

Prosecuting Acquaintance Rape Cases: Practical Suggestions for Trial from Social Science Research

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Jury trials for acquaintance rape cases can be difficult for a prosecutor to win. There are usually no witnesses, and little or no conclusive evidence of use of force and lack of consent. It often becomes a case of “he said, she said”: the man says it was consensual sex and the woman says it was not. Absent physical evidence, jurors can be reluctant to hand down a conviction that will have a lasting negative effect on the defendant’s life.

For the last three decades, social scientists—psychologists and sociologists—have studied people’s beliefs and attitudes about rape, and the results of those studies can be a resource for prosecutors as they evaluate an acquaintance rape case and prepare for jury selection and case presentation. We reviewed social science research on acquaintance rape with a view to extracting results that have application in a jury trial setting. Below, we outline key themes of this research, and then we present our practical suggestions in two parts, Voir Dire and Jury Selection, and Case Evaluation and Presentation.

The key themes explain why it’s difficult for most people to judge a rape case and how they resolve that problem.

- Accounts of acquaintance rape are likely to contain ambiguous speech and actions. For example, both parties may agree that one person said or did X, but disagree on its meaning. In ambiguous situations, people fall back on their preconceptions, knowledge, and experience of acquaintance rape.
- Relatively few people have direct personal experience with rape of any kind. Without personal experience to guide them in evaluating claims of rape, most people turn to cultural stereotypes and schemas about rape. Thus, two factors—ambiguity and lack of experience—impel people to rely on cultural stereotypes.
- Cultural stereotypes fail to reflect the reality of acquaintance rape. Although acquaintance rape is much more common than stranger rape, most people consider stranger rape to be “typical” and “real.” They have cultural scripts for what constitutes a “real rape” and a “real victim,” and these scripts, and the beliefs and attitudes that accompany them, do not match the characteristic experience of acquaintance rape.¹

We believe that many jurors will be in the position of relying on cultural stereotypes, with attitudes that bias them against a victim in acquaintance rape. In the first section below, we describe the different bases of bias, and how to identify jurors with these biases. In the second section, we describe more generally the features of acquaintance rape cases about which jurors probably need to be educated.

¹ Irina Anderson, “What is a typical rape? Effects of victim and participant gender in female and male rape perception.” *British Journal of Social Psychology* (2007) 46: 225-245.

I. Voir Dire and Jury Selection

Researchers have found two different types of factors that influence how individuals attribute blame in AR cases: characteristics of the individuals, such as particular attitudes, and apparent characteristics of the AR case, such as “inappropriate” behavior by the victim.

A. Juror characteristics influencing attributions of blame in AR Cases

The most significant juror characteristics to identify and explore in voir dire for AR cases are personal experience of rape and coerced sex, gender, Rape Myth Acceptance, Hostile/Benevolent Sexism, and Just World Beliefs.

1. Jurors with experience of rape need to be identified through a Supplemental Juror Questionnaire to protect their privacy and encourage disclosure and then evaluated carefully. Being raped and being accused of rape are experiences that are searing and personal. It is unlikely that a person can go through such an experience and remain objective about instances of alleged rape for others. They should be closely examined, because their personal experiences are likely to color their view of the case and make them an expert on the jury. Jurors who have been accused of rape should be excluded.

2. Gender is not necessarily a predictor of attitudes, except in instances where sex roles play a part in the issue, as happens in rape cases. Nearly every study of the schemas and scripts that people construct about rape shows that men have significantly different scripts for rape versus those held by women, especially as to what constitutes “real” rape. We describe those differences below in the section on Case Evaluation. This difference doesn’t mean men should be excluded from an AR jury, or that women get a free pass. Gender is not definitive, but you should look carefully at male jurors to determine whether they fall into any of the categories described below.

3. Rape Myth Acceptance (RMA) has been researched extensively and is a key factor in attributing blame to a victim in any rape case. When a rape doesn’t fit widely-held notions of what is “real” or “typical,” people are much more likely to rely on their beliefs about rape—that is, the level of Rape Myth Acceptance—in evaluating victim blame.² (TC – I moved this to go in rape myth section instead of having it singled out in intro summary). People who hold the following beliefs are likely to blame the victim in an acquaintance rape case. [These beliefs would be best identified by including the following statements in a supplemental juror questionnaire and using a “*Strongly agree* to *Strongly disagree*” scale.]³

1. A person who thinks all sexual jokes about women are offensive is just overreacting.
2. The extent of AR on college campuses has been greatly exaggerated.
3. It is not right for a man to be accused of raping his date if the date does not say “no” to sexual intercourse.

² Bettina Frese, Miguel Moya, and Jesús L. Megías, “Social Perception of Rape: How Rape Myth Acceptance Modulates the Influence of Situational Factors,” *Journal of Interpersonal Violence* (2004) 19:2, 143-161.

³ This version is adapted from G. Lawrence Farmer and Sarah McMahon, “Scale for the Identification of Acquaintance Rape Attitudes: Reliability and Factorial Invariance,” *Journal of Human Behavior in the Social Environment*, The Haworth Social Work Practice Press, an imprint of The Haworth Press, Inc., 11:3-4 (2005) 213-325.

4. It is OK for a man to joke around with his friends about forcing a woman to have sexual intercourse, as long as he never actually does it.
5. When an unattractive woman is raped, it can be assumed that she did more to provoke it than an attractive woman would.
6. When rape happens on a date, it is usually because the woman sends mixed messages to the man about what she wants sexually.
7. A woman who gets upset when a man jokingly grabs her breast at a party is overreacting.
8. A woman would probably think it was romantic if a man assumed she wanted to have sexual intercourse without actually asking her first.

4. Sexism, either hostile or benevolent. When determining whose account to believe in an AR case, people rely on their assumptions and beliefs about the sexes—what men are like, what women are like, what their relationships are supposed to look like. Although early research focused mainly on adversarial attitudes about the sexes, the latest research suggests that it's helpful to distinguish hostile sexism from benevolent sexism.

Hostile sexism is, as the label suggests, an attitude that sees the other sex—in the context of AR, this is usually men viewing women—as monolithic (“Women are all the same”) and an adversary who can't be trusted. These attitudes can be identified using the following voir dire questions⁴.

9. Do you believe that many women are actually seeking special favors under the guise of asking for “equality”?
10. Do you believe that most women interpret innocent remarks or acts as being sexist?
11. Do you think that most women are too easily offended?
12. Do you think that feminists want women to have more power than men?
13. Do you believe that women seek to gain power by getting control over men?
14. Do you think that when women lose to men in a fair competition, they typically complain about being discriminated against?

Benevolent sexism also views women as sharing one identity, but this identity is a positive one—warm, nurturing, and feminine. Benevolent sexists put women on a pedestal and see women as responsible for “guarding their virtue”. Therefore, they disapprove of women who engage in “inappropriate/unwomanly” activities such as heavy drinking, dressing provocatively, or appearing to neglect their family. The following voir dire questions will help identify jurors who hold such attitudes².

15. Do you believe that many women have a quality of purity that few men possess?
16. Do you think that women should be cherished and protected by men?
17. Do you believe that men are not complete without women?
18. Do you think that a good woman should be set on a pedestal by her man?
19. Do you believe that women, compared to men, tend to have a superior moral sensibility?

⁴ The questions for both hostile and benevolent sexism are adapted from Peter Glick and Susan Fiske, “The Ambivalent Sexism Inventory: Differentiating Hostile and Benevolent Sexism,” *Journal of Personality and Social Psychology*, 70:3 (1996), 491-512, as well as their second article, Glick and Fiske,, “The Ambivalence Toward Men Inventory: Differentiating Hostile and Benevolent Beliefs About Men,” *Psychology of Women Quarterly* 23 (1999) 519-553.

20. Do you think that men should be willing to sacrifice their own well-being in order to provide financially for the women in their lives?

5. Just World beliefs. From the earliest rape research on, a constant theme has been that some people's evaluation of rape derives from their Just World Beliefs, and/or from defensive attribution. In order for jurors to maintain their own personal sense of security, they find a way to attribute blame to the victim so they can feel reassured that they would not have met the same fate. The following questions will help identify such jurors:

21. Do you believe that most people get what they deserve in life?
22. Do you think that when something bad happens to someone, they probably played a part in causing it?
23. Do you believe that good things happen to good people?

6. Culture cognition. One study⁵ uses a concept called "cultural cognition" to distinguish among individuals, in particular "hierarchical" types and "egalitarian" types. In this study, people who attributed the greatest blame to an AR victim were hierarchical females over 60; individuals under 30 who were "egalitarian" blamed the victim the least. This is a reminder that making assumptions based on gender alone—that women will always be more sympathetic to a rape victim than men—does not guarantee a bias-free jury.

The questionnaire used to determine whether an individual is hierarchical or egalitarian consists of 32 questions, most of which are not voir dire-friendly: e.g., "A lot of problems in our society today come from the decline in the traditional family, where the man works and the woman stays home," and "Too many people today expect society to do things for them that they should be doing for themselves."⁶ Although such questions are likely not permissible in voir dire, we do believe you should be attentive to anything a juror says that indicates he or she has a very traditional-hierarchical or very egalitarian outlook.

B. AR case characteristics that influence attributions of blame

Although AR cases may share basic similarities—little solid evidence and a lot of ambiguity—they differ in details. In some instances, those details have been studied and we know what type of person is more likely to blame the victim in those cases. In this section, we focus on those particular characteristics of AR cases and suggest voir dire questions that will help identify undesirable jurors.

1. Cases involving "inappropriate behavior." Behavior deemed "inappropriate" often figures in an AR case—the victim may have been drinking, dressed provocatively, and/or apparently receptive to the man's advances. In this situation, benevolent sexists are a special concern. These may appear to be good jurors, because their high opinion of women would seem to indicate that they would be sympathetic to the victim. However, if the victim

⁵ Dan M. Kahan, "Culture, Cognition, and Consent: Who Perceives What, and Why, in 'Acquaintance Rape' Cases," in *University of Pennsylvania Law Review*, available from the author at <http://www.culturalcognition.net/browse-papers/culture-cognition-and-consent-who-perceives-what-and-why-in.html>.

⁶ A full list of these questions can be found in D.M. Kahan, D. Braman, J. Gastil, P. Slovic, and C.K. Mertz, "Culture and Identity-Protective Cognition: Explaining the White-Male Effect in Risk Perception," *Journal of Empirical Legal Studies* 4:3, 465-505. Available at <http://www.culturalcognition.net/browse-papers/culture-and-identity-protective-cognition-explaining-the-whi.html>

doesn't fit their notion of "appropriate," this is the group that is most likely to blame the victim. We suggest asking the questions for benevolent sexism (above) as well as probing about notions of appropriate behavior:⁷

24. Do you think that most women always put their family first?
25. Do you believe that most women do not go out and party while their children are at home?
26. Do you think it is unladylike for women to dress provocatively?
27. Do you think it is unladylike for a woman to have more than one or two drinks?

2. Cases involving the claim that "She really wanted it" or "She led me on". These claims are a little different from being "apparently receptive" to a man's advances—it suggests active pursuit instead of passive acceptance. In this type of case, it's important to include questions for hostile sexism in your voir dire. In addition, questions on sexual expectations⁸ will be helpful. [Due to the nature of the questions, we would recommend including the following statements in a supplemental juror questionnaire and using a "Strongly agree to Strongly disagree" scale.]

28. Many women get a kick out of teasing men by seeming sexually available and then refusing male advances.
29. If a woman does not physically resist a man's sexual advances, it is safe for the man to assume that the woman wants to have sexual intercourse.
30. When a woman passionately kisses her date, she is letting him know that she wants to have sexual intercourse.
31. If a woman goes to her date's apartment, she is letting her date know that she is open to having sexual intercourse.
32. Any time a woman dresses seductively, she is indicating that she is willing to have sexual intercourse.
33. If a woman initiates physical contact on a date, it is OK for her partner to assume she wants to have sexual intercourse.
34. If a woman is saying "yes" to sexual intercourse with her body language, but she is saying "no" verbally, a man should listen to the woman's body language because it is more accurate.

3. Cases in which the victim did not behave as a "real" victim would. "Real" victims are thought to act a certain way: they resist their attacker, verbally and physically, they are obviously emotionally shaken by the event, crying and incoherent; they report the rape immediately; and they help the police in their investigation. If the AR victim did not behave consistent with that schema, potential jurors who hold such beliefs need to be identified. We suggest incorporating the following questions into your voir dire.

35. Do you believe that a genuine rape victim tries to fight off her attacker with every last bit of strength?

⁷ Questions about "appropriate" behavior are adapted from Dominic Abrams, G. Tendayi Viki, Barbara Masser, and Gerd Bohner, "Perceptions of Stranger and Acquaintance Rape: The Role of Benevolent and Hostile Sexism in Victim Blame and Rape Proclivity," *Journal of Personality and Social Psychology* (2003) 84:1, 111-125.

⁸ These are from G. Lawrence Farmer and Sarah McMahon, "Scale for the Identification of Acquaintance Rape Attitudes," cited above.

36. Do you believe that a genuine rape victim would co-operate with the police in every possible way?
37. (For men) Do you believe you would be able to physically fight off an attacker? (For men) Do you believe the women in your life (wife/sister/mother) would be able to fight off an attacker?
38. Do you believe that in most cases, a rape victim will have physical injuries?

II. Case Evaluation and Presentation

The attitudes and expectations about AR are culturally-based and widely shared. The widespread nature of these attitudes makes it impossible to eliminate every juror who holds such biases. For this reason, it is likely that some of the seated jurors will be persons who are skeptical of the victim. Through your presentation and explanation, you will need to educate and persuade those jurors about AR. In this section, we examine research findings pertinent to both the evaluation of AR cases and the presentation of evidence in such cases.

A. Priming the jury. Rape research has shown multiple factors and attitudes that contribute to how a victim of AR is evaluated. Researchers have also studied ways to try to soften those judgments. One finding was that people viewed the rape victim more favorably if they had previously been exposed to information about the unfair treatment of women (unrelated to rape).⁹ The information presented included the following points:

- Women have been treated as inferior to men throughout history and while that treatment is no longer as bad as it was in the past, it continues to some degree.
- Women are not paid as much as men for equivalent jobs.
- Women often feel they will be penalized at work if they get pregnant and they often have difficulty getting their jobs back following maternity leave.

When trying an AR case, we would recommend trying to incorporate those ideas early – either in jury selection or in openings – to prime jurors to be more receptive to the plight of the victim.

Much of the research into rape explores and accepts the notion advanced by Susan Brownmiller in her seminal study, *Against Our Will: Men, Women, and Rape*, that rape is not about sex, but is a means by which men control women and render them powerless. We would not advise introducing this larger issue, or any discussion of feminism, but we do believe it's helpful to keep in mind that any juror who seems to accept male viewpoints should be privileged over female viewpoints is a juror who merits more scrutiny.

B. Gender differences in evaluating rape cases. For acquaintance rape, research shows that men and women have different scripts or explanations for how an acquaintance rape unfolds. Below, we highlight certain aspects of these differences,¹⁰ and then note what this

⁹ J.D. Johnson and I. Russ, "Effects of salience of consciousness-raising information on perceptions of acquaintance versus stranger rape," *Journal of Applied Social Psychology*, 19 (1989), 1182-1197.

¹⁰ These findings come from M. Diane Clark and Marjorie H. Carroll, "Acquaintance Rape Scripts of Woman and Men: Similarities and Differences." *Sex Roles* (2008) 58: 616-625.

means for presentation of an AR case at trial. These are the assumptions and preconceptions they bring to bear on interpreting it and attributing blame:

- Women are more likely to say that a rape occurred, and men more likely to say that the event was not a rape and the accuser is mistaken.
- Women were more likely to be sensitive to the victim's internal emotional experiences, while men have a tendency to place responsibility on the woman.
- Women can believe that AR can happen when a man insists on sex and won't take "no" for an answer; men generate a script where the man insists and the woman "gives in"—but they don't view that as rape, and a man who did that and who is then accused of rape is wrongly accused of rape.
- Attitudes about AR are related to attitudes about how men and women are supposed to behave on dates—men believe that it's okay to date someone just to get sex, while women tend not to entertain that notion.
- Men are less likely to deem "party rape" as rape—there's alcohol, both parties are drunk, and that's not rape.

Consideration must be given to the presence or absence of factors in your case that may trigger the above-mentioned beliefs and assumptions. For example, you may need to address the reluctance (particularly of male jurors) to define an event as "rape", explicitly clarify that lack of resistance does not equal consent, and/or describe how alcohol consumption interferes with one's ability to consent to sexual activity. In addition, if your case – by virtue of the facts present – is at particular risk for highlighting such preconceptions, then male jurors must be screened for these attitudes with great care.

C. Presentation of victim. Social science research has also identified certain features of a rape case that jurors will use to determine credibility in the absence of any conclusive evidence. Many studies confirm that people believe that a "real victim":

- Did not know the perpetrator
- Was not drinking or doing drugs
- Was appropriately dressed
- Said "no" clearly
- Resisted the rape, possibly sustaining injuries
- Has not had/does not have multiple sex partners (in theory, this information should be in limine)
- Is physically smaller than the perpetrator (Victims larger than perpetrators are more likely to be blamed; while victims smaller than the perpetrator are less likely to be blamed.)¹¹
- Is socially respectable and has a good reputation¹²
- Is visibly emotional in court and on the stand¹³ (TC: added the cite)

¹¹ Richard M. Ryckman, Suzanne S. Graham, Bill Thornton, Joel A. Gold, and Marc A. Lindner, "Physical Size Stereotyping as a Mediator of Attributions of Responsibility in an Alleged Date-Rape Situation," *Journal of Applied Social Psychology* (1998) 28:20, 1876-1888.

¹² Level of social respectability: Barbara Krahé, "Social psychological issues in the study of rape." *European Review of Social Psychology* (1991) 2: 279-309; reputation: Ellen S. Cohn, Erin C. Dupuis, and Tiffany M. Brown, "In the Eye of the Beholder: Do Behavior and Character Affect Victim and Perpetrator Responsibility for Acquaintance Rape?" *Journal of Applied Social Psychology* (2009) 39,7: 1513-1535. Reputation was operationalized as victim dates but does not "hook up"/victim sleeps around, and perpetrator doesn't "hook up" and is "real gentleman"/victim always picking up girls to sleep with.

If any of these features describe the victim, they should be highlighted. Where the victim departs from these features, we suggest you explicitly point out that these features are not elements of rape and direct jurors' attention to the actual key elements of rape (e.g., lack of consent, use of force).

D. Presentation of aggressor/defendant. Often, in the case of AR, the defendant appears to be a “nice young man,” one “with his future ahead of him”—a future that jurors believe should not be undermined or wrecked by “one mistake.” Overcoming that hurdle is often a difficult one, but two characteristics have been identified as key for many people when evaluating whether the accused is really a rapist:

1. Whether he used physical force
2. Whether he got angry with the victim if/when she resisted, as anger can be a sign that the victim did not “give in.”¹⁴

If possible, highlight the use of coercion, whether physical or verbal, and any display of anger.

Additionally, research shows that people assign less blame to perpetrators when they were under the influence of alcohol or drugs at the time of the rape.¹⁵ If the defendant was not drinking or using drugs, that is a fact that should be emphasized.

In conclusion, we believe that while social science research can be valuable in and of itself, such research can have practical application in court. Our aim is to bridge the gap between theory and practice. In this paper, we have tried to identify and adapt social research findings on acquaintance rape to aid the prosecution in conducting voir dire and in presenting the case at trial.

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¹³ See Karl Ask and Sara Landstrom, “Why Emotions Matter: Expectancy Violation and Affective Response Mediate the Emotional Victim Effect,” *Law & Human Behavior* 34 (2010), 392-401, which makes this point and also cites previous studies making the same point.

¹⁴ Cohn, Dupuis, and Brown, “In the Eye of the Beholder,” cited above.

¹⁵ K. J. Stormo, A.R. Lang, and W.G.K. Stritzke, “Attributions About Acquaintance Rape: The Role of Alcohol and Individual Differences,” (1997) *Journal of Applied Social Psychology* 27:279-305. See also Jennifer Castello, Christina Coomer, Jamie Stillwell, and Kelly Leach Cate, “The Attribution of Responsibility in Acquaintance Rape Involving Ecstasy,” *North American Journal of Psychology* (2006) 8:3, 411-420.