Winter 1-1-2021

Caracter, Credibility, and Rape Shield Rules

R. Michael Cassidy
Boston College, michael.cassidy@bc.edu

ARTICLES

Character, Credibility, and Rape Shield Rules

R. MICHAEL CASSIDY*

ABSTRACT

Rape shield laws have played an important role in protecting complainants and jurors from some of the most pernicious and ill-founded assumptions about sexual autonomy and consent. Yet the development and application of these rules have left many thorny questions. The policy debate has now shifted from whether and how the accuser's prior sexual conduct should be admitted to prove consent or lack of credibility due to what was once termed "unchastity" (now universally condemned and rightly prohibited) to whether and how the accuser's prior sexual conduct should be admitted to support a more specific and logically relevant argument for dishonesty. That is, when prior sexual conduct itself involves dishonest behavior, the defendant is not offering the prior incident to support a general character trait for mendacity because the complainant has been sexually active; rather, the defendant is arguing that the complainant has a character trait for untruthfulness because the accuser has lied. One narrow but critical question we need to confront as evidence and rape law progress during the "Me Too" movement is whether the jury, in assessing a complainant's credibility in a rape prosecution, should be allowed to hear about prior false allegations of sexual assault made by the accuser.

This article focuses on rape shield rules throughout the United States, highlighting how these evidence rules have been stretched beyond their original purpose to prevent a defendant from raising incidents in the accuser's sexual history that may be highly pertinent to a jury's determination of who they should believe. Specifically, it addresses limitations courts have placed on inquiring into prior false allegations (PFA) of sexual assault by the accuser to prove lack of credibility in the present case. The author argues that some courts in the United States have mistakenly weighed the accuser's privacy interests and the court's interests in protecting the jury from being confused or misled ahead of the defendant's fundamental right to a fair trial.

The thesis of this article is that interpreting rape shield rules to require the exclusion of prior false allegations of rape jeopardizes the ascertainment of the truth. Yet the state of the law at the intersection of prior false allegation evidence, rape shield rules and the Sixth Amendment protections for confrontation

---

* Professor and Dean's Distinguished Scholar, Boston College Law School. I am grateful for the research and editing assistance of Sean Fishkind (BC Law 2020), Joseph Archambeau (BC Law 2021), and Taylor Vitelli (BC Law 2022). My colleague Mary Ann Neary in the Boston College Law Library was very generous to us in providing guidance and direction in source collection.

and compulsory process leaves the admissibility of this particular type of evidence highly contested and uncertain. The confusing and in places incoherent state of the case law on PFA—both definitional and procedural—underscores the need for a clarity that only a legislative solution can provide. This article proposes a "next wave" of reform of rape shield rules that specifically addresses this form of proof, and that appropriately balances the interests of victims, defendants, and the judicial process.

TABLE OF CONTENTS

INTRODUCTION

Harvey Weinstein's conviction and sentencing on charges of third-degree rape and aggravated sexual assault were heralded as "landmark" and "watershed" moments in the "Me Too" movement.[1] Women finally became free to come forward to speak their truths about sexual violence and oppression, prosecutors became more willing to bring charges in difficult cases, and juries became more willing to believe victims and hold the powerful accountable.

1. *Full Coverage: Harvey Weinstein is Found Guilty of Rape*, N.Y. TIMES (Feb. 24, 2020), https://www.nytimes.com/2020/02/24/nyregion/harvey-weinstein-verdict.html [https://perma.cc/GQ4H-WAHT]; Jan Ransom, *Harvey Weinstein's Stunning Downfall: 23 Years in Prison*, N.Y. TIMES (Mar. 11, 2020), 11, 2020), 11, 2020), https://www.nytimes.com/2020/03/11/nyregion/harvey-weinstein-sentencing.html [https://perma.cc/A3XX-WMDM].

This debate about what it means to "believe women," which has now become a rallying cry of the "Me Too" movement,[2] extends beyond the courtroom. The public's attention has recently been consumed by allegations of sexual assault against several high-profile public figures. Christine Blasey Ford's allegations of sexual assault against then-Supreme Court nominee Brett Kavanaugh in 2018,[3] as well as former Senate intern Tara Reade's allegations of sexual assault against then-Presidential candidate Joe Biden in 2020,[4] are reminders that the question of when and why to believe sexual assault allegations can be both excruciating and highly divisive. It is tautological to say "we believe survivors,"[5] because the complainant is only a survivor if her claim of victimization is truthful. The war cry "believe women" is seen by some as a necessary corrective to a historic injustice and by others as dangerous ideological orthodoxy if "believe women" becomes "believe all women."[6] Indeed, just months after Tara Reade's allegations against President Biden were first broadcast on March 26, 2020,[7] it was revealed that Reade fabricated both a college degree and a subsequent visiting faculty position at Antioch University.[8] Would the public be warranted in taking those fabrications into account in evaluating Reade's credibility? Would a jury?

At least in the courtroom, we do not hastily or reflexively conclude that all sexual assault allegations are true.[9] On the contrary, the presumption of innocence

---

2. Morgan Gstalter, *Dating App Bumble Publishes Full-Page Ad in NY Times: 'Believe Women'*, THE HILL (Sept. 28, 2018), https://thehill.com/blogs/blog-briefing-room/news/408946-female-driven-dating-app-bumble-publishes-full-page-ad-in-the [https://perma.cc/CDR2-DLDW]; Marie Solis, *When Believing Women Isn't Enough to Help Them,* VICE (Oct. 9, 2018), 9, 2018), 9, 2018), https://www.vice.com/en_us/article/gyemm3/when-believing-women-isnt-enough-to-help-them [https://perma.cc/9KW5-5GEZ].

3. Sheryl Gay Stolberg, *Kavanaugh's Nomination in Turmoil as Accuser Says He Assaulted Her Decades Ago*, N.Y. TIMES,(Sept. 16, 2018), https://www.nytimes.com/2018/09/16/us/politics/brett-kavanaugh-christine-blasey-ford-sexual-assault.html [https://perma.cc/XBH8-J7W7].

4. Jim Rutenberg, Stephanie Saul & Lisa Lerer, *Tara Reade's Tumultuous Journey to the 2020 Campaign*, N.Y. TIMES (May 31, 2020), https://www.nytimes.com/2020/05/31/us/politics/tara-reade-joe-biden.html [https://perma.cc/3ZRX-ZW94].

5. Tarana Burke (@taranaburke), TWITTER (Sept. 27, 2018, 10:11AM), https://twitter.com/TaranaBurke/status/1045314888560717824?s=20 [https://perma.cc/SQV9-6ZDC].

6. Bari Weiss, Opinion, *The Limits of 'Believe All Women'*, N.Y. TIMES (Nov. 28, 2017), https://www.nytimes.com/2017/11/28/opinion/metoo-sexual-harassment-believe-women.html [https://perma.cc/LF6S-LRQH].

7. *See the Katie Halper Show*: *Biden Accuser Tara Reade: "I wanted to be a senator; I didn't want to sleep with one"*, APPLE PODCASTS (Mar. 26, 2020), https://podcasts.apple.com/us/podcast/biden-accuser-tara-reade-i-wanted-to-be-senator-i-didnt/id1020563127?i=1000469598310 [https://perma.cc/7REM-E7QE].

8. Amber Phillips, *New Reporting Puts Focus on Tara Reade's Inconsistencies*, WASH. POST (May 23, 2020), https://www.washingtonpost.com/politics/2020/05/23/reporting-tara-reade-credibility/ [https://perma.cc/H8MC-H6EW].

9. In this article I use the terms "complaining witness," "complainant," and "accuser" to refer to the alleged rape victim. Using these terms, rather than the increasingly common "victim," gives respect to the presumption of innocence. Moreover, it seems particularly appropriate in an article focusing on the jury's credibility determinations in difficult sexual assault cases. Where pronouns are necessary, I will use the pronouns "she" or "her" to refer to the complainant and "he" or "him" to refer to the defendant. These pronouns are not intended to imply that men cannot be raped or that women cannot perpetrate

and the government's burden of proof beyond a reasonable doubt in all criminal cases remind us that jurors have an obligation to weigh the credibility of accusers very carefully. Indeed, a defendant must be given leeway to cross-examine alleged victims to establish that they may be mistaken in their memory of historical events, that they might have a motive to fabricate claims, or that alcohol or narcotics may have clouded their perception. All members of society must be conditioned to listen with care and compassion when complainants bring forth accusations of sexual assault so that we do not apply subconscious stereotypes or biases to reflexively discredit them. But as the "Me Too" movement grows, it is essential that bedrock protections for the accused not be eroded in a way that predetermines a defendant's guilt.[10]

Most rape cases are not "whodunits" where identity is an issue. They involve interactions between two or more people who are known to each other from previous interactions—so-called "acquaintance rape" situations—where the issue is *what* happened, not by whom. Sexual assaults typically occur in private; it is rare that they are witnessed by third-parties, and alleged attacks often leave little medical evidence or physical injury.[11] The determinative issues in these types of rape cases are the victims' consent and the defendants' *mens rea*. Where there are no injuries[12] and where the defense is either non-occurrence or consent, the credibility of the accuser is especially central to the jury's verdict.

Concerning "rape shield" rules, the policy debate in this country has now shifted from whether and how the accuser's prior sexual conduct should be admitted to prove consent or lack of credibility due to so-called "unchastity" (now universally condemned and rightly prohibited) to whether and how the accuser's prior sexual conduct should be admitted to support a more specific argument for mendacity. We are well past the days when judges were allowed to admit evidence of prior sexual conduct to suggest a general character trait for either promiscuity or untruthfulness—the so-called "twin myths" about sexual history that

---

sexual assaults; rather, they are chosen to reflect the genders of parties most frequently described in the caselaw. Moreover, statistical data shows that most victims of sexual assault are female and most perpetrators are male. *See* MICHELE C. BLACK ET AL., NAT'L CTR. FOR INJURY PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMERY REPORT 1, 2-3 (2011), https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf [https://perma.cc/PH4P-BJ9J].

10. In fact, the Harvey Weinstein verdict suggests that the jury did not fully credit the testimony of one "prior bad act" witness, *Sopranos* actress Anabella Sciorra, which would have formed the basis for the second or subsequent commission of forcible rape necessary to prove the higher felony of predatory sexual assault, a crime for which Weinstein was acquitted. Shayna Jacobs, *Harvey Weinstein Guilty on Two Charges, Acquitted on Others in New York Sexual Assault Case*, WASH. POST Feb (Feb. 24, 2020), https://www.washingtonpost.com/lifestyle/harvey-weinstein-trial-verdict/2020/02/24/057b9f36-5284-11ea-b119-4faabac6674f_story.html [https://perma.cc/2DZN-7QAD]. *See* N.Y. PENAL LAW § 130.95 (McKinney 2019).

11. FIONA E. RAITT & M. SUZANNE ZEEDYK, THE IMPLICIT RELATION OF PSYCHOLOGY AND LAW: WOMEN AND SYNDROME EVIDENCE 91 (2000).

12. Because often and understandably the rape victim does not aggressively fight back due to fear or overpowerment, there may be little medical or forensic evidence on the body of the victim (bruising, bleeding, swollen eyes or limbs, etc.) that would rebut consent.

rape shield rules were purposely designed to overcome.[13] But less commonly, prior sexual conduct might itself involve dishonest behavior and therefore demonstrate mendacity in a more targeted way. For example, a rape complainant may previously have engaged in consensual sexual activity with another resident of a foster home and thereafter, fabricated a sexual assault charge in order to be removed from that placement, subsequently recanting. Offering such evidence is not intended to show that the accuser has a character trait for untruthfulness because she is promiscuous, but rather that she has a character trait for untruthfulness because she has lied. One narrow but critical question we need to confront during the "Me Too" movement is whether the jury should be allowed to hear about prior false allegations of sexual assault in assessing a complainant's credibility.

This article will focus on rape shield doctrines throughout the United States and how they have been stretched beyond their original purpose to prevent a defendant from discussing incidents in the accuser's sexual history that may be highly pertinent to a jury's determination of what happened on the date in question. Specifically, I will address limitations that courts have placed on inquiring into prior false allegations (PFA)[14] of sexual assault by the accuser to prove a lack of credulity in the present case. I will argue that some courts in the United States have mistakenly determined that the accuser's privacy interests and the court's interests in protecting the jury from confusion outweigh the defendant's fundamental right to a fair trial. I will propose a "next wave" of reform of rape shield rules—reforms which would specifically address prior false allegation evidence and appropriately balance the interests of witnesses, defendants, and the judiciary.

The thesis of this article is that interpreting rape shield rules to require the exclusion of prior false allegations of rape jeopardizes the ascertainment of truth. Yet, the confusing state of the law at the intersection of PFA evidence and rape shield rules leaves the admissibility of this particular type of evidence highly contested and uncertain. Questions surrounding the admissibility of PFA evidence sometimes doom a prosecution before it starts,[15] thus putting substantial discretion in the hands of prosecutors, rather than in the hands of judges and jurors. The confusing and indeed incoherent state of the case law on PFA—both definitional

13. Claire McGlynn, *Rape Trials and Sexual History Evidence: Reforming the Law on Third Party Evidence*, 81 J. CRIM. L. 367 (2017).

14. Throughout this article, I will use the term "prior" false allegation of sexual assault. For purposes of impeaching the credibility of a complaining witness, the legal significance of a false allegation of sexual assault is the same whether it occurred (as is most typical) prior to the event currently being litigated, or between the time of the event currently being litigated and the time of trial.

15. In 2011, the Manhattan District Attorney dropped rape charges against former IMF Director Dominique Strauss- Kahn that accused him of sexually assaulting a hotel housekeeper, noting publicly that one reason it had lost faith in the credibility of the victim was that she had falsely claimed to have been gang raped in Guinea in her application for asylum in the United States. John Eligon, *Strauss-Kahn Drama Ends With Short Final Scene*, N.Y. TIMES (Aug. 23, 2011), https://www.nytimes.com/2011/08/24/nyregion/charges-against-strauss-kahn-dismissed.html [https://perma.cc/33SU-PHYZ].

and procedural—underscores the need for clarity that only legislation can provide. Legislative action to revise rape shield rules to specifically address prior false allegation evidence would constrain judicial discretion and make outcomes more predictable and uniform. My recommendations in this article will strengthen rape shield protections by making results more predictable and will ensure that PFA evidence is governed by the same strict notice and pre-trial hearing provisions that are designed to protect complainants from public exposure of their sexual histories.

I. THE PROBLEM

Imagine a thirty-two-year-old complainant who alleges that a co-worker attacked and raped her on a business trip. The assault allegedly occurred in the complainant's hotel room, where she had invited the co-worker for a drink after a successful business meeting and dinner. The alleged victim reported to the police the day following the incident that the co-worker forced himself on her, pinned her to a bed, and forcefully penetrated her despite verbal protests. The co-worker's defense is consent and/or reasonable mistake of fact as to consent; that is, that the two engaged in mutual kissing and foreplay, that the complainant behaved in a manner that suggested to the defendant her affirmative consent to sex, and that she never verbally resisted.

During a pre-trial investigation, a private investigator for the defense attorney learned that three years earlier, the complaining witness had brought an allegation of sexual assault against a former co-worker at another company. The complainant reported sexual harassment and sexual assault to human resources, alleging that the co-worker frequently made inappropriate sexual comments to her, brushed up against her, and touched her inappropriately. She specifically alleged that her co-worker pinned her against a filing cabinet, forcibly kissed her, groped her under her clothing, and digitally penetrated her when they were alone in the office. Three days after first reporting this behavior to human resources and after human resources conducted a threshold investigation, the complainant withdrew the allegation of sexual assault. She admitted that she had fabricated the sexual harassment and assault complaint against her co-worker because she was angry that he had abruptly ended their two-year extramarital affair. The complainant declined to pursue any criminal charges with the police and instead, voluntarily resigned her position at the company with a severance package and nondisclosure agreement.

Assuming that charges in the hotel incident are filed by a prosecutor and that these charges proceed to trial, the defendant co-worker would seek to cross-examine the complainant about her prior false accusation of sexual assault to raise doubts about her credibility. While the prior fabrication is certainly not dispositive that the current allegation is false, the incident suggests credibility defects that the defense attorney would want to explore. This problem raises both evidentiary and constitutional issues. Is such cross-examination a permissible form of character attack? If so, is it limited by rape shield protections? If the

answer to the second question is yes, does the rape shield rule interfere with the defendant's Sixth Amendment rights to confrontation and compulsory process? Each of these questions is as layered and complex as the next, and the inconsistency across both federal and state jurisdictions in this area has created unpredictable results in a prosecutor's decision whether to bring charges, the trial judge's decision whether to admit evidence, and caselaw on appellate review. This article will delve deeply into these questions, as well as advocate for a new wave of rape shield reform that specifically addresses prior false accusation evidence. My proposed reform would give guidance to judges and prosecutors, safeguard the fundamental constitutional rights of the accused, and provide procedural protections for complaining witnesses.

II. OVERVIEW OF STATE AND FEDERAL RAPE SHIELD RULES IN THE UNITED STATES

Rape shield statutes are designed to limit a court's discretion to admit evidence of the complainant's prior sexual behavior. State legislatures began adopting rape shield laws in the 1970s following the sexual revolution and the women's rights movements, recognizing the modern fallacy of assuming that simply because a complainant had consented to sex with someone else that she was more likely to have consented to sexual intercourse with the defendant on the date in question or was more likely to have lied about it under oath.[16] Whereas character evidence of an alleged victim in other types of criminal cases could be admitted through reputation or opinion evidence under the so-called "mercy rule,"[17] character evidence of sexual assault complainants was now specifically excluded in order to protect the privacy of the accuser, protect against unfair prejudice, and encourage the reporting of rape.[18] These statutes were designed to dispel "twin" myths: that "unchaste" women were considered more likely to consent to sex[19] and that they were more likely to lie about it later.[20] Additional policy interests underlying rape shield rules included preventing the jury from determining guilt or innocence on

16. Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO.WASH. L. REV. 51, 53–55 (2002).

17. *See, e.g.*, FED. R. EVID. 404(a)(2).

18. Some studies suggest that as few as one-third of sexual assaults are ever reported to police. RAINN, THE CRIMINAL JUSTICE SYSTEM: STATISTICS, https://www.rainn.org/statistics/criminal-justice-system (last visited June 5, 2020) [https://perma.cc/FTR5-T3EV]. Top reasons for nonreporting include lack of trust in the criminal justice system, fear of not being believed, humiliation, concern for other people's reactions, and self-blame.

19. Before the enactment of rape-shield rules, many courts presumed that if the complainant had prior consensual experiences outside of marriage she was more likely to have consented to sexual intercourse with the defendant on the date in question: "[A]lthough the body of a harlot may, in law, no more be ravished than the person of a chaste woman, nevertheless it is true that the former is more likely than the latter voluntarily to have yielded." Lee v. State, 179 S.W. 145, 146 (Tenn. 1915).

20. In 1953, a panel of the 8th Circuit Court of Appeals affirmed the relevance of a rape complainant's prior consensual sexual activity on the issue of credibility, reasoning that the complainant's "story of having been raped would be more readily believed by a person who was ignorant of any former unchaste conduct on her part than it would be by a person cognizant of the unchaste conduct defendants offered to prove against her." Packineau v. United States, 202 F.2d 681, 685 (8th Cir. 1953).

the basis of the alleged victim's sexual history; sheltering alleged victims from humiliation, invasion of privacy, and psychological damage from testifying; and encouraging the reporting of rape offenses.[21] However, courts have grappled with whether and how these same policy considerations apply to sexual conduct in the accuser's past that itself involves dishonesty.

A. Federal Rules of Evidence 608(b) and 412

In the unlikely event that our hypothetical rape case were prosecuted in federal court—say, for example, that the assault occurred on federal property or tribal land—the admissibility of evidence of the prior recanted sexual assault allegation would turn on the intersection between Federal Rules of Evidence (FREs) 608(b) and 412.

Normally, a litigant is entitled to impeach a witness to show a character trait for dishonesty under Rule 608(b) if the litigant has a good faith basis to believe that the witness committed a dishonest act in the past. However, one critical limitation on this form of character attack is that the litigant is stuck with the answer.[22] In our hypothetical—putting aside Rule 412 for the moment—the defense attorney could ask the complainant whether she fabricated an allegation of sexual assault against a co-worker three years prior to the incident in question, but if the witness denies the fabrication, the defense could not call any witnesses (human resources officer, co-worker) to prove the allegation or the recantation. This is one of the concessions the federal rules make to character forms of credibility impeachment. Rule 608(b) recognizes that while it is important for the jury to hear about prior acts of dishonesty in order to assess a witness's credibility, it is not worth an extended sidetrack into collateral evidence to prove that act of dishonesty, as that would create a trial within a trial and distract the jury from the main factual question at issue.

In our example, however, the Federal Rape Shield Rule may trump Rule 608 (b). Rule 412 prohibits the introduction of a sexual assault complainant's "sexual behavior" or "sexual predisposition" in criminal cases, except in three very limited circumstances: other sexual acts with the defendant to show consent, sexual acts with others to show an alternative source of injury or pregnancy, and evidence of other sexual acts or predisposition the exclusion of which would violate the "constitutional rights" of the defendant. The mandatory "shall not be admitted" language in Rule 412 directs that the federal rape shield rule, where it applies, trumps other rules, including Rule 608(b). Legislative history reflects this true "shield" nature of the rule but provides the trial judge with discretion under Rule 403 to bar evidence the probative value of which is substantially

21. Rosanna Cavallaro, *Rape Shield Evidence and the Hierarchy of Impeachment*, 56 AM. CRIM. L. REV. 295, 302 (2019).

22. The defendant in our hypothetical could also call a "character" witness under Rule 608(a) to testify that the complainant has a general reputation for dishonesty, but that witness is prohibited from testifying to his knowledge of specific instances of conduct by the complainant, and is limited to testifying in the form of reputation or opinion generally. *See* FED. R. EVID. 404(a), 608(a).

outweighed by its prejudicial effect[23]—even if it meets one of the first two exceptions in Rule 412(b)(1).[24]

When does a prior false allegation of sexual assault involve "other sexual behavior" of the complainant? This is an essential question, because—as we saw above—if the rape shield rule *does not apply*, then the evidence will likely be admitted on cross examination of the complainant under Rule 608(b). But if the rape shield rule *does apply*, then the evidence will likely be excluded unless constitutionally required. Courts have struggled with this difficult question.[25] If a prior false allegation involves a completely fabricated encounter, a court may conclude that the rape shield rule is simply not implicated because inquiry into the allegation will not explore the prior sexual behavior of the complainant (although sexual fantasies of rape arguably entail "predisposition").[26] But if a prior false allegation suggests that the complainant subsequently and falsely alleged that a *consensual sexual encounter* was forcible, inquiry into the prior allegation will certainly expose some prior sexual behavior of the complainant.[27] Moreover, there are gray areas between these two extremes. For example, in our problem above, if the defense contends that the complainant's motive for falsely accusing her former co-worker of sexual assault was retribution for his decision to end a mutual extra-marital sexual relationship, the incident surely would expose the complainant's "sexual behavior." For this reason, a number of federal courts have ruled that prior false allegations of rape fall under the protections of the rape shield rule.[28]

---

23. The relevant portion of the legislative history of Rule 412 (enacted by Congress rather than the Rules Committee) is contained in the debate on October 10, 1978 in the House of Representatives preceding passage of H.R. 4727 in which Congresswoman Elizabeth Holtzman (New York) made clear that Rule 403 was intended to provide a discretionary backstop to Rule 412. 124 CONG. REC. 34, 913 (1978) (statement of Rep. Holtzman). Federal courts uniformly rule that Rule 403 survives enactment of Rule 412 where the evidence concerns other sexual behavior or sexual predisposition of the complainant. *See* United States v. Brown, 2020 WL 2538889 at *3 (10th Cir. 2020); United States v. Pumpkin Seed, 572 F.3d 552, 558–59 (8th Cir. 2009); United States v. Begay, 937 F.2d 515, 521–22 (10th Cir. 1991).

24. Of course, if evidence is constitutionally required to be admitted under Rule 412, the judge lacks discretion to exclude it on the basis of prejudice.

25. Kassandra Altantulkhuur, Note, *A Second Rape: Testing Victim Credibility Through Prior False Accusations*, 18 U. ILL. L. REV. 1092, 1103 (2018).

26. *See, e.g.*, United States. v. Stamper, 766 F. Supp. 1396, 1399 (W.D.N.C. 1991); State v. Barber, 766 P.2d 1288, 1299 (Kan. Ct. App. 1989); Miller v. State, 779 P.2d 87, 89 (Nev. 1989). *Cf.* Holley v. Yarborough, 568 F.3d 1091 (9th Cir. 2009).

27. *See, e.g.*, United States v. Cardinal, 782 F.2d 34 (6th Cir. 1986); Bond v. State, 288 S.W.3d 206, 210 (Ark. 2008); Carter v. State, 451 N.E.2d 639 (Ind. 1983).

28. *See* United States v. A.S., 939 F.3d 1063, 1075 (10th Cir. 2019); Boggs v. Collins, 226 F.3d 728 (6th Cir. 2000); United States v. Withorn, 204 F.3d 790, 795 (8th Cir. 2000). In a 2006 article, Professor Jules Epstein argued that rape shield rules simply are not implicated at all by prior false allegations of sexual assault. Jules Epstein, *True Lies: The Constitutional and Evidentiary Basis for Admitting False Accusation Evidence in Sexual Assault Prosecutions*, 24 QUINN. L. REV. 609, 652 (2006). I think this argument is overstated for two reasons. First, Epstein's argument that sexual conduct has not occurred in these situations is not always true—in many cases, sexual conduct *has* occurred, but it was consensual and the complainant is fabricating the nature of the conduct. Second, Epstein's argument that by making

B. State Approaches to Character for Dishonesty

One initial problem with attempting to categorize and assess state approaches to prior false accusation evidence is that not all states follow FRE 608(b) and allow character impeachment of a witness by cross examination for prior acts of dishonesty. In fact, a rather large minority of states in the U.S. do *not* allow this form of impeachment accepted in federal court. Alaska, California, Florida, Illinois, Kansas, Louisiana, Massachusetts, Oregon, Pennsylvania, and Texas do not allow impeachment by prior acts of dishonesty.[29] Evidence of prior dishonest acts is inadmissible in these states unless: (1) the state rape shield rule specifically accounts for prior false accusation evidence in its list of exceptions to the admissibility of prior sexual behavior of the victim; (2) the state supreme court adopted some common law recognition of the right to cross examine on prior false accusation evidence; or (3) the court recognizes a constitutional right to engage in such cross examination under the Sixth Amendment Confrontation or Compulsory Process Clauses.

In Massachusetts, a state where prior acts of dishonesty are inadmissible on cross examination to expose a witness's trait for dishonesty, the Supreme Judicial Court nonetheless carves out a narrow exception for certain prior false allegations of sexual assault. In *Commonwealth v. Bohannon*,[30] the court reversed a defendant's conviction for kidnapping and forcibly raping a thirty-year-old mentally disabled hitchhiker where defense counsel was precluded from asking the complainant on cross examination whether she made false allegations of rape after being taken to the hospital on several prior occasions. The court emphasized that: consent was the central issue in the case; there were no witnesses on the issue of consent other than the alleged participants; and the complainant's trial testimony was inconsistent and confused.[31] In these factual circumstances, the court decided that the rule against impeachment by prior acts of dishonesty was not "inflexible"[32] and that crafting a narrow exception to this prohibition was necessary to protect the defendant's right to present a full defense. Although the court cited *Chambers v. Mississippi*[33] in its reasoning, it did not explicitly ground its opinion in constitutional protections for the accused under either the federal or state

---

false accusations about sexual assault a complainant somehow forfeits the privacy interests that rape shield rules seek to protect assumes that these allegations are always made publicly. In many cases, however, they are made privately to family members, friends, or employers rather than to law enforcement officials. *Id.* In our problem above, for example, it is difficult to argue that our complainant forfeits her interest in not having an extra marital affair aired in a public courtroom because she complained about a co-worker's behavior to a human resources representative in the privacy of a corporate office.

29. ALASKA R. EVID. 608; CAL. EVID. CODE § 787; FLA. STAT. § 90.609 (2019); ILL. R. EVID. 608; KAN. STAT. ANN. § 60-422(d) (2016); LA. CODE EVID. art. 608(b); MASS. GUIDE EVID. 608; OR. REV. STAT. § 40.350 (2019); PA. R. EVID. 608(b)(1); TEX. R. EVID. 608.

30. Commonwealth v. Bohannon, 376 Mass. 90 (1978).

31. *Id.* at 95.

32. *Id.* at 94.

33. Chambers v. Mississippi, 410 U.S. 284 (1973). *See infra* note 63 and accompanying text.

constitution.[34] Moreover, it expressly limited its reasoning to situations where the defendant had a good faith basis in independent evidence to believe that a prior rape accusation had been made and that it was false and where the evidence did not implicate the rape shield rule by inviting the jury to decide consent based on the victim's prior sexual behavior.[35] After retrial, conviction, and further appeal, the court clarified in *Bohannon II* that even extrinsic evidence to prove a prior false allegation of rape is admissible where the witness denies the same under oath,[36] thereby going one step beyond FRE 608(b).

At least two states that do follow 608(b) (and allow cross examination but not extrinsic evidence of prior acts of dishonesty) have nonetheless created an exception for rape cases and like Massachusetts, allow both cross examination and extrinsic proof of prior false allegations of sexual assault. In *Miller v. State*, the Nevada Supreme Court ruled that prior false allegation evidence was not governed by the rape shield rule. Nonetheless, because the prior false allegations were so highly probative of truthfulness, the court determined that the defense "may cross-examine a complaining witness about previous fabricated accusations, and if the witness denies making the allegations counsel may introduce extrinsic evidence to prove that, in the past, fabricated charges were made."[37] Similarly, in *People v. Mikula*,[38] the Michigan Court of Appeals ruled that a defense attorney may cross examine a rape complainant regarding prior false rape accusations, and if the complainant denied making such charges or denied that they were false, the defendant may introduce extrinsic evidence. In carving out an exception to state evidentiary rules on character impeachment for sexual assault cases, both the Nevada and Michigan courts joined the Massachusetts

34. In *Commonwealth v. Lavelle*, the Supreme Judicial Court in Massachusetts seemed to clarify that *Bohannon* was a common law ruling, suggesting that its narrow exception to the prohibition of using prior acts of dishonesty to impeach was created "in special circumstances" to further "the interests of justice." 414 Mass. 146, 151 (1993).

35. *Bohannon*, 376 Mass. at 95. The Massachusetts Appeals Court interprets *Bohannon* to require 1) evidence of actual falsity of the prior claim—such as a recantation by the complainant or her admission of falsity to a third party—rather than simple unwillingness to press charges or refutation by the defendant (*see* Commonwealth v. Wise, 39 Mass. App. Ct. 922, 923 (1995); Commonwealth v. Hicks, 23 Mass. App. Ct. 487, 491 (1987)); and, 2) sufficient temporal proximity between the prior allegation and the current charge. *See* Commonwealth v. Nichols, 37 Mass. App. Ct. 332, 335 (1994) ("[I]t is surely important that the collateral allegation be proximate in time to the primary accusation against the defendant, but the collateral allegation has no less bearing on the credibility of the accusing witness if made after the primary allegation."). There is some language in Massachusetts Appeals Court opinions stating that a "pattern" or prior false allegations is also required, suggesting more than a single isolated occurrence. *See Hicks*, 23 Mass. App. Ct. at 490; Commonwealth v. Doe, 8 Mass. App. Ct. 297, 302 (1979). This unfortunate pattern language seems to have been derived from dicta in *Lavelle*, 414 Mass. at 146, which noted that the defendant in *Bohannon* had hospital records reflecting more than one prior false allegation. *See Bohannon*, 376 Mass. at 93. The Supreme Judicial Court in Massachusetts has never specifically opined on the question of whether evidence of *one* prior false allegation is sufficient to invoke the *Bohannon* rule.

36. Commonwealth v. Bohannon, 385 Mass. 733, 745 (1982). The Court nonetheless ruled that it was not error to exclude the hospital records where they did not satisfy a state hearsay exception. *Id.*

37. Miller v. State, 779 P.2d 87, 89 (Nev. 1989).

38. People v. Mikula, 269 N.W.2d 195, 198–99 (Mich. Ct. App. 1978).

court in relying on principles of fundamental fairness and on the court's general superintendence powers over the lower courts, rather than on express constitutional protections for the accused.[39]

C. State Rape Shield Rules and Prior False Accusation Evidence

As discussed above, the general approach of state rape shield rules is to prohibit evidence of either a complainant's reputation for sexual behavior or her specific prior sexual conduct as a way of proving lack of credibility or consent on a particular occasion. Beyond this commonality, state rape shield rules then diverge in their protections and can roughly be categorized into three groups.[40] By far, the largest number of states (what have been termed the "categorical" jurisdictions[41]) track the approach of FRE 412 and create specific categories of exceptions to those general prohibitions, plus a notice and *in camera* hearing procedure.[42] A slightly smaller number of states (what I will term the "contextualized discretion" states) only provide for a notice and hearing process, plus a modified balancing test requiring the judge to determine that the probative value of the evidence (to prove some non-prohibited inference) outweighs its prejudicial effect.[43] The smallest group of states distinguishes between evidence to prove credibility and evidence to prove consent, disallowing one and allowing the other but only in very strict circumstances.[44]

Most state rape shield rules are simply *silent* on the subject of false allegations of sexual assault. States that follow the "categorial" approach, like FRE 412,

---

39. *Id.* at 199; *Miller*, 779 P.2d at 89.

40. For a helpful but now somewhat dated taxonomy of state rape shield laws, see Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 812–83 (1986); see also NATIONAL DISTRICT ATTORNEY'S ASSOCIATION NATIONAL CENTER FOR PROSECUTION OF CHILD ABUSE, STATE RAPE SHIELD STATUTES, https://ndaa.org/wp-content/uploads/NCPCA-Rape-Shield-2011.pdf (database updated March, 2011) [https://perma.cc/8jz4-7mcp].

41. Galvin, *supra* note 40, at 812.

42. *See, e.g.*, ARIZ. REV. STAT. § 13-1421 (2020); COLO. REV. STAT. § 18-3-407 (2020); MD. CODE ANN. CRIM. LAW § 3-319(c) (2020); MASS GEN. LAWS ch. 233, § 21B (2020); MICH. COMP. LAWS ANN. § 750.520j (West 2020); MINN. STAT. § 609.347 (2020); N.J. STAT. § 2C:14-7 (2020); N.Y. CRIM. PROC. LAW § 60.42 (McKinney 2020); TX. R. EVID. 412 (2020); WIS. STAT. § 972.11 (2020).

43. *See, e.g.*, ALASKA STAT. ANN § 12.45.045 (2019); ARK. CODE ANN. § 16-42-101 (2018); KAN. STAT. ANN. § 21-5502 (2016); N.M. STAT. ANN. § 30-9-16 (2015); R.I. GEN. LAWS § 11-37-13 (2010); WYO. STAT. ANN. § 6-2-312 (2019).

44. *Compare* CAL. EVID. CODE §§ 782, 1103 (allowing a victim's prior sexual conduct to prove credibility—provided notice and hearing and subject to a regular 403-type balancing test—but not allowing the same to prove consent unless it involves prior conduct with the defendant), *and* DEL. CODE ANN. tit. 11, §§ 3508, 3509 (2017) (where any evidence of alleged rape victim's prior sexual conduct to prove credibility requires notice and hearing, and evidence of prior sexual conduct is not admissible to prove consent unless it is prior sexual conduct with the defendant), *with* NEV. REV. STAT. §§ 48.069, 50.090 (2014) (where no credibility proof by prior conduct for rape victim is admissible to prove consent unless—sometimes—the evidence satisfies the balancing test under the state version of 403 if also accompanied by notice and hearing), *and* WASH. REV. CODE § 9A.44.020 (2019) (excluding evidence of a rape victim's prior sexual conduct to prove credibility, but allowing it to prove consent if exclusion "would result in denial of substantial justice for defendant").

typically allow evidence of prior sexual conduct with the defendant to show consent and evidence of prior sexual conduct with another to prove source of injury or forensic specimens. Two additional categories of permissible evidence sometimes allowed in those majority jurisdictions include evidence to show bias or motive on the part of the complainant[45] and evidence to show a pattern or common scheme or plan by the complainant.[46]

Evidence of the complainant's prior false allegations of sexual assault is expressly accounted for in the rape shield rules of only eight jurisdictions. Six jurisdictions that follow the "categorical" approach expressly include prior false allegations of sexual assault in their list of exceptions describing when proof of the complainant's prior sexual behavior or conduct is permitted.[47] Colorado—which follows the categorical approach but allows only evidence of prior sexual conduct with the defendant to show consent and evidence of prior sexual conduct with another to show source of injury—creates a special notice and hearing procedure for all other allegedly relevant evidence related to the sexual history of the complainant. This procedure includes prior false allegations of sexual assault as admissible evidence under that section—so long as the defendant follows the required procedure and the court determines that the evidence is relevant and material.[48] None of the statutes in these seven states provides guidance or definition about what constitutes a prior false allegation; appellate courts in those jurisdictions have been left to determine what constitutes "falsity" on a case-by-case basis.[49]

Arkansas, which is a contextualized discretion state, takes a somewhat different approach. Evidence that the complainant made a prior false allegation of sexual assault against the defendant or another is presumptively *inadmissible* where either the complainant denies making the allegation or presently asserts that it was true.[50] In either of those situations, however, the defendant can rebut the presumption of inadmissibility through a pre-trial hearing by convincing the court that the allegation is relevant to a fact at issue and that its probative value outweighs its inflammatory or prejudicial nature.[51]

---

45. *See, e.g.*, MD. CODE ANN. CRIM. LAW § 3-319 (2020); VA. CODE ANN. § 18.2-67.7 (2010).

46. *See, e.g.*, FLA. STAT. § 794.022(2) (2010); MINN STAT. § 609.347 (2020).

47. ARIZ. REV. STAT. § 13-1421(A)(5) (2020) (standard of admissibility of all evidence within categorical exceptions is clear and convincing); IDAHO R. EVID. 412 (b)(2)(c); MIS. R. EVID. Rule 412 (b)(2)(c); OKLA. STAT. tit. 12, § 2412(B)(2) (2010); VT. STAT. ANN. tit. 13 § 3255(a)(3) (2020); WIS. STAT. § 972.11 (2020).

48. COLO. REV. STAT. § 18-3-407(2) (2020).

49. *See, e.g.*, State v. Gilfillan, 196 Ariz. 396 (2000); People v. Marx, 2019 WL 97003 at *8–9 (Colo. 2019); State v. Chambers, 2020 WL 3026325 at *8–10 (Idaho 2020).

50. ARK. CODE ANN. § 16-42-101(C) (2020). Under the Arkansas framework the prior false allegation is admissible without further inquiry if the complainant admits that she made it and admits that it was false.

51. State v. Kindall, 428 S.W. 3d 486, 489 (Ark. 2013) (explaining that "[t]he statute specifically precludes the admissibility of evidence of a victim's prior allegation of sexual conduct if the victim asserts that the allegation is true," but notwithstanding that exception, allows discretion if the judge deems evidence more probative than prejudicial). *See* Amanda B. Hurst, *The Arkansas Rape-Shield*

Given that so few states expressly account for prior false allegations of sexual assault in their rape shield rules, state appellate courts have either been proactive and fashioned common law doctrine in this area (as was the case in Massachusetts, Michigan and Nevada), or they have limited relief to those narrow situations where they believed that introduction of PFA was constitutionally compelled. As we will see below, however, Sixth Amendment doctrine in this area is far from clear.

III. CONSTITUTIONAL PROTECTIONS FOR THE ACCUSED

Federal Rule of Evidence 412(b)(1)(C) allows admission of evidence of the complainant's prior sexual behavior or predisposition if it is constitutionally required. This subsection is superfluous, of course, because constitutional guarantees always trump the protections of evidentiary rules. But FRE 412(b)(1)(C) serves as a reminder that a court may not limit introduction of evidence under the direction of rape shield protections if doing so would violate the defendant's 6th Amendment right to confront the witnesses against him,[52] his 6th Amendment right to call witnesses in his defense (the so-called "Compulsory Process" clause),[53] or his 5th Amendment right to Due Process.[54] "Whatever its source,"[55] however, this right to present evidence is not without limitations. The right "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. But restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve."[56]

In *Michigan v. Lucas*,[57] the defendant was convicted of third-degree sexual assault after a bench trial. He was precluded from offering evidence about his prior sexual relationship with the complainant, his ex-girlfriend, because he did not give the ten-day notice and offer-of-proof required by the Michigan rape

---

Statute: Does it Create Another Victim?, 58 ARK. L REV. 949, 980–82 (2006) (arguing that statute should not create a rebuttable presumption of truthfulness just because complainant does not admit falsity; defendant should be allowed to prove falsity in pre-trial hearing through other means).

52. *See* Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986) (holding that the trial court's refusal to permit defense counsel to ask prosecution witness on cross examination about government's agreement to dismiss criminal charge pending against him in an effort to show bias violated Sixth Amendment Confrontation Clause, and remanding for determination whether error was harmless beyond a reasonable doubt).

53. *See* Nevada v. Jackson, 569 U.S. 505 (2013) (per curiam) (holding that Nevada Rule 608(b), which allowed defendant to ask victim about prior recanted allegations on cross examination but did not allow defendant to prove them up by extrinsic evidence, did not violate the Compulsory Process Clause of the Sixth Amendment).

54. *See* Clark v. Arizona, 548 U.S. 735, 769 (2006) (stating that due process guarantees a defendant the right "to present evidence favorable to himself on an element that must be proven to convict him").

55. The Supreme Court recognized in *Rock v. Arkansas* that "[t]he right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution," including the Due Process Clause, Compulsory Process Clause, and Self-Incrimination Clause. 483 U.S. 44, 51–52 (1987).

56. *Id.* at 55–56 (internal citations omitted) (holding that Arkansas's per se rule prohibiting hypnotically refreshed testimony violated 6th and 5th Amendment protections because a more tailored rule would have adequately served state interests).

57. 500 U.S. 145 (1991).

shield rule.[58] The Michigan Court of Appeals reversed his conviction, finding that where the proof involves sex between the defendant and victim, there was little state interest to be served by the notice rule. Therefore, the court found, imposing the notice rule violated the defendant's 6th Amendment rights. The United States Supreme Court reversed, ruling that the appellate court's decision amounted to a *per se rule* allowing such evidence and that this was inconsistent with Supreme Court precedent.[59] According to the Supreme Court, "The Sixth Amendment is not so rigid."[60] A failure to comply with a rape shield rule's notice and offer-of-proof requirement "may in some cases justify even the severe sanction of preclusion,"[61] because trial judges retain wide latitude to limit evidence "based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness's safety, or interrogation that is repetitive or only marginally relevant."[62]

While *Michigan v. Lucas* suggests that the Supreme Court will defer to state rape shield rules, so long as they serve legitimate interests relating to the conduct of the proceedings, *Chambers v. Mississippi*[63] points exactly in the opposite direction, reminding us that the Court's deference to state evidentiary rules has its limits. In *Chambers,* the Court reversed the murder conviction of a defendant who was precluded from cross examining a witness about the fact that the witness had previously confessed to the killing in question and from calling other witnesses who had heard that same confession. The Court ruled that the state's hearsay rule refusing to recognize an exception for declarations against penal interest, coupled with its "voucher" rule prohibiting a litigant from impeaching a witness who was called affirmatively by that same litigant, together violated Due Process protections for the accused under the 5th Amendment.[64] Although the Court stated that its opinion was not a "diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures,"[65] it also cautioned that these rules may not be applied "mechanistically" to deprive the defendant of fundamental fairness.[66]

So far, the Supreme Court has offered very little guidance on the question of what type of evidence might be *disallowed* under rape shield rules but *required*

---

58. MICH. COMP. LAWS 750.520j (West 2020).

59. *Lucas*, 500 U.S. at 151. The Court has upheld notice provisions against constitutional attack in other situations. *See* United States v. Nobles, 422 U.S. 225 (1975) (Jencks Act disclosure of witness statements); Williams v. Florida, 399 U.S. 78 (1970) (notice of alibi). *See also* Taylor v. Illinois, 484 U.S. 400 (1988) (rejecting defendant's argument that the Compulsory Process Clause of the Sixth Amendment is violated where a state judge refused to allow an undisclosed witness to testify when the defendant violated a pretrial discovery rule).

60. *Id.* at 152.

61. *Id.* at 153.

62. *Id.* at 149 (quoting Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986)).

63. 410 U.S. 284 (1973).

64. *Id.* at 294.

65. *Id.* at 302–03.

66. *Id.* at 302.

under constitutional protections for the accused. Bias is clearly one constitutionally required line of impeachment. In *Davis v. Alaska*,[67] the Supreme Court ruled that an Alaska evidentiary rule prohibiting impeachment of a witness with a juvenile conviction violated the 6th Amendment's Confrontation Clause. There, the prime witness against the defendant in a burglary and larceny prosecution was a juvenile who was out on probation. The defendant sought to cross examine the witness, Green, with his conviction and probationary status in order to suggest that he harbored a bias toward the government because he feared that if he did not cooperate with the police, his probationary status might be revoked. The Court noted that Green was a "crucial witness" and that defendant's proposed cross examination was not a general character attack, but one designed to expose "possible biases, prejudices, or ulterior motives of the witness."[68] While *Davis* was not a case involving a state rape shield rule, it does suggest that any evidence of a complainant's prior sexual conduct which arguably gives rise to a bias against the accused or in favor of the government must be admitted.[69] For example, if a police officer is accused of raping a sex worker, the defendant might be constitutionally entitled to admit evidence that he had previously arrested the complainant on charges of prostitution to show why she might be biased against him.

Closely akin to bias, "motive to lie" is another constitutionally protected form of impeachment. In *Olden v. Kentucky*,[70] the Court ruled that exposure of a witness's motivation in testifying is "a proper and important function of the constitutionally protected right of cross-examination."[71] The Court reversed state court rape, kidnapping, and sodomy convictions because the defendant's Confrontation Clause rights under the 6th Amendment were violated. He was precluded from cross examining the complainant about her ongoing extramarital cohabitation with her boyfriend. The boyfriend observed her alight from the defendant's car

---

67. 415 U.S. 308 (1974).

68. *Id.* at 316. "The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.'" *Id.* (quoting 33 J. WIGMORE, EVIDENCE § 940, 775 (Chadbourn rev. 1970)). "The claim of bias which the defense sought to develop was admissible to afford a basis for an inference of undue pressure because of Green's vulnerable status as a probationer . . . as well as of Green's possible concern that he might be a suspect in the investigation." *Id.* at 317–18.

69. *See* Marion v. State, 590 S.W.2d 288, 290 (Ark. 1979) (acknowledging that the defendant was denied an effective cross-examination when he was barred from introducing evidence of bias that witness threatened to "get even with him" following a fight over their prior consensual sexual encounter that resulted in him contracting a venereal disease); Johnson v. State, 632 A.2d 152, 161 (Md. 1993) (holding that the trial court erred when it did not admit evidence that the witness and defendant had exchanged sex for drugs in the past, as it deprived him of the ability to present the defense that she lied because he refused to give her drugs on the occasion in question); Commonwealth v. Black, 487 A.2d 396, 398–99 (Pa. 1985) (holding that the state's rape shield rule did not extend to evidence introduced to show bias of the complainant). *Cf.* United States v. Valenzuela, 2008 WL 2824958 at *3–4 (C.D. Cal. 2008) (although the court ultimately excluded the evidence, it acknowledged that if the evidence had demonstrated bias it would have been admissible).

70. 488 U.S. 227 (1988) (per curiam).

71. *Id.* at 231.

outside his apartment in the early morning hours on the date of the alleged rape.[72] The Court ruled that where a jury might reasonably find that the complainant concocted the rape charges in order to explain to her paramour what she was doing out late in the defendant's car, the jury was entitled to hear that evidence because it might have raised an inference of motive to lie.[73] Had they heard the excluded evidence, then "[a] reasonable jury might have received a significantly different impression of [the witness's] credibility."[74]

Decisions of the Court after *Davis* and *Olden* fail to conclusively resolve whether Confrontation, Compulsory Process, and Due Process rights extend to non-bias or motive to lie forms of impeachment. Lower courts have been left to grapple with the issue of what *other* types of impeachment evidence—such as character evidence for dishonesty—might be constitutionally required notwithstanding rape shield protections. In reversing the defendant's conviction in *Davis*, the Supreme Court distinguished between a general attack on credibility and a more particular attack on credibility.[75] As the Court noted, the use of a prior conviction for the purpose of having a jury "infer that the witness's character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony," is a *general* attack on credibility.[76] The examination of a witness "directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case" is a *particular* attack on credibility.[77] The Court suggested that a particular attack on credibility is entitled to special protection under the Confrontation Clause.[78] The Court "recognized that the exposure of witness motivation [such as bias] in testifying is a proper and important function of the constitutionally protected right of cross-examination."[79]

On the other hand, there was no suggestion in *Davis* that the use of the prior juvenile record to impeach the cooperating witness's credibility—a general attack—in violation of Alaska's rules of evidence would have been compelled under the Confrontation Clause. In fact, Justice Stewart, in his concurring opinion, emphasized that very point. He expressly stated: "I would emphasize that the Court neither holds nor suggests that the Constitution confers a right in every

72. The trial court in *Olden* did not exclude this evidence under the state rape shield statute because the judge believed that the complainant's cohabitation with the witness did not explicitly evoke evidence of other sexual conduct. *See* Petition for Writ of Certiorari at n.1, Olden v. Kentucky, 448 U.S. 227 (1988) (No. 88-223). Rather, the trial court exercised its discretion under the Kentucky version of FED R. EVID. 403 to exclude this evidence because the affair was both extramarital and interracial, and evidence of the interracial nature of the affair would have been substantially prejudicial. *See Olden*, 488 U.S. at 230; Petition for Writ of Certiorari *supra* note 72 at 10.

73. *Id.* at 232 (quoting Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986)).

74. *Id.*

75. Davis v. Alaska, 415 U.S. 308, 316 (1974).

76. *Id.*

77. *Id.*

78. *Id.* at 316–17.

79. *Id.*

case to impeach the general credibility of a witness through cross-examination about his past delinquency adjudications or criminal convictions."[80]

The federal circuits have taken markedly different approaches to the question of whether and how a defendant is constitutionally entitled to introduce evidence of a rape complainant's prior false allegations of sexual assault. This "divide"—which by no means draws bright lines[81]—suggests that the current state of rape shield rules raises legitimate concerns about both the predictability of trials for complaining witnesses and the potentially widespread violations of the constitutional rights of the accused. Without legislative action, courts are left to interpret confusing and unpredictable precedent under the Sixth Amendment.

The Sixth, Seventh, Eighth, and Tenth Circuits, echoing Justice Stevens concurring opinion in *Davis*, place no limitations on a state's ability to preclude a general character attack on a witness's credibility; they would categorize most prior false allegations of sexual assault, like other bad acts of dishonesty, as a general form of character attack. As such, they would allow states almost unfettered authority to regulate admission of such evidence under their evidence rules.[82] The Sixth Circuit's exploration in *Boggs v. Collins* of the tension between rape shield rules, PFAs, and the Confrontation Clause is instructive:

> Under *Davis* and its progeny, the Sixth Amendment only compels cross-examination if that examination aims to reveal the motive, bias or prejudice of a witness/accuser. Because he failed to articulate such an argument either at trial or on appeal, and because there is not a plausible theory of motive or bias apparent from the trial record ... Boggs has not demonstrated a Confrontation Clause infraction.[83]

---

80. *Id.* at 321 (Stewart, J., concurring).

81. Some circuit decisions defy easy categorization. The Second Circuit has held that trial judges have broad discretion under 608(b) to bar cross-examination where a witness would deny that she made a prior false allegation, because such denial would prevent the line of questioning from having sufficient probative value. United States v. Crowley, 318 F.3d 401, 418 (2d Cir. 2003). Meanwhile, the Fourth Circuit has only gone as far as to ban *per se* rules of inadmissibility for prior false accusations under a state's rape shield rules. Barbe v. McBride, 521 F.3d 443, 454 (4th Cir. 2008).

82. *See, e.g.*, Sussman v. Jenkins, 636 F.3d 329, 354 (7th Cir. 2011) (holding that the trial court erred in barring cross-examination of PFA because the questions were an attempt to show motive to garner attention from a father figure similar to the currently charged crime as opposed to a general lack of truthfulness); Boggs v. Collins, 226 F.3d 728, 740 (6th Cir. 2000) (holding that there is no constitutional right to a general attack on credibility, but exposing a witness's motivation is an important function under the Confrontation Clause and therefore cross-examination of PFA must be permitted when done to reveal bias, prejudice or motive); United States v. Bartlett, 856 F.2d 1071, 1089 (8th Cir. 1988) (acknowledging that Confrontation Clause does not protect defendant's right to cross-examine about a prior false accusation where it constitutes a mere attack on general credibility); United States v. A.S., 939 F.3d 1063, 1074 (10th Cir. 2019) (upholding trial court's limitation on cross examination and preclusion of extrinsic evidence regarding complainant's alleged prior false allegation: "[T]he Constitution does not mandate the admission of irrelevant or general impeachment evidence").

83. *Boggs*, 226 F.3d at 740.

The Seventh Circuit agrees: "[E]xposing a witness's *reasons* for fabrication in a specific case . . . reaches the core of Confrontation Clause concerns."[84] For these courts, lying about a prior sexual attack is no different than lying on a mortgage application or being caught cheating on a college exam; each is a prior incident of dishonesty offered to the jury to suggest that the witness should not be believed on the witness stand. Such general forms of character attack are simply not protected by the Confrontation Clause. However, if the defendant shows some similarity or thematic link between the prior false allegation and the current charge—such as the drug addict who alleges rape after her sexual partner robs her of the stash or the juvenile in foster care who alleges sexual assault in order to modify her placement—then the court is required to allow cross examination under the "motive to lie" protections of *Davis* and *Olden*.[85]

The First and Eleventh Circuits have articulated an approach that is more nuanced and more favorable to criminal defendants. These circuits recognize that prior false accusations of sexual assault must be admitted in extreme situations where failure to alert the jury to potential credibility defects would be patently unreasonable.[86] In *Coplan*, the First Circuit was tasked with determining whether New Hampshire's exclusion of PFA under its judicially created "demonstrable falsity" by "clear and convincing evidence" standard satisfied the Confrontation Clause.[87] As applied to the facts of the defendant's case, the First Circuit determined that this standard violated the defendant's right to confront his accusers—two young girls who had made and allegedly recanted prior sexual assault allegations against another male neighbor and a cousin.[88] Although the First Circuit could not derive an explicit motive from the complainants' prior accusations, such a pattern—if sufficiently shown—was certainly probative of an unspecified willingness to lie about sexual matters.[89]

> White's evidence was not merely "general" credibility evidence. That label applies to the traditional proofs—offered though character or reputation witnesses and sometimes through proof of specific instances of misbehavior, especially prior convictions—to support an inference that the witness has a tendency to lie . . . The evidence in this case was considerably more powerful. The past accusations were about sexual assaults, not lies on other subjects; and

84. *Sussman*, 636 F.3d at 354.

85. 488 U.S. at 230; *Sussman*, 636 F.3d at 354.

86. White v. Coplan, 399 F.3d 18, 26 (1st Cir. 2005); Sec'y, Fla. Dept. of Corrections v. Baker, 406 Fed. App'x 416, 424–25 (11th Cir. 2010). *See* Abram v. Gerry, 672 F.3d 45 (1st Cir. 2012) (holding the Confrontation Clause was not violated by barring evidence of PFA because unlike *Coplan* there were not "extreme circumstances" present which would warrant interference with state authority to regulate cross examination); Chretien v N.H. Prison, 2008 WL 4372766 (D.N.H. 2008) (holding the state court erred in barring cross-examination of a witness who admitted making a nearly identical prior accusation that was false).

87. *Coplan*, 399 F.3d at 22.

88. *Id.* at 26.

89. *Id.*

> while sexual assaults may have some generic similarity, here the past accusations by the girls bore a close resemblance to the girls' present testimony—in one case markedly so. In this regard the evidence of prior allegations is unusual. If the prior accusations were false, it suggests a pattern and a pattern suggests an underlying motive (although without pinpointing its precise character).[90]

The First Circuit eschewed the rigid categorization of the Sixth, Seventh, Eighth and Tenth Circuits, under which PFA evidence offered to show bias, prejudice, or motive to lie deserves Sixth Amendment protection (and close scrutiny), but a general character form of impeachment does not.[91] The Eleventh Circuit reached a similar conclusion in *Baker*, where a complainant admitted in a *voir dire* hearing prior to trial that she had made rape accusations against other family members which had been false, yet the trial judge precluded cross examination on those topics at trial.[92] Because the prior accusations suggested a pattern of making false sexual assault allegations against other male family members, the court ruled that the similarity of the claims alone—without any specified motive—was sufficient to state a valid Sixth Amendment violation on appeal.

One can appreciate the importance of this circuit court split by returning to the problem outlined in Section II: if the criminal defendant seeks to raise the complainant's prior recanted allegation of sexual assault against a co-worker with whom she admitted having a consensual extra-marital affair, this evidence could be excluded under rape shield protections because it would identify prior sexual conduct of the complainant. But a judge may not exclude evidence if it would violate the Sixth Amendment rights of the accused. The Sixth, Seventh, Eighth, and Tenth Circuits would rule that this is a general attack on the witness' character for honesty, and that states are free to regulate such impeachment evidence without interference because the defendant is not raising a specific motive to lie. The defendant has a somewhat stronger argument in the First and Eleventh Circuits, which would look instead to whether there is a sufficiently similar pattern or connection between the two alleged sexual allegations, such that exclusion of the allegations would be patently unreasonable or unfair—whether or not the defendant alleges a consistent and specific motive to lie by the complainant in the two instances.

Examining *Davis*, *Van Arsdall*, and their progeny, Professor Rosanna Cavallaro has argued convincingly that "the long-established hierarchy of impeachment that governs in all criminal trials, for rape or any other crime, and

---

90. *Id.* at 24 (citation omitted).

91. The First Circuit suggested in *Coplan* that PFA questions are ones of degree, rather than of rigid categorization, and that some forms of PFA evidence might lie somewhere on a continuum between specified motive evidence and general credibility evidence. *Id.* Even though certain types of PFA evidence that do not raise a specified "motive to lie" may have a "lower status" under the Sixth Amendment, they are still deserving of Sixth Amendment protection. *Id.* at 26.

92. *Baker*, 406 Fed. App'x at 424.

that places bias above both character and contradiction as a basis for juror evaluation of witness reliability, is constitutionally insupportable and bears reconsideration."[93]

> While a rule of exclusion of other sexual behavior of a complainant in a rape case enjoys broad support for a host of reasons well and thoroughly examined, it is an entirely different question why certain theories of impeachment that require reference to or use of that evidence should enjoy constitutional status, while others do not. To date, the Court's explication of this distinction has been tautological and hence unsatisfying.[94]

Although Professor Cavallaro did not probe in depth the subject of prior false allegation evidence,[95] she made a highly convincing argument that the combined operation of rape shield rules and Sixth Amendment doctrine can deny jurors access to critical evidence that could help shape their assessment of a complainant's credibility.[96]

The Supreme Court has not resolved this disagreement among the Circuits, and indeed since *Davis* has not applied either the Confrontation Clause or the Compulsory Process Clause of the Sixth Amendment to override a state rule barring evidence offered to attack the general credibility of a witness. In *Nevada v. Jackson*,[97] the Court reversed the Ninth Circuit's grant of habeas corpus in a case presenting the issue, ruling that the Nevada State Supreme Court's resolution of the matter did not involve "an unreasonable application of . . . clearly established Federal law" under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[98] But because *Jackson* was decided on *habeas* rather than direct review, the Court did not decide whether general forms of character attack to undermine credibility implicate any Confrontation or Compulsory Process Clause concerns. In fact, the defendant in *Jackson* was permitted under Nevada law to cross-examine the complainant about prior instances of allegedly false allegations of sexual assault against him. However, he was not allowed to introduce extrinsic evidence of those fabrications once she denied the incidents, because he had not given written notice of the incidents as required by state law.[99] Likening the applicable Nevada evidence rule[100] to FRE 608(b), the Court stated simply that "the constitutional propriety" of the widely accepted rule of evidence that generally precludes the admission of extrinsic evidence of specific

---

93. Rosanna Cavallaro, *Rape Shield Evidence and the Hierarchy of Impeachment*, 56 AM. CRIM. L. REV. 295, 297 (2019).

94. *Id.* at 313–14.

95. I credit Professor Cavallaro's provocative analysis in convincing me that the PFA subject was worthy of further exploration.

96. *Id.* at 300.

97. 569 U.S. 505 (2013).

98. *Id.* at 508–09.

99. Miller v. State, 779 P.2d 87, 88–89 (Nev. 1989).

100. NEV. REV. STAT. § 50.085(3) (2011).

instances of a witness' conduct to prove the witness' character for untruthfulness "cannot seriously be disputed."[101]

State Supreme Courts have similarly struggled with the application of constitutional principles to PFA evidence. Whether a state rape shield rule contains an explicit exception for constitutionally required evidence or not, a state may not preclude a defendant from admitting evidence if exclusion of that evidence would violate the 6th Amendment Confrontation or Compulsory Process Clauses, or the 5th Amendment Due Process Clause.[102] Several state courts have grappled with the issue of when prior false allegation evidence is constitutionally required, and if so, how it may be admitted. Although decisions in New Hampshire, Rhode Island and Georgia are particularly enlightening, appellate courts in Alaska[103] and Missouri[104] have also weighed in to the debate.

New Hampshire's journey along the PFA path has been particularly rocky and circuitous. In *State v. White*, the New Hampshire Supreme Court, citing Confrontation and Due Process Clause concerns, ruled that a defendant in a sexual assault case must be allowed to introduce extrinsic evidence of a rape complainant's prior allegation of sexual assault only where there was "clear and convincing" evidence that the allegation was "demonstrably false."[105] In *State v. Gordon*, the New Hampshire Supreme Court narrowed *White* by suggesting that there must be "similarity" between the types of allegations. However, it then expanded *White* by demanding that the "demonstrably false" and "clear and convincing" standards be met even before a defendant be allowed to cross examine a complainant about the prior allegation under state rule of evidence 608(b).[106] A

---

101. *Jackson*, 569 U.S. at 510.

102. Pointer v. Texas, 380 U.S. 400 (1965).

103. Alaska permits evidence of PFAs to be admitted if (through either a *voir dire* examination of the witness or presentation of extrinsic evidence outside of the presence of the jury) the defendant shows by a preponderance of the evidence that: (1) the complaining witness made another accusation of sexual assault; (2) the accusation was factually untrue; and (3) the witness *knew* it was untrue at the time. Morgan v. State, 54 P.3d 332, 333 (Alaska Ct. App. 2002). The Alaska court rationalized its approach by characterizing this narrow exception as a "restatement of the principle" that PFAs of sexual assault can have a "special relevance" to the accusations at hand so long as the evidence is "strong enough." *Id.* at 336. The strength of the alleged PFA is key—Alaska's court explicitly held that if the judge finds that the PFA is only "arguably false," it does not touch the Confrontation Clause and therefore must not be admitted into evidence. *Id.* at 337.

104. Missouri's Supreme Court uses a preponderance of the evidence standard, but unlike Alaska it does not limit prior false accusations to sexual assault. If the defendant convinces a judge by a preponderance of the evidence that the prosecuting witness previously made knowingly false accusations about *any* crime, and further establishes the legal relevance of that false accusation, the trial court must admit the evidence. State v. Long, 140 S.W.3d 27, 31 (Mo. 2004). The Missouri Court rooted its decision in the state Confrontation Clause, MO. CONST. art. 1, § 18(a), observing that a defendant would be deprived of evidence "highly relevant to the crucial issue" if he/she were completely barred from admitting extrinsic evidence that the witness had a history of mendacity when it comes to accusations of criminal conduct. *Id.* at 30-31. The Court ruled in *Long* that the PFA at issue in that case did not implicate the state rape-shield rule, although it recognized that in certain circumstances a PFA may do so. *Id.* at 30, n.3.

105. State v. White, 145 N.H. 544, 553–54 (2000).

106. State v. Gordon, 146 N.H. 258, 261 (2001).

few years later, the court partially overruled *Gordon* in *State v. Miller*, abandoning these preconditions to cross examination in favor of a simpler 403 balancing test.[107] Surprisingly, the court also ruled under its state constitution—following the lead of the First Circuit under the 6th Amendment, *infra*[108]— that general forms of credibility attack may not raise the same level of constitutional concerns as particular forms of credibility attack. The New Hampshire Supreme Court stated in *Miller* that its limitations in *White* on cross examination were purely a matter of state common law and *not* required by the Confrontation Clause, at least in the circumstances presented in *Miller* where the prior false allegations were not remotely similar to the instant allegations against the defendant.[109]

Rhode Island's approach has also evolved over time as its Supreme Court has sought to define the contours of the relationship between PFA and the Confrontation Clause. The Court outlined a very broad rule for admitting PFA in the 1990 decision *State v. Oliveira*.[110] First, the Court acknowledged that the state rape shield rule did not explicitly bar evidence of prior allegations.[111] Then, underscoring that the credibility of the complaining witness is "always in issue" for sexual assault cases, the Court ruled that "evidence of a complaining witness' prior allegations of sexual assault must be admitted to challenge effectively the complaining witness's credibility under the 6th Amendment Confrontation Clause, even if the allegations were not proven false or withdrawn."[112] But in a line of cases beginning in 2000, the Rhode Island Supreme Court began walking back its *Oliveira* decision.[113] In the 2009 decision *State v. Manning*, the court held that a trial judge did not abuse his discretion when he barred questioning a 15-year-old witness-complainant about prior false accusations she had levied against her godfather that never resulted in formal charges.[114] In reaching this conclusion, the court observed that the evidence had only been introduced to attack general credibility and did not implicate issues of "bias, prejudice, or pattern [of false accusations]."Additonally, the court stated "the probative value [of PFA] . . . is directly proportional to the degree of certainty that the prior accusation was false."[115] In reaching this conclusion, the court qualified *Oliveira* by

107. State v. Miller, 155 N.H. 246, 252–53 (2007).

108. Coplan v. White, 359 F.3d 18, 26 (1st Cir. 2005).

109. *Miller*, 155 N.H. at 254.

110. 576 A.2d 111 (R.I. 1990).

111. *Id.*

112. *Id.* at 113 (holding that the trial judge had infringed on the defendant's Sixth Amendment right by denying the right of the defense to challenge the victim's credibility, even if the "allegations were not proven false or withdrawn").

113. *See, e.g.*, State v. Lynch, 854 A.2d 1022, 1035-36 (R.I. 2004) (noting that judges should still exclude the evidence if the risk of confusing the issues, misleading the jury, or unfair prejudice substantially outweighed probative value); State v. Dorsey, 783 A.2d 947, 951-52 (R.I. 2001) (excluding PFA because they had occurred over twenty years prior); State v. Botelho, 753 A.2d 343, 347 (R.I. 2000) (affirming the trial judge's exclusion of PFA when there was insufficient evidence that the witness had actually put forth such an allegation).

114. 973 A.2d 524, 534 (R.I. 2009).

115. *Id.* at 535.

noting that even though it wasn't technically necessary to prove falsity, the evidence lacks the necessary probative value to outweigh its prejudicial effect in the absence of such proof.[116]

Perhaps no state illustrates the confusion surrounding the Confrontation Clause and the admissibility of PFA better than Georgia. In the 1989 case *Smith v. State*, the Georgia Supreme Court held as a threshold matter that Georgia's rape shield statute did not prohibit evidence about previous false allegations by the victim "because such evidence does not involve the victim's past sexual conduct but rather the victim's propensity to make false statements regarding sexual misconduct."[117] The court then created a *per se* rule of admissibility for prior accusations of sexual assault which had a "reasonable probability of falsity" rooted in both evidentiary and Constitutional law.[118] In 2019, however, the Georgia Supreme Court overruled *Smith* in *State v. Burns* on the basis that the court had erred in its Confrontation Clause analysis thirty years earlier.[119] While the court in *Burns* preserved the ability of the defendant to introduce evidence of PFA through evidentiary principles, it eliminated the *per se* admissibility rule, instead requiring the trial judge to weigh the probative value of this evidence against its prejudicial effect under Rule 403.[120]

These state decisions merely illustrate the inconsistent and unpredictable ways in which courts have applied constitutional principles to PFAs in sexual assault cases. As state courts continue to grapple with these tensions, it is apparent that rape shield rules in their current form are largely inadequate to address the defendant's right to confrontation and compulsory process, particularly given the federal circuit split and the dearth of guidance from the United States Supreme Court. As Rhode Island and Georgia demonstrate, even states which at one point recognized a broad right to confrontation have now struggled with "balancing" that right against protecting the privacy rights of complaining witnesses and the trial courts' interest in narrowing the jury's focus to the allegations at hand. These unpredictable results demonstrate the need for a new wave of rape shield rules that directly address PFAs with coherent and strict limitations.

IV. RECOMMENDATIONS

Although there is general agreement that judicial discretion in admitting prior false allegation evidence should be constrained, there are divergent approaches about how to do so.[121] A reader of the caselaw in this area is reminded of the

116. In 2018, the Rhode Island Supreme Court followed this logic once more, rejecting the defendant's Confrontation Clause claim and upholding a trial judge's decision to exclude evidence of PFA due to 403 issues. State v. Danis, 182 A.3d 36, 44 (R.I. 2018).

117. Smith v. State, 377 S.E.2d 158 (Ga. 1989).

118. *Id.* at 160; *see also* State v. Burns, 829 S.E.2d 367, 373-74 (Ga. 2019).

119. *Burns*, 829 S.E.2d at 373–74 ("Our sweeping decision in *Smith* lacked nuance.").

120. *Id.*

121. *See* Morgan v. State, 54 P. 3d 332, 334 (Alaska 2002) ("The problem is that, even though a majority of states allow a defendant to raise the issue of a complaining witness's prior false accusations

weary Goldilocks looking for the perfect bed to rest her head[122]—this approach seems too hard, this approach seems too soft, and none thus far seems just right. The legislative solution I offer focuses on three primary elements: (1) the procedural mechanism for raising claims of PFA; (2) the role of the judge in the preliminary fact-finding process; and (3) the proper calibration of probative value versus prejudicial effect. A proposed reform rape shield rule is included in Appendix A to the article.[123]

As noted in Section III-C above, only eight of fifty-two jurisdictions in the United States now expressly control for admission of prior false allegations of sexual assault in their rape shield statutes. This means admission of PFA evidence is left to the court's construction of other state evidence rules and common law authority, subject to decidedly murky constitutional constraints.

One benefit of explicitly covering PFA in a rape shield statute or rule—notwithstanding that not all prior false allegations involve sexual "conduct" or sexual "behavior," even though they arguably involve sexual fantasies or sexual "disposition"—is that it avoids litigating whether the complainant is protected by the rape shield rule's notice and hearing provisions on a case-by-case basis. Rape shield rules are fundamentally designed to protect the complainant's privacy interests and to insulate the jury from irrelevant information. Toward those dual ends, most U.S. rape shield rules require the defendant to provide notice to the government of their intent to introduce designated types of evidence well in advance of trial; to accompany that motion with an affidavit explaining its relevance and theory of admissibility; and to ensure that the motion hearing will be conducted *in camera* and that the transcript will be kept under seal.[124] These procedures are designed to protect the complainant from public embarrassment and invasion of privacy, and thus to encourage the reporting of sexual assault. All of those important privacy interests will be undermined if alleged prior false allegations of rape can be sprung on a complainant at trial without complying with these important procedural safeguards. Adding "evidence that the victim made a false allegation of sexual assault on another occasion" to the limited category of complainant conduct that may be admitted at trial only when such evidence satisfies critical substantive and procedural limitations will provide protections in rape cases that would otherwise not exist. It will provide notice to the prosecutor of

---

under certain circumstances, there is no 'majority rule' concerning this evidence. Our sibling states rely on several different theories to justify allowing a defendant to inquire or present evidence concerning the complaining witness's prior accusations—and the scope of the permitted inquiry varies from state to state, depending on that state's legal rationale for allowing the inquiry.")

122. ROBERT SOUTHEY, THE STORY OF THE THREE BEARS (1837).

123. My recommended rape shield rule applies only to criminal cases, as do the rape shield rules in many states. *See generally* National District Attorney's Association, *Rape Shield Statutes* (Mar. 2011), https://ndaa.org/wp-content/uploads/NCPCA-Rape-Shield-2011.pdf [https://perma.cc/84XS-R3G2]. The admissibility of prior false allegations of sexual assault to impeach complainants in civil cases is beyond the scope of this article.

124. Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 72 (1977).

the defendant's intent to introduce such evidence so that the government may conduct important pre-trial investigations, and it will avoid hijacking the trial mid-stream with collateral judicial inquiries.

Additionally, judges should not be allowed to admit evidence of PFA unless the evidence of falsity is strong. The reform I propose defines the contours of when the evidence of falsity is sufficiently strong to warrant a form of character impeachment that intrudes upon sexual history. Evidence of falsity may be in the form of a prior recantation by the complainant in circumstances that do not give rise to an inference of pressure or intimidation or evidence from a third party witness *other than the claimed perpetrator* that the event in question did not happen. In the absence of either of these two forms of proof,[125] there would not be sufficient and demonstrable grounds to allow the defendant to sidetrack the current trial by a character form of impeachment to show dishonesty.[126] Moreover, where the falsity of the prior allegation requires a preliminary determination of fact, that question should be considered a question of admissibility for the judge under Rule 104(a) rather than an issue of conditional relevance for the judge and jury under Rule 104(b). The victim's alleged recantation might have been equivocal and might depend upon how a reasonable observer would interpret the statement in context. For example, a statement to a friend or to a social worker "I can't do this to him" might mean "I can't tell a lie" in certain circumstances, but in other circumstances, it might mean "I can't put him through the ordeal of a rape trial."

While we ordinarily want the jury to be the finder of fact, there are many circumstances where judges are required to resolve factual disputes in order to make preliminary determinations about the admissibility of evidence. Throughout the Federal Rules of Evidence, there are situations where judges make preliminary determinations of admissibility, notwithstanding that they may involve resolutions of factual issues—including the qualifications of expert witnesses, whether conditions are met for application of a privilege, and whether or not a statement satisfies an exception to the hearsay rule. These are all questions for the court under Rule 104(a), even though they require preliminary determinations of fact.[127] Numerous states place factual questions incident to a determination about whether an exception to the rape shield rule applies in the category of judicial gatekeeping—rather than conditional relevance for the jury—because it guards against the fact finder hearing marginal evidence and the case being sidetracked by a trial within a trial.[128]

---

125. Even evidence of acquittal of a defendant on prior charges should not be considered sufficient evidence of a prior *false* allegation to warrant impeachment, due to the government's high level of proof beyond a reasonable doubt in criminal cases. In re Winship, 397 U.S. 358 (1970).

126. Arizona is an example of a state that requires there to be clear and convincing evidence of a prior false allegation of sexual assault before it may be brought up at trial. ARIZ. REV. STAT. ANN. § 13-1421(B) (2020).

127. *See*, FED. R. EVID. 104(a) advisory committee's note to the rules (1973).

128. *See, e.g.*, D.C. CODE ANN. § 22-3022(b)(2) (West 2020) ("If the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers, or at a subsequent hearing in chambers scheduled for such purpose, shall

While the Supreme Court has interpreted the identity of the perpetrator of prior bad acts under FRE 404(b) as being a 104(b) issue rather than a 104(a) issue,[129] it did so as a matter of statutory construction rather than constitutional necessity.[130] For the first sixteen years that the Federal Rape Shield Rule was in operation, the issue of whether the victim had ever had prior sexual contact with the defendant under Rule 412 was considered a 104(a) issue for preliminary determination by the judge, rather than an issue of conditional relevance under Rule 104(b).[131] In 1994, when federal rape shield protections were extended to civil cases and any alleged victim of sexual assault (i.e., pattern witnesses), section (c) of Rule 412 was also amended to delete the 1978 language making factual determinations during preliminary hearings 104(a) determinations.[132] The Comments to the 1994 amendment suggest that this change was made out of respect for the defendant's jury trial right.[133] But there was scant authority offered then[134] (and there is little

---

accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue."); IDAHO. R. EVID. Rule 412(c) (2010) ("Notwithstanding [subdivision (b)] of Rule 104, if the relevance of the evidence which the defendant seeks to offer depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, must accept evidence on the issue of whether such condition of fact is fulfilled and determine the issue."); MINN. STAT. § 609.347 (a)(1) (2020) (whether complainant's alleged prior sexual conduct fits common plan or scheme exception is a 104(a) determination); MINN. R. EVID. 412(c) ("[I]f the relevance of the evidence depends on whether a fact exists, determines—at this or a later hearing—whether the fact exists, notwithstanding Rule 104(b).); N.C. GEN. STAT. § 8C-1, Rule 412 (2020) ("Notwithstanding subdivision (b) of Rule 104, if the relevancy of the evidence which the proponent seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the *in camera* hearing or at a subsequent in camera hearing scheduled for that purpose, shall accept evidence on the issue of whether that condition of fact is fulfilled and shall determine that issue."); OR. REV. STAT § 40.210(4)(b) (2019) ("[I]f the relevancy of the evidence that the accused or the respondent seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in camera or at a subsequent hearing in camera scheduled for the same purpose, shall accept evidence on the issue of whether the condition of fact is fulfilled and shall determine the issue."). In *State v Guenther*, which authorized the admission of prior false allegation evidence as a specially crafted exception to its state prohibition of extrinsic evidence under N.J. R. Evid. 608(b), the New Jersey Supreme Court assigned the trial judge the gatekeeping function of making a preliminary determination of falsity. 854 A.2d 308, 323 (2004).

129. Huddleston v. United States, 485 U.S. 681 (1988).

130. *Id.* at 687–88.

131. Act of Oct. 28, 1978, Pub. L. No. 95-540, 92 Stat. 2046.

132. The Supreme Court recommended not to apply Rule 412 to civil cases, but Congress overruled that recommendation in the statute approving the 1994 amendment to Rule 412. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, § 40141, 108 Stat. 1796, 1918–19.

133. The Advisory Committee's amendment to Rule 412(c) was accompanied by the following explanation. "One substantive change made in subdivision (c) is the elimination of the following sentence: 'Notwithstanding subdivision (b) of Rule 104, if the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue.' On its face, this language would appear to authorize a trial judge to exclude evidence of past sexual conduct between an alleged victim and an accused or a defendant in a civil case based upon the judge's belief that such past acts did not occur. Such an authorization raises questions of invasion of the right to a jury trial under the Sixth and Seventh Amendments. *See* 1 S. SALTZBURG & M. MARTIN, FEDERAL RULES OF EVIDENCE MANUAL, 396–97 (5th ed. 1990). The Advisory Committee concluded that the amended rule

now) that treating a preliminary question of admissibility as a purely judicial question, rather than a question of conditional relevance, violates a defendant's Sixth Amendment right to trial by jury.[135]

Finally, if states adopt my recommendation and include prior false allegations of sexual assault in their rape shield rules, they should apply a heightened balancing test to this category of evidence, only allowing evidence of PFA if its probative value exceeds its prejudicial effect. This test would give judges discretion to exclude evidence of PFA where, for example, the prior allegation of sexual assault was decades old; where there is an extreme dissimilarity in operative circumstances between the case currently being litigated and the prior incident; or where it would take several witnesses to prove the chain of circumstances of the alleged recantation. Several states that follow a categorical approach to their rape shield rules impose a heightened balancing test for admission of evidence under one or more of their categorical exceptions. That is, even if it meets one of the specified criteria for admission (such as evidence of sexual conduct with the defendant on a prior occasion to prove consent or evidence of sexual conduct with another to show the source of injury), it may not be admitted unless its probative value outweighs its danger of unfair prejudice, including the possibility that it may confuse the jury, waste judicial resources, delay the proceedings, and embarrass or humiliate a witness.[136] If, as I propose, legislatures explicitly add "evidence that the victim made a false allegation of sexual assault on another occasion" as a new category of permitted inquiry, notwithstanding the state's

---

provided adequate protection for all persons claiming to be the victims of sexual misconduct, and that it was inadvisable to continue to include a provision in the rule that has been confusing and that raises substantial constitutional issues." This language was incorporated verbatim in the Congressional Record. *See* H.R. REP. NO. 103-711, at 103 (1994) (Conf. Rep.).

134. *See* SALTZBURG & MARTIN, *supra* note 133. *See also* Galvin, *supra* note 40, at 893, n.580.

135. *See, e.g.*, United States v. Frazier, 387 F. 3d 1244, 1271–72 (11th Cir. 2004) (holding that a trial judge exercising authority under Rule 702 to exclude a defendant's expert witness due to lack of qualifications and reliability did not deprive defendant of constitutional right to present a defense, confrontation, or due process, stating: "[a] policy which aims at preventing the use of unreliable or misleading expert evidence in criminal trials is far from arbitrary. Accordingly, a court may constitutionally enforce evidentiary rules to limit the evidence an accused (or for that matter any party) may present in order to ensure that only reliable opinion evidence is admitted at trial."). As Professor Imwinkelried explained, the division of authority between Rules 104(a) and 104(b) is often demarcated between legal competence and factual relevance; we do not desire or expect jurors to enforce norms about the former. Edward J. Imwinkelried, *Trial Judges: Gatekeepers or Usurpers? Can the Trial Judge Critically Assess the Admissibility of Expert Testimony Without Invading the Jury's Province to Evaluate the Credibility and Weight of the Testimony?*, 84 MARQ. L. REV. 1, 18 (2000). To the extent PFA evidence is a special and limited exception to the general rule prohibiting extrinsic evidence of prior acts of dishonesty to show a general character trait, this is an issue of competence, not relevance.

136. *See, e.g.*, ARIZ. REV. STAT. § 13-1421 (2020); CONN. GEN. STAT. § 54-86(f) (2020); D.C. CODE ANN. § 22-3022 (West 2020); HAW. REV. STAT. § 626-1, Rule 412 (2020); IOWA R. EVID. 5.412; MASS. GEN. LAWS ch. 233, § 21B (2020); MICH. COMP. LAWS ANN. § 750.520j (West 2020); OR. REV. STAT. § 40.210 (2019); WIS. STAT. § 972.11 (2020). New Jersey's Rape Shield Rule requires the probative value of evidence of the rape victim's prior sexual conduct *substantially* outweigh its prejudicial effect before it may be admitted, even if it meets a statutorily recognized category of admissible material. N.J. REV. STAT. § 2C:14-7 (2020).

rape shield bar, a heightened balancing test should apply. As noted above, Rule 412 does not apply such a heightened balancing test to its narrow categories of evidence excluded from rape shield protections, preferring instead the default Rule 403 balancing test with its emphasis on admissibility.[137] But numerous states that have enacted categorial approaches to rape shield exceptions have reversed their balancing tests, only allowing evidence that fits within their categorical exceptions if the proponent demonstrates that the probative value exceeds the prejudicial effect.

In *State v Guenther*,[138] the New Jersey Supreme Court created a narrow exception to its state evidence rule barring extrinsic evidence to impeach on prior acts of dishonesty. The court held that its new common law rule for prior false criminal allegations, including allegations of sexual assault, was "informed" by Confrontation Clause concerns.[139] But the court also cautioned judges should not allow extrinsic evidence of prior false criminal allegations under this new rule unless the probative value of this evidence exceeded its prejudicial effect.[140] The New Jersey Supreme Court's guidance to trial judges on factors to consider before admitting evidence under this standard was highly instructive:

1. whether the credibility of the victim-witness is the central issue in the case;
2. the similarity of the prior false criminal accusation to the crime charged;
3. the proximity of the prior false accusation to the allegation that is the basis of the crime charged;
4. the number of witnesses, the items of extrinsic evidence, and the amount of time required for presentation of the issue at trial; and
5. whether the probative value of the false accusation evidence will be outweighed by undue prejudice, confusion of the issues, and waste of time.[141]

My proposed amendment to state and federal rape shield rules would both narrow and broaden the traditional mechanism for impeachment by character evidence under Rule 608(b) for sexual assault complainants. It would narrow 608(b) for this class of witnesses because defendants would need more than a good faith basis to ask the witness about certain prior acts of dishonesty on cross examination. Further, before being allowed to examine the witness about this particular form of past conduct, the defendant would need to give notice as required by the rape shield rule, participate in a pre-trial *in camera* hearing, and obtain the permission of a judge under a heightened 104(a)

137. *See supra* note 23 and accompanying text.
138. 854 A.2d 308 (N.J. 2004).
139. *Id.* at 323.
140. *Id.* at 324.
141. *Id.*

gatekeeping standard. Like other ways in which rape shield rules trump traditional forms of proof and provide added protections to sexual assault complainants, these procedural hurdles would ensure that intimate details of the accuser's history are not sprung on the witness by surprise at a public trial with no oversight or supervision.

This recommendation would also broaden Rule 608(b)'s treatment of character evidence, because it would allow the admission of extrinsic evidence of the prior false allegation if the witness, on cross examination, denied either making the allegation or denied that it was false, following the approach of states like Michigan, Massachusetts, and Nevada.[142] If the First and Eleventh Circuits are correct that prior acts of dishonesty on sexual matters represent something more than mere general character evidence on a constitutional continuum, which can be thought of as "character plus," then the defendant may be constitutionally entitled to "prove up" these lies if the complainant denies them. In *United States v. Abel*,[143] the Supreme Court recognized that bias may be proven with extrinsic evidence if it is denied by the witness on cross examination.[144] The Seventh Circuit in *Sussman*[145] took the same approach for prior false allegations of sexual assault that supports a motive to lie: if the accuser denies the prior conduct on cross examination, the defendant is allowed to offer extrinsic evidence of the conduct.[146] Thus far, the Supreme Court has been unwilling to disentangle the Confrontation Clause and the Compulsory Process Clause for impeachment evidence.[147] Applying the same tripartite test for determining PFA claims, as set forth above, avoids the complexity of having one set of standards for determining when to allow cross examination on PFA and another set of standards for determining when to allow proof by extrinsic evidence.

Accordingly, my recommendation leaves the door open to proof of PFA in limited and carefully circumscribed situations where the relevance is compelling. This legislative fix has the benefit of constraining judicial discretion through clear guidelines, notice and hearing requirements, and evidentiary burdens. It is fair to both complainants and defendants, and it would pass constitutional muster under even the strictest interpretation of the Confrontation and Compulsory Process Clauses of the Sixth Amendment adopted by the First and Eleventh Circuits, because it is not a *per se* rule of exclusion that is

142. *See supra* notes 36–38 and accompanying text.

143. 469 U.S. 45 (1984).

144. *Id.* at 56. While *Abel* was not a constitutional decision because the evidence of bias was offered by the government and not by the defendant, it would be a strange rule indeed if FRE 401 and 403 offer greater protections to the government than the Sixth Amendment Compulsory Process Clause offers to a criminal defendant.

145. 636 F.3d 329 (7th Cir. 2011).

146. *Id.* at 359-60. *See also* Morgan v. State, 54 P.3d 332, 336 (Alaska 2002) (cataloguing state decisions that have allowed extrinsic evidence of PFA while citing constitutional concerns).

147. Michigan v. Lucas, 500 U.S. 145, 149–51 (1991); Chambers v. Mississippi, 410 U.S. 284, 294 (1973); *see* Nevada v. Jackson, 569 U.S. 505, 511–12 (2013).

arbitrary or grossly disproportionate to its objectives.[148] Rather, it is a carefully tailored evidentiary rule designed to advance difficult but essential credibility determinations.

CONCLUSION

Character to show consent and character to show credibility are two very different things. For strong policy and evidentiary reasons, it is no longer permissible to show that a rape complainant engaged in prior sexual behavior with someone other than the accused to support an inference of consent on the date in question. Similarly, it is also impermissible to show that just because a sexual complainant had consensual sex with others, she has a general character trait for untruthfulness. But the government should not be able to weaponize rape shield rules to prohibit inquiry into prior false accusations that are primarily indicative of *dishonesty*, rather than sexual behavior, because that is a disingenuous application of the rape shield rule which serves none of its primary purposes.

Both state and federal courts have struggled mightily with the admissibility of prior false allegation evidence. Some have ruled that this character form of proof is on par with bias or motive to lie evidence, and therefore is constitutionally required. Others have ruled that character forms of impeachment are not constitutionally protected, and therefore states are free to craft rules governing the admissibility of prior false allegation evidence. But most states to date have declined to address the issue by rules of evidence, and instead have done so by common law decision making. In light of the morass of confusion and uncertainty that has ensued, legislatures should step in and amend their rape shield rules to make specific provisions for prior false allegation evidence. Precise legislative action would attend to constitutional concerns, while at the same time carefully tailoring the discretion of trial judges regarding the admissibility of this evidence, thereby ensuring fairness, predictability, and reliability.

148. Rock v. Arkansas, 483 U.S. 44, 56 (1987); *see* Michigan v. Lucas, 500 U.S. 145, 152 (1991) ("The notice-and-hearing requirement serves legitimate state interests in protecting against surprise, harassment, and undue delay.")

APPENDIX A

Sex-Offense Cases: Victim History

(a) Prohibited Uses. The following evidence is not admissible in a criminal proceeding involving alleged sexual misconduct:

(1) evidence offered to prove that a victim engaged in other sexual behavior, including sexual fantasies;

(2) evidence offered to prove a victim's sexual predisposition; or

(3) reputation or opinion evidence of either of the foregoing.

(b) Exceptions.

Notwithstanding paragraph (a), the court may admit the following evidence in a criminal case:

(1) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;

(2) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and

(3) evidence that the victim made a false allegation of sexual assault on another occasion.

(c) Procedure to Determine Admissibility.

(1) ***Motion.*** If a party intends to offer evidence under section (b) the party must:

(A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;

(B) do so at least 14 days before trial unless the court, for good cause, sets a different time;

(C) serve the motion on all parties; and

(D) notify the victim or, when appropriate, the victim's guardian or representative.

(2) ***Hearing.*** Before admitting evidence under this rule, the court must conduct an *in camera* hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the record of the hearing must be and remain sealed.

The court may not admit evidence under exception (b)(3) of this rule unless it determines that the probative value of that evidence in allowing the jury to assess the credibility of the victim outweighs its prejudicial effect, including undue delay, needless presentation of cumulative evidence, confusion of the issues, misleading the jury, invasion of privacy, or humiliation or embarrassment of a witness. Notwithstanding subdivision (b) of Rule 104, if the relevance of evidence which the proponent seeks to offer under exception (b)(3) depends upon the fulfillment of a condition of fact, the court, at the *in camera* hearing, shall accept evidence on the issue of whether that condition of fact is fulfilled and shall determine the issue.

(d) Definition of "Victim." In this rule, "victim" includes any alleged victim.