Advances in Psychology and Law 6

Brian H. Bornstein
Monica K. Miller
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# Advances in Psychology and Law

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# Advances in Psychology and Law

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The edited series focuses on topics at the nexus of Psychology and Law. It enhances understanding of the connections between these disciplines, presents "state of the science" summaries for current researchers, and provides a starting point for scholars wanting to delve into a new topic of study by reading an up-to-date review chapter on that topic. All areas of psychology (e.g., developmental, social, cognitive, clinical, neuroscience) and law (e.g., criminal, civil, contracts, property, family) are appropriate for inclusion. For instance, developmental psychology can play a role in developing legal procedures appropriate for children; clinical psychology can help develop dangerousness assessments for mentally ill criminals; and social psychologists can provide information about how jurors deliberate to a verdict. The series editors welcome proposals for possible chapters in forthcoming volumes. To submit a chapter proposal, please contact: Brian H. Bornstein: bbornstein2@unl.edu Monica K. Miller: mkmiller@unr.edu Editorial Board: Neil Brewer (Flinders University, Australia), Theresa Gannon (University of Kent, UK), Edie Greene (University of Colorado, Colorado Springs), Margaret Bull Kovera (John Jay College of Criminal Justice, City University of New York), Jeffrey Neuschatz (University of Alabama Huntsville), Jodi Quas (University of California, Irvine), and Jennifer Skeem (University of California, Irvine)

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*To MRC, with deep appreciation for 50 years of friendship: "Can you imagine us years from today, sharing a park bench quietly?" – B.B.*
*To Jeanne Steward Hansen, who taught me about books, hard work, and life. – M.M.*
*To my children, Emma and Jake, for continuing to provide a refreshing perspective in an increasingly complex world. – D.D.*

# Preface

The field of psychology and law is expanding rapidly, as courts and policy makers pay more attention than ever before to psychological research (e.g., eyewitness and expert testimony, jury instructions, forensic assessment, and risk reduction), creating new opportunities for psychological research to contribute to efforts to improve the justice system. The present volume, sixth in the Advances in Psychology and Law book series, seeks to enhance understanding of the connections between the disciplines of psychology and law, present "state of the science" summaries for current researchers, and chart a course for future research. The book consists of up-to-date reviews of topics relevant to psychology and law, and will be of current interest to both researchers and practitioners in the field.

For this volume, we made a deliberate effort to include topics that come at psycholegal issues from diverse perspectives. Thus, some topics are currently very much in the public eye, and likely to remain there, such as body cameras, wrongful conviction, and sexual assault; other chapters address "cutting-edge" topics, like gait analysis and therapy dogs; and clinically focused chapters examine the experience of special populations in the court system, such as veterans, parents of juvenile offenders, persons adjudicated incompetent, and persons using therapeutic animals. In addition, several chapters take a close look at important methodological questions, such as how best to select fillers for identification lineups, the reliability of gait analysis as an identification technique, and how to analyze archival data from exoneration cases to understand factors contributing to erroneous convictions.

The book begins with a thorough overview of a critically important yet complex and somewhat unwieldy topic, namely, juror decision making in cases of adult rape. Chapter 1 by Golding and colleagues explicates the many factors that make rape cases complicated to research, to prosecute, to defend, and to decide, such as the cultural beliefs and myths surrounding rape and the numerous legal and extralegal variables involved in rape trials. The authors also distinguish among the various kinds of adult sexual assault, such as stranger versus acquaintance rape, intimate partner rape, and non-heteronormative rape. Inasmuch as rape is, in the authors' words, "a pervasive criminal justice and public health problem," clarification of the

myriad issues involved in rape trials has the potential to make substantial contributions to both research and policy on this topic.

Chapter 2, by Pezdek, examines much more nascent questions, though ones that are rapidly growing in importance: What is the psychological impact of body-worn cameras (BWCs), and how should BWC footage be used in the legal system? The author introduces psychological theories to provide a framework for considering how BWCs might influence civilians' and police officers' attitudes and behavior in a number of ways. Moreover, police department policies vary widely in terms of how the footage should be used when there is a possible use-of-force incident; for example, should officers have an opportunity to view the footage prior to writing a report or testifying at trial? As more and more law enforcement agencies adopt BWCs, such questions will only become more pressing.

The next three chapters address topics related to witness identification. In Chapter 3, Bergold addresses a critical and fundamental question: How to select eyewitness lineup fillers? If they are not similar enough to the suspect, then there is a greater chance of lineup bias and suspect misidentification (i.e., false positives); yet if they are too similar to the suspect, then the task becomes too difficult and increases the risk that a guilty suspect will not be identified (i.e., misses). The chapter discusses how different theoretical models explain the problem of filler-suspect similarity and applies new analytical techniques to optimize the level of lineup similarity. Chapter 4 likewise addresses the problem of misidentification, but those based on an error in recognizing a culprit's gait rather than their face, as in most witness identification research. Because gait identifications often involve comparison of a suspect's gait to that of a culprit captured on surveillance video, forensic experts may be called to testify. Le Grand and colleagues review the literature on such forensic gait analysis and conclude that it lacks a scientific foundation and should therefore be used little if at all. Chapter 5, by Toglia and colleagues, examines misidentifications through the lens of a detailed analysis of exoneration data. The authors identify numerous variables associated with these real-world misidentifications, and they describe the implications of this kind of intensive archival analysis for both the field of eyewitness research and the work being done by conviction integrity units.

The book's last four chapters cover special populations in the court system. For example, in Chapter 6, Snider et al. examine juvenile justice from a unique perspective, namely, that of juvenile offenders' parents. The chapter explores parental roles in the juvenile justice system, barriers to those roles, and parents' experience of those roles across different points of contact in the system. The next chapter (Chapter 7), by Lanterman, reviews the ways in which veterans experience the criminal justice system. The chapter covers the scope of veterans' justice involvement, the role played by service-related behavioral health disorders, and policies and programs designed to address veterans' needs (e.g., veterans' courts). Chapter 8, by Gowensmith and Murrie, addresses an important function performed by forensic psychologists, namely, restoring defendants' competence for purposes of criminal adjudication. The authors review characteristics of defendants that predict successful restoration and the different kinds of competence restoration services. Finally, in Chapter 9, McDermott and colleagues describe the psychological and legal aspects

of therapeutic animals—that is, situations in which animals are intended to enhance people's well-being. Such animals live and work alongside humans in a broad range of contexts, each with its own set of legal requirements and rights, as well as both purported and actual psychological benefits.

While the structure of the book and high quality of the chapters are the same as previous volumes in the series, the personnel behind the scenes have changed somewhat. We bade a sad farewell to our former editor at Springer, Judith Newlin, but hardly missed a beat under the sure-handed guidance of Anna Goodlett; we are also grateful for the efforts of Hemalatha Velarasu on the production side, and for Springer's commitment to the series in general. Thanks to Paul Simon for the quote in the Dedication. And last but not least, after editing the first five volumes as a two-member team, we welcomed David DeMatteo as co-editor. Dave's keen editorial judgment and breadth of knowledge, especially on clinical-forensic topics, have improved the present volume significantly and will continue to do so in future volumes.

Durham, NC, USA — Brian H. Bornstein
Reno, NV, USA — Monica K. Miller
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# About the Editors

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# Chapter 1
# Beyond the Stranger in the Woods: Investigating the Complexity of Adult Rape Cases in the Courtroom

**Jonathan M. Golding, Kellie R. Lynch, Claire M. Renzetti, and Andrea M. Pals**

Adult rape is a pervasive criminal justice and public health problem, with a range of negative consequences. Over the past 50 years, researchers have published a myriad of work across a variety of disciplines (e.g., psychology, Schuller & Wall, 1998; criminology and criminal justice, Ullman, 2007; law, Seidman, & Vickers, 2005) investigating perceptions of rape in the courtroom. This body of published work has largely attempted to (a) understand the legal decision-making process and (b) assist the legal system in adopting judicial reforms that might help the justice system fairly adjudicate these difficult cases. The present review will offer a summary of research that has investigated specific factors affecting perceptions of rape cases and discuss future directions for research investigating legal decision-making involving rape in the courtroom. It should be noted that the chapter will focus on research conducted in a courtroom context that included a legal outcome-dependent variable (i.e., verdict, guilt rating, or prison sentence) and will not review rape cases in international courts that involve war rape or similar atrocities (see Borer, 2009; Brownmiller, 1975; Hastings, 2002; Henry, 2011). The review attempts to cover as much of the literature as possible, but the growth of the field has likely led to missing some articles. Still, the review presents an overview of highlights from this large body of work, thereby extending prior reviews of adult rape research that included

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a broad range of studies, such as attitude research in non-court contexts (e.g., Olsen-Fulero & Fulero, 1997). The present review will illustrate that rape is a crime subject to social bias, myths, and cultural beliefs and is therefore vulnerable to the impact of extralegal factors on legal decision-making.

In presenting research, one should note that terminology reflecting sexual victimization varies and some terms are used interchangeably both in research and practice. Sexual violence, for example, is meant to encompass all aspects of sexual victimization – rape (both attempted and completed), sexual coercion, unwanted sexual contact, sexual abuse, and sexual assault. Some studies might operationalize sexual victimization in a narrow way by only including completed or attempted rape, while others might include a wider range of sexual victimization behaviors (Cook et al., 2011). This inconsistency across definitions of sexual victimization in the research literature contributes to variations, sometimes quite dramatic, in prevalence estimates (Cook et al., 2011; Logan et al., 2015). Given that most of the research examining perceptions of sexual victimization in a legal context focuses almost exclusively on rape, the present review will also primarily focus on and adopt the term *rape* (both attempted and completed).

Rape typically encompasses both completed and attempted penetration achieved via physical force, threat of physical force, drug/alcohol facilitation, and forcing a person to penetrate another (Basile et al., 2014). The Centers for Disease Control (CDC, 2019) estimate nearly 1 in 5 women and 1 in 38 men in the United States have experienced completed or attempted rape in their lifetime. Other national household surveys estimate the prevalence of forced rape for US women ranges from 1 in 8 (12.3%) to 1 in 6 (16%; Basile et al., 2007; Black et al., 2011; Kilpatrick et al., 1992, 2007; Tjaden & Thoennes, 2006). Most female and male victims are raped by someone they know – typically, either an intimate partner or an acquaintance (Black et al., 2011).

## Defining and Understanding Consent

Countries across the world and states within the United States also vary in how they define rape in a legal context. However, legal definitions of rape typically include three basic components: (1) contact between the genital, anal, or oral areas of a victim and the genitals or hand of the perpetrator or an object used by the perpetrator; (2) the use of physical force or threat of force to complete the act; and (3) the act must have occurred without the victim's consent or if the victim was unable to give consent (i.e., nonconsensual). Most of the ambiguity and the basis of many legal battles involving rape center on the third component: establishing consent or the lack thereof. Sometimes, consent is defined by the age of the victim (i.e., statutory rape), the victim's cognitive abilities (e.g., cognitive impairment), or the relationship between the victim and perpetrator (e.g., perpetrator is in a position of power). However, many times consent is an abstract legal or social concept at the focal point of a "he-said-she-said" battle, in which the prosecution argues that the

incident was nonconsensual and the defense argues that the incident was indeed consensual. Therefore, it is critical to consider how the notion of consent is defined and perceived when examining legal decision-making in cases of rape.

Although unwanted sex is often equated in research with nonconsensual sex, some researchers argue that consent and wantedness are different constructs (Hamby & Koss, 2003; Logan et al., 2015; Peterson & Muehlenhard, 2007). Peterson and Muehlenhard (2007) proposed a framework that suggests (1) consent and wantedness are different constructs; (2) the conceptualization of wantedness involves a continuum, rather than a categorical distinction; and (3) nonconsensual sex is rape. When sex is both nonconsensual and unwanted, it is clearly rape. When sex is both consensual and wanted, it clearly is not rape. However, what happens in between? Logan et al. (2015) point out that there are instances, particularly in intimate relationships, in which there is a precedent of consent, in which consent is unclear (e.g., sex while sleeping, sex while intoxicated) but sexual contact might be wanted (or not unwanted), and other situations in which sex is consensual but unwanted (e.g., verbally pressured, sex after an argument, someone is too tired). Establishing consent for sexual activity goes beyond a verbal "yes" or "no." Even if a clear, verbal "no" is given, there are those who assume that "no" might mean "yes" if a woman feels social pressure to play hard to get for fear of seeming "easy." Decades ago, researchers investigated the idea of "token resistance," which involves false, scripted refusals that women use to avoid violating traditional gender scripts that women should be less sexually active than men. For example, Muehlenhard and Rodgers (1998) found that 15% of female college students' narratives of sexual encounters actually met the definition of token resistance (i.e., saying no but actually meaning yes) when taking into account changing one's mind to have sex after initially saying "no" or conflating desire to have sex with actual intent to have sex with a partner (e.g., the woman was attracted to the man and wanted to have sex but never intended to do so). Thus, the authors concluded that an overwhelming number of women mean no when they say "no" to intercourse. This is important to consider given that the belief that a woman "really means yes" when saying "no" is a pervasive rape myth in Western society (Burt, 1980). This research also demonstrates the problem in conflating want or desire for sex with consent.

While some note that it should not be necessary to say "no" if one party is showing nonverbal signs of refusal (e.g., pauses, excuses; Kitzinger & Frith, 1999), the notion of "affirmative consent" has become increasingly popular, particularly on college campuses. At a basic level, affirmative consent requires a clear "yes" before sexual activity can be considered consensual (i.e., "yes" means "yes"). However, most definitions of affirmative consent have evolved to include the condition that saying "yes" was done so in a voluntary manner, free of coercion. Logan et al. (2015) emphasized that autonomy or free will to say "yes" or "no" is critical when conceptualizing sexual consent, as a victim must freely acknowledge sexual consent without any threats (implicit or explicit) or influence. For example, California adopted the following definition of affirmative consent in its law aimed at reducing campus sexual assaults: "affirmative, conscious, and voluntary agreement to engage in sexual activity" (see End Rape on Campus, 2020). However, it is important to

note that policies of affirmative consent might not represent the reality of how sex is "negotiated" or initiated among sexual partners – which typically relies on resistance (e.g., saying "no") or nonverbal cues (Gruber, 2020; Hirsch & Khan, 2020; Jozkowski et al., 2014; Miller, 2020). There is evidence that consent policies can affect how sexual assault cases are perceived. Miller (2020) examined perceptions of undergraduate students and community members in sexual assault scenarios when told to adopt either an affirmative consent policy or traditional "no means no" policy. Participants who adopted an affirmative consent policy were more likely to agree that the incidents were sexual assault compared to participants who read the standard "no means no" policy.

So, then, what is sexual consent? The CDC defines consent as, "Words or overt actions by a person who is legally or functionally competent to give informed approval, indicating a freely given agreement to have sexual intercourse or sexual contact" (Basile et al., 2014, p. 11). Researchers, such as Muehlenhard and colleagues (e.g., Peterson & Muehlenhard, 2007), have also emphasized that consent is just as much a "state of mind" as it is a behavior. Although researchers endorse frameworks advocating for consent and/or wantedness on a continuum rather than as orthogonal categories, the legal system does not reflect this. In fact, many statutes do not actually define consent but rather outline instances of "lack of consent." Schulhofer (1998) argued that the notion of "consent" is a major challenge for prosecutors, due to the lack of a clear definition, and it places responsibility on the victim to not consent or fight back. Even when a victim says no or fights back, she or he can be accused of not fighting back hard enough or not being insistent enough in her or his "no" (Gavey, 2005; Schulhofer, 1998). Thus, the legal system often conflates consent and wantedness with resistance. If a victim does not resist out of fear, physical inability, or some other reason, defense attorneys can argue that "letting" the intercourse happen was effectively consenting to it. In fact, some states, such as Alabama, require a victim to fight back "in earnest" for the incident to meet the standards of rape in the first degree (Alabama Code 1975, § 13A-6-61[a][1], 2020). Many legal definitions of consent also make no mention of fear, coercion, or threats, which are all important to autonomy and free will in a sexual interaction. Statutes also fail to define "incapacitation" as it is unclear how incapacitated (e.g., unconscious, very drunk) a victim must be to be legally incapable of consent. In sum, while the idea of rape might seem straightforward at face value, the conceptualization of rape by researchers often is discrepant with the legal system, and within the criminal justice system, there are inconsistencies and ambiguity within the definitions of key components of rape statutes.

## Prosecuting Rape

Researchers have estimated that the prosecution of reported rape only occurs in 37% of cases involving adult women victims and that 46.2% of prosecuted cases result in a conviction (Tjaden & Thoennes, 2006). Because most victims do not

report rape to the police, the same researchers estimate that only 3.4% of all rapes (including those that are unreported and not prosecuted) lead to a conviction of the rapist. There are several contributing factors to the prosecution rates of rape. First, a victim must identify the incident as rape (or some form of sexual crime) if he or she is to then report it to the justice system. Some victims might not label their experience as rape if it was not violent (e.g., resulting in physical injuries), if they did not fight back, or if they knew their perpetrator well (e.g., an intimate partner; Hammond & Calhoun, 2007; Kahn et al., 2003; Lazar, 2010; Raphael & Logan, 2009a, b). Additionally, it might be a psychological defense mechanism to not label an incident as rape and subsequently label oneself a rape victim (Peterson & Muehlenhard, 2007). Victims might also be less inclined to report their rape to police if they were under the influence of alcohol at the time of the incident. This is a particular problem and contributing factor to low reporting rates among college sexual assault victims (e.g., Fisher et al., 2003). Victims often experience guilt following the incident and fear that they will not be believed and/or will be blamed for what occurred. Reliving their story in front of a room of strangers and undergoing intense cross-examination by the defense team has been described as a "second rape" (Madigan & Gamble, 1991). Therefore, rape victims might be very hesitant to pursue action via the criminal justice system.

Next, prosecutors must choose to move forward with the case. Some research suggests that prosecutors are more likely to accept cases when the victim and offender do not know each other (i.e., strangers) compared to cases of acquaintance or intimate partner rape (e.g., Spohn et al., 2001). Rape often occurs without any eyewitnesses, and victims know their perpetrators in most cases (e.g., Black et al., 2011; Tjaden & Thoennes, 2006). The defense often argues that the intercourse was consensual, which results in a "he-said-she-said" conflict and renders DNA evidence proving that the couple had sex irrelevant (Seidman & Vickers, 2005). Therefore, if the case does go to trial, victims face intense scrutiny, and trials are often reduced to a character battle with the word of the defendant poised against the word of the victim. In the absence of "hard evidence," jurors are often left to make judgments about the victim and defendant using extralegal factors – aspects of the case (or those involved in the case) that should not be directly used as evidence.

## Theories of Jury Decision-Making in Rape Cases

Much of the research reviewed in this chapter examines factors associated with juror decisions. This section, however, addresses theories of *how* jurors make decisions. Although there is substantial research on the former in rape cases, there are considerably fewer studies that examine how jurors reach their decisions in these cases. There are several theoretical models developed to explain juror decision-making in general, but the three major models most relevant to rape cases are the Story Model, the Commonsense Justice model, and the theory of Generic Prejudice.

In this section, an overview of these models is provided as well as a discussion of how each might be helpful in explaining juror decision-making in adult rape cases.

The Story Model posits that, throughout a trial, jurors do not sit passively absorbing evidence presented to them but instead actively process and organize evidence into a narrative or a story that explains the "facts" of a case, which, in turn, leads them to a verdict (Pennington & Hastie, 1986, 1988, 1993). They might construct and need to evaluate more than one story during a trial; indeed, it is the job of the prosecution and the defense in the American adversarial system of justice to try to persuade jurors to adopt one of two opposing stories based on the presentation of evidence and witness testimony. Pennington and Hastie's (1988) studies show that when research participants evaluated a mock trial summary in which evidence was presented in either a witness-by-witness format or a story format, they considered the evidence stronger when it was presented as a story. Moreover, regardless of whether it was the prosecution or the defense who presented the evidence as a story, the story format was favored by mock jurors. As Groscup and Tallon (2016) point out, while the strength of the evidence was important to mock jurors in these studies, it was the strength of one story relative to another story that appeared to have the greatest impact on the verdict rendered. In fact, the influence of the story on jurors' decision-making is considered so significant that some observers have even suggested lawyers learn the techniques of Hollywood screenwriters in order to construct more compelling stories for the courtroom (see, e.g., Bruce, 2019).

In constructing and evaluating stories, jurors use case-specific evidence and witness testimony presented at trial as well as their own knowledge and beliefs, including *scripts* (i.e., beliefs about how people will behave in specific situations) and *schemas* or *stereotypes* (i.e., widely held, but overly simplified, ideas about "typical" members of particular groups; Devine, 2012). But what makes one story stronger or more influential than another? To evaluate competing stories and decide which one is "correct," thereby leading to an appropriate verdict, the Story Model maintains that jurors consider each story's coverage, coherence, and plausibility. *Coverage* refers to how well the various pieces of evidence fit into the story; the more evidence that can be integrated into a particular story, the greater the coverage, which will increase jurors' confidence in that story as the "correct" one (Groscup & Tallon, 2016). *Coherence* refers to the overall logic of a story and has three components: consistency, completeness, and plausibility. A consistent story is one that has few, if any, internal contradictions. In other words, the pieces of evidence and information that make up the story do not conflict with one another. A complete story is one in which all the pieces of evidence and information that are needed for a causal explanation of what happened are present and there are no gaps in the evidence. And a plausible story is one that makes sense in terms of jurors' understanding of how the "real world" works (Devine, 2012), which, as noted above, might be grounded in their personally held scripts and stereotypes. *Uniqueness* is a function of coverage and coherence. Given that in any trial there are competing stories, the "best" story – or, the one unique story that provides the strongest explanation of what happened – will be the one with the greatest coverage and coherence (Devine, 2012).

Research on juror decision-making in adult rape cases provides some support for the Story Model. In rape cases, evidence is often circumstantial, and the verdict usually hinges on the contradictory stories of the defendant and the complainant (i.e., the victim). Research shows that jurors often draw on stereotypes (or schemas) to help them organize and understand the competing, equivocal stories presented at rape trials (Stuart et al., 2019). The stereotypes they apply are frequently grounded in rape myths. Rape myths are a set of stereotypical beliefs about what constitutes a "real" rape and a "worthy" rape victim. Stuart et al. (2019) note that rape myths are conceptually rooted in the "just world" bias (Lerner, 1980) or the belief that a person's actions will result in fair or fitting consequences for that person (as exemplified by the adage, "She got what was coming to her"). A common rape myth about the crime is that a "real" or "genuine" rape is perpetrated by a stranger in a dark, deserted public place (rather than by an acquaintance in the victim's or the assailant's home or other private space). Research indicates that jurors are more likely to view defendants as guilty in stranger rape cases compared to acquaintance rape cases (Pollard, 1992).

Common rape myths about victims require that a "real" or "worthy" rape victim is one who did or said nothing to provoke the assault, fought the assailant vigorously, reported the assault immediately after it occurred to the appropriate authorities, and was clearly emotionally distraught after the assault. There is a large body of research showing that jurors often apply these stereotypes in rendering verdicts in rape cases. This is especially true with acquaintance rape, in which jurors are also inclined to draw on scripts of mutually consented sex in the context of a heterosexual date rather than on rape scripts, thereby leading them to view the defendant as less culpable and the victim as more blameworthy (Krahe, 2016; McKimmie et al., 2014; Stuart et al., 2019). Ryan and Westera's (2018) findings are particularly noteworthy in this context. Their study examined the effect of expert witness testimony on mock jurors' decision-making in cases in which the complainant's behavior did not coincide with the "worthy" victim stereotype. Ryan and Westera (2018) report that study participants judged the defendant as more culpable when they were provided with both the complaining witness's statement explaining why she behaved the way she did *and* expert witness testimony explaining her counterintuitive behavior. Ryan and Westera (2018) emphasize that their findings demonstrate the importance of police and prosecutors' mitigating rape myths when they construct a rape case (i.e., the case story) for trial.

The two other theories of juror decision-making – Commonsense Justice and Generic Prejudice – are compatible with one another and the Story Model. The Commonsense Justice model, developed by Finkel (1995), recognizes that the "written law" or the law "on the books" might be quite different from "ordinary" people's everyday or "commonsense" notions of what the law is or should be. Ordinary people serve as jurors, and they bring to trial their own ideas about human nature, responsibility, fairness, punishment, and justice. Central to the Commonsense Justice model is the concept of the *prototype*; a prototype is a cognitive construct that encompasses the typical characteristics of a group or category, such as a prototypical rape or a prototypical rape defendant (Finkel & Groscup, 1997; Groscup &

Tallon, 2016; Eno Louden & Skeem, 2007). Prototypes help people organize information, observations, and experiences through mental categorization. Research indicates that people more easily process and remember new information they receive when it closely matches the prototypes they hold (Rosch, 1973). Studies have also shown that people might hold multiple prototypes for a single crime category, that these prototypes are sometimes inaccurate, and that they might be strongly influenced by media depictions and reporting (Krahe, 1991; Smith, 1991; Wiener et al., 2002). Research on juror decision-making demonstrates that jurors' understanding of legal instructions could be affected by the prototypes they hold (Smith, 1991) and that in rape cases, jurors' crime and victim prototypes influence their perceptions of a victim's credibility, a defendant's culpability, and an appropriate punishment (Pickel & Gentry, 2017).

The theory of Generic Prejudice, developed by Vidmar (1997, 2002, 2003), also focuses on how stereotyping might influence juror decision-making. Generic prejudice is a type of bias in which "the nature of the crime or the type of parties involved cause the juror to classify the case as having certain characteristics, thereby invoking stereotyped prejudices about *any* defendant accused of the crime" (Vidmar, 1997, p. 6, emphasis in original). Consequently, jurors who hold generic prejudices will instantly draw on these stereotypes upon hearing the crime of which the defendant is accused or that the defendant is a member of a certain group. In one study, for example, Vidmar (1997) found that potential jurors in a child sexual abuse case reported that they found the crime and perpetrators so repugnant that they could not remain impartial regardless of the evidence presented. Although there is less research directly testing Generic Prejudice (Groscup & Tallon, 2016), it is clear that the presence of generic prejudice among potential jurors in rape cases could significantly undermine foundational principles of justice (see also Sussenbach et al., 2017, on the effects of implicit judgments or "gut responses" on jurors' explicit judgments in rape cases).

As pointed out by Devine (2012), both the Commonsense Justice and Generic Prejudice models complement the Story Model of juror decision-making "by identifying important individual differences related to the evaluation of evidence and story construction" (p. 30). These models emphasize the role of schematic or stereotyped thinking, not only in terms of how it might assist jurors in evaluating evidence and witness testimony during a trial but also in terms of how it might influence their decision-making, for better or for worse. More research is needed, however, on how schematic thinking develops and, perhaps more importantly, how it might be modified or overcome to prevent negative prejudices from coloring jurors' consideration of non-prototypical information. In addition, most of the research to date has been on how individual jurors make decisions; far fewer studies have examined how juries *collectively* make decisions. The review will return to these and other gaps in the research literature later in the chapter.

## Research Methods

Various methodologies are available to investigate legal decision-making involving adult rape. These methodologies include field-based studies and archival data analyses outside of the laboratory. Although both abovementioned methods are useful tools in understanding legal decision-making, most research investigating rape and legal decision-making has used a mock trial methodology (i.e., a researcher generating a plausible case typically based on actual case facts) with mock jurors or mock juries. Participants (undergraduates and/or community members) are presented cases including components that allow for a high degree of ecological validity, such as legally appropriate charges, realistic witnesses and admissible evidence, and pattern jury instructions. After hearing a case, participants typically make explicit judgments (but see Sussenbach et al. (2017) for a study using explicit and implicit measures) such as rendering a verdict and making other case judgments (e.g., perceived credibility of witnesses; Wenger & Bornstein, 2006). Still, one must acknowledge the artificiality in such methods when generalizing from a mock trial to an actual case (Diamond, 1997; Weiten & Diamond, 1979). Especially important in this regard are (1) a mock trial is not a real trial (e.g., the verdict rendered by mock jurors or a mock jury has no impact on the defendant), and (2) the experiences of mock jurors are not the same as actual jurors (e.g., mock jurors typically do not hear a case in a courtroom; see also Bornstein, 1999, 2017; Bornstein & McCabe, 2005).

Mock trial research has the important benefit of offering experimental control that is critical to ensuring the scientific integrity of research. That is, it is possible to draw definitive conclusions about the effects of a particular factor (e.g., defendant or victim race and gender) only if it is varied while keeping all other factors constant. Such control is impossible when studying juror or jury decision-making in actual cases because each case is unique in numerous idiosyncratic ways. Therefore, the present review supports Goodman et al. (1992), who argued that it is important for psychology to provide the best available evidence on important legal questions whenever possible. Moreover, one could argue that the best conclusions emerge from converging evidence from various types of research studies.

Although the mock trial methodology is not perfect, it allows researchers to move forward (albeit cautiously) investigating various factors influencing legal decision-making in adult rape cases (see Goodman et al., 1992). The present review will now describe the results of many of these studies conducted over the past 50 years, with the hope that future researchers will use a variety of methodologies to generate converging evidence.

## Extralegal Factors Influencing Legal Decision-Making in Adult Rape Cases

As discussed above, "weak" physical evidence often characterizes adult rape trials, resulting in the reliance on extralegal factors when making outcome judgments (Devine et al., 2001). Extralegal factors are those that are not considered within the scope of the law. One can trace the interest in the impact of extralegal factors on decision-making to the landmark Kalven and Zeisel (1966) study. Although the book describing this research is often cited, typically there is no mention that Kalven and Zeisel (1966) devoted Chapter 17 exclusively to 106 adult rape cases. In this chapter, they noted many of the extralegal factors about rape that researchers continue to investigate: (1) cases of forcible rape go beyond the issue of consent, including a woman's (they only examined male perpetrator and female victim rape cases) conduct with regard to prior relationship history; (2) there is greater leniency toward a defendant whenever suggestions arise concerning contributive behavior on the victim's part; (3) the use of alcohol by a victim often leads to an acquittal; and (4) rape cases designated as "simple" (i.e., not involving a stranger, not involving multiple assailants) often lead to not guilty verdicts. It should be noted that across all crimes, judges and juries agreed on 78% of the cases, and this agreement was comparable at 72% for rape cases (about 50% agreement to convict).

Our review of the influence of extralegal factors in adult rape trials will focus on cases in which the victim and defendant know one another, either as acquaintances or intimate partners. The decision to focus on these types of studies reflects the data showing that most rape cases involve people who know one another and that stranger rape is relatively rare (Black et al., 2011). However, and as evidenced in subsequent sections, some early studies examined the influence of extralegal factors in a stranger rape context – likely due to a lack of awareness (at least on a mainstream level) that rape typically occurs among victims and offenders who know one another. Additionally, studies have also included a stranger rape comparison or control group when employing an experimental design, but the focus of the study was not examining rape in the context of strangers.

Acquaintance rape can include rape by a friend, co-worker, date, or any person that the victim might know, not a person with whom the victim is in an intimate relationship. It is estimated that about 41% of female victims and 52% of male victims are raped by an acquaintance (Black et al., 2011). The term "date rape" is sometimes used in place of acquaintance rape, particularly among college-aged samples. Prevalence rates of date rape vary across studies, but Johnson and Sigler (2000) revealed that 13% of college women surveyed reported that they were forced to have sexual intercourse on a date. Other studies (e.g., Finkelson & Oswalt, 1995) revealed lower rates of date rape (around 6%). Establishing a prevalence rate of date rape has been difficult for multiple reasons, including that researchers define date rape differently across various studies (e.g., use of physical force only versus physical force and psychological coercion). Consequently, date rape researchers might not be establishing prevalence rates of the same sort of behavior.

Relatedly, date rape might not actually occur on a "date," as dating norms continue to change. Researchers interested in "hookup" culture have begun to examine how scripts or norms affect college students' interpretation of hookup experiences. Hookup culture in the context of rape is a growing area of research, as what was once thought of as a "date" rape might now be less about dating and more about brief sexual encounters (i.e., hooking-up; Bogle, 2008; Hirsch & Khan, 2020; Paul & Hayes, 2002) without a first date needed (Littleton et al., 2009). For example, 79–85% of US college students report they have engaged in at least one hookup (e.g., Paul & Hayes, 2002), and over half of US and Canadian college students have engaged in sexual relations with someone with whom they were not in a romantic relationship (e.g., Grello et al., 2006; Lewis et al., 2012; Weaver & Herold, 2000). Littleton et al. (2009) highlighted the perceived ambiguity in possible situations of rape or sexual assault by investigating the qualitative differences in college students' perceptions of rape versus a "bad hookup" (i.e., an unpleasant intimate encounter with an individual one is not dating). Most college students classified rape as a situation only involving force and violence, and many blurred the line between sexual assault and a "bad hookup" experience. Additionally, very few college students associated rape or sexual assault with common hookup behavior.

Another problem with establishing date rape prevalence is that victims of rape might not characterize an incident as rape (Cook et al., 2011). For example, a woman coerced into having sexual intercourse without much use of physical force on a date might not characterize the experience as rape. This is problematic for establishing prevalence rates for all types of rape, especially in intimate partner rape and date rape, which are subtypes of rape that elicit social and dating norms. In other words, a woman might comply with having sex if she thinks it is normal to have sex with her partner when she does not want to, or a woman might think that she ought to have sex on a first date even though she does not want to. Neither of these examples necessarily involves physically forced sex; however, they do involve unwanted sex, making it difficult for the victim and persons in the criminal justice system to identify the situation as rape.

The following subsections will examine the impact of a commonly studied extralegal factor (juror characteristics) but will also describe more contemporary research investigating how victim and defendant characteristics and behavior influence legal decision-making in adult rape trials.

## *Impact of Mock Juror Characteristics*

Much of the early research (see Olsen-Fulero & Fulero, 1997) investigating extralegal factors focused on juror characteristics, specifically attitudes (e.g., toward rape and/or sex roles) and traits (e.g., authoritarianism) in studies that did not include court outcome measures (e.g., verdict). The inclusion of outcome measures, however, can be found in an early study by Feild (1978), which demonstrated that juror attitudes did, in fact, influence verdicts. For example, belief in severe punishment

for rape led to harsher sentences, and a stronger belief that a woman was responsible for a rape led to more lenient punishment. In addition, a meta-analysis (including 8 rape cases of 32 total cases) by Narby et al. (1993) showed a relationship between authoritarianism and the tendency to convict rape defendants, but this finding might not hold in cases of acquaintance rape. Authoritarianism is a personality trait associated with submission to authorities perceived as legitimate, adherence to traditional values, and hostility toward those who violate traditional social norms (Altemeyer, 1981). Canto et al. (2020) report that people high in authoritarianism are more likely to place blame for an acquaintance rape on female victims than on their assailants.

Regarding specific juror demographic factors, researchers have consistently noted that juror gender influences outcome measures: female participants are more pro-victim than male participants (see Livingston et al., 2019). In fact, one could argue that this factor is the most widely described juror characteristic in the literature. The Olsen-Fulero and Fulero (1997) review included many examples of gender main effects (typically females more pro-victim than males) and interactions, including participant gender. There are a number of other studies (since 1996) that show evidence of the juror gender main effect (Black & Gold, 2008; Feldman-Summers & Lindner, 1976; Fischer, 1997; Hodell et al., 2009; Jenkins & Schuller, 2007; Kanekar et al., 1991; Lippert et al., 2017; Lynch et al., 2013, 2017; McKimmie et al., 2014; Russell et al., 2011; Schuller & Wall, 1998; Wall & Schuller, 2000; Wenger & Bornstein, 2006).

Researchers have also investigated jurors' empathy and identification with the victim. The former involves the tendency for people (including jurors) to assume the psychological perspective of either the rape victim or the rapist in viewing a rape incident (Deitz et al., 1982). In the 1980s, Deitz and her colleagues published three important studies in this research domain. This research, utilizing undergraduate participants, presented scenarios stating that a victim had been raped. The results showed that greater victim empathy (measured by their Rape Empathy Scale) was related to longer prison sentences (Deitz & Byrnes, 1981; Deitz et al., 1982) and a greater certainty of defendant guilt (Deitz et al., 1984).

Few studies have focused on the issue of rape empathy since Deitz's initial work. One such study (Weir & Wrightsman, 1990) replicated Deitz's work by showing undergraduate participants who had high empathy with the victim rated the victim as more credible and yielded more guilty verdicts (see also Allison, 1996). In another study (Wiener et al., 1989), community members with prior experience with a rape victim were more likely to render a guilty verdict after reading a written rape summary, but there was no relationship between participants' rape empathy scores and verdict. Other studies have investigated issues related to identification with rape victims. For example, Kaplan and Miller (1978) examined identification with a potential rape victim. They found that parents of female-only children were more conviction-prone than were parents of male-only children when a rape occurred during a child's normal daily routine. In addition, Kanekar et al. (1985, experiment 3) asked female undergraduates from India to act as jurors or to think of themselves as victims in a stranger rape case. Identification with the victim led to longer recommended prison sentences than acting as a juror.

## *Impact of Victim Characteristics and Behavior*

Research involving acquaintance rape has investigated various aspects of victim/defendant characteristics and behaviors, attempting to uncover specific factors that might influence jurors during decision-making. This domain of research includes investigating the sexual assault of elders. Hodell et al. (2009) examined rape of older women by presenting undergraduates with a rape trial in which a 76-year-old woman (experiment 1) or different-aged elders (66-, 76-, or 86-year-old woman; experiment 2) was raped by a son or a neighbor in either the victim's home or a nursing home. Both experiments showed that guilty verdicts were rare, and experiment 2 found that mock jurors rendered more guilty verdicts when the rape occurred at the victim's home than at a nursing home. It was argued by Hodell et al. that relative to one's home, a nursing home may be perceived by participants as a safe and secure location where such a crime was less likely to occur. Other studies in this domain include those that have focused on physical characteristics of a victim in an acquaintance rape. For example, recent studies have investigated the influence of victim weight. Clarke and Lawson (2009) presented undergraduates with an acquaintance rape case and found that participants who had higher Rape Myth Acceptance scores and held anti-fat attitudes recommended longer sentences when the victim was overweight compared to thin. It was argued that this finding is consistent with previous research finding an association of rape myth acceptance with a stereotypical and conservative view of the world in which thinness is accepted for women (e.g., Vrij & Firmin, 2001). Research also finds that victims who dressed more conservatively were blamed less than those who dressed provocatively at the time of the attack (Cassidy & Hurrell, 1995; Workman & Freeburg, 1999).

Besides physical appearance, research has focused on internal characteristics of those involved in a rape, such as victim beliefs and attitudes. Brown-Iannuzzi et al. (2019) examined the perceived morality of a rape victim via manipulating the victim's involvement in Christianity. Community members received an acquaintance rape case in which the victim offered testimony indicating that she was an atheist, a practicing Christian, or there was no mention of religion. Although there was no main effect of the religion manipulation, morality of the victim mediated the relationship between the victim's religious belief and the participants' verdict. Participants perceived the Christian victim as more moral than the atheist victim, which predicted a higher conviction rate.

Research has also investigated the influence of victim behavior during and after an acquaintance rape on legal decision-making. Finkel et al. (1991) examined the issue of victim resistance during an assault (see Woodhams et al., 2012) by presenting undergraduates and community members with one of three cases: a battered woman who kills her spouse, a female defendant who kills an alleged assailant on the subway, and an alleged female rape victim who kills one of her assailants – the woman pleads self-defense. The results showed that the participants supported the victim's claim of self-defense more in the battered woman's case (63%) compared to the subway killing (27%) and rape (23%) cases. However, research by Angelone

et al. (2015) showed that, if the victim physically resisted the attack, participants rated defendant guilt higher. Other research has also found that victims who did not resist a rape (Ong & Ward, 2006) and victims who resisted later in the man's sexual advances (e.g., resisting intercourse versus touching; Kopper, 1996) were blamed more than those who resisted the rape or resisted earlier sexual advances. Interestingly, Black and Gold (2008) found that mock jurors (counter to a hypothesis) recommended harsher punishments for a defendant when the victim resisted the rape verbally rather than using both physical and verbal resistance. The authors argued that (like Krulewitz & Nash, 1979) participants may have viewed the victim's physical resistance as an unacceptable reaction based on traditional gender norms. Focusing on the victim's demeanor, Klippenstine and Schuller (2012) varied the victim's emotional response (tearful/calm) and the time of the emotional response (day following assault versus at trial). The results showed that undergraduate participants rendered more guilty verdicts when the victim showed the same emotion both the day after the assault and at trial. Thus, a victim's consistent demeanor, rather than a specific type of emotion, influences guilty verdicts.

### *Impact of Defendant Characteristics and Behavior*

Studies examining defendant characteristics have shown that race (e.g., Feild, 1979; Klein & Creech, 1982), attractiveness (e.g., Bagby et al., 1994; Erian et al., 1998; Jacobson, 1981; Lynch et al., 2017), socioeconomic status (e.g., Black & Gold, 2003, 2008), and defendant gender (Russell et al., 2011) influence juror decision-making in cases involving acquaintance rape. When a perpetrator is of a relatively high socioeconomic status, mock jurors (especially men) blame the victim more and are less punitive toward the perpetrator. Specifically, Black and Gold (2008) manipulated the socioeconomic status of a rape defendant (high: doctor versus low: bus driver) in a date rape scenario and found that mock jurors were more likely to blame the victim and less likely to blame a defendant who was a doctor compared to a defendant who was a bus driver. Researchers have also found positive-leaning biases of physical attractiveness, which might be explained by the halo effect (i.e., attractive people are judged more positively; Nisbett & Wilson, 1977). Bagby et al. (1994) found that undergraduate participants judged a physically attractive defendant less harshly than a physically unattractive defendant in a mock rape trial, regardless of victim attractiveness. However, Erian et al. (1998), also using undergraduate participants, found that defendant attractiveness interacted with both victim attractiveness and strength of evidence. Relatively weak evidence led to an unattractive defendant receiving a harsher sentence, regardless of the victim's attractiveness, but stronger evidence led to the defendant receiving a harsher sentence when the victim was attractive.

Recently, Lynch et al. (2017) manipulated the desirability of a rape defendant (high: attractive and high SES vs. low: unattractive and low SES) and the price of a date (expensive vs. inexpensive) in a mock rape trial administered to a sample of

community participants. Overall, participants viewed the desirable defendant as more credible than the undesirable defendant, and women viewed the desirable defendant as more credible than the undesirable defendant when the date was expensive. Further, participants' perceptions of the victim's expectations to have sex and the defendant's deservedness to have sex (i.e., entitlement to sex) following the date significantly mediated the relationship between defendant desirability and victim blame. Specifically, when the defendant was desirable, participants viewed the victim as having higher expectations to have sex and the defendant as more deserving of sex and consequently blamed the victim more than participants in the undesirable condition.

Studies have also investigated the interaction of defendant and victim race. This research has not yielded consistent results. For example, evidence of a race interaction was found by Feild (1979) in a study with community members and a stranger rape case. Prison sentence was equal for a Black victim, regardless of whether the offender was Black or White, but when the victim was White, prison sentences were longer when the defendant was Black than White. Klein and Creech (1982), with an undergraduate sample (experiment 1, relationship between the victim and defendant not stated; experiment 2, stranger rape), did not find this interaction. They found that perpetrators who committed crimes against a White woman were rated as more likely to be guilty than those who victimized a Black woman, regardless of the perpetrator's race. Finally, Bagby et al. (1994) presented undergraduates with a stranger rape case, but the victim's race did not predict verdict.

Besides physical appearance, research has focused on internal characteristics of rape defendants, such as intention and attitudes. Regarding the former, Wiener and Rinehart (1986) manipulated the defendant's initial intention (rape versus seduction) and the motivating impetus for the attack (externally imposed attraction to an ex-lover versus self-induced thought about the convenient stranger) in a sample of undergraduate participants. The perpetrator received a longer sentence when the rape was "intentional" and the rape involved self-induced motivation.

### *Impact of Victim/Defendant Intoxication*

Society regards women who partake in excessive drinking as diverging from prescriptive gender norms (Gomberg, 1982; Leigh, 1995; Wilsnack, 1984) and, therefore, not exhibiting socially acceptable behavior. If a victim was intoxicated at the time of a rape, it has critical implications for how the justice system treats the case. It is possible that the case will not reach the courtroom (see Campbell, 2008). This possibility exists because prosecutors try to avoid uncertainty (Albonetti, 1986, 1987), tending to prosecute those cases that have the greatest chance of leading to a conviction. Prosecutors might perceive an intoxicated victim as less credible than a sober victim and thus not pursue her case (Spohn, 2008). In addition, an intoxicated rape victim might be disinclined to report the crime, thinking (with some justification) that the police will not believe her (Cook & Koss, 2005).

The concerns of victim credibility among intoxicated victims and offenders are well founded. Schuller and Wall (1998, see also Osborn et al., 2018; Wall & Schuller, 2000) were the first to show this in a court context. Community members received a trial summary of an acquaintance rape in which either one, neither, or both parties were moderately intoxicated (from alcohol) at the time of the alleged assault. When the complainant had consumed alcohol, as opposed to cola, participants found the complainant's claim less credible and were less likely to view the defendant as guilty. However, if the defendant had consumed alcohol, as opposed to cola, participants were more likely to view the case as one of assault, to perceive the defendant as less credible, and to find the defendant guilty. A later study (Wenger & Bornstein, 2006) showed a similar effect for LSD as well as for alcohol intoxication, using undergraduate participants in an acquaintance or dating context.

There are some studies that have manipulated drinking and drug use only on the part of the victim. Regarding alcohol, Lynch et al. (2013) showed that the context of intoxication is an important factor in legal decision-making involving rape. Lynch et al. (2013) manipulated whether the victim purchased her own alcoholic or nonalcoholic drinks or had these drinks purchased for her by an alleged perpetrator. Community members voted guilty more often when the alleged perpetrator bought the alcoholic drinks versus the victim. Moreover, when the perpetrator was the drink purchaser, jurors rated him as less credible, thus increasing guilty verdicts (i.e., there was evidence of mediation). These results appear to indicate that participants perceived the alleged perpetrator (when he bought the alcoholic drinks) as responsible for getting the victim intoxicated (i.e., he was planning to take advantage of her).

Other research examining only victim intoxication involved the ingestion of rohypnol, otherwise known as the "date rape drug" or "roofies." Jenkins and Schuller (2007; see also Schuller et al., 2013) presented a rape case to undergraduates in which a victim claimed that the defendant surreptitiously placed rohypnol in her drink. The researchers manipulated whether a forensic report was negative for the presence of the drug, was negative but there was an expert witness testifying on her behalf (i.e., the drug test might not be conclusive), or there was no report and no expert. Negative reports without an expert led to the lowest guilt rating.

## *Impact of Culture and Social Norms*

Other factors that might influence perceptions and judgments of the persons involved in an alleged rape are social and cultural influences. Many researchers interested in heterosexual dating scripts (i.e., cognitive models that guide people's dating interactions) have found that these scripts are very traditional. For example, a man is traditionally expected to ask a woman on a date and then pay for the date (Bartoli & Clark, 2006; Serewicz & Gale, 2008; Muehlenhard et al., 1985). In a series of two studies, Muehlenhard et al. (1985) investigated how situational dating factors affected undergraduate participants' justifications of a hypothetical date rape. They