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Prior False Allegations of Rape: Falsus in Uno, Falsus in Omnibus?

Denise R. Johnson††

Since Biblical times, men have feared being falsely accused of rape. Indeed, the notion that women will lie about rape or sexual assault for any number of reasons is firmly entrenched in societal attitudes toward women and rape. Whether the motive to lie finds voice in a woman scorned, in the sexually repressed and fantasizing woman who desires to be raped, or in the unchaste woman who seeks to mask her own promiscuity by crying rape, these myths have allowed the focus in rape cases to be placed on the victim's lack of innocence rather than on the guilt of the accused.

The notion of a woman's supposed propensity to lie about sexual encounters invaded our jurisprudence long ago and provides the rationale for admitting prior false allegations of rape made by the complaining witness in rape cases. Despite the enactment of rape shield statutes, which were

† "False in one thing, false in everything." LATIN WORDS AND PHRASES FOR LAWYERS 90 (R.S. Vasan ed. 1980).
†† Associate Justice, Supreme Court of Vermont. This article is adapted from a thesis submitted by the author in partial fulfillment of the requirements for the degree of Master of Laws in the Judicial Process at the University of Virginia. I am very grateful to the law clerks and interns who worked with me on this project. For concept development, I value my association with Vicki Henry; for tireless research, I thank Jennifer Wagner; for editing suggestions, footnotes and final format, I greatly appreciate the assistance of Johan Maitland and Carrie Legus; and for assistance in translating thesis to article, I thank Bridget Asay. I owe a special debt of gratitude to my husband, Thomas N. Wies, who advised and supported me throughout the project, and who willingly read more drafts of this article than he cares to remember.

1. SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 12-13, 25 (1975). Brownmiller details the story of Potiphar, an Egyptian whose wife sought the sexual favors of a slave, Joseph the Israelite. Joseph fled her advances, Potiphar’s wife cried rape and Joseph was thrown into prison. Id. at 22.
4. BROWNMILLER, supra note 1, at 315-17, 322-33.
5. Torrey, supra note 2, at 1058; see id. at 1025-31, for a discussion of prevalent rape myths in addition to false reporting, such as that only women with bad reputations are raped; that women want to be raped and fantasize about it; and that women invite rape by their behavior and appearance.
6. One need look no further for proof of the currency of rape mythology than the 1991 Senate confirmation hearings on then Supreme Court nominee, Clarence Thomas. Anita Hill, Thomas’s former employee at the Federal Equal Employment Opportunity Commission, accused Thomas of sexual harassment. The “Lying Woman/Innocent Man” stereotype was prevalent throughout the hearings as Hill was vilified as either a woman scorned or one whose mental imbalance had caused her to fantasize the verbal sexual encounters that she described. Ann Althouse, Beyond King Solomon’s Harlots: Women in Evidence, 65 S. CAL. L. REV. 1265, 1277 n.33 (1992).
7. Perhaps the most frequently reported quotation is that of Lord Chief Justice Matthew Hale, a seventeenth-century jurist, who wrote that rape “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.” MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 635 (photo. reprint 1987) (1736). As antiquated as it may seem the warning remained in California’s standard jury instructions for rape as late as 1973, with the accompanying direction that the complaining party’s allegation was, therefore, to be viewed with caution. BROWNMILLER, supra

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intended to limit judicial discretion to find that a complaining party's sexual past was relevant to her veracity, old problems have survived the new rules. Common law exceptions to evidentiary rules and statutory exceptions to rape shield statutes have preserved the "woman as liar" stereotype by their assumption that prior false allegations of rape are highly probative in a subsequent case. Many courts have permitted prior false allegations to be proved by extrinsic evidence of specific acts, despite rules on character evidence that prohibit the use of such evidence for the purpose of attacking a witness's credibility. Frequently, the supposed justification is the Confrontation Clause, which is advanced without any of the analysis that should be undertaken in the consideration of character evidence.

This paper challenges the assumption that a complaining witness's prior false allegation of rape, offered solely to prove that she has a propensity to lie

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note 2, at 414. As recently as the 1970 revised edition of Wigmore on Evidence, the treatise states, "[often is found in women sexual assault complainants . . . a dangerous form of abnormal mentality . . . to fabricate irresponsibly charges of sex offenses against persons totally innocent." ILLA WIGMORE ON EVIDENCE § 934a (Chadbourn rev. ed. 1970) (hereinafter WIGMORE (Chadbourn)).


10. Id. at 858; Vivian Berger, Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom, 77 COLUM. L. REV. 1, 21 (1977); J. Alexander Tanford & Anthony J. Bocchino, Rape Victim Shield Laws and the Sixth Amendment, 128 U. PA. L. REV. 544, 544-45 (1980).


12. U.S. CONST. amend. VI. I discuss the constitutional requirements with respect to character evidence in Part I.E, infra.

13. See cases cited infra note 113.
about rape, is of such high probative value that it should be admitted to impeach the witness and proved by extrinsic evidence if she denies it. It is an evidentiary question that deserves the same analysis that courts give to character evidence in less gender-charged contexts. At the very least, it requires a contextualized analysis of probative value.

Parts I.A. and I.B. give an introduction to the problem that illustrates the manner in which prior false allegations of rape are treated differently from prior false statements made by witnesses testifying in other crimes. Part I.C. explains the character evidence rules as they are applied in most cases. Part I.D. traces the origin and development of the special rule that has been applied in rape cases, and argues that it is grounded in rape mythology. Part I.E. discusses the analytical mistakes that have led courts to mischaracterize prior false allegations of rape, offered for a character purpose, as evidence that is constitutionally compelled.

Part II contends that rules limiting the admission of character evidence should not be ignored in sexual assault cases, and that prior false accusations of rape offered solely for character purposes should be analyzed under Rules 403 and 608(b) of the Federal Rules of Evidence (or their counterparts in state jurisdictions). The emphasis should be on probative value, which must be considered in a contextual analysis of the evidence. Part III concludes that a change in the evidentiary rules governing prior false accusations of rape, though not a perfect solution, will reduce gender bias in rape cases.

I.

A. Introduction to the Problem

The treatment of prior false accusations of rape stands in sharp contrast to the treatment of prior false statements made by witnesses testifying for the prosecution in other kinds of crimes. The difference is shown by postulating a court’s evidentiary rulings in the following hypotheticals.

Suppose that a complaining witness is testifying to the identity of the person who mugged him and stole his wallet. The victim was beaten quite brutally, and his wallet was later found in a dumpster in another part of the city. At trial, then, the issue is not whether the crime occurred (the “corpus delicti”) but whether the defendant committed the crime. The victim is the only witness who can testify to the defendant’s identity. The defendant attempts to introduce evidence of a prior incident in which the victim loaned his car to a friend, who drove carelessly and wrecked the car. In a fit of misguided anger, the

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14. This paper is not about the admission of prior false allegations of rape or sexual conduct offered to show motive to fabricate, bias, or a repetitive pattern of false charges, all of which are always admissible to impeach the reliability of the complaining witness’s testimony. Fed. R. Evid. 404(b).
victim had called the police and claimed that his friend had stolen his car. Soon after, he recanted the bogus car theft story.

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

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

A trial court judge would almost certainly treat the evidence of the prior false allegation of robbery as character evidence, or evidence that tends to show that the witness has a propensity to lie. The judge would then weigh the probative value of the evidence (the usefulness of the evidence in determining the credibility of the witnesses and, by extension, the innocence or guilt of the defendant) against the likelihood that the evidence would mislead or confuse the jury, or be unfairly prejudicial. In the first example, the evidence of the prior false allegation is quite likely to be excluded. Although both the false allegation and the current accusation involved robbery, the factual circumstances are so different that the evidence of the prior lie says very little about whether the complaining witness is lying in this case. While the probative value is low, there is a substantial danger that the jury would be misled by the evidence, most likely because they will give it undue weight. Even if the evidence were admitted, the defendant would be permitted only to ask the witness about the prior false allegation on cross-examination, and would not be permitted to bring in other evidence regarding the prior claim.

In the rape case hypothetical, the prior false allegation is likely to be admitted on the grounds that a prior false allegation of rape is so highly probative of the victim's credibility that the defendant should be allowed to cross-examine her on the prior statement. Moreover, the court is likely to permit the presentation of extrinsic evidence (other witnesses and documents) to prove the defendant's point that the victim lied about rape on another occasion, and is therefore lying on this occasion.

The comparison of these hypotheticals reveals the crux of the problem addressed by this Article. A specific type of evidence, a prior false allegation of the crime charged, is treated differently in rape cases than in other types of criminal cases, although the evidentiary issues are the same. The heightened focus on prior false allegations in rape cases can be explained only by an impermissible reliance on rape mythology.
B. The Legal Framework

A brief discussion of where the treatment of prior false allegations of rape fits within the broader evidentiary context defines the legal issue under discussion and illustrates the extraordinary scrutiny given to the rape victim's credibility. In many jurisdictions, courts and legislatures have created special evidentiary rules for the impeachment of complainants in sexual assault prosecutions who allegedly have made prior false allegations of rape.

Admissibility of evidence under the special rule is predicated on the defendant's ability to show that the prior allegation was, in fact, false—it is axiomatic that if a prior allegation is true, it provides no basis to impeach the victim's credibility as to the events of her current complaint. If the court satisfies itself that the allegation was false, it is generally admitted without

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17. See, e.g., State v. Kringstad, 353 N.W.2d 302, 311 (N.D. 1984) (“Evidence of one truthful charge of rape does not make the truthfulness of a subsequent rape charge ‘less probable than it would be without the evidence.’ Thus, to be relevant in this case, the prior charge must necessarily have been false.” (citation omitted)).

18. Earlier cases give very short shrift to whether the prior allegation of sexual assault was, in fact, false. See, e.g., People v. Hurlburt, 333 P.2d 82, 86-87 (Cal. Dist. Ct. App. 1958) (evidence that prosecutrix has made prior false accusations is relevant as to the state of mind of the prosecutrix and has great probative value, both as substantive evidence that the alleged rape did not occur, and as impeachment of her general character and reputation); State v. Quinn, 80 Conn. 546, 548 (1908) (trial judge has discretion to permit prosecutrix to be asked about whether she had not falsely charged others with rape, and after denial, to permit testimony in contradiction); People v. Evans, 40 N.W. 473, 478 (Mich. 1888) (error not to permit, after denial by prosecutrix, independent testimony that prosecutrix had made prior false accusations of rape against her father, the defendant; trial judge erred in ruling such evidence collateral because the evidence strongly contradicted the girl's story and showed that she was subject to hallucinations). But see Peters v. State, 103 Ark. 119, 122-26 (1912) (trial judge did not err in refusing to admit testimony, after complaining witness's denial, tending to show that the witness had a disposition
further consideration of the relevance or probative value of the evidence relative to the specific case at hand. Probative value is assumed to be high if the accusation was false, rather than analyzed in relation to the evidence in the subsequent case.19 If the complaining witness denies that the allegations were made or that they were false, the defendant may then contradict her by presenting extrinsic evidence to show that she is lying.20 In crimes other than sexual assault, the ordinary rules of evidence apply when the defendant seeks to impeach a witness for the prosecution by showing that the witness has falsely accused others of crimes.21 The rules bar evidence of specific acts, such as prior false statements, unless they are admissible under one of two theories of relevance: (1) a non-character use of a prior bad act to show, for example, a motive to fabricate false charges,22 or (2) character for untruthfulness.23 Impeachment for a motive to fabricate is a specific attack on credibility, attempting to show that the witness has a specific reason for lying in the case before the court, and that the proffered evidence will expose the motivation.24 Impeachment for character for untruthfulness is a general,
rather than specific, attack on credibility, seeking only to raise the inference that because the witness lied on one occasion, she may be lying on this occasion. The distinction between impeachment for motive to fabricate and impeachment for character for untruthfulness is an important one because they are subject to very different evidentiary treatment. Assuming an appropriate nexus is shown between the proffered evidence and the theory of relevance, evidence showing a specific motive to fabricate is always admissible and may be constitutionally compelled. Evidence of character for untruthfulness, however, has low probative value and is subject to strict regulation under the Federal Rules of Evidence and the corresponding state rules. It is, therefore, necessary for the court to properly identify the nature of the evidence offered so that the appropriate rules may be applied.

The special evidentiary rule for prior false accusations of rape does not distinguish between evidence of specific acts offered to show motive to fabricate and evidence offered for a character purpose. Instead, the evidence is treated as if the theory of relevance is motive to fabricate, allowing the defendant a much more liberal inquiry into the credibility of the complaining witness. The practical effect is to raise the value of propensity evidence—evidence that attempts to show that the witness is acting in conformity with a character trait for untruthfulness—to a higher level in sexual assault cases than in any other kind of crime.

It is true that, in some cases, prior false accusations of rape, like prior false statements of witnesses in other crimes, are relevant on a motive to fabricate theory. The familiar hypothetical in the prior false accusations of rape context is that of the prostitute who repeatedly charges rape when her clients refuse to pay for her services. Such evidence may be offered either as tending to show a propensity to lie in similar circumstances under a character theory, or as tending to show the prostitute's modus operandi. Modus operandi usually refers to a "particularized and closely repetitive kind of conduct ... bordering on the habitual." Both theories of admissibility rely on the notion that future conduct may be predicted from specific acts, but modus operandi will generally be based on numerous like incidents. It carries more weight than propensity evidence, and may be constitutionally compelled

opposed to an attack on her general credibility); People v. Mascarenas, 21 Cal. App. 3d 660, 668 (1971) (prior false accusation that complaining witness had charged another with furnishing narcotics was properly admitted as relevant to an issue other than proof of character trait for lying).

26. Davis v. Alaska, 415 U.S. 308, 315-17 (1973) (distinguishing between general and specific attacks on credibility, and recognizing that exposure of a witness's bias, prejudice, or ulterior motivation in testifying is an important function of the constitutional right to cross-examination).
27. WRIGHT & GOLD, supra note 11, § 6113.
29. Id. at 74.
30. Id.
31. Id. at 75.
if there is a probative relationship between the prior incidents and current charges. A distinction should be made, however, between repetitive patterns of false charges, admissible to show modus operandi, and prior false accusations that may show only a propensity to lie. The fact that a complaining party in a rape case has lied about rape on a prior occasion may be repetitive conduct, but it is not necessarily a pattern constituting a modus operandi.

This paper does not challenge the admissibility and proof by extrinsic evidence of prior false accusations of rape that are legitimate evidence of the complaining witness's motive to fabricate her testimony in a subsequent prosecution for sexual assault. Numerous, and sometimes extreme hypotheticals, in which such evidence would be unquestionably admissible have been so well rehearsed in the academic commentary and evidence casebooks surrounding the enactment of rape shield laws that they need no further discussion here. But if the theory of relevance is, in fact, character for untruthfulness, character rules should strictly limit the inquiry into past events, as they do in the prosecution of other kinds of crimes.

C. Character Evidence Rules

In general, character evidence is not admissible to show that the witness acted in conformity with a certain character trait on a particular occasion. Despite this general prohibition, the rule is subject to numerous exceptions, including Rule 608, which permits an attack on the credibility of a witness by showing a character for untruthfulness. In contrast to the common law in many states prior to the codification of the rules of evidence, character for

32. Stamper, 766 F. Supp. at 1406 (sufficient relevant evidence going to the issue of the falsity of three prior allegations of sexual abuse and the bias of the complainant in making the allegations to warrant submission to the jury).
34. See, e.g., Ann Althouse, The Lying Woman, the Devious Prostitute, and Other Stories from the Evidence Casebook, 88 NW. U. L. REV. 914, 943-68 (1994) [hereinafter The Lying Woman]; Berger, supra note 11, at 57-69; Letwin, supra note 28, at 74-75.
35. FED. R. EVID. 608(b) provides in pertinent part:
Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness's character for truthfulness or untruthfulness.
36. FED. R. EVID. 608(b) provides in pertinent part:
Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness's character for truthfulness or untruthfulness.
37. Prior to the codification of the Federal Rules of Evidence, courts did not permit the introduction of specific acts of misconduct, other than criminal convictions, to impeach the credibility of a witness, and generally limited the inquiry to conduct relevant to veracity and honesty. 3 Jack B. Weinstein &
veracity or its opposite may now be shown on cross-examination through inquiry concerning specific instances of conduct. While it is no longer limited to opinion and reputation evidence, if the witness denies the conduct, extrinsic evidence may not be introduced to rebut the denial.\textsuperscript{40}

In jurisdictions in which rules similar to the federal rules have been adopted, Rule 608(b) is controlling when specific acts are proffered to impeach for a character purpose. The rule permits a witness to be asked on cross-examination about specific instances of conduct.

The court must first find, however, that such acts are probative of the witness's character for truthfulness or untruthfulness, and specific acts may not be proved by extrinsic evidence.\textsuperscript{41} Even if the terms of 608(b) are satisfied, evidence may still be excluded under Rule 403\textsuperscript{42} if its probative value is substantially outweighed by the danger of unfair prejudice or confusion of the issues, or by the length of time that would be necessary to explore the issue. The practice that follows from 608(b) is that, assuming the threshold inquiry is satisfied and the question allowed, the questioner must take the answer of the witness. If the answer is a denial of the questioner's allegations, no other documentary or testimonial evidence may be offered in contradiction of the witness.\textsuperscript{43} The ultimate effect of 608(b) is to strictly limit the use of specific act evidence to impeach the witness's character for veracity.\textsuperscript{44}

D. The Special Rule for Sexual Assault Cases and Rape Mythology

No consistent evidentiary theory is advanced to support the admission of prior false accusations of rape and their proof by extrinsic evidence. Some

\textsuperscript{40}United States v. Abel, 469 U.S. 45, 55 (1984); see FED. R. EVID. 405, 608(b).

\textsuperscript{41}The federal rules of evidence, while barring the use of specific acts evidence to show that a witness acted in conformity with a certain character trait, permit specific acts evidence if introduced to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake. FED. R. EVID. 404(b), 608(b). If a prior false allegation of sexual assault fits within one of these exceptions, it is admissible, as long as it passes the probative value versus prejudice balancing test of Rule 403, notwithstanding Rule 608(b). Rule 608(b) is addressed solely to the introduction of evidence to show character for truthfulness.

\textsuperscript{42}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.

\textsuperscript{43}See, e.g., United States v. Peterson, 808 F.2d 969, 973-74 (2d Cir. 1987) (where witness denied forging check, Rule 608(b) would have precluded introduction of the check to impeach the witness); United States v. Herzberg, 558 F.2d 1219, 1222-23 (5th Cir. 1977), cert. denied, 434 U.S. 930 (1977) (trial court erred in admitting, during cross-examination of witness, written evidence of fraud suit denied by witness). But see Carter v. Hewitt, 617 F.2d 961, 970-71 (3d Cir. 1980) (if witness admits acts alleged by cross-examiner, documentary evidence of acts may be admitted because not inconsistent with any underlying policy of Rule 608(b)).

\textsuperscript{44}See infra note 154 and accompanying text.

Whatever the theory of admissibility advanced, at least one commentator has suggested that courts have been willing to break or ignore the rules because they have recognized the “high probative value” of the evidence.\footnote{\textit{See infra} note 111.} But this assertion glosses over a major question: why is a prior false allegation of sexual assault so highly probative of the current charge that special rules should require its admission and proof by extrinsic evidence? In other words, what is there about a prior false allegation of sexual assault that is different from other evidence found to bear on a witness’s truthfulness? One would expect to find the answer in the cases advancing the exception, but it is rarely given in the case law and it does not exist in the brief commentary on this subject.\footnote{Galvin, \textit{supra} note 9, at 861.}\textsuperscript{49} An examination of the historical development of the exception through the case law, however, shows that the evidentiary treatment of prior false accusations of rape is grounded in rape mythology. The exact origin of the exception is unclear, but one may find case law dating from as early as 1888, which applied a different rule on character evidence in sex cases, as well as commentary in evidence treatises describing the manner in which courts have carved out a special exception for such cases.\footnote{But see State v. Boggs, 624 N.E.2d 204, 210 (Ohio Ct. App. 1993) (excluding evidence of alleged rape victim’s prior false rape accusations at evidentiary hearing did not violate defendant’s constitutional rights to confrontation, cross-examination, or due process).}

The rules on character evidence prevent a searching inquiry into the complaining party’s mental and social history. As late as the 1970 edition, Wigmore's treatise on evidence argued strongly that in any criminal charge of a sex offense or in any civil suit involving seduction or illegitimacy, these rules should not apply when the complaining party is a woman.\footnote{WIGMORE, \textit{supra} note 7, \S 924b.} While
Wigmore had a general fear that innocent men were vulnerable to false charges of rape,\footnote{52} he came to focus on "female types of excessive or perverted sexuality," and relied on modern psychiatry to support his belief that a woman's chastity is related to a woman's veracity.\footnote{53}

Modern psychiatrists have amply studied the behavior of errant young girls and women who come before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects . . . diseased derangements or abnormal instincts . . . bad social environment . . . temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offenses by men. The unchaste . . . mentality finds . . . direct expression in the narration of imaginary sex incidents of which the narrator is the heroine or the victim. . . . The real victim . . . too often in such cases is the innocent man . . . .\footnote{54}

Wigmore's editors maintain that he was not the first legal scholar to emphasize the danger of rape charges without foundation,\footnote{55} referring the reader to the Lord Chief Justice Matthew Hale, whose views on the judicial caution to be exercised in favor of an accused rapist are well known.\footnote{56} Certainly, Wigmore had company among judges and legal scholars,\footnote{57} but Wigmore's treatise is the one cited in modern cases to support deviations from current evidence rules that limit the admissibility of specific acts and bar their proof by extrinsic evidence.\footnote{58} One may argue that Wigmore's statements were directed at a small class of women and girls, but Wigmore's gender-biased perspective on character evidence in sex cases, dressed up in pseudo-scientific jargon,\footnote{59} has broadly influenced court decisions in this area.

If there is any one case that has furthered Wigmore's ideas in the context of prior false allegations of rape, it is \textit{People v. Hurlburt}.\footnote{60} In this case, the
defendant was charged with lewd conduct with a nine year-old girl. At trial, the defendant was refused permission to cross-examine the girl or to introduce evidence that she had made similar charges against two other men. The offer of proof for one of the charges was that she admitted she had lied. The ground for exclusion was the common law rule that a witness's character for veracity could not be impeached by evidence of particular, wrongful acts, but only by opinion or reputation evidence. In its reversal, the appellate court relied on both Lord Hale and Wigmore, holding that, in sex cases, exceptions to the ordinary rules were longstanding and the widest possible latitude should be allowed in making such evidentiary decisions, for the philosophical reasons expressed by these commentators.61 Indeed, the California court viewed the evidence as admissible not just for the purpose of impeachment, but to disprove the charge before the court, apparently adopting Wigmore's view that a prior false allegation indicates a corrupt mind.62 In that light, the court considered this evidence more probative than evidence of bias and motive, which is always admissible.63

Despite the antiquated tone and outright expression of gender bias, the Hurlburt decision and Wigmore's treatise continue to be relied on by other courts addressing this issue in more recent times. For example, in Phillips v. State, issued in 1989, the court relied on Wigmore and Hurlburt to support the notion that if prior false allegations were made, they are admissible because

61. Hurlburt, 333 P.2d at 85.
62. Id. at 87. See Wigmore, supra note 7, § 963, at 808-12, on habitual false charges and sundry corrupt conduct. Although Wigmore recognized the evidentiary distinction between “conduct indicating a corrupt moral character in general and conduct indicating a specific corrupt intention for the case in hand,” he clearly believed that prior false accusations of sexual assault indicated a corrupt mind. Id. at 810. Therefore, the character rules prohibiting the admission of specific acts evidence should not apply. He warned:

[T]he court-room has its quota of false claimants and pretended victims of wrongs; some are children, some eccentrics, some hysterics, some insane, some nymphomaniacs, some conscious blackmailers. It is hard enough, at least, to detect and expose them. . . .

The double barrier erected by our strict precedents in this field may be instances by the case nowadays common in our courts, a charge against an oldish man of indecencies with a young girl or child in his shop or house. Usually the facts are either that the man is a sexual pervert, or that the female is a sexual hysteric or a precocious little reprobate. If the former case, the prosecution tries to show that the man has a habit of treating little girls in that way. But, NO, that cannot be done; the character rule forbids. If the latter case, the defence tries to show that the girl has been falsely charging other men with similar offenses. But, NO, that cannot be done; the witness-rule forbids. And so, whichever the truth may be, the court ties up the case in these intellectual ropes, and lets the parties struggle away with the fragments of evidence that are permitted to be used. And yet we assume that this process is a skilled and worthy effort to establish the truth!

Id. at 811-12.
63. Hurlburt, 333 P.2d at 87. By viewing the evidence as admissible “substantively,” the court found another justification for its admissibility without regard to the rules on impeachment. See Galvin, supra note 9, at 860 (courts have used the substantive versus impeachment distinction to avoid the rules on character evidence). Later cases pick up the distinction between permitting the evidence for substantive versus impeachment purposes, but aside from the avoidance of character rules, the distinction is insignificant to the jury.
they indicate a general pattern of making false charges. Because the court accepted the idea that a woman who has made a prior false allegation has a corrupt mind, it concluded that the false charges were substantive proof that the current events in question did not occur. In *Miller v. State*, also issued in 1989, the court relied on Wigmore's explanation of a dangerous abnormality found in female complainants in sex cases to hold that an alleged victim's prior false accusations of sexual assault were so probative of her credibility that the defendant was entitled to prove them by extrinsic evidence.

One of the most backward-looking decisions comes from the Supreme Court of Arkansas in *West v. Arkansas*. The defendant in that case was convicted of sexual abuse, based on the testimony of the victim, a fifteen-year-old girl. She testified that the defendant, with whom she was slightly acquainted, drove her to a deserted area and then assaulted her by squeezing her breast and kissing her neck. The defense attempted to cross-examine the victim about similar accusations she had supposedly made against two other men. The defense also asked to call three witnesses who it claimed would testify that the victim had once made a similar charge against her uncle, who had denied it, and that once at a concert she had reported someone attempting to touch her breast, but that the person was not found. The trial court excluded both the cross-examination and the testimony. The Supreme Court of Arkansas reversed the conviction, adopting the *Hurlburt* rule permitting the cross-examination of the witness to show that she made the allegations and that they were false.

The decision in *West*, issued in 1986, came 74 years after the same court's decision in *Peters v. State*. *Peters* had upheld a trial judge's refusal to admit testimony showing that the complaining witness in a rape case had a disposition to make false charges similar to the accusation on trial. The ground for exclusion was that the evidence was collateral and its admission would have violated the common law rule barring impeachment by specific acts. In affirming the trial court, the *Peters* court stated that the evidence would only be admissible to show that the prosecutrix was “mentally deranged, or that she was of a weak mind, or that she was subject to hallucinations.” In the 1970 edition of his treatise, Wigmore criticized the holding of the case as dangerous, recommending that the court review that section of his work that discussed several articles by psychiatrists and other commentators in asserting that some

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64. 545 So. 2d 221, 223 (Ala. Crim. App. 1989).
65. Id.
67. 719 S.W.2d 684 (Ark. 1986).
68. Id. at 685-88.
69. Id. at 686.
70. Id. at 686-87.
71. 146 S.W. 491 (Ark. 1912).
72. Id. at 492.
73. Id. at 492-99.
74. Id. at 493.
women and girls have fantasies about being attacked by men, which then induces them to make false accusations.\textsuperscript{75} The \textit{West} court noted Wigmore's "required reading" suggestion, stating "[w]e agree with Wigmore's basic criticism of our holding in \textit{Peters}."\textsuperscript{76} That rape mythology is still operative in the application of evidentiary rules is apparent when one considers that it took a sweeping effort at reform, only twenty years ago, to place the defendant, rather than the victim, on trial for rape.\textsuperscript{77} The problem was not with the evidence rules as they were written, but with how judges applied them at their discretion at trial.\textsuperscript{78} To effect reform, rape shield statutes had to contain language that limited the judge's discretion to find certain evidence relevant. As a consequence, there are now legislative declarations of the irrelevance of certain classes of information about the complaining witness, most notably sexual history.\textsuperscript{79} Even so, judges retain enormous discretion to interpret the exceptions to rape shield statutes and the defendant's constitutional rights in a manner that can limit the effect of the legislation.\textsuperscript{80}

Here, too, the problem with the admission of prior false allegations of rape is not with the way evidence rules are written, or even with the rules as they were understood prior to codification, but with their application to particular cases through the exercise of judicial discretion. One would expect that, by applying the ordinary rules on character evidence, judges would be forced to conduct a contextual analysis of the evidence before the court.\textsuperscript{81} As is so convincingly demonstrated by the avoidance of the character rules, however, "the way [judges] think about the evidence they hear is more important than any rule."\textsuperscript{82} If a judge is biased by rape myths, the labels assigned to the proffered prior allegations will reflect those myths,\textsuperscript{83} and no rule will bar their admission.

The inadequacy of rules alone to control gender bias in the admission of this kind of evidence is dramatically illustrated by \textit{State v. Cox},\textsuperscript{84} a rape case that was reversed and remanded because of the exclusion of a prior false

\textsuperscript{75} Wigmore, supra note 7, § 963, at 808.
\textsuperscript{76} West, 719 S.W. 2d at 687.
\textsuperscript{78} See Vaught & Henning, supra note 2, at 901 (noting that myths and misconceptions concerning women and sexuality were incorporated in the interpretation of evidentiary rules, including the myth that women would falsely accuse men of rape and that chastity was a character trait, reflecting society's pervading concern for men's rather than women's interests).
\textsuperscript{79} See statutes cited supra note 8; see also Ann Althouse, Thelma and Louise and the Law: Do Rape Shield Rules Matter?, 25 LOY. L.A. L. REV. 757, 762 (1992) [hereinafter \textit{Thelma and Louise}].
\textsuperscript{80} Thelma and Louise, supra note 79, at 766; see also Andrew Z. Soshnick, Comment, The Rape Shield Paradox: Complainant Protection Amidst Oscillating Trends of State Judicial Interpretation, 78 J. CRIM. L. & CRIMINOLOGY 644 passim (1987) (discussing judicial interpretations of rape shield laws that are contrary to plain meaning and legislative intent).
\textsuperscript{81} Victor J. Gold, Limiting Judicial Discretion to Exclude Prejudicial Evidence, 18 U.C. DAVIS L. REV. 59, 75 (arguing that analysis of probative value requires context).
\textsuperscript{82} Thelma and Louise, supra note 79, at 768.
\textsuperscript{83} Id. at 761.
\textsuperscript{84} 468 A.2d 319, 322 (Md. 1983).
allegation of rape. The decision did not rely on the exception to character evidence rules that has been prevalent in sex cases, and the court made it clear that the inquiry on remand would be limited to cross-examination if the witness denied the allegation.85 Instead, the court operated under the "general rule that any witness may be cross-examined on matters and facts affecting his credibility, so long as such facts are not immaterial or irrelevant to the issue being tried."86 The conviction was reversed for the same reason that has operated in the cases that have relied on the Hurlburt rule that a prior false allegation of rape made by the complaining party is highly probative of her credibility and therefore "relevant" to the case at bar.87 The concurring opinion tellingly framed the relevance question:

Would it be relevant for the trier of fact, in deciding whether to believe the victim's accusation of Cox, to know that she had once before caused another man to be criminally charged with assault, that she had repeated that accusation under oath at the man's trial, and that on cross-examination she had recanted, thus at least tacitly admitting that (1) she had falsely accused the man, and (2) she had lied under oath?

There is no reasonable way that question can be answered in the negative. That is why the conviction must be reversed.88

The judge may be quite right that most triers of fact would agree that the answer to the relevance question is yes, but it can only be relevant if one accepts the premise that women have a propensity to make false charges of rape.89

One lone dissenter took up a contextual analysis.90 In weighing the probative value of the collateral matter, the dissent argues, the trial judge must review it within the range of the litigated controversy and the evidence.91 Here, the rape was so brutal that the corpus delicti was not contested. The sole issue litigated at trial was the victim's identification of the defendant as the perpetrator. The defendant's proffer was that the complaining witness had accused her boyfriend of rape and recanted under cross-examination during the prosecution of the case. Although it was true that the victim's lie involved a rape case, it had to do with whether she was assaulted within the context of

85. Id. at 324-25.
86. Id. at 322. See also Cox v. State, 443 A.2d 607, 618 (Md. Ct. Spec. App. 1982) (Lowe, J., dissenting) (criticizing the rule as stated by the majority because it removes all discretion from the trial judge to decide what is properly within the sphere of cross-examination), aff'd, 468 A.2d 319 (Md. 1983).
87. Cox, 443 A.2d at 613.
88. Id. at 617.
89. See Torrey, supra note 2, at 1047. Torrey discusses the behavioral science literature and concludes that jurors fit the facts of the case into the fundamental premises they already believe to be true. "Jurors will strive to reach a verdict in a rape case that will not conflict strongly with the rape myth cognitions they hold at the beginning of the trial." Id. at 1050.
90. Cox, 443 A.2d at 617.
91. Id. at 618-22.
a consensual relationship. She did not lie about the assailant's identity. Therefore, the dissent argues that the trial judge was correct in exercising his discretion to exclude a single indiscretion that implied no propensity for untruthfulness, and that had potential to lead to “such time-consuming and distracting explanations that even the uncontested corpus delicti issue may be obscured.” 92 Moreover, other evidence pointing to the defendant as the perpetrator was strong. The victim knew the defendant's identity before the attack, and therefore was not identifying a stranger from a line-up. 93 The defendant had been apprehended shortly after the crime, and the condition of his clothes and body corroborated the victim's story. The perpetrator had also told the victim during the crime, by way of explanation, that he had just been released from jail and that he had not had a woman for six months. These facts were consistent with the defendant's recent whereabouts. After considering all of the evidence in some detail, including an alibi of the defendant that placed him in the vicinity of the crime with an opportunity to commit it, the dissent concluded that it was inconceivable that the victim's recanted charge against a boyfriend suggested that she was mistaken now about the identity of her assailant. 94 He summarized the propensity issue by asking “Where is there a single case cited . . . by the majority holding that a victim's past may be scoured for a single suggestio falsi, however irrelevant, which may then be used to becloud the issue before the fact finder?” 95

The Cox decision was upheld on further appeal for essentially the same reasons as those stated by the intermediate appellate court—that attacking the credibility of the complaining witness was critical to the defendant's case and that the proffered question went to the heart of that issue, but the “heart of the issue” is merely assumed, not probed. 96

The problem is not with the rules per se, but with the judicial lens through which the rules, no matter how they are drafted, are applied. Whether the court is assessing character for truthfulness, relevance, or probative value, the conclusion that must be drawn from a review of the Hurlburt line of cases and others, like Cox, is that the judicial lens frequently is clouded by rape mythology when it confronts a prior false allegation of rape.

The precedent is not uniform, however, in its refusal to challenge the notion that a prior false accusation of rape is always probative of credibility on subsequent charges. At least some courts are moving towards considering

92. Id. at 619.
93. Id. at 622. The complaining witness' prior knowledge of the defendant did not indicate anything other than that she knew who he was. There was no suggestion that prior knowledge or relationship created a motive to fabricate.
94. Given the large number of cases in which women have, out of fear of retribution, fear of loss of support, or other reasons, recanted accusations of assault by their partners, we should be skeptical of the proposition that it was the accusation, rather than the recantation, that was untruthful.
95. Cox, 443 A.2d at 622.
such evidence absent the gender biased attitude that has too often been a component of the judicial response.

For example, in Hughes v. Raines, a defendant convicted of sexual assault brought a writ of habeas corpus in federal court claiming that he had been denied his right to confront witnesses by the trial judge's refusal to permit certain cross-examination. The proffered testimony was that the complaining witness had accused another man of attempted rape, that the man had denied it, and that the district attorney did not prosecute. Aside from the sufficiency of the proffer, which the federal court found inadequate to show falsity, the court noted that the relevance of the evidence to the case in chief was slight. It characterized the inference to be drawn by the jury as a propensity to lie and noted that the evidence rules reflect a reluctance to draw an inference about character from evidence of specific conduct.

Moreover, the court reasoned that the dissimilarity of the two incidents negated the inference. The prior incident involved sexual conduct which occurred on a date. At issue was the extent of the woman's consent. In this case, the defendant was accused of driving the complaining party to an isolated location, throwing her to the ground, ripping off her clothes, and physically struggling with her before giving up and leaving her obviously injured. The court concluded that exploring the first incident would have added collateral issues with very little probative value.

Similarly, in State v. Boggs, the court found that there was no inference of a propensity to lie to be drawn from the mere fact that a rape victim made a prior false allegation. Although the court remanded the case for an in camera hearing to determine whether the proffered evidence involved prior sexual conduct that would be excluded by Ohio's rape shield law, it made clear that if the allegations were found to be false and were probative of the witness's veracity only cross-examination would be allowed. Viewing such allegations as entirely collateral, the court stated that it knew of no case law that applied a different rule on extrinsic evidence for witnesses testifying in cases of murder, arson, burglary, or robbery.

The courts that expressly adopt Wigmore's views on a woman's propensity to lie in sex cases are the minority of the more recent decisions of state and federal courts. But the fact remains that many modern courts, whether or not they mention Wigmore or Hurlburt, use the Hurlburt rule. To accept the

97. 641 F.2d 790, 791 (9th Cir. 1981).
98. Id. at 792-93.
99. Id. at 793.
100. Id.
101. See also United States v. Bartlett, 856 F.2d 1071, 1088 (8th Cir. 1988) (circumstances of two instances of alleged rape were so dissimilar that probative value of inference that complaining witness lied about first instance, and therefore, was lying about second instance, was minimal).
103. Id. at 818.
104. See id. at 817.
105. See cases cited supra note 20.
rule—that a prior false allegation of rape is so highly probative of the victim’s credibility that it should be subject to special evidentiary rules—is to accept the myth that women have a propensity to falsely accuse men of rape. The myth serves as a substitute for an analysis of probative value.

To the extent that there has been any academic comment on the subject, the thinking is consistent with the case law, although the justification is likely to be framed in constitutional terms. Commentators assume that evidence of prior allegations of rape is presumptively admissible if false, but there is no apparent recognition that the underlying assumption of its probative value might be gender biased. Indeed, because its probative value is not challenged, no analysis is given. The only rationale for not analyzing whether a prior false accusation truly shows a character for truthfulness or untruthfulness in a specific case is the commentator’s belief that women will lie about sexual assault and that their charges must be more seriously scrutinized than those of witnesses in other contexts. If this mythology is operative, no further analysis is necessary and the confrontation clause is an easy trump card to play.

E. Character Evidence and Constitutional Requirements

The Confrontation Clause of the sixth amendment, made applicable to the states through the fourteenth amendment, is frequently advanced to justify the admissibility of prior false accusations of rape. Sixth

106. See Galvin, supra note 9, at 858 (noting that “[o]ne would be hard-pressed to dispute the high probative value of evidence that on previous occasions the complainant had made false allegations of rape”); Wright & Graham, supra note 59, § 5387 at 580 (“If the defendant’s right to a fair trial means anything, surely he must have the right to introduce evidence that the victim has previously made similar accusations against others that were proved to be false”); Pamela J. Fisher, State v. Alvey: Iowa’s Victimization of Defendants Through the Overextension of Iowa’s Rape Shield Law, 76 Iowa L. Rev. 835, 845-46 (1991) (arguing that the Iowa Supreme Court erred in not permitting an alleged prior false allegation of rape to be introduced at the defendant’s rape trial, even though the evidence was very much disputed and remote in time).

107. But see Thelma and Louise, supra note 79, at 757-58.

108. See Galvin, supra note 9, at 860. Galvin recognizes that relevance depends on falsity, but once a prior allegation is determined false, she accepts it as highly probative without a contextual analysis.

109. Galvin, supra note 9, at 858-59. Galvin begins her brief commentary on prior false allegations of rape with the true story of a woman’s recantation of an accusation of rape, a charge on which the defendant had spent considerable time in prison, which indicates that she sees the complaining party in that case as a prototype for all complaining parties. This is simply another version of Lord Hale’s view that courts ought to view complaining parties in rape cases with extraordinary suspicion. See Wigmore (Chadbourn), supra note 7. Galvin’s justification is that the complaining witness’s credibility is the central issue in a rape case and that the jury has nothing to rely on but opposing versions of the alleged events. Id. at 861. But see infra notes 146-58 and accompanying text (discussing why a credibility contest between the complaining witness and the accused does not justify abandonment of the character evidence rules solely in rape cases).

110. See Thelma and Louise, supra note 79, at 766.

111. U.S. Const. amend. VI.


Prior False Allegations

amendment rights guarantee a criminal defendant the right to confront and cross-examine witnesses, and the right to present witnesses in one’s favor, by virtue of the compulsory process clause. In cross-examining a witness, the defendant must be allowed to test the credibility of the witness and the witness's knowledge of the facts.

In the context of prior false accusations of rape, the constitutional argument is based on the view that the evidence is probative of the complaining witness’s credibility, and, therefore, defendants should be permitted to cross-examine and present extrinsic evidence to prove that the complaining witness lied about rape on a previous occasion. It is unconstitutional, so the argument goes, to allow an evidentiary rule, such as the restriction on extrinsic evidence, to defeat the sixth amendment right of the defendant to attack credibility.

The leading case on which the constitutional argument rests is Davis v. Alaska, in which the Supreme Court held that the state’s policy underlying the confidentiality of juvenile court records did not justify the exclusion of the juvenile record in the face of the confrontation clause. In Davis, which involved a prosecution for burglary, the defense attempted to introduce a witness’s juvenile court records, to show that the witness was on probation for burglary. The defense wanted to use the juvenile records to suggest that the witness may have been pressured to make identifications in order to shift attention away from himself and out of fear of probation revocation.

The Court distinguished between an attack on the general credibility of the witness and one directed toward “revealing possible biases, prejudices or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand.” The juvenile record was admissible as evidence because it was intended to show bias and prejudice. Although the Davis decision was limited to impeachment for bias, a number of state jurisdictions have apparently viewed it as compelling the introduction of prior false accusations of rape, and their proof by extrinsic evidence, to attack credibility generally.


114. U.S. CONST. amend. VI. The sixth amendment provides that “in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor . . .” Id. Tanford & Bocchino, supra note 10, at 556 (compulsory process clause includes the right to call, not merely subpoena, witnesses in defendant’s behalf).


116. 415 U.S. at 316.

117. Id. at 311.

118. Id. at 316.

119. Id. at 317.

120. See cases cited supra note 113.
Since Davis, the Supreme Court has clarified sixth amendment rights when those rights are opposed to a state evidentiary rule or rule of procedure.\textsuperscript{121} In the rape shield context, the Supreme Court held in Michigan v. Lucas that defendant Lucas's right to confront witnesses and to present a defense were not absolute, and could be limited to “accommodate other legitimate interests in the criminal trial process.”\textsuperscript{122} The legitimate interest that overcame the defendant's rights in Lucas was a notice and hearing provision in Michigan's rape shield statute requiring the defense to tell the prosecution of its intent to introduce evidence of a prior sexual relationship between the complaining witness and the accused. The trial court excluded the proffered testimony because the defense failed to give notice. The Court rejected what it viewed as a per se rule prohibiting preclusion of the defendant's evidence as not constitutionally required by the sixth amendment.\textsuperscript{123} Relying on Delaware v. Van Arsdall,\textsuperscript{124} the Court explained that trial courts have broad discretion to limit a defendant's right to cross-examine witnesses based on a host of concerns, including harassment of witnesses, prejudice, confusion of the issues, and exclusion of cumulative or marginally relevant evidence.\textsuperscript{125} The touchstone is whether the restriction is arbitrary or disproportionate to the purpose it is designed to serve.\textsuperscript{126}

The admission of prior false accusations of rape, offered for a character purpose, does not present a complex constitutional question under Davis or subsequent cases. The potential clash between the rules of evidence and the confrontation clause occurs primarily because of analytical mistakes. The first and most obvious mistake is the failure of courts to identify those prior accusations offered solely to show propensity to lie as a question of character evidence, that are subject to restrictions and are generally of low probative value. Instead, courts have classified the evidence as an attack on “credibility,” and have viewed the defendant's right to attack credibility as sacrosanct, without making the distinction between an attack for bias and an attack on general character.\textsuperscript{127}

\begin{footnotes}
\item[123.] Id. at 152.
\item[124.] 475 U.S. 673, 679 (1986).
\item[125.] Lucas, 500 U.S. at 149.
\item[126.] Rock, 483 U.S. at 56.
\end{footnotes}
Second, in decisions like *Hurlburt*\(^\text{128}\) and those expressly viewing the complaining witness's prior false accusation as an indication of a "corrupt mind" or other mental defect\(^\text{129}\), again there is a misidentification of character evidence, but with a particularly gender-biased twist. There, without any analysis of the probative value of the prior accusation, courts have accepted the evidence as substantive proof that the subsequent crime did not occur, rather than as an attack on credibility of either a general or specific nature. They have done so by generalizing Wigmore's view—that there exists a defective class of females prone to fantasizing sexual encounters and falsely accusing innocent men of rape—to any complaining witness who has made a false allegation in the past. If a prior false accusation is proffered, these courts apparently reason it must be coming from a defective female. By describing the evidence as substantive, the restrictions on extrinsic or collateral evidence are neatly avoided\(^\text{130}\). In reality, the evidence in *Hulburt*, and later decisions relying on it, is an attack on general credibility that should be identified as character evidence, because there is no probative relationship between the prior accusation and the present crime other than a propensity to engage in the character trait of lying. Of course, if the facts of these cases actually showed mental illness resulting in a pattern of false charges, the decisions would be justified, but "common sense warps to myth when society comes to view extreme types of women as prototypes of the rape complainant."\(^\text{131}\)

The third mistake courts make is to equate falsity with probative value, so that falsity, and not probative value, determines admissibility\(^\text{132}\). Indeed, analysis of probative value might have ameliorated the characterization mistakes. However expansively one defines sixth amendment rights to cross-examine and present testimony, evidence must be related to the issues involved in the case before the exclusion properly takes on a constitutional dimension\(^\text{133}\). In other words, like probative value, the right to confrontation may be defined in the abstract, but its violation must be judged in light of specific deprivations\(^\text{134}\). When falsity is unanalytically equated with probative value, it appears that rape mythology, in particular, the myth that women have a neurotic propensity to lie about sexual assault, is operative.


\(^{129}\) See cases cited supra note 20.

\(^{130}\) Galvin, supra note 9, at 860-61.

\(^{131}\) Berger, supra note 10, at 25.

\(^{132}\) See cases cited supra note 20. I do not overlook the fact that honesty is a generally held cultural value and that witnesses who have lied about anything in their past lives are going to be viewed with suspicion, quite apart from adding cultural myths about rape. Both may be operating in the minds of judges when they approach these admissibility questions, but this is precisely why such evidence is regulated. See Wright & Gold, supra note 11, § 6118, at 104.

\(^{133}\) Tanford & Bocchino, supra note 10, at 557.

\(^{134}\) See, e.g., Chipman v. Mercer, 628 F.2d 528, 531 (9th Cir. 1980) (confrontation clause does not prevent the trial court from weighing the offer of proof to determine its probative value to the trier of fact and its probable effect on fair and efficient conduct of the trial).
When viewed without the kinds of analytical mistakes discussed above, attempts to prove prior false accusations of rape will generally be seen to be proffers of evidence of character for untruthfulness, which is an attack on general credibility.\textsuperscript{135} Such evidence is of low probative value, and the Confrontation Clause does not compel its admission and its proof by extrinsic evidence under any decision of the Supreme Court.\textsuperscript{136} Whether the admission of a prior false accusation of rape is constitutionally compelled depends entirely on the purpose for which the evidence is relevant. The constitution is implicated only if it is relevant for a non-character purpose.\textsuperscript{137} The sixth amendment cannot be abridged by the exclusion of irrelevant evidence.\textsuperscript{138} Therefore, rules similar to 608(b), which prohibit the introduction of extrinsic evidence of collateral matters, will not unconstitutionally stand in the way of the defendant's presentation of his case, and it is unnecessary to engage in a comparison of the state interests in the evidentiary rule excluding it versus the defendant's sixth amendment rights.\textsuperscript{139}

\textbf{II. Prior False Allegations of Rape Under 608(b)}

There is no logical reason to favor the admission of prior false allegations of rape by treating them outside the restrictions of 608(b) as a separate species of character evidence. First, there is nothing special about the crime of rape that makes evidence of the victim's propensity to make false allegations more valuable or necessary in rape cases. Second, even if the prior allegation is false, it should not be admitted without an analysis of probative value and potential prejudicial effect. Third, the focus on falsity requires pretrial hearings in which the complaining witness is placed on trial to determine her veracity. Finally, character evidence is subject to restrictions because of the dangers inherent in its introduction, which may be heightened in a rape case.

\textsuperscript{135} See, e.g., Hughes v. Raines, 641 F.2d 790, 793 (9th Cir. 1981) (it is an attack on general credibility to ask the jury to draw an inference that because the complaining witness lied on a previous occasion about rape, her subsequent accusation in another case is false).

\textsuperscript{136} United States v. Bartlett, 856 F.2d 1071, 1089 (8th Cir. 1988) (prior false allegation was offered solely to attack the general credibility of the witness and its admission was not constitutionally compelled); Hughes, 641 F.2d at 793 (admission of prior false accusation of rape was not constitutionally compelled where attack was on general credibility of the witness); State v. DeSantis, 456 N.W.2d 600, 609 (Wis. 1990) (exclusion of prior allegedly untruthful allegation did not violate the confrontation clause as the evidence of highly prejudicial and had little probative value).


\textsuperscript{138} Delaware v. Van Arsdall, 475 U.S. 673, 679 (exclusion of marginally relevant evidence does not violate the sixth amendment); see also State v. Patnaude, 438 A.2d 402, 404-11 (Vt. 1981).

\textsuperscript{139} Stamper, 766 F. Supp. at 1403-04 (discussing the balancing of the state's and the complaining witness's interests versus the defendant's when prior false accusations are offered to show a motive to fabricate that is probative evidence in the subsequent case). See also Tanford & Bocchino, supra note 10, at 565-89 (analyzing the state interests in rape shield statutes versus the defendant's right to present a defense); Lara E. Simmons, Michigan v. Lucas: Failing to Define the State Interest in Rape Shield Legislation, 70 N.C. L. REV. 1592 passim (1992) (discussing Supreme Court's failure to adequately define state interest in rape prosecutions as opposed to defendant's sixth amendment rights).
Therefore, it is not an area of evidence law in which the discretion of courts should be unguided.

A. Rape Versus Robbery

Although the prosecution of rape has been subject to special rules that have set it apart from other crimes like burglary or robbery, there is nothing about the crime itself that elevates the value of evidence of the victim's propensity to make false accusations. Generally, most jurisdictions exclude evidence when it is offered against a criminal defendant solely to show that the defendant acted in conformity with a certain propensity in committing a crime.140 Evidentiary issues in rape cases have been treated differently from other crimes of personal assault both because of wholly unwarranted, stereotypical assumptions regarding the psychology and behavior of sexual assault complainants and because of the erroneous belief that it is inherently more difficult to expose a liar in a rape case than in any other crime.141 These myths have spawned many different aberrations in both substantive law and evidence.142 The latter justification is derived from the notion that the supposed outrage and sympathy for the victim would unfairly tip the balance of the scales toward the prosecution.143 When that mythology is stripped away, the complaining witness's credibility should be no more of an issue in the prosecution of a rape than it is in the prosecution of a robbery.

Both rape and robbery may be described as "nonconsensual and forcible version[s] of ordinary human interaction."144 As shown by the earlier hypotheticals, it is not difficult to hypothesize similar proof problems in both rape and robbery trials. Even if the hypotheticals are changed to make it unclear as to whether the prior allegation was, in fact, false, the evidentiary question is not altered.

For example, like rape, robbery may arise out of consensual human interaction, such as that of a taxicab patron being picked up at an airport, taken to a remote location and robbed by the cabdriver. In this example, the crime takes place outside the presence of any witnesses, so that the ensuing prosecution results in a credibility contest between robber and robbed. The disputes at trial may involve identity, corpus delicti, consent, and extent of force used. There may or may not be corroborating physical evidence of the assault, and the jury will be forced to decide the case solely on the credibility of the witnesses.

140. Fed. R. Evid. 404(a). See Wright & Graham, supra note 61, § 5231, at 334-39 (providing an overview of state versions of Rule 404(a)).
143. Berger, supra note 10, at 21; Tanford & Bocchino, supra note 11, at 544-45.
If the unlucky victim in the taxicab example had made a previous complaint that he had been robbed on the subway by another passenger, which the cabdriver defendant claims was a false accusation, the court is unlikely to see the prior false allegation as so highly probative of the victim's credibility that it will a) hold a hearing to determine whether the allegation is false, b) upon determining that the allegation is false, permit both cross-examination and extrinsic evidence to prove it, and c) justify the admission of the evidence on the ground that the confrontation clause requires it. Robbery does not occur in the gender-charged context in which rape occurs, and no extraordinary suspicion is operating against the complaining party. In reality, however, the problems of proof may be quite similar, and the prior accusations should be considered pursuant to 608(b) and 403, whether they are proffered in a robbery or rape case.

145. When the typical cross-examination of a rape complainant is applied to a hypothetical robbery victim, the extraordinary suspicion of the witness in a rape case is convincingly demonstrated:

"Mr. Smith, you were held up at gunpoint on the corner of First and Main?"
"Yes."
"Did you struggle with the robber?"
"No."
"Why not?"
"He was armed."
"Then you made a conscious decision to comply with his demands rather than resist?"
"Yes."
"Did you scream? Cry out?"
"No. I was afraid."
"I see. Have you ever been held up before?"
"No."
"Have you ever given money away?"
"Yes, of course."
"And you did so willingly?"
"What are you getting at?"
"Well let's put is like this, Mr. Smith. You've given money away in the past. In fact, you have quite a reputation for philanthropy. How can we be sure that you weren't contriving to have your money taken from you by force?"
"Listen, if I wanted. . . ."
"Never mind. What time did this holdup take place, Mr. Smith?"
"About 11:00 P.M."
"You were out on the street at 11:00 P.M.? Doing what?"
"Just walking."
"Just walking? You know that it's dangerous being out on the street that late at night. Weren't you aware that you could have been held up?"
"I hadn't thought about it."
"What were you wearing at the time, Mr. Smith?"
"Let's see . . . a suit. Yes, a suit."
"An expensive suit?"
"Well—yes. I'm a successful lawyer, you know."
"In other words, Mr. Smith, you were walking around the streets late at night in a suit that practically advertised the fact that you might be a good target for some easy money, isn't that so? I mean, if we didn't know better, Mr. Smith, we might even think that you were asking for this to happen, mightn't we?"


146. *See supra* notes 37-8, 42-3 and accompanying text.
B. Probative Value

Any consideration of specific acts evidence under 608(b) must begin with an analysis of probative value. Probative value is the degree to which the proffered evidence assists the jury in accurately determining the credibility of witnesses. It does not exist in a vacuum but "should be viewed as a product of the logical potential of evidence in the evidentiary and cognitive context within which it is offered." Under 608(b), the probative value of a prior act may be viewed as the extent to which that act shows that the witness has an untruthful character. If the circumstances surrounding the specific lie or deceptive conduct are similar to those of the case at trial, the inference supposedly is stronger.

As part of the probative value analysis, courts consider whether the prior conduct alleged actually occurred and whether the admission of evidence of the prior conduct is overly prejudicial. The probative value of the evidence is weak if it is doubtful that the alleged past events actually occurred. But even where there is no doubt as to their occurrence, the circumstances may be so different that they can have no bearing on the witness's veracity in the current case. Thus, even if the evidence showed that the witness made a false statement in the past, there must be a sufficient nexus between that statement and the current charge. Returning to the robbery hypothetical, the fact that the victim in the hypothetical was robbed before is not likely to be considered probative on the issue of whether he is telling the truth about the second robbery, because the circumstances are quite different. If, however, the victim claimed that he had been robbed by a cabdriver in exactly the same way as the current charge, then the past events would weigh more heavily in the probative value analysis.

It is true that courts have considered prior deceptive conduct to bear on witnesses's truthfulness in cases not involving sexual assault, so that witnesses who have lied in the past may be impeached with those lies. It is true,

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147. See supra note 38.
148. See WRIGHT & GOLD, supra note 11, § 6118, at 94; see also Gold, supra note 82, at 73 ("[E]vidence has probative value if it enhances the accuracy of jury fact finding.").
149. Gold, supra note 82, at 76; see WRIGHT & GOLD, supra note 11, § 6118, at 94-97 (providing list of factors relevant to contextual analysis of probative value).
150. See WRIGHT & GOLD, supra note 11, § 6118, at 94.
151. See WRIGHT & GOLD, supra note 11, § 6118, at 94-97.
152. See United States v. Rios Ruiz, 579 F.2d 670, 674 (1st Cir. 1978) ("[O]ne of the policy reasons for Rule 608(b) . . . [i]s to avoid fact-finding detours to determine whether allegations of prior misconduct on the part of the witness are accurate."); see also WRIGHT & GOLD, supra note 11, § 6118, at 96 n.19 (stating that "the party seeking to inquire into misconduct of a witness can be required to make a threshold showing that there is some factual basis for the allegations," and citing cases); MCCORMICK ON EVIDENCE, supra note 51, § 196, at 578 ("Exposing fraudulent claims is important, but so is protecting innocent litigants from unfair prejudice.").
153. See WRIGHT & GOLD, supra note 11, § 6118, at 104-06 and nn. 53-76 (providing list of specific acts that courts have admitted as probative of truthfulness or untruthfulness).
however, that the inquiry rarely has proceeded further than cross-examination of the witness.154

By contrast, in cases involving prior false accusations of rape, the proper analytic framework of probative value is distorted. The focus in these cases is solely on whether the allegation is false. That is not the appropriate focus under 608(b).155 As discussed in Part I, in cases involving prior allegations of rape, probative value is equated with falsity, so that if falsity is proved to the satisfaction of the court in a pretrial hearing, the defendant is permitted to use the evidence to impeach the victim’s credibility at trial through cross-examination and extrinsic evidence.156 When evidence is admitted in this manner, the only nexus between the prior accusation and the current rape is that both charges concern sexual assault. This is insufficient evidence of context to show that the victim has a propensity to lie about rape.157

The reliance on the gross similarity between sexual assault charges, rather than on a more detailed analysis of each charge, is consistent with acceptance

154. See, e.g., United States v. Estell, 539 F.2d 697, 700 (10th Cir. 1976), cert. denied 429 U.S. 982 (1976) (impeachment of witness by showing specific instances of prior misconduct “must be in the form of cross-examination”); United States v. Banks, 520 F.2d 627, 631 (7th Cir. 1975) (defendants properly barred from calling psychiatrist to testify that informants who testified for prosecution were using drugs during the trial); United States v. Banks, 475 F.2d 1367, 1368 (5th Cir. 1973) (defendant properly barred from calling witnesses to impeach informant by testifying to drug sales for which he had not been tried or convicted); United States v. Lipowski, 423 F. Supp. 864, 868-69 (D.C.N.J. 1976) (stating that witness who allegedly falsified tape recording with defendant could be cross-examined to impeach defendant’s credibility but that tape could not be used).

155. See supra notes 16-20 and accompanying text. One commentator suggests that the emphasis on falsity is a safeguard sufficient to abandon all other considerations relevant to character evidence. Galvin, supra note 9, at 858-63.

156. The similarity of the context of the past event and the current event is certainly an element of probative value. But it should not be mistaken for “similar transactions,” which is sometimes confused with the doctrines of character and habit. For example, one commentator points out that prior false accusations of a witness offered to attack the veracity of that witness in a subsequent, similar case is usually admissible, even though it is a species of character evidence to show conduct because the inquiry is limited to cross-examination. Mccormick on Evidence, supra note 51, § 196, at 580 n.12. This suggests that there is a legitimate rule of relevance operating in both sexual assault and non-sexual assault cases based on similar transactions. The cases the commentator cites, however, do not support this analysis. The sexual assault cases cited are the Hulburt line of cases in which the inquiry is not limited to cross-examination and in which the rationale is wigmore’s theory of the depraved female mind. The non-sexual assault cases involve accusations that were proffered as part of a plan or motive to fabricate charges, which would be independently admissible under the common law rules permitting extrinsic evidence for these purposes. See also John R. Schmertz, Jr., The First Decade Under Article VI of the Federal Rules of Evidence: Some Suggested Amendments to Fill Gaps and Cure Confusion, 30 VILL. L. REV. 1367, 1432 (1985) (stating that extrinsic evidence of bias traditionally has been allowed under the common law, and 608(b) does not bar it). Thus, to the extent the commentator suggests that sexual assault cases are treated the same as other cases involving prior false accusations made by a witness, or that the rules of relevance relating to “similar transactions” justify the admission of such evidence, the comment simply adds to the confusion. See 22 Charles A. Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5170, at 112-13 (1978) (similar transactions have been confused with the related evidentiary doctrines of character and habit, leaving the precedent in a “state of hopeless disorder”).
of the myth that women will lie about rape. In reality, rape is multifarious. As in the Cox case, the fact that a complaining witness previously lied about the extent of her consent to sexual activity with her boyfriend has no bearing on whether she is lying about the identity of a subsequent rapist with whom she had no relationship. Whether a prior lie about rape was made under circumstances that are relevant to the subsequent crime cannot be answered by examining superficial, external similarities. The analysis of probative value required by 608(b) for the admission of other character evidence should not be brushed aside simply because the crime involved is rape.

C. The Focus on Falsity

Another problem resulting from the equation of falsity with probative value is that courts must determine both that the accusations were made and that they were false. The procedure to determine falsity that has been developed by decisional law and by statute is one in which the court holds an in camera hearing prior to trial to rule on admissibility. At first blush, the in camera hearing may be viewed as protection for the complaining party. The witness cannot be confronted with the prior accusation for the first time during the trial without time to prepare a response. The pretrial hearing also requires more proof to ask questions about the prior allegations than the "good faith" basis demanded of the questioner under 608(b). Nevertheless, the in camera hearing poses a number of problems.

The first problem is the degree of certainty courts should require in the pretrial hearing in determining whether the evidence of prior false accusations should be admissible at trial. This question is more important than other pretrial admissibility questions because falsity has been equated with probative value. The evidence will be admitted if the court finds that the accusation was false. Moreover, a collateral inquiry will be permitted unless the witness admits the conduct. This suggests that the burden of proof should be high, otherwise highly prejudicial evidence that courts agree may be totally irrelevant if falsity is not shown will be admitted.

Courts have answered the burden of proof question differently. Some courts have used standards such as proof by a preponderance of the evidence and "reasonable probability of falsity." Other courts inquire whether the allegations are "demonstrably false," or "proven false." At least one federal court...
has held that under the Federal Rules of Evidence, pretrial admissibility is judged by a preponderance of the evidence standard, the same standard governing other questions requiring the court to determine facts to support admissibility.\textsuperscript{163}

The term "proven false" implies that the courts will accept a judgment of acquittal, or even dismissals of the charges, as sufficient evidence of falsity; however, the few decisions that have chosen and applied a burden of proof to the facts of a particular case have not accepted that proposition. Prior allegations that were the subject of a legal proceeding, such as a criminal prosecution for sexual assault, have not been held to establish that the charges were false even though the prosecution was not successful.\textsuperscript{164} The mere fact of acquittal establishes only that the prosecution did not convince the jury of the defendant's guilt beyond a reasonable doubt.\textsuperscript{165} Similarly, the prosecution's failure to dismiss or drop a charge is not evidence that the charges were false.\textsuperscript{166} The same analysis applies to the results of civil proceedings for sexual harassment.\textsuperscript{167}

The second problem is that the pretrial hearing can be as lengthy as the trial itself. For example, in \textit{Smith v. State}, the defendant called nine witnesses in a pretrial hearing to testify about prior allegations of sexual assault made by the complaining witness, a minor.\textsuperscript{168} Five testified that they had "heard" that the victim made similar allegations against them and that they were innocent of any wrongdoing.\textsuperscript{169} Another witness testified that he had also "heard" about similar allegations against him but that the victim had recanted in his presence; he also denied wrongdoing.\textsuperscript{170} Two other witnesses testified to the complaining witness's recantation of sexual allegations against people other than Smith and a ninth witness testified that she had "heard" similar


\textsuperscript{165} Schwartzmiller, 685 P.2d at 833.

\textsuperscript{166} Alexander, 452 N.E.2d at 595 (holding that the fact that prior charge was dismissed after a finding of no probable cause did not show that it was false). Indeed, the failure of police and prosecutors to pursue rape charges for reasons of gender bias has been the subject of controversy for many years. See ESTRICH, supra note 2, at 16 (simple rape not pursued because it does not fit the stereotype). F.B.I. crime statistics show that rape has the highest percentage of "unfounded" complaints. 1993 FBI UNIFORM CRIME REPORTS FOR THE UNITED STATES 24. Of all attempted rapes, only 52.5% were actually reported to the police. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES 102 (1992).

\textsuperscript{167} See, e.g., State v. Goodnow, 649 A.2d 752, 754 (Vt. 1994).

\textsuperscript{168} 377 S.E.2d 158, 159 (Ga. 1989).

\textsuperscript{169} \textit{Id}.

\textsuperscript{170} \textit{Id}.
recantations. The trial court refused to admit the evidence because it found that Georgia's rape shield law barred its admission. The court permitted several defense witnesses to testify regarding the victim's alleged lack of truthfulness. Nevertheless, the appellate court reversed the conviction, holding that specific evidence of the complaining witness's propensity to make false charges was admissible if the trial court found that it was reasonably probable that the allegations were false.

The pretrial hearing creates other problems similar to those associated with the collateral excursion at trial. Complaining witnesses may be deterred from coming forward if they know that their "past" is at issue; the exploration of the lie may involve explanations of the witness's sexual past. If the complaining witness testifies, the defendant has yet another opportunity to question her before trial, with the hope that she will make inconsistent statements or will be too intimidated to continue. Furthermore, the focus of the case is shifted back to the innocence of the complaining witness, requiring a virtue that is not demanded of other witnesses. If the judge then decides that all of the evidence may be presented to the jury, both prosecutor and witness may decide not to proceed.

The pretrial hearing has become a feature of rape shield legislation to protect the complaining witness and to allow the court to consider evidence that may be excepted by those statutes. Judges naturally turn to the pretrial hearing as a means to prevent the admission of irrelevant and damaging evidence. This approach is flawed, however, because it is based on the faulty premise that falsity equals probative value, placing greater emphasis on falsity than would ordinarily be the case under Rule 608(b).

Under Rule 608(b), a court assesses probative value and considers whether the prior allegation actually occurred and whether admission of the allegations is too prejudicial. No standard of proof is specified in 608(b) to determine the admissibility of what are usually uncharged bad acts, but pretrial hearings over this issue are avoided. Again, the stakes are limited to cross-examination, so that less judicial time and emphasis are placed on whether the accusation will be admitted. Understanding that the judicial viewpoint may be more

171. Id.
172. Id.
173. Id.
174. Id. at 160. Interestingly, the court did not comment on the obvious hearsay nature of the evidence, and the fact that, apparently, no complaints were made to any official authority or in any official proceeding. Under these circumstances, the evidence was appropriately handled as general reputation evidence. If it was based on more than appears in the opinion, the number of accusations could support a pattern of false charging that would be admissible regardless of any restrictions on specific acts.
175. But see Berger, supra note 10 at 72-73 (expressing concern that rape shield legislation at pretrial hearings will unfairly require defendants to disclose their defense).
176. WRIGHT & GRAHAM, supra note 59, § 5391. But see FED. R. EVID. 412(c) (revised rule no longer permits witnesses at pretrial hearing).
177. See supra Part II.B.
important than the rule applied, it is more sensible to consider prior false accusations of rape under 608(b), which would lower the stakes of admitting prior allegations by restricting the inquiry into them to cross-examination. The necessity of holding a pretrial hearing would be eliminated. Moreover, a 608(b) analysis would offer two opportunities to exclude the evidence. It may be excluded because of limited probative value, or it may be excluded under Rule 403, as tending to cause inferential errors by the jury.

In fact, there is a trend toward excluding prior false accusations on essentially the same theory as 608(b) even in jurisdictions that continue to treat prior false accusations as a separate type of character evidence. The focus is still on falsity, but the defendant's proffer seems to be subjected to stricter scrutiny. As a consequence, evidence is screened at the proffer stage. On appeal, courts may state the special rule for sexual assault cases, accept the admissibility of extrinsic evidence, and even voice concern over the Confrontation Clause, but they ultimately uphold the trial judge's refusal to admit the evidence. In reality, evidence is being excluded for failure to show falsity that should have been excluded for lack of probative value. The difference is that there is no restriction on the collateral inquiry if the evidence is admitted.

178. See Althouse, Thelma and Louise, supra note 79, at 761 ("The reasoning processes of the human mind do not come from rules of evidence."); Althouse, The Lying Woman, supra note 35, at 924 ("Assessments of relevance depend on preexisting belief systems.").

179. See Gold, supra note 81, at 68; infra notes 199-200 and accompanying text.

180. See, e.g., People v. Williams, 477 N.W.2d 877, 879-80 (Mich. Ct. App. 1991) (although prior false allegations of rape bear on victim's credibility, defendant was not able to make the requisite offer of proof to justify introduction of evidence); State v. Anderson, 686 P.2d 193, 199-200 (Mont. 1984) (adopts Hulburt rule, and further reason for dismissal of prior allegation of rape victim would not establish falsity and would be highly prejudicial); State v. Kringstad, 353 N.W.2d 302, 311 (N.D. 1984) (failure to pursue rape charge against ex-husband did not indicate charge was false and ex-husband's unsubstantiated testimony was insufficient to establish the falsity of the previous charge); State v. Demos, 619 P.2d 968, 969-70 (Wash. 1980) (en banc) (trial court did not abuse its discretion in denying admission of evidence of two allegedly false prior accusations of rape, the first of which was reported to authorities, but not pursued because no suspects were located and the complaining witness left town, and the second, also not pursued, rested entirely on the polygraph examiner's interpretations of the complaining witness's answers which would not have been admissible evidence).

181. See, e.g., State v. Barber, 766 P.2d 1288, 1290 (Kan. Ct. App. 1989) (accepting rule that extrinsic evidence is constitutionally compelled if witness denies prior false allegations of rape, but upholding trial court's exclusion of prior accusations on grounds that defendant failed to show falsity of three prior accusations); State v. LeClair, 730 P.2d 609, 615 (Or. Ct. App. 1986) (confrontation clause requires that defendant be able to cross-examine complaining witness concerning other allegations 1) if plaintiff has recanted, 2) if defendant demonstrates they are false, or 3) there is "some evidence" that the victim has made prior accusations that were false, unless probative value is substantially outweighed by prejudice, confusion, embarrassment, or delay). In LeClair, there was "some evidence" from which the court might find false allegations in 1981 and 1984. Both incidents failed the balancing test because they were likely to result in significant delay and jury confusion. The probative value of the 1981 incident was also diminished because of its remoteness, the victim's young age at the time, the fact that the only evidence of the accusation was a CSD report quoting the victim's mother, where both the victim and her mother denied that there was any incident, or any accusations made, in 1981. Id.
D. Problems with Character Evidence

Rule 608(b) is already a compromise between competing policies in what has been a controversial area of evidence law: using evidence of specific acts to attack credibility. On one hand, the rule’s purpose is to promote accurate fact-finding, prevent witness harassment, and eliminate the expense and delay resulting from unnecessary inquiry into collateral matters. On the other hand, the rule admits evidence that undercuts each one of those goals to some degree. Both its limited application to acts bearing on a witness’s character for truthfulness and its bar on extrinsic evidence are attempts to balance the jury’s need to have sufficient evidence of credibility with its need to focus primarily on the issues at hand. Completely ignoring the rule leaves judicial discretion unlimited in an area that commentators view as fraught with danger.

The principal danger of character evidence is that it takes on an importance to the jury that may be disproportionate to its actual probative value, thereby prompting an improper decision. Psychological studies show that jurors infer that character evidence can be used to accurately predict behavior, but that this inference itself is doubtful. When rape mythology is added to the questionable proposition that behavior can be predicted by prior acts, the danger increases that the jurors will give disproportionate weight to the character evidence. The admission of such evidence is likely to give vent to the myth of the lying woman/innocent man on the part of the jury. As a result, the jurors may structure their beliefs in accordance with their preconceived ideas, rather than the actual events of the case. These risks are present whether or not extrinsic evidence is allowed, but if the inquiry moves beyond cross-examination, the danger is that they will rise to an unreasonable level.

The tradeoff for the admission of character evidence of truthfulness is that
the inquiry will be limited to cross-examination. 191 The purpose of Rule 608(b) is to avoid lengthy excursions into collateral matters, which over-emphasize the collateral issues, confuse the jury, and waste judicial resources. 192 Obviously, when extrinsic evidence is admitted for the purpose of impeaching the complaining witness's testimony in a rape case, the tradeoff is lost. If the accusation is denied on cross-examination, and the defendant is permitted to introduce additional witnesses to prove the alleged lie, the case becomes a trial-within-a-trial. The witness is once again placed on trial for events in her social, and sometimes sexual, history. Even if the witness admits the conduct, the nature of the evidence is so prejudicial that the state will be forced to produce an explanation of the incident that may involve sexual conduct. 193 Either way the courts are led directly into a conflict with the purpose of rape shield statutes. 194

From the standpoint of assisting the jury, the collateral inquiry has dubious utility. Not only does it pursue evidence that has low probative value, but one commentator suggests that asking the jury to compare the credibility of the impeached witness with that of the impeaching witness does little to help the jury decide who is telling the truth. 195 In the end, each juror is forced to evaluate the witnesses' testimony according to his or her own view of plausibility, which is shaped by the individual juror's own experiences. 196 If the jury's cultural context or experiences are different from the actors, there may be no "plausibility match." 197 If the jury is without touchstones in a rape case, stereotypical scenarios may be supplied to reach a resolution that has a "logical" fit for the jury, but no relation to the facts. 198

191. FED. R. EVID. 608(b). See supra note 43 and accompanying text.
192. WRIGHT & GOLD, supra note 11, § 6118, at 97-102.
193. The evidence is highly prejudicial because it arouses the lying woman/innocent man myth. See supra Part I.D and accompanying text. For examples of the judicial view of the degree of prejudice accompanying such evidence, see People v. Hulburt, 333 P.2d 82, 88 (Cal. Dist. Ct. App. 1958) ("The point does not have to be labored that the chances of the verdict of the jury being correct will definitely be enhanced if the jury has before it the fact that the prosecutrix had, on occasions in the past, made similar charges against the defendant or others which were subsequently denied or proved false."); Cox v. State, 443 A.2d 607, 613 (Md. Ct. Spec. App. 1982) (evidence of prior false allegation "would certainly be 'likely to affect her credibility' in the eyes of the jury").
194. See Althouse, The Lying Woman, supra note 35, at 965-66 (witness impeached by prior false accusations of rape will be forced to establish her credibility); but see Galvin, supra note 9, at 858-63 (arguing that proof of prior false allegations of rape will almost never require introduction of sexual conduct evidence, but to extent they do, rape shield statutes should be amended to allow their admission because of their high probative value). Because rape shield statutes are for the protection of the complaining witness, presumably she could waive the statute if necessary to establish her credibility. Rule 608(b) is no bar to extrinsic rebuttal evidence, subject to Rules 401 and 403. Schmertz, supra note 157, at 1429-30.
195. Uviller, supra note 186, at 781 (discussing the utility of impeachment by contradiction). Using extrinsic evidence to impeach witnesses in rape cases on collateral matters is technically impeachment by contradiction, which is a permissible method of impeachment, but only when it relates to matters in issue. It is not permitted if the issue is collateral. MCCORMICK ON EVIDENCE, supra note 50, § 47, at 110.
196. Uviller, supra note 186, at 783-84.
197. Id.
198. Coombs, supra note 190, at 280-93 (arguing that range of credible stories of rape is narrower than range of true ones, and to be successful at trial, women have to tell stories that fit within range of cultural myths).
Gold argues that, in weighing the probative value of evidence, the judge can reliably predict how the jury will use the evidence. If the jury is likely to make an inferential error by giving the evidence too much weight, or is operating under a bias that distorts reality, the admission of even a single fact may encourage the jury in that direction, and the evidence should be excluded. According to this theory, it may be argued that even cross-examination about a prior false accusation may unduly affect accurate fact finding, but to permit a collateral excursion into the issue would virtually guarantee it.

It is hard to find a justification for the introduction of extrinsic evidence to prove untruthfulness of character. The drafters of Rule 608(b) and the courts that have applied the rule have not specified exceptions in which there is reason to depart from the rule's prohibition on extrinsic evidence. Given the potential for misuse of character evidence in general, and the exacerbation of the problem caused by the inclusion of rape mythology, the compromise inherent in 608(b) should not be abandoned in sexual assault trials.

III.

A perplexing question that remains is whether the abandonment of a gender-biased evidentiary rule and the adoption of a facially neutral rule will solve the problem. A review of the cases involving prior false accusations of rape suggests that judges who cling to rape mythology will find, within their broad discretion to determine probative value, a rationale for the admission of this evidence. This conclusion supports the claim that judges' discretion is so broad that it renders rules meaningless. If this is true, why advocate the rejection of the special rule that has developed in many jurisdictions in favor of existing rules of broad application?

The first step in solving the problem is to eliminate an evidentiary rule that arose out of the irrational fear of false accusation and the general mistrust of women's credibility on sexual matters. The character evidence rules are the logical substitute. They provide an unbiased framework by which a witness's prior false statements may be assessed, whether the witness is testifying in a rape or a robbery. Without these tools, judges cannot solve the evidentiary problems that come before them. Applying the ordinary rules to rape cases may not change the way a biased judge views the evidence, but it may keep neutral judges from being pushed in the wrong direction.

The few courts that have given fair consideration to the probative value of prior false accusations offered for purposes of discerning character have

199. Gold, supra note 81, at 68.
200. This view assumes that the judge will not make the same inferential errors. See Id. at 68-69. Although Gold is referring to an analysis of probative value and prejudice under Rule 403, his arguments on the judicial exercise of discretion apply with equal force to 608(b), not only because the concept is the same, but because 403 may exclude evidence that is admissible under 608(b).
recognized that sexual assault crimes do not present singular problems of proof that must be overcome by unique rules. If such precedent increases, more courts will begin to view this issue like any other prior false statement of a witness. Judges who are guided by myth will be compelled to state reasons why a complaining witness’s propensity to lie in a rape case is stronger than for any other crime. Judges who are not guided by myth, but who are blindly following a substantial and confusing line of precedent, may be persuaded by rational arguments to the contrary.
Marietta Stow, better known as the Vice Presidential running mate of noted attorney Belva Lockwood on the Equal Rights Party ticket in 1884, tirelessly campaigned across the country for probate law reform in the 1870s.