a) balancing test does not apply to civil plaintiffs. *Id.*

that the trial court has broad discretion in determining whether to allow a party to use a prior conviction for impeachment purposes.<sup>80</sup> Therefore, the *Petty* court concluded that the trial judge did not abuse his discretion in admitting evidence of the plaintiff's prior conviction.<sup>81</sup>

Unlike the United States Court of Appeals for the Fifth Circuit, the United States Courts of Appeal for the Sixth and Eighth Circuits, along with numerous district courts and commentators, have concluded that the rule 609(a) balancing test protects only criminal defendants.<sup>82</sup> In *Donald v.*

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80. *Id.* The *Petty* court acknowledged that the prejudicial effect of the prior conviction evidence came close to outweighing the probative value of the evidence in *Petty* but refused to find that the trial court abused its discretion by admitting the prior conviction evidence. *Id.*

81. *Id.*

82. *See, e.g., Donald v. Wilson*, 847 F.2d 1191, 1197 n.4 (6th Cir. 1988) (holding that Congress did not intend rule 609(a) to protect civil plaintiffs); *Jones v. Board of Police Comm'rs*, 844 F.2d 500, 505 (8th Cir. 1988) (holding that civil plaintiff lacks standing to invoke rule 609(a) balancing test), *petition for cert. filed*, — U.S.L.W. — (U.S. Aug. 18, 1988) (No. —); *Lewis v. Sheriff's Dep't*, 817 F.2d 465, 467 (8th Cir.) (upholding admission of civil plaintiff's prior convictions under rule 609(a) because of importance of determining plaintiff's credibility as witness), *cert. denied*, 108 S. Ct. 298 (1987); *Moore v. Volkswagenwerk*, 575 F. Supp. 919, 920-21 (D. Md. 1983) (finding rule 609(a) improper rule for examining admissibility of prior conviction evidence in civil trial); *Tussel v. Witco Chem. Corp.*, 555 F. Supp. 979, 984 (W.D. Pa. 1983) (concluding that rule 609(a) affords no protection to civil plaintiff).

In *Tussel*, the plaintiff sued to recover for injuries that he incurred when a hose that defendant's employee allegedly mishandled ruptured and sprayed carbolic acid on the plaintiff. *Tussel*, 555 F. Supp. at 980. The United States District Court for the Western District of Pennsylvania prohibited the defendant from attacking the plaintiff's credibility by introducing evidence of the plaintiff's prior guilty plea to a conspiracy felony. *Id.* at 979. In determining whether the defendant could attack the plaintiff's credibility with prior conviction evidence, the district court considered the evidence under both rule 403 and rule 609(a). *Id.* at 980, 984. While ultimately excluding the prior conviction evidence under rule 403, the district court first concluded that rule 609(a) did not bar admission of the prior conviction evidence. *Id.* at 984. The *Tussel* court reasoned that the drafters of rule 609(a)(1) primarily intended to avoid prejudice to criminal defendants. *Id.* at 983. The court further noted that the language and legislative history of rule 609 did not mandate mechanical application of the rule 609(a) balancing test when the party potentially subject to prejudice is not a criminal defendant. *Id.* The court asserted that, in a civil case, evidence concerning the plaintiff's prior criminal conduct likely will be tangential or entirely irrelevant to the issues at hand. *Id.* The court thus concluded that the special protection provided by rule 609(a)(1) is applicable only to criminal defendants. *Id.* at 984; *see also* 3 D. LOUISELL & C. MUELLER, *FEDERAL EVIDENCE* § 316 at 324 (1979) (rule 609(a) does not authorize exclusion of prior convictions offered for impeachment purposes in civil litigation); C. MCCORMICK, *EVIDENCE* § 43 at 94 (3d ed. 1984) (parties can utilize prior felony convictions without rule 609(a) weighing process in civil cases); 10 J. MOORE & H. BENDIX, *MOORE'S FEDERAL PRACTICE* § 609.14 [4] (2d ed. 1988) (stating that rule 609(a)(1) sensibly cannot apply in civil cases); S. SALTZBURG & K. REDDEN, *FEDERAL RULES OF EVIDENCE MANUAL* 520 (4th ed. 1986) (noting that Congress intended special protection of rule 609(a)(1) against prejudicial prior conviction evidence to protect only criminal defendants); Smith, *Impeaching the Merits: Rule 609(a)(1) and Civil Plaintiffs*, 13 N. KY. L. REV. 441, 462 (1987) (concluding that rule 609(a) should not apply to prior conviction evidence offered to impeach plaintiffs in civil trials); Note, *The Place for Prior Conviction Evidence in Civil Actions*, 86 COLUM. L. REV. 1267, 1273 (1986) (stating that courts should not apply rule

*Wilson*,<sup>83</sup> for example, inmate Roy Donald filed a civil rights action against prison officials who allegedly violated the inmate's eighth and fourteenth amendment rights.<sup>84</sup> The trial court admitted Donald's prior rape conviction into evidence, and the jury found for the defendants.<sup>85</sup> On appeal the Sixth Circuit studied whether rule 609(a) should exclude evidence of Donald's prior rape conviction.<sup>86</sup> The court noted, initially, that rule 609(a) refers to prejudice to the defendant, not to a plaintiff like Donald.<sup>87</sup> After extensively analyzing various courts' and commentators' opinions on whether to invoke the rule 609(a) balancing test in civil cases,<sup>88</sup> the Sixth Circuit concluded that Congress never intended rule 609(a) to address the impeachment of civil plaintiffs by prior conviction evidence.<sup>89</sup> Although the *Donald* court did not apply rule 609(a), the court affirmed the trial court's admission of evidence of Donald's prior rape conviction under rule 403.<sup>90</sup>

The *Campbell* court correctly adopted the Sixth Circuit's rationale in *Donald* that the rule 609(a) balancing test applies only to criminal defendants.<sup>91</sup> To support the holding that rule 609(a) applies to civil plaintiffs, the Fifth Circuit in *Petty* relied on Fifth Circuit precedent.<sup>92</sup> The *Petty*

609(a)(1) in civil actions); 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, 1073 (1986) (asserting that rule 609(a) offers no test for balancing probative value against prejudicial effect of prior conviction evidence in civil cases).

Other circuits have declined to resolve the issue of whether to apply the rule 609(a) balancing test in civil cases. See, e.g., *Brown v. Flury*, 848 F.2d 158, 159 (11th Cir. 1988) (finding scope of rule 609(a) not ripe for resolution); *Abshire v. Walls*, 830 F.2d 1277, 1281 (4th Cir. 1987) (declining to decide whether rule 609(a) applies to civil proceeding); *Wierstak v. Heffernan*, 789 F.2d 968, 972 (1st Cir. 1986) (failing to resolve whether rule 609(a) mandates admission of convictions in civil trial).

83. 847 F.2d 1191 (6th Cir. 1988).

84. See *Donald v. Wilson*, 847 F.2d 1191, 1193 (6th Cir. 1988) (stating basis of Donald's claim). Donald claimed that prison officials violated Donald's eighth and fourteenth amendment rights by taking away his prosthesis, which caused Donald to fall in the shower, and by using excessive force in removing Donald from his cell. *Id.*

85. *Id.* at 1193, 1194.

86. *Id.* at 1194-98.

87. *Id.* at 1195.

88. *Id.* at 1195-97. The *Donald* court specifically considered *Diggs v. Lyons*, *Campbell v. Greer*, commentators Weinstein, Moore, Louisell, Mueller, and other sources in studying the applicability of rule 609(a) to civil cases. *Id.*; see *supra* note 82 (listing courts and commentators who have limited use of rule 609(a) to criminal cases).

89. *Donald*, 847 F.2d at 1197 n.4.

90. *Id.* at 1197. The court explained that, although the probative value of Donald's prior conviction was slight, any potential prejudice to Donald was less. *Id.* at 1198. The court noted that the jury knew that Donald was a convicted felon because the testimony at trial described numerous jail-related instances. *Id.* Further, the court considered defense counsel's very brief inquiry into the details of Donald's rape conviction to present only a minimal risk of prejudice to the plaintiff. *Id.*

91. See *infra* notes 92-98 and accompanying text (supporting *Campbell* court's adopting Sixth Circuit's rationale in *Donald*); *supra* notes 83-90 and accompanying text (discussing Sixth Circuit's rationale for restricting application of rule 609(a) balancing test to criminal trials).

92. See *Petty v. Ideco*, 761 F.2d 1146, 1152 (5th Cir. 1985) (discussing rationale for

court then placed any rule 609(a) issue within the broad discretion of the trial court.<sup>93</sup> The *Petty* court completely failed to address the legislative history of rule 609.<sup>94</sup> In contrast, the Sixth Circuit in *Donald* appropriately analyzed rule 609's legislative history and concluded that the drafters of rule 609 were preoccupied with unfair prejudice to criminal defendants.<sup>95</sup> Consequently, the Sixth Circuit in *Donald*, unlike the Fifth Circuit in *Petty*, correctly followed the intent of the drafters of rule 609.<sup>96</sup> The *Campbell* court, faced with facts almost identical to *Donald*, similarly found legislative preoccupation with protecting criminal defendants and, therefore, restricted rule 609(a)'s application to criminal defendants.<sup>97</sup> Faced with a potential loss of liberty, criminal defendants deserve a heightened degree of protection from possibly prejudicial impeachment evidence.<sup>98</sup>

Although the Seventh Circuit in *Campbell* correctly determined that civil plaintiffs may not demand a rule 609(a) balancing test, the court erroneously concluded that courts may not exclude prior conviction evidence in a civil or a criminal trial under rule 403.<sup>99</sup> As a result of *Campbell* a party may introduce evidence of any prior criminal conviction, no matter how damaging, into a Seventh Circuit civil proceeding to impeach a witness.<sup>100</sup> Consequently, under the Seventh Circuit's reasoning, no party to a

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applying rule 609(a) balancing test to civil plaintiffs). The Fifth Circuit in *Petty* explained that, in *Howard v. Gonzales*, 658 F.2d 352, 358-59 (5th Cir. 1981), the court indicated that trial courts have broad discretion to apply the rule 609(a) balancing test in civil trials. *Id.*

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

94. See *supra* note 67 and accompanying text (discussing legislative history of rule 609).

95. See *Donald v. Wilson*, 847 F.2d 1191, 1197 (6th Cir. 1988) (holding that evidence of prior convictions offered to attack witness' credibility in civil trial is subject to rule 403 rather than rule 609(a) balancing test) (citing *Diggs v. Lyons*, 741 F.2d 577, 583 (3d Cir. 1984) (Gibbons, J., dissenting), *cert. denied*, 471 U.S. 1078 (1985)). The *Diggs* dissent, in part, persuaded the *Donald* court of the congressional preoccupation under rule 609 with protecting criminal defendants. *Donald*, 847 F.2d at 1197; see *supra* note 67 and accompanying text (discussing legislative history of rule 609).

96. See *supra* note 67 and accompanying text (discussing legislative history of rule 609).

97. See *Campbell v. Greer*, 831 F.2d 700, 704 (7th Cir. 1987) (discussing restriction of rule 609(a) to criminal defendants). The United States Supreme Court should decide the issue of rule 609's applicability to civil trials in *Green v. Bock Laundry Machine Co.*, 845 F.2d 1011 (3d Cir. 1988), *cert. granted*, 57 U.S.L.W. 3029 (U.S. July 19, 1988) (No. 87-1816). *Green* presents to the Court the specific question of whether rule 609 mandates the admission of any felony conviction against a civil plaintiff in a tort action. See 57 U.S.L.W. at 3029 (summarizing issue in *Green*). The Third Circuit in *Green* permitted defense counsel to attack the plaintiff's credibility by introducing evidence that the plaintiff had received a conviction for statutory rape because the defendant had had consensual sexual relations with a girl younger than 14 and, in addition, that the plaintiff had participated in a burglary. See *id.* (relying on *Diggs v. Lyons*, 741 F.2d 577 (3d Cir. 1984), *cert. denied*, 471 U.S. 1078 (1985)).

98. See generally W. LAFAYE & J. ISRAEL, *CRIMINAL PROCEDURE* 26 (1985) (noting that protecting accused is important goal of criminal process and one that requires great accuracy of guilty verdict).

99. See *infra* notes 104-08, 137-42 and accompanying text (discussing injustice of *Campbell* court's rule 403 holding).

100. See *Campbell v. Greer*, 831 F.2d 700, 708 (1987) (discussing consequences of *Campbell*

civil suit may enjoy the protection of a rule 403 balancing of prejudicial effect against probative value.<sup>101</sup> By holding that rule 403 may not exclude prior conviction evidence that a party offers for impeachment purposes, the *Campbell* court failed to consider the legislative intent behind rule 403 and the case law that supports applying rule 403 to prior conviction evidence in civil trials.<sup>102</sup>

The Advisory Committee's Note to rule 403 suggests that rule 403 is a general rule of evidence that governs when no specific rule of evidence applies.<sup>103</sup> After holding a specific rule, rule 609(a), inapplicable to prior conviction evidence in civil trials, the next logical step for the *Campbell* court would have been to apply rule 403 in civil trials.<sup>104</sup> The Seventh Circuit, nonetheless, failed to take the logical step of applying rule 403 and, instead, removed the entire prior conviction issue beyond the scope of rule 403.<sup>105</sup> Numerous commentators agree that Congress intended rule 403 to apply generally to exclude unfairly prejudicial evidence in civil and criminal trials.<sup>106</sup> Rule 403 allows a trial judge to exclude evidence that the judge believes presents a great risk of unfair prejudice to the defendant.<sup>107</sup> By placing prior conviction evidence outside the reach of both the rule 403 and the rule 609(a) balancing tests, the Seventh Circuit runs a substantial risk of allowing prior conviction evidence to prejudice parties in civil trials.<sup>108</sup>

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decision). The concurring judge in *Campbell* notes that, under the majority's analysis, the trial judge has no discretion to exclude even highly prejudicial evidence of prior criminal convictions. *Id.*

101. *Id.*

102. See *infra* notes 103, 106-07, 124-35 and accompanying text (discussing advisory committee's note, commentators, and case law addressing rule 403's applicability in civil cases).

103. See FED. R. EVID. 403 advisory committee's note (discussing use of rule 403 in absence of specific rule of evidence). The relevancy rules in Article IV of the Federal Rules of Evidence are concrete applications created for particular situations. *Id.* However, these Article IV rules reflect the policies underlying rule 403, which is a general guide that governs when no specific rule applies. *Id.*

104. See *infra* notes 106, 124-35 and accompanying text (discussing widespread application of rule 403 to prior conviction evidence in civil trials).

105. *Campbell v. Greer*, 831 F.2d 700, 706 (7th Cir. 1987); see *Diggs v. Lyons*, 741 F.2d 577, 583 (1984) (Gibbons, J., dissenting) (declaring that majority incorrectly placed use of prior conviction evidence outside of court's discretion under rule 403), *cert. denied*, 471 U.S. 1078 (1985).

106. See, e.g., C. MCCORMICK, EVIDENCE § 185 at 545 (3d ed. 1984) (stating that rule 403 codifies common-law power of judges to exclude prejudicial relevant evidence); S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 141 (4th ed. 1986) (noting that few rules, with possible exception of rule 609(a)(2), deny judges discretion to exclude prejudicial evidence under rule 403); 1 J. WEINSTEIN, EVIDENCE 403[01] at 403-5 (1988) (noting that balancing approach of rule 403 applies to all types of impeachment evidence except possibly rule 609(a)(2) offenses).

107. See *supra* note 6 and accompanying text (text of rule 403).

108. See *Campbell v. Greer*, 831 F.2d 700, 704, 706 (7th Cir. 1987) (holding that neither rule 609 nor rule 403 apply to prior conviction evidence offered to impeach witnesses in civil trials); *supra* note 69 and accompanying text (discussing dangers of allowing prior conviction evidence into civil trials).

The only federal circuit court opinion that supports the *Campbell* court's limitation on the applicability of rule 403 to prior conviction evidence is *Diggs v. Lyons*.<sup>109</sup> In *Diggs* the United States Court of Appeals for the Third Circuit addressed a civil rights action against various prison officials.<sup>110</sup> The plaintiffs alleged that certain officials used excessive force to prevent the plaintiffs' escape from prison.<sup>111</sup> The trial court, over objection by Diggs' counsel, permitted counsel for the defendants to introduce Diggs' prior convictions into evidence.<sup>112</sup> The jury returned a verdict in favor of the defendants.<sup>113</sup>

On appeal the Third Circuit upheld the lower court's admission of the prior conviction evidence under rule 609(a).<sup>114</sup> The court studied the legislative history of rule 609<sup>115</sup> and found no suggestion that Congress intended to limit the applicability of rule 609(a) to criminal cases.<sup>116</sup> In essence the *Diggs* court held that rule 609(a) preempts rule 403 in determining the admissibility of prior conviction evidence.<sup>117</sup> The Third Circuit concluded that rule 403 gives the trial judge no authority beyond rule 609(a) to exclude prior conviction evidence.<sup>118</sup> The only authority that the *Diggs* court cited

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109. 741 F.2d 577 (3d Cir. 1984), *cert. denied*, 471 U.S. 1078 (1985).

110. *Diggs v. Lyons*, 741 F.2d 577, 578 (3d Cir. 1984), *cert. denied*, 471 U.S. 1078 (1985). The plaintiffs in *Diggs* sued under 42 U.S.C. § 1983, alleging that the defendants unconstitutionally used excessive force in preventing plaintiffs' escape from prison. *Id.*

111. *Id.*

112. *Id.* Defense counsel cross-examined Diggs on his prior convictions for murder, bank robbery, attempted prison escape, and criminal conspiracy. *Id.*

113. *Id.*

114. *Id.* at 582.

115. *Id.* at 579-81. The *Diggs* court conceded that Congress, in devising rule 609(a), primarily focused on criminal cases and criminal defendants. *Id.* at 580-81.

116. *Id.* at 581. In particular, the statements of Representatives Dennis, Hogan, and Lott influenced the *Diggs* court that rule 403 does not apply to prior conviction evidence in civil cases because a specific rule, rule 609, governs all questions concerning the admissibility of prior conviction evidence. *Id.*; see *supra* note 66 and accompanying text (remarks of Representatives Dennis, Hogan, and Lott).

A thorough examination of the rule 609 legislative debate suggests that the *Diggs* court rested its decision that rule 609 would apply to exclude prior conviction evidence offered in civil cases exclusively on a few atypical remarks that the *Diggs* court gleaned from the Congressional debate of rule 609. See *supra* note 66 and accompanying text (discussing legislative history of rule 609). The primary Congressional concern during the debate over rule 609 was with potential prejudice to criminal defendants. See *supra* note 67 (containing House Conference Committee remarks on rule 609).

117. See *Diggs*, 741 F.2d at 582 (suggesting that *Diggs* court found that rule 609(a) preempts rule 403 with respect to prior conviction evidence).

118. *Id.* at 581. The *Diggs* court relied on *United States v. Wong*, 703 F.2d 65 (3d Cir.), *cert. denied*, 464 U.S. 482 (1983), in holding that rule 609 precludes applicability of rule 403 to exclude prior conviction evidence. *Diggs*, 741 F.2d at 581. In *Wong*, the trial court convicted Wong of mail fraud and violation of the Racketeer Influenced and Corrupt Organizations Act. *Wong*, 703 F.2d at 66. On appeal Wong argued that the trial court erroneously admitted evidence of two prior convictions involving rule 609(a)(2) crimes without weighing the prejudicial effect of the evidence under rule 403. *Id.* The United States Court of Appeals for the Third Circuit upheld the lower court's admission of the evidence. *Id.* at 68. The Third Circuit held



for the proposition that rule 609(a) completely displaces rule 403 with respect to prior conviction evidence was a single criminal case in which the Third Circuit considered the admissibility of various rule 609(a)(2) crimes.<sup>119</sup> Accordingly, the *Diggs* court relied, in a civil case, on the rationale of a criminal case involving crimes of dishonesty and false statement.<sup>120</sup> The *Diggs* court's limitation of rule 403, therefore, stands on weak precedent and offers insufficient support for the *Campbell* court's holding that courts may not apply rule 403 to prior conviction evidence offered for impeachment of witnesses in civil cases.<sup>121</sup>

In contrast to the *Campbell* court, the majority of federal courts have applied rule 403 more flexibly to prior conviction evidence that a party introduces to impeach a witness in a civil case.<sup>122</sup> Although courts generally agree that rule 609(a) applies to prior conviction evidence in criminal trials,<sup>123</sup> numerous courts have held that the rule 403 balancing test similarly protects parties to civil trials from unfairly prejudicial prior conviction evidence.<sup>124</sup> One of the first civil cases to apply rule 403 to prior conviction evidence is *Shows v. M/V Red Eagle*.<sup>125</sup> In *Shows* an employee sued his employer to

that the rule 403 balancing test is not applicable to impeachment by evidence of rule 609(a)(2) convictions. *Id.*

119. *Diggs*, 741 F.2d at 581; see *supra* note 118 (discussing *Diggs* court's reliance on criminal case of *United States v. Wong*, 703 F.2d 65 (3d Cir. 1983)).

120. *Diggs*, 741 F.2d at 581. Judge Gibbons, the dissenting judge in *Diggs*, characterized the majority's holding as activist. *Id.* at 583. Judge Gibbons argued that the majority had blazed its own trail by ruling that the admission of prior conviction evidence for impeachment of any witness in a civil trial is mandatory. *Id.* The dissenting judge noted that under the majority's holding an attorney could, for example, use prior conviction evidence to impeach a totally disinterested witness testifying on whether a light at an intersection was red or green. *Id.* Judge Gibbons concluded that requiring courts to admit prior conviction evidence in all cases would produce absurd results at trial. *Id.*

121. See *supra* notes 39-48 and accompanying text (discussing *Campbell* court's refusal to apply rule 403 in context of prior conviction evidence).

122. See *infra* notes 124-35 and accompanying text (discussing majority position on rule 403's role with respect to prior conviction evidence in civil cases).

123. See *supra* note 72 and accompanying text (discussing courts that have applied rule 609(a) to prior conviction evidence in criminal trials).

124. See, e.g., *Donald v. Wilson*, 847 F.2d 1191, 1197 (6th Cir. 1988) (holding that evidence of prior conviction used to impeach party or nonparty witness in civil trial is subject to rule 403 balancing test); *Abshire v. Walls*, 830 F.2d 1277, 1281 (4th Cir. 1987) (affirming, under rule 403, trial court's exclusion of civil plaintiff's prior conviction); *Wierstak v. Heffernan*, 789 F.2d 968, 972 (5th Cir. 1986) (upholding trial court's exclusion in civil trial under rule 403 of prior convictions for possession of hypodermic needle and heroin); *Czajka v. Hickman*, 703 F.2d 317, 319 (8th Cir. 1983) (ruling that courts must apply rule 403 in civil cases when party seeks to cross-examine opposing party about criminal convictions); *Shows v. M/V Red Eagle*, 695 F.2d 114, 118 (5th Cir. 1983) (concluding that protective effect of rule 403 pervades rules of evidence including prior conviction evidence in civil trials); *Moore v. Volkswagenwerk*, 575 F. Supp. 919, 921-22 (D. Md. 1983) (deciding that rule 403 rather than rule 609(a) applies to exclude prior conviction evidence in civil case); *Tussel v. Witco Chem. Corp.*, 555 F. Supp. 979, 984 (W.D. Pa. 1983) (holding that rule 609(a) does not preclude courts from applying rule 403 balancing test to prior conviction evidence in civil case).

125. 695 F.2d 114 (5th Cir. 1983).

recover for injuries that the employee incurred while working on the employer's boat.<sup>126</sup> The defendant employer sought to impeach the plaintiff's credibility by introducing evidence of the plaintiff's prior conviction for armed robbery.<sup>127</sup> The trial court admitted the evidence, and the jury held for the defendant.<sup>128</sup> On appeal the Fifth Circuit declined to rule on whether courts should apply the rule 609(a) balancing test in civil trials and, instead, reversed the trial court on the basis of rule 403.<sup>129</sup> The Fifth Circuit explained that the trial court improperly admitted evidence of Shows's prior conviction and, thereby, unfairly prejudiced Shows.<sup>130</sup> The *Shows* court conceded that the prior conviction was relevant to Shows' credibility.<sup>131</sup> The court concluded, however, that the prior conviction evidence was unfairly prejudicial to the plaintiff because the conviction occurred ten years before the *Shows* lawsuit and because defense counsel unnecessarily probed into the nature of the offense, the prison time that Shows served, and the conditions of Shows' parole.<sup>132</sup> The court determined that the defense attorney used the prior conviction evidence primarily to trigger the jury's punitive instincts.<sup>133</sup> According to the Fifth Circuit, the trial judge should have recognized that the protective effect of rule 403 permeates the Federal Rules of Evidence and can apply to exclude prejudicial evidence of a prior conviction in a civil trial.<sup>134</sup> Consequently, the *Shows* court reversed the trial court for failing to apply rule 403 to exclude evidence of Shows' prior conviction.<sup>135</sup>

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126. See *Shows v. M/V Red Eagle*, 695 F.2d 114, 115 (5th Cir. 1983) (finding reversible error because of admission in civil trial of plaintiff's ten-year old conviction for armed robbery). Shows claimed that the defendants were negligent in maintaining and controlling the boat at the time of the accident. *Id.* Shows testified that as he swung on a rope from the platform to the deck of the ship, the deck rose with the surge of the ship, resulting in his injury. *Id.* at 116.

127. *Id.* During cross-examination of Shows, the defense counsel in *Shows* suggested that Shows had been in prison. *Id.* After an extended bench conference and an off-the-record conference, defense counsel continued to interrogate Shows about his armed robbery conviction. *Id.*

128. *Id.* at 115.

129. *Id.* at 119. The *Shows* court noted, further, that the trial court abused rule 609 itself by allowing defense counsel to inquire at length into the details of the prior conviction. *Id.* The court maintained that evidence of the plaintiff's prior conviction had little probative value and a great deal of prejudice. *Id.* at 115. The *Shows* court concluded, therefore, that rule 609 would have excluded the evidence. *Id.* at 119. The *Shows* court decided, however, to use rule 403 to exclude the evidence. *Id.*

130. *Id.* at 118.

131. *Id.*

132. *Id.*

133. *Id.* at 119.

134. *Id.* at 118. The *Shows* court reasoned that the protective effect of rule 403 pertains to all of the Federal Rules of Evidence. *Id.*; see *Jones v. Board of Police Comm'rs*, 844 F.2d 500, 505 (8th Cir. 1988) (citing with approval *Shows*' holding that rule 403 applies throughout Rules of Evidence), *petition for cert. filed*, — U.S.L.W. — (U.S. Aug. 18, 1988) (No. —); *Czajka v. Hickman*, 703 F.2d 317, 319 (8th Cir. 1983) (same).

135. *Shows*, 695 F.2d at 119.

While courts and commentators alike have cited with approval the *Shows* court's application of rule 403 to prior conviction evidence,<sup>136</sup> the *Campbell* court declined to follow *Shows*.<sup>137</sup> In *Campbell*, by refusing to apply rule 403 to prior conviction evidence in a civil trial, the Seventh Circuit unreasonably eliminated rule 403 protection.<sup>138</sup> The *Campbell* court's construction of rule 403, combined with the court's narrow reading of rule 609(a), permits a party in a civil trial to impeach a witness using evidence of any prior conviction, regardless of the relevance or prejudicial effect of the evidence.<sup>139</sup> By admitting evidence of prior convictions with no prior rule 609(a) or rule 403 balancing test, Seventh Circuit courts may permit unfairly prejudicial evidence to deny fair trials to civil parties.<sup>140</sup> The Seventh Circuit, therefore, should abandon its decision in *Campbell* regarding rule 403.<sup>141</sup> Seventh Circuit practitioners, meanwhile, can minimize the danger of *Campbell*'s rule 403 holding by requesting precautionary jury instructions when prior conviction evidence does not bear a strong relation to the substantive issues of a civil suit.<sup>142</sup>

136. See *infra* note 138 and accompanying text (discussing propriety of applying rule 403 to prior conviction evidence).

137. See *Campbell v. Greer*, 831 F.2d 700, 706 (7th Cir. 1987) (refusing to follow *Shows*).

138. See *id.* (holding that court may not exclude prior conviction evidence under rule 403 in either criminal or civil case); S. SALTZBURG & K. REDDEN, *FEDERAL RULES OF EVIDENCE* 520-21 (4th ed. 1986) (contending that Congress intended general notion of balancing harmful attributes of prior convictions to protect all parties, not just criminal defendants, against undue prejudice); 1 J. WEINSTEIN, *EVIDENCE* 403[01] at 403-05 (1988) (asserting that courts should employ rule 403 balancing test to determine admissibility of all types of impeachment evidence, except possibly in cases involving rule 609(a)(2) crimes); Note, *The Place for Prior Conviction Evidence in Civil Actions*, 86 COLUM. L. REV. 1267, 1282 (1986) (arguing that judges must subject prior felony evidence in civil cases to rule 403 balancing test); 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, 1078 (1986) (suggesting that judges apply rule 403 to prior conviction evidence in civil trials to guard against possible unfair prejudice); Comment, *Tussel v. Witco Chemical Corp.*, 22 DUQ. L. REV. 535, 545 (1984) (asserting that rule 403 may exclude prior conviction evidence in civil trials even if rule 609 also applies); Comment, *Evidence—Impeachment of Witnesses by Prior Felony Convictions: A New Approach in Civil Litigation*, 13 MEM. ST. U.L. REV. 413, 421 (1983) (agreeing with *Tussel* court's holding that rule 609 does not preclude application of rule 403 in civil case).

139. *Campbell*, 831 F.2d at 708 (Will, J., concurring); see *supra* note 100 and accompanying text (discussing trial judges' lack of discretion after *Campbell* to exclude even highly prejudicial evidence).

140. See *supra* note 69 and accompanying text (discussing dangers of admitting prior conviction evidence).

141. See COMMITTEE ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, *PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE, FEDERAL RULES OF CIVIL PROCEDURE, FEDERAL RULES OF BANKRUPTCY PROCEDURE AND THE FEDERAL RULES OF EVIDENCE* 29 (1988) (suggesting that courts admit prior conviction evidence that party offers for impeachment of any witness other than criminal defendant, but subject to rule 403).

142. See 2 D. LOUISELL & C. MUELLER, *FEDERAL EVIDENCE* § 125 at 19 (1985) (stating that institution of jury system implies some faith in limiting instructions and in good sense of jury members). Precautionary jury instructions, however, may have only limited effectiveness.

In *Campbell v. Greer* the Seventh Circuit considered the proper application of rule 609(a) and rule 403 in excluding prior conviction evidence that a party offers for impeachment purposes in a civil trial.<sup>143</sup> Relying on the legislative history of rule 609 and precedent from other federal courts,<sup>144</sup> the *Campbell* court correctly concluded that the balancing test of rule 609(a) does not apply in civil actions.<sup>145</sup> However, by further concluding that courts may not exclude prior conviction evidence under rule 403,<sup>146</sup> the Seventh Circuit effectively ruled that a court in a civil trial must admit prior conviction evidence, regardless of the potentially prejudicial effect to the witness.<sup>147</sup> As a result of the Seventh Circuit's holding in *Campbell*, prior criminal convictions may overwhelm the substance of meritorious civil claims.<sup>148</sup> By preventing Seventh Circuit courts from excluding highly prejudicial prior conviction evidence under rule 403, the *Campbell* court potentially allows tangential criminal convictions to prevent a party to a civil suit from receiving a fair trial.<sup>149</sup>

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See 3 D. LOUISELL & C. MUELLER, *FEDERAL EVIDENCE* § 315 at 317 n.4 (1985) (citing survey suggesting ineffectiveness of jury instructions); *supra* note 69 and accompanying text (discussing possibility that jury may fail to limit consideration of prior conviction evidence to issue of witness' veracity).

143. See *supra* notes 28-48 and accompanying text (discussing *Campbell* court's analysis of rule 609 and rule 403).

144. See *supra* notes 67, 82-90 and accompanying text (discussing legislative history and case law concerning scope of rule 609).

145. See *supra* note 65 and accompanying text (discussing *Campbell* court's ruling that only criminal defendants may receive protection of rule 609(a) balancing test).

146. See *supra* note 138 and accompanying text (discussing *Campbell* court's ruling that court may not exclude prior conviction evidence under rule 403 in civil trial).

147. See *supra* notes 100-42 and accompanying text (discussing dangerous result of *Campbell* court's combined rule 609 and rule 403 holdings).

148. See *supra* notes 69, 120, 124-42 and accompanying text (discussing dangers of admitting prior conviction evidence without prior balancing of prejudicial effect against probative value).

149. See *supra* notes 69, 82, 120, 124-48 and accompanying text (discussing dangers of admitting prior conviction evidence and *Tussey* court's statement that prior conviction may be tangential to present case).

