# IMPEACHING WITH AN ALLEGED PRIOR FALSE ACCUSATION

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## INTRODUCTION

The question of whether, how, and to what extent to allow impeachment of a complainant alleging sexual assault or child sexual abuse is inherently fraught. On the one hand, both as a matter of law and social norms, sexual assault is often minimized or dismissed as a serious social problem. It cannot seriously be disputed that both sexual assault and child sexual abuse remain dramatically underreported offenses or that the legal system has mistreated sexual assault and abuse complainants in the investigation, prosecution, and punishment of such offenses. Even though empirical research has produced strong evidence undermining the claim that sexual assault complaints are especially likely to be fabricated,[1] both laypersons and legal actors often meet

* Norman Dorsen, Professor of Civil Liberties, NYU School of Law. I am grateful to Dan Capra for the invitation to present these ideas and for his helpful comments and suggestions on both the draft and proposed rule. Thank you to Mac McCall and Joyce Choo for their exceptional research assistance. This Essay was prepared as a companion to the Philip D. Reed Lecture held on October 27, 2023, at the University of St. Thomas School of Law, under the sponsorship of the Judicial Conference Advisory Committee on Evidence Rules.

1. Empirical work studying the prevalence of false accusations produces broad ranges, largely because of methodological differences (and flaws) in how falsehood is assessed. For instance, some studies count a recantation as a false accusation without considering external factors that might have motivated that recantation or the existence of corroborating evidence.

sexual assault complaints with skepticism, especially in the absence of physical injury.[2] As a result, recent social movements have reinvigorated calls for greater accountability for acts of sexual harassment and sexual violence.[3]

On the other hand, however, when sexual assault charges are levied, those accused are often treated with singular harshness and severity. Accusations of sexual offending not only carry special weight and stigma in our society, but they also receive exceptional treatment as a matter of law in ways that favor complainants. Sex cases are singled out by category in three rules of evidence,[4] specialized procedures are occasionally authorized in sex cases (such as allowing an accuser to testify outside the presence of the defendant),[5] and punishments in sex cases can be especially onerous (such as sex-offender registration).[6] It is also indisputable that false accusations of sexual misconduct have long been wielded for political or even nefarious purposes. To give just two examples, consider (1) the moral panic that led to a series of overturned convictions in the "day-care cases" in the 1980s[7] and (2) white women's intentionally false accusations of sexual assault against Black men, which were used to justify and incite legal and extralegal

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*See, e.g.*, Eugene J. Kanin, *False Rape Allegations*, 23 ARCHIVES SEXUAL BEHAV. 81 (1994) (classifying recantations as false accusations). Other studies consider an accusation false simply if police failed to pursue or substantiate it. *See, e.g.*, P.N.S. Rumney, *False Allegations of Rape*, 65 CAMBRIDGE L.J. 128, 130–31 (2006) (collecting studies and noting variations, including studies tracking false reports based on police assessment alone). The most reliable quantitative studies suggest that false reports are a small percentage of total cases, ranging from around 6 percent to 10 percent. *See, e.g.*, David Lisak, Lori Gardinier, Sarah C. Nicksa & Ashley M. Cote, *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 1318, 1329 (2010) (finding, after independent investigation, that 5.9 percent of sexual assault allegations were false). In another careful study, Professor Cassia Spohn and Dr. Katherine Tellis found that, over a five-year period, the Los Angeles Police Department classified 11 percent of the reported rapes and attempted rapes as "unfounded." CASSIA SPOHN & KATHARINE TELLIS, POLICING AND PROSECUTING SEXUAL ASSAULT: INSIDE THE CRIMINAL JUSTICE SYSTEM 102, 140, 164 (2014). Many of these classifications, however, involved judgments about inadequate evidence or complainants who recanted for reasons consistent with a valid initial complaint. *Id.* at 138–40. After thorough review of the case files, the authors concluded, however, that 68 percent of the "unfounded" classifications (thus roughly 7.6 percent of the initial reports) involved "false allegations in which complainants deliberately lied about being raped." *Id.* at 142. The authors, although arguing that rape allegations must be taken more seriously and prosecuted more vigorously, nonetheless cautioned, "It is clear . . . that some girls and women do lie about being sexually assaulted. . . . [Such allegations] lead to cynicism and frustration among detectives tasked with investigating sexual assaults. They also undermine the credibility of genuine victims and divert scarce resources from the investigation of the crimes committed against them." *Id.* at 165.

2. *See* SPOHN & TELLIS, *supra* note 1, at 138–40.

3. *Id.* at 162–64.

4. FED. R. EVID. 412–15.

5. *See, e.g.*, Maryland v. Craig, 497 U.S. 836, 849 (1990).

6. *See, e.g.*, Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1 (2003) (upholding public sex registration); Gundy v. United States, 139 S. Ct. 2116 (2019) (same).

7. *See* DEBBIE NATHAN & MICHAEL R. SNEDEKER, SATAN'S SILENCE: RITUAL ABUSE AND THE MAKING OF A MODERN AMERICAN WITCH HUNT 2–4 (1995).

punishment.[8] This tension—a legal system that has a record of both over- and underreaching when it comes to sex cases—explains why slogans such as "believe all women" can be both a valuable reminder to give sexual assault complainants the same presumption of credibility that is given to victims of other crimes and also a dangerous proposition when understood as a justification to dispense with due process in sex cases.

A central concern prompting the initial wave of rape shield rules that Congress enacted in the 1970s[9] was the widely accepted use of prior instances of a complainant's consensual sexual activity as evidence of general bad character or as evidence that a complainant must have consented in the contested case, given evidence of past consensual sexual activity.[10] The "rape shield" rule, Federal Rule of Evidence 412, thus broadly barred all evidence of a complainant's sexual behavior, even for purposes of impeachment, unless offered for two narrow exceptions: to show an alternative source of physical evidence[11] or to prove prior consensual activity with the accused.[12]

The rule also explicitly stated what would be true even if unstated, which is that sexual behavior is admissible if constitutionally required.[13] In *Olden v. Kentucky*,[14] the U.S. Supreme Court held that the rape shield rule had been improperly used to bar the defendant from his constitutional right to impeach the complainant for bias.[15] In its ruling, the Court affirmed that "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination."[16]

The Court's categorical recognition of bias as a constitutionally protected, and therefore rape-shield recognized, exception to the general bar on evidence of sexual history has led to questions about whether other forms of impeachment might also evade rape shield restrictions. In particular, courts have grappled with the admissibility of impeachment by evidence of a prior false accusation (PFA).[17]

The current treatment of PFAs is inconsistent and controversial for several reasons. First, as explained further in Part I, there is a lack of clear guidance in the rules about how such evidence should be treated. Second, of course, there are the contradictory political and social forces referenced above, which resulted in a history replete with examples of disbelieving and smearing credible complainants, as well as of believing and acting on false accusations. Last, perhaps, legal actors are reluctant to take a side in what feels like a

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8. *See, e.g.*, PHILIP DRAY, AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA 315 (2003).

9. *See* FED. R. EVID. 412–15.

10. *See, e.g.*, Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 86–89 (2002).

11. *See* FED. R. EVID. 412(b)(1)(A).

12. *See id.* 412(b)(1)(B).

13. *See id.* 412(b)(1)(C).

14. 488 U.S. 227 (1988) (per curiam).

15. *Id.* at 232–33.

16. *Id.* at 231 (quoting Davis v. Alaska, 415 U.S. 308, 316–17 (1974)).

17. *See infra* Part I.

binary debate between those who "believe all women" and those who, like Sir Matthew Hale, view rape as an accusation "easily to be made . . . and harder to be defended."[18] Ultimately, these factors have led to inconsistent and unjust treatment of prior false-accusation evidence—both in the sense of admitting evidence that should be excluded and excluding evidence that should be admitted.

In Part II, this Essay argues that evidence of a witness's PFA is so distinctive and powerful as a form of impeachment that it is imperative for a factfinder to be able to consider it, so long as the PFA is first shown to be of sufficient reliability. Because the existing rules inadequately address the issue and courts have failed to articulate and apply a consistent rule, Part III of this Essay proposes adopting a new rule along with providing suggested text. Although propelled by the concerns surrounding PFAs in the sexual assault context, it is essential to note that the logic behind the rule, and thus the rule itself, applies to *all* case types and *all* witnesses, not just to sexual assault complainants.[19]

## I. CURRENT FRAMEWORK

Consider the following scenarios:

(1) A defendant is charged with sexually assaulting a woman at an inpatient drug treatment program. The defendant uncovers evidence that the woman previously accused employees of sexual assault at two different programs, allegedly to get out of the program.

(2) A teacher suspects sexual abuse and, after questioning the child, refers the child to the principal, who in turn calls the police. Throughout questioning by various adults, the child names the older sibling of a friend and the mother's boyfriend as the perpetrators. The investigation also reveals that the child had previously accused the child's father of an act of sexual abuse. Police ultimately believe the boyfriend to have perpetrated the offense, and he is charged.

If the accused in either case seeks to introduce the complainant's prior accusations as probative of the complainant's credibility, alleging that those prior accusations were false, then under what circumstances should the rules allow this evidence? What threshold of proof should be required to establish

18. 1 MATTHEW HALE, THE HISTORY OF PLEAS OF THE CROWN 635 (W. A. Stokes & E. Ingersoll eds., Phila., Robert H. Small 1847) (1680).

19. *See, e.g.*, State v. Herrerra, 48 A.3d 1009, 1029 (N.J. 2012) (citing N.J. R. EVID. 608(b)) (noting generally the applicability of a state rule that allows credibility attacks on witnesses in criminal cases based on alleged PFAs of similar crimes); Shelnutt v. State, 564 S.E.2d 774, 777 (Ga. Ct. App. 2002) (precluding evidence of PFAs made by complainant in domestic abuse case); Commonwealth v. LaVelle, 596 N.E.2d 364 (Mass. App. Ct. 1992) (regarding prior false claims of having been threatened); Cliburn v. State, 710 So. 2d 669, 669 (Fla. Dist. Ct. App. 1998) (finding error in refusal to allow impeachment of complainant in burglary case regarding prior false accusation); State v. Izzi, 348 A.2d 371, 373–74 (R.I. 1975) (same in assault case, citing precedent concerning false drug-trafficking and larceny accusations).

the accusations as false? Should the accusations be provable extrinsically? What are the permissible inferences from such evidence?

In federal court and state courts with analogous evidentiary standards, admission of such evidence is governed by a patchwork of rules, including Rule 412, Rule 608(b), Rule 404(a)(2)(B), Rule 608(a), Rule 404(b), and constitutional Confrontation Clause or due process requirements. This section briefly addresses each approach in turn.

### *A. Rule 412*

Rule 412, "the rape shield rule," bars evidence of a complainant's sexual history for any reason other than (1) to show an alternative source of physical evidence; (2) to show consent if the prior act was a consensual encounter with the accused; or (3) if constitutionally required.[20]

Rule 412 may feel like the most natural fit for analyzing the admissibility of a PFA. The rape shield rules were enacted precisely to counter the misuse of evidence to perpetuate myths and biases about complainants in sexual misconduct cases, such as the notion that women routinely lie about sexual assault or that sexual assault complaints warrant special scrutiny.[21] Indeed, in some jurisdictions, courts remain uniquely *generous* in allowing defense evidence in sex cases—for instance, by admitting PFA evidence in sex cases even when evidence of a PFA for any other kind of crime is categorically inadmissible under the jurisdiction's rules.[22] In addition, the rape shield rules in eight states also explicitly address the issue of false-accusation evidence, with all but one expressly allowing such evidence specifically in sex cases.[23]

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20. FED. R. EVID. 412(b)(1)(A)–(C).

21. FED. R. EVID. 412 advisory committee's note to 1994 amendment.

22. *See* Brett Erin Applegate, Comment, *Prior (False?) Accusations: Reforming Rape Shields to Reflect the Dynamics of Sexual Assault*, 17 LEWIS & CLARK L. REV. 899, 916–18 (2013) (discussing the debate over admitting intrinsic versus extrinsic evidence and noting the readiness of courts to hold 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"). Not every state needs to specially except sexual assault cases to admit extrinsic evidence, as some state rules track common law rather than mirroring Rule 608(b). As one court explained, under the common law,

> a party could present [extrinsic] evidence of a witness's "corruption"—a term that encompassed evidence of (1) the witness's general willingness to lie under oath, (2) the witness's offer to give false testimony for money or other reward, (3) the witness's acknowledgement of having lied under oath on prior occasions, (4) the witness's attempt to bribe another witness, or (5) *the witness's pattern of presenting false legal claims*.

Morgan v. State, 54 P.3d 332, 335 (Alaska Ct. App. 2002) (emphasis added). These principles applied across all kinds of cases and were not sex-offense specific.

23. *See* ARIZ. REV. STAT. ANN. § 13-1421(A)(5) (2024) (admitting "[e]vidence of false allegations of sexual misconduct made by the victim against others" if relevant and material and if prejudice does not outweigh probative value); COLO. REV. STAT. § 18-3-407(2) (2024) (including "evidence that the victim or a witness has a history of false reporting of sexual assaults" within the scope of protection, which provides for pretrial hearing to determine relevance and materiality); IDAHO R. EVID. 412(b)(2)(C), (c)(3) (establishing "false allegations of sex crimes made at an earlier time" as an exception to the rape shield rule and admissible if relevant and more probative than prejudicial); MINN. STAT. § 609.347(3)(a)(i) (2023) (admitting "evidence of the victim's previous sexual conduct tending to establish a common

Rule 412 is a poor fit, however, for determining the admissibility of PFA evidence. First, although some alleged PFAs involve prior sexual behavior, others do not.[24] Even a PFA that ostensibly claims prior sexual behavior may, by virtue of being false, not actually involve sexual behavior at all. In other words, a PFA may arise from a situation in which sexual activity is conceded and the alleged "falsehood" is solely as to whether that activity was consensual. In such a case, then, arguably, Rule 412 properly governs an alleged PFA (as its text applies to "sexual behavior"). But when the "falsehood" is alleged as to the entire event—i.e., when it is disputed whether any sexual activity occurred at all—then it is less clear as a textual matter that Rule 412 has any pertinence (as no "sexual behavior" occurred). Likely for this reason, the Advisory Committee on Evidence Rules specifically admonishes that "[e]vidence offered to prove allegedly false prior claims by the victim is not barred by Rule 412."[25]

Courts have likewise generally avoided deciding whether PFAs fall within the scope of the rule at all,[26] or they have read statutes narrowly and concluded that false accusation evidence is not covered by the shield's terms. As a result, PFA evidence is neither presumptively excluded nor subject to the rape shield's special admissibility requirements and pretrial procedures.[27]

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scheme or plan of similar sexual conduct under circumstances similar to the case at issue," wherein "the judge must find that the victim made prior allegations of sexual assault which were fabricated" to find a "common scheme or plan," and applying preponderance standard); MISS. R. EVID. 412(b)(2)(C), (c)(2)(C)–(D) (admitting "[f]alse allegations of [past] sexual offenses" made by the alleged victim at any time prior to the trial when relevant and more probative than prejudicial); OKLA. STAT. tit. 12, § 2412(B)(2) (2024) (stating that "false allegations of sexual offenses" are admissible upon pretrial notice); WIS. STAT. § 972.11(2)(b)(3) (2024) (accepting "evidence of prior untruthful allegations of sexual assault made by the complaining witness"); VT. STAT. ANN. tit. 13, § 3255(a)(1)(C) (2023) (allowing court to admit "evidence of specific instances of the complaining witness'[s] past false allegations of violations of this chapter" when "it bears on the credibility of the complaining witness or it is material to a fact at issue and its probative value outweighs its private character"). Of course, other states have generally applicable rules regarding false accusation evidence, *see, e.g.*, N.J. R. EVID. 608(b)(1), or case law addressing false accusations, *see, e.g.*, Commonwealth v. Bohannon, 378 N.E.2d 987, 991 (Mass. 1978).

24. *See supra* note 23 (citing examples of PFAs related to other kinds of activities).

25. FED. R. EVID. 412 advisory committee's note to 1994 amendment.

26. *See* United States v. Frederick, 683 F.3d 913, 916–17 (8th Cir. 2012) (choosing to avoid the question of whether Rule 412 disallows PFAs); United States v. Tail, 459 F.3d 854, 859–61 (8th Cir. 2006) (same); United States v. Bartlett, 856 F.2d 1071, 1088 (8th Cir. 1988) (same).

27. *See, e.g.*, Smith v. State, 377 S.E.2d 158, 160 (Ga. 1989) ("Numerous other courts have faced the issue presented by this appeal, and have ruled that evidence of prior false allegations by the victim does not fall within the proscription of rape-shield laws. The courts have reasoned that the evidence does not involve the victim's past sexual conduct but rather the victim's propensity to make false statements regarding sexual misconduct."); State v. Walton, 715 N.E.2d 824, 826 (Ind. 1999) ("Evidence of prior false accusations of rape made by a complaining witness does not constitute 'prior sexual conduct' for rape shield purposes."); State v. Durham, 327 S.E.2d 920, 926 (N.C. Ct. App. 1985) (noting that the "statute excluded evidence of 'sexual behavior,' but not evidence of language or conversation whose topic might be sexual behavior"); State v. LeClair, 730 P.2d 609, 613 (Or. Ct. App. 1986) ("Evidence of previous *false accusations* by an alleged victim is not evidence of *past sexual behavior* within the meaning of the Rape Shield Law and, therefore, is not inadmissible

As one court explained, "*false* statements of unrelated sex assaults are not excluded by the rape shield statute because they are not evidence of sexual *conduct*."[28] Or, as another court put it, "the defendant is not attempting to inquire into the complaining witness' sexual history to reveal unchaste character. On the contrary, the defendant seeks to prove for impeachment purposes that the complaining witness has, in the past, made false accusations concerning sexual behavior."[29] Some state courts have further found that their rape shield statutes admit PFA evidence by implication of their statutory text or commentary[30] or because of constitutional concerns.[31] At least one oddball jurisdiction endeavored to split the baby, ordering a pretrial hearing into the nature of the false accusation.[32] If the alleged falsehood encompasses the sexual act itself, then the evidence is governed by ordinary evidence rules. But if the alleged falsehood only extends to whether the sexual activity was consensual, then the state rape shield law precludes it.[33]

Second, even if the *text* of rape shield rules covers PFA evidence, such evidence is *conceptually* a bad fit for the rule. Rule 412 is intended to prevent sexual history from being used to challenge the complainant through improper inferences about character—for example, that unchaste complainants are either unworthy of protection or more likely to lie about sex. But PFA evidence is not about linking sexual purity to credibility; it is about linking prior falsehood to credibility.[34] That latter inference, unlike

under OEC 412."); Clinebell v. Commonwealth, 368 S.E.2d 263, 264–65 (Va. 1988) ("We conclude that such statements are not 'conduct' within the meaning of [the rape shield statute] and therefore, the section is inapplicable."); State v. Quinn, 490 S.E.2d 34 (W. Va. 1997) (finding "true" prior accusations covered by the rape shield law, and "false" accusations not).

28. State v. West, 24 P.3d 648, 654 (Haw. 2001) (collecting cases) (emphasis added).

29. *See, e.g.*, Miller v. State, 779 P.2d 87, 89 (Nev. 1989).

30. *See* State v. Tarrats, 122 P.3d 581, 585 (Utah 2005) (finding that a false statement was not covered by the rape shield rule and citing the advisory committee notes to the state's statute, which specifically state that "[e]vidence offered to prove allegedly false prior claims by the victim is not barred by Rule 412").

31. *See* Abbott v. State, 138 P.3d 462, 473–74 (Nev. 2006). In *Abbott*, the court observed:

> Nevada's rape shield law precludes admission of a victim's previous sexual conduct. However, this court has carved out an exception to [the rape shield law], holding that it does not encompass prior false allegations of sexual abuse or sexual assault because "it is important to recognize in a sexual assault case that the complaining witness' credibility is critical and thus an alleged victim's prior fabricated accusations of sexual abuse or sexual assault are highly probative of a complaining witness' credibility concerning current sexual assault charges." As such, "defense counsel may cross-examine a complaining witness about previous fabricated accusations, and if the witness denies making the allegations, counsel may introduce extrinsic evidence to prove that, in the past, fabricated charges were made."

*Id.* (first quoting *Miller*, 779 P.2d at 89; then quoting Efrain M. v. State, 823 P.2d 264, 265 (Nev. 1991)).

32. State v. Boggs, 588 N.E.2d 813, 817 (Ohio 1992).

33. *Id.* (collecting cases) ("We therefore hold that where an alleged rape victim admits on cross-examination that she has made a prior false rape accusation, the trial judge shall conduct an *in camera* hearing to ascertain whether sexual activity was involved and, as a result, would be prohibited by [the state rape shield statute], or whether the accusation was totally unfounded and therefore could be inquired into on cross-examination pursuant to Evid. R. 608(B).").

34. *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.

the former one, is both defensible and not dependent on sex stereotyping or gender-based oppression. As one Indiana court explained, "In presenting [PFA] evidence, the defendant is not probing the complaining witness's sexual history. Rather, the defendant seeks to prove for impeachment purposes that the complaining witness has previously made false accusations of rape."[35] Numerous other courts have reached similar conclusions.[36]

### *B. Rule 608(b)*

The most common way that courts assess PFA evidence is Rule 608(b) or its state-level analogs.[37] That rule permits a party with a good faith basis to cross-examine a testifying witness about specific instances of a witness's

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REV. 609, 652 (2006) (arguing that PFA evidence should not implicate Rule 412 and that courts are misguided to try to apply Rule 412 to proposed PFAs). Significantly, Professor Jules Epstein's argument rests in large part on the idea that Rule 412 is founded on concerns for a complainant's privacy and that a complainant forfeits the right to privacy by making a false allegation. *See id.* at 651–52. In contrast, this Essay argues that it is the substantive value of the evidence (as distinct from ordinary forms of general credibility impeachment) that merits distinct treatment of PFAs.

35. Williams v. State, 779 N.E.2d 610, 613 (Ind. Ct. App. 2002) (quoting State v. Walton, 715 N.E.2d 824, 826 (Ind. 1999)).

36. *See* State v. Anderson, 686 P.2d 193, 200 (Mont. 1984) ("Despite the general policy against sordid probes into a victim's past sexual conduct, we conclude that the policy is not violated or circumvented if the offered evidence can be narrowed to the issue of the complaining witness'[s] veracity."); State v. Baron, 292 S.E.2d 741, 743 (N.C. Ct. App. 1982) ("[D]efense counsel should have been allowed to introduce the evidence in order to attack the credibility of the witness . . . . Since there is no contention that the complainant ever engaged in sexual activity, there was no need to invoke the statute to prevent the disclosure of complainant's prior statements accusing others of improper sexual advances."); State v. McCarthy, 446 A.2d 1034, 1035 (R.I. 1982) (reversing for prejudicial error and finding that the "trial justice's refusal to allow defendant to submit to the jury evidence that the complaining witness had made false charges of rape against another individual undermined defendant's ability to challenge effectively the complaining witness's credibility," as the complainant had made and withdrawn charges against another man after the alleged incident); People v. Garvie, 384 N.W.2d 796, 798 (Mich. Ct. App. 1986) ("Notwithstanding the [rape shield] statute, 'the defendant should be permitted to show that the complainant has made false accusations of rape in the past.'" (quoting People v. Hackett, 365 N.W.2d 120, 125 (Mich. 1984))); Mathis v. Berghuis, 202 F. Supp. 2d 715, 722 (E.D. Mich. 2002) ("Petitioner had a right to cross examine the complainant regarding prior false accusations 'of a similar nature,' and, if she were to deny making such a false accusation, Petitioner would have been entitled to submit into evidence extrinsic proof of such a charge in order to impeach the complainant." (quoting People v. Mikula, 269 N.W.2d 195, 197–98 (Mich. Ct. App. 1978))); Morgan v. State, 54 P.2d 332, 336 (Alaska Ct. App. 2002) ("[W]hen there is strong evidence that the complaining witness has falsely accused others of sexual assault, this evidence is admissible."); *cf.* Dennis v. Commonwealth, 306 S.W.3d 466, 472 (Ky. 2010) (applying a threshold standard of proving falsehood and then noting that "numerous courts, both federal and state, have held that the credibility of the complaining witness in a sex crime case may be attacked by cross-examination concerning a prior false accusation" and that "[t]his is so notwithstanding the fact that such an attack implicates KRE 412, the rape shield rule"); State v. Kornbrekke, 943 A.2d 797, 801 (N.H. 2008) ("A prior false accusation of sexual assault is highly probative of the complainant's truthfulness or untruthfulness regarding the current charges.").

37. *See* Kassandra Altantulkhuur, *A Second Rape: Testing Victim Credibility Through Prior False Accusations*, 2018 U. ILL. L. REV. 1091, 1125–46 (listing each state's rule regarding character for truthfulness and PFA impeachment).

conduct that are probative of truthfulness.[38] Rule 608(b) is considered a "lesser" form of impeachment because it is so general in nature.[39] It relies on a general inference of lack of truthfulness—i.e., "you've lied once in your life, so you must be lying now"—that often ill-fits the facts of the case or fails to offer particular insight into the witness's proclivity to lie under oath in the specific circumstance of the trial. As a result, Rule 608(b) impeachment is limited in scope, and extrinsic evidence is generally not permitted to prove specific instances of untruthfulness even if the witness denies them.[40]

Rule 608(b) may seem like the most natural fit for proposed PFA evidence because a PFA is, at its core, a prior act of untruthfulness. But this rule has several shortcomings. First, and as explained in greater detail in Part II, the correct characterization of general evidence for untruthfulness as weakly probative does not capture the value of substantiated PFA evidence. There is simply a sharp conceptual and practical distinction between using a random, generic act of dishonesty to impugn a person's honesty under oath at trial and using evidence of a PFA to impugn the credibility of a complainant's present accusation.

Second, the breadth of discretion accorded judges in admitting or excluding evidence under Rule 608(b) is inappropriate with respect to probative PFA evidence. Judges may be too lenient in admitting a PFA using only the "good faith basis" standard used to determine whether the prior alleged act of untruthfulness in fact occurred and is probative of untruthfulness. And even scrupulously applied, a good faith basis standard is too low and too vague for determining the admissibility of evidence as powerful as an alleged prior false accusation, inviting too much uncertainty. Indeed, some courts have used their discretion to arbitrarily impose too high a standard, making it virtually impossible to establish falsehood.[41] Rule 608(b) also has no pretrial notice or hearing requirements, as compared to the more robust standards found in the rules governing other potentially

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

39. *See* United States v. Abel, 469 U.S. 45, 52 (1984) (alluding to "less favored forms of impeachment" like that under Rule 608(b)); Davis v. Alaska, 415 U.S. 308, 316 (1974) (distinguishing between general and particular attacks on credibility).

40. *See id.*

41. *See* White v. Coplan, 399 F.3d 18, 26 (1st Cir. 2005) (reversing an earlier holding that New Hampshire's requirement of clear and convincing evidence of "demonstrable falsehood" violated the Constitution, but nonetheless finding that this standard violated defendant's rights as applied in the case at bar); Morgan v. State, 54 P.3d 332, 337–38 (Alaska Ct. App. 2002) (discussing an overly stringent application of falsehood tests, such as proof that the complainant conceded, under oath, that the accusation was false). *See generally* State v. Guenther, 854 A.2d 308, 322–23 (N.J. 2004) (noting threshold standards adopted by courts in varying jurisdictions, including "demonstrably false," clear and convincing evidence, "preponderance of the evidence," and "reasonable probability of falsity"); Applegate, *supra* note 22, at 907–09 (surveying state falsehood standards and finding that roughly half lack a clearly articulated standard; several have standards like "clearly and convincingly untrue" or require conviction for the falsehood; twelve impose a "preponderance-plus" standard; seven impose a preponderance standard; seven impose a "reasonableness-ish" standard; and one requires "some quantum" of falsity).

incendiary evidence, such as those in Rule 412, Rule 404(b) (which governs evidence of prior bad acts), or Rule 609(b)(2) (which governs evidence of prior convictions older than ten years).

Lastly, the evidentiary restrictions on Rule 608(b), tailored to match the "lesser value" of such evidence, unduly restrict the probative force of a PFA.[42] Rule 608(b) operates only if there is a testifying witness and disallows extrinsic proof,[43] both of which can unjustly circumscribe the admission of highly probative PFA evidence.

### *C. Rule 404(b)*

Some courts have considered PFA evidence under Rule 404(b).[44] Rule 404(b) permits a party to introduce evidence—including extrinsic evidence—of prior acts for a non-propensity purpose.[45] Although Rule 404(b) is commonly used by prosecutors admitting evidence against criminal defendants, defendants have sought to introduce evidence of the complainant's prior acts of false accusation as "reverse 404(b)" evidence,[46] citing various purposes including common scheme or plan,[47] intent or

42. *See id.*

43. *Compare* Nevada v. Jackson, 569 U.S. 505, 510 (2013) (per curiam) (affirming constitutionality of precluding extrinsic evidence of prior false accusation evidence), *with* United States v. Stamper, 766 F. Supp. 1396, 1405 (W.D.N.C. 1991), *aff'd*, *In re* One Female Juvenile Victim, 959 F.2d 231 (4th Cir. 1992) (admitting extrinsic evidence and noting that "Rule 608(b) should not be read so broadly as to disallow the presentation of extrinsic evidence that is probative of a material issue in a case"). *See also* State v. Long, 140 S.W.3d 27, 31 (Mo. 2004) (en banc) ("The current Missouri rule prohibiting extrinsic evidence of prior false allegations does not strike the appropriate balance. Therefore, a criminal defendant in Missouri may, in some cases, introduce extrinsic evidence of prior false allegations. This rule is not limited to sexual assault or rape cases."). One court even, counterintuitively, admitted extrinsic proof of a PFA despite precluding cross-examination of the complainant as to that PFA. *See* United States v. Crowley, 318 F.3d 401, 416, 418 (2d Cir. 2003) (finding no error in the trial court's admission of a witness who testified about complainant's PFAs against other persons but precluding cross-examination of the complainant as to those accusations). Other courts have allowed cross-examination by applying a less demanding standard of falsehood but required heightened proof of falsity in order to admit extrinsic evidence. *See, e.g.*, Applegate, *supra* note 22, at 909 (citing examples of Tennessee and New Hampshire).

44. *See Stamper*, 766 F. Supp. at 1400 (common scheme or plan of lying); Sussman v. Jenkins, 636 F.3d 329, 354 (7th Cir. 2011) (motive to lie to garner attention); United States v. Velarde, No. CR 98-391, 2008 WL 5993210 (D.N.M. May 16, 2008) (motive to lie to get something); *cf.* Peeples v. State, 681 So. 2d 236, 237–39 (Ala. 1995) (admitting a PFA as habit).

45. *See id.*

46. *See, e.g.*, Jessica Broderick, Comment, *Reverse 404(b) Evidence: Exploring Standards When Defendants Want to Introduce Other Bad Acts of Third Parties*, 79 U. COLO. L. REV. 587, 596–99 (2008) (surveying how courts assess 404(b) character evidence when offered by the defendant).

47. *See Stamper*, 766 F. Supp. at 1400; United States v. Lukashov, 694 F.3d 1107, 1118 (9th Cir. 2012).

motive,[48] or as just a general attack on credibility.[49] Applying the standard established in *United States v. Huddleston*,[50] courts typically assess Rule 404(b) evidence using a sufficiency standard.[51]

Here, again, Rule 404(b) feels ill-suited to this evidence. Although there may be some limited cases in which evidence of a PFA does, in fact, reveal a complainant's motive or a common scheme or plan, in general, such evidence is not truly offered for those reasons. It is not as much a particular motive to lie that the evidence reveals as much as a capacity to falsely accuse. In other words, it is usually not the case that the prior false accusations somehow reveal a grand plan or design, nor that they show a complainant's particularized motive or reason to lie.[52] Rather, the inference is that a complainant has a history of false accusation and, thus, it is justified for the factfinder to be skeptical of the present accusation. That is a credibility inference, not a character inference.

In addition, Rule 404(b) is inapt because the sufficiency standard, like the good faith basis in Rule 608(b), fails to adequately safeguard against attempts to introduce alleged PFAs based on threadbare evidence of falsehood. Yet ensuring that an adequate basis exists to judge the prior accusation false is essential to determining whether its use is a fair attack on credibility versus an unjust effort to smear a complainant. There is also no notice requirement for defense-initiated 404(b) or "reverse-404(b)" (even though there is one for

48. *Velarde*, 2008 WL 5993210, at *37 (admitting evidence as "knowledge, motive, and capacity to concoct false allegations that adult males acted inappropriately towards [the witness] to get what she wanted"). *But see* United States v. Withorn, 204 F.3d 790 (8th Cir. 2000) (finding no abuse of discretion in exclusion of complainant's PFA, holding that "impeaching the victim's truthfulness and showing her capability to fabricate a story 'are not recognized exceptions to Rule 412'" (quoting United States v. White Buffalo, 84 F.3d 1052, 1054 (8th Cir. 1996))); *cf. Sussman*, 636 F.3d at 354 (holding that the trial court erred in barring cross-examination of PFA because the questions were an attempt to show motive to garner attention from a father figure similar to the currently charged crime, as opposed to a general lack of truthfulness).

49. Courts, at times, blend what is essentially a Rule 608(b) and Rule 404(b) inquiry, finding, for instance, that the impeachment is proper to show state of mind, motive, or bias. *See, e.g.*, State v. Anderson, 686 P.2d 193, 199 (Mont. 1984) (admitting PFA as evidence of "state of mind, motive, or biases" while citing the state's version of Rule 608(b)). Traditionally, Rule 608(b) is meant to address credibility as it pertains to the present assessment of a witness's *testimony*, whereas reverse-404(b) is meant to govern a person's truthful character with respect to judging motive, intent, and so forth as regards the complainant's actions in a disputed historical event, but the two can blend easily in sexual assault cases.

50. 485 U.S. 681 (1988).

51. *Id.*

52. To be clear, there might be instances in which Rule 404(b) truly applies to PFA evidence—for instance, a distinctive pattern of behavior of false accusation or motive to fabricate in a specific circumstance, such as to retaliate against a colleague or secure money from a victim's fund. *See, e.g.*, Julianne McShane, *Stanford University Employee Charged with Making 2 False Sexual Assault Allegations*, NBC NEWS (Mar. 16, 2023, 4:02 PM), https://www.nbcnews.com/news/crime-courts/stanford-university-employee-charged-making-2-false-sexual-assault-all-rcna75264 [https://perma.cc/Q3EP-UGP9]. But recognizing a general claim of "motive to lie to get things" dilutes what should be a more rigorous standard for admission of Rule 404(b) evidence, as "lying to get things" is a *credibility* character trait, not a non-propensity specialized motive or pattern.

prosecutor-initiated 404(b)), which means that a complainant or witness may not have an opportunity to challenge the evidence prior to the impeachment.

### *D. Rule 404(a)(2)(B) or 608(a)*

In theory, a defendant might seek to introduce prior false accusation evidence by asserting that being a "false accuser" is a "pertinent trait" of the complainant or the basis of an affirmative attack on character for truthfulness. If so, the PFA must be offered as general reputation or opinion evidence rather than as specific act evidence. However, even assuming that courts would allow such evidence,[53] it both invites inappropriate generalizations of character and unnecessarily dilutes what should be allowed as a more potent form of attack by requiring that evidence take the form of reputation or opinion evidence.

### *E. Constitutional Protections*

Lastly, in the absence of a clear route to admit a PFA, defendants have often cited the constitutional right of confrontation, whether packaged as an attack on bias or just general credibility.[54] This is particularly the case, for obvious reasons, in a large number of cases brought into federal court via a writ of habeas corpus.[55] However, relying on the discretionary application of a constitutional standard unjustly ignores the significance of a court recognizing a right as constitutional in nature. It also raises the specter of inconsistency in the exercise of judicial discretion, especially in light of convoluted habeas standards, and interposes an unnecessary hurdle to the introduction of what Part II argues is important impeachment evidence.

## II. ANALYSIS

Although PFA evidence does not readily fit any existing rule of impeachment, such evidence carries significant probative value and ought to be categorically admissible once it meets the threshold showing of falsehood. Indeed, when offered by a criminal defendant against an accuser, such evidence is—as several courts have acknowledged[56]—properly considered a constitutional necessity. This part explains the distinct probity of PFA evidence and argues for its categorical admissibility once certain prerequisites are satisfied.

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53. *See, e.g.*, Dennis v. Commonwealth, 306 S.W.3d 466, 471–72 (Ky. 2010) (rejecting Rule 404 argument because the general character rule was limited by the rape shield rule).

54. *See, e.g.*, Kittelson v. Dretke, 426 F.3d 306, 322 (5th Cir. 2005) (finding that the trial court had violated defendant's Sixth Amendment right to confrontation by prohibiting questioning on alleged PFA).

55. *Compare* Redmond v. Kingston, 240 F.3d 590, 591–92 (7th Cir. 2001) (granting habeas petition after finding a constitutional violation in preclusion of cross-examination regarding juvenile complainant's admission of PFA of forcible rape), *with* Cookson v. Schwartz, 556 F.3d 647, 655 (7th Cir. 2009) (denying petition after finding no violation in exclusion of evidence that juvenile complainant's prior accusation of sexual abuse was judged "unfounded" by child services).

56. *See, e.g.*, *Kingston*, 240 F.3d at 591–92; *Kittelson*, 426 F.3d at 322.

Although PFA evidence is often considered a subspecies of general credibility evidence, PFAs are both conceptually and theoretically distinguishable from the low-value, general credibility evidence covered by Rule 608(b). Rule 608(b) evidence is typically considered low-value impeachment evidence because it rests on a weak supposition: the idea that because a witness was untruthful in a separate, unrelated context, the witness may be untruthful when testifying under oath. This inference is weak because we know that people are often untruthful for reasons unrelated to their general veracity—such as to protect loved ones, to cover up personal shortcomings, or to promote their self-interest. Inferring a willingness to lie under oath about a serious matter based solely on a prior falsehood in an unrelated context with separate stakes, therefore, seems attenuated at best and indefensible at worst.

However, although PFAs are often shoehorned into Rule 608(b), as a practical matter, a PFA attack is far more probative of credibility, and the supported inferences are far more logically sound than general attacks on truthfulness. To be sure, both a false accusation and an act of untruthfulness share in common a witness's apparent willingness to speak falsely. But context and what is at stake with the falsehood matters immensely. Speaking falsehoods solely to protect oneself or to promote one's self-interest, even in a way that exposes the *speaker* to serious legal or other jeopardy, is sharply distinguishable from speaking falsehoods that directly place *others* in jeopardy. Even for falsehoods that indirectly implicate another's interest—such as a lie to receive an undeserved benefit—the primary intention is self-serving and the primary risk is only to the liar; the harm to others from the falsehood is diffuse and collateral. Moreover, everyone intuits that people may lie when it serves their self-interest, so a witness's testimony may already be assessed with that caution in mind. Additional evidence of a prior self-serving falsehood does nothing more than reinforce that intuition.

In contrast, a demonstrated willingness to directly harm *another* by making a false accusation, especially when the accusation places the other person in legal or other significant jeopardy, signals something more probative about a witness's veracity. It is not just that the witness lied once in some abstract way and thus may be lying now on the stand—it is that the witness previously lied in a way that showed (to borrow from criminal law) a malicious intent or depraved indifference to the harms that such lies may directly cause another. In contrast to a self-serving lie, for which the liar bears both the risks and benefits of the lie, a lie that accuses another benefits the liar at the expense of the other person. Everyone has been untruthful at some point in their lives, and many people have even been untruthful in ways that may carry serious consequences for themselves—such as, for example, failing to disclose taxable income or lying about credentials to get a job. That is why such evidence feels low-value even for "big" lies. But far fewer people have gone so far as to intentionally levy a false accusation of wrongdoing against *another* person, and most people recognize the stark moral difference between lies that put one's own self, reputation, or future at risk and those which directly jeopardize another. That is why PFA evidence feels both more

specific and of higher value. In this way, PFA evidence is not about a witness's general character for untruthfulness, but about a witness's specific character for wrongful or false accusation.

Viewed in this way, it is easy to see why some courts have rejected the Rule 608(b) frame when presented with such evidence and reached instead for Rule 404(b) or the constitutional right to confront a witness with bias. The specificity of PFA evidence makes it feel less like a general credibility attack and more like a form of attack aimed at revealing a particular kind of motive to lie (i.e., to harm another for one's own benefit) or "biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand."[57] But neither rule truly fits. If the PFA attack was truly evidence of bias in the sense of the witness's motive to fabricate vis-a-vis the *specific accused*, then there would be no need to cite constitutional standards in non-habeas cases. Ordinary principles of bias impeachment ought to do the trick. And if it were true Rule 404(b) evidence, it would relate more directly to the facts of the case rather than to the witness's general veracity.

To be sure, not all PFA evidence is created equal; whispering "he took my pencil" to a classmate is obviously an entirely different matter from saying "he stole my laptop" to a police officer. And judging *when* an alleged prior accusation is in fact a prior *false* accusation is particularly difficult, especially because it is not just the falsehood of the accusation that makes it probative, but the fact that the accuser *knew* it to be false. An erroneous but authentic accusation simply does not support the same credibility inference chain—namely, that the witness's untruthfulness is not inadvertent, but specifically characterized by a willingness to directly place another person in jeopardy with a falsehood. Similarly, because a dispute over whether a prior accusation was in fact false has the capacity to distract from the present factfinding, a pretrial determination of falsehood is essential to ensuring that such evidence is properly circumscribed when admitted at trial.

It is thus evident that PFA evidence is most probative when:

- The PFA is made publicly or to an official;
- The PFA places the other person in significant jeopardy, whether legal, financial, reputational, or otherwise;
- The PFA is of the same magnitude or nature as the present claim or against the same person regardless of the claim;[58]
- The PFA is made by a witness (including the complainant) whose credibility is a central issue in the case.

PFA evidence is most prejudicial when:

57. Davis v. Alaska, 415 U.S. 308, 316 (1974).

58. When a PFA is made about the same person as the present claim, the PFA may in fact be accurately presented to the court as an attack for bias (against that person) or as reverse-404(b) evidence showing a specialized motive or plan. That said, the proposed framework for all PFAs may prove helpful in discerning whether such attacks, even when packaged as bias, should be permitted.

- There is no notice or opportunity for the witness to challenge, outside the jury's presence, the assertion that the witness made a prior accusation and that it was false;
- There is insufficient evidence that the accusation was, in fact, false and that the witness knew it was false at the time of making it;
- The PFA distracts from or clouds the factfinding because the admission of extrinsic evidence is not properly circumscribed.

Given these considerations, it is clear why the current rules are inadequate in addressing proposed PFA impeachment.[59] Rule 608(b) is both too strict—in that it requires that the witness testify and forbids the introduction of extrinsic evidence—and too lenient—in that it does not require notice and imposes only a good faith basis for questioning. Rule 404(b) is likewise an ill fit, in that it muddles the application of non-propensity purposes like "common scheme or plan" and "motive/intent," allows for admission of evidence on a threadbare *Huddleston* sufficiency showing, and does not require notice or a pretrial hearing when offered as reverse 404(b) evidence. Rules 404(a) and 608(a) are insufficiently precise, allowing only general testimony about character rather than specific, probative evidence. And Rule 412 and the constitutional standard are too demanding, interposing too high a bar for critical impeachment evidence and inviting the exercise of inconsistent and unpredictable judicial discretion. Rule 412 is also too narrow, at best directly addressing PFAs only in the context of sex cases. Part III, therefore, proposes the adoption of a new rule to govern the admission of PFA evidence.

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59. The handful of scholars who have most recently considered this question at length have generally reached a similar conclusion, although with different reasoning or ultimate recommendations. *See generally* R. Michael Cassidy, *Character, Credibility, and the Rape Shield Rules*, 19 GEO. J.L. & PUB. POL'Y 145 (2021) (advocating for an exception to Rule 412 that permits admission of "evidence that the victim made a false allegation of sexual assault on another occasion"); Rosanna Cavallaro, *Rape Shield Evidence and the Hierarchy of Impeachment*, 56 AM. CRIM. L. REV. 295, 297, 307–10 (2019) (arguing, with respect to sexual assault in particular, that the "the long-established hierarchy of impeachment that governs in all criminal trials, for rape or any other crime, and that places bias above both character and contradiction as a basis for juror evaluation of witness reliability, is constitutionally insupportable and bears reconsideration"); Edward J. Imwinkelreid, *Should Rape Shield Laws Bar Proof that the Alleged Victim Has Made Similar, False Rape Accusations in the Past?: Fair Symmetry with the Rape Sword Laws*, 47 U. PAC. L. REV. 709, 727–29 (2016) (rejecting idea that rape shield should bar PFA evidence, proposing admission if the PFA is shown false (applying a Rule 104(b) sufficiency standard) and is sufficiently similar to the current complaint, and allowing extrinsic evidence); Epstein, *supra* note 34, at 657 (predominantly arguing that a defendant's right to offer PFA evidence is "constitutionally-founded and compelling" and briefly sketching three parameters: (1) specifications regarding the type of covered accusations, (2) a sufficiency standard for admission, and (3) some pretrial consideration). *But see* Denise R. Johnson, *Prior False Allegations of Rape: Falsus in Uno, Falsus in Omnibus*, 7 YALE J.L. & FEMINISM 243, 244–45 (1995) (presenting an argument "challeng[ing] the assumption that a complaining witness's prior false allegation of rape . . . is of such high probative value that it should be admitted to impeach the witness and proved by extrinsic evidence if she denies it").

## III. PROPOSAL

The Advisory Committee on Evidence Rules should adopt the following proposed rule:[60]

**Rule 416. Prior False Accusation**

(a) ADMISSIBILITY. A person's credibility may be attacked through cross-examination about an alleged prior false accusation if the following requirements are met:

(1) *Proof of Falsehood and Awareness of Falsehood*. The falsehood of the prior accusation, and the person's awareness of its falsehood, have both been established by a preponderance of the evidence. The court may consider an accused's denial of the accusation or the fact that a complaint was not pursued by the complainant or by law enforcement as evidence of falsehood, but these facts do not alone or together establish falsehood or awareness of falsehood by a preponderance of the evidence.

(2) *Nature of the False Accusation.* The prior false accusation is similar in nature, or of equal or greater magnitude, to the present allegation.

(b) EXTRINSIC EVIDENCE. Extrinsic evidence of a person's prior false accusation is admissible if the person does not testify or testifies and denies having made the prior accusation or denies its falsehood.

(c) NOTICE. The proponent must provide reasonable written notice of any such evidence that the proponent intends to offer at trial, so that the opponent has a fair opportunity to meet it. If the prior false accusation relates to an act of alleged sexual misconduct, the notice must comply with Rule 412(c).

The proposed rule offers several benefits. First, the rule makes plain that PFA evidence is, under the right conditions, admissible and probative impeachment evidence. Because the intention is to properly channel PFA evidence, it is expected that this new rule would govern the admissibility of PFAs rather than any other rule, unless a party could genuinely meet a particularized bias or reverse-404(b) purpose. Second, the rule ensures that proper notice and pretrial consideration are given to such evidence when offered and that the special protections of the rape shield rules apply when the prior false accusation is one alleging sexual misconduct.

Third, the rule imposes several standards that a court must find satisfied before admitting alleged PFA evidence, and it requires that each of these foundational pieces be established by a preponderance of the evidence, rather than relying on the good faith basis or sufficiency standards (at the least demanding end of the spectrum) or requiring clear and convincing evidence or proof of demonstrable falsehood (at the most demanding end).

60. For utmost clarity, the committee should also amend Rule 412 to make clear that evidence of an accusatory witness's allegedly false prior accusation of sexual misconduct is not precluded by that rule, regardless of whether the alleged sexual conduct occurred or not, but that such evidence is instead governed by the new rule.

Specifically, the proponent of a PFA must show that the prior accusation was false and that the accuser was aware that it was false. The rule also explicitly states that such a showing is not satisfied with mere evidence that the complaint was not pursued, whether by the complainant or by law enforcement, or that the accuser denied it. It is well documented that law enforcement routinely disregards legitimate complaints,[61] that complainants have no constitutional right to force law enforcement to take action on complaints,[62] and that many legitimate complaints are not further pursued (or even recanted) by complainants for reasons unrelated to veracity.[63] It is also not surprising that an accused may deny an accusation. But that denial alone is hardly evidence of the accusation's falsehood. These restrictions are thus important to ensure that the rule does not inadvertently operate to reinscribe existing biases.

Fourth, the rule requires that the PFA be either "similar in nature" or of "equal or greater magnitude[] to the" charged offense.[64] This requirement is intended to ensure that a truly inconsequential or collateral PFA—recall the stolen pencil example from above—is not admissible given its categorically limited value. It is not meant to impose a requirement of factual similarity—such that the PFA involve the same general activity or circumstances as the present accusation. Although precise line-drawing may in some cases be difficult, courts have proven capable of handling such distinctions. Moreover, the inclusion of a similarity requirement (augmented here by a

61. *See* REBECCA CAMPBELL, GIANNINA FEHLER-CABRAL, STEVEN J. PIERCE, DHRUV B. SHARMA, DEBORAH BYBEE, JESSICA SHAW, SHEENA HORSFORD & HANNAH FEENEY, MICH. STATE UNIV., THE DETROIT SEXUAL ASSAULT KIT (SAK) ACTION RESEARCH PROJECT (ARP), FINAL REPORT 173–75 (2015), https://www.ncjrs.gov/pdffiles1/nij/grants/248680.pdf [https://perma.cc/R3LP-TBQV] (reporting results of tests of rape kits previously untested because law enforcement dismissed the complaints as bogus and finding that half of the kits matched a profile in the database and a quarter of all matches were to serial sex offenders); *cf.* United States v. Crow Eagle, 705 F.3d 325, 329 (8th Cir. 2013) (finding bare assertion that complaints were not prosecuted insufficient to show that the allegations were false). One military court even held that an acquittal at a criminal trial was insufficient to establish falsity. United States v. Erikson, 76 M.J. 231, 236 (C.A.A.F. 2017). Although it is technically true that an acquittal is a finding of a lack of evidence beyond a reasonable doubt, rather than of actual innocence, an acquittal should in nearly all cases suffice to meet the threshold under the rule. Of course, the victim is free to maintain that the accusation was not, in fact, false and that the acquittal was a miscarriage of justice.

62. *See* Town of Castle Rock v. Gonzales, 545 U.S. 748, 768 (2005) (finding no private right or interest in enforcement of restraining order, notwithstanding mandatory enforcement law).

63. *See, e.g.*, Jeffrey S. Jones, Carmen Alexander, Barbara N. Wynn, Linda Rossman & Chris Dunnuck, *Why Women Don't Report Sexual Assault to the Police: The Influence of Psychosocial Variables and Traumatic Injury*, 36 J. EMERGENCY MED. 417, 417–28 (2009). Recantations pose an especially vexing problem. One court discussed the question of whether recantations are "conclusive of falsity" at length, finding that evidence that the complainant recanted a prior accusation should be considered along with other evidence in determining whether the accusation was, in fact, false and knowingly so. Morgan v. State, 54 P.3d 332, 337–38 (Alaska Ct. App. 2002).

64. FED. R. EVID. 416.

magnitude alternative) tracks existing law pertaining to both PFAs[65] and analogous admissibility rules such as Rule 404(b).[66]

Lastly, the rule provides for the admission of extrinsic evidence to prove the PFA in two circumstances: if the witness does not testify at all and, alternatively, if the witness testifies and either denies making the accusation or denies its falsehood. Conventionally, Rule 608(b) restricts extrinsic evidence because general credibility impeachment is, as explained above, typically considered to have low probative value and a high risk of prejudice.[67] There is also a sense of its limitlessness; given how many falsehoods a diligent investigator might be able to uncover, allowing proof of each could easily derail a trial. In the case of PFAs, Rule 608(b)'s requirement of a testifying witness and ban on extrinsic evidence may propel advocates to seek to repackage PFA evidence as Rule 404(b) evidence—as that rule does not require a testifying witness and permits extrinsic proof.

The proposed rule's allowance of extrinsic evidence in certain limited circumstances intends to strike a balance between the concerns about judicial efficiency and juror distraction that animate the restriction on extrinsic proof in Rule 608(b) and the (in some cases constitutional) imperative of permitting highly probative evidence.[68] The rule thus expressly allows extrinsic proof

65. *See, e.g.*, MINN. STAT. § 609.347(3)(a)(i) (2023) ("[E]vidence of the victim's previous sexual conduct tending to establish a common scheme or plan of similar sexual conduct under circumstances similar to the case at issue [is admissible when victim consent is at issue]. In order to find a common scheme or plan, the judge must find that the victim made prior allegations of sexual assault which were fabricated . . . ."); State v. Guenther, 854 A.2d 308, 324 (N.J. 2004) (requiring a finding as to the "similarity of the prior false criminal accusation to the crime charged," now codified for all case types in New Jersey Rule of Evidence 608(b)(1)). *See generally* Cassidy, *supra* note 59, at 164 (noting that courts are more likely to admit PFA evidence when the offenses are similar and that this similarity is the decisive criterion for admission in the First and Eleventh Circuits). *Cf.* State v. Miller, 921 A.2d 942, 947–52 (N.H. 2007) (clarifying the prior similarity requirement with similarity as a factor considered when distinguishing constitutionally compelled and permissibly admitted evidence). *But see* State v. Long, 140 S.W.3d 27, 31 (Mo. 2004) (rejecting a similarity rule, reasoning that a "rule limiting the inquiry to prior false allegations that are the same as the charged offense erroneously focuses the relevance analysis entirely upon the subject matter of the allegation and ignores the fact from which relevance to witness credibility is derived; the fact that the allegation was false").

66. *See* 22B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5247.1 (2d ed. 2017) ("Usually, the doctrine of chances is not itself a ground for admission. Rather, it provides the rationale underlying the use of other act evidence to prove propositions such as intent, knowledge, plan, or absence of mistake or accident.").

67. *See, e.g.*, State v. Boggs, 588 N.E.2d 813, 817 (Ohio 1992) (denying use of extrinsic evidence to complete impeachment under Rule 608(b), conceptualizing the value of such evidence as boundless and "collateral").

68. This compromise approach, although unusual, is not unprecedented. *See, e.g.*, State *ex rel.* Mazurek v. Dist. Ct. of Mont. Fourth Jud. Dist., 922 P.2d 474, 480 (Mont. 1996) (allowing "cross-examination of the complaining witness concerning the alleged false accusations . . . [and] extrinsic evidence of the false accusations only if the complaining witness denies or fails to recall having made such accusations"). In fact, it appears that in the 1980s, this was the practice in several jurisdictions. *See, e.g.*, *Miller*, 779 P.2d at 89 ("[D]efense counsel may cross-examine a complaining witness about previous fabricated accusations, and if the witness denies making the allegations, counsel may introduce extrinsic

when the witness is a hearsay declarant or otherwise not testifying,[69] and it allows completion of the impeachment through extrinsic evidence if a testifying witness denies the PFA.[70] But if a witness testifies and admits the PFA, then no extrinsic proof is allowed. Put more succinctly, because a PFA is more probative than Rule 608(b) general credibility evidence, it is imperative that it be admissible even if a witness is a hearsay declarant and also that it be admissible to complete the impeachment of a witness who denies the PFA on the stand. But because PFA evidence, like Rule 608(b) evidence, has the potential to distract the jury and slow the proceedings, the ability to introduce extrinsic proof is limited to those two circumstances. If the witness testifies and admits the PFA on the stand—even if the witness minimizes it or distinguishes it from the present situation—then the value of offering extrinsic proof is no longer offset by its prejudicial impact. To the extent that subtle questions as to the scope or breadth of such evidence arise, judges can rely on Rule 403 to impose appropriate limits.

## CONCLUSION

By imposing rigorous, but surmountable, hurdles to admission of PFA evidence, the proposed rule maximizes the probability that truly probative impeachment evidence will be admitted while minimizing the risk of prejudicial inferences. And, of course, by clearly articulating these standards, the rule provides greater guidance to courts in ruling on such motions and to parties in anticipating the admissibility of the evidence.

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evidence to prove that, in the past, fabricated charges were made.”). *See generally* Johnson, *supra* note 59, at 248 n.20 (listing cases). Of course, during that period, the rule was particular to sex cases, whereas the proposed rule would apply to all prior false accusations regardless of case type.

69. *See, e.g.*, David Sonenshein, *Impeaching the Hearsay Declarant*, 74 TEMP. L. REV. 163, 166–67 & nn.19–21 (2001) (noting varying judicial responses to the conflict between Rule 608(b)’s allowance of cross-examination regarding acts probative of truthfulness and its ban on extrinsic evidence, in light of Rule 806’s permission of impeachment of nontestifying declarants as though they had testified).

70. Of course, Rule 403 governs the scope and extent of that extrinsic proof.