

“DO YOU THINK SEXUAL ASSAULT AND
HARASSMENT ARE A BIG PROBLEM IN SOCIETY?”:
HOW #METOO MAY IMPACT JUROR DECISION-
MAKING IN SEXUAL ASSAULT AND HARASSMENT
CASES

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I. INTRODUCTION

The #MeToo phenomenon suggests that attitudes about sexual assault and harassment are changing. Indeed, a year after the #MeToo movement gripped national attention, one survey shows that “not only are most Americans familiar with the #MeToo movement,” they also believe “the #MeToo movement will have a lasting effect on the way society thinks about sexual harassment and/or assault in the workplace.”¹ However, another survey suggests the lasting effect may be “a small but clear shift against victims,” demonstrating that “18% of Americans now think false accusations of sexual assault are a bigger problem than attacks that go unreported or unpunished, compared with 13% in November last year.”² Some researchers reconcile the growing differences in attitudes about sexual assault and harassment by linking them to political polarization,³ while others consider the possibility that gender differences are intensifying:

The movement has evidently changed the way many women understand sexual harassment/assault, as 24% say it has made them realize that they may have been a victim. Only 12% of men say the same Men are also

* Dual J.D./M.A. of Political Science Candidate, May 2021, University of Louisville Brandeis School of Law. In the late years of his life, my Grandfather, John Paul Pennington, remarked that he didn’t understand why women were expected to carry the vestiges of sexual assault and harassment. This Note was written with the same spirit. In addition to my Grandfather, I would like to dedicate this Note to everyone who has supported my research and writing—my parents, Paul and Kimberly Pennington, my husband, William Richards, the University of Louisville Political Science Department, and Brandeis School of Law Professors Canon and Abramson. You are all deeply loved and appreciated.

¹ Chris Jackson & Mallory Newall, *The #MeToo Movement: One Year Later*, IPSOS (Oct. 5, 2018), <https://www.ipsos.com/en-us/news-polls/MeToo-Movement> [https://perma.cc/G9QG-NHJ3].

² *After a Year of #MeToo, American Opinion Has Shifted Against Victims*, THE ECONOMIST (Oct. 15, 2018), <https://www.economist.com/graphic-detail/2018/10/15/after-a-year-of-metoo-american-opinion-has-shifted-against-victims> [https://perma.cc/6QE5-TN8W].

³ Jackson & Newall, *supra* note 1.

more inclined than women to believe that some have been unfairly accused during the movement (59% vs. 51% of women) and that the prominent people accused of sexual harassment/assault have been adequately punished (26% vs. 19% of women).⁴

Understanding social attitudes about sexual assault and harassment is crucial to litigators who prosecute or defend such claims in the courtroom because “no other criminal offense . . . is as intimately related to broader social attitudes and evaluations of the victim’s conduct as sexual assault.”⁵ Research on juror decision-making has typically found that “male and female jurors reach comparable verdicts in many, if not most kinds of cases [But] women are relatively more likely to side with the prosecution or a civil plaintiff in cases involving child or sexual assault victims.”⁶ Research further detects that “women are more likely than men to interpret behavior as sexually harassing” and “less likely than men to assign responsibility to the victim.”⁷ Competing with the influence of gender in juror decision-making, research also “shows that women are less likely to be chosen as foreperson, participate less, and both see themselves and are perceived by other jurors as less persuasive.”⁸ This research subset further demonstrates that when female jurors are muted in the process of deliberation of sexual assault and harassment claims, stereotypical attitudes predominate.⁹ Rape is commonly misunderstood as “an infrequent crime in which a degenerate, sex-starved, knifewielding stranger jumps from the bushes to attack a blameless, nubile young woman.”¹⁰ Thus, sexual assault and harassment claims are usually analyzed through rape myths, which are “prejudicial, stereotyped, or false beliefs” about perpetrators, victims, and the circumstances under which sex crimes occur.¹¹

This Note intends to: (1) raise awareness of the effect of the #MeToo movement on juror decision-making; and (2) demonstrate the applicability and utility of social science research in addressing those effects. The first section focuses on the origins of the #MeToo movement,

⁴ *Id.*

⁵ JoAnne Sweeny, “*These Are Not Rapists*”: *Rape Myths and Character Letters in Sexual Assault Cases*, 89 UMKC L. REV. (forthcoming 2020) (manuscript at 21) (on file with author).

⁶ Brian H. Bornstein & Amy J. Kleynhans, *The Evolution of Jury Research Methods: From Hugo Münsterberg to the Modern Age*, 96 DENV. L. REV. 813, 824 (2019).

⁷ Joanna D. Pozzulo et al., *The Effect of Victim Gender, Defendant Gender, and Defendant Age on Juror Decision Making*, 37 CRIM. JUST. & BEHAV. 47, 49–50 (2010).

⁸ Bornstein, *supra* note 6, at 824.

⁹ Sweeny, *supra* note 5.

¹⁰ *Id.* at 22.

¹¹ *Id.*

the factors that transformed #MeToo from a mere symbol to a major cultural phenomenon, and the resultant impact of the successful social movement. In addition, it will discuss research on juror decision-making, explaining the best-known model of juror decision-making and the impact of extralegal influences. The second section demonstrates how data assessing the impact of the #MeToo movement on public opinion could facilitate an understanding of changes in how prospective jurors may view plaintiffs, defendants, and victims in sexual assault and harassment controversies. Finally, the Note’s conclusion provides practical recommendations for attorneys to address these attitudes, through interpretation and application of social science research in jury selection, even without the help of jury consultants and social science researchers.

II. BACKGROUND

A. *The Impact of the #MeToo Movement*

On October 5th, 2017, the *New York Times* headline read, “Harvey Weinstein Paid Off Harassment Accusers for Decades.”¹² Thereafter, disturbing accounts of the Hollywood producer’s sexual harassment and assaults of women, including many well-known actresses, appeared in every major American media outlet.¹³ Weinstein’s subsequent criminal indictment led to what media dubbed the “Weinstein Effect,” where “men and women around the world have [become] emboldened to come forward with their own accusations of sexual abuse.”¹⁴ In conjunction with the Weinstein Effect, #MeToo gained national prominence. The phrase was originally coined by social activist Tarana Burke, who wanted to create solidarity among victims of sexual harassment and assault.¹⁵ On October 15th, 2017, actress Alyssa Milano used the phrase on Twitter: “If you’ve

¹² See Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html?mtrref=www.google.com> [https://perma.cc/DT65-ZUUN].

¹³ See Riley Griffin et al., *#MeToo: One Year Later*, BLOOMBERG (Oct. 5, 2018), <https://www.bloomberg.com/graphics/2018-me-too-anniversary> [https://perma.cc/C2UE-8MKG].

¹⁴ Jesselyn Cook & Ned Simons, *The Weinstein Effect: How a Hollywood Scandal Sparked A Global Movement Against Sexual Misconduct*, HUFFINGTON POST (Nov. 8, 2017, 7:49 AM), https://www.huffingtonpost.com/entry/weinstein-effect-global_us_5a01d0e0e4b066c2c03a563b [https://perma.cc/CUD9-4Y84].

¹⁵ Stephanie Zacharek et al., *TIME Person of the Year 2017: The Silence Breakers*, TIME (Dec. 18, 2017), <http://time.com/time-person-of-the-year-2017-silence-breakers> [https://perma.cc/KMT8-FTRU].

been sexually harassed or assault[ed] write ‘me too’ as a reply to this tweet.”¹⁶ By the next day, more than 30,000 people had tweeted #MeToo.¹⁷

#MeToo quickly became a global movement, inspiring women worldwide to share stories of abuse, intimidation, and discrimination across industries, racial groups, and political party lines.¹⁸ Soon after #MeToo trended, allegations against other high-profile men surfaced.¹⁹ Roy Moore, Republican nominee for the U.S. Senate in Alabama, and Al Franken, a Democratic U.S. Senator from Minnesota, lost their political careers as a result of sexual misconduct allegations.²⁰ Larry Nassar, a former doctor for U.S. Gymnastics, was indicted and constructively sentenced to life in prison after more than 150 women accused him of committing sexual abuse under the guise of medical treatment.²¹ Older allegations against Bill Cosby, star of the *The Cosby Show*, found renewed traction, leading to his indictment and conviction for aggravated sexual assault in 2018.²² Further, #MeToo spurred the use of other hashtags (e.g., #MyHarveyWeinstein, #WhatWereYouWearing),²³ and led to the founding of Time’s Up, a formal organization founded by Hollywood celebrities, which boasted a vast legal defense fund and advocacy for anti-harassment legislation.²⁴

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Griffin, *supra* note 13.

¹⁹ *Id.*

²⁰ See Jessica Taylor, *An Upset in Trump Country: Democrat Doug Jones Bests Roy Moore in Alabama*, NPR (Dec. 12, 2017, 8:00 PM), <https://www.npr.org/2017/12/12/570291123/will-it-be-moore-or-jones-polls-are-closed-in-divisive-alabama-senate-election> [<https://perma.cc/CBL8-7932>]; Jane Mayer, *The Case of Al Franken*, THE NEW YORKER (July 22, 2019), <https://www.newyorker.com/magazine/2019/07/29/the-case-of-al-franken> [<https://perma.cc/4BTB-NK3Z>]; Dan Corey, *Here’s a List of Political Figures Accused of Sexual Misconduct*, NBC (Dec. 16, 2017, 5:00 PM), <https://www.nbcnews.com/storyline/sexual-misconduct/here-s-list-political-figures-accused-sexual-misconduct-n827821> [<https://perma.cc/A8XV-9PXV>].

²¹ See Carla Correa & Meghan Louttit, *More Than 160 Women Say Larry Nassar Sexually Abused Them. Here Are His Accusers in Their Own Words.*, N.Y. TIMES (Jan. 24, 2019), <https://www.nytimes.com/interactive/2018/01/24/sports/larry-nassar-victims.html> [<https://perma.cc/C9RJ-R3QP>].

²² See Laura Benshoff & Bobby Allyn, *Bill Cosby Sentenced to At Least 3 Years in State Prison for Sexual Assault*, NPR (Sept. 25, 2018, 2:15 PM), <https://www.npr.org/2018/09/25/651065803/bill-cosby-sentenced-to-at-least-3-years-in-state-prison> [<https://perma.cc/UC58-CSDS>].

²³ See Samantha Schmidt, *#MeToo: Harvey Weinstein Case Moves Thousands to Tell Their Own Stories of Abuse, Break Silence*, WASH. POST (Oct. 16, 2017, 5:17 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2017/10/16/me-too-alyssa-milano-urged-assault-victims-to-tweet-in-solidarity-the-response-was-massive> [<https://perma.cc/7Y8B-39QA>]; Abby Ohlheiser, *#MeToo Made the Scale of Sexual Abuse Go Viral. But is it Asking Too Much of Survivors?*, WASH. POST (Oct. 15, 2017, 5:27 PM), <https://www.washingtonpost.com/news/the-intersect/wp/2017/10/16/metoo-made-the-scale-of-sexual-abuse-go-viral-but-is-it-asking-too-much-of-survivors> [<https://perma.cc/3GQA-E6YT>].

²⁴ See Cara Buckley, *Powerful Hollywood Women Unveil Anti-Harassment Action Plan*, N.Y.

Despite these developments, news media questioned the sustainability of the #MeToo movement, warning that backlash over false or exaggerated accusations—and the blurred lines between awkward flirting and inappropriate behavior—could destabilize the movement.²⁵ *Vox* wrote, “at some point in the future, it is almost guaranteed that the reckoning as we know it will change, as reporting attention turns elsewhere and the seemingly never-ending faucet of misconduct allegations against high-profile figures slows down.”²⁶

Indeed, most digitally-supported social movements follow Anthony Downs’ classic issue-attention cycle, where alarmed discovery rapidly catapults an issue to national attention.²⁷ As the public realizes the costs involved in resolving the problem, disenchantment grows, interest declines, and attention moves to a new problem.²⁸ The initial issue remains unresolved or minimally treated, although sometimes subject to sporadic periods of renewed interest.²⁹ Evgeny Morozov goes further, reducing digitally-supported social movements to *slacktivism*, which describes “feel-good online activism that has zero political or social impact.”³⁰ *Slacktivism* comes in many forms, such as joining or subscribing to digital groups; signing an online petition; or posting with symbolic hashtags, memes, or pictures.³¹ While the activity spreads political awareness, the ultimate outcome is confined to the *appearance* of doing good.³²

TIMES (Jan. 1, 2018), <https://www.nytimes.com/2018/01/01/movies/times-up-hollywood-women-sexual-harassment.html> [<https://perma.cc/LCX8-P9L2>].

²⁵ P.R. Lockhart, *How the #MeToo Movement Can Survive a Brewing Backlash*, VOX (Dec. 22, 2017, 9:00 AM), <https://www.vox.com/identities/2017/12/22/16803346/metoo-movement-backlash> [<https://perma.cc/M263-GBD9>].

²⁶ *Id.*

²⁷ Anthony Downs, *Up and Down with Ecology—The Issue-Attention Cycle*, 28 PUB. INT. 38, 38 (1972).

²⁸ See *id.* at 39. “Costs” refers not only to the financial costs of solving the problem, but also to “any major restructuring of society or any loss of present benefits.” *Id.* at 40. Downs uses the example of solving traffic congestion or smog caused by increasing automobile usage, which would cost Americans in terms of mobility. *Id.*

²⁹ Downs, *supra* note 27, at 40.

³⁰ Evgeny Morozov, *The Brave New World of Slacktivism*, FOREIGN POL’Y (May 19, 2009, 8:11 AM), <http://foreignpolicy.com/2009/05/19/the-brave-new-world-of-slacktivism> [<https://perma.cc/6SWD-BU92>]. Slacktivism is propelled by the decline of social capital, defined by Robert Putnam as the “features of social organization such as networks, norms, and social trust that facilitate coordination and cooperation for mutual benefit.” Robert Putnam, *Bowling Alone: America’s Declining Social Capital*, 6 J. OF DEMOCRACY 65, 66–67 (1995). Putnam lists “the technological transformation of leisure” as one reason for the decline of social capital, arguing greater technology use enables individuals to customize their leisure time and improve satisfaction with their experience, but at the cost of external social interaction. *Id.*

³¹ Morozov, *supra* note 30.

³² *Id.*

Malcolm Gladwell agrees: “The platforms of social media are built around weak ties.”³³ He points to the Civil Rights Movement, namely the costs and dangers of participation and the strong ties that united participants, insisting that social change requires high-risk activism and strategic, hierarchical organization.³⁴ This is the opposite of online activism, which is characterized by low-cost, decentralized participation:

[Online activism] doesn’t involve financial or personal risk; it doesn’t mean spending a summer being chased by armed men in pickup trucks. It doesn’t require that you confront socially entrenched norms and practices. In fact, it’s the kind of commitment that will bring only social acknowledgement and praise.³⁵

However, other scholars believe digital media *is* effective in propelling social movements.³⁶ Lincoln Dahlberg argues that the Internet is not only a tool for systematic communication, but a tool that facilitates deliberative democracy.³⁷ Deliberative democracy is a rational-critical communication process where individuals deliberate over disputed validity claims.³⁸ While other forms of democracy “allow for the domination of politics by private power,” deliberative democracy enables public individuals to engage in debate cooperatively and reach mutual understandings and agreements.³⁹ Dahlberg believes that the Internet reproduces dominant discourses, but simultaneously allows marginalized groups to develop alternative discourses that would traditionally go unheard.⁴⁰ These “counter-publics”

³³ Malcolm Gladwell, *Small Change: Why the Revolution Will Not Be Tweeted*. NEW YORKER (Sept. 27, 2010), <https://www.newyorker.com/magazine/2010/10/04/small-change-malcolm-gladwell> [<https://perma.cc/5MLH-YP2V>].

³⁴ *Id.*

³⁵ *Id.*

³⁶ See Bill Wasik, *Gladwell vs. Shirkey: A Year Later, Scoring the Debate Over Social-Media Revolutions*, WIRED (Dec. 27, 2011, 4:00 PM), <https://www.wired.com/2011/12/gladwell-vs-shirkey> [<https://perma.cc/9G3M-4WDM>]. Shirkey argues, “the fact that barely committed actors cannot click their way to a better world does not mean that committed actors cannot use social media effectively.” *Id.* He explains that the Internet is becoming a tool for activism and online networks have played a crucial role in major political moments, like the 2001 impeachment of the President of the Philippines; South Korean protests against United States beef in 2008; the 2009 defeat of the Communist government in Moldova; and the Egyptian revolution of 2011. *Id.*

³⁷ Lincoln Dahlberg, *The Internet, Deliberative Democracy, and Power: Radicalizing the Public Sphere*, 3(1) INT’L J. OF MEDIA AND CULTURAL POL. 47, 51 (2007).

³⁸ *Id.* at 49.

³⁹ *Id.* at 50.

⁴⁰ *Id.* at 55–56.

can subsequently contest the dominant meanings and practices promoted by the “dominant publics.”⁴¹

Despite those who insisted the #MeToo movement would fail because of backlash or declining interest, #MeToo continues to empower victims and produce tangible, measurable outcomes.⁴² Indeed, the success of the #MeToo movement fits squarely into Dahlberg’s counter-publics theory, where #MeToo was not attached to a demand for change or a call to action, but rather encouraged victims to come forward. Mary Anne Franks best articulates that the #MeToo movement has been characterized by “the exposure of how much silencing women have experienced when they’ve tried to talk about sexual assault or sexual harassment.”⁴³ Franks further explains that the stories emerging from the #MeToo movement may imply the need for change, but specifically target the past silencing of women who have been sexually assaulted or harassed.⁴⁴ Franks says, “Sometimes the story is being told for [a reason other than demanding change]. Sometimes the story is being told simply to say this is worth hearing.”⁴⁵

Thus, #MeToo has created not only a low-cost⁴⁶ opportunity to share common experiences of sexual harassment and assault, but also a snowball phenomenon where, as the hashtag was increasingly used, the collection of voices created a sensation of solidarity. This encouraged more victims to speak, deepened the critical assessment of sexual assault and harassment in

⁴¹ *Id.* Dahlberg’s counter-publics directly oppose Gladwell’s assertion that high-risk activism is required to create social change. Although a counter-public requires a minimally demanding form of participation, they confront “socially entrenched norms and practices,” and pose a degree of personal risk to individuals who choose to associate with an alternative discourse. Gladwell, *supra* note 33. While the tangible implications may be limited, the phenomenon of counter-publics at least gives lasting rise to marginalized voices or alternative discourse, in a world previously dominated by the voice of a few privileged elites. Dahlberg, *supra* note 37, at 55–56.

⁴² See Univ. of Louisville Brandeis Sch. of Law, *#MeToo Keynote Speaker Mary Anne Franks*, YOUTUBE (Feb. 12, 2018), <https://www.youtube.com/watch?v=ViZKeAModiA> [<https://perma.cc/D3EQ-QD8U>].

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Here, “low-cost” is used to refer to the ease of posting online, as well as the possibility of doing so anonymously or without detail of the user’s experience. However, using #MeToo is not necessarily low-cost in terms of the associated risks, where the movement has spurred “a surge in retaliatory defamation lawsuits” and “mass online attacks, trolling, and other forms of harassment.” Bruce Johnson & Davis Wright Tremaine, *Worried About Getting Sued for Reporting Sexual Abuse? Here Are Some Tips*, ACLU (Jan. 22, 2018, 4:00 PM), <https://www.aclu.org/blog/womens-rights/worried-about-getting-sued-reporting-sexual-abuse-here-are-some-tips> [<https://perma.cc/RD33-FWBR>]; Leigh Honeywell, *Staying Safe When You Say #MeToo*, ACLU (Feb. 12, 2018, 10:00 AM), <https://www.aclu.org/blog/privacy-technology/internet-privacy/staying-safe-when-you-say-metoo> [<https://perma.cc/EYC7-4MPK>]. This also counters Gladwell’s assertion that online activism lacks “financial or personal risk.” Gladwell, *supra* note 33.

society, and propelled consequences and changes that persist. Since #MeToo went viral, the phrase has become a powerful symbol to draw attention to all women's issues.⁴⁷

In addition to becoming a powerful symbolic product, #MeToo continues to embolden women to expose perpetrators of sexual harassment and assault, albeit with mixed results. On one hand, sexual assault allegations were the focus of Brett Kavanaugh's confirmation hearings in 2018, but the Senate nevertheless approved his nomination to the Supreme Court.⁴⁸ Several women have come forward to express discomfort about the behavior of former Vice President and 2020 Democratic presidential candidate Joe Biden, who allegedly "touched [one woman], smelled her hair, and kissed the back of her head while she was working a campaign event."⁴⁹ While Biden's campaign briefly stumbled, it remains largely unaffected by these incidents.⁵⁰ On the other hand, ride-sharing companies Uber and Lyft are embroiled in litigation over policies that fail to protect female drivers and passengers from sexual assault and rape.⁵¹ And most recently, numerous high-profile men have been criminally charged or civilly sued for rape, sexual assault, and/or sexual harassment and face trial.⁵²

⁴⁷ See Monica Anderson & Skye Toor, *How Social Media Users Have Discussed Sexual Harassment Since #MeToo Went Viral*, PEW RES. CTR. (Oct. 11, 2018), <https://www.pewresearch.org/fact-tank/2018/10/11/how-social-media-users-have-discussed-sexual-harassment-since-metoo-went-viral/> [https://perma.cc/82B5-UWQF]. #MeToo continues to be used as a hashtag on social media, but has also become a staple in American journalism when reporting on sexual harassment or assault or beyond. Pew Research explains #MeToo content is now a part of everyday American media consumption: "Roughly two-thirds (65%) of U.S. adults who use social media say that at least some of the content they see on these platforms pertains to sexual harassment or assault. This includes 29% who say that a great deal of what they see on social media is focused on this issue . . ." *Id.*

⁴⁸ See Domenico Montanaro, *Republicans Push Kavanaugh Nomination Forward, But At What Cost?*, NPR (Sept. 29, 2018, 12:54 PM), <https://www.npr.org/2018/09/29/652724915/republicans-push-kavanaugh-nomination-forward-but-at-what-cost> [https://perma.cc/ME3R-84GU].

⁴⁹ Marie Solis, *Reckoning with the Joe Bidens of the #MeToo Movement*, VICE (Apr. 11, 2019, 1:20 PM), https://www.vice.com/en_us/article/8xz4nb/joe-biden-allegations-inappropriate-touching-me-too [https://perma.cc/4M5L-28F2].

⁵⁰ See *id.*

⁵¹ See Eric Westervelt, *Lawsuits Say Lyft Doesn't Do Enough To Protect Women From Predatory Drivers*, NPR (Sept. 12, 2019, 11:51 AM), <https://www.npr.org/2019/09/12/759876637/lawsuits-say-lyft-doesnt-do-enough-to-protect-women-from-predator-drivers> [https://perma.cc/5K6Z-K3V6]; Emily Stewart, *Uber and Lyft are Getting Rid of Tactics That Keep Sexual Assault Victims Silent*, VOX (May 15, 2018), <https://www.vox.com/technology/2018/5/15/17355702/uber-driver-arbitration-nondisclosure-sexual-harassment-assault> [https://perma.cc/YVX6-N44M].

⁵² See Tadd Haislop, *Antonio Brown Investigation: What to Know About Rape Accusation, Lawsuit by Former Trainer*, SPORTING NEWS (Dec. 11, 2019), <https://www.sportingnews.com/us/nfl/news/antonio-brown-investigation-lawsuit-trainer-rape-accusation/32meh1uotus1kcorpawbkr3f> [https://perma.cc/CS8A-K5CW] (discussing civil lawsuit filed against football player Antonio Brown); Brendan Pierson, *Factbox: Two Years of #MeToo in the Courts*, REUTERS (Jan. 8, 2020, 6:09 AM),

While misconduct allegations continue to flow,⁵³ the #MeToo movement has also led to reconsideration of broader law and policies on sexual harassment and assault, resulting in a number of changes at the state-level:

Some states have placed limits on nondisclosure agreements (NDAs).⁵⁴ Legislators also have cited the #MeToo movement in passing legislation to improve the testing of rape kits and to extend the statute of limitations for victims who want to file civil lawsuits against their abusers.⁵⁵ And nearly every legislature in the country has reexamined its own policies for dealing with workplace harassment.⁵⁶

Perhaps the most noteworthy effect, and the most elusive to researchers, is how the #MeToo movement has changed public opinion. One survey, conducted by YouGov on behalf of *The Economist*, suggested that the “storm of allegations, confessions and firings has actually made

<https://www.reuters.com/article/us-people-harvey-weinstein-factbox-metoo/factbox-two-years-of-metoo-in-the-courts-idUSKBN1Z71J9> [<https://perma.cc/L2ZM-YKXD>] (discussing R&B singer R. Kelly and actor Cuba Gooding Jr., who will stand trial on criminal charges for various sexual offenses); Jan Ransom & Jose A. Del Real, *Harvey Weinstein Charged With Rape in Los Angeles as N.Y. Trial Starts*, N.Y. TIMES (Jan. 24, 2020), <https://www.nytimes.com/2020/01/06/nyregion/harvey-weinstein-trial.html> [<https://perma.cc/D9WP-GNRL>] (discussing that prosecutors in Los Angeles announced charges against Harvey Weinstein for rape and sexual assault, as his trial for charges of sexual assault began in New York).

⁵³ Lockhart, *supra* note 25.

⁵⁴ See MD. CODE ANN., LAB. & EMP. § 3-715 (nullifies language in any employment agreement that waives “substantive or procedural right or remedy” for a future claim of sexual harassment); N.Y. GEN. OBLIG. LAW § 5-336 (prohibits employers from requiring nondisclosure of a sexual harassment claim unless it is the complainant’s preference); TENN. CODE ANN. § 50-1-108 (prohibits employers from requiring employees “to execute or renew a non-disclosure agreement with respect to sexual harassment in the workplace as a condition of employment.”); VT. STAT. ANN. tit. 21, § 495h(g) (limits the extent to which an agreement to settle a sexual assault claim can restrict the individual who made that claim from further disclosures concerning the claim); WASH. REV. CODE ANN. § 49.44.210(1) (prohibits employers from requiring employees to sign non-disclosure agreements preventing the disclosure of sexual harassment or sexual assault arising from work as a condition of employment). Arizona, New Jersey, and California have also passed laws limiting the use of or creating exceptions to nondisclosure agreements in the settlement of sexual harassment or assault claims. See Jeffrey Johnson, *Non-Disclosure Agreements and Arbitration Clauses in the #MeToo Era*, JD SUPRA (Aug. 29, 2019), <https://www.jdsupra.com/legalnews/non-disclosure-agreements-and-30226/> [<https://perma.cc/3SDU-Q59P>].

⁵⁵ See S.B. 5649, 66th Leg., Reg. Sess. (Wash. 2019).

⁵⁶ See Rebecca Beitch, *#MeToo Has Changed Our Culture. Now It’s Changing Our Laws*. PEW CHARITABLE TRUSTS (July 31, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/07/31/metoo-has-changed-our-culture-now-its-changing-our-laws> [<https://perma.cc/8E3C-Q7JT>]. See also Jon Griffin, *#MeToo Movement Has Lawmakers Looking for Ways to Halt Harassment in the Statehouse*, NAT’L CONF. OF STATE LEGIS. (Sept. 17, 2018), <https://www.ncsl.org/research/about-state-legislatures/legislatures-move-quickly-to-address-sexual-harassment.aspx> [<https://perma.cc/7L4J-6DR7>].

Americans more skeptical about sexual harassment.”⁵⁷ The results demonstrated “a small but clear shift against victims,” where all respondents agreed with statements like “false accusations of sexual assault are a bigger problem than unreported assaults” or “men who sexually harassed women 20 years ago should not lose their jobs today.”⁵⁸

The Democracy Fund Voter Study Group for 2016 and 2018 found that opinions on sexual harassment and women’s role in society increasingly correspond to the growing partisan divide.⁵⁹ For example:

On the question of whether women who complain about harassment often cause more problems than they solve, 54 percent of Republicans said in 2018 they agreed with that statement, up 4 points from 2016. Among Democrats, the change was again in the opposite direction, down 17 percent in 2018 from 19 percent in 2016.⁶⁰

A Pew Research Center study similarly found attitudes on #MeToo issues divided along party lines.⁶¹ Nevertheless, in both studies, as well as a 2018 poll by ABC News and the *Washington Post*, all participants were actually more likely to agree that sexual harassment against women is a problem in the workplace, regardless of party affiliation.⁶²

A *Vox* survey conducted with Morning Consult specifically examined the impact of #MeToo on women.⁶³ Its results highlighted that women of all ages: (1) overwhelmingly support the #MeToo movement; (2) have experienced similar rates of sexual harassment; and (3) generally agree on what constitutes sexual harassment, such as sexual jokes or comments, or being physically touched in a way that causes discomfort.⁶⁴ The survey also demonstrated that young women were more likely to have changed

⁵⁷ *After a Year of #MeToo, American Opinion Has Shifted Against Victims*, *supra* note 2.

⁵⁸ *Id.*

⁵⁹ Meredith Conroy, *Are Americans More Divided On #MeToo Issues?*, FIVETHIRTYEIGHT (Apr. 16, 2019, 6:01 AM), <https://fivethirtyeight.com/features/are-americans-more-divided-on-metoo-issues/> [<https://perma.cc/JDH4-HQXP>].

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Democracy Fund Voter Study Group, 2018 VOTER Study Full Data Set: Top Lines and Crosstabs including weighted panel 8 (2018), <https://www.voterstudygroup.org/publication/2018-voter-survey-1>; Democracy Fund Voter Study Group, 2016 VOTER Study Full Data Set: Top Lines and Crosstabs 23 (2016), <https://www.voterstudygroup.org/publication/2016-voter-survey>; Washington Post-ABC News Poll 9, WASH. POST. (2018), <https://www.washingtonpost.com/polling/2019/05/24/washington-post-poll-archive/>.

⁶³ Anna North, *The #MeToo Generation Gap is a Myth*, VOX (Mar. 20, 2018, 5:45 AM), <https://www.vox.com/2018/3/20/17115620/me-too-sexual-harassment-sex-abuse-poll> [<https://perma.cc/7JGH-EZNG>].

⁶⁴ *Id.*

their opinion on sexual assault or harassment, including their own experiences, and the #MeToo movement had become important to their political choices.⁶⁵ This survey suggests gender, rather than party, may be responsible for differences in attitudes about sexual assault and harassment.

The #MeToo movement has lasting impact on culture and the law. While the results of public opinion research are mixed, the data nevertheless suggests #MeToo has changed how individuals think about sexual assault and harassment. These differences include awareness of the issues experienced by women, what constitutes assault and harassment, and whether accusers should be more willingly believed or more deeply scrutinized. Said differences were powerfully manifest on February 24th, 2020, when Harvey Weinstein was convicted of one count of criminal assault in the first degree and one count of rape in the third degree.⁶⁶ Jane Manning, the Director of the Women’s Equal Justice Project, attributed the conviction to the strong-tie phenomenon fostered by the #MeToo movement: “The conviction of Harvey Weinstein is a stunning victory for every single woman who refused to remain silent any longer.”⁶⁷ Litigators should be aware of the #MeToo movement as it continues to drive powerful change in both the world and the courtroom. Particularly, where public opinion changes, attorneys should anticipate changes in the jury pool.

⁶⁵ *Id.*

⁶⁶ Compare Jan Ransom, *Harvey Weinstein’s Stunning Downfall: 23 Years in Prison*, N.Y. TIMES (Mar. 11, 2020), <https://www.nytimes.com/2020/03/11/nyregion/harvey-weinstein-sentencing.html> [<https://perma.cc/E83W-7RQE>] (reporting that Weinstein was sentenced to twenty-three years in prison and faces a criminal trial in Los Angeles) with Liam Stack, *Light Sentence for Brock Turner in Stanford Rape Case Draws Outrage*, N.Y. TIMES (June 6, 2016), <https://www.nytimes.com/2016/06/07/us/outrage-in-stanford-rape-case-over-dueling-statements-of-victim-and-attackers-father.html> [<https://perma.cc/VMH2-UUH6>]. Over a year before the #MeToo movement gained national attention, and four years before Weinstein was convicted and sentenced, the Brock Turner case exemplified the legal system’s poor approach to sexual assault. Turner was convicted of three counts of felony sexual assault. *Id.* Turner was further sentenced to six months in jail followed by three years of probation. *Id.* Turner was also required to register as a sex offender. *Id.* During the sentencing, Judge Aaron Persky remarked: “A prison sentence would have a severe impact on him. I think he will not be a danger to others.” *Id.*; See also Maggie Astor, *California Voters Remove Judge Aaron Persky, Who Gave a 6-Month Sentence for Sexual Assault*, N.Y. TIMES (June 6, 2018), <https://www.nytimes.com/2018/06/06/us/politics/judge-persky-brock-turner-recall.html> [<https://perma.cc/86NG-NGUA>]. Turner served only three months in jail. *Id.* Judge Persky’s lenient treatment resulted in his recall. See *id.* He was the “first judge recalled in California in more than 80 years.” *Id.* The discrepancy between Turner and Weinstein’s sentences demonstrates the powerful impact of the #MeToo movement.

⁶⁷ Jodi Kantor et al., ‘Finally’: *Ashley Judd and Other Weinstein Accusers Respond to Verdict*, N.Y. TIMES (Feb. 24, 2020), <https://www.nytimes.com/2020/02/24/nyregion/harvey-weinstein-accusers.html> [<https://perma.cc/Y75F-P995>].

B. The State of the Science on Jury Decision-Making

“[J]urors . . . need not enter the box with empty heads in order to determine facts impartially.”⁶⁸ The ignorant jury, or a “jury [that] operates on a blank slate, influenced only by what it hears and sees in court,” is a legal fiction.⁶⁹ Realistically, each juror brings her own values, experiences, and opinions to the jury box, which “are prime factors in shaping perceptions of evidence,” and affect how jurors understand and decide a case.⁷⁰ Thus, scientific research on jury decision-making places an emphasis on individual juror judgments to better understand the impact of extralegal influences.⁷¹ The predominant finding about jury decision-making is that “the best predictor of the jury’s verdict is the individual jurors’ predeliberation verdict preferences.”⁷²

The earliest research on jury decision-making occurred between 1914 and 1940.⁷³ This early research suffered from low ecological validity⁷⁴ and low external validity⁷⁵ because of methodological limitations.⁷⁶ Ultimately, researchers cannot recreate the tension and pressure that occurs during jury service, because surveys and experimental simulations lack the consequences that occur in actual judicial settings. Nevertheless, even early studies detected the impact of extralegal factors, such as gender.⁷⁷ The second major period of research on jury decision-making focused on the relationship between individuals’ characteristics and their judgments, setting the tone for the discipline.⁷⁸

⁶⁸ *Skilling v. United States*, 561 U.S. 358, 398 (2010).

⁶⁹ Newton N. Minow & Fred H. Cate, *Who is an Impartial Juror in an Age of Mass Media?*, 40 AM. U. L. REV. 631, 657 (1991).

⁷⁰ *Id.*

⁷¹ Brian H. Bornstein & Amy J. Kleyhans, *The Evolution of Jury Research Methods: From Hugo Munsterberg to the Modern Age*, 96 DENV. L. REV. 813, 813–816 (2019).

⁷² *Id.* at 816.

⁷³ *Id.* at 820.

⁷⁴ See ANOL BHATTACHERJEE, SOCIAL SCIENCE RESEARCH: PRINCIPLES, METHODS, AND PRACTICES 73 (2012) (“External validity or generalizability refers to whether the observed associations can be generalized from the sample to the population (population validity), or to other people, organizations, contexts, or time (ecological validity).”).

⁷⁵ *See id.*

⁷⁶ Bornstein, *supra* note 71, at 817–20.

⁷⁷ *Id.* at 822–824.

⁷⁸ *Id.* at 826 (“The renewed interest in the discipline, in general and jury research in particular, was fueled by a number of forces: larger societal changes (e.g., social unrest, rising rates of crime and violence), the growth of clinical psychology as a distinct profession with forensic applications (e.g., risk assessment), and courts’ gradual acceptance of social scientific research. Around the same time, trial consulting became popular . . .”).

Most research seeks to understand how jurors make decisions in general verdict cases⁷⁹ that require juries to decide whether a defendant is guilty or not guilty, after both parties present evidence and the judge instructs the jury.⁸⁰ In general verdict cases, jurors deliberate independently, with few limitations.⁸¹ Once the jurors give their decision, no supporting reasons are necessary.⁸²

While several theories of reasoning may explain how jurors reach general verdicts, the story model is both the most well-known and the most accurate model of juror decision-making.⁸³ In a general verdict case, jurors interpret the presented evidence through their own life experiences and perceptions to formulate a fitting narrative or “story of the case.”⁸⁴ Throughout the trial, jurors will “search these stories for inconsistencies, check for contradictions in evidence, and explore the fit of alternative stories.”⁸⁵ When a juror encounters evidence that contradicts or undermines their chosen narratives, the juror may dismiss or lend little credence to said evidence.⁸⁶ Jurors may even “misremember and mischaracterize evidence in order to shoehorn it into their story narrative.”⁸⁷ When jurors engage in group deliberation, jurors will similarly defend their own construction of the story, until the group reaches consensus on the “best” story.⁸⁸

Recent research extends the story model by identifying “a number of juror and defendant characteristics likely to play a role in shaping jurors’ preferred verdicts at trial.”⁸⁹ The identified juror characteristics include race, gender, socioeconomic status, trust in the legal system, and need for

⁷⁹ Kayla A. Burd & Valerie P. Hans, *Reasoned Verdicts: Oversold?*, 51 CORNELL INT’L L. J. 319, 329 (2018).

⁸⁰ *Id.* at 329.

⁸¹ *Id.* There is usually no external interference with this process, but jurors may be required to reach a unanimous decision, imposing some limitation on their deliberations. *Id.* Federal Rule of Civil Procedure 49 also allows judges to order civil juries to use general verdicts accompanied by questions that the jury must answer, to give the court insight into jurors’ comprehension and decision-making. *Id.*

⁸² *Id.* General verdicts are used in both criminal cases and civil cases. *Id.* They may be supplemented by the use of written questions “employed during sentencing to determine relevant facts, such as the presence of aggravating and mitigating circumstances, issues of culpability, the amount of a theft, or the danger that a defendant poses.” *Id.* at 329–30.

⁸³ *Id.* at 335–36.

⁸⁴ *Id.* at 336.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 337.

⁸⁸ *Id.* at 336 (“The deliberation generally leads to acceptance of the most fitting story, which is the one that most comprehensively accounts for the facts in the case.”).

⁸⁹ Dennis J. Devine & David E. Caughlin, *Do They Matter? A Meta-Analytic Investigation of Individual Characteristics and Guilt Judgments*, 20 PSYCH. PUB. POL. AND L. 109, 111 (2014).

cognition.⁹⁰ The identified defendant characteristics include race, socioeconomic status, prior criminal record, physical attractiveness, and courtroom demeanor.⁹¹ In the “director’s cut” version of the story model:

jurors’ initial mental representations of trial-related events are determined by juror and defendant characteristics along with any information acquired before trial via the media, the nature of the charges, and the attorneys’ opening statements. Initial trial representations then interact with characteristics of the incoming evidence and serve as the basis for formulating one or more stories, which are then translated into mental models for evaluation. How stories fare when tested via mental simulation then has direct implications for a juror’s preference verdict.⁹²

Similarly, an investigation of multiple empirical studies links juror and defendant characteristics to jurors’ judgments.⁹³ However, the meta-analytic investigation also considers the impact of stereotypes and scripts:

Stereotypes are person-related categories consisting of a central label and associated behavioral attributes; *scripts* represent sets of related events that are understood to occur in a causal sequence. In essence, stories are based on inferences about what is true, but some inferences come from information stored in memory and made accessible via the activation of jurors’ stereotypes and scripts.⁹⁴

The investigation centers around a few fundamental premises: (1) existing cognitive structures interact with incoming trial-related information to provide jurors with a set of information used to construct the story of the case; (2) jurors’ stereotypes and scripts are a function of life experiences, which are in turn associated with their personal characteristics; and (3) much of what jurors know about crimes and criminal behavior comes from media sources, including news, TV shows, and movies.⁹⁵ Several participant characteristics exhibit relationships with guilt judgments, namely juror race (in conjunction with defendant race), juror authoritarianism, juror legal trust, and juror gender (in cases involving sex-related crimes).⁹⁶ While the ideal is that extralegal influences play no role at

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 111–12.

⁹⁶ *Id.* at 125.

trial, the large and growing empirical literature demonstrates that juror decision-making is influenced by what jurors are exposed to before trial, courtroom practices and procedures during trial, *and* the personal characteristics of trial participants.⁹⁷ While the research suggests the extent to which these extralegal influences affect jurors depends on the nature of the case, ultimately they are “large enough to warrant the attention of jury scholars and legal practitioners.”⁹⁸

While the Sixth Amendment does not include the word “bias,” extralegal influences threaten a defendant’s Sixth Amendment right to a fair trial when these impressions harden into bias.⁹⁹ Courts have held that “the bias of even a single juror would violate the right to a fair trial by impartial, indifferent jurors.”¹⁰⁰ The Supreme Court itself broadly considers bias as “any influence that jurors acquire outside of the evidence and argument presented in open court.”¹⁰¹ However, according to the Supreme Court, impartiality is not compromised until these sensations rise to an actual predisposition against a defendant.¹⁰² Thus, “it is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.”¹⁰³

Biases prejudicial to a defendant may be implicit or explicit.¹⁰⁴ Implicit biases may be attitudinal (feelings one has about a particular group) or stereotypical (traits one associates with a particular group).¹⁰⁵ Implicit biases are deeply embedded in the subconscious and propel subtle, unconscious actions.¹⁰⁶ Most individuals are unaware of their implicit biases, which further can be seen in studies where levels of implicit bias conflict with self-reported attitudes.¹⁰⁷ Explicit bias refers to “the kinds of

⁹⁷ *Id.* at 109, 125. Personal characteristics may be observable characteristics like race, gender, or age, or psychological characteristics like intelligence, personality traits, moral values, trust in the legal system, and stereotypes or prejudices. *Id.* at 110.

⁹⁸ *Id.* at 125.

⁹⁹ Dov Fox, *Neuro-Voir Dire and the Architecture of Bias*, 65 HASTINGS L.J. 999, 1002 (2014).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Murphy v. Florida*, 421 U.S. 794, 800 n.4 (1975).

¹⁰⁴ Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Jury Bias*, 44 CONN. L. REV. 827, 829 (2012).

¹⁰⁵ *Id.* at 833 (“Implicit bias operates in areas such as gender, nationality, and social status, but strong levels of implicit racial bias relating to African-Americans have drawn the most attention. African-Americans, for example, are stereotypically linked to crime and violence; their behavior is more likely to be viewed as violent, hostile, and aggressive than is the behavior of whites; and they are more readily associated with weapons than are whites.”).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 834 (“‘Seek, and ye shall find’ has been the theme of implicit bias research. Implicit bias has been shown to be widespread among the general public, and to influence behavior by professionals

bias that people knowingly—sometimes openly—embrace.”¹⁰⁸ Explicit bias is also an important predictor of behavior, albeit a more obvious one.¹⁰⁹ Both implicit and explicit biases arise in issues concerning race, gender, nationality, social status, etcetera.¹¹⁰ Where “*subjective* experiences and attitudes are precisely what qualify jurors as . . . peers to render a commonsense verdict[,]” these sensations also underlie and inform implicit and explicit biases, potentially leading to the impartiality that deprives a defendant of the right to a fair trial.¹¹¹

The presence of either type of bias may be difficult to ascertain, especially as they occur in jurors.¹¹² Explicit biases go undisclosed because not only are individuals aware of their explicit biases, but they are also usually aware that such biases are socially unacceptable and will lead to disqualification.¹¹³ On the other hand, where implicit biases are “the subtle, unconscious alteration of judgment, not the conscious desire to injure,”¹¹⁴ the most extensive and penetrating *voir dire* may still overlook unwittingly biased jurors.¹¹⁵ Research finds judgments based on bias “appear to derive from both racial and class cues about the defendant” and may be more pronounced where race or class is presented as a salient fact in the case.¹¹⁶ Researchers have identified that jurors may experience a similarity-leniency effect, where jurors who share demographic features with the defendant, namely gender, socioeconomic status, or racial or ethnic identity, are more likely to acquit.¹¹⁷ Alternatively, out-group bias causes jurors with demographics dissimilar to the defendant to be more likely to convict.¹¹⁸ While the causal relationship is not straightforward, and researchers

and laypeople in contexts that include employment, medicine, voting, and law enforcement; it has also been detected in juvenile and criminal justice authorities.”)

¹⁰⁸ *Id.* at 842. See also Gregory Mitchell, *An Implicit Bias Primer*, 25 VA. J. SOC. POL’Y & L. 27, 33 (2018) (“Explicit bias is the bias observed when an individual verbally expresses a negative or positive attitude toward members of a particular group when directly asked how the individual feels about that group, or when an individual explicitly endorses a positive or negative stereotype with respect to a particular group.”).

¹⁰⁹ Kristin A. Lane et al., *Implicit Social Cognition and Law*, 3 ANN. REV. L. SOC. SCI. 427, 430 (2007).

¹¹⁰ Roberts, *supra* note 104, at 833.

¹¹¹ Fox, *supra* note 99, at 1004.

¹¹² Roberts, *supra* note 104, at 838–46.

¹¹³ *Id.* at 844 (“In addition, jurors may remain silent when asked about bias because they do not comprehend the extent to which their biases will affect their ability to assess the case fairly. They will also remain silent if they are ‘intent on giving play to their biases.’”).

¹¹⁴ *Id.* at 846.

¹¹⁵ *Id.* at 840.

¹¹⁶ Jeannine Bell & Mona Lynch, *Cross-Sectional Challenges: Gender, Race, and Six-Person Juries*, 46 SETON HALL L. REV. 419, 440–41 (2016).

¹¹⁷ *Id.* at 437.

¹¹⁸ *Id.* at 438.

frequently find biases may be countered by the strength of evidence in a case, researchers continue to explore how jurors’ “attitudes and cognitive schemas inform the perception and interpretation of a host of evidentiary factors critical to fair legal judgment.”¹¹⁹

III. ANALYSIS

After the #MeToo movement flooded the American media landscape,¹²⁰ Pew Research Center found that two-thirds of Americans overall believed “recent sexual harassment allegations primarily reflect widespread societal problems.”¹²¹ Research further showed that twenty-two percent of women had experienced sexual harassment at work while forty-two percent of women had experienced some form of gender discrimination at work.¹²² Forty-five percent of men admitted they face a lot or some pressure to join in when other men talk about women in a sexual way.¹²³ Finally, fifty-seven percent of women and forty-two percent of men agreed the country has not gone far enough when it comes to giving women equal rights with men.¹²⁴

Similarly, in 2019, FiveThirtyEight aggregated a number of polls “to track changes in attitudes and beliefs, including what Americans think about issues of sexual harassment and misconduct.”¹²⁵ Although 2016 and 2018 data from the Democracy Fund Voter Study demonstrated a growing partisan gap on gender issues, the evidence also showed “that more people

¹¹⁹ Jennifer K. Elek & Paula Hannaford-Agor, *First, Do No Harm: On Addressing The Problem of Implicit Bias in Juror Decision Making*, 49 COURT REV. 190, 192 (2013).

¹²⁰ See *supra* Part II, section A.

¹²¹ John Gramlich, *10 Things We Learned About Gender Issues in the U.S. in 2017*, PEW RES. CTR. (Dec. 28, 2017), <https://www.pewresearch.org/fact-tank/2017/12/28/10-things-we-learned-about-gender-issues-in-the-u-s-in-2017/> [https://perma.cc/A2EP-FELQ] (discussing J. Baxter Oliphant, *Women and Men in Both Parties Say Sexual Harassment Allegations Reflect ‘Widespread Problems in Society’*, PEW RES. CTR. (Dec. 7, 2017), <https://www.pewresearch.org/fact-tank/2017/12/07/americans-views-of-sexual-harassment-allegations/> [https://perma.cc/AFJ6-4EW4]).

¹²² *Id.* (discussing Kim Parker & Cary Funk, *Gender Discrimination Comes in Many Forms for Today’s Working Women*, PEW RES. CTR. (Dec. 14, 2017), <https://www.pewresearch.org/fact-tank/2017/12/14/gender-discrimination-comes-in-many-forms-for-todays-working-women/> [https://perma.cc/7B5Y-BZD9]).

¹²³ *Id.* (discussing Kim Parker et al., *On Gender Differences, No Consensus on Nature vs. Nurture*, PEW RES. CTR. (Dec. 5, 2015), <https://www.pewsocialtrends.org/2017/12/05/on-gender-differences-no-consensus-on-nature-vs-nurture/#millennial-men-are-far-more-likely-than-those-in-older-generations-to-say-men-face-pressure-to-throw-a-punch-if-provoked-join-in-when-others-talk-about-women-in-a-sexual-way-and-have-many-sexual-par> [https://perma.cc/LL52-R63K]).

¹²⁴ *Id.* (discussing Juliana M. Horowitz et al., *Wide Partisan Gaps in U.S. Over How Far the Country Has Come on Gender Equality*, PEW RES. CTR. (Oct. 18, 2017), <https://www.pewsocialtrends.org/2017/10/18/wide-partisan-gaps-in-u-s-over-how-far-the-country-has-come-on-gender-equality/> [https://perma.cc/TJG2-65QE]).

¹²⁵ Conroy, *supra* note 59.

from both parties view sexual harassment as a problem today than did before.”¹²⁶ Thus, while the data implies the #MeToo movement has “increased polarization on some issues of sexual harassment, the #MeToo movement [also] may have made Democrats and Republicans more aware of the prevalence of sexual harassment at work.”¹²⁷

As previously described, polling opinions about sexual assault and harassment in the wake of the #MeToo movement produce mixed results. However, the research consistently finds partisan differences.¹²⁸ An NPR–Ipsos poll found eighty-five percent of Democrats, compared with sixty-seven percent of Republicans, agreed alleged victims of sexual assault should receive the benefit of the doubt.¹²⁹ The report stated, “[the] party gap is nearly *twice* the size of the gender gap.”¹³⁰ A 2018 Pew Research Center survey on sexual harassment in the workplace also found that while “attitudes differ somewhat by gender, they vary most dramatically between Democrats and Republicans.”¹³¹ Indeed, some academics have argued the 2016 presidential election “primed sexist attitudes, which might have otherwise lain dormant,” in relationship to several studies that found hostile attitudes toward women predicted support for Donald Trump’s candidacy.¹³² The #MeToo movement “continued to elevate a discussion about changing cultural norms and offered an opportunity for elite partisans . . . to signal how they felt about issues of sexual harassment, which, in turn, may have shaped how . . . Republicans and Democrats said they viewed the issue.”¹³³

The 2016 and the 2018 data from the Democracy Fund Voter Group demonstrates Republicans are growing more skeptical of women who report assault or harassment and the motivation behind their claims.¹³⁴ In particular, over fifty percent of Republican respondents agreed that “when

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Tovia Smith, *On #MeToo, Americans More Divided By Party Than Gender*, NPR (Oct. 31, 2018, 5:00 AM), <https://www.npr.org/2018/10/31/662178315/on-metoo-americans-more-divided-by-party-than-gender> [<https://perma.cc/8WTF-9BAT>] (discussing Chris Jackson et al., *Ipsos/NPR Examine Views on Sexual Harassment and Assault*, IPSOS (Oct. 31, 2018), <https://www.ipsos.com/en-us/news-polls/NPR-Sexual-Harassment-and-Assault> [<https://perma.cc/9CCT-AMYG>]).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ NIKKI GRAF, PEW RES. CTR., *SEXUAL HARASSMENT AT WORK IN THE ERA OF #METOO 3* (2018), <https://www.pewsocialtrends.org/wp-content/uploads/sites/3/2018/04/Pew-Research-Center-Sexual-Harassment-Report-April-2018-FINAL.pdf> [<https://perma.cc/RA3P-65MF>].

¹³² Nicholas A. Valentino et al., *Mobilizing Sexism: The Interaction of Emotion and Gender Attitudes in the 2016 US Presidential Election*, 82 PUB. OPINION Q. 799, 805 (2018).

¹³³ Conroy, *supra* note 59.

¹³⁴ *Id.*

women demand equality these days, they are actually seeking favors” and “women who complain about harassment often cause more problems than they solve.”¹³⁵ The data also showed the percentage of Republicans who agreed that “women often miss out on good jobs because of discrimination” declined from thirty-nine percent to thirty-six percent across the surveys.¹³⁶ Further, the 2018 survey conducted by Pew Research Center found a small percentage of Republicans believed men were getting away with sexual harassment in the workplace and that women were not being believed.¹³⁷ Rather, sixty-eight percent of Republicans agreed the “focus on sexual harassment has made it harder for men to interact with women at work.”¹³⁸ Finally, the 2018 NPR–Ipsos poll found seventy-five percent of Republicans feel the #MeToo movement has gone too far, with seventy-seven percent of Republicans agreeing that false accusations are common.¹³⁹

However, while the partisan gap appears greater than the gender gap, party affiliation splits sharply according to gender.¹⁴⁰ Further, the differences in party affiliation have remained consistent over time.¹⁴¹ Pew Research Center studied party affiliation in early 2018 and stated: “As has been the case for more than two decades of Pew Research Center surveys, women are significantly more likely than men to associate with the Democratic Party.”¹⁴² In fact, Pew found that while the proportion of women voters who identify with the Democratic Party has remained relatively constant, a greater number of women are admitting they at least *lean toward* the Democratic Party.¹⁴³ The same survey demonstrated white voters are more likely to affiliate with or lean toward the Republican Party, as well as older generations.¹⁴⁴ In sum, research demonstrating partisan differences still invokes sharp differences in gender, race, and age, by virtue of the composition of the parties themselves.

Moreover, while partisan differences plainly manifest, research on attitudes after the #MeToo movement still finds effects that depend on

¹³⁵ Conroy, *supra* note 59.

¹³⁶ *Id.*

¹³⁷ GRAF, *supra* note 131, at 3.

¹³⁸ *Id.* at 7.

¹³⁹ *Id.* at 3.

¹⁴⁰ PEW RES. CTR., WIDE GENDER GAP, GROWING EDUCATIONAL DIVIDE IN VOTERS’ PARTY IDENTIFICATION 6 (2018), <https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2018/03/03-20-18-Party-Identification-CORRECTED.pdf> [<https://perma.cc/H9EA-CV3N>].

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 7, 13–14.

gender. In particular, studies demonstrate a growing political self-efficacy in women.¹⁴⁵ In late 2017, Pew Research Center analyzed Facebook posts discussing sexual misconduct, and found seventy-two percent of women in Congress were active on the topic as opposed to thirty-seven percent of men in Congress.¹⁴⁶ More significantly, Stop Street Harassment conducted an online survey in early 2018 where eighty-one percent of women admitted they had experienced sexual harassment during their lifetime.¹⁴⁷ The figure could have been a result of the design of the survey, which included “a broader definition of sexual harassment that includes the ‘continuum of experiences’ that women face.”¹⁴⁸ However, the results also included a specific breakdown, demonstrating “[seventy-seven] percent of women had experienced verbal sexual harassment, and [fifty-one] percent had been sexually touched without their permission. About [forty-one] percent said they had been sexually harassed online, and [twenty-seven] percent said they had survived sexual assault.”¹⁴⁹ Most women expressed their experiences of sexual harassment had occurred in public spaces, while “[thirty-eight] percent of women said they experienced sexual harassment at the workplace. Thirty-five percent said they had experienced it at their residence.”¹⁵⁰ The survey also found both women and men experience sexual harassment early in life, either “during preteen or teenage years.”¹⁵¹ While both women and men experienced feelings of anxiety and depression as a result of sexual harassment, women were particularly likely to change

¹⁴⁵ Political self-efficacy is “one’s estimation of personal ability to affect political outcomes.” Meghan Condon & Matthew Holleque, *Entering Politics: General Self-Efficacy and Voting Behavior Among Young People*, 34(2) POL. PSYCH. 167, 168 (2013). Political self-efficacy may be general or specific. *Id.* at 166-67. Scholars differ as to which estimation is more controlling. *Id.* Regardless of the distinction, political self-efficacy is important to political engagement, especially in younger or inexperienced participants. *Id.* at 168. The causal link between political self-efficacy and political participation is what supports the author’s assertion that #MeToo is creating greater political self-efficacy in women, where subsequently cited sources demonstrate greater political participation.

¹⁴⁶ Onyi Lam et al., *There’s a Large Gender Gap in Congressional Facebook Posts About Sexual Misconduct*, PEW RES. CTR. (Feb. 1, 2018), <https://www.pewresearch.org/fact-tank/2018/02/01/theres-a-large-gender-gap-in-congressional-facebook-posts-about-sexual-misconduct/> [https://perma.cc/Q5Z7-D4FN].

¹⁴⁷ Rhitu Chatterjee, *A New Survey Finds 81 Percent of Women Have Experienced Sexual Harassment*, NPR (Feb. 21, 2018, 7:43 PM), <https://www.npr.org/sections/thetwo-way/2018/02/21/587671849/a-new-survey-finds-eighty-percent-of-women-have-experienced-sexual-harassment> [https://perma.cc/Z48N-ZQEH] (citing *2018 Study on Sexual Harassment and Assault*, STOP STREET HARASSMENT (Feb. 21, 2018), <http://www.stopstreetharassment.org/our-work/nationalstudy/2018-national-sexual-abuse-report/> [https://perma.cc/W49M-2NMS]).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

“their own lives to avoid harassers and reduce their risks of being harassed.”¹⁵²

While studies showed women commonly experienced sexual assault and harassment in 2017, the results of the Stop Street Harassment survey detail how sexual assault and harassment are “[pervasive problems that] permeate[] all sectors of [women’s] lives.”¹⁵³ The number and quality of responses have been attributed to the #MeToo movement; while most victims do not report their experiences, the movement has “[broken] that silence and made it more culturally acceptable to talk about sexual harassment.”¹⁵⁴ As stated above, the #MeToo movement has become an important symbolic product not only drawing attention to sexual assault and harassment, but creating solidarity among victims and propelling them to further share their stories. Indeed, beyond the Stop Street Harassment survey, the number of sexual harassment claims filed with the Equal Employment Opportunity Commission increased nearly fourteen percent in 2018.¹⁵⁵ Further, Time’s Up Legal Defense Fund had received 4,000 complaints and was actively fighting 160 cases of sexual harassment in November 2019.¹⁵⁶

In addition to becoming more vocal about their experiences, a 2018 study by PRRI and MTV found young women were more likely to report political engagement than young men, in defiance of historical trends.¹⁵⁷ While women appeared ambivalent about Hillary Clinton’s campaign, studies now demonstrate “a greater interest in supporting female candidates” generally.¹⁵⁸ Not only did sixty-five percent of women ages eighteen through forty-four believe the country would be better off with more women in political office, sixty-one percent stated electing more women as “a very important priority.”¹⁵⁹ Further, women are increasingly admitting they would rather work for a woman than a man.¹⁶⁰ Thus, the

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Yuki Noguchi, *For Many #MeToo Accusers, Speaking Up is Just The Beginning*, NPR (Nov. 5, 2019, 7:14 AM), <https://www.npr.org/2019/11/05/772223109/for-many-metoo-accusers-speaking-up-is-just-the-beginning> [<https://perma.cc/PD9N-PUVF>].

¹⁵⁶ *Id.*

¹⁵⁷ Daniel Cox & Melissa Deckman, *Young Women Could Redefine The Women’s Vote*, FIVETHIRTYEIGHT (Jul. 5, 2018, 6:00 AM), <https://fivethirtyeight.com/features/why-young-women-might-get-more-women-elected/> [<https://perma.cc/2KQB-ESUY>] (citing Robert P. Jones et al., *Diversity, Division, Discrimination: The State of Young America*, MTV/PRRI REPORT (Jan 10, 2018), <https://www.prii.org/research/mtv-culture-and-religion/> [<https://perma.cc/8UB7-AXLL>]).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* (discussing Jennifer De Pinto, *Women Think U.S. Would Be Better Off With More Women in*

#MeToo movement has not only spurred women to be more vocal, but more politically active as well.

However, while “the #MeToo movement has served as a powerful unifying force for women,” research does find a generational difference within the female demographic.¹⁶¹ The same 2018 CBS News Poll that found young women were more interested in female candidates also found older women and men overall were considerably less likely to agree.¹⁶² Only half of older women considered women in political office a very important priority.¹⁶³ Perhaps most significantly, older women are less likely to say the #MeToo movement has affected how they think about sexual harassment and assault.¹⁶⁴ Scholars cite a variety of reasons for these differences, including disagreements over the messaging of the #MeToo movement,¹⁶⁵ what constitutes sexual harassment and how the behavior should be treated,¹⁶⁶ and the advent of social media, which subjected young women to a form of sexual harassment older women never experienced.¹⁶⁷ Other scholars point to the interactions between age and marital status:

Young women today are also far more likely to be single than those in their parents’ and grandparents’ generations were at this age. A study published in 2017 found that white married women’s political behavior tends to be oriented more narrowly to further the interests of their husbands and family. In contrast, women who are single are more likely to see their interests as aligned with those of other women.¹⁶⁸

The #MeToo movement also called into question the norms of masculinity, but much like older women, research shows the movement has had little impact on “how men feel about being men.”¹⁶⁹ FiveThirtyEight

Office – CBS News Poll, CBS NEWS (Jan. 19, 2018, 11:33 PM), <https://www.cbsnews.com/news/women-think-u-s-would-be-better-off-with-more-women-in-office-cbs-news-poll/> [https://perma.cc/5NF2-N4PF]).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Danielle Kurtzleben, *In 2017, Women Marched In Solidarity; 2019 Finds A Fractured Movement*, NPR (Jan. 19, 2019, 7:01 AM), <https://www.npr.org/2019/01/19/686830517/in-2017-women-marched-in-solidarity-2019-finds-a-fractured-movement> [https://perma.cc/QJ67-P236].

¹⁶⁶ Sheila Weller, *#MeToo’s Generational Divide*, TIME (Mar. 12, 2018, 2:14 PM), <https://time.com/5195952/metoo-generational-divide/> [https://perma.cc/2LWR-7GAX].

¹⁶⁷ *Id.*

¹⁶⁸ Cox & Deckman, *supra* note 157.

¹⁶⁹ Ella Koeze & Anna Maria Barry-Jester, *What Do Men Think It Means To Be A Man?*, FIFTYEIGHT (Jun. 20, 2018, 4:00 AM), <https://fivethirtyeight.com/features/what-do-men-think-it-means-to-be-a-man/> [https://perma.cc/44KW-MX57].

and WNYC conducted a nationwide poll of 1,615 men.¹⁷⁰ A majority admitted they had not “rethought their on-the-job behavior in the wake of #MeToo[,]” although seventy-seven percent were familiar with the movement.¹⁷¹ The survey further found “most employed men don’t believe they’ve seen sexual harassment at work; three-quarters said they had never been witness to such an incident [at all].”¹⁷² Rather, forty-two percent of men believed the #MeToo movement had created a disadvantage for men by creating a greater risk of being accused of sexual harassment.¹⁷³ Finally, “as with behavior in the workplace, #MeToo has not led most men to rethink their typical dating behaviors: [eighty-six] percent said they had not changed their behavior in romantic relationships in the wake of the movement.”¹⁷⁴ While verbal consent has become required in some states, most men continue to rely on physical body language to gauge interest in intimacy.¹⁷⁵

As previously stated, the results of public opinion research are mixed when measuring attitudes potentially affected by the #MeToo movement. However, the polls aggregated above represent the emerging trends that should alert attorneys to possible changes in the jury room.

Most importantly, research on the #MeToo movement demonstrates the empirical literature on the decision-making of female jurors is likely dated. While said research consistently found female jurors were muted in the deliberation process, research on the #MeToo movement shows women are becoming more vocal and politically involved on such issues. This implies that female jurors post-#MeToo would *not*, in fact, be sidelined in jury deliberations, but rather active in sharing and pressing discussion of their experiences. Furthermore, research on the #MeToo movement demonstrates consideration of extralegal influences are exceptionally important, where the data shows differences based on party affiliation and gender, as well as between younger and older women. By identifying these demographics, attorneys can also identify the impact of the #MeToo movement, including whether it has hardened or softened attitudes toward victims of sexual assault and harassment. In conclusion, while no singular profile of the post-#MeToo landscape exists, the emerging trends merit further research and careful *voir dire* to detect new attitudes affecting “the story of the case” jurors will build around claims of sexual assault and harassment.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

IV. BEST PRACTICES

The importance of jury selection has propelled the development of an entire industry of jury investigators and consultants.¹⁷⁶ If a juror has an online presence, investigators can obtain “pictures; conversations; preferences; as well as the places they have traveled; their relationship statuses; who they are friends with; their favorite books, movies, and hobbies; and sometimes their current locations.”¹⁷⁷ Consultants, on the other hand, usually rely on social science methods: “they first conduct public opinion polls and then trace correlations between a potential jurors' traits (race, sex, religion) and their attitudes toward certain subject matters, such as authority or equity. Based on these statistical averages, consultants help attorneys to select the best jurors during *voir dire*.”¹⁷⁸

Ultimately, jury investigators and consultants are financially unreasonable for most litigants. At \$10,000 to \$250,000 per trial, “consultants work mainly in high-stakes civil litigation and high-publicity criminal trials.”¹⁷⁹ Moreover, while online investigation does produce rich data points that are useful for evaluating jurors, the information is freely available for attorneys to collect themselves.¹⁸⁰ Finally, jury investigators and consultants can pose ethical considerations, especially where such services are largely “reserved for high-dollar civil trials and wealthy criminal defendants.”¹⁸¹ However, attorneys prosecuting or defending criminal or civil sexual assault or harassment cases can reduce the guesswork in jury selection without incurring the expense of jury investigators or consultants.

A. Polling Trends

First, public opinion polls demonstrate the attitudes attorneys should be aware of as they conduct *voir dire*. While both Republicans and Democrats have acknowledged the prevalence of sexual harassment, party remains a

¹⁷⁶ Katherine Allen, *The Jury: Modern Day Investigation and Consultation*, 34 REV. LITIG. 529, 529 (2015).

¹⁷⁷ *Id.* at 534–35. Physical investigations of jurors were curbed by *Sinclair v. United States*, 279 U.S. 749 (1929), but the rise of social media has supported the work of jury investigators, especially where “jurors are far more frank in their communications in their personal [social media] pages than typical jury questionnaires.” Allen, *supra* note 177, at 533–35.

¹⁷⁸ *Id.* at 536, 540.

¹⁷⁹ *Id.* at 538.

¹⁸⁰ *Id.* at 549–50.

¹⁸¹ *Id.* at 549.

strong indicator of attitudes toward sexual assault and harassment.¹⁸² Here, it is important to remember that while party identification is a plain statement, partisanship is a spectrum. A juror may express they are a Republican, even a ‘moderate’ Republican, but said juror could be anywhere from weakly fiscally and socially conservative to strongly fiscally and socially conservative. Thus, understanding where jurors exist on the spectrum of partisanship also affects the predictive power of their party identification. Ultimately, Republican party affiliation predicts a juror will be less likely to believe a victim of sexual assault or harassment, and more likely to treat their story with skepticism.¹⁸³ Moreover, Republican party affiliation predicts that a juror is less likely to believe women suffer negative consequences from discrimination, but rather discrimination and sexual harassment claims are in fact women “seeking favors” or creating conflict.¹⁸⁴ Where party identification sharply splits attitudes, the opposite applies in the case of Democratic party affiliation.¹⁸⁵ With both parties, these attitudes are likely to be more deeply entrenched in jurors who demonstrate strong partisanship.

The next significant pattern occurs at the intersection of age and gender.¹⁸⁶ While women overall lean towards Democratic Party affiliation¹⁸⁷—suggesting a more sympathetic attitude towards victims of sexual assault or harassment—women above forty-four are less likely to say the #MeToo movement has affected how they think about sexual assault and harassment.¹⁸⁸ Not only does this suggest that victims are likely to receive stronger support from younger women, but younger women are probably more likely to be vocal and assertive about their support for victims.¹⁸⁹ Data demonstrates that as the #MeToo movement spurred awareness of the prevalence of sexual assault and harassment, it also created solidarity that promoted self-efficacy among the women affected by the movement.¹⁹⁰ This change conflicts with the literature that says female jurors are less likely to participate in juror decision-making, and merits the attention of attorneys to the extent that, now, a young female juror’s voice may be the loudest during jury deliberations.¹⁹¹

¹⁸² See *supra* notes 128–39 and accompanying text.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ See *supra* notes 161–64 and accompanying text.

¹⁸⁷ See *supra* notes 140–44 and accompanying text.

¹⁸⁸ See *supra* notes 161–68 and accompanying text.

¹⁸⁹ See *supra* notes 149–59 and accompanying text.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

Finally, public opinion data also points to the possibility that some attitudes are now ‘baked-in’ according to gender.¹⁹² In addition to older women, the #MeToo movement appears to have had little effect on men.¹⁹³ Most men admit the #MeToo movement did not affect thoughts about their gender identity, workplace or romantic behavior.¹⁹⁴ Further, most men stated they had never seen sexual harassment at work, nor did they believe they had ever seen an incident of sexual harassment.¹⁹⁵ This implies that male jurors may view sexual assault and harassment claims through a pre-movement lens, misunderstanding or undervaluing the notion of consent, questioning the action and motives of the victim, and even undervaluing or sympathizing with the actions of the defendant.

B. Applying Social Science Methods to Voir Dire

In addition to understanding the attitudes that can be distilled from public opinion data, attorneys can apply social science methodology to detect these attitudes as they conduct *voir dire*. *Voir dire* is best likened to survey research, where scientists use “standardized questionnaires or interviews to collect data about people and their preferences, thoughts, and behaviors in a systematic manner.”¹⁹⁶ *Voir dire* is also comparable to survey research where attorneys should use the process not only to narrow the jury pool to the jury panel, but to gather information that can benefit the presentation of their case. In both settings, question construction is crucially important, requiring a design that allows respondents to “understand and respond to [the questions] in a meaningful way Poorly framed or ambiguous questions will likely result in meaningless responses with very little value.”¹⁹⁷ Further, in the context of civil or criminal sexual assault or harassment cases, question construction must be mindful of the sensitivity of the topic. Researchers explain “a question is sensitive if it raises concerns about disapproval or other consequences (such as legal sanctions) for reporting truthfully or if the question itself can be seen as an invasion of

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ BHATTACHERJEE, *supra* note 74, at 73.

¹⁹⁷ *Id.* at 74–75. Question content and wording should be scrutinized for whether the question is (1) clear and understandable; (2) worded in a negative manner; (3) ambiguous; (4) biased or contains value-laden words; (4) double-barreled; (5) too general; (6) too detailed; (7) presumptuous; (8) imaginary; or, (9) lacking in the information needed to correctly answer the question. *Id.* at 75–77. These factors affect the respondent’s understanding of the question and the accuracy of their answer. *Id.*

privacy.”¹⁹⁸ Questions about sexual behavior, victimization, and voting behavior are commonly labeled sensitive or threatening.¹⁹⁹

Demographic information is best suited for dichotomous, categorical questions.²⁰⁰ Even to the extent that these questions require jurors to admit their party identification, which fits into the genre of sensitive topics, resistance may be reduced by asking these questions to the entire jury pool.²⁰¹ This “decrease[s] the possibility of [singularly] identifying the respondent.”²⁰² On the other hand, indirect, open-ended questions are generally recommended to reduce the apprehension associated with sensitive topics.²⁰³ Indirect questions are “less threatening and [also] remove the tendency of respondents to answer in the way they perceive to be most socially desirable.”²⁰⁴ Open-ended questions “allow participants to explain their answer” and also increase rapport between the participant and the interviewer, neutralizing the social interaction and increasing the overall ease of answering honestly.²⁰⁵ Compared to party identification alone, partisanship is better measured through indirect, open-ended questions about partisan issues or voting frequency (e.g., “How often do you vote for Republican candidates?”). Respondents tend to avoid extreme answers about the frequency of certain behaviors,²⁰⁶ so attorneys can better gauge the strength of partisanship through the language and physical appearance of a juror responding to an indirect, open-ended question.

Likewise, questions about sexual assault, harassment, or victimization, are best suited for indirect, open-ended questions, but researchers recommend a few adjustments. First, “the use of behaviorally specific questions cannot be overemphasized . . . because they use words and phrases that describe to the respondent exactly what behavior is being measured.”²⁰⁷ This is important to attorneys in criminal or civil sexual assault or harassment cases, because such cases encompass a broad range of behavior. Attorneys not only need to understand how jurors react to various

¹⁹⁸ Susan McNeeley, *Sensitive Issues in Surveys: Reducing Refusals While Increasing Reliability and Quality of Response’s to Sensitive Survey Items*, in HANDBOOK OF SURVEY METHODOLOGY FOR THE SOCIAL SCIENCES 377, 377 (Lior Gideon ed., 2012).

¹⁹⁹ *Id.* at 379–80.

²⁰⁰ *Id.* at 391.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at 389–91.

²⁰⁴ *Id.* at 389.

²⁰⁵ *Id.* at 391.

²⁰⁶ *Id.*

²⁰⁷ Bonnie S. Fisher, *The Effects of Survey Question Wording on Rape Estimates*, 15 VIOLENCE AGAINST WOMEN 133, 143 (2009). In survey research, the use of behaviorally specific screen questions has also been linked to better recall. *Id.*

behaviors, but also whether jurors have experienced *any* inappropriate behavior, even if personal experiences differ from the behavior at issue in the case. Furthermore, a broad definition of sexual victimization is recommended because “respondents [often] limit their reports to incidents they [define] as criminal,”²⁰⁸ meaning jurors may not share certain opinions or experiences otherwise.

In addition to question construction, the overall structure of the questions asked should be considered. Survey researchers find the best response rates follow questions which “flow from least sensitive to most sensitive, from factual to attitudinal, and from more general to the more specific.”²⁰⁹ Researchers recommend beginning with “easy non-threatening questions that can be easily recalled,” and to avoid beginning with open-ended questions, instead opting for demographic data (e.g., age, gender, education level) or a dichotomous question (e.g., yes or no, true or false).²¹⁰ In the context of *voir dire*, this approach introduces the question-answer process to prospective jurors and puts them at ease, while also allowing the attorney to flag individuals based on the patterns identified above.

In survey research conducted through interviews, the interviewer herself is important to the outcome of the interview.²¹¹ The conduct of attorneys during *voir dire* is no different, as respondents or prospective jurors alike “feed off the motivation” of the interviewer.²¹² To elaborate, “if the interviewer is disinterested or inattentive, respondents won’t be motivated to provide useful or informative responses either.”²¹³ Attorneys should also be prepared to “ask probing questions as necessary even if such questions are not in the script,” especially as to those jurors who have been flagged based on characteristics that predict problematic attitudes for the attorney’s case.²¹⁴ Not only do interviewers control the quality of the interviews, but they are “in the best position to judge the quality of information *collected*, and may supplement responses obtained using

²⁰⁸ *Id.* at 144.

²⁰⁹ BHATTACHERJEE, *supra* note 74, at 77.

²¹⁰ *Id.*

²¹¹ *Id.* at 79.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.* See also Jeffrey M. Berry, *Validity and Reliability Issues in Elite Interviewing*, 35 PS: POL. SCI. AND POLS. 679, 679 (“[T]he best interviewer is not one who writes the best questions. Rather, excellent interviewers are excellent conversationalists. They make interviews seem like a good talk among old friends. [They don’t] carry a printed set of questions in front of [them] to consult as the interview [progresses]; yet [they] always [know where they are] going and never [lose] control of the discussion.”).

personal observations of gestures or body language as appropriate.”²¹⁵ Thus, attorneys should not only be mindful of the impact of their demeanor during *voir dire*, but also their ability to gain richer information with follow-up questions and observations of physical reactions.

Ultimately, “interviewers must keep in mind that it is not the obligation of a subject to be objective and to tell us the truth.”²¹⁶ Careful question construction and script, coupled with a controlled and scrupulous interviewer, function to avoid biases that may infect respondents and impact their responses.²¹⁷ Survey research itself faces a number of systematic biases, but social desirability bias is most applicable to *voir dire*.²¹⁸ Social desirability bias occurs where “respondents avoid negative opinions or embarrassing comments . . . [spinning the truth] in order to portray themselves in a socially desirable manner.”²¹⁹ Social desirability bias is likely particularly threatening in the context of *voir dire* during civil or criminal sexual assault or harassment cases, where attorneys are asking a group of potential jurors about personal and polarizing attitudes. While there is no recommendation that can completely overcome social desirability bias, it is easily provoked by nonverbal cues, which could come from the attorney, the judge, fellow jurors, or any other person in the courtroom.²²⁰ Moreover, negative questions prime social desirability bias (e.g., “Have you ever illegally downloaded music files from the Internet?”).²²¹ To actively address social desirability, “an astute interviewer [might] be able to spot inconsistent answers and ask probing questions or use personal observations to supplement respondents’ comments.”²²²

V. CONCLUSION

A full juror questionnaire has been provided in addition to this Note. The questionnaire adheres to the script pattern recommended by researchers, beginning with non-threatening demographic questions to

²¹⁵ *Id.* (emphasis added).

²¹⁶ *Id.* at 680.

²¹⁷ BHATTACHERJEE, *supra* note 74, at 80–82.

²¹⁸ *Id.* Recall bias may also be applicable and affects the validity of responses where “respondents may not adequately remember their own motivations or behaviors.” *Id.* at 82. Recall bias usually manifests when asking respondents to consider events in the distant past but may be overcome by asking for an account of the specific events that occurred, rather than the respondent’s perceptions and motivations. *Id.*

²¹⁹ *Id.* at 81.

²²⁰ BHATTACHERJEE, *supra* note 74, at 81.

²²¹ *Id.*

²²² *Id.* at 82.

acclimate prospective jurors and flag indicators that predict particular attitudes on sexual assault and harassment. The questionnaire then uses dichotomous queries to measure where open-ended questions are needed. The questionnaire also notes the nature of responses an attorney may flag as an actual indicator of a certain attitude. An attorney may decide to strike or may use this information to balance their presentation of the case. In conclusion, public opinion polls call attention to changes in attitudes about sexual assault and harassment, propelled by the #MeToo movement. However, where these attitudes might manifest in jurors deciding criminal or civil sexual assault and harassment cases, costly jury investigators and consultants may be less necessary. As long as attorneys know the trends across party affiliation, gender, and age, they can use basic social science methods to discern when those attitudes are present in prospective jurors, and take the appropriate measures to facilitate better outcomes for their clients.

VI. JUROR QUESTIONNAIRE²²³

A. Demographic Information²²⁴

1. Juror Name²²⁵:
2. Juror Number²²⁶:
3. Gender²²⁷:
4. Date of Birth²²⁸:
5. Age²²⁹:

²²³ This questionnaire has been adapted from JEFFREY T. FREDERICK, *MASTERING VOIR DIRE AND JURY SELECTION* 323–33 (2018). While the original questionnaire was intended for written use, these questions and the overall survey structure are also suitable for *voir dire*.

²²⁴ Demographic questions are the least sensitive and most factual. *Supra* notes 209–10 and accompanying text. Beginning with demographic information presents “easy non-threatening questions” that familiarizes jurors with the process, activating their recall and making them comfortable answering questions. *Id.* Moreover, while registering demographic information, the attorney can flag indicators of attitudes about sexual assault and harassment, namely gender and age. *Id.*

²²⁵ FREDERICK, *supra* note 223, at 323.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

6. What is your current address?²³⁰
7. How long have you lived at your current residence?²³¹
8. Please list any other place you have lived in the last five years²³²:
9. Marital Status²³³:
 10. If married or living with another person, what is your spouse's or significant other's job or occupation?²³⁴
 - (a) Job Description²³⁵:
 - (b) Educational Background²³⁶:
11. If you have children, please provide the following for each child²³⁷:
 - (a) Name²³⁸:
 - (b) Gender²³⁹:
 - (c) Age²⁴⁰:
 - (d) Do they live with you?²⁴¹
 - (e) Education²⁴²:
 - (f) Occupation²⁴³:

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ *Id.* Note that marital status may be an important indicator of attitude, where scholars have pointed to marital status as a reason for differences in the attitudes of young women and older women. *Supra* note 162 and accompany text.

²³⁴ FREDERICK, *supra* note 223, at 324.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

(g) Marital Status²⁴⁴:

12. If anyone else is living in your home, what is their relationship to you, age, and occupation?²⁴⁵

13. What is your highest level of education completed?²⁴⁶

14. Have you ever studied or received training in medicine, psychology, psychiatry, social work, sociology, or counseling?²⁴⁷ *Yes or no.*

15. If yes to question #14, please elaborate.

16. Do you have any friends or family who are physicians, psychiatrists, psychologists, or social workers?²⁴⁸ *Yes or no.*

17. Have you received any training in law, law enforcement, or criminology?²⁴⁹ *Yes or no.*

18. If yes to question #17, please elaborate.

19. Do you have any friends or family who work in law, law enforcement, or criminology?²⁵⁰ *Yes or no.*

20. Have you ever done any volunteer work?²⁵¹ *Yes or no.*

21. If yes to question #20, please elaborate.

22. What is your present job or occupation?²⁵²

23. Please list any other job or occupation you have had²⁵³:

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.* at 325.

²⁵³ *Id.*

24. Please list all groups or organizations in which you participate or are a member. For example, service clubs, church or church groups, unions or professional organizations, volunteer activities, educational or political groups, neighborhood or self-help groups²⁵⁴:

25. Were you ever in the military?²⁵⁵ *Yes or no.*

26. If yes to question #25, please elaborate.

*B. Partisanship*²⁵⁶

27. Please indicate which political party you identify most closely with²⁵⁷:

(a) Republican Party

(b) Democratic Party

(c) Other

28. Have you ever given money to a political party or political campaign?²⁵⁸ *Yes or no.*

29. Have you ever attended a political party or political campaign event?²⁵⁹ *Yes or no.*

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 326.

²⁵⁶ Although this section largely uses dichotomous questions, it further relies on indirect questions to measure the strength of partisanship. *Supra* notes 197–200 and accompanying text. Prospective jurors who indicate a high level of political activity by responding positively to questions 28–33 are likely to be more partisan. Likewise, prospective jurors demonstrate strong partisanship if their answers to questions 34–36 are consistent with their party identification. Finally, question 33(a) is an open-ended question intended to offer some perspective on the partisanship of prospective jurors who do not answer questions 28–33 positively or questions 34–36 consistently. This question also measures efficacy, where an answer emphasizing concern about election outcomes demonstrates a higher level of efficacy.

²⁵⁷ Although party identification is typically collected with demographic information, here it has been clustered with questions to measure strength of partisanship. By asking the party question to the entire jury pool, attorneys can decrease the sensitivity of the topic.

²⁵⁸ Adapted from *National Tracking Poll #181011*, MORNING CONSULT (2018), https://morningconsult.com/wp-content/uploads/2018/10/181011_crosstabs_METOO_Adults_v1_.pdf [<https://perma.cc/7C7S-B4BP>] (detailing crosstabulation results from a survey among among a national sample of 2201 adults conducted Oct. 4–8, 2018).

²⁵⁹ *Id.*

30. If yes to question #29, please elaborate.

31. Have you ever worked for a political party or political campaign?²⁶⁰
Yes or no.

32. If yes to question #31, please elaborate.

33. Have you ever voted in a local, state, or national election?²⁶¹ *Yes or no.*

(a) How concerned are you over election outcomes?

34. Please identify which issues are important to you when making a political decision:

(a) protecting Christian values

(b) protecting Second Amendment rights

(c) protecting a woman's right to choose

(d) promoting equality between minorities and whites

35. Do you frequently vote for candidates within your own party?²⁶² *Yes or no.*

36. Please identify your favorability of the current President²⁶³:

(a) very favorable

(b) somewhat favorable

(c) somewhat unfavorable

(d) very unfavorable

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

*C. Sexual Assault and Harassment Attitudes*²⁶⁴

37. How much have you seen, read, or heard about the #MeToo movement?²⁶⁵

38. Based on what you know, would you say that the #MeToo movement represents issues that are important to you?²⁶⁶

39. When thinking about the #MeToo movement, are you concerned about the following²⁶⁷:

(a) Men being falsely accused of sexual assault and harassment.²⁶⁸

(b) Men being denied due process when they are accused of sexual assault and harassment.²⁶⁹

(c) Men’s careers being ruined when they are accused of sexual assault and harassment.²⁷⁰

(d) The punishment for less-serious forms of sexual assault or harassment being the same as the punishment for more serious forms of sexual assault and harassment.²⁷¹

(e) Sexual assault and harassment young women face throughout their lives.²⁷²

(f) Whether victims of sexual assault or harassment are believed.²⁷³

²⁶⁴ Attitudes about sexual assault and harassment are likely to be the most sensitive and the most susceptible to social desirability bias. Thus, this section of questions relies on various tactics to reduce directly or indirectly sensitive questions, open-ended questions, and questions directed at the entire jury pool. *Supra* notes 201–06 and accompanying text.

²⁶⁵ *National Tracking Poll #181011*, *supra* note 258.

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

40. Do you think sexual assault and harassment are a big problem in society?²⁷⁴ *Yes or no.*

41. Do you think sexual assault and harassment occur²⁷⁵:

(a) frequently

(b) infrequently

42. In general, what are your feelings about the criminal justice system?²⁷⁶

43. What are your feelings about the sexual assault and harassment laws in our state?²⁷⁷

Other criminal justice-oriented questions should be included at this point.²⁷⁸

44. Have you or has anyone close to you, including a child, ever been the victim of any form of sexual assault or harassment? This includes actual or attempted sexual assault or other unwanted sexual advances, including by a stranger, acquaintance, or family member.²⁷⁹ *Yes or no.*

45. Have you or has anyone close to you ever felt in danger of being sexually assaulted by another person, including a stranger, acquaintance, or family member?²⁸⁰ *Yes or no.*

²⁷⁴ *Id.*

²⁷⁵ This question may be an indicator of a juror with prejudicial or stereotypical views about sexual assault and harassment, where rape myths often come from the misunderstanding of rape as an infrequent occurrence. Sweeny, *supra* note 5, at 22.

²⁷⁶ FREDERICK, *supra* note 223, at 326.

²⁷⁷ *Id.*

²⁷⁸ This digression is recommended to briefly distract and reduce apprehension about the sensitivity of questions about sexual assault and harassment. *See also* FREDERICK, *supra* note 224, 326–29.

²⁷⁹ FREDERICK, *supra* note 223, at 328. Behaviorally specific questions are used here to increase the reliability of the measure. *Supra* notes 207–09 and accompanying text.

²⁸⁰ FREDERICK, *supra* note 219, at 328.