A SECOND RAPE: TESTING VICTIM CREDIBILITY THROUGH PRIOR FALSE ACCUSATIONS

KASSANDRA ALTANTULKHUUR*

The Federal Rules of Evidence ("FRE") govern the introduction of evidence at civil and criminal trials in the United States district courts. The purpose of these rules is to administer proceedings in a manner that is fair to both parties, eliminate expense and delay, and promote truth and justice. However noble the purpose of these rules may be, some rules are incompatible with the interests of those they seek to protect. One such case is FRE 608(b), which carves out a narrow exception to the rule barring specific instances of conduct to prove a witness's character for truthfulness or untruthfulness. Although, on its face, the rule's language is straightforward and seemingly reasonable, it disproportionally hurts the credibility of survivors of sexual assault and domestic violence who have made accusations in the past. Their prior false accusations serve as the predicate "specific instances of conduct," which have then been used to discredit those witnesses as having a character for untruthfulness. Due to the continuing and widespread belief that survivors of sexual assault and domestic violence recant their accusations because they lied, perpetrators of such violence everywhere have increasingly sought to use these recantations or prior accusations to undermine their accuser's credibility. This Note concerns the dilemma that lies therein: how do we reconcile defendants' rights and interests with respecting survivors' experiences and traumas? It argues that Rule 608 of the FRE should be officially amended to require defendants to satisfy a higher burden of proof when they seek to introduce evidence about a prior false accusation. It recommends the adoption of a two-part analysis to govern the admissibility of such evidence to ensure that prejudicial and unreliable information does not serve as yet another barrier preventing survivors from accusing their perpetrators in court.

* J.D. Candidate 2018, University of Illinois College of Law. This Note is dedicated to my family—thank you for your constant sacrifice, support, and love. I would also like to thank Aaron Hsieh, who never took Evidence and would have hated it even if he did, but who endeavored to learn it anyway so that he could give me thoughtful comments and feedback. Thank you to the editors and members of the *University of Illinois Law Review*. Special thanks to Professor Karla Fischer and the women who participated in the Domestic Violence Clinic with me—our time in the clinic truly touched me and ultimately inspired the topic of this Note.

TABLE OF CONTENTS

I. INTRODUCTION 1092
II. BACKGROUND 1095
A. *Variations in Application of FRE 608(b) and Its State Counterparts* 1096
1. *Common Law Excluding Evidence of Prior False Accusations* 1096
2. *Common Law Admitting Evidence of Prior False Accusations* 1097
3. *The Sixth Amendment: Defendants' Rights* 1099
B. *Rape-Shield Laws: Do They Protect Victims' Past Accusations?* 1102
C. *Why These Cases Are Different from Other Cases* 1104
1. *Domestic Violence* 1104
a. Dispelling the Myth: Women as Liars 1105
2. *Syndrome Evidence* 1107
a. Battered Woman Syndrome 1107
b. Rape Trauma Syndrome 1108
III. ANALYSIS 1109
A. *Inadequacies of Common Law Amendment* 1110
B. *Victim Psychology—How to Judge "Falsity"* 1110
1. *Recanting Does Not Mean Lying* 1110
C. *Defendants' Confrontation Clause Rights* 1115
D. *Forty-Eight State Survey of 608(b)* 1116
IV. RECOMMENDATION 1120
V. CONCLUSION 1123
APPENDIX A 1125

I. INTRODUCTION

Imagine a scenario where Sally alleges that John raped her. Imagine the case gets litigated all the way to a federal court. Now imagine that Sally has made a similar accusation in the past against another party but nothing came of it. John would like to introduce extrinsic evidence to prove that Sally's past accusation was false. Pursuant to the Federal Rules of Evidence ("FRE"), John's attorney can question Sally about the incident on cross-examination. But, if Sally denies that she made such a prior accusation, John's attorney must take the answer given. If Sally has a history of making false accusations like this, does it seem fair to withhold this evidence from the fact-finder? Does it *matter* what Sally did in the past? Is there an inference that because she lied in the past, she is lying here, too? The issue seems to hinge on Sally's character for truthfulness, or at least whether she is testifying truthfully in this case.

FRE 601 states that "every person is competent to be a witness unless these rules provide otherwise."[1] A witness can be impeached, however, in a number of ways: prior criminal conviction, prior inconsistent statement, character for truthfulness, and bias or interest.[2] The subject of this Note is FRE 608(b), which addresses a witness's character for truthfulness:

> Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of: (1) the witness; or (2) another witness whose character the witness being cross-examined has testified about. By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.[3]

The only time an attorney can ask questions about *specific instances of conduct* in order to attack a witness's character for *truthfulness* is during cross-examination, and only if those questions are probative of that character.[4] The catch is that extrinsic evidence is not admissible to prove those instances of conduct.[5] But what if a witness, when asked on cross-examination about a particular instance that demonstrates his or her character for untruthfulness, lies or denies the existence of such an instance? There is nothing the crossing attorney can do—she must take the answer given by the witness. Of course, impeachment is always an option. The crossing attorney may introduce prior inconsistent statements the witness made, but the attorney cannot use those statements to prove that the witness truly does have a character for untruthfulness. The attorney can only use them to show that the witness made inconsistent statements. In such cases, FRE 402 and 403 govern, not 608(b).[6]

FRE 608(b) becomes especially relevant in domestic violence and sexual assault cases. Going back to the hypothetical of Sally and John, we are confronted with hard questions. Should courts allow John to bring up Sally's past?

1. FED. R. EVID. 601 ("Every person is competent to be a witness unless these rules provide otherwise. But in a civil case, state law governs the witness's competency regarding a claim or defense for which state law supplies the rule of decision.").

2. *See* FED. R. EVID. 608, 609, 613.

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

4. FED. R. EVID. 608(b) advisory committee's notes on proposed rules.

5. FED. R. EVID. 608(b) advisory committee's notes to 2003 amendment ("The Rule has been amended to clarify that the absolute prohibition on extrinsic evidence applies only when the sole reason for proffering that evidence is to attack or support the witness' character for truthfulness.").

6. FED. R. EVID. 608(b) advisory committee's notes to 2003 amendment ("By limiting the application of the Rule to proof of a witness' character for truthfulness, the amendment leaves the admissibility of extrinsic evidence offered for other grounds of impeachment (such as contradiction, prior inconsistent statement, bias and mental capacity) to Rules 402 and 403."); *see, e.g.*, United States v. Winchenbach, 197 F.3d 548, 559 (1st Cir. 1999) (stating that admissibility of a prior inconsistent statement offered for impeachment is governed by FRE 402 and 403, not FRE 608(b)); United States v. Lindemann, 85 F.3d 1232, 1243 (7th Cir. 1996) (stating that admissibility of extrinsic evidence of bias is governed by FRE 402 and 403); United States v. Tarantino, 846 F.2d 1384, 1406 (D.C. Cir. 1988) (stating that admissibility of extrinsic evidence offered to contradict a witness is governed by FRE 402 and 403).

Are past victim accusations protected under rape-shield laws? Is it fair to withhold this information, even if it is detrimental to the defendant? Can a jury reasonably determine the guilt or innocence of a party without all the facts? Must Sally be punished in this case for her past false accusation? How does a party demonstrate that a past accusation was indeed false? Morality aside, the FRE are not all that helpful in resolving these issues.

When answering the above questions, one thing needs to be determined with certainty: how do we know that a prior accusation is "false"? When a woman recants her accusation of a sexual assault, there is an implicit assumption that she recanted because the accusation was false.[7] But, an in-depth look at the dynamics of domestic violence and the psychology behind syndrome evidence suggest that these assumptions may not be true. In fact, in an overwhelming number of cases, survivors recant not because they made up the accusation in the first place, but rather because of various other reasons: threats made by the perpetrator, denial, shame, embarrassment, self-blame, not wanting to relive the trauma, and avoiding a lengthy trial or public exposure.[8] Unfortunately, there is continuing widespread belief that sexual assault victims lie about rape, which contributes to the need to test victim credibility.[9] As a result, perpetrators are increasingly seeking to use such evidence of recantation as evidence of prior false accusations to undermine their accuser's credibility.

How can we reconcile defendants' interests in confronting their accusers and questioning their credibility with respecting survivors' experiences and making sure the fact-finder understands how dynamics in domestic violence, sexual assault, and child abuse cases may have led to so-called prior false accusations? How can Rule 608(b) be amended to reflect this compromise? These questions provide the subject of this Note.

Part II of this Note is a background of the relevant FRE, state rules of evidence, and diverging case law. Although the subject of this Note is Rule 608(b) and how it should be amended, state counterparts of this rule are also discussed here. Part II also contains information about the current psychology regarding domestic violence and sexual assault cases and how that dynamic affects victims' testimonies and actions in a legal proceeding. Part III analyzes the reasoning behind 608(b) and how its goals are incompatible with the interests of the victims it seeks to protect. It also examines a survey of various amendments states have made prior to adopting Rule 608(b) in order to evaluate the different approaches states have taken to balance the rights of victims and defendants. This survey is contained in its entirety in Appendix A. Part IV outlines one approach that courts could take to deal with this problem—by officially amending the FRE to impose a uniform rule requiring defendants to satisfy a higher bur-

7. Brett Erin Applegate, *Prior (False?) Accusations: Reforming Rape Shields to Reflect the Dynamics of Sexual Assault*, 17 LEWIS & CLARK L. REV. 899, 899 (2013).

8. *Id.*; Joanne Belknap, *Rape: Too Hard to Report and Too Easy to Discredit Victims*, 16 VIOLENCE AGAINST WOMEN 1335, 1339 (2010) (finding that victims may "recant when they encounter skepticism, disbelief, or blame or because they find their disclosure makes matters worse or more dangerous for them").

9. Philip N.S. Rumney, *False Allegations of Rape*, 65 CAMBRIDGE L.J. 128, 128–30 (2006).

den of proof when they seek to introduce evidence about a prior false accusation. Included in this Part is a proposal for what that burden of proof should be and how courts should apply that rule to achieve optimal results. Part V provides a brief conclusion.

A brief note on terminology: this Note will often refer to "prior false accusations." This is in no way meant to pass judgment regarding the truth or falsity of an accusation. Instead, it is a term of art used in case law, statutory law, and commentary. In addition, this Note uses the pronoun "she" when referring to survivors of domestic violence or sexual assault and the pronoun "he" when referring to perpetrators of domestic violence or sexual assault. This is not being used to imply that men cannot be victims of domestic violence or sexual assault or that women cannot be perpetrators of it. Instead, the designated pronouns are used to reflect the overwhelming statistical data showing that most survivors are female and most perpetrators are male.[10] To avoid confusion, when this Note is referring specifically to the federal rules, it will use the term "FRE," and it will use the term "rule" when referring to the state rules.

II. BACKGROUND

To tackle this issue, it is illuminating to understand why the judiciary adopted FRE 608(b), specifically its ban on the introduction of extrinsic evidence. The rule was adopted in part to make trials more efficient.[11] The "notion underlying the rule is that while certain prior good or bad acts of a witness may constitute character evidence bearing on veracity, they are not evidence of enough force to justify the detour of extrinsic proof."[12] Thus, FRE 608(b) avoids "mini-trials on peripherally related or irrelevant matters."[13] But the reality is that most courts do not adhere to this strict ban on extrinsic evidence, and unfortunately, as a result, most cases do turn into mini-trials on peripheral matters.[14] Although FRE 402 prohibits the amendment of the FRE by common law,[15] it happens quite often.[16] The need for formal amendment of the FRE can

10. *See, e.g.*, *Statistics About Sexul Violence*, NAT'L SEXUAL VIOLENCE RES. CTR., https://www.nsvrc.org/sites/default/files/2015-01/publications_nsvrc_factsheet_media-packet_statistics-about-sexual-violence_0.pdf (last visited Apr. 10, 2018); *Scope of the Problem: Statistics*, RAINN, https://www.rainn.org/statistics/scope-problem (last visited Apr. 10, 2018).

11. Gerald L. Shargel, *Federal Evidence Rule 608(b): Gateway to the Minefield of Witness Preparation*, 76 FORDHAM L. REV. 1263, 1263 (2008).

12. United States v. Perez-Perez, 72 F.3d 224, 227 (1st Cir. 1995).

13. United States v. Martz, 964 F.2d 787, 789 (8th Cir. 1992); *see also* Daniel D. Blinka, *Ethical Firewalls, Limited Admissibility, and Rule 703*, 76 FORDHAM L. REV. 1229, 1242 (2007) (suggesting that limiting cross-examination in this way may also prevent the jury from drawing unfair and prejudicial inferences).

14. *See* State v. Walton, 715 N.E.2d 824, 828 (Ind. 1999); State v. Guenther, 854 A.2d 308, 323–26 (N.J. 2004).

15. FED. R. EVID. 402 (stating in the advisory committee's notes that although the text of the rule does not explicitly prohibit such amendment, it does state that only relevant evidence will be admissible unless specified otherwise by the United States Constitution, a federal statute, these rules, or other rules prescribed by the Supreme Court).

16. *See, e.g.*, State v. Smith, 743 So. 2d 199, 203–04 (La. 1999).

be starkly shown through the different outcomes reached by the courts around the country.[17]

A. Variations in Application of FRE 608(b) and Its State Counterparts

States that chose to adopt FRE 608 have either adopted it as it was written or have amended it to reflect prior case law.[18] States that have adopted substantially the same or similar versions of this rule have interpreted it in different ways. Even federal courts have not uniformly interpreted or applied FRE 608. Because of the various versions of rule 608 (in federal and state courts) and the different ways these courts have interpreted this rule, there is substantial divergence in common law and established rules regarding if and when evidence of prior false accusations is admissible. Sometimes, the decision comes down to a constitutional issue or the scope of other evidentiary rules. This Section is an overview of the various common law decisions that have interpreted rule 608.

1. Common Law Excluding Evidence of Prior False Accusations

Various federal courts have held that evidence of prior false accusations is inadmissible where the defendant could not sufficiently prove that those accusations were false,[19] where the defendant relied on attenuated evidence to prove falsity,[20] and where the court considered rape-shield laws to govern the admissibility of such material.[21] Courts have also considered the role that the constitutional rights of defendants has in this decision-making process.[22]

There are instances where certain states have adopted rule 608 provisions identical to the federal rule and have come to the same conclusions that the above federal courts have. For example, in *Williams v. State*, the defendant was convicted of sexual misconduct with a minor and appealed the trial court's exclusion of testimony regarding a prior accusation of sexual misconduct made by the victim.[23] The Court of Appeals of Indiana affirmed the trial court's ruling.[24] The court held that the "trial court's restriction of cross-examination of [the] victim and her father concerning alleged prior false accusation was not [a] manifest abuse of discretion" because the victim never admitted to making a

17. It is important to note that the cases analyzed in this Section are state court cases; therefore they are not applying the *federal* rules of evidence but *state* equivalents of 608(b).

18. *See infra* Appendix A.

19. Campbell v. Poole, 555 F. Supp. 2d 345, 375 (W.D.N.Y. 2008) (finding that "the only 'evidence' that [petitioner] adduced to prove that the allegations were false was the fact that he was awarded joint custody of his daughter. [Petitioner] clearly failed to present any competent evidence to prove the falsity of [victim's] alleged prior accusations . . . .").

20. United States v. Crow Eagle, 705 F.3d 325, 329 (8th Cir. 2013) (finding that defendant's reliance on the long time-span between the alleged assaults and reports, as well as the lack of prosecution, was not "firm proof" of the falsity of past accusations).

21. United States v. Withorn, 204 F.3d 790, 795 (8th Cir. 2000) (holding that the victim's "capability to fabricate a story" was not a recognized exception to Rule 412).

22. See *infra* Section II.A.3 for further discussion on the Confrontation Clause.

23. 779 N.E.2d 610, 611 (Ind. Ct. App. 2002).

24. *Id.*

false accusation, and "testimony submitted as [an] offer of proof did not constitute [a] demonstrably false accusation."[25] The court held that a mere inference that a prior accusation was false was not enough to prove that the trial court abused its discretion by excluding such unreliable information.[26] It should be noted that Indiana has adopted the 608(b)-equivalent of the federal rules.[27]

Oregon went a step further and prohibited not only the introduction of extrinsic evidence but also cross-examination into specific instances of conduct, even if probative of character for truthfulness.[28] In *State v. LeClair*, the defendant appealed his conviction for attempted rape in the first degree.[29] He sought to cross-examine and introduce evidence that the victim allegedly made a false rape accusation four years prior to his conviction.[30] The court cited the Oregon Evidence Code and held that even if the prior false accusation had "some probative value," it was correctly excluded.[31]

2. Common Law Admitting Evidence of Prior False Accusations

Other courts have ruled the other way. For example, in *Averilla v. Lopez*, a federal district court held that precluding information about prior false accusations would deprive the jury of its ability to evaluate "[the victim's] accusations against Petitioner in the full context of a pattern of false accusations and a possible underlying motive."[32] In that case, the court determined that the victim's prior accusations were "factually very similar" to those against the petitioner, and that there existed a "reasonable probability" that the prior allegations were false.[33]

Cases in state courts have followed a similar argument—that under special circumstances, evidence which might otherwise be unreliable should be admitted. In *State v. LeClair*, the court denied the defendant an opportunity to cross-examine his victim or to introduce extrinsic evidence regarding prior false accusations.[34] The Oregon Court of Appeals ruled that despite the clear prohibitions of the Oregon Evidence Code, considerations of the defendant's Confrontation Clause rights required that in certain cases, such prohibited information be admitted into evidence.[35] The court held that the defendant should be able to cross-examine the complaining witness concerning other accusations she had made if:

> 1) she has recanted them; 2) the defendant demonstrated to the court that those accusations were false; or 3) there is some evidence that the victim

25. *Id.* at 610, 613.
26. *Id.* at 614.
27. IND. R. EVID. 608(b) (barring extrinsic evidence).
28. OR. REV. STAT. ANN. § 40.350 (West 2015).
29. 730 P.2d 609, 611 (Or. Ct. App. 1986).
30. *Id.*
31. *Id.* at 614.
32. 862 F. Supp. 2d 987, 995 (N.D. Cal. 2012).
33. *Id.* at 997.
34. *LeClair*, 730 P.2d at 616.
35. *Id.*

> has made prior accusations that were false, unless the probative value of the evidence which the defendant seeks to elicit on the cross-examination (including the probability that false accusations were in fact made) is substantially outweighed by the risk of prejudice, confusion, embarrassment or delay.[36]

Although the facts of *this* case ensured the expected outcome, the court sanctioned subsequent decisions, guaranteeing divergence from the black-letter law of evidence based on these decisions. Other states have followed this trend. In *State v. Guenther*, the defendant was convicted of aggravated sexual assault of a child.[37] At trial, the court denied him opportunity to present evidence that his stepdaughter (the victim) had made a prior false accusation against their neighbor.[38] On appeal, the New Jersey Supreme Court held that the excluded evidence was admissible to impeach the victim's credibility.[39] The New Jersey Supreme Court carved out a narrow exception to New Jersey Rule of Evidence 608(b) because the defendant had "the right to show that a victim-witness has made a prior false criminal accusation for the purpose of challenging that witness's credibility."[40] By carving out this common law exception, the New Jersey Supreme Court explicitly disregarded the literal interpretation of the rules of evidence.[41] But the court placed a safeguard into its ruling—there must first be a pre-trial hearing where the court must decide by a preponderance of the evidence whether the defendant has proven that a "prior accusation charging criminal conduct was made by the victim-witness and whether that accusation was false."[42] When making that determination, the court must consider factors such as

> the similarity of the prior false criminal accusation to the crime charged, the proximity of the prior false accusation to the allegation that is the basis of the crime charged and the number of witnesses, the items of extrinsic evidence, and the amount of time required for presentation of the issue at trial.[43]

The New Jersey Supreme Court's ruling is actually somewhat desirable because it places an initial burden on the defendant to present the probative value of the evidence, while at the same time not setting an exceedingly high bar.[44]

36. *Id.*

37. 856 A.2d 308, 309 (N.J. 2004).

38. *Id.*

39. *Id.* at 325.

40. *Id.* at 323.

41. *See id.*

42. *Id.* at 324.

43. *Id.* (warning against the danger that introduction of this type of evidence might lead to mini trials on the victim's credibility). The court stated:

> If the court, pursuant to its gate-keeping role, determines that evidence of the prior false accusation is admissible, the court has the discretion to limit the number of witnesses who will testify concerning the matter at trial. The court must ensure that testimony on the subject does not become a second trial, eclipsing the trial of the crimes charged.

Id.

44. *Id.*

In 2006, two years after *Guenther*, the New Jersey Rules of Evidence were amended to explicitly incorporate this exception:

> [T]he credibility of a witness in a criminal case may be attacked by evidence that the witness made a prior false accusation against any person of a crime similar to the crime with which defendant is charged if the judge preliminarily determines, by a hearing pursuant to Rule 104(a), that the witness knowingly made the prior false accusation.[45]

Other courts have implicated the rape-shield rule,[46] holding that it does not bar evidence of prior false accusations of rape by the complaining witness because that is not considered to be a part of his or her "prior sexual conduct."[47] The rape-shield laws and the protections they offer in situations of prior false accusations will be analyzed later in this Note.[48]

3. The Sixth Amendment: Defendants' Rights

The United States Supreme Court first recognized the doctrine of a "right to present a defense" in *Washington v. Texas*[49] as part of the Compulsory Process Clause, and the doctrine expanded over the next few decades to include the right to present a defense through witnesses.[50] The doctrine entitles a criminal defendant to certain rights:

> [A] defendant [has the right] to discover the existence of potential witnesses; to put them on the stand; to have their testimony believed; to have their testimony admitted into evidence; to compel witnesses to testify over claims of privilege; and to enjoy an over-all fair balance of ad-

45. N.J. R. EVID. 608(b). The comments explain how this rule was amended to reflect present practices (following *Guenther*):

> [A]lthough this rule follows the formulation of Fed. R. Evid. 608, it retains present New Jersey practice by rejecting the provision of paragraph (b) of the federal rule which permits limited admissibility of specific instances of conduct on cross-examination. N.J. Evid. R. 22(d), followed by this rule, prohibited 'specific instances of conduct' proof in any form if introduced to prove a trait of character. Thus, this rule is consistent in philosophy and effect with the choice made in respect of Rule 405(a), namely adopting the state rather than the federal analogue. It is the Committee's view that Rule 607 affords sufficient scope for the effective impeachment of credibility.

Id.

46. FED. R. EVID. 412 ("The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct: (1) evidence offered to prove that a victim engaged in other sexual behavior; or (2) evidence offered to prove a victim's sexual predisposition."). But, there are several exceptions in both criminal and civil cases. *Id.*

47. State v. Walton, 715 N.E.2d 824, 826 (Ind. 1999) (holding that rule 412 is "designed only to preclude evidence of a complaining witness's prior sexual conduct"). The court stated:

> Evidence of prior false accusations of rape made by a complaining witness does not constitute 'prior sexual conduct' for rape shield purposes. In presenting such evidence, the defendant is not probing the complaining witness's sexual history. Rather, the defendant seeks to prove for impeachment purposes that the complaining witness has previously made false accusations of rape. Viewed in this light, such evidence is more properly understood as verbal conduct, not sexual conduct.

Id.

48. *See infra* Section II.B.

49. 388 U.S. 14, 19 (1967).

50. *See* MARK J. MAHONEY, THE RIGHT TO PRESENT A DEFENSE 11 (2011), http://www.harringtonmahoney.com/content/Publications/Mahoney%20-%20Right%20to%20Present%20a%20Defense.pdf.

> vantage with the prosecution with respect to the presentation of witnesses.[51]

The Supreme Court further expanded the doctrine in subsequent cases.[52] But does this rather broad right entitle a defendant to compel testimony about a prior false accusation made by a victim? In *Nevada v. Jackson*,[53] the U.S. Supreme Court held that a defendant's right to present a defense was not violated by the state trial court when it excluded evidence of a victim's prior accusations of sexual assault during trial.[54]

Although the question of whether a defendant's Confrontation Clause rights are violated in such instances has not been decided by the U.S. Supreme Court, there is a circuit split on this issue. The Second,[55] Fourth,[56] Sixth,[57] Eighth,[58] and Ninth Circuits[59] have held that the lower courts' decisions to preclude defendants from cross-examining complaining witnesses about prior false accusations (either against those particular defendants or against third-parties) did not violate the defendants' Confrontation Clause rights or their rights to present a defense.[60] Depending on the jurisdiction, courts have considered the following factors when deciding whether exclusion of cross-examination regarding prior false accusations violates the Confrontation Clause: whether the material is for general credibility impeachment or to show specific "bias" or

51. Peter Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 120–21 (1974) (footnotes omitted).

52. *See, e.g.*, Crane v. Kentucky, 476 U.S. 683, 690 (1986); David v. Alaska, 415 U.S. 308, 320–21 (1974); Chambers v. Mississippi, 410 U.S. 284, 302–03 (1973).

53. 569 U.S. 505 (2013).

54. *Id.*

55. United States v. Crowley, 318 F.3d 401, 417–18 (2d Cir. 2003) (holding that preclusion of cross-examination of the victim did not violate the Confrontation Clause, *even though* they were relevant to the victim's credibility and the defendant had a "good faith basis for proposed questioning").

56. Quinn v. Hayes, 234 F.3d 837, 852 (4th Cir. 2000). The Court of Appeals took up the issue of whether the West Virginia Supreme Court's use of the West Virginia rape-shield law to limit petitioner's cross-examination was an "unreasonable application of Supreme Court Confrontation Clause precedent. *Id.* at 848. The court ultimately held that "state procedural and evidentiary rules control the presentation of evidence and do not offend a defendant's Sixth Amendment Confrontation Clause right." *Id.*

57. *E.g.*, Fuller v. Woods, 528 F. App'x 566, 571 (6th Cir. 2013) (distinguishing between material intended for general impeachment and material that is "relevant to the 'complaining witness' bias or 'ulterior motive'"); Piscopo v. Michigan, 479 F. App'x 698, 704–05 (6th Cir. 2012); Latimer v. Burt, 98 F. App'x 427, 431 (6th Cir. 2004) (upholding the trial court's decision to prohibit defendant from questioning victim regarding prior false accusations, where the defendant's "only viable theory of admissibility [was] that because the witnesses lied once, they would do so again"); Boggs v. Collins, 226 F.3d 728, 745 (6th Cir. 2000).

58. United States v. Frederick, 683 F.3d 913 (8th Cir. 2012) (holding that evidence of prior false accusation was "too attenuated to provide more than minimal probative value," as evidence was inconclusive as to falsity of prior accusations); United States v. Tail, 459 F.3d 854, 861 (8th Cir. 2006) (holding that prior accusation was not sufficiently similar).

59. Morales v. Terhune, 61 F. App'x 335, 336 (9th Cir. 2003) (precluding evidence of prior false accusation where "there was no evidence that accusations were false," and "[the] accusations [were not] necessary for defense counsel to show victim's motive to lie . . ."); Hughes v. Raines, 641 F.2d 790, 793 (9th Cir. 1981).

60. *See Boggs*, 226 F.3d at 743 (stating that "[r]ules excluding evidence 'do not abridge an accused's right to present a defense so long as they are not "arbitrary" or "disproportionate to the purpose they are designed to serve."'") (quoting Rock v. Arkansas, 483 U.S. 44, 56 (1987)).

"ulterior motive" of the witness,[61] the scope of rape-shield law,[62] the similarity between the prior and current accusation,[63] the time elapsed,[64] the conclusiveness with which the defendant can show the falsity of the prior accusation,[65] the admissibility of extrinsic evidence to prove the prior false accusation,[66] and the strength of other evidence the prosecution presents.[67]

State courts have ruled similarly in their analyses of whether prohibiting testimony of prior false accusations infringed on a defendant's Confrontation Clause rights. For example, in *State v. Wyrick*, the defendant's right to meaningful cross-examination, as guaranteed by the Confrontation Clause, was implicated when the defendant tried to introduce evidence that the complaining witness made a prior false rape accusation.[68] The Tennessee Court of Criminal Appeals acknowledged that there are few rights more fundamental than that of an accused in presenting witnesses in his own defense, but at times these rights must yield to "legitimate interests in the criminal trial process," such as the "established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence."[69]

In fact, this balancing of interests between established rules meant to ensure reliability and fairness and a defendant's right to present a meaningful defense seems to be at the heart of this issue. After weighing these competing interests against each other, other courts of appeals have held that preclusion of testimony regarding victims' prior false accusations can violate a defendant's Confrontation Clause rights. The First,[70] Seventh,[71] and Eleventh Circuits[72]

61. *Latimer*, 98 F. App'x at 431 (holding that the trial court did not violate the defendant's right to question the victim regarding prior false statements when there was no showing that the victim had "bias, motive, or prejudice"); *see* Davis v. Alaska, 415 U.S. 308, 316–17 (1974).

62. *See* Quinn v. Haynes, 234 F.3d 837, 848–49 (4th Cir. 2000).

63. *See* Piscopo v. Michigan, 479 F. App'x 698, 703 (6th Cir. 2012) (holding that where the victim's alleged prior false accusation occurred decades earlier and allegations were "markedly different from those made against [petitioner]," the trial court's refusal to permit cross-examination regarding the incident was not a violation of defendant's rights); *Tail*, 459 F.3d at 859–60 (holding that, *inter alia,* where prior accusation was not "sufficiently similar," exclusion of such evidence was not a violation of defendant's rights); White v. Coplan, 399 F.3d 18 (1st Cir. 2005) (holding that the petitioner was entitled to cross examine victims regarding their prior false accusations when, *inter alia*, the past accusations bore a close resemblance to witnesses' testimony about petitioner's assault).

64. United States v. Frederick, 683 F.3d 913, 919–20 (8th Cir. 2012).

65. *Id.* at 918.

66. United States v. Crowley, 318 F.3d 401, 418 (2d Cir. 2003) (reasoning that "*voir dire* examination established [that the victim] would deny making false accusations . . . cross-examination before the jury would have produced little of probative value" and "prejudicial impact of engendering speculation about the subject outweighed the minimal probative value of permitting the jury to evaluate [the victim's] demeanor during question and answer"). Since FRE 608(b) prohibits introduction of extrinsic evidence, what is the point of confronting a witness with prior false accusations during cross examination? Surely, the witness will deny it. Now, the jury is confused and witness credibility may be damaged for no good reason. This is exactly *Crowley*'s point.

67. *See generally Coplan*, 399 F.3d. 18.

68. 62 S.W.3d 751, 770 (Tenn. Ct. App. 2001).

69. *Id.*; *see* Chambers v. Mississippi, 410 U.S. 284, 302 (1973).

70. *Coplan*, 399 F.3d at 18, 19 (holding that state court's finding that prohibition of petitioner to cross-examine victim about prior false accusations against other individuals did not violate the Confrontation Clause was an "unreasonable application of clearly established right to confront adverse witnesses . . . .").

have found exclusion of such evidence to be a violation of the Confrontation Clause. These courts seem to believe this was an issue of weight, not admissibility—it was up to the jury to weigh each witness's credibility and assess other evidence in light of that.[73] Once again, it becomes clear that witness credibility, specifically *victim* credibility, seems to be at the heart of this issue.

B. Rape-Shield Laws: Do They Protect Victims' Past Accusations?

Federal and state rape-shield laws may be particularly relevant to this issue. FRE 412 was enacted to prohibit the admissibility of evidence regarding a victim's past sexual history or predisposition in cases involving sexual misconduct so that the victim is protected from "invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the fact-finding process."[74] The rule was also adopted so that victims—who otherwise might not have come forward because of the possibility that their sexual history would be explored at length—now may be able to do so with little to fear.[75] But FRE 412 is not absolute—there are three exceptions for when such evidence may be admissible in a criminal case:

> 1) [e]vidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence; 2) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and 3) evidence whose exclusion would violate the defendant's constitutional rights.[76]

Given these exceptions, the question then becomes: are prior accusations or charges by complaining witnesses considered to be a part of their sexual history and thus protected by FRE 412?

---

71. Martin v. Foster, 656 F. App'x 258, 262 (7th Cir. 2016) (distinguishing this case from *Redmond* and *Sussman* because the falsity of this victim's prior accusation had not been sufficiently established and there was only a police officer's opinion that the victim was lying); Sussman v. Jenkins, 636 F.3d 329, 358 (7th Cir. 2011) (holding that exclusion of evidence that the victim had previously falsely accused his father of sexual abuse would have violated Confrontation Clause); Redmond v. Kingston, 240 F.3d 590 (7th Cir. 2001) (reversing the district court's holding that despite the fact that Wisconsin's rape-shield law has an exception for a prior false charge of sexual assault, the victim's prior accusation did not have "sufficient probative value to outweigh its inflammatory and prejudicial nature . . . .").

72. Sec'y, Fla. Dep't of Corr. v. Baker, 406 F. App'x 416, 421 (11th Cir. 2010) (stressing the importance of the victim's credibility).

73. *See Coplan*, 399 F.3d at 25. The court stated:

> The ability to ask a witness about discrediting prior events—always assuming a good faith basis for the question—is worth a great deal. Imagine if [petitioner] had been allowed to question the [victims] about their prior accusations, establish their similarity, and inquire into supposed recantations. The jury, hearing the questions and listening to the replies, might have gained a great deal even if neither side sought or was permitted to go further.

Id.

74. FED. R. EVID. 412 advisory committee's note to 1994 amendments.

75. *Id.*

76. FED. R. EVID. 412(b).

Although FRE 412 is relatively straightforward, its application in cases involving prior false accusations by the complaining witness has not been as clear. Courts all over the nation have split in their decisions as to whether prior false accusations fall under FRE 412 protection or whether they can be properly admitted under FRE 608 for impeachment purposes.[77] Faced with arguments that rape-shield statutes infringe upon a defendant's Confrontation Clause rights to engage in complete confrontation and cross-examination of the complainant, many courts have held that these statutes and FRE 412 bar only evidence of the complaining witness's "unchastity," not "involuntary incidents such as sexual assault or false charges of misconduct."[78] Other courts have held that rape-shield laws do not protect prior accusations that were *proven* to be false.[79]

A minority of jurisdictions have held that rape-shield laws *do* bar the admissibility of evidence of prior similar accusations made by complaining witnesses.[80] In *United States v. Cardinal*, a rape prosecution case, the Sixth Circuit held that the district court properly denied the defendant's attempt to admit evidence that the complaining witness, a thirteen-year-old girl, had reported other instances of sexual assault but had later withdrawn them.[81] Although the defendant sought to introduce this evidence for the purpose of impeaching the witness's credibility, the district court barred the admission of this evidence on the basis that this evidence did not come within one of the exceptions of the rape-shield rule.[82] The Sixth Circuit noted a small portion of the district court's opinion, which, while not particularly eloquent, points out the precise issue with the application of FRE 412:

> I don't see how you can separate evidence of a victim's past sexual behavior from the fact that she had made an allegation of rape and then withdrawn it. I think they are interwoven. This is a thirteen-year-old

77. Nancy M. King, Annotation, *Impeachment or Cross-examination of Prosecuting Witnesses in Sexual Offense Trial by Showing that Similar Charges Were Made Against Other Persons*, 71 A.L.R. 4th 469 (1989).

78. *Id.*; *see also* United States v. Stamper, 766 F. Supp. 1396, 1399–1400 (W.D.N.C. 1991) (holding that prior recanted accusations of molestation in a prosecution for statutory rape was not evidence of "past sexual conduct" and therefore not barred by rape-shield statute); Booker v. State, 976 S.W.2d 918, 920 (Ark. 1998) (holding that the rape-shield statute did not bar evidence of a rape victim's prior allegations, later withdrawn, of sexual misconduct against another man); People v. Tidwell, 78 Cal. Rptr. 3d 474, 481–82 (Cal. Ct. App. 2008) (stating that a "prior false accusation of sexual molestation is . . . relevant on the issue of the molest victim's credibility" and that "the same is true of a prior false rape complaint"); Graham v. State, 736 N.E.2d 822, 825 (Ind. Ct. App. 2000) ("Evidence of prior false rape accusations is more properly understood as verbal conduct, not sexual conduct. Consequently, its admission does not run afoul of the Rape Shield Rule.").

79. King, *supra* note 77, at 479 (citing Osborne v. State, 662 S.E.2d 792, 795–96 (Ga. Ct. App. 2008)).

> Evidence that complaining witness made prior false allegations of sexual misconduct by persons other than defendant is admissible under the rape-shield law to attack the credibility of the witness and as substantive evidence tending to prove that the charged offense did not occur; however, to protect the witness from unfounded allegations that the witness has made similar false allegations in the past, before such evidence can be admitted, the trial court is required to make a threshold determination outside the jury's presence that a reasonable probability of falsity exists.

Id.

80. United States v. Cardinal, 782 F.2d 34, 36 (6th Cir. 1986); King, *supra* note 77, at 469.

81. *Cardinal*, 781 F.2d at 36.

82. *Id.*

> young lady [and under] the spirit of Rule 412, it seems to me that it's just this type of allegation that this young woman should be protected from.[83]

Still other courts have restricted admission of such evidence depending on the conduct of the witness and the nature of the prior accusation.[84] For example, some jurisdictions have held that accusations that were later recanted were admissible to attack the witness's credibility[85] while others have held that accusations that were later recanted were not admissible.[86] FRE 412 and 608 seem to be so interrelated that sometimes it may seem impossible to tell which rule must govern and what evidence is admissible on what grounds. While this Note looks to FRE 412 to clarify some of the issues regarding prior false accusations, it seems as though the language of FRE 412 is even more ambiguous than FRE 608.

C. Why These Cases Are Different from Other Cases[87]

A rudimentary knowledge of what constitutes domestic violence and how these cases are different from other cases is necessary in order to understand why the issue of admission or exclusion of prior false accusations into evidence is so important.

1. Domestic Violence

Domestic Violence ("DV") refers to the tactics "abusers use to control their intimate partners."[88] DV is neither only physical nor necessarily illegal; instead it is a pattern of "controlling and coercive behavior," which leaves the victim fearful.[89] This cycle of abuse[90] causes women to become conditioned to accept that it is better to do whatever her abuser wants her to do because otherwise she will be punished.[91] It can involve the silent treatment, angry words, manipulation, subtle threats that only have meaning to the victim, and withholding of financial support or intimate contact.[92] As a result, victims experience feelings of terror, powerlessness, and helplessness.[93] Because they are in

83. *Id.*

84. King, *supra* note 77, at 469; *see also* People v. Burrell-Hart, 237 Cal. Rptr. 654, 656–57 (Cal. Ct. App. 1987); State v. Weymouth, 496 A.2d 1053, 1055–56 (Me. 1985); Cox v. State, 443 A.2d 607, 614–15 (Md. Ct. Spec. App. 1982); People v. Wilson, 137 N.W. 92, 93–93 (Mich. 1912).

85. *E.g.*, Tyson v. State, 503 S.E.2d 640, 642 (Ga. Ct. App. 1998); *see also* King, *supra* note 77.

86. *E.g.*, Pantoja v. State, 990 So. 2d 626, 628 (Fla. Dist. Ct. App. 2008); *see* King, *supra* note 77.

87. *See generally* SHARON R. CROWLEY, SEXUAL ASSAULT: THE MEDICAL-LEGAL EXAMINATION (1999).

88. BARRY GOLDSTEIN & ELIZABETH LIU, REPRESENTING THE DOMESTIC VIOLENCE SURVIVOR 1–2 (2013).

89. *Id.*

90. Lenore Walker first coined the term "cycle of abuse" in her seminal *The Battered Woman.* LENORE E. WALKER, THE BATTERED WOMAN 55 (1979). The cycle of abuse has three parts: tension building, explosion, and honeymoon. *Id.*

91. GOLDSTEIN & LIU, *supra* note 88, at 1–2.

92. *Id.*

93. B.J. CLING, SEXUALIZED VIOLENCE AGAINST WOMEN AND CHILDREN: A PSYCHOLOGY AND LAW PERSPECTIVE 9 (B.J. Cling ed., 2004).

constant fear, they often have trouble making long-term plans and focus only on surviving one day at a time.[94]

It is possible that one of the reasons why so many myths regarding DV persist is because of how counterintuitive it is. For example, when confronted with issues of DV, many people wonder why the battered woman stays.[95] The choice between a life of abuse and fear or peace and safety seems like it is one that is easy to make. But the reality is that those are not the choices that battered women have. If battered women try to leave, they are faced with homelessness, financial deprivation, and loss of friends and family.[96] They are faced with potentially losing their children.[97] In an overwhelming amount of cases, they may even sustain life-threatening injuries or death.[98] When battered women contemplate leaving, they have to make a choice between the lesser of two evils. For these reasons, battered women rarely leave their abusers, and the ones who do are often stalked, threatened, and beaten into going back to their abusers.[99] Indeed, the most dangerous time for battered women is when they attempt to separate from their abusers.[100]

a. Dispelling the Myth: Women as Liars

Women claim they have been raped when they regret sex. Women accuse celebrities and athletes of rape for money and attention. No means yes. Women secretly want violent and aggressive sex. The majority of women who have been raped are promiscuous or have bad reputations. If a woman "teases" a man, she deserves to be raped. If a rapist was not convicted, it was probably because she made it up. If she was actually raped, she would have reported it. We are all familiar with myths like these—they are rampant in our culture.[101] Bombarded with expectations to conform to archaic gender stereotypes, inquiries about what she was wearing, and whether her story followed a "genuine" rape narrative,[102] sexual assault victims came to see the criminal justice process

94. *Id.*

95. *Id.*

96. GOLDSTEIN & LIU, *supra* note 88, at xxix.

97. *Id.*

98. *Id.* at 4–19.

99. CLING, *supra* note 93.

100. Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 816 (1993) ("[S]tudies in Philadelphia and Chicago revealed that twenty-five percent of women murdered by their male partners were separated or divorced from their assailants. Another twenty-nine percent of women were murdered during the separation or divorce process." (footnotes omitted)).

101. *See, e.g.*, Janice Du Mont et al., *The Role of "Real Rape" and "Real Victim" Stereotypes in the Police Reporting Practices of Sexually Assaulted Women*, 9 VIOLENCE AGAINST WOMEN 466, 466 (2003); Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1014–15 (1991).

102. Du Mont et al., *supra* note 101, at 469 ("Rape mythology characterizes rape as an act of violence, forceful penetration committed by a stranger during a blitz attack in a public, deserted place. The victim is portrayed as a morally upright White woman who is physically injured while resisting.") (citations omitted). This kind of narrative invalidates the experiences of others, "including lesbians, sex workers, low-income women, etc." *Id.* at 469–70.

as a "second rape."[103] It is of no surprise, then, that only about a third of sexual assaults are even reported to the police.[104] The top reasons for not reporting rape are lack of trust in the criminal justice system, fear of not being believed, humiliation or fear of people's reactions, and self-blame or guilt.[105] Even in DV settings, there is a myth that women frequently make false allegations of abuse.[106] But, research has demonstrated that DV victims make "deliberately false allegations only one or two percent of the time."[107] Even though these myths are untrue,[108] they are common themes that continue to play an important role in how judges, attorneys, and jurors perceive assault victims and their trials.[109]

To begin an analysis of how the dynamics of DV and sexual assault affect admissible evidence regarding the victim's prior false accusation, we must look at how and why this myth of women as liars came about and, to this day, perpetuates in our culture.

The consequence of these myths is that the criminal justice system continues to prefer objective evidence of rape, such as physical injury, even though in almost all states physical injury is not one of the elements of the crime that must be proven.[110] Made famous by Susan Estrich in 1987,[111] an alleged rape is most likely to be perceived as a "real rape" if it involves a stranger, physical force or some sort of weapon, a resisting victim, and physical injury.[112] It is not "real rape" if it is not violent or if there was no blitz attack.[113] This classic rape narrative discounts the experiences of everyone who does not fit that profile: men, lesbians, women of color,[114] sex workers, women raped by acquaintances, and women who were drinking or doing drugs when they were raped.[115] Traditional norms of chastity and respectability have kept these groups of people from achieving "real victim" status.[116] How can we, as a society, expect to believe victims when we do not even consider them to be "victims" unless they fall into this narrow construction of what we expect victims to look like?

103. Julia Quilter, *Rape Trials, Medical Texts and the Threat of Female Speech: The Perverse Female Rape Complainant*, 19 LAW TEXT CULTURE 231, 231 (2015).

104. *The Criminal Justice System: Statistics*, RAINN, https://www.rainn.org/statistics/criminal-justice-system (last visited Apr. 10, 2018) ("Only 344 out of every 1,000 sexual assaults are reported to police. That means about 2 out of 3 go unreported.").

105. Du Mont et al., *supra* note 101, at 466.

106. GOLDSTEIN & LIU, *supra* note 88, at 2-8.

107. *Id.* (citing Stephanie J. Dallam & Joyana L. Silberg, *Myths That Place Children at Risk During Custody Litigation*, 9 SEXUAL ASSAULT REP. 33 (2006)).

108. Torrey, *supra* note 101, at 1015.

109. *Id.*

110. Quilter, *supra* note 103, at 232.

111. *Id.*

112. *Id.*

113. Du Mont et al., *supra* note 101, at 469.

114. *Id.* at 470 ("'[R]ace never absents itself from the rape script,' with Black and Aboriginal women considered 'less inherently worthy than White women.'").

115. *Id.* at 469–70.

116. *Id.* at 469.

2. Syndrome Evidence

The relationship between law and psychology encompasses many domains: jury selection and deliberation, accuracy of eyewitnesses, testimony of children, and many others.[117] In particular, syndrome evidence is a common explanation offered to justify the actions of women in cases where they are accused of some criminal offense.[118] Lawyers seek to have this evidence admitted as a mitigating factor on behalf of their clients.[119] While the array of syndrome evidence is wide, this Note is only concerned with Battered Woman Syndrome ("BWS") and Rape Trauma Syndrome ("RTS") and how they may offer an insight into why victims recant initial accusations, which their abusers later try to use against them as a prior false accusation.

a. Battered Woman Syndrome

Domestic violence is the domain where syndrome evidence has made the most impact.[120] In 1979, Lenore Walker published *The Battered Woman*, in which she described the effects that cyclical violence and long-term abuse have on women.[121] Walker explained that a battered woman may experience a "state of psychological paralysis," which can only be ended by violence on her part.[122] Walker portrayed a "typical" battered woman as one who has been "subjected to repeatedly coercive behavior (physical, sexual and/or psychological) by a man attempting to force her to do what he wants her to do, regardless of her own desires, rights or best interests."[123] Walker analogized her findings with those of Martin Seligman and his theory of "learned helplessness."[124] In 1965, Seligman and his colleagues were researching classical conditioning, in which an animal or human learns to associate one thing with another.[125] During this research, he discovered that dogs that had received unavoidable electric shocks failed to take action in subsequent situations to such an extent that even when it became possible for them to leave their cages, they refused to do so.[126] Seligman described their condition as "learned helplessness," or basically not trying to get out of a negative situation because your past experiences have taught you that such attempts are futile.[127] Walker applied this theory to DV, arguing that women who were subjected to long-term abuse responded the

117. FIONA RAITT & M. SUZANNE ZEEDYK, THE IMPLICIT RELATION OF PSYCHOLOGY AND LAW: WOMEN AND SYNDROME EVIDENCE 1 (2000).

118. *Id.*

119. *Id.* at 1–2.

120. *Id.* at 63.

121. WALKER, *supra* note 90, at 55–70.

122. RAITT & ZEEDYK, *supra* note 117, at 66.

123. WALKER, *supra* note 90, at xv.

124. *Id.* at 45.

125. Jeannette L. Nolen, *Learned Helplessness*, ENCYCLOPEDIA BRITANNICA (Dec. 24, 2015), https://www.
britannica.com/topic/learned-helplessness.

126. *Id.*

127. *Id.*

same way.[128] Because Walker described the syndrome as a psychological response to repeated violence, it was first included in the third edition of the Diagnostic and Statistical Manual of Mental Disorders ("DSM-III") as a subcategory of Post-Traumatic Stress Disorder ("PTSD") in 1980.[129] The fourth edi-edition of the DSM ("DSM-IV") described BWS in the following way:

> [The] constellation of symptoms [that] may occur and are commonly seen in association with an interpersonal stressor (e.g. . . . domestic battering . . .) [including]: impaired affect modulation, self-destructive and impulsive behavior; dissociative symptoms; somatic complaints; feelings of ineffectiveness, shame, despair, or hopelessness; feeling permanently damaged; a loss of previously sustained beliefs; social withdrawal; feeling constantly threatened; impaired relationships with others; or a change from the individual's previous personality characteristics.[130]

Expert testimony on BWS has most commonly been used to bolster an affirmative defense in cases where the battered woman has killed her abusive partner.[131]

b. Rape Trauma Syndrome

RTS was first recognized as a set of symptoms that develop as a reaction to rape by Ann Burgess and Lynda Holmstrom in 1974 while working in a Boston hospital emergency room.[132] Their studies and publications on uniform and predictable emotional and psychological reactions to rape led the American Psychiatric Association to designate RTS as a form of PTSD, with rape as the stressor.[133] Their findings show that reactions to rape vary greatly: in the acute phase, victims may experience a wide range of emotions including shock, disbelief, anger, fear, and anxiety.[134] In the second phase, victims' feelings may transform from fear, humiliation, and embarrassment to anger, revenge, and self-blame.[135]

128. WALKER, *supra* note 90, at 46–48.

129. RAITT & ZEEDYK, *supra* note 117, at 67.

130. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 425 (4th ed. 1994); *see also* RAITT & ZEEDYK, *supra* note 117, at 67. Although the current edition of the DSM (DSM-V) does not specifically include BWS (or RTS), it now explicitly includes sexual violence as constituting a traumatic event. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 271 (5th ed. 2013).

131. RAITT & ZEEDYK, *supra* note 117, at 67–69 (stating that generally these women are charged with homicide or manslaughter and use BWS to bolster self-defense, provocation, or diminished responsibility defenses); *see also* Ibn-Tamas v. United States, 407 A.2d 626, 626 (D.C. Cir. 1979); State v. Kelly, 478 A.2d 364, 368 (N.J. 1984). In both of these cases, the courts held that expert testimony on BWS was relevant to a battered woman defense because it put into context the woman's perceptions and actions. RAITT & ZEEDYK, *supra* note 117, at 70.

132. B.J. Cling, *Rape and Rape Trauma Syndrome*, *in* SEXUALIZED VIOLENCE AGAINST WOMEN AND CHILDREN: A PSYCHOLOGY AND LAW PERSPECTIVE 13, 19 (B.J. Cling ed., 2004).

133. *Id.* at 20.

134. RAITT & ZEEDYK, *supra* note 117, at 91.

135. *Id.*

Victims fight an uphill battle to prove rape. Sexual assaults usually take place in private, there are rarely eyewitnesses, and the assaults usually leave little medical or physical injury.[136] In the absence of significant physical injury, it is almost impossible to distinguish between rape and consensual sex, especially if the parties are acquaintances, and the situation turns into a case of he-said, she-said.[137] Additionally, the notoriously poor treatment of rape victims by law enforcement personnel and the potential that their sexual past may be explored during prosecution act as barriers for victims to report their assault.[138] In such dire instances, victims may recant because of the emotional toll that the prosecution has on them, coupled with the symptoms of RTS.[139] Even when a victim does not recant, police officers and attorneys may determine that her accusation was false because of how RTS is affecting her perceived credibility.[140] Further exacerbating the problem are issues with delayed reporting and the demeanor of the victim during trial.[141] While some victims react emotionally after a rape, others will compose themselves in a much more controlled style, appearing "calm," or "subdued," which does not comport with what many view as the appropriate reaction to a rape or how a "real victim" would react, thus leading to the idea that she is lying.[142]

This illustrates the need for expert testimony on RTS to educate a fact-finder about typical reactions to rape and how what they perceive to be a lack of credibility may, in fact, be a typical symptom of a traumatic event. This information will enable a fact-finder to make more informed decisions concerning the credibility and reliability of victims and their testimony. In the face of little extrinsic evidence that victims may have to prove they were assaulted, many trials depend heavily on the victim's credibility.

III. ANALYSIS

This Part is organized as follows: Section A addresses the need for a formal amendment of the FRE. Section B is an analysis of what role the psychology involved in cases of domestic violence and sexual assault plays in a victim's decisions and actions as she moves through a prosecution. It confronts the existing problems with judging the "falsity" of prior accusations made by alleged victims and how the courts' reliance on this kind of deceptive evidence is misplaced. Section C argues that a defendant's Confrontation Clause rights are not violated if evidence of a prior false accusation is excluded from the trial. Finally, Section D is a summary of a research survey I conducted to evaluate the differences between the rules of evidence in each of the fifty states in the hopes of gaining some insight as to what a model rule 608(b) should look like. Through-

136. *Id.* at 93.
137. *Id.*
138. *Id.* at 88–89.
139. Applegate, *supra* note 7, at 905.
140. *Id.*
141. *Id.* at 905–06.
142. *Id.* at 906.

out Part III, the need for a uniform standard regarding the admission of prior false accusations will become clear.

A. Inadequacies of Common Law Amendment

The first step in addressing this issue is recognizing that going through the proper channels to amend the FRE is the best way to ensure that the law will be evenly and uniformly applied. First, the FRE prescribes how it can be amended and what determines which evidence is admissible.[143] The advisory notes for FRE 402 state: "[n]ot all relevant evidence is admissible. The exclusion of relevant evidence occurs in a variety of situations and may be called for by these rules, by the Rules of Civil and Criminal Procedure, by Bankruptcy Rules, by Act of Congress, or by constitutional considerations."[144] None of these explicitly give power to courts to amend these rules, but every time a court declares a "narrow" exception to rule 608(b) and applies it on a case-by-case basis that is exactly what the court is doing.[145]

Besides the illegitimacy of common law amendments to the FRE, there are practical considerations which demand formal amendment. Case law divergence is an issue not only for rule 608(b) but for all the rules of evidence.[146] For example, there is major divergence between FRE 801 and common law regarding the meaning of "implied assertion" and whether or not it is considered hearsay.[147] In another example, the rule admitting learned treatises does not on its face permit introduction of videotapes, and yet such tapes have been admitted under case law.[148] Because of the variation in how courts interpret and apply the rules, there is no uniform standard which determines what evidence is admissible.[149] A formal amendment of these rules would lead to the efficient application of standard uniform rules. This is especially necessary for FRE 608(b) since the decision to exclude or include 608(b) material goes to victim credibility, which, as discussed above, seems to be one of the biggest, if not the only, factor that juries consider in reaching verdicts in he-said-she-said cases.

B. Victim Psychology—How to Judge "Falsity"

1. Recanting Does Not Mean Lying

When defendants seek to introduce evidence of prior false accusations, the best evidence they have to prove such a false accusation is victim recantation. Practically speaking, this makes sense because when one recants an accu-

143. FED. R. EVID. 402; FED. R. EVID. 1102.

144. FED. R. EVID. 402 advisory committee's notes to 1972 proposed rules.

145. DANIEL J. CAPRA, FED. JUDICIAL CTR., CASE LAW DIVERGENCE FROM THE FEDERAL RULES OF EVIDENCE 7 (2000).

146. *See id.* at 1–2.

147. *Id.* at 9.

148. FED. R. EVID. 803(18); Constantino v. Herzog, 203 F.3d 164, 171 (2d Cir. 2000); CAPRA, *supra* note 145, at 25.

149. CAPRA, *supra* note 145, at 1.

sation, one disavows it or denies it, meaning, for whatever reason, the victim is no longer suggesting the accused did what they are purported to have done. But, a closer look at victim psychology and recantation would suggest that victims recant not because they made false accusations but because the abuser has convinced them to, especially in DV cases.[150] For DV cases that reach the criminal justice system, reports suggest that as many as 80% of victims recant or refuse to cooperate with the prosecution.[151] Witness tampering is a significant problem in DV cases[152]—even the U.S. Supreme Court has acknowledged these cases as being "notoriously susceptible to intimidation or coercion of the victim to ensure she does not testify at trial."[153] Research has shown that victims tend to recant or not cooperate with prosecution efforts if there is financial dependence on the abuser, if the victim believes the abuse is not severe enough to warrant prosecution, if the victim perceives there is a poor criminal justice system response (*i.e.*, dual arrest policies), and if there are not enough social support systems (*i.e.*, court advocates and victim-assistance workers).[154] We must also take into consideration factors such as the psychological vulnerability of the victim (for example, if the abuser promises or takes concrete steps to change his behavior, the victim is less willing to testify against him) and, most importantly, that the victim may still have emotional attachments to her abuser.[155]

Although it is relatively well-documented why victims recant, there is not much information about how they arrive at their decision to recant.[156] In a rigorous study spanning almost three years, researchers analyzed telephone calls between heterosexual couples in which the male was being held at a detention facility in Washington State for a felony-level DV offense.[157] The results of this study show exactly the kind of hold that abusers have over their partners and how they can manipulate the criminal justice system to their benefit. The women in these situations sustained severe injuries, such as broken bones, lacerations, and contusions.[158] Several victims were strangled until they lost consciousness.[159] Two had been kidnapped or unlawfully imprisoned.[160] Out of the twenty-five couples whose telephone calls were recorded, recantation occurred in seventeen of them.[161]

The facility began recording telephone conversations of detainees, and the parties were made aware that they were being recorded through an automated

150. Amy E. Bonomi et al., *"Meet Me at the Hill Where We Used to Park": Interpersonal Processes Associated with Victim Recantation*, 73 SOC. SCI. & MED. 1054, 1054–55 (2011).

151. *Id.* at 1054.

152. *Id.*

153. *See* Davis v. Washington, 547 U.S. 813, 832–33 (2006).

154. Bonomi et al., *supra* note 150, at 1055.

155. *Id. See generally* GOLDSTEIN & LIU, *supra* note 88.

156. Bonomi et al., *supra* note 150, at 1055.

157. *Id.*

158. *Id.* at 1056.

159. *Id.*

160. *Id.*

161. *Id.* at 1055–56.

message at the beginning of the call.[162] The researchers found that in all cases, the phone call initially started out with both individuals lashing out, expressing anger and blame about the abuse which started the criminal process.[163] Most victims were empowered enough to call the men "perpetrators," but this agency quickly unraveled in response to the abusers' tactics, such as "the perpetrator's minimization of the abuse event, the perpetrator's appeals to her sympathy, and the couple's expressed need to keep their relationship and family intact."[164] To convince his victim to recant, the abuser often recounted to the victim an account of his own suffering, such as intolerable jail conditions.[165] In describing their suffering, the perpetrators positioned themselves as a "victim" of their suffering and the actual victim as the perpetrator's caretaker.[166] Following such accounts, the women's resolve to follow through with the prosecution began to waver, and they began to change their stance, moving from a "space of anger and resistance to sadness, guilt, and regret" and subsequently agreeing to do anything they could to get the perpetrator out of jail, which meant recanting.[167]

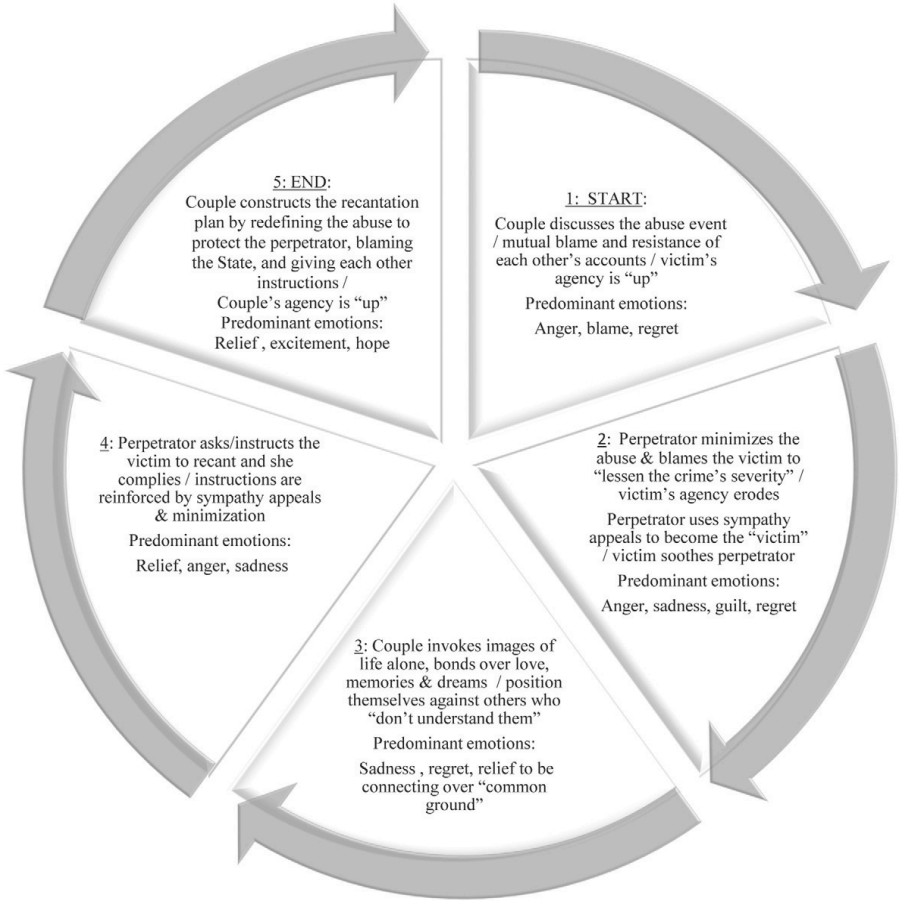
After the couples agreed that the victim would recant the accusation and testimony, they worked together to redefine the abuse event to protect the perpetrator and exchanged specific instructions as to what should be done and said in court to legal representatives and to family members.[168] Interestingly enough, by the time the couple made the decision to recant, they perceived the state as a common enemy—a persecuting agency that did not recognize the "specialness" of their relationship.[169] One victim explained:

> I told the judge we don't want it . . . they're ruining people's lives. [The] domestic violence advocate called me . . . she said the whole case is totally unfair and . . . I told her what happened and she said that no contact order is totally . . . not fair because we didn't want it, we do not want it . . . we want to be together and have a family, we have children.[170]

Figure 1 is a visual representation of this cycle.[171] The cycle begins with the couple blaming each other, telling each other their account of what happened, and at this point, the victim feels empowered. Then, as the couple talks more, the perpetrator has a chance to minimize his actions and appeal to the victim's sympathy. The couple reconnects, bonds over love and visions of their future, and eventually the perpetrator convinces the victim to recant.

162. *Id.* at 1055.
163. *Id.* at 1057.
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.* at 1058.
169. *Id.*
170. *Id.*
171. *Id.*

FIGURE 1



While this study addresses a very specific situation, it is an accurate and poignant insight into the dynamics of DV and how much power abusers have over their victims.

The same factors that influence a battered woman to recant are further intensified in situations of child abuse.[172] Child victims may not want to get their abusers in trouble, especially if the abuser is a family member, or they may be concerned about the impact their accusation will have on their families.[173] Certain adults in the child victim's life, such as family members, friends, and even

172. Lindsay C. Malloy et al., *Filial Dependency and Recantation of Child Sexual Abuse Allegations*, 46 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 162, 163 (2007).

173. Laura S. Brown, *Memories of Childhood Abuse: Recovered, Discovered, and Otherwise*, *in* SEXUALIZED VIOLENCE AGAINST WOMEN AND CHILDREN: A PSYCHOLOGY AND LAW PERSPECTIVE 188, 191 (B.J. Cling ed., 2004).

social workers or psychologists may convince the vulnerable child to recant.[174] When considering whether or not a victim's recantation is credible, courts consider factors such as:

> the importance of the purportedly recanting witness in obtaining the conviction; the existence of evidence corroborating either the conviction or the recantation; the potential trauma to an abused minor of having to retestify; the temporal proximity of the trial testimony and the purported recantation; the consistency of the recantation with the witness's comments and behavior before, during, and after trial; and the existence of evidence of outside influence suggesting either coerced testimony or coerced recantation.[175]

Intuitively, it seems to make sense to admit evidence regarding prior false accusations made by victims. After all, we want to guard against people falsely accusing others, not make it easier for them to get away with it. The difficulty lies, however, in determining whether or not a recantation necessarily means that the alleged victim has deliberately lied about being assaulted by someone. Unfortunately, many jurisdictions will admit evidence of a recantation under the assumption that a victim who has recanted must have done so because the prior accusation was false.[176] Since evidence of recantation is the most direct evidence tending to prove false accusation, it is extremely important for courts to understand why victims may want to recant. In cases of sexual assault, victims may be suffering from RTS, the symptoms of which may make the victim look not credible. During the acute phase of this syndrome, women experience a range of difficult emotions and attempt to erase their assaults from their memories.[177] The effects of trauma may make a victim have flashbacks, nightmares, and daydreams.[178] It may make them forget details or give inconsistent accounts because they may be in a state of shock and incapable of giving a coherent, detailed account of their assault.[179] Such inconsistent or confused narratives, coupled with delayed reporting, may lead law enforcement to believe a victim is lying.[180] These instances further lead law enforcement personnel, lawyers, judges, and ordinary people to confirm their beliefs in widespread myths about women "crying rape."[181]

Victim recantation is a poor proxy for proving prior false accusations. Evidence of recantation alone is extremely misleading—it automatically gives rise to an inference that the original accusation was false when it is more likely that the opposite is true.[182] In fact, precisely because of how often recantation is co-

174. GOLDSTEIN & LIU, *supra* note 88, at 13–21.

175. United States v. Rojas, 520 F.3d 876, 884 (8th Cir. 2008); *see also* United States v. Baker, 479 F.3d 574, 576–77 (8th Cir. 2007); United States v. Gayles, 1 F.3d 735, 737–38 (8th Cir. 1993).

176. Applegate, *supra* note 7, at 904.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 904.

182. *Id.* at 906.

erced, courts should be extremely careful in their analysis of whether such evidence is relevant and if its prejudicial effects can outweigh its probative value.

C. Defendants' Confrontation Clause Rights

In *State v. Taylor*, the defendant was convicted of fourth-degree felony assault.[183] In that case, the defendant's wife accused the defendant of domestic abuse, and the defendant sought to impeach her with evidence that she previously made a similar false allegation.[184] This evidence was a police officer's handwritten "Application for 72-Hour Detention for Evaluation and Treatment."[185] In this report, the responding officer noted that he had observed a broken window and signs of disarray in the house but did not observe cuts, bruises, scratches, or other signs of abuse on the accuser; thus, he determined in the report that no fight had taken place.[186] The Oregon Court of Appeals held that "exploration of the [prior] matter 'would not be helpful to the jury' because it would 'ask[ ] the jury to decide the truth or falsity of the occurrence of the facts in this previous event' based on no evidence other than the written detention application and questioning of the victim."[187] Because the defendant could not prove with sufficient reliability the falsity of the prior accusation, he could not cross-examine the witness on this matter.[188] Thus, the defendant's rights under the Confrontation Clause were not violated.[189] Most state courts have held similarly: the exclusion of prior false accusations, *when insufficiently proven*, cannot be brought up in cross-examination and therefore does not violate the defendant's Confrontation Clause rights.[190]

Given the array of reasons why women recant, and the misconceptions that most people have regarding women who "cry rape," allegations of prior false accusations are inherently the type of unreliable evidence that the rules of evidence were meant to exclude from trials. Although some courts have held that such allegations are impeachment evidence and admissible anyway,[191] what most courts have implied in all of the decisions involving prior false accusations is the necessity of proving the prior allegations to be false to a satisfactory level before courts will even consider admitting them. In the face of that requirement—and evidence strongly tending to prove that in cases of DV and sexual assault, prior false accusations by victims in fact may not actually be false accusations— the need for courts to impose a strict and higher burden of proof is desperately clear.

183. 365 P.3d 1149, 1151 (Or. Ct. App. 2015).
184. *Id.* at 963.
185. *Id.*
186. *Id.*
187. *Id.* at 1152.
188. *Id.* at 1151.
189. *Id.*
190. *E.g.*, Boggs v. Collins, 226 F.3d 728, 738 (6th Cir. 2000) (precluding cross-examination of rape victim about alleged prior false accusation did not violate the Confrontation Clause).
191. White v. Coplan, 399 F.3d 18, 25 (1st Cir. 2005).

D. Forty-Eight State Survey of 608(b)

At the risk of sounding obvious, this Note ultimately seeks to find a way to balance the needs of a defendant to confront his accusers and question their credibility with the interests of victims, especially since their experiences may automatically make them "not credible" in the eyes of current evidence law. In order to fashion such a model rule, I reviewed the evidence rules of all fifty states in the United States and compared how states applied their rules on credibility and character for truthfulness. The logic was that perhaps one of the states had figured out what this right balance was and maybe the recommendation this Note makes could be informed by its rationale. I sought to read the relevant portions of the state rules, research whether exceptions were made by amendment or common law, and understand why the states adopted their respective rules. During my research, I did not find a single comprehensive source which detailed this information, so I compiled this information as Appendix A.[192]

Out of the fifty states, New York and Missouri do not have codified rules of evidence but rather rely on court opinions, statutes, and treatises.[193] For example, the Missouri Bar Association has an "Evidence Restated" desk book that is a summary of Missouri law as it developed through case law and statutes.[194] Because of this lack of codification of evidence law, I disregarded these two states in this survey. The California Evidence Code is also organized in a very different way than the FRE,[195] but there is a California counterpart to FRE 608(b), even if somewhat unsatisfying, so California was included in the survey. The Florida Evidence Code and the Illinois Rules of Evidence have not adopted provisions on specific instances of conduct to attack credibility.[196] Nevertheless, I decided to include both states in the survey because both states' courts have long held in common law that prior bad acts (including prior false accusations) may not be inquired into during cross-examination or proven by extrinsic evidence.[197] I concentrated on the rest of the states and divided them into the following categories: (1) states that prohibit *both* inquiry into prior bad acts on cross-examination and extrinsic evidence, (2) states that allow inquiry on cross-examination but *not* extrinsic evidence (*i.e.*, the federal rule), (3) states

192. *See infra* Appendix A for results of how states amended FRE 608(b) prior to adopting it.

193. Ben Trachtenberg, *Rules of Evidence: Are They Necessary?*, LAW PROFESSOR BLOGS NETWORK: EVIDENCEPROF BLOG (Sept. 30, 2013), http://lawprofessors.typepad.com/evidenceprof/2013/09/rules-of-evidence-are-they-necessary.html.

194. *Deskbook—Evidence Restated*, MO. BAR, http://mobarcle.mobar.org/store/seminar/seminar.php?seminar=53309 (last visited Apr. 10, 2018).

195. Trachtenberg, *supra* note 193.

196. FLA. STAT. § 90.609 (2016); ILL. R. EVID. 608.

197. Pantoja v. State, 59 So. 3d 1092, 1096–97 (Fla. 2011) (holding that a prior false accusation of abuse by a person other than the defendant was a prior act not admissible to attack credibility); McPhee v. State, 117 So. 3d 1137, 1139 (Fla. Dist. Ct. App. 2012); Podolsky & Assocs. L.P. v. Discipio, 697 N.E.2d 840, 847 (Ill. App. Ct. 1998) (rejecting adoption of FRE 608(b)); *see also* GINO L. DIVITO, THE ILLINOIS RULES OF EVIDENCE 45, http://www.jdsupra.com/documents/757d4967-292b-4ff3-a799-f82c6abf583a.pdf (last revised Nov. 22, 2010).

that allow *both* inquiry on cross-examination and extrinsic evidence, and (4) states that have provisions or common law exceptions specifically allowing evidence of prior false accusations.

The results are as follows: eight states, including Illinois, prohibit the introduction into evidence of any prior bad act of a witness for the purpose of attacking or supporting the witness's character for truthfulness *either* through cross-examination or through the introduction of extrinsic evidence.[198]

Thirty-four states prohibit introducing extrinsic evidence but allow an attorney to inquire about prior bad acts if they are probative of the character for untruthfulness or truthfulness of that witness.[199] The high number of states in this category is no surprise—this is what the FRE allows, and it makes sense that many states simply adopted the federal rules without making many substantive changes. But, within this category, there are some interesting variations on FRE 608(b). For example, in Maryland, the court may permit the inquiry into the prior bad act only if the questioner establishes, outside the presence of the jury, a "reasonable factual basis" for asserting that the conduct of the witness occurred.[200] In Tennessee, the rules require that certain conditions be met before a questioner is allowed to inquire about a witness's prior bad act.[201] If a questioner wishes to introduce evidence of a witness's prior bad act, he or she must request a hearing where the judge must determine whether "the alleged conduct has probative value and that a reasonable factual basis exists for the inquiry" and that the conduct must have occurred no more than ten years before the current proceeding (along with certain other conditions if the witness to be impeached is the accused in a criminal prosecution).[202]

There are two states, Hawaii and Kansas, that allow both inquiry about prior bad acts on cross-examination *and*, at the discretion of the court, the introduction of extrinsic evidence, without specifically mentioning prior false accusations.[203] Finally, there are four states—Massachusetts, New Jersey, Rhode Island, and Virginia—that have specific provisions in their rules of evidence or common law exceptions allowing evidence of prior false accusations.[204]

The text of the Massachusetts Rules of Evidence strictly prohibits the admission of prior bad acts for the purpose of establishing a witness's character for truthfulness.[205] But the Supreme Judicial Court has recognized a "narrow exception"—that in "special circumstances" (so far, only rape and sexual as-

198. The eight states are Alaska, California, Illinois (by common law), Louisiana, Oregon, Pennsylvania, Texas, and Florida (by common law). *See infra* Appendix A.

199. They are Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Georgia, Idaho, Indiana, Iowa, Kentucky, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. *See infra* Appendix A.

200. MD. CODE ANN., CRIM. LAW § 5-608(b) (West 2016).

201. TENN. R. EVID. § 608(b).

202. *Id.*

203. *See infra* Appendix A.

204. *See infra* Appendix A.

205. MASS. R. EVID. 608(b) ("In general, specific instances of misconduct showing the witness to be untruthful are not admissible for the purpose of attacking or supporting the witness's credibility.").

sault cases), "the interest of justice would forbid strict application of the rule."[206] New Jersey amended its rule 608(b) in 2006 to reflect the holding of *State v. Guenther*[207] (which carved out an exception to the then-existing rule), allowing a defendant to introduce evidence that a victim-witness had made a prior false criminal accusation.[208] The amended rules of evidence require a judge to conduct a preliminary hearing, and if the judge determines that the witness to be impeached *knowingly* made the prior false accusation, then such evidence is admissible at trial to attack the witness's credibility.[209] The Rhode Island Rules of Evidence allow inquiry into any prior bad acts, and in certain cases, if there is "evidence of similar false accusations," the judge may allow admission of extrinsic evidence.[210] The Virginia Rules of Evidence have a specific provision for "prior false accusations in sexual assault cases" which states that a "complaining witness in a sexual assault case may be cross-examined about prior false accusations of sexual misconduct."[211] The rules also state that a witness may be impeached with "any proof that is relevant to the witness's credibility," meaning extrinsic evidence will also be admissible.[212]

Figure 2 is a visual representation of this survey.

206. Commonwealth v. LaVelle, 605 N.E.2d 852, 855 (Mass. 1993); *see* Commonwealth v. Bohannon, 378 N.E.2d 987, 990 (Mass. 1978).

207. State v. Guenther, 854 A.2d 308, 325 (N.J. 2004).

208. *Id.*

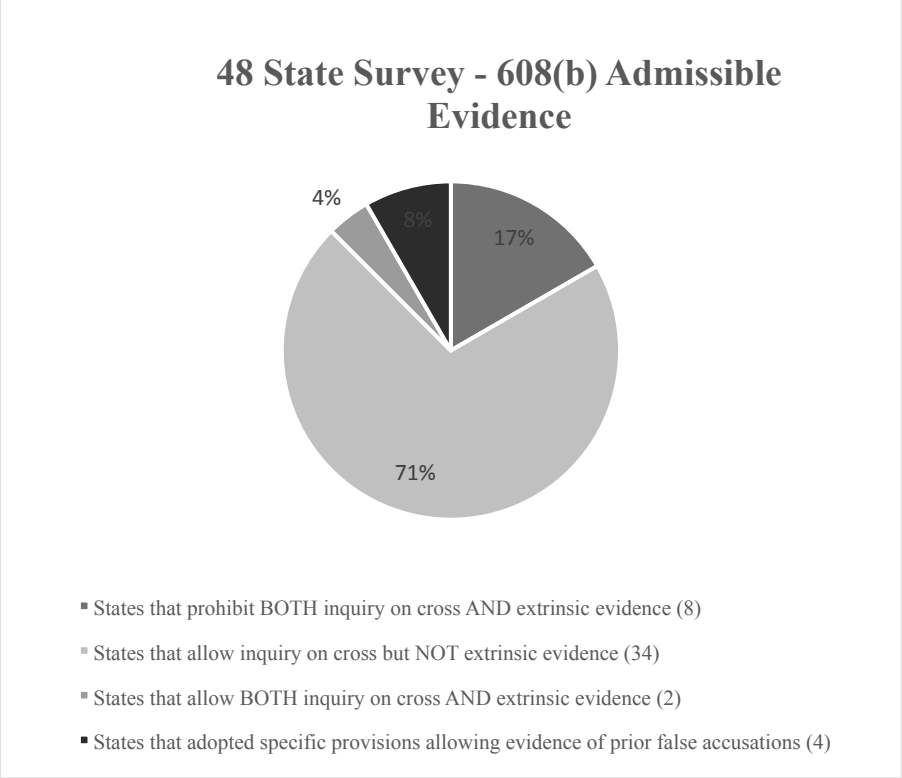
209. N.J. R. EVID. 608(b). When the New Jersey Supreme Court adopted the amended 608(b), it commented: "The application of Rule 608(b) is limited to criminal matters and is subject to the provisions of State v. Guenther, 181 N.J. 129 (2004)." N.J. R. EVID. 608(b) court comment to 2006 amendment.

210. R.I. R. EVID. 608(b).

211. VA. SUP. CT. R. 2-608(e).

212. VA. SUP. CT. R. 2-607(a).

FIGURE 2



Two things stand out from this survey: (1) most states have adopted the FRE without any substantial modifications; and (2) the states that adopted explicit provisions—or have carved out common law exceptions to their existing rule 608 provisions—concerning the admission of prior false accusations have all tended to favor admissibility of such evidence. It can reasonably be inferred that if the FRE were officially modified and amended, there is a good chance that most states would follow that trend and make their own amendments to their respective rules of evidence. It is also clear that when states do address issues of prior false accusations, they are favoring admissibility of such evidence on the grounds that this evidence goes to the credibility of the testifying witness or that a defendant's Confrontation Clause rights will be infringed upon if he is prohibited from introducing such evidence.[213] But it is also clear that the introduction of such evidence is unreliable and serves to unfairly prejudice the jury against these victims.[214] Juries, faced with a discredited complaining witness, will not take into account the various reasons set forth in this Note as to why women recant accusations or why they make them in the first place.

213. *See, e.g.*, *Guenther*, 854 A.2d at 323.
214. *See* State v. Lee, 396 P.3d 316, 327 (Wash. 2017).

They will see a liar, and they will acquit on the basis of unreliable, irrelevant evidence that is the product of backdoor character evidence.

IV. RECOMMENDATION

It is unlikely that all evidence of prior false accusations will be excluded *per se*. Despite what the text of the rule says, courts have consistently allowed this evidence in, albeit subject to different balancing tests.[215] Some courts have said this evidence is admissible subject to establishment, by a preponderance of the evidence, that the prior accusation was, in fact, false.[216] Other courts, by not adopting a specific standard of proof, have automatically subjected it to the overriding FRE 403 balancing test. FRE 403 favors admissibility and imposes an extremely high bar for those opposing admissibility to meet before the evidence in question will be excluded.[217] Evidence must be "*substantially* more prejudicial than probative" in order to be excluded.[218] In these situations, it is almost always the case that defendants can establish some probative value of evidence relating to the credibility of the witness, regardless of whether or not those prior accusations have definitively been shown to be false. Because there is some probative value to such evidence and the prejudicial effect on the impeached witness does not "substantially outweigh" that probative value, such unreliable evidence will almost always be allowed into evidence.

Faced with these obstacles, the need for a formal, uniform, and comprehensive rule, which both attends to the sensitive needs of victims and guards against defendants seeking to use prior false accusations as a way to attack credibility, is substantial and imperative.

First, the FRE need to be formally amended, and it is highly recommended that states follow that lead and formally amend their own rules of evidence. Formally amending the rules will allow a uniform application of a sorely needed evidentiary rule, which will prevent certain defendants from using unreliable evidence based on stereotypes and misconceptions to bolster their case and tear down the credibility of the complaining witness. A formal amendment will also solve the problem of case law divergence.

Second, the process whereby courts make determinations as to whether or not prior false accusations can be admitted into evidence should be a two-step analysis. If a defendant seeks to use such information, the initial burden should fall on him to prove the prior accusation is demonstrably false. This would re-

215. *E.g.*, KY. R. EVID. 608(b) ("[T]he cross-examiner [must have] a factual basis for the subject matter of the inquiry."); MD. CT. R. 5-608(b) ("Upon objection, . . . the court may permit the inquiry only if the questioner, outside the hearing of the jury, establishes a reasonable factual basis for asserting that the conduct of the witness occurred."); *see also* Morgan v. State, 54 P.3d 332, 339 (Alaska Ct. App. 2002) (holding that a sexual assault defendant must establish, by a preponderance of the evidence, the falsity of prior accusations).

216. *Morgan*, 54 P.3d at 339.

217. FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.").

218. *Id.* (emphasis added).

quire defendants to show by clear, convincing, and substantial proof that the victim actually made a false accusation. Much like in New Jersey,[219] the courts should make this determination at a hearing pursuant to FRE 104(a).[220] Other states have imposed a much lower burden on defendants. Kentucky, Maryland, and Tennessee require defendants to establish some form of a factual basis for the inquiry before the questioner can impeach the witness.[221] Connecticut requires only that the questioner ask about prior bad acts "in good faith."[222] This Note proposes a higher standard of proof than that because that would even the playing field for victims who have made prior accusations. Given the fact that most women recant not because they have lied, but because of other external factors, such evidence should only be admissible when defendants have met this higher burden and demonstrated to the satisfaction of the court that victims have in fact made false accusations. For a court to be satisfied with this showing, defendants will have to show concrete evidence of falsity, not merely inferences meant to insinuate to the jury that the victim lied. This requirement would guard against a jury making the wrong inference.

If the defendant is able to make that initial showing, the next inquiry should be whether the evidence is admissible in light of the its highly prejudicial effect. Even if the defendant has made a satisfactory initial showing that the witness's prior accusation was demonstrably false, there is yet another determination of whether this evidence should be admitted, because there is a high risk that the fact-finder, especially a jury, might make an improper inference from that evidence. Specifically, they may infer something that the FRE already acknowledges and prohibits from introduction into evidence: action in conformity with a character trait.[223] FRE 404 prohibits admitting a person's character trait to prove that, on a particular occasion, a person acted "in accordance with [that] character or trait."[224] For example, assume John was questioned by the police two years ago because the police suspected he had started a fire in an abandoned building. He was not arrested or charged. But now, John has been arrested in connection with starting a fire in another abandoned building. This time, he goes to trial, and the prosecutor seeks to introduce evidence at trial about the police questioning John two years ago. This would be inad-

219. N.J. R. EVID. 608(b).

220. FED. R. EVID. 104(a) ("The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.").

221. *See infra* Appendix A; *see also* KY. R. EVID. 608(b) (requiring that the questioner must have a "factual basis for the subject matter of the inquiry"); MD. CT. R. 5-608(b) ("Upon objection, . . . the court may permit the inquiry only if the questioner, outside the hearing of the jury, establishes a reasonable factual basis for asserting that the conduct of the witness occurred."); TENN. R. EVID. 608(b)(1) ("[T]he alleged conduct [must have] probative value and . . . a reasonable factual basis [must exist] for the inquiry.").

222. CONN. CODE EVID. 6-6; *see* State v. Chance, 671 A.2d 323, 338 (Conn. 1996); Marsh v. Washburn, 528 A.2d 382, 385 (Conn. App. Ct. 1987).

223. FED. R. EVID. 404. Although propensity evidence is prohibited, there are some exceptions to the prohibition, such as if the evidence is being use to prove motive, intent, knowledge, or lack of accident, etc. *Id.*

224. FED. R. EVID. 404(a)(1) ("Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.").

missible because the prosecutor is trying to prove propensity or "action in conformity"—specifically that, because John has a character or trait of tending to start fires or because he potentially started a fire in the past, he acted in conformity with that character and started a fire this time.

As always, there are exceptions to this rule. If prosecutors were trying to prove something other than propensity (for example, knowledge or identity), they could introduce this evidence.[225] Going back to the hypothetical with John—assume the first fire that John was questioned about was started in a very specific way. Maybe there was a very distinct fire pattern or some similar identifier. When the prosecutor finds out that the second fire followed that pattern, the prosecutor will seek to connect the two fires. The prosecutor is using the information about John being questioned regarding the first fire to show knowledge or identity (by proving modus operandi).[226] That would be admissible because the prosecutor is not using the first fire to show propensity (that because John maybe did it in the past, he did it this time)[227] but rather to show that John could have committed this second fire since he was questioned about a very similar fire two years ago. In such a situation, the judge may, on timely request, give a limiting instruction.[228] A limiting instruction is the "standard tool" for limiting the use of admitted evidence where the judge instructs a jury how to use evidence properly admitted for a limited purpose.[229]

The FRE bars this kind of propensity evidence because there is a high level of danger that the jury will be misled—that they will not consider the defendant's actions in this case, but instead be influenced by his prior conduct.[230] Although evidence relating to a witness's character for truthfulness is an exception to the rule barring propensity evidence,[231] the reality is that despite the court admitting this evidence for credibility purposes, juries often ignore such limiting instructions and make improper inferences anyway.[232] In a case involving prior false accusations, a judge might give some variation of the following instruction:

> You have heard that Sally, the complaining witness in this case, made a false accusation against another person in the past. You may consider this

225. FED. R. EVID. 404(b)(2) ("This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.").

226. *Id.*

227. *Id.*

228. FED. R. EVID. 105 ("If the court admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.").

229. 21A KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5066 (2d ed. 2017).

230. FED. R. EVID. 404 advisory committee's notes on proposed rules.

231. FED. R. EVID. 608(a); *see also* FED. R. EVID. 404 advisory committee's notes on proposed rules.

232. *See* J. Alexander Tanford, *The Law and Psychology of Jury Instructions*, 69 NEB. L. REV. 71, 92 (1990).

> evidence *only* in deciding the believability of Sally's testimony and how much weight to give to it.[233]

In this case, it is possible that juries will make the improper inference, however unconsciously, that because Sally falsely accused someone in the past, that is what she is likely doing now. Thus, because of the danger of undue prejudice, the court should allow the admission of this evidence only if it is more probative than prejudicial. For example, if Sally's prior accusation was particularly similar to the facts of the second case, or if the circumstances present themselves in such a way that Sally had a malicious reason for accusing both men, then perhaps the probative value of her past actions might overcome the danger of prejudice.

Of course, this approach presupposes that the judges who will conduct these preliminary hearings are well-versed in the nuances of DV and that they will not take into account all the stereotypes that run rampant in our society about women who lie about rape or assault. All the steps and standards and balancing tests in the world cannot correct for ignorance and unconscious bias. After all, judges are humans too, and they are also susceptible to unconscious gender bias, stereotypical and prejudiced notions, and false, unreliable research. Thus, although this is not a formal part of the Recommendation, I nevertheless believe that it is the duty of attorneys to provide judges with current, reliable DV research in order to facilitate this process.[234] DV advocates and others who are providing legal representation to victims of DV/sexual assault need to be well versed in the most up-to-date information regarding victim psychology, promote reliable research, educate others about the relevant issues, and challenge other attorneys to dispel prejudiced notions which hinder victims' abilities to defend themselves throughout a litigated matter.

V. CONCLUSION

It is my hope that the hypothetical posed at the beginning of this Note suddenly seems more complicated than it initially did. At first, the issue was about whether Sally was credible. And although that is still at the heart of the issue, many courts have intimated that there are more factors at play: What was the nature of her prior accusation? Did she recant it? Was the allegation against this defendant or a third party? How long ago was it? What was the relationship between Sally and the accused? FRE 608's original goal of avoiding "mini-trials on peripherally related or irrelevant matters"[235] seems laughable now. But, the sad reality is that these issues will always come up, and victims will always have to prove that they are victims and that they are credible. This Note

233. I wrote this instruction based on a model jury instruction from the Seventh Circuit. *See* THE COMM. ON FED. CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT, PATTERN CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT 3.07 (2012) (emphasis added).

234. For an excellent chapter on what attorneys representing DV victims can do to promote reliable research and studies on the effects of DV on victims, see GOLDSTEIN & LIU, *supra* note 88.

235. United States v. Martz, 964 F.2d 787, 789 (8th Cir. 1992).

proposes a rule that will ensure that, if and when victims are ready to face their abusers, they will not be subject to irrelevant and prejudicial evidence at trial.

Thus, adopting the proposed two-part analysis, which would occur at a preliminary hearing prior to trial for DV and sexual assault cases, will ensure the admissibility of relevant and reliable evidence that will not unduly prejudice a jury against a victim based on unsubstantiated allegations of false prior accusations. Otherwise, these rules act as yet another barrier preventing victims of DV and sexual assault from reporting assaults and, if they do, from going through with prosecution.

APPENDIX A
STATE RULES OF EVIDENCE RE: CHARACTER FOR TRUTHFULNESS & PRIOR FALSE ACCUSATIONS

No Codified Rules of Evidence (2)

New York
Missouri

***Both* Cross-Examination a*nd* Extrinsic Evidence Prohibited (8)**

Alaska (ALASKA R. EVID. 608(b))	Specific Instances of Conduct: If a witness testifies concerning the character for truthfulness or untruthfulness of a previous witness, the specific instances of conduct probative of the truthfulness or untruthfulness of the previous witness, may be inquired into on cross-examination. Evidence of other specific instances of the conduct of a witness offered for the purpose of attacking or supporting that witness' credibility is inadmissible unless such evidence is explicitly made admissible by these rules, by other rules promulgated by the Alaska Supreme Court or by enactment of the Alaska Legislature.
California (CAL. EVID. CODE §787 (West 2016))	Subject to Section 788, evidence of specific instances of his conduct relevant only as tending to prove a trait of his character is inadmissible to attack or support the credibility of a witness.
Illinois (ILL. R. EVID. 608; by common law)	The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the

	witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
Louisiana (LA. CODE EVID. ANN. 608(b))	Particular acts, vices, or courses of conduct: Particular acts, vices, or courses of conduct of a witness may not be inquired into or proved by extrinsic evidence for the purpose of attacking his character for truthfulness, other than conviction of crime as provided in Articles 609 and 609.1 or as constitutionally required.
Oregon (OR. R. EVID. 608(2))	Specific instances of the conduct of a witness, for the purpose of attacking or supporting the credibility of the witness, other than conviction of crime as provided in ORS 40.355, may not be proved by extrinsic evidence. Further, such specific instances of conduct may not, even if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness.
Pennsylvania (PA. R. EVID. 608(b))	Specific Instances of Conduct: Except as provided in Rule 609 (relating to evidence of conviction of crime), (1) the character of a witness for truthfulness may not be attacked or supported by cross-examination or extrinsic evidence concerning specific instances of the witness' conduct; however, (2) in the discretion of the court, the credibility of a witness who testifies as to the reputation of another witness for truthfulness or untruthfulness may be attacked by cross-examination concerning specific instances of conduct (not including arrests) of the other witness, if they are probative of truth-

	fulness or untruthfulness; but extrinsic evidence thereof is not admissible.
Texas (TEX. R. EVID. 608(b))	Specific Instances of Conduct: Except for a criminal conviction under Rule 609, a party may not inquire into or offer extrinsic evidence to prove specific instances of the witness's conduct in order to attack or support the witness's character for truthfulness.
Florida (FLA. STAT. ANN. §90.609 (West 2016); by common law)	Character of witness as impeachment: A party may attack or support the credibility of a witness, including an accused, by evidence in the form of reputation, except that: (1) The evidence may refer only to character relating to truthfulness. (2) Evidence of a truthful character is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence.
Cross-Examination Allowed; Extrinsic Evidence Prohibited (34)	
Alabama (ALA. R. EVID. 608(b))	Specific Instances of Conduct: Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, other than conviction of crime as provided in Rule 609, may not be inquired into on cross-examination of the witness nor proved by extrinsic evidence. They may, however, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Arizona (ARIZ. R. EVID. 608(b))	Specific Instances of Conduct: Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of: (1) the witness; or (2) another witness whose character the witness being cross-examined has testified about.
Arkansas (ARK. R. EVID. 608(b))	Specific Instances of Conduct: Specific instances of the conduct of a witness, for the purpose of attacking or supporting his 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 his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.
Colorado (COLO. R. EVID. 608(b))	Specific instances of conduct: Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness other than conviction of crime as provided in § 13-90-101, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of

	truthfulness or untruthfulness, be inquired into on cross- examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.
Connecticut (CONN. GEN. STAT. ANN. § 6-6(b) (West 2016))	Specific instances of conduct: (1) General rule. A witness may be asked, in good faith, about specific instances of conduct of the witness, if probative of the witness' character for untruthfulness. (2) Extrinsic evidence. Specific instances of the conduct of a witness, for the purpose of impeaching the witness' credibility under subdivision (1), may not be proved by extrinsic evidence.
Delaware (DEL. R. EVID. 608(b))	Specific instances of conduct: Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.
Georgia (GA. CODE ANN. §24-6-608(b) (West 2016))	Specific instances of the conduct of a witness, for the purpose of attacking

	or supporting the witness's character for truthfulness, other than a conviction of a crime as provided in Code Section 24-6-609, or conduct indicative of the witness's bias toward a party may not be proved by extrinsic evidence. Such instances 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; or (2) Concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.
Idaho (IDAHO R. EVID. 608(b))	Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the credibility, of the witness, 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 concerning (1) the character of the witness for truthfulness or untruthfulness, or (2) the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.
Indiana (IND. R. EVID. 608(b))	Specific Instances of Conduct: Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be

	inquired into if they are probative of the character for truthfulness or untruthfulness of another witness whose character the witness being cross-examined has testified about.
Iowa (IOWA R. EVID. 608(b))	Specific instances of conduct: 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 5.609, 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, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.
Kentucky (KY. R. EVID. 608(b))	Specific instances of conduct: Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness: (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. No specific instance of conduct of a witness may be the subject of inquiry

	under this provision unless the cross-examiner has a factual basis for the subject matter of his inquiry.
Maine (ME. R. EVID. 608(b))	Specific instances of conduct: Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. The court may, on cross-examination, allow a party to inquire into specific instances of a witness's conduct if they are probative of the character for truthfulness or untruthfulness of: (1) The witness; or (2) Another witness about whose character the witness being cross-examined has testified.
Maryland (MD. CODE ANN. § 5-608(b) (West 2016))	Impeachment by Examination Regarding Witness's Own Prior Conduct Not Resulting in Convictions: The court may permit any witness to be examined regarding the witness's own prior conduct that did not result in a conviction but that the court finds probative of a character trait of untruthfulness. Upon objection, however, the court may permit the inquiry only if the questioner, outside the hearing of the jury, establishes a reasonable factual basis for asserting that the conduct of the witness occurred. The conduct may not be proved by extrinsic evidence.
Michigan (MICH. R. EVID. 608(b))	Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as pro-

	vided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.
Minnesota (MINN. R. EVID. 608(b))	Specific instances of conduct. Specific instances of the conduct of the witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.
Mississippi (MISS. R. EVID. 608(b))	Specific Instances of Conduct.—Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of: (1) the witness; or

	(2) another witness whose character the witness being cross-examined has testified about.
Montana (MONT. R. EVID. 608(b))	Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.
Nebraska (NEB. REV. STAT. ANN. §27-608 (West 2016))	Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in section 27-609, 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 (a) concerning his character for truthfulness or untruthfulness, or (b) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.
Nevada (NEV. REV. STAT. ANN. §50.085(3) (West 2016))	Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of crime, may

	not be proved by extrinsic evidence. They may, however, if relevant to truthfulness, be inquired into on cross-examination of the witness or on cross-examination of a witness who testifies to an opinion of his or her character for truthfulness or untruthfulness, subject to the general limitations upon relevant evidence and the limitations upon interrogation and subject to the provisions of NRS 50.090.
New Hampshire (N.H. R. EVID. 608(b))	Specific Instances of Conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of: (1) the witness; or (2) another witness whose character the witness being cross-examined has testified about.
New Mexico (N.M. R. EVID. 11-608(b))	Specific Instances of Conduct: Except for a criminal conviction under Rule 11-609 NMRA, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness of (1) the witness; or (2) another witness whose character the witness being cross-examined has testified about.

North Carolina (N.C. R. EVID. 608(b))	Specific instances of conduct: Specific instances of the conduct of a witness, for the purpose of attacking or supporting his 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 his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.
North Dakota (N.D. R. EVID. 608(b))	Specific Instances of Conduct: Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of: (1) the witness; or (2) another witness whose character the witness being cross-examined has testified about.
Ohio (OHIO R. EVID. 608(b))	Specific Instances of Conduct: Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, other than conviction of crime as provided in Evid. R. 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if clearly probative of truthfulness or untruthfulness,

	be inquired into on cross-examination of the witness (1) concerning the witness's character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.
Oklahoma (OKLA. STAT. ANN. tit. 12, §2608(b) (West 2016))	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 Section 2609 of this title, 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 if they: 1. Concern the witness's character for truthfulness or untruthfulness; 2. Concern the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.
South Carolina (S.C. R. EVID. 608(b))	Specific Instances of Conduct: Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

South Dakota (S.D. CODIFIED LAWS §19-19-608(b) (2016))	Specific instances of conduct: Except for a criminal conviction under § 19-19-609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of: (1) the witness; or (2) another witness whose character the witness being cross-examined has testified about.
Tennessee (TENN. R. EVID. 608(b))	Specific Instances of Conduct: Specific instances of conduct of a witness for the purpose of attacking or supporting the witness's character for truthfulness, other than convictions of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, if probative of truthfulness or untruthfulness and under the following conditions, be inquired into on cross-examination of the witness concerning the witness's character for truthfulness or untruthfulness or concerning the character for truthfulness or untruthfulness of another witness as to which the character witness being cross-examined has testified. The conditions which must be satisfied before allowing inquiry on cross-examination about such conduct probative solely of truthfulness or untruthfulness are: (1) The court upon request must hold a hearing outside the jury's presence and must determine that the alleged conduct has probative value and that a reasonable factual basis exists for the

	inquiry; (2) The conduct must have occurred no more than ten years before commencement of the action or prosecution, but evidence of a specific instance of conduct not qualifying under this paragraph (2) is admissible if the proponent gives to the adverse party sufficient advance notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence and the court determines in the interests of justice that the probative value of that evidence, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and (3) If the witness to be impeached is the accused in a criminal prosecution, the State must give the accused reasonable written notice of the impeaching conduct before trial, and the court upon request must determine that the conduct's probative value on credibility outweighs its unfair prejudicial effect on the substantive issues. The court may rule on the admissibility of such proof prior to the trial but in any event shall rule prior to the testimony of the accused. If the court makes a final determination that such proof is admissible for impeachment purposes, the accused need not actually testify at the trial to later challenge the propriety of the determination.
Utah (UTAH R. EVID. 608(b))	Specific Instances of Conduct: Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be

	inquired into if they are probative of the character for truthfulness or untruthfulness of: (1) the witness; or (2) another witness whose character the witness being cross-examined has testified about.
Vermont (VT. R. EVID. 608(b))	Specific Instances of Conduct: Specific instances of the conduct of a witness, for the purpose of attacking or supporting his 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 his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.
Washington (WASH. R. EVID. 608(b))	Specific Instances of Conduct: Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

West Virginia (W.VA. R. EVID. 608(b))	Specific Instances of Conduct: Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination of a witness other than the accused, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of: (1) the witness; or (2) another witness whose character the witness being cross-examined has testified about.
Wisconsin (WIS. STAT. ANN. §906.08(2) (West 2016))	Specific instances of conduct: Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, other than a conviction of a crime or an adjudication of delinquency as provided in s. 906.09, may not be proved by extrinsic evidence. They may, however, subject to s. 972.11(2), if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness or on cross-examination of a witness who testifies to his or her character for truthfulness or untruthfulness.
Wyoming (WYO. R. EVID. 608(b))	Specific Instances of Conduct: Specific instances of the conduct of a witness, for the purpose of attacking or supporting his 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 his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.
***Both* Cross-Examination *and* Extrinsic Evidence Allowed (2)**	
Hawaii (HAW. R. EVID. 608(b))	Specific instances of conduct: Specific instances of the conduct of a witness, for the purpose of attacking the witness' credibility, if probative of untruthfulness, may be inquired into on cross-examination of the witness and, in the discretion of the court, may be proved by extrinsic evidence. When a witness testifies to the character of another witness under subsection (a), relevant specific instances of the other witness' conduct may be inquired into on cross-examination but may not be proved by extrinsic evidence.
Kansas (KAN. STAT. ANN. §60-420 (West 2016))	Subject to K.S.A. 60-421 and 60-422, for the purpose of impairing or supporting the credibility of a witness, any party including the party calling the witness may examine the witness and introduce extrinsic evidence concerning any conduct by him or her and any other matter relevant upon the issues of credibility. §60-422: As affecting the credibility of a witness (a) in examining the witness as to a statement made by him or her in writing inconsistent with any part of his or her testimony it shall not be necessary to show or read to the witness any part of the writing provided that if the judge deems it feasible the time and place of the writing

	and the name of the person addressed, if any, shall be indicated to the witness; (b) extrinsic evidence of prior contradictory statements, whether oral or written, made by the witness, may in the discretion of the judge be excluded unless the witness was so examined while testifying as to give him or her an opportunity to identify, explain or deny the statement; (c) evidence of traits of his or her character other than honesty or veracity or their opposites, shall be inadmissible; (d) evidence of specific instances of his or her conduct relevant only as tending to prove a trait of his or her character, shall be inadmissible.
Specifically Allowing Evidence of Prior False Accusations (4)	
Massachusetts (MASS. R. EVID. 608(b); by common law)	Specific Instances of Conduct. In general, specific instances of misconduct showing the witness to be untruthful are not admissible for the purpose of attacking or supporting the witness's credibility. EXCEPT: The Supreme Judicial Court has "chiseled" a narrow exception to the rule that the testimony of a witness may not be impeached with specific acts of prior misconduct, recognizing that in special circumstances (to date, only rape and sexual assault cases) the interest of justice would forbid its strict application. Commonwealth v. LaVelle, 414 Mass. at 151-152. In Commonwealth v. Bohannon, 376 Mass. 90, 94-96 (1978), the special circumstances warranting evidence of the prior accusations were that (1) the witness was the victim in the case on trial; (2) the victim/witness's consent was the central issue at trial; (3) the victim/witness was the only Com-

	monwealth witness on the issue of consent; (4) the victim/witness's testimony was inconsistent and confused; and (5) there was a basis in independent third-party records for concluding that the victim/witness's prior accusation of the same type of crime had been made and was false. Not all of the Bohannon circumstances must be present for the exception to apply. Commonwealth v. Nichols, 37 Mass. App. Ct. 332, 337 (1994).
New Jersey (N.J. R. EVID. 608(b))	The credibility of a witness in a criminal case may be attacked by evidence that the witness made a prior false accusation against any person of a crime similar to the crime with which defendant is charged if the judge preliminarily determines, by a hearing pursuant to Rule 104(a), that the witness knowingly made the prior false accusation.
Virginia (VA. CODE ANN. §2-608(e) (West 2016))	(a) In general. Subject to the provisions of Rule 2:403, the credibility of a witness may be impeached by any party other than the one calling the witness, with any proof that is relevant to the witness's credibility. Impeachment may be undertaken, among other means, by: (i) introduction of evidence of the witness's bad general reputation for the traits of truth and veracity, as provided in Rule 2:608(a) and (b); (ii) evidence of prior conviction, as provided in Rule 2:609; (iii) evidence of prior unadjudicated perjury, as provided in Rule 2:608(d); (iv) evidence of prior false accusations of sexual misconduct, as provided in Rule 2:608(e); (v) evidence of bias as provided in Rule 2:610; (vi)

	prior inconsistent statements as provided in 2:613; (vii) contradiction by other evidence; and (viii) any other evidence which is probative on the issue of credibility because of a logical tendency to convince the trier of fact that the witness's perception, memory, or narration is defective or impaired, or that the sincerity or veracity of the witness is questionable. §2-608(b): Specific instances of conduct; extrinsic proof. Except as otherwise provided in this Rule, by other principles of evidence, or by statute, (1) specific instances of the conduct of a witness may not be used to attack or support credibility; and (2) specific instances of the conduct of a witness may not be proved by extrinsic evidence. 2-608(e): Prior false accusations in sexual assault cases. Except as otherwise provided by other evidentiary principles, statutes or Rules of Court, a complaining witness in a sexual assault case may be cross-examined about prior false accusations of sexual misconduct.
Rhode Island (R.I. R. EVID. 608(b))	Specific Instances of Conduct: Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, or, in the discretion of the trial judge, evidence of prior similar false accusations, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2)

concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.