Introduction---Overview

This is the second phase of a sequential national study of federalism focused on identifying, evaluating, and ordering the current state standards for admitting convictions to impeach. It employs as the fulcrum for this analysis the standards during this study period of the current federal rule on this issue. This study like the first examines pertinent authority for a fifteen year period, 1990-2004. Studies in patterns of federalism can be done at various levels of authority. State legislative standards regulating the same issue can be compared and contrasted based on pertinent policy concerns. State legislative rules can also be compared and contrasted, employing as the point of departure for the evaluation how the states' standards compare to the standards of the federal rule, that served to some significant degree as a source for the states to reconsider their rules. The first of these two studies in federalism focused on those issues. [1]

The next level of comparative evaluation is the interpretation of each states' rule's standards by that state's supreme court, and the comparative effect of those interpretations on the rankings of the state standards from most to least liberal in admitting convictions to impeach. This is the focus of this article.

Part one of this article summarizes the findings of the first of these two sequential studies of how our federal system regulates the admission of convictions to impeach. [2] Part two of this article identifies and evaluates the decisions of the state supreme courts interpreting rules which admitted convictions to impeach on the same standards as the current federal rule. [3] Part three identifies and evaluates the decisions of the state supreme courts interpreting rules whose standards overall admitted convictions to impeach more restrictively than the federal rule. [4] Part four of this article identifies and evaluates the decisions of the state supreme courts interpreting rules whose standards overall admitted convictions to impeach more liberally than the federal rule. [5]

Each of these three parts of the article tracking the outcomes of the three sets of state supreme court decisions during the study period is organized to track the following major points of analysis. First, basic demographic outcome data from the
decisions in each of the three types of rule states is identified and sequenced. [6] Next, in each section, the data's significance is identified and analyzed. [7]

The decision data is analyzed to determine the degree to which state supreme courts in each category referred to and relied upon the federal rule and the standards proscribed by that rule. [8] Second and third, the decision data is assessed to determine the degree to which state supreme courts in each category examined the trial record to determine if the trial judge had made the appropriate rule standard evaluation, and to determine the degree to which each state supreme court in each category themselves properly employed the standard(s) of their rules to determine the admissibility of convictions to impeach. [9] Fourth, the case data is assessed to determine how the three sets of courts defined and evaluated for admission to impeach, convictions for crimes of "dishonesty" or "false statement", and similar limiting concepts. [10] Fifth, the case data is assessed to determine how the three sets of courts defined and evaluated for admission to impeach, convictions for crimes punishable by more than a year in prison when that punishment term was the basis for at least preliminarily qualifying a conviction for possible admission to impeach. [11] Finally, each of these sections assesses the opinions of the three sets of state supreme courts to evaluate how each set of courts identified, defined, and evaluated the admissibility significance of exclusionary policies, particularly unfair prejudice. [12]

The article concludes with a comparative evaluation of the crucial findings from parts 2-4, and provides policy perspectives concerning those findings. [13] Finally, in light of its findings, the article recommends, as did the first study, wholesale changes in the standards for admitting convictions to impeach. [14] Changes which if implemented would create a single national standard that barred use of conviction records to impeach. A standard that the article documents is more consistent with related constitutional doctrines and the existing body of evidence, particularly empirical evidence on the impact of admitting conviction records to impeach. This is particularly true in light of what this article documents is the overwhelming reality in most of our state courts - wholesale and standardless admission of convictions records ostensibly only to impeach, especially defendants in criminal cases, which cause significant unfair prejudice, and which in all but the rarest of cases are irrelevant to prove propensity to lie, and in those rare instances are still unnecessary to admit for that purpose.

2.1.1 Part 1 - Summary of Article 1 - The Federal and State Rules Regulating The Admissibility
of Convictions to Impeach

The first article began with an analysis of the origins and evolution of the standards of the federal rule regulating the admission of convictions to impeach - a change in that rule in 1990 prompted beginning the study period in that year. [15] The article found that only nine states' rules mimic the current federal rule's standards, despite the fact that the federal rule was touted as a possible basis for reaching consensus on this issue. [16]

The article next focused in Part two on its primary research and analysis findings. It identified and ranked each state's evidence rule regulating the admission of convictions to impeach during the fifteen year period, 1990-2004. The conceptual premises of the rankings were explained. [17] The comparison was organized by placing each states' rule in one of three categories - identical to the federal rule, more restrictive than the federal rule in admitting convictions to impeach, or more liberal than the federal rule.

The most significant and somewhat startling finding of that article was that there were currently twenty-eight different standards in the fifty states with regard to admitting convictions to impeach. The article also found that despite the diversity in the states' standards, nine of every ten of the fifty states' rules at the beginning of 2005 still authorized the possible admission to impeach most witnesses, including the accused, with a record of conviction for crimes which by element analysis were irrelevant as proof of a propensity to lie. [18] The second most significant overall finding of this part of the article was that even when state rules expressly or implicitedly recognize that conviction records must be relevant to prove propensity to lie to be admissible on that issue, almost all of them, like the federal rule, negate that recognition by failing to define such limiting concepts as "dishonesty" or "false statement". [19] Failure to define such terms, opens the door to the possibility of broad interpretations of the terms---eliminating any rational argument that conviction records for crimes qualified by these characterizations constitute logical proof of propensity to lie. [20] Blame for this fundamental failure must be shared by the drafters of the federal rule - who in the official commentary discussed and expressed a preference for a narrow and policy based meanings of these concepts, yet failed to so define the concepts in the federal rule. [21]

Part three of that article began by identifying two major consequences of twenty-eight different state rule standards regulating the issue of admitting conviction records to impeach. Both of these consequences impact most heavily the behavior of members of the legal profession. First, even evidence experts
don't necessarily know the current national state of the law on this important issue, and second and more importantly, the practicing bar is faced with the possibility of further variance in these standards by state supreme courts' interpretations, and ultimately the possibility of hundreds of variants at the trial judge level. [22] Part three found that ultimately these consequences fall most heavily on the rights, including constitutional rights, of testifying party litigants, particularly the accused in criminal cases. [23]

The article concluded that this was not a desirable federalism pattern/outcome, especially since the federal rule's enactment was viewed as a national opportunity for policy reflection and perhaps consensus on this issue. This conclusion was qualified by an acknowledgement that there could be a plausible policy reason that could justify in a mature federal system this much diversity. The article identified and evaluated the five possible and four plausible policy reasons for this pattern. [24]

The article offered proof that none of these reasons were supported by empirical or any form of reality based evidence, and therefore could not serve as legitimate policy justifications for this pattern of federalism. [25] An element of this finding was disproof of the hypotheses that no constitutional rights are implicated by any or only a few of the current twenty-eight state standards, authorizing the possible or mandating the admission of convictions to impeach. [26] Injury to the accused specific constitutional right to an impartial jury and the right of the accused and at least parties who testify in civil cases to minimal substantive due process protection, are both threatened by most of the states' standards. [27]

An element of this overall finding was disproof of the hypotheses that there is empirical or any form of reality based evidence that a record of criminal conviction is relevant (makes it logically more likely) to prove propensity to lie. [28] No credible evidence supports this hypotheses, the existing empirical evidence supports the conclusion that the hypothesized reason is false, and their is widespread admission by lawyers and other experts that a record of conviction is not relevant to prove propensity to lie. [29] Admitting irrelevant evidence violates the most basic evidence admissibility principal, and risks violating the most basic substantive constitutional protection. [30]

An element of this overall finding was disproof of the hypotheses that most or all of these twenty-eight current state standards authorizing the possible or mandating the admission of convictions to impeach were consistent with current major evidence trends such as the "Daubert" doctrine. [31] The article concluded
that most of these standards are inconsistent with Daubert's and its progeny's call for critical evaluation and even reexamination of the basis for admission of expert testimony. The article argued that Daubert's premise that reliance on hunch and heuristics by experts in other fields is subject to judicial scrutiny and evaluation, in fairness, should be seen as a general call for a reality check on the basis of admission of all evidence, even those justified solely by the hunch and heuristics of the legal profession. [32] As such, Daubert's basic concerns are a subset and supportive of the basic evidence admissibility requirement of relevance. [33] There is more than just the appearance of intellectual hubris on the part of lawyers and judges participating in drafting and interpreting evidence rules in continuing to rely on an unproven historical heuristic, while at the same time ignoring empirical research supporting the conclusions that conviction records while irrelevant to prove propensity to lie do cause partial jurors and juries. [34]

An element of this overall finding was disproof of the hypotheses that most or all of these twenty-eight current state standards which do authorize the possible or mandate the admission of convictions to impeach are consistent with the reality that there is no or inadequate empirical or other evidence that admitting conviction records ostensibly only to impeach testimony will result in, or create a substantial risk of partial juror(s) and juries. [35] The article identified multiple empirical studies and their consistent and consensus findings were reported. Those findings were that jurors and juries are prejudiced in deciding the merits of cases by misusing conviction evidence for that purpose, while disdaining use of such conviction records ostensibly for its only authorized use as impeachment evidence. [36]

Finally, the article identified the crucial consequence of disproof of all identified plausible reasons for the twenty-eight state standards. Currently, nine of every ten of these state rules regulating admission of convictions to impeach by opening the door to the potential admission of irrelevant and highly prejudicial information, violates or threaten to violate national and state constitutional rights to substantive due process and the right of an accused to an impartial jury. [37]

The article proposed reform. [38] It proposed that all fifty states and the federal rule should abolish admission of conviction records to impeach, especially where the unfair prejudice that results is likely to be greatest—when the accused or civil parties take the stand as witnesses. Hence all reference to conviction records as a basis for impeachment should be eliminated. Montana has adopted this ban for all witnesses, and that ban demonstrates that such a ban can be implemented now. [39]
In fairness, enhancing the likelihood of convicting persons with records, and taking their property in civil cases are not adequate counterweights to the admission of irrelevant evidence which injures these persons constitutional rights. Nothing in substance will be injured by the ban when the focus is upon the primary goal of trials - the search for truth, because jurors will always be skeptical of the veracity of the accused, civil parties, and any witness who stands to gain or lose as a result of the outcome of the trial. [40] Furthermore, when it is appropriate and necessary, i.e. when a witness refuses to admit that he has previously lied under oath, and their is a judicial determination that he has so lied, the trial judge can instruct the jury of the fact that the person has previously lied under oath. There is never a justification for reference to a record of criminal conviction, and such a conviction record need not necessarily be the only basis for a judicial determination that the witness has previously lied under oath. [41] The article concluded that "Our federalism is one of the greatest strengths of our system, it is not, however, an excuse for ignoring our most basic constitutional and evidence law policies".

We turn now to the focus of this article --- the impact of the state supreme courts' interpretations of these rules over the same very recent fifteen year period. Potentially the collective impact of the work of these most important state courts could ameliorate or exacerbate the current pattern of federalism gone astray. What the article uncovers is a pattern of judicial anarchy that greatly exacerbates the flaws in our federalism on this issue.

The one hundred and fifty state supreme courts decisions analyzed in this article collectively have the effect of further opening the door in the substantial majority of states to the wholesale admission of irrelevant and highly prejudicial evidence, while also creating the wide spread potential for drastic and unprincipled discrepancies in the application of most of these states' standards by the hundreds of state trial judges.

3.1.1

Part 2 - State Supreme Court Decisions 1990-2004 of Standards to Impeach that Mimicked the Federal Rules's Standards

8 of the 9 state supreme courts whose evidence rules were identical to the federal rule, made eighteen pertinent admission of conviction to impeach decisions during the period of this study, 1990-2004, and in sixteen of those decisions they affirmed lower court admission decisions. [42] 7 of 8 of these state supreme courts in 15 of these eighteen decisions (83%) sanctioned or authorized the admission of one or more convictions ostensibly only to impeach at least one trial witness. [43] 2 of these 8 state
supreme courts in 3 of the 18 decisions (22%) sanctioned or ruled that one or more convictions ostensibly proffered to impeach at least one trial witness was or should have been properly excluded. [44]

6 of these 8 state supreme courts in 12 of these eighteen decisions sanctioned the admission of one or more convictions to impeach the accused. [45] 1 of these eight state supreme courts sanctioned or ruled in 1 case that two "felony" convictions proffered to impeach the accused should have been excluded. [46] 5 of these eight state supreme courts in 8 of the eighteen decisions sanctioned the admission of multiple convictions to impeach the accused or that would have been admitted to impeach the accused should he have decided to testify, and only one of these courts in one decision decided to exclude multiple convictions of the accused. [47]

2 of these eight state supreme courts in 3 of the eighteen decisions between 1990-2004, the period under study in this article, sanctioned or authorized the admission of one or more convictions to impeach witnesses other than the accused. [48] 2 of these eight state supreme courts in 2 of the eighteen decisions during the period, 1990-2004, under study in this article, sanctioned or ruled that one or more convictions ostensibly proffered to impeach a witness other than the accused, including a key agent of a civil party, should have been or were properly excluded. [49]

To recap, in three of five decisions when the witness was not the accused against whom prior convictions were offered to impeach, state supreme courts interpreting standards identical to those of the federal rule, sanctioned the admission of one or more convictions proffered to impeach. In two of the three decisions sanctioning admission, the witness impeached was a prosecution witness, while in one of the two cases in which one of these state supreme courts sanctioned exclusion of a conviction to impeach, when the witness was not the accused, the witness was also a prosecution witness. On the other hand, when the accused was the witness against whom convictions were offered to impeach, these state supreme courts affirmed trial judges, and sanctioned the admission of convictions to impeach in twelve of thirteen decisions.

7 of 8 of these state supreme courts, in 13 of these 18 decisions (72%) either sanctioned a trial attorney's failure to raise or rely on the argument that a conviction proffered to impeach one of his witnesses was irrelevant, or the trial judge's failure to even attempt to articulate why the conviction was relevant to prove propensity to lie, or failed to make their own
independent assessment of relevance, or substituted its characterization of the charge as meeting its criteria of "dishonesty" or "false statement", or resorted to the historical heuristic that all felonies per se were relevant and had some probative value to prove propensity to lie. [50] As a result, these 7 supreme courts collectively sanctioned the admission of all of the following irrelevant as proof of propensity to lie convictions as impeachment evidence: armed robbery(multiple cases), assault with intent to do bodily harm, attempted robbery, breaking into a vehicle, burglary, carrying a concealed weapon, felony riot, involuntary manslaughter, manslaughter, murder, rape, receipt of stolen property, reckless endangerment, robbery, shooting with intent to kill, shoplifting, theft, theft by check, unauthorized use of a motor vehicle, and unlawful possession of a firearm. [51] By rule in these states whose rule mimicked the federal rule, irrelevant, and even marginally relevant convictions must be excluded.

These state supreme courts for the most part ultimately failed in most of these decisions to competently apply the appropriate standard required by their identical rule, including when applicable the correct balancing evaluation. The Oklahoma Court of Criminal Appeals strayed even further from basic evidence principals and policies and the Oklahoma rule by not only admitting irrelevant convictions to impeach the accused, but also sanctioning in three of four cases the admission to impeach the accused with a conviction for a crime similar to one or more of the charges currently being tried. [52]

3.1.2 State Supreme Courts Whose Rule Mimicked the Federal Rule's Standards on Admitting Convictions to Impeach --- Assessing The Case Outcome Data---Part 1 - Reliance on The Federal Rule as an Element in Interpreting The State's Rule

Four of these eight state supreme courts expressly asserted in at least one of their decisions during the period under study in this article, 1990-2004, an intention to adopt the policy that the interpretation of their rule authorizing the possible admission of convictions to impeach may be guided by the official commentary, definitions, and interpretations of the federal rule which their rule mimics. [53] Two of these courts, for example, relied on federal precedent or expressly asserted that its definition of crimes of "dishonesty" and "false statement" would be guided by the definitions of those concepts suggested in the official commentary to the federal rule. [54] One of the state supreme courts making this assertion actually adhered to this reliance on the federal rule interpretive guideline as a significant element in its basis
of decision. [55] On the other hand, both the Oklahoma and South Carolina Supreme Courts' reliance on the federal rule in one case was inconsistent with a holding of those courts on this issue in other decisions within just a few years of the decisions acknowledging the propriety of relying on the federal rule. [56]

3.1.3 & 3.1.4
State Supreme Courts Whose Rule Mimicked the Federal Rule's Standards on Admitting Convictions to Impeach - Assessing The Case Outcome Data---Part 2 - Study

Period Decisions Evaluated to Determine Likelihood that these Courts Examined the trial record to determine if trial judge had made the appropriate Rule standard Evaluation & Employed The Appropriate Rule Standard to Evaluate and Determine the Admissibility of Convictions to Impeach

In only 3 of these eighteen decisions (17%), did a state supreme courts hold that the trial judge's admissibility decision with regard to one or more convictions to impeach was uncorrected error. [57] In 16 of these 18 decisions (89%), all eight federal rule mimicking state supreme courts failed to competently perform the evaluation required by the appropriate standard(s) of its rule as the basis for review of the trial judge's decision, or to guide its own decision making. [58] Most egregiously, as already discussed, seven of these courts failed in 74% of these decisions to require trial judges or themselves to consistently adhere to the most basic admissibility rule requirement, that evidence must be relevant on the issue for which it was offered, here as proof of a propensity to lie. [59] This was true despite the fact that in several of the cases, the courts did make reference to and even restated their states' rule standards. [60]

3.1.5
State Supreme Courts Whose Rules Mimicked the Federal Rule's Standards on Admitting Convictions to Impeach - Assessing The Case Outcome Data---Part 3 - Study

Period Decisions Evaluated to Determine Whether & How These Courts Defined and Evaluated for Admission Convictions for Crimes of "Dishonesty" or "False Statement"

The rules in these jurisdictions authorize per se admission of convictions characterized as involving "dishonesty" or "false statement". [61] Yet neither the federal rule or the rules of these states included specific definitions of these concepts,
although commentary to the federal rule suggested a narrow
definition of these concepts designed to make convictions which
qualified for per se admission logically relevant as proof of
propensity to lie. [62] Hence the state supreme courts were left
with the obligation and the opportunity to define these terms for
the purpose of providing policy guidance to trial judges and lower
appellate courts. Yet none of these eight state supreme courts
during the fifteen year period of this study expressly acknowledged
the failure of the federal rule and their state rules mimicking the
federal rule to define "dishonesty" or "false statement". Nor did
any of these state supreme courts expressly generally define or
even attempt to define during the study period "dishonesty" or
"false statement". In fact in only 6 of these eighteen decisions
did five of these eight state supreme courts focus on this issue.
[63]

Three of these state supreme courts held that convictions
for burglary, theft related crimes, and even robbery were
convictions for crimes of "dishonesty", thereby sanctioning the per
se admission of the convictions at issue, and signalling to trial
judges that these concepts should be broadly defined as a basis for
per se impeachment of any witness. [64] On the other hand, the New
Mexico Supreme Court ruled that a trial judge had discretion to
exclude a prosecution witness' juvenile adjudication for what it
characterized as a crime of dishonesty or false statement, by
sanctioning evaluation of admissibility by resort to the evidence
code's residuary policy balancing exclusionary rule. [65] The Iowa
Supreme Court similarly, but based on an obvious conceptual error
in interpreting the standards of its rule, departed from the per se
admission of convictions characterized as involving dishonesty or
false statement by requiring a balancing evaluation to determine
admissibility, even after a conviction was so cast, thereby giving
unwarranted protection to an accused. [66]

3.1.6
State Supreme Courts Whose Rules Mimicked the Federal
Rule's Standards on Admitting Convictions to Impeach.
Assessing The Case Outcome Data...Part 4 - Study
Period Decisions Evaluated to Determine How Faithful
Were Courts to Rule Standards When the Basis for
Admission of Conviction to Impeach was Preliminarily
that The Potential maximum punishment exceeded a year
in Prison

State Supreme Courts with an evidence rule that mimics the
federal rule, when the conviction is not for a crime of dishonesty
or false statement, and the alleged error is a cognizable issue on
appeal, by rule are required to review a trial judge's decision to
assure that the conviction preliminarily qualifies as one for a crime punishable by more than a year in prison, and that the appropriate balancing test was employed and the appropriate evaluation was done. [67] Six of these eight state supreme courts in 12 of these eighteen decisions in which the admission to impeach on this basis was at issue, almost never thoroughly examined the record to determine if the trial judge had performed, nor evaluated the quality of the trial judge's performance of the appropriate balancing evaluation. [68] Even more significantly, the courts failed to undertake such an evaluation themselves.

First, as previously discussed, these courts in 11 of these decisions failed to perform competently the first step in both balancing evaluations, a minimally competent assessment of whether the conviction at issue was even relevant to prove propensity to lie. [69] The North Dakota Supreme Court, for example, presumed, in direct conflict with the implications of its rule's standards, that all "felonies" were relevant to prove propensity to lie, and therefore the court did not make its own assessment of the relevance of the crimes that were the basis of each of the three convictions it sanctioned to impeach the accused. [70] More significantly, the decision signalled to all trial judges in North Dakota that they too could forego the rule required evaluation of relevance of a "felony" conviction as proof of a propensity to lie, and simply assume not only relevance but probative value. The Oklahoma Court of Criminal Appeals went even further in nullifying the rule imposed need to find that a conviction was relevant to prove propensity to lie by holding that anytime the accused takes the stand in his own defense, the prosecution may automatically admit the number of times the accused was previously convicted of a "felony", but not necessarily the name/nature of those convictions. [71]

Additionally these two state supreme courts were joined by the New Mexico Supreme Court in eschewing the policy analysis required by their rules' balancing standards, and instead empowered themselves to remake the rule, by resort to heuristic hunches that the court had created. [72] The North Dakota Supreme Court, for example, asserted that if the conviction is for a crime similar to a crime currently being prosecuted that is a reason to exclude, but if a conviction is for a dissimilar crime it favors admission. [73] This is a significant conceptual error because while similarity may increase the unfair prejudice that will result if it is admitted to impeach, significant unfair prejudice results when even a dissimilar conviction is admitted to impeach. [74] The New Mexico Supreme Court in evaluating the admissibility of a felony conviction, not involving dishonesty or false statement, asserted it had developed a six factor evaluation - (1) nature of crime in relation to its impeachment value as well as its inflammatory
impact, (2) date of the conviction and witness's subsequent history, (3) similarities, and the effect thereof, between the conviction and current crime charged, (4) a correlation of standards expressed in rule 404, (5) the importance of the "defendant's" testimony, and (6) centrality of the credibility issue. [75]

These state supreme courts then compounded the risk that trial judges now faced with the rule and its standards, and these court created heuristics were more likely to reach disparate results, by failing to establish uniform state-wide standards adequately defining each of these factors, the significance of each of these factors, nor the interrelationship and hierarchy among these factors. Significantly, for example, none of these supreme courts adopting this multi-factor analysis, have recognized that neither the importance of the witness' testimony nor the importance of the credibility issue are factors which add an iota to the relevance—probative value of a conviction to prove propensity to lie, but both independently and collectively increase the danger that unfair prejudice will result from the admission of the conviction. [76] Nor did they recognize that these two factors were per se slanted towards favoring admission of convictions against any party witness, particularly the accused, who chooses to testify in a criminal case. [77]

State Supreme Court decisions in which review of the trial judge's evaluation, and/or an independent evaluation of the factors are made by definition provide better guidance to trial judges and other lawyers. For example the Oklahoma Court of Criminal Appeals at the beginning of this study's period of evaluation, 1990, expressly found that it was error for the trial judge in admitting only two of six convictions of the accused in a criminal case ostensibly to impeach him, to choose to admit the only two convictions which were for crimes similar to the crime currently being prosecuted. [78] The court expressly found that such similar crime convictions are more likely to result in the jury convicting the accused based on a substantive propensity inference. [79]

3.1.7
State Supreme Courts Whose Rules Mimicked the Federal Rule's Standards on Admitting Convictions to Impeach - Assessing The Case Outcome Data---Part 5 - Study Period Decisions Evaluated to Determine The Quality of These Courts Identification and Evaluation of Pertinent Exclusionary Concerns/Particularly Unfair Prejudice

In these eighteen decisions, the state supreme courts almost never examined the trial record to determine if the trial judge had
followed the component of their rule required balancing evaluation that mandated the identification and evaluation of the rule identified exclusionary concerns implicated by the facts of the case. Nor in these decisions did the courts as required by their rule identify and evaluate themselves the rule identified exclusionary concerns implicated by the facts of the case. Instead of the systematic evaluation required by the rule, these courts for example relied on more court created junk science heuristics to denigrate the significance of implicated exclusionary concerns.

[80] In summary these eight supreme courts in these eighteen cases, proved that the adoption of the intended significantly more restrictive than the common law current federal rule standards with regard to impeachment via convictions, did not necessarily matter. State Supreme Court Justices in these jurisdictions systematically failed to review the trial record to determine if the trial judge had identified and employed the correct one of three available standards of the rule, and failed to independently identify and apply these standards in their own evaluations.


4.1.1 Studies in Federalism - Overall More Restrictive Rules than Federal Rule 24 States' Supreme Courts Decisions 1990-2004 - Basic Case Demographics & Outcomes

There were potentially twenty-four state supreme courts who could have during the period of this study, 1990-2004, interpreted an evidence rule that overall more restrictively than the current federal rule, admitted convictions to impeach. [81] 20 of the twenty-four state supreme courts made seventy-one pertinent admission of conviction to impeach decisions during the period of this study, 1990-2004. [82] 15 of these twenty state supreme courts in 39 of these 71 decisions (56%) authorized or sanctioned the admission of one or more convictions ostensibly to impeach at least one trial witness. [83] 15 of these twenty state supreme courts in 32 of these 71 decisions (44%) sanctioned or held that under their respective standards, one or more convictions proffered to impeach at least one trial witness was properly excluded or should have been or arguably should have been excluded. [84]

14 of these twenty of these state supreme courts in 31 of these 71 decisions sanctioned the admission or authorized the possible admission of one or more convictions to impeach the
of these twenty state supreme courts, including seven courts which had also sanctioned the admission of convictions to impeach the accused, in 14 of these 71 decisions sanctioned the exclusion or authorized the possible exclusion of one or more convictions to impeach the accused. [86] 9 of these twenty state supreme courts in 17 of these 71 decisions sanctioned the admission or authorized the possible admission of multiple convictions to impeach the accused. [87] 4 of these twenty state supreme courts in 4 of these 71 decisions sanctioned the exclusion or authorized the possible exclusion of multiple convictions to impeach the accused. [88]

5 of these twenty state supreme courts in 8 of these 71 decisions sanctioned a trial judge's admission of a conviction, or ruled that one or more convictions ostensibly proffered to impeach a witness other than the accused, including civil parties, was or should have been properly admitted for that purpose. [89] 9 of these twenty state supreme courts in 18 of these 71 decisions sanctioned a trial judge's exclusion of a conviction, or ruled that one or more convictions ostensibly proffered to impeach a witness other than the accused, including civil parties, should have been excluded. [90]

To recap, in 18 of 26 (69%) decisions when the witness was not the accused against whom convictions were offered to impeach, state supreme courts interpreting standards which overall authorized admission of convictions for this purpose more restrictively than the federal rule, sanctioned the exclusion of one or more convictions proffered to impeach. When the witness to be impeached was a prosecution witness, these state supreme courts sanctioned the exclusion of convictions to impeach in 12 of 17 (71%) of those decisions. On the other hand, when the accused was the witness against whom convictions were offered to impeach, these state supreme courts sanctioned or authorized exclusion of convictions to impeach in only 14 of 45 (31%) of those decisions.

Despite the fact that these 20 state supreme courts were interpreting rules with overall more restrictive standards than the federal rule, in 31 of the 71 decisions (45%) included in this study, 14 of these courts sanctioned the admission of one or more irrelevant as proof of propensity to lie convictions to impeach a witness by ignoring the trial judge's failure to even attempt to articulate why the conviction was relevant to prove propensity to lie, or failing to make their own independent assessment of relevance, or by substituting their characterization of the charge as meeting its criteria for involving "dishonesty" or "false statement", or by reliance on the historical heuristic that all felonies per se were relevant and had some probative value to prove propensity to lie, or by reliance upon the even more illogical and
unfairly prejudicial heuristic that if the accused claims he is innocent at trial, evidence of a prior conviction for the same or similar crime is relevant to prove the falsity of that claim. [91]

Included in the irrelevant to prove propensity to lie convictions admitted by these courts were: aggravated battery, aggravated assault, aggravated robbery, armed robbery, arson, assault with a deadly weapon, attempted murder, attempted robbery, burglary (multiple times by multiple supreme courts), check kiting/felony theft, confinement, conspiracy to commit murder, conspiracy to commit robbery, criminal sexual assault/conduct (multiple times), delivery and distribution of cocaine (multiple times), drug distribution, escape (multiple times), immoral acts with a child, kidnapping, larceny, lewd conduct with a minor (against the accused), misdemeanor theft, murder, possession of a contraband substance (in multiple cases), possession of a controlled substance with intent to distribute, possession of a firearm, rape (multiple times by multiple courts), receipt of stolen property, robbery (multiple times), sexual battery, sexual contact with a minor, shoplifting, theft (by multiple courts), unlawful use of a weapon by a felon, and use of an automobile for purpose of sale of drugs. [92]

The Connecticut Supreme Court went even further. The court endorsed the tactic of "sanitizing" convictions not directly probative of dishonesty; ostensibly to mitigate unfair prejudice to the witness, but in fact keeping from the jury the irrelevancy of these convictions as proof of a propensity to lie. [93]

Furthermore, avoiding unfair prejudice to a witness as opposed to a party is not one of the policy goals of the Connecticut or any other state impeachment with convictions rule. There is evidence in these cases that the only pertinent unfair prejudice, that to the parties, is not mitigated by first telling the jury that an irrelevant to prove propensity to lie "felony" convictions is relevant only for that purpose, and then provide the jury with the opportunity to speculate as to the nature of the crime which was punishable by more than one year in prison. [94] Jurors are thereby freed by the court's doublespeak to draw, which they did in these cases, and act upon the relatively obvious and logical inference, that they are to use their common sense, and use the fact that the witness is a convicted felon, currently accused of a felony (perhaps the same "felony"), as a factor favoring his conviction. [95]

Despite the fact that these twenty state supreme courts were interpreting rules which were overall more restrictive than the federal rule, did not prevent 11 of these courts in 19 decisions, from sanctioning the admission of crimes to impeach the accused which were identical or very similar to one or more of the charges currently being tried. [96] On the other hand, 8 of these
courts (including four of the same courts which had admitted such similar crime convictions) in 10 decisions during the study period, held that similar crime convictions of the accused should have been excluded as impeachment evidence. [97]

State supreme courts sanctioned such same crime convictions even when the record proved the accused declined to testify, and had expressly argued that the admission of such a conviction would or did force him to forego testifying, even in instances when the accused alleged that this result violated his constitutional rights. [98] The Minnesota Supreme Court sanctioned this outcome, even when a lower appellate court had ruled that admitting such a same crime conviction, which would prevent the accused from testifying, violated both the national and state constitutions right to testify in his own defense. [99] One of these courts sanctioned the admission of multiple similar crime convictions in part on the theory that the trial judge prohibited reference to the specific names of the convictions. [100] One of these courts did hold that the admission of a similar crime conviction ostensibly only to impeach was likely to increase the risk that the resulting unfair prejudice would influence the merits to the point that justified the exclusion of the conviction. [101] The defense in this case presented sufficient evidence to raise a serious factual dispute of whether the accused was guilty of the current charge of sexual battery. [102]

4.1.2
State Supreme Courts Whose Rules's Standards were Overall More Restrictive than the Federal Rule's Standards on Admitting Convictions to Impeach --- Assessing The Case Outcome Data--- Part 1 - Reliance on The Federal Rule as an Element in Interpreting Their States' Rules

These state supreme courts did not consistently acknowledge and identify how at least one or more of their standards for admitting convictions to impeach was different than the federal rule's standards, although on occasion, a court did expressly assert that the standard by design rejected the standards of the federal rule. [103] On the other hand, five of these state supreme courts did compare and contrast their standards for admitting convictions to impeach with the federal rule, and expressly asserted an intent to rely on the federal rule and its legislative history as guidance. [104] At least two of these five courts expressly adopted the policy of being guided by the federal rule with regard to the definitions of categories of crimes qualifying for possible admission to impeach, or with regard to the balancing evaluation that its rule and the federal rule required before a "felony" conviction could be admitted to impeach a witness. [105]
One of these courts, however, failed to cite to the federal rule's commentary which evaluated theft and found it was not a crime of dishonesty and therefore lacked probative value to prove propensity to lie. [106] Instead, the Maryland Court of Appeals, earlier in the same opinion, had characterized theft as the embodiment of deceit. [107]

4.1.3 & 4.1.4
State Supreme Courts Whose Rules's Standards were Overall More Restrictive than the Federal Rule's Standards on Admitting Convictions to Impeach
Assessing The Case Outcomes Data---Part 2 - Study
Period Decisions Evaluated to Determine Number & Percentage of the Cases in Which the Courts Examined the trial record to determine if trial judge had made the appropriate Rule standard Evaluation & The Number & Percentage of the Decisions in Which the Courts Employed The Appropriate Rule Standard to Evaluate and Determine the Admissibility of Convictions to Impeach

In 24 of these 72 decisions (36%), one of these twenty state supreme courts held that the trial judge's admissibility decision with regard to one or more convictions to impeach was uncorrected error. [108] These twenty state supreme courts, only in a small minority of the pertinent decisions during the study period took the first analytic step in adhering to the restrictions in their rules which were greater than those found in the federal rule, by expressly reviewing the trial record to determine if the trial judge was faithful to those restrictions. [109] Even more importantly, these courts in most of these decisions failed to perform competent evaluations of their own rules, especially the restrictions in their rules that made their rules less liberal overall than the federal rule in admitting convictions to impeach. [110] Most egregiously, as already discussed, seventy-five percent of these courts in forty-five percent of these seventy-five cases, failed to require trial judges or themselves to consistently adhere to the most basic admissibility requirement, that evidence must be relevant on the issue proffered, here as proof of a propensity to lie. [111]

In perhaps the most startling example, of ignoring more stringent exclusionary standards, the Georgia Supreme Court was forced to acknowledge, but did not explain why it had erroneously sanctioned in 1998 the admission of a felony conviction to impeach the accused, despite the fact that its rule standard required blanket exclusion of such convictions to impeach the accused unless
he first placed his character at issue. [112] Even this acknowledgement of error, however, did not make reference to the fact that in the interim the court had sanctioned prosecutorial introduction of same crime conviction evidence against the accused by merely resorting to the illegal and specious tactic of asking on cross-examination if the accused had a character for the trait reflected in the same crime conviction, and when the accused denied the trait, admitting the conviction to impeach the denial. [113]

There were exceptions. The outstanding exception was the strong policy advocacy of its rule prohibiting the use of convictions to impeach by the Montana Supreme Court. [114] In addition, multiple times the Illinois Supreme Court reviewed the performance of trial judges in admitting convictions to impeach. [115] Most of these reviews, however, were triggered by flagrant failures of trial judges to follow the standards of the rule, which were the standards originally developed in decisions of the state supreme court. [116] Review, however, did not necessarily mean reversal for flagrant failures to follow those standards. [117]

In addition, 6 other of these twenty supreme courts, joined the Illinois Supreme Court by ostensibly providing guidance for their trial judges by restating the sequential evaluation protocol required by its rule, or by expressly allocating the burden of proof on this issue, or expressly requiring that every trial judge place their rule evaluation on the record, or less effectively by adding the court's own guidelines, or a combination of these actions. [118] Four of these state supreme courts detailing their standards and identifying and using protocols to apply/enforce accurate application of their rule's standards, were among the six of the twenty state supreme courts interpreting overall more restrictive, than the federal standards, rules making decisions during the study period, which did not admit a conviction clearly irrelevant to impeach. [119] The fifth and sixth state supreme courts not admitting irrelevant convictions during the study period were those of Kansas and Montana. [120]

In the other three state supreme courts, review of whether trial judges had adhered to the standard, and even express articulation and employment of the standard by the supreme court to guide its own review, did not assure, however, that a minimally competent substantive evaluation/application of the standard would be undertaken by the court or required of trial judges. [121] The Washington Supreme Court nullified its own substantive standards and procedural protocols simply by broadly characterizing crimes for which an accused had been convicted as involving "dishonesty", and therefore per se admissible to impeach. [122]

At times during the study period, the Connecticut Supreme
Court seemed to completely abandon its standard in favor of a sequence of rough heuristics. First, the court took the position that convictions generally were inadmissible to impeach at least the accused, but that felony convictions for crimes such as larceny, that it thought implicated lack of veracity, were almost per se admissible, and any felony conviction which were not, were still admissible, but the name of the offense should be withheld from the jury. [123] The court seemed to be operating on a sequence of not necessarily consistent hunches. First, if a witness has committed a serious crime that is not logically probative of lying, the witness is a person of general bad character, and therefore more likely to lie during testimony. The jury should therefore learn of this conviction, but the jury should not hear the name of the crime of which the witness was convicted, because if they do, they will believe the witness is a specific type of bad person, and focus on that, and this is unfair to the witness, even if the witness is not the accused in a criminal case. [124] This court's real standard thereby jettisoned both the state rules' focus on logical relevance as a minimal admission requirement, and an evaluation of unfair prejudice to the litigants because the admission of convictions increases the likelihood of non-merit based decision making by the jury. The court also endorsed employment by trial judges of unproven, heuristic-hunch based factors in addition to rule factors for use in the evaluation of whether a conviction should be admitted for impeachment purposes. [125] Connecticut Supreme Court Justices, as was true during the study period of justices on state supreme courts interpreting overall more liberal standards than the federal rule, endorsed the idea that the significance of the testimony of a witness, increases the probative value of a conviction offered to impeach. [126] Of course as a matter of logic, this is patently a false inference to draw. Instead, the logical inferences are that the introduction of the conviction will, given the significance of the testimony, heighten the potential for unfair prejudice as the basis for deciding the merits of the case, while leaving completely unchanged the relevance/probative value of the conviction as proof of propensity to lie. The Connecticut Supreme Court in its rule required assessment of unfair prejudice eyeballed, minimized, and underestimated the significance of unfair prejudice that results when convictions are admitted to impeach. [127] The court also relied on another unproven heuristic, that all prosecution witnesses with regard to this issue should be lumped together, including the alleged victim of the crime, and that generally it is unlikely that the introduction of a conviction of any prosecution witness will result in any unfair prejudice to the government's one fair opportunity to convict. [128]

The Illinois Supreme Court in several decisions during the study period abandoned its rule standard's required balancing
evaluation, and upheld the admission of multiple felony convictions
to impeach the testimony of the accused, despite the fact that all
of these convictions were irrelevant to prove propensity to lie. [129]  The court multiple times acknowledged that the record failed
to prove that the judge had expressly undertaken the sequential
evaluations required by its balancing standard, and failed to make
its own crime specific relevance/probative value assessment
required by its rule. [130]  Instead the court asserted or merely
assumed that any felony conviction per se had some unspecified
quantity of probative value to prove propensity to lie, because
they were evidence of propensity to be of general bad character.
[131]  Of course no empirical or any other real evidence was
referred to in support of this totally specious conclusion.

The Illinois Supreme Court further departed from the
balancing evaluation required by its rule, by taking positions that
denigrated or eliminated the significance of exclusionary concerns.
First the court failed to make an assessment of the unfair
prejudice likely to have resulted when these convictions were
admitted.  The court compounded this error of omission by an error
of commission-assuming that the unspecified unfair prejudice could
be mitigated by the fiction that a limiting instruction is likely
to dissipate that prejudice. [132]  Third, the court simply
abandoned even a semblance of following its own rule of law, by
endorsing the fundamentally specious heuristics that similar crime
convictions should be admitted to impeach when the accused claims
to be innocent at this trial, when he in fact was previously
convicted of the same crime, and that naming the offense underlying
that conviction reduced the risk of unfair prejudice. [133]  Obviously both assertions are conceptually flawed, and are
tantamount to negating the evidence rule barring propensity
evidence to prove substantive guilt. As a result, the court
sanctioned in several decisions the admission of convictions for
crimes identical or very similar to crimes for which the accused
was currently standing trial. [134]

4.1.5
State Supreme Courts Whose Rules's Standards were
Overall More Restrictive than the Federal
Rule's Standards on Admitting Convictions to Impeach
Assessing The Case Outcomes Data---Part 3 - Study
Period Decisions Evaluated to Determine Whether &
How These Courts Defined and Evaluated for Admission
Convictions for Crimes of "Dishonesty" or "False
Statement"

Fourteen(14) of the twenty state supreme courts who made
pertinent decisions during the fifteen year period of this study,
were interpreting ten rule standards which were not only overall more restrictive than the federal rule, but were also more restrictive than that rule for all witnesses (8 standards and twelve states) or the accused (two standards - one in each of two states), with regard to admission of convictions to impeach on the basis that the crime underlying the conviction was characterized as involving "dishonesty", "false statement", or similar concepts. [135] These states either excluded admission of such convictions to impeach the accused or required exclusion or a balancing evaluation before such convictions could be admitted against any witness. [136] The rules in ten of these fourteen states included express reference to the concepts of "dishonesty" and/or false statement", and in the case of Vermont, the seemingly narrower concepts of "untruthfulness" and "falsification". [137] In the fifteen year period of this study, 1990-2004, none of these ten courts expressly acknowledged that their rule which was enacted or amended in most of these states after the federal rule's enactment, like that rule, failed to define the concepts "dishonesty" and "false statement". Even more significantly, none of these courts undertook to generally define these concepts, despite the fact that even in these states these concepts were often liberally employed by these courts as important factors favoring the admission of convictions to impeach.

The Montana Supreme Court enforced its rule's ban on use of any conviction to impeach any witness, including even convictions for crimes properly characterized as involving dishonesty or false statement. [138] The Montana Supreme Court, in the context of both civil and criminal cases, made an express reference to that ban, and asserted a policy preference to strictly enforce it. [139] The Montana Supreme Court as well as the Hawaii Supreme Court which excluded such convictions to impeach the accused, also held however, during the period of this study, 1990-2004, that while a witness cannot be impeached with a conviction, the witness can be confronted with the underlying conduct when it is relevant to proving a greater likelihood of lying. [140]

Six of the remaining thirteen state supreme courts which were interpreting rule standards which were overall more restrictive than the federal rule, and with regard to admitting convictions for crimes of "dishonesty" or "false statement" to impeach, but whose standards were less restrictive than the blanket exclusionary standard of Montana, made pertinent decisions on this issue during the study period. [141] Four of these six supreme courts intermittently honored the more restrictive standard(s) of their rules. [142] Another of the six state supreme courts conclusionarily characterized convictions as within its rule's terms chosen as surrogates for an evaluation of relevance as proof of a propensity to lie. [143]
In addition, three of these six courts, despite being required by rule to identify and balance exclusionary concerns, failed in some decisions to even attempt to employ a principled protocol to identify and evaluate exclusionary policies implicated by the admission of convictions characterized as involving "dishonesty" or "false statement". The Tennessee Supreme Court, for example, even though it ultimately decided that the convictions for crimes similar to current trial charges should have been excluded, did not attempt to assess the potential cumulative unfair prejudice of the prosecution's impeachment of the accused and subsequent closing argument commentary focusing on that impeachment.\[145\]

There were also decisions during the study period made by the six state supreme courts interpreting rules which overall were more restrictive than the federal rule in admitting convictions to impeach, but which were as liberal as the federal rule (per se admission to impeach) with regard to the admissibility to impeach with convictions fairly characterized as involving "dishonesty" or "false statement". One of these courts made reference to its precedent which is asserted had crafted a general definition of "dishonesty" and/or "false statement." \[147\]

This shared standard which authorized per se admission to impeach of all convictions so characterized, therefore gave these six state supreme courts a significant incentive, if they wanted to sanction the admission of convictions to impeach, to be extremely inclusive in determining which crimes were crimes of "dishonesty", "false statement" and similar concepts. 4 of the 6 supreme courts interpreting this standard during the period of this study, 1990-2004, did just that. \[148\] These four courts sanctioned characterizing attempted robbery, burglary, "check kiting", misdemeanor shoplifting, receipt of stolen property, robbery, and theft, as convictions for crimes involving "dishonesty" or "false statement". None bothered to, but on the other hand in reality none could, provide a rational explanation of how such offenses were logically related to proof of greater propensity to lie. \[150\]

The Pennsylvania Supreme Court for example which banned admission of convictions to impeach based solely on the length of the maximum period of imprisonment, characterized an accused's conviction for theft of a bike as a conviction of a crime crimi falsi, therefore dishonesty, and therefore admissible to prove propensity to lie. \[151\] The court's decision thus almost completely circumvented the rule's closing of the door on the admission of any felony conviction, by resort to a third level specious inference that resulted in the forbidden admission of
irrelevant evidence. The Delaware and Washington Supreme Courts went so far as to declare all theft crimes to be crimes of dishonesty, and therefore relevant to prove propensity to lie, without even attempting to support this assertion with evidence or logic. [152]

On the other hand, the Delaware, Kansas, Pennsylvania, and Washington Supreme Courts, sometimes even in the same case when one of these courts had yielded to the temptation, concluded that an array of convictions for such offenses as drug trafficking, felony marijuana possession, kidnapping, misdemeanor criminal mischief, and possession of weapons were not eligible for per se admission because they did not qualify as based upon offenses involving "dishonesty" or "false Statement". [153] The Washington Supreme Court expressly took the presumptive policy position that few crimes which could not be characterized as within its broad definition of involving "dishonesty" or "false statement" were relevant-probative of veracity. [154]

4.1.6
State Supreme Courts Whose Rules's Standards were Overall More Restrictive than the Federal Rule's Standards on Admitting Convictions to Impeach Assessing The Case Outcomes Data---Part 4 - Study Period Decisions Evaluated to Determine How Faithful Were These Twenty State Supreme Courts to Their Rule Standards When the Basis for Admission of Conviction to Impeach was Preliminarily that The Potential maximum punishment exceeded 1 year in Prison

Eighteen of the twenty state supreme courts making decisions during the study period which were interpreting rules which were overall more restrictive than the federal rule with regard to admitting convictions to impeach, also had a more restrictive standard when the conviction offered to impeach qualified at least for consideration for admission based on the fact that the maximum sentence for such a conviction exceeded a year in prison, i.e. was a "felony". [155] The evidence rules of these states either required exclusion of such convictions or employed a balancing standard for at least one category of witnesses which was tilted more towards exclusion then the federal rule's standard for such witnesses. [156] The article next evaluates how faithful to these restrictions were these eighteen state supreme courts in their almost seventy study period decisions which determined the admissibility of such convictions to impeach. [157]

There is strong circumstantial evidence that a substantial majority of these courts were not faithful to their more
restrictive standards. The strongest such evidence which this article has already disclosed, is that 14 of these 18 state supreme courts in 27 decisions during the fifteen year period of this study admitted, based solely or significantly on the fact that the underlying crime was punishable by more than a year in prison, scores of irrelevant to prove propensity to lie convictions, as compared to 12 of the same 14 courts excluding such irrelevant convictions in 16 cases. [158] The overwhelming majority of the admission of such convictions sanctioned or authorized by these courts were admissions to impeach the accused in criminal cases, while the majority of the sanctioned exclusions prevented impeachment of prosecution witnesses in criminal cases. [159] Irrelevant convictions were admitted in these cases even when the appeal record provided a basis for concluding that the physical and eyewitness evidence did not clearly establish guilt beyond reasonable doubt. [160] Ironically, the Tennessee Supreme Court who did not have a more restrictive rule than the federal rule regulating the admission of "felony" convictions to impeach, in the context of a factually disputed case in which the prosecutor repeatedly made reference to the similar crime conviction during closing argument, did inerentially find sufficient unfair prejudice to reverse the conviction. [161] The court ruled that the trial judge committed error by admitting a sexual battery conviction to impeach the accused witness who was currently charged with sexual battery, attempted rape, and attempted incest. [162]

The Texas, Arkansas, and Delaware Supreme Courts were particularly flagrant in ignoring the most basic admission requirement, and the first mandatory step in their rule required balancing evaluation - that the evidence must be relevant to the issue for which it is offered. The Texas Court of Criminal Appeals wrote an opinion in which it made the most egregious conceptual error of asserting that a felony conviction need not be relevant to prove propensity to lie in order to impeach a witness. [163] The Arkansas and Delaware Supreme courts simply sanctioned the use of substantive propensity evidence ostensibly on the theory that a person previously convicted of the same crime who now claims he did not commit that crime this time must be lying--he did it before, he therefore must by lying if he claims or wishes to claim that he did not do it again during the current prosecution. [164] The Arkansas Supreme Court recently signalled its endorsement of its right simply not to follow its rule standard. Instead, the court made reference to its own decisions which had held that the prosecution has a right to impeach any accused who chooses to testify with any felony conviction, including convictions which are similar to those currently being tried, even if the conviction signals(apparently to the jury) a unique perversion. [165]

8 of the eighteen supreme courts in 14 decisions were not
even remotely faithful to their greater restrictions on admitting "felony" convictions to impeach, often failing to state or giving no more than the most perfunctory of lip service to the balancing evaluation required by the more restrictive standard or its implications for their interpretation task. [166] These state supreme courts evaluating the admission to impeach of "felony" convictions, failed to identify, despite being required by rule, or poorly evaluated the exclusionary concerns implicated by the admission of such convictions to impeach, most importantly the existence and magnitude of the unfair prejudice that was caused or would have been caused by the admission of the conviction(s). [167] Exclusionary concerns were ignored to the point that several of these state supreme courts by fiat sanctioned de facto restoration of the historical dominant common law rule which admitted almost any felony conviction to impeach any witness. [168] Failure to consider exclusionary concerns set the stage for all 8 of these courts in 11 decisions to sanction the admission of "felonies" to impeach the accused which were identical or very similar to one or more of the charges currently being tried. [169]

In the few instances when these state supreme courts did make policy driven evaluations of the relevance of a proffered "felony" conviction as proof of propensity to lie, and of countervailing exclusionary concerns as required by their rule standards, it made an outcome determinative difference. [170] The Washington Supreme Court was the only supreme court to make express reference to the pertinent empirical evidence that proves the great likelihood of inherent unfair prejudice of the merits anytime a "felony" conviction record is admitted ostensibly only to impeach a criminal defendant who opts to testify at his own trial. [171]

4.1.7 State Supreme Courts Whose Rules's Standards were Overall More Restrictive than the Federal Rule's Standards on Admitting Convictions to Impeach
Assessing The Case Outcomes Data -- Part 5 - Summary

First, several of these twenty state supreme courts signalled the hundreds of trial judges in their respective states, that they would not carefully evaluate, correct, or set standards to facilitate uniform interpretation and obedience to the overall more restrictive than the federal rule admission of convictions to impeach standards of their rules. [172] Second, despite the fact these state supreme courts were interpreting evidence rules overall more stringent than the federal rule they nevertheless admitted at least two dozen different felonies, for which there is not a scintilla of evidence, particularly empirical evidence, to support the conclusion that a conviction for any one of them was relevant to prove that the particular witness had a propensity to lie. [173]
The more restrictive standards also did not prevent these state supreme courts from sanctioning admission of similar or identical crime convictions almost always ostensibly to only impeach the testimony of the accused should he testify. [174]

More troubling is evidence, that the more restrictive standards were not interpreted in an evenhanded fashion by these state supreme courts. First, two of these courts, employing a rule standard that favored the accused or was neutral, within the study period, sanctioned exclusion of convictions to impeach a prosecution witness, while sanctioning the admission of convictions for the same crime when offered to impeach the accused. [175] In 1993 and 1998, just two years before and three years after its decision sanctioning exclusion to impeach of all of the felony convictions of a crucial prosecution witness, the Minnesota Supreme Court sanctioned the admission of felony sexual misconduct convictions to impeach two defendants charged with sexual misconduct crimes, finding that they had probative value on the issue of credibility because they gave the jury a basis to make a determination of the appellant's credibility. [176] The Minnesota Court in sanctioning the exclusion of the prosecution's witness' convictions to impeach held that the admission of the convictions could have led the jury to believe that the witness was a bad person who deserved to be a victim, which amounts to influencing the jury to make its decision on an improper basis. [177] This obviously important policy consideration which is highly relevant to an assessment of the quantity and quality of unfair prejudice which would result from admission of a conviction(s) to impeach was never mentioned by the court in its decisions which sanctioned the trial court's admission of an array of felony convictions to impeach the accused. The court also employed several other heuristics to justify exclusion of the prosecution witness convictions. Heuristics which were not employed in the cases admitting felony convictions to impeach the accused. [178]

In 1998, the Minnesota Supreme Court compounded this departure from its rule and standards it employed in evaluating the admissions of convictions to impeach other witnesses by holding that prior convictions could be admitted against an accused despite the fact that the conviction and the current charges were for the same crime, only differing in the degree of the crime. [179] The court admitted the conviction ostensibly only to impeach on the basis that the facts underlying the conviction differed from the facts underlying the current charges. [180] In 1995, the Minnesota Supreme Court, as was true for almost every state supreme court which decided this issue, expressly recognized that the proper normative approach was excluding reference to any underlying facts when a conviction was admitted for impeachment purposes. [181] By the end of the fifteen year period of this study, half(ten) of the
states, whose state supreme courts made at least one pertinent decision during the study period, and whose rules were overall more restrictive in admitting convictions to impeach than the federal rule, had their state supreme courts convert their state standard to one which more liberally, than the federal rule, admitted convictions to impeach. [182]

Part 4
5.1
State Supreme Courts and the Use of Convictions to Impeach - Studies in Federalism Part 3 - 17 States with Overall More Liberal Rules re Admission of Convictions to Impeach - State Supreme Court Interpretations

5.1.1 Studies in Federalism - Overall More Liberal Rules than Federal Rule - 17 States' Supreme Courts' Decisions 1990-2004 - Basic Case Demographics & Outcomes

Seventeen state supreme courts during the period 1990-2004 were potentially to interpret an evidence rule that overall, more liberally than the current federal rule, admitted convictions to impeach. [183] 16 of the 17 state supreme courts with an evidence rule that overall more liberally than the current federal rule, admitted convictions to impeach, made 61 pertinent admission of conviction to impeach decisions during the period of this study, 1990-2004. [184] 12 of these 16 state supreme courts in 50 of these 61 decisions (82%) sanctioned the admission of one or more convictions ostensibly to impeach at least one trial witness. [185] 7 of these 16 state supreme courts held in 11 of these 61 decisions (18%) sanctioned or held that under their respective standards, one or more convictions proffered to impeach at least one trial witness was properly excluded or should have been excluded. [186]

11 of these 16 state supreme courts in 46 of these 61 decisions sanctioned the admission or authorized the possible admission of one or more convictions to impeach the accused. [187] 3 of these 16 state supreme courts in 4 of these 61 decisions sanctioned the exclusion, authorized the possible exclusion, or held a conviction should have been excluded as a basis to impeach the accused. [188] 9 of these 16 of these state supreme courts in 23 of these 61 decisions sanctioned the admission or authorized the possible admission of multiple convictions to impeach the accused. [189]

3 of these 16 state supreme courts in 4 of these 61
decisions sanctioned a trial judge's admission of a conviction, or ruled that one or more convictions ostensibly proffered to impeach a witness other than the accused, including civil parties, was admissible. [190] 6 of these 16 state supreme courts in 7 of these 61 decisions sanctioned a trial judge's exclusion of a conviction, or ruled that one or more convictions ostensibly proffered to impeach a witness other than the accused, including civil parties, was properly excluded or should have been excluded. [191]

To recap, in only 4 of 11 (36%) decisions when the witness was not the accused against whom convictions were offered to impeach, did the state supreme courts interpreting standards which overall more liberally than the federal rule admitted convictions for this purpose, sanctioned the admission of one or more convictions proffered to impeach. In six of seven of the cases sanctioning exclusion, the witness protected was a prosecution witness, while in two of the four cases in which a state supreme court sanctioned the admission of a conviction to impeach, when the witness was not the accused, the witness was a criminal defense witness, and never a prosecution witness. On the other hand, when the accused was the witness against whom convictions were offered to impeach, these state supreme courts sanctioned the admission of convictions to impeach in 46 of 50 (92%) of their decisions.

Unlike with some of the states with overall more restrictive rules than the current federal rule regulating admission of convictions to impeach, all but two of these sixteen state supreme courts were interpreting rules which authorized the admission of irrelevant "misdemeanor" convictions, irrelevant "felony" convictions, or both as a basis for impeaching all or a category of witnesses. [192] It is therefore not surprising that in 39 of these 61 decisions (64%), 11 of these 16 state supreme courts sanctioned the admission of just more than 60 different crime convictions, many of them multiple times by multiple courts, to impeach one or more witnesses, all of which were irrelevant as proof of propensity to lie. [193] While intellectually inconsistent with basic evidence admission standards, it is not even shocking that two of these courts sanctioned trial judges admission to impeach any witness, including the accused in a criminal case, with convictions that these courts expressly acknowledged were not relevant or at best only slightly probative of "dishonesty"/propensity to lie. [194] Included in the irrelevant convictions admitted ostensibly only to impeach were convictions for: aggravated assault, aggravated sexual assault, aggravated kidnapping, armed burglary, armed robbery, assault (multiple courts), assault and battery, assaults with dangerous weapons (multiple times by multiple courts against the accused), assault with a deadly weapon—a knife, assault with a
dangerous weapon-a sharp instrument, assault with intent to commit murder, including with a sharp instrument (multiple times), assault with intent to rape (multiple times by multiple courts), assault with intent to rob (multiple times), attempted burglary, attempted rape, breaking and entering (multiple times by multiple courts), breaking and entering, breaking and entering a home with a knife with the intent to commit armed-robbery, burglary (multiple times), car theft, conspiracy to commit murder, cocaine trafficking, criminal contempt, defacing a firearm, escape, delivery of cocaine, delivery of a controlled substance, disorderly conduct, domestic abuse-assault, driving to endanger, death resulting, driving under the influence, entry into a building with the intent to commit a felony (multiple times), illegal possession of a knife, illegal possession of a sawed off shotgun, kidnapping, larceny (multiple times), larceny of a motor vehicle, leaving the scene of an accident, malicious wounding, misdemeanor trespass, misdemeanor use of a weapon, seventeen unspecified misdemeanors, murder (multiple times by multiple state supreme courts), narcotics, obstruction of a police officer, personal and two corporate pollution related convictions, possession of burglary tools, possession of a controlled substance (multiple times by multiple courts), possession of a controlled substance with intent to distribute (multiple times by multiple courts), possession of cocaine with intent to distribute, receipt of stolen property (multiple times), rape, robbery (multiple times against the accused), sale and delivery of cocaine, sexual abuse (multiple times), sexual assault, theft (multiple times), threatening phone calls, trespass, unlawful possession of ammunition, unlawful possession of a firearm, and uttering a check. [195] 9 of these 16 state supreme courts in 23 of these 61 decisions sanctioned not only the admission of convictions of crimes to impeach the accused which were irrelevant as proof of propensity to lie, but which were also identical or similar to one or more of the charges currently being tried. [196]

5.1.2
State Supreme Courts Whose Rules's Standards were Overall More Liberal than the Federal Rule's Standards on Admitting Convictions to Impeach
--- Assessing The Case Outcome Data---Part 1 - Reliance on The Federal Rule as an Element in Interpreting Their States' Rules

Two of these sixteen state supreme courts expressly adopted the general policy of using the federal evidence rules as guidance in determining if a conviction should be admitted to impeach, but at the same time reserving to themselves ultimate authority to determine their state's approach to this issue. [197] The Rhode
Island Supreme Court, on the other hand, expressly asserted that their rule was substantively different from the federal rule, usually as a partial justification for admitting a conviction(s) against the accused. [198]

5.1.3 & 5.1.4
State Supreme Courts Whose Rules's Standards were Overall More Liberal than the Federal Rule's Standards on Admitting Convictions to Impeach Assessing The Case Outcomes Data---Part 2 - Study Period Decisions Evaluated to Determine Number & Percentage of the Cases in Which the Courts Examined the trial record to determine if trial judge had made the appropriate Rule standard Evaluation & The Number & Percentage of the Decisions in Which the Courts Employed The Appropriate Rule Standard to Evaluate and Determine the Admissibility of Convictions to Impeach

In 5 of these 61 decisions (8%), four of these sixteen state supreme courts held that the trial judge's admissibility decision with regard to one or more convictions to impeach was uncorrected error. [199] In most of their decisions during the period of this study, 1990-2004, these sixteen state supreme courts failed to review the trial record to determine if the trial judge did more than merely assert, but in fact had conducted the appropriate rule /rule as interpreted by that court evaluation of whether a conviction should have been admitted to impeach. [200] In most of their decisions during the period of this study, 1990-2004, these sixteen state supreme courts were not faithful to the standards of their rules, and failed to competently conduct their own independent evaluation of whether under the standards of their rules a conviction should have been admitted to impeach. [201] Most egregiously, as already discussed, sixty-nine percent (11 of 16) of these supreme courts in sixty-four percent (39 of 61) of these sixty-one cases, failed to require trial judges or themselves to consistently adhere to the minimum admissibility requirement, that evidence must be relevant on the issue for which it is proffered, here as proof of propensity to lie. [202]

5.1.5
State Supreme Courts Whose Rules's Standards were Overall More Liberal than the Federal Rule's Standards on Admitting Convictions to Impeach Assessing The Case Outcomes Data---Part 3 - Study Period Decisions Evaluated to Determine To what Degree these courts Were Faithful to their More
Liberal Standards for the Admission of Convictions for "Misdemeanor" Not Properly Characterized as involving "dishonesty" or "false statement"

The federal rule prohibits the use of misdemeanor convictions to impeach when those misdemeanor convictions are not properly characterized as involving "dishonesty" or "false statement". [203] Ten of seventeen of these state supreme courts (and nine of sixteen courts which made decisions during the period under study in this article, 1990-2004), however, were interpreting rules which authorized the potential admission of some such convictions against at least a category of witnesses. [204] This meant that seven states, with overall more liberal than the federal rule admission of convictions to impeach, were not more liberal with regard to these irrelevant misdemeanor convictions. [205]

There were very few decisions by these sixteen state supreme courts addressing this issue. The Louisiana Supreme Court and the New York Court of Appeals did impose a balancing evaluation to potentially limit their rules' per se admission to impeach of even irrelevant "misdemeanor" convictions. [206] The imposition of the balancing evaluation, however, did not prevent the New York Court of Appeals, from subsequently sanctioning the admission of seventeen unspecified misdemeanor convictions to impeach the accused. [207] Nor did the fact that their evidence rules' mandated balancing evaluation, prevent the Rhode Island and Wisconsin Supreme Courts from sanctioning the admission of multiple irrelevant misdemeanor convictions to impeach the accused, by placing reliance on the junk science heuristic that any and all criminal convictions were relevant to prove propensity to lie. [208] The Wisconsin Supreme Court recently chose to deliberately ignore the fact that the trial judge made no genuine attempt to perform the rule required balancing evaluation, including failing to even mention the court's own array of balancing factors. The court also failed to conduct a minimally competent evaluation itself, and ultimately sanctioned the admission of multiple misdemeanor convictions which were a quarter of century old and irrelevant as proof of propensity to lie. [209] The court sanctioned continued adherence to the purely junk science and meritless heuristic that any person with any criminal record is more likely to lie when called as a witness. [210] Finally, the Wisconsin Supreme Court, joined the Rhode Island Supreme Court in defacto substituting for the identification of exclusionary concerns required by its rule's balancing evaluation, the illogical inference that giving of a limiting instruction by the trial judge was evidence that the trial judge did conduct the balancing evaluation. [211] A limiting instruction logically cannot constitute evidence of a judge's conducting such an evaluation, and
by itself only signals the possibility that the judge equated and therefore substituted the limiting instruction for that evaluation.

Of the seven states interpreting rule standards at least as stringent as the federal rule with regard to admitting "misdemeanors" to impeach three of these state supreme courts interpreting rules identical to the federal rule on this issue. None of their rules defined "dishonesty" or "false statement", and none of these supreme courts generally defined these concepts during the period of this study. [212] During the study period, however, one of the state supreme courts, without an express policy evaluation, concluded that a guilty plea to the misdemeanor of giving a false statement to a police officer was within the definition of the rule's reference to crimes of "dishonesty" or "false statement". [213] Another of these three courts, the New Hampshire Supreme Court, conclusionarily asserted that the two misdemeanor offenses of reckless conduct and simple assault were not crimes of "dishonesty" or "false statement", and therefore were inadmissible to impeach a prosecution witness. [214]

Finally, the California Supreme Court, one of four of these sixteen states whose rule barred admission of all "misdemeanor" convictions to impeach, appeared to remain faithful to this standard, by asserting that a misdemeanor conviction record was irrelevant to impeach. [215] The California Supreme Court, however, resorted to a junk science heuristic of eyeballing the conduct underlying the misdemeanor theft in the case, characterized it as morally depraved, and therefore by sheer hunch, concluded it was per se relevant proof of propensity to lie. [216] Of course the court cited to no evidence, and no evidence exist to support this heuristic. Apparently the court consciously or unconsciously recognized this reality, because it subsequently, in the very same decision, qualified its reliance on this heuristic by characterizing it as in inference that is not so irrational that a jury in a specific case may not draw it. [217]

5.1.6
State Supreme Courts Whose Rules's Standards were Overall More Liberal than the Federal Rule's Standards on Admitting Convictions to Impeach Assessing The Case Outcomes Data---Part 4 - Study Period Decisions Evaluated to Determine How Faithful Were These Sixteen State Supreme Courts to Their Rule Standards When their Rules Also More Liberally than the Federal Rule admitted Convictions for "felonies"(Punishable by more than one year in prison) Not Properly Characterized as Involving "Dishonesty" or "False Statement"
All sixteen of these state supreme courts interpreting overall more liberal than the federal rule standards regulating the admission of convictions to impeach during the study period, were also interpreting a standard that more liberally than the federal rule admitted or authorized the possible admission of convictions to impeach solely because the underlying crime was punishable by a maximum period of imprisonment of more that one year. [218] Thirteen of these sixteen state supreme courts were interpreting rules which authorized per se admission of even those felonies not properly characterized as involving "dishonesty" or "false statement" to impeach all witnesses in both civil and criminal cases, or in one of these states all witnesses in criminal cases, and in a second state all witnesses, other than the accused. [219] This means three states, New Jersey, Rhode Island, and Wisconsin were interpreting rules whose standards imposed some form of balancing evaluation, but in all three, a balancing evaluation tilted more towards admission than at least one of the federal rule's two balancing standards for such convictions. [220] The article next evaluates how these state supreme courts in over fifty of these sixty-one decisions evaluated the admissibility of convictions to impeach based on the punishment for the underlying crime exceeding one year. [221]

The three state supreme courts interpreting rules which required some form of balancing were rhetorically faithful to their rules by expressly acknowledging that the rules did require that such a balancing evaluation be undertaken by trial judges. [222] A majority of the other thirteen state supreme courts, seven, were not at least rhetorically true to their states' rule standard(s) because they adopted or continued to impose a balancing evaluation in assessing if a "felony" convictions should be admitted to impeach when the only basis for qualifying the conviction for such admission was that the underlying crime was punishable by a maximum term of more than one year in prison. [223] This means that a total of ten of these sixteen state supreme courts were at least rhetorically committed to requiring trial judges to conduct a balancing evaluation before admitting "felony" convictions to impeach. It also means that six of these state supreme courts were expressly rhetorically faithful to their per se admission of any "felony" conviction to impeach standard. [224]

The most basic reason for imposing a balancing evaluation asserted by these state supreme courts was that a conviction should not be admitted to impeach unless it is relevant---has probative value as proof of a propensity to lie. [225] While relevance was noted by these courts, it almost never was assessed directly as a matter of logical nexus to the theory of its admission or its correct definition as a fundamental evidence admissions standard.
Instead, heuristics were substituted, or no analysis was undertaken at all. [226] Among the other policy reasons offered by the courts for imposing a balancing evaluation was that if felony convictions which have little or no relevance as proof of propensity to lie are automatically admitted to impeach, it risk causing unjust results, and that the avoidance of unjust results was one of the overall policy goals the evidence rules as a whole sought to achieve. [227]

Six of the ten state supreme courts which at least paid lip service to the policy of evaluating admission and exclusion policy factors, continued or adopted during the period of this study their own multi-factor, heuristic balancing evaluation guidelines, both with regard to the definition of such convictions as well as the factors to be considered, and sometimes the priority to be given the identified factors. [228] Among those factors were: the nature of the crime-relevance to credibility, whether the crime involved dishonesty or false statement, the date and hence the age of the prior conviction and the witness's criminal record since the conviction, the similarity between the crime that was the basis of the conviction and any conduct underlying any of the current crimes for which the accused is on trial, the disposition of the conviction, how many times the prosecutor made reference to the conviction of the accused, the danger that the conviction would be used for substantive propensity purposes, the importance of the witness' testimony, and the centrality of the credibility issue. [229]

Despite adoption or adherence to a rule required balancing evaluation, and the identification of at least heuristics to guide that evaluation, the majority of these 10 state supreme courts simply abandoned this protocol substantively, and willy-nilly sanctioned the admission of scores of irrelevant "felony" convictions, multiple convictions, scores of similar crime and old "felony" convictions, and failed to substantively define or give any genuine consideration to exclusionary policies, especially the quantity and quality of unfair prejudice that would have or did result when these convictions were admitted to impeach. [230] They accomplished this feat by a process which can be fairly characterized as abandonment of the balancing evaluation, conjuring up relevance, and disappearing exclusionary concerns. Documentation follows.

First, the three supreme courts required by rule to require trial judges to conduct balancing evaluations as the basis for authorizing the admission of "felony" convictions to impeach, failed to require or conduct themselves the balancing evaluation required by rule. Since 1990, the Rhode Island Supreme Court sanctioned the admission of every "felony" conviction, including every very old "felony" conviction and every similar or identical
"felony" conviction to impeach or potentially impeach the testimony of an accused in each of its decisions when asked to affirm a trial judge's decision to admit convictions on behalf of the prosecution. [231] The New Jersey Supreme Court simply adopted related junk science heuristics that resulted in the assumption that all "felony" convictions were relevant to impeach, and the Wisconsin Supreme Court asserted that its rule, which expressly required a balancing evaluation, nevertheless had language upon which the court based the conclusion that any and all such convictions were admissible to impeach any witness. [232]

There was a multiplicity of reasons for these three and most of these other ten supreme courts to admit "felonies" to impeach without any legitimate effort to adhere to the rule required or self-imposed balancing evaluation. The New York Court of Appeals, for example, was quite schizophrenic with regard to using evaluation guidelines. Multiple times the court credited itself for refusing to establish guidelines for its self-imposed balancing evaluation. [233] The Kentucky Supreme Court more expressly encouraged anarchy by directly asserting that trial judges should have discretion to identify factors each trial judge believed pertinent to the determination of whether the admission of a conviction to impeach would unduly prejudice the case. [234] Unwittingly, therefore, the Kentucky court was increasing the likelihood of a lack of uniform identification and prioritization of the factors trial judges should employ in making the balancing evaluation to determine if a "felony" conviction should be admitted to impeach. [235]

The most fundamental way these courts conjured up relevance to tilt the balancing evaluation towards admitting "felony" convictions, was endorsed by 4 of the ten state supreme courts. These four state supreme courts relied on the historical junk science heuristic, or a closely related junk science heuristic, that any criminal conviction proves willingness to disobey law or subordinate the interests of society to the person's own self-interests, and therefore such a person is more likely to disregard the trial oath to tell the truth. [236] Four of the ten state supreme courts, including two of the same courts, conjured up relevance by simply endorsing and relying upon the closely related "junk science" presumption that every such conviction has probative value to prove propensity to lie. [237] A closely related junk and anti-science heuristic employed by the California Supreme Court was that admitting a criminal conviction "strips" the false aura of veracity from witnesses previously convicted of crime so that the jury is not misled by their air of respectability. [238]

Of course no empirical evidence was offered by these courts to support these junk science heuristics, and the existing
empirical evidence suggests jurors are more skeptical, even without learning of prior convictions, of the veracity of witnesses with much to lose as a result of the outcome of the litigation. [239] Even more significant, is the fact that studies have also found that when jurors learn that a witness was previously convicted of a crime their negative emotional reaction to that person, produces no significant lessening of their already skeptical view of his credibility, but does produce, particularly if that person is a party to the litigation, unfair prejudice, which causes the jury to regret less returning an outcome contra to the interests of the stigmatized witness. [240]

These courts also adopted a variety of meritless junk science heuristics which depended on categorizing "felony" convictions into a variety of subsets, which category label was used by these courts to justify their per se or presumptive admission to impeach. The New Jersey and Rhode Island Supreme Courts endorsed the meritless junk science heuristic, that the more serious the crime underlying the conviction, the more probative of the accused credibility. [241] Of course these views are tantamount to these state supreme courts endorsing use of irrelevant "felony" convictions to prove propensity to lie, for whatever use the jury chooses to employ them, including in almost all of these cases in which the accused was also the witness, significantly increasing the likelihood of a substantive verdict of guilty.

The California and Virginia Supreme Courts endorsed the closely related junk science heuristic that all crimes of "moral turpitude" were worthy of admission or at least presumptively admissible to impeach all witnesses, or all witnesses except the accused, even if their definition of that common law concept was vague and the meaning which could be discerned made the categorization irrelevant as proof of a propensity to lie. [242] In four cases, the California Supreme Court relied on the junk science heuristic that a "felony" conviction properly characterized as one involving dishonesty, or any such theft conviction per se involves dishonesty, and therefore either characterization made a conviction per se relevant to prove propensity to lie. [243]

The Kentucky Supreme Court also broadly characterized, without generally defining for this purpose, the concept of dishonesty, concluding that attempted burglary was a crime of dishonesty and therefore a conviction for this crime had plus probative value as proof of a lack of credibility. [244] The Massachusetts' Supreme Court went even further when it asserted, in conflict with the intuitions of almost all other state supreme courts, that violent crimes are not only probative but especially probative to discredit a witness' credibility. [245] These courts
of course did not cite and could not cite to any evidence, empirical or otherwise, to support the reality of these heuristics. Instead they simply repeated their own historical recitation of these heuristics.

Three of these ten state supreme courts made the age of the conviction a significant element of their balancing evaluation, because these courts embraced the faulty premise that assumed such a conviction per se had probative value as proof of propensity to lie which could for the most part only be lost with time, i.e. when the conviction became remote. The Kentucky Supreme Court asserted dual components of this heuristic. First, the court held that the older the conviction the less probative was the conviction on credibility---but the court did not identify why any "felony" conviction was by definition relevant to prove propensity to lie. Second, the court asserted that the older the conviction the more unduly prejudicial it becomes, on the surmise that the undue prejudice it did cause becomes more difficult to dispel. No evidence was cited to support either element of this heuristic, and in fact the heuristic finds no support in most actual studies of jury behavior. Decisions of the California, Kentucky, and others among these ten state supreme courts, endorsing this balancing factor demonstrated the standardless nature of this consideration. When given the opportunity, six of these courts sanctioned the admission to impeach of convictions which at the time of the trial were more than ten years old, and in several instances, decades old.

These state supreme courts also conjured relevance by compounding the previously identified heuristics, and converting them into the heuristic that if one felony conviction was evidence of a propensity to lie, multiple felony convictions was independent relevant proof of the same character trait. The Rhode Island Supreme Court endorsed a junk science heuristic employed by trial judges that all multiple convictions should be admitted, because together the string of convictions over a period of years, signalled a crime commission pattern that provided a basis for inferring disobedience to law, that provided a basis to make a second level inference that each and all the convictions were therefore relevant to warrant admission to impeach. Two other of these ten state supreme courts took the opposite path down this same road to judicial anarchy, by intermittent resort to a junk science admission favoring heuristic that because the trial judge who had admitted one or more of these irrelevant "felony" convictions to impeach, had also excluded one or more convictions, and sometimes had also forbade cross-examination of the accused on the details of the conviction(s) admitted, the judge must have conducted a balancing evaluation/an adequate balancing evaluation. The California Supreme Court adopted another related, but
equally meritless heuristic that when one or more of these irrelevant "felony" convictions is properly admitted, the erroneous admission of other such convictions, even if similar or identical to the current charge(s), is harmless. [254]

Four of these ten supreme courts conjured up relevance of convictions to impeach, not by directly attributing a propensity to lie to the proffered "felony" conviction, but by instead placing reliance on the anti-science twin heuristics that the greater the importance of the testimony of the target witness, especially the accused, the more important was the credibility of that witness, and therefore the conviction should be admitted to impeach. [255] As discussed previously, logically, these factors favor exclusion of such conviction evidence, and not admission. [256]

**Disappearing/Denigrating/Diminishing Exclusionary Concerns**

Exclusionary interests were ignored or undervalued by these ten supreme courts. [257] First, two of these courts resorted to a procedural fiction—the meritless junk science heuristic that a limiting instruction to the jury, with regard to the permissible and impermissible uses of the convictions during their deliberations, was a significant factor diminishing potential unfair prejudice. [258] The Rhode Island Supreme Court went much further with this factor, however, sanctioning a trial judge's elimination of the sequential evaluations required by rule, and substituting a presumption that any and all convictions were per se admissible to impeach a witness provided that the judge gave a limiting instruction as to the use of the conviction. [259] These courts failed to offer empirical or other evidence to support this heuristic. Significantly, these courts ignored existing evidence which documents the likelihood that such limiting instructions are ineffective, and certainly cannot be asserted as a panacea to the risks created by the quantity and quality of unfair prejudice which is likely to result from the admission of one or more convictions to impeach. [260]

Second, the California Supreme Court was the only one of these ten state supreme courts to expressly endorse by reference to authority, other than the evidence rules, a laundry list of exclusionary policy concerns. [261] On the other hand, that court was also the only one of these courts to hold that these exclusionary policies could be offset by the fact that the accused by testifying waived these concerns, since he testified usually after a trial judge ruling admitting his conviction to impeach. [262] No explanation and no evidence was offered by the court to support this obviously post hoc and junk science heuristic.
Third, 4 of these ten state supreme courts, despite widespread admission of similar convictions documented earlier, adopted a policy of using as a limiting or exclusionary balancing consideration the fact that the conviction(s) was similar or substantially similar to one of the current charges. [263] Two of these courts expressly endorsed the policy concern that the admission of a conviction not involving or implicating lying, especially one similar to a crime currently being tried, would produce significant unfair prejudice because it could impermissibly impact the outcome of jury deliberations, since the jury was likely to convict the accused of the current crime, not because it was to convinced of his guilt beyond reasonable doubt, but because he was a bad man. [264] Even three of the six state supreme courts whose evidence rules authorized either the per se admission of irrelevant to prove propensity to lie misdemeanors and/or felonies, approved use by trial judges of this exclusionary policy consideration. [265]

6 of these seven state supreme courts who recognized the potential for unfair prejudice if similar crime convictions were admitted to impeach, accommodated that concern by nevertheless sanctioning the admission of such convictions provided they were "sanitized". [266] "Sanitized" meant that a conviction for a similar or identical crime could be referred to as a felony conviction, and the date of the conviction disclosed to the jury, but not the name, nature, or details of the felony. [267] In contrasts to the prevalent reliance on junk science heuristics, the New Jersey Court made reference to and placed reliance upon empirical studies to support its adoption of "sanitizing" similar crime convictions. [268]

The Kentucky Supreme Court sanctioned the broader employment of the tactic of sanitizing any admitted conviction by omitting reference to the name of the underlying crime. [269] The Kentucky Supreme Court, however, reverted immediately to another junk science heuristic that whatever unfair prejudice that results from the admission of a conviction to impeach, it is less in civil cases than in criminal. [270]

The remaining approximately one-half of these sixteen supreme courts, however, diminished exclusionary concerns, including concerns with unfair prejudice, by omitting any reference to or evaluation of the unfair prejudice that would result from the admission of such same-similar crime convictions, ostensibly only to impeach. In addition, while the justices of the California Supreme Court acknowledged this exclusionary policy factor, they were willing to let the accused live (or literally die) with the consequences of subordinating that policy, and sanctioning the admission of such convictions, even in death penalty cases. [271] The Rhode Island Supreme Court, despite interpreting a rule which
required it to balance exclusionary concerns against probative value to prove propensity to lie, nevertheless held that all a trial judge need do is state the conclusion that the unfair prejudice of a conviction(s) as a whole or individually did not outweigh their probative value with regard to credibility. [272]

5.1.7
State Supreme Courts Whose Rules's Standards were Overall More Liberal than the Federal Rule's Standards on Admitting Convictions to Impeach
Assessing The Case Outcomes Data -- Summary

The most troubling finding just reported about the sixteen supreme courts with overall more liberal rules than the federal rule with regard to standards for admitting convictions to impeach, is similar to the most troubling finding that was reported in the prior section with regard to the state supreme courts who were interpreting rules overall more restrictive than the federal rule. There is evidence that these standards were not interpreted in an evenhanded fashion by these state supreme courts. First, two of these courts sanctioned exclusion of convictions to impeach a prosecution witness, while ignoring the fact, or rejecting an express claim that it had sanctioned admission to impeach the accused with an identical or similar conviction, even under similar circumstances, such as the age of the conviction. [273]

Second, some state supreme courts during the period of this study so broadly sanctioned the admission of convictions to impeach that they strayed far from the standards and policies of their rules, and in effect re-ranked the state's rule in relation to the federal and the standards of other states as interpreted by the respective supreme courts. [274] For example, decisions by the Rhode Island and Wisconsin Supreme Courts during the study period, 1990-2004, provide a basis for concluding that the two states which had the same rule standards, did not have the twelfth most liberal standard in admitting convictions to impeach, at least with respect to criminal defendants, but in fact were among a handful of the most liberal states in admitting convictions to impeach, even when those convictions are irrelevant and even when they are very likely to cause great unfair prejudice. [275]

Third, there are multiple cases decided by these courts in which the admission of irrelevant and highly prejudicial convictions drove the accused from the stand, and thereby played a significant role in forcing the accused to forego exercise of his right to testify in his own defense. [276] Significantly, the trial record indicated that there was evidence in one of these
cases, that admission of convictions ostensibly only to impeach was done in context of a close case as to whether there was proof to establish guilt beyond reasonable doubt. [277] Fourth and finally, these overall more liberal rule in admitting or authorizing convictions to impeach state supreme courts, were quick to dismiss any constitutional complaints the accused made about their liberal admission of his conviction(s) ostensibly only to impeach his actual or potential trial testimony. [278]

6.1 Summary Comparisons of Outcomes(6.1.1)

Outcome Assessments(6.1.2)
Identifying The Most Significant Effects of These Outcomes/Outcome Assessments(6.1.3)
Identifying The Most Significant Causes of These Outcomes/Outcome Assessments(6.1.4)
& Recommendations(6.1.5)

6.1.1 Summary Comparisons of Outcomes

Eight of the nine state supreme courts with rule standards on authorizing convictions to impeach that mimicked the current federal rules's standards sanctioned or authorized the admission of one or more convictions ostensibly only to impeach at least a trial witness in 83% of their eighteen (15) decisions during the fifteen year period of this study, 1990-2004. [279] While twenty of the twenty-four state supreme courts with rule standards which were overall more restrictive than the federal rule in admitting convictions to impeach, sanctioned or authorized the admission of one or more convictions ostensibly only to impeach at least a trial witness in 55% of their seventy-one decisions during the study period. [280] 16 of the 17 state supreme courts with an evidence rule that overall more liberally than the current federal rule admitted convictions to impeach sanctioned or authorized the admission of one or more convictions ostensibly only to impeach at least a trial witness in 82% of their sixty-one decisions during the study period. [281]

This outcome comparison is a gross indicator that a state's rule standard(s) on admitting convictions to impeach may not be a good predictor of how trial judges will apply, or the rate at which its state supreme court will carefully evaluate, authorize, or sanction the use of convictions to impeach. In this comparison, for example, the state supreme courts reviewing trial judge
decisions interpreting standards which mimicked the federal rule, standards which were actually closer to the standards of the more restrictive admission than the more liberal admission states, nevertheless, authorized or sanctioned the admission of convictions to impeach at a very high rate, and in fact at a rate equal to that of states with more liberal admission standards. This was true despite the fact that there was no significant difference in the crime convictions that were sanctioned for use to impeach, and despite the fact that most of the time in all three sets of state supreme courts, the convictions sanctioned were irrelevant as proof of a propensity to lie. [282]

When the accused was the witness to be impeached, state supreme courts with rule standards authorizing convictions to impeach that mimicked the current federal rule's standards sanctioned or authorized the admission of one or more convictions ostensibly to impeach in ninety-two percent (12 of 13) decisions during the fifteen year period of this study, 1990-2004. [283] In the state supreme courts' decisions interpreting rules whose standards were overall more restrictive than the federal rule in admitting convictions to impeach, the justices sanctioned or authorized the possible admission of one or more convictions to impeach the accused in 69% (31 of 45) of the cases. [284] In the state supreme courts' decisions interpreting rules whose standards were overall more liberal than the federal rule in admitting convictions to impeach, the justices sanctioned or authorized the possible admission of one or more convictions to impeach the accused in ninety-two percent (46 of 50) of the cases. [285]

Hence all three sets of state supreme courts sanctioned or authorized the admission of convictions to impeach the accused at a very high rate, and at a much higher rate than when they reviewed cases involving the issue of the propriety of admitting convictions to impeach other witnesses. When the issue on appeal was the propriety of admitting convictions to impeach other witnesses, the three sets of supreme courts rate of sanctioning or authorizing the admission of convictions to impeach was only sixty percent (3 of 5), thirty-one percent (8 of 26), and thirty-seven percent (4 of 11) respectively. [286] An even more startling contrasting result is that in the twenty-six cases in which the issue was the propriety of impeaching a prosecution witness or witnesses with prior convictions, these same state supreme courts sanctioned or authorized the admission to impeach in only twenty-seven percent (7 of 26) of the decisions. [287]

These outcomes in the eight state supreme courts interpreting rule standards on authorizing convictions to impeach that mimicked the current federal rules's standards was in apparent conflict with the fact that the shared standards, at least with
respect to qualifying convictions for possible admission solely upon the basis that the underlying crime was punishable by more than a year in prison, provided greater protection to the accused than other witnesses. [288] These outcomes were also in apparent conflict with the fact that in the twenty states supreme courts interpreting rule standards overall more restrictive than the federal rule, four courts were interpreting standards which imposed greater restrictions on admitting convictions to impeach the accused than other witnesses, and none provided greater protection to other witnesses than to the accused. [289] Only among the rules interpreted by the sixteen state supreme courts in states with overall more liberal standards than the federal rule regulating the admission of convictions to impeach, were there at least two states whose rule more liberally admitted convictions to impeach against some accused or all criminal witnesses. [290] The rule of only one of these states more restrictively authorized possible admission of convictions to impeach only a sub-group of accused. [291] There was even some evidence that state supreme courts would ignore the fact that in contemporaneous decisions, they sanctioned or authorized the exclusion to impeach a prosecution witness, with the same or similar crime conviction which they sanctioned the admission of to impeach the accused. [292] Irrelevant "felony" convictions were admitted against the accused even when the appeal record provided a basis for concluding that the physical and eyewitness evidence did not clearly establish guilt beyond reasonable doubt. [293]

By rule, state supreme courts interpreting evidence rules identical to the federal rule or more restrictive than the federal rule were barred from admitting to impeach any witness, convictions for crimes which were irrelevant to prove propensity to lie. Despite this most fundamental evidence admissibility principle, seventy-eight and one-half percent of the state supreme courts in both sets of states who interpreted their rules' standards during the study period(22 of 28) admitted collectively scores of convictions which logically were irrelevant to prove propensity to lie. [294] These state supreme courts turned a blind eye to incompetent representation, failed to consistently require trial judges to articulate why the conviction was relevant to prove propensity to lie, failed to make their own independent assessment of relevance, substituted their characterization of the crime as meeting their ill-defined or undefined criteria of "dishonesty" or "false statement", or embraced a variety of junk science heuristics to justify or excuse this failure to adhere to this most basic evidence admissibility requirement. [295] On this same issue, the sixteen supreme courts interpreting rule standards which overall more liberally admitted convictions to impeach, also admitted scores of irrelevant convictions to impeach, but at least all but three of them were authorized by their rules to admit at least
certain categories of irrelevant convictions, at least against certain categories of witnesses. [296]

Added concern for the quantity and quality of unfair prejudice that will be caused by the admission of convictions ostensibly only to impeach, is implicated when the accused is the target witness, and the current trial charges include those which are identical or similar to the crimes underlying the proffered convictions. [297] Despite this added concern, 21 of these forty-four supreme courts when given the opportunity to sanction or authorize the admission of similar crime convictions ostensibly only to impeach the accused, did so in 45 of 58 (77.5%) the cases when this issue was presented. [298] The admission of this high of a percentage of similar crime convictions is even more startling when by rule or in one state by decision of the same state supreme court, all but two of these twenty-six courts were either interpreting standards which required consideration of exclusionary concerns, or the court itself imposed such a consideration. [299]

Lack of academic or other models or perhaps sheer outcome driven determinations, are two plausible reasons for this almost universal ignoring or denigration of heightened concern for unfair prejudice, included the universal failure of these courts to precisely define unfair prejudice or develop protocols for measuring the quantity and quality of unfair prejudice risked by the admission of the similar crime conviction ostensibly only to impeach. [300] In any event this mass ignoring or minimizing of exclusionary concerns by these courts, is a second gross indicator that a state's rule standard(s) on admitting convictions to impeach may not be a good predictor of how trial judges will apply, or if a state supreme court will carefully evaluate, authorize, or sanction the use of a conviction to impeach.

6.1.2 Summary Comparisons of Outcomes Assessments
Comparing Key Assessment Findings from Three Sets of States' Supreme Courts --- Building Towards a Finding that the Effects of Demographics is State Supreme Courts Anarchy-Result oriented Anarchy--re Use of Convictions to Impeach

6.1.2.1 Compare 3.1.2 with 4.1.2 & 5.1.2

The summary now focuses upon a comparative evaluation of the crucial assessment findings from parts two through four, and provides policy perspectives concerning those findings. First, it is fair to say that the federal rule's standards for admitting convictions to impeach, often thought of as a model for state evidence rules, was not a strong influence on the state supreme courts in any of the three groups of states herein studied,
including the eight supreme courts which were interpreting standards identical to those of the federal rule. [301] Only eleven of the forty-four supreme courts, including four of the courts interpreting rules identical to the federal rule, expressly stated at some point during the fifteen year study period that their interpretations of their rules on admission to impeach would be guided by official commentary, interpretations, or history of the federal rule. [302] Three of these eleven states, however, including two of the four courts interpreting rules identical to the federal rule, made decisions during the study period significantly inconsistent with the official commentary, interpretations, or history of the federal rule. [303]

These departures from the federal rule's commentary or legislative history were always holdings by these courts, in contrasts to the federal rule's official commentary, broadly defining the qualifying terms "dishonesty" or "false statement" in order to sanction or authorize the admission of convictions for crimes such as theft or robbery to impeach. [304] Hence the federalism policy goal of trying to encourage a uniform national standard on the admissibility of convictions to impeach, embraced by the uniform law commissioners when they amended the uniform rule to mimic the federal rules' standards was not achieved in the last quarter century, and not even modest progress towards achieving this goal as we reached the mid-point of the first decade of the twenty-first century. [305]

6.1.2.2 Compare 3.1.3 & 4 with 4.1.3 & 4 & 5.1.3 & 4

Second, the decision data for each of the three categories of state supreme courts was assessed to determine the likelihood that the courts in each category would examine the trial record to determine if the trial judge had made the appropriate rule standard evaluation, and competently apply their rules' standards regulating the admissibility of convictions to impeach. [306] In total, during the fifteen period of this study, the forty-four state supreme courts held that lower court decisions on the admission of convictions to impeach was uncorrected error in 32 of the 150 (21%) cases, and reversed for a new trial based on that error(s) in 17 of those thirty-two cases (about 11% of the total cases. [307] Studies have found that the rate of reversal by state supreme courts has fluctuated over the decades, becoming progressively lower in more recent time (less than ten percent) with the increase in appellate litigation. [308] The three groups of state supreme courts rate of finding such error was consistent with the relative scrutiny required by their states' collective rules - the rate of finding uncorrected error was almost five times as great in the group of states with overall more restrictive admission rules than the
federal rule, in comparison to those supreme courts with overall more liberal admission rules than the federal rule. [309]

Twenty-seven of the thirty-two findings of uncorrected error benefitted an accused, either because these courts found that the accused(17) or a defense witness(2) conviction(s) should have been excluded as impeachment evidence, or that a prosecution witness' conviction(8) should have been admitted to impeach. [310] This finding when coupled with the previous finding of outcome difference favoring the prosecution in state supreme court decisions, provides a basis for an inference that in these relatively heatedly contested state litigations, trial judges tended to greatly favor prosecutors in making rulings on whether to sanction impeachment of the accused or a witness of the accused, in comparison to permitting the use of convictions to impeach a prosecution's witness.

The next key finding based on the collective and comparative assemblage and evaluation of the data, is that for the most part, the forty-four state supreme courts took a sequence of related steps greatly encouraging judicial anarchy with regard to determining if a conviction should be admitted to impeach. First, all three sets of states, despite a few exceptions that could have served as models, failed to require trial judge's to place their admission of convictions to impeach evaluations on the record, or failed to competently use the standards of its rules as the basis for review of the trial judge's decision. [311] The vast majority of these courts in all three categories also failed to competently perform the evaluation required by the appropriate standard(s) of its rule to guide its own decision making. [312] Most egregiously, hiding behind history and junk science heuristics, thirty-four of forty-four of these courts(77%) failed in over half of these one hundred fifty decisions(82/55%) to require trial judges or themselves to consistently adhere to the most basic admissibility standard, that evidence must be relevant on the issue, here as proof of a propensity to lie, for which it is offered. [313] These significant failures are the third gross indicator the rule standards as enacted were not necessarily a good comparative basis for determining state supreme court decision making. This is further driven home by the fact that a higher percentage of state supreme courts with identical or more restrictive admission of convictions to impeach standards than the federal rule, admitted irrelevant convictions than state supreme courts with more liberal standards than those of the federal rule. [314]
made pertinent decisions during the study period, were interpreting rules whose standards included a standard which made express reference to convictions for crimes of "dishonesty" or "false statement". Despite the fact that none of their rules expressly defined these concepts, none of these courts generally defined "dishonesty" or "false statement" in the decisions they made during the study period, and only a few of them made reference to precedent which they characterized as including such definitions. [315] Nor did these courts adopt the narrow definition of these concepts recommended in the federal rule's commentary. [316] Instead, some courts in all three categories, without justification or policy analysis, broadly defined these concepts to include convictions for crimes which had no logical basis to serve as proof of a propensity to lie. [317] Third, state supreme courts interpreting standards which employed a specific standard only for crimes of dishonesty or false statement, a standard which more liberally authorized admission of crimes so categorized, were likely once a conviction was so characterized, to forego a rule required balancing evaluation, and the identification and weighing of exclusionary concerns. [318] These sequential failures to adhere or make clear standards with regard to "dishonesty" or "false statement" is a fourth gross indicator that a state's rule standard(s) on admitting convictions to impeach don't work and therefore may not be a poor predictor of how trial judges will apply, or whether the state supreme court will carefully evaluate, authorize, or sanction the use of convictions to impeach.

6.1.2.4 Compare 3.1.6 with 4.1.6 & 5.1.6

No matter which of the three groups of state rules on convictions to impeach, the article confirmed that the standards of most of the rules in each group sanctioned at least qualifying for possible admission convictions based on their punishment, despite the fact that the legislative decision to provide for a maximum punishment of more than a year in jail is irrelevant to prove propensity to lie. [319] Most of the state supreme courts in all three groups, provided a significant boost to judicial anarchy on this issue, when they were willing to ignore or excuse failure to comply with the universal minimal admissibility requirement, even though their state rules or the courts themselves recognized compliance with the relevance rule was at least the first necessary step to justify admission of any evidence, including admitting "felony" convictions to impeach. [320]

In evaluating "felony" convictions for admission to impeach, these courts often gave short shift to their rules' required balancing evaluation and ignored or minimized exclusionary concerns that were supposed to be identified, evaluated, and weighed against
probative value during that balancing evaluation. [321] Failure to appropriately evaluate and value exclusionary concerns set the stage for about twenty of these forty-four state supreme courts in thirty-five decisions to sanction the admission of "felonies" to impeach the accused which were identical or very similar to one or more of the charges currently being tried. [322]

6.1.3 Identifying Significant Effects on The Justice System of The Comparative Outcome & Outcome Assessment Findings of this Study

6.1.3.1 Effect of Comparative Outcomes & Outcomes Assessment Findings - Effect #1 - Driving Accused from the Stand

There is some evidence derived from this case study that the overall lack of adherence to a variety of rule and self-imposed standards which limited the admission of irrelevant convictions, multiple convictions, and convictions similar to the current trial charges, ostensibly only to impeach the accused, have the effect of driving the accused from the witness stand. [323] In as few as thirty (28%) and as many as thirty-nine (36%) of the one hundred eight cases in this study in which the accused was the witness to be impeached, the accused did not testify. [324] A much higher percentage of the accused, in the decisions of the state supreme courts interpreting rules more liberally admitting convictions to impeach than the federal rule, did not testify. [325] Hence in these cases very often irrelevant evidence put the accused to the dilemma of protecting his constitutional right to an impartial trial, by foregoing his constitutional right to testify in his own behalf. [326]

When the accused testimony is crucial to his theory of defense, as was true in some of these cases, and when some of these state supreme courts, following the meritless position of the United States Supreme Court in Luce v. United States[327], also employ a procedural rule which moots an appeal of denial of his constitutional claims to an impartial jury and right to testify if the accused fails to testify, the accused guilt or innocence may not be fairly determined. [328]

6.1.3.2 Effect of Comparative Outcomes & Outcomes Assessment Findings - Effect # 2 - Resigning Lawyers to Conceded Admissibility of Irrelevant Convictions
When standards limiting admission of convictions to impeach are not consistently enforced or evaluated by state supreme courts, it is also likely to resign lawyers to assuming a conviction when offered will be admitted. This happened in several state supreme court decisions from jurisdictions whose rules or statutes as interpreted by their state supreme courts admitted convictions to impeach more liberally than the federal rule. [329] At other times the liberal admission rule may have contributed to an attorney failing to make an appropriate argument to exclude past matters that did not or should not have qualified even as a "conviction" in the state. [330]

6.1.3.3 Effect of Comparative Outcomes & Outcomes Assessment Findings - Effect # 3 - Shifting the Most Restrictive to Least Restrictive Rankings of State Rules & the number of states whose rules rank as more or less liberal than the federal rule, but of course with caveat that at least federal courts of appeals' interpretations of the federal rule would have to be evaluated before re-ranking based on case law was fair comparison

The most significant effect of the comparative outcome and outcome assessment findings of this study is that they evidence a shift in the ranking of some of the states' admission of conviction to impeach standards. In total, seventeen supreme courts made decisions significantly altering their rules' standards, and in every case the change made it more likely that one or more types of convictions would be more easily admitted to impeach at least one category of witness. [331] Of the nine states sharing the same standards- those which mimicked the federal rule, three of the supreme courts, those of New Mexico, North Dakota, and Oklahoma authorized significantly more liberal admission standards, and standards which were not identical to each other. [332] Decisions by the Arkansas, Connecticut, Delaware, Idaho, Illinois, Maine, Maryland, Minnesota, and South Dakota Supreme Courts, and the Texas Court of Criminal Appeals during the last decade and a half had the effect of moving their overall more restrictive than the federal rule standards for admitting convictions to impeach, to standards which more liberally than the federal rule admitted convictions to impeach. [333]

The Arkansas, Maryland, Minnesota, and Texas Courts, for example, decided that almost any "felony" conviction was universally admissible to impeach, or admissible to impeach even if irrelevant as proof of a propensity to lie, and the Arkansas Court
joined the Delaware Court in expressly sanctioning the admission of convictions as substantive evidence to prove guilt, in the guise of impeachment evidence. [334] These courts thereby jettisoned any principled consideration of implicated exclusionary concerns, and they were joined by the Maine Supreme Court who simply abandoned its rule's balancing evaluation requirement to identify and evaluate exclusionary concerns. [335]

Finally, decisions by the New Jersey, Rhode Island, and Wisconsin Supreme Courts already interpreting standards overall more liberally admitting convictions to impeach than the federal rule, made decisions greatly expanding the liberality of those rules - The Rhode Island and Wisconsin Courts demonstrating a willingness to admit almost any conceivable conviction to impeach the accused. [336] This shift of thirteen states meant that at the beginning of 2005, that from a minority of sixteen of forty-four (36%), in fact a majority (25 of 44/58%) of the states whose supreme courts made decisions during the study period in fact had sanctioned or authorized standards more liberal than the federal rule in admitting convictions to impeach. These shifts also had the effect of swelling the number of distinct admission standards in the states to well over thirty.

6.1.4 Accounting for These Effects --- Especially Pattern of Significant Departures from the States' Rule Standards---Identifying Causes

6.1.4.1

This article next identifies or reconfirms the identity of those factors that plausibly account for this pattern of outcomes, patterns identified by the assessment of those outcomes, and their key effects, especially the significant departures from their respective rules' standards by many of the state supreme courts. The article has documented that among the reasons for these patterns and effects are these courts; parochial decision making process, failure to define crucial rule standards' concepts, continue to rely upon history as policy, incessantly invoke an array of junk science heuristics as substitute for logical relevance, and finally simply seem hellbent on ignoring or minimizing exclusionary policy concerns to facilitate the government's ability to convict recidivists. [337]

A final reason can be gleaned when the history of enactment of modern evidence codes is used to provide perspective about this fifteen year pattern of state supreme court decisions. This factor many be characterized as the exercise of judicial power. Modern state evidence codes while approved by state legislatures, were
documents often drafted by state supreme courts or drafted under the supervision of those courts. [338] State supreme courts take therefore more of a proprietary stance in the interpretation of these rules. [339] This proprietary posture can be seen most pervasively in the fact documented herein that state supreme courts with a wide range of admission of conviction to impeach standards have asserted their authority to employ or continue to employ guidelines they have created independent of the rules to supplant or supplement the standards of their respective rules. [340] Unfortunately, these guidelines for the most part further fueled the risk of judicial anarchy on this issue because they were most often in the form of a non-exhaustive list of multiple factors for trial judges to consider in no particular order, and most of them were simply heuristics without evidential basis. [341]

These assertions of judicial rule making authority, even embraced endorsement and use of junk science and anti-science heuristics during the decade and one-half period of this study, as well as the Solomon like tactic of splitting the baby, by admitting irrelevant convictions to impeach, but "sanitizing" that admission. [342] These heuristics and tactic were made part of the legal standard by state supreme courts despite available evidence they were inconsistent with reality, and recognition by several of these courts that the tactic was ineffectual and unfair. [343]

This proprietary interests in the rules, however, was abdicated by many of the state supreme courts by authorizing and sometimes even encouraging every state trial judge in their state to interpret the admission rule each using their own criteria - via the great deference to trial judge decision without requiring the trial judge to state the basis of that decision, reviewing those decisions to determine if they were moderately competent applications of the existing standards, and failing by their own fiat to impose state wide evaluation criteria. [344] The Rhode Island Supreme Court's decisions were the quintessential example of such abdication. [345]

6.1.5 Recommendations

The basis of the following recommendations are the findings and commentary on those findings summarized to this point in this section of the article. This final section of the article identifies and defends recommendations for national reform of the current process and substance of admitting convictions to impeach. The procedural recommendations and the substantive reform recommendation are independent of each other.

6.1.5.1 Procedural
The recommended procedural reforms are sequential. First, in order to admit a conviction record as a basis for impeachment, all states should require the proponent to make a pretrial motion, which would trigger an admission hearing, if the witness against whom the admission is sought is a "party" witness. In a criminal prosecution, the only prosecution witness within this definition of party witness is the victim(s) of the alleged crime. [346] Second, the hearing judge would be required to put on the record the specific findings of fact that justify under each element of the state's rule standard(s), as interpreted by the state supreme court, their admission/exclusion decision. [347] No conviction should be sanctioned for admission to impeach by a state supreme court based on the intuitive-phantom balancing so often endorsed by these courts as documented in this article. [348]

Third, the judge's decision should be followed, when the decision is to admit one or more convictions to impeach a party witness, with a required interlocutory appeal. Fourth, the appellate court hearing that appeal would be required to determine de-novo - as a matter of law, if the trial judge competently performed the second procedural reform just described. [349]

At the state supreme court level the evaluation of the accuracy of the trial judge's interpretation of the state standard would also be reviewed as a matter of law. Far too often, too many state supreme courts use the abuse of discretion standard to justify deference to a trial judge's decision even when that judge obviously failed to make even a good faith effort to employ the standards of the rule, and multiple times failed to refer to or place their interpretations of each sequential element of the standards set out in their rules on the record. [350] Finally, the harmless error rule, when applied to the admission against a party of a similar crime conviction is inconsistent with the weight of empirical evidence that there is almost always significant unfair prejudice produced in a jury. Therefore that doctrine should not be employed, or employed in only the most obvious of guilt beyond reasonable doubt established by non-tainted admitted trial evidence cases. [351] Otherwise twice protected specific national constitutional and state constitutional rights expressly guaranteeing an accused a right to an impartial jury, and the right to testify on his own behalf are subordinated to a deliberate state policy decision largely based on a court created, and frequently legislative endorsed irrelevant and highly unfairly prejudicial heuristic. [352]

6.1.5.2 Substantive Reform Recommendation
Substantial reform of the standards for admitting convictions to impeach to succeed must be radical. The crucial findings of this study, just reviewed and summarized, and those of the earlier rule focused article require no less than this level of reform - all states must, as is currently true in the state of Montana, abolish the use of conviction records as a form of impeachment. While it might be argued that a conviction record for perjury should be an exception to this ban, a perjury conviction record should only be admitted when there is a denial by the witness that he previously lied under oath. The only arguably relevant conviction record therefore would serve its only appropriate impeachment function warranted by their only salient characteristic - as an excellent, yet unfairly prejudicial proof source. Under this proposal, however, the party calling the witness can not complain about that unfair prejudice because the first option was to admit that the witness had previously lied under oath.

Obviously, this ban on conviction records is easy to apply and therefore will not only produce the appropriate result, but uniform results in the trial courts of all of the states. It eliminates all of the egregious major flaws in the current pattern of federalism documented in this article including: state supreme courts' focus on preservation and exercise of judicial power more than adherence to the rule of law or sound policy, the related failure of these courts to follow rule standards even when these courts articulated the standards of their rules, the conscious decision of some of these courts to admit convictions to convict in the current case if the accused dared take the stand and claim to be innocent, the wholesale admission of irrelevant conviction records, multiple irrelevant conviction records, identical or similar conviction records, ignoring or denigrating pertinent exclusionary policies and constitutional principals, skewed balancing attempts by trial and appellate courts, and qualifying for admission to impeach a broad subset of convictions by giving them a label as a flawed surrogate that the conviction is relevant proof of a propensity to lie. It is long past time for state supreme courts, the courts with the greatest authority in the states and collectively nationally, to stop sanctioning and expanding the deliberate skewing of trial outcomes, and in criminal cases denying specific constitutional rights. It is time to ban the use of conviction records as "impeachment" evidence.
FOOTNOTES


2. See infra notes 15 - 41, and accompanying text.

3. See infra notes 42 - 80, and accompanying text.

4. See infra notes 81 - 182, and accompanying text.

5. See infra notes 183 - 278, and accompanying text.

6. See infra notes 42 - 52, 81 - 102, and 183 - 196, and accompanying text.

7. See infra notes 53 - 80, 103 - 182, and 197 - 278, and accompanying text.

8. See infra notes 53 - 56, 103 - 107, and 197 - 198, and accompanying text.


10. See infra notes 61 - 66, 135 - 154, and 203 - 217, and accompanying text.


12. See infra notes 78 - 80, 166 - 171, and 257 - 272, and accompanying text.

13. See infra notes 279 - 345, and accompanying text

14. See infra notes 346 - 352, and accompanying text.

15. See Holley supra note 1 at notes 10-31 and accompanying text.

16. Id., at note 1.

17. Id., at notes 32-38 and accompanying text.
18. Id., at notes 39, 51, 65, 70, 79, 81, 88, 95, 100, 110, text following notes 114-115, 123, 127, 130, 133, 138 and 140, 142, 148-150, 152, 154, 156, and 159 and accompanying text.

19. Id., at notes 45, 50, test following note 53, 56, 61, 66, 73, 78, 92, text following note 109, text following note 114, 116 (four states), 125, 139, 147, 153 (two states), and 160 accompanying text.

20. Id., at note 166 and accompanying text.

21. Id., at notes 29-30 and accompanying text.

22. Id., at notes 164-167 and accompanying text.

23. Id., at notes 175-191, 199, 219-232 and accompanying text.

24. Id., at notes 168-174 and accompanying text.

25. Id. As Justice Kennedy commented in Lawrence v. Texas, 539 U.S. 558, 572 (2003) history and tradition are the starting point but not necessarily ending point of substantive due process evaluations).

26. Id., at notes 175-218 and accompanying text.

27. Id., at notes 170-171 and accompanying text.

28. Id., at notes 175-191, and 199 and accompanying text.

29. Id., at notes 172 and accompanying text.

30. Id., at notes 193-198 and accompanying text.

31. Id., at notes 191 and 199 and accompanying text.

32. Id., at note 173 and accompanying text.

33. Id., at notes 200-201 and accompanying text.

34. Id., at notes 202-203 and accompanying text.

35. Id., at notes 204-208 and accompanying text.

36. Id., at note 174 and accompanying text.

37. Id., at notes 209-218 and accompanying text.

38. Id., at notes 219-232 and accompanying text.

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39. *Id.*, at notes 42-44, 52, and 102, and accompanying text. Discussing the fact that Hawaii, Kansas, and Georgia all ban the offensive introduction of any conviction to impeach the accused. Of course this means that all states should immediately abandon qualifying convictions to at least potentially be admitted to impeach on the ground that the crime charged was punishable by more than one year in jail. Of course this also means that states should immediately abandon qualifying convictions to at least potentially be admitted to impeach by reference to common law concepts such as moral turpitude or any generic and undefined concepts such as crimes of "dishonesty" or "false statement". Common law and generic concepts open door to distortion to accomplish admission goal.

40. *Id.*, at note 211 and accompanying text.

41. Pretrial notice, and a pre-trial hearing provide a procedural avenue for proving a previously unadjudicated lie under oath. Eliminating any reference to a record of criminal conviction means that the new national standard becomes simply a very limited procedural exception to Federal Rule of Evidence 608 and state comparable rules - which allow questioning but not extrinsic evidence to prove specific incidents of behavior relevant to prove propensity to lie.


47. State v. Stewart, 646 N.W.2d 712, 715 (N.D., 2002) (court sanctioned trial judge's decision that three felony convictions were all admissible to impeach the accused. Convictions were for unauthorized use of a motor vehicle, unlawful possession of a firearm, and reckless endangerment); State v. Taylor, 676 N.E.2d 82, 93 (Ohio, 1997) (the attorney for an accused in a capital murder trial assumed that the trial judge had previously ruled that the accused could be impeached with a murder conviction. Ohio Supreme Court, without making a critical comment, upheld the prosecution's cross-examination of the accused to clarify that in fact the decades old conviction was for two murders.); State v. Hooks, 19 P.3d 294, 318 (Okl. Cr. App., 2001) (court approved the admission of convictions for rape and assault with intent to do bodily harm against a testifying accused in a murder trial); State v. Cheatham, 900 P.2d 414, 427 (Okl. Cr. App., 1995) (court sanctioned trial judge's decision that three felony convictions for crimes of violence were admissible to impeach the accused should he testify at trial. The accused decided not to testify); State v. Banks, 810 P.2d 1286, 1292 (Okl. Cr. App., 1991) (two robberies, an armed robbery, and burglary convictions); Turner v. State, 803 P.2d 1152, 1156 (Okl. Cr. App., 1991); State v. Colwell, 994 P.2d 177, 184 (Utah, 2000) (felony riot and theft); Ramirez v. State, 994 P.2d
court reviewed record which demonstrated that the defense attorney on direct examination of his client, the accused, charged with aggravated assault (with a knife), asked and the trial judge allowed him to ask the accused to admit to prior convictions to burglary, involuntary manslaughter, and armed robbery convictions. The state supreme court sanctioned this "strategic" decision. All of the convictions were entered twenty years before the trial. None of these convictions were even arguably relevant to prove propensity to lie, and mention of the third conviction resulted in the prosecutor being allowed to ask the accused if he used a knife during the robbery.) The one case excluding multiple convictions to impeach the accused was Hardiman v. State, 798 P.2d 222 (Okl. Cr. App., 1990)


50. State v. Mora, 950 P.2d 789, 803 (N.M., 1997); State v. Stewart, 646 N.W.2d 712, 715 (N.D., 2002) (historical presumption of relevance of all felonies relied upon); State v. Randall, 639 N.W.2d 439, 444 (N.D., 2002); State v. Farzaneh, 468 P.2d 638, 640 (n.1) (N.D., 1991) (conclusionary characterization of theft by check as crime involving dishonesty); State v. Bryan, 804 N.E.2d 433, 458 (Ohio, 2004) (assumption, without reference to the basic relevance admissibility or standards of the admission of convictions to impeach rule, that the conviction was properly admitted); State v. Taylor, 676 N.E.2d 82, 93 (Ohio, 1997); State v. Hooks, 19 P.3d 294, 318 (Okl. Cr. App., 2001); State v. Cheatham, 900 P.2d 414, 427 (Okl. Cr. App., 1995); State v. Banks, 810 P.2d 1286, 1292 (Okl. Cr. App., 1991); Turner v. State, 803 P.2d 1152, 1156 (Okl. Cr. App., 1991) (Court of Criminal Appeals approved, admission of two armed robbery convictions to impeach the two defendants); State v. Johnson, 512 S.E.2d 795, 800 (S.C., 1999) (shoplifting is a crime of dishonesty, but no evaluation of why that makes it relevant as proof of a propensity to lie generally or under oath specifically); State v. Colwell, 994 P.2d 177, 184 (Utah, 2000) (defense counsel with accused (charged with murder of a police officer) on the stand, had him admit to convictions for felony riot and theft); Ramirez v. State, 994 P.2d 970, 972-973 (Wyo., 2000) (defense attorney asked client to admit to three convictions all of which were irrelevant to prove propensity
to lie. Only the Iowa Supreme Court in its only decision of the survey period did not evaluate or authorize the admission in at least one decision of a conviction which was irrelevant to prove propensity to lie."


52. **State v. Hooks**, 19 P.3d 294, 318 (Okl. Cr. App., 2001) (court approved the admission of a conviction for assault with intent to do bodily harm against a testifying accused in a murder trial); **State v. Banks**, 810 P.2d 1286, 1292 (Okl. Cr. App., 1991) (current prosecution was for murder committed during an armed robbery. Among the four convictions which the state supreme court sanctioned for admission to impeach the accused were two robberies, both with a firearm, and an armed robbery); **Turner v. State**, 803 P.2d 1152, 1156 (Okl. Cr. App., 1991) (despite express arguments during a motion in limine hearing, the trial judge admitted and the Court of Criminal Appeals approved, admission of two armed robbery convictions to impeach the two defendants currently being prosecuted for armed robbery. Ironically, it was the same court which showed in one of its first decisions during the study period, some decisive concern for the unfair prejudice that results when similar crime evidence is admitted ostensibly to only impeach the
accused; **Hardiman v. State, 798 P.2d 222 (Okl. Cr. App., 1990)** (court reversed the conviction of the accused for drug possession on the grounds that the trial judge had authorized for admission from among several convictions, only the two convictions for possession of contraband)

53. **State v. Lasner, 14 P.3d 1282, 1289 (N.M., 2000); State v. Randall, 639 N.W.2d 439, 444 (N.D., 2002); State v. Farzaneh, 468 P.2d 638, 641 (N.D., 1991)** (North Dakota Evidence Code's standards regulating admission of convictions to impeach based on borrowing from uniform rules of evidence, and the uniform rules were amended to adopt the federal rule's standards); **Three "M" Investments, Inc. v. The Ahrend Co., 827 P.2d 1324, 1326 (Okl., 1992); State v. Cheeseboro, 552 S.E.2d 300, 310 (S.C., 2001)**

54. **State v. Lasner, 14 P.3d 1282, 1289 (N.M., 2000)** (court adopted federal rule definition of crimes committed by fraud or deceit; **State v. Cheeseboro, 552 S.E.2d 300, 310 (S.C., 2001)** (South Carolina Supreme Court relied on federal appeals court interpretation of the federal rule that held that criminal impersonation is a crime involving dishonesty and false statement)

55. **State v. Lasner, 14 P.3d 1282, 1289 (N.M., 2000)**

56. Oklahoma Supreme Court decision in **Three "M" Investments, Inc. v. The Ahrend Co., 827 P.2d 1324, 1326 (Okl., 1992)** (asserted propriety of guidance by federal rule, but in **State v. Banks, 810 P.2d 1286, 1292 (Okl. Cr. App., 1991)**, the Oklahoma Court of Criminal Appeals ignored the fact that the federal advisory committee notes to the federal rule expressly asserted that the crimes of dishonesty or false statement do not include general theft crimes accomplished by taking the property from its owner, without his consent. The Court of Criminal Appeals held that convictions for robbery with a firearm, armed robbery, and burglary were all crimes of dishonesty or false statement); **State v. Johnson, 512 S.E.2d 795, 800 (S.C., 1999)** (Accused convicted by jury of multiple counts of criminal sexual conduct with a minor, as well as multiple counts of lewd acts with children under fourteen. Trial judge denied, but both appellate courts held that accused should have been allowed to impeach mother of one of the victim's who testified for the government, with a conviction for shoplifting. Trial judge, the state supreme court acknowledged, relied upon federal authority that under the federal rule shoplifting was not a crime involving dishonesty or false statement. Yet this state supreme court analyzed shoplifting crime, and found, because it did involve either removing a label or sales tag, or taking stolen item out of its container, that it did involve dishonesty)
57. State v. Randall, 639 N.W.2d 439, 443 (N.D., 2002) (all of prosecution witness' convictions should have been admitted, but their exclusion was harmless error); Hardiman v. State, 798 P.2d 222 (Okl. Cr. App., 1990) (accused. admission of conviction error, and reversal on this basis); State v. Johnson, 512 S.E.2d 795, 800 (S.C., 1999) (prosecution witness' conviction for shoplifting should have been admitted, but its exclusion was harmless error).

58. See supra notes 50 - 51, and infra. notes 65 - 77, and 80, and accompanying text. The two decisions in which the court did appear to make the rule required evaluation were: Three "M" Investments, Inc. v. The Ahrend Co., 827 P.2d 1324, 1326 (Okl., 1992), and State v. Cheeseboro, 552 S.E.2d 300, 310 (S.C., 2001)

59. See supra notes 50 - 51, and accompanying text.

60. In only five of these eighteen decisions, three of them by the Oklahoma Court of Criminal Appeals, did these courts fail to restate the rule.

61. See Holley, supra note 1, at notes 17, 27, and 39, and accompanying text.

62. Id. at notes 29-30, and 238, and accompanying text.


64. State v. Farzaneh, 468 P.2d 638, 641 (N.D., 1991) (theft of checks was a conviction that could have been properly characterized as involving a crime of dishonesty or false statement, and was therefore admissible to impeach the accused); State v. Banks, 810 P.2d 1286, 1292 (Okl. Cr. App., 1991) (Oklahoma Court of Criminal Appeals ignored the fact that the federal advisory committee notes to the federal rule expressly asserted that the crimes of dishonesty or false statement do not include general theft crimes accomplished by taking the property from its owner, without his consent. The Court of Criminal Appeals held that convictions for robbery with a firearm, armed robbery, and burglary were all crimes of dishonesty or false statement); State v. Johnson, 512 S.E.2d 795, 800 (S.C., 1999) (Accused convicted by jury of multiple counts of criminal sexual conduct with a minor, as well as multiple counts of lewd acts with children under fourteen. Trial judge denied, but both appellate courts held that accused should have been allowed to impeach mother of one of the victim's who testified for the
government, with a conviction for shoplifting on theory it involved dishonesty. South Carolina State Supreme Court analyzed shoplifting crime, and found, because it did involve either removing a label or sales tag, or taking stolen item out of its container, that it did involve dishonesty.

65. State v. Lasner, 14 P.3d 1282, 1288-1289(N.M., 2000) (Accused charged and convicted of first degree murder and aggravated battery. Accused sought to impeach one of surviving victims who testified at trial, with multiple juvenile adjudications including one for concealing identity-a misdemeanor. After conclusionarily asserting that concealing identity is a crime of deceit or fraud, the court then asserted that the trial judge, despite the mandatory admission language of 11-609(A)(2), had discretion via its 403 rule to exclude the conviction. It then sanctioned, in a highly conclusionary manner, the trial judge's exclusion, asserting it was not an abuse of discretion.

66. State v. Axiotis, 569 N.W.2d 813, 816(Iowa, 1997) (Supreme Court erroneously asserted that trial judge must determine if the prior conviction is one of dishonesty or false statement, and even if she concludes that it was such a conviction, that the probative value of the conviction to prove propensity to lie outweighed its prejudicial effect; Id.. Accused on appeal conceded conviction was for a crime of dishonesty or false statement, and hence by rule, the conviction was admissible to impeach him. Iowa Supreme Court simply failed to recognize that its rule, like the federal rule, embodied two independent standards for the accused)

67. See Holley supra note 1, at notes 18-26, and 39, and accompanying text.


69. See supra note 51, and accompanying text.

70. State v. Stewart, 646 N.W.2d 712, 715-716(N.D., 2002)

72. State v. Mora, 950 P.2d 789, 803 (N.M., 1997) (six factor analysis); State v. Stewart, 646 N.W.2d 712, 716 (N.D., 2002) (five factor analysis, omitting from the New Mexico list discussed infra in the next text sentence the correlation with substantive 404 propensity rule policy factor); Hardiman v. State, 798 P.2d 222, 224 (Okl. Cr. App., 1990) (identical five factor analysis as North Dakota Supreme Court, which Oklahoma court asserted it had established in an earlier case).

73. State v. Stewart, 646 N.W.2d 712, 716 (N.D., 2002).

74. See Holley, supra note 1, at notes 211 - 218, and accompanying text.

75. State v. Mora, 950 P.2d 789, 803 (N.M., 1997)

76. State v. Mora, 950 P.2d 789, 803 (N.M., 1997) (The New Mexico Supreme Court proceeded to uphold admission of a receipt of stolen property conviction to impeach, because the accused had recently pled guilty, the offense was not similar to the current charges, and credibility was a critical and central issue in this case. In Turner v. State, 803 P.2d 1152, 1156 (Okl. Cr. App., 1991), on the other hand, the court reasoned that because the two defendants testified they were innocent of the armed robbery charge, it was appropriate to admit two other robbery convictions against each accused. See also State v. Randall, 639 N.W.2d 439, 449 (N.D., 2002) (North Dakota Supreme Court makes similar conceptual error by asserting that the lack of other evidence to impeach, enhances probative value of each and every felony conviction of the witness to impeach the witness).

77. The record in these cases, and discussions with experienced prosecutors and defense lawyers support the conclusion that when defendants in criminal cases testify in their case-in-chief it is almost always because the person and defense counsel have concluded that among the most viable theories of defense, is one or more theories for which the accused testimony is crucial.


79. Id.

80. State v. Mora, 950 P.2d 789, 803 (N.M., 1997) (Apparently the fact that the crime was not similar, was found by implication by the court to reduce the unfair prejudice --- but no attempt was made to articulate the remaining quantity and quality of the unfair prejudice that would result, especially given the express reference to a gun, as the item stolen); State v. Cheatham, 900 P.2d 414,

81. These twenty-four jurisdictions were: Alaska, Arizona, Arkansas, Connecticut, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, Pennsylvania, South Dakota, Tennessee, Texas, Vermont, Washington, and West Virginia. See Holley supra note 1 at 41-126, and accompanying text.

82. The four state supreme courts which did not make a pertinent decision with regard to determining the admissibility of a conviction to impeach during the period 1990-2004 were Alaska, Michigan, Mississippi, and West Virginia.


84. State v. Green, 29 P.3d 271 (Ariz., 2001) (felony sexual offenses); State v. Dorans, 806 A.2d 1033 (Con., 2002); State v. Carter, 636 A.2d 821 (Con., 1994) (manslaughter and carrying a pistol without a permit); State v. Sauris, 631 A.2d 238 (Con., 1993) (multiple larceny and breaking and entering convictions);

85. Benson v. State, 160 S.W.3d 341 (Ark., 2004) (accused did not testify, but court did expressly recite its evidence rule's standards, Id. at 344); Pryor v. State, 861 S.W.2d 544, 547 (Ark., 1993) (accused did testify; but the court did not expressly recite its evidence rule's standards, Id.); Walker v. State, 790 A.2d 1214, 1217 (n.2) (Del., 2002) (accused did testify, but the court did
(accused did testify, but the court did not expressly recite its evidence rule's standards, Id.); State v. Fender, 504 N.W.2d 858, 860-861 (S.D., 1993) (accused did not testify, and court did not expressly recite its evidence rule's standards, Id. at 859 and 860); State v. Loop, 477 N.W.2d 40, (S.D., 1991) (accused did not testify, and the court did expressly recite its evidence rule's standards, Id., at 40 and 41); Norris v. State, 902 S.W.2d 428, 440 (Tx.Cr.App., 1995) (accused did testify, but the court did not expressly recite its evidence rule's standards, Id. at 439 and 440); State v. Setien, 795 A.2d 1135 (Vt., 2002) (accused did not testify, but the court did expressly recite its evidence rule's standards, Id. at 1137 and 1138); State v. Rivers, 921 P.2d 495, 498-499 (Wa., 1996) (accused did testify, and the court did expressly recite its evidence rule's standards, Id., at 497 and 498); State v. McKinsey, 810 P.2d 907, 908 (Wa., 1991) (accused did testify, but the court did not expressly recite its evidence rule's standards, Id. at 907 and 908).

State v. Green, 29 P.3d 271, 275-76 (Ariz., 2001) (accused did testify, and the court did expressly recite its evidence rule's standards. The court held that the admission of the accused's two fifteen year old convictions for felony sexually related offenses was uncorrected and reversible error); Morris v. State, 795 A.2d 653, 665 (Del. 2002) (accused did testify, Id. at 656, and the court did expressly recite its evidence rule's standards. The court held that the admission of the accused's conviction for kidnapping was uncorrected, but not reversible error); Mann v. State, 541 S.E.2d 645 (Ga., 2001) (accused did testify, Id. at 648. The court held that the admission of the accused's conviction for possession with intent to distribute was uncorrected, but harmless, and therefore not reversible error); State v. Pacheco, 26 P.3d 572, 587 and 589 (Haw., 2001) (accused did testify, Id. at 579, and the court did expressly recite its evidence rule's standards, Id. at 578. The court held that the admission of the accused's shoplifting conviction during his trial on public drunkenness and resisting arrest charges was uncorrected error, and revered the conviction based on this error and related issues); People v. Cox, 748 N.E.2d 166, 167 (I11., 2001) (accused did testify, Id. at 169, and the court did expressly recite its evidence rule's standards, Id. at 169 - 170. The court held that the admission of the accused's felony theft and burglary convictions even if not named was uncorrected and reversible error); State v. Davis, 874 P.2d 1156, 1162 (Kan., 1994) (accused did not testify, Id. at 1159, but the court did expressly recite its evidence rule's standards. The court affirmed trial court decision that a conviction for the felony of possession of cocaine was not a conviction for a crime of dishonesty or false statement, and was therefore inadmissible to impeach the accused, but nevertheless affirmed the convictions of the accused in this
case for aggravated burglary and multiple serious crimes against the person); Com. v. Nieves, 746 A.2d 1102 (Pa., 2000) (accused did not testify, Id. at 1103, and the court did expressly recite its evidence rule's standards. The court held that the defendant's trial attorney (accused on trial and convicted of capital murder and possession of an instrument of crime) provided ineffective assistance when he told the accused that if he testified he could be impeached with four convictions. Court held error was grounds for reversal because by rule neither the two drug trafficking convictions or the two possession of weapons convictions met the only qualifying criteria that the underlying crime must implicate "dishonesty" or "false statement"); State v. Galmore, 994 S.W.2d 120 (Ten., 1999) (accused did not testify. The court held it was uncorrected, but not reversible error for the trial judge to have authorized the prosecution to impeach the accused should he testify, even if no reference to the name of the crime was permitted, with a conviction for robbery when the accused was currently on trial for robbery and other crimes); State v. Taylor, 993 S.W.2d 33, 35 (Ten., 1999) (accused did not testify, Id. at 34, and the court did not fully recite its evidence rule's standards. The court held it was uncorrected but harmless error for the trial judge to authorize prosecution impeach the accused should he testify with convictions for burglary and larceny at a trial of the accused for crimes of aggravated burglary and theft); State v. Mixon, 983 S.W.2d 661, 663, 674-675 (Tenn., 1999) (accused did testify, Id. at 664, and the court did recite its evidence rule's standards, Id. at 673. The court held it was reversible error for the trial judge to authorize the prosecution to impeach the accused with sexual battery conviction. The accused was currently on trial for sexual battery, attempted rape, and attempted incest); Theus v. State, 845 S.W.2d 874, 881 (Tx. Cr. App., 1993) (accused did testify, Id. at 877, but the court did not expressly recite its evidence rule's standards. The court held that it was uncorrected error for the trial judge to authorize the prosecution to impeach the accused's trial testimony by referring to and having admitted his arson conviction); State v. Ashley, 623 A.2d 984, 987 (Vt. 1993) (accused did testify, Id. at 986, and the court did recite its evidence rule's standards. The court held it was reversible error for the trial judge to authorize the prosecution to impeach the accused with sixteen prior convictions); State v. Calegar, 947 P.2d 235, 240 (Wa., 1997) (accused did testify, Id. at 236, and the court did recite its evidence rule's standards, Id. at 237. The court held the original trial judge's decision to authorize the prosecution to impeach the accused with a possession of a controlled substance conviction was reversible error; State v. Hardy, 946 P.2d 1175, 1181 (Wa., 1997) (accused did testify, Id. at 1177, and the court did recite its evidence rule's standards, Id. at 1178. The court held that it was uncorrected and reversible error for the trial judge to authorize the prosecution to impeach
the accused's trial testimony with a felony drug conviction).

87. Benson v. State, 160 S.W.3d 341, 343 (Ark., 2004) (aggravated robbery, kidnapping, and rape); Walker v. State, 790 A.2d 1214, 1217 (n.2) (Del., 2002) (State supreme court sanctioned the trial judge’s decision to allow the state to impeach the accused with two of five convictions); Archie v. State, 721 A.2d 924 (Del., 1998) (unspecified convictions); Desmond v. State, 654 A.2d 821, 825 (Del., 1994) (five convictions, including four felony convictions and a misdemeanor theft conviction); People v. Casillas, 749 N.E.2d 864, 880 (Ill., 2001) (escape and unlawful use of a weapon by a felon); People v. Atkinson, 713 N.E.2d 532 (Ill., 1999) (two felony burglary convictions); People v. Redd, 553 N.E.2d 316, 324 (Ill., 1990) (rape and attempted murder); State v. Gray, 755 A.2d 540, 545 (Me., 2000) (fourteen convictions for forgery or unsworn falsification); State v. Lobozzo, 719 A.2d 108, 110 (Me., 1998) (escape, possession of a firearm, and theft); State v. Wright, 662 A.2d 198 (Me., 1995) (theft and burglary); State v. Warren, 661 A.2d 1108, 1110-1111 (Me., 1995) (assault with a dangerous weapon and armed robbery); Jackson v. State, 668 A.2d 8, 11 and 12 (Md., 1995) (three theft convictions); State v. Ihnot, 575 N.W.2d 581, 583 (Minn. 1998) (burglary, controlled substance, and criminal sexual conduct); Com. v. Pursell, 724 A.2d 293, 310 (Pa., 1999) (theft (a bike) and theft by deception); State v. Fender, 504 N.W.2d 858, 860-861 (S.D., 1993) (aggravated assault and escape could be admitted if the accused testified); State v. Loop, 477 N.W.2d 40, (S.D., 1991) (two convictions for sexual contact with a child); State v. Rivers, 921 P.2d 495, 498-499 (Wa., 1996) (attempted robbery and robbery)

88. State v. Green, 29 P.3d 271, 272 (Ariz., 2001) (two "sexual offenses"); People v. Cox, 748 N.E.2d 166 (Ill., 2001) (reversible error to make even mere fact reference to multiple convictions for theft and burglary); State v. Taylor, 993 S.W.2d 33, 35 (Tenn., 1999) (State Supreme Court ruled it was error for the trial judge to authorize state to impeach the accused with eight unspecified felony convictions, all of which the state was authorized to refer to as felonies of dishonesty. Hence the court rejected the trial judge's apparent attempt to reach a policy compromise, by striking the specific name of the convictions, which was similar or identical to the current charges (burglary convictions, burglary charge; larceny conviction, theft current charge); State v. Ashley, 623 A.2d 984, 986 (Vt. 1993) (court ruled that the trial judge erred in admitting perhaps all sixteen convictions to impeach the accused, including convictions for burglary and thirteen convictions for false pretense.)

89. Wal-Mart Stores, Inc. v. Regions Bank Trust Department, 69 S.W.3d 20, 26 (Ark. 2002) (named civil plaintiff); Label Systems,


93. State v. Askew, 716 A.2d 36, 40 (n.13) (Con., 1998) (court makes reference to its own precedent to approve trial court tactic of admitting felony convictions (in this case arson) to impeach a prosecution witness, but prohibiting reference to the name of the underlying felony).

94. Id. The judge's jury instructions expressly made reference to the admission of the accused felony conviction to impeach; followed by an admonition to use that fact only to evaluate the credibility of the accused as witness. With regard to the case evidence see infra note 95, and accompanying text.

95. State v. Green, 29 P.3d 271, 272-273 (Ariz., 2001) (trial judge authorized the prosecutor to only ask accused if he testified if he had been previously convicted of two felonies. The judge's decision was caused by the fact that the two prior offenses were felony sexual offenses, and the accused was currently on trial for a felony sex offense. The judge therefore felt a fair policy resolution was to "sanitize" (no reference by name) the convictions that he nevertheless thought remained relevant to impeach as unspecified felonies. Immediately after the prosecution completed cross-examining the accused, two jurors passed notes asking about the specific name/nature of the two prior felony convictions, and one expressly asked were the convictions for sexual offenses.

96. Benson v. State, 160 S.W.3d 341, 343-344 (Ark., 2004) (court authorized state to impeach accused if he would have testified at his rape trial with a conviction for rape); Pryor v. State, 861 S.W.2d 544, 547 (Ark., 1993) (accused prosecuted for drug dealing. Court held that a drug possession conviction was admissible by the prosecution to impeach the accused because he testified and claimed he was innocent of the current charge.); Fennell v. State, 691 A.2d 624, 625 (Del. 1997) (delivery of cocaine); Desmond v. State, 654 A.2d 821, 825 (Del., 1994) (accused on trial for and convicted of almost thirty crimes, including three theft charges. Delaware Supreme Court sanctioned admission of a misdemeanor theft conviction to impeach the accused's trial testimony); Hudson v. State, 521 S.E.2d 810, 816 (Ga., 1999) (court sanctioned admission of an aggravated assault conviction as impeachment evidence against the accused at a trial for murder); State v. Thompson, 977 P.2d
(Accused convicted of sexual battery of a minor, and assault. State supreme court sanctioned the admission to impeach the accused with the fact of but not the name of his conviction for lewd and lascivious conduct); State v. Muraco, 968 P.2d 225, 226 (Idaho, 1998) (court sanctioned admission of a conviction for lewdness with a minor to impeach an accused on trial for lewd conduct with a minor child); State v. Bush, 951 P.2d 1249, 1258 (Idaho, 1997) (court sanctioned admission of immoral acts with a child conviction, to impeach an accused currently standing trial for multiple sexual offenses, including lewd acts with a minor); People v. Atkinson, 713 N.E.2d 532 (Ill., 1999) (accused tried and convicted in the current trial of burglary, was impeached with his two prior convictions for the same crime); People v. Williams, 670 N.E.2d 638, 654 (Ill., 1996) (accused tried and convicted in the current trial of murder, attempted murder, and aggravated battery with a firearm, was impeached with his prior conviction for aggravated battery); People v. Redd, 553 N.E.2d 316, 324, 350 (Ill., 1990) (accused tried and convicted of two counts of murder and two counts of rape in the current trial. Trial judge authorized and state supreme court sanctioned use of prior convictions for attempted murder and rape); State v. Warren, 661 A.2d 1108, 1110-1111 (Me. 1995) (Accused convicted by jury of gross sexual assault. Trial judge admitted and state supreme court affirmed the admission of accused's convictions for assault with a dangerous weapon and for armed robbery to impeach); Jackson v. State, 668 A.2d 8, 11 and 12 (Md., 1995) (prosecutor characterized theft as crime of dishonesty, and Maryland Court of Appeals made deceit characterization. Three theft convictions used to impeach the accused, currently being prosecuted for theft); State v. Ihnot, 575 N.W.2d 581, 583 (Minn. 1998) (Defense attorney expressly argued that admission of a felony conviction for criminal sexual conduct, in the current trial for the same charge, was so unfairly prejudicial that it would prevent accused from testifying. Accused did not testify at trial, and presented no other evidence); State v. Moorman, 505 N.W.2d 593, 603 (Minn., 1993) (Accused prosecuted and convicted of first degree murder and rape of a fourteen year old girl. State Supreme Court sanctioned the admission of a felony sexual assault conviction against the accused) State v. Loop, 477 N.W.2d 40 (S.D., 1991) (Court sanctioned admission of sexual contact with a minor to impeach the accused in a case in which the accused was charged with sexual contact with a child.); Norris v. State, 902 S.W.2d 428, 440 (Tex. Cr. App., 1995) (murder conviction when the accused was on trial for capital murder); State v. Rivers, 921 P.2d 495, 498-499 (Wa., 1996) (Accused charged with robbery. State Supreme court sanctioned trial judge's decision to admit attempted robbery and robbery convictions. Trial court sought, and state supreme court sanctioned, attempt to temper the unfairly prejudicial impact of the admission of these identical to current charge crimes having prosecutor omit their names and generically characterize them as
felonies); *State v. Mckinsey*, 810 P.2d 907, 908 (Wa., 1991) (receipt of stolen property prosecution. Court sanctioned admission of a receipt of stolen property conviction to impeach the accused). See also *State v. Askew*, 716 A.2d 36, 40 (Con., 1998) (Connecticut Supreme Court expressly restated without criticism trial judge's decision to sanction the impeachment of the accused with a robbery conviction when he testified in his own defense at his current robbery prosecution. Jury was not told the name of the crime, but the accused admitted on direct examination of having been previously convicted of a felony. Accused appeal attorney, apparently felt that there was no strong basis to appeal the admission of this identical crime conviction). For documentation of why all convictions, and particularly similar crime convictions do in fact cause unfair prejudice see *Holley*, *supra* note 1 at 211 - 218, and accompanying text.

97. *State v. Green*, 29 P.3d 271, 275-76 (Ariz., 2001) (current charges were for sexual assault and sexual abuse. Two fifteen year old convictions of the accused that the state supreme court ruled should have been excluded, were for felony sexually related offenses); *Mann v. State*, 541 S.E.2d 645, (Ga., 2001) (accused tried for possession with intent to distribute cocaine, and court held that it was uncorrected but not reversible error for the prosecutor to make reference to a prior conviction for possession with intent to distribute cocaine); *People v. Cox*, 748 N.E.2d 166,167 (Ill., 2001) (felony theft and burglary convictions even if not named should not have been admitted to impeach the accused currently charged with unlawful possession of a stolen vehicle); *Com. v. Nieves*, 746 A.2d 1102 (Pa., 2000) (accused trial charges included possession of an instrument of crime. Court ruled that it was uncorrected error for the trial judge to authorize admission among other crimes of two possession of weapons convictions); *State v. Galmore*, 994 S.W.2d 120 (Ten., 1999) (court held it was error to authorize the prosecution to impeach the accused should he testify, even if no reference to the name of the crime was permitted, with a conviction for robbery when the accused was currently undergoing trial for robbery and other crimes); *State v. Taylor*, 993 S.W.2d 33, 35 (Ten., 1999) (court held it was error for trial judge to authorize admission to impeach with convictions for burglary and larceny at a trial of the accused for crimes including burglary and theft); *State v. Mixon*, 983 S.W.2d 661, 663, 674-675 (Tenn., 1999) (court held it was error for trial judge to authorize admission to impeach the accused with sexual battery conviction. The accused was currently on trial for sexual battery, attempted rape, and attempted incest)); *Theus v. State*, 845 S.W.2d 874, 881 (Tx. Cr. App., 1993) (court ruled that the accused's arson conviction should have been excluded as a basis to impeach the accused on trial for possession and delivery of cocaine); *State v.
Ashley, 623 A.2d 984,987(Vt. 1993)(court ruled that perhaps all sixteen prior convictions were improperly admitted, and must be excluded at the retrial on serious sexual offenses); State v. Calegar, 947 P.2d 235,240(Wa., 1997)(possession of a controlled substance by prescription fraud, and state sought to admit a possession of a controlled substance conviction)

98. Walker v. State, 790 A.2d 1214, 1217(Del., 2002); State v. Ihnot, 575 N.W.2d 581, 583(Minn. 1998)(State supreme court sanctioned the admission of a criminal sexual conduct felony conviction to impeach the accused should he choose to testify during the trial of the current charge for criminal sexual conduct. Defendant's attorney did argue that the criminal sexual conduct charge was so unfairly prejudicial that it would prevent accused from testifying. Trial judge ruled that conviction would be admitted to impeach. Accused did not testify at trial.

99. State v. Ihnot, 575 N.W.2d 581, 583(Minn. 1998)(court reviewed trial judge's findings at hearing which resulted in trial judge's conclusion that he would admit the conviction to impeach the accused. Trial judge reasoning so flawed that it arguably constituted violation of due process(note intermediate Minnesota appellate court ruled that trial judge's ruling violated state and national constitution's guarantees that the accused has a right to testify at her trial)

100. State v. Rivers, 921 P.2d 495, 498-499(Wa., 1996)(State Supreme court sanctioned trial judge's decision to admit attempted robbery and robbery convictions on theory that the judge tempered the unfairly prejudicial impact of the per se admission of these convictions in the current robbery prosecution, by omitting their names.

101. State v. Mixon, 983 S.W.2d 661, 663, and 674-675(Tenn., 1999)(sexual battery conviction approved by trial judge to impeach the accused witness who was currently charged with sexual battery, attempted rape, and attempted incest)

102. Id.


104. State v. Green, 29 P.3d 271, 273-274(Ariz., 2001)(federal rule's legislative history relied upon in the context of evaluating admissibility considerations when a conviction which is offered to impeach is more than ten years old); State v. Sauris, 631 A.2d 238, 248-249(n.14)(Con., 1993)(federal rule standard is rough bench mark for determining if a conviction is too old to be admitted); Archie v. State, 721 A.2d 924, 927(n.7)(Del., 1998)(reliance upon notes
from the federal congress, judiciary center, and the advisory committee to the effect that the federal rules should be considered as part of the comments prepared by the Delaware Study Committee on the Delaware Rules of Evidence); Jackson v. State, 668 A.2d 8,12(Md., 1995); Theus v. State, 845 S.W.2d 874, 879(Tx. Cr. App., 1993)

105. Jackson v. State, 668 A.2d 8, 13(Md., 1995); Theus v. State, 845 S.W.2d 874, 879(Tx. Cr. App., 1993)(Court expressly asserted that the federal courts interpretation of the federal rule will be some guidance to the court in interpreting the state evidence rules when the state evidence rule is similar, even if not identical in all respects to the prior enacted comparable federal rule). See also State v. Dorans, 806 A.2d 1033, 1050(n.30)(Con., 2002)(federal standard "not our own, but serves as a rough bench mark in evaluating whether the trial judge abused discretion in making admission of conviction to impeach evaluation)

106. Jackson v. State, 668 A.2d 8, 13(Md., 1995). With regard to the federal rule commentary see discussion supra note 21, and accompanying text.

107. Id. at 12-13.

108. See supra fourteen cases cited in footnote 86; Wal-Mart Stores, Inc. v. Regions Bank Trust Department, 69 S.W.3d 20, 26(Ark. 2002)(court reversed at least in substantial part based on this error); State v. Askew, 716 A.2d 36(Con., 1998)(court reversed based on this error); State v. Pinnock, 601 A.2d 521(Con., 1992)(court did not reverse based on this error); Archie v. State, 721 A.2d 924, 927(Del., 1998)(court held trial judge had committed error in limiting scope of prosecution's impeachment of the accused with prior convictions, by prohibiting reference to the name/nature of the offenses underlying those convictions. Court did not reverse based on this error); Webb v. State, 663 A.2d 452, 461(Del., 1995)(court reversed based on this error); Ely v. State, 529 S.E.2d 886, 889(Ga., 2000)(court did not reverse based on this error); Sapp v. State, 520 S.E.2d 462,463-465(Ga., 1999)(court reversed based on this error); Hall v. Hall, 402 S.E.2d 726, 727(Ga., 1991)(court reversed based on this error); State v. Bristow, 882 P.2d 1041, 1044(Mont. 1994)(court reversed based on this error); State v. Ray, 806 P.2d 1220, 1228(Wa., 1991)(court had already reversed conviction on another grounds)

109. Morris v. State, 795 A.2d 653, 665 (Del. 2002)(court held that the trial judge abused his discretion by failing to make the required balancing evaluation before strongly indicating that he thought a kidnapping conviction was admissible to impeach the accused); Walker v. State, 790 A.2d 1214, 1217(n.2)(Del., 2002);
Desmond v. State, 654 A.2d 821, 825 (Del., 1994); McClure v. State, 603 S.E.2d 224, 227-228 (Ga., 2004); State v. Page, 16 P.3d 890, 894 (Idaho, 2001); State v. Lobozzo, 719 A.2d 108, 110 (Me., 1998); State v. Wright, 662 A.2d 198, 200 (Me., 1995); State v. Giddens, 642 A.2d 870, 875 (Md., 1994) (see discussion infra note ___ and accompanying text) State v. Fender, 504 N.W.2d 858, 860-861 (S.D., 1993); State v. Fender, 504 N.W.2d 858, 860-861 (S.D., 1993) (trial judge conclusionarily stated that he thought the name of the convictions of aggravated assault and escape should be admitted if the accused testified because he felt that the convictions are more probative than they are prejudicial. The South Dakota Supreme Court only required that this conclusion appear in the record.) State v. Taylor, 993 S.W.2d 33, 34 (Tenn., 1999) (court noted but did not evaluate the reasons why the trial judge first ruled that seven identical crime convictions were inadmissible because of the danger of unfair prejudice, but subsequent prosecution research for some unstated reason convinced that judge to admit all seven burglary convictions to impeach as crimes the jury could be told were crimes involving dishonesty). The failure to assess the basis of the trial judge's change of heart, occurred despite the fact, that less than six months earlier, the Tennessee Supreme Court had held that it was good practice for trial judges to place on the record their reasons for finding that a conviction was relevant to impeach, State v. Mixon, 983 S.W.2d 661, 674 (Tenn., 1999); State v. Ashley, 623 A.2d 984, 986 (Vt. 1993) (court failed to identify where in the trial record the judge performed the analysis required by the rule to determine the admissibility of sixteen convictions it admitted to impeach the accused. The Vermont rule expressly required the trial judge to make such findings on the record.); State v. Calegar, 947 P.2d 235, 237-240 (Wa., 1997); State v. Hardy, 946 P.2d 1175, 1177-1178 (Wa., 1997)

110. See the authority discussed in the text and notes immediately following this note, and see also infra notes 112 - 113, 123 - 134, 143 - 146; 148 - 150, 158 - 169. For cases in which these state supreme courts did not perform the evaluation required by their rules, or established procedures to encourage such reviews, or both, see infra. note 118 - 119, 138 - 139, 153 - 154, and accompanying text.

111. See supra note 91, and accompanying text. For state supreme court decisions from these courts recognizing that there was doubt about the relevance or no relevance to prove propensity to lie simply because a conviction was for a crime punishable by more than a year in jail, see infra notes 153 - 154, and 170, and accompanying text.

112. Mann v. State, 541 S.E.2d 645, 648 (Ga., 2001) (case overruled was Kyler v. State, 508 S.E.2d 152 (Ga., 1998). Court also
acknowledged that trial judge had authorized prosecution to admit in its case-in-chief, and the supreme court did not question, an identical crime conviction as a "similar transaction". See also Francis v. State, 463 S.E.2d 859,861(Ga., 1995) (The court ruled it was harmless error for the trial judge to give the jury an instruction authorizing the jury to use a conviction of the accused, properly admitted to counter specific testimony given by the accused, as a basis to generally infer propensity to lie. Harmless error finding was based in part on the fact the judge did subsequently tell the jury the appropriate use of the conviction)

113. Hudson v. State, 521 S.E.2d 810, 814-816(Ga., 1999) (by the court's own acknowledgement, the conviction, prior to the prosecution's question, was inadmissible for any purpose. The Georgia impeachment rule required the accused to put his character at issue. It is difficult to understand how multiple justices on the state's highest court could so badly misconstrue their own rule)

114. With regard to the Montana Supreme Court's policy advocacy, see infra notes 138 - 139, and accompanying text. See also State v. Dorans, 806 A.2d 1033, 1050(n.32)(Con., 2002) (contrary to appeal claim of accused, state supreme court found that trial judge at least asserted that he understood an element of his evaluation was to conduct a balancing evaluation)

115. People v. Harvey, 813 N.E.2d 181(Ill., 2004)(three consolidated cases); People v. Casillas, 749 N.E.2d 864(Ill., 2001); People v. Cox, 748 N.E.2d 166(Ill., 2001); People v. Atkinson, 713 N.E.2d 532(Ill., 1999)

116. People v. Harvey, 813 N.E.2d 181, 191(Ill., 2004) (in these three consolidated cases, trial judges had deliberately ignored recent state supreme court rulings condemning avoiding the rule's balancing standard by per se admitting any felony conviction to impeach, but admitting only the "mere fact" of conviction without identifying the underlying crime); People v. Cox, 748 N.E.2d 166(Ill., 2001)

117. People v. Harvey, 813 N.E.2d 181, 191-192(Ill., 2004) (three consolidated cases, and state supreme court in all three cases, despite acknowledging that the trial judges defied the court's mandate to apply the rule standard and balance exclusionary concerns against probative value before a conviction was admitted to impeach, nevertheless found reasons to not reverse any of the current convictions on this basis)

standards, adding its multi-factor totality approach, and listing approximately nine specific factors from that approach); State v. Dorans, 806 A.2d 1033, 1049 (Con., 2002); State v. Askew, 716 A.2d 36, 41 (Con., 1998) (inherent authority of trial courts is particularly applicable to screen felony convictions by evaluating and balancing unfair prejudice against probative value before admitting to impeach. But in a recent decision, Label Systems, Inc. v. Aghamohammadi, 852 A.2d 703, 718 (Con. 2004) the court asserted that with regard to this standard, the normative rule that the proponent of evidence has the burden of proving its admissibility, was reversed, and therefore the opponent of admitting a conviction to impeach, had the burden to prove there is sufficient unfair prejudice to justify its exclusion); State v. Pacheco, 26 P.3d 572, 578 (n.7) and 588 (Haw., 2001); People v. Casillas, 749 N.E.2d 864, 880 (Ill., 2001) (restatement of balancing standard, and review of record to determine if trial judge followed it); People v. Cox, 748 N.E.2d 166, 169-171 (Ill., 2001) (reviewing in detail the rule standard, its evolution, and policy basis); People v. Atkinson, 713 N.E.2d 532, 535-538 (Ill., 1999); State v. Galmore, 994 S.W.2d 120, 122 (Tenn., 1999) (balancing test must be made by focused on rule policies and not speculation about significance of the potential testimony of the accused); State v. Mixon, 983 S.W.2d 661, 674 (Tenn., 1999) (the Tennessee Supreme Court cited, with apparent approval, a jurisdiction specific secondary source's assertions, that trial judges should state for the record their assessment of the relevance of the crime underlying the conviction to prove propensity to lie); State v. Ashley, 623 A.2d 984, 986 (Vt. 1993) (The court resorted to its own guidelines developed prior to the adoption of the current substantive rule as the basis for determining the admissibility of convictions to impeach. The Court relied on the reporter's notes to the rule which expressly stated that its intent was not to displace the court's guidelines. The Court failed to recognize, however, that its former guidelines were inconsistent and far more imprecise that the analysis required by the rule. These guidelines were developed in cases, including a 1981 decision all prior to the 1989 rule. At the same time, the court noted that the purpose of the amendment was to provide two different balancing standards, one applicable to convictions for crimes of untruthfulness and falsification which was to ease admission, and the other to make the admission of other preliminarily qualifying convictions more difficult. Court then proceeded to reach a decision that was contra to its own restatement of the purpose of the newly enacted rule. The Vermont Supreme Court identified its guidelines as including consideration of the number of convictions, the age of the convictions, and the importance of the accused testifying and the prosecution's need to impeach that testimony with the convictions. The court omitted policy evaluation of why these factors should be used instead of focus on policy factors and sequence of those factors found in the
current specific rule, and in other evidence rules, most pertinently rule 403. Here for example rule content and structure would require the trial judge and subsequently the state supreme court to first focus on whether each crime qualified as a crime of untruthfulness or falsification. Neither apparently performed even this first step. Neither made the required assessment of the unfair prejudice that would result from the admission of each conviction to impeach. Hence the state supreme court took a gross approach to determining admissibility or exclusion of all sixteen convictions on an all or nothing premise); State v. Calegar, 947 P.2d 235, 237 (Wa., 1997) (court cited with approval its own decision which added on to the analytical evaluation required by the standards of its rule, the court's six policy factors to be evaluated in determining the admissibility to impeach of a "felony" conviction. This state supreme court decided upon the following apparently non-sequential and non-prioritized heuristics: length of defendant's criminal record, the remoteness of the prior conviction, the nature of the prior crime, the age and circumstances of the defendant, the centrality of the credibility issue, and the impeachment value of the prior conviction); State v. Hardy, 946 P.2d 1175, 1177-1178 (Wa., 1997) (State supreme court expressly held that proponent of conviction has burden of proof to satisfy standards of rule to gain admission of a conviction for purpose of impeachment. Court cited with approval its earlier decision which required trial judges to state on the record the factors which favored the admission and the factors which favored exclusion of the conviction to impeach. Court characterized adherence to this protocol as imperative to assure a proper record for appellate court review of the trial judge's decision. Court also required that trial judges place on the record their evaluation of the next crucial step, balancing of exclusionary policy concerns against the probative value of the conviction as evidence of a propensity to lie. This step was required when the basis of preliminary qualifying the conviction for admission to impeach was that it was punishable by a maximum term of more than a year in jail); State v. Rivers, 921 P.2d 495, 499 (Wa., 1996) (State supreme court faithful to standards for admission of convictions to impeach as established by its rule as evidenced by reference to sequential inquiries required by rule, and requiring trial courts in exercising their discretion to follow that sequence on the record including the ultimate balancing phase of the standard. But see Theus v. State, 845 S.W.2d 874, 879 (n.6) (Tx. Cr. App., 1993) (court refused an express defense attorney request that it correct this trial judge, and require all trial judges to put on the record the balancing evaluation required by rule. The court reasoned that because the Texas rule did not expressly require such record making, it would not require it.)]

119. The six states not admitting any such convictions during the
study period were Arizona, Hawaii, Kansas, Montana, Tennessee, and Vermont. See supra note 91, and accompanying text.

120. With regard to the Kansas Supreme Court's rule and policy evaluations see supra note 86, and infra note 142. With regard to the Montana Supreme Court's prohibition and the court's advocacy of the policy supporting the prohibition, see infra notes 138 - 139, and accompanying text.


123. State v. Dobson, 602 A.2d 977, 982-983(Con., 1992)(sanctioning trial judge ruling that a prosecution witness' narcotics felony conviction could be used to impeach her, provided no reference was made to the name of the crime. Court endorsed general resort to this tactic, whenever the felony conviction was for a crime not having direct relevance to credibility); State v. Pinnock, 601 A.2d 521, 529(Con., 1992)


125. State v. Askew, 716 A.2d 36, 44-45(Con., 1998)

126. Id. See discussion infra notes 229, 255 - 256, and accompanying text.

127. Label Systems, Inc. v. Aghamohammadi, 852 A.2d 703, 717(Con. 2004)(court cited with approval its precedent sanctioning the admission to impeach the accused with a conviction for breaking and entering that was more than a decade old, endorsing the conclusionary characterization of minimal unfair prejudice that resulted from its admission)

128. State v. Askew, 716 A.2d 36, 42(Con., 1998)


130. People v. Casillas, 749 N.E.2d 864, 880(Ill., 2001); People v. Atkinson, 713 N.E.2d 532,535-538(Ill., 1999); People v.
Williams, 670 N.E.2d 638, 654(Ill., 1996); People v. Redd, 553 N.E.2d 316, 350(Ill., 1990)

131. People v. Casillas, 749 N.E.2d 864, 881(Ill., 2001); People v. Atkinson, 713 N.E.2d 532,537(Ill., 1999); People v. Williams, 670 N.E.2d 638, 654(Ill., 1996); People v. Redd, 553 N.E.2d 316, 350(Ill., 1990)

132. People v. Casillas, 749 N.E.2d 864, 881(Ill., 2001); People v. Atkinson, 713 N.E.2d 532,537(Ill., 1999); People v. Williams, 670 N.E.2d 638, 654(Ill., 1996); People v. Redd, 553 N.E.2d 316, 324(Ill., 1990)

133. People v. Casillas, 749 N.E.2d 864, 881(Ill., 2001); People v. Atkinson, 713 N.E.2d 532,537(Ill., 1999)(accused claim of innocence rested principally on his testimony and therefore his credibility. Therefore the two prior burglary convictions were crucial to assessing that credibility. Not a single justice on the Illinois Supreme Court gave an indication that they realized that this was an admission of use of the evidence for the prohibited substantive purpose of proving guilt, by proving lying about his current claim of innocence because he was guilty of the same crime twice before); People v. Williams, 670 N.E.2d 638, 654(Ill., 1996); People v. Redd, 553 N.E.2d 316, 324(Ill., 1990)

134. People v. Atkinson, 713 N.E.2d 532(Ill., 1999)(accused tried and convicted in the current trial of burglary, was impeached with his two prior convictions for the same crime); People v. Williams, 670 N.E.2d 638, 654(Ill., 1996)(accused tried and convicted in the current trial of murder, attempted murder, and aggravated battery with a firearm, was impeached with his prior conviction for aggravated battery); People v. Redd, 553 N.E.2d 316, 324(Ill., 1990)(accused tried and convicted of two counts of murder and two counts of rape in the current trial. Trial judge authorized and state supreme court sanctioned use of prior convictions for attempted murder and rape)

135. The fourteen state rules being interpreted by the state supreme courts were those of Arizona, Connecticut, Georgia, Hawaii, Idaho, Illinois, Kansas, Maine, Maryland, Montana, South Dakota, Tennessee, Texas, and Vermont. See discussion Holley, supra note 1 at notes 42, 44, 48-49, 52, 74-78, 82, 88-90, 95-98, 100-102, 105 - 110, and 120 - 121, and accompanying text.

136. See Holley supra note 1, at notes 42, 47 - 49, 52, 74, 83, 89-90, 98, 102, 106, and 121, and accompanying text.

137. The 10 states were Arizona, Hawaii, Illinois, Kansas, Maine, Maryland, South Dakota, Tennessee, Texas, Vermont. See discussion
Holley, supra note 1 at notes 44, 51, 74, 88, 105, 110, and 121, and accompanying text.

138. See Holley supra note 1 at notes 42-43, and accompanying text. The four other states were Georgia, Hawaii, Kansas, and West Virginia.

139. In the Matter of the Seizure of $23,691.00 in U.S. Currency, 905 P.2d 148, 153(Mont., 1995); State v. Bristow, 882 P.2d 1041, 1044(Mont. 1994) (the admission of any conviction as "inherently prejudicial"); State v. Gollehon, 864 P.2d 249, 259(Mont., 1993) (court cited with approval in earlier decision in which it had asserted that with regard to eyewitnesses, evidence of previous misconduct of such a witness was wholly unrelated to the person's ability to observe, recall, or testify to the relevant occurrences. Court also held that Gollehon's right to confrontation was not violated by the trial court's refusal to allow cross-examination of prosecution witnesses' past criminal conduct.)

140. State v. Pacheco, 26 P.3d 572, 587-589(Haw., 2001) (court made its own assessment, and asserted that petty theft is not per se(appearing reference to element analysis) a crime of "dishonesty". Hence court eventually ruled only if specific circumstances of the theft, by their very nature, made conviction at least relevant and perhaps have added probative value may the conviction be admitted to impeach. Court reviewed record and found no specific finding by trial judge that circumstances of theft were relevant to prove propensity to lie. Court than made its own evaluation of the record and found that the only "evidence" at pretrial hearing was that theft involved shoplifting from a church. Hence conviction should not have been admitted to impeach); State v. Maier, 977 P.2d 298, 308(Mont., 1998); State. v. Martin, 926 P2d 1380 (Mont., 1996) (Court ruled that the trial court properly allowed the prosecution to cross-examine the accused wife as to whether she had provided false alibi testimony, but by prohibiting it from inquiring whether she had been convicted of perjury). See also State v. Culkin, 35 P.3d 231, 249(Haw., 2001) (court ruled that conduct that was basis for a pending charge of forgery by making false identifications by the accused so that he could assume the name of another real person was admissible because its rule barring conviction evidence did not preclude its use)


142. State v. Pacheco, 26 P.3d 572, 586 and 589(Haw., 2001)(rejecting attempt to admit accused's theft/shoplifting
conviction as involving dishonesty or false statement); Fuller v. Wolters, 807 P.2d 633, 639 (Idaho, 1991) (sanctioning exclusion of misdemeanor failure to file income tax return); State v. Diggs, 34 P.3d 63, 69 (Kan., 2001) (affirmed exclusion of a prosecution witness' convictions of aggravated indecent liberties with a child and aggravated sexual battery, when by rule only convictions involving crimes of dishonesty or false statement could be admitted to impeach. Court did not undertake a policy analysis. Instead it referred to one of its earlier decisions in which it had held that these convictions did not involve dishonesty or false statement); State v. Taylor, 993 S.W.2d 33, 35 (Tenn., 1999) (court ruled it was error for the trial judge to authorize the state to impeach the accused with eight unspecified felony convictions, all of which the state referred to as felonies of dishonesty. The court rejected the trial judge's apparent attempt to reach what that judge viewed as an appropriate policy compromise which on the one hand admitted all of the convictions to impeach, but on the other required striking the specific names of the convictions which was similar or identical to the current charges (burglary and theft convictions and current charge).

143. State v. Setien, 795 A.2d 1135, 1137 (Vt., 2002) (Accused convicted after jury trial of three crimes, larceny from the person, attempted assault, and robbery. Vermont Supreme Court sanctioned admission to impeach the accused with convictions for attempted fraud and false pretense. Court made no reference to the elements of either crime, or to the facts in the particular case that were proof of those elements as the basis to justify its characterizations of these crimes); State v. Ashley, 623 A.2d 984, 986 (Vt. 1993).

144. State v. Gray, 755 A.2d 540, 544-545 (Me., 2000) (on appeal the accused expressly asserted that the trial judge abused its discretion by failing to apply the proper balancing test required by the state's evidence rule, and by failing to recognize that the admission of all fourteen convictions (nine of them for forgery and five of them for unsworn falsification) significantly compounded the unfair prejudice. State supreme court held that the convictions were not so similar to the current charge as to be unfairly prejudicial. The court concluded that there was no abuse of discretion, even if the error was properly preserved for normal appellate review. Without reference to empirical or any other evidential basis, the court implied that the only unfair prejudice it was willing to recognize as a significant danger when prior convictions are admitted to impeach, was when the conviction was "similar" to the current charge(s). This view is not provided for in the language of the state's rule. The court implicitly found in this case that the potential admission of fourteen convictions would not cumulatively cause any significant unfair prejudice to

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the defendant had he chosen to testify. This view contradicts evidence available to the court, and is not provided for in the language or in the policy underlying the state's rule; State v. Taylor, 993 S.W.2d 33, 35 (Tenn., 1999); State v. Setien, 795 A.2d 1135, 1137 (Vt., 2002) (Accused convicted after jury trial of three crimes, larceny from the person, attempted assault, and robbery. Vermont Supreme Court agreed with trial judge conclusion at end of required balancing that the probative value to prove propensity to lie of two conviction, one for attempted fraud and one for false pretense, was not substantially outweighed by any unfair prejudice. The Court's assessment re probative value of these convictions as proof of propensity to lie was conclusionary only. Court's unfair prejudice assessment was also purely speculative, since it did not know the nature of the testimony of the accused, or provide criteria for evaluating how the jury was to assess that testimony or the accused guilt in light of the admission of these two criminal convictions. Court made no reference to pertinent empirical research on the likely magnitude of unfair prejudice that would result from admission of two prior criminal convictions).

145. State v. Taylor, 993 S.W.2d 33, 35 (Tenn., 1999) (Accused decided not to testify. But these policy considerations should have been evaluated by the state supreme court, especially since the court proceeded to make a harmless error evaluation that failed to take into account these policy considerations.)

146. These six states were Arkansas, Delaware, Indiana, Minnesota, Pennsylvania, and Washington


148. Wal-Mart Stores, Inc. v. Regions Bank Trust Department, 69 S.W.3d 20, 28 (Ark. 2002) (court asserted that crime of check kiting is "clearly" crime of dishonesty. Court defined crime by reference to definition in Black's Law Dictionary, but made no reference to felony theft elements of the offense as they appeared in the Arkansas Penal Code that was the actual basis for the conviction. That dictionary definition contained no culpability concept. That definition included reference to concept of "hoping". That definition ties "hoping" to a mind set of the accused at the time of the submission of the check that it was possible that funds will be deposited before the check is "deposited". Hence court failed to recognize that by its own definition, it is not clear that such a person "knows" that there will be inadequate funds in the bank, but only he is aware of that risk (recklessness). Court used conclusionary language "clearly" without even attempting an element
analysis to demonstrate that crime is one involving "dishonesty". Most crucially court made no attempt to identify the appropriate culpable mental state for the crucial objective element of "inadequate funds". Hence there is a conceptual flaw in the court's implication that the accused is aware his conduct was dishonest); Webb v. State, 663 A.2d 452, 461 (Del., 1995) (the Delaware Supreme Court, without an explanation, has defined crimes of dishonesty to include misdemeanor shoplifting, and ruled that the crime's admission was mandatory to impeach a prosecution witness: Desmond v. State, 654 A.2d 821, 825 (Del., 1994) (characterization of misdemeanor theft as crime of dishonesty sanctioned by state supreme court); Com. v. Pursell, 724 A.2d 293, 310 (Pa., 1999) (theft and theft by deception. Court holding was in the context of an appeal in a case in which the trial had occurred prior to the 1998 adoption of the current evidence rule regulating the admission of convictions to impeach. The court made no reference to the rule. Court did make reference to its own standard as modified in its 1987 decision in Com. v. Randall, 528 P.2d 1326 (Pa., 1987). In that case, the supreme court purported to adopt the federal rule standard with regard to the accused in a criminal case, requiring automatic admission of crimes of "dishonesty" and "false statement". In apparent ignorance, however, of the restrictive definition of those concepts in the commentary to the federal rule, the court found the admission of a burglary conviction to impeach the accused was justified.); State v. Rivers, 921 P.2d 495, 498-499 (Wa., 1996) (State supreme court cited its own precedent to conclusionarily assert, apparently as a settled matter, that all crimes that involve theft, such as the robbery and attempted robbery convictions in this case, per se involve "dishonesty", and therefore are per se admissible to impeach any witness.); State v. Mckinsey, 810 P.2d 907, 908 (Wa., 1991) (State supreme court reaffirmed position established in its precedent which held that crimes of theft per se involve dishonesty and are therefore under its evidence rule per se admissible to impeach. Court then held that theft related crimes such as receipt of stolen property were also crimes of dishonesty, and therefore per se admissible to impeach any witness.

149. Wal-Mart Stores, Inc. v. Regions Bank Trust Department, 69 S.W.3d 20, 28 (Ark. 2002) (check kiting); Webb v. State, 663 A.2d 452, 461 (Del., 1995) (misdemeanor shoplifting); Desmond v. State, 654 A.2d 821, 825 (Del., 1994) (misdemeanor theft); Com. v. Pursell, 724 A.2d 293, 310 (Pa., 1999) (theft and theft by deception); State v. Rivers, 921 P.2d 495, 498-499 (Wa., 1996) (all crimes that involve theft, such as the robbery and attempted robbery); State v. Mckinsey, 810 P.2d 907, 908 (Wa., 1991) (theft and theft related crimes such as receipt of stolen property)

150. See Holley supra note 1 at 192 - 199, and accompanying text.
151. Com. v. Pursell, 724 A.2d 293, 310 (Pa., 1999) (capital murder conviction affirmed. Among appeals issues raised by accused and rejected by Pennsylvania Supreme Court was claim that trial counsel was ineffective for "drawing the sting" strategy of asking accused about prior convictions for theft (a bike) and for theft by deception. Supreme Court ruled that the strategy was not ineffective because both convictions were for crimes falsi, and therefore could have been introduced by the prosecution to impeach.

State Supreme Court cited to its own 1973 decision as authority for this proposition. No reference by the court to the 1998 evidence rule. Hence court apparently assumed that since rule had no definitions of "dishonesty" or "false statement" its prior decisions interpreting these concepts remained good law. No policy analysis by the court on this issue)

152. Morris v. State, 795 A.2d 653, 665 (Del. 2002) (expressly quoting its 1992 decision in Gregory v. State, 616 A.2d 1198, 1204 (Del., 1992) for the proposition that "dishonesty" encompasses five distinct concepts, and one of those concepts was stealing); State v. Mitchell, 817 P.2d 398, 406 (Wa., 1991); State v. Mckinsey, 810 P.2d 907, 908 (Wa., 1991) (State supreme court reaffirmed position established in its precedent which held that crimes of theft per se involve dishonesty and are therefore under its evidence rule per se admissible to impeach. Court then held that theft related crimes such as receipt of stolen property were also crimes of dishonesty, and therefore per se admissible to impeach any witness. The dissent in the case noted that the impact of the court's broad definition of crimes of dishonesty to include all theft and theft related crimes was a de facto and per se impermissible amendment of the rule, and thereby made the Washington rule in fact one of the most liberal rules in the country for admitting prior convictions to impeach, Id. at 908-910)

153. Morris v. State, 795 A.2d 653, 665 (Del. 2002) (Delaware Supreme Court concluded without any policy analysis, but with approving text reference to an Iowa Supreme Court decision which had held that kidnapping was not a crime involving dishonesty); Harris v. State, 695 A.2d 34, 42-43 (Del., 1997) (court held in the context of a trial judge's exclusion of multiple convictions of three prosecution witnesses, that convictions for misdemeanor criminal mischief, two felony juvenile adjudications, and two felony drug trafficking offenses were not offenses involving "dishonesty" and "false statement"); State v. Davis, 874 P.2d 1156, 1162 (Kan., 1994) (court affirmed trial court decision that a conviction for the felony of possession of cocaine was not a conviction for a crime of dishonesty or false statement, and was therefore inadmissible to impeach any witness including the accused); Com. v. Nieves, 746 A.2d 1102 (Pa., 2000) (two drug trafficking convictions and two possession of weapons convictions);
State v. Calegar, 947 P.2d 235, 240 (Wa., 1997) (possession of a controlled substance); and State v. Hardy, 946 P.2d 1175, 1181 (Wa., 1997) (felony drug conviction)

154. State v. Calegar, 947 P.2d 235, 237 (Wa., 1997) (court expressly rejected government's proffered junk science surrogate for relevance of a crime to prove propensity to lie, that convictions equate to criminal personality, and all criminal personalities have a greater propensity to lie, Id. at 238); State v. Hardy, 946 P.2d 1175, 1177-1178 (Wa., 1997) (Court went on to apply standards to conviction it was reviewing, and reconfirmed its repudiation of the reality hypotheses that all persons convicted of drugs are secretive and sneaky. Instead, the court ruled that such convictions have little to do with veracity.)

155. These eighteen states were Arizona; Arkansas; Connecticut; Delaware; Georgia; Hawaii; Idaho; Indiana; Kansas; Maine; Maryland; Minnesota; Montana; Pennsylvania; South Dakota; Texas; Vermont; and Washington. The two states whose standards for "felonies" was no more restrictive than that of the federal rule were Illinois and Tennessee; See Holley supra note 1 at notes 96-97, 105-110, 121, and accompanying text.

156. See Holley supra note 1, at notes 41-125, and accompanying text.

157. See supra notes 84 and 91 - 92, and accompanying text.

158. See supra notes 84, 91 - 92, and 119, and accompanying text.

159. See supra notes 85 and 90, and accompanying text. See further discussion of this discrepancy infra note 175, and accompanying text.

160. Benson v. State, 160 S.W.3d 341; 344 (Ark., 2004) (court acknowledged that attending doctor testified that he found no evidence of injury or rape. Court sanctioned admission, of a prior rape felony conviction, as well as two other felony convictions to impeach the accused. Accused did not testify to his version of the alleged rape); State v. Warren, 661 A.2d 1108, 1111 (Me. 1995); State v. Moorman, 505 N.W.2d 593, 603 (Minn., 1993) ]

161. State v. Mixon, 983 S.W.2d 661, 663, and 674-675 (Tenn., 1999)

162. Id.

163. Theus v. State, 845 S.W.2d 874, 881 (Tex. Cr. App., 1993) (court relied on fatuous fact that relevance is not mentioned in its impeachment with convictions rule and therefore does not apply. Irrelevant evidence is by logic and evidence code basic structure
inadmissible and nothing in passage of federal rule or state rules mimicking federal rule supports conclusion that and legislature sought to declare a variant on the world is flat fiction, by displacing that basic admissions requirement, otherwise applicable to all other evidence offered for admission. See also Norris v. State, 902 S.W.2d 428, 440 (Tex. Cr. App., 1995) (Court adopted prosecution red herring argument that convictions are relevant to prove likelihood of lying because a capital murder defendant who testifies has a "motive to lie". A person on trial for capital murder has a motive to lie to avoid death penalty when such a person testifies at guilt stage of trial. But every criminal defendant, and every party, and even other witnesses often have the very same motive to lie when they testify because the outcome of the trial is personally significant. The jury knows every person with an interests in the outcome has a motive to lie, and the introduction of a prior conviction is unnecessary to bring home that point. Besides this "motive to lie" factor does not add an iota of relevance to the prior conviction as proof of propensity to lie-the standard required by the rule).

164. Pryor v. State, 861 S.W.2d 544, 547 (Ark., 1993) (Accused prosecuted for drug dealing); Fennell v. State, 691 A.2d 624, 626 (Del. 1997). See also discussion supra note 133, and accompanying text in which the Illinois Supreme Court took the same unjustifiable position. See also Theus v. State, 845 S.W.2d 874, 880 (Tx. Cr. App., 1993) in which court fell into the trap of converting credibility issue outcome importance into heightened relevance for any conviction offered to impeach any witness whose testimony was important. This illogical conclusion includes two conceptual errors-false attribution of heightened probative value of the conviction to impeach, and failure to recognize that in such circumstance the only policy concern that is strengthened is the exclusion policy of increased unfair prejudice; See also discussion supra notes 76 - 77, and accompanying text.


166. Benson v. State, 160 S.W.3d 341; 344 (Ark., 2004); Pryor v. State, 861 S.W.2d 544, 547 (Ark., 1993); Taylor v. State, 849 A.2d 405, 408 (Del., 2004) (perfunctory and conclusionary reference to balancing evaluation. Sanctioned exclusion of all felony improper sexual conduct felonies of a prosecution witness); Walker v. State, 790 A.2d 1214, 1217 (n.2) (Del., 2002) (court reviewed record and found that trial judge decided to allow the state to impeach the accused with two of five felony convictions. The two convictions the trial judge admitted were the two oldest convictions, approximately ten years old, and both indicated that the accused was a drug dealer); Desmond v. State, 654 A.2d 821, 825 (Del., 1994); State v. Page, 16 P.3d 890, 894 (Idaho, 2001); State v.
State v. Lobozzo, 719 A.2d 108, 110 (Me., 1998) (State supreme court, without reference to standards of its rule or application of those standards to the facts of this case, in a highly conclusionary fashion, merely asserted that all three convictions for theft, escape, and possession of a firearm, were relevant to the credibility of the accused. This conclusion of the court is not justified by evidence, policy, or reason, and is a clear example of a state supreme court failing to follow the admissibility standards of its own rule with regard to use of convictions solely to impeach. Further the state supreme court completely omitted any reference to the rule's requirement that the trial judge, even if she found that the conviction had relevance to prove propensity to lie, was required to balance, using a balanced scale, that probative value against the possibility of unfair prejudice to the accused); State v. Warren, 661 A.2d 1108, 1111 (Me. 1995) (all such serious crime convictions are relevant and admissible to prove propensity to lie); State v. Giddens, 642 A.2d 870, 875 (Md., 1994); State v. Moorman, 505 N.W.2d 593, 603 (Minn., 1993); State v. Ihnot, 575 N.W.2d 581, 583, and 586 (Minn. 1998); State v. Loop, 477 N.W.2d 40 (S.D., 1991); Norris v. State, 902 S.W.2d 428, 440 (Tex.Cr.App., 1995)

167. Benson v. State, 160 S.W.3d 341; 344 (Ark., 2004) (state supreme court asserted that despite its rule, its practice was to admit any felony conviction, including similar crime convictions to impeach an accused who testified at his trial. Court made no reference to and no attempt to evaluate the quality and quantity of unfair prejudice that resulted from the admission of such convictions); Desmond v. State, 654 A.2d 821, 825 (Del., 1994); Morris v. State, 795 A.2d 653, 664-665 (Del. 2002) (court failed to evaluate, admissibility under what it acknowledged was a balancing evaluation which should have considered the quantity and quality of unfair prejudice, of the accused past conviction for assault, despite facts that one of the crimes for which the accused was presently charged was assault, and the court had decided to remand the case for a new trial); State v. Page, 16 P.3d 890, 894 (Idaho, 2001) (Accused was convicted of aggravated assault and appealed. Trial judge admitted and supreme court upheld admission of conviction of conspiracy to commit robbery to impeach the testimony of the accused. Court erroneously asserted that robbery is relevant to prove propensity to lie, and completely ignored considerable unfair prejudice the admission would cause because of the implication of use of force re robbery.); State v. Thompson, 977 P.2d 890, 893 (Idaho, 1999) (Supreme court upheld trial judge's admission to impeach the accused of the fact of a felony conviction, but prohibited prosecution from making reference to the nature of the crime. The Idaho rule expressly sanctioned this
compromise. Idaho Supreme Court failed to evaluate unfair prejudice and jury confusion that was likely to result when only the fact of conviction of a felony is admitted.); State v. Muraco, 968 P.2d 225 (Idaho, 1998); State v. Giddens, 642 A.2d 870, 875 (Md., 1994); State v. Wright, 662 A.2d 198, 200 (Me., 1995) (court sanctioned trial court's justification to admit two convictions to impeach the accused that the underlying crimes were not crimes of violence. In the very same year, the Maine Supreme Court sanctioned admission of convictions of crimes of violence to impeach the accused, without comment or evaluation of the likely unfair prejudice that would result from the admission of such convictions. See State v. Warren, 661 A.2d 1108, 1110-1111 (Me. 1995) (assault with a dangerous weapon and armed robbery convictions admitted by trial court to impeach the accused, and that decision affirmed by the state supreme court); State v. Ihnot, 575 N.W.2d 581, 583, and 586 (Minn. 1998) (court sanctioned admission ostensibly only to impeach of a prior felony conviction for a sexual offense against a minor. This was also the charge in the current case. The court, despite expressly making reference to Minnesota evidence rule's Advisory Committee's assessment that there is inherent prejudice in admitting felony convictions theoretically to impeach which are not probative on propensity to lie, and that the prejudice in such situations is heightened if the potential witness is the accused. Court proceeded to ignore the stated policy evaluation of the committee.); State v. Fender, 504 N.W.2d 858, 860-861 (S.D., 1993) (trial judge in granting the prosecution's day of trial motion to use convictions to impeach the accused should he testify, conclusinarily stated that he thought the name of the convictions of aggravated assault and escape should be admitted if the accused testified because he felt that the convictions are more probative than they are prejudicial); State v. Loop, 477 N.W.2d 40 (S.D., 1991) (two sexual contact with a minor convictions admitted in current prosecution for same offense.)

168. Benson v. State, 160 S.W.3d 341; 344 (Ark., 2004); State v. Giddens, 642 A.2d 870, 875 (Md., 1994) (court upheld admission to impeach the accused, charged with assault, of a conviction for distribution of cocaine, even after going through steps in sequential analysis required by the rule, and completing a policy analysis of the first step - relevance of the conviction to prove propensity to lie. The trial judge relied on historical common law heuristic-devoid of a scintilla of evidential support, that if a crime can be characterized as infamous it therefore can be secondarily characterized as vile and it therefore follows that it is contrary to acceptable conduct, and it therefore follows that a person convicted of such a crime is more likely to commit perjury it called as a witness. The majority opinion of the supreme court asserted that it had in an earlier decisions embraced meritless common law position that all violations of the law involve some
element of dishonesty, and that this principle applied to sale but not possession of drugs.); State v. Moorman, 505 N.W.2d 593, 603 (Minn., 1993) (Accused convicted of first degree murder for rape and strangulation death of a fourteen year old girl. Trial judge admitted a conviction for criminal sexual assault to impeach the accused, who testified, denying guilt. Trial judge admitted the conviction in part because he chose to ignore the text and policy underlying the Minnesota evidence rule, unilaterally reinstated the historical rule that without policy support admitted all prior felony convictions, and thereby asserted that the conviction was admissible to impeach because it gave the jury a basis to make a determination of the appellant's credibility. State supreme court sanctioned this decision by asserting that its precedent recognizes that the evidence rule by implication must be premised on accepting the meritless proposition that any felony conviction is relevant to prove propensity to lie); State v. Loop, 477 N.W.2d 40 (S.D., 1991); Norris v. State, 902 S.W.2d 428, 440 (Tx.Cr.App., 1995)

169. See supra note 96 and accompanying text.

170. State v. Green, 29 P.3d 271, 273-276 (Ariz., 2001) (court began by making the same conceptual error made by so many of these state supreme courts---the substitution of a heuristic for real evidence. Here the court began by assuming that felonies were major crimes, and all persons convicted of such offenses, even as in this case those considerably more than ten years old, were, based on a third level inference, more likely to lie. The court, however, did continue its analysis and evaluated other considerations. The court held that the importance of the testimony and therefore the credibility of the accused's testimony was not an adequate justification for admitting an old and identical conviction which otherwise based on sound policy evaluation should be excluded because of its potential for causing unfair prejudice); State v. Mixon, 983 S.W.2d 661, 674 (Tenn., 1999) (State supreme court next reviewed record to substantively evaluate whether the trial judge adhered to the evaluation protocol it had just outlined. It concluded that the trial judge had failed at each step of the protocol. The trial judge had failed to evaluate and place that evaluation on the record of the relevance/probative value of the sexual battery conviction to attach the accused/witness' credibility. The court found in the record evidence to warrant concluding that the trial judge simply assumed that any felony conviction could be used to impeach any witness, including the accused in a criminal trial. Nor did the trial judge evaluate the substantial similarity (here identity) of the crime that was the basis of the conviction and the charged crimes and the resulting unfair prejudice.); State v. Calegar, 947 P.2d 235 (Wa., 1997) (court reviewed record to find the basis for the trial judge's decision to
deny accused motion to exclude his conviction. Trial judge, without any basis in the standards of the state rule, held that the conviction was relevant to impeach because a prior conviction could provide incentive to lie because if the accused was convicted at this trial it could influence the severity of the sentence he received. Of course this reasoning substitutes for an actual evaluation of logical nexus as proof of propensity to lie a heuristic which would make "relevant" to lying all convictions. State supreme court rejected this reasoning; State v. Hardy, 946 P.2d 1175, 1177-1178 (Wa., 1997) (Court began its analysis for example, by focusing on standard for evaluating if the proffered felony conviction, which was not for a crime of dishonesty or false statement, was relevant for its only legitimate purpose under the rule --- to cast doubt on the likelihood that the witness was telling the truth. The court placed the burden on the proponent of the conviction to prove it had probative value to prove propensity to lie, because the court took the presumptive policy position that few such crimes are probative of veracity. Court went on to apply standards to conviction it was reviewing, and reconfirmed its repudiation of the reality hypotheses that all persons convicted of drugs are secretive and sneaky. Instead, the court ruled that such convictions have little to do with veracity.)

171. State v. Hardy, 946 P.2d 1175, 1177-1178 (Wa., 1997) (state supreme court took policy position that the admission of prior conviction evidence was inherently prejudicial when the witness is a defendant in a criminal case because the jury will focus on the inappropriate substantive issue of the accused propensity for criminality. The state supreme court supported its policy position by reference to two of the empirical studies. See Holley, supra note 1 at 36, 38, 204 - 218, and accompanying text.

172. See supra notes 109 - 113, and 121 - 134, and accompanying text.

173. See supra notes 91 - 92, and accompanying text.

174. See supra note 96, and accompanying text.

175. In Walker v. State, 790 A.2d 1214, 1217 (Del., 2002), the court blamed the accused for not testifying to properly preserve his claim that the trial judge had driven him from the stand and thereby unfairly prejudiced the merits by authorizing the prosecution to impeach his potential trial testimony with two decade old drug trafficking convictions. The court made no reference to the fact that just five years earlier it had sanctioned the trial judges exclusion of prior convictions to impeach three prosecution witnesses, including two offenses for felony drug trafficking; Harris v. State, 695 A.2d 34, 42-43 (Del.,
1997); State v. Lanz-Terry, 535 N.W.2d 635, 639 (Minn., 1995),
compared to State v. Ihnot, 575 N.W.2d 581, 586 (Minn. 1998); State
v. Moorman, 505 N.W.2d 593 (Minn., 1993). But see State v. Askew,
716 A.2d 36, 37 (Con., 1998) (Connecticut Supreme Court gave some
significance to fact that the trial judge decided to admit a felony
robbery conviction of the accused while at the same time excluding
a felony larceny conviction of the victim, which allowed the
prosecutor to characterize the accused as an admitted convicted
felon, while at the same time maintaining that the jury had no
reason to question the character and therefore the credibility of
the victim)

176. State v. Ihnot, 575 N.W.2d 581, 586 (Minn. 1998); State v.
Moorman, 505 N.W.2d 593 (Minn., 1993). Compare and contrasts with
State v. Lanz-Terry, 535 N.W.2d 635, 639 (Minn., 1995)

177. State v. Lanz-Terry, 535 N.W.2d 635, 639 (Minn., 1995)

178. Id.

179. State v. Ihnot, 575 N.W.2d 581, 586 (Minn. 1998)

180. Id.

181. State v. Bolte, 530 N.W.3d 191, 197 (n.4) (Minn., 1995)

182. See supra notes 91 - 92, 96, 121 - 134, 163 - 166, and 168
and accompanying text. See infra text accompanying note 333;
identifying the ten states.

183. These seventeen states were: California; Colorado; Florida;
Kentucky; Louisiana; Massachusetts; Missouri; Nebraska; Nevada; New
Hampshire; New Jersey; New York; North Carolina; Oregon; Rhode
Island; Virginia; and Wisconsin. For the explanations of why these
states's rules overall more liberally admitted convictions to
impeach see Holley, supra note 1, at notes 127 - 163, and
accompanying text.

184. The state supreme court which did not make a pertinent
decision with regard to determining the admissibility of a
conviction to impeach during the period 1990-2004 was Missouri.

185. People v. Gutierrez, 52 P.3rd 572, 584 (Cal., 2002); People v.
Carpenter, 988 P.2d 531, 557 (Cal., 1999); People v. Barnett, 954
P.2d 384, 437 (Cal., 1998); People v. Turner, 878 P.2d 521 (Cal.,
1994); People v. Wheeler, 841 P.2d 938, 946 (Cal., 1992); People v.
Sandoval, 841 P.2d 862, 873 (Cal., 1992); People v. Webster, 814 P.2d
1273, 1292 (Cal., 1991); People v. Morris, 807 P.2d 949, 959 and
971 (Cal., 1991); People v. Lesney, 856 P.2d 1364, 1367 (Col., 1993);


187. People v. Gutierrez, 52 P.3rd 572, 584 (Cal., 2002) (accused did testify, Id. at 605); People v. Carpenter, 988 P.2d 531, 635 (Cal., 1999) (accused did testify, Id. at 634); People v. Turner, 878 P.2d 521 (Cal., 1994) (accused did testify, Id. at 557); People v. Sandoval, 841 P.2d 862, 873 (Cal., 1992) (accused did not testify (inference), Id. at 874); People v. Webster, 814 P.2d 1273,
1292(Cal., 1991)(accused did testify, Id. at 1291); People v. Morris, 807 P.2d 949, 959 and 971(Cal., 1991)(accused did testify, Id. at 959); People v. Lesney, 856 P.2d 1364, 1367(Col., 1993)(accused did not testify, Id. at 1366); Cummings v. People, 785 P.2d 921(Col., 1990)(accused did testify, Id. at 922-923); Com. v. Pauling, 777 N.E.2d 135, 143 and 144(Mass., 2002)(not clear if accused did testify, Id. at 138); Com. v. Leftwich, 724 N.E.2d 691(Mass., 2000)(not clear if accused did testify, Id. at 695); Com. v. Carter, 708 N.E.2d 943, 945(Mass., 1999)(accused did testify, Id.); Com. v. Smith, 686 N.E.2d 983, 988(Mass., 1997)(not clear if accused did testify, Id.). Small basis for inference that he did not testify); Com. v. Drungold, 666 N.E.2d 300, 314(Mass., 1996)(accused did testify, Id.); Com. v. Stewart, 663 N.E.2d 255, 257(Mass., 1996)(accused did not testify, Id.). Com. v. Whitman, 617 N.E.2d 625, 629(Mass., 1993)(accused did testify, Id. at 627); Com. v. Gallagher, 562 N.E.2d 80, 85(Mass., 1990)(accused did testify, Id. at 84); Com. v. Feroli, 553 N.E.2d 934, 936(Mass., 1990)(accused did not testify, Id.); Leonard v. State, 958 P.2d 1220, 1236(Nev., 1998)(accused did not testify, Id.); Wesley v. State, 916 P.2d 793, 798-799(Nev., 1996)(accused did not testify, Id. at 798); State v. Mann, 625 A.2d 1102, 1109(N.J., 1993)(accused did testify, Id. at 1105); State v. Brunson, 625 A.2d 1085(N.J., 1993)(accused did not testify, Id. 1087); State v. Harvey, 581 A.2d 483, 495(N.J., 1990)(not clear if accused did testify, Id.), but by implication because important appellate issue was did accused have the requisite culpable mental state, provides a basis for inferring that accused did not testify); State v. Pennington, 575 A.2s 816, 837(N.J., 1990)(not clear if accused did testify, Id., but by implication based on complexity of the appellate record and because important appellate issue was did accused have the requisite culpable mental state, provides a basis for inferring that accused did not testify); People v. Hayes, 764 N.E.2d 963, 964-965(N.Y., 2002)(accused did not testify, Id. at 964); People v. Gray, 646 N.E.2d 444(N.Y., 1995)(accused did not testify, Id. at 445); People v. Walker, 633 N.E.2d 472, 473-474(N.Y. 1994)(accused did not testify, Id. at 473); People v. Mattiace, 568 N.E.2d 1189, 1192(N.Y., 1990)(accused did not testify, Id.); State v. Brown, 584 S.E.2d 278, 282-283(N.C., 2002)(not clear if accused did testify); State v. Sidberry, 448 S.E.2d 798, 800(N.C., 1994)(accused did not testify, Id. at 799(by implication)); State v. Busby, 844 P.2d 897, 898(Or., 1991)(accused did not testify, Id.); State v. Rocha, 834 A.2d 1263, 1266-1267(R.I., 2003)(accused did not testify, Id. at 1266); State v. Medina, 747 A.2d 448, 449-50(R.I., 2000)(accused did testify, Id. at 450); State v. Garcia, 743 A.2d 1038, 1056(R.I., 2000)(not clear if accused did testify, Id.); State v. Rodriguez, 731 A.2d 726, 731-732(R.I., 1999)(accused did testify, Id. at 728); State v. Walsh, 731 A.2d 696, 699(R.I. 1999)(not clear if accused did testify, Id.); State v. Lombardi, 727 A.2d 670(R.I., 1999)(not clear if accused did testify, Id. at 676);
State v. Morel, 676 A.2d 1347, 1357 (R.I., 1996) (accused did testify, Id. at 1350); State v. Martinez, 652 A.2d 958, 960 (R.I., 1995) (accused did testify, Id.); State v. Aponte, 649 A.2d 219, 223 (R.I., 1994) (accused did testify, Id. at 224); State v. Simpson, 606 A.2d 677, 680-681 (R.I., 1992) (accused did testify, Id. at 679); State v. Mattatail, 603 A.2d 1098, 1104-05 and 1116 (R.I. 1992) (accused did testify, Id. at 1104); State v. Taylor, 581 A.2d 1037, 1040 (R.I., 1992) (accused did testify, Id. at 1038); State v. Pailin, 576 A.2d 1384, 1388 (R.I., 1990) (not clear if accused did testify, Id.); State v. Camirand, 572 A.2d 290, 296 (R.I., 1990) (not clear if accused did testify, Id. at 295); State v. Gary M.B., 676 N.W.2d 475 (Wis., 2004) (accused did testify, Id. at 479); State v. Kuntz, 467 N.W.2d 531 (Wis., 1991) (accused did testify, Id. at 534)

188. People v. Gurule, 51 P.3rd 224, 259 (Cal., 2002) (accused did not testify, Id. at 260. Accused was convicted of first degree murder. He was sentenced to death. His death sentence meant the case was heard on automatic appeal by the state supreme court. That court held that the trial judge abused its discretion in permitting the accused to impeach the accused if he had testified at trial his prior rape and murder convictions. Court, however, found that the error were harmless); Com. v. Sommers, 843 S.W.2d 879, 887 (Kent., 1992) (accused did testify, Id. at 886. The court held trial judge abused discretion by authorizing prosecution to impeach the accused with eighteen year old burglary conviction. Court had already held that the conviction should be reversed on other grounds); Brown v. Com., 812 S.W.2d 502 (Kent., 1991) (accused did testify, Id. at 503.

The court held, without explanation, that it was reversible error to admit the accused's twenty-two year old felony conviction for storehouse breaking at his current trial for rape and incest to impeach him, because it was extremely prejudicial); State v. Ross, 405 S.E. 2d 158, 163 (N.C., 1992) (accused did testify, Id. at 160. The court held that the trial judge had made an uncorrected, but harmless error in authorizing the prosecution to impeach the accused's trial testimony with his nineteen year old sodomy conviction)

189. People v. Carpenter, 988 P.2d 531, 557 (Cal., 1999) (two theft convictions); People v. Turner, 878 P.2d 521 (Cal., 1994) (receipt of stolen property and burglary convictions); People v. Morris, 807 P.2d 949, 959 and 971 (Cal., 1991) (assault with intent to commit rape, attempted rape, kidnapping, and car theft); People v. Lesney, 856 P.2d 1364, 1367 (Col., 1993) (affirming use of multiple convictions to impeach the accused should he have testified); Com. v. Pauling, 777 N.E.2d 135, 143 and 144 (Mass., 2002) (assault and battery, assault with a dangerous weapon-a handgun, two assaults with a dangerous weapon-a knife, possession of a controlled substance with intent to distribute); Com. v. Smith, 686 N.E.2d 983, 988 (Mass., 1997) (robbery, assault with intent to rob, and
larceny of a motor vehicle); Com. v. Drumgold, 666 N.E.2d 300, 314 (Mass., 1996) (unlawful possession of a firearm, defacing a firearm, and unlawful possession of ammunition); Com. v. Gallagher, 562 N.E.2d 80, 85 (Mass., 1990) (breaking and entry and larceny, and receipt of stolen property); Leonard v. State, 958 P.2d 1220, 1236 (Nev., 1998) (state supreme court affirmed admission against the accused of murder convictions at the accused current murder trial); Wesley v. State, 916 P.2d 793, 798-799 (Nev., 1996) (robbery and assault with a deadly weapon); State v. Brunson, 625 A.2d 1085, 1092-1093 (N.J., 1993) (possession of cocaine, possession of cocaine with intent to distribute, and theft); State v. Harvey, 581 A.2d 483, 495 (N.J., 1990) (rape and three other convictions); People v. Hayes, 764 N.E.2d 963, 964-965 (N.Y., 2002) (four felony convictions); People v. Gray, 646 N.E.2d 444 (N.Y., 1995) (misdemeanor trespass and cocaine trafficking); People v. Walker, 633 N.E.2d 472, 473-474 (N.Y. 1994) (One of the two felony convictions "involved" narcotics, and the other was a robbery conviction. The seventeen misdemeanor convictions were entered over the course of a dozen years. Trial judge ruled that the prosecution could allude to the number, dates, and apparently names of all of the convictions, but not to the underlying facts.); People v. Mattiace, 568 N.E.2d 1189, 1192 (N.Y., 1990) (two personal and two corporate pollution related convictions); State v. Garcia, 743 A.2d 1038, 1056 (R.I., 2000) (misdemeanor convictions for possession of stolen property and for possession of a contraband substance); State v. Rodriguez, 731 A.2d 726, 731-732 (R.I., 1999) (five convictions); State v. Walsh, 731 A.2d 696, 699 (R.I. 1999) (four convictions); State v. Lombardi, 727 A.2d 670, 676 (R.I., 1999) (three convictions); State v. Martinez, 652 A.2d 958, 960 (R.I., 1995) (six convictions); State v. Simpson, 606 A.2d 677, 680-681 (R.I., 1992) (four convictions-possession of marijuana, conspiracy to murder, assault with a deadly weapon, and assault with intent to kill); State v. Mattatall, 603 A.2d 1098, 1104-05 and 1116 (R.I. 1992) (seven convictions); State v. Gary M.B., 676 N.W.2d 475, 478-479 (Wis., 2004) (five convictions admitted by generic reference in the direct testimony of the accused to five convictions. No mention of names of underlying crimes, or of fact that all of them were at least a decade old, and the three contested convictions were entered almost a quarter century prior to the trial. These three convictions were for relatively minor offenses including uttering a check, disorderly conduct, and assault).

Batista, 847 A.2d 243, 251 (R.I., 2004) (civil defendant)

191. People v. Clair, 828 P.2d 705, 719 (Cal., 1992) (voluntary manslaughter conviction of a prosecution witness); Foster v. State, 614 So.2d 455, 457 and 460 (Fla., 1993) (prosecution "witness". At his murder trial a state witness testified to her first hand knowledge of the circumstances leading to the killing, and that she saw the accused kill the victim. Over a decade and one-half later accused received a re-sentencing hearing. At that hearing he sought to impeach the 1975 testimony of that witness, who by the time of the rehearing was deemed unavailable, by her 1989 convictions. The trial judge excluded that conviction. State supreme court affirmed the exclusion of admission of these convictions without significant policy analysis); Zola v. Kelley, 826 A.2d 589, 596 (N.H., 2003) (plaintiff in civil case. Court sanctioned exclusion of her drug conviction); State v. Newell, 679 A.2d 1142, 1146 (N.H., 1996) (misdemeanor convictions for reckless conduct and simple assault of prosecution witness); State v. Pratt, 853 P.2d 827, 834 (Or., 1993) (additional theft conviction of a prosecution witness); State v. Werner, 831 A.2d 183, 205 (R.I., 2003) (prosecution witnesses' convictions for disorderly conduct, driving while intoxicated, filing a false police report, malicious damage, possession of marijuana, operating on a suspended license, reckless driving, and resisting arrest); Williams v. Comm., 450 S.E.2d 365, 375 (Va., 1994) (prosecution witness and alleged co-perpetrator, with that person's conviction for assault and battery).

192. See Holley, supra note 1, 142 - 144, and accompanying text.


194. Com. v. Pauling, 777 N.E.2d 135, 144 (Mass., 2002); Com. v. Carter, 708 N.E.2d 943, 945 (Mass., 1999); State v. Rocha, 834 A.2d 1263, 1266-1267 (R.I., 2003) (state supreme court acknowledged that by element analysis the misdemeanor of obstructing a police officer was irrelevant to prove propensity to lie. The court thereby ignored the fact that if specific conduct underlying a crime is the only basis for finding that it is relevant to prove propensity to lie, there is no logical basis to justify authorizing reference to the fact or the name of the resulting conviction, and the Rhode Island Supreme Court also ignored the majority rule that bars the use of extrinsic evidence to prove an individual act(s) relevant to prove propensity to lie. See FRE 608.

195. People v. Gutierrez, 52 P.3rd 572, 584 (Cal., 2002) (Assault with a deadly weapon on a police officer); People v. Carpenter, 988 P.2d 531, 557 (Cal., 1999) (two theft convictions); People v. Barnett, 954 P.2d 384, 437 (Cal., 1998) (felony escape convictions); People v. Turner, 878 P.2d 521 (Cal., 1994) (receipt of stolen property and burglary convictions); People v. Wheeler, 841 P.2d 938, 946 (Cal., 1992) (misdemeanor theft conviction); People v. Sandoval, 841 P.2d 862, 873 (Cal., 1992) (assault with intent to commit murder); People v. Webster, 814 P.2d 1273, 1292 (Cal., 1991) (burglary); People v. Morris, 807 P.2d 949, 959 and 971 (Cal., 1991) (assault with intent to commit rape, attempted rape, kidnapping, and car theft); People v. Lesney, 856 P.2d 1364, 1367 (Col., 1993); Cummings v. People, 785 P.2d 921 (Col., 1990) (aggravated assault); Miller ex rel. Monticello Baking Co. v. Marymount Medical Center, 25 S.W.3d 274, 285 (Ky., 2004) (attempted burglary); Com. v. Pauling, 777 N.E.2d 135, 143 and 144 (Mass., 2002) (assault and battery, assault with a dangerous weapon-a handgun, two assaults with a dangerous weapon-a knife, possession

196. **People v. Gutierrez**, 52 P.3rd 572, 584, 606 (Cal., 2002) (Accused on trial and eventually convicted of several crimes including murder and attempted murder of a police officer. On appeal, an issue raised by the accused was that the trial judge erred in admitting, ostensibly to impeach his trial testimony, his four year old conviction for assault with a deadly weapon on a police officer. Accused expressly argued on appeal that this conviction for a crime of moral turpitude should be excluded because its admission would cause significant unfair prejudice because it was similar to one of the charges for which he was currently being tried. The California Supreme Court rejected the accused appeal on the independent ground that the accused trial attorney invited the error by questioning a witness related to the conviction and by expressly requesting the trial judge to rule that the conviction was admissible to impeach the accused. The Court, however, went on for to assert that even if defense attorney had not invited the error, the conviction was admissible substantively because the court, simply conclusionary asserted, the conviction was admissible even if somewhat similar. The court made no reference to any balancing of exclusionary evidential concerns, including the resulting unfair prejudice.); **People v. Sandoval**, 841
Accused convicted by jury of four counts of first degree murder. Court sanctioned the authorization to impeach his trial testimony his prior conviction for assault with intent to commit murder; Cummings v. People, 785 P.2d 921 (Col., 1990) (Accused on trial and eventually convicted of two counts of first degree murder. Court sanctioned possible impeachment of the accused with his prior conviction for aggravated assault); Com. v. Leftwich, 724 N.E.2d 691 (Mass., 2000) (Accused tried and convicted by jury of murder in the first degree. State supreme court sanctioned trial judge's decision that the state could impeach the accused, should he testify, with a ten year old conviction for armed burglary); Com. v. Smith, 686 N.E.2d 983, 988 (Mass., 1997) (Jury found accused guilty of murder in the first degree on the theory of extreme atrocity or cruelty. Court sanctioned trial judge's ruling that the accused should he have testified could have been impeached with three felony convictions, including a conviction for assault with intent to rob); Com. v. Stewart, 663 N.E.2d 255, 257 (Mass., 1996) (court sanctioned admission of thirty year old conviction for illegal possession of a sawed off shotgun when the current trial charges against the accused included assault and battery with a dangerous weapon); Com. v. Whitman, 617 N.E.2d 625, 629 (Mass., 1993) (assault with intent to rape conviction admitted in a murder prosecution in which the prosecution's theory, as explained to the jury, was that the killing was motivated by an accompanying sexual assault of the victim); Leonard v. State, 958 P.2d 1220, 1236 (Nev., 1998) (state supreme court affirmed admission against the accused of two murder convictions at the accused current murder trial); Wesley v. State, 916 P.2d 793, 798 (Nev., 1996) (Accused on trial for and convicted by jury of robbery with a deadly weapon, and two counts of murder with a deadly weapon. Supreme Court sanctioned admission of accused convictions for robbery and assault with a deadly weapon) to impeach him should he testify); State v. Mann, 625 A.2d 1102, 1109 (N.J., 1993) (Accused on trial for and convicted of two counts of sexual assault and criminal sexual contact. Court sanctioned admission on retrial of a prior conviction for sexual assault. Court ordered that the identical conviction could be "sanitized" by only permitting the existence and date but not the name of the sexual assault conviction to be admitted on retrial); State v. Brunson, 625 A.2d 1085, 1092-1093 (N.J., 1993) (possession of cocaine and possession of cocaine with intent to distribute convictions authorized for admission by the court (although court ordered no reference to the name or nature of the convictions) in a prosecution in which the accused was charged and convicted for the same offenses); State v. Pennington, 575 A.2s 816, 837 (N.J., 1990) (murder is strongly probative of credibility, and therefore admissible against the accused in his current trial for murder); People v. Hayes, 764 N.E.2d 963, 964-965 (N.Y., 2002) (Accused on trial on charges of rape, coercion in the first degree, burglary, and unlawful
imprisonment in the second degree, and assault in the third degree.

Court sanctioned trial judge's ruling that the prosecutor could make reference on the retrial to the existence and nature of convictions for assault, sexual abuse, aggravated sexual assault, and aggravated kidnapping); People v. Mattiace, 568 N.E.2d 1189, 1192 (N.Y., 1990) (Accused was convicted of one count of criminal possession of a forged instrument based on company personnel, including accused, preparing document attributing source of waste to a company who was not the waste provider (false hazardous waste manifest). Court approved trial court's admission of two personal and two corporate pollution related convictions to impeach the accused should he testify at trial.) But see discussion infra note ___ discussing the state supreme court created heuristic amelioration doctrine of "sanitization"); State v. Brown, 584 S.E.2d 278, 282-283 (N.C., 2002) (malicious wounding conviction admitted to impeach accused on trial for murder); State v. Busby, 844 P.2d 897, 898 (Or., 1991) (accused was convicted by a jury of first degree sexual assault. Court sanctioned decision of the trial judge to admit accused prior conviction for sexual abuse for purposes of impeachment if he should testify at trial); State v. Rocha, 834 A.2d 1263, 1266-1267 (R.I., 2003) (Accused charged and convicted by jury of possession of cocaine, disorderly conduct, obstruction of a police officer, and resisting arrest. The State Supreme Court held that trial judge did not abuse its discretion in admitting a nolo plea to an identical charge of obstructing a police officer); State v. Rodriguez, 731 A.2d 726, 731-732 (R.I., 1999) (Accused was on trial for and eventually convicted of robbery, during the course of which he used a sharp instrument. State supreme court sanctioned the trial judge's admission of multiple conviction of the accused to impeach his trial testimony. The convictions admitted included: fourteen year old convictions for breaking and entering a home with a knife with the intent to commit armed-robbery and assault with intent to rob); State v. Walsh, 731 A.2d 696, 699 (R.I. 1999) (Accused currently on trial for multiple charges was eventually convicted of those charges including possession of cocaine. The court sanctioned admission to impeach the accused with multiple convictions, including a conviction for possession of a controlled substance.); State v. Lombardi, 727 A.2d 670, 676 (R.I., 1999) (accused tried and convicted in current prosecution for possession of cocaine. Court sanctioned admission of three convictions to impeach the accused, including a conviction for possession of marijuana); State v. Martinez, 652 A.2d 958, 960 (R.I., 1995) (Accused was convicted by a jury of first degree murder and assault with a dangerous weapon. State supreme court sanctioned trial judge's decision to authorize the prosecutor to use and the prosecutor asked accused by name about convictions for assault with a dangerous weapon and assault with intent to rob); State v. Mattatall, 603 A.2d 1098, 1104-05 and 1116 (R.I. 1992) (A jury convicted the defendant of second degree murder in 1988. On
appeal, the accused raised the issue that the trial judge erred in denying in part his motion in limine to exclude from use to impeach his trial testimony, a fifteen year old conviction for assault with a dangerous weapon); **State v. Pailin, 576 A.2d 1384, 1388 (R.I., 1990)** (conviction for illegal possession of a knife admitted in current prosecution for murder by stabbing victim with a knife).

**197. Zola v. Kelley, 826 A.2d 589, 594 (N.H., 2003)** (New Hampshire Supreme Court reviewed decision of the U.S. Supreme Court in **Green v. Bock Laundry, 490 U.S. 527 (1989)**). Court acknowledged that federal appellate courts' decisions on the federal evidence rule could be used for guidance in interpreting similar state rules, but that state supreme court was final authority of appropriate interpretation of state rules). See also **State v. Raydo, 713 So.2d 996, 999 (n.5) (Fla., 1998)** (employing as a policy reason for following a United States Supreme Court non-constitutional ruling interpreting the federal rule of evidence authorizing convictions to impeach, that the comparable Florida state rule was modeled upon and substantially similar to the federal standard).

**198. State v. Pailin, 576 A.2d 1384, 1387, 1388 (R.I., 1990)** (state supreme court miscast its own 1987 evidence rule with regard to admitting convictions to impeach by asserting that the rule did not establish an admissibility standard, unlike the federal rule, but only established a new procedure for considering the admission of convictions to impeach); **State v. Walsh, 731 A.2d 696 (R.I. 1999)** (court noted that the federal rule may have given decisive significance to the fact that three of the convictions were older than ten years old, but expressly decided that it would give no significance to the age of the convictions on their relevance/probative value to prove propensity to lie).

**199. People v. Gurule, 51 P.3rd 224, 259 (Cal., 2002)** (court did not reverse based on this error-harmless error doctrine employed); **Com. v. Sommers, 843 S.W.2d 879, 887 (Kent., 1992)** (court reversed conviction primarily on other grounds); **Brown v. Com., 812 S.W.2d 502 (Kent., 1991)** (court reversed based on this error); **Zola v. Kelley, 826 A.2d 589, 596 (N.H., 2003)** (court reversed based on this error); **State v. Ross, 405 S.E. 2d 158, 163 (N.C., 1992)** (court did not reverse based on this error-harmless error doctrine employed).

**200. Miller ex rel. Monticello Baking Co. v. Marymount Medical Center, 125 S.W.3d 274, 286 (Ky., 2004)** (judge must have conducted appropriate balancing evaluation because he inquired about the nature of the underlying offense, and postponed his final ruling on admissibility until the target witness' testimony) **Com. v. Pauling, 777 N.E.2d 135, 143 and 144 (Mass., 2002)** (state supreme court implicitedly sanctioned the trial judge's decision which permitted the prosecutor to wait to trial to announce intention to
impeach the accused, with several convictions, should he testify).

Even more importantly the court sanctioned the decision of the trial judge, without reference to the basis of his conclusion, to authorize the prosecution to impeach the accused with multiple convictions all of which were totally irrelevant to prove propensity to lie.); People v. Mattiace, 568 N.E.2d 1189, 1192 (N.Y., 1990) (Court asserted without specific reference to the record of that hearing, that the trial judge considered multiple factors in reaching the admissibility conclusion. Court did not identify what factors trial judge employed); State v. Garcia, 743 A.2d 1038, 1056 (R.I., 2000) (court, despite the balancing evaluation required by rule, asserted it lacked authority to reverse the trial judge's discretionary ruling, thereby effectively eliminating the balancing evaluation required by rule. The court made no attempt to do what rule required - determine if the trial judge had a justifiable basis for first finding that the conviction was relevant to prove propensity to lie, and if it was relevant was its probative value substantially outweighed by the unfair prejudice that would result); State v. Martinez, 652 A.2d 958, 960 (R.I., 1995) (court acquiesced in the trial judge's decision to admit six irrelevant convictions to impeach the accused, on the ground that the record proved the judge had performed the required balancing because in the record was that judge's conclusionary statement that he did not think that any of the convictions were too remote or too prejudicial to warrant exclusion. Court cited to a precedent in which, as in this case, the defendant claimed that trial judge had failed to make the evaluation properly with regard to determining if each conviction is probative to prove propensity to lie, and even if it is, was its probative value substantially outweighed by unfair prejudice. The court held that all a trial judge need do is state the conclusion that the unfair prejudice of such convictions as a whole and or individually does not outweigh their probative value.); State v. Pailin, 576 A.2d 1384, 1388 (R.I., 1990) (Court apparently accepted as a substitute for the rule required balancing evaluation a conclusionary finding that the trial judge did the balancing without a single reference to indicate that the judge even attempted to assess the unfair prejudice that would result if the jury learned that the accused on trial for murder by stabbing the victim with a knife, had another conviction based on his illegal possession of a knife); State v. Kuntz, 467 N.W.2d 531, 542 and 543 (Wis, 1991) (The court made reference to some of the factors that trial judges should employ in conducting the balancing evaluation, but failed to demonstrate that the trial judge used such factors, and did not specifically apply these guidelines to the facts of the current case). See also cases discussed, infra note 209)

201. See infra. notes 206, 208 - 211, 223 - 224, 265, and accompanying text.
202. See supra note 193, and accompanying text.


204. Massachusetts, New York, and Missouri by rule authorized the per se admission of all such convictions, but the Missouri Supreme Court did not render a pertinent decision during the fifteen year study period. North Carolina, authorized the per se admission of all such misdemeanor convictions if the maximum punishment exceeded sixty days. The New Jersey Rule, authorized the admission of all such convictions, but only if they passed a general balancing evaluation which pitted their propensity re credibility against exclusionary concerns they implicated. The Louisiana rule authorized per se admission of all such irrelevant misdemeanor convictions in criminal cases, and in civil cases all such convictions punishable by a term of imprisonment of more than six months, but only if they passed a evenly weighted balancing evaluation. The Rhode Island and Wisconsin rules, which impose identical standards, authorize admission of all such irrelevant misdemeanor convictions but only if they pass a balancing evaluation tilted towards admission. Oregon authorized the possible admission of such a conviction but only against the accused, and only if he was a recidivist, and only if the conviction and current charge related to assaultive behavior in a domestic setting. Finally, Virginia authorized admission of such irrelevant misdemeanor convictions but only in civil cases against non-party witnesses.

205. Three states, Florida, Nebraska, and New Hampshire had the same rule as the federal rule-excluding these misdemeanors), while four states's rules, California, Colorado, Kentucky, and Nevada banned use of all misdemeanor convictions to impeach.

206. State v. Tolbert, 849 So.2d 32(La, 2003)(court held that its criminal rule, which authorized admission of any conviction, including any misdemeanor(case involved issue of whether the alleged victim's municipal misdemeanor convictions were admissible) conviction to impeach, was nevertheless subject to exclusion by application of the evidence code's general policy balancing rule. Hence, upon objection to admission, the probative value to prove propensity to lie must be assessed and the conviction could be excluded if that value was substantially outweighed by unfair prejudice and other exclusionary policy concerns. The court expressly recited list of exclusionary policy concerns in its policy rule-in addition to unfair prejudice-misleading the jury, confusion of the issues, undue delay, and waste of time); People v. Mattiace, 568 N.E.2d 1189, 1192(N.Y., 1990)(two personal and two corporate pollution related misdemeanor convictions could be
admitted against the accused to impeach him should he testify at trial. Court asserted without specific reference to the record of the pretrial hearing, that the trial judge considered multiple factors in reaching the admissibility conclusion. Court did not identify what factors trial judge employed)


208. State v. Garcia, 743 A.2d 1038, 1056 (R.I., 2000) (State supreme court ruled that the trial judge did not abuse its discretion in admitting misdemeanor convictions for possession of stolen property and for possession of a contraband substance); State v. Gary M.B., 676 N.W.2d 475, 483 (Wis., 2004) (court sanctioned the admission of misdemeanor conviction for disorderly conduct, and probably misdemeanor uttering a check and assault.

209. State v. Gary M.B., 676 N.W.2d 475, 483-488 (Wis., 2004) (trial record proved trial judge uttered only a single sentence that could be fairly characterized as an evaluation of the admissibility of the convictions at issue. No reference to balancing or to even the identification of a single implicated exclusionary concerns)

210. Id. at 484. Court further compounded reliance on junk science by endorsing as reality prosecutor's assertion that three, quarter of a century old convictions for minor offenses, were a part of a pattern of convictions because they happened over a span of three years and the accused was subsequently convicted twelve years latter of two domestic assault convictions, and this "pattern" was independent proof of a person more likely to lie.

211. Id. at 486. With regard to the Rhode Island Supreme Court's ringing endorsement of this specious inference see infra note 259, and accompanying text.

212. See supra note 205, and accompanying text.

213. State v. Porter, 455 N.W.2d 787, 795 (Neb., 1990) (The appeal theory of the defense by inference conceded that normally such a conviction was admissible to impeach. The defense objection was based on an erroneous understanding of the use of an uncounseled guilty plea as a conviction)

214. State v. Newell, 679 A.2d 1142, 1146 (N.H., 1996) (Accused was convicted by a jury of first degree assault. At trial, his defense theory was self-defense. On appeal, he claimed it was error for the trial judge to exclude two past misdemeanor convictions of the alleged victim for reckless conduct and simple assault, as well as the conduct underlying those offenses. The state supreme court evaluated the two convictions and concluded that neither the
adjudications or the conduct underlying was relevant to prove propensity to lie) See also State v. Norgren, 618 A.2d 505, 507 (N.H., 1992) (supreme court acknowledged that misdemeanor criminal mischief, simple assault, and criminal threatening convictions did not qualify under its rule as crimes of "dishonesty" of "false statement". Court did not restate or make any reference to a developed definition of these concepts)

215. People v. Alvarez, 926 P.2d 365, 392 (n. 11) (Cal., 1997), (misdemeanor convictions lack reliability as proof per se of the required conduct to prove the elements); People v. Wheeler, 841 P.2d 938, 941 (Cal., 1992) (Court expressly recognized that prior to 1982 amendment misdemeanor convictions were per se excluded, and that the generic evidence policy rule, required that before a felony conviction could be admitted to impeach its probative value to prove propensity to lie had to be balanced against its potential for unfair prejudice, and if the latter substantially outweighed the former, the conviction must be excluded. State supreme court ruled that the effect of the constitutional amendment was to authorize the admission of relevant underlying conduct, but not the fact of, a misdemeanor conviction to impeach, i.e. relevant to prove propensity to lie.


217. Id.

218. See Holley supra note 1 at notes 127 - 163, and accompanying text.

219. Id.

220. See Holley supra note 1, at notes 133, 142 - 144, and accompanying text. New Jersey's Supreme Court was interpreting a generic balancing standard, applicable to all witnesses, and the Rhode Island and Wisconsin Supreme Court were interpreting a standard titled towards admission for all witnesses, including the accused.

221. Compare supra notes 185 - 186 with "misdemeanor" conviction cases identified in 206 - 217, and accompanying text.

222. State v. Brunson, 625 A.2d 1085, 1088 (N.J., 1993) (State supreme court made reference to its 1976 decision in which it had held that its general evidence policy balancing rule applied to its rule on the admissions of convictions to impeach, and therefore convictions were not per se admissible for that purpose. Instead, the court ruled in that case, that its policy rule required trial judges to make a balancing evaluation. That rule the court held,
required that the evaluation focus upon whether the probative value of the conviction to prove propensity to lie, was substantially outweighed by the risks of unfair prejudice, misleading the jury, or confusion of the issues. The court expressly recognized that the overriding policy concern that warranted this balancing evaluation was to provide discretion to provide a fair trial and do justice.); State v. Pailin, 576 A.2d 1384, 1387-1388 (R.I., 1990); State v. Kuntz, 467 N.W.2d 531, 542 and 543 (Wis., 1991)

223. These seven states were: California, Kentucky, Louisiana, Massachusetts, New Hampshire, New York, and Oregon. People v. Gurule, 51 P.3rd 224, 259(Cal., 2002); People v. Sandoval, 841 P.2d 862, 873(Cal., 1992); People v. Wheeler, 841 P.2d 938, 941(Cal., 1992) (Court expressly recognized that prior to 1982 amendment misdemeanor convictions were per se excluded, and that the generic evidence policy rule, required that before a felony conviction could be admitted to impeach its probative value to prove propensity to lie had to be balanced against its potential for unfair prejudice, and if the latter substantially outweighed the former, the conviction must be excluded); People v. Clair, 828 P.2d 705, 719(Cal., 1992); Com. v. Sommers, 843 S.W.2d 879, 886-887 (Kent., 1992); Brown v. Com., 812 S.W.2d 502, 503 (Kent., 1991); State v. Tolbert, 849 So.2d 32 (La, 2003) (discussed supra note 5-22); Com. v. Pauling, 777 N.E.2d 135, 143 (Mass., 2002); Zola v. Kelley, 826 A.2d 589, 594-595 (N.H., 2003); People v. Dokes, 595 N.E.2d 836, 839 (N.Y., 1992); State v. Pratt, 853 P.2d 827, 833-834 (Or., 1993) (Court reviewed history of its rule since its enactment in 1981, noting that originally the rule required, but only with regard to the accused as witness, that trial judges balance the probative value of a felony conviction to prove propensity to lie against the unfair prejudice the admission would cause. The court next noted that a 1986 ballot initiative amended the rule, by eliminating the balancing requirement. Court asserted that the purpose of the amendment was to assure that any felony conviction of an accused would be admitted to impeach his testimony. The court next ruled that such convictions were still subject to be excluded on the specific policy ground recognized in its pervasive policy balancing rule that the convictions probative value was substantially outweighed by the fact that it was cumulative.)

224. These six states were Colorado, Florida, Nebraska, Nevada, North Carolina, and Virginia. People v. Lesney, 856 P.2d 1364, 1367 (Col., 1993); Cummings v. People, 785 P.2d 921 (Col., 1990) (implication of opinion was that the only basis to bar accused impeachment with his prior conviction for aggravated assault was to timely prove the conviction was error, or as in this appeal to claim ineffective assistance of trial counsel for failure to make this claim.); McFadden v. State, 772 So.2d 1209 (Fla, 2000); State v. Jackson, 601 N.W.2d 741 (Neb., 1999); Leonard v. State, 958 P.2d 110
1220, 1236(Nev., 1998) (Accused a racist prisoner, stabbed to death a black inmate. Jury convicted him in 1989 of murder, and he was sentenced to death. Accused filed a petition for post-conviction relief in 1992, which was not heard and denied until 1996. Trial judge indicated that it would sanction the admission of two prior murder convictions for purpose of impeachment, and possibly for substantive purpose. On appeal, the Nevada Supreme Court upheld that decision as within the sound discretion of the trial judge. Court made no reference to a balancing evaluation, and upheld admission of two same crime convictions.); State v. Brown, 584 S.E.2d 278, 282(N.C., 2002)(court claimed it lacked the authority to give trial judges the right to evaluate if exclusionary concerns should result in exclusion of qualified convictions (crimes punishable by more than sixty days in jail. Court expressly rejected accused argument that the pervasive evidence policy evaluation rule equivalent to federal rule 403, required that the admission of the conviction to impeach should depend upon whether its probative value to prove propensity to lie, was substantially outweighed by its prejudicial effect. Court held that the North Carolina legislature had rejected adoption of a balancing evaluation as an express policy decision. Court did not assert, however, that the legislature had decided to defy logic and eliminate the minimum admission requirement that the evidence must be relevant to the issue for which it is offered); Williams v. Com., 450 S.E.2d 365(Va., 1994). But see infra note 5-79 and accompanying text in which three of these six courts adopted a mitigation doctrine of "sanitizing" the convictions admitted to impeach as a means of ameliorating the unfair prejudice that could result from the admission by name of such convictions).

225. People v. Gurule, 51 P.3rd 224, 259(Cal., 2002); People v. Sandoval, 841 P.2d 862, 873(Cal., 1992); People v. Wheeler, 841 P.2d 938,941(Cal., 1992); Zola v. Kelley, 826 A.2d 589,595(N.H., 2003); State v. Newell, 679 A.2d 1142, 1146(N.H., 1996) (Accused was convicted by a jury of first degree assault. At trial, his defense theory was self-defense. On appeal, he claimed it was error for the trial judge to exclude two past misdemeanor convictions of the alleged victim for reckless conduct and simple assault, as well as the conduct underlying those offenses. The state supreme court evaluated the two convictions and concluded that neither the adjudications or the conduct underlying was relevant to prove propensity to lie.)

226. People v. Sandoval, 841 P.2d 862,873(Cal., 1992) (Accused convicted by jury of four counts of first degree murder. Court without reference to any substantive evaluation merely endorsed the trial judge's illogical assumptions that such a conviction was not only relevant to prove propensity to lie, but that its probative value on that issue outweighed the potential for unfair prejudice.)
227. Zola v. Kelley, 826 A.2d 589, 594-595 (N.H., 2003) (The court relied on the "Reporter's Note" to its specific rule which made express reference to its general exclusionary policy balancing rule, implying the court concluded that the general rule would apply when the more specific and more exclusionary balancing rule favoring the accused did not apply). 

228. People v. Gurule, 51 P.3rd 224, 259 (Cal., 2002); People v. Sandoval, 841 P.2d 862, 873 (Cal., 1992); People v. Wheeler, 841 P.2d 938,941 (Cal., 1992); Com. v. Sommers, 843 S.W.2d 879,887 (Kent., 1992); Brown v. Com., 812 S.W.2d 502,503 (Kent., 1991); Com. v. Pauling, 777 N.E.2d 135, 143-144 (Mass., 2002); Zola v. Kelley, 826 A.2d 589,595 (N.H., 2003); People v. Dokes, 595 N.E.2d 836, 839 (N.Y., 1992); State v. Kuntz, 467 N.W.2d 531,542 and 543 (Wis., 1991) (The court made reference to some of the factors that trial judges should employ in conducting the balancing evaluation. See also supra notes 71 - 76, 118, 125, 143 for identification of states whose rules mimicked the federal rule, and states whose rules were overall more liberal than the federal rule also resorting to their own guidelines.

229. People v. Wheeler, 841 P.2d 938,941 (Cal., 1992) (exclusionary concern laundry list); Com. v. Sommers, 843 S.W.2d 879,887 (Kent., 1992) (age of the conviction); Com. v. Pauling, 777 N.E.2d 135, 144 (Mass., 2002) (how many times prosecutor made reference to the admitted conviction of the accused); Zola v. Kelley, 826 A.2d 589,595 (N.H., 2003) (The New Hampshire Supreme Court applied these heuristics to the plaintiff's drug conviction, and identified three of them, all of which, court concluded, pointed in the direction of exclusion which the court concluded was the appropriate decision. Court pointed to fact that conviction was almost ten years old, and reasoned that the conviction had minimal probative value to prove propensity to lie, and was likely to cause unfair prejudice because the jury could decide the merits in part because of disapproval of the plaintiff); People v. Dokes, 595 N.E.2d 836, 839 (N.Y., 1992) (similarity of the conviction to the current charge, the relevance of the conviction to the accused credibility, the age of the accused at the time of the conviction "bad acts", and the disposition of the charges. Court also acknowledged other factors could be used in the evaluation); State v. Kuntz, 467 N.W.2d 531,543 (Wis., 1991) (was the conviction one for a crime involving dishonesty or false statement).

230. See discussion supra notes 189, 193 - 196, and accompanying text.

231. State v. Rocha, 834 A.2d 1263,1266-1267 (R.I., 2003) (identical crime conviction admitted); State v. Medina, 747 A.2d 448 (R.I.,
2000); State v. Rodríguez, 731 A.2d 726, 732 (R.I., 1999) (five similar crime convictions admitted to impeach the accused); State v. Walsh, 731 A.2d 696, 699 (R.I. 1999) (two similar crime convictions admitted); State v. Lombardi, 727 A.2d 670, 672 and 676 (R.I., 1999) (Accused convicted by a jury of possession of a controlled substance-cocaine. Court sanctioned the admission, to impeach the defendant's trial testimony, of three fourteen year old convictions - breaking and entering, possession of burglary tools, and possession of marijuana); State v. Martinez, 652 A.2d 958, 960 (R.I., 1995) (court sanctioned admission of six defendant convictions, including an identical conviction for assault with a dangerous weapon and a similar conviction for assault with intent to rob); State v. Mattatall, 603 A.2d 1098, 1117 (R.I. 1992) (court sanctioned the trial judge's admission of seven convictions to impeach the accused, including one similar crime conviction); State v. Taylor, 581 A.2d 1037, 1040 (R.I., 1990) (breaking and entering).


233. People v. Hayes, 764 N.E.2d 963, 966 (N.Y., 2002) (court credited itself for not creating per se rules that would bar the admission of convictions likely to cause substantial unfair prejudice including convictions for sex crimes, and crimes identical or similar to a crime or crimes currently being tried); People v. Gray, 646 N.E.2d 444, 445 (N.Y., 1995) (court lauded itself for failing to establish guidelines for the balancing evaluation it created. While trial judges must balance, what and how they balance is up to each of hundreds of trial judges across the state, and it is the responsibility of intermediate appellate courts to review these decisions because they have authority to review factual findings).

234. Brown v. Com., 812 S.W.2d 502, 503 (Kent., 1991) (court did not list a comprehensive set of factors that trial judges could or should employ in performing the balancing evaluation)

235. See discussion of similar behavior by the New York Court of Appeals, discussed supra note 233, and see also infra notes 338 - 345 and accompanying text.

236. Com. v. Sommers, 843 S.W.2d 879, 887 (Kent., 1992); Com. v. Rivera, 682 N.E.2d 636, 646 (Mass., 1997); Com. v. Drumgold, 666 N.E.2d 300, 314 (Mass., 1996); Com. v. Whitman, 617 N.E.2d 625, 628 (Mass., 1993); State v. Brunson, 625 A.2d 1085, 1088 (N.J., 1993); People v. Hayes, 764 N.E.2d 963, 965-966 (N.Y., 2002); People v. Gray, 646 N.E.2d 444, 445 (N.Y., 1995). See also illustrating how state supreme courts who were true to their per se admission rule, justified that loyalty by resort to this same fiction, McPadden v.
State, 772 So.2d 1209, 1216 (Fla. 2000) (Court also endorsed, again without reference to any evidence, a related and mitigating heuristic - that when a person is convicted of a felony but the trial judge withholds final adjudication, the judge has determined that the person for whom final adjudication is withheld is not likely again to commit crime, and is therefore no more likely to lie under oath.)

237. Com. v. Pauling, 777 N.E.2d 135, 144 (Mass., 2002); Com. v. Carter, 708 N.E.2d 943, 945 (Mass., 1999); State v. Brunson, 625 A.2d 1085, 1088 (N.J., 1993) (Court added a third heuristic which further favored admission of convictions against an accused who sought to testify at his trial. The court asserted that such a person has an added motive to lie to avoid another conviction. The court did not explain why such a person had a greater motive to avoid a second or multiple conviction, as opposed to a person seeking to avoid a first conviction. Risk of significant losses are also possible for parties in civil cases. The court did not acknowledge this reality); State v. Walsh, 731 A.2d 696, 699 (R.I. 1999); State v. Simpson, 606 A.2d 677, 681 (R.I., 1992) (The state supreme Court asserted that convictions can be admitted to impeach even if they do not relate to dishonesty or false statement. The court did not explain on what basis such convictions would be even relevant to prove propensity to lie). The court relied on pre-rule historical precedent and statute to continue the view that unless the trial judge makes a specific finding that a conviction should be excluded, any conviction is admissible to impeach any witness); State v. Mattatall, 603 A.2d 1098, 1117 (R.I. 1992); State v. Kuntz, 467 N.W.2d 531, 542-543 (Wis, 1991)

238. People v. Carpenter, 988 P.2d 531, 556 and 557 (Cal., 1999) (state supreme court endorsed multiple junk science heuristics in this opinion. First the court asserted that the admission of convictions pierces a false aura of veracity.

239. See Holley supra note 1, at notes 194-199 and accompanying text

240. Id. at notes 210 - 218, and accompanying text.

241. State v. Brunson, 625 A.2d 1085, 1091 (N.J., 1993); State v. Harvey, 581 A.2d 483, 495 (N.J., 1990); State v. Pennington, 575 A.2s 816, 837 (N.J., 1990); State v. Mattatall, 603 A.2d 1098, 1117 (R.I. 1992) (State supreme court employed junk science heuristic that it is reasonable to assume that one who has been convicted of a serious crime has demonstrated anti-social tendencies and therefore a jury may properly place less credence in that person's testimony then that of a law abiding witness.)
People v. Gutierrez, 52 P.3rd 572, 606 (Cal., 2002) (accused convicted of five felonies including the attempted murder of a police officer. State Supreme Court began by indicating that it was significant to the resolution of the issue of the admissibility of a conviction to impeach, that the attorney for the accused agreed that it was accurate to characterize the accused conviction for assault with a deadly weapon on a police officer as an offense of "moral turpitude". The court did not explain at this point why this was significant); People v. Wheeler, 841 P.2d 938, 944 (Cal., 1992); People v. Clair, 828 P.2d 705, 719 (Cal., 1992) (The court reviewed that precedent which held that even after the 1982 constitutional amendment via referendum which sought apparently to authorize per se the admission of any felony convictions to impeach, only felonies involving moral turpitude qualified for possible admission), People v. Morris, 807 P.2d 949, 972 (Cal., 1991) (court eyeballed four crimes, and justices asserted that the elements evidenced a general readiness to do evil, and based on this third level inference they were each therefore admissible with regard to impeachment.); Williams v. Comm., 450 S.E.2d 365, 375 (Va., 1994) (court extended the application of this heuristic to "misdemeanor" convictions, even though its rule seemingly barred admission of misdemeanors to impeach. Court did rule that neither misdemeanor assaults nor batteries were crimes of moral turpitude for purpose of impeachment.)

People v. Gurule, 51 P.3rd 224, 260 (Cal., 2002); People v. Carpenter, 988 P.2d 531, 556 (Cal., 1999); and People v. Clair, 828 P.2d 705, 719 (Cal., 1992) (court identified as one of the most crucial factors in the balancing evaluation, a heuristic surrogate for the appropriate logical relevance inquiry, in a criminal case when the witness is not the accused - is the conviction relevant as proof of dishonesty); People v. Webster, 814 P.2d 1273, 1292 (Cal., 1991) (state supreme court endorsed, without evaluation, the trial judge's list of balancing factors favoring admission of convictions against the accused, including a finding that the burglary conviction was theft related and therefore bore on dishonesty).

Miller ex rel. Monticello Baking Co. v. Marymount Medical Center, 125 S.W.3d 274, 285 (Ky., 2004)

Com. v. Whitman, 617 N.E.2d 625, 628 (Mass., 1993) (Court equated the probative value of violent crimes to disprove credibility with that of convictions for crimes of dishonesty)

See Holley, supra note 1 at notes 192 - 199, and accompanying text.

People v. Gurule, 51 P.3rd 224, 259 (Cal., 2002) (court endorsed two related junk science heuristics - the age of the
conviction and whether the accused has led a crime free blameless life since the conviction as factors in the balancing evaluation); **People v. Carpenter, 988 P.2d 531, 556(Cal., 1999)** (state supreme court held that because the accused spent most of fifteen years since the two felony theft related convictions in prison, they were not too remote to demonstrate to be used for impeachment. Apparently California Supreme Court simply piled another junk science heuristic upon the others employed in its premise. Accused must have opportunity as free citizen to commit another crime or his prior crimes continue to have the same relevance as the day they were committed with regard to proving he has a propensity to lie. Court lost focus completely on its previous point as to issue to which their admission must be at least relevant - propensity to lie, and how lapse of time could lessen whatever relevancer-probative value these particular convictions had to prove likelihood of lying); **People v. Turner, 878 P.2d 521, 557(Cal., 1994)** (state supreme court evaluated as a factor in determining the admission of the conviction to impeach the age of the conviction. It concluded a thirteen and eleven year old convictions for receipt of stolen property and burglary were not too old to be used to impeach the testimony of the accused because the accused had spent most of the intervening years in prison); **People v. Clair, 828 P.2d 705,719(Cal, 1992); People v. Webster, 814 P.2d 1273, 1292(Cal., 1991)** (court approved the age of the conviction as a factor and concluded that the burglary conviction was not too remote to be used to impeach because the accused had not thereafter led a blameless life); **People v. Morris, 807 P.2d 949,972(Cal., 1991)** (state supreme court affirmed the trial judge's decision to admit all of accused prior felony convictions ostensibly only to impeach his trial testimony. The court held that convictions of seven and nine years of age at the time of the current trial were not too remote.); **Com. v. Sommers, 843 S.W.2d 879,887(Kent., 1992); Brown v. Com., 812 S.W.2d 502,503(Kent., 1991)** (Court cited to federal rule and presumptive ten year rule as guidance. Court did not expressly adopt that presumption. Court cited with approval, but without explanation or reference to their rationale, two decisions, one admitting a thirteen year old conviction and one excluding a seventeen year old conviction); **State v. Brunson, 625 A.2d 1085, 1088(N.J., 1993)** (The court did not specify what passage of time would even presumptively begin to dissipate the probative value of a conviction, but did indicate that the aging of the conviction could be tempered by subsequent convictions, and service of jail time)

248. Com. v. Sommers, 843 S.W.2d 879, 887(Kent., 1992)

249. Id.
250. See Holley supra note 1 at notes 208 - 218, and accompanying text.

251. People v. Carpenter, 988 P.2d 531, 556(Cal., 1999)(state supreme court sanctioned trial judge's decision to allow prosecution to impeach the accused with two fifteen year old felony theft related convictions); People v. Lesney, 856 P.2d 1364,1367(Col., 1993)(affirming use by the co-defendant of multiple convictions to impeach the accused should he have testified. All of convictions were over ten years old. Court still sanctioned apparent per se admission of all of these convictions); Miller ex rel. Monticello Baking Co. v. Marymount Medical Center, 125 S.W.3d 274(Kent., 2004)(court sanctioned anonymous admission of twelve year old attempted burglary conviction to impeach one of the plaintiffs in a civil case); Brown v. Com., 812 S.W.2d 502,503(Kent., 1991)(Court cited with approval, but without explanation, its precedent admitting a thirteen year old conviction); Com. v. Stewart, 663 N.E.2d 255, 257(Mass., 1996)(Court sanctioned admission to impeach the accused of a thirty year old possession of a sawed off shotgun conviction); People v. Walker, 633 N.E.2d 472, 473-474(N.Y. 1994)(Court sanctioned the trial judge's admission of seventeen misdemeanor convictions which were entered over the course of a dozen years); State v. Rodriguez, 731 A.2d 726, 731-732(R.I., 1999)(court sanctioned admission of fourteen year old convictions for breaking and entering a home with a knife with the intent to commit armed-robbery, assault with intent to rob, and assault with a deadly weapon-a knife; as well as two ten year old convictions for assault with a dangerous weapon-a sharp instrument, and assault with intent to commit murder with a sharp instrument); State v. Walsh, 731 A.2d 696,699(R.I. 1999)(court sanctioned the admission to impeach the accused with an eleven year old conviction for possession with intent to deliver a controlled substance); State v. Mattatall, 603 A.2d 1098, 1104-05 and 1116(R.I. 1992)(court sanctioned the admission to impeach the accused with a thirteen year old conviction)

252. State v. Walsh, 731 A.2d 696, 699(R.I. 1999); State v. Mattatall, 603 A.2d 1098, 1117(R.I. 1992)(state supreme court employed junk science heuristic that multiple conviction demonstrates disdain for the law, and therefore makes all/almost all conviction in the sequence, no matter how old, arguably relevant to attack credibility. The court expressly endorsed heuristic that continued disobedience to the law is a logical basis for inferring that the person is more likely to disregard his oath and more likely to lie on the stand)

964 (N.Y., 2002) (trial judge had admitted four irrelevant and highly prejudicial convictions, but court pointed to fact that the trial judge had excluded an attempted assault conviction and a twenty year old trespass conviction); People v. Mattiace, 568 N.E.2d 1189, 1192 (N.Y., 1990) (Following, what the state supreme court characterized as a lengthy pre-trial hearing, the trial judge concluded that three of seven of accused and corporation prior convictions could not be used by prosecution to impeach him, but that two personal and two corporate pollution related convictions could be admitted for this purpose. Accused did not testify).

254. People v. Gurule, 51 P.3rd 224, 260 (Cal., 2002) (Current murder trial resulted in a conviction and death sentence. Court ruled that the improper admissions to impeach the accused with his convictions for murder and rape were harmless, in part because another conviction was admissible) Few other supreme courts had relied on this heuristic, and the court did not cite to any evidence to support this novel notion.

255. Miller ex rel. Monticello Baking Co. v. Marymount Medical Center, 125 S.W.3d 274, 285 (Ky., 2004); Com. v. Whitman, 617 N.E.2d 625, 629 (Mass., 1993); People v. Hayes, 764 N.E.2d 963, 964 (N.Y., 2002); People v. Mattiace, 568 N.E.2d 1189, 1192 (N.Y., 1990); Castellucci v. Batista, 847 A.2d 243, 251 (R.I., 2004); State v. Pailin, 576 A.2d 1384, 1388 (R.I., 1990) (Trial judge found and state supreme court concurred that credibility was a significant issue at trial, and it then resorted to the anti-science/junk science heuristic inference that this factor favored admission of any conviction, including this misdemeanor conviction, to impeach the accused).

256. See discussion supra notes 76 - 77 explaining why these factors logically favor exclusion and not admission.

257. See e.g. People v. Hayes, 764 N.E.2d 963, 964-965 (N.Y., 2002) (Accused, on trial for multiple offenses, including sexual assault, at a pre-trial hearing argued that the admission, ostensibly only to impeach, of his convictions, many of them similar to the current charges, would impair his right to a fair trial because of the unfair prejudice that would result. The trial judge ruled that the accused could be impeached with four convictions, all four similar to at least one of the current charges. The judge ruled that the prosecutor could make reference to the existence and nature of convictions for assault, sexual abuse, aggravated sexual assault, and aggravated kidnapping. The judge excluded an attempted assault conviction and a twenty year old trespass conviction. Accused did not testify at trial, and was convicted of all charges except assault. The intermediate appellate court reversed the trial judge, and held that the trial
judge had abused his discretion, because of the danger of unfair prejudice which resulted when the similar convictions were authorized to impeach the accused. That court focused on the risk of such unfair prejudice particularly caused by the trial judge authorizing reference by the prosecution to the nature of the conviction as opposed to the mere existence of convictions. The appellate court had also reversed because the trial judge's decision had contributed to keeping accused from testifying, and therefore denied him the only witness who could substantiate his consent theory. Despite these detailed findings, the New York Court of Appeals reversed the intermediate appellate court, an action it never took when the appellate court affirmed the admission of any conviction to impeach the accused during the entire decade and one-half period of this study)


259. State v. Rodriguez, 731 A.2d 726,732(R.I., 1999)(court expressly acknowledged that the trial judge did not undertake the balancing evaluation that the state supreme court expressly acknowledged was the standard of its rule)

260. See Holley supra note 1 at note 219, and accompanying text.

261. People v. Sandoval, 841 P.2d 862, 873(Cal., 1992)(the court acknowledged that a 1982 constitutional amendment had obliterated some of its detailed working rules developed to guide the balancing evaluation. The court did not specify which working rules in its view were obliterated by the constitutional amendment); People v. Wheeler, 841 P.2d 938,941(Cal., 1992)(Court cited with approval McCormick's and Wigmore's treatise for a laundry list, of which it did not specify each element, of policy reasons supporting limiting use of convictions to impeach any witness, including the special substantive propensity conviction concern when the witness is the accused).

262. People v. Carpenter, 988 P.2d 531, 556 and 557(Cal., 1999)


McFadden v. State, 772 So.2d 1209, 1217 (Fla., 2000) (court's holding was that the trial judge committed reversible error by treating as a conviction for purpose of the state's impeachment rule, an unadjudicated guilty plea. The court went on to note that the trial judge committed further error by allowing the prosecutor to identify the nature of the underlying offense which was the same as the current charge, as well as the fact that the victim was the same. The court, however, was not always faithful to this heuristic, see e.g. Fotopoulos v. State, 608 So.2d 784, 790 (Fla., 1992); State v. Jackson, 601 N.W.2d 741, 748 (Neb., 1999); State v. Ross, 405 S.E. 2d 158, 165 (N.C., 1992)


Jones v. State, 580 So.2d 143, 145 (Fla., 1991); Brown v. Com., 812 S.W.2d 502, 503 (Kent., 1991) (prohibited identification of the specific felony for which the person was convicted, unless the witness denied the conviction; State v. Jackson, 601 N.W.2d 741, 748 (Neb., 1999) (interprets rule to authorize admission only of the fact of conviction for a felony and the number of such convictions, but to exclude reference to the name, nature, sentence, and details of the crime and conviction); State v. Brunson, 625 A.2d 1085, 1092-1093 (N.J., 1993) (The court found that the prosecution's interests in attacking the credibility of an accused who testified with a felony conviction was adequately vindicated by admission of the grade and date of such convictions. Court added guideline that when the accused was also convicted of non-similar convictions the prosecution options were to seek to admit by name those convictions only, or to seek to admit "sanitized" statements of all of the convictions; State v. Ross, 405 S.E. 2d 158, 165 (N.C., 1992) (court, which did not adopt a balancing standard, recognized both the propriety of sanitizing a conviction and employing as a balancing factor which favored and in this case should have resulted in exclusion of the convictions to impeach - the policy consideration that the jury was likely to use

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such convictions for the impermissible substantive purpose of convicting the accused); State v. Gary M.B., 676 N.W.2d 475, 487 (Wis., 2004) (court majority found significant fact that judge did not authorize reference to names or date of entry of three decades old convictions); State v. Kuntz, 467 N.W.2d 531, 542-543 (Wis., 1991) (the court did not make express reference to "sanitized", but did assert that the proper procedure was to limit the inquiry only to the facts that the witness was convicted of a crime, and the number of convictions)

268. State v. Brunson, 625 A.2d 1085, 1088-1089 (N.J., 1993) (Court first cited an empirical study to note that criminal defendants with criminal records are less likely to testify than those without such records. Subsequent to that reference, the court cited to an empirical study, first for the proposition that the study findings included a finding that jurors stated that a prior conviction did not affect their view of the credibility of the accused. Second, court cited to a finding of that study that the highest conviction rate by these same sampled jurors occurred when the prior conviction was for a crime identical or similar to the current crime being tried. Court noted that other empirical studies had reported similar findings. State supreme court failed to recognize the significance of its first finding-jurors do not view any particular conviction as a logical reason to believe that a witness is more likely to lie. The state supreme court also cited to several commentators for their consensus conclusion that the admission of prior convictions including their admission only to impeach, would unfairly prejudice the accused, if he was the witness, and that such unfair prejudice would occur even if the judge gave a limiting instruction)

269. Miller ex rel. Monticello Baking Co. v. Marymount Medical Center, 125 S.W.3d 274, 285-286 (Ky., 2004) (court sanctioned anonymous admission of twelve year old attempted burglary conviction to impeach one of the plaintiffs in a civil case)

270. Id. (apparently the court had never contemplated the significance of the outcome and aftermath of Green v. Bock Laundry, 490 U.S. 527 (1989). See also Holley, supra note 1, at note 38, and accompanying text. Referring to evidence that the quantum and quality of unfair prejudice has to be evaluated on a specific witness type, and that unfair prejudice is likely to rank second for civil party witnesses right after the potential for unfair prejudice when the accused is the witness impeached with a prior conviction.

271. People v. Gutierrez, 52 P.3rd 572, 584, 606 (Cal., 2002) (accused on trial and eventually convicted of several crimes including murder and attempted murder of a police officer, and
sentenced to death. Trial judge admitted his four year old conviction for assault with a deadly weapon on a police officer. The court conclusionarily asserted that the conviction was admissible even if somewhat similar)

272. State v. Martinez, 652 A.2d 958, 960 (R.I., 1995) (court acquiesced in the trial judge's decision to admit six irrelevant convictions to impeach the accused, on the ground that the record proved the judge had performed the required balancing because in the record was that judge's conclusionary statement that he did not think that any of the convictions were too remote or too prejudicial to warrant exclusion); State v. Taylor, 581 A.2d 1037, 1039-1040 (R.I., 1990)

273. People v. Clair, 828 P.2d 705, 719 (Cal, 1992) (court found that it was reasonable, hence no abuse of discretion, for the trial judge to conclude that the admission of the voluntary manslaughter conviction would have been highly prejudicial, and so remote that it diminished the relevance of the conviction, apparently one the court conceded was for a crime of moral turpitude, to prove propensity to lie. Court did not identify a basis to justify the highly prejudicial finding, or more importantly why no trial judge during the approximately decade and one-half of this study had ever made and it had never confirmed such a finding when a range of felony convictions were admitted to impeach the accused.); State v. Werner, 831 A.2d 183, at 204 & 205 (R.I., 2003) (court referred to its precedent for principle that age of convictions can mitigate unfair prejudice that could result from their admission, and subsequently sanctioned exclusion in this case on the grounds employed by the trial judge - the convictions were "stale" and the nature of the offenses were not strongly probative of lying. Hence court accepted at face value trial judge's balancing evaluation, and most egregiously failed to reconcile, despite having the issue expressly raised on appeal, that in recent decisions it had rejected the same reasoning relied upon by this trial judge, when it was asserted by the defendant to exclude one or more of his convictions)

274. See supra notes 207 - 210, 223, 230 - 234, 252, 259, 272, and accompanying text.

275. See supra notes 208 - 211, 231, 252, and 259, and accompanying text.

276. Com. v. Smith, 686 N.E.2d 983, 988 (Mass., 1997) (jury found accused guilty of murder in the first degree on the theory of extreme atrocity or cruelty. Accused did not testify after the trial judge ruled that the prosecution could impeach him with his convictions for robbery, assault with intent to rob, and larceny of
a motor vehicle); Com. v. Feroli, 553 N.E.2d 934, 936 (Mass., 1990) (Accused convicted at his second (first ended in mistrial because of hung jury) by a jury of two counts of first degree murder by reason of deliberate premeditation and felony murder. Accused made a pretrial motion to exclude his conviction from use by the prosecution should he testify at trial, and took the position, which he in fact followed, that unless the convictions were excluded he would not testify at trial); People v. Hayes, 764 N.E.2d 963, 964 (N.Y., 2002) (Accused did not testify at trial, and was convicted of all charges except assault); People v. Mattiace, 568 N.E.2d 1189, 1192 (N.Y., 1990) (Following what the state supreme court characterized as a lengthy pre-trial hearing the trial judge concluded that three of seven of accused and corporation prior convictions could not be used by prosecution to impeach him, but that two personal and two corporate pollution related convictions could be admitted for this purpose. Accused did not testify.

277. Com. v. Feroli, 553 N.E.2d 934, 936 (Mass., 1990) (Accused convicted at his second (first ended in mistrial because of hung jury) by a jury of two counts of first degree murder by reason of deliberate premeditation and felony murder.

278. Com. v. Pauling, 777 N.E.2d 135, 143 (Mass., 2002) (highly conclusionary analysis); State v. Sidberry, 448 S.E.2d 798, 799-800 (N.C., 1994) (no analysis of the constitutional issue); State v. Busby, 844 P.2d 897, 898 (Or., 1991) (Accused was convicted by a jury of first degree sexual assault. Accused did not testify during the trial. State supreme court ruled that in order to have his constitutional claim that the admission of a prior sexual abuse conviction denied him his constitutional right to an impartial jury trial. State supreme court ruled on appeal the accused was required to make an offer of proof at trial, describing what he would have testified to had his convictions been excluded. Accused failed to make the offer of proof, and therefore state supreme court refused to evaluate the merits of his constitutional claims)

279. See supra notes 43 - 44, and accompanying text. Seventy-two percent of these decisions involved impeaching the accused in a criminal case.

280. See supra notes 83 - 84, and accompanying text. Sixty-three percent of these decisions involved impeaching the accused in a criminal case.

281. See supra notes 185 - 186, and accompanying text.

282. See infra note 294, and accompanying text.

283. See supra notes 45 - 46, and accompanying text.
284. See supra notes 85 - 86, and accompanying text.

285. See supra notes 187 - 188, and accompanying text.

286. See supra notes 48 - 49, 89 - 90, and 190 - 191, and accompanying text.

287. See supra notes 48 - 49, 89 - 90, and 190 - 191, and accompanying text.

288. See Holley, supra note 1 at notes 25, 26, and 39, and accompanying text.

289. Id., at notes 44, 52, 102, and 105, and accompanying text.

290. Id., at notes 140, and 148 - 150, and accompanying text.

291. Id., at notes 148 - 150, and accompanying text.

292. See supra notes 175 - 181, and accompanying text.

293. See supra note 160 and 277, and accompanying text.

294. See supra notes 50 - 51, 91 - 92, and accompanying text.

295. See supra notes 50 and 91, and accompanying text.

296. See supra notes 192 - 195, and accompanying text.

297. See Holley, supra note 1, at note 216, and accompanying text.

298. See supra notes 52, 96 - 97, 188, and 196, and accompanying text.

299. See supra notes 52, 58, 80, 144 - 145, and 206 and 223, and accompanying text. See also infra note 321 and accompanying text.


301. See supra notes 53 - 56, 103 - 107, 197 - 198, and accompanying text.

302. See supra notes 53, 103, and 197, and accompanying text.
303. See supra notes 56, and 107, and accompanying text.

304. See supra notes 56, 107, and accompanying text.

305. See Holley, supra note 1, at note 1, and accompanying text.

306. See supra notes 57 - 60, 108 - 134, and 199 - 200, and accompanying text.


309. See supra notes 57, 108, and 199, and accompanying text.

310. See supra notes 46, 48, 57, 86, 89, 90, 108, 188, and 199, and accompanying text.

311. See supra notes 58, 109, 118, 200, and accompanying text.

312. See supra notes 58, 110, 201, and accompanying text.

313. See supra notes 50 - 51, 91 - 92, 111, 193, 202, and accompanying text.

314. See supra notes 50 - 51, 91, 111, 193, 202, and accompanying text.

315. See supra notes 62 - 63, 137, 140 - 141, and 212, and accompanying text.

316. See discussion supra notes 54 - 56, 64, 105 - 107, 143, 148 - 149, 151 - 153, and 212 - 214, and accompanying text.

317. See supra. notes 64, 143, and 148 - 151, But see 153, and 213 - 214, and accompanying text.

318. See supra notes 144 and 145, and accompanying text.
319. 68, 157, and 221 and accompanying text.

320. See supra notes 69 - 70, 158, 231, 236 - 256, and accompanying text.

321. See supra notes, 70 - 79, 166 - 167, and 259 - 272, and accompanying text.

322. See supra notes 52, 169, 196, and 298 and accompanying text.

323. See supra notes 98 - 99, 276 - 277, and accompanying text.

324. See supra notes 45 - 46, 85 - 86, and 187 - 188, and accompanying text.

325. In all thirteen decisions from state supreme courts whose rules mimicked the federal rule and in which the issue was the propriety of impeaching the accused, the accused testified in all 13 cases - see supra notes 45 - 46. In eleven of the forty-five decisions (25%) made by state supreme courts interpreting rules more restrictive than the federal rule in admitting convictions to impeach, the accused did not testify - see supra notes 85 - 86. In as many as twenty-eight (56%), and as few as nineteen (38%) decisions made by state supreme courts interpreting rules that were more liberal overall than the federal rule in admitting convictions to impeach, the accused did not testify - see supra notes 187 - 188. In nine of the cases from these supreme courts, it was not clear from the opinions if the accused had testified.

326. Benson v. State, 160 S.W.3d 341, 344 (Ark., 2004) (accused expressly asserted that the trial judge's decision to permit the prosecution to impeach him with three felony convictions, all of which were irrelevant to prove propensity to lie, but which included a conviction for a crime, rape, identical to a current charge, kept him from testifying at trial. The justices of the Arkansas Supreme Court deemed that contention unworthy of analysis, but instead responded by noting the accused was given right to choose to testify or to decline to testify); Walker v. State, 790 A.2d 1214, 1217 (Del., 2002) (the court dismissed the accused express constitutional claim that the trial judge's decision to admit multiple convictions to impeach his potential trial testimony drove him from the stand, thereby denying him his express constitutional right to testify on his own behalf. Instead, the state supreme court blamed the accused for not testifying to properly preserve this claim); State v. Busby, 844 P.2d 897, 901 (n.7) (Or., 1991) (Accused was convicted by a jury of first degree sexual assault. Accused did not testify during the trial. On appeal accused alleged that he did not testify because the trial judge had ruled he could be impeached with his conviction for sexual assault
should he testify, and that the ruling violated both his constitutional right to testify in his own behalf and his right to an impartial jury. Oregon Supreme Court did make an evaluation of whether the accused right under the state's constitutional provision assuring a right to an impartial jury was violated. The court concluded that the jury did not hear about the conviction for the same offense since the accused did not testify. Therefore, of course, it could not have been prejudiced by that information. The court asserted that the accused theory was that anytime that a jury heard that the defendant was previously convicted of sexual abuse and he was currently charged with sexual abuse it would convict the accused. The court expressly declined to assume that the accused was denied an impartial jury.

327. 469 U.S. 38 (1984). The standards of the federal rule and those of most states on admitting convictions to impeach makes no reference to the accused having to testify, and the substantive focus of those standards provide no basis for implying that whether the accused testifies impacts the merits of the evaluation of whether a conviction should be admitted to impeach. Procedural justifications suggested by the United States Supreme Court in Luce, such as the judge might have changed his mind about the admissibility of the conviction to impeach, when stripped of any nexus to the actual standards of the rule, are so easily overcome and specious that it is difficult to understand what ever prompted their identification. See discussion infra., notes 346 - 349, and accompanying text.

328. See supra notes 102, 123, and 134, and accompanying text. See also Fennell v. State, 691 A.2d 624, 625 (Del. 1997) (accused failure to testify moots appeal of decision of trial judge to admit a same crime conviction); State v. Raydo, 713 So.2d 996, 1001 (Fla., 1998) (state supreme court held that accused must take stand and testify to preserve appellate review of claim of error with regard to trial judge's authorizing use by prosecution of prior convictions for burglary and petty larceny. The accused did not testify at trial); State v. Busby, 844 P.2d 897, 900 (n. 6) (Or., 1991) (state supreme court expressly acknowledged that had the accused testified he would still have the right to claim on appeal that his two constitutional rights identified in this appeal were violated. Failure to testify, coupled with failure to make an offer of proof, court concluded made it impossible to determine if accused constitutional right to testify was impaired.

329. Com. v. Drumgold, 666 N.E.2d 300, 305 (Mass., 1996) (Jury found accused guilty of murder in the first degree with deliberate premeditation. During the cross-examination of the accused at trial, the prosecution offered and the judge approved the admission to impeach the accused of his prior convictions for unlawful
possession of a firearm, defacing a firearm, and unlawful possession of ammunition. Accused lawyer failed to object to the admission of any of these convictions); **State v. Taylor, 676 N.E.2d 82, 93 (Ohio, 1997)** (the attorney for an accused in a capital murder trial assumed that the trial judge had previously ruled that the accused could be impeached with a murder conviction); **State v. Garcia, 743 A.2d 1038, 1056 (R.I., 2000)** (lawyer for defendant erroneously conceded that misdemeanor convictions for possession of a contraband substance, and possession of stolen property had some relevance to prove that the accused wasn't trustworthy); **Miller v. State, 67 P.3d 1191, 1192 (Wyo., 2003)** (prosecuting attorney failed to argue that the victim's prior cocaine possession conviction was irrelevant to issue on only issue for which it was offered - as proof of propensity to lie. State rule required balancing evaluation. No reference made to that balancing evaluation); **Ramirez v. State, 994 P.2d 970, 972-973 (Wyo., 2000)** (court reviewed record which demonstrated that the defense attorney on direct examination of his client, the accused, charged with aggravated assault (with a knife), asked and the trial judge allowed him to ask the accused to admit to prior convictions to burglary, involuntary manslaughter, and armed robbery convictions. The state supreme court sanctioned this "strategic" decision. All of the convictions were entered twenty years before the trial. None of these convictions were even arguably relevant to prove propensity to lie)

**330. State v. Raydo, 713 So.2d 996, 1001 (Fla., 1998)** (prosecutor asserted and trial judge authorized admission of two prior nolo pleas to impeach the accused during his robbery trial. Accused did not take the stand, and was convicted. The state supreme court refused to reverse the conviction despite the fact, by its own admission, the trial judge had made an obvious legal error in his ruling, because an express provision of the evidence code forbade use of nolo pleas in a subsequent criminal proceeding. Trial judge and defense counsel apparently were both ignorant of this specific provision); **State v. Cole, 703 A.2d 658, (N.H., 1997)** (state supreme court did not evaluate if two court martial convictions for similar sexual offenses qualified as felonies. Court ruled that the judge did not abuse its discretion in refusing to make a pre-trial ruling. Court failed to acknowledge obvious prejudice that would result if these convictions were admitted. Court relied in part on a finding that the accused attorney failed to specify that prejudice would result, and the quantity or quality of resulting prejudice. Accused attorney only made reference to the impact on the trial if these convictions were admitted as a basis for needing to know prior to trial if the convictions would be admitted.)

**331. See supra notes 70 - 77, 182, 223, 232, 234 - 235, 241, 259, and 267, and accompanying text.**
332. See supra notes 70 - 77, and accompanying text.

333. See supra notes 91 - 92, 96, 121 - 134, 163 - 166, and 168, 182, and accompanying text.

334. See supra notes 163 - 166, 168, and accompanying text.

335. See supra note 166, and accompanying text.

336. See supra notes 208 - 211, 231, and, and accompanying text.

337. See summary findings supra notes 283 - 292, 300 - 305, 313, 315 - 316, 318 - 321, and accompanying text. But see supra 309 finding that the result of most of findings of error by these state supreme courts did benefit the accused.

338. See infra notes 333 - 343, and accompanying text.

339. See e.g. McFadden v. State, 772 So.2d 1209, 1215 (Fla, 2000); Label Systems, Inc. v. Aghamohammadi, 852 A.2d 703, 718(Con. 2004) (legislature apparently delegated authority to the judges of the superior courts to adopt a comprehensive evidence code. In 1999, when these judges exercised this authority, with regard to the standard for determining the admissibility of convictions to impeach, they adopted the common law standard developed by the state supreme court); Sphect v. State, 734 N.E.2d 239, 240(Ind., 2000) ("Confinement" identified in the Indiana rule as one of eight crimes conviction for which was admissible to impeach any witness. The Indiana Supreme Court did not explain why "confinement" was identified as a crime not involving dishonesty or false statement which nevertheless should be used as a basis for impeachment. The court subsequently did make reference, however, to the policy decision that its 1994 adoption of the current impeachment with convictions evidence rule as part of a comprehensive adoption of an evidence code, rejected adoption of the federal rule, and preserved the evolved state common law version of the rule. The court did not explain why it chose to retain the common law, rather than adopt the federal rule or other more recent approaches to this issue); State v. Ashley, 623 A.2d 984, 986(Vt. 1993) (The court then resorted to its own guidelines developed prior to the adoption of the current substantive rule as the basis for determining the admissibility of convictions to impeach). See also supra note 116 with regard to the Illinois Supreme Court as "creator" of Illinois Rule-Standards in its case decisions; and 222 supra with regard to the New Jersey Supreme Court as author of the impeachment with convictions balancing evaluation standards.

340. See supra notes 72 - 78, 116, 118, 124 - 128, 222, 226, and
228 - 229, and 232, and accompanying text.


344. See supra notes 307, 311, and 313, and accompanying text.

345. State v. Morel, 676 A.2d 1347, 1356(R.I., 1996) (court reiterated, without explanation, its deference to the trial judge's decision with regard to this issue. In truth, the court could not offer a plausible explanation, because neither it nor any other state supreme court asserting this great deference standard can justify such deference on this issue. The articulation of the correct rule standards, and how to lawyer on that standard is a matter of law, and the job of the top court in the state to articulate and determine that state judges are adhering to the court's rule protocol. The conviction to impeach rule standards are at their core free of current case specific fact sensitivity. No deference to the trial judge's decisions, unless and until viable standards are stated in the rule as interpreted by the state supreme court, and the state supreme court does a minimally competent monitoring to assure there is a systematic good faith effort to apply those standards, is therefore justified.

346. A North Dakota Supreme Court decision is illustrative of why the minimum protection should extend to decisions to admit convictions against any party witness, including those in civil cases. The court cited as authority the federal Advisory Committee Notes to the 1990 amendments to the federal rule and a secondary authority, that because it is unlikely that the jury will use prior convictions of a prosecution witness as propensity evidence, the trial courts should only rarely exclude any and every felony convictions of such witnesses when offered by the accused for impeachment purposes; State v. Randall, 639 N.W.2d 439, 446(N.D. 2002). The court's position ignored, however, as do the authorities referred to by the court, that such convictions, which are irrelevant to prove propensity to lie, are likely to distract the jury, and when as in this case, the prosecution witness is the victim of the crime, admission is likely, as in Green v. Bock Laundry, 490 U.S. 527(1989) (civil plaintiff), to result in unfair prejudice thereby creating the risk that the jury will acquit the
accused or find for the defendant in a civil case because the victim or the plaintiff is cast by the jury as a bad person But Id. at 448, the court recognized this possible danger, but asserted that the government failed to argue that this danger was present in this case. The state supreme court failed to review the record to determine that the trial judge had identified these concerns which by rule were supposed to be considered, or why the state supreme court in its own evaluation failed to evaluate and condemn a decision which authorized the admission of seventeen irrelevant to prove propensity to lie convictions to impeach the alleged victim of an attempted murder)

347. See cases discussed supra note 118. FRE 609(b)(2005) also requires an on the record specific fact finding of the basis to admit a conviction to impeach when it is over ten years old.

348. See supra notes 321, and accompanying text.

349. See e.g. Idaho Supreme Court decisions making reference to its rule standard which expressly required a de-novo appellate review of the issue of whether the conviction is relevant to prove a propensity to lie; State v. Page, 16 P.3d 890(Idaho, 2001)

350. See e.g. Wilson v. Sisco, 713 A.2d 923, 924(Del. 1998) (State supreme court held that the correct standard of review of the trial judge's interpretation of the meaning of an element of the evidence rule regulating admission of convictions to impeach is a de-novo review of a matter of law. The assertion and use of this standard by the Delaware Supreme Court can be contrasted with its inappropriate use several times of the abuse of discretion standard in cases decided within a few years of Wilson.

351. See e.g. State v. Eugene, 536 N.W.2d 692, 696(N.D., 1995) (sanctioned admission of similar crime convictions (here drug possession and an escape conviction). The dissenting judge, Id. at 697, strongly argued that harmless error rule should be used very sparingly when the trial judge has erroneously admitted felony convictions to impeach the accused. He asserted that such admissions are intrinsically prejudicial. Judge noted in only two prior decisions had the court used harmless error doctrine as basis to refuse to reverse a conviction when such prior convictions were erroneously admitted ostensibly solely for purpose of impeaching the accused); and State v. Taylor, 993 S.W.2d 33, 35(Tenn., 1999) (despite ruling trial judge had erroneously authorized the prosecution to impeach the accused's potential trial testimony with seven felonies for crimes of dishonesty, the court conclusionarily asserted that the facts in the trial record demonstrated that the error was harmless. Accused did not testify at trial)
352. See supra notes 98, 278, and 326 - 327, and accompanying text.