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FALSE ALLEGATIONS OF RAPE

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I. INTRODUCTION

A. False Allegations of Rape in Law and Its Enforcement

THERE can be little doubt that the spectre of false rape allegations has significantly influenced the development of legal doctrine and its enforcement. The fear of false allegations has been used to justify evidential rules in cases involving sexual offences such as the corroboration warning,[1] the retention of the marital rape immunity[2] and continues to influence police and prosecutorial decision-making.[3] Sir Matthew Hale's seventeenth century opinion that rape "is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent",[4] and the suspicion of rape complainants that this view represents has figured prominently in the legal response to rape. Across many jurisdictions, judges, legal practitioners and scholars have commented upon the ease with which women, children and sometimes men can fabricate an allegation of rape and how difficult it is to refute such claims.[5] This suggestion has been made by

* Reader, Division of Law, Sheffield Hallam University. I would like to thank my colleagues Kevin Williams and Rob Heywood for their comments on earlier drafts of this paper. All views expressed within this paper remain my own. Special thanks go to Nina Lorusso who kept me talking about anything other than this paper.

[1] The rule that jurors in cases involving sexual offences be warned of the dangers of relying upon the uncorroborated word of a complainant was modified with the enactment of s. 32(1) Criminal Justice and Public Order Act 1994. Section 32(1) gives judges a discretion as to whether a warning is given. The Court of Appeal has made clear that such warnings should not be given unless there is an evidentiary basis for the suggestion that a witness is unreliable and that "[t]his will not be so simply because the witness is a complainant of a sexual offence": *R.* v. *Makanjoula* [1995] 3 All E.R. 730, 733.

[2] Criminal Law Revision Committee, Fifteenth Report, *Sexual Offences* Cmnd. 9213 (1984) paras. 2.69, 2.74.

[3] This issue is discussed in detail later in this article: below notes 20–102 and accompanying text. For discussion of prosecutorial decision-making, see: L Frohmann, "Discrediting Victims" Allegations of Sexual Assault: Prosecutorial Accounts of Case Rejections", in P. Searles and R.J. Berger (eds.), *Rape and Society: Readings on the Problem of Sexual Assault* (Oxford 1995).

[4] M. Hale, *History of the Pleas of the Crown* (London 1971 ed.) 635, cited in J. Taylor, "Rape and Women's Credibility: Problems of Recantation and False Accusations Echoed in the Case of Cathlees Crowell Webb and Gary Dotson" (1987) 10 Harvard Women's Law Journal 59, p. 75.

[5] See, *e.g. R.* v. *Henry and Manning* (1968) 53 Cr. App. R. 150, 153; R. Heath, "Jail for woman who claimed rape ordeal" *Sheffield Star* June 10, 2004 (trial judge quoted as stating "... it is easy to make a false allegation of rape", at 9). At an Old Bailey rape trial in 1993 Smedley J. stated: "Experience has shown that people who allege sexual offences, whether

judges when issuing the corroboration warning, during sentencing appeals and underlies a proposal by one judge who argued for a register of women who have made false allegations of rape.[6]

It is perhaps surprising, therefore, that while the issue of false allegations appears significant in the treatment of rape by the criminal justice system, there has been little detailed attention given to the reliability of the evidence on the prevalence of false allegations. The recent joint HMCPSI/HMIC report on the investigation and prosecution of rape, for example, noted that there is a "scarcity of research" by police into the rate of false allegations and police recording practice.[7] Consequently, there are several reasons why the study of false allegations should be included in discussions concerning the enforcement of rape law and associated legal reform. The first reason is that there appears to be a widely held view that false allegations of rape are common and easily made by vengeful or desperate women,[8] mirroring media coverage that cites high estimates as to the number of false allegations.[9] The second reason is that incorrect or unreliable assumptions about false complaints provide a poor basis upon which to develop appropriate policy responses to rape. Indeed, legal scholars, law reform bodies and interested pressure groups have proposed or rejected reform measures that rest on untested assumptions as to the frequency of false allegations.[10] Assumptions

women, men, boys or girls for some reason or no reason at all tell false stories ... Allegations ... are relatively easy to make and are difficult for a man to refute", quoted by S. Lees, "Unreasonable Doubt: the Outcomes of Rape Trials", in M. Hester *et al.* (eds.), *Women, Violence and Male Power* (Buckingham 1996), 110; A. Pitts, "Difficulties Experienced in Legal Practice" (1996) 36 Med. Sci. Law 140, 145. For numerous examples from the United States, see.Taylor, above note 4, 74–81.

[6] *Id.* In *Goodwin* (1989) 11 Cr. App. R. (S.) 194, 196 the Court of Appeal considered a sentencing appeal involving a woman who had been imprisoned for three years for perverting the course of justice, having made a false allegation of rape. In upholding the trial judge's sentence Lord Lane C.J. stated: "As everyone knows rape is an easy allegation to make and may be very difficult to refute." J. Temkin, *Rape and the Legal Process*, 2nd ed. (Oxford 2002) 7, note 43.

[7] Her Majesty's Crown Prosecution Service Inspectorate/Her Majesty's Inspectorate of Constabulary, *A Report on the Joint Inspection into the Investigation and Prosecution of Cases involving Allegations of Rape* (2002), para. 6.18.

[8] One British survey that examined young people's attitudes to rape found that 68% of female and 81% of male participants agreed with the statement that "women cry rape the next day when really they have just had second thoughts" (p. 15). In group discussions some participants argued that it was "easy" for a woman to accuse a man of rape, that there was little chance of men proving their innocence when accused of rape, that women could convincingly lie about being raped and that women cry rape "a lot" (pp. 26–28): S. Burton *et al.*, *Young People's Attitudes Towards Violence, Sex and Relationships: A Survey and Focus Group Study* (Edinburgh 1998).

[9] See *e.g.* A. Ahulja, "A question of rape" *The Times* (Supplement) 6 April 2001, 2. See also N. Gavey and V. Gow, "'Cry Wolf,' Cried the Wolf: Constructing the Issue of False Rape Allegations in New Zealand Media Texts" (2001) 11 Feminism & Psychology 341.

[10] See *e.g.* B.J. Cling, "Rape Trauma Syndrome: Medical Evidence of Non-Consent" (1988) 10 Women's Rights Law Reporter 243 (arguing for the reliability of Rape Trauma Syndrome as a corroborative tool in rape prosecutions because *inter alia* "the danger of lying by self-reported rape victims [to doctors is] very small", p. 258). Contrast also the approach to false

as to the commonality of false complaints have also fuelled calls for the introduction of techniques specific to cases of rape and other sexual offences designed to judge the truthfulness of allegations.[11] Finally, false allegations raise the possibility of miscarriages of justice; they divert attention from genuine victims and may help to create a dangerous (and unjustifiable) scepticism among criminal justice professionals to all allegations of rape.

B. Defining Terms

A key starting point in discussing false rape allegations is to consider how this term should be defined. This is a critical question and plays an important role in determining the numbers of allegations of rape deemed to be false. At its most basic level, a false allegation can be defined as the description of an event that the complainant knows never actually occurred. Such a definition suggests a conscious or malicious motive on the part of the complainant. There may, however, be false allegations that fall outside this definition. For example, there may be non-malicious allegations from people with particular medical conditions who genuinely believe they are victims of rape or other sexual offences, but who are mistaken, as opposed to being malicious.[12] There may also be circumstances that give rise to technically "false", though non-malicious, complaints of rape. For example, there is evidence that prior to the House of Lords' ruling in *R.* v. *R.*[12a] the police would sometimes classify complaints of marital rape as false (otherwise known as "no-criming") despite the fact that the complainant may have been reporting a genuine incident of non-consensual sex.[13] Recent research by Kelly *et al.* has found another category of technically false, but non-malicious allegations of rape. They found a group of no-crimed cases that arose from complainants who thought they might have been sexually assaulted while asleep or intoxicated, but subsequent forensic examination indicated that no sexual contact had taken place.[14]

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complaints of the Criminal Law Revision Committee, above note 2, paras. 2.69, 2.74 and the Law Commission's report on the abolition of the marital immunity: *Rape Within Marriage*, Law Com No. 205 (1992) paras. 3.42–3.46.

[11] For discussion see A.D. Parker and J. Brown, "Detection of Deception: Statement Validity Analysis as a Means of Determining Truthfulness or Falsity of Rape Allegations" (2000) 5 Legal and Criminological Psychology 237.

[12] See, *e.g.* P. Hays, "False But Sincere Accusations of Sexual Assault Made by Narcotic Patients" (1992) 60 Medico-Legal Journal 265; M. Matas and A. Marriott, "The Girl Who Cried Wolf: Pseudologia Phantastica and Sexual Abuse" (1987) 32 Canadian Journal of Psychiatry 305.

[12a] [1992] A.C. 599.

[13] S. Grace *et al.*, *Rape: From Recording to Conviction* (London 1992), 6.

[14] L. Kelly *et al.*, *A gap or a chasm? Attrition in Reported Rape Cases*, Home Office Research Study 293 (London 2005), 46–47.

In 1986, as a response to a tendency of the police to no-crime large numbers of rape reports, the Home Office issued circular 69/1986 giving the police guidance as to when to classify a report as a no-crime. The purpose of this circular was to improve the accuracy of police recording practice in an attempt to ensure that the no-criming label was attached only to those reports that were untrue, rather than to cases where, for example, the complainant withdrew her allegation or where there was insufficient evidence to prosecute.[15] For an offence to be no-crimed the circular sets out two criteria: that the complainant retracts the allegation *and* admits to fabrication.[16] These criteria are clearly strict. To what extent they may result in some complaints being crimed, when they are in fact false, cannot be established using the existing research literature. In this respect, Harris and Grace quote one police officer thus: "If rape was treated as any other crime you would probably no-crime a lot more. But because rape is treated as something special, and indeed it is a serious crime, it is much more difficult to no-crime it".[17] The Metropolitan Police appear to have adopted a policy that does allow greater flexibility in designating an allegation as false.[18] It is evident, however, in research that has examined police recording practice within the Metropolitan Police, that there is widespread misuse of the no-crime designation. For example, in a 1999 study of the processing of rape complaints by the Metropolitan Police, it was found that in the 123 reports that had been no-crimed, most had been given this designation for reasons other than the complaint being false or malicious.[19]

The apparent difference between police definitions of what constitutes a false allegation and the definitions set out in existing guidelines raises two key questions: first, what is the actual extent of the false reporting of rape? Second, does this existing evidence provide a reliable foundation upon which to base policy decisions?

[15] For discussion see: L.J.F. Smith, *Concerns About Rape*, Home Office Research Study 106 (London 1989), 8.

[16] J. Harris and S. Grace, *A Question of Evidence? Investigating and Prosecuting Rape in the 1990s* (London 1999), 14.

[17] *Ibid.*, p. 15.

[18] For discussion see T. Williamson, "Police Investigations-Separating the False and the Genuine" (1996) 36 Med. Sci. Law 135, 137. Williamson notes that police officers may no-crime where for example, the "victim's evidence is *substantially* contradicted by forensic or medical examination or by an independent witness" or "where there is substantial evidence that the victim is suffering from delusion". (emphasis in original).

[19] Above note 16, p. 14. Likewise, in an earlier study Grace found that 66% of reports were designated as false for reasons other than that they were false or malicious: above note 13, p. 6.

II. Evidence on the Prevalence of False Allegations

There is no shortage of research evidence on the prevalence of false rape allegations. On examination what becomes readily apparent, however, is that this research varies considerably in terms of adopted methodologies and in particular, how each study judges an allegation to be false. This section analyses studies in England, Scotland, the United States of America and elsewhere. It is not intended to be an exhaustive analysis of all studies of false allegations. Rather it is intended to indicate the range of findings between various studies and the relative strengths and weaknesses of the methodologies and criteria that have been adopted.

A. England and Scotland

In England and Scotland there have been a number of studies that have examined how the police record complaints of rape and provide important evidence on the police no-criming of rape reports. The first study to be discussed examined the recording of rape complaints in two London boroughs between 1984 and 1986.[20] One of the areas of investigation for this study was how Home Office circular 69/1986 altered recording practices. As already noted above, this circular was an attempt to encourage police officers to record rape complaints more accurately and to avoid the use of the "no-crime" label in inappropriate cases. Smith found that the circular had a significant impact in that there was a 50% increase in criming of rape reports during the three-year period under review.[21] During this time there were 447 allegations of rape reported to the police, of which 215 were not recorded as offences. In contravention of circular 69/1986, nearly half of these 215 cases (101) were not recorded because of "insufficient evidence", with another 91 not recorded because the complainant withdrew the allegation. Included within the category of cases not recorded were only 17 complaints that were deemed to be malicious, a rate of 3.8% of the total number of reported cases.[22] However, this study, as acknowledged by its author, was limited. Smith notes that it was not possible to tell whether reports that were not recorded because of insufficient evidence, may in fact, have been false.[23]

In subsequent Home Office research Harris and Grace examined the progress of 483 reports of rape to the Metropolitan Police in 1996.[24] They found that the increase in the number of reports being

[20] Above note 15.
[21] *Ibid.*, 23.
[22] *Ibid.*, 23–24.
[23] *Ibid.*, 25.
[24] Above note 16, p. 3.

crimed was offset by the increased numbers that were designated as involving "no further action" (NFA) and that 56% of all reports were either no-crimed or NFA-ed.[25] They found that 25% of cases were no-crimed, but that there was widespread misuse of the criteria, with 57% of complaints being no-crimed for reasons other than them being deemed false/malicious.[26] Consequently, the number of reports no-crimed for being false/malicious in this study was around 10.9%. The problem however, lies in the limitations of this research—we do not know *how* police officers determined a complaint to be false. Indeed, the recent HMCPSI/HMIC report noted how little we know about the way in which police officers come to their decision to no-crime:

> This is clearly an area that could be pursued further to establish if this is an issue of incorrect recording, a workplace cultural issue, or what factors motivate those who make false allegations of rape, be they male or female.[27]

Other research that has examined police recording practice also suggests misuse of the no-crime criteria. Gregory and Lees found that 50% of the no-crimed cases were designated as such on the basis of the "complainant's failure to substantiate the allegation" and noted the "diversity of situations covered by this category". Indeed, they found that the no-crime label was being used in highly inappropriate circumstances such as when a complainant was unable to give evidence in court because of a heart condition or where the "victim obtained an injunction against the suspect and subsequently withdrew [her] allegation".[28] Recent research by Lea *et al.* further supports the argument that the police may be using the no-crime designation in inappropriate circumstances.[29]

The most up-to-date Home Office research on police recording practice gives the lowest estimate as to the number of false allegations within the domestic literature. While Kelly *et al.* found that the no-crime designation was used in 22% of reported cases, they also noted that it appeared to be used as a "dustbin" with less than a third of no-crimes being viewed by officers as false allegations.[30] The researchers note: "The 'no-crime' category comprises a complex layering of different kinds of cases and circumstances, many of which are not "false" in the literal meaning

[25] *Ibid.*, 12, 45.
[26] Below note 61.
[27] Above note 7, para. 6–18.
[28] J. Gregory and S. Lees, "Attrition and Rape in Sexual Assault Cases" (1996) 36 British Journal of Criminology 1, 4–5.
[29] S.J. Lea *et al.*, "Attrition in Rape Cases" (2003) 43 British Journal of Criminology 583, 593. For discussion see below notes 182–183 and accompanying text.
[30] Above note 14, pp. 38–39.

of this term".[31] Perhaps the most significant part of this study is the attempt by the researchers to evaluate police designation of rape reports by examining the information recorded by officers in their case files. While acknowledging some limitations on the data available, the researchers estimated that only 3% of reports were either "possible" or "probable" false allegations.[32] As with other studies, this figure is significantly lower than the estimates many officers themselves gave as to the number of false allegations.[33]

In addition to the studies of police recording practice, another source of statistics on the extent of false reporting is from research conducted by police surgeons. Maclean, for example, undertook a study of 34 rape complainants he examined between 1969 and 1974. He concluded that nearly half of these reports were either false or probably false (see Table 1 below), with three being probably genuine and 15 genuine.[34] In this study, the major problem was the means by which Maclean determined reports to be false. It is evident that those cases where there was a delay in reporting were much more likely to be labelled as false,[35] as were cases where the victim did not appear "dishevelled", where they did not appear upset or were not seriously injured.[36] Maclean identified these as key factors in distinguishing the genuine and false accusations,[37] though some of the cases he classed as false or probably false did include such factors as injury, prompt reporting, distress and agitation. Generally speaking it is difficult to find compelling evidence to support Maclean's conclusion regarding the rate of false allegations because his evidence is often vague and open to contrary interpretations. In a second survey by a police surgeon, Stewart examined 18 allegations of rape and concluded that 16 were false. Of these 16, it was claimed that the complainant admitted to making a false complaint in 14 cases. Leaving aside the small sample size of this study, Stewart gives little information as to the form or circumstances of these retractions. He does, however, refer to one instance in which he claims that the case "was disproved on the grounds that it was totally impossible to have removed her extremely tight undergarments from her

[31] *Ibid.*, 39.
[32] *Ibid.*, 50. The researchers adopted the police's own internal rules for judging police designations. Those criteria state that an allegation should only be designated as false where "either there is a clear and credible admission by the complainants, or where there are strong evidential grounds" (at p. 50).
[33] *Ibid.*, 50–51.
[34] N.M. Maclean, "Rape and False Accusations of Rape" (1979) Police Surgeon 29, 30, 38.
[35] *Ibid.*, 32.
[36] *Ibid.*, 33–35. However, such features are not reliable indicators that a report is false. For discussion see P. Rumney and M. Taylor, "The Use of Syndrome Evidence in Rape Trials" [2002] 13 Criminal Law Forum 471.
[37] Above note 34, p. 39.

extremely large body against her will".[38] However, as Temkin comments: "Presumably the woman was able to remove the garments herself and might have done so if, for example, she was threatened".[39] Other research involving police surgeons suggests a false reporting rate as low as 3%, with the most experienced police surgeons giving the lowest estimates.[40]

A further source of information that may be of help in this analysis is from interviews with police officers and rape complainants themselves. In their 1983 Scottish study of police treatment of rape, Chambers and Millar found that some decisions to no-crime were dubious, for example, where there was insufficient evidence or the complaint was withdrawn.[41] They also found that "Interviews conducted with police officers indicated that some officers had fixed assumptions about how women who had been sexually assaulted "ought" to behave, which, when absent, cast doubt on the complainant's veracity".[42] More recently, in a study of women who had reported rape to the police, Temkin found that some complainants were disbelieved because of their demeanour.[43] She notes: "[Two complainants] were entirely negative about their first encounter with the police ... this was mainly because of the disbelieving attitude of the officers concerned which was apparently borne of an expectation that genuine rape victims react in certain stereotypical ways".[44] In interviews conducted with police officers from the Sussex Constabulary, Temkin found that some officers had "fixed and stereotypical ideas of what makes a genuine rape victim".[45] She interviewed one officer who commented: "You get a feel for something and how genuine it is or isn't by the demeanour of the victim, by the time it has taken her to report it, whether she does or doesn't know the offender ..."[46] In the context of

[38] C.H. Stewart, "A Retrospective Survey of Alleged Sexual Assault Cases" (1981) Police Surgeon 28, 32.

[39] Temkin, note 6 above, p. 5.

[40] R. Geis *et al.*, "Police Surgeons and Rape: A Questionnaire Survey" (1978) Police Surgeon 7, cited in Taylor, note 4 above. Geis questioned police surgeons on how many false complaints they believed they had dealt with in their careers. Estimates varied from 3% to 31%.

[41] G. Chambers and A. Millar, *Investigating Sexual Assault* (Edinburgh 1983), 38–42.

[42] *Ibid.*, 90.

[43] J. Temkin, "Reporting Rape in London: A Qualitative Study" (1999) 38 Howard Journal of Criminal Justice 17, 23 and 27.

[44] *Ibid.*, 23.

[45] J. Temkin, "Plus Ça Change: Reporting Rape in the 1990s" (1997) 37 British Journal of Criminology 507, 516. Similarly, Parker and Brown quote without question one police officer who noted in an investigation log: "As the victim relayed her story to me she offered no expression of emotion or sense of disgust at what she had allegedly endured. She appeared to be reeling off a list ... She wanted to shock but what she was saying did not match the way she was telling it. There is good reason to doubt this allegation": note 11 above, p. 251. Apparently, the officer was unaware that this complainant's reaction fell within the normal range of reactions following rape: see for example, A. Burgess and L. Holmstrum, "Rape Trauma Syndrome" (1974) 131 Am. J. Psychiatry 981.

[46] *Ibid.*

prosecutors the HMCPSI/HMIC report found "prosecutors often assess a victim's behavior against what they view as logical, common sense and natural responses to a crime".[47] In the most recent Home Office research on police attitudes and recording practices, Kelly *et al.* found a culture of disbelief that impacted upon police recording of rape reports:

> The interviews with police officers and complainants' responses show that despite the focus on victim care, a culture of suspicion remains within the police, even among some of those who are specialists in rape investigations. There is also a tendency to conflate false allegations with retractions and withdrawals, as if in all such cases no sexual assault occurred. This reproduces an investigative culture in which elements that might permit a designation of a false complaint are emphasised ... at the expense of a careful investigation, in which the evidence collected is evaluated.[48]

Table 1
A Selection of Findings on the Prevalence of False Rape Allegations

Source	False Reporting Rate	
	Number	%
Theilade and Thomsen (1986)[49]	1 out of 56	1.5%-
	4 out of 39	10%[50]
New York Rape Squad (1974)[51]	N/A	2%
Hursch and Selkin (1974)[52]	10 out of 545	2%
Kelly *et al.* (2005)[53]	67 out of 2,643	3%[54]
		22%[55]
Geis (1978)[56]	N/A	3–31%
Smith (1989)[57]	17 out of 447	3.8 %

[47] See note 7 above, at para. 8.67.
[48] See note 14 above, p. 51–52.
[49] P. Theilade and J.L. Thomsen, "False Allegations of Rape" (1986) 30 Police Surgeon 17.
[50] This range covers the rate of false allegations during the five-year duration of this study. For the statistics for each year, see *ibid.* p. 18, Table 1.
[51] "Remarks of Lawrence H. Cooke, Appellate Division Justice, Before the Association of the Bar of the City of New York", 16 January 1974 (mimeo) p. 6, cited in S. Brownmiller, *Against Our Will: Men, Women and Rape* (Harmondsworth 1975), 366, 444–445.
[52] C.J. Hursch and J. Selkin, *Rape Prevention Research Project* Mimeographed Annual Report of the Violence Research Unit, Division of Psychiatric Service, Department of Health and Hospitals, Denver, 1974, cited in S. Katz and M.A. Mazur, *Understanding the Rape Victim: A Synthesis of Research Findings* (New York 1979) ch. 13.
[53] See note 14 above.
[54] *Ibid.*, 50. This figure is derived from the researchers' assessment of the number of "possible" and "probable" false allegations.
[55] *Ibid.*, 38. This figure is derived from the number of rape reports recorded as no-crimes.
[56] See note 40 above.
[57] See note 15 above, pp. 23–24.

U.S. Department of Justice (1997)[58]	N/A	8%
Clark and Lewis (1977)[59]	12 out of 116	10.3%
Harris and Grace (1999)[60]	53 out of 483	10.9%[61]
	123 out of 483	25%[62]
Lea *et al.* (2003)[63]	42 out of 379	11%
HMCPSI/HMIC (2002)[64]	164 out of 1,379	11.8%
McCahill *et al.* (1979)[65]	218 out of 1,198	18.2%
Philadelphia police study (1968)[66]	74 out of 370[67]	20%
Chambers and Millar (1983)[68]	44 out of 196	22.4%
Grace *et al.* (1992)[69]	80 out of 335	24%
Jordan (2004)[70]	68 out of 164	41%[71]
	62 out of 164	38%[72]
Kanin (1994)[73]	45 out of 109	41%
Gregory and Lees (1996)[74]	49 out of 109	45%
Maclean (1979)[75]	16 out of 34	47%[76]
Stewart (1981)[77]	16 out of 18	90%

[58] L.A. Greenfield, *Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault* (US Department of Justice 1997), p. 7.
[59] L. Clark and D. Lewis, *Rape: The Price of Coercive Sexuality* (Toronto 1977), p. 38.
[60] Harris and Grace, note 16 above, p. 14.
[61] *Ibid.*, 14. This figure was calculated on the basis of the number of false/malicious complaints that were no-crimed as a proportion of the total number of reports. Of 123 no-crimes, only 43% (53) were no-crimed because they were false/malicious. The overall number of reports (483), together with the 53 no-crimes, produces a figure of 10.9%. This is a slight underestimate as this research indicates that a very small proportion of NFAs were described as involving false/malicious complaints: p. 13. For a similar finding, see Kelly *et al.*, note 14 above, p. 38.
[62] This figure is derived from the number of rape reports recorded as no-crimes.
[63] See note 29 above, at p. 592. This study does not provide clear statistics on the number of no-crimes. The figure of 42 out of 379 was calculated by the author of this article on the basis of the statistics provided by the authors.
[64] See note 7 above, p. 35.
[65] T.W. McCahill *et al.*, *The Aftermath of Rape* (Lexington 1979), p. 115.
[66] "Police Discretion and the Judgement that a Crime Has Been Committed—Rape in Philadelphia" (1968) 117 University of Pennsylvania Law Review p. 277, 284.
[67] This calculation of 74 false complaints is based upon this study's reference to "approximately" 370 complaints of rape and attempted rape of which "approximately one of every five of these reports was unfounded", *ibid.*, pp. 280–281.
[68] See note 41 above, p. 10.
[69] See note 13.
[70] J. Jordan, "Beyond Belief? Police, Rape and Women's Credibility" (2004) 4 Criminal Justice 29.
[71] This figure combines cases that the police designated as false and those in which the complainant said the allegation was false: *ibid.*, pp. 35–36.
[72] This figure refers to allegations viewed by the police as "possibly true/possibly false": *ibid.*, at p. 35.
[73] E.J. Kanin, "False Rape Allegations" (1994) 23 Archives of Sexual Behavior p. 81.
[74] See note 28 above, p. 14.
[75] See note p. 34.
[76] This figure is made up of 10 (29%) cases that were deemed to be false, and 6 (18%) cases that were deemed to be "probably false": *ibid.*, pp. 30, 38.
[77] See note 38.

B. The United States of America

In the United States, law enforcement agencies make a distinction between rape reports that are "founded" and "unfounded". The Federal Bureau of Investigation's Uniform Crime Reports has stated that "unfounding" refers to the "percentage of complaints determined through investigation to be false".[78] The US Department of Justice, Bureau of Justice Statistics report from 1997 on sex offences and offenders has published data from more than 16,000 local, county and state law enforcement agencies. The Bureau found that "[l]aw enforcement agencies indicated that about 8% of forcible rapes reported to them were determined to be unfounded and were excluded from the count of crimes".[79] The FBI Uniform Crime Reports have shown an unfounding rate between 1966 and 1994 of 8%–20% for rape and between 2%–4% in other "index crimes" such as murder or robbery.[80] The extent to which this figure can be relied upon has to be questioned. Among such a large number of agencies there is likely to be a significant variation in recording practice. For example, it was recently discovered that for nearly two decades the Philadelphia police department deliberately mislabelled rape complaints and "dumped cases" by unfounding reports to reduce workload and create favourable crime statistics.[81]

One of the earliest and most detailed studies of police recording practice in the United States was a study that examined the police investigation reports for 295 reports of rape and attempted rape notified to the Philadelphia Police Department in the second half of 1966.[82] In discussions with police and other criminal justice personnel in the course of this research, the numbers of false reports were estimated at between 75% and 90%.[83] In contrast, 20% of rape reports examined in this study were "unfounded". The author examined the basis of the unfounding decision in 75 additional cases and judged them in light of the common law rules that existed at that time used to denote the veracity of rape complaints.[84] The author of this study uncritically accepted these existing common law rules and police criteria for judging a

[78] D.E.H. Russell and R.M. Bolen, *The Epidemic of Rape and Child Sexual Abuse in the United States* (London 2000), 49.
[79] See note 58 above, pp. 6–7.
[80] Russell and Bolen, note 78 above, p. 50.
[81] M. Fazlollah *et al.*, "Timoney to allow Sex-case Oversight" *The Philadelphia Inquirer* 21 March 2000, A9, cited in Russell and Bolen, note 78 above, pp. 61–62.
[82] See note 66 above, pp. 280–281.
[83] *Ibid.*, 279.
[84] For example, the author uncritically cites the decision of the court in *Commonwealth* v. *Berklowitz* 133 Pa. Super. 190, 193, 2 A.2d 516, 517 (1938) where it was argued that lack of a prompt complaint of rape "tends to show" consent.

complaint as false. This might suggest that the 20% unfounding rate is too high. By contemporary standards it simply cannot be accepted that a complaint of rape be deemed false because the victim did not resist her attacker, or did not complain promptly.[85]

Few studies have established clear and reliable criteria for establishing whether police recording practices give an accurate indication as to the number of rape reports that are genuinely false. One of the few studies to attempt to do this was by Kanin who examined 109 reports to the police over a 9-year period in a small metropolitan area in the Midwestern United States. Of these reports, Kanin found that the police had officially declared 45 (41%) to be false. Kanin claimed that the investigation always included a "serious offer" by the police to polygraph the complainant and suspect(s) and noted that it was police department policy that a report could only be declared false if the complainant herself admitted that the allegation was untrue.[86] While this research has been described as a "careful study",[87] Kanin also warns against generalising from his findings[88] and there are a number of reasons why its reliability might be questioned. First, is the uniqueness of the finding that *every* unfounded report resulted from a recantation by the complainant.[89] Kanin does not disclose how many complainants in his study were in fact, polygraphed, which might have provided an additional measure of reliability. Second, Kanin claims that the police acted professionally and "recantations did not follow prolonged periods of investigation and interrogation".[90] However, while Kanin reports that the police in this study were very co-operative in sharing information such as case files, it is not at all apparent how he can be sure from paper records that complainants were not subjected to pressure to withdraw. Nor does he consider that the offer of a polygraph test might have represented an underlying view by officers that rape complaints, by their nature, were suspect—a view that might influence subsequent recording practice, as noted in other research. The third and perhaps most significant problem is that Kanin appears to assume that police officers abided by departmental policy in only labelling as false, those cases where the complainant

[85] See note 66 above, pp. 286–287, 294, 282,
[86] See note 73 above, at 83.
[87] R. Thornhill and C.T. Palmer, *A Natural History of Rape* (London 2000), 160.
[88] See note 73 above, at 89.
[89] To add to this at the end of his article Kanin briefly refers to another study he conducted of police records at "two large Midwestern state universities". At these two institutions he found a false reporting rate of 50%, and again it is claimed that allegations were only labelled as false where there was a recantation by the complainant: note 73 above, at 90.
[90] *Ibid.*, 85.

admitted to fabrication. He does not consider that actual police practice, as other studies have shown, might have departed from guidelines.[91]

C. Other countries

The lowest estimated number of false allegations of rape can be found in a study of reports between 1981 and 1985 at the Institute of Forensic Medicine, University of Copenhagen.[92] The lowest figure recorded was for the year 1983 where 1.5% of rape complaints were deemed to be false, with the highest rate being 10% in 1982. Like many other of the studies, the reasons for determining a report to be false are vague.[93] In their Canadian study, Clark and Lewis reviewed reports of rape involving victims over the age of 14 years made to the Metropolitan Toronto Police Department in 1970. In reviewing the relevant police files, Clark and Lewis examined the basis upon which reports of rape were classified as founded or unfounded. They agreed with the police decision in the 42 cases that were founded. They also identified a category of 62 cases that the police classed as unfounded, but where this decision appeared to be unrelated as to whether a rape had actually occurred. Clark and Lewis discovered that reports were unfounded where the complainant was viewed as an unsuitable witness, where there was a lack of solid corroborative evidence, and where the complainant wished to withdraw her allegation. They concluded:

> In general, it appeared that this classification had been based either on police perceptions of the victim's character, or on an evaluation of how successfully her case could be prosecuted ... Factual evidence that there had been no rape—which was the only justifiable basis for such a classification—was absent in every case.[94]

Clark and Lewis calculated that the true unfounding rate was 12 reports out of 116, amounting to 10.3%. These were cases where

[91] It is also important to note that if, indeed, officers did abide by this policy then the 41% could, in fact, be an underestimate given the restrictive definition of false complaints offered by the police in this study. The reliability of these findings may be somewhat bolstered by the fact that the police appeared to record the details and circumstances of the fabrications. This allowed Kanin to explore the "alibi function" of the false allegations in this study: note 73 above, at 85–87.

[92] See note 49 above. As a study of doctors, this research, of course, cannot tell us anything about how criminal justice professionals designate rape reports as false.

[93] The authors state: "This survey only includes cases where the allegations without any doubt are found to be false, or incidents where the burden of proof for a false allegation had been so extensive that any possibility of doubt could have been precluded": note 49 above, p. 17. It might be doubted the extent to which doctors can make a definitive determination as to the veracity of rape complaints given that, unlike the police, they are unlikely to have access to other evidence that may indicate the truthfulness or otherwise of a complaint.

[94] See note 59 above, pp. 37.

Clark and Lewis were of the view that there was evidence that a rape had not been committed. Of these 12 cases, it was noted that five were either reported by someone other than the complainant, and in two cases women reported under pressure from others.[95] The reporting of false allegations by people other than the complainant is an observation reported in other research.[96]

The most up-to-date study of police recording practice in rape cases outside of England is an analysis of the New Zealand police by Jan Jordan. Crucially, this research examines *how* police officers determined a complaint to be false.[97] Jordan examined 164 reports of rape and sexual assault, which included analysis of police files which allowed her to examine the basis upon which officers recorded reports of rape.[98] Jordan found that 38% of cases were deemed by police to be "possibly true" or "possibly false", 33% were deemed as false and 8% were cases where the complainant said the allegation was false. Only 21% of cases, based on the file analysis, were viewed as genuine. Thus 41% of cases were deemed false and a further 33% could not be positively categorised as either true or false. In her analysis of the reasons for why so many cases were deemed false, Jordan found a number of factors were prominent. Delays in reporting were linked to "credibility concerns", with "86% of complainants who had delayed reporting being viewed suspiciously".[99] Other characteristics which were found in cases that were deemed false, included situations where the complainant was "intellectually impaired" or "psychologically disturbed", where there was concealment of information or lying, previous sexual victimisation, intoxication, complaint withdrawal or where officers perceived the complainant as "'sluttish' or promiscuous".[100] Like earlier studies that have analysed police recording practice, Jordan concludes:

> While false complaints do occur, approximately three-quarters of the incidents concluded by the police to be false appeared to have been judged to some extent at least on the basis of stereotypes regarding the complainant's behavior, attitude, demeanour or possible motive. Suspicious file comments were made by the detectives regarding a woman who laughed while being interviewed, others who were seen as 'attention seeking,'

[95] *Ibid.*, 38. On this see also: M.M. Aiken, "False Allegation: A Concept in the Context of Rape" (1993) 31 Journal of Psychosocial Nursing 15, 16, and G. Adshead, "Psychological Trauma and its Influence on Genuine and False Complaints of Sexual Assault" (1996) 36 Med. Sci. Law 94, 98.

[96] See *e.g.* Jordan, below note 70, pp. 49–50.

[97] The last study to examine police practice in this way was published in 1983: above note 41.

[98] See note 70 above, p. 34.

[99] See note 70 above, p. 37.

[100] *Ibid.*, at pp. 37–38, 49.

and some who were said to be 'crying rape' for revenge or guilt motives.[101]

Two conclusions can be drawn from this review of literature on the prevalence of false rape allegations. First, many of the studies of false allegations have adopted unreliable or untested research methodologies and, so we cannot discern with any degree of certainty the actual rate of false allegations. A key component in judging the reliability of research in this area relates to the criteria used to judge an allegation to be false. Some studies use entirely unreliable criteria, while others provide only limited information on how rates are measured. The second conclusion that can be drawn from the research is that the police continue to misapply the no-crime or unfounding criteria and in so doing it would appear that some officers have fixed views and expectations about how genuine rape victims should react to their victimisation. The qualitative research also suggests that some officers continue to exhibit an unjustified scepticism of rape complainants, while others interpret such things as lack of evidence or complaint withdrawal as "proof" of a false allegation.[102] Such findings suggest that there are inadequacies in police awareness of the dynamics and impact of sexual victimisation and this further reinforces the importance of training and education. However, the exact extent to which police officers incorrectly label allegations as false is difficult to discern. Bearing in mind these findings, this article proceeds by examining how this research has been used within the scholarly literature.

III. The Issue of False Allegations within the Scholarly Literature

Historically, legal scholarship has produced two broad approaches to the issue of false rape allegations. The first approach claims that women are very likely to make false complaints of rape, and provides various medical or psychological explanations for this behavior.[103] These works have consistently failed to challenge the assumption that significant numbers of women falsely allege rape.[104] Since the mid-1970s, a second approach has emerged. It can be found in a large number of legal articles and books examining the

[101] *Ibid.*, at pp. 48.

[102] See, *e.g.*, *ibid.*, 49; Harris and Grace, note 16 above, p. 14.

[103] See *e.g.* "Corroborating Charges of Rape" (1967) 67 Columbia Law Review 1137, 1138 ("Surely the simplest, and perhaps the most important, reason not to permit conviction for rape on the uncorroborated word of the prosecutrix is that the word is very often false".); "Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard" (1952) 62 Yale Law Journal 55.

[104] For discussion see the sources discussed in Taylor, note above 4, 74–81; N. Naffine, "Windows on the Legal Mind: the Evocation of Rape in Legal Writings" (1992) 18 Melbourne University Law Review 741.

law of rape and its enforcement taking the view that the number of false allegations is low, or at least no higher than the rate for other serious offences.[105] Indeed, such a view has been said to form an "overwhelming consensus".[106] Within this body of work probably the single most commonly cited false reporting statistic is taken from Susan Brownmiller's book *Against Our Will: Men, Women and Rape*. Here, Brownmiller referred to a talk given by Judge Lawrence H. Cooke before the Association of the Bar of the City of New York, thus:

> When New York City created a special Rape Analysis Squad commanded by police- women, the female police officers found that only 2 percent of all rape complaints were false—about the same false-report rate that is usual for other kinds of felonies.[107]

In a recently published article, Greer recounts his attempts at tracking down the origins of this statistic and concludes that there is no evidence that it was the product of any systematic research.[108] Yet within the scholarly literature and elsewhere, repeated reference is made to "research" or "studies" in the context of the New York figure even though the original source for this figure cannot be identified.[109] In developing legal policy, one might question the wisdom of relying upon a statistic that has never been published or subject to peer review, that is several decades old, and in the context of its use in this country, is derived from a foreign jurisdiction. Of course, there are a small number of studies that lend support to the 2% claim, though they are rarely cited, and with the exception of the most recent research in this area, we know only a limited amount of their methodology.

The "overwhelming consensus" as to the frequency of false allegations can also be found within the British literature. Indeed, the 2% figure and its associated claim that false rape complaints are no more common than for other offences, has become so engrained that claims regarding the rarity of false complaints are sometimes made without any reference to supporting evidence. In an analysis of the Criminal Law Revision Committee's 1984 report on sexual

[105] See *e.g.* S. Lees, *Carnal Knowledge: Rape on Trial* (London 1997), p. xix. See also Lees' new edition of *Carnal Knowledge* (London 2002), p. 124.

[106] D.L. Rhode, *Speaking for Sex: The Denial of Gender Inequality* (Cambridge, Mass. 1997), p.125 (referring to the claim that only 2% of rape reports are deemed to be false).

[107] See note above 51, p. 366.

[108] E. Greer, "The Truth Behind Legal Dominance Feminism's 'Two Percent False Rape Claim' Figure" (2000) 33 Loyola of Los Angeles Law Review 947, 949, 954–8.

[109] Greer attempted to find out the original source of the 2% figure by contacting those who were involved in the preparation of Judge Cooke's original speech upon which Brownmiller relied. However, he was unable to establish the source: "Whether the original source was a press release, a more formal report, or simply an oral statement to a reporter, remains lost in antiquity": *Ibid.*, at p. 958.

offences, Celia Wells criticised the Committee for appearing to perpetuate the "myth ... that there is *more* likelihood that women will lie about rape than that anyone else will falsely report other crimes". (emphasis in original)[110] Again, without reference to supporting evidence Aileen McColgan goes further, stating: "[w]omen do, very occasionally, make false allegations of rape", and that the numbers of false allegations are "infinitesimal".[111] There have also been attempts to bolster the credibility of the New York 2% figure within the domestic literature. Adler explicitly cites the New York statistic by claiming that it is the "only methodologically sound" study of false allegations.[112] What is interesting here is Adler's use of sources. In support of her claim she cites the work of Polly Pattullo. It is worth quoting Adler's source in full:

> Those who believe that rape victims lie might look to the report of the New York City Rape Analysis Squad which found that only two per cent of rape charges reported were false and that these figures were not out of step with false charges made for other serious crimes.[113]

Perhaps the most obvious point to make about this quotation is that it makes no reference to the New York statistic being the "only methodologically sound" study of false allegations. In addition, Pattullo does not provide any source for her information, but what she states is entirely consistent with the contents of Brownmiller's *Against Our Will*, which likewise does not include any reference to the New York research methodology. Adler's reference to the methodology of the New York study has also been cited by other scholars who appear neither to have looked at the work of Pattullo, nor Brownmiller, as her most likely source.[114] Within the US literature, Greer has noted that similar problems abound with the New York statistic being cited by many scholars with little regard for its reliability.[115] In addition, he has found that while some scholarly articles cite multiple sources of authority for the 2% figure, on closer analysis, all those sources appear to be based upon the New York statistic from *Against Our Will*.[116]

The New York statistic has also been cited in a curious context. In research commissioned by the Sentencing Advisory Panel (SAP),

[110] C. Wells, "Law Reform, Rape and Ideology" (1985) 12 Journal of Law and Society 63, 67.
[111] A. McColgan, *The Case for Taking the Date Out of Rape* (London 1996), p. 103.
[112] Z. Adler, *Rape on Trial* (London 1987), p. 25.
[113] P. Pattullo, *Judging Women: A Study of Attitudes that Rule our Legal System* (London 1983), p. 18.
[114] See, *e.g.* Naffine, note above 104, p. 752.
[115] See Greer, note above 108, pp. 954–960.
[116] *Ibid.* pp. 954–955 (discussing: M. Torrey, "When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions" (1991) 24 U.C. Davis L. Rev. 1013, 1028).

which examined people's attitudes to marital and relationship rape, the issue of false allegations arose in the survey participant discussion of so-called "date rape". The authors of the study responded to this by arguing that "the idea that a high percentage of date rape cases are actually false allegations is undermined by two pieces of empirical work".[117] One of their references is to the New York statistic, or rather Patullo's description cited in Adler. Apart from the various reasons already given as to why this study should be questioned as reliable, there is another point to be made regarding its use in this context. There is no evidence that the New York statistic arose from a study of date rape. The SAP report also cites research published on the prevalence of date rape among US college students. However, this was not research examining false rape allegations and it is therefore difficult to see how it can support any suggestion that the rate of false complaints is low.[118]

In the literature review for the HMCPSI/HMIC report on the investigation and prosecution of rape, Professor Liz Kelly also makes reference to claims that the false reporting rate for rape is no higher than for other offences and also speculates that "they are probably considerably lower than for some crimes, for example, thefts that are reported to support an insurance claim".[119] She also uses the work of Naffine, which is itself a fourth-hand account of Brownmiller's New York City Rape Analysis Squad claim that the presence of a female officer during interviews with rape complainants increased the number of cases in which the allegation was regarded as founded.[120] Kelly appears to suggest that the key difference in this context is the gender of the police officer.[121] There is certainly evidence that some male officers may be particularly sceptical of rape complaints, but the reference to gender may be an over-simplification. For example, it may be that the 2% figure reflects the fact that the officers on the squad had been properly trained.[122] Indeed, Harry O'Reilly, who was a supervising sergeant

[117] A. Clarke *et al.*, *Attitudes to Date Rape and Relationship Rape: A Qualitative Study* (2002), 54.

[118] M.P. Koss, "Hidden Rape: Sexual Aggression and Victimisation in a National Sample in Higher Education", in A.W. Burgess, *Rape and Sexual Assault II* (London 1988); M.P. Koss, "Defending Date Rape" (1992) 7 Journal of Interpersonal Violence 122.

[119] L. Kelly, *Routes to (in)justice: a Research Review on the Reporting, Investigation and Prosecution of Rape Cases* (2001), 22.

[120] *Ibid.*, 23. This claim is a fourth-hand account of the original source as Naffine took it from Adler, who took it from Pattullo, who took it from Brownmiller, who took it from a speech given by Judge Lawrence H. Cooke to the New York Bar Association.

[121] Kelly notes that: "This tendency [to focus on false complaints] appears to be especially strong among (male) investigative officers": note above 119, p. 23.

[122] For discussion of the training of officers as part of this squad see: "Harry O'Reilly, Ex-policeman", in S. Levine and J. Koenig (eds.), *Why Men Rape: Interviews with Convicted Rapists* (London 1980), 162–163. Given that we know nothing of how this figure was compiled it could also be that officers were over-reluctant to label complaints as unfounded,

on the New York City Rape Analysis Squad, when interviewed about his experiences, stated:

> Our experience in dealing with sex crimes investigation, however, has shown us that when given the option to choose, a woman rape victim is as likely to ask for a male officer as she is a female officer. And it seems that the criteria are the sensitivity, the compassion, and the empathy and the understanding and professionalism of the officer rather than the sex of the officer.[123]

In her recent study of the New Zealand's police, Jordan found that: "Maleness *per se* did not appear to determine the quality of an officer's response to sexual assault victims ... while some women found it traumatic being interviewed by a man, others felt this was not so nearly as important as the officer's attitude".[124] This is not to say that female officers are unimportant. The need for female officers is of clear importance, partly on the basis of victim-choice, but also because most rape complainants are female. However, whether it is male officers *per se* or male and female officers who do not have the attributes described by O'Reilly, who are more likely to dismiss rape complaints as false or treat victims unsympathetically, cannot be answered by reference to Brownmiller.

Finally, it is worth considering one further issue. An integral part of the 2% figure is the claim that the false reporting rate for rape is no higher than for other offences. Yet rarely do scholars actually cite studies of false complaints for offences other than rape.[125] The findings from studies of false reporting in non-sexual assault cases would appear to be inconclusive. In a direct comparison with rape complaints and those involving non-sexual assaults, Theilade and Thomsen found that the highest rate of false complaints was for non-sexual assault.[126] By contrast, Gregory and Lees cite a no-crime rate for non-sexual assaults of 3%, while the no-criming rate for rape in their study was 45%.[127] Chambers and Millar cite research suggesting a no-crime rate for general crime reports of between 1.6% and 6%. They also cite one study of 3000

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though this would be at odds with much of the evidence on police recording practice discussed earlier.

[123] *Ibid.*, 161.

[124] J. Jordan, "Worlds Apart? Women, Rape and the Police Reporting Process" (2001) 41 British Journal of Criminology 679, 692.

[125] For a recent example see Lea, note above 29, p. 597.

[126] Over a five-year period they found the following rate of false reporting (with the percentage rate of false complaints in brackets). In cases of rape: 1981: 3 (7%); 1982: 4 (10%); 1983 1 (1.5%); 1984 3 (7.5%); 1985 3 (5%). In cases involving "victims of violence": 1981: 0 (0%); 1982 0 (0%); 1983 0 (0%); 1984: 3 (8%); 1985: 3 (19%): note above 49, p. 18.

[127] See note above 28, pp. 4, 14.

crime reports that found a no-crime rate of 17% for non-sexual assaults and 11% for sexual assaults.[128]

IV. False Allegations and the Parliamentary Process

In the last three decades, the problem of rape and sexual assault has been repeatedly debated in Parliament. The issue of false allegations has often arisen as part of these debates and continues to influence the agenda for legislative change. In 1976, during the passage of the Sexual Offences (Amendment) Bill, an amendment was debated which would have abolished the marital rape exemption. The issue of false allegations was prominent during the debate of this proposal and provided the basis for repeated claims that the immunity should remain:

> When that stage of hatred is reached [during divorce], the more hurtful the allegation the more likely it is to be made ... There does not have to be any evidence of injury. All that a woman has to do is to disarrange her clothes ...
> In marriage, the charge [of rape] can be made with ease when the couple are living under the same roof.
> ... one must also have regard to the ease with which the allegation can be made in marriage and the greater ease of a false allegation being made ... there are many reasons why a woman could be vengeful towards her husband ... Therefore, one has to be very careful.[129]

During the same debate it was also argued that a false allegation might be used by a wife to get a better settlement on divorce: "If she could secure that on a baseless allegation, or one without substance, she would be in a position of very great strength, and the mere threat of the publicity might be sufficient to cow the respondent to a petition to drop proceedings and agree to divorce". And further: "What about the wife who is in a bad psychiatric condition, finds it easy to work herself up into an intense emotional belief and alleges that she has been sexually assaulted by her husband? ... For all these reasons it would be unfair and dangerous to allow rape to come into the question".[130]

In more recent times the issue of false allegations has arisen over debates concerning suspect and defendant rights in cases involving sexual offences. During the passage of the Sexual Offences Bill in 2003, an amendment, later to be defeated, was introduced in the House of Lords that would have granted limited anonymity to suspects and defendants in cases involving sexual offences. The

[128] See note above 41, p. 38.
[129] Hansard (HC), vol 911, cols 1961, 1964, 1965–1966, 21 May 1976.
[130] *Ibid.* col 1968.

support for this amendment was primarily based upon the impact of allegations of sex offences on the life of suspects, particularly those who are never subsequently charged.[131] Unlike debates in previous decades, there was relatively little reference made to the issue of false allegations. However, one example of where the issue arose was during a speech by Lord Thomas of Gresford when he said: "As we said in earlier debates on these provisions, the complainant who may well be lying, as happens in sex cases, is granted anonymity throughout, no matter the result of the case".[132] The issue of anonymity was also raised on at least two occasions during 2004. First, by the submission of a petition to the House of Commons by Labour MP Claire Curtis-Thomas calling for teachers to be given anonymity when accused of sexual offences against children. This petition stated: "The majority of the allegations are false, unfounded, exaggerated or malicious".[133] Second, the issue of false allegations arose during a Parliamentary debate, when the Conservatives argued that teachers should be granted anonymity when facing allegations of abuse from pupils.[134]

The issue of false allegations has also featured in two recent Home Affairs Select Committee reports, one that examined so-called "past" allegations of abuse in children's homes,[135] and a second report that examined the provisions of the Sexual Offences Bill.[136] It is worth examining the assumptions on the rate of false allegations that underlie these Committee reports. In the case of the Committee's report on past allegations of abuse, it repeatedly emphasised the risk of false allegations and identified a range of factors including the payment of compensation and the nature of historic allegations that magnify such a risk. The following passage is typical of the tone throughout the report: "In large-scale police operations into past abuse, there is arguably ample opportunity for

[131] Lord Thomas of Gresford noted that "publicity [in cases of sex offences] results in considerable pain and anguish to a suspect. It can result in the ruination of his reputation and the destruction of his family life": *Hansard* (HL), vol.654, col. 1914, 18 November 2003. See also: G Langdon-Down, "Name and Shame?" Law Society Gazette, 23 October 2003, 24.

[132] *Hansard* (HL), vol.654, cols. 1914–1915, 18 November 2003. See also col. 1917.

[133] *Hansard* (HC), vol.422, col. 376, 9 June 2004. See also R. Scorer, "Giving Teachers the Right to Sue" New Law Journal 11 June 2004, 880.

[134] During the recent debate on this subject, the Conservative Education spokesman Tim Collins MP argued that such allegations could have a devastating impact upon the lives of teachers who are never convicted of an offence. He also stated: "... teachers are very understandably of the view that they are treated now as though they are guilty until proven innocent, when it should be the reverse. The pendulum has swung too far. No doubt in the past children's complaints were not given sufficient weight. Today, it is the right of teachers to basic justice, protection from false or malicious allegations and the presumption of innocence that needs to be given more weight". *Hansard* (HC), vol.428, col. 1404, 13 December 2004.

[135] House of Commons Home Affairs Committee, *The Conduct of Investigations into Past Cases of Abuse in Children's Homes*, Fourth Report of Session 2001–02 (London 2002).

[136] House of Commons Home Affairs Committee, *Sexual Offences Bill*, Fifth Report of Session 2002–03 (London 2003).

individuals to bring forward false or exaggerated allegations".[137] Perhaps surprisingly, given the prominence it gave to the issue, the Committee only dedicated a single paragraph on the actual prevalence of false allegations. It cited several views "on the scale of the problem". They cited a "guess" by an investigative journalist that: "50 or more of the 120 or so former care workers convicted of sexual abuse had been wrongly convicted", and a defence solicitor who "estimated" that over 100 former care workers had been wrongly convicted. Another claim was that "in excess of 80 or 90 *per cent* of the 581 or so suspects trawled by South Wales Police were completely innocent" and finally, the Committee cited a claim by Claire Curtis-Thomas MP that she was aware of 20 cases where there had been "significant abuses of the criminal justice system".[138] What is interesting about these claims, other than that some are based on nothing more than guess work, is that they are measuring different things, from "wrongful" convictions, suspects questioned by the police, to "significant abuses". Of course, trying to determine the extent of false allegations is no easy task. However, such difficulties should be explicitly recognised, and in this report generally they were not. Instead, the Committee made not only the assumption that there was a high risk of false allegations, but also that there had, in fact, been a "significant number of miscarriages of justice".[139]

The Committee supported its claim that there were a "significant number of miscarriages of justice" by stating: "The fact that the Crown Prosecution Service rejects an astonishing 79 *per cent* of the care home abuse cases put to it tends to support this view".[140] Earlier in its report, the Committee claimed that this figure is "even more astounding when compared to the general discontinuance rate, which is 13 *per cent* of all cases referred to the CPS".[141] However, the Committee used this discontinuance rate to support two very different and potentially contradictory positions. While claiming the discontinuance rate supported its views on miscarriages of justice, earlier in its report the Committee stated that the high discontinuance rate "graphically illustrates the view that police trawls are not generating evidence of sufficient quality in these cases

[137] See note above 135, para. 85.

[138] *Ibid.*, para. 15. These claims should also be judged in light of the fact that of those cases where there have been convictions "the vast number" were secured by "guilty pleas": *ibid.*, para. 63.

[139] *Ibid.*, para. 135. On this issue see also the Government's reply to the Select Committee report: *The Government's Reply to the Fourth Report from the Home Affairs Committee Session 2001–2002 HC 836* (Cm. 5799, 2003), paras. 9–13 (noting the lack of "objective fact" to support the Committee's claims regarding false allegations and miscarriages of justice).

[140] See note above 135, para. 135.

[141] *Ibid.*, paras. 135 and 63.

to satisfy the burden of proof".[142] An allegation lacking evidence sufficient to prosecute is of course, very different from that allegation being false. In addition, an alternative interpretation of the discontinuation statistics can be given. The high rate of discontinuance may simply be a product of the fact that these are allegations that are often reported many years after the alleged offences occurred. In such cases there may be little, if any, corroborating evidence, a point recognised by the Committee, but only as a basis for arguing how difficult it is for those wrongly convicted to have their convictions overturned.[143] We might also note that to compare the discontinuance rate in *past* cases with the 13% rate for all cases referred to the CPS is unlikely to be comparing like-with-like. In cases of rape the discontinuance rate is significantly higher than 13%. Harris and Grace found a rate of 29%.[144] Lea *et al.* found that the CPS classified 14% of cases as involving "no further action" (NFA) and another 14% were NFA-ed by the CPS or the police.[145] This lower discontinuance rate may be wholly or partly explained by the fact that the vast majority of rape allegations in these studies are not historic and may therefore have at least some corroborative evidence that make discontinuance less likely.[146]

V. Future Directions of Policy and Research

A. Implications for rape law enforcement and the use of "Statement Validity Analysis"

The fear of false rape allegations has informed a number of proposals for change to the criminal justice system. However, basing policy recommendations on unreliable data may pose a risk because this data may result in unnecessary or misguided reforms to the criminal justice process. The importance of critical analysis of research findings is emphasised by Russell and Bolen, who in the context of research on the incidence and prevalence of sexual assault, argue:

> A lack of internal criticism is contrary to scientific principles ... defective research deserves to be characterized as such because it leads to inappropriate policy decisions. Sound research that nevertheless suffers from one or more serious

[142] *Ibid.*, para. 63.
[143] *Ibid.*, paras. 130–131.
[144] Seenote above 16, p. 26.
[145] See note above 29, p. 592.
[146] The recent Home Office study by Kelly *et al.* indicates that most allegations of rapes are reported to the police within 24 hours, thus increasing the likelihood that corroborating evidence such as forensic evidence will be found: Kelly *et al.*, note 14 above, p. 43. Lea *et al.* found 66% of cases "were reported within a day of the alleged crime": note 29 above, p. 590.

> flaws should be criticized for these flaws, and the consequences of these flaws should be evaluated and pointed out.[147]

The problem of "inappropriate policy decisions" is no more apparent than in the context of policy responses to false rape allegations. For example, underlying the argument for anonymity for defendants and suspects in cases involving sex offences are assumptions pertaining to the issue of false complaints. In his review of arguments for and against anonymity for the accused in cases of rape, Samuels states: "The proportion of acquittals in rape cases is very high, something in the order of 90 per cent, so *ex hypothesi* most of the defendants are innocent, or at least not proved to be guilty. Unfortunately the incidence of false accusation (sic) by the alleged [victim] is uncomfortably high".[148] Similarly, in its report on the Sexual Offences Bill, the Home Affairs Select Committee called for anonymity to be given to the accused in cases involving sex offences,[149] citing evidence given by the Criminal Bar Association that "anonymity for the complainant increases the risk of false allegations ..."[150] In its report on past allegations of child abuse the Committee also recommended that anonymity be extended to defendants in such cases: "[g]iven the prejudicial nature of allegations of sexual offences, publicity can do enormous damage to persons who are falsely accused".[151] In response to these kinds of claims, Temkin notes:

> Implicit in these complaints is an assumption that allegations of rape are prone to be false, so that men require special protection from them. The absence of any evidence for this assumption and the increasing recognition that the guilty are all too often acquitted in rape cases may partially explain why successive governments have stood commendably firm against this backlash.[152]

Suspect anonymity has not been the only area where the issue of false allegations has guided calls for changes to the way in which sex offences are dealt with by the criminal justice system. This section proceeds by examining one specific technique that has recently been advocated as a means of enabling the police to more accurately identify false, as well as truthful allegations of rape. Parker and Brown have argued for the use of "Statement Validity Analysis" (SVA) as an "objective" means of assessing the veracity

[147] Russell and Bolen, note 78 above, p. 15.
[148] A. Samuels, "Anonymity for the Rape Accused" (2003) 67 Journal of Criminal Law 492
[149] See note 136 above, para. 76.
[150] *Ibid.*, para. 74.
[151] See note 135 above, paras. 98–99.
[152] See note 6 above, p. 308. See also: J. Temkin, "Putting the Clock back on Rape" New Law Journal November 5, 1993, p. 1575.

of rape complaints. SVA involves assessing a complainant's allegation of rape according to a set of criteria. These criteria are gleaned from a base of actual false and truthful rape allegations. In conducting this research Parker and Brown used a small number of rape complaints. Parker and Brown analysed 30 crimed rape reports and 43 that had been no-crimed. Given the necessity that these cases be accurately recorded, a report would only be judged as false if it fell within "stringent" criteria, including instances where the complainant admitted to fabrication or where "medical, forensic or witness evidence substantially contradict[ed] the account".[153] The "psychological and practical characteristics" of these allegations are then identified and a comparison is made with the complaint under investigation, allowing officers to assess its credibility. Parker and Brown note: "SVA seeks to identify the extreme within an account-finding a statement credible or non-credible based on its content".[154] In judging the truthfulness of rape complaints it was found that "SVA performed consistently better than any individual police officer or the group as a whole".[155] There are however, a number of observations that should be made regarding this study.

It is the case that some doubts must be expressed regarding the reliability of some of the characteristics they identify. For example, on the basis of a complainant's calm demeanour the authors of this research, presumably unintentionally, cite an example of what they claim is a false complaint that may have been genuine.[156] Parker and Brown also contrast this with a genuine case "in which the victim had considerable trouble maintaining her composure throughout her description of events".[157] They also note that some of their findings are inconsistent with other research. They found that in their study genuine allegations of rape tended to involve "a wider range of sexual acts", than false allegations. Parker and Brown note that other studies have found the exact opposite.[158] Indeed, there are several criteria identified by Parker and Brown that do not appear to form a reliable basis upon which to judge a complaint as false. These include delays in reporting, the absence of physical injury, as well as victim demeanour.[159] It has been repeatedly shown that delays in reporting are not uncommon responses by victims; that many rape victims do not suffer physical

[153] See note 11 above, pp. 241, 243.
[154] *Ibid.*, pp. 241–242, 250.
[155] *Ibid.*, p. 249.
[156] For discussion see note 11 above, p. 251 and note 45 above.
[157] *Ibid.*, p. 251.
[158] See note 11 above, p. 252.
[159] *Ibid.*, p. 259.

injury and that not all rape victims react to their experiences in an expressive or emotional manner.[160] Even if such characteristics are disproportionately found in false allegations, there is a significant danger that SVA may simply legitimise the unfounded assumptions of some police officers that such characteristics are inconsistent with genuine allegations.

Another problem lies in the cases that comprise the sample of false allegations in this study: the credibility characteristics identified are a product of a particular group of false complaints, which may not be representative of such cases generally. For example, Parker and Brown note that: "69% of false allegers had a psychiatric history compared with 13% of the genuine rape victims". The potential problem is whether this figure of 69% is representative of false allegers generally.[161] If not, then this immediately creates a problem that SVA may be identifying characteristics that are not representative of false complaints generally. Of course, there may be great difficulties in identifying a representative sample of false allegers, but all the same, the absence of such a sample may raise doubts regarding the reliability of SVA.

The proposed use of SVA appears to rest upon assumptions regarding the incidence of false complaints that do not withstand critical scrutiny. For example, the SVA research has been the subject of a two-page story in *The Times* newspaper.[162] This story cites the 25% no-crime rate found in a 1999 Home Office survey discussed earlier.[163] Parker and Brown also cite this study and accurately note "just under half of these cases were thought to have been false or malicious allegations".[164] In other words, in a significant number of cases, the no-crime criteria are being applied to allegations that are *not* deemed false or malicious. Yet as becomes apparent, the unreliability of the no-crime criteria for judging a complaint to be false, does not impact on what would appear to be an underlying assumption that crime reports involving sexual offences are particularly problematic. They cite a Home Office study that found a no-crime rate of 45% and while noting a drop in this rate as reported by Smith, they did not note that the rate measured by Smith was 3.8%.[165] Parker and Brown also cite

[160] For some of the studies in this area, see: Rumney and Taylor, note 36 above, pp. 489–490.

[161] See note 11 above, p. 252. People with mental health problems do appear to be a significant feature of no-crimes in cases of rape, but some studies suggest a rate much lower than the 69% rate found by Parker and Brown. The research by Harris and Grace found that 22 no-crimes out of 123 involved complainants with learning disabilities or mental health problems: below notes 181 and accompanying text. In addition, the reasons behind the use of no-criming in such cases remain unclear.

[162] See note 9 above.

[163] See note 62 above and accompanying text.

[164] See note 11 above, pp. 238–9.

[165] See note 57 above and accompanying text.

false allegation statistics of between 10% and 41%.[166] They make no attempt to judge the reliability of these estimates, and indeed, the 41% figure is taken from the small-scale study by Kanin, that must be approached with caution, for the reasons discussed earlier.[167] Parker and Brown's use of the 10% figure is part of a study of false complaints by the Institute of Medicine in Copenhagen.[168] As noted earlier, the 10% figure is the highest given during the five year period covered by this study, the lowest number, not mentioned by Parker and Brown, was 1.5%.[169] The highest overall figure in this study, 19%, was for non-sexual assaults.[170] Despite the unreliability of these higher estimates, Parker and Brown clearly see sexual offence reporting as inherently problematic: "Veracity of the victim's accounts of events is thus critical in the investigation of a rape allegation".[171] One could of course make the point that "veracity" of the victim's account is central to any criminal investigation. However, it is unclear why rape cases *specifically* require techniques to measure veracity.

One of the other issues that arises in discussion of SVA is the extent to which this can be viewed as an "objective" measure of false complaints. In evidence before the Home Affairs Select Committee, Detective Inspector Andrew Parker, co-author of the SVA study under discussion, stated: "I think the value of SVA is that it provides a structure to that evaluation and instead of relying on subjective indicators of credibility, which we all use, it is an objective basis on which to give direction to inquiries".[172] The claim of "objectivity" is an attractive one as it suggests a means by which police officers' subjective (and inaccurate) judgements can be mitigated. However, the problem with SVA is that it is based in part on criteria that are open to multiple interpretations and while in combination, the criteria may provide some assistance, as the proponents of this technique recognise, it is not intended to be used as a replacement for other investigative tools.[173] Thus a high degree of subjectivity inevitably remains. A sounder approach might be to emphasise the importance of the ongoing education of police officers so that they better understand such things as victim reactions to rape, victim perceptions of their treatment by officers and false allegations. This is particularly important, because even

[166] *Ibid.*, at p. 238.
[167] See notes 86–91 above, and accompanying text.
[168] See note 49 above, p. 142.
[169] *Ibid.*, at p. 18.
[170] See note 126 above.
[171] See note 11 above, p. 239.
[172] See note 135 above, para. 48.
[173] See note 11 above, pp. 241, 254.

with a reliable system of SVA, problems such as officers misinterpreting victim reactions will undoubtedly remain.

B. Some Suggestions for a Future Research Agenda

Given its inadequacies, much of the current research literature cannot be used to determine the rate of false rape allegations. There is a need for further, methodologically sound empirical research, as noted by the HMCPSI/HMIC report.[174] Of central importance in this respect is research that examines how and why police officers determine that particular allegations are false.[175] The recent study by Kelly *et al.* has, to some extent, alleviated this evidence gap, though there continue to be areas where we know relatively little. For example, an examination of the role played by forensic medical examiners and prosecutors in the classification of rape reports at different points in the criminal justice process is also of importance.[176] This would enable us to examine the basis upon which reports are classified as no-crimes or where they are discontinued, the factors taken into account in making such decisions, and the assumptions or beliefs that underlie the decision-making process.

It seems likely however, that even with qualitative research methods there are going to be inherent limitations. In her recent research, Jan Jordan acknowledged the limitations of her study, which was based on case file analysis. In discussing police scepticism of rape complainants, she stated: "It is virtually impossible to tell from the file evidence available whether or not such scepticism is well founded in reality or simply emanates from a police occupational trait of general suspiciousness".[177] Indeed, evidence from the United States suggests that information in rape case files held by the police may not always be accurate.[178] Ultimately, it would appear that the only way researchers could determine whether scepticism in individual cases was well founded would be to accompany police officers from the start of an investigation into an alleged rape to its conclusion. This would provide invaluable information on how officers come to particular

[174] See note 7 above, para. 6–18.

[175] Jan Jordan's recent study of the New Zealand police provides an important example of this type of research methodology, see note 70 above.

[176] For research that raises questions regarding the response of these two groups to cases of rape, see: J. Temkin, "Prosecuting and Defending Rape: Perspectives From the Bar" (2000) 27 Journal of Law and Society 219; J. Temkin, "Medical Evidence in Rape Cases: A Continuing Problem for Criminal Justice" (1998) 61 Modern Law Review 821; J. Temkin, "Doctors, Rape and Criminal Justice" (1996) 35 Howard Journal of Criminal Justice 1.

[177] See note 70 above, p. 47.

[178] In the Philadelphia study discussed earlier, officers disclosed that they might emphasise, de-emphasise or even omit information from a case file in order to support a particular conclusion regarding the veracity of a complaint: see note 66 above, p. 292.

decisions and crucially, allow an evaluation of the quality of the decision-making process. Such research would require significant co-operation between researchers and the police, which for a range of operational and other reasons might not be forthcoming.[179]

There is also a need for future research to examine several trends that are apparent in the existing literature on police recording practice. For example, future research should examine criminal justice decision-making in the context of vulnerable groups of complainants, such as those with learning disabilities or mental health problems.[180] In their Home Office survey, Harris and Grace found that of forty cases involving complainants with a learning disability or mental health problem, 22 were no-crimed "usually because they were believed to be false" and 18 were designated as involving no further action.[181] Research by Lea *et al.* indicates that significant numbers of cases are being no-crimed due to the complainant being viewed as "an unstable female". The researchers note: "The grounds for deeming a complainant as 'unstable' seemed entirely dependent upon the investigating officer's personal judgement".[182] These researchers also found that the attrition rate was "very high" where the complainant "had a learning disabilities, psychiatric problems or physical disabilities".[183] Jan Jordan's study of the New Zealand police replicates these findings,[184] as does the most recent Home Office research that examines rape case attrition.[185] Given the vulnerability of people with learning disabilities and mental health problems, it is essential that future research focus on police treatment of such cases and the basis upon which allegations are no-crimed or NFA-ed.

Not only is there a need for further quality research into the approach of criminal justice professionals to the issue of false allegations, there is also a need to be mindful of the perils of supporting research that may have limited value. Endorsing further research into Statement Validity Analysis, the Home Affairs Select Committee stated: "We recommend that resources are channelled into researching and piloting the use 'statement validity analysis' as

[179] Sue Lees for example, noted in her study of police recording practice the "arduous process of negotiation" with the police in order to get access to police case files: "Unreasonable Doubt: the Outcomes of Rape Trials", in Hester, see note 5 above, p. 100. Such problems would likely be increased by attempts to use more invasive research techniques.

[180] Evidence suggests that in the past the police have been eager to dismiss complaints of rape by other groups, such as prostitutes. For discussion see: Katz and Mazur, note 52 above, ch. 13.

[181] See note 16 above, at p. 23.

[182] See note 29 above, p. 593.

[183] *Ibid.*, at p. 594.

[184] See note 70 above, pp. 36–37.

[185] See note 14 above, p. 48 (noting that "those with disability were almost twice as likely to be in the false allegations group as the non-disabled".)

a tool for evaluating the credibility of witness testimony in complex historical child abuse cases".[186] For the reasons discussed earlier, it has to be questioned whether this method of analysis, even if reliable, would significantly assist investigators. The Home Affairs Select Committee's uncritical approach to SVA is unfortunately indicative of the approach of many to the issue of false allegations where research is endorsed with little concern for its reliability.

VI. Conclusion

The issue of false rape allegations should not be viewed as a peripheral matter of little concern to those who are seriously concerned with the way in which rape complaints are handled by the criminal justice process. It is not only an important issue for those concerned with the treatment of complainants, but it also has implications for suspects and defendants. The actual rate of false allegations may also be highly relevant to the future direction of legal policy. For example, if the rate of false allegations is significantly higher than for other serious offences, then this may require a re-assessment of legal provisions relating to such things as suspect/defendant anonymity.[187] It is also evident that police officers no-crime some reports on the basis of highly questionable assumptions concerning appropriate or expected complainant behavior and responses to rape. In order to address this particular issue, the actual rate of false allegations is much less important than educating police officers regarding the range of normal responses exhibited by rape victims. Education, however, should not be limited to police officers and should include prosecutors and forensic medical examiners.

The issue of false rape allegations also has implications for scholarship, as well as the enforcement of rape law. The literature on false allegations requires careful analysis, yet such an approach is often absent from discussions within legal and other scholarship. One of the interesting aspects of this analysis has been the way in which scholarly trends repeat themselves. Just as early legal commentaries uncritically adopted psychoanalytical theories of why women make false complaints, along with claims that false allegations were common, in the last three decades there has been a lack of critical analysis by those who claim a low false reporting rate and the uncritical adoption of unreliable research findings. There has also been a failure to acknowledge the methodological

[186] See note 135 above, para. 50.
[187] In addition to the other arguments and issues of policy that are also of importance when considering reform of the law in this area.

limitations of much of the existing research and the state of our current understanding of the rate of false allegations. As a consequence of such deficiencies within legal scholarship, factual claims have been repeatedly made that have only limited empirical support. This suggests a widespread analytical failure on the part of legal scholarship and requires an acknowledgment of the weakness of assumptions that have been constructed upon unreliable research evidence. Ultimately, the criminal justice system and those writing about the issue of rape have dealt poorly with the issue of false allegations. Given the legal and societal prominence of this subject, it is a failure that should be addressed.