

True Lies:

The Constitutional and Evidentiary Bases for Admitting Prior False Accusation
Evidence in Sexual Assault Prosecutions

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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.¹

Introduction:

Aesop's message that a pattern of lying can lead, justifiably, to disbelief of subsequent statements, permeates² the law. It can preclude a finding of probable cause to arrest³; support a

¹ Aesop's Fable "The Boy Who Cried Wolf."
<http://www.storyarts.org/library/aesops/stories/boy.html>

² 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.

³ *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

finding of bad faith of a party to litigation⁴; and justify rejecting a witness' declaration or testimony⁵. It can also undermine an advocate's excessive use of certain objections⁶ and treatment of all claims of error as of equal magnitude.⁷ The behavior of the boy shepherd is viewed as paradigmatic of a course of untruthful conduct.⁸

previously firmly identified several different people as her attacker and repeatedly called the police demanding that they be arrested”).

⁴ 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”).

⁵ United States v. Myers, 864 F. Supp. 794, 798 (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”).

⁶ 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”).

⁷ 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.' ").

⁸ People v. Hotchkiss, 300 N.Y.S.2d 405, 407 (N.Y. Misc., 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 limitations⁹, 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's¹⁰ or plaintiff's¹¹ history of vexatious litigation is admissible to establish motive and bias; and 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 offense¹².

This issue has particular importance and consequence in a sexual assault prosecution

⁹ Caution has been urged against using this parable as a measure to reject claims without further investigation. Patten v. Green, 369 N.W.2d 105, 109 (N.D., 1985) (“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.

¹⁰ The most notorious recent example of this is in 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. http://www.courtstv.com/trials/jackson/052405_ctv.html

¹¹ *See, e.g.*, Gastineau v. Fleet Mortg. 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”). Where courts are reluctant is in admitting evidence of prior lawsuits which show nothing more than a generic pattern of litigiousness. *Id.*, at 496 (“evidence must tend to show something other than a plaintiff's tendency to sue...”); Outley v. City of New York, 837 F.2d 587 (2d Cir. 1988) (same).

¹² *See, e.g.*, Rule 413, F.R.E., admitting “[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...” Rule 413 and various state counterparts have been upheld against constitutional challenge. United States v. Enjady, 134 F.3d 1427, 1430-35 (10th Cir. 1998) (upholding application of Rule 413 against constitutional challenge); United States v. Mound, 149 F.3d 799, 800-802 (8th Cir. 1998) (finding Rule 413 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 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).

where there is proof that the complainant has made one or more false accusations in the past. The strong policies behind rape shield laws, in particular the protection of the complainant's privacy and the facilitation of prosecutions for sexual assault, are the strongest justification for excluding false accusation evidence; but, when 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 responded¹³ 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.¹⁴

This article demonstrates that the right to present false accusation evidence is indeed constitutionally-founded and compelling; that lower courts have erred by mis-characterizing the occurrence of false allegations as mere "impeachment" (which this article argues is, at least for false accusation evidence, a category of proof of which the Constitution compels admission in a criminal trial); and that, when more properly identified as proof of non-character "plan" or

¹³ The national response is detailed in §I, *infra*.

¹⁴ Compare Fishman, *Consent, Credibility, And The Constitution: Evidence Relating to a Sex Offense Complainant's Past Sexual Behavior*, 44 Cath. U.L. Rev. 711, 770-771 (Spring 1995), describing exclusion of such evidence as "unfair, unjust, and hopefully, unconstitutional...because...[a] false accusation of rape...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." and 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.

“doctrine of chance,”¹⁵ the evidence is indisputably admissible, 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*.¹⁶ 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 accusations.

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.¹⁷ Section III addresses the Sixth Amendment rights of

¹⁵ This term, discussed at length in section IV, *infra*, 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.

¹⁶ U.S., 124 S.Ct. 1354 (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).

¹⁷ The difference between impeachment and substantive is one of evidentiary ‘use.’ Where 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 Ritter, *Your Lips Are Moving . . . But the Words Aren’t Clear: 1 Dissecting the Presumption that Jurors Understand Instructions*, 69 Mo. L. Rev. 163 (Winter 2004).

Confrontation and Compulsory Process¹⁸ 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, discusses how evidence of prior false accusations can meet either of these exceptions to the ban on other acts evidence as substantive evidence, and 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*¹⁹ and in its arguably more restrictive formulation as set forth in *United States v. Scheffer*.²⁰ Finally, section V addresses policy and practical concerns, including those addressed by rape shield laws, and concludes with an appraisal of the validity, and problems, of the “boy who cried wolf” paradigm in sexual assault cases.

¹⁸ “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...” USCS Const. Amend, 6.

¹⁹ 388 U.S. 14, 23 (U.S., 1967).

²⁰ 523 U.S. 303, 308 (U.S., 1998).

§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: 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.²¹ Each is false because in each instance, as to the named accused, there was absolutely no criminal conduct.²²

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.²³ Where the dispute rages is in assessing the level of false accusations, with many

²¹ 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).

²² 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* at §§ II C (surveying the current judicial analysis of this question) and V C (this article’s conclusion of the proper standard).

²³ McDowell and Hibler, Chapter 11, “False Allegations,” in HAZELWOOD and BURGESS, PRACTICAL ASPECTS OF RAPE INVESTIGATION: A MULTIDISCIPLINARY APPROACH (Elsevier, New York 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. Hunter, Burns-Smith & Walsh, “Equal Justice? Not Yet for Victims of Sexual Assault”, <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%.”). The DeKalb Rape Crisis Center contends that “The FBI reports that false accusations account for only 2% of all reported sexual assaults...”

advocates and scholars contending that the rate is in the 2% range, mimicking the rate of false accusations for non-sex offenses²⁴, and others vigorously contending that the rate is more substantial, beginning at 8 percent²⁵ and then proceeding to higher, if sometimes indeterminate, numbers.²⁶

<http://www.dekalbrapecrisiscenter.org/display.asp?pageid=171&ms=42&ss=114&contentid=171>
Even Susan Brownmiller, in her path-breaking book "AGAINST OUR WILL: MEN, WOMEN AND RAPE 410 (1976), posits a false reporting rate of 2%.

²⁴ 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"); 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 other crimes"); Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. Davis L. Rev. 1013, 1028 (1991) (same, citing Patricia A. Harwig & Georgette Bennett Sandler, *Rape Victims: Reasons, Responses, and Reforms*, in *THE RAPE VICTIM* 13 (Deanna R. Nass ed. 1977)). See generally, Greer, *The Truth Behind Legal Dominance Feminism's "Two Percent False Rape Claim" Figure*, 33 Loy. L.A. L. Rev. 947, 949 n. 11, 2000 (collecting authorities that adopt or rely on the 2% figure).

²⁵ Haws, "The Elusive Numbers on False Rape," *Columbia Journalism Review*, October-November 1997, <http://archives.cjr.org/year/97/6/rape.asp> (noting the wide divergence in numbers but citing to the FBI for its statistics that "since 1991 [and through 1995]...the annual rate for the false reporting of forcible sexual assault across the country has been a consistent 8 percent"); Allison and Wrightsman, *RAPE, THE MISUNDERSTOOD CRIME* 10-11 (1993), cited in Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U.L. 945, 986, n.234 (hereafter "Legacy").

²⁶ Alan Dershowitz, *Rape: Guilty Until Proven Innocent*, *BOSTON HERALD*, May 20, 1991, at 25 (a "considerable number" of rape accusations are "false" or "exaggerated"); Alan Dershowitz, *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 in 1978-87 in one mid-western city, 45 -- or 41 percent -- turned out to be false, as admitted by the women themselves. Kanin, *False Rape Allegations*, *Archives of Sexual Behavior*, Vol. 23, 81-90, 1994. Kanin acknowledges that these results cannot necessarily be extrapolated beyond the one city

What accounts for this divergence? In some respects, there may have been an uncritical acceptance of the 2% rate, a theory espoused by 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.²⁷ But Greer's own analysis is flawed, conflating "false" accusations with those of mistaken identification.²⁸ Similarly, articles conflate or interchange 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."²⁹

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 occasioned by peer, police or other pressures.³⁰ As well, a significant proportion of rapes are never reported to authorities³¹, making any statistic about "false" reports a percentage

studied. *Id.*

²⁷ Greer, note 24 *supra*, 33 Loy. L.A. L. Rev. at 949.

²⁸ "[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?" 33 Loy. L.A. L. Rev. at 953.

²⁹ *Legacy*, at 986, n. 237, citing Lynn Hecht Schafran, *Writing and Reading About Rape: A Primer*, 66 St. John's L. Rev. 979, 1010 (1993).

³⁰ Anderson, *New Voices on The New Federalism Women Do Not Report The Violence They Suffer: Violence Against Women And The State Action Doctrine*, 46 Vill. L. Rev. 907, 931-932 (2001).

³¹ 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, <http://www.ojp.usdoj.gov/bjs/pub/ascii/cv03.txt>.

of reported rape cases and not of the overall occurrence of rape. Finally, some police departments have deliberately mis-coded or down-graded reported sexual assault cases.³²

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.³³

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;'³⁴ and if the incidence is greater, then such a risk is offset by the risk of false convictions where such evidence is excluded.

§II - The Judicial Response to False Accusation Evidence

The judicial response to defense claims of trial error arising from the exclusion of

³² Anderson, note 30 *supra*, 46 Vill. L. Rev. at 929 (2001) (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").

³³ *Legacy*, 84 B.U.L. Rev. at 986 (citation omitted).

³⁴ See §IV, *infra*, at notes 134-137.

evidence of or the barring of questioning regarding prior false accusations, one dating back to the 1800s but litigated largely in the past several decades, has been wildly inconsistent and often ill-reasoned. Decisions have little or no analysis of how to properly categorize the evidence (as impeachment or substantive); offer confused and often only superficial discussion of the nature of the Confrontation right being alleged and its proper dimensions; are most often highly focused on what degree of proof is necessary to validate the accusation is meriting the label “false;” and grapple with but often do not resolve 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 categories³⁵ is surveyed here.

A. Impeachment or Substantive Evidence:

Impeachment evidence, at times described as “credibility” proof, is a secondary attack on a witness’ [here, the rape complainant’s] testimony. The refutation is by a process of inference³⁶,

³⁵ A fifth concern, whether false accusation evidence is within the terms and proscriptions of rape shield states, 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, 264-265 (Va., 1988) (collecting cases). Two states’ rape shield statutes have explicit exceptions for false accusation evidence. 13 V.S.A. § 3255 (“Evidence of specific instances of the complaining witness’ past false allegations of violations of this chapter”); Wis. Stat. § 972.11 (“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).

³⁶ *See, e.g.*, Imwinkelreid, *Evidentiary 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’ 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, one using a prior inconsistent statement to directly contest the accuracy or truthfulness of the witness’ in-

as is illustrated below:

attack on general credibility →→→proves dishonest character→→→therefore since
the person is generally dishonest she is probably lying here.

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

Complaint made prior false accusation →→→proves dishonest character→→→therefore since 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,
the rape under prosecution. The general evidentiary chain is:

the person engages in a plan or pattern when confronted with a particular circumstance→→
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→→Since 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 questions 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

court testimony. Rule 613, F.R.E.

she denied having made the charges."³⁷

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.³⁸

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.³⁹

Explicit references to the false accusation proof as “credibility” evidence became prevalent after 1990 and persist until today.⁴⁰ As the D.C. Court of Appeal explained, “W.D.'s

³⁷ People v. Evans, 72 Mich. 367, 381 (Mich., 1888).

³⁸ People v. Neely, 228 Cal. App. 2d 16, 19 (Cal. Ct. App., 1964).

³⁹ State ex rel. Pope v. Superior Court, 113 Ariz. 22, 29 (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”).

⁴⁰ The clear majority of courts to address this issue accept the evidence for impeachment purposes rather than as substantive proof. *Clinebell v. Commonwealth*, 368 S.E.2d 263, 265-266 (Va., 1988) (collecting cases and listing twenty states accepting such evidence,

past allegations would be probative of her credibility only if they were fabricated.”⁴¹ This “credibility” analysis, linked to Federal Rule of Evidence 608(b)⁴², continues unabated.⁴³ In part,

fifteen for impeachment and only five as substantive evidence.

⁴¹ 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. n6 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

581 A.2d at 318.

⁴² Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness...

USCS Fed Rules Evid R 608(b).

⁴³ 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' bias or motive to fabricate, as limited to credibility); Benn v. Greiner, 294 F. Supp. 2d 354, 366 (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...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 witnesses' 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”);

this is attributable to defense counsel, whose offers of proof are couched in terms solely 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.⁴⁴

Somewhere beyond traditional impeachment because it is not merely the establishment of the witness' 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."⁴⁵ Acknowledging the difficulty in categorizing the

State v. Gordon, 770 A.2d 702, 704-705 (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).

⁴⁴ Adams v. Smith, 280 F. Supp. 2d 704, 714 (D. Mich., 2003).

⁴⁵ 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 acknowledgement of having lied under oath on prior occasions, [or] (4) the witness's attempt to bribe another witness...

foundational basis for admitting such evidence⁴⁶, the Alaska court concludes by finding admission of such evidence inherent in the right of confrontation.⁴⁷

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.⁴⁸ 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'

⁴⁶ 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)".

54 P. 3d at 335, citing JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW (Chadbourn rev'n 1970), §§ 956-964, Vol. 3A, pp. 802-812.

⁴⁷ 54 P.3d at 336. *See also*, State v. Long, 140 S.W.3d 27, 30-31 (Mo., 2004) (citing to Morgan in a kidnaping prosecution and concluding that “excluding extrinsic evidence of the witnesses' 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”).

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.” 54 P.3d at 334.

⁴⁸ *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.”).

present testimony--in one case markedly so. In this regard the evidence of prior allegations is unusual.

If the prior accusations were false, it suggests a pattern and a pattern suggests an underlying motive (although without pinpointing its precise character). 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.⁴⁹

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"⁵⁰ or as

⁴⁹ White v. Coplan, 399 F.3d 18, 24 (1st Cir., 2005), Petition for Writ of Certiorari filed 6/23/2005. White is limited to the "factual similarity" context, and to proof by cross-examination and not extrinsic evidence.

Washington state 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.

State v. Harris, 989 P.2d 553, 557 (Wash. Ct. App., 1999).

⁵⁰ Phillips v. State, 545 So. 2d 221, 223 (Ala. Crim. App., 1989).

“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.”⁵¹

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 proof of bias or motive. The leading⁵² case is *Boggs v. Collins*⁵³, in which habeas relief was denied to a petitioner challenging the state court’s ban on impeachment with false accusation evidence.⁵⁴ *Boggs* contends that

⁵¹ *People v. Hurlburt*, 333 P.2d 82, 87 (Cal. Ct. App., 1958). *See also*, *State v. Nab*, 421 P.2d 388, 390-391 (Or., 1966), adopting Hurlburt’s reasoning and showing its historic antecedent from the 19th century:

As the court said in *People v. Evans*, *supra*, 72 Mich at 380:

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."

⁵² *Id.* For cases following *Boggs* in the false accusation context, see *Adams v. Smith*, 280 F. Supp. 2d 704, 714 (D. Mich., 2003); *State v. Raines*, 118 S.W.3d 205, 213 (Mo. Ct. App., 2003). *Raines* notes that “the majority of federal appellate courts that have addressed this issue [hold] that a trial court does not violate the Confrontation Clause by prohibiting a defendant from cross-examining a witness where the sole purpose of the cross examination is to prove that the witness's tendency to lie, based on a pattern of past lies.” *Id.*

⁵³ 226 F.3d 728, 740 (6th Cir., 2000).

⁵⁴ *Boggs*, charged with raping a woman in her apartment, admitted to visiting the premises earlier that day but denied presence at the time of the occurrence and the commission of the act. *Boggs* “sought to question [the complainant] about a false accusation of rape that she

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.⁵⁵

A small but growing number of decisions reads the Confrontation right more broadly to guarantee impeaching a witness' 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."⁵⁶ Missouri has found this same right in its state constitution.⁵⁷ The historic validity of these competing views is detailed in §III,

allegedly made against another man approximately one month before she accused Boggs of rape. Boggs also sought to introduce the testimony of two witnesses [Copas and Yazell]...concerning the prior false accusation. According to Boggs, Copas would have testified that Berman told her that she had been raped by Yazell, and Yazell would have testified that the accusation was untrue." 226 F.3d at 733.

⁵⁵ *Id.*

⁵⁶ *Benn v. Greiner*, 294 F. Supp. 2d 354, 364 (D.N.Y., 2003), *quoting* *Pennsylvania v. Ritchie*, 480 U.S. 39, 51, 94 L. Ed. 2d 40, 107 S. Ct. 989 (1987).. *See also*, *Morgan v. State*, 54 P.3d 332, 336 (Alaska Ct. App., 2002) ("We believe that this confrontation-clause rationale is, at its core, simply a restatement of the principle that, in sexual assault prosecutions, a complaining witness's prior false accusation of sexual assault can indeed have a special relevance -- a relevance that removes this evidence from the normal ban on attacking a witness's general character for honesty through the use of specific instances of dishonesty."); *State v. Ellsworth*, 709 A.2d 768, 774 (N.H., 1998) (Constitution's confrontation guarantee trumps state evidence provision barring use of extrinsic evidence).

⁵⁷ *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. MO. CONST. art. 1, section 18(a).").

infra.

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 standard⁵⁸, clear and convincing evidence⁵⁹, a test described as "evidence sufficient to support [this] finding"⁶⁰ and another requiring "substantial evidence" that the prior accusation was false.⁶¹

Equally varied is the determination of precisely what must be shown, pre-trial or *in limine*, to satisfy admissibility.⁶² One court has required no proof that the prior accusation is false, finding that the pattern of making numerous complainants without seeking law enforcement intervention makes it "probable to some degree that the instant accusation is false or delusional."⁶³ More typical is the three part requirement that a defendant establish

(1) the victim made another allegation of rape or sexual assault;

⁵⁸ State v. Long, 140 S.W.3d 27, 31-32 (Mo., 2004); Morgan v. State, 54 P.3d 332, 338 (Alaska App. 2002).

⁵⁹ State v. White, 145 N.H. 544, 765 A.2d 156, 159 (N.H. 2000); State v. Johnson, 102 N.M. 110, 692 P.2d 35, 43 (N.M. App. 1984); Hughes v. Raines, 641 F.2d 790, 792 (9th Cir. 1981); *cf.* Clinebell v. Commonwealth, 235 Va. 319, 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).

⁶⁰ State v. Smith, 743 So. 2d 199, 203 (La. 1999), citing Huddleston v. United States, 485 U.S. 681, 690, 99 L. Ed. 2d 771, 108 S. Ct. 1496 (1988). *See also*, State v. DeSantis, 155 Wis. 2d 774, 456 N.W.2d 600, 606-07 (Wis. 1990) (same).

⁶¹ See State v. LeClair, 730 P.2d 609, 613-16 (Or. App. 1986).

⁶² *See generally*, State v. Guenther, 854 A.2d 308, 322-323 (N.J., 2004)(summarizing national law).

⁶³ Benn v. Greiner, 294 F. Supp. 2d 354, 365-366 (D.N.Y., 2003).

(2) this allegation was false; and, (3) the victim knew the allegation was false.⁶⁴

At least one state mandates “similarity” between the prior accusation and the current offense.⁶⁵

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,⁶⁶ a stance at odds with other states’ requirement that a defendant “proffer any credible evidence that the accusation was false.”⁶⁷

D. Cross-Examination, or Examination and Extrinsic Proof

For those states which qualify false accusation proof as impeachment evidence, there is a

⁶⁴ State v. Long, 140 S.W.3d 27, 31-32 (Mo., 2004) (summarizing national law).; State v. Guenther, 854 A.2d 308, 324 (N.J., 2004). Missouri abandoned the first requirement, permitting evidence of a false accusation of *any* crime 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.” 140 S.W.2d at 31.

⁶⁵ State v. Gordon, 146 N.H. 258, 261 (N.H., 2001) (admitting false accusation evidence “only where the allegations are similar, and the proffered evidence is highly probative of the material issue of the complainant’s motives”). Compare People v. Mandel, 48 N.Y.2d 952, 401 N.E.2d 185, 187, 425 N.Y.S.2d 63 (N.Y. 1979) (approving the preclusion of cross examination where “there was.. 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”).

⁶⁶ 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”).

⁶⁷ People v. Stickler, 2001 Mich. App. LEXIS 2157, 9-10 (Mich. Ct. App., 2001).

substantial divide over whether the evidence may be presented extrinsically⁶⁸ as opposed to solely by means of cross-examination.⁶⁹ Constitutional challenges to limits on extrinsic proof of such evidence have largely been rejected⁷⁰, with one federal court of appeals reserving judgment on the question but casting doubt on a constitutional right to use extrinsic proof for impeachment.⁷¹

This wide array of treatments of false accusation evidence is tolerable if indeed, such

⁶⁸ e.g., *Morgan v. State*, 54 P.3d 332, 336 (Alaska Ct. App. 2002); *State v. Hutchinson*, 141 Ariz. 583, 688 P.2d 209, 212-13 (Ariz. Ct. App. 1984) (interpreting *State ex rel Pope v. Superior Court*, 113 Ariz. 22, 545 P.2d 946, 953 (Ariz. 1976)); *West v. State*, 290 Ark. 329, 719 S.W.2d 684, 686-87 (Ark. 1986), reh'g denied, 290 Ark. 340A, 290 Ark. 329, 722 S.W.2d 284 (1987); *Smith v. State*, 259 Ga. 135, 377 S.E.2d 158, 160 (Ga.), cert. denied, 493 U.S. 825, 110 S. Ct. 88, 107 L. Ed. 2d 53 (1989); *State v. Schwartzmiller*, 107 Idaho 89, 685 P.2d 830, 833 (Idaho 1984); *Little v. State*, 413 N.E.2d 639, 643-44 (Ind. Ct. App. 1980); *State v. Barber*, supra, 766 P.2d 1288, 1290 (Kan. App. 1989); *State v. Smith*, 743 So. 2d 199, 202 (La. 1999); *State v. Long*, 140 S.W.3d 27, 31-32 (Mo., 2004) ;*State v. Gordon*, 146 N.H. 258, 770 A.2d 702, 704-05 (N.H. 2001); *State v. Guenther*, 854 A.2d 308, 324 (N.J., 2004); *Miller v. State*, 105 Nev. 497, 779 P.2d 87, 89-90 (Nev. 1989); *Clinebell v. Commonwealth*, 235 Va. 319, 368 S.E.2d 263, 266, 4 Va. Law Rep. 2497 (Va. 1988).

⁶⁹ *State v. Almurshidy*, 1999 ME 97, 732 A.2d 280, 287 n.4 (Me. 1999); *State v. Cox*, 298 Md. 173, 468 A.2d 319, 323-24 (Md. 1983); *State v. Raines*, 118 S.W.3d 205, 211-14 (Mo. Ct. App. 2003); *Commonwealth v. Bohannon*, 376 Mass. 90, 378 N.E.2d 987, 991 (Mass. 1978); *State v. Scott*, 113 N.M. 525, 828 P.2d 958, 962-63 (N.M. Ct. App. 1984); *State v. Boggs*, 63 Ohio St. 3d 418, 588 N.E.2d 813, 816-17 (Ohio 1992); *State v. Driver*, 192 Ore. App. 395, 86 P.3d 53, 55-58 (Or. Ct. App. 2004).; *State v. Wyrick*, 62 S.W.3d 751, 780-82 (Tenn. Crim. App. 2001); *State v. Leggett*, 164 Vt. 599, 664 A.2d 271, 272 (Vt. 1995); *State v. Olson*, 179 Wis. 2d 715, 508 N.W.2d 616, 619-20 (Wisc. Ct. App. 1993), reh'g denied, 515 N.W.2d 715 (Wis. 1994).

⁷⁰ *Boggs v. Collins*, 226 F.3d 728, 736-40 (6th Cir. 2000), cert. denied, 532 U.S. 913, 121 S. Ct. 1245, 149 L. Ed. 2d 152 (2001); *Hogan v. Hanks*, 97 F.3d 189, 191 (7th Cir. 1996), cert. denied, 520 U.S. 1171, 117 S. Ct. 1439, 137 L. Ed. 2d 546 (1997); *United States v. Bartlett*, 856 F.2d 1071, 1088-89 (8th Cir. 1988).

⁷¹ *White v. Coplan*, 399 F.3d 18, 26 (1st Cir., 2005) (“we 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”).

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 Amendment⁷² confers a right to present a defense and whether, as part of that right or that of “confronting” (as in “challenging”) witnesses, this extends to impeaching a witness’ presumed veracity: first, by every account⁷³ the historic record for ascertaining the Framers’ intent in adopting the Confrontation Clause is skimpy, diffuse and potentially contradictory; and, second, the Supreme Court’s writing on this [scope of cross-examination] aspect of Confrontation analysis has been largely devoid of historic

⁷² “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.” USCS Const. Amend. 6.

⁷³ Justice Harlan’s observation that “[t]he Confrontation Clause comes to us on faded parchment[.]” *California v. Green*, 399 U.S. 149, 173-74 (1970) (Harlan, J., concurring) is oft-cited and deemed accurate. See, e.g., Kroger, *the Confrontation Waiver Rule*, 76 B.U.L. Rev. 835, 868 n.205 (1996); Berger, *The Deconstitutionalization of The Confrontation Clause: a Proposal For a Prosecutorial Restraint Model*, 76 Minn. L. Rev. 557, 562 n. 22 (February 1992) (“Little information exists about precisely what the concept of confrontation signified in the seventeenth and eighteenth centuries in England and the colonies”); Clark, *An Accuser-obligation Approach to The Confrontation Clause*, 81 Neb. L. Rev. 1258, 1269 (2003)(“the Framers left us little or no direct indication of what the confrontation right meant to them”); Howard W. Gutman, *Academic Determinism: The Division of the Bill of Rights*, 54 S. Cal. L. Rev. 295, 332 n.181 (1981) (maintaining that the Confrontation Clause was only debated for five minutes before its adoption).

reference or rootedness,⁷⁴ in marked contrast to its writings on the hearsay⁷⁵ and face-to-face⁷⁶ 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 guarantee's right of cross-examination. In his extensive treatment of this subject,⁷⁷ Professor Jonakait acknowledges first that the evidence of both the Framers' intent and of contemporaneous practice at the time of the Confrontation guarantee's adoptions is "scanty"⁷⁸ with only limited references in the constitutional debates.⁷⁹ He posits that the Confrontation right

⁷⁴ In *Davis v. Alaska*, 94 S.Ct. 1105, 1110 (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 the intent of the Constitution's drafters to incorporate or define the scope of this aspect of Confrontation.

⁷⁵ See, e.g., *Crawford v. Washington*, 124 S. Ct. 1354, 1364-1365 (U.S., 2004) (tracing the ban on "testimonial" hearsay from Roman times through common law and early colonial history)..

⁷⁶ *Coy v. Iowa*, 108 S. Ct. 2798, 2800 (U.S., 1988) (finding the right to face-to-face confrontation one with antecedents in Roman practice and the development of English law).

⁷⁷ *The Origins of The Confrontation Clause: an Alternative History*, 27 Rutgers L.J. 77 (1995).

⁷⁸ *Id.* at 116.

⁷⁹ *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, in 1 *id.* at 435. As well, the state of Maryland, in its 1776 Declaration of Rights, provided that "In 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

of cross-examination reflects the ascendance and acceptance of the role of lawyers in American colonial and early post-independence trials:

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.⁸⁰:

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 Herrmann & Speer, *Facing The Accuser: Ancient And Medieval Precursors of The Confrontation Clause*, 34 Va. J. Int’l L. 481, 541-542 (Spring, 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.” Comment: *Reading The Text of The Confrontation Clause: “To Be” or Not “To Be”*, 3 U. Pa. J. Const. L. 722, 747 (April, 2001).

⁸⁰ 27 Rutgers L. J. 77, 108. The importance of the role of counsel in defining the intent of the Confrontation right is also accepted by Professors Friedman and McCormack:

[T]he 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

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.⁸¹

than in England, and with it rose an adversarial spirit that made the opportunity for confrontation of adverse witnesses especially crucial

Dial-in Testimony, 150 U. Pa. L. Rev. 1171, 1206-1207 (April 2002). See also, 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...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...[A]n emphasis on cross-examination was ascending.”).

⁸¹ THOMAS PEAKE, COMPENDIUM OF THE LAW OF EVIDENCE 61 (Frederick-Town, John P. Thompson, 3d ed. 1809), 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’ 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

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 limiting hearsay in criminal trials.⁸² However, even if correct this still fails to address 'how much' confrontation is required.⁸³

client as the party by whom he is called, he is not restrained to any particular mode of examination...

PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE, 1801, at 135 (Garland Publishing Inc., New York & London 1979).

⁸² *Crawford v. Washington*, note 69, *supra*. 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...

124 S.Ct. at 1359. The *Crawford* Court concluded

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 1363.

⁸³ Other theories of the nature of the Confrontation right also leave this question unanswered. 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. Douglass' *Beyond Admissibility: Real Confrontation, Virtual Cross-examination, And The Right to Confront Hearsay*, 67 Geo. Wash. L. Rev. 191 (January 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

A survey of the leading Confrontation cross-examination decisions of the Supreme Court similarly provides only guidance in answering this question. Here, there are three reasons: the paucity of historic authority; the wide-ranging and conflicting descriptions of the right of cross-examination; and the lack of any directly controlling decision.

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.⁸⁴ 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 that those witnesses had made statements 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 the dead witness' inability to refute the claim *and* the potential for a criminal defendant to conjure up perjured accounts of

impeachment equivalent to the cross-examination of a live witness, extols impeachment but provides no test for 'how much' impeachment is guaranteed. 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 since the Confrontation right addresses multiple concerns - a defendant's right of presence in the courtroom, the manner of face-to-face 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. 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 (Spring, 1990); Comment, *The Confrontation Clause in Search of a Paradigm: Has Public Policy Trumped the Constitution?*, 22 Pace L. Rev. 455 (Spring 2002) (tracking the varying streams of Confrontation jurisprudence).

⁸⁴ *Mattox v. United States*, 15 S.Ct. 337, 338-340 (1895).

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.⁸⁵

With no Constitutional underpinning to this second holding, *Mattox* can be read only as precluding potentially unreliable impeachment evidence that a witness is unable, due to death, to refute.⁸⁶ Implicit in the decision is an acceptance of traditional witness impeachment (at least

⁸⁵ *Id.* at 342.

⁸⁶ *Mattox* applies a variant of the principle set forth in *The Queen's Case*, 2 Br. & B. 284, 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. Rule 613, Fed.R.Evid.

Significantly, the dissent in *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:

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.

where the witness in question is alive and able to challenge the impeachment).⁸⁷.

Indisputably the most important case in addressing the scope of cross-examination guaranteed to a criminal accused is *Davis v. Alaska*.⁸⁸ The Court guaranteed the right to cross-examine to prove bias⁸⁹ 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' 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 so doing 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

Mattox v. United States, 15 S. Ct. at 346 (Shiras, J., dissenting)..

⁸⁷ It is important to note that the *Mattox* distinction between available and unavailable witnesses no longer survives. Rule 806, Fed.R.Evid., permits the impeachment of any hearsay declarant the same as if the declarant had testified in court.

⁸⁸ 94 S.Ct. 1105 (1974).

⁸⁹ In *Davis*, the defense was denied the right to prove, at trial, that the accusing witness was himself on juvenile court probation because Alaska law made such status confidential. *Id.* at 1108.

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."⁹⁰

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 kind⁹¹ from (and potentially more probative than) impeachment by proof of prior conviction. Indeed, the *Davis* Court's citation to and quoting from *Greene v. McElroy*⁹² gives further support to the right to

⁹⁰ *Id.* at 1110.

⁹¹ See Rules 608 and 609, Fed.R.Evid., 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. Rule 609, Fed.R.Evid., Notes of Advisory Committee ("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 opposite and not remote in time." Rule 608, Fed.R.Evid., Notes of Advisory Committee.

⁹² 79 S.Ct. 1400 (1959) (emphasis added here), *quoted* in *Davis* at 1110:

where 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

establish that the accusing witness is a “perjurer...” Yet the language in *Greene* is *dictum* in a case analyzing whether the complete denial of confrontation in a security clearance revocation proceeding is constitutional. 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.⁹³

In sum, while strongly supporting the constitutional right to “general” character impeachment confrontation, *Davis* ultimately leaves the matter unresolved.

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. . .

⁹³ *Davis v. Alaska*, 94 S.Ct. at 1112-1113 (Stewart, J. concurring). This distinction between “general” and case-specific [bias] impeachment has been seized on in both academic writing, *see Johnson, Prior False Allegations of Rape: Falsus in Uno, Falsus in Omnibus?*, 7 Yale J.L. & Feminism 243, 261 (1995) (“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 decision, *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.

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,⁹⁴ and then as authority for the holding that inquiry into a witness’ bias is core to this right.⁹⁵ While the cited portion of Wigmore does not address attacks on a witness’ dishonest character, that subject is part of the “testimonial impeachment section⁹⁶ termed “emotional incapacity”⁹⁷ that approves of false accusation evidence as part of the category of witness “corruption” and being admissible “beyond question.”⁹⁸

The approval of evidence of witness corruption dates at least to the time of the adoption of the Confrontation Clause.⁹⁹ As the Connecticut Court explained in 1793, a witness may be

⁹⁴ 94 S. Ct. at 1110, *quoting* 5 J. Wigmore, *Evidence* § 1395, p. 123 (3d ed. 1940).

⁹⁵ *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.’ 3A J. Wigmore, *Evidence* § 940, p. 775 (Chadbourn rev. 1970).”).

⁹⁶ 3A J. WIGMORE, *EVIDENCE* §§ 940 *et seq.* (Chadbourn rev. 1970).

⁹⁷ *Id.* at 775.

⁹⁸ *Id.*, §957, p. 803 (“A willingness to swear falsely is, beyond any question, admissible as negating the presence of that sense of moral duty to speak truthfully which is at the foundation of the theory of testimonial evidence”).

⁹⁹ 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. Minnow and Cate, *Who Is an Impartial Juror in an Age of Mass Media?*, 40 *Am. U.L. Rev.* 631, 637 (Winter, 1991) (“In its earliest common law origins, the jury was composed of people specifically chosen for their knowledge of the parties and facts involved in the case”); HANS & N. VIDMAR, *JUDGING THE JURY* 23-24 (1986) (same). 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

impeached with proof that he would say anything for money “as it went to lessen the weight of his testimony.”¹⁰⁰ Wigmore also relies on the 1833 South Carolina decision in *Anonymous*,¹⁰¹

which was elaborated on in a later decision of that Court:

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...[T]he 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

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, 152-153 (N.Y., 1837).

¹⁰⁰ Newhal v. Wadhams, 1 Root 504 (Conn., 1793), cited in WIGMORE at §957, p. 803 n.1. In 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.”

¹⁰¹ 19 S.C.L. (1 Hill) 251, 252 (1833), cited in Wigmore at §957, p. 803.

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."¹⁰²

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.¹⁰³ Stephens' 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..."¹⁰⁴ Stephens illustrates this

¹⁰² Sweet v. Gilmore, 52 S.C. 530, 535-536 (S.C., 1898).

¹⁰³ WILLIAM BEST, A TREATISE ON THE PRINCIPLES OF EVIDENCE, 1849, at 217-218 §171 (Garland Publishing Inc., New York and London 1978).

¹⁰⁴ JAMES FITZJAMES STEPHENS, QC, A DIGEST OF THE LAW OF EVIDENCE, Article 129, MacMillan and Co. 1876 (Garland Publishing Inc., New York and London 1978).

principle by citation to *R v Orton* (1873)¹⁰⁵ 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.¹⁰⁶ Clearly, in both this country and England, the scope of witness examination was extensive.

Wigmore's characterization of such evidence as something more than mere impeachment is also critical to this analysis. He recognizes that

It 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.¹⁰⁷

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

¹⁰⁵ Cited in 14 QBD 170; 18 Digest (Repl) 116, 979.

¹⁰⁶ *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 maintained, separately, that if the witness denied the act while being cross-examined, extrinsic proof of the same was generally forbidden. *Id.*, §130.

¹⁰⁷ 3A J. WIGMORE, EVIDENCE §956, pp. 802-803 (Chadbourn rev. 1970).

Confrontation holdings is alternately expansive or restrictive. *Olden v. Kentucky*¹⁰⁸ emphasized that “the cross-examiner has traditionally been allowed to impeach, i. e., discredit, the witness[]” but dealt with case-specific evidence, 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.¹⁰⁹ *Michigan v. Lucas*¹¹⁰ reiterated that “trial judges retain wide latitude’ to limit reasonably a criminal defendant's right to cross-examine a witness”¹¹¹ 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.¹¹² The Court in *Owens v. United States*¹¹³ spoke of the guarantee of an “adequate opportunity to cross-examine adverse witnesses” but did so in the context of a witness who suffered memory loss.¹¹⁴ In *Pennsylvania v. Ritchie* the Court viewed the right expansively as including “the opportunity to show that a witness is biased, or that the

¹⁰⁸ 109 S. Ct. 480, 483 (U.S., 1988), *quoting Davis*.

¹⁰⁹ *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”).

¹¹⁰ 111 S. Ct. 1743, 1747 (U.S., 1991).

¹¹¹ *Id.*, at 1746, *quoting Delaware v. Van Arsdall*, 475 U.S. 673, 679, 89 L. Ed. 2d 674, 106 S. Ct. 1431 (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. 106 S. Ct. at 1437-1438.

¹¹² *Id.*, at 1747.

¹¹³ *United States v. Owens*, 108 S. Ct. 838, 841 (U.S., 1988).

¹¹⁴ *Id.*, at 841-843.

testimony is exaggerated or unbelievable[,]”¹¹⁵ but did so in analyzing a pre-trial discovery claim and not a restriction on cross-examination.¹¹⁶

At the same time, *Owens* quotes approvingly from *Delaware v. Fensterer*,¹¹⁷ which holds 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.”¹¹⁸

Yet again, the facts of *Fensterer* are inapposite to the quotation. 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.¹¹⁹

¹¹⁵ *Pennsylvania v. Ritchie*, 107 S. Ct. 989, 998 (U.S., 1987).

¹¹⁶ *Id.*

¹¹⁷ *Delaware v. Fensterer*, 106 S. Ct. 292, 295 (U.S., 1985).

¹¹⁸ 108 S. Ct. at 842, *quoting* *Delaware v. Fensterer*, 106 S. Ct. 292, 295 (U.S., 1985).

¹¹⁹ 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.” 106 S. Ct. at 294. 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.

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 right and its twin,¹²⁰ the Compulsory Process clause, do include cross-examination on and extrinsic proof¹²¹ regarding

¹²⁰ 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*, 108 S. Ct. 646, 653 (U.S., 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. Ky.*, 106 S. Ct. 2142, 2146 (U.S., 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”); *Washington v. Texas*, 388 U.S. 14, 19 (1967) (holding “right to present . . . witnesses to establish a defense . . . is a fundamental element of due process of law”); Nagareda, *Reconceiving The Right to Present Witnesses*, 97 Mich. L. Rev. 1063 (March 1999); Harris, *Criminal Law, the Constitution and Truth Seeking: a New Theory on Expert Services for Indigent Defendants*, 83 J. Crim. L. & Criminology 469, 508 (Fall, 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.”); Westen, *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* NOTE: *The Current Value of Compulsory Process: Can a Defendant Compel the Admission of Favorable Scientific Testimony?*, 48 Case W. Res. 865, 875-877 (Summer, 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, *infra*, at §V.

¹²¹ 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, note 120, *supra* at 1103-1104.

In *United States v. Abel*, 105 S.Ct. 465, 468 (1984), the Court explicitly linked the

false accusation *impeachment* evidence.¹²² As we demonstrate next, such evidence is in fact not only impeachment, but substantive evidence with sufficient reliability to mandate admission under both Confrontation and Compulsory Process guarantees.

§IV: “Plan” and the “Doctrine of Chance”: The 404(b) Exceptions and Their Applicability to False Accusation Evidence:

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.”¹²³ The intent of the drafters,¹²⁴ and of Congress¹²⁵ in adopting this

Federal Rules of Evidence’s treatment of proof of bias with that of proof of “corruption,” citing to E. CLEARY, MCCORMICK ON EVIDENCE §§ 40, p. 85 (3d ed. 1984). The McCormick treatise makes clear that such proof may be made on cross-examination *and* extrinsically. *Id.*

¹²² 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: Proving the accused’s state of mind, Doe v. United States, 666 F.2d 43, 48 (4th Cir. 1981); United States v. Stamper, 766 F.Supp. 1396, 1400 (W.D.N.C. 1990) (affirmed without opinion by In re One Female Juvenile Victim, 959 F.2d 231 (4th Cir. N.C. 1992)); an alternative explanation for physical evidence, Lajoie v. Thompson, 217 F.3d 663, 671 (9th Cir. 2000), United States v. Begay, 937 F.2d 515, 523 (10th Cir. 1991); United States v. Bear Stops, 997 F.2d 451, 455 (8th Cir. 1993); the complainant’s knowledge of sexual acts or source of information, Lajoie, at 672; evidence “of consent...”, Lewis v. Wilkinson, 307 F.3d 413, 420 (6th Cir. 2002); faulty or flawed memory, Latzer v. Abrams, 602 F.Supp. 1314, 1319 (E.D.N.Y. 1985) (Rape Shield principles had to yield to explain basis for misidentification); and inconsistent statements pertaining to the case at hand, Driscoll v. Delo, 71 F.3d 701, 710 (8th Cir. 1995).

¹²³ Rule 404(b), Fed.R.Evid. 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. *See* note 194, *infra*.

¹²⁴ The draftsmen of Rule 404(b) intended it to be construed as one of "inclusion," and not "exclusion." They intended to emphasize

language, was for an expansive¹²⁶ approach to admissibility, restricted or channeled only by Rule 403.¹²⁷ considerations of undue prejudice, confusion of the issues, and waste of time. The result is a strong presumption of admissibility: “Rule 404(b) is a rule of inclusion, prohibiting only

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 followed.

United States v. Long, 574 F.2d 761, 766 (3d Cir., 1978). For a review of the early decisional law following adoption of the Federal Rules and its expansive approach to 404(b) evidence, see Reed, *Admitting The Accused's Criminal History: The Trouble With Rule 404(b)*, 78 Temple L.Rev. 201 (Spring 2005).

¹²⁵ The House Committee on the Judiciary explained that the use of the term “may” in allowing use of other acts evidence placed "greater emphasis on admissibility than did the final Court version." H.R.Rep. 650, 93d Cong., 1st Sess. (1973), reprinted in 4 U.S. Code Cong. & Ad. News 7075, 7081 (1974). The Senate Committee on the Judiciary was more explicit: "[W]ith respect to permissible uses for such evidence [i.e., 'other crimes,' etc.], the trial judge may exclude it only on the basis of those considerations set forth in Rule 403, i.e. prejudice, confusion or waste of time." S.Rep. No. 1277, 93d Cong., 2d Sess. (1974), reprinted in 4 U.S. Code Cong. & Ad. News 7051, 7071 (1974).

¹²⁶ 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, 1238-1239 (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”).

¹²⁷ 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 evidence.

Rule 403, Fed.R.Evid.

evidence that tends solely to prove the defendant's criminal disposition.”¹²⁸ So applied, evidence of prior false accusations is readily admitted under 404(b) and its state law analogs as substantive proof on two discrete non-character grounds - plan, and the doctrine of chance.

Plan:

What is “plan” as denominated in Evidence rules such as Federal Rule of Evidence 404(b)?¹²⁹ The term, given no explicit definition or limitation,¹³⁰ 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

¹²⁸ United States v. Shoffner, 71 F.3d 1429, 1432 (8th Cir., 1995).

¹²⁹ Rule 404(b) (**bold emphasis added**) provides that

Evidence of other crimes, wrongs, or acts...may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, *plan*, knowledge, identity, or absence of mistake or accident...

¹³⁰ 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. MCCORMICK ON EVIDENCE, THIRD EDITION §190, p. 559 n. 15 (1984), Cleary, Ed. 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, p. 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.

action in conformity therewith[]”¹³¹ and, second, as being distinct from evidence of unique *modus operandi*,¹³² proof adduced to establish the separate 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 little more than propensity.

Where that line is drawn is unclear, notwithstanding extensive and diligent scholarly comment and dispute.¹³³ There is general agreement that “plan” covers other crimes that are

¹³¹ Rule 404(b), Fed.R.Evid.

¹³² 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 on trial by showing 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 past, is part of a large class of bank robbers. There is little or no probative value, but a 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).

¹³³ EDWARD J. IMWINKELREID, UNCHARGED MISCONDUCT EVIDENCE (1984) (discussing the admissibility of prior bad acts in criminal prosecutions); Edward J. Imwinkelried, *The Plan Theory for Admitting Evidence of the Defendant's Uncharged Crimes: A Microcosm of the Flaws in the Uncharged Misconduct Doctrine*, 50 Mo. L. Rev. 1, 12-13 (1985); Miguel A. Mendez & Edward J. Imwinkelried, *People v. Ewoldt: The California Supreme Court's About-Face on the Plan Theory for Admitting Evidence of an Accused's Uncharged Misconduct*, 28 Loy. L.A. L. Rev. 473 (1995); Cammack, *Using the Doctrine of Chances to Prove Actus Reus in Child Abuse and Acquaintance Rape: People v. Ewoldt Reconsidered*, 29 U.C. Davis L. Rev. 355 (Winter 1996); David P. Bryden & Roger C. Park, "Other Crimes"

“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).¹³⁴ Where the disagreement flows 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 presents itself.

Professor Imwinkelreid has identified¹³⁵ three discrete conceptualizations of plan evidence:

- “the unlinked plan theory[.]” admitting uncharged misconduct upon proof of a common methodology;
- “linked methodology theory” where evidence proves that the defendant crafted a plan to use “to be used whenever the opportunity presented itself[.]” and
- “the linked act theory,” where there is proof that the various crimes were all planned as part of a single criminal episode or undertaking.¹³⁶

Evidence in Sex Offense Cases, 78 Minn. L. Rev. 529, 547-48 (1994).

¹³⁴ MUELLER AND KIRKPATRICK, FEDERAL EVIDENCE, Vol. 1, §113, at. 666;

¹³⁵ Imwinkelreid, *Using a Contextual Construction to Resolve the Dispute over the Meaning of the Term "Plan" in Federal Rule of Evidence 404(b)*, 43 Kan. L. Rev. 1005. 1009-1010 (Summer 1995).

¹³⁶ 43 Kan. L. Rev. at 1009-1010.

While Imwinkelreid supports admission primarily only of the last category of evidence,¹³⁷ he does acknowledge the at-least occasional propriety of utilizing “linked methodology” proof.¹³⁸ 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,¹³⁹ and the United States Supreme Court has issued no decision limiting or even questioning this expansive reach of Federal Rule 404(b).¹⁴⁰

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

¹³⁷ 43 Kan. L. Rev. at

¹³⁸ 43 Kan. L. Rev. 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”).

¹³⁹ See Reed, *Admission of Other Criminal Act Evidence After Adoption of The Federal Rules of Evidence*, 53 U. Cin. L. Rev. 113, 135-138 (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...”).

¹⁴⁰ To the contrary, the Court has admitted other act evidence to prove witness bias, *United States v. Abel*, 105 S.Ct. 465 (1984); and to prove identity even where the defendant was acquitted of the prior act, *Dowling v. United States*, 110 S. Ct. 668 (U.S., 1990). In a more general sense the Court affirmed its commitment to an inclusivity approach in *Old Chief v. United States*, 117 S. Ct. 644, 654 (U.S., 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.”

[against other civilians, in unrelated circumstances] are admissible to show the officers' "plan" to resort to such tactics when needed. In *Wilson v. City of Chicago*,¹⁴¹ the plaintiff [a convicted murderer in a police killing prosecution] sought monetary damages for civil rights violations, in particular for being beaten by detectives during his post-arrest interrogation.¹⁴² The Seventh Circuit found error in the District Court's exclusion of other acts of police brutality by the defendant officers:

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.¹⁴³

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."¹⁴⁴

¹⁴¹ 6 F.3d 1233 (7th Cir. 1993).

¹⁴² Wilson claimed "he was punched, kicked, smothered with a plastic bag, electrically shocked, and forced against a hot radiator..." 6 F.3d at 1236.

¹⁴³ *Id.*, at 1238.

¹⁴⁴ *Id.*

Wilson does not stand in isolation,¹⁴⁵ and its conceptualization of “plan” expands slightly on Imwinkelreid’s category of “linked methodology.”¹⁴⁶ Rather than proof that the person crafted a plan to use “to be used whenever the opportunity presented itself[,]” it is 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] when peculiar circumstances or difficulties arise.

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*.¹⁴⁷ In *Smith*, the accused had married Ms.

¹⁴⁵ 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).

¹⁴⁶ See text at note 121, *supra*.

¹⁴⁷ 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) support this view. As explained in *United States v. Woods*, 484 F.2d 127, 134 n. 7 (4th Cir. 1973),

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.

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]."¹⁴⁸

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.¹⁴⁹ The admissibility is appropriate (assuming a valid factual predicate of similarity) for two reasons: 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, as Imwinkelreid explains, the resulting non-character nature of such evidence.¹⁵⁰

Thus, the doctrine of chances is a conceptual 'cousin' of "plan." It does not require proof

¹⁴⁸ *Id.* at 2154-2155.

¹⁴⁹ 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, 1135-1136 (1993) (collecting cases). *See also*, Cammack, *Using the Doctrine of Chances to Prove Actus Reus in Child Abuse and Acquaintance Rape: People v. Ewoldt Reconsidered*, 29 U.C. Davis L. Rev. 355 (Winter 1996) (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, n35 (Mich. 1993), which specifically applied the doctrine of chance as a basis for admissibility.

¹⁵⁰ *Id.*, at 1136 ("the doctrine qualifies as a noncharacter theory of logical relevance").

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:

- First, the unlikelihood of two alleged perpetrators each claiming that the cry of rape is false; and
- Second, conversely, the unlikelihood of a rape being committed on a person who has falsely accused at least one other person of rape.

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 404(b) non-character evidence¹⁵¹ is greater than the prosecution, and without the same degree of similarity,¹⁵² 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:

¹⁵¹ As explained by Professor Imwinkelreid, 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. 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, 1133 (1993). See 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).

¹⁵² See §V, text at note 200, *infra*.

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.

B. Reliability:

This article has posited that evidence of prior false accusations is admissible for impeachment as a matter of constitutional right.¹⁵³ 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.¹⁵⁴

However, the defendant’s right to present substantive evidence in his/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

¹⁵³ See §III, *supra*.

¹⁵⁴ As is discussed below at text at note 166, all that is needed is for the questioner to have a good faith basis for the inquiry.

guarantee,¹⁵⁵ has been held to ensure a criminal accused "a meaningful opportunity to present a complete defense"¹⁵⁶ and the right to present "reliable evidence...when such evidence is central to the defendant's claim of innocence."¹⁵⁷ State court restrictions on defense use of hearsay evidence,¹⁵⁸ defense impeachment of its own witnesses,¹⁵⁹ defendant testimony contending his confession was obtained involuntarily,¹⁶⁰ and defense use of a co-defendant's or crime co-participant's testimony,¹⁶¹ have all been deemed unconstitutional and a denial of Due Process.¹⁶²

¹⁵⁵ The Court's most current analysis of the "right-to-present-a-defense" claim treats the two as essentially interchangeable and cognate. *United States v. Scheffer*, 523 U.S. 303, 308 (U.S., 1998). Professor 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* Note 156, *infra*. Regardless, the *Scheffer* lead opinion distinguishes between exclusion of polygraph evidence, which suggests 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." 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.

¹⁵⁶ *California v. Trombetta*, 467 U.S. 479, 485 (1984).

¹⁵⁷ *Crane v. Kentucky*, 46 U.S. 683, 690 (U.S., 1986)

¹⁵⁸ *Chambers v. Mississippi*, 410 U.S. 284 (U.S., 1973).

¹⁵⁹ *Id.*

¹⁶⁰ *Crane v. Kentucky*, 476 U.S. at 687.

¹⁶¹ *Washington v. Texas*, 388 U.S. 14, 23 (U.S., 1967) (incorporating the Compulsory Process guarantee of the Sixth Amendment to state criminal prosecutions through the Due Process guarantee).

¹⁶² In *Montana v. Egelhoff*, 518 U.S. 37, 43 (U.S., 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

Accepting the “reliability” standard as essential¹⁶³ 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 defense propensity evidence to be sufficiently reliable to be used against a criminal defendant,¹⁶⁴ yet in those cases there is no requirement of similarity between the charged offense and the prior

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.” *Montana v. Egelhoff*, 518 U.S. at 53 (U.S., 1996). 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.

¹⁶³ See note 162, *supra*, discussing the rejection of that test by a plurality of the Court in *Montana v. Egelhoff*, 518 U.S. 37 (1996).

¹⁶⁴ *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 Federal sexual offense propensity rules do not violate defendant’s right to fair trial); *People v. Falsetta*, 986 P.2d 182, 188-189 (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*, 204 Ill. 2d 159, 178 (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 to 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).

act(s).¹⁶⁵ 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, *ipso jure* proof of an essentially cognate accusation has at least the same predictive value and thus “reliability.”¹⁶⁶.

C. The Requisite Level of Proof:

¹⁶⁵ Rule 413(a), Fed.R.Evid., provides only that

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, and may be considered for its bearing on any matter to which it is relevant.

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.

¹⁶⁶ 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 reoffense patterns from one category to another.

Most significantly, the CSOM report found sex offender recidivism to be *lower* than that of the general offender population. <http://www.csom.org/pubs/mythsfacts.html>.

As is detailed above,¹⁶⁷ 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 impeachment¹⁶⁸ 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 prior dishonest act): the questioner must have a “good faith basis” for the inquiry.¹⁶⁹ A good faith basis will be determined first by an acceptable determination of what a false accusation in fact is,¹⁷⁰ and then ascertaining the reason(s) counsel believes the prior accusation to be false. They may include a prior accusation where:

- the complainant then withdrew the charges;
- a jury acquitted the accused *and* the acquittal arose from a specific defense that the accusation was false;
- the prior accused was never prosecuted, and himself reports that the accusation was false; and
- 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, as

¹⁶⁷ See §II C, *supra*.

¹⁶⁸ §III, *supra*.

¹⁶⁹ See, e.g., *United States v. Davis*, 77 Fed. Appx. 902, 904-905 (7th Cir., 2003) (applying the “good faith basis” standard to questioning under Rule 608(b), Fed.R.Evid.).

¹⁷⁰ See §I, text at n. 21, *supra*, 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.”

that without more does not suggest falsity as opposed to mistaken identification or a determination of evidentiary insufficiency on an element such as force.¹⁷¹

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.”¹⁷² There is no pre-

¹⁷¹ Illustrative of the latter is the much-discussed case of Commonwealth v. Berkowitz, 641 A.2d 1161, 1164 (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:

the 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 was 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.

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.

¹⁷² Huddleston v. United States, 485 U.S. 681,685 (U.S., 1988). Huddleston sets the standard for admission of 404(b) non-character evidence. Dowling v. United States, 493 U.S.

screening by the trial judge to determine whether in fact the prior accusation occurred,¹⁷³ and the judge makes no independent credibility assessment.¹⁷⁴ 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

342 (U.S., 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 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 348-349.

¹⁷³ Huddleston v. United States, 485 U.S. at 688 (“[p]etitioner'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)”).

¹⁷⁴ *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.

independent extrinsic evidence.¹⁷⁵

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 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 *State v. Quinn*,¹⁷⁶ 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 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.¹⁷⁷

¹⁷⁵ Although Rule 608(b), Fed.R.Evid., 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. *Compare* *United States v. Abel*, 469 U.S. 45, 51 (U.S., 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”).

¹⁷⁶ 490 S.E.2d 34, 41 (W. Va., 1997).

¹⁷⁷ *Id.*

But the potential for abuse here is no greater than that in any use, by either the defense or the prosecution,¹⁷⁸ of other acts evidence. And, as well, easily structured preventive measures exist. There is no constitutional bar to requiring pre-trial disclosure by the defense of its intent to use “false accusation” evidence,¹⁷⁹ and sanctions for non-compliance up to and including the exclusion of defense evidence have been countenanced.¹⁸⁰ Indeed, two states include pre-trial disclosure provisions for false accusation evidence in their respective Rape Shield statutes.¹⁸¹ In sum, while concerns for abuse of evidentiary rights are real, they are controllable and provide no basis for offsetting the constitutional command of admissibility.

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

¹⁷⁸ Mis-use of other acts evidence is not the sole province of defense lawyers. *See, e.g. Guerra v. Collins*, 916 F. Supp. 620 (D. Tex., 1995), affirmed *sub nom. Guerra v. Johnson*, 90 F.3d 1075, 1078 (5th Cir., 1996)(habeas 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).

¹⁷⁹ *See Michigan v. Lucas*, 500 U.S. 145, 150 (U.S., 1991) (upholding as constitutional pre-trial disclosure rule of intent to offer of evidence of a rape complainant’s past sexual behavior); *Wardius v. Oregon*, 412 U.S. 470, 473 (U.S., 1973) (upholding notice-of-alibi pre-trial disclosure rules); *Williams v. Florida*, 399 U.S. 78 (1970) (same).

¹⁸⁰ *Taylor v. Illinois*, 484 U.S. 400, 98 L. Ed. 2d 798, 108 S. Ct. 646 (1988) (upholding sanction of witness preclusion where trial counsel willfully failed to disclose witness during pre-trial discovery); *United States v. Nobles*, 422 U.S. 225, 45 L. Ed. 2d 141, 95 S. Ct. 2160 (1975) (precluding witness testimony a permissible sanction for refusal of defense to provide witness’ written report).

¹⁸¹ 13 V.S.A. § 3255 (“Evidence of specific instances of the complaining witness’ past false allegations of violations of this chapter”); Wis. Stat. § 972.11 (“Evidence of prior untruthful allegations of sexual assault made by the complaining witness”).

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.”¹⁸² At their core are the protection of privacy¹⁸³ and facilitating the prosecution of sex offense cases.¹⁸⁴ With these principles in mind, and because of the historic difficulties in prosecuting rape cases¹⁸⁵ and in appearing as a rape victim in court,¹⁸⁶ the question must be posed¹⁸⁷ as to whether such concerns

¹⁸² 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. 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.”).

¹⁸³ *Michigan v. Lucas*, 111 S. Ct. 1743, 1746 (U.S., 1991) (the Michigan shield law “represents a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy”).

¹⁸⁴ *Id.* (“The statute also protects against surprise to the prosecution”).

¹⁸⁵ 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 and Rand, *Criminal Victimization 2002*, Bureau of Justice Statistics National Crime Victimization Survey, <http://www.ojp.usdoj.gov/bjs/pub/pdf/cv02.pdf>. See also, Anderson, *Legacy*, 84 *B.U.L. Rev.* at 987 (“decades of studies document the great reluctance of true rape victims to report their attacks to the police”).

¹⁸⁶ Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 *Minn. L. Rev.* 763, 764 (April, 1986) (noting that “victims of rape are humiliated and harrassed [sic] when they report and prosecute the rape [and bullied] and cross-examined about their prior sexual experiences” and linking these experiences to the low reporting of rape cases); cf., Blackburn, *Identity Protection for Sexual Assault Victims: Exploring Alternatives to the Publication of Private Facts Tort*, 55 *S.C. L. Rev.* 619, 622 (Spring 2004),

are implicated by admitting false accusation evidence. The simple answer is largely “no.”

This negative arises not merely from the fact that a false accusation is not “sexual conduct” or “predisposition” and thus not within the literal terms of many shield laws.¹⁸⁸

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.

As well, 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 *with persons other than the accused* shows a willingness to consent to activity with the defendant; but a witness’ willingness to falsely accuse someone and thereby engage 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.¹⁸⁹

noting that increased privacy for rape victims increases reporting and encourages participation in the court process).

¹⁸⁷ Although the question is indeed posed, it is in its truest sense academic. If indeed the right to present false accusation evidence is constitutionally mandated, these public policy 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 (U.S., 1974)..

¹⁸⁸ See, e.g., Rule 412, Fed.R.Evid., restricting inquiry regarding whether the witness “engaged in other sexual behavior” or what her//his “sexual predisposition” is.

¹⁸⁹ 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 with the defendant on trial. See, e.g., Rule 412, Fed.R.Evid. (exempting from rape shield exclusions “evidence of specific instances of sexual behavior by the alleged victim with

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/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, a prior untruthful act, drug or alcohol use or mental capacity. It is the essence of confrontation against an accuser.

F. The Claimed Double Standard:

In “Prior False Allegations of Rape: Falsus in Uno, Falsus in Omnibus?”¹⁹⁰ Justice Denise Johnson¹⁹¹ contends that a false dichotomy exists, with false accusation evidence being excluded in other violent crime prosecutions but being 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

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.

¹⁹⁰ 7 Yale J.L. & Feminism 243 (1995).

¹⁹¹ The author was and remains an Associate Justice of the Vermont Supreme Court.

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.¹⁹²

Johnson recognizes that “[i]n 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.”¹⁹³ Her conclusions, however, are that (1) trial judges would

¹⁹² 7 Yale J.L. & Feminism at 245-246.

¹⁹³ *Id.*, at 246.

bar the evidence in the robbery but admit it in the rape trial;¹⁹⁴ and, (2) that exclusion is proper as the general rule in both cases.¹⁹⁵

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 fight¹⁹⁶) 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," above), it is dubious. The claim is mistake, yet the evidence seeks to prove dishonesty, *i.e.*, deliberate falsehood, and thus is a

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*, at 262-263 (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 at §3, *supra*.

¹⁹⁶ 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.

virtual *non sequitur*¹⁹⁷. 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 admissibility for impeachment¹⁹⁸ purposes.

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.¹⁹⁹ 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.²⁰⁰

¹⁹⁷ 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). And, while admissible, it would be weak evidence, subject to strong prosecution refutation in closing argument.

¹⁹⁸ 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.

¹⁹⁹ 7 Yale J.L. & Feminism 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.*

²⁰⁰ *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

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.

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.” *Id.* at 1404.

Numerous other courts have adopted this or similar standards. *United States v. Aboumoussallem*, 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 victims of father’s acts were female); *Newman v. United States*, 705 A.2d 246, 254-57 (D.C. App. 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”)

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 the specific details of the fabricated incident as juxtaposed with those of the crime on trial.

G. The Problematic 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 the flock decimated.²⁰¹ 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 blindered - 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.²⁰²

H. Conclusion:

Examination regarding, and evidence 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 is material²⁰⁰ to the truth-determining process. When analyzed properly as

²⁰¹ See Aesop’s fable, text at note 1, *supra*. Thus, although the fable is taught for its lesson that lying begets disbelief, Those Fabulous Fables, Grade 3, National Teacher Training Institute, <http://www.myetv.org/education/nttcd/lessons/k-3/fables.html> (“When you say what isn’t true, people lose faith in you”), a secondary cautionary lesson is that even liars can and do report real harm accurately.

²⁰² 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’ 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.

²⁰⁰ 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).

proof of witness “corruption” its admissibility for impeachment purposes is assured by the Confrontation guarantee; and for its non-character purposes of “plan” an “doctrine of chance” evidence it is substantive (and substantial) proof refuting 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. They are:

- **Defining a “False” Accusation:** To have relevance in a criminal proceeding, it 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.
- **Setting 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.”²⁰¹

²⁰¹ Huddleston v. United States, 485 U.S. 681,685 (U.S., 1988). Huddleston sets the standard for admission of 404(b) non-character evidence. Dowling v. United States, 493 U.S. 342 (U.S., 1990):

to introduce evidence on this point at the bank robbery trial, the

- **Preventing Undue Prejudice and the Harms meant to be Precluded by Rape Shield**

Laws: Litigation of a pre-trial motion *in limine* by the prosecution to ascertain the intended use of “false accusation” evidence will ensure that only proper proof is introduced and proper questioning occurs.²⁰²

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 348-349.

²⁰² As noted above (*see* text at note 179, *supra*), states have the right, consistent with a defendant's Due Process and Fifth Amendment protections, to enact pre-trial notice rules for such evidence.