

# Jury Selection in the Age of



## #MeToo

Jessa Nicholson Goetz

It is both the best and worst of times to be a criminal defense attorney handling sex crimes. Over the past two years, allegations of sexual misconduct have dominated our news cycles. The infamous Donald Trump/Billy Bush tape, the subsequent rise of the #metoo movement, and, most recently, the confirmation process of Justice Brett Kavanaugh have all shown us that sexual assault is primary in the minds of the American public. These events have also shown us that the American public is deeply divided as to how to handle accusations of sexual misconduct. Due process and criminal trials cannot be summed up by hash tags or protest signs. We are a country wrestling with the application of seemingly irreconcilable ideas—#BelieveAllWomen but remember #NotAllMen; innocent unless proven guilty *but* #WhyIDidn'tReport. The result is that many criminal defense attorneys are deeply

conflicted on how to talk with jurors who want to both publicly applaud a woman for coming forward and have care and concern for the indignation of a wrongfully accused man.

There is confusion about whether it is strategically best to tackle these news cycles head on, or to quietly wonder how the national conversation about sexual misconduct translates into jury deliberations, arguing that each set of facts must be considered separately from the American experience. Further, as social science regarding the commonality of delayed reporting becomes more prevalent in the minds of our prospective jurors, our job has become more challenging, because we are tasked with convincing jurors these cases can simultaneously be the most emotionally difficult to hear *and* the most difficult to prove.

This landscape provides a sensitive and thin line that we must walk as defense attorneys. We must adjust our trial advocacy strategies such that we no longer appear to be victim-blaming while still zealously advancing the notion that testimony alone cannot equate to proof beyond a reasonable doubt. We must do all of this in an atmosphere where virtually any critique of a woman who reports sexual misconduct is met with vitriol. Put simply, the “snowflake” generation hasn’t got anything on the potential sensitivity of sex crimes jurors in the current climate, and the “but why didn’t she...” questions of the 20th century defense giants are rapidly becoming outdated and irrelevant. Despite all of this, the burden of proof has not shifted and our advocacy goals have not changed. Our methods of talking to juries may need to change—at least, if we want to win these cases.

## **Jury Selection – Unbiased Jury**

A defendant has a constitutional right to an impartial jury, and that the jury is supposed to represent a cross section of the community.<sup>1</sup> Beyond that, however, case law provides little guidance on the appropriate subjects for voir dire.

We no longer function in a world where simple inquiries about police contact or CSI viewership will get the job done. Today, a defense attorney must simultaneously build a community with her prospective jury panel while also acknowledging the inherent tension between the role of the defense attorney and the prosecution having the burden of proof. Trustworthiness and likeability have never been more important—if we don’t establish buy in with our juries at the outset, we run the risk of being viewed as “out of touch” with the moral compass of our communities.

One way to connect is to start by discussing what assumptions prospective jurors may make about gender—the gender of the accuser, the defendant, and that of the attorneys handling the case. Female defense attorneys should regularly ask prospective jurors about what, if anything, jurors expect from a female

attorney compared to a male attorney trying the same case. Then, we should follow the flow of conversation from there, asking follow-up questions like:

- How many people immediately became uncomfortable when they heard what my client is accused of? Why? What can you do to set these feelings aside and make sure he gets a fair trial? Do you care if he gets a fair trial? What might happen to our world if people weren’t entitled to a fair trial?
- Have you followed some of the very public allegations of sexual assault and/or sexual harassment in the media in the past year? What opinions do you have about the #metoo movement?
- Do you think it is fair for someone to be fired from a job because they’ve been accused of sexual misconduct? Even before an investigation is completed? Even if there are never any criminal charges filed?
- Does anyone think that sexual assault cases are harder to prove than other types of criminal cases like, say, an armed robbery? Why is that?
- As a defense attorney, there are some things that I absolutely have an ethical obligation to do in a trial. I worry that by doing those things, you might come to conclusions about me that aren’t correct or fair. Can you all promise me that you won’t hold it against me when...
  - o I object to questions that the Court rules are improper?
  - o I ask the complaining witness questions about her actions?
  - o When I talk to you about the burden of proof?
  - o When I must talk in detail about very specific, sexually explicit things?

The answers are often illuminating, not just because they predict how the jury will respond to the evidence, but also because it helps establish a baseline for what type of attitudes about gender exist in the panel. These answers help us “sort” jurors into basic categories—those who will be accuser-sympathetic and those that will be defense-friendly.<sup>2</sup>

## Psychology and Juror Bias

There are few comprehensive studies on jury selection compared to other areas of social science research. There are, however, a few studies that discuss general attitudes about sexual assault. These findings can be applied to voir dire techniques.

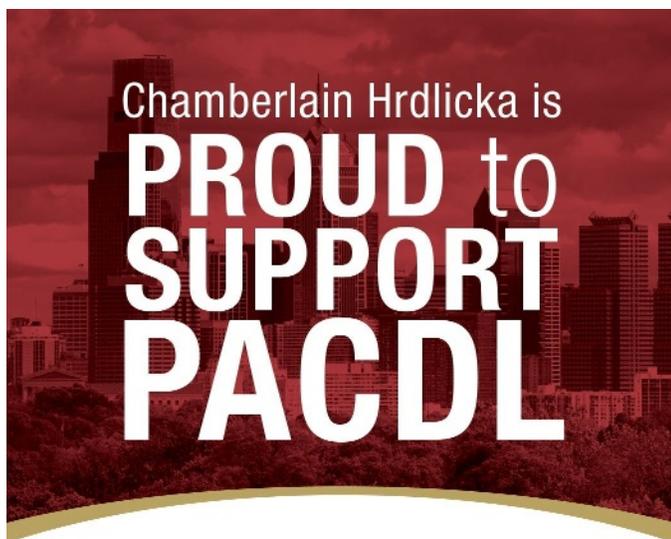
First, social science tells us that when narratives are framed from the perspective of the defendant, jurors are more likely to identify with him. Simple adjustments to the forms of jury selection questions can help drive the narrative in the defendant's favor. Voir dire is also how we start to connect the prospective jury to the concept of proof beyond a reasonable doubt. We need to ask our juries how they would envision an innocent person would go about participating in a "he said, she said" sexual assault trial, and get the prospective jurors to arrive at the natural conclusion that an individual cannot possibly affirmatively prove his innocence. Thus voir dire serves a critical time to inform (or remind) the jury that it is exceedingly important to demand that the government meet its burden of proof. Prospective jurors who state that

they are inclined to believe the victim without additional corroborating evidence should not be rehabilitated by defense counsel. Rather, we should use such comments to start a dialogue with our remaining jurors. Suppose a vocal prospective juror explains that in her experience, most sexual assaults are not reported, and it is very uncommon for a false report to occur. Old techniques of jury selection might suggest that this person needs to be struck for cause. Instead, when we receive a "bad" answer to a question, we need to open the response up for discussion with the rest of the panel. Ask them if any of them feel that such an assumption may disadvantage a defendant or go against the defendant's right to be presumed innocent. Don't stop there. Get them to explain how they'll actively fight to preserve that presumption of innocence in the jury room if and when they find themselves confronted with the idea that a complainant *must* be truthful if she is willing to go through the laborious process of testifying at a trial.

We need to understand that jurors, like the rest of us, want to see the world as a fair, just place. This is why jurors often believe that if someone has been arrested, they must be guilty of something—the world is a fair place and wouldn't let someone be wrongfully arrested. Proper questioning can turn this psychological phenomenon on its head, thereby creating an implicit pro-defense bias in each juror. People tend to rationalize events by creating a narrative that the world is a fair place. Framing our case in a pro-defendant, accused-focused narrative will shift this assumption to work in our client's favor.<sup>3</sup> If a juror has proper "buy in" on the presumption of innocence, then s/he is free to transfer the natural belief in a fair world towards the critical evaluation of an accuser.

## Gender and Psychology

There is often an assumption that women will be more likely to sympathize with an accuser because they will put themselves in the accuser's shoes. This can be true for some women, but social science research suggests that the exact opposite can be true in many cases. Women, particularly women with iconoclastic approaches



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to life, with strong career ambitions, or otherwise “alpha” qualities tend to put distance between themselves and victimization. “Strong” women would never find themselves in the position of being assaulted, and they are thus free to critique the choices of the accuser because those choices are illegible to them.<sup>4</sup> This may sound as though it functions as victim-blaming, but carefully phrased questions can stand up for women. By crafting a narrative that women are not hapless victims of their own choices, but rather autonomous, independent actors, you can create a space in which acquitting your client is *consistent* with feminist ideals rather than contrary to them.<sup>5</sup>

When choosing between prospective male jurors, there is equally counterintuitive social scientific data. One may assume that old-fashioned or traditional men would be quick to attempt to protect an accuser. However, research suggests that “benevolent sexism” functions to separate men from an accuser. Men, who hold more antiquated views of chivalry, divide women.

These men subconsciously draw lines between “good” women and “bad” women.<sup>6</sup> Men that express opinions during voir dire that seem paternalistic may be some of the best defense-side jurors if the accuser’s actions are debatably outside the traditional expectations for women’s behavior. If we are successful in shifting the narrative from accuser-focused to defendant-focused and can demonstrate through the facts of the case that the accuser engaged in behavior that could historically be viewed as high-risk, then these men will discard the notion of protecting her.

To best explore the role of gender and gender bias in jury selection, we need to ask questions that may, at first glance, seem to be outside the norm for voir dire techniques like:

- How many people believe a man should pay for dinner on the first date?
- What, if any assumptions can we make about two people going back to an apartment together late at night? Why or why not?



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- What is the difference between “bad sex” and sexual assault?
- How many people believe that both men and women give off non-verbal cues to indicate sexual desire?

These questions help reveal jurors’ unconscious attitudes towards gender, and thus function to screen undesirable jurors.

## Conclusion

Being open and honest about the changing landscape of our country and its attitudes towards sexual misconduct is crucial for the attorney selecting jurors in a sexual assault case. It may feel as though this newfound attention hinders a defendant during the jury selection process, but if, as skilled advocates, we confront this national conversation head on and reframe it to steer jurors towards buying into the burden of proof beyond a reasonable doubt, we actually have an opportunity to select jurors that will critically apply the law to the facts of each case rather than “voting for the movement.” Talking about current events should not intimidate

the criminal defense attorney, it should excite them. After all, no matter how credible people found Dr. Christine Blasey-Ford, the consensus on mainstream news channels was that there was “no way” to “know” what happened 36 years ago. This type of uncertainty is the epitome of reasonable doubt. 🙋

## NOTES:

- <sup>1</sup> U.S. Const. amend. VI.
- <sup>2</sup> Caroline Crocker & Margaret Bull Kovera, *Handbook of Trial Consulting* at 13-31. (2011).
- <sup>3</sup> Oliver Burkeman, *You’re More Biased Than You Think – Even When You Know You’re Biased*, THE GUARDIAN, February 28, 2014, <https://www.theguardian.com/news/oliver-burkeman-s-blog/2014/feb/28/bias-political-psychology-burkeman-blog>.
- <sup>4</sup> Courtney Fraser, *From “Ladies First” to “Asking For It”: Benevolent Sexism in the Maintenance of Rape Culture*, 103 CALIF. L. REV. 141 (2015).
- <sup>5</sup> Kayleigh Roberts, *The Psychology of Victim Blaming*, THE ATLANTIC, October 5, 2016, <https://www.theatlantic.com/science/archive/2016/10/the-psychology-of-victim-blaming/502661/>.
- <sup>6</sup> Suzanne Weiss, *7 Examples Of Benevolent Sexism That Are Just As Harmful As Hostile Sexism*, BUSTLE MAGAZINE, December 22, 2015, <https://www.bustle.com/articles/131418-7-examples-of-benevolent-sexism-that-are-just-as-harmful-as-hostile-sexism>.

## About the Author



**Jessa Nicholson Goetz** is the founding partner of [Nicholson, Gansner & Otis, S.C.](#), and is widely regarded as one of the most skilled sensitive crimes defense attorneys in the State of Wisconsin. While Nicholson handles all types of state criminal charges, her focus has been on defending individuals accused of what can be the most controversial and serious crimes in our justice system—sexual assault (of both adults and children), homicide, attempted homicide, and child abuse.

The Wisconsin Association of Criminal Defense Lawyers (WACDL) awarded Nicholson twice with the Martin Hanson Memorial Advocate’s Prize, which is only given when an attorney receives a complete acquittal in a homicide case. Nicholson graduated **magna cum laude** from the University of Michigan - Ann Arbor, with undergraduate degrees in Economics and History of Art. Nicholson graduated **cum laude** from the University of Wisconsin - Madison Law School in 2006.

Nicholson coached high school mock trial for a number of years, and now acts a “judge” in both mock trial and moot court proceedings at the high school, college, and law school levels. She has acted as a consultant and received editorial credit from the hit audio drama podcast **Deliberations**, and hosts a popular legal podcast along with Nicholas Gansner, **Getting Off**.

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