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Minnesota's Distortion of Rule 609

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Minnesota's Distortion of Rule 609

Abstract

Rule of Evidence 609, which governs the admission of prior convictions of a witness for purposes of impeachment, occupies an important place in the day to day operation of American criminal trials. The rule is a compromise that reflects these competing values. It admits some prior convictions but not all. Crimen falsi offenses such as perjury and fraud are automatically admissible under 609(a)(2). All other felonies are analyzed under the balancing test of 609(a)(1), which allows the admission of a defendant-witness's crimes if the "probative value of admitting this evidence outweighs its prejudicial effect to the accused." The rule seeks to strike a balance, but Minnesota courts have upset that balance. Indeed, in Minnesota, the flexible, case-specific balancing test has been largely written out of the rule, replaced by a mechanical test that admits nearly all felonies for impeachment. Minnesota cases interpreting Rule 609 have departed from standards that prevail in other jurisdictions and also from the text itself. The aim of this article is to diagnose the specific points of departure and to suggest reconsideration of Minnesota's current Rule 609 jurisprudence.

Keywords
trial, evidence, criminal convictions, impeachment, testimony

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MINNESOTA’S DISTORTION OF RULE 609

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MINNESOTA’S DISTORTION OF RULE 609

Ted Sampsell-Jones

I. INTRODUCTION

Rule of Evidence 609, which governs the admission of prior convictions of a witness for purposes of impeachment, occupies an important place in the day to day operation of American criminal trials. The rule ostensibly admits prior convictions for one purpose only – to show the witness’s bad character for truthfulness. But especially when admitted against criminal defendants who take the stand, the use of prior convictions for impeachment presents a risk that juries will use the evidence for an improper purpose. As Justice Stevens once put it:

When the prior conviction is used to impeach a defendant who elects to take the stand to testify in his own behalf, two inferences, one permissible and the other impermissible, inevitably arise. The fact that the defendant has sinned in the past implies that he is more likely to give false testimony than other witnesses; it also implies that he is more likely to have committed the offense for which he is being tried than if he had previously led a blameless life. The law approves of the former inference but not the latter.

Juries are duly instructed to consider only the former inference and not the latter, but relevance is not so easily cabined. A substantial body of social science evidence suggests that jurors regularly use Rule 609 evidence...
for impermissible purposes. A defendant "who has a 'record' but who thinks he has a defense to the present charge, thus faces a harsh dilemma:” He must either give up his right to present his defense through his own testimony, or he must put his past crimes before the jury.

Rule 609 evidence thus threatens the goal of accurate verdicts in two ways: first, if a defendant testifies, Rule 609 evidence creates a risk of conviction on improper grounds; and second, if a defendant forgoes testifying to avoid the that risk, Rule 609 works to deprive the jury of a potentially important source of information. Balanced against these risks, however, is the rule's legitimate salutary function: It allows juries to better judge the credibility of witnesses, including defendant-witnesses.

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The rule is a compromise that reflects these competing values.\(^9\) It admits some prior convictions but not all. *Crimen falsi* offenses such as perjury and fraud are automatically admissible under 609(a)(2).\(^10\) All other felonies are analyzed under the balancing test of 609(a)(1), which allows the admission of a defendant-witness’s crimes if the “probative value of admitting this evidence outweighs its prejudicial effect to the accused.”\(^11\) The rule seeks to strike a balance.

Minnesota courts have upset that balance. Indeed, in Minnesota, the flexible, case-specific balancing test has been largely written out of the rule, replaced by a mechanical test that admits nearly all felonies for impeachment. Minnesota cases interpreting Rule 609 have departed from standards that prevail in other jurisdictions and also from the text itself. The aim of this article is to diagnose the specific points of departure and to suggest reconsideration of Minnesota’s current Rule 609 jurisprudence.

## II. BACKGROUND: THE GORDON TEST

Minnesota’s distortion of Rule 609 stems from its misapplication of the *Gordon* test. The *Gordon* test, derived from Warren Burger’s opinion in *Gordon v. United States*, is the dominant framework used by state and federal courts interpreting Rule 609(a)(1).\(^12\) In *Gordon*, then-Judge Burger sought to “give some assistance to the trial judge to whom we have assigned the extremely difficult task of weighing and balancing” the probative value and prejudicial effect of prior convictions offered for impeachment.\(^13\) He noted five factors that should be considered as part of the balancing test:

1. **The impeachment value of the prior crime:** “In common human experience acts of deceit, fraud, cheating, or stealing, for example, are universally regarded as conduct which reflects adversely on a man’s honesty and integrity. Acts of violence on the other hand, which may result from a short temper, a combative nature, extreme provocation, or other

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\(^9\) See *McCormick on Evidence*, *supra* note 6, § 42, at 187 (“The Federal Rule governing impeachment by proof of conviction of crime is the product of compromise.”).

\(^10\) Under Federal Rule 609(a)(2), “evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.”


causes, generally have little or no direct bearing on honesty and veracity.”

(2) *The staleness of the prior conviction:* “The nearness or remoteness of the prior conviction is also a factor of no small importance. Even one involving fraud or stealing, for example, if it occurred long before and has been followed by a legally blameless life, should generally be excluded on the ground of remoteness.”

(3) *The similarity between the past crime and the charged crime:* “[S]trong reasons arise for excluding those which are for the same crime because of the inevitable pressure on lay jurors to believe that ‘if he did it before he probably did so this time.’ As a general guide, those convictions which are for the same crime should be admitted sparingly . . . .”

(4) *The importance of defendant’s testimony:* “One important consideration is what the effect will be if the defendant does not testify out of fear of being prejudiced because of impeachment by prior convictions. Even though a judge might find that the prior convictions are relevant to credibility and the risk of prejudice to the defendant does not warrant their exclusion, he may nevertheless conclude that it is more important that the jury have the benefit of the defendant’s version of the case than to have the defendant remain silent out of fear of impeachment.”

(5) *The centrality of the credibility issue:* “[B]ecause the case had narrowed to the credibility of two persons – the accused and his accuser – and in those circumstances there was greater, not less, compelling reason for exploring all avenues which would shed light on which of the two witnesses was to be believed.”

When Congress drafted Rule 609, its discretionary balancing approach was based largely on the approach developed by the D.C. Circuit in cases like *Gordon.* In part for that reason, the *Gordon* test has remained

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14 *Gordon*, 383 F.2d at 940.
15 *Id.*
16 *Id.*
17 *Id.* at 940-41.
18 *Id.* at 941.
influential in post-Rules jurisprudence. The Gordon test continues to operate as an interpretive gloss on the probativeness-prejudice balancing test mandated by 609(a)(1). Many American jurisdictions use the five-factor Gordon test to assess prior convictions offered under 609(a)(1). Others use similar multi-factor tests with slight variations. At one point, the Advisory Committee on the Federal Rules considered amending Rule 609 to incorporate a multi-factor test based on Gordon but declined to do so "on the ground that it simply codified what Courts were generally doing under the Rule already."

Minnesota, like many other states, employs the Gordon test. Minnesota courts use the five Gordon factors to analyze evidence offered under Minnesota Rule 609(a)(1), which is substantially the same as Federal


21 "Since the federal Rules of Evidence have been codified, the federal courts have used those factors described in Gordon in determining the outcome of the balancing test for felonies." People v. Allen, 420 N.W.2d 499, 513 (Mich. 1988).


Several states have different versions of Rule 609 that do not involve any balancing test. Some states, for example, admit only crimes involving dishonesty and categorically exclude all others. See, e.g., ALASKA R. EVID. 609(a); HAW. R. EVID. 609(a). Other states categorically admit all felonies without regard to any balancing test. See, e.g., COLO. REV. STAT. § 13-90-101. For discussions of the differing approaches used by different states, see Allen, 420 N.W. 2d at 518-20; Dodson, supra note 8, at 12-28; Dannye W. Holley, Federalism Gone Far Astray from Policy and Constitutional Concerns: The Admission of Convictions to Impeach by State's Rules--1990-2004, 2 Tenn. J. L. & Pol'y 239, 256-93 (2006).

24 2 STEPHEN A. SALZBURY ET AL., FEDERAL RULES OF EVIDENCE MANUAL 1033 (2d ed. 1998).

Rule 609(a)(1). But the *Gordon* test works differently in Minnesota than it does elsewhere. Around the country, there is a substantial body of state and federal case law applying the *Gordon* factors, and, despite some jurisdictional variation, courts have developed a fairly consistent set of norms for applying the *Gordon* factors. Minnesota courts, however, do not adhere to those hornbook principles. When it comes to applying Rule 609 and the *Gordon* test, Minnesota is an outlier.

**III. DIAGNOSING MINNESOTA’S DEPARTURE**

Minnesota courts have, through a series of decisions, departed from traditional Rule 609 analysis under the *Gordon* test. Each point of departure would be, by itself, fairly inconsequential. But taken together, these departures have distorted Rule 609. Both the rule itself and the *Gordon* gloss are premised on notions of balance and discretion. Minnesota cases have lost the proper sense of balance, and they have replaced a flexible discretionary test with a more mechanical and one-sided rule.

**A. Factor One: The Nature of the Offense and the “Whole Person”**

The first factor of the five-factor *Gordon* test instructs courts to assess “the impeachment value of the prior crime.” In *Gordon* itself, Judge Burger noted that certain crimes such as fraud are highly probative of character for truthfulness, while other crimes, including impulsive, violent crimes, “have little or no direct bearing on honesty and veracity.” Different crimes, in other words, have varying degrees of probative value when used for impeachment.

By dividing crimes into two categories, Rule 609 reflects the same principle. Crimes such as perjury and fraud that involve “an act of dishonesty or false statement,” and thus bear directly on veracity, are automatically admissible under 609(a)(2). Other felonies shed less light on the nature of the offense.

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26 The federal version of the rule contains two different balancing tests, one for defendant-witnesses and a looser 403 balancing test (that is, a test tilted more in favor of admissibility) for all other witnesses. *See* FED. R. EVID. 609(a). Minnesota, by contrast, applies the single, stricter test to all witnesses. *See* MINN. R. EVID. 609(a).

27 *Jones*, 271 N.W.2d at 538.


29 *See* FED. R. EVID. 609(a) advisory committee’s note (“For purposes of impeachment, crimes are divided into two categories by the rule . . . .”). The rule implicitly treats a third category of offenses — misdemeanors not involving an act of false statement or dishonesty — as automatically inadmissible if offered to show character for truthfulness. *See* People v. Allen, 420 N.W.2d 499, 516-17 (Mich. 1988).

30 *See* FED. R. EVID. 609(a)(2); MINN. R. EVID. 609(a)(2); *see also* MUELLER & KIRKPATRICK, supra note 3, ¶ 6.32, at 501 (stating that 609(a)(2) crimes “have special probative worth on veracity” and are “automatically admissible”).
veracity and thus are only admissible subject to the discretionary balancing test of 609(a)(1).\(^3\)

Within the large category of crimes covered by 609(a)(1),\(^3\) courts have recognized further gradations of probative value.\(^3\) Rule 609(a)(1) reflects a view that all serious crimes have some bearing on veracity, on the theory that it is "improbable that one who undertakes to rob a bank with a gun will prove to be a person of high character who is devoted to the truth."\(^3\) As Judge Wald put it in her seminal opinion in United States v. Lipscomb, "Rule 609(a)(1) incorporates a congressional belief that all felony convictions . . . are somewhat probative of credibility, even crimes of impulse . . . ."\(^3\) But she was quick to add the following "important caveat":

[W]e have deliberately used the phrases "somewhat probative" or "probative to some degree" for no stronger statement could be made. Congress recognized, and it is obvious, that some prior convictions have little relationship to credibility while others are highly probative.\(^3\)

In other words, even if all felonies shed some light on veracity, they do not all shed the same amount of light.

Following Lipscomb, courts around the country have recognized that, among 609(a)(1) offenses, "certain crimes are more strongly related to truthfulness than others."\(^3\) The large body of case law interpreting Rule

\(^{31}\) See Fed. R. Evid. 609(a)(1); Minn. R. Evid. 609(a)(1); see also Mueller & Kirkpatrick, supra note 3, § 6.30, at 494 (stating that 609(a)(1) covers crimes whose connection to truthfulness is "less obvious").

\(^{32}\) Rule 609(a)(1) covers a broad class of crimes because Rule 609(a)(2) has a fairly narrow application. See United States v. Cunningham, 638 F.2d 696, 698 (4th Cir. 1981) ("Rule 609(a)(2), however, is confined to a narrow class of crimes which by their nature bear directly upon the witness' propensity to testify truthfully."); accord United States v. Brackeen, 969 F.2d 827, 830 (9th Cir. 1992); United States v. Smith, 551 F.2d 348, 362 (D.C. Cir. 1976). At the federal level, Rule 609(a)(2) was amended in 2006 to confirm its limited scope. See Fed. R. Evid. 609 advisory committee's note to 2006 amendment ("The amendment is meant to give effect to the legislative intent to limit the convictions that are to be automatically admitted under subdivision (a)(2).").

\(^{33}\) Surratt, supra note 13, at 931-32.

\(^{34}\) United States v. Halbert, 668 F.2d 489, 495 (10th Cir. 1982); see also Mueller & Kirkpatrick, supra note 3, § 6.30, at 494 ("FRE 609(a)(1) adopts the view that convictions for serious crimes bear on credibility.").

\(^{35}\) United States v. Lipscomb, 702 F.2d 1049, 1057 (D.C. Cir. 1983).

\(^{36}\) Id. at 1062.

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609(a)(1) has produced some standard guidelines for identifying which crimes have substantial probative value for truthfulness and which do not. [Some crimes] fall relatively high on the scale of probative worth on veracity, including especially crimes of theft and receiving stolen property. . . . Others fall lower on the scale, including especially crimes in which violence is the central feature, which in turn embraces many sex offenses. Also low on the scale are many drug crimes, and crimes against public morality, such as prostitution. The first factor of the Gordon test is assessed on a sliding scale; probative value under the first factor is a matter of degree. Minnesota courts, however, have departed from these guidelines and tend to ignore the gradations of probative value among 609(a)(1) crimes. In applying the first factor of the Gordon test, Minnesota courts rely on the "whole person" doctrine. The doctrine, borrowed from pre-Rules jurisprudence, holds that evidence of a prior conviction allows the jury to "see 'the whole person' and thus to judge better the truth of his testimony."

The object of a trial is not solely to surround an accused with legal safeguards but also to discover the truth. What a person is often determines whether he should be believed. When a defendant voluntarily testifies in a criminal case, he asks the jury to accept his word. No sufficient reason appears why the jury should not be informed what sort of person is asking them to take his word. In transactions of everyday life this is probably the first thing that they would wish to know. . . . Lack of trustworthiness may be evinced by his abiding and repeated contempt for laws which he is legally and morally bound to obey . . . though the violations are not concerned

McClure, 692 P.2d 579, 588-590 (Or. 1984); Theus v. State, 845 S.W.2d 874, 881 (Tex. Crim. App. 1992); 4 WEINSTEIN'S FEDERAL EVIDENCE, supra note 22, § 609.05[3][b].

See United States v. Brewer, 451 F. Supp. 50, 53 (E.D. Tenn. 1978) (stating that when the crime is not one shedding much light on veracity, the first factor weighs "against admitting them").
solely with crimes involving "dishonesty and false statement." \(^{42}\)

The continuing validity of the whole person doctrine under Rule 609 is debatable. \(^{43}\) On one hand, the whole person doctrine seems to revive what Wigmore called the "more primitive view of human nature" that led eighteenth century courts to admit evidence of bad general character for impeachment. \(^{44}\) Wigmore himself infamously endorsed one use of bad general character evidence for impeachment: evidence of a female accuser’s unchastity to show her lack of veracity in sexual assault cases. \(^{45}\) That antiquated view has been thoroughly repudiated by Rule 412. \(^{46}\) More generally, Rule 608 at least partially repudiates the view that all immoral acts bear on veracity. \(^{47}\) To the extent that the whole person doctrine revives the primitive view that any evidence of bad character is probative of truthfulness, it is partly in tension with modern evidence law. \(^{48}\)

On the other hand, the "primitive" view derided by Wigmore is precisely the view adopted by Rule 609. \(^{49}\) As Judge Wald found in

\(^{42}\) State v. Brouillette, 286 N.W.2d 702, 707 (Minn. 1979) (quoting State v. Duke, 123 A. 2d 745, 746 (N.H. 1956)).

\(^{43}\) Peter Thompson has described the Court’s reliance on pre-Rules jurisprudence in this context as “peculiar.” 11 Peter N. Thompson, Minnesota Practice—Evidence § 609.02, at 338 n.26 (3d ed. 2001).

\(^{44}\) 3A Wigmore on Evidence § 923, at 728 (Chadbourn rev. ed. 1970); see also id. § 980, at 828 (“If in a given jurisdiction general bad character is allowable for impeachment . . . then any offense will serve to indicate such bad character . . . .”). For an early statement of that “primitive” view, see Jeffrey Gilbert, The Law of Evidence 159 (London Henry Lintot 1756) (“[W]here a Man is convicted of Falsehood and other Crimes against the common Principles of Honesty and Humanity, his Oath is of no Weight.”). Based on that view, until the nineteenth century, most Anglo-American jurisdictions prevented defendants from testifying under oath. See McCormick on Evidence, supra note 6, § 42, at 74.

\(^{45}\) 3A Wigmore on Evidence § 924a, at 736 (“The unchaste (let us call it) mentality finds incidental but direct expression in the narration of imaginary sex incidents of which the narrator is the heroine or the victim.”).

\(^{46}\) See Fed. R. Evid. 412 (generally excluding evidence of an accuser’s sexual history or predisposition); Minn. R. Evid. 412 (same).

\(^{47}\) Rule 608 allows a party to impeach a witness with specific instances of conduct but only if those instances of conduct are “probative of truthfulness or untruthfulness.” Fed. R. Evid. 608(b); accord Minn. R. Evid. 608(b). “FRE 608 and modern cases reject the broad view” that “virtually any conduct indicating bad character also indicates untruthfulness.” Mueller & Kirkpatrick, supra note 3, § 6.25, at 481-82. For a discussion of the differences between Rule 608 and Rule 609, see Donald H. Zeigler, Harmonizing Rules 609 and 608(b) of the Federal Rules of Evidence, 2003 Utah L. Rev. 635.

\(^{48}\) “[T]he proper inquiry under ER 609(a)(1) is not whether the prior conviction shows a ‘non-law-abiding character’ but whether it shows the witness is not truthful.” State v. Hardy, 946 P.2d 1175, 1178 (Wash. 1997).

\(^{49}\) The Advisory Committee noted in its commentaries to the first draft that “[a] demonstrated instance of willingness to engage in conduct in disregard of accepted patterns is translatable into willingness to give false testimony.” Stephen A. Saltzberg & Kenneth R. Redden, Federal Rules Of Evidence Manual 557 (4th ed. 1986); see also People v. Allen, 420 N.W.2d 499, 506 (Mich. 1988).
Lipscomb, Rule 609(a)(1) appears to incorporate the view that all felonies are at least somewhat probative of truthfulness.\textsuperscript{50} To the extent that the whole person doctrine merely recognizes that conclusion, it is consistent with the case law of other jurisdictions, and it is at least arguably consistent with intent of the rule drafters.\textsuperscript{51}

Putting that theoretical debate to one side, Minnesota's interpretation of the first Gordon factor differs in a more concrete, more practical way. Minnesota courts tend to cite the whole person doctrine for the proposition that all crimes are relevant for impeachment, and thus that the first factor always favors admission. In so doing, they rarely if ever recognize varying degrees of impeachment. The Minnesota Supreme Court's opinion in State v. Gassler, upholding the admission of prior violent offenses for impeachment, provides an example.\textsuperscript{52} In analyzing the first Gordon factor, the court stated,

Generally, convictions for violent crimes lack the impeachment value of crimen falsi. See e.g., Gordon, 383 F.2d at 940. However, trial courts have great discretion in determining what prior convictions are admissible under the balancing test of Rule 609(a)(1). Moreover, the fact that a prior conviction did not directly involve truth or falsity does not mean it has no impeachment value. We have stated that impeachment by prior crime aids the jury by allowing it to see the "whole person" and thus to judge better the truth of his testimony.\textsuperscript{53}

The Gassler court recognized in passing that violent crimes have less probative value, but then cited the whole person doctrine as a compelling counterargument, and concluded that the first Gordon factor favored admission.

More regularly, especially in more recent cases, Minnesota courts do not even recognize in passing that various crimes have varying degrees of

\textsuperscript{50} See supra notes 34-36 and accompanying text. See also United States v. Lipscomb, 702 F.2d 1049, 1056 (D.C. Cir. 1983).

\textsuperscript{51} The intent of the drafters, however, is not entirely certain. On the hard question of "whether Rule 609(a)(1) incorporates a congressional belief that all felony convictions less than 10 years old are somewhat probative of credibility," Judge Wald found both the text and the legislative history of the rule to be uncertain. Lipscomb, 702 F.2d at 1057-61; see also David A. Sonenshein, Circuit Roulette: The Use of Prior Convictions to Impeach Credibility in Civil Cases Under the Federal Rules of Evidence, 57 GEO. WASH. L. REV. 279, 294 (1988) ("It must be apparent ... that if the conviction is for a crime having nothing to do with dishonesty, its revelation to the jury has virtually no relationship to the truth-telling as a witness ... ").

\textsuperscript{52} State v. Gassler, 505 N.W.2d 62, 66-67 (Minn. 1993).

\textsuperscript{53} Id. at 66-67 (other citations omitted) (internal quotation marks omitted). For similar holdings, see, for example, State v. Bias, 419 N.W.2d 480, 487 (Minn. 1988); State v. James, 638 N.W.2d 205, 211 (Minn. Ct. App. 2002). In a few older cases, the Minnesota Supreme Court appeared to more seriously acknowledge the limited impeachment value of certain crimes, but nonetheless upheld admission. See, e.g., State v. Bettin, 295 N.W.2d 542, 546 (1980).
probative value. Rather, they simply cite the whole person doctrine and conclude that the first factor favors admission—period. The Minnesota Supreme Court’s opinion in State v. Ihnot, upholding the admission of sexual assault convictions for impeachment, provides an example.\(^{54}\) Analyzing the first Gordon factor, the Ihnot court stated simply,

[I]mpeachment by prior crime aids the jury by allowing it to see the whole person and thus to judge better the truth of his testimony. Here, evidence of past criminal misconduct involving children could have been of assistance to the jury in weighing the credibility of the defendant. The first [Gordon] factor is satisfied on these facts.\(^{55}\)

The Ihnot mode of analysis, which takes no account of varying degrees of probative value, is now the norm in Minnesota courts.\(^{56}\)

The idea that different crimes have different degrees of probative value has been largely lost in Minnesota. Indeed, the idea that the nature of the prior offense is important has been lost. Application of the first factor is mechanical. It is simply a switch that is on or off, “satisfied” or “not satisfied,” and under the whole person doctrine, it is always satisfied.

**B. Factor Two: Staleness**

The second Gordon factor instructs courts to assess the staleness of a prior conviction. Judge Burger instructed that convictions become less probative as they age, and thus that older convictions generally should be excluded as having little bearing on the witness’s current veracity.\(^{57}\) The same principle is reflected in Rule 609(b), which generally excludes convictions older than ten years.\(^{58}\)

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\(^{54}\) State v. Ihnot, 575 N.W.2d 581, 586-88 (Minn. 1998).

\(^{55}\) Id. at 587 (citation omitted).

\(^{56}\) See, e.g., State v. Davis, 735 N.W.2d 674, 680 (Minn. 2007) (admitting five unnamed felonies, relying on the “whole person” doctrine); State v. Pendleton, 725 N.W.2d 717, 728-29 (Minn. 2007) (admitting prior convictions of terroristic threats and fleeing a police officer); State v. Swanson, 707 N.W.2d 645, 655 (Minn. 2006) (admitting prior convictions of assault, among others); State v. Smith, 669 N.W.2d 19, 29 (Minn. 2003) (admitting convictions of assault, sexual assault, and drug offense); State v. Moorman, 505 N.W.2d 593, 604 (Minn. 1993) (admitting prior conviction of assault); State v. Amos, 347 N.W.2d 498, 502-03 (Minn. 1984) (admitting prior convictions of robbery and aggravated rape); State v. Flemino, 721 N.W.2d 326, 329 (Minn. Ct. App. 2006) (admitting prior convictions of burglary and drug possession); State v. Vanhouse, 634 N.W.2d 715, 719 (Minn. Ct. App. 2001) (admitting prior conviction of sexual assault).

\(^{57}\) See Gordon v. United States, 383 F.2d 936, 940 (D.C. Cir. 1967).

\(^{58}\) Under 609(b), crimes older than ten years are inadmissible “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.” FED. R. EVID. 609(b); accord MINN. R. EVID. 609(b).
For convictions less than ten years old, remoteness is still a relevant factor.59 As Judge Wald explained in Lipscomb, "Rule 609(b) reflects Congress' belief that 'convictions over ten years old generally do not have much probative value.' This implies that many 9-year-old convictions are only slightly probative; probativeness does not suddenly vanish when the 10-year mark is reached."60 Following Lipscomb, most courts analyzing the second Gordon factor recognize that even for those crimes younger than ten years, "[t]he probative value of a conviction decreases as its age increases."61 In other jurisdictions, staleness is a matter of degree.62

Once again, Minnesota courts generally do not recognize these gradations. Minnesota courts simply hold that so long as a conviction falls within the ten-year limit, the second Gordon factor is "satisfied" — that is, it favors admission.63 The second Gordon factor, like the first Gordon factor, is a binary inquiry, not a matter of degree.

Making matters worse, Minnesota courts interpret Rule 609(b) more loosely than other jurisdictions. Rule 609(b) expresses a rule of presumptive exclusion for stale convictions. The drafters of Federal Rules of Evidence expressed an intent that convictions older than ten years should be admitted "very rarely and only in exceptional circumstances,"64 and most courts have

59 See United States v. Figueroa, 618 F.2d 934, 942 (2d Cir. 1980) ("Both Rule 609 and Rule 403, which is pertinent here, oblige the trial court to assess the probative value of every prior conviction offered in evidence and the remoteness of a conviction, whatever its age, is always pertinent to this assessment.").


61 4 WEINSTEIN'S FEDERAL EVIDENCE, supra note 22, § 609.05[3][c]. "FRE 609(b) creates in effect a presumption that a conviction more than ten years old should be excluded, but even the age of a more recent conviction may tip the balance in favor of exclusion." MUELLER & KIRKPATRICK, supra note 3, § 6.31, at 498. See also United States v. Field, 625 F.2d 862, 872 (9th Cir. 1980) ("[T]he conviction occurred less than two years prior to Field's trial, thus being more probative of veracity than comparatively older crimes."); State v. Gardner, 433 A.2d 249, 252 (Vt. 1981) ("Older crimes are less relevant to the issue of the defendant's credibility.").

Thus, eight and nine year old convictions, even though they fall within the ten-year limit, are more likely to be excluded. See, e.g., United States v. Beahm, 664 F.2d 414, 419 (4th Cir. 1981); United States v. Paige, 464 F. Supp. 99, 100 (E.D. Pa. 1978). Conversely, more recent convictions are more likely to be admitted. See, e.g., United States v. Causey, 9 F.3d 1341, 1344 (7th Cir. 1993); United States v. Jackson, 696 F.2d 578, 589 (8th Cir. 1982); United States v. Field, 625 F.2d 862, 872 (9th Cir. 1980); United States v. Hayes, 553 F.2d 824, 828 (2d Cir. 1977).

62 Surratt, supra note 13, at 933-35.


interpreted the provision accordingly. The standard in Minnesota is looser, and Minnesota courts admit convictions older than ten years fairly regularly.

The principle that the probative value of convictions decreases with age is reflected in both the text of Rule 609 and in the body of case law interpreting the rule. In Minnesota, that principle carries less weight.

C. Factor Three: Similarity

The third Gordon factor instructs courts to assess the similarity between the prior conviction and the charged offense. While the first two factors are intended to measure the probative value of the prior conviction, the third factor is intended to measure its potential for unfair prejudice. Greater similarity produces a greater risk of unfair prejudice. Judge Burger thus wrote that similar prior convictions should be "admitted sparingly" because they produce "the inevitable pressure on lay jurors to believe that 'if he did it before he probably did so this time.'"

State and federal courts around the country have repeatedly reaffirmed that principle. "The generally accepted view . . . is that evidence..."
of similar offenses for impeachment purposes under Rule 609 should be admitted sparingly if at all."

Minnesota courts, however, do not conform to that generally accepted view. They regularly uphold the admission of similar priors for impeachment. Minnesota courts give less weight to the third factor, and moreover, they have narrowed the definition of similarity. The Minnesota Supreme Court in *Ihnot* suggested that even a conviction for the same offense does not count as "similar" so long as "the facts underlying each charge are sufficiently different." Applying that rationale, the court held that the third factor actually *favored* the admission of prior convictions that were the same offense as the charged crime.

In other jurisdictions, the third Gordon factor is interpreted to mean that the similarity of crimes counts strongly against admission. In Minnesota, by contrast, the third Gordon factor has been interpreted to support the admission of the very same offense for impeachment. Minnesota's application of the third factor marks another significant departure from generally prevailing norms of Rule 609 jurisprudence.

**D. Factors Four and Five: Cancellation or Combination**

The combined application of the fourth and fifth Gordon factors is strange even outside of Minnesota. Under the fourth factor, the importance of

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To be sure, not all jurisdictions take such a restrictive approach. *See, e.g.*, Griffin v. State, 823 S.W.2d 446, 447 (Ark. 1992) ("When a defendant chooses to testify, we have consistently allowed prior convictions to be used for impeachment, even when the convictions are of crimes similar to the charged offense."). Even when admitting similar prior convictions, however, most courts at least note that similarity is a factor that weighs in favor of exclusion. *See, e.g.*, United States v. Hernandez, 106 F.3d 737, 740 (7th Cir. 1997).

69 United States v. Sanders, 964 F.2d 295, 297-98 (4th Cir. 1992); accord 4 *WEINSTEIN’S FEDERAL EVIDENCE*, supra note 22, § 609.05[3][d].

70 Minnesota courts “have been liberal in admitting prior convictions for impeachment even when the prior crime is the same as the crime charged.” State v. Stanifer, 382 N.W.2d 213, 218 (Minn. Ct. App. 1986). *See also, e.g.*, State v. Frank, 364 N.W.2d 398, 399 (Minn. 1985) (upholding the admission of prior rape convictions in a rape case); State v. Bettin, 295 N.W.2d 542, 546 (Minn. 1980) (upholding the admission of a prior rape conviction in a rape case); State v. Brouillette, 286 N.W.2d 702, 708 (Minn. 1979) (upholding the admission of a rape conviction in a rape case); State v. Steeprock, No. A04-1016, 2005 Minn. App. LEXIS 615, at *5 (Minn. Ct. App. June 7, 2005) (upholding the admission of a prior assault in an assault case); State v. Vanhouse, 634 N.W.2d 715, 720 (Minn. Ct. App. 2001) (upholding the admission of a prior rape conviction in a rape case).


72 In the court's words, despite the fact that the prior conviction was for the same offense, the third factor was "satisfied" because the facts were sufficiently different. *Ihnot*, 575 N.W.2d at 587.

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a defendant's testimony favors exclusion of priors because admission might dissuade him from testifying. Under the fifth factor, the importance of a defendant's credibility favors admission of prior convictions because its admission will shed more light on credibility.

The combined application of these two factors is strange for two reasons. First, it is unclear whether the factors really measure probative value and prejudicial effect or whether they are "merely restatements of the conflicting interests that Congress balanced in adopting the rule."73 Second, the two factors seem to simply cancel each other out regardless of the circumstances of the case.74 As the Oregon Supreme Court noted,

We recognize that factors (4) and (5) relating to the importance of the testimony to the defendant and the impeachment evidence to the state usually offset each other in a criminal case and, therefore, do not require comments or findings of the trial judge as required by factors (1), (2) and (3).

As one of these factors increases in importance in a particular case, so does the other. For example, if a case boils down to a "swearing match" between the defendant and the victim — a situation in which only one of the witnesses can be telling the truth — both sides can make a strong argument under factors (4) and (5).75

This anomaly of the Gordon test, however, is harmless. If the fourth and fifth factors offset each other, then they should not affect the outcome.76

In Minnesota, however, the fourth and fifth factors do not offset because the application of the fourth factor has been turned on its head. Other jurisdictions apply the fourth factor to mean that the importance of the defendant's testimony favors exclusion.77 That is, after all, what Judge

73 Surrratt, supra note 13, at 943.
74 "When one [of these two factors] increases in importance, the other does also, and there appears to be no principled way to determine which factor should prevail." Id. at 945; see also Bruce P. Garren, Note, Impeachment By Prior Conviction: Adjusting to Federal Rule of Evidence 609, 64 CORNELL L. REV. 416, 435 n.114 (1979) (observing "as the need for the defendant's testimony becomes more critical, so does the credibility issue").
75 State v. McClure, 692 P.2d 579, 591 (Or. 1984) (footnotes omitted). The Maryland Supreme Court has also puzzled over the fourth and fifth factors, suggesting that "these two factors can be interpreted to weigh either for or against admitting prior convictions." Jackson v. State, 668 A.2d 8, 16 (Md. 1995).
76 See, e.g., United States v. Brewer, 451 F. Supp. 50, 54 (E.D. Tenn. 1978) (concluding "[factors four and five seem to counterbalance each other in this case"]).
Burger intended. But Minnesota courts apply the fourth factor to mean that the importance of the defendant's testimony favors admission. The Minnesota Supreme Court has held that "[i]f credibility is a central issue in the case, the fourth and fifth [Gordon] factors weigh in favor of admission of the prior convictions." The court has never explained why it flipped the application of the fourth factor.

As they are applied in most jurisdictions, the fourth and fifth Gordon factors tend to offset one another. As they are applied in Minnesota, the fourth and fifth Gordon factors double-count the same value and both favor admission. The reversed fourth factor marks yet another departure from the rules that prevail in other jurisdictions.

E. Overall Function: Guidance or Control

Rule 609 and the Gordon test are premised on notions of flexibility, balance, and trial court discretion. The rule itself is the product of a hard-fought political debate that resulted in a compromise. Rather than mechanically admitting or excluding all prior offenses, the rule adopted an "intermediate view" that "permits the introduction of the defendant's prior convictions in the discretion of the judge.'

Rule 609(a)(1), which covers most felonies, mandates a balancing test. It makes felonies admissible against a testifying defendant "if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused." That language is simply a modified and

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78 As Judge Burger stated in explaining the rationale of the fourth factor:

Even though a judge might find that the prior convictions are relevant to credibility and the risk of prejudice to the defendant does not warrant their exclusion, he may nevertheless conclude that it is more important that the jury have the benefit of the defendant's version of the case than to have the defendant remain silent out of fear of impeachment.

Gordon v. United States, 383 F.2d 936, 940-41 (D.C. Cir. 1967). See also Gainor, supra note 19, at 783 (discussing the proper application of the fourth factor).


80 State v. Swanson, 707 N.W.2d 645, 655 (Minn. 2006).

81 In earlier cases, the Minnesota Supreme Court had interpreted the fourth factor consistently with Gordon — that is, the court had interpreted the fourth as weighing in favor of exclusion. See, e.g., State v. Bettin, 295 N.W.2d 542, 546 (Minn. 1980). The court appears to have changed its interpretation of the fourth factor for the first time in Ihnot. It did so without explanation. See State v. Ihnot, 575 N.W.2d 581, 587 (Minn. 1998).

82 For extensive discussions of the legislative history of the federal rule, see Victor Gold, Impeachment by Conviction Evidence: Judicial Discretion and the Politics of Rule 609, 15 CARDOZO L. REV. 2295, 2310-21 (1994).

83 MCCORMICK ON EVIDENCE, supra note 6, § 42, at 88.

84 FED. R. EVID. 609(a)(1).
more restrictive form of the Rule 403 balancing test. As with the Rule 403 balancing test, the Rule 609 balancing test should be a case-specific inquiry largely committed to the discretion of the trial judge.

Wise judges may come to differing conclusions in similar situations. Even the same item of evidence may fare differently from one case to the next, depending on its relationship to the other evidence in the case, the importance of the issues on which it bears, and the likely efficacy of cautionary instructions to the jury. Accordingly, much leeway is given trial judges who must fairly weigh probative value against probable dangers.

But discretion is not absolute under either Rule 403 or Rule 609. Discretion is guided, and ought to be guided, by principles developed in appellate opinions.

The Gordon test serves to guide discretion. The goal of the test was, as Judge Burger said, "give some assistance to the trial judge" who is assigned the task of weighing probative value against prejudicial effect. But while giving guidance and assistance, Gordon still emphasized flexibility and discretion. The Gordon factors were not intended as "firm guidelines" because, as Judge Burger cautioned, "the very nature of judicial discretion precludes rigid standards." Moreover, Judge Burger noted that the five factors he mentioned were not an exhaustive list, and that "there are many other factors that may be relevant in deciding whether or not to exclude prior convictions in a particular case." Most jurisdictions that employ the Gordon test maintain that spirit of flexibility in several ways. First, as described above, the various factors are measured on sliding scales. It is not the case that a certain factor either does

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85 While Rule 609 requires exclusion if the danger of prejudice outweighs probative value, Rule 403 only allows exclusion if the danger of prejudice substantially outweighs probative value. See United States v. Tse, 375 F.3d 148, 160 (1st Cir. 2004); State v. Martin, 704 N.W.2d 674, 676 n.1 (Iowa 2005); RONALD J. ALLEN ET. AL, EVIDENCE: TEXT, PROBLEMS, AND CASES 373 (4th ed. 2006); Uviller, supra note 8, at 799-800.


87 MCCORMICK ON EVIDENCE, supra note 6, § 185, at 739-40.

88 Gordon, 383 F.2d at 941; see also State v. Gary M.B., 676 N.W.2d 475, 483 n.9 (Wis. 2004) ("[T]he listed factors are merely elements to be considered when applying the 'particularized application' of the [Rule 403] balancing test under [Rule 609].").

89 Gordon, 383 F.2d at 941.

90 Id. at 940.

91 See supra sections III.A. and III.B.
or does not favor admissibility; rather, it favors admissibility to some degree. Second, different factors have different weight in different cases. The five factors are not always given equal weight, and in some cases, certain factors predominate. Third, the five Gordon factors are illustrative rather than exhaustive, and there are factors beyond the five that are often critically important.

And above all, it must be remembered that the Gordon factors are offered for guidance, and that the ultimate test is the balancing test mandated by Rule 609(a)(1) itself. As the New Mexico Supreme Court instructed,

While these [Gordon] factors may be useful in aiding a court to fairly determine whether to admit certain prior convictions, they are not to be considered mechanically or in isolation. The court should make every effort to strike a reasonable balance between the interests of the public and

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93 For example, in some cases where the previous conviction as for the same offense as the charged crime, courts have given the third factor extra weight. See, e.g., United States v. Sanders, 964 F.2d 295, 297-98 (4th Cir. 1992); United States v. Bagley, 765 F.2d 836, 841-42 (9th Cir. 1985); United States v. Coleman, No. 05-CR-295-02, 2006 WL 3208677 at *2-3 (E.D. Pa. Nov. 2, 2006); Jones v. State, 625 S.W.2d 471, 472 (Ark. 1981); State v. Daly, 623 N.W.2d 799, 802-03 (Iowa 2004). In other cases, where credibility is especially important because the trial depends on a swearing match between the defendant and his accuser, courts have given the fifth factor extra weight. See, e.g., United States v. Pritchard, 973 F.2d 905, 909 & n.6 (6th Cir. 1992); United States v. Castor, 937 F.2d 293, 298 (7th Cir. 1991); United States v. Huff, No. 97-6020, 1998 WL 385555 at *3 (6th Cir. June 30, 1998); United States v. Spero, 625 F.2d 779, 781 (8th Cir. 1980); United States v. Brown, 603 F.2d 1022, 1028 (1st Cir. 1979); State v. Askew, 716 A.2d 36, 45 (Conn. 1998) (citing additional cases).

94 “This list does not exhaust the range of possible factors, but it does outline the more basic concerns relevant to the balancing under Rule 609(a)(1).” United States v. Jackson, 627 F.2d 1198, 1209 (D.C. Cir. 1980). For example, several courts have noted that the availability of other means of impeachment reduces the probative value of 609 evidence. See, e.g., United States v. Johnson, 388 F.3d 96, 104 (3d Cir. 2004) (McKee, J., concurring); United States v. Bagley, 772 F.2d 482, 488 (9th Cir. 1985); Calver v. Ottawa County, No. 1:98 CV 133, 2001 U.S. Dist. LEXIS 1765, at *26-27 (W.D. Mich. Feb. 15, 2001); People v. Rist, 545 P.2d 833, 839 (Cal. 1976); State v. Martin, 704 N.W.2d 674, 676 (Iowa 2005); State v. Gardner, 433 A.2d 249, 252 (Vt. 1981). When the Federal Advisory Committee considered incorporating the Gordon factors into the text of the rule itself, its proposed rule added this as an additional factor: “other evidence offered or to be offered by the party to impeach the witness.” 2 SALTZBURG ET AL., supra note 24, at 1033.

This approach is consistent with the principles governing Rule 403. As the Advisory Committee to the Federal Rules stated, courts conducting a 403 balancing test should consider “availability of other means of proof.” FED. R. EVID. 403 advisory committee’s notes; see also Old Chief v. United States, 519 U.S. 172, 183 (1997) (holding that under Rule 403, courts should exclude evidence if the “discounted probative value” is substantially outweighed by the danger of unfair prejudice).
those of the defendant in disposing of the charges in accordance with the truth, keeping in mind the high degree of prejudice often associated with the introduction of a prior conviction at trial.95

Minnesota’s application of the Gordon test has become overly mechanical. The Gordon factors are not treated as sliding scales; rather, they are treated as binary switches that are either “satisfied” or “not satisfied.”96 Minnesota courts have rarely recognized that depending on the circumstances of the case, different factors should receive different weight.97 Nor have they recognized that other factors, such as the availability of other means of impeachment, should be considered. Applying the Gordon test in Minnesota is simply a matter of checking five boxes. Because the test is so mechanical, it serves more to control outcomes than it does to guide discretion.

F. The Resulting Imbalance

Minnesota’s interpretation of Rule 609 and its application of the Gordon test have thus departed in a variety of ways from the standards that prevail in other jurisdictions. The combined effect of those departures has been to make Minnesota’s version of the Gordon test almost entirely one-sided. A rule that was intended to admit some prior felonies while excluding others has been transformed into a rule that allows (or mandates) the admission of all felonies.98 The ideal of balance has been lost.

In a criminal case in Minnesota, the prosecution can admit seemingly any felony for impeachment under 609(a)(1) because under Minnesota’s interpretation of the Gordon test, the prosecution almost invariably wins each factor. The prosecution (1) wins the first prong, because under the whole person doctrine, all crimes are probative of untruthfulness; (2) wins the second prong for any crime within the ten-year limit; (3) wins the third prong, even if the prior conviction was for the same crime, so long as the facts were sufficiently different; (4) wins the fourth prong, because a

97 Cf. State v. Swanson, 707 N.W.2d 645, 656 (Minn. 2006) (“Because only one of the [Gordon] factors weighs against the admission of Swanson’s assault convictions . . . the district court did not abuse its discretion under Minn. R. Evid. 609(a)(1).”); State v. Mitchell, 687 N.W.2d 393, 398 (Minn. Ct. App. 2006) (“Because four of five [Gordon] factors weigh in favor of admitting the impeachment evidence, the district court did not abuse its discretion in determining that the evidence was more probative than prejudicial.”).
98 See Gold, supra note 82, at 2297-98. (“[T]he Rule expresses a clear preference for admitting conviction evidence in some situations while excluding it in others.”).
defendant's testimony is often important to the case; and (5) wins the fifth prong, because a defendant's credibility is often important.

The Minnesota Supreme Court's decision in *Ihnot* provides a striking example of how one-sided Minnesota's 609 jurisprudence has become and how far Minnesota has strayed from other jurisdictions. The defendant in *Ihnot* was charged with sexual assault, and as impeachment evidence, the state sought to introduce a nine-year-old sexual assault conviction. Under the standards that prevail in other jurisdictions, such a crime probably would not have been admitted for impeachment. The prior conviction had limited probative value because sexual assault convictions have little bearing on truthfulness and because it was barely within the ten-year limit of Rule 609(b). The prior conviction also had a significant potential for prejudice because it was for the same offense as the charged crime.

With such minimal probative value and such a high risk of unfair prejudice, the *Ihnot* conviction could have served as a paradigmatic example of a prior offense that ought to be excluded under *Gordon* and 609(a)(1). And yet the Minnesota Supreme Court upheld the admission of the prior offense. In fact, it found that all five *Gordon* factors favored admission.

The one-sidedness of Minnesota's version of the *Gordon* test can also be seen by surveying Minnesota appellate court opinions. The Minnesota Supreme Court adopted the *Gordon* test in 1978 in *State v. Jones*. Between 1978 and 2006, 234 appellate court opinions applying Rule 609 cited *Jones*. 215 of those cases involve appeals by criminal defendants claiming that a trial court improperly admitted their prior convictions as impeachment. Of those 215 cases, the prosecution prevailed in 214. The sole defense victory came in an unpublished Court of Appeals opinion that pre-dated *Ihnot*.

Recently, the Court of Appeals held in favor of a defendant appealing a 609(a)(1) ruling for only the second time since *Jones*. In *State v. Walker*, the defendant was charged with second-degree assault, and the trial judge admitted for impeachment evidence of a prior second-degree assault conviction. The ruling in *Walker* is a hopeful sign. Unfortunately, *Walker* is arguably inconsistent with *Ihnot* and its progeny, and as an unpublished

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99 *Ihnot*, 575 N.W.2d at 587.

100 Id. at 588.

101 Id. at 586-87.

102 *State v. Jones*, 271 N.W.2d 534, 538 (Minn. 1978).

103 See infra Appendix A.

104 See infra Appendix A.

105 See infra Appendix A.


108 For example, in applying the third *Gordon* factor, the *Walker* court held that the similarity of the crimes counted against admission. Id. at *4. In *Ihnot*, the Minnesota
opinion, it is nonprecedential. On the whole, Minnesota courts’ interpretation of Rule 609 and the Gordon test is profoundly one-sided, and that one-sidedness cannot be effectively cured without intervention from the Minnesota Supreme Court.

**IV. CONCLUSION**

The doctrinal and statistical analysis of case law presented above suggests that Minnesota courts have departed sharply from other jurisdictions in their interpretation of the Gordon test and Rule 609. There are of course risks in drawing broad conclusions based solely on the study of appellate court opinions. It is possible that trial courts in Minnesota apply the Gordon test differently than appellate courts. Trial court rulings excluding prior convictions under 609(a)(1) are unlikely to produce appeals. Given that 609 rulings, like most evidentiary rulings, are discretionary, most trial court rulings should be affirmed, and statistically most are affirmed. It is possible that the one-sided statistics of appellate opinions interpreting 609 in Minnesota simply reflect a great deal of deference.

There are two problems with such a dismissive argument. First, Rule 609(a)(1) does not give trial courts unlimited, unreviewable discretion to admit all felonies for impeachment. The rule grants discretion, but it requires that the discretion be exercised in a careful, balanced manner. When appellate courts simply rubber-stamp the decisions of lower courts, they perform a disservice to the competing values that Rule 609 reflects.

Second, in exercising their discretion under 609(a)(1), trial courts are not only guided but also bound by the decisions of appellate courts. When Minnesota trial courts apply the Gordon factors, they must follow the Supreme Court’s application of those factors in cases like Ihnot. When dutifully following Ihnot, a trial court could exclude virtually no prior convictions under 609(a)(1). Minnesota appellate courts’ interpretation of the Gordon factors has become so mechanical and so one-sided that it serves to

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109 See Minn. Stat. § 480A.08, subd. 3(c); Vlahos v. R&I Constr., Inc., 676 N.W.2d 672, 676 n.3 (Minn. 2004).

110 Gold, supra note 82, at 2296-97 (“Too often [courts] make the mistake of assuming that the uncertainties of the Rule’s text provide license to exercise virtually unrestricted discretion. In making this assumption, the courts have largely ignored the legislative history of Rule 609, which reveals a determined, even if unfinished, congressional effort to craft a balance between conflicting values.”).

111 In part for that reason, many jurisdictions encourage or even require trial courts to make explicit findings regarding the Gordon factors before admitting convictions under 609(a)(1). See, e.g., United States v. Moore, 917 F.2d 215, 234 (6th Cir. 1990); United States v. Givens, 767 F.2d 574, 579-80 (9th Cir. 1985); United States v. Preston, 608 F.2d 626, 639 (5th Cir. 1979); State v. Stewart, 646 N.W.2d 712, 716 (N.D. 2002); State v. Ashley, 623 A.2d 984, 986 (Vt. 1993); State v. Sexton, No. 02-0286-CR, 2002 WL 1163820, at *3 (Wis. Ct. App. June 4, 2002); 2 SALTZBURG ET AL., supra note 24, at 1044-45.
extinguish discretion rather than enhancing it. Coupling affirmances in the language of deference only places a veneer of discretion on a structure of control.

When a rule of evidence creates an open-ended discretionary standard, it makes sense for appellate courts to create clarifying tests like *Gordon* to provide additional guidance. But when the judicially created clarifying tests become too rigid, they can do a disservice to the underlying text.

Without question, Minnesota is not the only jurisdiction whose Rule 609 jurisprudence has drifted off course. Illinois, for example, experienced a similar phenomenon. The Illinois Supreme Court adopted the *Gordon* test in 1971 in *People v. Montgomery*. Over time, however, Illinois courts' interpretation of the test became too mechanical and one-sided, so the Illinois Supreme Court stepped in to re-affirm the foundational principles of *Gordon* and Rule 609:

In *People v. Williams*, 641 N.E.2d 296 (1994), we revisited the *Montgomery* balancing test. We found “a regression toward allowing the State to introduce evidence of virtually all types of felony convictions for the purported reason of impeaching a testifying defendant.” Noting that trial courts often mechanically applied the balancing test to allow more prior-conviction evidence, we stated, “The *Montgomery* rule does not, however, allow for the admission of evidence of any and all prior crimes. The focus of *Montgomery* was on crimes which bear on the defendant’s truthfulness as a witness.” Trial courts should not tip the balancing test toward probative value simply because all felonies show a disrespect for society and, thus, indicate a willingness to lie on the witness stand. More importantly, trial courts should not admit prior-conviction evidence as probative of guilt, rather than credibility. We reaffirmed that trial courts, in exercising their discretion to admit evidence of a defendant’s prior convictions, should consider the nature of the prior crime, its recency and similarity to the current charge, and the length of the defendant’s criminal record. Convictions for the same crime for which the defendant is on trial should be admitted sparingly.

Minnesota has experienced a similar regression. It is time for the Minnesota Supreme Court to revisit its Rule 609 jurisprudence.
Lower courts have no power to alter the Minnesota Supreme Court's Rule 609 doctrine, so presenting such an argument at trial would be an entirely futile, pro forma exercise. State v. Gilmartin, 535 N.W.2d 650, 653 (Minn. Ct. App. 1995). Nonetheless, the Court apparently considers the pro forma exercise necessary to review.

Most courts consider trial objections unnecessary when they would be futile in light of settled appellate case law. Guam v. Yang, 850 F.2d 507, 512 n.8 (9th Cir. 1988) (citing cases) (stating "were we to insist that an exception be taken to save the point for appeal, the unhappy result would be that we would encourage defense counsel to burden district courts with repeated assaults on then settled principles out of hope that those principles will be later overturned")
APPENDIX

Since the Minnesota Supreme Court set forth the Jones standard governing admission of prior crimes for impeachment, 215 defendants have appealed their convictions on the basis of asserted Jones error.115 Only 1 of those 215 defendants obtained a reversal on the basis of a Jones error.

- 25 Minnesota Supreme Court cases have affirmed the admission of prior convictions under Jones.
- 57 published Minnesota Court of Appeals cases have affirmed the admission of prior convictions under Jones.
- 126 unpublished Minnesota Court of Appeals cases have affirmed the admission of prior convictions under Jones.
- 4 Minnesota Court of Appeals cases have declined to reach the Jones issue squarely and simply affirmed the convictions on harmless error grounds.
- 1 Minnesota Court of Appeals case reached the Jones issue and found error but affirmed the conviction on harmless error ground.
- 1 Minnesota Court of Appeals case reversed the conviction on other grounds and went on to find that the trial court had properly admitted some prior convictions under Jones but improperly admitted other prior convictions.
- 1 unpublished Minnesota Court of Appeals case reversed a defendant's conviction for Jones error.

115 As of February 21, 2006, Westlaw reveals that 234 Minnesota court cases have cited Jones. 215 of those cases presented Jones claims regarding the improper admission of a defendant's prior crimes for impeachment. The remaining 19 cases cited Jones for reasons unrelated to the admission of a defendant's prior crimes for impeachment.

3 of the 19 other cases presented claims that the trial court had improperly excluded Jones evidence offered by the defendant to impeach prosecution witnesses. All 3 of those cases affirmed trial court's exclusion.
Minnesota Supreme Court Cases Affirming Admission of Prior Convictions Under Jones

1. State v. Swanson, 707 N.W.2d 645 (Minn. 2006).
4. State v. Cogshell, 538 N.W.2d 120 (Minn. 1995).
5. State v. Sims, 526 N.W.2d 201 (Minn. 1994).
7. State v. Gassler, 505 N.W.2d 62 (Minn. 1993).
10. State v. Bias, 419 N.W.2d 480 (Minn. 1988).
17. State v. Ware, 306 N.W.2d 879 (Minn. 1981).

Published Minnesota Court of Appeals Cases Affirming Admission of Prior Convictions Under Jones


Unpublished Minnesota Court of Appeals Cases Affirming Admission of Prior Convictions Under Jones


Cases Declining to Reach the Substantive Jones Claim and Affirming on Harmless Error Grounds

1. State v. Darveaux, 318 N.W.2d 44 (Minn. 1982).

2. State v. Lee, 322 N.W.2d 197 (Minn. 1982).

3. State v. Leecy, 294 N.W.2d 280 (Minn. 1980).


Case Finding Error Under Jones but Affirming on Harmless Error Grounds


Case Reversing Primarily on Other Grounds and Also Finding Partial Jones Error


Case Reversing for Jones Error