

## **THE DUKE LACROSSE CASE: EXPLOITING THE ISSUE OF FALSE RAPE ACCUSATIONS**

Review Essay

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### **The Duke Lacrosse Case: Exploiting the Issue of False Rape Accusations**

In a book recently published by St. Martin's press, journalist Stuart Taylor Jr. and Brooklyn College historian KC Johnson (2007) have provided a description of the attempted prosecution of three Duke lacrosse team players. Detailing the events the night of the party and in the months following, the authors delve into the prosecutor's malfeasance and ethical lapses as well as the media frenzy around the case. Curious to learn how the authors treated the complaining victim, I read the book. Their description of the complaining witness was low-key and more sympathetic than I would have expected from Taylor's earlier journalistic presentations. I have no grounds to question the accuracy of the facts in this book, but I was astonished at the lessons the authors draw from the case.

Feminist overkill, proclaim the authors. Men as demons, "men accused of rape often face a de facto presumption of guilt that is hard to dispel no matter how strong the evidence of innocence...the charges have gone too far, driven by radical feminists' wild exaggerations of the extent of male sexual predation and female victimization and their empirically untenable view that women never (or hardly ever) lie about rape." (Taylor & Johnson, 2007, p.372)

These are the learnings authors Stuart Taylor, Jr. and KC Johnson take from the Duke lacrosse case. But is the Duke case really emblematic of what is going on in the world of rape prosecutions?

To prove that it is, the authors have to demonstrate that false rape allegations, and prosecutors' reliance upon them, represent a serious problem in the U.S. today. They cite several pages of evidence reporting that false rape claims are in the neighborhood of 50%. Can these statistics be correct?

The determination that a report is false can only be made when there is sufficient evidence to establish that the sexual assault did not happen. This does not mean that the investigation failed to prove that the sexual assault occurred or was unable to produce enough evidence to proceed; that is an unfounded or unsubstantiated case. To be labeled

false, there must be evidence that the sexual assault never actually happened, which will usually only be seen after a thorough investigation has been conducted.

In reporting sexual assaults to the FBI in the Uniform Crime Reports, or UCR program, police departments are allowed to list rape reports as “unfounded,” which means either that they are false (*i.e.*, they did not happen) or baseless (*i.e.*, something happened but it did not meet the elements of a sexual assault offense). It does not include reports that are unsubstantiated (*i.e.*, there is insufficient evidence to prove that the rape happened). In fact, there is no unique category in the UCR program for these cases; they should technically be left open by the police department and never closed (*i.e.*, cleared) using UCR criteria. This is certainly complicated, but it only gets worse.

Because baseless reports make up a sizable percentage of those that are deemed “unfounded,” this means that the term cannot be used interchangeably with the notion of false reports. In other words, people often use the term “unfounded” to mean “false,” but this is technically in error because unfounded reports in the UCR program include both those that are false as well as those that are baseless. The distinction is understandably difficult to grasp, so it is not surprising that this confusion has crept into discussion of false rape reporting, little helped by the lack of clear criteria in the UCR definitions.

With these distinctions in mind, let’s look at how they translate into real life situations. What are examples of false rape reports? The clearest is the woman who cried “rape” to the 911 operator to get the police officers to come more quickly during a domestic altercation and who readily admitted it when the police arrived. Another example would be the case in which police later determined that the alleged victim herself wrote a note attributed to the suspect or who herself purchased materials purportedly used in the sexual assault.

The difficulty of ascertaining false rape reports in any kind of research study is brought home by some cases labeled “false” which later turn out to be all too true. In one instance, DNA evidence five years later linked a sex offender to a blind woman who said her intruder raped her at knifepoint, but who was disbelieved and even charged with lying about the episode. The City has apologized, offering the woman \$35,000. In still another case, a DNA check nabbed a perpetrator who then could be linked to an earlier rape accusation in New York City. Queens detectives had thought the high school sophomore had faked the attack to cover up an unwanted pregnancy and had charged her with filing a false report, for which she was sentenced to picking up garbage for three days (Lonsway, Archambault, & Berkowitz, 2007).

Even complainant recanting causes difficulties. Some may argue that victim recantations

are enough to put a case into the category of a false report. But because many victims recant when they encounter skepticism, disbelief or blame, or because they find their disclosure makes matters worse or more dangerous for them, some experts believe that recantations cannot be used as the only evidence to determine whether a report is false. Those in the domestic violence field are all too familiar with this dynamic, and realize that just because the victim recants does not mean the abuse did not happen. All this is to cause reasonable minds to agree that determining just what is a false rape claim puts one into a thicket of problems and issues. Given all this, we may never know the true number of false rape claims.

A few research projects have attempted to determine the percentage of false reports; that is, researchers attempt to determine the number of cases in which the evidence definitely proves that the accusation is false. The Portland, Oregon police department examined 431 complaints of completed or attempted sexual assault in 1990, and found that 1.6% were determined to be false, in comparison to a rate of 2.6% of false reports for stolen vehicles. The San Diego Police Department Sex Crimes Division routinely evaluated the rate of false reports over several years and found them to be around 4%. In a recent study of 2,643 sexual assault cases reported to British police, 8% were classified as false allegations. Yet when researchers applied the actual criteria for a false report, as opposed to an unsubstantiated or unfounded report, the figure dropped to 2% (Lonsway, Archambault, & Berkowitz, 2007).

It is often said that there are many more false rape reports than for any other crime. But the rate of false reporting for property offenses such as arson, auto theft, and burglary, offenses in which there is a lot of insurance fraud, may be just as high. Yet no ink is spilled about the horrors of false reporting of property crimes.

So back to Taylor and Johnson's 50% figure for false rape claims. Let's examine the three major documents on which the authors rely. The first expert is Linda Fairstein, a former Manhattan sex crimes prosecutor. Taylor and Johnson quote a November 2003 Cosmopolitan magazine article, "Why Some Women Lie About Rape," authored by Fairstein, as follows:

"These falsehoods trivialize the experience of every rape survivor." Fairstein also wrote, "There are about 4,000 reports of rape each year in Manhattan. Of these, about half simply did not happen." (Taylor & Johnson, 2007, p.374)

What did not happen in the Cosmopolitan article is that last sentence. In a recent e-mail correspondence, Ms. Fairstein informed me that the quote was inaccurate and that a

correction had been made on one of the author's websites. There, KC Johnson admitted the error, indicating that the material had been taken from someone else's website and that neither of the authors had consulted the original article.

Next, the authors cite a research study by Purdue sociologist Eugene Kanin, who summarized rape reports in a small Midwestern town between 1978 and 1987, finding that the police department determined 41% of them to be false. This is another study that is frequently cited on web sites devoted to debunking the prevalence of rape. During this ten-year period, the police department followed policy (now deemed unlawful by the U.S. Congress for police departments receiving federal funds) that required polygraphing complainants and suspects as a condition of investigating rape reports. Kanin's department only declared a complaint false when the victim recanted and admitted it was.

In his published journal article, Kanin (1994) admitted that "A possible objection to these recantations concerns their validity....rather than proceed with the real charge of rape, the argument goes, these women withdrew their accusations to avoid the trauma of police investigation."

And indeed, the Kanin study has been criticized for the department's use of polygraph testing in every case, a process that has been rejected by many police departments because of its intimidating impact on victims. The International Association of Chiefs of Police disapproves of requiring polygraph tests during rape investigations because "victims often feel confused and ashamed, and experience a great deal of self-blame because of something they did or did not do in relation to the sexual assault. These feelings may compromise the reliability of the results of such interrogation techniques. The use of these interrogation techniques can also compound these feelings and prolong the trauma of a sexual assault" (Lisak, 2007, p.6).

Given the popularity of Kanin's study, especially in light of the collapse of the Duke University lacrosse players prosecution, David Lisak (2007), an associate professor of psychology at the University of Massachusetts Boston, cautions that this particular police department employed a common procedure in which officers' inherent suspicion of rape victims results in a confrontational approach towards the victim that would likely result in an extraordinarily high number of victim recantations. Lisak also points out that Kanin's is not a research study, because it only puts forth the opinions of the police officers without any further investigation on his part.

Kanin (1994) himself cautioned against the generalizability of his findings from a single police agency handling a relatively small number of cases, calling for future studies in other

cities to help assess the representatives of these statistics.

Lastly, the authors cite a recent Department of Defense report, findings that need to be read carefully. Taylor and Johnson correctly state that the report found that fraudulent rape complaints were perceived as a problem at the academies by 73 percent of the women and 72% of the men in a survey of students at the Air Force Academy, West Point, and the Naval Academy. Participants, however, were not asked their own opinions in the matter, but whether they thought that their classmates consider false reporting to be a problem. Obviously, this report does not present data about the true extent of false reporting at the academies.

The survey (Office of the Inspector General of the Department of Defense, 2005) also uncovered the fact, unreported by Taylor and Johnson, that 262 of the 1,906 female respondents reported sexual assaults between 1999 and 2004. Most of these victims (67%) did not report their assaults to the authorities, and the main reasons for not doing so were shame/embarrassment and “ability to deal with it myself.” From this we can conclude that the academies are not awash with sexual assault allegations or reports. For this reason, it is difficult to understand just why the students felt that their classmates thought there were so many false rape reports. To make matters even more confusing, those who were victims of sexual assault thought their classmates saw false rape reports as a more significant problem, causing the researchers to believe that victims did not understand the question or applied interpretations to the question that were not intended. None of this, however, offers any indication on the actual extent of false reporting on the three campuses.

That none of these cited studies is convincing should not be surprising. Professor Lisak (2007) reminds us that not a single “benchmark” study on false rape claims can be found in the social science literature, which sadly does not prevent the debate from raging on.

It seems unwise to generalize from celebrity or high profile rape cases where one could persuasively argue that all the media attention causes some of the more outlandish goings-on. Police inaction in rape cases may be a bigger problem than false rape accusations. An investigation by the Philadelphia Inquirer has found that, in an effort to build an impressive arrest record for rape, the police department banished and hid difficult cases, a practice that left many serious cases uninvestigated (Anderson, 2000). One such case involved the rape and strangulation of Shannon Schieber (Kohler, 2005). After wriggling through an air-conditioner opening in a Philadelphia apartment, the man pounced on the occupant, who talked him out of raping her. She provided some hairs he had left, but the police discounted

her story, doubting that a grown man could have entered her home through such a small space. Two more attacks occurred two months later and were similarly discounted. After a prowler was reported in the neighborhood the next month, an officer stopped the wiry Troy Groves, the actual rapist, close to the apartments where the rapes occurred, but not knowing of the rapes, did not bring him in for questioning.

The following spring Shannon Schieber was raped and strangled by her attacker. Her killer's DNA matched the two earlier rapes. When a Philadelphia Inquirer story broke about the police department's failure to aggressively pursue rape complaints, the department in a new investigation found that the DNA also matched that in the first rape attempt case. Later the rapist moved to Fort Collins, Colorado, where his DNA tied him to eight reported rapes there. He was eventually arrested. Schieber's parents believe their daughter would be alive today had police paid proper attention to the claims of the victims who came before her.

Numerous recent stories demonstrate similar occurrences. In Harvey, Illinois (Walberg, 2007) police investigators had DNA evidence linking a convicted sex offender to a 2002 rape, but never sought charges against the man, who later raped a woman in Chicago. And in another case in Chicago, prompt DNA testing might have prevented a third rape and a slaying; the DNA lay untested in the state lab for months (Coen & Sadovi, 2005).

If we don't watch out, this to-do about false rape claims, fueled now by the Duke case, could even further limit the already miniscule percentage of rape reports that result in an investigation and prosecution. And that may well be the intent, as commentators appear to be waging an organized attack to fuel incredulity regarding reports of sexual assault, especially those committed by someone who is known to the victim.

Rape remains a thorny crime for the criminal justice system-difficult, because some innocent individuals may be found guilty, but at the same time, equal, if not more rapists may be going free to commit the same crime again and again. There may be some remedies for all this, but labeling the majority of cases as propelled by women who are vicious liars bent on sending innocent men to prison won't do much to help.

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