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Rape Shield Laws and Prior False Accusations of Rape: The Need for Meaningful Legislative Reform;Legislative Reform

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Rape Shield Laws and Prior False Accusations of Rape: The Need for Meaningful Legislative Reform

> History, sacred and profane, and the common experience of mankind teach us that women of the character shown in this case are prone for selfish reasons to make false accusations both of rape and insult upon the slightest provocation, or even without provocation for ulterior purposes.[1]

I. INTRODUCTION

The words of Judge James E. Horton of the Alabama Circuit Court, written in an opinion that would ultimately curtail his judicial career,[2] reflect an age-old fear that men are often falsely accused of rape. Since Biblical times, society has witnessed the detrimental effects of false rape accusations and the resulting prejudice directed towards rape complainants. The oft-cited moral teaching of Joseph and Potiphar's wife[3]

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1. Alabama v. Patterson, April 3-9, 1933 (Ala. Cir. Ct. June 22, 1933) (setting aside a death sentence as against the weight of the evidence and granting a new trial in the Scottsboro case), *reprinted in* HAYWOOD PATTERSON & EARL CONRAD, SCOTTSBORO BOY app. at 277 (1950).

The facts of the Scottsboro case, which became a *cause celebre* concerning the mistreatment of blacks in the criminal justice system, merit a brief recitation. In 1931 nine black youths, known as the Scottsboro boys, were accused of raping two white girls while on a Memphis bound freight train. At the various trials in 1931, the girls testified for the prosecution. Eight of the boys were found guilty and sentenced to death, while a mistrial was declared for thirteen year-old Roy Wright because the jury could not decide between a death sentence or life imprisonment. The United States Supreme Court reversed the convictions and remanded the cases, holding that the boys were not afforded adequate counsel. Powell v. Alabama, 287 U.S. 45 (1932).

By this time, the infirmities in the testimony of the girls had become manifest. In January 1932, Ruby Bates, one of the alleged victims, wrote a letter to one of her friends denying that the black youths had attacked her. At the retrial in 1933 presided over by Judge James E. Horton, Bates testified for the defense that neither her nor Victoria Price had been raped, and that the story had been contrived to prevent the girls from being prosecuted for vagrancy. Two days later, however, an all white jury again convicted the defendants. Judge Horton, citing the inconsistencies and contradictions in the testimony, granted a motion for a new trial on the ground that the conviction was against the weight of the evidence.

For a complete account of the Scottsboro case, *see generally*, PATTERSON & CONRAD, *supra*; JAMES GOODMAN, STORIES OF SCOTTSBORO (1994); DAN CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH (rev. ed. 1979).

2. Judge Horton's reversal of the jury verdict met with harsh criticism, and he reluctantly withdrew from the case under pressure from Alabama Chief Justice John Anderson. CARTER, *supra* note 1, at 272-73. Judge Horton was defeated in the 1934 election for circuit court judge, although his beliefs concerning false rape allegations played little role in bringing about his defeat. As a final show of contumaciousness, the voters rewarded Thomas G. Knight, the Attorney General who prosecuted the case, by electing him Lieutenant Governor. *Id.*

3. Joseph the Israelite was a slave in the house of Potiphar the Egyptian. After a time, Potiphar's wife began to look fondly at Joseph. When Joseph refused to lie with Potiphar's wife, she

demonstrates that "a woman scorned-especially if she is gentile-can get a good man into a hell of a lot of trouble by crying rape."[4] In the face of stories like these, it is not surprising that many people still agree with the proposition that men are often falsely accused of rape,[5] despite studies that have shown that the frequency of rape reports proven false, approximately two percent, mirrors the false reporting rates for other crimes.[6] Nonetheless, the fear of false rape accusations and the popular misconceptions about the tendency of women to lie about being raped, have suffused American law since the colonial period.[7] Throughout the 1960s and 1970s, scholars exaggerated the problem of false rape accusations by providing theories, supported largely by anecdotal evidence, explaining why a woman would falsely accuse a man of rape.[8] Consequently, many rape complainants suffered unjustly as a result of these specious arguments grounded in amateur psychology.[9]

The last quarter century has witnessed a substantial lessening of the general distrust of rape complainants that punctuated earlier jurisprudence. Sadly, however, some women do lie about being raped.[10] And the lives of some men are ruined by

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seized his cloak and accused him of coming to her with the intent to seduce her. Joseph was imprisoned, but later obtained a full pardon. *Genesis* 39:7-20; *see* SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 21-22 (1975) for a modern feminist interpretation of this story.

4. BROWNMILLER, *supra* note 3, at 22.

5. JOYCE E. WILLIAMS & KAREN A. HOLMES, THE SECOND ASSAULT: RAPE AND PUBLIC ATTITUDES 136 tbl.18 (1981). Williams and Holmes conducted a study from a random sample of the San Antonio, Texas population. When presented with the proposition that men are often falsely accused of rape, the following rates of agreement were noted: Anglo-American men, 40%, Anglo-American women, 63%; African-American men, 92%, African-American women, 41%; Mexican-American men, 73%, and Mexican-American women, 57%. *Id.*

6. *See* 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) (citing Patricia A. Harwig & Georgette Bennett Sandler, *Rape Victims: Reasons, Responses, and Reforms, in* THE RAPE VICTIM 13 (Deanna R. Nass ed. 1977)).

7. During his career as a lawyer in colonial Virginia, Thomas Jefferson advocated eliminating the state's castration punishment for rape. Defending his position, Jefferson protested of "the temptation women would be under to make it an instrument of vengeance against an inconstant lover, and of disappointment to a rival." WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO 1550-1812 463-64 (1968) (quoting 9 THOMAS JEFFERSON, PAPERS OF THOMAS JEFFERSON (Julian P. Boyd ed. 1950) (letter to James Madison)).

8. The 1970 Wigmore treatise on evidence stated:

> Modern psychiatrists have amply studied the behavior of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offenses by men.

3A JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 924a, at 736 (Chadbourn rev. 1970).

> Similarly, an unsigned comment in the 1970 *University of Pennsylvania Law Review* opined: Women often falsely accuse men of sexual attacks to extort money, to force marriage, to satisfy a childish desire for notoriety, or to attain personal revenge. Their motives include hatred, a sense of shame after consenting to illicit intercourse, especially when pregnancy results.

Comment, *The Corroboration Rule and Crimes Accompanying a Rape*, 118 U. PA. L. REV. 458, 460 (1970).

9. For an article discussing the flaws in the logic of these sources, see Julie Taylor, *Rape and Women's Credibility: Problems of Recantations and False Accusations Echoed in the Case of Cathleen Crowell Webb and Gary Dotson*, 10 HARV. WOMEN'S L.J. 59, 78-79 (1987).

10. Newspapers abound with stories of rape recantations. *See* Bill Rams, *Woman Fabricated Mall Rape Story to Hide Affair, Police Say*, ORANGE COUNTY REG., Apr. 12, 1997, at B4, *available in*

false rape charges.[11] How should prior false accusations be handled in subsequent litigation involving the same complainant? The Federal Rules of Evidence and comparable state evidence codes must fairly handle the false accusations without subjecting all rape complainants to unjust scrutiny. This Note proposes the enactment of a new Rule of Evidence designed to handle specifically a complainant's prior false sexual assault allegations. Such an enactment, allowing the introduction of false rape allegations through both cross-examination and extrinsic evidence[12] after a requisite showing of falsity is established, would provide necessary stability and guidance in this controversial area of the law. This rule would afford a criminal defendant the opportunity to benefit from this highly probative evidence of credibility, without subjecting all rape complainants to a rigorous and demeaning examination of their sexual history. The exclusive purpose of this rule would be to examine *lies, not sexual behavior.*

The next section of this Note describes the institutionalized prejudices faced by rape complainants at common law, and details the corresponding transitions that rape law has undergone to mitigate, if not remove, these prejudices. Part III reconciles the judicial treatment given to false rape accusations with the existing character and credi-

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1997 WL 7415609; Gina Sitaramiah, *When a Woman Says 'I Take It Back': False Rape Allegations Can Only Hurt Real Victims, But Recent High-Profile Cases Don't Seem to Be Damaging*, KAN. CITY STAR, Mar. 17, 1997, at D1, *available in* 1997 WL 3007816; Jason Sickes & Robert Ingrassia, *Cowboy Allegations Discredited: Woman May Face Charge After Rape Inquiry Dropped*, DALLAS MORNING NEWS, Jan. 12, 1997, at 1A, *available in* 1997 WL 2638658; Maryann Spoto, *Woman Who Cried Rape in Union Jail Is Now Being Sought as a Fugitive: Prosecutor Charges Her with Filing False Report and Recanting Story*, STAR-LEDGER (Newark, N.J.), Apr. 30, 1996, at 37, *available in* 1996 WL 7930624; Dan Kelly, *Rape Charges Dismissed as Lies*, READING EAGLE (Reading, Pa.), Feb. 2, 1996, at B1, *available in* 1996 WL 2196738; Tony Perry, *DNA Test Frees Inmate After 10 Years Justice: Frederick Daye Spent a Decade in Vacaville on Kidnaping and Rape Charges. A Lawyer and a TV Reporter Fought to Win His Release*, L.A. TIMES, Sept. 29, 1994, at 3, *available in* 1994 WL 2349767; Jennifer Warren, *Dad Challenges Memory Therapy/ Daughter's Accusations of Rape as a Young Girl Ruined His Life*, MORNING NEWS TRIB. (Tacoma, Wash.), April 7, 1994, at A1, *available in* 1994 WL 4629530; *Rape Charges Dropped Against Rapper 'Run,'* CHI. TRIB., Feb. 21, 1992, at 2, *available in* 1992 WL 4455497; Jolayne Houtz, *Rape Puzzle Broke Apart With Last Piece—Charges Dropped Against Man*, SEATTLE TIMES, Jan. 14, 1992, at B1, *available in* 1992 WL 5007683; Tom Coakley, *Man Seeks Charges in Rape Accusation*, BOSTON GLOBE, Sept. 8, 1988, at 70, *available in* 1988 WL 4631242.

11. The most publicized false rape allegation case in the last half of the century involved Cathleen Crowell Webb and Gary Dotson. In 1976 the sixteen year-old Cathleen Crowell Webb claimed she had been raped, and identified Gary Dotson as her assailant. Dotson was convicted and sentenced to an incarceration term of twenty-five to fifty years. Six years after the trial, Webb, citing her beliefs as a born-again Christian, recanted her story. She had contrived the story because she was concerned about the consequences of her promiscuity. In 1985, after serving nearly six years of his sentence, Dotson received clemency from Illinois Governor James Thompson. For a more thorough explication of the case, see Taylor, *supra* note 9, at 61-74. This author is troubled by the use of high rates of non-reported rapes to contrast the belief that many women falsely accuse men of rape. Morrison Torrey concludes that "The myth is false claims of rape; the reality is severe underreporting of rape." Torrey, *supra* note 6, at 1030-31. While this author acknowledges that underreporting of rape is a common and troubling phenomenon, the use of reporting statistics to refute concerns about false rape allegations is inappropriate. Torrey seems to be arguing that the problem of underreporting obviates the need to worry about false rape accusations. On the contrary, these are different problems and must be considered separately. False rape accusations do occur, ruining the lives and reputations of those accused. Consequently, the reality of underreporting is a separate problem and is of no consolation to those falsely accused of rape.

12. Although not explicitly defined in the Federal Rules, extrinsic evidence in the context of impeachment refers to "evidence other than that which is spoken from the witnesses [sic] mouth while he or she is on the stand. The evidence may be anther's [sic] testimony, a written document, physical object, or documentation of previous testimony." Janeen Kerper & Bruce E. MacDonald, *Federal Rule of Evidence 608(b): A Proposed Revision*, 22 AKRON L. REV. 283 (1989).

bility rules, including the various justifications provided by appellate courts for circumventing these rules. Part IV argues that the flexible, case specific application of the character and credibility rules should be replaced by a single rule to treat new prior false accusations of rape. Finally, Part V contains and explains the author's proposed model rule for dealing with prior false allegations of rape.[13]

II. MODERN TRANSFORMATIONS IN RAPE LAW

During the 1970s and 1980s, the criminal justice system, in an attempt to lessen the prejudices faced by rape complainants, radically altered the way it handled rape cases. Prior to that time, the common law treatment of rape cases, shaped by English common law and subsequently adopted by most American jurisdictions, discouraged rape prosecutions and frustrated rape victims. At common law, a woman who concealed her injury for a considerable period of time was presumed to have feigned her story.[14] Consonant with the treatment of women as chattel property, common law provided a spousal exemption for rape.[15] As part of the "forcible compulsion" requirement, a woman was required to resist to the utmost, except where precluded by fear of grave harm.[16] If a woman failed to provide such resistance, it was presumed that she must have either consented or encouraged the rapist. As the common law abolished the corroboration requirement for all crimes except perjury, corroboration for sex offenses was not required.[17] Concerned about unfounded accusations of rape, however, several states, through statute or judicial decision, installed a specific corroboration requirement for rape prosecutions.[18] Juries received cautionary instructions about the ease

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13. Since most sex crimes are prosecuted in state courts, there is a paucity of federal cases involving prior false accusations by a complaining witness. Moreover, many of these cases are uninstructive. Consequently, most of the cases referred to in this Note will be state cases. As most states, however, have adopted rules of character and credibility evidence resembling the Federal Rules of Evidence, this paper will use the federal rules as a model.

14. During the reign of Henry III, a woman was required to report her injury immediately following the attack. The statute Westm. I. cap. 13 lengthened the reporting period to forty days from the attack, providing that the failure of a woman to prosecute within that time reduced the offense to a trespass. Additionally, the statute lessened to two years imprisonment the punishment for rape. Although the prompt complaint requirement was abolished by the time of Blackstone's writing, he noted that "the jury will rarely give credit to a stale complaint." 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *211-12.

15. "But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract." 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 629 (Philadelphia, 1st American ed., 1847) (1736).

16. Although rape was committed if a woman ceased resistance under fear of death of duress, the prosecution had to prove that the defendant intended to complete his purpose in defiance of all resistance. 2 FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES § 1143 (7th ed. 1874).

17. Although not required, corroboration increased significantly the likelihood that a conviction would result from a prosecution. Blackstone stated that "if [the prosecuting witness] be of evil fame, and stands unsupported by others . . . these and the like circumstances carry a strong, but not conclusive, presumption that her testimony is false or feigned." 4 BLACKSTONE, *supra* note 14, at *213-14. Additionally, the failure to produce corroborative evidence when such evidence was available weighed against the prosecution. 2 WHARTON, *supra* note 16, § 1149 (7th ed. 1874).

18. Supporters of corroboration requirements offered three justifications for corroboration requirements, all motivated by the nature of the offense. Corroboration requirements: (1) minimized the risk that false charges would be brought; (2) balanced the sympathy given the victim by the jury; and (3) served as an appropriate evidentiary requirement, given the difficulty of defending against a rape charge. *See generally* Comment, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 YALE L.J. 1365 (1972).

with which rape charges could be brought, and the difficulty of defending against such charges.[19] Finally, the chastity of the rape victim could be examined, in an attempt to show that her willingness to consent to previous sexual encounters increased the possibility that she consented in this situation.[20] John Henry Wigmore, the leading evidence scholar of the 1900s and no friend to rape victims, suggested that "[n]o judge should let a sex offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician."[21] Unsympathetic treatment received from the state, coupled with personal privacy concerns and a desire to put the matter behind them, caused many victims not to report their attacks,[22] especially in cases of non-stranger or acquaintance rape.[23] Until

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19. The difficulty of defending against rape charges was described in the oft-quoted passage by Matthew Hale:

> It is true rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent.

1 HALE, *supra* note 15, at 635. Consequently, many states followed the advice of Hale and established standard jury instructions resembling the following California instruction:

> A charge such as that made against the defendant in this case is one which is easily made and, once made, difficult to defend against, even if the person accused is innocent. Therefore, the law requires that you examine the testimony of the female person named in the information with caution.

Cal. Jury Instructions-Criminal No. 10.22 (3d ed. 1970).

Prior to 1975, the following cases held that a similar cautionary instruction should be given under particular circumstances: People v. Lucas, 105 P.2d 102 (Cal. 1940) (charge of contributing to the delinquency of a minor through sexual acts); People v. Putnam, 129 P.2d 367 (Cal. 1942) (charge of committing lewd and lascivious acts upon a child); People v. Nye, 237 P.2d 1 (Cal. 1951) (any sexual offense not involving children); People v. Merriam, 426 P.2d 161 (Cal. 1967) (virtually any sexual case, regardless of whether it is requested by the defendant); Howell v. State, 136 So. 456 (Fla. 1931) (charge of incest); Territory v. Bodine, 32 Haw. 528 (1932) (charge of rape); Reynolds v. State, 42 N.W. 903 (Neb. 1889) (charge of rape); State v. Clevenger, 202 P. 687 (N.M. 1921) (charge of rape where the evidence is conflicting); State v. Fulks, 160 N.W.2d 418 (S.D. 1968) (any charge where a conviction could be sustained on the uncorroborated testimony of the complaining witness); Connors v. State, 2 N.W. 1143 (Wis. 1879) (charge of rape). As this list only includes cases *requiring* such an instruction, it is necessarily under-inclusive. Many states made discretionary the giving of the instruction. Since an acquittal cannot be appealed by the prosecution, this list omits the vast number of cases in which a cautionary instruction was given and an acquittal resulted.

20. As Blackstone wrote, "[T]he law of England does not judge so hardly of offenders, as to cut off all opportunity of retreat even from common strumpets . . . It therefore holds it to be felony to force even a concubine or harlot; because the woman may have forsaken that unlawful course of life." 4 BLACKSTONE, *supra* note 14, at *213. Since the defendant could impeach the character of the victim for chastity, the fact that the complaining witness was of evil fame was certainly considered by the jury.

21. 3A WIGMORE, *supra* note 8, § 924a, at 737.

22. The two most common measures of criminal activity are the Uniform Crime Reports (UCRs), collected from data submitted to the Federal Bureau of Investigation by law enforcement agencies, and the National Crime Victimization Survey (NCVS), a yearly household survey designed to provide a measurement of both reported and unreported victimizations. Notwithstanding minor differences between the two surveys in the definition of rape, comparisons between these surveys are used to show the unreported nature of rape. In 1988, for example, the UCRs showed 92,486 rapes being committed, while the NCVS figure was 127,370. *See* FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, 1988 27 (1989); U.S. DEPARTMENT OF JUSTICE BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 1988 14 (1989). In 1991, the UCR reported 106,593 offenses, while the NCVS reported 173,310 offenses. *See* FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, 1991 23 (1992); U.S. DEPARTMENT OF JUSTICE BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 1991 [hereinafter CRIMINAL VICTIMIZATION 1991] 16 (1992).

rape reforms originated in the mid 1970s, the meager number of rape convictions produced under these restrictions evidenced the futility of the rigorous and demeaning processes that rape complainants were forced to undergo.[24]

Widespread and justified criticism that rape law was unfair to women precipitated enormous changes in the legislative and judicial treatment of rape cases.[25] No state preserves the spousal exemption in its unqualified form, and fifteen states have completely eliminated the distinction between marital and non-marital rape.[26] In a movement that some feminists think may ultimately damage the cause of women in general,[27] new statutes and case law have recognized as forcible compulsion threats other than the use of overt physical force.[28] Addressing the issue of victim consent,

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Other attempts have been made to estimate the prevalence of rape in society. *See* Mary Koss et al., *The Scope of Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students*, 55 J. CONSULTING & CLINICAL PSYCH. 162, 168 (1987) (concluding that, since the age of 14, 27.5 percent of female college students had experienced an act that met legal definitions of rape, including attempts); *but cf.* Neil Gilbert, *The Phantom Epidemic of Sexual Assault*, PUB. INT. at 54 (Spring 1991) (discussing possible flaws in Koss's "advocacy numbers").

23. Between 1973 and 1991, the reporting rate for sexual offenses, without regard to victim-attacker relationship, varied from 45 to 61 percent, consistently making it one the most frequently reported crimes. *See* CRIMINAL VICTIMIZATION, *supra* note 22, at 8. When a relationship exists between the victim and the attacker, the reporting rate is significantly lower. Of the approximately 173,300 rapes reported in the NCVS, 83,000, or approximately 47.8 percent involved non-strangers. However, 61.9 percent of all victimizations involving strangers were reported to the police, whereas 55.4 percent of all victimizations involving non-strangers were reported. CRIMINAL VICTIMIZATION, *supra* note 22, at 102-03.

24. *See* Harry Kalven, Jr., & Hans Zeisel, THE AMERICAN JURY 352-54 (1966) (discussing the willingness of jurors to acquit in rape cases where judges would have convicted). During the early 1970s, the entire state of New York only averaged 18 rape convictions per year. *Justice System is Expanding Rape Prosecutions, Study Finds*, 25 CRIM. JUST. NEWSL., May 16, 1994, at 3.

25. JOEL EPSTEIN & STACIA LANGENBAHN, THE CRIMINAL JUSTICE AND COMMUNITY RESPONSE TO RAPE *passim* (1994).

26. Only one state, Oklahoma, still defines rape as "intercourse involving vaginal or anal penetration accomplished with a male or female who is not the spouse of the perpetrator . . . " OKLA. STAT. ANN. tit. 21, § 1111 (West 1983 & Supp. 1996). By 1994, twenty four states had removed any type of marital rape exemption. Some states abolished the exemption through statute, while other state courts struck down the exemption as a violation of equal protection. *See, e.g.*, People v. Liberta, 474 N.E.2d 567 (N.Y. 1984), *cert. denied*, 471 U.S. 1020 (1985); Merton v. State, 500 So. 2d 1301 (Ala. Crim. App. 1986); Williams v. State, 494 So. 2d 819 (Ala. Crim. App. 1986); People v. M.D., 595 N.E.2d 702 (Ill. App. Ct.), *appeal denied*, 602 N.E.2d 467 (Ill. 1992); Shunn v. State, 742 P.2d 775 (Wyo. 1987).

See also ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT 45-72 (1994); DIANA E. H. RUSSELL, RAPE IN MARRIAGE 375-82 (2d ed. 1990); Lisa R. Eskow, Note, *The Ultimate Weapon?: Demythologizing Spousal Rape and Reconceptualizing Its Prosecution*, 48 STAN. L. REV. 677, 681-82 (1996); *Developments in the Law: Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1533-34 (1993); Note, *To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99 HARV. L. REV. 1255 (1986).

27. As one feminist has written: "[W]e don't want the law to patronize women; when it did, in a vast number of areas, we fought it and won significant victories. To treat as victims in a legal sense all of the female victims of life is at some point to cheapen, not celebrate, the rights to self-determination, sexual autonomy, and self- and societal respect of women." Vivian Berger, *Not So Simple Rape*, 7 CRIM. JUST. ETHICS 69, 75 (1988).

28. Wisconsin, Utah and Washington have criminalized nonconsensual intercourse without force or threat. WIS. STAT. ANN. § 940.225 (West 1996); UTAH CODE ANN. § 76-5-402 (1995); WASH. REV. CODE ANN. § 9A.44.060 (West 1988); *see also* State in the Interest of M.T.S., 609 A.2d 1266 (N.J. 1992) (statutory crime of sexual assault did not require physical force in addition to involuntary or unwanted sexual penetration); Commonwealth v. Berkowitz, 641 A.2d 1161 (Pa. 1994) (although conviction for rape required forcible compulsion, no such requirement existed for indecent assault).

some courts have reduced or eliminated the "reasonable mistake" defense, a result unique to rape cases.[29]

Aside from the definition and state of mind requirements stated above, the law of evidence as applied to rape cases underwent a similar transformation. The corroboration requirement once so prevalent in American rape law was abandoned by most of the states.[30] Through statute or judicial decision, many jurisdictions abandoned the jury instruction concerning the ease of making or the difficulty of defending against a rape charge.[31] Additionally, the Congress and forty-nine states have passed "rape-shield" laws to exclude evidence of a rape complainant's past sexual history to establish consent.[32] Of the modern developments in rape law, the emergence of rape

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For a more thorough explication on the force element in modern rape cases, see Daphne Edwards, Comment, *Acquaintance Rape & The "Force" Element: When "No" is Not Enough*, 26 GOLDEN GATE U. L. REV. 241 (1996); Joshua Mark Fried, *Forcing the Issue: An Analysis of the Various Standards of Forcible Compulsion in Rape*, 23 PEPP. L. REV. 1277 (1996); Major Timothy Murphy, *A Matter of Force: The Redefinition of Rape*, 39 A.F. L. REV. 19 (1996).

29. *See* Commonwealth v. Ascolillo, 541 N.E.2d 570 (Mass. 1989) (reasonable mistake as to consent was not a valid defense to rape); State v. Reed, 479 A.2d 1291 (Me. 1984) (same). Rather than follow the strict liability theory imposed by these courts, Indiana took a different approach to the reasonable mistake defense. In *Tyson v. State*, 619 N.E.2d 276 (Ind. Ct. App. 1993), the Indiana Court of Appeal held that Tyson was not entitled to a jury instruction stating that a reasonable mistake as to consent would be a defense. The justification for refusing to give the instruction lay in the fact that there was no equivocal conduct from which Tyson could have believed that the complainant was consenting. According to the court, "There is no recitation of equivocal conduct by D.W. which reasonably could have led Tyson to believe that D.W. only appeared to consent to the charged sexual conduct; no gray area exists from which Tyson can logically argue that he misunderstood D.W.'s actions . . . [I]t does not support the giving of a mistake of fact instruction." *Id.* at 295. For a stinging criticism of this equivocal conduct requirement, *see* GEORGE P. FLETCHER, WITH JUSTICE FOR SOME 129-31 (1995).

30. For a discussion of the states that have abandoned their corroboration requirements, see Vitauts M. Gulbis, Annotation, *Modern Status of Rule Regarding Necessity for Corroboration of Victim's Testimony in Prosecution for Sexual Offense*, 31 A.L.R.4th 120 (1984). Despite the modern trend to remove the corroboration requirement, Mississippi still provides: "no person shall be convicted [of rape] upon the uncorroborated testimony of the injured female." MISS. CODE ANN. § 97-3-69 (1994).

31. COLO. REV. STAT. ANN. § 18-3-408 (West. Supp. 1996); IOWA CODE ANN. § 709.6 (West 1993); MD. ANN. CODE art. 27, § 461B (1996); NEV. REV. STAT. § 175.186 (1997); 18 PA. CONS. STAT. ANN. § 3106 (West Supp. 1997); United States v. Vik, 655 F.2d 878 (8th Cir. 1981); Burke v. State, 624 P.2d 1240 (Alaska 1980); State v. Settle, 531 P.2d 151 (Ariz. 1975); People v. Rincon-Pineda, 538 P.2d 247 (Cal. 1975); Marr v. State, 470 So.2d 703 (Fla. App.); Overton v. State, 199 S.E.2d 205 (Ga. 1973); State v. Gong, 764 P.2d 453 (Idaho App. 1988); Taylor v. State, 278 N.E.2d 273 (Ind. 1972); State v. Feddersen, 230 N.W.2d 510 (Iowa 1975); State v. Selman, 300 So.2d 467 (La. 1974); State v. Liddell, 685 P.2d 918 (Mont. 1984); State v. Bashaw, 672 P.2d 48 (Or. 1983); State v. Jette, 569 A.2d 438 (R.I. 1990); State v. Holcomb, 643 S.W.2d 336 (Tenn. Crim. 1982); State v. Reddish, 550 P.2d 728 (Utah 1976); State v. Wilder, 486 P.2d 319 (Wash. 1971).

32. FED. R. EVID. 412; ALA. CODE § 12-21-203 (1995); ALASKA STAT. § 12.45.045 (Michie & Supp. 1996); ARK. CODE. ANN. § 16-42-101 (Michie 1994 & Supp. 1995); CAL. EVID. CODE §§ 782, 1103 (West 1995 & Supp. 1997); COLO. REV. STAT. ANN. § 18-3-407 (West 1990 & Supp. 1996); CONN. GEN. STAT. ANN. § 54-86f (West 1994 & Supp. 1996); DEL. CODE ANN. tit. 11, §§ 3508-3509 (1995); FLA. STAT. ANN. ch. 794.022 (West Supp. 1997); GA. CODE ANN. § 24-2-3 (1995 & Supp. 1996); HAW. R. EVID. 412; IDAHO CODE § 18-6105 (1987); 725 ILL. COMP. STAT. ANN. 5/115-7 (West Supp. 1996); IND. CODE ANN. § 35-37-4-4 (Michie 1994); IOWA R. EVID. 412; KAN. STAT. ANN. § 21-3525 (1995); KY. R. EVID. 412; LA. CODE EVID. ANN. art. 412 (West 1995); ME. R. EVID. 412; MD. ANN. CODE art. 27, § 461A (1996); MASS. ANN. LAWS ch. 233, § 21B (Law. Co-op. 1986); MICH. COMP. LAWS ANN. § 750.520j (West 1991); MINN. R. EVID. 412; MISS. R. EVID. 412; MO. ANN. STAT. § 491.015 (West 1996); MONT. CODE ANN. § 45-5-511 (1995); NEB. REV. STAT. § 28-321 (1995); NEV. REV. STAT. ANN. §§ 48.069, 50.090 (Michie 1996); N.H. REV. STAT. ANN. § 632-A:6 (1996 & Supp. 1996); N.J. STAT. ANN. § 2C:14-7 (West Supp. 1996); N.M. R. ANN. § 11-413 (Michie 1997); N.Y. CRIM. PRO. LAW § 60.42 (McKinney 1992); N.C. R. EVID. 412; N.D. CENT.

shield statutes has caused the most controversy and has generated voluminous amounts of literature.[33]

The criminal justice system's long-awaited efforts to make the disposition of rape charges and convictions more efficient and fairer to complainants has increased the importance of the credibility of the complainant. Since defendants are no longer allowed to examine the prior sexual history of the complainant, they must focus their attention primarily on the complainant's character for truthfulness.[34] Instead of showing promiscuity, the defense attorney must show mendacity. Such mendacity may be established for the fact-finder through the introduction of prior false rape accusations by the complainant. The American evidentiary system, largely through judicial treatment, has looked with great skepticism upon complaining witnesses who have made prior false allegations of rape against other men.[35] This skepticism has resulted in the admission into evidence of a complaining witnesses' prior false rape charges.[36]

CODE §§ 12.1-20-14 to -15 (1985); OHIO REV. CODE ANN. § 2907.02(D) (Anderson 1996); OKLA. STAT. ANN. tit. 12, § 2412 (West 1993 & Supp. 1997); OR. REV. STAT. § 40.210 (1988 & Supp. 1996); 18 PA. CONS. STAT. ANN. § 3104 (West 1983); R.I. R. EVID. 412; S.C. CODE ANN. § 16-3-659.1 (Law. Co-op. 1985 & Supp. 1996); S.D. CODIFIED LAWS § 23A-22-15 (Michie Supp. 1996); TENN. R. EVID. 412; TEX. R. CRIM. EVID. 412; UTAH R. EVID. 412; VT. STAT. ANN. tit. 13, § 3255 (Supp. 1996); VA. CODE ANN. § 18.2-67.7 (Michie 1996); WASH. REV. CODE ANN. § 9A.44.020 (West 1988); W. VA. CODE § 61-8B-11 (1992); WIS. STAT. ANN. § 972.11(2)(b) (West 1995 & Supp. 1996); WYO. STAT. ANN. § 6-2-312 (Michie 1988). The lone state that does not have a rape shield statute, Arizona, has prohibited through judicial decision character evidence concerning unchastity for substantive purposes on the issue of consent. State *ex rel.* Pope v. Superior Court, 545 P.2d 946 (Ariz. 1976).

33. Some of the more valuable commentaries on the subject can be found in: Ann Althouse, *Thelma and Louise and the Law: Do Rape Shield Rules Matter?*, 25 LOY. L.A. L. REV. 757 (1992); Harriet R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763 (1986); David Haxton, Comment, *Rape Shield Statutes: Constitutional Despite Unconstitutional Exclusions of Evidence*, 1985 WIS. L. REV. 1219; J. Alexander Tanford & Anthony J. Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544 (1980); Leon Letwin, *"Unchaste Character," Ideology, and the California Rape Laws*, 54 S. CAL. L. REV. 35 (1980); Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1 (1977); Abraham P. Ordover, *Admissibility of Patterns of Similar Sexual Conduct: The Unlamented Death of Character for Chastity*, 63 CORNELL L. REV. 90 (1977).

34. In the 1991 rape trial of William Kennedy Smith, the defense strategy was to develop the motives of the complainant, Patricia Bowman, to lie about the accusations. Consequently, the defense attempted to introduce evidence of a history of abuse and resentment towards men. Although Judge Mary Lupo rejected the defense efforts to probe the background of Ms. Bowman, future counsel can be expected to construct similar defenses. *See* Susan Estrich, *Palm Beach Stories*, 11 LAW & PHIL. 5, 14-16 (1992).

35. Torrey, *supra* note 6, at 1039; *see also* Denise R. Johnson, *Prior False Allegations of Rape: Falsus in Uno, Falsus in Omnibus*, 7 YALE J.L. & FEMINISM 243 (1995); James A. Vaught & Margaret Henning, *Admissibility of a Rape Victim's Prior Sexual Conduct in Texas: A Contemporary Review and Analysis*, 23 ST. MARY'S L.J. 893, 901 (1992).

36. Four states provide specific exceptions in their rape shield statutes to admit prior false accusations of rape. MISS R. EVID. 412, OKLA. STAT. ANN. tit. 12, § 2412(B)(2) (West 1993 & 1997 Supp.); VT. STAT. ANN. tit. 13, § 3255(a)(3)(C) (Supp. 1996); WIS. STAT. ANN. § 972.11(2)(b) (West 1995 & Supp. 1996). Other states have reached the same result through judicial decision. Phillips v. State, 545 So.2d 221, 223 (Ala. Crim. App. 1989); West v. State, 719 S.W.2d 684, 686-87 (Ark. 1986); People v. Burrell-Hart, 237 Cal. Rptr. 654, 658 (Cal. Ct. App. 1987); Smith v. State, 377 S.E.2d 158, 160 (Ga. 1989); Little v. State, 413 N.E.2d 639, 643 (Ind. Ct. App. 1980); Cox v. State, 443 A.2d 607, 613 (Md. Ct. Spec. App. 1982); Commonwealth v. Bohannon, 378 N.E.2d 987, 991 (Mass. 1978); Miller v. State, 779 P.2d 87, 89 (Nev. 1989); State v. Durham, 327 S.E.2d 920, 926 (N.C. Ct. App. 1985); State v. Baron, 292 S.E.2d 741, 743 (N.C. Ct. App. 1982); State v. Boggs, 588 N.E.2d 813, 816 (Ohio 1992); State v. LeClair, 730 P.2d 609, 613 (Or. Ct. App. 1986); Clinebell v. Virginia, 368 S.E.2d 263, 264-65 (Va. 1988).

III. ADMISSIBILITY OF PRIOR FALSE RAPE ACCUSATIONS

The Federal Rules treat differently the character of a victim or the accused in a criminal case from the character of a witness.[37] Under the Federal Rules, the alleged victim of a sexual assault assumes the dual role of victim and witness. Consequently, relevant evidence[38] about the alleged victim may be introduced through either the 400 rules governing character or the 600 rules governing the credibility of a witness. Through these rules, evidence about the prior false allegations of rape may be admitted. Additionally, some courts have held that the admission of prior false accusations of rape by a complaining witness are constitutionally required to be admitted. This section examines the interesting and novel theories by which evidence of specific false rape accusations has been admitted.

A. Admissible as Evidence of Character

Since character evidence often possesses low probative value and high potential for prejudice,[39] this type of evidence is viewed with a skeptical eye. Federal Rule of Evidence 404 provides that evidence of a person's character may not be admitted to prove that the person acted in conformity with that character on a particular occasion.[40] The rule, however, provides an exception for the admission of testimony regarding a pertinent trait of character by the victim.[41] For example, the defendant in a homicide case may introduce evidence that the victim was a violent person. Evidence allowed under this exception to Rule 404 may be proved by reputation or opinion

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37. Although the Federal Rules include credibility rules under the broad umbrella of character rules, this paper will use the term "character rules" to refer to Rules 404 and 405, governing the character of an accused or victim. The term "credibility rules" will refer to Rules 607, 608 and 609, governing the credibility of a witness.

38. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. FED. R. EVID. 401.

39. C. MCCORMICK, MCCORMICK ON EVIDENCE § 186, at 342 (John William Strong ed., 4th ed. 1992).

40. Rule 404 provides:

> (a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> (1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;
>
> (2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
>
> (3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.
>
> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

FED. R. EVID. 404.

41. FED R. EVID. 404(a)(2).

testimony.[42] Similarly, if the character of a person is an essential element of a charge or defense, such as in a defamation case, proof may be made of specific instances of that person's conduct.[43] As with all relevant evidence, evidence about a person's character may be excluded under Rule 403 if its probative value is substantially outweighed by the danger of unfair prejudice, confusion or waste of time.[44]

Under Rule 404, a defendant in a sexual assault case can argue that sexual intercourse had occurred, but that it was consensual. Until 1978, the defendant could introduce evidence about the victim's prior sexual behavior, implying that since the alleged victim had consented to sexual activity before, it was more likely that she had consented on this occasion. Although evidence about the alleged victim's character for promiscuity was shown most frequently through reputation and opinion testimony, some courts allowed defendants to introduce specific instances of sexual conduct concerning the alleged victim.[45]

Following the example of many states, in 1978 Congress added Federal Rule of Evidence 412.[46] Rule 412, enacted "to protect rape victims from the degrading and embarrassing disclosure of intimate details about their private lives,"[47] governs the admissibility of character evidence tending to prove the unchaste character of the victim. Although the original Rule 412 applied only to criminal proceedings, in 1994 Congress extended the coverage of the rule to any civil or criminal proceedings involving sexual misconduct.[48] The current rule[49] prohibits the introduction of any evidence

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42. FED. R. EVID. 405(a).

43. Federal Rule of Evidence 405(b) provides:

> Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

FED. R. EVID. 405(b).

44. Federal Rule of Evidence 403 provides:

> 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.

FED. R. EVID. 403.

45. At English common law, the defendant could impeach the character of the alleged victim through "general evidence, but not by particular acts." 2 WHARTON, *supra* note 16, § 1151. Wharton noted that this view was pushed so far that "the witness was not bound to say whether she had had connection with other men, or with a particular person named; and that evidence of her having had such connection was inadmissible." 2 *id.*

The American courts split over whether to follow their English counterparts. By the beginning of the twentieth century, New York, Vermont, Michigan, California and North Carolina had abandoned the English rule and had allowed the introduction of evidence concerning specific acts of unchastity by the alleged victim. 2 *id.* § 1152.

Wigmore's treatise noted an increase during the 1940s and 1950s in decisions allowing the admission of evidence of specific instances of the alleged victim's unchastity. 1A WIGMORE, *supra* note 8, § 62.1, at 1318.

46. Privacy Protection for Rape Victims Act of 1976, Pub. L. 95-540 § 2(a), 92 Stat. 2046 (1978). The process used to enact Rule 412 deviated from the usual rule-making process. Under the Rules Enabling Act, 28 U.S.C. §§ 2071-2077 (1994), Congress has vested the federal judiciary with the power to prescribe the rules of evidence for federal courts. Once a rule is prescribed for approval by the judiciary, which includes, among other procedures, approval by the Supreme Court of the United States, the rule is forwarded to Congress for consideration. Congress may either amend, reject, or approve any of the rules. In rare situations, Congress will enact a rule without paying deference to the judicial consideration. Rule 412, a political "hot potato," represents a situation where Congress acted unilaterally.

47. 124 CONG. REC. H11944 (1978) (remarks of Rep. Mann).

48. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 40141,

offered to prove that *any* alleged victim engaged in other sexual behavior or to prove *any* alleged victim's sexual predisposition.[50] In a criminal proceeding, specific instances of an alleged victim's sexual predisposition are admissible only in three circumstances: (1) past sexual behavior with persons other than the accused when offered to show that the accused was not the source of semen, injury, or other physical evidence;[51] (2) past sexual behavior with the accused to prove that the alleged victim consented to the alleged offense;[52] (3) when constitutionally required to be admitted.[53] In order for evidence of sexual behavior to be admitted in a civil case, the probative value of the evidence must substantially outweigh the danger of harm to any victim and unfair prejudice to any party.[54] Before evidence can be admitted under any

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108 Stat. 1919 (1994).

49. Federal Rule of Evidence 412 provides:

> (a) Evidence generally inadmissible. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):
>
> (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.
>
> (2) Evidence offered to prove any alleged victim's sexual predisposition.
>
> (b) Exceptions.
>
> (1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:
>
> (A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;
>
> (B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and
>
> (C) evidence the exclusion of which would violate the constitutional rights of the defendant.
>
> (2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.
>
> (c) Procedure to determine admissibility.
>
> (1) A party intending to offer evidence under subdivision (b) must:
>
> (A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and
>
> (B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.
>
> (2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

FED. R. EVID. 412.

50. The use of the words "any victim" in Rule 412 extends the rule to "'pattern' witnesses in both criminal and civil cases whose testimony about other instances of sexual misconduct by the person accused is otherwise admissible." FED. R. EVID. 412 advisory committee's note.

51. FED. R. EVID. 412(b)(1)(A).

52. FED. R. EVID. 412(b)(1)(B).

53. FED. R. EVID. 412(b)(1)(C). This provision serves no practical purpose. Evidence constitutionally required to be admitted must be admitted, regardless of whether a specific provision in the rules allows for its admission.

54. FED. R. EVID. 412(b)(2). This balancing test is an inverse of the usual Rule 403 test for unfair prejudice, which allows relevant evidence to be admitted unless the probative value is substantially outweighed by the danger of unfair prejudice.

of the exceptions to Rule 412, the party seeking to introduce the evidence must file a written motion at least 14 days before trial,[55] serve the motion on all parties and notify the alleged victim.[56] The court must then conduct a hearing *in camera* before making the final determination concerning the admissibility of the evidence.[57]

Trial judges and appellate courts generally agree that prior false rape allegations do not constitute sexual behavior within the meaning of rape shield statutes,[58] and therefore are not excluded by rape shield laws. Notwithstanding that rape shield laws do not exclude prior false allegations from being admitted, testimony regarding a character trait of the victim may only be proved by reputation or opinion testimony.[59] Consequently, prior false allegations may only be introduced under the character rules to prove something other than the complainant's negative character, such as the complainant's motive, opportunity or intent.[60]

Some courts have admitted the introduction of false rape accusations, reasoning that these allegations present a corrupt state of mind, or a similar motive to fabricate.[61] One court even held that the witness' behavior in falsely accusing somebody was habit.[62] Evidence of other acts or wrongs is always allowed under the character

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55. FED. R. EVID. 412(c)(1)(A).

56. FED. R. EVID. 412(c)(1)(B).

57. FED. R. EVID. 412(c)(2).

58. U.S. v. Stamper, 766 F. Supp. 1396, 1399 (W.D. N.C. 1991) (past false allegations of sexual assault are not evidence of past sexual conduct); West v. State, 722 S.W.2d 284, 290 (Ark. 1987) (evidence that complainant had filed prior charges of sexual assault was not sexual conduct); Calloway v. State, 404 S.E.2d 811, 814 (Ga. Ct. App. 1991) (rape shield statute did not affect admissibility of evidence of prior false accusations); State v. Barber, 766 P.2d 1288, 1289 (Kan. App. 1989) (evidence of alleged sex offense victim's prior false accusations is not evidence of "past sexual conduct"); People v. Williams, 477 N.W.2d 877, 879 (Mich. App. 1991) (rape shield statute would not preclude evidence of prior false allegation of rape); Efrain M. v. State, 823 P.2d 264, 265 (Nev. 1991) (rape shield statute prohibits only evidence of past sexual conduct, but that prior false allegations are not conduct); Brown v. State, 807 P.2d 1379, 1380 (Nev. 1991) (same); Miller v. State, 779 P.2d 87, 89 (Nev. 1989) (rape shield statute does not prohibit cross-examining complaining witnesses about fabricated rape accounts); State v. Baron, 292 S.E.2d 741, 743 (N.C. App. 1982) (rape shield statute did not preclude introduction of evidence that complainant made similar charges against other relatives); State v. Boggs, 588 N.E.2d 813, 816 (Ohio 1992) (it is within discretion of trial court to permit cross-examination concerning prior false accusations of rape); State v. Hendricks, 791 P.2d 139 (Or. App. 1990) (accusation of sexual abuse was not sexual behavior within meaning of rape shield statute); State v. Wattenbarger, 776 P.2d 1292, 1293 (Or. App. 1989) (same); State v. LeClair, 730 P.2d 609, 613 (Or. App. 1986) (same). *But contra* United States v. Cardinal, 782 F.2d 34 (6th Cir. 1986) (since evidence of prior false accusations did not fall within one of three defined exceptions to Rule 412, the evidence must be excluded); Carter v. State, 451 N.E.2d 639 (Ind. 1983) (testimony regarding whether complainant had made prior sexual assault charges was excluded as a violation of the rape shield statute).

For a comprehensive examination of the cases in which evidence of false rape allegations has been considered, as well as the particular circumstances under which such evidence was allowed, see Nancy M. King, Annotation, *Impeachment or Cross-Examination of Prosecuting Witness in Sexual Offense Trial By Showing That Similar Charges Were Made Against Other Persons*, 71 A.L.R. 4th 469 (1989).

59. FED. R. EVID. 405(a).

60. FED. R. EVID. 404(b).

61. United States v. Stamper, 766 F. Supp. 1396, 1399 (W.D. N.C. 1991) (false rape accusations go to the motive or bias of the complainant); Phillips v. State, 545 So. 2d 221, 223 (Ala. Crim. App. 1989) (evidence of prior false allegations was admissible as exposing victim's corrupt state of mind); People v. Hurlburt, 333 P.2d 82, 86-87 (Cal. Dist. Ct. App. 1958) (false rape allegations are admissible as showing the complainant's animosity towards the defendant); People v. McClure, 356 N.E.2d 899, 901 (Ill. App. Ct. 1976) (since false rape allegations concerned motivation in bringing current charge, evidence of these false charges should have been admitted); State v. Anderson, 686 P.2d 193, 198-201 (Mont. 1984) (evidence of prior false rape accusations should be admitted as probative of the state of mind of the complainant).

62. Ex parte Loyd, 580 So. 2d 1374, 1376 (Ala. 1991). The characterization is blatantly errone-

rules to prove motive, intent or plan.[63] Additionally, since motive or plan is treated as a substantive element of the case, the strictures of the character rules do not apply, and extrinsic evidence may be admitted. For example, in *Phillips v. State*,[64] a 1989 decision, the Alabama Court of Criminal Appeals reversed the trial court's decision to exclude testimony that the victim had brought prior unfounded rape charges against three other persons. Since this evidence did not highlight the victim's past sexual behavior, but merely "exposed her corrupt state of mind," the evidence was admissible.[65]

B. Admissible as Evidence of Credibility

In sexual assault cases, the victim is often the sole witness. As such, the credibility of the complaining witness is essential to the strength of the prosecution's case, and is frequently attacked by defense attorneys. The credibility rules, an exception to the character rules described above, allow an attorney to construct a propensity argument regarding the truthfulness or untruthfulness of a witness.[66] Since evidence admitted pursuant to the credibility rules may refer only to character for truthfulness or untruthfulness,[67] such evidence does not go to the issue of consent. Instead, the evidence concerns whether the witness is lying on the witness stand. Although all jurisdictions have rejected the belief of Professor Wigmore that rape complainants lack general credibility,[68] evidence admitted under the credibility rules allows defense attorneys to

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ous. Habit, according to the Advisory Committee Note, "describes one's regular response to a repeated specific situation." FED. R. EVID. 406 advisory committee's note. Such practices as smoking a cigarette after every meal, or taking the same route to work every day would be habits. Falsely accusing somebody of rape is not done regularly or automatically enough to be considered a habit.

63. FED R. EVID. 404(b).

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

65. *Id.* at 223. By admitting evidence of specific wrongs or acts to prove intent or knowledge, the Federal Rules permit evidence of specific wrongs to show different levels of a person's state of mind. Rather than different levels of state of mind, the Alabama court allows the introduction of specific acts to demonstrate a corrupt or clean state of mind. This construction resembles the type of character evidence that is usually limited to proof by reputation or opinion. FED. R. EVID. 405(a).

66. Federal Rule of Evidence 608, pertaining to the credibility of a witness, provides:

> (a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
>
> (b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of a 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, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.
>
> The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.

FED. R. EVID. 608.

Most states have a similar bar against the introduction of extrinsic evidence to prove credibility. Extrinsic evidence may sometimes be introduced not for credibility purposes, but to disprove a statement that comprises a material issue within the case. *See infra* note 73 and accompanying text.

67. FED. R. EVID. 608(a).

68. The 1970 edition of the Wigmore treatise stated: "Occasionally is found in woman [sexual as-

use prior instances of untruthfulness by the witness to argue that there is a greater likelihood that they are lying in the present situation. Prior false rape allegations are often introduced through the credibility rules.

The credibility of a witness may be attacked through opinion or reputation evidence.[69] Additionally, specific instances of untruthfulness by a witness may be examined upon cross-examination of that witness.[70] In a sexual assault case, a defense attorney may call other witnesses to provide reputation or opinion, but not specific acts evidence about the general untruthfulness of a complaining witness.[71] Similarly, Rule 608 provides that "[s]pecific instances of the conduct of the witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of a crime as provided in Rule 609, may not be proved by extrinsic evidence."[72] The upshot of this rule is that the answer of a complaining witness must be taken as true, and is not subject to refutation by extrinsic evidence. This rule only applies, however, for the purposes of attacking the credibility of the witness. If evidence is used not to attack the general credibility of the witness, but to contradict the testimony of a witness as to a material issue, then the introduction of extrinsic evidence is permissible.[73] This distinction, difficult to define and even more difficult to apply, plays a critical role in the admission of prior false allegations of rape.

The most frequently used method of admitting evidence of prior false rape charges is through the credibility rules. A majority of jurisdictions have held that evidence of prior false accusations is admissible to impeach the credibility of the complaining witness.[74] Additionally, several courts have held that if the complainant denies making

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sault] complainants . . . a dangerous form of abnormal mentality . . . to fabricate irresponsibly charges of sex offenses against persons totally innocent." 3A WIGMORE, *supra* note 8, § 934a.

69. FED. R. EVID. 608(a).

70. FED. R. EVID. 608(b).

71. Once the defense introduces reputation or opinion evidence of the complaining witness' untruthful character, the prosecution may cross-examine the defense witness about the defendant's truthful acts. FED. R. EVID. 608(a).

72. FED. R. EVID. 608(b).

73. 3 JACK B. WEINSTEIN & MARGARET BERGER, WEINSTEIN'S EVIDENCE ¶ 608[05], 608-49-608-57 (1985). Weinstein and Berger state that:

> The Rule 608(b) requirement that 'the examiner must take his answer' does not prevent extrinsic evidence from being admitted to attack the witness' credibility on some theory other than impeachment by prior misconduct. Counsel and courts sometimes have difficulty in distinguishing between Rule 608 impeachment and impeachment by contradiction. The troublesome kind of case has arisen when the witness-usually the defendant-makes a claim on direct examination inconsistent with bad conduct. Extrinsic evidence may not be admitted pursuant to Rule 608 to rebut this claim. Whether extrinsic evidence may be admitted on a theory of impeachment by contradiction would depend on the circumstances of the case."

Id. *See, e.g.*, Boutros v. Canton Reg'l Transit Auth., 997 F.2d 198 (6th Cir. 1993) (Rule 608(b)'s prohibitions on extrinsic evidence do not apply in determining the admissibility of relevant evidence to contradict a witness' testimony as to a material issues); Lamborn v. Dittmer, 873 F.2d 522 (2d Cir. 1989); United States v. Smith Grading & Paving, Inc., 760 F.2d 527 (4th Cir. 1985); United States v. Opager, 589 F.2d 799 (5th Cir. 1979).

74. *See* Covington v. Alaska, 703 P.2d 436, 442 (Alaska Ct. App. 1985); People v. Simbolo, 532 P.2d 962, 963-64 (Colo. 1975); State v. Schwartzmiller, 685 P.2d 830, 833 (Idaho 1984); People v. Gorney, 481 N.E.2d 673, 675-76 (Ill. 1985); Little v. State, 413 N.E.2d 639, 643 (Ind. App. 1980); State v. Barber, 766 P.2d 1288, 1290 (Kan. Ct. App. 1989); State v. Cox, 468 A.2d 319, 324 (Md. 1983); Commonwealth v. Bohannon, 378 N.E.2d 987, 991 (Mass. 1978); People v. Garvie, 384 N.W.2d 796, 798 (Mich. Ct. App. 1986); State v. Caswell, 320 N.W.2d 417, 419 (Minn. 1982); Miller v. State, 779 P.2d 87, 89 (Nev. 1989); State v. Johnson, 692 P.2d 35, 43 (N.M. Ct. App. 1984); State v. Boggs, 588 N.E.2d 813, 817 (Ohio 1992); State v. McCarthy, 446 A.2d 1034, 1034-35 (R.I. 1982);

the allegations, counsel may introduce extrinsic evidence to prove that the allegations were made.[75] An example of this may be found in the 1989 Nevada case of *Miller v. State*.[76] The court began by asserting that a complaining witness' prior false allegations of sexual abuse were highly probative of truthfulness.[77] After holding that prior false allegations were not protected under the rape shield law, the court allowed the introduction of extrinsic evidence to prove such prior false acts. The court stated:

> We hold, therefore, that in a sexual assault case, [the rape shield statute] does not bar the cross-examination of a complaining witness about prior false accusations. Accordingly, under conditions specified hereafter, defense counsel may cross-examine a complaining witness about previous fabricated accusations, and if the witness denies making the allegations, counsel may introduce extrinsic evidence to prove that, in the past, the witness made fabricated charges.[78]

Similar to the Federal Rules,[79] Nevada did not allow extrinsic evidence to disprove the denial of a witness as to past conduct.[80] Noting that their holding contradicted this rule, the court opined "[t]o the extent that our holding transcends the limitations of [the extrinsic evidence rule], we carve out an exception for sexual assault cases."[81]

In *People v. Mikula*,[82] the court reached a similar result. In that case, a Michigan appellate court overturned the trial court's denial of a discovery motion that precluded introducing evidence of prior false accusations by the complaining witness. The court held that a defendant may cross-examine a complainant regarding prior false rape accusations.[83] If the witness denies making such charges, the defendant may introduce contrary evidence.[84] This court justified this departure from the usual credibility rules by stating that "[i]n a case such as the one before us, where the verdict necessarily turned on the credibility of the complainant, it is imperative that the defendant be given an opportunity to place before the jury evidence so fundamentally affecting the complainant's credibility."[85] Although the court cited precedents dating back to 1888, it failed to explain its logic for circumventing the statutory prohibition against extrinsic evidence.

C. Admissible as a Constitutional Requirement

The Sixth Amendment to the United States Constitution provides an accused in a criminal prosecution with the right to be confronted with the witnesses against him and to have compulsory process for obtaining favorable witnesses.[86] Although arguments

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Thomas v. State, 669 S.W.2d 420, 423 (Tex. Crim. App. 1984).

75. Hall v. State, 374 N.E.2d 62, 65 (Ind. Ct. App. 1978); People v. Mikula, 269 N.W.2d 195, 198-99 (Mich. Ct. App. 1978); State v. Barber, 766 P.2d 1288, 1290 (Kan. Ct. App. 1989); Miller v. State, 779 P.2d 87, 89 (Nev. 1989); Clinebell v. Commonwealth, 368 S.E.2d 263, 265 (Va. 1988). *But cf.* State v. Boggs, 588 N.E.2d 813, 816 (Ohio 1992) (refusing to allow extrinsic evidence of prior false charges to be admitted into evidence).

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

77. *Id.* at 89. The court cited Wigmore's treatise to substantiate this proposition.

78. *Id.* at 89.

79. FED. R. EVID. 608(b).

80. Moore v. State, 607 P.2d 105, 107-08 (Nev. 1980).

81. *Miller*, 779 P.2d at 90.

82. People v. Mikula, 269 N.W.2d 195 (Mich. Ct. App. 1978).

83. *Id.* at 198-99.

84. *Id.* at 199.

85. *Id.*

86. The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the

asserting the unconstitutionality of rape shield laws generally have been dismissed,[87] some courts have held that the exclusion of prior false rape accusations violates the defendant's constitutional right to confrontation.[88] For example, in *People v. Williams*,[89] the trial court refused to allow the defendant to conduct an inquiry concerning a previous sexual assault accusation filed by the victim. The appellate court opined that the credibility of the witness was critical to the case, and that the preclusion of prior false accusations of rape would unconstitutionally abridge the defendant's right to confrontation.[90] Although the trial court erred in excluding the evidence under the rape shield law without inquiring further into the nature of the false charges, the defendant failed to make the requisite offer of proof to justify introduction of the evidence.[91] The court held that defendants should be afforded the protections of the constitution, without being allowed to conduct a "fishing expedition," in the hopes of turning up a false accusation.[92]

Although a state policy excluding evidence tending to show bias or prejudice may violate the Confrontation Clause,[93] a recent Supreme Court decision, *Michigan v. Lucas*,[94] held that reasonable procedural requirements may be imposed on criminal defendants. During his trial for third degree sexual conduct, Nolan Lucas sought to introduce evidence of his prior sexual relationship with the victim. Because Lucas failed to notify the prosecution of his intent to introduce this evidence, a requirement of the Michigan rape shield statute, his motion was denied. Lucas argued that the Sixth Amendment prevented the judge from excluding the evidence. The Supreme Court rejected an absolute rule that would prohibit preclusion of evidence of prior sexual conduct between a complaining witness and an accused.[95] As in prior cases limiting the effect of the Confrontation Clause,[96] the Court held that the right to confront wit-

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right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . . ." U.S. CONST. amend. VI. The Confrontation Clause was applied to the states through the Fourteenth Amendment in *Pointer v. Texas*, 380 U.S. 400 (1965).

87. For arguments concerning the unconstitutionality of rape shield laws, *see* Tanford & Bocchino, *supra* note 33, *passim*; Haxton, *supra* note 33, at 1226-27; Clifford S. Fishman, *Consent, Credibility, and the Constitution: Evidence Relating to a Sex Offense Complainant's Past Sexual Behavior*, 44 CATH. U. L. REV. 709, 721-23 (1995); Robin Rubrecht Dill, *The Oklahoma Rape Shield Statute: Who Needs a Shield When the Opponents' Weapons Have Been Seized*, 17 OKLA. CITY U. L. REV. 727, 740-43 (1992); Richard W. Miller III, *Stephens v. Miller: Placing Rape Shield Statutes Between Rock and a Hard Place*, 27 U. TOL. L. REV. 217, 244-47 (1995).

88. People v. Sheperd, 551 P.2d 210, 212 (Colo. Ct. App. 1976); State v. Cox, 468 A.2d 319, 322 (Md. 1983); People v. Hackett, 365 N.W.2d 120, 127 (Mich. 1984); People v. Williams, 477 N.W.2d 877, 879 (Mich. Ct. App. 1991); State v. Caswell, 320 N.W.2d 417, 419 (Minn. 1982); State v. Baron, 292 S.E.2d 741, 743 (N.C. Ct. App. 1982); State v. LeClair, 730 P.2d 609, 614 (Or. Ct. App. 1987); State v. McCarthy, 446 A.2d 1034, 1035 (R.I. 1982).

89. People v. Williams, 477 N.W.2d 877 (Mich. Ct. App. 1991).

90. *Id.* at 879.

91. *Id.* at 879-81.

92. *Id.* at 880.

93. Davis v. Alaska, 415 U.S. 308 (1974). In *Davis*, the defendant was precluded from obtaining disclosure of a witness' juvenile court record for impeachment purposes. The Court held that this preclusion violated Davis' right to confront witnesses. The right of confrontation trumped the state's policy underlying the confidentiality of juvenile court records.

94. Michigan v. Lucas, 500 U.S. 145 (1991). For a thorough and critical explication of the *Lucas* decision, *see* Lara English Simmons, *Michigan v. Lucas: Failing to Define the State Interest in Rape Shield Legislation*, 70 N.C. L. REV. 1592 (1992).

95. *Lucas*, 500 U.S. at 149.

96. California v. Green, 399 U.S. 149, 164 (1970) (holding the Confrontation Clause does not preclude introduction of an out-of-court declaration, taken under oath and subject to cross-examination,

nesses could be limited to "accommodate other legitimate interests in the criminal trial process."[97] Since the state has a legitimate state interest in protecting rape victims from harassing or offensive interrogation about their sexual history, the notice requirement was constitutionally permissible.[98]

The recent decisions limiting the effect of the Confrontation Clause call into question whether prior false rape allegations are constitutionally required to be admitted.[99] If they are used to demonstrate the bias or prejudice of the witness, then they would most likely be admissible under *Davis*. If false rape allegations are used to attack the general credibility of a witness, then the state interest in prohibiting the proof of prior false rape accusations by extrinsic evidence[100] may trump the defendant's right to confront the witness. Although the distinction between proving bias or prejudice and proving general credibility is often unclear, such distinctions make the difference in determining whether the evidence of false rape allegations is admitted.

IV. THE NEED FOR A RULE DEALING WITH PRIOR FALSE RAPE ALLEGATIONS

The purpose of the Federal Rules of Evidence is to "secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that truth may be ascertained and pro-

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to prove the truth of the matters asserted therein, when the declarant is available as a witness at trial); United States v. Inadi, 475 U.S. 387, 400 (1986) (holding the Confrontation Clause does not require the Government to show that a non-testifying co-conspirator is unavailable to testify, as a condition for admission of that co-conspirator's out-of-court statements); Richardson v. Marsh, 481 U.S. 200, 211 (1987) (holding the Confrontation Clause is not violated by the admission of a non-testifying co-defendant's confession with a proper limiting instruction, when the confession eliminates any references to the defendant's existence); United States v. Owens, 484 U.S. 554, 564 (1988) (holding the Confrontation Clause does not prohibit testimony concerning a prior, out-of-court identification when the identifying witness is unable, because of memory loss, to explain the basis for the identification); Maryland v. Craig, 497 U.S. 836, 857 (1990) (Confrontation Clause does not prohibit a child witness in a child abuse case from testifying against a defendant at trial, outside the defendant's physical presence, by one-way closed circuit television); Idaho v. Wright, 497 U.S. 805, 827 (1990) (holding the Confrontation Clause is not violated when statements from a child who is unable to testify at trial are admitted under a hearsay exception against a defendant who stands accused of abusing her so long as particularized guarantees of trustworthiness are met).

97. *Lucas*, 500 U.S. at 149.

98. *Id.* The Court refused to decide whether the preclusion of the evidence was justified, but remanded to the state courts for that determination.

99. This section only examines whether the Confrontation Clause of the federal Constitution requires the admission of prior false rape allegations. All of the states have their own state constitutional provisions allowing an accused to be confronted with the witnesses against him. Some states assure the defendant of the right to meet the witnesses "face-to-face." Louisiana specifically provides a right to "confront and cross-examine the witnesses." LA. CONST. art. I, § 16. See BARRY LATZER, STATE CONSTITUTIONS AND CRIMINAL JUSTICE 203-04 (1991) for a compilation of the confrontation of witnesses provisions of the state constitutions.

If a state decides, under independent state grounds, that the admission of prior false rape allegations is required by their state constitution, the Supreme Court will not reverse that determination. *See* Michigan v. Long, 463 U.S. 1032 (1983).

100. The interests of the state in prohibiting the proof of prior sexual allegations through extrinsic evidence is twofold. Similar to character evidence, evidence of prior false rape accusations carries a potential for substantial prejudice. Additionally, the prohibition against extrinsic evidence was designed to eliminate the needless consumption of time through the conducting of several mini-trials. *See* 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 6112 (1980 & Supp. 1996).

ceedings justly determined."[101] The rules surrounding prior false rape accusations are a judicial morass. The only thing that can be said for certain is that the Committee Note to the amended Rule 412 provides that "Evidence offered to prove allegedly false prior claims by the victim is not barred by Rule 412. However, this evidence is subject to the requirements of Rule 404."[102] As rule 404 cross-references the credibility rules, false rape allegations are admissible for credibility purposes, and are governed by Rules 607, 608 and 609. As with all evidence, the admission of such false accusations must pass through the Rule 403 balancing test.[103] Although the committee note ultimately resolves that Rule 412 deals with sex, not lies, this is only the beginning of our problems. Analyzing the present jurisprudence regarding prior false rape allegations in light of the purposes of the Federal Rules, the need to replace the current, ad hoc approach to this problem with a definite rule becomes manifest.

A. Fairness in Administration

Although arguments based on what is fair may often be supplanted by arguments based upon what is logical, the use of the term "fairness" in Rule 102 suggests "an awareness of the limitations of our verbal apparatus and the need to make room for feelings that cannot be expressed in the language of the law."[104] A fundamental precept of fairness is that all persons in similar situations should be treated equally. Although idealistic, the uniformity envisioned by that ideal was desired by Congress when they enacted the Federal Rules of Evidence. If the rules of evidence apply reasoning from a common source to twenty different cases and achieve twenty different results, they have accomplished their goal.[105] The rules were deliberately created to permit a flexible approach to problems not explicitly covered by the rules, and placed responsibility on trial judges and attorneys.[106] The current methods by which the evidentiary system handles false rape accusations demonstrates the problems with this flexibility. Instead of applying reasoning from a common source, courts interpreting the existing rules are producing outcome-based jurisprudence. One need only look at the cases in the previous section to see judicially created exceptions to existing rules, and decisions that fail to provide supporting legal authority.[107] Such a jurisprudence fails to provide guidance to the defendant concerning the type of arguments he will have to make in order to present evidence of prior allegations, or the type of proof he will have to provide to substantiate those allegations. Similarly, the current system of *ad hoc* determinations fails to afford the witness advance notice of whether prior allegations may be examined on cross-examination, and whether other witnesses will be allowed to testify concerning these allegations.[108] Unlike the current approach, a defi-

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101. FED. R. EVID. 102.

102. FED. R. EVID. 412 committee's note.

103. FED. R. EVID. 403.

104. 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5023, at 135 (1977).

105. As Wright and Graham note, "The uniformity of result was seen as an impossible, if not an undesirable, ideal." *Id.* § 1023, at 127.

106. 1 WEINSTEIN'S FEDERAL EVIDENCE, § 102.02[5] (Matthew Bender 2d ed. 1997).

107. *See* Miller v. State, 779 P.2d 87 (Nev. 1989) and People v. Mikula, 269 N.W.2d 195 (Mich. Ct. App. 1978).

108. Courts should consider fairness to the witness as well as to the parties and the public. WRIGHT & GRAHAM, *supra* note 104, § 5023. Rape shield statutes represent an obvious example of a legislative enactment motivated by concerns about fairness to the witness.

nite rule addressing prior false rape allegations would promote reasoning from a common source and provide fairness to both the defendant and the complaining witness.

B. Elimination of Expense

Similar to the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure,[109] one of the primary purposes of the Rules of Evidence is the elimination of unjustifiable expense and delay. Although justice should never be compromised in the interest of expense, "[j]udges are forced to allocate resources among various litigants by manipulation of the rules of evidence in accordance with a set of surreptitious rules-of-thumb."[110] Given the existence of these determinations, an evidentiary system that provides fixed rules concerning admissibility permits intelligent decisions by lawyers about what evidence to present in court. The upshot of fixed rules is the prevention of unnecessary expenditure of time and energy chasing down evidence that will not be admitted.

Obtaining evidence of prior false rape allegations requires a significant commitment of time and money from a defendant. Notwithstanding the cases involving high-profile celebrities who can afford to conduct an entire background investigation of the complaining witness,[111] many defendants do not possess the pecuniary resources necessary to locate witnesses and compel testimony that may never reach the witness stand.[112] The enactment of a rule concerning the introduction of prior false allegations would spare litigants the unnecessary time and expense involved in eliciting testimony that is subsequently excluded through questionable interpretations of false rape allegations under the existing rules.[113]

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109. Federal Rule of Civil Procedure 1 states that the rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1. Federal Rule of Criminal Procedure 2 states that the rules "shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." FED. R. CRIM. P. 2.

110. WRIGHT & GRAHAM, *supra* note 104, § 5024, at 142.

111. In the William Kennedy Smith rape trial, described above, lawyers for Smith conducted a rigorous background examination of the complaining witness, Patricia Bowman. They argued that Bowman possessed a long-standing psychological disorder, lingering trauma from having been sexually abused when she was eight years of age, and that she was laboring under the emotional effects of at least two abortions and one miscarriage. *See* ESTRICH, *supra* note 34, at 15.

In the recent, well-publicized, forcible sodomy case of sportscaster Marv Albert, lawyers for Albert spent months doing a background investigation on the complaining witness. After claiming to have obtained "upwards of 30 witnesses" who knew the background of the complainant, the defense attempted to show the woman had sought to entrap Albert. Judge Benjamin N.A. Kendrick disallowed testimony of the complainant's conflicts with former lovers, and Albert pleaded guilty to a misdemeanor assault and battery charge. *See Interview: Defense Attorney Roy Black Discusses the Marv Albert Trial*, TODAY, Sept. 26, 1997, available in 1997 WL 11223529.

112. If the desired witness lives in a different state, it becomes increasingly difficult to compel their testimony. Under the Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings, the applicant desiring to compel the witness' attendance must establish the materiality of the witness. UNIF. ACT SECURE ATTEND. WITNESSES WITHOUT STATE IN CRIM. PROC. § 3 (1936). Courts, recognizing the harshness of the procedure, are often reluctant to grant the application compelling the attendance of the out-of-state witness. *See, e.g.*, People v. McCartney, 345 N.E.2d 326 (N.Y. 1976) (defendant failed to meet burden of proving materiality of testimony of out-of-state witness at pre-trial hearing to suppress defendant's prior statements as being involuntary).

113. Included in the necessary risks of litigation is the possibility that resources will be drained obtaining testimony that is subsequently excluded. Although evidentiary rules are supposed to reduce this risk, the current interpretations of the existing rules merely increase the risk.

C. Promotion of Growth and Development of the Law

The final purpose of the Rules of Evidence is "promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."[114] Whether one views the trial as a scientific event, the approach taken by the Progressive school,[115] or as a political event, the primary purpose of the trial remains the ascertainment of truth. To ascertain truth, the Federal Rules adopt an exclusive attitude towards inclusion and admit all relevant evidence,[116] unless otherwise excluded by the Constitution, statute or other rule.[117] Allowing the credibility of a witness to be examined,[118] an exception to the usual prohibitions against the introduction of character evidence,[119] further underscores the paramount position that truth-finding occupies within the rules of evidence.

Although the mutable nature of the rules facilitates the growth and development of the law of evidence,[120] the current system inhibits the truth and justice sought by the letter of the rules. Since the critical issue in a rape case is whether a rape of the complainant by the defendant actually occurred, the credibility of the complaining witness is a material issue. To exclude evidence concerning the credibility of the complainant jeopardizes the ascertainment of truth, especially if the witness directly contradicts the evidence sought to be admitted by the defendant. A rule that admits evidence of prior false rape allegations, without subjecting all rape complainants to the type of demeaning and character besmirching rape trials held before the introduction of rape shield laws, would promote the ascertainment of truth without compromising the justice of the proceedings.

V. PROPOSED RULE FOR HANDLING PRIOR FALSE ALLEGATIONS OF RAPE

The following proposed rule represents the author's attempt to handle prior false allegations of rape, succeeded by an explanation of the individual portions of the rule.

> *Proposed Rule* — Sex Offense Cases; Evidence of Complaining Witness' Prior False Allegations of Sexual Assault
>
> (a) In a criminal proceeding in which a person is accused of sexual assault, evidence of the complaining witness' prior allegations of sexual assault against a person other than the accused may be admitted, subject to the conditions of subdivision (b).
>
> (b) Procedure to determine admissibility—
>
> (1) An accused intending to offer evidence under subdivision (a) must:
>
> (A) file a written motion at least fourteen days before trial specifically describing the evidence and stating the purpose for which it is offered unless

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114. FED. R. EVID. 102.

115. WRIGHT & GRAHAM, *supra* note 104, § 5025, at 147-49.

116. Relevant evidence means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401.

117. FED. R. EVID. 402.

118. FED. R. EVID. 607, 608, 609.

119. FED. R. EVID. 404(a)(3).

120. *See* United States v. Bibbs, 564 F.2d 1165, 1169 (5th Cir. 1977), *cert. denied*, 435 U.S. 1007 (1978) (federal rules are designed to be applied by analogy to new situations).

the court, for good cause requires a different time for filing or permits filing during trial; and

(B) serve the motion on all parties and notify the complaining witness or, where appropriate, the complaining witness' guardian or representative.

(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the complaining witness and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

(3) In order to introduce evidence under this rule, the accused must establish, by clear and convincing evidence, that:

(A) the complaining witness made an allegation or allegations of sexual assault against a person other than the accused;

(B) the allegation or allegations made by the complaining witness were false; and

(C) the probative value of the evidence sought to be admitted under this rule is not outweighed by the danger of unfair prejudice.

(c) Extrinsic evidence. If the accused satisfies the conditions of subdivision (b), the accused may cross-examine the complaining witness concerning the allegation or allegations. If the complaining witness denies or fails to recall making such allegation or allegations, the accused may present extrinsic evidence of the false allegation or allegations.

(d) Definitions. As used in this rule, the following terms shall have the following respective meanings:

(1) Allegation. An actual, formal complaint lodged with someone in authority, regardless of whether the complaint resulted in prosecution.

(2) Sexual assault. A crime under the laws of this jurisdiction involving any conduct proscribed by [relevant provisions of the jurisdiction's penal code].

(3) Complaining witness. Any person alleging to be the victim of the crime charged, the prosecution of which is subject to the provisions of this rule.

This rule attempts to provide the consistency and stability that has been lacking from this delicate area of the law, without eviscerating the protections afforded to a complaining witness. This rule attempts to answer the three essential questions underlying the admission of this evidence: whether evidence of prior false allegations should be admitted, what procedures should be implemented for the admission of this evidence and what methods of proof should be allowed to introduce this evidence. These questions, as answered by the proposed rule, are addressed in order.

A. Should Evidence of Prior False Allegations Be Admitted?

Consistent with existing jurisprudence, the proposed rule allows evidence of prior false rape allegations to be admitted under certain conditions. This rule follows the principle, established through case law, that prior false rape accusations represent evidence of lies, not sex, and do not fall within the protections of the rape shield statutes.[121] Unlike crimes where the character of the victim is called into question, such as the chastity of a rape complainant under pre-rape shield law or the aggressiveness of a homicide victim, evidence of false rape accusations deal entirely with the victim as a witness. Treating evidence of these allegations as character evidence rather than

121. *See supra* note 58 and accompanying text.

credibility distorts the distinction between victim as victim and victim as witness.[122] Consonant with the existing credibility rules, which allow for the admission of a wider range of evidence than the character rules,[123] witnesses can be examined about their prior falsehoods. In this respect, the proposed rule represents a necessary restatement of the existing credibility rules.

B. What Procedures Should Be Implemented for the Admission of This Evidence?

In order to secure the protections of complaining witnesses from defendants who may attempt to use the rules to conduct a "fishing expedition" for false accusations, the proposed rule imposes strict procedural limitations on the introduction of prior false allegations. In order to introduce evidence of these allegations, the accused must prove, by clear and convincing evidence, that the complaining witness made a false allegation, and that the probative value of admitting this allegation would not be outweighed by the danger of unfair prejudice. As prior true allegations of sexual abuse fall within the protections of the rape shield statutes,[124] the falsity of the allegations must be established.[125] This proposed rule establishes the standard by which this falsity must be established. Additionally, the trial judge is afforded the discretion to disallow evidence that would be unfairly prejudicial.[126] The procedures that the proposed rule establish closely mimic the procedures for admitting evidence under Federal Rule 412. An accused must both offer the prosecution fair notice and inform the complaining witness of his intent to offer this evidence. The complaining witness has a right to

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122. Character rules concern elements of conduct that made it more or less likely that a specific event occurred. If a homicide victim was hot-tempered, that temper may have resulted in his demise. The fact that the complaining witness lied about prior "rapes" would not make it more or less likely that sexual intercourse occurred. The fact that the complaining witness filed a prior false allegation would make it more or less likely that she is lying on this particular occasion. This is a credibility argument, and differs from the character arguments found in Rules 404 and 405.

123. The credibility rules admit further evidence of specific acts than do the character rules. A defendant who wishes to attack a victim's character for peacefulness may only use reputation or opinion testimony. FED. R. EVID. 404, 405. A defendant who wishes to attack the same victim's character for truthfulness may, in the discretion of the court, inquire on cross-examination about specific acts of untruthfulness by the victim. FED. R. EVID. 608(b).

124. The advisory committee note to the 1994 amendments to Rule 412 define sexual behavior as "all activities that involve actual physical conduct, i.e., sexual intercourse or sexual contact." FED. R. EVID. 412 committee's note. This definition would include prior rapes within the definition of sexual behavior, and render them inadmissible. Similarly, commentators have noted that this evidence has little relevance and may distract the jury. Fishman, *supra* note 87, at 771.

125. This view correlates with the existing case law, which provides overwhelmingly that the falsity of the allegations must be proved before they may be admitted. *See, e.g.*, Hughes v. Raines, 641 F.2d 790, 792 (9th Cir. 1981); Phillips v. State, 545 So. 2d 221, 223 (Ala. Crim. App. 1989); Covington v. State, 703 P.2d 436, 442 (Alaska Ct. App. 1985); State v. Hutchinson, 688 P.2d 209, 213 (Ariz. Ct. App. 1984); State v. Slater, 579 A.2d 591, 593 (Conn. App. Ct. 1990); Smith v. State, 377 S.E.2d 158, 160 (Ga. 1989); Idaho v. Schwartzmiller, 685 P.2d 830, 833 (Idaho 1984); People v. Alexander, 452 N.E.2d 591, 595 (Ill. App. Ct. 1983); Little v. State, 413 N.E.2d 639, 643 (Ind. Ct. App. 1980); Commonwealth v. Bohannon, 378 N.E.2d 987, 991 (Mass. 1978); State v. Anderson, 686 P.2d 193, 199 (Mont. 1984); Miller v. State, 779 P.2d 87, 90 (Nev. 1989); State v. Johnson, 692 P.2d 35, 43 (N.M. Ct. App. 1984); People v. Mandel, 401 N.E.2d 185, 187 (N.Y. 1979); State v. Kringstad, 353 N.W.2d 301, 311 (N.D. 1984); State v. Nab, 421 P.2d 388, 391 (Or. 1966); Clinebell v. Virginia, 368 S.E.2d 263, 266 (Va. 1988); State v. Demos, 619 P.2d 968, 969 (Wash. 1980); State v. DeSantis, 456 N.W.2d 600, 605 (Wis. 1990).

126. For example, if a judge finds that prior false allegations were made, but under circumstances completely different from the instant case, the judge could exclude them, holding that the probative value of their admission would be outweighed by the danger of unfair prejudice.

attend and be heard at the subsequent hearing to determine the admissibility of the evidence. Because these allegations will be protected by the rape shield statute if the defendant cannot make a requisite showing of falsity, the proceedings are to be conducted in camera and remain under seal. By implementing these procedural requirements, the defendant may still obtain this critical evidence upon a proper showing without diminishing the rights of the complaining witness.

C. What Methods of Proof Should Be Allowed to Introduce This Evidence?

The proposed rule would establish two methods of proof for the introduction of prior false rape allegations after the judge has made the requisite findings. First, the complaining witness could be cross-examined about these claims. Subsequently, if the witness denies making or fails to recollect these charges, extrinsic evidence of these allegations may be admitted. This rule deviates from the traditional statutory prohibition on the introduction of extrinsic evidence.[127] Historically, extrinsic evidence was excluded because of its potential to confuse the central issues of the case and to result in the needless consumption of time.[128] The admission of this evidence is warranted by the circumstances under which it is offered.

The credibility of a complainant is a central, and often determining issue in a rape case. In many rape cases, the jury is required to decide based not upon physical or scientific evidence, but based upon "the diametrically opposed versions of the event put forth by the complainant and the accused."[129] Prior false allegations of criminal activity, especially for a crime carrying the social opprobrium and harsh punishments of rape, are highly probative of a witness' credibility.[130] Since the credibility of the complaining witness in a rape case is so probative, the jury must be afforded the opportunity to embrace or ignore any relevant evidence bearing on this material issue. Consequently, if the complaining witness denies making false charges after the judge at a preliminary hearing has determined both the existence and falsity of prior allegations, the accused should be allowed to introduce extrinsic evidence to contradict the witness' testimony. One of the central policy reasons justifying the prohibition against extrinsic evidence is the desire to avoid the multiplicity of mini-trials and hearings concerning tangential issues. Allowing extrinsic evidence for the limited purpose of proving that the victim falsely accused somebody of a crime is a reasonable and well-defined exception to this policy determination. Currently, most states and the federal rules require a motion and hearing before evidence that falls within an exception to the rape shield statute may be admitted.[131] Additionally, the proposed rule follows the practice of requiring a hearing to determine the falsity of prior rape allegations before they may be admitted into evidence.[132] Allowing an accused who has demonstrated

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127. FED. R. EVID. 608(b).

128. *See* Kerper & MacDonald, *supra* note 12, at 285.

129. Galvin, *supra* note 33, at 861.

130. *Id.* Moreover, Professor Fishman writes:

> [o]ther than murder, sexual assault is perhaps the most serious accusation one person can make against another. The accusation alone is likely to permanently damage the accused's reputation, jeopardize his professional standing, and disrupt and traumatize his family. To accuse someone falsely of sexual assault is, therefore, a despicable and malignant act which reveals far more about the accuser's character than do other, more common, less destructive falsehoods.

Fishman, *supra* note 87, at 768.

131. FED. R. EVID. 412(c).

132. Most courts require falsity of prior allegations to be demonstrated before they may be admit-

the existence of prior false rape allegations to admit extrinsic evidence of these allegations presents a minimal additional burden on the existing hearing requirements. This additional burden is consistent with current procedures for handling evidence of prior sexual behavior and false rape allegations, and does not waste the time or the resources of the court.

VI. CONCLUSION

Prior false rape accusations demonstrate a willingness on the part of the accuser to manipulate the legal process and use sexual allegations unjustly. Consequently, these lies should not be shielded from the jury. The admission of prior false rape accusations by a complaining witness allows a jury to consider these specific acts of the complainant's credibility. Since the admission of this evidence targets specific persons who have made these allegations, it does not seek to attack the credibility of all, or even most rape victims.

Although courts have consistently held that evidence of prior false rape allegations should be admitted, they have used specious legal reasoning and questionable invocations of precedent to achieve this desired result. By failing to provide a consistent and uniform approach to this matter, the evidentiary rules have failed to effectuate their purpose. The proper way to meet this purpose is not to subject this evidence to novel or dubitable interpretations of existing rules of evidence, but to make additions or amendments to the rules. If this Note produces a movement in that direction, it will have accomplished its purpose.

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ted. *See supra* notes 124-25 and accompanying text. A preliminary hearing is the mechanism used to make this determination.

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