

Jury Selection & the Challenges Presented by #MeToo

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The success of the voir dire process during jury selection depends considerably on the willingness of prospective jurors to disclose information about their past experiences (e.g., whether they have been victims of crime or sexual harassment) and their existing attitudes relevant to the trial (e.g., dispositions towards claims of sexual misconduct). When members of the jury panel are not forthcoming during voir dire, there is a greater chance that persons who hold certain biases will be seated on a jury, thus undermining the goal of an impartial jury to try the case.

Social science research with respondents who previously served on juries has demonstrated that honest self-disclosure may not occur reliably (e.g., Broeder, 1965; Marshall & Smith, 1986; Seltzer, Venuti, & Lopes, 1991). These investigations show that jurors may not volunteer information about their past experiences or reveal their attitudes related to significant aspects of the case that could be important. The purpose of voir dire is subverted when prospective jurors are not forthcoming, honest, and self-disclosing in response to questions from the court or the attorneys during voir dire.

The principle focus of this research is that honest self-disclosure is mediated by prospective jurors' past experiences and the format by which they are questioned about sensitive issues during voir dire.

This research gathered respondent's demographic data, including gender, age, race/ethnicity, level of education, and political affiliation. Following collection of demographic data, respondents were presented with three high profile sexual assault/harassment figures: Bill Cosby, Harvey Weinstein, and Brett Kavanaugh. Regarding each of these figures, respondents were asked the degree to which they believed the allegations against the men to be true. The next section focused on respondents' familiarity and experience with sexual assault and harassment in their own lives and community. The focus here was on whether the respondent had more direct family or community familiarity with sexual assault or harassment events (as opposed to high profile people like Cosby, Weinstein, and Kavanaugh). Next was focus on direct, personal experience with sexual assault or harassment and perceived satisfaction with resolution. Finally, respondents were asked, hypothetically, about their perceived comfort with answering potentially sensitive questions in the context of the voir dire.

Respondents & Procedure

American Jury Centers prepared an online survey questionnaire that was administered via SurveyMonkey in April 2019. There were 1,017 surveys completed, most fully complete and a smaller portion with some items not completed. That is, some respondents discontinued the survey at some latter point in the instrument. All respondents were citizens of the United States and reside in one of the 50 states. An overview of the general demographics is presented below.

Table 1		
Respondent Demographics		
	Frequency	Percent
Gender		
Male	444	44%
Female	569	56%
Race/Ethnicity		
American Indian /Alaskan Native	14	1%
Asian / Pacific Islander	31	3%
Black / African American	54	5%
Hispanic	67	7%
Multiple ethnicity	48	5%
White / Caucasian	803	79%
Highest Level of Education Completed		
< HS	24	2%
Graduated from HS	150	15%
Some college	259	25%
College graduate	302	30%
Some grad school	59	6%
Completed grad school	223	22%
Political Party		
Republican	272	27%
Democrat	402	40%
Independent	289	29%
None / No affiliation	39	4%
Libertarian	7	< 1%
Green	2	< 1%
Socialist	1	< 1%

The first component of our analyses was to examine respondents' views regarding the allegations of sexual assault/sexual misconduct against Bill Cosby, Harvey Weinstein, and Brett Kavanaugh. The perceptions of allegations here serve as a vehicle to compare and contrast the views of respondents by varied demographics.

Respondents were posed the following questions:

Bill Cosby

Accusations were first made against actor and comedian Bill Cosby in 2005. Bill Cosby was convicted of sexual assault in September 2018, but continues to maintain his innocence. On a scale of 1 - 10, where 1 is untrue and 10 is true, how likely do you believe the allegations against Bill Cosby are true?

Harvey Weinstein

In October 2017 allegations of sexual harassment first arose against American film producer Harvey Weinstein. On a scale of 1 - 10, where 1 is untrue and 10 is true, how likely do you believe the allegations against Harvey Weinstein are true?

Brett Kavanaugh

Prior to and during his confirmation hearings, Supreme Court Justice Brett Kavanaugh was accused of sexual assault and sexual misconduct. On a scale of 1 - 10, where 1 is untrue and 10 is true, how likely do you believe the allegations against Brett Kavanaugh are true?

The data presented in table 2 underscore the premise that respondents, and prospective jurors, maintain differing views of the allegations against the three high profile men, which are related to varied experiential and demographic variables. Some of the notable, statistically significant¹, differences revealed in our analyses include:

- Females were more likely to view the allegations against Brett Kavanaugh as true.
- African-American respondents were less inclined than White respondents to view the allegations against Bill Cosby as true.
- Republicans and Democrats maintained *extremely* divergent views regarding the claims made against Brett Kavanaugh.
- Younger respondents, in the 18 – 29 and 30 – 44 years of age groups were more likely to believe the allegations made against Brett Kavanaugh than respondents over the age of 44.
- Respondents with lower levels of education were less likely to view the allegations against Harvey Weinstein as true than those with a college education.

¹ All $p < .01$

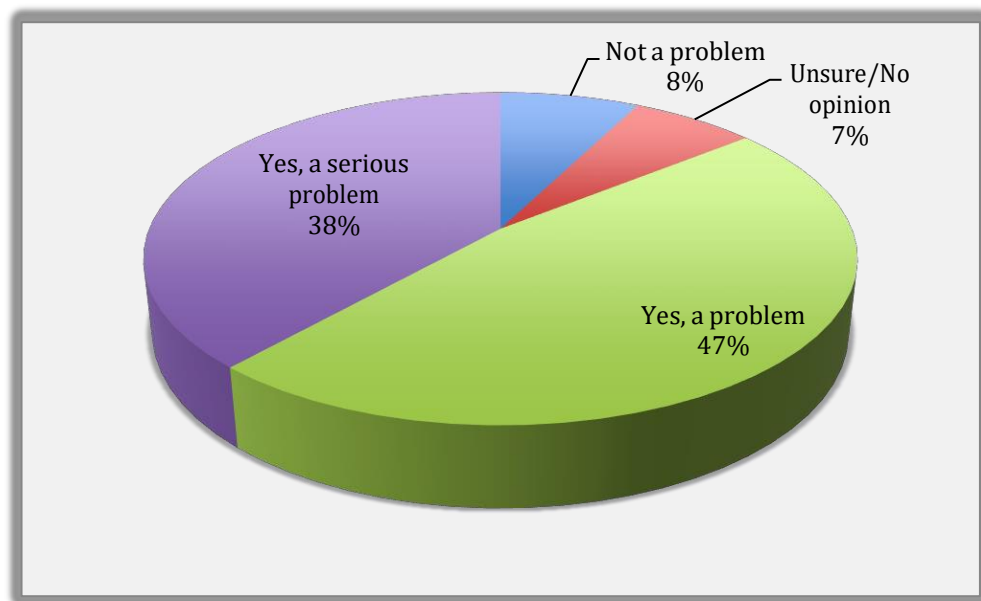
Table 2				
Respondent Perceptions of Allegations				
1	= untrue			
10	= true	Bill Cosby	Harvey Weinstein	Brett Kavanaugh
Gender				
	Male	8.1	8.8	5.7
	Female	7.9	8.5	6.5
Age				
	18 - 29	7.9	8.0	6.9
	30 - 44	7.7	8.5	6.6
	45 - 60	7.7	8.5	5.3
	> 60	8.4	9.1	6.0
	American Indian /Alaskan Native	6.9	7.1	6.1
	Asian / Pacific Islander	7.7	8.4	6.6
	Black / African American	6.2	7.7	7.3
	Hispanic	7.6	8.4	7.0
	Multiple ethnicity	7.7	8.7	6.2
	White / Caucasian	8.2	8.7	6.0
	< HS	6.7	7.2	5.3
	Graduated from HS	7.3	7.8	6.0
	Some college	7.8	8.4	6.1
	College graduate	8.3	9.0	6.1
	Some grad school	8.1	8.9	6.5
	Completed grad school	8.5	9.1	6.3
Political Party				
	Republican	7.5	8.3	3.1
	Democrat	8.5	9.0	8.2
	Independent	7.8	8.5	6.1
	None / No affiliation	7.2	8.4	6.1
OVERALL		8.0	8.6	6.1

Opinions & Experiences of Respondents

Following respondents' views of the three high profile men accused of sexual assault / misconduct they were then asked whether they believed sexual harassment of women in the workplace is a problem or not in this country. As seen in figure 1, 85% of respondents view sexual harassment in the workplace as a problem, with a significant proportion viewing it as a serious problem.

Figure 1

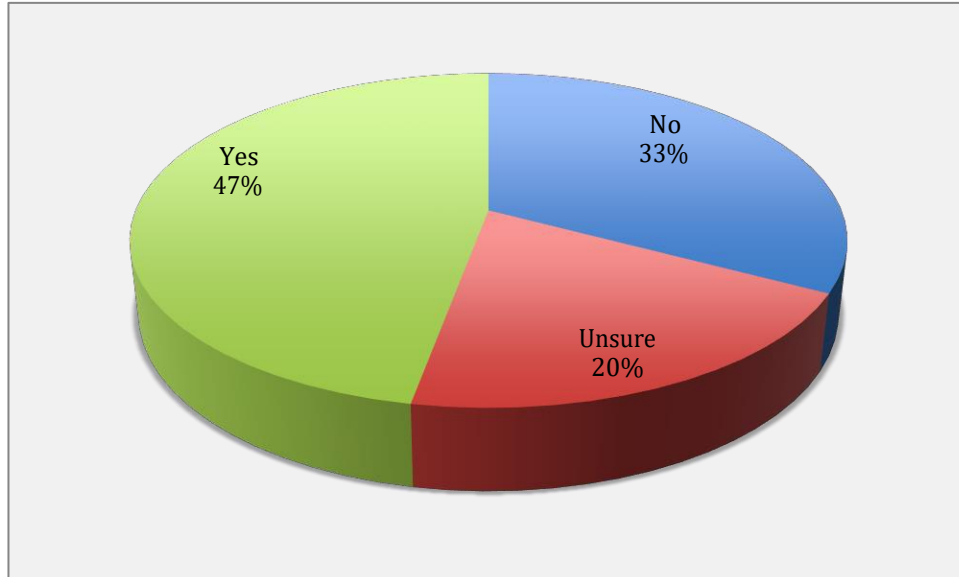
Q: Do you think sexual harassment of women in the workplace is a problem in this country or not?



Bringing focus more to the respondents' more immediate world; their family, friends, and community, they were asked next about their *immediate* community.

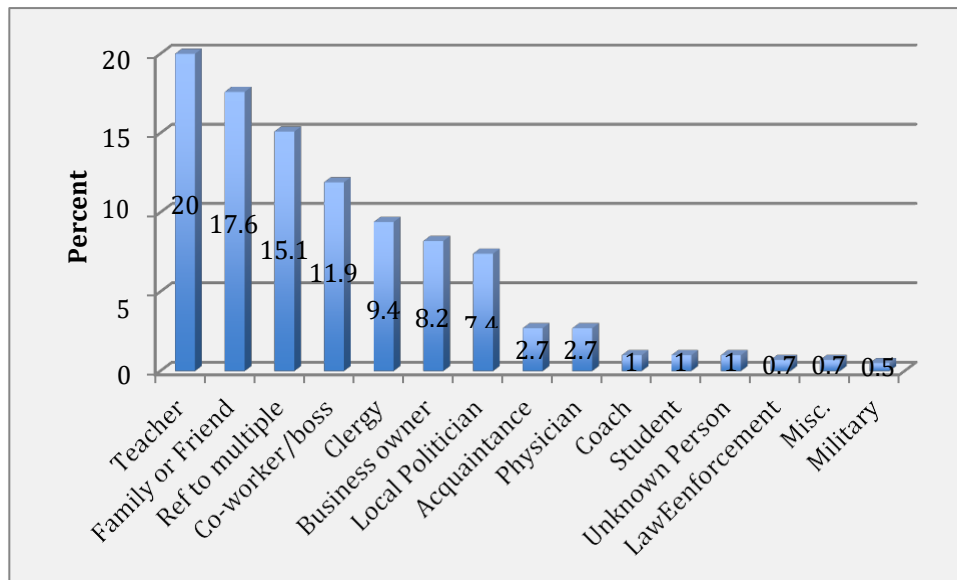
Q: Thinking about the people in your life (family or friends) and/or your **immediate community** (e.g., local politicians, local teachers, local clergy, local coaches, business owners, etc.), have there been any allegations of sexual assault, harassment, or misconduct? If there is more than one, consider the most recent.

Figure 2



Next, respondents were asked, “Who is the person that was alleged to have committed sexual assault, harassment, or misconduct? If there is more than one, consider the most recent.” Responses provided were open-ended with respondents writing in the alleged perpetrator. The subsequent responses were classified into one of the below categories:

Figure 3



Examination of figure 3 shows the top four categories of people alleged to have committed sexual assault, harassment, or misconduct were teachers; family or friends; references to multiple people, and; a co-worker or boss.

What is most relevant here is simply that *nearly half of all respondents* indicated that there is someone within their own community, the respondents' own "world," that has faced such accusations. Generalizing these experiences to a jury panel, during voir dire counsel could expect about half of all prospective jurors to have "something" to talk about. Below are comments regarding the accused that would likely bear further questioning of a prospective juror:

- Teacher They were kind, a little weird in the way they liked to hug students or joke with them in ways that seemed a bit unprofessional.
- Clergy Our community has had over 50 priests accused in the last 20 yrs.
- Co-worker A coworker was fired for aggressively hitting on women and making them feel very uncomfortable at the workplace.
- Teacher He's creepy and odd, but I never felt in danger.
- Clergy I feel sorry for the man; this has ruined his life, and he was a good friend.
- Family/Friend I've been molested at the age of 5 by my dad's best friend.
- Teacher I saw this person molest the boys.
- Physician My childhood physician. Hundreds of pictures taken secretly with a pen that was also a camera without parents' consent. He was convicted. He is a terrible person
- Family/Friend Power corrupts, and only execution cures it.

Voir Dire Questioning

As revealed by nearly half of all of the respondents in this research, a significant proportion of people reported experience or awareness of varied incidents that are likely relevant to their ability to serve as an impartial juror. It is a reasonable argument that if some of the comments noted above were *unknown* to counsel during jury selection a potentially biased juror might be seated.

Next in the survey respondents were asked to consider a hypothetical scenario, that of being in court, and asked, “In the event you were summoned to court for jury service and the judge and attorneys were asking questions regarding prospective jurors' experiences regarding sexual assault or sexual harassment, how comfortable would you feel discussing personal, and potentially sensitive, experiences with the attorneys and Judge in the following scenarios?”

First, how comfortable would you feel **responding in open court in front of other prospective jurors, the attorneys, and Judge?**

How comfortable would you feel sharing personal, and potentially sensitive, experiences with the attorneys and Judge **in private, before the Judge and attorneys only?**

How comfortable would you feel sharing personal, and potentially sensitive, experiences with the attorneys and Judge **on paper, in a written questionnaire?**

The responses to these questions revealed that respondents believed they would be more comfortable *responding in a manner that was more private and confidential*. That is, in all instances, across varied demographic variables, respondents reported a greater level of comfort responding either in private or in a written questionnaire. Table 3 reveals this linear trend with regard to privacy and confidentiality.

Table 3				
Answering Sensitive Questions				
1 = Very Uncomfortable 5 = Neutral 10 = Very Comfortable		Open Court	In Private with Judge & Attorneys	Written Questionnaire
Gender				
Male		6.5	6.9	6.9
Female		5.6	6.4	6.9
Age				
18 - 29		5.0	6.1	6.5
30 - 44		5.9	6.4	6.6
45 - 60		6.2	6.8	7.1
> 60		6.4	7.1	7.1
Education				
< HS		5.3	5.4	5.9
Graduated from HS		5.8	6.3	6.6
Some college		5.7	6.5	6.9
College graduate		6.0	6.6	6.9
Some grad school		6.2	7.1	7.1
Completed grad school		6.5	7.0	7.1
OVERALL		6.0	6.7	6.9

DISCUSSION

Nationwide survey data makes it clear that respondents maintain views of varied high-profile men alleged and convicted of sexual misconduct that are associated with their views of sexual harassment and sexual misconduct. These worldviews shape their schemas², the way people see the world and interpret information.

Research within the social sciences exists to support the assertion that supplemental juror questionnaires can increase juror honesty and candor during voir dire (Giewat, 2001; Marshall & Smith, 1986). Justice is not served when jurors fail to disclose or withhold experiences that may reveal potential bias. Furthermore, the threat of voir dire

² Schemas are “cognitive structures of organized prior knowledge, abstracted from experience with specific instances.” That is, they are mental frameworks that help us organize information and often influence the manner by which we process information. See Fiske, S.T., Linville, P.W. (1980). What does the schema concept buy us? *Personality and Social Psychology Bulletin*, 6, 543-557.

questioning in sensitive areas pose a threat to a juror's privacy and is a fundamental issue courts must address (National Center for State Courts, 2002). More recent focus has turned to implicit bias, which can potentially be mitigated or curbed with the use of supplemental questionnaires.

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