

meaning rule of *TVA v. Hill* and *Griffin*,<sup>b</sup> as suggested by the exchanges in the cases that follow.

### GREEN v. BOCK LAUNDRY MACHINE COMPANY

Supreme Court of the United States, 1989  
490 U.S. 504, 109 S.Ct. 1981, 104 L.Ed.2d 557

JUSTICE STEVENS delivered the opinion of the Court.

[Green, a county prisoner on work-release at a car wash, reached inside a large dryer to stop it and had his arm torn off. At trial in his product liability action against the machine's manufacturer, he testified that he had been inadequately instructed about the machine's operation and dangerousness. Green admitted that he had been convicted of burglary and of conspiracy to commit burglary, both felonies, and those convictions were used by defendant to impeach his credibility. The jury returned a verdict for Bock Laundry. The Court of Appeals affirmed, rejecting Green's argument that the district court erred by denying his pretrial motion to exclude the impeaching evidence.]

[The Court's opinion noted that criticism of automatic admissibility of prior felony convictions to impeach civil witnesses, particularly civil plaintiffs, has been "longstanding and widespread."] Our task in deciding this case, however, is not to fashion the rule we deem desirable but to identify the rule that Congress fashioned. \* \* \*

[I] Federal Rule of Evidence 609(a) provides:

"General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment."

By its terms the Rule requires a judge to allow impeachment of any witness with prior convictions for felonies not involving dishonesty "only if" the probativeness of the evidence is greater than its prejudice "to the defendant." It follows that impeaching evidence detrimental to the prosecution in a criminal case "shall be admitted" without any such balancing.

The Rule's plain language commands weighing of prejudice to a defendant in a civil trial as well as in a criminal trial. But that literal reading would compel an odd result in a case like this. Assuming that all impeaching evidence has at least minimal probative value, and given that the evidence of plaintiff Green's convictions had some prejudicial effect on his case — but surely none on defendant Bock's — balancing according to the strict language

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b. For commentary proposing a "textualist originalism" similar to the *TVA* and *Griffin* approach in place of the new textualism, see Martin Redish & Theodore Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 Tul. L. Rev. 803 (1994).

of Rule 609(a)(1) inevitably leads to the conclusion that the evidence was admissible. In fact, under this construction of the Rule, impeachment detrimental to a civil plaintiff always would have to be admitted.

No matter how plain the text of the Rule may be, we cannot accept an interpretation that would deny a civil plaintiff the same right to impeach an adversary's testimony that it grants to a civil defendant. The Sixth Amendment to the Constitution guarantees a criminal defendant certain fair trial rights not enjoyed by the prosecution, while the Fifth Amendment lets the accused choose not to testify at trial. In contrast, civil litigants in federal court share equally the protections of the Fifth Amendment's Due Process Clause. Given liberal federal discovery rules, the inapplicability of the Fifth Amendment's protection against self-incrimination, and the need to prove their case, civil litigants almost always must testify in depositions or at trial. Denomination as a civil defendant or plaintiff, moreover, is often happenstance based on which party filed first or on the nature of the suit. Evidence that a litigant or his witness is a convicted felon tends to shift a jury's focus from the worthiness of the litigant's position to the moral worth of the litigant himself. It is unfathomable why a civil plaintiff — but not a civil defendant — should be subjected to this risk. Thus we agree with the Seventh Circuit that as far as civil trials are concerned, Rule 609(a)(1) "can't mean what it says." *Campbell v. Greer*, 831 F.2d 700, 703 (1987) [Posner, J.].

Out of this agreement flow divergent courses, each turning on the meaning of "defendant." The word might be interpreted to encompass all witnesses, civil and criminal, parties or not. It might be read to connote any party offering a witness, in which event Rule 609(a)(1)'s balance would apply to civil, as well as criminal, cases. Finally, "defendant" may refer only to the defendant in a criminal case. These choices spawn a corollary question: must a judge allow prior felony impeachment of all civil witnesses as well as all criminal prosecution witnesses, or is Rule 609(a)(1) inapplicable to civil cases, in which event Rule 403 would authorize a judge to balance in such cases? \* Because the plain text does not resolve these issues, we must examine the history leading to enactment of Rule 609 as law.

[II] At common law a person who had been convicted of a felony was not competent to testify as a witness. "[T]he disqualification arose as part of the punishment for the crime, only later being rationalized on the basis that such a person was unworthy of belief." 3 J. Weinstein & M. Berger, Weinstein's Evidence paragraph 609[02], p. 609-58 (1988)[.] As the law evolved, this absolute bar gradually was replaced by a rule that allowed such witnesses to testify in both civil and criminal cases, but also to be impeached by evidence of a prior felony conviction or a *crimen falsi* misdemeanor conviction. In the

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\* *Editors' note:* Rule 403 provides that relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

face of scholarly criticism of automatic admission of such impeaching evidence, some courts moved toward a more flexible approach.<sup>11</sup>

[The American Law Institute's Model Code of Evidence and the ABA's proposed Uniform Rules of Evidence recommended that trial judges be given discretion to exclude evidence of prior convictions in appropriate circumstances. In 1969, however, the Advisory Committee's proposed Rules of Evidence included Rule 6-09, which allowed all *crimen falsi* and felony convictions evidence without mention of judicial discretion. But the Committee's second draft Rule 609(a)] authorized the judge to exclude either felony or *crimen falsi* evidence upon determination that its probative value was "substantially outweighed by the danger of unfair prejudice." The Committee specified that its primary concern was prejudice to the witness-accused; the "risk of unfair prejudice to a party in the use of [convictions] to impeach the ordinary witness is so minimal as scarcely to be a subject of comment." Yet the text of the proposal was broad enough to allow a judge to protect not only criminal defendants, but also civil litigants and nonparty witnesses, from unfair prejudice.

[T]he Advisory Committee's revision of Rule 609(a) met resistance. The Department of Justice urged that the Committee supplant its proposal with the strict, amended version of the District Code. Senator McClellan objected to the adoption of the *Luck* doctrine and urged reinstatement of the earlier draft.

The Advisory Committee backed off. As Senator McClellan had requested, it submitted as its third and final draft the same strict version it had proposed in March 1969. \* \* \* This Court forwarded the Advisory Committee's final draft to Congress on November 20, 1972.

The House of Representatives did not accept the Advisory Committee's final proposal. A Subcommittee of the Judiciary Committee recommended an amended version similar to the text of the present Rule 609(a), except that it avoided the current rule's ambiguous reference to prejudice to "the defendant." Rather, in prescribing weighing of admissibility of prior felony convictions, it used the same open-ended reference to "unfair prejudice" found in the Advisory Committee's second draft.

The House Judiciary Committee departed even further from the Advisory Committee's final recommendation, preparing a draft that did not allow impeachment by evidence of prior conviction unless the crime involved dishonesty or false statement. Motivating the change were concerns about the deterrent effect upon an accused who might wish to testify and the danger of unfair prejudice, "even upon a witness who was not the accused," from allowing impeachment by prior felony convictions regardless of their relation to the witness' veracity. H.R.Rep. No. 93-650, p. 11 (1973). Although the

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11. In a seminal article, Dean Ladd questioned the traditional rule's "premise, that the doing of an act designated by organized society as a crime is itself an indication of testimonial unreliability," and advocated barring impeachment by evidence of convictions bearing no relation to a witness' truthfulness. Ladd, *Credibility Tests — Current Trends*, 89 U. Pa. L. Rev. 166, 176, 190 (1940). \* \* \*

Committee Report focused on criminal defendants and did not mention civil litigants, its express concerns encompassed all nonaccused witnesses.

Representatives who advocated the automatic admissibility approach of the Advisory Committee's draft and those who favored the intermediate approach proposed by the Subcommittee both opposed the Committee's bill on the House floor. Four Members pointed out that the Rule applied in civil as well as criminal cases. The House voted to adopt the Rule as proposed by its Judiciary Committee.

The Senate Judiciary Committee proposed an intermediate path. For criminal defendants, it would have allowed impeachment only by *crimen falsi* evidence; for other witnesses, it also would have permitted prior felony evidence only if the trial judge found that probative value outweighed "prejudicial effect against the party offering that witness." This language thus required the exercise of discretion before prior felony convictions could be admitted in civil litigation. But the full Senate, prodded by Senator McClellan, reverted to the version that the Advisory Committee had submitted. See 120 Cong. Rec. 37076, 37083 (1974).

Conflict between the House bill, allowing impeachment only by *crimen falsi* evidence, and the Senate bill, embodying the Advisory Committee's automatic admissibility approach, was resolved by a Conference Committee. The conferees' compromise — enacted as Federal Rule of Evidence 609(a)(1) — authorizes impeachment by felony convictions, "but only if" the court determines that probative value outweighs "prejudicial effect to the defendant." The Conference Committee's Report makes it perfectly clear that the balance set forth in this draft, unlike the second Advisory Committee and the Senate Judiciary Committee versions, does not protect all nonparty witnesses:

"The danger of prejudice to a witness other than the defendant (such as injury to the witness' reputation in his community) was considered and rejected by the Conference as an element to be weighed in determining admissibility. It was the judgment of the Conference that the danger of prejudice to a nondefendant witness is outweighed by the need for the trier of fact to have as much relevant evidence on the issue of credibility as possible." H.R. Conf. Rep. No. 93-1597, pp. 9-10 (1974).

Equally clear is the conferees' intention that the rule shield the accused, but not the prosecution, in a criminal case. Impeachment by convictions, the Committee Report stated, "should only be excluded where it presents a danger of improperly influencing the outcome of the trial by persuading the trier of fact to convict the defendant on the basis of his prior criminal record."

But this emphasis on the criminal context, in the Report's use of terms such as "defendant" and "to convict" and in individual conferees' explanations of the compromise,<sup>26</sup> raises some doubt over the Rule's pertinence to civil

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26. Representative Dennis, who had stressed in earlier debates that the Rule would apply to both civil and criminal cases, see 120 Cong. Rec. 2377 (1974), explained the benefits of the Rule for criminal defendants and made no reference to benefits for civil litigants when he said:

"[Y]ou can ask about all . . . felonies on cross examination, only if you can convince the

litigants. The discussions suggest that only two kinds of witnesses risk prejudice — the defendant who elects to testify in a criminal case and witnesses other than the defendant in the same kind of case. Nowhere is it acknowledged that undue prejudice to a civil litigant also may improperly influence a trial's outcome. Although this omission lends support to [an] opinion that "legislative oversight" caused exclusion of civil parties from Rule 609(a)(1)'s balance, a number of considerations persuade us that the Rule was meant to authorize a judge to weigh prejudice against no one other than a criminal defendant.

A party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change. Cf. *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494, 502 (1986). The weight of authority before Rule 609's adoption accorded with the Advisory Committee's final draft, admitting all felonies without exercise of judicial discretion in either civil or criminal cases. Departures from this general rule had occurred overtly by judicial interpretation, as in *Luck*, or in evidence codes, such as the Model Code and the Uniform Rules. Rule 609 itself explicitly adds safeguards circumscribing the common-law rule. The unsubstantiated assumption that legislative oversight produced Rule 609(a)(1)'s ambiguity respecting civil trials hardly demonstrates that Congress intended silently to overhaul the law of impeachment in the civil context.

To the extent various drafts of Rule 609 distinguished civil and criminal cases, moreover, they did so only to mitigate prejudice to criminal defendants. Any prejudice that convictions impeachment might cause witnesses other than the accused was deemed "so minimal as scarcely to be a subject of comment." Advisory Committee's Note, 51 F.R.D., at 392. Far from voicing concern lest such impeachment unjustly diminish a civil witness in the eyes of the jury, Representative Hogan declared that this evidence ought to be used to measure a witness' moral value.<sup>27</sup> Furthermore, Representative Dennis — who in

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court, and the burden is on the *government*, which is an important change in the law, that the probative value of the question is greater than the damage to the *defendant*; and that is damage or prejudice *to the defendant alone*." *Id.*, at 40894 (emphases supplied). In the same debate Representative Hogan manifested awareness of the Rule's broad application. While supporting the compromise, he reiterated his preference for a rule

"that, for the purpose of attacking the credibility of a witness, *even if the witness happens to be the defendant in a criminal case*, evidence that he has been convicted of a crime is admissible and may be used to challenge that witness' credibility if the crime is a felony or is a misdemeanor involving dishonesty of [sic] false statement." *Id.*, at 40895 (emphasis added).

27. "Suppose some governmental body instituted a civil action for damages, and the defendant called a witness who had been previously convicted of malicious destruction of public property. Under the committee's formulation, the convictions could not be used to impeach the witness' credibility since the crimes did not involve dishonesty or false statement. Yet, in the hypothetical case, as in any case in which the government was a party, justice would seem to me to require that the jury know that the witness had been carrying on some private war against society. Should a witness with an anti-social background be allowed to stand on the same basis of believability before juries as law-abiding citizens with unblemished records? I think not . . .

advocating a Rule limiting impeachment to *crimen falsi* convictions had recognized the impeachment Rule's applicability to civil trials — not only debated the issue on the House floor, but also took part in the conference out of which Rule 609 emerged. See 120 Cong.Rec. 2377–2380, 39942, 40894–40895 (1974). These factors indicate that Rule 609(a)(1)'s textual limitation of the prejudice balance to criminal defendants resulted from deliberation, not oversight.

Had the conferees desired to protect other parties or witnesses, they could have done so easily. Presumably they had access to all of Rule 609's precursors, particularly the drafts prepared by the House Subcommittee and the Senate Judiciary Committee, both of which protected the civil litigant as well as the criminal defendant. Alternatively, the conferees could have amended their own draft to include other parties. They did not for the simple reason that they intended that only the accused in a criminal case should be protected from unfair prejudice by the balance set out in Rule 609(a)(1).

[Finally, the Court concluded that Rule 609, as the specific provision governing the facts of the case, controlled over the general balancing provisions of Rule 403. The Court affirmed the judgment for defendant.]

JUSTICE SCALIA, concurring in the judgment.

We are confronted here with a statute which, if interpreted literally, produces an absurd, and perhaps unconstitutional, result. Our task is to give some alternate meaning to the word “defendant” in Federal Rule of Evidence 609(a)(1) that avoids this consequence; and then to determine whether Rule 609(a)(1) excludes the operation of Federal Rule of Evidence 403.

I think it entirely appropriate to consult all public materials, including the background of Rule 609(a)(1) and the legislative history of its adoption, to verify that what seems to us an unthinkable disposition (civil defendants but not civil plaintiffs receive the benefit of weighing prejudice) was indeed unthought of, and thus to justify a departure from the ordinary meaning of the word “defendant” in the Rule. For that purpose, however, it would suffice to observe that counsel have not provided, nor have we discovered, a shred of evidence that anyone has ever proposed or assumed such a bizarre disposition. The Court's opinion, however, goes well beyond this. Approximately four-fifths of its substantive analysis is devoted to examining the evolution of Federal Rule of Evidence 609 \* \* \* all with the evident purpose, not merely of confirming that the word “defendant” cannot have been meant literally, but of determining what, precisely, the Rule does mean.

I find no reason to believe that any more than a handful of the Members of Congress who enacted Rule 609 were aware of its interesting evolution from the 1942 Model Code; or that any more than a handful of them (if any) voted, with respect to their understanding of the word “defendant” and the relation-

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Personally I am more concerned about the moral worth of individuals capable of engaging in such outrageous acts as adversely reflecting on a witness' character than I am of thieves . . . .”  
*Id.*, at 2376.



ship between Rule 609 and Rule 403, on the basis of the referenced statements in the Subcommittee, Committee, or Conference Committee Reports, or floor debates — statements so marginally relevant, to such minute details, in such relatively inconsequential legislation. The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated — a compatibility which, by a benign fiction, we assume Congress always has in mind. I would not permit any of the historical and legislative material discussed by the Court, or all of it combined, to lead me to a result different from the one that these factors suggest.

I would analyze this case, in brief, as follows:

(1) The word “defendant” in Rule 609(a)(1) cannot rationally (or perhaps even constitutionally) mean to provide the benefit of prejudice-weighting to civil defendants and not civil plaintiffs. Since petitioner has not produced, and we have not ourselves discovered, even a snippet of support for this absurd result, we may confidently assume that the word was not used (as it normally would be) to refer to all defendants and only all defendants.

(2) The available alternatives are to interpret “defendant” to mean (a) “civil plaintiff, civil defendant, prosecutor, and criminal defendant,” (b) “civil plaintiff and defendant and criminal defendant,” or (c) “criminal defendant.” Quite obviously, the last does least violence to the text. It adds a qualification that the word “defendant” does not contain but, unlike the others, does not give the word a meaning (“plaintiff” or “prosecutor”) it simply will not bear. The qualification it adds, moreover, is one that could understandably have been omitted by inadvertence — and sometimes is omitted in normal conversation (“I believe strongly in defendants’ rights”). Finally, this last interpretation is consistent with the policy of the law in general and the Rules of Evidence in particular of providing special protection to defendants in criminal cases.\*

(3) As well described by the Court, the “structure of the Rules” makes it clear that Rule 403 is not to be applied in addition to Rule 609(a)(1).

I am frankly not sure that, despite its lengthy discussion of ideological evolution and legislative history, the Court’s reasons for both aspects of its decision are much different from mine. I respectfully decline to join that

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\* Acknowledging the statutory ambiguity, the dissent would read “defendant” to mean “any party” because, it says, this interpretation “extend[s] the protection of judicial supervision to a larger class of litigants” than the interpretation the majority and I favor, which “takes protection *away* from litigants.” But neither side in this dispute can lay claim to generosity without begging the policy question whether judicial supervision is better than the automatic power to impeach. We could as well say — and with much more support in both prior law and this Court’s own recommendation — that our reading “extend[s] the protection of [the right to impeach with prior felony convictions] to a larger class of litigants” than the dissent’s interpretation, which “takes protection *away* from litigants.”

discussion, however, because it is natural for the bar to believe that the juridical importance of such material matches its prominence in our opinions — thus producing a legal culture in which, when counsel arguing before us assert that “Congress has said” something, they now frequently mean, by “Congress,” a committee report; and in which it was not beyond the pale for a recent brief to say the following: “Unfortunately, the legislative debates are not helpful. Thus, we turn to the other guidepost in this difficult area, statutory language.” \* \* \*

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

\* \* \* The majority concludes that Rule 609(a)(1) cannot mean what it says on its face. I fully agree.

I fail to see, however, why we are required to solve this riddle of statutory interpretation by reading the inadvertent word “defendant” to mean “criminal defendant.” I am persuaded that a better interpretation of the Rule would allow the trial court to consider the risk of prejudice faced by any party, not just a criminal defendant. Applying the balancing provisions of Rule 609(a)(1) to all parties would have prevented the admission of unnecessary and inflammatory evidence in this case and will prevent other similar unjust results until Rule 609(a) is repaired, as it must be. The result the Court reaches today, in contrast, endorses “the irrationality and unfairness” of denying the trial court the ability to weigh the risk of prejudice to any party before admitting evidence of a prior felony for purposes of impeachment.

The majority’s lengthy recounting of the legislative history of Rule 609 demonstrates why almost all that history is entitled to very little weight. Because the proposed rule changed so often — and finally was enacted as a compromise between the House and the Senate — much of the commentary cited by the majority concerns versions different from the Rule Congress finally enacted.

The only item of legislative history that focuses on the Rule as enacted is the Report of the Conference Committee. Admittedly, language in the Report supports the majority’s position: the Report mirrors the Rule in emphasizing the prejudicial effect on the defendant, and also uses the word “convict” to describe the potential outcome. But the Report’s draftsmanship is no better than the Rule’s, and the Report’s plain language is no more reliable an indicator of Congress’ intent than is the plain language of the Rule itself.

Because the slipshod drafting of Rule 609(a)(1) demonstrates that clarity of language was not the Conference’s forte, I prefer to rely on the underlying reasoning of the Report, rather than on its unfortunate choice of words, in ascertaining the Rule’s proper scope. The Report’s treatment of the Rule’s discretionary standard consists of a single paragraph. After noting that the Conference was concerned with prejudice to a defendant, the Report states:

“The danger of prejudice to a witness other than the defendant (such as injury to the witness’ reputation in the community) was considered and rejected by the Conference as an element to be weighed in determining admissibility. It was the judgment of the



Conference that the danger of prejudice to a nondefendant witness is outweighed by the need for the trier of fact to have as much relevant evidence on the issue of credibility as possible. Such evidence should only be excluded where it presents a danger of improperly influencing the outcome of the trial by persuading the trier of fact to convict the defendant on the basis of his prior criminal record."

The Report indicates that the Conference determined that any felony conviction has sufficient relevance to a witness' credibility to be admitted, even if the felony had nothing directly to do with truthfulness or honesty. In dealing with the question of undue prejudice, however, the Conference drew a line: it distinguished between two types of prejudice, only one of which it permitted the trial court to consider.

As the Conference observed, admitting a prior conviction will always "prejudice" a witness, who, of course, would prefer that the conviction not be revealed to the public. The Report makes clear, however, that this kind of prejudice to the witness' life outside the courtroom is not to be considered in the judicial balancing required by Rule 609(a)(1). Rather, the kind of prejudice the court is instructed to be concerned with is prejudice which "presents a danger of improperly influencing the outcome of the trial." Congress' solution to that kind of prejudice was to require judicial supervision: the conviction may be admitted only if "the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant." Rule 609(a)(1).

Although the Conference expressed its concern in terms of the effect on a criminal defendant, the potential for prejudice to the outcome at trial exists in any type of litigation, whether criminal or civil, and threatens all parties to the litigation. The Report and the Rule are best read as expressing Congress' preference for judicial balancing whenever there is a chance that justice shall be denied a party because of the unduly prejudicial nature of a witness' past conviction for a crime that has no direct bearing on the witness' truthfulness. In short, the reasoning of the Report suggests that by "prejudice to the defendant," Congress meant "prejudice to a party," as opposed to the prejudicial effect of the revelation of a prior conviction to the witness' own reputation.

It may be correct, as Justice Scalia notes in his opinion concurring in the judgment, that interpreting "prejudicial effect to the defendant" to include only "prejudicial effect to [a] *criminal* defendant," and not prejudicial effect to other categories of litigants as well, does the "least violence to the text," if what we mean by "violence" is the interpolation of excess words or the deletion of existing words. But the reading endorsed by Justice Scalia and the majority does violence to the logic of the only rationale Members of Congress offered for the Rule they adopted.

Certainly the possibility that admission of a witness' past conviction will improperly determine the outcome at trial is troubling when the witness' testimony is in support of a criminal defendant. The potential, however, is no less real for other litigants. Unlike Justice Scalia, I do not approach the Rules of Evidence, which by their terms govern both civil and criminal proceedings,

with the presumption that their general provisions should be read to “provid[e] special protection to defendants in criminal cases.” Rather, the Rules themselves specify that they “shall be construed to secure fairness in administration . . . to the end that the truth may be ascertained and proceedings justly determined” in *all* cases. Rule 102. The majority’s result does not achieve that end. \* \* \*

As I see it, therefore, our choice is between two interpretations of Rule 609(a)(1), neither of which is completely consistent with the Rule’s plain language. The majority’s interpretation takes protection *away* from litigants — *i.e.*, civil defendants — who would have every reason to believe themselves entitled to the judicial balancing offered by the Rule. The alternative interpretation — which I favor — also departs somewhat from plain language, but does so by *extending* the protection of judicial supervision to a larger class of litigants — *i.e.*, to all parties. Neither result is compelled by the statutory language or the legislative history, but for me the choice between them is an easy one. I find it proper, as a general matter and under the dictates of Rule 102, to construe the Rule so as to avoid “unnecessary hardship,” see *Burnet v. Guggenheim*, 288 U.S. 280, 285 (1933), and to produce a sensible result. \* \* \*

#### NOTES ON *BOCK LAUNDRY* AND DIFFERENT FOUNDATIONALIST THEORIES IN ACTION

1. *Does Textualism Work in Bock Laundry?* Note that, like the other eight Justices, textualist Justice Scalia *also* rewrote the statute, which has a perfectly “plain meaning” in this case: The felony convictions of civil plaintiffs can always be introduced to impeach them, but those of civil defendants are subject to a balancing test. Of course, such a plain meaning surely is unconstitutional, but in that event why doesn’t the textualist simply invalidate Rule 609(a)(1) (at least as far as civil cases) and apply the Rule 403 default rule, which would probably exclude Green’s conviction from evidence?

Justice Scalia disregarded plain meaning in this case because he believed that Rule 609(a)(1) was absurd as written, that the absurdity was unintended, and that an unintended absurdity justifies departure from plain meaning. This is itself significant. By creating an exception to textualism when a statute requires unintended “absurd” consequences, is Justice Scalia not conceding that following statutory text is not all that is going on in statutory interpretation, and that current interpretive values have a role to play in statutory interpretation? While Justice Scalia surely believes that plain meaning can only be sacrificed in the rare absurd-result case, why not sacrifice plain meaning when it directs an “unreasonable” result that was probably unintended by Congress?

Although Justice Scalia agreed to rewrite the statute in *Bock Laundry*, his opinion dismissed the dissenting opinion’s rewrite in favor of the majority’s rewrite:

The available alternatives [for rewriting the rule] are to interpret “defendant” to mean (a) “civil plaintiff, civil defendant, prosecutor and criminal defendant,” (b) “civil