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Interpreting the New Rule 609(A)(2)

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COMMENT

INTERPRETING THE NEW RULE 609(A)(2)

INTRODUCTION

As of December 1, 2006, a new version of Federal Rule of Evidence 609(a)(2)[1] came into effect. This Comment will explain the problems with the prior version of Rule 609(a)(2)[2] and the goals of the Advisory Committee on Evidence Rules (the Committee) in drafting the new Rule. In addition, this Comment will critique the new Rule 609(a)(2) and suggest a means for interpreting it by drawing a connection to Federal Rule of Evidence 803(22).[3] Recognizing the similarity between the rules will enable courts to draw from the scholarship on Rule 803(22) when interpreting issues that the new Rule 609(a)(2) does not address.

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[1] Rule 609(a)(2) states:

a) General rule. For the purpose of attacking the character for truthfulness of a witness, ... (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.

FED. R. EVID. 609(a)(2).

[2] Prior to December 1, 2006 Rule 609(a)(2) stated:

(a) General Rule. For the purpose of attacking the credibility of a witness, ... (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of punishment.

FED. R. EVID. 609(a)(2) (prior to the amendment of December 1, 2006).

[3] Rule 803(22) provides an exception from the hearsay definition for:

Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

FED. R. EVID. 803(22).

I. RULE 609

A. Basic Approach

Rule 609 permits courts to admit evidence of prior convictions for impeachment to suggest untruthful character.[4] The theory of admissibility is that "a person with an untruthful character is more likely to act in conformity with that character while testifying than a person without that character."[5] The critical issue is to determine what types of prior convictions demonstrate an untruthful character.[6]

Rule 609 divides prior convictions into two categories. In one category, under Rule 609(a)(2), are convictions for crimes that are inherently highly probative of untruthful character.[7] Rule 609(a)(2) requires *automatic* admission of crimes in this category. In the second category, under Rule 609(a)(1),[8] are those crimes that a court *may* admit.[9] These crimes are not inherently highly probative of untruthful character, but merely crimes that a court finds to have more probative than prejudicial value on the issue of a witness's truthfulness.[10]

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[4] The conviction is still used for a hearsay purpose, but that fact is essentially ignored. *See* 4 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 472, at 667 & n.50 (acknowledging the technical hearsay problem but suggesting that the Rule either obviates a hearsay objection or creates one).

[5] PAUL C. GIANNELLI, UNDERSTANDING EVIDENCE § 22.08, at 270 (2006) (citing Walden v. Georgia-Pacific Corp., 126 F.3d 506, 523 (3d Cir. 1997)).

[6] *Id.*

[7] These are "crimes such as perjury, subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the [witness's] propensity to testify truthfully." FED. R. EVID. 609(a)(2) Committee note (citing Stuart P. Green, *Deceit and the Classification of Crimes: Federal Rule of Evidence 609(a)(2) and the Origins of* Crimen Falsi, 90 J. CRIM L. & CRIMINOLOGY 1087 (2000)).

[8] Rule 609(a)(1) states:

> a) General rule. For the purpose of attacking the character for truthfulness of a witness, (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused[.]

FED. R. EVID. 609(a)(1).

[9] See GIANNELLI, *supra* note 5, § 22.08, at 272 n.85 (citing United States v. Pritchard, 973 F.2d 905, 909 n.6 (11th Cir. 1992) ("This circuit does not consider burglary a crime . . . admissible under Rule 609(a)(2). However, the fact that the defendant has committed a burglary is relevant to the determination of whether he is likely to be truthful under oath.") (citations omitted)).

[10] In addition, FED. R. EVID. 609(b) requires that a conviction admitted under Rule 609(a)(1) must generally have been committed within ten years. *See id.* § 22.08, at 275 & n.101 (describing the discretion court exercises in determining the relevant date for the purpose of this Rule 609(b)). In effect, there is a third group of convictions that are inadmissible because they do not meet the requirements of either 609(a)(1) or 609(a)(2). It is possible that they could be admissible under Rule 608, but that is beyond the scope of this Comment.

B. Problems with the Old Rule

In 2003, the Committee expressed a desire to amend the definition of an automatically admissible crime under Rule 609(a)(2). At the time, Rule 609(a)(2) defined an automatically admissible crime as one that "involved dishonesty or false statement."[11] The Committee noted that a conflict in the courts had developed over how to interpret this definition.[12] Under the majority approach, courts looked behind the conviction to determine whether the crime was committed in a way that involved dishonesty or false statement.[13] Under this approach for example, a murder would be considered a crime of dishonesty or false statement if the murderer had lied about the crime, either before or after committing it.[14] Under the minority approach, courts looked solely to the elements of the crime and admitted the conviction only if the elements necessarily required an act of false statement or deceit.[15]

The Committee found the majority approach of looking behind convictions lacking for a number of reasons.[16] First, the Committee found that the majority approach led to a waste of judicial resources. The Committee noted that inquiring behind convictions is often both burdensome and indefinite, as "it is often impossible to determine . . . what facts of dishonesty or false statement the jury might have found."[17] Second, admitting crimes committed deceitfully does not provide any probative value because "the jury is told only about the general nature of the conviction, not about the underlying facts."[18] Third, Congress intended the Rule to be interpreted narrowly, to

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[11] FED. R. EVID. 609(a)(2). (Prior to amendment of December 1, 2006).

[12] ADVISORY COMMITTEE ON EVIDENCE RULES, REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES 5 (2003), *available at* http://www.uscourts.gov/rules/Reports/EV12-2003.pdf [hereinafter COMMITTEE REPORT, 2003].

[13] *See, e.g.*, United States v. Payton, 159 F.3d 49, 58 (2d Cir. 1998) (determining that a conviction for larceny demonstrated dishonesty and false statement because the evidence demonstrated that the defendant had committed the crime by submitting a false welfare application); United States v. Whitman, 665 F.2d 313, 320 (10th Cir. 1981) (holding that a larceny conviction stemming from a land fraud scheme was a crime of dishonesty because the larceny was committed by false pretenses rather than stealth).

[14] ADVISORY COMMITTEE ON EVIDENCE RULES, Minutes of the Meeting 17 (Apr. 29–30, 2004), *available at* http://www.uscourts.gov/rules/Minutes/EV04-2004.pdf [hereinafter MINUTES 2004].

[15] *See, e.g.*, Cree v. Hatcher, 969 F.2d 34, 38 n.2 (3d Cir. 1992) ("For the purposes of Rule 609(a)(2), however, the manner in which a particular defendant commits a crime is irrelevant; what matters is whether dishonesty or false statement is an element of the statutory offense.").

[16] ADVISORY COMMITTEE ON EVIDENCE RULES, Minutes of the Meeting 17 (Nov. 13, 2003), *available at* http://www.uscourts.gov/rules/Minutes/1103EVMin.pdf [hereinafter MINUTES 2003].

[17] *Id.*

[18] *Id.* at 19–20.

ensure that only highly probative crimes were automatically admitted.[19]

C. Amending Rule 609(a)(2)

The Committee's stated goals in amending Rule 609(a)(2) were to 1) resolve the circuit split; 2) avoid a mini-trial; and 3) limit automatically admissible crimes to those that are especially probative.[20] When the Committee first considered amending Rule 609(a)(2), it viewed an elements definition as the best way to achieve these goals.[21] Under this approach, a prior conviction would satisfy Rule 609(a)(2), and would be automatically admissible, "only if its statutory elements necessarily involve the commission of an act of dishonesty or false statement."[22] The Committee favored this approach because it promotes judicial efficiency and uniform results. In addition, this approach had a low cost because courts might admit convictions not admissible under Rule 609(a)(2) under Rules 609(a)(1) or 608.[23]

The Committee, however, decided against the elements definition. The Department of Justice representative argued that the elements definition would make automatic admissibility subject to the vagaries of charging and pleading, and would thereby exclude certain highly probative acts from consideration under Rule 609(a)(2).[24] As an example, the Committee noted obstruction of justice as a crime that does not require deceit as an element, but that in some cases, an underlying act of deceit could be readily determined from, for example, the charging instrument.[25] As a result of the concern that an elements definition would not automatically admit these types of probative acts, the Committee abandoned the elements definition.[26]

To address the concern that probative acts would not be automatically admitted if they were charged under a statute that did not include dishonesty or falsehood as an element, the Committee

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[19] *Id.* at 20 (concluding, presumably, that by describing the crimes admissible under this section, Congress demonstrated that this is a limited category of crimes).

[20] MINUTES 2004, *supra* note 14, at 18.

[21] COMMITTEE REPORT, 2003, *supra* note 12, at 5. Most commentators also favor this approach. *See, e.g.*, 3 MUELLER & KIRKPATRICK, *supra* note 4, § 278, at 269; Green, *supra* note 7, at 1120–23 (describing the advantages of this approach).

[22] COMMITTEE REPORT, 2003, *supra* note 12, at 4.

[23] MINUTES 2003, *supra* note 16, at 18–20 (citing cases).

[24] MINUTES 2004, *supra* note 14, at 17.

[25] *Id.* at 17–18. The DOJ representative recognized that the court could admit deceitful conduct under Rule 608, but noted that Rule 608 would not permit extrinsic evidence if the witness denied the deceitful conduct. The DOJ representative also argued that such a crime could only be admitted under Rule 609(a)(1) if it were a felony. *Id.*

[26] *Id.* at 18.

expanded its definition of an automatically admissible crime. The Committee adopted the new language of Rule 609(a)(2), describing automatically admissible crimes as those where "it *readily can be determined* that *the elements of the crime*, as proved or admitted, *required an act of dishonesty or false statement* by the witness."[27] The purpose of this language is to allow some limited inquiry behind the elements of a conviction. Thus, the Committee explains by example, that:

> evidence that a witness was convicted of making a false claim to a federal agent is admissible under this subsection regardless of whether the crime was charged under a section that expressly references deceit (e.g., 18 U.S.C. § 1001, Material Misrepresentation to the Federal Government) or a section that does not (e.g., 18 U.S.C. 1503, Obstruction of Justice).[28]

D. Evaluating the New Rule 609(a)(2)

The new language of Rule 609(a)(2) improves the Rule both in terms of efficiency and reliability. First, the new Rule 609(a)(2) eliminates the possibility that crimes that merely *involved* dishonesty or false statement could be automatically admitted. The new Rule 609(a)(2) thereby increases the reliability of the Rule by limiting automatic admissibility to those crimes that are truly probative of untruthful character.[29] Second, the new Rule 609(a)(2) eliminates the old Rule's amorphous inquiry into whether a crime *involved* dishonesty or false statement. The new Rule 609(a)(2) thus increases the efficiency of the Rule, as there are undoubtedly fewer crimes that arguably *require* an act of dishonesty to satisfy an element than there are crimes that merely *involve* and act of dishonesty as part of their underlying circumstances. In addition, this inquiry should be less burdensome as the Committee has specifically warned courts not to spend substantial judicial resources on it.[30]

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[27] FED R. EVID. 609(a)(2) (emphasis added).

[28] FED. R. EVID. 609(a)(2) advisory committee's note.

[29] "Evidence of crimes in the nature of *crimina falsi* must be admitted under Rule 609(a)(2), regardless of how such crimes are specifically charged." *Id.* There may be difficulties in defining *crimen falsi* at the margin, but that problem is beyond the scope of this Comment. *See* Green, *supra* note 7 at 1115–6 (describing the "uncertain boundaries of the category of *crimen falsi*").

[30] The Committee undoubtedly recognized the efficiency loss created by its rule, and tried to limit it by requiring that admissibility be "readily" determinable. FED. R. EVID. 609(a)(2) advisory committee's note. The Committee elaborated by saying that "the amendment does not contemplate a 'mini-trial' in which the court plumbs the record of the previous proceeding to

Compared to an elements definition, however, the new Rule 609(a)(2) sacrifices efficiency *for* reliability. Allowing some inquiry behind the elements of conviction will consume more judicial resources than an elements definition would consume. Under the new Rule 609(a)(2), there will be documents submitted and some argument on the issue of what was required and what was proved. Under an elements definition, the court would simply have looked at the record of conviction and the statutory elements. Despite the Committee's valiant attempt to limit the loss of judicial efficiency by cautioning against a mini-trial and requiring that the issue be "readily"[31] determinable, it is clear that the new Rule 609(a)(2) will require more judicial resources than an elements approach.

The benefit of the new Rule's approach of allowing some inquiry behind the conviction is that the Rule is more reliable than an elements definition. As the Committee note clarifies, the new Rule 609(a)(2) will now automatically admit probative acts even if they are not clear from the statutory elements.[32] Thus, the Committee sacrificed some of the efficiency it sought in favor of added reliability. The Committee could have limited the loss of efficiency by discussing, or at least referencing Rule 803(22), which also requires courts to look behind convictions. Doing so would have given courts guidance in making difficult decisions and thereby streamlined the decision-making process.

II. COMPARISON TO RULE 803(22)

A. Basic Approach

Rule 803(22) is similar to Rule 609(a)(2) in that both rules require courts to determine the admissibility of convictions by examining the facts underlying those convictions. Under Rule 803(22) a court may admit "evidence of a previous conviction . . . to prove any fact *essential to* sustain the [previous] judgment."[33] A court determining

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determine whether the crime was in the nature of *crimen falsi*." *Id.* The purpose of this Comment, however, is to suggest that the Committee could have further limited the efficiency loss by referencing Rule 803(22).

[31] *Id.*

[32] "[C]rimes such as perjury, subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the [witness's] propensity to testify truthfully [will be admitted]. Historically, offenses classified as *crimena falsi* have included only those crimes in which the ultimate criminal act was itself an act of deceit." FED. R. EVID.ED. R. EVID. 609(a)(2) advisory committee's note (citing Green, *supra* note 7, at 1115).

[33] FED. R. EVID. 803(22) (emphasis added). *See, e.g.*, First Nat'l. Bank of Louisville v.

whether to admit a conviction under Rule 803(22) must determine whether the question of fact or law for which the judgment of conviction is offered was "essential to sustain the [previous] judgment."[34] Thus, the determination of what was essential under Rule 803(22) is analogous to the determination, under the new Rule 609(a)(2), of whether the elements of a crime *required* an act of dishonesty or false statement.

B. Looking Behind Judgments

Under both rules, the determination may not be clear from the face of the judgment. This problem is demonstrated by the Committee's obstruction of justice example in the discussion of Rule 609(a)(2).[35] This same problem arises in the context of Rule 803(22). For example, in *New York v. Hendrickson Bros.*,[36] the defendants argued that the trial court had improperly admitted their convictions for mail fraud as evidence of a collusive bidding scheme.[37] The trial court had to determine whether a finding of collusive bidding was essential to the conviction for mail fraud.[38] Because mail fraud does not require a finding of collusive bidding as an element of the crime, the court had to look behind the judgment.[39] The trial court had to determine whether collusive bidding was essential to *that particular* conviction for mail fraud.[40] Thus, the court here faced the same issue as in the Committee's hypothetical obstruction of justice: in both cases, the

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Lustig, 96 F.3d 1554, 1574 (5th Cir. 1996) (affirming the admission of a conviction of a bank employee for fraud, in subsequent civil case in which the bank used the conviction to argue that it had been intentionally defrauded and could therefore collect on its insurance policy). The rationale for admitting criminal convictions is that the judgments are reliable due to the procedural safeguards and beyond-a-reasonable-doubt standard of proof. 4 STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL § 803.02[23] (9th ed. 2006). The previous conviction is proven by introducing into evidence the document embodying the judgment of conviction. 5 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 803.24 (Joseph M. McLaughlin ed., 2d ed. 2006). The court should instruct the jury as to the purpose of the previous judgment in the present case. SALTZBURG ET AL., *supra* note 33, § 803.02[23].

[34] The judgment "may be used . . . [in a] subsequent civil suit only with respect to matters of fact or law that were *necessarily decided* by the conviction and the verdict on which it was based." WEINSTEIN & BERGER, *supra* note 33, § 803.24[1] (citing New York v. Hendrickson Bros., 840 F.2d 1065, 1081 (2d Cir. 1988) (emphasis added).

[35] FED. R. EVID. 609(a)(2) advisory committee's note.

[36] 840 F.2d 1065, 1081 (2d Cir. 1988).

[37] *Id.* at 1080.

[38] *Id.* at 1081 (citing Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 569 (1951)).

[39] *Id.*

[40] *Id.*

court needed to look behind the elements of the conviction to determine admissibility.

Neither the language of, nor official commentary to Rule 803(22) explain how to determine what is essential to sustain a judgment. *Emich Motors Corp. v. General Motors Corp.*,[41] is often cited by courts and scholars as providing guidance.[42] In *Emich*, the Supreme Court explained that a previous conviction is admissible on "all matters of fact and law *necessarily decided* by the conviction and verdict."[43] As under Rule 609(a)(2), the judge must determine "what was decided by the criminal judgment . . . upon examination of the record, including the pleadings, the evidence submitted, the instructions under which the jury arrived at its verdict, and any opinions of the court."[44]

Hendrickson provides a relatively simple example of this process. In *Hendrickson*, the Second Circuit affirmed the trial court's determination that the collusive bidding was essential to the mail fraud conviction and therefore admissible.[45] The court did so because it found that the trial judge's review of the jury instructions and the indictment clearly demonstrated what had been essential.[46]

There are more complicated examples, where the determination of what was essential may require courts to confront complex jurisprudential issues[47] and where it may not be possible to determine what was essential to the previous judgment.[48] The purpose of this brief discussion is simply to point out what seems obvious: the similarity between the rules. Recognizing this similarity is of more than academic value. When courts face complicated examples under the new Rule 609(a)(2), they can turn to Rule 803(22) for guidance.

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[41] 340 US 558 (1951) (A pre-rules case that is widely cited as demonstrating the theoretical underpinning for Rule 803(22)).

[42] *See, e.g.*, Columbia Plaza Corp. v. Security Nat'l Bank, 676 F.2d 780, 789–90 (D.C. Cir. 1982) (noting that the trial court correctly applied the test of *Emich* in determining what was essential to the previous judgment); 2 WEINSTEIN & BERGER, *supra* note 33, § 803.24; GIANNELLI, *supra* note 5, § 33.17, at 503.

[43] *Emich*, 340 U.S. at 569 (emphasis added).

[44] *Id.*

[45] *Hendrickson*, 840 F.2d at 1081.

[46] *Id.* (concluding that the "instructions stated that 'what the evidence must show beyond a reasonable doubt is that the members of the scheme . . . came to a mutual understanding to accomplish the bid rigging scheme'") (citation omitted).

[47] *See infra* Part III.

[48] *See, e.g.*, Columbia Plaza Corp. v. Security Nat'l Bank, 676 F.2d 780, 790–91 (D.C. Cir. 1982) (affirming the trial court's decision not to admit evidence under Rule 803(22) because the general verdict in the underlying case did not provide a basis for determining which of the numerous allegations had been proved).

III. BEYOND SIMILARITY

Recognizing the similarity between Rules 609(a)(2) and 803(22) will help salvage some of the efficiency lost by the Committee's decision to allow inquiry behind convictions. In amending Rule 609(a)(2), the Committee did not address certain problems that are likely to arise when courts look behind convictions in situations that are more complicated than the basic obstruction of justice example discussed in the Committee Note. When these situations arise, courts can look to the case law and scholarship on Rule 803(22) for guidance and thereby streamline the judicial process.

One issue the Committee did not address is how a court should determine what was required by a previous judgment. This question is not merely asking what a court should look at, as the Committee explained *that* aspect of the inquiry.[49] The inquiry *here*, is what should a court *do* when it looks at these things?

There is certainly more than one possible approach. For example, consider two ways a court could attempt to determine what was essential to a conviction for murder where the murderer lured the victim to the scene of the crime by means of deceit.[50] One way for a court to determine whether the act of deceit was essential to the murder conviction is for the court to ask: *could* there have been a conviction if all the facts other than the act of deceit were proven? In this case, of course, the answer is yes, because deceit is not an element of murder and therefore, ignoring its existence does not affect the outcome. The noteworthy aspect of this inquiry is that asking whether there *could* have been a conviction puts the court in the position of determining whether the case would have survived a motion for summary judgment. This inquiry, however, is not the only possibility.

Alternatively, the court could ask whether there *would* have been a conviction without the act of deceit. This approach requires the court to weigh the evidence and thereby puts the court in the position of the jury. This approach is unusual, but not unheard of. For example, "a finding of harmless error by an appellate court infringes on the function of the jury because it puts the appellate court in the position

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[49] *See* FED R. EVID. 609(a)(2) advisory committee's note (explaining that "[w]here the deceitful nature of the crime is not apparent from the statute and the a face of the judgment . . . a proponent may offer information such as an indictment, a statement of admitted facts, or jury instructions to show that the factfinder had to find, of the defendant had to admit an act of dishonesty or false statement in order for the witness to have been convicted.").

[50] The Committee uses this example to demonstrate the kind of crime that is not admissible under the new Rule 609(a)(2). Nonetheless, I use it here to illustrate a different point.

of weighing the evidence before the trial court."[51] There has been much written on the propriety and implications of this approach.[52] Whether it is appropriate in the context of the new Rule 609(a)(2) is not clear.

Looking to Rule 803(22) suggests that the latter approach is not appropriate and that courts should avoid stepping into the role of the jury. Some scholars have suggested that the determination of what was essential under Rule 803(22) is similar to determining what issues have been decided previously under the collateral estoppel doctrine, or more specifically, issue preclusion.[53] Drawing from this doctrine, it is clear that courts should apply the former standard. As Charles Alan Wright suggests, determining what was necessarily decided by a previous decision should be an "objective process, in which a later court simply asks what was reasonably necessary to support the prior judgment."[54] He cautions that any inquiry into the role a particular finding might have played in the subjective process of deciding the first action should be avoided because of the difficulty of reconstructing the decision-making process with any degree of certainty.[55] Thus, the Committee could have, and should have, clarified the proper standard under the new Rule 609(a)(2) by reference to Rule 803(22).[56]

Another issue the Committee did not address is how a court should treat a judgment based on two allegations, either one of which, standing alone, would have been sufficient for a conviction, but only one of which is an act of dishonesty or false statement. For example, consider a conviction for obstruction of justice based on the conduct of making a false claim to a federal agent *and* intimidating a witness.

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[51] McQueeney v. Willmington Trust Co., 779 F.2d 916, 925–26 (3d Cir. 1985)(J. Becker)(describing this premise as "undeniable") (citing *Martha A. Field, Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of a Rationale*, 125 U. PA. L REV. 15, 60–61 (1976)).

[52] *See, e.g.*, United States v. Bollenbach, 326 U.S. 607, 614 (1946) ("The question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials . . . ."); Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U.CHI L. REV. 511 (2004) (presenting an interesting psychological examination of how judges and juries make decisions); John M.M. Greabe, *Spelling Guilt out of a Record? Harmless-Error Review of Conclusive Mandatory Presumptions and Elemental Misdescriptions*, 74 B.U. L. REV. 819 (1994) (arguing that traditional harmless-error review improperly presupposes jury findings).

[53] *See, e.g.*, 4 MUELLER & KIRKPATRICK, *supra* note 4, § 472, at 663 (noting that Rule 803(22) and "the collateral estoppel doctrine share common ground and invite a common approach.").

[54] 18 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 4421, at 545 (1980).

[55] *Id.*

[56] Indeed, the Committee's failure to draw such an obvious connection has caused this commentator to lose precious sleep.

Standing alone, either act would be sufficient for a conviction for obstruction of justice. Only the act of making a false claim, however, is probative of untruthfulness and therefore automatically admissible under Rule 609(a)(2). How should a subsequent court determine whether the conviction required an act of dishonesty? The new Rule 609(a)(2) does not provide an answer.[57]

Again, the scholarship and case law surrounding Rule 803(22) has addressed the issue of how to treat alternative sufficient findings in great depth. Although there is not agreement among scholars or courts, various approaches have been presented.[58] Some scholars have taken the position that both determinations should have a preclusive effect, such that either finding could be the basis of collateral estoppel in subsequent litigation.[59] The *Restatement (Second) of Judgments*, however, takes the position that neither finding "should have a preclusive effect, because neither is essential."[60] There is support for each approach in the case law.[61] The merits of each approach in this vexing debate must be left for another day. The modest purpose of this Comment is merely to point out that courts will confront the difficult issue of alternative findings when looking behind convictions pursuant to the new Rule 609(a)(2) and that the Committee could have simplified the judicial process by endorsing one of the approaches, or at least referencing the scholarship from an analogous area of the law as a valuable resource.[62]

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[57] The Committee note says that the question of what was essential should be "readily determinable." So a court might simply say that where there are alternative sufficient findings, what was essential is not readily determinable, and therefore the judgment is inadmissible. If the Committee, however, had endorsed one of the following approaches, then what was essential would be readily determinable, and might also be admissible. FED R. EVID. 609(a)(2) advisory committee's note

[58] *See generally* Robert C. Casad, *Two Important Books on Res Judicata*, 80 MICH. L. REV. 664 (1982) (comparing the RESTATEMENT (SECOND) OF JUDGMENTS (1982) with WRIGHT & GRAHAM, *supra* note 54).

[59] *Id.* at 678 (citing RESTATEMENT (SECOND) OF JUDGMENTS § 68, cmt. n (1942); 1 B J. MOORE, FEDERAL PRACTICE ¶ 0.443[5], at 3922–23 (2d ed. 1980)).

[60] *Id.* (citing RESTATEMENT (SECOND) OF JUDGMENTS § 27, cmt. i (1982)).

[61] *See, e.g.*, In re Microsoft Corp. Antitrust Litig., 355 F.3d 322, 328 (4th Cir. 2004) (finding that neither of two independently sufficient findings satisfies the "essential to" requirement of issue preclusion). *But see, e.g.*, Magnus Elecs., Inc. v. La Republica Arg., 830 F.2d 1396, 1402 (7th Cir. 1987) (holding that a plaintiff in a subsequent suit is precluded from litigating an alternative ground upon which a previous judgment was based).

[62] At least one scholar has suggested a third way which the Committee may have found appealing, but would hardly advance the ball. Under this approach "preclusion should arise . . . only if a second court can determine without extended inquiry that a particular finding reflects a careful process of decision." 18 WRIGHT & GRAHAM, *supra* note 54, § 4421, at 580; *see* Casad, *supra* note 58 at 678–9 (discussing this approach).

IV. CONCLUSION

It seems clear that the new Rule 609(a)(2) is an improvement from the old Rule in terms of both its reliability and efficiency. The new Rule 609(a)(2), however, is not as efficient as it could be because the Committee decided to endorse an approach that slightly favors reliability over efficiency. Nonetheless, the courts can salvage some of this lost efficiency by referencing to Rule 803(22) when looking behind convictions to determine admissibility under the new Rule 609(a)(2).

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