**COMMENTS**

# PRIOR (FALSE?) ACCUSATIONS: REFORMING RAPE SHIELDS TO REFLECT THE DYNAMICS OF SEXUAL ASSAULT

*by*

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*When a victim of sexual assault recants her accusation against a perpetrator, future perpetrators may attempt to use that recantation as evidence of a prior false rape accusation. However, use of that recantation as such evidence assumes that the victim recanted because her accusation was false, and this is not always the case, and in fact public skepticism of rape accusations furthers the incidence of false recantations by victims. Additionally, a victim's accusation may lack credibility, and may be perceived as false, because of the effects of rape trauma syndrome. All 50 states have adopted rape shield statutes to protect victims, but their treatment of victims is inadequate, inconsistent, and ignores modern scholarship on the effects of rape on victims. This Comment argues that legislatures should amend their rape shield statutes to specifically address prior accusations in ways that account for the dynamics and realities of sexual assault. The Comment begins by examining the legal and social framework underlying sexual assault, including an examination of the rape shield protections in each state, and then sets forth the substance of proposed legislative reforms and addresses arguments opposed to rape shield reform. The rights and interests of both victims and defendants must be respected, and the only way to successfully balance those rights and interests is through a careful examination of the social realities and legal framework that are present in sexual assault.*

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## I. Introduction

> Sometimes the failure to discriminate is discriminatory; where there are real differences, failure to recognize and take account of them is the proof of unfairness. If the defenders of the system are right in saying rape cases are treated just like assault, and just like robbery and burglary, they are surely wrong in taking this as evidence of a fair and just system.[1]

In 1987, Susan Estrich unleashed a damning critique of the substantive law of rape and the ways in which it has failed victims of "nonviolent" rape.[2] Professor Estrich's argument that "rape is different" continues to echo throughout the evidentiary law of rape, an area still in dire need of reform. A particularly problematic and under-examined area is the admissibility of evidence of prior false accusations of rape. In this context, the idea that "rape is different" cuts both ways, with some arguing that special evidentiary rules are necessary to admit such evidence,[3] and others claiming that arguments favoring special rules

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[1] Susan Estrich, Real Rape 25 (1987).

[2] *Id.*

[3] *See, e.g.*, Christopher Bopst, *Rape Shield Laws and Prior False Accusations of Rape: The Need for Meaningful Legislative Reform*, 24 J. Legis. 125, 147–48 (1998).

reflect longstanding rape mythologies.[4] Key to the dilemma is the intimate nature of the crime, which is often witnessed by only two individuals and which often leaves little, if any, physical evidence. In this closed evidentiary universe, credibility—that of the victim and that of the accused—takes center stage. For these reasons and others, rape is a singularly troubling crime, one that poses unique evidentiary questions that must be approached with an awareness of the dynamics underlying sexual assault.

This Comment argues that a majority of states currently employ wholly inadequate approaches to the admission of prior false accusation evidence in sexual assault trials. This Comment focuses on the issue of "falsity" and challenges the idea that determining the truth or falsity of an accusation is simple or straightforward. Ultimately, this Comment concludes that the best way to cure the inadequacies of the current system is for lawmakers to amend state rape shield statutes to clearly address prior false accusation evidence. The new evidentiary rules must account for the dynamics of sexual assault—otherwise, the system will continue to operate in a way that is unfair to victims and to the public interest.

Part II lays out the legal and social framework underlying the issue of prior false accusation evidence. Part II.A. discusses the difficulty of determining whether an accusation is false, even where there is evidence that the victim has recanted or other indicia of falsity. Parts II.B. and II.C. examine current state approaches to determining the falsity of a prior accusation and to determining the relevancy of the prior accusation to the instant sexual assault trial. Part II.D. discusses state rape shield statutes and the way they are, and are not, employed as procedural devices to assist courts in handling prior false accusation evidence. Part II.E. reviews the evidentiary bases for admission of prior false accusation evidence. Part II.F. examines police and prosecutorial discretion and the important, but largely hidden, role they play. Part II.G. provides a summary of the issues examined in Part II.

Part III.A. sets forth the substance of a proposed amendment to state rape shield statutes that would guide courts faced with prior false accusation evidence. Part III.B. demonstrates the benefits and application of the proposed amendment. Part III.C. defends the proposed amendment in light of scholarly work on the issue of prior false accusation evidence.

A note on terminology: this Comment uses the pronoun "she" when referring to victims of sexual assault and the pronoun "he" when referring to perpetrators. This choice is not intended to imply that males cannot be victims of rape or that females cannot be perpetrators of rape. Instead, this choice reflects the fact that the majority of the case law

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[4] *See, e.g.*, Denise R. Johnson, *Prior False Allegations of Rape: Falsus in Uno, Falsus in Ominibus?*, 7 YALE J.L. & FEMINISM 243, 263 (1995).

discussed in this Comment involves female victims and male perpetrators. Additionally, this Comment refers to "victims" of sexual assault and does not use the terms "accuser," "complaining witness," or the antiquated "prosecutrix." The term "victim" was selected, not to undermine the presumption of innocence, but to respect the experience of those who report sexual assault, as well as in the interest of consistency and clarity. Finally, this Comment repeatedly refers to "prior false accusations." Please note that this is a term of art used in commentary, case law, and statutory language. This term is used in the interest of uniformity, and its use in this Comment does not reflect a value judgment on the "truth" or "falsity" of any accusation of sexual assault.

## II. Legal and Social Framework

### A. *The Difficulty of Identifying False Accusations*

The perception that false accusations of sexual assault are common is longstanding. The oft-quoted 1680 statement by the English Chief Justice Sir Matthew Hale is illustrative: "[Rape] is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent."[5] From Blackstone to Wigmore, the perception that victims lie about sexual assault is deeply rooted in legal history and culture.[6] Indeed, there is a very real history of false accusations of rape in the American South where, until relatively recently, white women "were often pressured by white men to falsely accuse black men of rape so that the alleged suffering of the victims could be seized upon to justify the execution or lynching of the accused individuals, and by extension to legitimize the segregation and repression of all black men."[7]

In modern day America, high-profile stories of false rape accusations periodically capture the collective imagination,[8] and the view that women falsely accuse men of rape persists. For example, when the victim refused to go forward in the rape prosecution of Kobe Bryant after she received death threats and was subjected to repeated privacy violations—including the release of her name to the national news media—a *USA Today* poll

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[5] 1 Matthew Hale, The History of the Pleas of the Crown 635 (P.R. Glazebrook ed., London Prof'l. Books Ltd. 1971) (1736).

[6] See Julie Taylor, *Rape and Women's Credibility: Problems of Recantations and False Accusations Echoed in the Case of Cathleen Crowell Webb and Gary Dotson*, 10 Harv. Women's L.J. 59, 74–81 (1987) for an excellent discussion of the history of scholarly literature on false accusations of rape.

[7] Andrew Karmen, Crime Victims: An Introduction to Victimology 260 (6th ed. 2007) (discussing the 1931 "Scottsboro Boys" case in which eight black men were charged with gang raping two white women in a boxcar).

[8] *See id.* at 261.

found that a majority of people believed she withdrew from the prosecution because her accusations against Bryant were false.[9]

The continuing widespread perception that sexual assault victims lie about rape has led to specific rules and procedures designed to test victim credibility[10]—for instance, special evidentiary rules for the admission of prior false accusation evidence.[11] Those who support such special rules and subscribe to the idea that false rape accusations are common often cite studies like the one conducted by Eugene J. Kanin (the Kanin Study), which found, based on alleged victim recantations, that 41% of reported rapes in a small community were false.[12] However, statistics on the frequency of false accusations of rape vary widely, ranging from as low as below 2% to as high as 90%.[13]

Despite the difficulty of pinning down precise statistics on the prevalence of false accusations of rape, there is reason to believe that there exists just as much—if not more—cause for concern about false recantations as false accusations. The Kanin Study has been criticized for its equation of false recantations with false accusations. Some critics have hypothesized that the victims in the Kanin Study may have recanted falsely, out of a desire to prevent their cases from proceeding in light of police implications that, absent a recantation, the case would go forward whether the victim wanted it to or not.[14] While Philip N.S. Rumney acknowledges that Professor Kanin himself stated that his results should not be generalized, Professor Rumney criticizes Professor Kanin's assumptions that police in his study never placed undue pressure on victims to recant and that police labeled cases false only when the victim actually recanted.[15] Furthermore, Professor Rumney points to Professor Kanin's acknowledgment that the police officers in his study offered polygraph examinations to sexual assault victims, and Professor Rumney criticizes Professor Kanin's failure to consider the possibility that the offer (or threat) of a polygraph incentivized victims to recant.[16]

Indeed, the practice of police subjecting sexual assault victims to polygraph examination is widely documented; a 1995 study found that 17 states required rape victims to submit to a polygraph before proceeding

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[9] *See* Joanne Belknap, *Rape: Too Hard to Report and Too Easy to Discredit Victims*, 16 VIOLENCE AGAINST WOMEN 1335, 1340–41 (2010).

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

[11] *See infra* Part II.B–D.

[12] Eugene J. Kanin, *False Rape Allegations*, 23 ARCHIVES SEXUAL BEHAV. 81, 83–84 (1994).

[13] Rumney, *supra* note 10, at 136–37.

[14] David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1312–13 (1997).

[15] Rumney, *supra* note 10, at 139–40.

[16] *Id.*

with the case.[17] In some cases, victims confronted with this accusatorial practice have recanted despite the truthfulness of their accusations.[18] While many states have outlawed the use of polygraphs on crime victims, polygraphs are still administered in some states.[19] Even in states where polygraphs are no longer used, the attitude of distrust may remain, potentially leading to false recantations. Victims may "recant when they encounter skepticism, disbelief, or blame or because they find their disclosure makes matters worse or more dangerous for them."[20] Indeed, at least one commentator believes that Cathleen Crowell Webb's highly publicized 1985 rape recantation was false and that the victim recanted because of internalized guilt for her own rape, exacerbated by a troubled childhood and born-again Christian beliefs.[21] While it is impossible to say whether Webb falsely recanted or how frequently false recantations occur, the evidence indicates that they occur more frequently than many assume.[22]

The frequency of false recantations sheds light on the issue of the admissibility of prior false accusation evidence for several reasons. First, recantations fuel the public perception that prior false accusations are common[23] and thus deserving of special attention from courts and the rules of evidence. Second, many jurisdictions will admit evidence of a recantation under the assumption that a victim who has recanted a prior accusation must have done so because the accusation was false.[24] However, the facts of many sexual assault cases are far from clear-cut, and it is not always the case that a recantation is synonymous with a false

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[17] Patricia D. Rozee & Mary P. Koss, *Rape: A Century of Resistance*, 25 PSYCHOL. OF WOMEN Q. 295, 303 (2001).

[18] *Id.*

[19] *See* KARMEN, *supra* note 7, at 261.

[20] Belknap, *supra* note 9, at 1339 (quoting Jody Raphael, Book Note, 14 VIOLENCE AGAINST WOMEN 370, 371 (2008) (reviewing STUART TAYLOR JR. & K.C. JOHNSON, THE DUKE LACROSSE CASE: EXPLOITING THE ISSUE OF FALSE RAPE ACCUSATIONS (2007))).

[21] Taylor, *supra* note 6, at 73 n.75.

[22] *See id.* at 91.

[23] Rumney, *supra* note 10, at 129.

[24] *See, e.g.*, Peeples v. State, 681 So. 2d 236, 238–39 (Ala. 1995) (finding that, because an accusation of sexual assault and a denial of the accusation are mutually exclusive, a recanting victim necessarily made a false accusation); State v. Bailey, No. 9312009229, 1996 WL 587721, at *7 (Del. Super. Ct. Sept. 12, 1996) (finding that a victim's subsequent recantation is sufficient evidence of the falsity of the prior accusation); Dennis v. Commonwealth, 306 S.W.3d 466, 475 (Ky. 2010) (finding the same); Cox v. State, 443 A.2d 607, 613–14 (Md. Ct. Spec. App. 1982), *aff'd*, 468 A.2d 319 (Md. 1983) (finding the same); State v. LeClair, 730 P.2d 609, 615 (Or. Ct. App. 1986) (finding the same). *But see* Bond v. State, 288 S.W.3d 206, 211 (Ark. 2008) (finding recantation evidence only slightly relevant and finding that prejudice outweighed probative value); State v. White, 765 A.2d 156, 159 (N.H. 2000) (noting that the trial court had discretion to find that the forced recantation did not meet the falsity standard).

accusation.[25] The difficulty of determining whether a recantation equals falsity underscores the difficulty of determining the falsity of any accusation. A recantation is, after all, the most straightforward evidence that the victim has made a false accusation. Therefore, the fact that a recantation is not trustworthy evidence of a false accusation casts doubt on other, less trustworthy evidence of falsity.

Even when a victim does not recant an accusation, police and others may determine that her accusation is false because the effects of trauma may harm her perceived credibility.[26] A 1974 study by Ann Wolbert Burgess and Lynda Lytle Holmstrom first identified the two-phase syndrome they coined "rape trauma syndrome."[27] The acute phase of rape trauma syndrome occurs in the weeks following an assault. During that time, in addition to the physical effects of rape, victims experience a range of emotions, including fear, embarrassment, and anger, and many victims attempt to erase their assaults from their memories.[28] Furthermore, rape victims may suffer posttraumatic stress disorder, which causes them to "re-experience the attack over and over again in daydreams, flashbacks, or nightmares."[29] The effects of trauma may cause a victim to give inconsistent accounts from interview to interview because she may be in a state of shock and thus incapable of giving a full account of the sexual assault at a particular time.[30] Furthermore, studies show that traumatic experiences, such as rape, may cause a victim to forget some or all of the experience, and this traumatic forgetting can occur even after the victim initially remembered, and even described, the event.[31]

Inconsistent or confused accounts may create the impression that a victim is lying about a sexual assault, as may delayed reporting, which is common among sexual assault victims.[32] Further exacerbating the

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[25] *See, e.g.*, State v. MacDonald, 956 P.2d 1314 (Idaho Ct. App. 1998). After the victim accused her father of sexual abuse, she was removed from her home and placed in foster care, where she was raped and impregnated by her foster father. *Id.* at 1315–17. The victim recanted her accusation against her father when he and her mother informed her that she would be allowed to return home if she recanted. *Id.* As an adult, the victim was again raped, and at the trial, the defendant attempted to introduce the victim's recantation as evidence of a prior false accusation. *Id.* at 1315–16. The appellate court affirmed the trial court's refusal to admit the evidence on the grounds that a "trial within a trial" would ensue and that the prejudicial effects of the recantation evidence outweighed its probative value. *Id.* at 1318.

[26] *See* Taylor, *supra* note 6, at 93–94.

[27] Ann Wolbert Burgess & Lynda Lytle Holmstrom, *Rape Trauma Syndrome*, 131 AM. J. PSYCHIATRY 981, 981 (1974).

[28] ANN WOLBERT BURGESS & LYNDA LYTLE HOLMSTROM, RAPE: CRISIS AND RECOVERY 35–39 (1979).

[29] KARMEN, *supra* note 7, at 250.

[30] Taylor, *supra* note 6, at 93 n.167.

[31] Jennifer J. Freyd, *What Juries Don't Know: Dissemination of Research on Victim Response is Essential for Justice*, TRAUMA PSYCHOL. NEWSL. (Am. Psychol. Ass'n, Washington, D.C.) Fall 2008, at 15, 16.

[32] *Id.*

problem is the fact that, while some victims react in an emotional manner following a rape, many victims react in a "controlled style," which manifests in the victim maintaining a "calm, composed, or subdued affect."[33] Such a calm reaction does not comport with what many view as the "appropriate" response to a sexual assault and may lead to the perception that the victim is lying. Additionally, the trauma of a sexual assault often affects all areas of the victim's life including "economic stability, emotional security, and physical safety."[34] These profound, wide-reaching effects may harm the victim's perceived credibility because they may render her unable, or unwilling, to follow up with a police investigation, which may create the appearance that her accusation is false.

Finally, many rape victims are vulnerable individuals who suffer multiple rapes, and for this reason, it is relatively likely that a victim will have made prior accusations that lack traditional indicia of credibility. A majority of rapes are committed by serial rapists.[35] For these individuals, rape is often a crime of opportunity, and the rapist will select a victim whose vulnerabilities make her an easy target.[36] And those same vulnerabilities that make for a "good victim" also tend to make for a witness who lacks credibility.[37] To make matters worse, sexual assaults occur much more frequently than many people realize,[38] and revictimization is common among sexual assault victims.[39] Thus, it is likely that a rape victim who suffers multiple rapes will also possess traits that cause her to lack credibility in the eyes of those to whom she reports.

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[33] BURGESS & HOLSTROM, *supra* note 28, at 36.

[34] Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U. L. REV. 467, 473 (2005).

[35] *See* David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73, 78 (2002). Lisak and Miller conducted a study in which they identified 120 "undetected rapists" and found that 63.3% of the rapists reported committing multiple rapes. *Id.* at 73, 78; *see also* David Lisak, *Behind the Torment of Rape Victims Lies a Dark Fear: Reply to the Commentaries*, 16 VIOLENCE AGAINST WOMEN 1372 (2010). Lisak reports that 90–95% of rapes are committed by repeat rapists who specifically target vulnerable victims, and Lisak posits that society's focus on allegedly false accusations detracts from this startling statistic. *Id.* at 1372–74.

[36] One study found that convicted rapists admitted to selecting victims perceived as "easy prey." HARVEY WALLACE, VICTIMOLOGY: LEGAL, PSYCHOLOGICAL, AND SOCIAL PERSPECTIVES 140 (2d ed. 2007).

[37] For example, studies show that rapists target women who are intoxicated and that a victim who was intoxicated at the time of an assault may not report out of fear that she will not be viewed as credible by police. TK LOGAN ET AL., WOMEN AND VICTIMIZATION: CONTRIBUTING FACTORS, INTERVENTIONS, AND IMPLICATIONS 55–57 (2006).

[38] While the low reporting rate makes the frequency of rape difficult to quantify, estimates of the percentage of women who are victims of completed rapes range from 2% to 25%. WALLACE, *supra* note 36, at 135–37.

[39] *See* ROBERT C. DAVIS ET AL., VICTIMS OF CRIME 40–41 (3d ed. 2007) ("Women who are raped are usually raped more than once[.]").

*B. Standards for Determining the Falsity of a Prior Accusation*

Every state except Rhode Island[40] requires a showing that a prior accusation was false before evidence of the accusation will be admissible in a sexual assault trial. And even in Rhode Island, prior accusation evidence will rarely, if ever, be admissible unless the prior accusation was false because evidence of a true prior accusation will rarely be relevant.[41] The relevancy of prior false accusation evidence depends on a showing that the accusation either impugns the victim's credibility as a witness or provides evidence of the victim's habit or plan of lying about sexual assault.[42] Thus, it is important to show that an accusation is false before it is admitted at trial. But, as the discussion in Part II.A. demonstrates, pinning a prior accusation as "false" is a task more difficult than it may first appear.

While each of the remaining 49 states requires that the defense show that a prior accusation was false before the accusation will be admissible, standards for measuring falsity vary widely. The two states with the most stringent standards are likely Texas and Florida. In Texas, prior false accusation evidence is admissible only if required by the Confrontation Clause.[43] Similarly, in Florida, prior false accusation evidence is admissible only if required by the Confrontation Clause or if the prior false accusation resulted in a criminal conviction.[44] Twelve states have preponderance-plus standards, requiring falsity to be proven by more than a preponderance of the evidence; of those, six require that the prior accusation be "demonstrably false,"[45] two require clear and convincing evidence of falsity,[46] two require the prior accusation to have been "proven to be false,"[47] one requires a "strong probability" of falsity,[48] and

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[40] *See* State v. Oliveira, 576 A.2d 111, 113 (R.I. 1990).

[41] *See* State v. Manning, 973 A.2d 524, 535 (R.I. 2009).

[42] *See infra* Part II.E.

[43] *See* Lopez v. State, 18 S.W.3d 220, 225 (Tex. Crim. App. 2000). Admission is required by the Confrontation Clause only when the prior accusation was false. *See* Garcia v. State, 228 S.W.3d 703, 706 (Tex. App. 2005).

[44] Pantoja v. State, 59 So. 3d 1092, 1097–99 (Fla. 2011).

[45] Alabama: Peeples v. State, 681 So. 2d 236, 238–39 (Ala. 1995). Colorado: People v. Weiss, 133 P.3d 1180, 1189 (Colo. 2006). Indiana: State v. Walton, 715 N.E.2d 824, 828 (Ind. 1999); State v. Luna, 932 N.E.2d 210, 212–13 (Ind. Ct. App. 2010). Kentucky: Dennis v. Commonwealth, 306 S.W.3d 466, 475 (Ky. 2010). New Mexico: State v. Johnson, 692 P.2d 35, 43 (N.M. Ct. App. 1984). South Dakota: State v. Ralios, 783 N.W.2d 647, 663 (S.D. 2010); State v. Guthmiller, 667 N.W.2d 295, 305 (S.D. 2003).

[46] Arizona: State v. Valenzuela, No. 2 CA-CR 2006-0238, 2008 WL 3878290, at *2 (Ariz. Ct. App. Aug. 21, 2008). Delaware: State v. Bailey, No. 9312009229, 1996 WL 587721, at *7 (Del. Super. Ct. Sept. 12, 1996).

[47] California: People v. Miranda, 132 Cal. Rptr. 3d 315, 332 (Cal. Ct. App. 2011), *modified on denial of reh'g*, (Nov. 8, 2011). Montana: State v. Steffes, 887 P.2d 1196, 1206 (Mont. 1994); State v. Van Pelt, 805 P.2d 549, 552 (Mont. 1991).

one requires that the prior accusation be "totally false and unfounded."[49] Seven states require that falsity be proven by a preponderance of the evidence.[50] Seven states have some variation of a "reasonableness" standard; of those, four require a "reasonable probability of falsity,"[51] two require that a "jury could reasonably find" falsity,[52] and one requires that there be a "reasonable basis" for falsity.[53] One state requires "some quantum of evidence" of falsity.[54] Sixteen states currently lack consistent, clearly articulated standards for falsity.[55]

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[48] West Virginia: State v. Quinn, 490 S.E.2d 34, 40 (W. Va. 1997) ("strong probability"); *see also* State v. Wears, 665 S.E.2d 273, 280 (W. Va. 2008) (interpreting strong probability to require strong and substantial proof of actual falsity).

[49] Ohio: State v. Boggs, 588 N.E.2d 813, 818 (Ohio 1992).

[50] Alaska: Morgan v. State, 54 P.3d 332, 333 (Alaska Ct. App. 2002). Hawaii: State v. West, 24 P.3d 648, 656 (Haw. 2001); State v. Moisa, No. 30712, 2012 WL 247963, at *3 (Haw. Ct. App. Jan. 25, 2012). Iowa: Millam v. State, 745 N.W.2d 719, 722–23 (Iowa 2008). Missouri: State v. Long, 140 S.W.3d 27, 32 (Mo. 2004) (en banc); State v. Thompson, 341 S.W.3d 723, 732 (Mo. Ct. App. 2011). Nevada: Brown v. State, 807 P.2d 1379, 1380 (Nev. 1991). New Jersey: State v. Bray, 813 A.2d 571, 577–78 (N.J. Super. Ct. App. Div. 2003) (using preponderance of evidence standard to determine whether prior accusation is "probably false"). Utah: State v. Tarrats, 122 P.3d 581, 586 (Utah 2005).

[51] Georgia: Smith v. State, 377 S.E.2d 158, 160 (Ga. 1989); Walker v. State, 707 S.E.2d 122, 126 (Ga. Ct. App. 2011). Kansas: State v. Barber, 766 P.2d 1288, 1289–90 (Kan. Ct. App. 1989). Minnesota: State v. Goldenstein, 505 N.W.2d 332, 340 (Minn. Ct. App. 1993). Virginia: Ortiz v. Commonwealth, 667 S.E.2d 751, 760 (Va. 2008).

[52] Louisiana: *See* State v. Smith, 743 So. 2d 199, 202–03 (La. 1999) (requiring courts to consider "whether reasonable jurors could find" falsity). Wisconsin: State v. Ringer, 785 N.W.2d 448, 457 (Wis. 2010).

[53] Oklahoma: Walker v. State, 841 P.2d 1159, 1161 (Okla. Crim. App. 1992).

[54] North Dakota: State v. Kringstad, 353 N.W.2d 302, 311 (N.D. 1984).

[55] Arkansas: *See* Amanda B. Hurst, Note, *The Arkansas Rape-Shield Statute: Does It Create Another Victim?*, 58 ARK. L. REV. 949, 966 n.106 (2006) ("[N]o Arkansas case has articulated a standard for falsity . . . ."). Connecticut: State v. Martinez, 991 A.2d 1086, 1094 (Conn. 2010) (requiring specific evidence of falsity). Idaho: IDAHO R. EVID. 412(b)(2)(C) (using unclear terminology, "false allegations of sex crimes made at an earlier time"). Illinois: People v. Davis, 787 N.E.2d 212, 219–20 (Ill. App. Ct. 2003). Maine: State v. Almurshidy, 732 A.2d 280, 287 & n.4 (Me. 1999) (noting that defendant must at least suggest that the accusation was false). Maryland: Cox v. State, 443 A.2d 607, 613–14 (Md. Ct. Spec. App. 1982) *aff'd*, 468 A.2d 319 (1983) (finding recantation in open court under cross-examination sufficient for falsity). Massachusetts: Commonwealth v. Sperrazza, 396 N.E.2d 449, 451 (Mass. 1979) (setting forth fact-specific approach to whether the threshold for falsity has been met). Michigan: People v. Hackett, 365 N.W.2d 120, 124–25 (Mich. 1984) (prior accusation must be false in order to be relevant). Mississippi: Roberson v. State, 61 So. 3d 204, 221 (Miss. Ct. App. 2010) (defendant must make an offer of proof that the prior accusation was false). Nebraska: State v. Welch, 490 N.W.2d 216, 221 (Neb. 1992) (defendant must make some showing that the prior accusation was false). North Carolina: State v. Thompson, 533 S.E.2d 834, 842 (N.C. Ct. App. 2000) (requiring some definitive evidence that victim had previously made false accusations); State v. Anthony, 365 S.E.2d 195, 197 (N.C. Ct. App. 1988) (requiring the presence of some evidence). Pennsylvania: Commonwealth v. Gaddis, 639 A.2d 462, 466–67 (Pa. Super. Ct. 1994) (requiring sufficiently specific proffer of evidence).

In three states, the standards for falsity vary depending on the circumstances. In New Hampshire and Tennessee, the standard depends on the evidentiary basis for the admission of the prior false accusation evidence.[56] In New Hampshire, extrinsic evidence is admissible only when the prior accusation is "clearly and convincingly untrue."[57] However, if the defense seeks only to cross-examine the victim regarding prior false accusations, the falsity standard is lower.[58] Similarly, in Tennessee, while extrinsic evidence is admissible only where there is clear and convincing proof of falsity,[59] cross-examination is permissible so long as it is supported by a good faith basis.[60] Oregon, on the other hand, allows for the admission of prior accusation evidence in three circumstances: (1) where the victim has recanted; (2) where the defendant demonstrates falsity to the court; and (3) where there is some evidence that the victim has made prior false accusations, unless the probative value of the evidence is outweighed.[61]

At bottom, the importance of the falsity determination, alongside the inconsistent approaches taken by states (not to mention the lack of a clear evidentiary standard for determining falsity in nearly one-third of the states), underscores the need for legislative reform in the area of prior false accusation evidence.

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South Carolina: State v. Boiter, 396 S.E.2d 364, 365 (S.C. 1990) (trial judge must make a preliminary determination that the accusation was false). Vermont: State v. Leggett, 664 A.2d 271, 272 (Vt. 1995) (discussing sufficient showing). Washington: State v. Demos, 619 P.2d 968, 970 (Wash. 1980) (discussing arguably false standard). Wyoming: *See* Johnson v. State, 806 P.2d 1282, 1288–89 (Wyo. 1991) (limited case law appearing to require falsity, although not squarely addressing the issue of false accusation evidence).

[56] See *infra* Part II.E for a discussion of the evidentiary bases for admission of prior false accusation evidence.

[57] State v. White, 765 A.2d 156, 159 (N.H. 2000) (noting the trial court's discretion to find that a forced recantation did not meet the "clearly and convincingly untrue" standard); *see also* State v. Kornbrekke, 943 A.2d 797, 799 (N.H. 2008) (clarifying that the *White* rule provides differing falsity standards depending on whether the evidence is sought to be admitted through cross-examination or extrinsic evidence).

[58] *See Kornbrekke*, 943 A.2d at 799 (requiring that the prior false accusation evidence be "probative of truthfulness or untruthfulness and otherwise admissible"); *see also* State v. Oakes, 13 A.3d 293, 304 (N.H. 2010) ("A 'critical factor' in the *Kornbrekke* analysis is whether the other allegations of sexual assault were false.").

[59] *See* State v. Wyrick, 62 S.W.3d 751, 778 (Tenn. Crim. App. 2001).

[60] State v. Pottebaum, No. M2004-02733-CCA-R3-CD, 2006 WL 1222710, at *7 (Tenn. Crim. App. May 5, 2006) (requiring a good faith basis for cross-examination); *see also Wyrick*, 62 S.W.3d at 780 (requiring a reasonable factual basis).

[61] State v. LeClair, 730 P.2d 609, 615 (Or. Ct. App. 1986); *see also* State v. Nelson, 265 P.3d 8, 14 (Or. Ct. App. 2011) ("Thus, under the third category, if there is some evidence from which the court could find that the complaining witness had made a false accusation, the court must balance whether the probative value of the evidence which the defendant seeks to elicit on cross-examination is 'substantially outweighed by the risk of prejudice, confusion, embarrassment or delay.'") (quoting *LeClair*).

### *C. Beyond Falsity: Requirements of Pattern and Similarity*

In addition to the requirement of falsity, several states require or prefer either a pattern of prior false accusations or similarities between prior and current charges—or both—before prior false accusation evidence will be admissible. These states have recognized the importance of the falsity determination and have gone a step further in implementing a more nuanced relevancy determination. New York requires a good faith basis for the falsity of the prior accusation[62] and sufficient similarity between the prior accusation and the current charge so as to suggest a pattern.[63] Like New York, Massachusetts courts also look for falsity, a pattern, and similarity between prior and current charges. Massachusetts employs a multi-factor, fact-specific approach in an attempt to find "a pattern of false accusations or 'crying wolf.'"[64] Among the factors considered in Massachusetts is "a basis in independent third party records for concluding that the prior accusations of the same type of crime had been made and were false."[65] Additionally, four other states look at similarities between prior and current charges as a factor in determining admissibility of prior false accusation evidence.[66] Colorado has interpreted its rape shield statute as requiring the defense to show that "the alleged victim made multiple prior or subsequent reports of sexual assault that were in fact false."[67]

### *D. The Issue of Rape Shield Coverage*

The issues of falsity and relevance raise the related questions of when and how the court will decide the falsity, relevance, and admissibility of prior accusation evidence. The preferable approach is through a rape shield hearing. All 50 states have adopted rape shields,[68] victim-protective

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[62] People v. Bridgeland, 796 N.Y.S.2d 768, 770 (N.Y. App. Div. 2005).

[63] *See* People v. Mandel, 401 N.E.2d 185, 187 (N.Y. 1979); People v. Lackey, 853 N.Y.S.2d 668, 669 (N.Y. App. Div. 2008); People v. Pereau, 845 N.Y.S.2d 536, 538 (N.Y. App. Div. 2007).

[64] Commonwealth v. Haynes, 696 N.E.2d 555, 560 (Mass. App. Ct. 1998) (quoting Commonwealth v. LaVelle, 605 N.E.2d 852, 856 n.4 (Mass. 1993)).

[65] Commonwealth v. Sperrazza, 396 N.E.2d 449, 451 (Mass. 1979).

[66] Missouri: State v. Long, 140 S.W.3d 27, 31–32 (Mo. 2004) (en banc) (similarity to the charged offense factors into the relevance analysis but is not required and is not the only consideration). New Jersey: State v. Guenther, 854 A.2d 308, 323–24 (N.J. 2004) (similarity to the current charge is a factor to consider in determining whether the evidence is admissible). South Carolina: State v. Boiter, 396 S.E.2d 364, 365 (S.C. 1990) (similarity to the current charge and remoteness in time both factor into the admissibility decision). Utah: State v. Tarrats, 122 P.3d 581, 588 (Utah 2005) (similarity to the current charge factors into the relevancy analysis).

[67] People v. Weiss, 133 P.3d 1180, 1187 (Colo. 2006).

[68] *See* Nat'l Ctr. for Prosecution of Child Abuse, *Rape Shield Statutes as of March 2011* (Mar. 2011), Nat'l Dist. Attorney's Ass'n, http://www.ndaa.org/pdf/NCPCA%20Rape%20Shield%202011.pdf; *Rape Shield Chart* (Mar. 2011), Nat'l Dist. Attorney's Ass'n, http://www.ndaa.org/pdf/Rape%20Sheild%20Chart%20_

statutes passed in response to advocacy by the women's movement of the 1970s.[69] Prior to the passage of rape shield statutes, a sexual assault victim could expect extensive questioning about her sexual history during trial.[70] The theory was that a victim's prior sexual conduct was relevant for two reasons: (1) because consent on a prior occasion was indicative that the victim consented on the occasion in question and (2) because promiscuity reflected negatively on the victim's credibility as a witness.[71] As a result of intrusive defense questioning, many victims did not report sexual assaults for fear of shame and embarrassment, and many sexual assaults went unprosecuted.[72] Thus, states passed rape shield statutes to limit the defense's ability to question the victim about prior sexual conduct.[73] In general, rape shield statutes have three major purposes: (1) to protect the victim's privacy, (2) to encourage the reporting and prosecution of sexual assaults, and (3) to focus the trial on the conduct of the defendant rather than that of the victim.[74]

Rape shield statutes vary dramatically from state to state, but their primary common feature is a presumption against the admissibility of evidence of the victim's prior sexual conduct.[75] Rape shield statutes generally provide for a pre-trial in camera hearing to determine the admissibility of sexual conduct evidence.[76] The federal rape shield statute, for example, requires that a defendant provide notice at least 14 days prior to trial of his intent to introduce evidence that implicates the rape shield, and the statute requires that the court conduct an in camera hearing to determine the admissibility of such evidence.[77] Depending on the structure of the rape shield, the court might find that the evidence is

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[69] *See* Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 Geo. Wash. L. Rev. 51, 80 (2002). Michigan passed the nation's first rape shield law in 1974. *Id.* at 81. Congress considered the adoption of a federal rape shield law in 1976, but did not pass the bill that year. *Id.* at 86, 92. Two years later, in 1978, Congress passed the "Privacy Protection for Rape Victims Act," which eventually became Federal Rule of Evidence 412. *Id.* at 92.

[70] Ann Althouse, *Thelma and Louise and the Law: Do Rape Shield Rules Matter?*, 25 Loy. L.A. L. Rev. 757, 760 (1992). For an example of judicial reasoning typical of the pre-rape shield era, see *Packineau v. United States*, 202 F.2d 681 (8th Cir. 1953).

[71] *See* Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 Minn. L. Rev. 763, 765–66 (1986).

[72] *See* People v. Bryant, 94 P.3d 624, 630 (Colo. 2004) (providing statistical evidence of the low incidence of reporting of sexual assaults).

[73] *See* Galvin, *supra* note 71, at 767–68.

[74] Frances P. Reddington & Betsy Wright Kreisel, Sexual Assault: The Victims, the Perpetrators, and the Criminal Justice System 244 (2005).

[75] *See* Galvin, *supra* note 71, at 773.

[76] Clifford S. Fishman, *Consent, Credibility, and the Constitution: Evidence Relating to a Sex Offense Complainant's Past Sexual Behavior*, 44 Cath. U. L. Rev. 709, 718 (1995); *see also* Nat'l Ctr. for Prosecution of Child Abuse, *Rape Shield Statutes as of March 2011*, *supra* note 68 (setting forth the text of each state's rape shield statute).

[77] Fed. R. Evid. 412(c).

admissible because it falls within an enumerated categorical exception, because the constitution requires its admission, or because the court finds within its discretion that the evidence should be admitted.[78] While it is possible that the victim will be disappointed by the results of the rape shield hearing, the hearing provides the benefit of a private pre-trial procedure infused with the victim-protective policy and history underlying rape shields.

Only eight states have rape shield statutes that specifically reference prior false accusation evidence. Six of these eight statutes include such evidence among the categorical exceptions to the general rule excluding evidence of the victim's prior sexual conduct.[79] Categorical exceptions have been criticized as overly inclusive, allowing the admission of too much harmful and irrelevant evidence.[80] Furthermore, the specific enumeration of a prior false accusation exception has been criticized as "vague" and "difficult to apply."[81] The categorical exception approach does have the advantage of unequivocally placing prior false accusation evidence within the scope of the rape shield. However, this approach is wholly inadequate because it provides little guidance to trial courts and sends the message that prior false accusation evidence should presumptively be used against the victim.

Arkansas's rape shield statute employs a different approach. Rather than enumerate a categorical exception for prior false accusation evidence, Arkansas's rape shield facially excludes such evidence if the victim denies its falsity.[82] In a student note, Amanda B. Hurst criticizes

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[78] *See* Anderson, *supra* note 69, at 81 (describing and categorizing state rape shield approaches to the admissibility of sexual conduct evidence).

[79] *See* ARIZ. REV. STAT. ANN. § 13-1421(A)(5) (2011) (enumerating exception for "[e]vidence of false allegations of sexual misconduct made by the victim against others"); IDAHO R. EVID. 412(b)(2)(C) (enumerating exception for "false allegations of sex crimes made at an earlier time"); MISS. R. EVID. 412(b)(2)(C) (enumerating exception for "[f]alse allegations of past sexual offenses made by the alleged victim at any time prior to the trial"); OKLA. STAT. ANN. tit. 12, § 2412(B)(2) (West 2010) (enumerating exception for "[f]alse allegations of sexual offenses"); VT. STAT. ANN. tit. 13, § 3255(3)(C) (2009) (enumerating exception for "[e]vidence of specific instances of the complaining witness' past false allegations of violations of this chapter"); WIS. STAT. ANN. § 972.11(2)(b)(3) (West 2011) (enumerating exception for "[e]vidence of prior untruthful allegations of sexual assault made by the complaining witness").

[80] *See, e.g.*, Anderson, *supra* note 69, at 97 (arguing that various enumerated categorical exceptions are "inappropriately expansive and should be abolished").

[81] Tracey A. Berry, Comment, *Prior Untruthful Allegations Under Wisconsin's Rape Shield Law: Will Those Words Come Back to Haunt You?*, 2002 WIS. L. REV. 1237, 1272 (2002). Berry advocates for the repeal of Wisconsin's prior false accusation exception and argues that it should be replaced with "a constitutional catchall provision like that of the Federal courts." *Id.* at 1271.

[82] ARK. CODE ANN. § 16-42-101(b) (2012) ("[E]vidence of a victim's prior allegations of sexual conduct with the defendant or any other person, which allegations the victim asserts to be true . . . is not admissible by the defendant, either through direct examination of any defense witness or through cross-examination of

this approach as being under-protective of defendants' rights.[83] However, the practical effects are not excessively harsh on the defense because the facial exclusion does not prevent the defense from obtaining a rape shield hearing to determine the relevancy, and thus admissibility, of the excluded evidence.[84] Hurst cites her own informal survey of prosecutors as demonstrating that, in order to succeed on a motion to admit prior false accusation evidence, "a defendant must show relevance, falsity, and that the [evidence's] 'probative value is [not] substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.'"[85] Indeed, case law confirms that Arkansas trial courts demonstrate respect for defendants' rights by engaging in a careful relevancy analysis before excluding prior accusation evidence.[86] Thus, the fear that "the rape-shield statute contravenes the Sixth Amendment by restricting the defendant's right to fully confront the witnesses against him"[87] is arguably overblown. Indeed, the Arkansas rape shield's facial exclusion is an improvement on the enumerated exception approach because its presumption of inadmissibility advances the underlying policies, while its rape shield hearing provision provides a layer of protection for defendants.

Like the Arkansas statute, Colorado's rape shield statute excludes prior false accusation evidence unless the defendant establishes the relevancy and materiality of the evidence during a rape shield hearing.[88]

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the victim or other prosecution witness, to attack the credibility of the victim, to prove consent or any other defense, or for any other purpose.").

[83] Hurst, *supra* note 55.

[84] ARK. CODE ANN. § 16-42-101(c) (2012) ("Notwithstanding the prohibition contained in subsection (b) of this section, evidence . . . may be admitted at the trial if the relevancy of the evidence is determined in the following manner: (1) A written motion shall be filed by the defendant with the court at any time prior to the time the defense rests stating that the defendant has an offer of relevant evidence prohibited by subsection (b) of this section and the purpose for which the evidence is believed relevant; (2)(A) A hearing on the motion shall be held in camera no later than three (3) days before the trial is scheduled to begin, or at such later time as the court may for good cause permit. . . . (C) If, following the hearing, the court determines that the offered proof is relevant to a fact in issue, and that its probative value outweighs its inflammatory or prejudicial nature, the court shall make a written order stating what evidence, if any, may be introduced by the defendant and the nature of the questions to be permitted in accordance with the applicable rules of evidence[.]").

[85] Hurst, *supra* note 55, at 950 n.14 (quoting ARK. R. EVID. 403).

[86] *See* Bond v. State, 288 S.W.3d 206, 211 (Ark. 2008).

[87] Hurst, *supra* note 55, at 949.

[88] COLO. REV. STAT. ANN. § 18-3-407(2) (West 2011) ("[I]f evidence . . . that the victim or a witness has a history of false reporting of sexual assaults is to be offered at trial, the following procedure shall be followed: (a) A written motion shall be made . . . to the court and to the opposing parties stating that the moving party has an offer of proof of the relevancy and materiality of . . . evidence that the victim or witness has a history of false reporting of sexual assaults that is proposed to be presented. . . . (c) . . . If the prosecution stipulates to the facts contained in the offer

Thus, Colorado's approach is another example of an improvement on the enumerated exception approach because it provides guidance to trial courts and sets a victim-protective tone. Additionally, as discussed above, Colorado's approach provides the added benefits of a high standard for falsity and a requirement that the victim have a "history of false reporting" before the evidence will be admissible.[89]

The rape shield statutes of most states do not specifically address prior false accusation evidence.[90] In these states, case law dictates whether such evidence is covered by the state's rape shield statute and whether such evidence is subject to a rape shield hearing or other in camera hearing procedure to determine falsity, relevancy, and admissibility. In some states, case law indicates that prior false accusation evidence is within the scope of the rape shield statute;[91] in these states, the evidence is presumably subject to rape shield procedures, including an in camera rape shield hearing. The case law in other states indicates that prior false accusation evidence is subject to an in camera hearing before it will be admissible, but much of the case law is unclear as to whether this hearing is a rape shield hearing, a standard relevancy hearing, or something

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of proof, the court shall rule on the motion based upon the offer of proof without an evidentiary hearing. Otherwise, the court shall set a hearing to be held in camera prior to trial. In such hearing, to the extent the facts are in dispute, the court may allow the questioning of the victim or witness regarding the offer of proof made by the moving party or otherwise allow a presentation of the offer of proof, including but not limited to the presentation of witnesses. . . . (e) At the conclusion of the hearing, or by written order if no hearing is held, if the court finds that the evidence proposed to be offered regarding the sexual conduct of the victim or witness is relevant to a material issue to the case, the court shall order that evidence may be introduced and prescribe the nature of the evidence or questions to be permitted.").

[89] *Id.*

[90] Only eight states have rape shield statutes that specifically reference prior false accusation evidence. *See supra* notes 79, 82, 88, and accompanying text.

[91] Hawaii: State v. West, 24 P.3d 648, 655–56 (Haw. 2001) (prior accusation that has not been found true or false falls under the rape shield statute; thus, the trial court must make a determination as to whether the allegation was false before it will be admissible). Massachusetts: Commonwealth v. Haynes, 696 N.E.2d 555, 560 (Mass. App. Ct. 1998) (noting that the prior false accusation exception to the rape shield statute is a narrow one); Commonwealth v. Nichols, 639 N.E.2d 1088, 1091 (Mass. App. Ct. 1994) (noting the same). Minnesota: State v. Davis, 546 N.W.2d 30, 35 (Minn. Ct. App. 1996); State v. Kobow, 466 N.W.2d 747, 750 (Minn. Ct. App. 1991) (rape shield covers "allegations of sexual abuse"). Montana: State v. Hildreth, 884 P.2d 771, 774 (Mont. 1994) (identifying prior false accusations as an exception to the rape shield rule). Pennsylvania: Commonwealth v. Gaddis, 639 A.2d 462, 466–67 (Pa. Super. Ct. 1994). Utah: State v. Tarrats, 122 P.3d 581, 586 (Utah 2005); State v. Clark, 219 P.3d 631, 640 (Utah Ct. App. 2009) (holding that a defendant may be entitled to a rape shield hearing to determine the issue of falsity where there has been a threshold showing). West Virginia: State v. Wears, 665 S.E.2d 273, 280 (W. Va. 2008); State v. Quinn, 490 S.E.2d 34, 40 (W. Va. 1997) (prior accusation of rape is covered by the rape shield law until it is determined to be false by the judge outside the presence of the jury).

else.[92] Still other states appear to exclude prior false accusation evidence from rape shield coverage, but only after the trial judge finds at an in camera hearing that the prior accusation was false and thus admissible.[93] Rhode Island[94] and Washington[95] exclude all prior accusation evidence,

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[92] *See, e.g.*, Morgan v. State, 54 P.3d 332, 333 (Alaska Ct. App. 2002) (prior accusation evidence must be presented to the judge outside the presence of the jury so that the judge can make a falsity determination).

[93] Georgia: Smith v. State, 377 S.E.2d 158, 160 (Ga. 1989) (prior false accusation evidence does not fall under the ambit of the rape shield statute, but the trial judge must make a falsity determination outside the presence of the jury). Iowa: Millam v. State, 745 N.W.2d 719, 722–23 (Iowa 2008) (rape shield statute does not apply to prior false accusations, but the defendant must make a threshold showing of falsity before such accusations will be found to be outside the scope of the shield). Kansas: State v. Barber, 766 P.2d 1288, 1289–90 (Kan. Ct. App. 1989) (rape shield statute is not implicated by prior false accusations of rape, but prior accusations are admissible only if the judge makes an in camera determination of their falsity). Kentucky: Dennis v. Commonwealth, 306 S.W.3d 466, 472, 475 (Ky. 2010) (rape shield statute does not apply to prior false accusation evidence, but such evidence is only admissible after a relevancy hearing is held outside the presence of the jury). Louisiana: State v. Smith, 743 So. 2d 199, 202–03 (La. 1999) (rape shield statute does not apply to prior false accusations, so no rape shield hearing is required, but the trial judge must make a finding of falsity). Michigan: People v. Jackson, 726 N.W.2d 727, 727 (Mich. 2007) (prior false accusations "[do] not implicate the rape shield statute"); People v. Stickler, No. 221723, 2001 WL 761984, at *3 (Mich. Ct. App. July 6, 2001) (whether or not prior false accusation evidence is admissible depends on an initial determination of falsity and relevancy by the trial judge); People v. Makela, 383 N.W.2d 270, 276 (Mich. Ct. App. 1985) (a defendant can request a rape shield hearing to determine whether the victim has made a prior false accusation). Missouri: State v. Long, 140 S.W.3d 27, 30 n.3 (Mo. 2004) (en banc) ("Evidence of prior complaints, as opposed to prior sexual conduct, is not rendered inadmissible by [the rape shield statute]. . . . However, it is possible that some prior allegations of sexual assault could implicate prior sexual conduct. In that case, the trial court would have to consider the applicability of [the rape shield statute]."). Nevada: Brown v. State, 807 P.2d 1379, 1380 (Nev. 1991) (prior false accusations do not implicate the rape shield statute, but before such evidence can be admitted, the trial judge must make a falsity determination outside the presence of the jury). New Jersey: State v. Guenther, 854 A.2d 308, 323–24 (N.J. 2004) (the trial judge must conduct a relevancy hearing to determine whether the prior accusation was false and whether it is otherwise admissible); State v. Bray, 813 A.2d 571, 577–78 (N.J. Super. Ct. App. Div. 2003) (prior false allegations are not evidence of sexual conduct and thus are not subject to the rape shield). Virginia: Ortiz v. Commonwealth, 667 S.E.2d 751, 760 (Va. 2008) (once a court has made a threshold determination that a prior accusation was false, the evidence is not covered by the rape shield).

[94] The Rhode Island rape shield does not apply to prior accusation evidence. State v. Oliveira, 576 A.2d 111, 113 (R.I. 1990). Such evidence usually will not be relevant, however, unless there is a showing that the prior accusation was false. *See* State v. Rivera, 987 A.2d 887, 905 (R.I. 2010); State v. Manning, 973 A.2d 524, 535 (R.I. 2009).

[95] Prior false accusation evidence is not subject to the "special confines of [Washington's] rape shield statute" because allegations of abuse do not implicate the policies that underlie the rape shield; thus, such evidence is subject to other evidentiary rules. State v. Carver, 678 P.2d 842, 843–44 (Wash. Ct. App. 1984). Prior accusation evidence generally is not relevant unless the accusation was false. State v. Harris, 989 P.2d 553, 557 (Wash. Ct. App. 1999).

whether true or false, from rape shield coverage. Finally, Ohio takes the somewhat counterintuitive approach of providing an in camera hearing only after the victim affirms upon cross-examination that she has made a prior false accusation of rape.[96]

The confusing state of the case law on the important procedural question of whether prior false accusation evidence is covered by state rape shield statutes—not to mention the odd approach developed by the Ohio courts—further underscores the need for clear guidance from state rape shield statutes.

### *E. Evidentiary Basis for Admission: The Intrinsic/Extrinsic Dilemma*

If a court decides to admit prior false accusation evidence, it must determine in what form the evidence will be admissible. A major issue is whether to allow the evidence to be admitted in the form of extrinsic evidence or to limit the defense to cross-examining the victim on the alleged prior false accusations.[97] Commentators vary in their responses to the question. One view is that because state analogues to Federal Rule of Evidence 608(b)[98] do not allow extrinsic evidence of specific acts probative of character for untruthfulness, prior false accusation evidence—if it is admitted at all—can be introduced only via cross-examination.[99] Others argue that, in the context of sexual assault trials, exceptions must be made to rules prohibiting extrinsic evidence because of the high probative value of evidence of prior false accusations of sexual assault.[100] Yet another view is that no special rule is necessary

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[96] The purpose of this hearing is to determine whether the false accusation involved any sexual conduct barred by the rape shield. If the victim denies that the accusation was false, the trial judge determines whether and to what extent the defense can cross-examine the victim on the subject. State v. Boggs, 588 N.E.2d 813, 818 (Ohio 1992); State v. Chaney, 862 N.E.2d 559, 562 (Ohio Ct. App. 2006).

[97] For a good discussion of the background evidentiary issues, see generally Galvin, *supra* note 71, at 858–63 ("Long before the passage of rape-shield legislation, courts, although recognizing the high probative value of evidence of false rape charges, had to strain to find an evidentiary theory to support its admission." *Id.* at 859–60).

[98] "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." FED. R. EVID. 608(b).

[99] *See generally* Johnson, *supra*, note 4 (arguing that special evidentiary rules for prior false statements in sexual assault trials are inappropriate).

[100] *See, e.g.*, Fishman, *supra* note 76, at 777 ("[T]he prevailing, and correct, view is that if the complainant denies making the prior accusation or denies that it was false, the defendant may offer extrinsic evidence to establish these facts."); Bopst, *supra*, note 3, at 147–48 (arguing that, contrary to the traditional evidentiary rules, extrinsic evidence of a prior false accusation should be admitted if the victim denies having made such an accusation); Jennifer K. Bukowsky, Note, *The Girl Who Cried Wolf:*

because extrinsic evidence of prior false accusations is readily admissible under state analogues to Federal Rule of Evidence 404(b)[101] as evidence of plan or under the doctrine of chance.[102]

State courts have taken varying approaches to the intrinsic/extrinsic dilemma. The most common evidentiary basis for the admission of prior false accusation evidence is the state analogue of Federal Rule of Evidence 608(b). The issue is complicated, however, by the fact that some state rules track Federal Rule of Evidence 608(b) and allow cross-examination of specific acts probative of character for untruthfulness, while other state rules follow the common law approach and do not allow cross-examination of specific acts.[103] Of the states that follow the Federal Rules' approach, some strictly adhere to the language of 608(b) and allow admission only via cross-examination, prohibiting the use of extrinsic evidence.[104] Other states following the Federal Rules' approach have created an exception for prior false accusation evidence, allowing for the admission of extrinsic evidence if the victim denies the prior false accusation.[105]

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*Missouri's New Approach to Evidence of Prior False Allegations*, 70 Mo. L. Rev. 813, 828–35 (2005) (presenting a favorable discussion of Missouri's creation of an exception to the rule barring extrinsic evidence of prior false accusations).

[101] "Crimes, Wrongs, or Other Acts. (1) *Prohibited Uses*. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character. (2) *Permitted Uses*; *Notice in a Criminal Case*. 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. On request by a defendant in a criminal case, the prosecutor must: (A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and (B) do so before trial—or during trial if the court, for good cause, excuses lack of pretrial notice." Fed. R. Evid. 404(b).

[102] *See, e.g.*, Jules Epstein, *True Lies: The Constitutional and Evidentiary Bases for Admitting Prior False Accusation Evidence in Sexual Assault Prosecutions*, 24 Quinnipiac L. Rev. 609, 638–44 (2006).

[103] *See* State v. Guenther, 854 A.2d 308, 320–21 (N.J. 2004).

[104] Hawaii: State v. Moisa, No. 30712, 2012 WL 247963, at *3 (Haw. Ct. App. Jan. 25, 2012). Kentucky: Dennis v. Commonwealth, 306 S.W.3d 466, 475 (Ky. 2010). Maine: State v. Almurshidy, 732 A.2d 280, 287 n.4 (Me. 1999). Maryland: State v. Cox, 468 A.2d 319, 323–24 (Md. 1983). New Mexico: State v. Scott, 828 P.2d 958, 963 (N.M. Ct. App. 1991). Ohio: State v. Boggs, 588 N.E.2d 813, 818 (Ohio 1992). Tennessee: State v. Wyrick, 62 S.W.3d 751, 775–76 (Tenn. Crim. App. 2001). Vermont: State v. Leggett, 664 A.2d 271, 272 (Vt. 1995). Wisconsin: State v. Olson, 508 N.W.2d 616, 619–20 (Wis. Ct. App. 1993).

[105] Alaska: Morgan v. State, 54 P.3d 332, 336 (Alaska Ct. App. 2002). Arkansas: West v. State, 719 S.W.2d 684, 687 (Ark. 1986). Kentucky: *Dennis*, 306 S.W.3d at 475 (declining to decide whether, and under what circumstances, there might be an exception to the rule against extrinsic evidence). Michigan: People v. Mikula, 269 N.W.2d 195, 198–99 (Mich. Ct. App. 1978). Missouri: State v. Long, 140 S.W.3d 27, 31–32 (Mo. 2004) (en banc) (exception for extrinsic evidence of prior false accusations is not limited to sexual assault trials). Nevada: Miller v. State, 779 P.2d 87, 89–90 (Nev. 1989). New Hampshire: State v. Kornbrekke, 943 A.2d 797, 802 (N.H.

Of the states that follow the common law approach, some have created an exception for sexual assault cases, allowing cross-examination of the specific act of having made a prior false accusation.[106] Other common law states have taken the exception a step further, allowing the admission of extrinsic evidence of a prior false accusation if the victim denies having made a false accusation.[107]

Finally, while the most common method of introducing prior false accusation evidence is via state analogues of Federal Rule of Evidence 608(b), some states have acknowledged that such evidence may be admissible under state analogues of Federal Rule of Evidence 404(b) if the evidence is offered for a non-propensity purpose, such as to prove the victim's plan, common scheme, or habit.[108] The confusion surrounding the intrinsic/extrinsic dilemma—and the inconsistent approaches to the issue—emphasizes the need for legislative reform in the area of prior false accusation evidence.

### *F. Police and Prosecutorial Discretion*

Recently reported appellate cases, such as those discussed above, do not provide a huge number of instances of the admission of prior false accusation evidence. Thus, some might argue that while the admissibility of prior false accusations is theoretically troubling, victims and their advocates have no cause for concern. However, cause for concern does exist if one takes a few steps back in the process. Before a sexual assault case ever sees the inside of a courtroom, police and prosecutors exercise their discretion in ways that may determine the case's ultimate outcome. It is at this stage that the specter of the admissibility of prior false accusation evidence poses the most danger to victims. It is likely that many sexual assault cases never make it to trial because of the possibility that prior false accusation evidence might be admitted.

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2008) (noting that the Confrontation Clause might demand an exception to the rule against extrinsic evidence).

[106] Massachusetts: Commonwealth v. Bohannon, 378 N.E.2d 987, 990–91 (Mass. 1978). New Jersey: State v. Guenther, 854 A.2d 308, 323–24 (N.J. 2004) (exception applies to prior accusations in all criminal cases and is not limited to sexual assault cases). Oregon: State v. LeClair, 730 P.2d 609, 615 (Or. Ct. App. 1986). Texas: Garcia v. State, 228 S.W.3d 703, 706 (Tex. App. 2005) (exception only applies in cases in which the Confrontation Clause demands it).

[107] Indiana: State v. Walton, 715 N.E.2d 824, 827 (Ind. 1999). Kansas: State v. Barber, 766 P.2d 1288, 1289–90 (Kan. Ct. App. 1989). Virginia: Clinebell v. Commonwealth, 368 S.E.2d 263, 266 (Va. 1988).

[108] New Jersey: *Guenther*, 854 A.2d at 322 (acknowledging that New Jersey's rule 404(b) would allow prior accusation evidence to be admitted "to prove the accuser's habit, state of mind, motive, or common scheme"). Tennessee: *Wyrick*, 62 S.W.3d at 775–76 (extrinsic evidence of a prior false accusation may be admissible under Tennessee's 404(b) if offered for such non-propensity inferences as motive, common scheme, or plan).

First comes the police founding decision. When a victim reports a sexual assault, the police determine whether they believe a crime has occurred and, if so, who is responsible. If the police believe the case should go forward, they transmit it to the prosecutor's office, but if the police believe no crime has occurred, the case will not be transmitted.[109] Notably, the unfounding rate for sexual assault cases "is roughly four times higher than for other major crimes."[110] While there are many legitimate reasons a sexual assault case might be unfounded, police sometimes unfound for "three illegitimate reasons: a police officer does not like the woman, feels she 'asked for it,' or thinks her case will not stand up in court."[111] Indeed, evidentiary concerns may play a role in police founding decisions.[112] If a victim has made a prior accusation that may be admissible at trial, police may believe that the case is not likely to be successful and may unfound it for this reason. And even if the police do not officially unfound the case, it is unlikely that they will invest significant resources in an investigation when the likelihood of conviction is low.[113]

If a sexual assault case makes it past the police founding decision, it arrives at the desk of the public prosecutor, who, in deciding whether or not to go forward with a case, has "virtually unlimited discretion."[114] At bottom, many prosecutors seek cases they perceive as winnable "in order to improve their conviction rates, because this impresses their superiors and, if they are politically ambitious, the electorate."[115] A study of sexual assaults reported in Miami in 1997 revealed that "more than half of the sexual battery cases were rejected at screening, or filed and then later dismissed."[116] Many of the prosecutorial decisions not to charge were based on perceptions that the charge would not lead to a conviction.[117] A majority of prosecutors look for potential holes in a case, including problems with victim credibility, from the outset.[118] Thus, if the prosecutor perceives that prior false accusation evidence may be admissible at trial, she may be less likely to go forward with the case because of a perception that the case is unwinnable.

Even if the prosecutor herself does not believe that the prior accusation was false or that it has any bearing on the current charge, the prosecutor will likely still weigh the effects the prior accusation evidence

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[109] Bryden & Lengnick, *supra* note 14, at 1230.

[110] *Id.* at 1233.

[111] Taylor, *supra* note 6, at 92.

[112] Bryden & Legnick, *supra* note 14, at 1234.

[113] *Id.* at 1235, 1243.

[114] *Id.* at 1246.

[115] *Id.*

[116] Cassia Spohn et al., *Prosecutorial Justifications for Sexual Assault Case Rejection: Guarding the "Gateway to Justice," in* VIOLENCE AGAINST WOMEN 131, 155 (Claire M. Renzetti & Raquel Kennedy Bergen eds., 2005).

[117] *Id.* at 156.

[118] *Id.* at 157.

will have on the jury. Prosecutors seek victims that jurors will perceive as honest and credible,[119] and prior false accusation evidence will likely have a negative effect on victim credibility. Thus, while rape law reforms of the 1970s—including the enactment of rape shield statutes—have had positive effects on rape cases, these reforms have not been as effective at the police and prosecutorial discretion stage, where attitudes about certain conviction and "genuine" victims are pervasive.[120] It is at this stage of the process that the threat of prior false accusation evidence looms largest.

### *G. Summary of the Legal and Social Framework*

A victim's prior accusation of rape is relevant to a sexual assault trial only insofar as the defense can show that the accusation is false and that the accusation tends to either impugn the victim's credibility or demonstrate the victim's plan, common scheme, or habit. However, sexual assault is a uniquely traumatizing experience, and for this reason, it can be difficult to ascertain the truth or falsity of an accusation, even where the victim has recanted or where other indicia of falsity exist. This raises questions about the appropriate standards for determining falsity and other relevancy issues, as well as the best procedure to apply in making those determinations. Currently, states apply a wide range of standards in making the falsity determination. Furthermore, while some states utilize rape shield statutes, many do not. Making matters worse, the higher the likelihood that a prior false accusation will be admitted, the lower the likelihood that police and prosecutors will pursue the victim's case. At bottom, the confusing and discordant state of the law in this area points to the need for legislative reform. Ideally, reformers will take account of the complex dynamics underlying sexual assault.

## III. Proposal for Reform

### *A. Substance of Proposed Rule*

This Comment proposes that states amend their rape shield statutes to include specific provisions dealing with prior false accusation evidence. Such provisions should facially exclude such evidence, and the evidence should not be admitted unless the defendant meets the standards set forth in the paragraphs below. Whether the defendant has met the applicable standards should be determined by the trial judge during a pretrial rape shield hearing. The trial judge should admit the evidence only if its probative value outweighs any risk of unfair prejudice, tendency to confuse the jury, and tendency to waste time. The trial judge

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[119] *See* Bryden & Lengnick, *supra* note 14, at 1247; Taylor, *supra* note 6, at 99–100; *see also* Reddington & Kreisel, *supra* note 74, at 289 (noting that prosecutors seek victims whom jurors will perceive as likeable).

[120] *See* Spohn et al., *supra* note 116, at 161–62.

should not bend the rules of evidence and should not create special rules for the admission of prior false accusation evidence; instead, the trial judge should adhere to the state's versions of the Federal Rules of Evidence 608(b) and 404(b).

In determining whether the evidence is admissible via cross-examination as evidence of specific acts probative of character for untruthfulness, the trial judge must strictly adhere to the state's version of Federal Rule of Evidence 608(b). If the state's version of 608(b) follows the common law approach and prohibits cross-examination of specific acts, no prior false accusation evidence should be admitted under 608(b).[121] If, however, the state follows the Federal Rules' approach to 608(b) and allows cross-examination of specific acts, the defense should be permitted to cross-examine the victim about an alleged prior false accusation if the defendant proves by clear and convincing evidence that (1) the accusation was made, (2) the accusation was false, and (3) the victim made the accusation knowing it was false. No extrinsic evidence should be admissible under 608(b).

In determining whether to admit extrinsic evidence of a prior false accusation, the trial judge must adhere to the state's version of Federal Rule of Evidence 404(b). Extrinsic evidence should be admitted under 404(b) only in those rare instances in which the evidence has a tendency to prove the victim's plan, common scheme, or habit. In order to meet the plan/common-scheme/habit requirement, the defense must demonstrate by clear and convincing evidence that (1) the victim made a prior accusation, (2) the accusation was false, (3) the victim made the accusation knowing it was false, (4) the facts of the prior accusation are sufficiently similar to the current charge, and (5) there is an established pattern of the victim making false accusations.

In evaluating whether the defense has demonstrated the falsity of an accusation by clear and convincing evidence, the trial judge should not treat evidence that the victim has recanted a prior accusation as per se evidence of the accusation's falsity. Instead, in making the falsity determination, the trial judge should weigh recantation evidence alongside other evidence that tends to demonstrate the truth or falsity of the accusation. Finally, if the trial judge admits evidence of a prior false accusation, the trial judge should also permit the prosecution to introduce rebuttal evidence that any recantation—or other evidence tending to prove an accusation's falsity—was the result of rape trauma syndrome.

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[121] Under the proposed rule, prior false accusation evidence would be admissible only in common law states via 404(b) as described in the paragraph below.

### *B. Application and Benefits of Proposed Rule*

#### *1. Fair Treatment of Recantation Evidence*

Under the proposed rule, evidence that the victim has recanted a prior accusation would not constitute per se evidence that the prior accusation was false; however, many states currently treat a recantation as per se evidence of falsity. For example, in *State v. Bailey*, there was evidence that when the victim was approximately 13 years old, she twice accused her stepfather of rape and twice recanted those accusations, once to the police, and once to a school social worker.[122] Based on the recantation evidence alone, the Delaware appellate court held that the defendant in the instant case had proven by clear and convincing evidence that the victim had made prior false accusations against her stepfather.[123] Similarly, in *Peeples v. State*, Alabama's highest court ruled that the victim had made a prior false accusation in light of evidence that the victim had—at the age of nine—contradicted an accusation during an interview with a state social worker.[124] However, as the dissent in *Peeples* points out, "[m]any victims of sexual abuse or rape are very young, and victims are traumatized by their ordeal; they may not possess the ability to articulate their stories in a clear and concise narrative, and sometimes their accounts of what happened can give rise to inconsistencies."[125]

An approach that does not treat a recantation as per se evidence of falsity is preferable in light of research suggesting that victims recant for a variety of reasons.[126] Because the proposed rule explicitly states that a recantation is not per se evidence of falsity, the rule would require a court faced with facts similar to those in *Bailey* and *Peeples* to take a more nuanced view of the victim's prior inconsistent statements. In determining whether the facts are sufficient to establish clear and convincing evidence of falsity, the court would have to weigh the recantation alongside other evidence, including the victim's age, level of trauma, and the intimidation factor posed by government agents such as social workers and police.

The fact that the proposed rule does not equate a recantation with falsity on a per se basis does not prevent a recantation from serving as evidence of falsity. Although the rule requires a nuanced analysis of the circumstances surrounding a recantation, there might be circumstances where a recantation would tip the scales in favor of a finding of falsity. For example, in *Cox v. State*, the 18-year-old victim had previously accused another man of rape and had recanted that accusation in open court, on

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[122] State v. Bailey, No. 9312009229, 1996 WL 587721, at *2 (Del. Super. Ct. Sept. 12, 1996).

[123] *Id.* at *7.

[124] Peeples v. State, 681 So. 2d 236, 239 (Ala. 1995).

[125] *Id.* at 240–41 (Maddox, J., dissenting).

[126] *See supra* notes 12–25 and accompanying discussion.

the witness stand, during the man's criminal trial.[127] Furthermore, the victim's accusation against Cox bore similarities to the prior recanted accusation.[128] Based on these facts, the Maryland appellate court found sufficient evidence of falsity.[129] Application of the proposed rule might lead to the same result. Although the proposed rule would require the trial judge to examine the evidence during a rape shield hearing, the trial judge could find that the circumstances of the *Cox* recantation—the victim's age, the similarity of the recanted charge to the charge in the instant case, and the fact that the victim recanted not during an initial interview, but in open court—amount to clear and convincing evidence of falsity.

*2. Consistency and Efficiency Through the Rules of Evidence*

The proposed rule would admit evidence in a way that is consistent with the rules of evidence because it does not allow courts to deviate from the state's versions of Federal Rules of Evidence 404(b) and 608(b).[130] In *State v. Guenther*, New Jersey's highest court fashioned a prior false accusation exception to New Jersey's version of 608(b).[131] After making an initial finding that the testimony of two witnesses constituted sufficient evidence that the victim had made a prior false accusation, the court held that the defense could cross-examine the victim about the accusation, and if the victim were to deny the false accusation, the defendant would be permitted to call the two witnesses to impeach the victim.[132] Notably, New Jersey's version of 608(b) follows the common law approach and prohibits specific act evidence altogether.[133] Thus, *Guenther*'s holding—which allows both intrinsic and extrinsic evidence of specific acts under 608(b)—completely contradicts the evidentiary rule. Under the proposed rule, prior false accusation evidence would be admissible only in a common law state, like New Jersey, under 404(b) as evidence of the victim's plan, common scheme, or habit. Thus, in a common law state, the trial court would have to examine the prior accusation evidence for falsity, similarity to the current charge, and an established pattern of the victim making false accusations. Accordingly, the evidence would be admissible, but only if the defense met the standard already set by the state's established evidentiary rules. By refusing to deviate from the rules of evidence, the proposed rule admits evidence in a way that is fair to all interested parties and preserves the integrity of the evidentiary rules.

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[127] Cox v. State, 443 A.2d 607, 609–10 (Md. Ct. Spec. App. 1982), *aff'd*, 468 A.2d 319 (Md. 1983).

[128] *See id.* at 613–14.

[129] *Id.*

[130] For a discussion of the interplay between prior false accusation evidence and state versions of FED. R. EVID. 404 and 608, see *supra* Part II.E.

[131] State v. Guenther, 854 A.2d 308, 323, 325 (N.J. 2004).

[132] *Id.* at 325.

[133] *Id.* at 320.

In refusing to deviate from the state's versions of 404(b) and 608(b), the proposed rule would preserve time and resources by admitting extrinsic evidence only in those rare circumstances where it is truly warranted. For example, in *State v. Caswell*, the highest Minnesota court counterintuitively concluded that the trial court was constitutionally compelled to admit prior false accusation evidence but that failure to do so was harmless error.[134] The court based its finding of harmless error on the fact that the victim's prior accusation was dissimilar to the instant charge: she made the instant charge to the police and did not recant it, while she made the prior charge to her boyfriend and recanted it as soon as she realized that the accusation could have negative consequences for the accused.[135] Thus, under *Caswell*, trial courts are required to admit extrinsic evidence of prior false accusations that is ultimately of little probative value in the instant case. The proposed rule avoids such a result because, under 404(b), extrinsic evidence of a prior accusation that is markedly dissimilar from the charge in the instant case would not be admissible.[136] Under the proposed rule, the trial court would not be required to admit time-consuming, unnecessary—and potentially prejudicial—extrinsic evidence.

*3. Fairness Through Admission of Rebuttal Evidence*

The proposed rule strikes a fair balance by allowing the prosecution to rebut prior false accusation evidence with evidence that the victim may have been suffering from rape trauma syndrome when she said or did things that caused her accusation to appear false. For example, the victim in *People v. Lackey* had previously been convicted of filing a false police report in connection with a prior accusation of sexual assault.[137] After making the report, the victim had told police: "Lately, I don't know what is real and not real anymore. This has been going on a couple times in the past. When this happens, I black out, and I am not really aware of what goes on around me . . . I heard voices."[138] Given the victim's odd statement and her conviction for filing a false report, it is possible that the prior accusation would be admitted under the proposed rule; however, the proposed rule would grant the prosecution a guaranteed opportunity to explain rape trauma syndrome to the jury.[139] Such an explanation would serve to contextualize the victim's behavior. Although

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[134] State v. Caswell, 320 N.W.2d 417, 419–20 (Minn. 1982).

[135] *Id.* at 420.

[136] At most, the defendant would be permitted to cross-examine the victim under 608(b).

[137] People v. Lackey, 853 N.Y.S.2d 668, 669 (N.Y. App. Div. 2008).

[138] *Id.* at 670.

[139] *See supra* notes 26–34 and accompanying discussion of rape trauma syndrome. Additionally, it is notable that the victim in *Lackey* "had a history of depression, anxiety disorder and substance abuse problems." *Lackey*, 853 N.Y.S.2d at 670. Thus, the victim would have been a vulnerable target for perpetrators of sexual assault. *See supra* note 35–39 and accompanying discussion of vulnerable victims.

jurors might ultimately find that the prior and instant accusations are false, the admission of rape trauma evidence would enable the jury to make such a finding in a fair and informed manner. At the very least, the admission of rape trauma evidence would help prevent a knee-jerk reaction to the victim's prior inconsistent statements.

*4. Procedural Benefits of Rape Shield Coverage*

By using the rape shield statute as the procedural device for the admission (or non-admission) of prior false accusation evidence, the proposed rule avoids confusion and streamlines the process. A variety of reported appellate cases demonstrate confusion over how or whether the rape shield statute should function in the context of prior false accusation evidence. In *State v. Alberts*, Iowa's highest court found that the trial court erred in failing to hold a hearing to determine the falsity of a prior accusation before finding the accusation inadmissible.[140] At the same time, the court held that the rape shield statute does not apply to a false accusation.[141] What the court seems to have overlooked is that the rape shield statute provides the ideal procedural vehicle for determining the falsity and admissibility of a prior accusation: an in camera rape shield hearing. *State v. Pottebaum* further emphasizes the point.[142] In *Pottebaum*, the trial court prohibited the defense from cross-examining the victim about a prior false accusation because the defense had not complied with the procedural requirements of the rape shield statute.[143] The Tennessee criminal appellate court ruled that the trial court should have permitted the defense to cross-examine the victim about the accusation because the rape shield statute does not prohibit admission of false statements.[144] In so ruling, the appellate court appears to have overlooked the fact that the purpose of filtering the evidence through the rape shield hearing is to determine whether the accusation was false and otherwise admissible. Thus, the trial court in *Pottebaum* took the preferable position: that the defense must comply with the rape shield's procedural requirements and submit the accusation evidence during a rape shield hearing.[145] Under the proposed rule, no confusion over the role of the rape shield statute would arise. The rape shield statute would explicitly cover prior false accusation evidence, and such evidence would be admissible only upon a determination by the trial judge during a rape shield hearing.

By using the rape shield hearing as the procedural device for admission, the proposed rule forces courts to acknowledge that a prior accusation—even if it has the appearance of falsity—may in fact be

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[140] State v. Alberts, 722 N.W.2d 402, 409–10 (Iowa 2006).
[141] *Id.*
[142] No. M2004-02733-CCA-R3-CD, 2006 WL 1222710 (Tenn. Crim. App. May 5, 2006).
[143] *Id.* at *6–7.
[144] *Id.* at *4–5.
[145] *Id.* at *6–7.

truthful.[146] For example, in *People v. Grano*, an Illinois appellate court held that, because the rape shield statute was designed to protect the sexual histories of victims, the rape shield did not apply to the defense's inquiries about "prior allegedly false statements for impeachment purposes."[147] The problem with the court's analysis is that it altogether ignores the fact that the accusation might have been true and thus linked to sexual conduct clearly protected by the rape shield statute. Ohio's approach poses a similar problem. Ohio allows the defense to ask preliminary questions about a prior accusation during cross-examination.[148] It is only after this preliminary questioning that the requirement of an in camera hearing is triggered.[149] Thus, under the Ohio approach, the defense can question the victim about a traumatic prior rape before the trial judge makes any sort of determination about whether or not the rape actually occurred. By clearly placing prior false accusation evidence within the scope of the rape shield statute, the proposed rule avoids these pitfalls.

### *C. Defense of Proposed Rule*

#### *1. Rape Shield Coverage*

One potential argument against the proposed rule is that rape shield statutes should not apply to prior false accusation evidence. Various state courts have expressed the view that prior false accusation evidence does not implicate the policies underlying rape shield statutes.[150] Professor Epstein agrees. In her view, prior false accusation evidence should not be covered by rape shield statutes because (1) accusations are neither sexual conduct nor sexual predisposition, (2) an accusation is a public act that does not implicate privacy concerns in the way that private sexual conduct does, and (3) a prior false accusation evinces disrespect for the legal system in a way that prior sexual conduct does not.[151]

Professor Epstein's arguments have a logical appeal, particularly because she is correct that rape shield statutes are designed primarily to deal with prior sexual conduct evidence,[152] and a verbal accusation is obviously qualitatively different from sexual conduct. However, the view that prior false accusation evidence does not implicate rape shield policies is incorrect. The major policies underlying rape shield statutes are (1) protection of victim privacy, (2) encouraging the reporting and prosecution of sexual assaults, and (3) focusing the trial on the conduct

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[146] *See supra* notes 14–39 and accompanying discussion.
[147] People v. Grano, 676 N.E.2d 248, 257 (Ill. App. Ct. 1996).
[148] *See* State v. Boggs, 588 N.E.2d 813, 816–17 (Ohio 1992).
[149] *See id.* at 818.
[150] *See supra* notes 93–97 and accompanying discussion.
[151] Epstein, *supra* note 102, at 652.
[152] *See supra* notes 68–75 and accompanying discussion.

of the defendant rather than on the conduct of the victim.[153] As to the first policy concern, while it is true that an accusation is a public act that does not implicate victim privacy in the same way sexual conduct does, the subject matter of the accusation—a sexual assault—does implicate privacy concerns. Furthermore, the difficulty of assessing the truth or falsity of an accusation[154] makes it far from certain that the victim will be questioned only about "lies," rather than traumatic experiences. As for the second policy concern, it is undeniable that prior false accusation evidence implicates the public interest in the reporting and prosecution of sexual assaults. A system that is distrustful of vulnerable victims of multiple assaults[155] will discourage such victims from reporting their assaults and participating in the system. Furthermore, a system that freely admits prior false accusation evidence will deter police and prosecutors from pursuing potentially successful cases in which the victim has made a prior accusation that is not entirely credible. Finally, as to the third policy concern, the introduction of prior false accusation evidence has the potential to detract attention from the conduct of the accused and focus undue attention on unrelated past actions of the victim.

Another objection to rape shield coverage comes from Justice Denise R. Johnson, who argues that a pretrial in camera hearing has the potential to do more harm than good, even from the victim's perspective.[156] In her view, the use of a rape shield hearing to admit prior false accusation evidence is problematic because, among other reasons, the hearing can be lengthy, it gives the defendant an additional opportunity to harass the victim, and the hearing places too much attention on victim conduct.[157]

While Justice Johnson's concerns are valid and well taken, the same criticisms could be leveled against the use of rape shield hearings to determine the admissibility of any type of evidence, including sexual conduct evidence. Rape shield hearings are far from perfect, as evidenced by the highly publicized Kobe Bryant rape case, in which Bryant's attorneys manipulated the rape shield hearing to their client's advantage by subjecting the victim to what has been described as a "fishing expedition" into her sexual history.[158] Such an abuse of rape shield hearing procedures is in clear contradiction to the victim-protective policies underlying rape shield statutes. And, while such instances of abuse point to potential flaws in rape shield hearing procedures, they do not indicate that rape shield hearings should be

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[153] REDDINGTON & KREISEL, *supra* note 74, at 244.

[154] *See supra* notes 14–39 and accompanying discussion.

[155] *See supra* notes 35–39 and accompanying discussion.

[156] Johnson, *supra* note 4, at 269–72.

[157] *Id.* at 270–71.

[158] Wendy J. Murphy, *Rape Shield Laws Wrongly Protect Interrogation of Victims*, DAILY JOURNAL NEWSWIRE, April 2, 2004, *reprinted in* DOUGLAS E. BELOOF ET AL., VICTIMS IN CRIMINAL PROCEDURE 554, 554–55 (3d ed. 2010).

abolished altogether. Rape shield hearings provide a controlled, victim-protective environment in which evidence can be evaluated before trial. Unlike standard relevancy determinations—in which the scales are tipped in favor of admissibility—rape shield hearings are weighted in favor of victim privacy and, in most cases, require that probative value outweigh the risk of unfair prejudice before evidence will be admitted.[159] Furthermore, rape shield statutes like those in Arkansas and Colorado,[160] which facially exclude prior false accusation evidence, send a clear message that such evidence will not automatically be used against the victim. This message may encourage police and prosecutors to pursue potentially successful cases, even cases in which the victims have made prior accusations.

*2. Probative Value*

Justice Johnson has also raised the issue of equating falsity with probative value.[161] In her view, evidence that an accusation was false is not sufficient to establish that the accusation is relevant.[162] The proposed rule should not be interpreted as implying anything to the contrary. In all cases, the judge conducting the rape shield hearing must determine the probative value of the evidence and whether it outweighs the risk of undue prejudice. If it does not, the evidence must not be admitted in any form. Furthermore, before any extrinsic evidence of a prior false accusation will be admitted under the proposed rule, the defense must demonstrate by clear and convincing evidence that the facts of the prior accusation are similar to the present charge and that the prior accusation demonstrates a pattern of false accusations. In this way, the proposed rule moves the relevancy determination far beyond the basic question of falsity.

*3. "Special Rules"*

Another potential objection to my proposal is that it does not allow special rules for the admission of prior false accusation evidence. In a student note, Jennifer Koboldt Bukowsky praises the approach taken by the Missouri Supreme Court in *State v. Long*[163] in creating a special rule for the admission of extrinsic evidence of a prior false accusation.[164] Missouri follows the Federal Rules' approach to 608(b), allowing cross-examination of specific acts probative of character for untruthfulness but disallowing the admission of extrinsic evidence.[165] Prior to the *Long* decision, Missouri courts did not allow for an exception to this general rule, but in *Long*, the court ruled that extrinsic evidence of prior false

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[159] Althouse, *supra* note 70, at 762–63.
[160] *See supra* notes 82–89 and accompanying discussion.
[161] Johnson, *supra* note 4, at 263.
[162] *Id.*
[163] 140 S.W.3d 27 (Mo. 2004) (en banc).
[164] Bukowsky, *supra* note 100.
[165] *See supra* note 106.

accusations should be admissible under 608(b).[166] In Bukowsky's view, the departure from the established rule of evidence is a positive development.

Contrary to Bukowsky's assessment, there is little evidence that false accusations pose a sufficiently serious and widespread problem to necessitate a special rule of evidence for their admission.[167] A special exception to the rules of evidence targeted at prior false accusations sends the message that victims should be treated with skepticism, a dangerous assumption that contradicts the policies underlying rape shield statutes and that may discourage police and prosecutors from pursuing the cases of certain victims.[168] The better option is for states to work within the existing rules of evidence and create clear rape shield provisions to guide trial courts. Indeed, one of Bukowsky's criticisms of the *Long* exception is that the special rule may confuse trial courts.[169] State courts should decline to adopt a confusing exception to the rules of evidence that rests on unsound policy.

*4. The Confrontation Clause*

In a student note, Tracey A. Berry argues that Wisconsin's rape shield statute's categorical exclusion of prior false accusation evidence[170] should be replaced with a "constitutional catchall" provision calling for the admission of evidence compelled by the United States Constitution.[171] However, the confusing and contradictory state of the law of prior false accusation evidence demonstrates that what is needed is clear statutory guidance, not a vague constitutional catchall. Indeed, many state rape shields already include constitutional catchalls, which apply to all evidence implicated by the rape shield, including prior false accusation evidence.[172] Such provisions are arguably unnecessary altogether, as it should go without saying that the federal constitution trumps state evidentiary rules and that evidence whose admission is constitutionally compelled must be admitted.

Furthermore, much has been made of the argument that failure to admit prior false accusation evidence may violate the Confrontation

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[166] *See* Bukowsky, *supra* note 100, at 813. Notably, the *Long* exception is not limited to sexual assault trials. State v. Long, 140 S.W.3d 27, 31–32 (Mo. 2004) (en banc).

[167] *See supra* notes 13–25 and accompanying discussion.

[168] As previously noted, the *Long* exception is not limited to sexual assault trials; however, it seems likely that the exception will, in practice, be applied primarily to sexual assault trials where the case often rests on the credibility of a single witness.

[169] *See* Bukowsky, *supra* note 100, at 813.

[170] WIS. STAT. ANN. § 972.11(2)(b)(3) (West 2012) (enumerating exception for "[e]vidence of prior untruthful allegations of sexual assault made by the complaining witness").

[171] Berry, *supra* note 81, at 1271–72.

[172] *See supra* Part II.D.

Clause.[173] Such claims are arguably overblown. While it is true that circumstances will arise in which the constitution compels admission of prior false accusation evidence, there is no reason to believe that application of the established rules of evidence, within the framework of a rape shield statute, will lead to constitutional violations. Obviously, trial courts dealing with prior false accusation evidence must account for the Confrontation Clause, but the same can be said for a variety of evidentiary issues in a criminal trial. If anything, the constitutional issue emphasizes the need for clear statutory guidance: an evidentiary rule that may implicate the constitutional rights of defendants will be most effective if it is clearly and consistently applied in a constitutional manner.

## IV. Conclusion

The confusion and inconsistency in state approaches to the admission of prior false accusation evidence demonstrates the need for legislative reform. Because of the difficulty of determining the falsity of a prior accusation—and because prior false accusation evidence implicates many of the same policy concerns as prior sexual conduct evidence—state rape shield statutes provide the ideal vehicle for dealing with prior false accusation evidence. State legislatures should amend rape shield statutes to give guidance to courts on how to handle prior false accusation evidence. In so doing, lawmakers should not create special evidentiary rules for prior false accusation evidence, but should instead work within the existing evidentiary rules, as well as the rape shield framework, to provide appropriate protections for victims, defendants, and the public interest. In this way, state legislatures can help ensure that courts handle prior false accusation evidence in a way that respects the defense's right to present relevant evidence, while protecting victims from harassment and preserving the public's interest in the investigation and prosecution of sexual assaults. The challenge is in striking the right balance, and the only way to succeed is through careful examination of the legal and social realities that underlie the issue.

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[173] *See, e.g.*, Berry, *supra* note 81, at 1249–53; Bopst, *supra* note 3, at 139–41; Hurst, *supra* note 55, at 963–67.