Articles

TRUE LIES: THE CONSTITUTIONAL AND EVIDENTIARY BASES FOR ADMITTING PRIOR FALSE ACCUSATION EVIDENCE IN SEXUAL ASSAULT PROSECUTIONS

By Jules Epstein

There once was a shepherd boy who was bored as he sat on the hillside watching the village sheep. To amuse himself he took a great breath and sang out, "Wolf! Wolf! The Wolf is chasing the sheep!" The villagers came running up the hill to help the boy drive the wolf away. But when they arrived at the top of the hill, they found no wolf. The boy laughed at the sight of their angry faces . . . . Later, the boy sang out again, "Wolf! Wolf! The wolf is chasing the sheep!" To his naughty delight, he watched the villagers run up the hill to help him drive the wolf away . . . . Later, he saw a REAL wolf prowling about his flock. Alarmed, he leaped to his feet and sang out as loudly as he could, "Wolf! Wolf!" But the villagers thought he was trying to fool them again, and so they didn't come.

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INTRODUCTION

Aesop's message that a pattern of lying can lead, justifiably, to disbelief of subsequent statements, permeates the law. It can preclude a finding of probable cause to arrest; support a finding of bad faith of a party to litigation; and justify rejecting a witness's declaration or testimony. It can also undermine an advocate's excessive use of certain objections and treatment of all claims of error as of equal magnitude. The behavior of the boy shepherd is viewed as paradigmatic of a course of untruthful conduct.

3. A LEXIS search of the terms "boy w/2 cried w/3 wolf," conducted May 31, 2005, resulted in 49 reported federal and state decisions with this language.
4. Wilson v. Russo, 212 F.3d 781, 790 (3d Cir. 2000) ("We are also skeptical that the Seventh Circuit would . . . consider there to be probable cause to arrest someone identified as the assailant if the police officers were aware that the victim, like the boy who cried wolf, had previously firmly identified several different people as her attacker and repeatedly called the police demanding that they be arrested.").
5. Cobell v. Babbitt, 91 F. Supp. 2d 1, 53 (D.D.C. 1999) ("Defendants' cry of 'trust us' is offensive to the court and insulting to [the Native American] plaintiffs, who have heard that same message for over one hundred years . . . . [T]he court wonders if the tale of The Little Boy Who Cried Wolf would not have been more appropriate—when the same insincere statement is made time and again, the sincere statement is nearly impossible to discern and impossible to rely upon.").
6. United States v. Myers, 864 F. Supp. 794, 798 n.7 (N.D. Ill. 1994) ("Throughout his submissions Myers repeatedly implores this Court to investigate the sincerity of his devotion . . . . That invitation conjures up the parable of the boy who cried "Wolf!") It is unnecessary to recapitulate all of Myers' fraudulent misdeeds to recognize that Myers has not in the past demonstrated any inhibition against using religion as a pretext for personal gain . . . . Religion recognizes the legitimacy of even last-minute redemption, but it does not command the surrender of legitimate skepticism on that score.").
7. United States v. Powell, 55 M.J. 633, 645 (A.F. Ct. Crim. App. 2001) ("Like the boy who cried wolf too many times, the use of the per se rule [seeking race-neutral reasons for jury strikes] as a trial tactic to shape the court is ill conceived and serves to demean its very purpose. It will lead to an evisceration of its effectiveness and ultimately render its goal illusory.").
8. Perry v. State, 822 A.2d 434, 459 (Md. Ct. Spec. App. 2002) ("The attorney who treats every argument with equal gravity runs the danger of being perceived as was the legendary 'boy who cried wolf.'").
9. People v. Hotchkiss, 300 N.Y.S.2d 405, 407 (N.Y. Co. Ct. 1969) ("In this court's opinion, 'course of conduct' is . . . a pattern of conduct composed of same or similar acts repeated over a period of time, however short, which establishes a continuity of purpose in the mind of the actor. Thus, 'The Boy Who Cried Wolf' persisted in a course of conduct.").
Although not without its limitations, the recognition that past behavior can be given weight in evaluating current conduct or purpose is substantial, if not pervasive, and goes beyond a history of lying. In both criminal and civil litigation, a complainant's or plaintiff's history of vexatious litigation is admissible to establish motive and bias; in many jurisdictions, a criminal defendant's past behavior in committing sex offenses is presumptively admissible to establish propensity and the likelihood of guilt in the charged offense.

This issue has particular importance and consequence in a sexual assault prosecution where there is proof that the complainant has made one or more false accusations in the past. The policies underlying rape shield laws, in particular the protection of the complainant's privacy and the facilitation of prosecutions for sexual assault, appear to be strong justifications for excluding false accusation evidence. However, when

10. Caution has been urged against using this parable as a measure to reject claims without further investigation. See Patten v. Green, 369 N.W.2d 105, 109 (N.D. 1985) (Meschke, J., concurring) (“Nor, in my view, can a forma pauperis petition be rejected simply for multiplicity of pro se suits. The familiar fable about the boy who cried ‘wolf’ too often should not become a guiding principle of law, even if it is a human truism. Even the most irrational or irritating litigant may occasionally have a just cause.”). Nonetheless, this does not exclude its consideration as a weighing factor.

11. The most notorious recent example of this is the prosecution of singer Michael Jackson for allegedly sexually assaulting a minor. Jackson's defense was permitted to present evidence contending that the minor's mother had fraudulently sued a retailer for damages as part of the defense claim of bad motive, available at http://www.courttv.com/trials/jackson/052405_cv.html.

12. See, e.g., Gastineau v. Fleet Mortgage Corp., 137 F.3d 490, 495 (7th Cir. 1998) (admitting evidence of plaintiff's prior lawsuits to show, inter alia, “Gastineau's modus operandi of creating fraudulent documents in anticipation of litigation against his employers”). Courts are reluctant to admit evidence of prior lawsuits in situations where admitting that evidence shows nothing more than a generic pattern of litigiousness. See id. at 496 (“evidence must tend to show something other than a plaintiff's tendency to sue”); see also Outley v. City of New York, 837 F.2d 587 (2d Cir. 1988) (same).

13. See, e.g., FED. R. EVID. 413 (“In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible.”). Rule 413 and various state counterparts have been upheld against constitutional challenges. See United States v. Enjady, 134 F.3d 1427, 1430-35 (10th Cir. 1998) (upholding the application of Rule 413 against a constitutional challenge); United States v. Mound, 149 F.3d 799, 800-02 (8th Cir. 1998) (finding that Rule 413 passes constitutional muster if Rule 403 protections remain in place); United States v. Wright, 53 M.J. 476 (C.A.A.F. 2000) (same); Kerr v. Caspari, 956 F.2d 788, 790 (8th Cir. 1992) (upholding a Missouri rule allowing for propensity inferences in sex crime prosecutions as long as the Rule 403 test is applied); People v. Falsetta, 986 P.2d 182, 189 (Cal. 1999) (applying Enjady and upholding California propensity rule). See also Myers v. State, 17 P.3d 1021, 1030 (Okla. Crim. App. 2000) (approving an expansion of state evidentiary law to apply the "greater latitude rule" for the admissibility of prior uncharged acts in a sexual assault prosecution).
appropriate guidelines for defining and establishing false accusation proof are enforced, such a bar deprives an accused of competent, and indeed constitutionally-compelled, defense evidence.

Notwithstanding the prevalence of using past behavior to measure the validity and veracity of a current claim, courts have responded with caution and inconsistency in permitting evidence of a rape complainant’s prior false accusations, in some instances rejecting claims that a criminal defendant is constitutionally entitled to present such proof. The limited scholarship is equally divided.

This article demonstrates that the right to present false accusation evidence is indeed constitutionally-founded and compelling; that lower courts have erred by mischaracterizing the occurrence of false allegations as mere “impeachment” (which this article argues is, at least for false accusation evidence, a category of proof for which the Constitution compels admission in a criminal trial); and that, when more properly identified as proof of non-character “plan” or “doctrines of chance,” the evidence is indisputably admissible substantively, either through cross-examination or by extrinsic proof. The article also returns attention to the cross-examination aspect of the Confrontation Clause guarantee, one that has been overlooked as recent decisional law and scholarship have focused on the Clause’s limitations on the use of hearsay evidence following the Court’s 2004 decision in Crawford v. Washington.

The article suggests that the historic roots of the Confrontation Clause guarantee the right to impeach a testifying witness with proof of “corruption,” a category that includes the making of false

14. The national response is detailed infra Section I.

15. Compare Clifford S. Fishman, Consent, Credibility, And The Constitution: Evidence Relating to a Sex Offense Complainant’s Past Sexual Behavior, 44 CATH. U. L. REV. 711, 770-71 (1995) (describing the exclusion of such evidence as “unfair, unjust, and hopefully, unconstitutional . . . because . . . [a] false accusation of rape[] reveals a ruthless disregard of the truth and a willingness to use sexual allegations unjustly—which are highly relevant as to whether she has falsely accused the defendant”), with Denise R. Johnson, Prior False Allegations of Rape: Falsus in Uno, Falsus in Omnibus?, 7 YALE J.L. & FEMINISM 243 (1995) (contending that such evidence should be excluded unless probative of motive in the particular case). See also Jennifer Koboldt Bukowsky, Note, The Girl Who Cried Wolf: Missouri’s Approach to Evidence of Prior False Allegations, 70 Mo. L. REV. 813, 834 (2005) (applauding the admissibility of such evidence as particularly relevant in some cases).

16. This term, discussed at length infra Section IV, is a non-character use of other acts evidence to show that the current event is not an aberration, but instead, in terms of probability analysis, a likely recurrence of past behavior.

17. 541 U.S. 36 (2004). Crawford has engendered extensive discussion and analysis in reported cases and scholarly articles (a LEXIS Shepard’s search for Crawford on August 16, 2005, resulted in 1,718 cites, of which 103 were law review articles).
Section I examines the phenomenon of false accusations in sex crimes prosecutions, providing a uniform definition and demonstrating the lack of reliable proof of the incidence of this phenomenon. Section II details the courts' varied and irreconcilable responses to claims of improper exclusion of false accusation evidence and the differing categorizations of such evidence as impeachment or substantive. Section III addresses the Sixth Amendment rights of confrontation and compulsory process and, after tracing their history and application, concludes that if false accusation proof is indeed only impeachment evidence, these constitutional provisions require its admission, both on cross-examination and extrinsically through witness testimony. Section IV details the evidentiary exception of "plan" and the related construct of the doctrine of chances. Section IV also discusses how evidence of prior false accusations can meet either of these exceptions to the ban on other acts evidence as substantive evidence, and it explains why its admission is constitutionally mandated by the Due Process and Sixth Amendment right to present a defense under doctrine developed in Washington v. Texas and in its arguably more restrictive formulation as set forth in United States v. Scheffer. Section V addresses policy and practical concerns, including those addressed by rape shield laws, and it concludes with an appraisal of the validity and problems of the "boy who cried wolf" paradigm in sexual assault cases.

18. The difference between impeachment and substantive is one of evidentiary "use." When admitted for impeachment purposes, evidence may be argued only for its impact on determining the believability of a witness, while evidence admitted substantively stands as proof of the occurrence (or non-occurrence) of a particular event. Jury instructions will delimit the use in each instance, although the effectiveness of such instructions in cabining juror use of such evidence is questionable. See Judith L. Ritter, Your Lips Are Moving . . . But the Words Aren't Clear: Dissecting the Presumption that Jurors Understand Instructions, 69 Mo. L. Rev. 163 (2004).

19. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor." U.S. CONST. amend. XI.


I. FALSE ACCUSATIONS: A DEFINITION AND ISSUES OF OCCURRENCE AND PREVALENCE

What is a "false" accusation of rape? For purposes of this article, and to have relevance in a criminal proceeding, it must connote one of three phenomena: (1) a report of forced sexual contact where there was no sexual conduct at all; (2) a claim of forced contact where the actual encounter was consensual; or (3) an accusation of a particular person when the complainant knows that her assailant was someone else. All are false because in each instance, as to the named accused, there was absolutely no criminal conduct.

No authority in the area of rape law scholarship disputes that there are some false accusations of this crime; indeed, even the strongest advocates for victims of rape concede this point. Where the dispute rages is in assessing the level of false accusations, with many advocates and scholars contending that the rate is in the 2% range, mimicking the rate of false accusations for non-sex offenses, while others vigorously

22. This formulation models that provided by the Alaska Court of Appeals: "(1) that the complaining witness made another accusation of sexual assault, (2) that this accusation was factually untrue, and (3) that the complaining witness knew that the accusation was untrue." Morgan v. State, 54 P.3d 332, 333 (Alaska Ct. App. 2002).

23. The separate issues of what degree of proof is needed to establish the falsity of the accusation, and whether this may be proved extrinsically as well as on cross-examination, are discussed infra Sections II.C (surveying the current judicial analysis of this question) and V.C (this Article's conclusion of the proper standard).

24. C.P. McDowell & N.S. Hibler, False Allegations, in PRACTICAL ASPECTS OF RAPE INVESTIGATION: A MULTIDISCIPLINARY APPROACH (R.R. Hazelwood & Ann Burgess ed., 1987). McDowell, of the U.S. Air Force Office of Special Investigation, and Hibler, of the F.B.I. Behavioral Sciences Division, document the phenomenon without suggesting a rate of occurrence. Connecticut Sexual Assault Crisis Services, Inc., a victim assistance and advocacy organization, acknowledges a 1-2% false reporting phenomenon. See Sharon Hunter et al., Equal Justice? Not Yet for Victims of Sexual Assault, available at CONNSACS, http://www.connsacs.org/library/justice.html ("With respect to actual false allegations, certainly these do happen . . . . The Portland Oregon police reported in 1990 that of the 431 rape and attempted rape complaints received, 1.6% were determined to be false compared with 2.6% of stolen vehicle reports that were false. A 1989 comparative analysis of data on false rape allegations reported a rate of 2%."). Even Susan Brownmiller, in her path-breaking book AGAINST OUR WILL: MEN, WOMEN AND RAPE 410 (Simon and Schuster 1975), posits a false reporting rate of 2%.

25. DEBORAH L. RHODE, SPEAKING OF SEX: THE DENIAL OF GENDER INEQUALITY 125 (1997) ("the overwhelming consensus in . . . research relying on government data is that false reports account for only about 2 percent of rape complaints"); Christopher Bopst, Legislative Reform: Rape Shield Laws and Prior False Accusations of Rape: The Need for Meaningful Legislative Reform, 24 J. LEGIS. 125, 126 (1998) ("studies . . . have shown that the frequency of rape reports proven false, approximately two percent, mirrors the false reporting rates for
contend that the rate is more substantial, beginning at 8%\textsuperscript{26} and then proceeding to higher, if sometimes indeterminate, numbers.\textsuperscript{27}

What accounts for this divergence? In some respects, there may have been an uncritical acceptance of the 2% rate, a theory espoused by Edward Greer as he seeks to document a practice of repetition of early citations to the 2% rate without an exploration of the initial figure’s validity.\textsuperscript{28} But Greer’s own analysis is flawed, conflating “false” accusations with those of mistaken identification.\textsuperscript{29} Similarly, there is often a failure to distinguish between the terms “false” and “unfounded,” the latter a law enforcement category that can reflect either a report proved to be false or merely one that is “unverifiable, not serious, or not prosecutable.”\textsuperscript{30}

Further problems (beyond a uniform definition of “false”) confound the attempt to establish a valid rate of false accusations. Recantations do not necessarily establish falsehood, as at least some are

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27. Alan Dershowitz, \textit{Rape: Guilty Until Proven Innocent}, BOSTON HERALD, May 20, 1991, at 25 (a “considerable number” of rape accusations are “false” or “exaggerated”); Alan Dershowitz, \textit{When Women Cry Rape and Lie}, BOSTON HERALD, May 18, 1992, at 25 (claiming that lies arise in rape cases more than in other “less emotional” crimes and that in some circumstances women may confuse “aggressive seduction” with “criminal sexual assault”). An oft-cited report is that of Eugene Kanin, contending that of 109 reports of rape filed between 1978 and 1987 in one mid-western city, forty-five—or 41%—turned out to be false, as admitted by the women themselves. Kanin, \textit{False Rape Allegations}, 23 ARCHIVES OF SEXUAL BEHAVIOR 81, 81-90 (1994). Kanin acknowledges that these results cannot necessarily be extrapolated beyond the one city studied. \textit{Id.}


29. “[T]here is an elaborate body of literature and numerous examples suggesting that a significant number—way beyond the two percent range—of capital murder convictions are of innocent men. Why should criminal trials involving sexual assaults on women be more accurately discriminating than those involving capital homicide?” \textit{Id.} at 953.

occasioned by peer, police, or other pressures. In addition, a significant proportion of rapes are never reported to authorities, making any statistic about “false” reports a percentage of reported rape cases and not of the overall occurrence of rape. Finally, some police departments have deliberately miscoded or downgraded reported sexual assault cases.

What can be concluded from this disarray? As Professor Anderson suggests,

neither side’s numbers in the debate over the rate of false complaints of rape lodged with the police appear to be supported by the kind of empirical evidence upon which one might feel confident. As a scientific matter, the frequency of false rape complaints to police or other legal authorities remains unknown.

Ultimately, however, the discord on this subject is of no consequence to the resolution of the underlying legal issue—the admissibility of evidence of a false accusation when the complainant again avers rape. If the incidence of such reports is indeed low, there will be no catastrophic side effect to admission, such as the dissuasion of victims from reporting and, as is discussed below, the low incidence of occurrence supports the admissibility of such accusations under the law of “doctrine of chance,” and if the incidence is greater, then such a risk is offset by the risk of false convictions where such evidence is excluded.

32. According to the 2003 National Crime Victimization Survey, “During 2003, 48% of all violent victimizations and 38% of all property crimes were reported to the police . . . . Thirty-nine percent of victims of rape/sexual assault . . . . indicated that their victimization had been reported to the police.” Criminal Victimization 2003, Bureau of Justice Statistics, U.S. Department of Justice, available at http://www.ojp.usdoj.gov/bjs/pub/ascii/cv03.txt.
33. Anderson, Violence, supra note 31, at 929 (noting several such occurrences including one where “Philadelphia police have acknowledged that the department’s rape squad wrongly shelved approximately 400 cases a year using a non-criminal code as a dumping ground for those cases that the police found difficult.”).
34. Anderson, Legacy, supra note 26, at 986 (citation omitted).
35. See infra Section IV, notes 135-38.
II. THE JUDICIAL RESPONSE TO FALSE ACCUSATION EVIDENCE

The judicial response to defense claims of trial error arising from the exclusion of evidence or the barring of questioning regarding prior false accusations (one dating back to the 1800's but litigated largely in the past several decades) has been wildly inconsistent and often ill-reasoned. The case law has little or no analysis of how to properly categorize the evidence (as impeachment or substantive); offers confused and often only superficial discussion of the nature of the confrontation right being alleged and its proper dimensions; is most often highly focused on what degree of proof is necessary to validate that the accusation merits the label "false;" and grapples with, but often does not resolve the question of whether, if such proof is allowed, it is limited to use in cross-examination or may also be introduced with extrinsic proof. Each of these categories is surveyed here. 36

A. Impeachment or Substantive Evidence

Impeachment evidence, at times described as "credibility" proof, is a secondary attack on a witness's [here, the rape complainant’s] testimony. The refutation is by a process of inference, 37 as is illustrated

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36. A fifth concern, whether false accusation evidence is within the terms and proscriptions of rape shield statutes, is also covered in many of the decisions. The clear majority of courts to address this find such evidence to be outside of rape shield considerations, as a false accusation is not sexual conduct or preference evidence. See, e.g., Clinebell v. Commonwealth, 368 S.E.2d 263, 264-65 (Va. 1988) (collecting cases). Two states' rape shield statutes have explicit exceptions for false accusation evidence. VT. STAT. ANN. tit. 13, § 3255(a)(3)(C) (2005) ("Evidence of specific instances of the complaining witness' past false allegations of violations of this chapter."); WIS. STAT. § 972.11(2)(b)(3) (2005) ("Evidence of prior untruthful allegations of sexual assault made by the complaining witness"). But see Commonwealth v. Gaddis, 639 A.2d 462, 467 (Pa. Super. Ct. 1994) (applying Pennsylvania rape shield provisions in determining admissibility of false accusation evidence).

37. See, e.g., EDWARD J. IMWINKELREID, EVIDENTIALY DISTINCTIONS 90 (Michie, Charlottesville 1993) (explaining that "both at common law and under the Federal Rules, the courts are more receptive to reliance on a witness's character trait for untruthfulness to support the conclusion that the witness lied on direct examination"). In the Federal Rules of Evidence, witness character impeachment is embodied in Rules 608 and 609. This is to be distinguished from a separate, but more direct, credibility attack, using a prior inconsistent statement to directly contest the accuracy or truthfulness of the witness's in-court testimony. FED. R. EVID. 613.
below:

Attack on general credibility $\rightarrow$ proves dishonest character $\rightarrow$
therefore, since the person is generally dishonest, she is probably lying here.

Applied to the phenomenon of false accusations, the evidentiary chain
becomes:

Complainant made prior false accusation $\rightarrow$ proves dishonest
character $\rightarrow$ therefore, because she is generally dishonest, she is
probably lying here.

Substantive proof, by contrast, is proof the jury can rely on to find
an alternative version of the events. It establishes the occurrence (or
here, the non-occurrence) of the event at issue, i.e., the rape under
prosecution. The general evidentiary chain is:

The person engages in a plan or pattern when confronted with a
particular circumstance $\rightarrow$ that circumstance exists here and,
therefore, the person did it here as well.

Applied to the false accusation case, the chain is:

This person makes false accusations in certain circumstances $\rightarrow$
Because those circumstance are present here, this too is a case of a
false accusation.

The historic response to false accusation evidence is one of
imprecision, with its earliest formulations failing to distinguish between
its use as substantive or credibility evidence. In 1888, Michigan's
Supreme Court held such evidence admissible with no explanation of the
scope for which it may be used: “To question whether the plaintiff had
not made charges similar in nature against two other persons, objection
was made, but we have no doubt it was proper to allow them, and also to
prove the facts, if she denied having made the charges.”38 In 1964, the
California Court of Appeals found such evidence appropriate, with
sufficient proof of falsity, “to probe the state of mind of the prosecutrix,

in the hope of establishing the falsity of her past complaints of rape, and the likelihood that the charge against appellant was untrue."\(^{39}\) Not much later, however, the Arizona Supreme Court discussed such proof in an analysis of available substantive evidence in the most general terms, explaining that "evidence concerning unchastity would be admissible in conjunction with an effort by the defense to show that the complaining witness has made unsubstantiated charges of rape in the past."\(^{40}\)

Explicit references to the false accusation proof as "credibility" evidence became prevalent after 1990 and persist to this day.\(^{41}\) As the District of Columbia Court of Appeals explained, "W.D.'s past allegations would be probative of her credibility only if they were fabricated."\(^{42}\) This "credibility" analysis, linked to Federal Rule of Evidence 608(b),\(^{43}\) continues unabated.\(^{44}\) In part, this is attributable to


\(^{40}\) State ex rel. Pope v. Superior Court, 545 P.2d 946, 953 (Ariz. 1976). See also People v. Mandel, 401 N.E.2d 185, 187 (N.Y. 1979), which appears to include substantive use of such evidence ("no showing was made that the particulars of the complaints, the circumstances or manner of the alleged assaults or the currency of the complaints were such as to suggest a pattern casting substantial doubt on the validity of the charges made by the victim in this instance or were such as otherwise to indicate a significant probative relation to such charges").

\(^{41}\) The clear majority of courts to address this issue accept the evidence for impeachment purposes rather than as substantive proof. See Clinebell v. Commonwealth, 368 S.E.2d 263, 265-66 (Va. 1988) (collecting cases and listing twenty states accepting such evidence, fifteen for impeachment and only five as substantive evidence).

\(^{42}\) Roundtree v. United States, 581 A.2d 315, 321 (D.C. 1990). In Roundtree, the defendant was a prison guard charged with sexually assaulting an inmate, W.D. He sought to prove that W.D. had claimed to have been raped or sexually abused by different men on at least eight occasions. Several allegations involved sexual abuse by family members or boyfriends of family members; others involved sexual assaults committed by pimps. Id. at 318-19. In at least one instance, after initially telling a social worker that she had been sexually abused by her brother, Hank, W.D. later denied that any such sexual abuse had occurred. Id. at 318.

\(^{43}\) Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, at the discretion of the court, and if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness to probe that witness's character for truthfulness or untruthfulness. Fed. R. Evid. 608(b).

\(^{44}\) United States v. Crowley, 318 F.3d 401, 417 (2d Cir. 2003) ("the questions defendants proposed to ask, which related to alleged instances of false accusation, were certainly relevant to the witness's credibility"); Boggs v. Collins, 226 F.3d 728, 739 (6th Cir. 2000) (collecting cases treating such questioning, without a specific link to the witness's bias or motive to fabricate, as limited to credibility); Benn v. Greiner, 294 F. Supp. 2d 354, 366 (E.D.N.Y. 2003) (implicitly treating this as credibility evidence by ruling that trial judge could preclude extrinsic evidence if complainant denied making false accusations); Graham v. State, 736 N.E.2d 822, 825 (Ind. Ct. App. 2000) ("In presenting such evidence, the defendant..."
defense counsel, whose offers of proof are couched only in terms of impeachment or credibility.

Defense counsel apparently wanted to use information he possessed concerning recanted accusations to make a general attack on the victim's credibility. He did not allege that the victim was biased or prejudiced against Petitioner or that she had an ulterior motive in testifying against Petitioner. The defense theory was that the alleged assault on the victim was something that the victim dreamed, as opposed to something that actually occurred. 45

Somewhere beyond traditional impeachment, because it is not merely the establishment of the witness's character for dishonesty and denominated as "special relevance," is the view of the Alaska Court of Appeals. In a well-researched opinion, the court cited to common-law acceptance of proof of "corruption—a term that encompassed evidence of . . . the witness's pattern of presenting false legal claims."46 Acknowledging the difficulty in categorizing the foundational basis for admitting such evidence,47 the Alaska court concluded by finding admission of such evidence inherent in the right of confrontation.48

proffers the evidence for impeachment purposes to demonstrate that the complaining witness has previously made false accusations of rape."); State v. Long, 140 S.W.3d 27, 30-31 (Mo. 2004) ("excluding extrinsic evidence of the witness's prior false allegations deprives the fact-finder of evidence that is highly relevant to a crucial issue directly in controversy; the credibility of the witness"); State v. Gordon, 770 A.2d 702, 704-05 (N.H. 2001) (treating such evidence as admissible under state evidence rule 608(b) to show dishonest character); State v. Guenther, 854 A.2d 308, 324 (N.J. 2004) (same).

46. Morgan v. State, 54 P.3d 332, 335 (Alaska Ct. App. 2002). The remaining forms of "corruption" are "(1) the witness's general willingness to lie under oath, (2) the witness's offer to give false testimony for money or other reward, (3) the witness's acknowledgment of having lied under oath on prior occasions, [or] (4) the witness's attempt to bribe another witness." Id. at 335. In Morgan, the defendant was charged with raping a person so intoxicated that she was incapable of consent. His defense was that the sexual act was knowing and fully consented to, and the charge of assault a falsehood. "Morgan asked the trial judge to allow him to present the testimony of four witnesses who (according to Morgan's offer of proof) were prepared to say that T.F. had accused men of sexually assaulting her on two previous occasions, only to later concede that these accusations were false." Id. at 334.
47. "Dean Wigmore concedes that the precise theoretical foundation of this sort of impeachment is 'not easy to determine' because, he says, the impeachment 'is related in one aspect to interest, in another to bias, in still another to character (i.e., involving a lack of moral integrity)."" Id. at 335 (quoting 3A JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW vol. 3A, §§ 956-964, at 802-12 (Chadbourn rev. 1970)).
48. Morgan, 54 P.3d at 336. See also Long, 140 S.W.3d at 30-31 (Mo. 2004) (citing to
Finally, in Kittleson v. Dretke, the Fifth Circuit found the exclusion of evidence of false accusation evidence to be a deprivation of the right of confrontation, as it was pertinent to establishing bias and, thus, attacking credibility.

The evidence [as to T.D.'s accusation that some other man had improperly touched her] also supported Kittelson’s defense theory by showing that T.D. had a motive to make up such an accusation in order to gain attention and sympathy, as she had received once before, and to show that once T.D.’s accusation had been reported to the police, she was afraid to recant.

It is only recently that some courts have at least hinted at the substantive use of false accusation evidence, a proposition vigorously repudiated in earlier decisions. With imprecise language treating this as both “pattern” and “credibility” evidence, the First Circuit has embraced the right of cross-examination on a false accusation arising from a factually similar event:

[W]hile 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.

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*Morgan* in a kidnaping prosecution and concluding that "excluding extrinsic evidence of the witness's prior false allegations deprives the fact-finder of evidence that is highly relevant to a crucial issue directly in controversy; the credibility of the witness"). Similar reasoning led the Ninth Circuit to conclude that exclusion of proof of possibly false prior accusations denied the accused his right of confrontation. Fowler v. Sacramento County Sheriff’s Dep't, 421 F.3d 1027, 1040 (9th Cir. 2005) ("where, as here, the proffered cross-examination might reasonably have influenced the jury's assessment of Lara's reliability or credibility, absent sufficient countervailing interests, the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on [Lara's] testimony which provided a crucial link in the proof" (internal quotation marks omitted)).

49. 426 F.3d 306 (5th Cir. 2005).
50. Id. at 322.
51. See, e.g., Roundtree v. United States, 581 A.2d 315, 320 (D.C. 1990) ("he could not have used the prior allegations as substantive evidence that W.D. had falsely accused him in this case. The law generally "disfavors the admission of evidence of a person's character in order to prove conduct in conformity with that character in the matter at issue." ").
If the prior accusations were false, it suggests a pattern and a pattern suggests an underlying motive (although without pinpointing its precise character). The strength of impeachment evidence falls along a continuum. That a defendant told lies to his teacher in grade school is at one end; that the witness was bribed for his court testimony is at another. Many jurors would regard a set of similar past charges by the girls, if shown to be false, as very potent proof in White's favor.

More explicit endorsement of the use of this evidence as substantive proof is found in several state cases, which accept this as proof of the complainant's "corrupt state of mind" or as "not offered for the purpose of impeaching or discrediting the general character or reputation of the witness, but . . . to disprove the very charge before the court. It is relevant as to the state of mind of the prosecutrix."

B. The Nature and Dimension of the Confrontation Right

Here, the divide is simple. Several courts limit the confrontation right to substantive evidence or "focused" attacks on credibility, such as

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52. White v. Coplan, 399 F.3d 18, 24 (1st Cir. 2005). White is limited to the "factual similarity" context, and to proof by cross-examination and not extrinsic evidence. The state of Washington also seems to recognize the potential for false accusation evidence to serve as substantive proof:

[T]he propensity of the complaining witness to cry "rape" is usually offered to impugn credibility . . . . Evidence tending to establish a party's theory, or to qualify or disprove the testimony of an adversary, is always relevant and admissible . . . . But the court can keep out prior accusation evidence, even if the defendant offers it for a purpose other than attacking credibility, if it has slight probative value that is outweighed by suggesting to the jury some impropriety.


As the court said in People v. Evans . . . : "If she was accustomed, and had on numerous occasions, as claimed by counsel for respondent, made statements charging, not only her brothers, but numerous other men of that community, with other similar offenses, and then admitted the falsity of such charges, it would have a tendency to show a morbid condition of mind or body, and go a long way in explaining this charge, which, under the circumstances, and the surroundings shown to exist, seems almost unaccountable."

Id. at 391 (quoting People v. Evans, 40 N.W. 473, 478 (Mich. 1888)).
proof of bias or motive. The leading case\(^5\) is *Boggs v. Collins*,\(^6\) in which habeas relief was denied to a petitioner challenging the state court's ban on impeachment with false accusation evidence.\(^7\) *Boggs* stands for the proposition that

the Constitution does not *require* that a defendant be given the opportunity to wage a general attack on credibility by pointing to individual instances of past conduct . . . . Under *Davis* [v. Alaska] 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.\(^8\)

A small but growing number of decisions read the confrontation right more broadly, guaranteeing the opportunity to impeach a witness's credibility. Judge Weinstein's articulation of this principle emphasizes that "'[t]he right to cross-examine includes the opportunity to show that a witness is biased, or that the testimony is exaggerated or unbelievable.'"\(^9\) Missouri has found this same right in its state...
constitution.60 The historic validity of these competing views is detailed infra, in section III.

C. The Degree of Proof Needed to Establish Falsity

Virtually every standard of proof short of the reasonable doubt test has been applied to the admission of false accusation evidence: the preponderance standard,61 clear and convincing evidence,62 a test described as "evidence sufficient to support [this] finding,"63 and another requiring "substantial evidence" that the prior accusation was false.64

Equally varied is the determination of precisely what must be shown, pre-trial or in limine, to satisfy admissibility.65 One court has required no proof that the prior accusation is false, finding that the pattern of making numerous complaints without seeking law enforcement intervention makes it "probable to some degree that the instant accusation is false or delusional."66 More typical is the three-part requirement that a defendant establish: "(1) the victim made another allegation of rape or sexual assault; (2) this allegation was false; and (3) the victim knew the allegation was false."67 At least one state mandates "similarity" between the prior accusation and the current offense.68

60. State v. Long, 140 S.W.3d 27, 30-31 (Mo. 2004) ("An evidentiary rule rendering non-collateral, highly relevant evidence inadmissible must yield to the defendant's constitutional right to present a full defense.") (citing MO. CONST. art. 1, § 18(a)).
61. Id. at 31-32; Morgan, 54 P.3d at 338.
62. State v. White, 765 A.2d 156, 159 (N.H. 2000); State v. Johnson, 692 P.2d 35, 43 (N.M. Ct. App. 1984); Hughes v. Raines, 641 F.2d 790, 792 (9th Cir. 1981); cf. Clinebell v. Commonwealth, 368 S.E.2d 263, 266 (Va. 1988) (proof that some prior claims were "patently untrue" leads to a "reasonable probability" that two other accusations were false as well).
63. State v. Smith, 743 So. 2d 199, 203 (La. 1999) (citing Huddleston v. United States, 485 U.S. 681, 690 (1988)). See also State v. DeSantis, 456 N.W.2d 600, 606-07 (Wis. 1990) (same); Fowler, 421 F.3d at 1039 (requiring admission of "evidence tending to show that an alleged victim of sexual abuse is prone to fantasy").
67. State v. Long, 140 S.W.3d 27, 31-32 (Mo. 2004) (summarizing national law); Guenther, 854 A.2d at 324. Missouri abandoned the first requirement, permitting evidence of a false accusation of any crime to be admissible. "The relevance of the prior false allegation is thus derived primarily from the fact that the allegation was false and not entirely from the subject matter of the prior false allegation." Long, 140 S.W.2d at 31.
68. State v. Gordon, 770 A.2d 702, 704 (N.H. 2001) (admitting false accusation evidence "only where the allegations are similar, and the proffered evidence is highly
The final analytical disarray is over what constitutes sufficient proof of an accusation's falsity. While there is some basic agreement, in particular, that neither the dismissal of criminal charges nor an acquittal by jury is sufficient without more to prove falsity, one jurisdiction has ruled that evidence of recantation of the prior accusation is insufficient to prove its falsity, a stance at odds with other states' requirement that a defendant "proffer any credible evidence that the accusation was false."

D. Cross-Examination, or Examination and Extrinsic Proof

For those states that qualify false accusation proof as impeachment evidence, there is a substantial divide over whether the evidence may be presented extrinsically, as opposed to solely by means of cross-examination. Constitutional challenges to limits on extrinsic proof of such evidence have largely been rejected, with one federal court of probative of the material issue of the complainant's motives).

69. Shorter v. United States, 792 A.2d 228, 235 (D.C. 2001) ("recantation of an alleged prior sexual assault, by itself, is insufficient to show convincingly that the accusation is false").


appeals reserving judgment on the question but casting doubt on a constitutional right to use extrinsic proof for impeachment. 74

This wide array of treatments of false accusation evidence is tolerable if, indeed, such proof has no constitutional dimension and is appropriately categorized as impeachment rather than substantive. These issues are addressed, respectively, in the next two sections of this article.

III. THE CONSTITUTION, CROSS-EXAMINATION, AND THE PRESENTATION OF DEFENSE EVIDENCE

There is a dual dilemma in ascertaining whether the Sixth Amendment 75 confers a right to present a defense and whether, as part of that right, or the right of “confronting” (“challenging”) witnesses, this extends to impeaching a witness’s presumed veracity. First, by every account, 76 the historic record for ascertaining the Framers’ intent in adopting the Confrontation Clause is skimpy, diffuse, and potentially contradictory. Second, the Supreme Court’s writing on this “scope of cross-examination” aspect of confrontation analysis has been largely devoid of historic reference or rootedness, 77 in marked contrast to its

74. White v. Coplan, 399 F.3d 18, 26 (1st Cir. 2005) (“[W]e are not endorsing any open-ended constitutional right to offer extrinsic evidence .... [T]o say that impeachment here would cast light on a motive to lie is not to suggest that prior false accusations are the kind of evidence for which extrinsic evidence has traditionally been admitted.

75. “In all criminal prosecutions, the accused shall enjoy the right to 


77. In Davis v. Alaska, 415 U.S. 308, 316-17 (1974), the seminal case identifying the right to cross-examine concerning witness bias, the Court cited to no historic writings other than Wigmore's generalized treatise and dicta from Greene v. McElroy, 360 U.S. 474, 496 (1959). The Wigmore citation regards the utility of cross-examination and has no mention of
writings on the hearsay and face-to-face aspects of confrontation analysis, where historic analysis has been core.

Unfortunately, the scholarship in this area is equally irresolute in determining the scope of the Confrontation Clause’s guarantee of the right of cross-examination. In his extensive treatment of this subject, Professor Randolph N. Jonakait acknowledges first that the evidence of both the Framers’ intent and of contemporaneous practice at the time of the adoption of the Confrontation Clause’s guarantee is “scanty,” with only limited references in the constitutional debates. He posits that the confrontation right of cross-examination reflects the ascendancy and acceptance of the role of lawyers in American colonial and early post-independence trials:

the intent of the Constitution’s drafters to incorporate or define the scope of this aspect of confrontation.


79. Coy v. Iowa, 487 U.S. 1012, 1015-16 (1988) (finding that the right to face-to-face confrontation has a lineage that traces back to Roman practice and the development of English law).


81. Id. at 116.

82. Id. at 120. Jonakait does emphasize that the references that do exist exalt the right of cross-examination:

For example, “Brutus,” in discussing how evidence should be taken in the proposed courts concluded, “it is of great importance in the distribution of justice that witnesses should be examined face to face, that the parties should have the fairest opportunity of cross examining them in order to bring out the whole truth . . . .”

Id. (citing ESSAY OF BRUTUS XIV, reprinted in BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 690 (1971)). Also, the state of Maryland, in its 1776 Declaration of Rights, provided that “[i]n all criminal prosecutions, every man hath a right . . . to be confronted with the witnesses against him . . . [and] to examine the witnesses for and against him on oath.” THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, & ORIGINS 403 (Neil H. Cogan ed., 1997). Indeed, a recognition of the importance of cross-examination was developed in French criminal justice theory in the late 16th century writings of Pierre Ayrault, who emphasized the desirability of cross-examination as a complement to the face-to-face rendering of an accuser’s testimony. PIERRE AYRAULT, ORDRE, FORMALITE ET INSTRUCTION JUDICIAIRE 1.5 (1588), quoted in Frank R. Herrmann & Brownlow M. Speer, Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause, 34 Va. J. Int’l L. 481, 541-42 (1994). A much more restrictive reading of the clause, linking it to the procedural right of establishing the “validity” of an accusation (by requiring the accuser to confront the defendant) rather than the substantive right of testing its reliability (established through cross-examination) concedes, ultimately, that cross-examination is still either implicit in this right or now a due process right “essential and fundamental to a fair trial.” Jeremy A. Blumenthal, Comment, Reading The Text of The Confrontation Clause: “To Be” or Not “To Be,” 3 U. Pa. J. Const. L. 722, 747 (2001).
The suggestion here is that America had adopted an adversary system, with defense cross-examination at its core, by the time of the Bill of Rights. This contention is supported by the transformation defense counsel brought to English criminal procedure, America’s early acceptance of a full right to counsel, and America’s creation of a public prosecutor. An adversary system was also consistent with new American concepts about crime, a government of checks-and-balances, and how society should be ordered. 83

That cross-examination had become a signal feature of trials in the late colonial and early post-Revolution period is not disputable. As one scholar explained in the early nineteenth century,

The Law never gives credit to the bare assertion of any one, however high his rank or pure his morals; but always requires the sanction of an oath: It further requires his personal attendance in Court, that he may be examined and cross examined by the different parties . . . ; for the relation of one who has no other knowledge of the subject than the information he has received from others, is not a relation upon oath; and moreover the party against whom such evidence should be permitted would be precluded from his benefit of cross examination. 84

83. Jonakait, supra note 80, at 108. The importance of the role of counsel in defining the intent of the confrontation right is also accepted by Professors Friedman and McCormack:

[The Americans did not simply draw on English law. American criminal procedure developed in a distinctive way. The right to counsel in felony trials developed far more quickly in America than in England, and with it rose an adversarial spirit that made the opportunity for confrontation of adverse witnesses especially crucial.]

Richard D. Friedman & Bridget McCormack, Dial-in Testimony, 150 U. Pa. L. Rev. 1171, 1206-07 (2002). See also Robert P. Mosteller, Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions, 1993 U. Ill. L. Rev. 691, 742 (1993) ("Enactment of the Sixth Amendment occurred just as evidence law was rapidly developing . . . . [A]n emphasis on cross-examination was ascending . . . . It is likely, however, that because they were acting in the midst of a century in which the adversary system was expanding on many fronts, the Framers were looking forward to a doctrine with the right of cross-examination preeminent.").

84. THOMAS PEAKE, COMPENDIUM OF THE LAW OF EVIDENCE 61 (Frederick-Town, John P. Thompson, 3d ed. 1809). See id. at 6-7 (best evidence), 7-8 (oath). The earlier (1801) version of the Compendium, in its discussion "Of The Examination Of Witnesses," explained that after a witness’s direct examination "[t]he counsel retained on the other side, next cross-examines the witness, and the witness not being supposed so friendly to his client as the party by whom he is called, he is not restrained to any particular mode of examination." Id. at 135 (Garland ed. 1979) (1801).
This emphasis on the increased role of lawyers and of cross-examination is not limited to Jonakait’s research and is at the core of the Crawford decision, which limited hearsay in criminal trials. However, even if correct, this still fails to address “how much” confrontation is required.

A survey of the leading confrontation cross-examination decisions of the Supreme Court similarly only provides guidance in answering this question. There are three reasons for this: (1) the paucity of historic authority; (2) the wide-ranging and conflicting descriptions of the right of cross-examination; and (3) the lack of any directly controlling decision.

85. 541 U.S. 36 (2004). As the Court explained,

The founding generation’s immediate source of the [confrontation] concept, however, was the common law. English common law has long differed from continental civil law in regard to the manner in which witnesses give testimony in criminal trials. The common-law tradition is one of live testimony in court subject to adversarial testing.

Id. at 43. The Crawford Court concluded that “the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused . . . . The Sixth Amendment must be interpreted with this focus in mind.” Id. at 50.

86. Other theories of the nature of the confrontation right also leave this question unanswered. Sherman J. Clark’s An Accuser-Obligation Approach to the Confrontation Clause, 81 Neb. L. Rev. 1258 (2003), suggests that the clause be read as primarily addressing “an accuser’s obligation rather than primarily as a defendant’s right.” This analysis, used by Clark to attempt to rationalize confrontation claims involving hearsay and non-testifying declarants, has no strong historic rootedness, is of no value in addressing issues involving the scope of cross-examination and, indeed, has no discussion of the impact of the “accuser obligation” approach on cross-examination confrontation claims. John G. Douglass’s Beyond Admissibility: Real Confrontation, Virtual Cross-Examination, and The Right to Confront Hearsay, 67 Geo. Wash. L. Rev. 191 (1999), which seeks to de-emphasize the confrontation guarantee as a rule excluding hearsay and instead reconfigure it as a right to “confront” the hearsay declarant through the impeachment equivalent to the cross-examination of a live witness, exerts impeachment but provides no test for “how much” impeachment is guaranteed. Margaret A. Berger’s The Deconstitutionalization of The Confrontation Clause: a Proposal For a Prosecutorial Restraint Model., 76 Minn. L. Rev. 557, 557 (1992), which posits that “confrontation emerged as part of a procedural package for diminishing the government’s inquisitorial powers,” provides no standard for establishing boundaries on the scope of cross-examination. A further restricting factor is that because the confrontation right addresses multiple concerns—a defendant’s right of presence in the courtroom, the manner of face-toface confrontation, the admission of hearsay, and the right and scope of cross-examination—court decisions and scholarship often falter by addressing only one of these aspects while seemingly articulating an over-arching theory of the clause’s reach. James B. Haddad, Future Trends in Criminal Procedure: The Future of Confrontation Clause Developments: What Will Emerge When the Supreme Court Synthesizes the Diverse Lines of Confrontation Decisions?, 81 J. Crim. L. & Criminology 77 (1990); Ruth L. Friedman, Comment, The Confrontation Clause in Search of a Paradigm: Has Public Policy Trumped the Constitution?, 22 Pace L. Rev. 455 (2002) (tracking the varying streams of confrontation jurisprudence).
The Court's first reported confrontation decision dealt not with the scope of cross-examination but the use of transcripts of now-dead witnesses' testimony from an earlier trial where full cross-examination occurred.\textsuperscript{87} A secondary issue, one not litigated as a confrontation claim, was whether the trial court erred in precluding the impeachment of the now-dead witnesses with testimony from others to whom those witnesses had made statements that were inconsistent with their first trial testimony. In affirming the preclusion, the Court did not discount the importance of witness impeachment but focused instead on the problem of a dead witness's inability to refute the claim and the potential for a criminal defendant to conjure up perjured accounts of inconsistent statements by now-deceased witnesses:

While the enforcement of the rule, in case of the death of the witness subsequent to his examination, may work an occasional hardship by depriving the party of the opportunity of proving the contradictory statements, a relaxation of the rule in such cases would offer a temptation to perjury, and the fabrication of testimony, which, in criminal cases especially, would be almost irresistible.\textsuperscript{88}

With no constitutional underpinning to this second holding, \textit{Mattox} can be read only as precluding potentially unreliable impeachment evidence that a witness is unable, due to death, to refute.\textsuperscript{89} Implicit in the decision is an acceptance of traditional witness impeachment (at least where the witness in question is alive and able to challenge the

\begin{itemize}
\item \textsuperscript{87} Mattox v. United States, 156 U.S. 237, 238-44 (1895).
\item \textsuperscript{88} \textit{Id.} at 250.
\item \textsuperscript{89} \textit{Mattox} applies a variant of the principle set forth in \textit{The Queen's Case}, 129 Eng. Rep. 976 (1820), that a cross-examiner, prior to questioning the witness about his own prior statement in writing, must first show it to the witness. That rule, abolished by statute in England, has also been abolished in federal court practice here. \textit{Fed. R. Evid.} 613. Significantly, the dissent in \textit{Mattox} felt that such impeachment should be allowed regardless of the inability of the challenged (here, unavailable) witness to refute the allegation of dishonesty or corruption:
\item If, then, the right of the accused to confront the witnesses against him, although formally secured to him by the express terms of the Constitution, and being of that importance and value to him as are recognized by the court, may be dispensed with because of the death of a witness, it would seem justly to follow that neither should that death deprive the accused of his right to put in evidence valid and competent in its nature, to show that the witness was unworthy of belief, or had become convinced, after the trial, that he had been mistaken. \textit{Mattox}, 156 U.S. at 260 (Shiras, J., dissenting).
\end{itemize}
impeachment). 90

Undisputably, the most important case in addressing the scope of cross-examination guaranteed to a criminal accused is *Davis v. Alaska.* 91 There, the Court guaranteed the right to cross-examine to prove bias 92 as part of a broader right of cross-examination:

Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness's story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness. One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. By doing so, the cross-examiner intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony. The introduction of evidence of a prior crime is thus a general attack on the credibility of the witness. A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. 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. 93

Reading this language alone, *Davis* seems to validate the right to impeach based on prior false accusations, as such impeachment is "character" impeachment, no different in kind from (and potentially more probative than) impeachment by proof of prior conviction. 94

90. It is important to note that the *Mattox* distinction between available and unavailable witnesses no longer survives. Rule 806 of the Federal Rules of Evidence permits the impeachment of any hearsay declarant the same as if the declarant had testified in court.
92. In *Davis,* the defense was denied the right to prove, at trial, that the accusing witness himself was on juvenile court probation because Alaska law made such status confidential. *Id.* at 311-12.
93. *Id.* at 316 (internal quotation marks omitted).
94. See FED. R. EVID. 608 & 609 (treating impeachment by prior untruthful conduct (Rule 608(b)) and prior conviction (Rule 609) as impeachment by proof of dishonest character). There is significant debate over whether prior convictions are in fact demonstrative of a dishonest character. FED. R. EVID. 609 advisory committee's notes ("There is little dissent from the general proposition that at least some crimes are relevant to credibility but much disagreement among the cases and commentators about which crimes are usable for this purpose."). For prior untruthful conduct, the Federal Rules acknowledge probativeness as long as "the instances inquired into be probative of truthfulness or its
Indeed, the *Davis* Court's citation to and quotation from *Greene v. McElroy* gives further support to the right to establish that the accusing witness is a "perjurer." Yet the language in *Greene*, a case analyzing whether the complete denial of confrontation in a security clearance revocation proceeding is constitutional, is dictum. And, Justice Stewart's concurrence, not questioned in the majority opinion, notes the actual limited holding of *Davis*: "In joining the Court's opinion, I would emphasize that the Court neither holds nor suggests that the Constitution confers a right in every case to impeach the general credibility of a witness through cross-examination about his past delinquency adjudications or criminal convictions." In sum, while strongly supporting the constitutional right to "general" character impeachment confrontation, *Davis* ultimately leaves the matter unresolved.

Some further insight may be gained, however, from the *Davis* Court's reliance on Wigmore's influential treatise. Wigmore is cited first for the proposition that the confrontation guarantee requires actual and meaningful cross-examination, and then as authority for the opposite and not remote in time." FED. R. EVID. 608 advisory committee's notes.

95. 360 U.S. 474 (1959). In a quote that would later be used in *Davis*, 415 U.S. at 316-27, the Court held:

[W]here governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination.

*Greene*, 360 U.S. at 496 (emphasis added).

96. *Davis*, 415 U.S. at 321 (Stewart, J. concurring). This distinction between "general" and case-specific (bias) impeachment has been seized on in both academic writings, see Johnson, *supra* note 15, at 261 ("The Court distinguished between an attack on the general credibility of the witness and one directed toward 'revealing possible biases, prejudices or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand'"); and judicial decisions, see Boggs v. Collins, 226 F.3d 728, 736 (6th Cir. 2000) ("the *Davis* Court distinguished between a 'general attack' on the credibility of a witness—in which the cross-examiner 'intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony'—and a more particular attack on credibility 'directed toward revealing possible biases, prejudices, or ulterior motives as they may relate directly to issues or personalities in the case at hand'") to uphold as constitutional the exclusion of evidence of prior false accusations. Neither authority mentions *Greene* or its language.

97. *Davis*, 415 U.S. at 315 (quoting 5 J. WIGMORE, EVIDENCE § 1395, at 123 (3d ed. 1940)).
holding that inquiry into a witness’s bias is core to this right.\textsuperscript{98} While
the cited portion of Wigmore does not address attacks on a witness’s
dishonest character, that subject is part of the “testimonial impeachment
section”\textsuperscript{99} termed “emotional incapacity”\textsuperscript{100} that approves of false
accusation evidence as part of the category of witness “corruption” and
being admissible “beyond question.”\textsuperscript{101}

The approval of evidence of witness corruption dates at least to the
time of the adoption of the Confrontation Clause.\textsuperscript{102} As the Connecticut
Superior Court explained in 1793, a witness may be impeached with
proof that he would say anything for money “as it went to lessen the
weight of his testimony.”\textsuperscript{103} Wigmore also relies on the 1833 South
Carolina decision in \textit{Anonymous,}\footnote{104} which was later elaborated upon in a
decision of the South Carolina Supreme Court:

\textsuperscript{98} \textit{Id.} ("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.’") (quoting 3A
WIGMORE, \textit{supra} note 47, \S 940, at 775).
\textsuperscript{99} 3A WIGMORE, \textit{supra} note 47, \S\S 940 et seq.
\textsuperscript{100} \textit{Id.} \S 940, at 775.
\textsuperscript{101} \textit{Id.} \S\S 957, at 803 (“A willingness to swear falsely is, beyond any question,
admissible as negativing the presence of that sense of moral duty to speak truthfully which is
at the foundation of the theory of testimonial evidence.").
\textsuperscript{102} The admission of such evidence may also derive from the historic reliance on juries,
drawn from the vicinage where the event on trial occurred, who were presumed, if not
required, to know the character of each party. Newton N. Minnow & Fred H. Cate, \textit{Who Is an
common law origins, the jury was composed of people specifically chosen for their
knowledge of the parties and facts involved in the case.”); see V. HANS & N. VIDMAR,
\textit{Judging the Jury} 23-24 (1986). Once the requirement of impartial jurors became law, this
knowledge had to be recreated by cross-examination:

One of the great benefits of trial by jury was supposed to exist in the circumstance
that the jury, being from the vicinage of the parties and the witnesses, were better
able to judge of their relative honesty and credibility. It would seem, therefore, in
accordance with this principle, that under the modern forms of impaneling juries,
which do not in many cases afford to jurors the means of judging from personal
knowledge of the character of witnesses the measure of credit to be given to them,
that as liberal a course for supplying this deficiency of knowledge should be
allowed as would be compatible with the rights of the witnesses; for while the
policy of the law is against extending the absolute exclusion of testimony, it should
favor in the fullest degree practicable, the means of ascertaining its just value.
Bakeman v. Rose, 18 Wend. 146, 152-53 (N.Y. 1837).
\textsuperscript{103} Newhal v. Wadhams, 1 Ronn 504 (Conn. 1793) (cited in 3A WIGMORE, \textit{supra} note
47, \S 957, at 803 n.1). In \textit{Newhal}, “[t]he defendant offered to prove that one of the plaintiff’s
witnesses had declared that he would swear to anything, if he could get six shillings by it.” \textit{Id.}
\textsuperscript{104} 19 S.C.L. (1 Hill) 251, 252 (S.C. App. 1833) (cited in 3A WIGMORE, \textit{supra} note 47,
\S 957, at 803).
The witness may testify upon his examination in chief to particular facts, when they are such as directly show that the impeached witness is unworthy of credibility. The belief of a witness, that he was not bound on oath to tell the truth, would, if coming from his own lips, render him incompetent to be sworn, or if after he was sworn and had testified, it was proved by another witness, it would constitute a most satisfactory reason why the jury should disbelieve him. The testimony allowed for the purpose of impeaching the testimony of Nimrod Mitchell, was of this character. It was proved that he had said, "that if he heard any man say he would not swear a lie, he would not believe him, for on some particular occasions he would, for he thought any man would." Is not such testimony better evidence to discredit the witness than even a want of character? Such evidence is not establishing bad character from particular facts. It is showing that the witness holds such opinions of the obligations of an oath as to render him unworthy of belief, when he had called God to witness the truth of what he asserts.

Nineteenth-century English commentary also confirms the recognized right to examine a witness adversarially to challenge credibility. Best's 1849 treatise quotes Sir Matthew Hale's injunction that "[e]xceptions to the credit of a witness," although not disqualifying the person from testifying, were to be weighed by the jury. Stephens's 1876 Digest states authoritatively that the right of examination includes inquiry with "any questions which tend to test his .. credibility .. or to shake his credit by injuring his character." Stephens illustrates this principle by citation to R. v Orton and the right to examine a witness as to whether he had committed adultery with a friend's wife years before the matter on trial. Clearly, in both this country and England, the scope of witness examination was extensive.

106. WILLIAM BEST, A TREATISE ON THE PRINCIPLES OF EVIDENCE, § 171 (Garland ed. 1978) (1849)
108. 14 Q.B.D. 170 (1873).
109. Id. The full description of Orton, as provided by Stephens, is as follows:

The question was, whether A committed perjury in swearing that he was RT. B deposed that he made tattoo marks on the arm of RT, which at the time of the trial were not and never had been on the arm of A. B was asked and was compelled to answer the question whether, many years after the alleged tattooing, and many years before the occasion on which he was examined, he committed adultery with the wife of one of his friends.

STEPHENS, supra note 107, at Art. 130. Stephens maintained, separately, that if the witness denied the act while being cross-examined, extrinsic proof of the same was generally forbidden. Id.
Wigmore's characterization of such evidence as something more than mere impeachment is also critical to this analysis. He recognizes that "[i]t is related in one aspect to interest, in another to bias, in still another to character . . . the essential discrediting element is a willingness to obstruct the discovery of the truth by manufacturing or suppressing testimony." 110

Notwithstanding this historical record, decisions of the Court after Davis fail to conclusively resolve whether the confrontation right extends to non-bias impeachment. No decision addresses false accusation evidence or any analog thereto, and language in the Court's confrontation holdings is alternately expansive or restrictive. Olden v. Kentucky emphasized that "the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness[,]" 111 but dealt with case-specific evidence, which in that case was the right to prove that the complainant was in a relationship with another man and may have fabricated the rape accusation against Olden to avoid a confrontation with her paramour. 112 Michigan v. Lucas 113 reiterated that "trial judges retain wide latitude to limit reasonably a criminal defendant's right to cross-examine a witness" 114 but applied this language in a procedural context when the Court held that failure to comply with pre-trial discovery notice requirements under a state rape shield law may be sanctioned with evidence preclusion. 115 The Court in Owens v. United States 116 spoke of the guarantee of an "adequate opportunity to cross-examine adverse witnesses," but it did so in the context of a witness who suffered memory loss. 117 In Pennsylvania v. Ritchie, the Court viewed the right expansively, as including "the opportunity to show that a witness is biased, or that the testimony is exaggerated or

110. 3A WIGMORE, supra note 47, §956, at 802-03 (Chadbourn rev. 1970).
112. Id. ("In the instant case, petitioner has consistently asserted that he and Matthews engaged in consensual sexual acts and that Matthews—out of fear of jeopardizing her relationship with Russell—lied when she told Russell she had been raped and has continued to lie since").
114. Id. at 149 (quoting Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986)). Van Arsdall's language, emphasizing the restrictions that may be imposed on cross-examination, is clear dictum, as the Court in that case found a confrontation violation arising from a denial of the right to present proof of witness bias and focused on whether a harmless error analysis applied in such cases.
115. Id. at 150.
117. Id. at 557-60.
unbelievable[.]

but it did so in analyzing a pre-trial discovery claim and not a restriction on cross-examination.

At the same time, Owens quotes approvingly from Delaware v. Fensterer, holding that

The Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. To the contrary, the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony.

Yet again, the facts of Fensterer are inapposite to the quotation from Owens. In Fensterer, the question presented was whether an accused was denied the right of confrontation where a testifying expert witness could not recall the foundation for his opinion.

In sum, and, in particular, in light of the expansive language in Greene (permitting proof that the witness is a "perjurer"), Ritchie (allowing inquiry to show that the witness is "unbelievable") and Fensterer (allowing questioning that shows "evasion"), and in light of Wigmore's analysis and the Davis Court's reliance on his treatise in defining the confrontation right, there is substantial support for concluding that the Confrontation Clause and its twin, the

119. Id.
121. Owens, 484 U.S. at 558 (quoting Fensterer, 474 U.S. at 20).
122. The Court in Fensterer also explained that "the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Fensterer, 474 U.S. at 20. Yet read contextually, this statement does not address the types of questions permitted, but the fact that no violation occurs when the witness cannot fully answer those proper inquiries.
123. It is generally recognized and accepted that the right of compulsory process is not merely a procedural one conferring subpoena authority, but a substantive one permitting the presentation of evidence congruent with (if not more extensive than) that raised on cross-examination. See Taylor v. Illinois, 484 U.S. 4000 (1988) ("The right to compel a witness' presence in the courtroom could not protect the integrity of the adversary process if it did not embrace the right to have the witness' testimony heard by the trier of fact"); Crane v. Kentucky, 476 U.S. 683, 691 (1986) ("Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.") (internal quotation marks omitted); Washington v. Texas, 388
Compulsory Process Clause, do include cross-examination on, and extrinsic proof\textsuperscript{124} regarding, false accusation \textit{impeachment} evidence.\textsuperscript{125} As we demonstrate next, such evidence is in fact not only impeachment, but it is substantive evidence with sufficient reliability to mandate admission under both Due Process and Compulsory Process guarantees.

U.S. 14, 19 (1967) (holding that the "right to present ... witnesses to establish a defense ... is a fundamental element of due process of law"); Richard A. Nagareda, \textit{Reconceiving The Right to Present Witnesses}, 97 MICH. L. REV. 1063 (1999); David A. Harris, \textit{Criminal Law, the Constitution and Truth Seeking: A New Theory on Expert Services for Indigent Defendants}, 83 J. CRIM. L. \& CRIMINOLOGY 469, 508 (1992) ("If the Confrontation Clause and the right to cross-examination that it protects allows the defense to challenge the state's evidence, the Compulsory Process Clause gives the defense a critical tool it needs to put on its own evidence."); Peter Westen, \textit{The Compulsory Process Clause}, 73 MICH. L. REV. 71, 78 (1974) (noting that by 1791, compulsory process "represented the culmination of a long-evolving principle that the defendant should have a meaningful opportunity, at least on a par with that of the prosecution, to present a case in his favor through witnesses"); but see Lisa Graver, \textit{Note, The Current Value of Compulsory Process: Can a Defendant Compel the Admission of Favorable Scientific Testimony?}, 48 CASE W. RES. 865, 875-77 (1978) (acknowledging the right as extending to the presentation of favorable defense evidence, but suggesting that a state law determination of the unreliability of a category of evidence will suffice to support exclusion). The issue of reliability of false accusation evidence is discussed \textit{infra} at section V.

\textsuperscript{124} Nagareda argues, explicitly, that the right of compulsory process, when viewed as a defendant's right to exceptions from traditional rules of evidence, extends to extrinsic evidence of impeachment, i.e., the presentation of witnesses to prove dishonest acts of an earlier testifying witness. Nagareda, supra note 123, at 1103-04. In \textit{United States v. Abel}, 469 U.S. 45, 49-50 (1984), the Court explicitly linked the Federal Rules of Evidence's treatment of proof of bias with that of proof of "corruption." See E. CLEARY, \textit{MCCORMICK ON EVIDENCE} § 40, at 85 (3d ed. 1984)). The McCormick treatise makes clear that such proof may be made on cross-examination and extrinsically. \textit{Id.}

\textsuperscript{125} This support is also found in the holdings of lower federal courts finding numerous categories of impeachment evidence within the scope of the confrontation guarantee. \textit{See Doe v. United States}, 666 F.2d 43, 48 (4th Cir. 1981) (proving the accused's state of mind); \textit{United States v. Stamper}, 766 F. Supp. 1396, 1400 (W.D.N.C. 1991), \textit{aff'd without opinion, In re One Female Juvenile Victim, 959 F.2d 231 (4th Cir. 1992) (same)}; \textit{Lajoie v. Thompson, 217 F.3d 663, 671 (9th Cir. 2000)} (an alternative explanation for physical evidence); \textit{United States v. Begay}, 937 F.2d 515, 523 (10th Cir. 1991) (same); \textit{United States v. Bear Stops, 997 F.2d 451, 455 (8th Cir. 1993)} (same); \textit{Lajoie, 217 F.3d at 672} (the complainant's knowledge of sexual acts or source of information); \textit{Lewis v. Wilkinson, 307 F.3d 413, 420 (6th Cir. 2002)} (evidence "of consent"); \textit{Latzer v. Abrams, 602 F. Supp. 1314, 1319 (E.D.N.Y. 1985)} (faulty or flawed memory); \textit{Driscoll v. Delo, 71 F.3d 701, 710 (8th Cir. 1995)} (inconsistent statements pertaining to the case at hand).
IV. "PLAN" AND THE "DOCTRINE OF CHANCE": THE 404(B) EXCEPTIONS AND THEIR APPLICABILITY TO FALSE ACCUSATION EVIDENCE:

A. Introduction

Prior acts are admissible, as a general rule, when they serve a "non-character" purpose, i.e., when they are not admitted to "prove the character of the person to show action in conformity therewith." The intent of the drafters, and of Congress in adopting this language, was for an expansive approach to admissibility, restricted or channeled only by Federal Rule of Evidence 403 considerations of undue prejudice, confusion of the issues, and waste of time. The

126. FED. R. EVID. 404(b). Neither by its terms nor by decisional law is this rule limited to the conduct of parties. To the contrary, it has been applied directly and consistently to non-party individuals.

127. In United States v. Long, the Third Circuit noted that

The draftsmen of Rule 404(b) intended it to be construed as one of "inclusion," and not "exclusion." They intended to emphasize admissibility of "other crime" evidence. This emerges from the legislative history, which saw the " exclusionary" approach of the Supreme Court version of Rule 404(b) modified. Thus, the Supreme Court's final formulation, after prohibiting evidence of other crimes to prove the character of the defendant, had provided that "this subdivision does not exclude the evidence when offered for other purposes such as . . . ." The list of exceptions following.


129. Thomas M. DiBiagio, Intrinsic And Extrinsic Evidence in Federal Criminal Trials: Is the Admission of Collateral Other-crimes Evidence Disconnected to the Fundamental Right to a Fair Trial, 47 SYRACUSE L. REV. 1229, 1238-39 (1997) ("the courts have construed Rule 404(b) as an inclusive provision permitting the admission of all extrinsic evidence of other criminal conduct. The only practical limitation that has settled into the marrow is that other-crimes evidence cannot be introduced for the sole purpose of demonstrating the propensity of a defendant to commit a crime or his bad character.").

130. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative
result is a strong presumption of admissibility: “Rule 404(b) is a rule of inclusion, prohibiting only evidence that tends solely to prove the defendant’s criminal disposition.” So applied, evidence of prior false accusations is readily admitted under Rule 404(b), and state law analogs as substantive proof on two discrete non-character grounds—plan, and the doctrine of chance.

B. Plan

What is “plan” as denominated in evidence rules such as Federal Rule of Evidence 404(b)? The term, given no explicit definition or limitation, must be given meaning first by the general exclusion of propensity evidence embodied in the command that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith[.]” and second, as being distinct from evidence of unique modus operandi, proof evidence. FED. R. EVID. 404(b).

Beyond any absence of definition or limitation in Rule 404(b) itself, traditional evidence texts either offer no specific definition of “plan” or do so loosely. McCormick describes plan as “includ[ing] crimes committed in preparation for the offense charged[ ]” but fails to elucidate what else is “included” in this exception. CLEARY, MCCORMICK ON EVIDENCE, supra note 124, § 190, at 559 n.15. For Mueller and Kirkpatrick, plan (or design) "refers to a mental resolve to do something, and usually it is an anticipatory idea that implies preparation and working out of particulars (time, place, manner and means).” MUELLER AND KIRKPATRICK, FEDERAL EVIDENCE, Vol. 1, § 113, at 663 (1994). These authors do propose a limitation: “The other acts or crimes [must] . . . support an inference that the defendant or defendants formed a plan or scheme that contemplated commission of the crime charged.” Id. at 667.

As one court has explained this exception,

where the “pattern and characteristics of the crimes [are] so unusual and distinctive as to be like a signature,” 1 McCormick on Evidence §190, at 663, evidence of a defendant’s prior crimes is admissible to prove that it was indeed the defendant that committed the charged crime. In these cases, the evidence goes to identity.

United States v. Carroll, 207 F.3d 465, 468 (8th Cir. 2000). The need of the signature aspect is evident—as many people rob banks, little is proved in identifying the accused as the perpetrator of the crime by showing at trial that she/he committed another crime at another time. Without the signature aspect (e.g., wearing a Batman mask and using a bank robbery note written in red ink), we simply know that this defendant, who has robbed a bank in the
adduced to establish the separate Rule 404(b) purpose of "identity." In other words, a prior act may be proof of "plan" without the uniqueness necessary to prove identity, but with something more than a generic aspect that establishes nothing more than propensity.

Where that line is drawn is unclear, notwithstanding extensive and diligent scholarly comment and dispute. There is general agreement that "plan" covers other crimes that are "intrinsic" to that on trial, i.e., an earlier or subsequent crime committed to facilitate or complete the crime on trial (as when a person burglarizes a bank president's home to steal the safe combination used in the subsequent, under-prosecution, bank robbery). Where the disagreement flowers is in addressing "extrinsic" plan, i.e., evidence that weeks, months, or years prior, the accused committed a similar crime and thus evidenced his/her "plan" to commit such crimes whenever (or at some time when) a similar opportunity presented itself.

Professor Imwinkelreid has identified three discrete conceptualizations of plan evidence: (1) the "unlinked plan theory," whereby the prosecution may admit uncharged misconduct upon proof of a common methodology; (2) the "linked methodology theory," where there is evidence proving that the defendant crafted a plan "to be used whenever the opportunity presented itself"; and (3) the "linked act theory," where there is proof that the various crimes were all planned as part of a single criminal episode or undertaking.

past, is part of a large class of bank robbers. There is little or no probative value in such evidence, but there is tremendous potential for unfair prejudice. "The focus here, therefore, should be on whether the similarities between the other acts evidence and the charged crime clearly distinguish the defendant from other criminals committing the same crime." United States v. Smith, 103 F.3d 600, 603 (7th Cir. 1996).


137. MUELLER AND KIRKPATRICK, FEDERAL EVIDENCE, supra note 133, Vol. 1, § 113, at 666.


139. Id.
While Imwinkelreid supports admission primarily only of the last category of evidence, he does acknowledge the at-least occasional propriety of utilizing “linked methodology” proof. Yet, Imwinkelreid’s desire to exclude “unlinked plan theory” evidence is of little significance in false accusation cases, as prior false accusations arguably fit within the “linked methodology” form of plan, evincing intent or willingness to resort to a particular tactic to avoid a conflict or redress an apparent injury. And notwithstanding Imwinkelreid’s demarcations among categories of plan, courts have accepted plan evidence of each type, and the United States Supreme Court has issued no decision limiting or even questioning this expansive reach of Federal Rule 404(b).

The appropriateness of the plan category of evidence to include proof of false accusations is found in court treatment of cases of police misconduct, when prior acts of similar misconduct against other civilians, in unrelated circumstances, are admissible to show the officer’s “plan” to resort to such tactics when needed. In Wilson v. City of Chicago, the plaintiff, convicted of murdering two police officers, sought monetary damages for civil rights violations; in particular, for being beaten by detectives during his post-arrest interrogation. The Seventh Circuit found error in the district court’s exclusion of other acts of police brutality by the defendant officers:

140. Id.
141. Id. at 1011 (“the linked methodology theory can legitimately be used in only the rarest of cases . . . . [T]he linked act theory emerges as the only version of the doctrine that courts may legitimately apply with any regularity.”).
142. See Thomas J. Reed, Admission of Other Criminal Act Evidence After Adoption of The Federal Rules of Evidence, 53 U. Chi. L. Rev. 113, 135-38 (1984) (identifying a doctrine of the “one-man conspiracy” that has been read expansively [and improperly, in Reed’s view] to include prior acts by a defendant, not part of the current criminal enterprise, “as admissible to show the nature and extent of the enterprise or the defendant’s intent and plan or motive”).
143. To the contrary, the Court has admitted other act evidence to prove witness bias, United States v. Abel, 469 U.S. 45 (1984) and to prove identity even where the defendant was acquitted of the prior act, Dowling v. United States, 493 U.S. 342 (1990). In a more general sense, the Court affirmed its commitment to an inclusive approach in Old Chief v. United States, 519 U.S. 172, 188 (1997), where it explained the general rule that “the prosecution may fairly seek to place its evidence before the jurors, as much to tell a story of guiltiness as to support an inference of guilt, to convince the jurors that a guilty verdict would be morally reasonable as much as to point to the discrete elements of a defendant’s legal fault.”
144. 6 F.3d 1233 (7th Cir. 1993).
145. Wilson claimed that “he was punched, kicked, smothered with a plastic bag, electrically shocked, and forced against a hot radiator.” Id. at 1236.
Melvin Jones[...]. Melvin Jones[...] claimed to have been subjected to electroshock by Burge and other officers nine days before the interrogation of Wilson[...]. Another excluded defense witness, Donald White, would have testified that he was arrested as a suspect in the murder of the two police officers shortly before Wilson’s arrest and was taken to a police station where he was beaten for several hours by Burge and other defendant officers.

Recognizing the impermissibility of propensity evidence, the court instead found that “this made it more likely (the operational meaning of ‘relevant’) that [defendant Burge] had used [such techniques] on Wilson” and constituted evidence of “plan.”

Wilson does not stand in isolation, and its conceptualization of “plan” expands slightly on Imwinkelreid’s category of “linked methodology.” Rather than serving as proof that the person crafted a plan “to be used whenever the opportunity presented itself[...],” it serves as proof that the person crafted a plan to use when necessary to achieve a specific end. Given this elastic definition of “plan,” it is easy to conceptualize false accusation evidence as falling within its scope—the prior false accusation evidence shows a willingness to use a particular technique (here, a false accusation of rape rather than a coercive interrogation practice) when peculiar circumstances or difficulties arise.

C. Doctrine of Chance

Independent of plan, but also a non-character form of proof, is evidence of a recurring event of some singular nature and thus of a statistical significance. Denominated the “doctrine of chance,” it is a principle developed in Rex v. Smith. In Smith, the accused had

146. Id. at 1238.
147. Id.
148. See, e.g., United States v. McLernon, 746 F.2d 1098, 1117 (6th Cir. 1984) (approving the admission of proof of “prior schemes of coercive enforcement” but finding evidence insufficient to establish such a scheme); United States v. McClure, 546 F.2d 670 (5th Cir. 1977) (finding error when trial court excluded testimony concerning a government informant’s previous coercive enforcement techniques which established a plan or scheme pursuant to Rule 404).
149. See supra note 138.
150. 84 L. J. Rep. 2153 (C.C.A. 1915). For potential antecedents to Smith, see Makin v. Attorney General of New South Wales, [1894] A.C. 57 (P.C. 1893) (N.S. Wales) and Regina v. Roden, 12 Cox Crim. Cas. 630 (1874), which support this view. As the Fourth Circuit
married Ms. Mundy, who had inherited wealth from her parents. When Mundy was found dead in her bathtub, Smith was prosecuted for murder. He defended by claiming accident and thus contending that there was no criminal actus reus. The prosecution was permitted to respond with proof that two other women whom Smith had married "were . . . found drowned in their baths in houses where they lived with [him]."\footnote{Smith, 84 L. J. Rep. at 2154-55.}

Smith began a long trail of cases admitting prior acts to prove the improbability of a current accusation being unfounded because of the abundance (and basic similarity) of prior accusations of similar conduct.\footnote{Imwinkelreid, A Small Contribution to the Debate Over the Proposed Legislation Abolishing the Character Evidence Prohibition in Sex Offense Prosecutions, 44 Syracuse L. Rev. 1125, 1135-36 (1993) (collecting cases). See also Cammack, supra note 136 (endorsing the doctrine of chance analysis for admitting some prior act evidence). Another instance in which a court has admitted a defendant’s prior acts (there, of sexual misconduct) to confirm the likelihood of the act occurring in the case on trial may be found in People v. Vandervliet, 508 N.W.2d 114, 119 n.35 (Mich. 1993), which specifically applied the doctrine of chance as a basis for admissibility.}

The admissibility is appropriate (assuming a valid factual predicate of similarity) for two reasons: (1) the statistical unlikelihood that a particular person will be repeatedly falsely accused of a particular category of conduct, thus making it likely that the current accusation is true and not random; and (2), as Imwinkelreid explains, the resulting non-character nature of such evidence.\footnote{Imwinkelreid, supra note 152, at 1136 ("the doctrine qualifies as a noncharacter theory of logical relevance").}

Thus, the doctrine of chances is a conceptual "cousin" of "plan." It does not require proof of the mens rea in the "linked methodology" or "linked act" theories, but again is non-character use of prior conduct to prove the current occurrence. Applied to false accusation evidence, it establishes either of two probability determinations that are distinct from mere propensity: (1) the unlikelihood of two alleged perpetrators each claiming that the cry of rape is false; and (2), conversely, the unlikelihood of a rape being committed on a person who has falsely accused at least one other person of rape.

explained,

Makin was a prosecution for infanticide by a professional foster parent. Evidence that the bodies of twelve other infants, who had been entrusted to him with inadequate payment for their support, was held admissible. In Roden, a prosecution for infanticide by suffocation, evidence that three of defendant’s other children died in her lap, was held admissible.

United States v. Woods, 484 F.2d 127, 134 n.7 (4th Cir. 1973).

\footnote{Smith, 84 L. J. Rep. at 2154-55.}

\footnote{Imwinkelreid, supra note 152, at 1136 ("the doctrine qualifies as a noncharacter theory of logical relevance").}
Even if it can be argued that neither of these probabilities is as statistically significant as that of the unlikelihood of a defendant being twice falsely accused of killing his wife in a bathtub, the recognition that a defendant’s right to use Rule 404(b) non-character evidence is greater than the prosecution’s, and without the same degree of similarity, confirms the appropriateness of this analysis to admitting false accusation proof. It stands as the mirror image of Smith—rather than prosecutorial use of the prior occurrence to confirm the existence of the charged actus reus, here it is used to raise a reasonable doubt as to whether the charged actus reus occurred.

V. POLICY AND PRACTICAL CONCERNS IN ADMITTING FALSE ACCUSATION EVIDENCE

A. Introduction

Assuming a constitutional mandate to admit false accusation evidence, a number of policy and practical concerns arise: whether such evidence is “reliable”; what level of proof is needed as a predicate to examining the complainant regarding or calling witnesses to prove the prior false accusation; the potential for abuse of such evidence; the implications of admitting false accusation evidence in light of concerns addressed by rape shield laws; whether there is a double standard for admitting such evidence in sexual assault prosecutions but not in other categories of crime; and whether the paradigm of the boy who cried wolf is in fact a valid one, since the boy finally did tell the truth. Each of these is addressed in turn.

154. As explained by Professor Imwinkelried, the non-character use of such evidence is because the coincidence of the occurrence of the acts is probative of the truth of the current accusation. Id. at 1133 (1993). See Jeffery Waller, Comment, Federal Rules of Evidence 413-415: “Laws Are Like Medicine: They Generally Cure an Evil by a Lesser . . . Evil”, 30 Tex. Tech. L. Rev. 1503 (1999) (prior sexual assaults are admissible under Rule 413 more consistently with the doctrine of chances analysis than as mere character evidence).

155. See infra Section V, note 201.
B. Reliability

This article has posited that evidence of prior false accusations is admissible for impeachment as a matter of constitutional right. If that historical analysis is indeed correct, there is no independent need for an assessment of whether proof of witness "corruption" is reliable; like bias, the recognition of the constitutional right to confront with such evidence renders redundant any reliability inquiry.

However, the defendant's right to present substantive evidence in his or her defense has been held, in some instances, to be subject to a state's right to bar unreliable evidence. That right, whether derived from the Compulsory Process Clause or the more general due process guarantee, has been held to ensure the accused defendant "a meaningful opportunity to present a complete defense" and the right to present "reliable evidence . . . when such evidence is central to the defendant's claim of innocence." State court restrictions on defense . . .

156. See supra Section III.
157. As is discussed infra note 167, all that is needed is for the questioner to have a good-faith basis for the inquiry.
158. The Court's most current analysis of the "right-to-present-a-defense" claim treats the two as essentially interchangeable and cognate: Holmes v. South Carolina, 2006 U.S. LEXIS 3454, *11 (U.S. 2006) and United States v. Scheffer, 523 U.S. 303, 308 (1998). Professor Peter Westen, in Egelhoff Again, 36 AM. CRIM. L. REV. 1203, 1269 (Fall 1999), argues that Sixth Amendment claims entitle a defendant/appellant to "a more rigorous standard of review than either Justice Scalia's or Justice O'Connor's measures of Due Process," but he notes no difference in the scope of the right except that Sixth Amendment claims are not linked to a determination of what evidence was historically admissible. Id. The history-based analysis has been used by several members of the Court in analyzing due process claims. See infra note 165. Regardless, the Scheffer lead opinion distinguishes between exclusion of polygraph evidence, which suggest the veracity of the speaker (there, the defendant), and substantive proof of innocence or, in the Scheffer Court's words, "exclusions of evidence that . . . significantly undermined fundamental elements of the accused's defense." Scheffer, 523 U.S. at 315. Here, the false accusation evidence is a fundamental element of the accused's defense, i.e., a pattern of deception.

In Holmes, the Court emphasized anew the "broad latitude" accorded to states in formulating evidentiary rules but unanimously repudiated a state rule barring evidence of innocence [in Holmes, proof via third party witnesses that a person other than Holmes had acknowledged culpability] in cases where the prosecution evidence was strong. 2006 U.S. LEXIS 3454 *19-20. The Holmes Court's explication that the Constitution permits trial courts to "exclude evidence that is repetitive, . . . only marginally relevant or poses an undue risk of harassment, prejudice, [or] confusion of the issues" Id. at *15, leaves the boundaries of this right ill-defined but clearly encompassing evidence at the core of the defense.

use of hearsay evidence, defense impeachment of its own witnesses, defendant testimony contending his confession was obtained involuntarily, and defense use of a co-defendant’s or crime co-participant’s testimony, have all been deemed unconstitutional and a denial of due process.

Accepting the “reliability” standard as essential to a right-to-present-a-defense claim, false accusation evidence is indisputably reliable. It has the same (if not greater) evidentiary reliability as propensity evidence when used against a criminal accused: in each instance, it is taking past behavior as probative of conduct in the case at hand. Courts have uniformly held propensity evidence to be sufficiently reliable to be used against a criminal defendant, yet in those cases

164. *Washington v. Texas*, 388 U.S. 14, 23 (1967) (incorporating the compulsory process guarantee of the Sixth Amendment to state criminal prosecutions through the due process guarantee).
165. In *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996), four members of the Court viewed the right to present defense evidence as a much more limited one, with the due process guarantee not violated unless it is established that “a defendant’s right to have a jury consider evidence [of a particular category]... is a ‘fundamental principle of justice,’” one that existed at the time of the adoption of the Constitution or accepted as fundamental over the development of state criminal jurisprudence. The plurality also sought to limit the reach of *Crane*, quoting that decision’s explanation that “[i]n the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor’s case encounter and survive the crucible of meaningful adversarial testing.” *Id.* at 53. Not a majority holding, this decision does not abrogate the “reliability” test of *Crane* and *Chambers* and does not address the discrete analysis required for a compulsory process claim, which does not focus on the historic admissibility of categories of evidence. And on its own terms, application of the *Crane* test requires admission of false accusation evidence, as there can be no “valid state justification” for excluding such evidence where prior accusations against the defendant are admitted and deemed constitutionally reliable.
166. See supra note 165, discussing the rejection of that test by a plurality of the Court in *Egelhoff*.
167. *United States v. LeMay*, 260 F.3d 1018, 1026-27 (9th Cir. 2001) (holding Federal Rules of Evidence 413-414 do not violate Constitution, particularly in light of Rule 403’s applicability); *United States v. Withorn*, 204 F.3d 790, 796 (8th Cir. 2000) (affirming constitutionality of rules); *United States v. Enjady*, 134 F.3d 1427, 1433-34 (10th Cir. 1998) (concluding that federal sexual offense propensity rules do not violate a defendant's right to fair trial); *People v. Falsetta*, 986 P.2d 182, 188-89 (Cal. 1999) ("although defendant disputes the point, the case law clearly shows that evidence that he committed other sex offenses is at least circumstantially relevant to the issue of his disposition or propensity to commit these offenses"); *People v. Donoho*, 788 N.E.2d 707, 719 (Ill. 2003) ("this provision passes the rational basis test because it also promotes effective prosecution of sex offenses and strengthens evidence in sexual abuse cases"). The one successful constitutional challenge to
there is no requirement of similarity between the charged offense and the prior act(s). By contrast, the prior false accusation evidence requires a substantial parallel—proof that the named complainant falsely accused another person of a similar category offense. If proof of committing any type of sexual offense is constitutionally reliable in a new sex offense prosecution, then proof of an essentially cognate accusation, *ipso jure*, has at least the same predictive value and, thus, "reliability."\(^{169}\)

C. The Requisite Level of Proof

As is detailed above, \(^{170}\) courts have numerous approaches for ascertaining what quantum of evidence is necessary to satisfy the trial judge, as gatekeeper, that the prior accusation was indeed false. These variations, however, arise as a result of the failure to properly categorize the evidence as either constitutionally-required impeachment \(^{171}\) or substantive non-character proof. For the former, the standard is clear (like that of any other attempt to impeach a testifying witness with a such evidence arises not from its evidentiary unreliability but from its conflict with a state constitutional provision requiring that a defendant be tried only on the charges in the indictment. State v. Burns, 978 S.W.2d 759, 761 (Mo. 1998).

\(^{168}\) Federal Rule of Evidence 413(a) provides only that "[i]n a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant." FED. R. EVID. 413(a). The absence of a requirement of similarity is confirmed by decisional law. Illustrative is *United States v. Charley*, 189 F.3d 1251, 1260 (10th Cir. 1999), where Charley, charged with molesting two minors in 1997, was convicted, in part, on evidence that he had, three years earlier, molested his niece. The court of appeals made no finding that the nature of the molestation was similar or evinced a particular pattern or modus operandi; rather, "the similarity between Defendant's prior crime and the present charges, and... the fact that there was little direct corroborating evidence" were sufficient to permit use of the prior conviction. *Id.*

\(^{169}\) It cannot be argued that there is a greater statistical basis for finding prior acts of sexual assault probative of whether a current assault occurred than exists for whether a prior false accusation establishes the likelihood that the current allegation is also false. In a report titled *Myths and Facts about Sex Offenders*, the Center for Sex Offender Management, a program of the Office of Justice Programs, United States Department of Justice, concluded (verbatim) as follows: "Persons who commit sex offenses are not a homogeneous group, but instead fall into several different categories. As a result, research has identified significant differences in recidivism patterns from one category to another," available at [http://www.csom.org/pubs/mythsfacts.html](http://www.csom.org/pubs/mythsfacts.html). Most significantly, the CSOM report found sex offender recidivism to be lower than that of the general offender population. *Id.*

\(^{170}\) See *supra* Section II.C.

\(^{171}\) *Supra* Section III.
prior dishonest act): the questioner must have a "good faith basis" for the inquiry.\textsuperscript{172} A good faith basis will be determined first by an acceptable determination of what, in fact, a false accusation is,\textsuperscript{173} and then by ascertaining the reasons for which counsel believes the prior accusation is false. Those reasons may include a prior accusation where: (1) the complainant later withdrew the charges; (2) a jury acquitted the accused and the acquittal arose from a specific defense that the accusation was false; (3) the prior accused was never prosecuted and himself reports that the accusation was false; or (4) the complainant admitted to one or more persons that the accusation was false.

There will be no good faith basis arising merely from the fact of an accusation and acquittal; without more, this does not suggest falsity as opposed to mistaken identification or a determination of evidentiary insufficiency on an element such as force.\textsuperscript{174}

As to the admission of false accusation proof as substantive non-character "plan" or "doctrine of chance" evidence, the governing standard must be that used for all "other acts" evidence—whether there

\textsuperscript{172} See, e.g., United States v. Davis, 77 Fed. Appx. 902, 904-05 (7th Cir., 2003) (applying the "good faith basis" standard to questioning under FED. R. EVID. 608(b)).

\textsuperscript{173} See supra Section I, defining a false accusation as one where there was a report of forced sexual contact where there was no sexual conduct at all; a claim of forced contact where the actual encounter was consensual; or an accusation of a particular person when the complainant knows that her assailant was someone else.

\textsuperscript{174} Illustrative of the latter is the much-discussed case, Commonwealth v. Berkowitz, 641 A.2d 1161 (Pa. 1994), where the Pennsylvania Supreme Court concluded that the evidence was insufficient as a matter of law to establish the "force" element of rape:

[T]he complainant's testimony is devoid of any statement which clearly or adequately describes the use of force or the threat of force against her. In response to defense counsel's question, "Is it possible that when Appellee lifted your bra and shirt you took no physical action to discourage him," the complainant replied, "It's possible." When asked, "Is it possible that [Appellee] was not making any physical contact with you . . . aside from attempting to untie the knot in the drawstrings of complainant's sweatpants," she answered, "It's possible." She testified that "He put me down on the bed. It was kind of like—He didn't throw me on the bed. It's hard to explain. It's kind of like a push but not—I can't explain what I'm trying to say." She concluded that "it wasn't much" in reference to whether she bounced on the bed, and further detailed that their movement to the bed "wasn't slow like a romantic kind of thing, but it wasn't a fast shove either. It was kind of in the middle." She agreed that Appellee's hands were not restraining her in any manner during the actual penetration, and that the weight of his body on top of her was the only force applied. She testified that at no time did Appellee verbally threaten her.

\textit{Id.} at 1164. In such a circumstance, there was no "falsity" to the accusation; rather, the failure was one of proof of an essential element of the offense as detailed in the presumptively true accusation.
is some evidence that would permit the jury to find that a false accusation had occurred, i.e., "such evidence should be admitted if there is sufficient evidence to support a finding by the jury that the defendant committed the similar act."\textsuperscript{175} There is no pre-screening by the trial judge to determine whether in fact the prior accusation occurred,\textsuperscript{176} and the judge makes no independent credibility assessment.\textsuperscript{177} At the same time, the trial judge retains discretion under Rule 403 to exclude the evidence if it is too remote or otherwise substantially more prejudicial than probative.

In each instance (as impeachment or substantive proof), false accusation evidence is admissible, with the same threshold determination, both on cross-examination and as independent extrinsic evidence.\textsuperscript{178}

\textit{D. The Potential For Abuse}

The fear of abuse of a rule admitting false accusation questioning, evidence, and testimony is not groundless. Without application of a uniform definition of what constitutes a false accusation and enforcement of the "good faith basis" as predicates for use of such

\textsuperscript{175} Huddleston v. United States, 485 U.S. 681, 685 (1988). \textit{Huddleston} sets the standard for admission of Rule 404(b) non-character evidence. See Dowling v. United States, 493 U.S. 342, 348-49 (1990) ("to introduce evidence on this point at the bank robbery trial, the Government did not have to demonstrate that Dowling was the man who entered the home beyond a reasonable doubt: the Government sought to introduce Henry's testimony under Rule 404(b), and... in \textit{Huddleston}... we held that in the Rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor.") Id. at 348-49.

176. \textit{Huddleston}, 485 U.S. at 688 ("petitioner's reading of Rule 404(b) as mandating a preliminary finding by the trial court that the act in question occurred not only superimposes a level of judicial oversight that is nowhere apparent from the language of that provision, but it is simply inconsistent with the legislative history behind Rule 404(b)").

177. \textit{Id.} at 690 ("In determining whether the Government has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact—here, that the televisions were stolen—by a preponderance of the evidence.").

178. Although Fed. R. Evid. 608(b) limits impeachment with prior acts of dishonesty to cross-examination and precludes extrinsic proof of the same, that restriction cannot apply to constitutionally-protected impeachment. Cf. United States v. Abel, 469 U.S. 45, 51 (1984) ("The Courts of Appeals have upheld use of extrinsic evidence to show bias both before and after the adoption of the Federal Rules of Evidence.").
evidence, an unscrupulous lawyer may “poison” the atmosphere of a trial by floating the specter of a false accusation where none exists. Illustrative are the facts in State v. Quinn, where a defense attorney first sought to use proof of a prior sexual assault on the complainant to explain physical evidence (“an ‘enlarged vaginal opening’”). When the prosecution explained that it would not refer to the vaginal opening or argue that its size proved intercourse by Quinn, Quinn’s lawyer then sought to argue that the prior incident was untrue, and that it was probative of the complainant’s willingness to fabricate. Recognizing this ploy for what it was, the court condemned the act and affirmed the exclusion of this evidence: “It would be difficult to contrive a better example of statements that were not demonstrably false, when the appellant at various times contended that the statements were admissible for both their possible truth and their falsity.”

But the potential for abuse here is no greater than that in any use of other acts evidence, by either the defense or the prosecution. Easily structured preventive measures exist as well. There is no constitutional bar to requiring pre-trial disclosure by the defense of its intent to use “false accusation” evidence, and sanctions for non-compliance, up to and including the exclusion of defense evidence, have been countenanced. Indeed, two states include pre-trial disclosure provisions for false accusation evidence in their respective Rape Shield statutes. In sum, while concerns for abuse of evidentiary rights are real, they are controllable and provide no basis for offsetting the

180. id.
181. Misuse of other acts evidence is not the sole province of defense lawyers. See, e.g., Guerra v. Collins, 916 F. Supp. 620 (S.D. Tex. 1995), aff’d sub nom. Guerra v. Johnson, 90 F.3d 1075, 1078 (5th Cir. 1996) (habeeas relief granted where, at murder trial, a defense witness was questioned about his participation in a robbery that the prosecutors well knew had not resulted in a charge, and there was questioning of a defense witness about an extraneous murder which the prosecutors knew was a false rumor).
183. Taylor v. Illinois, 484 U.S. 400 (1988) (upholding a sanction of witness preclusion where trial counsel willfully failed to disclose a witness during pre-trial discovery); United States v. Nobles, 422 U.S. 225 (1975) (holding that precluding witness testimony is a permissible sanction for a refusal of the defense to provide witness’s written report).
E. Rape Shield Concerns

The salutary purposes of rape shield laws and evidence code provisions are many and cannot be denied. They have been detailed as including protection "from humiliating and intimidating cross-examination...; preventing judges and juries from being prejudiced by sexual history evidence that might have little probative value; and to encourage the reporting of rape by making the victim's in-court experience less grueling and degrading." At their core are the protection of privacy and facilitating the prosecution of sex offense cases. With these principles in mind, and because of the historic difficulties in prosecuting rape cases and in appearing in court as a rape victim, the question must be posed as to whether such concerns

185. Nancy E. Snow, Evaluating Rape Shield Laws: Why the Law Continues to Fail Rape Victims, in A MOST DETESTABLE CRIME: NEW PHILOSOPHICAL ESSAYS ON RAPE 245 (Keith Burgess-Jackson ed., 1999). The exclusion of evidence with little or no probative value is also seen as serving the truth-finding function in sexual assault trials. Michelle J. Anderson, From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law, 70 GEO. WASH. L. REV. 51, 159 (February 2002) ("The governmental interest underlying the New Rape Shield Law, however, is not protecting the sexual privacy of rape victims. It is, instead, furthering the truth-seeking process.").

186. Lucas, 500 U.S. at 149-50 (the Michigan shield law "represents a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy").

187. Id. at 150 ("The statute also protects against surprise to the prosecution.").

188. There is little doubt that there has been, historically, massive under-reporting of rape cases, both in absolute terms and relative to other crimes. In 2002, 53.7% of rape victims reported the offense to police, while 71.2% of robbery victims notified authorities. Rennison & Rand, Criminal Victimization 2002, BUREAU OF JUSTICE STATISTICS NATIONAL CRIME VICTIMIZATION SURVEY, available at http://www.ojp.usdoj.gov/bjs/abstract/cv02.htm. See also Anderson, Legacy, supra note 26, at 987 ("decades of studies document the great reluctance of true rape victims to report their attacks to the police").


190. Although the question is indeed posed, it is in its truest sense academic. If the right to present false accusation evidence is, indeed, constitutionally mandated, these public policy
are implicated by admitting false accusation evidence. The simple answer is "no."

This negative does not merely arise from the fact that a false accusation is not "sexual conduct" or "predisposition," and thus not within the literal terms of many shield laws. Clearly, the willingness to make a false accusation is the willingness to engage in public behavior, and as such no privacy interest is implicated in questioning a witness about the same. Also, the probative value of a false accusation is quantitatively and qualitatively greater than that of generic past sexual behavior. Neither a person's propensity (bisexual, sexually active, favoring a particular type of conduct) nor prior history indicates a willingness to consent to activity with the accused. However, a witness's willingness to falsely accuse someone, thereby engaging the legal system, is confirmatory of a disregard for that system's requirement of truthful testimony and a willingness to abuse that same system. One is diffuse, the other is specific to the court process.

There is neither proof nor reason to suspect or fear that admissibility of a false report (as opposed to admissibility of other sexual activity or propensity) will dissuade victims of rape from reporting their crimes. Indeed, as the prior allegation was in some sense made public, the witness is not risking exposure of some unknown fact if she or he comes forward. While there will be "humiliating and intimidating cross-examination," it is no different in kind or value than cross-examination regarding a criminal history or a prior untruthful act. It is the essence of confrontation against an accuser.

191. See, e.g., Fed. R. Evid. 412 (restricting inquiry regarding whether the witness "engaged in other sexual behavior" or what her or his "sexual predisposition" is).

192. Indeed, the line between diffuse behavior and focused behavior is at the heart of many rape shield provisions, which distinguish between general sexual behavior or predisposition and sexual conduct with the defendant on trial. See, e.g., id. ( exempting from rape shield exclusions "evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent"). In a false accusation case, the accusation may involve a different subject, but it is brought in the same fashion—to the public and the authorities. It is this "plan" and "corruption" in approach to the oath that particularize the behavior and make it probative.

considerations play a role only in designing procedures to regulate its admission, and not to preclude its use. At the core of the confrontation right is the right to proceed even in the face of witness humiliation or embarrassment: "the State's desire that [the witness] fulfill his public duty to testify free from embarrassment and with his reputation unblemished must fall before the right of petitioner to seek out the truth in the process of defending himself." Davis v. Alaska, 415 U.S. 308, 320 (1974).
F. The Claimed Double Standard

In "Prior False Allegations of Rape: Falsus in Uno, Falsus in Omnibus?," Justice Denise Johnson contends that a false dichotomy exists because false accusation evidence is excluded in other violent crime prosecutions but is admitted too hastily and excessively in sex offense prosecutions. She posits the following scenario:

Suppose that a complaining witness is testifying to the identity of the person who mugged him and stole his wallet. The victim was beaten quite brutally, and his wallet was later found in a dumpster in another part of the city. At trial, then, the issue is not whether the crime occurred (the "corpus delicti") but whether the defendant committed the crime. The victim is the only witness who can testify to the defendant's identity. The defendant attempts to introduce evidence of a prior incident in which the victim made a charge of robbery and then recanted. In the earlier situation, the victim loaned his car to a friend, who drove carelessly and wrecked the car. In a fit of misguided anger, the victim had called the police and claimed that his friend had stolen his car. Soon after, he recanted the bogus car theft story.

The robbery hypothetical is analogous to a rape case in which the rape was so brutal that the defendant cannot, as a defense, allege that the victim consented. Again, the only issue at trial is the identity of the defendant, and the victim is the only witness who can testify to that issue. The defendant attempts to introduce evidence that on a prior occasion, the victim had charged her boyfriend with rape after a bitter argument, but had later recanted the story, stating that the intercourse was in fact consensual.

Johnson recognizes that

[In these two examples, the evidentiary question for the judge is exactly the same: whether the prior lie of the victim has any bearing on the credibility of the victim in the case before the court, such that the defendant may use the lie to impeach, or discredit, the victim's testimony.

194. The author was and remains an Associate Justice of the Vermont Supreme Court.
196. Id. at 246.
Her conclusions, however, are: (1) trial judges would bar the evidence in the robbery but admit it in the rape trial;¹⁹⁷ and (2) exclusion is proper as the general rule in both cases.¹⁹⁸

Johnson's contention fails first because she provides absolutely no documentation of her claim that false accusation evidence will not be admitted in the robbery [non-sexual assault] prosecution. No decisional law is cited, no anecdotal evidence or persuasive rationale is offered; rather, it is "just so."

Johnson's second flaw is deeper. Her illustrative cases are atypical and conflate false accusations and the separate issue of mistaken identification. In her robbery hypothetical, the injuries to the victim belie any claim that an entire episode was fabricated; rather, the defense will be that (a) there was an assault (or fight¹⁹⁹) but no robbery or (b) there was a robbery but this defendant was not involved. What then is the evidentiary predicate for admitting a prior false accusation?

In the case of mistaken identification (defense "b"), it is dubious. The claim is mistake, yet the evidence seeks to prove dishonesty, i.e., deliberate falsehood, and thus is a virtual non sequitur.²⁰⁰ If, however, the defense claim is that the robbery itself is a fabrication, the prior false accusation has great significance, to wit, corruption, plan, and "doctrine of chance" probativeness.

The same is true in the sexual assault case. If the defense is that no assault occurred, then the probativeness is identical to the robbery case; and if it is a case of mistaken identification, the evidence has lesser weight, but is admissible for impeachment purposes.²⁰¹

¹⁹⁷. Id.
¹⁹⁸. Id. at 262-63 (finding this evidence to be a "general" form of impeachment and thus outside of the confrontation guarantee as identified in Davis v. Alaska, 415 U.S. 308, 315-17 (1973)). The inadequacy of the distinction between general and specific impeachment, on constitutional grounds, is addressed supra Section III.
¹⁹⁹. The defense contention might be that the complainant was in the "wrong place"—buying drugs, seeking out a prostitute, in a bar—where he became embroiled in a physical altercation. Unable to admit to others the circumstance which led him there, the "fight" becomes transformed into a robbery.
²⁰⁰. This is not to suggest that the false accusation evidence would be inadmissible in the mistaken identification case, but rather that it would be admitted only on dishonest character impeachment grounds, and not substantively (as there is no "plan" to make false accusations about the event itself, and thus no statistical significance under the doctrine of chance analysis). Though admissible, it would be weak evidence, subject to a strong prosecution refutation in closing argument.
²⁰¹. In the case of mistaken identification, the prior false accusation evinces neither "plan" nor "doctrine of chance" evidence and thus has no role as substantive proof.
A final error further undercuts Johnson’s analysis. In her view, without substantial correspondence between the prior false accusation and the new charges, there is no probative value and thus no ground for admissibility. This approach is contrary to well-settled law, permitting defensive use of “other acts” evidence on a less stringent standard than the “signature” requirement imposed on the prosecution. Although these decisions analyze defense use of evidence to refute identity (i.e., to prove that someone other than the charged defendant committed the crime in question), no basis exists for not applying this same asymmetry in cases involving “plan” or “doctrine of chance” evidence. What is cognate is the use of a false accusation, regardless of

202. Johnson, supra note 15, at 250 (“Modus operandi usually refers to a ‘particularized and closely repetitive kind of conduct . . . bordering on the habitual’ . . . . A distinction should be made, however, between repetitive patterns of false charges, admissible to show modus operandi, and prior false accusations that may show only a propensity to lie.”). Justice Johnson does separately acknowledge the propriety of admitting prior false accusation evidence probative of motive or bias. Id.

203. United States v. Stevens, 935 F.2d 1380, 1401-06 (3d Cir. 1991), addressed the admissibility of “reverse 404(b)” evidence concerning another person’s crimes presented by the defendant to show that the other person was responsible for the charged crime, and held that under the Federal Rules of Evidence the sole test for the admissibility of defensive “similar ‘other crimes’ evidence” is whether the evidence in question “tends, alone or with other evidence, to negate [the defendant’s] guilt of the crimes charged against him.” Numerous other courts have adopted this or similar standards. United States v. Abouroussaleem, 726 F.2d 906, 910-12 (2d Cir. 1984) (“[T]he standard of admissibility when a criminal defendant offers similar acts evidence as a shield need not be as restrictive as when a prosecutor uses such evidence as a sword.”); Rivera v. Rivera, 262 F. Supp. 2d 1217, 1224-28 (D. Kan. 2003) (holding in civil case where plaintiff alleged that his older half-brother had sodomized him that defendant half-brother could introduce evidence that non-party father had sodomized or attempted to sodomize two of his daughters, notwithstanding fact that the victims of the father’s acts were female); Newman v. United States, 705 A.2d 246, 254-57 (D.C. 1997) (“[F]or admissibility the crimes need not be identical if the totality of the circumstances demonstrates a reasonable probability that the same man attacked both complainants.”); Commonwealth v. Jewett, 467 N.E.2d 155, 158 (Mass. 1984) (“[J]ustice does require the admission of the proffered evidence concerning possible misidentification of the defendant, due to the similarity of the circumstances and importance of the identification in this case . . . . When a defendant offers exculpatory evidence regarding misidentification, prejudice ceases to be a factor, and relevance should function as the admissibility standard.”); State v. Garfole, 388 A.2d 587, 591 (N.J. 1978) (“[O]ther-crimes evidence submitted by the prosecution has the distinct capacity of prejudicing the accused . . . . Therefore a fairly rigid standard of similarity may be required of the State if its effort is to establish the existence of a common offender by the mere similarity of the offenses. But when the defendant is offering that kind of proof exculpatory, prejudice to the defendant is no longer a factor and simple relevance to guilt or innocence should suffice as the standard of admissibility.”); People v. Bueno, 626 P.2d 1167, 1170 (Colo. Ct. App. 1981) (holding other-crimes evidence admissible “[i]f all of the similar facts and circumstances, taken together, may support a finding that the same person was probably involved in both transactions”).
the specific details of the fabricated incident as juxtaposed with those of the crime on trial.

What Johnson does not confront is the sexual assault case without injuries and where the defense is either consent or non-occurrence. Here, credibility is the linchpin, and here, unlike in her "brutal" rape case, the false accusation evidence speaks volumes. There is no double standard; the issues are cognate in rape and non-rape cases, and no reason exists to believe that evidence will (or should) be excluded in one prosecution but admitted in the other.

**G. The Problematic Nature of the “Boy Who Cried Wolf” Motif**

Reliance on the boy who cried wolf motif is in one sense troubling. The boy ultimately was truthful: the “real wolf” did appear after several false reports and decimated the flock. The prior false alarms thus had no predictive value in the last instance.

Viewed in this constricted manner, false accusation evidence should be excluded. But this perception is blinded—it ignores the many instances where the boy’s cries of “wolf” were indeed false, thus justifying the disbelief and confirming its predictive value, and it disregards the fact that such evidence, like most other proof, is not admitted as dispositive, but as probative, to be weighed by jurors.

**VI. CONCLUSION**

Examination regarding and establishing “true lies” is at the core of determining veracity and whether there has been a failure of the government to prove guilt beyond a reasonable doubt, and it is

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204. *See Aesop’s fable, supra note 2. Thus, although the fable is taught for its lesson that lying begets disbelief, a secondary cautionary lesson is that even liars can and do report real harm accurately.*

205. *Jurors may be exposed to many extra-case facts that are admitted, not as dispositive proof, but as individual items of relevant evidence: a witness’s prior convictions (which are often much less probative of truthfulness than the act of a false accusation); proof of pecuniary motive; commission of other acts; a defendant’s flight or change of appearance; evidence of habit; and, in some instances, proof of insurance or subsequent remedial measures.*
material to the truth-determining process. When analyzed properly as proof of witness "corruption," its admissibility for impeachment purposes is assured by the confrontation guarantee. For its non-character purposes of "plan" and "doctrine of chance" evidence, it is substantive (and substantial) proof refuting either the occurrence of the crimes charged or the defendant's identity as perpetrator, the admission of which is compelled as part of the constitutionally guaranteed right to present a defense.

To ensure the orderly and fair presentation of such evidence, particularly in light of rape shield concerns and values, the necessity of guidelines is clear. The first such guideline should define a "false" accusation. In order to be relevant in a criminal proceeding, a false accusation must connote one of three phenomena: a report of forced sexual contact where there was no sexual conduct at all; a claim of forced contact where the actual encounter was consensual; or an accusation of a particular person when the complainant knows that her assailant was someone else. The second guideline should set standards for admissibility. For impeachment purposes, the requirement of "good faith" in posing the question is the requisite standard. As to the admission of false accusation proof as substantive non-character "plan" or "doctrine of chance" evidence, the governing standard must be that used for all "other acts" evidence—whether there is some evidence that would permit the jury to find that a false accusation had occurred, i.e., "such evidence should be admitted if there is sufficient evidence to support a finding by the jury that the defendant committed the similar act." The last guideline should prevent undue prejudice and the harms meant to be protected by Rape Shield Laws. Litigation of a pre-trial motion in limine by the prosecution to ascertain the intended use of

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206. See Ellsworth v. Warden, 333 F.3d 1, 3 (1st Cir. 2003) (documentation showing prior false accusation of a teacher by the complainant, who accused Ellsworth (his teacher at a residential facility) of sexual assault, constitutes material exculpatory evidence that the prosecution must disclose under its due process discovery obligations).


[T]o introduce evidence on this point at the bank robbery trial, the Government did not have to demonstrate that Dowling was the man who entered the home beyond a reasonable doubt: the Government sought to introduce Henry's testimony under Rule 404(b), and . . . in Huddleston . . . we held that in the Rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor.

Id. at 348-49.
“false accusation” evidence will ensure that only proper proof is introduced and proper questioning occurs.208

208. As noted above, supra note 182, states have the right, consistent with a defendant's due process and Fifth Amendment protections, to enact pre-trial notice rules for such evidence.