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We're proud of this issue in part because much of its content comes from repeat contributors.

It was a year ago that we started two new features in each issue—a regular column, “Thoughts from Canada,” by Canadian judge Wayne Gorman, and a crossword puzzle by Vic Fleming, a district judge in Arkansas. Many readers have told us they enjoyed these new features, and we greatly appreciate the contributions Judges Gorman and Fleming are making for us.

We begin the articles for this issue with our annual review of the civil cases decided by the United States Supreme Court in the past Term. For the fifth straight year, that review has been masterfully done by Professor Todd Pettys, the H. Blair and Joan V. White Chair in Civil Litigation at the University of Iowa College of Law. Professor Pettys puts an interesting Term in context and provides an overview of cases already accepted for the coming Term. Our next issue will feature a summary of the past Term’s criminal cases by Professor Charles D. Weisselberg, the Shannon C. Turner Professor of Law at Berkeley Law. This will be the ninth year Professor Weisselberg has summarized the cases for us—and he too puts them in context and offers a look ahead to the coming Term.

We are so fortunate to have these regular contributors. Please thank them if you have the chance.

Our issue has two other articles we think you’ll find interesting. First, a group of four authors (two psychology professors, one graduate student, and one attorney) survey some websites that many judges don’t know about— websites that tell people how to avoid jury duty. You may well come across people trying to avoid jury duty using these techniques. We think you’ll be interested in reading about them here. Second, Nancy Steblay, a psychology professor and expert in the area of eyewitness testimony, provides a primer for judges on meta-analysis, a technique in which researchers combine the results of several different studies with the hope of drawing more powerful conclusions than they could from any single study. She provides an overview of this type of study so that judges may be better able to evaluate them. She also provides a helpful table with several meta-analyses that would be of interest to judges, along with links to where they may be found on the web.—SL

Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. Court Review seeks to provide practical, useful information to the working judges of the United States and Canada. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work. Guidelines for the submission of manuscripts for Court Review are set forth on page 131 of this issue. Court Review reserves the right to edit, condense, or reject material submitted for publication.

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Cover photo, Mary S. Watkins (maryswatkins@mac.com). The cover photo is of the Maricopa County Courthouse in Phoenix, Arizona, which opened in 1929.

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I was privileged to meet with many of the representatives of our justice partners who had been invited to the NACM meeting. Mary McQueen, NCSC president, played a prominent role at the conference using her warmth, unique style, and breadth and depth of knowledge on so many issues important to state courts to contribute to many discussions and effectively engage those in attendance. NCSC staffed many of the conference committees and contributed much to the success of the conference! AJA is blessed to have a longstanding, close relationship with the National Center. In fact, Jesse Rutledge of NCSC will be on hand at our Toronto conference, just as he was at NACM’s, working behind the scenes to help everyone. Jesse, a native of Toronto, has kindly agreed to speak at our conference and give us a “virtual guided tour” of the programs and projects NCSC is working on for the betterment of all our state courts.

Last year, we were fortunate to partner with the National Association of State Judicial Educators (NASJE) and the State of Washington to host our Seattle AJA conference. All agree that the conference was a huge success, thanks in no small part to a grant from another of our justice partners, the State Justice Institute, led by its executive director, Jonathan Mattiello. Thanks, Jonathan. Unfortunately, this year’s NASJE conference is scheduled for the same time as our Toronto conference.

I met with NASJE president Margaret Allen at the NACM meeting in Pittsburgh. She and I were disappointed we could not attend each other’s conferences this year. We’ll work to coordinate our meeting schedules for next year. We value a continued strong relationship with NASJE. We learned a great deal about effective judicial education from NASJE last year in Seattle and hope to continue to closely collaborate with NASJE in the future.

Speaking of learning from our justice partners, what struck me the most at the NACM conference was the unselfish dedication and service of the NACM members! President-elect Scott Griffith led a timely and important discussion with Ohio Chief Justice Maureen O’Connor and Kentucky court administrative director Laurie Dudgeon on the work of the National Task Force on Fines, Fees, and Bail Practices. Congratulations, Scott! NACM is in good hands, and AJA wishes you well as you begin your presidency.

I had the opportunity to attend several of the NACM committee meetings as well. Assisted by the exceptional staff from the National Center for State Courts (NCSC), whose long-time professional Shelley Rockwell serves as AJAs association manager, the NACM members worked through lengthy agendas focused on how to improve our court system and our system of justice.

Continued on page 128
The Death of Mandatory Minimum Periods of Imprisonment in Canada?

Wayne K. Gorman

Over the last number of years, the Government of Canada (which has exclusive constitutional jurisdiction over criminal law in Canada) enacted various pieces of legislation mandating the imposition of mandatory minimum periods of imprisonment for specific offences contained within the Criminal Code of Canada, R.S.C. 1985. This has included:

– the Safe Streets and Communities Act, S.C. 2012, c 1 (which imposed mandatory minimum penalties for certain sexual offences against children and which amended the Controlled Drugs and Substances Act, R.S.C. 1985, to provide for minimum penalties for certain drug offences); and

– the Increasing Offenders’ Accountability for Victims Act, S.C. 2013, c 11 (which requires that a minimum “victim surcharge” be imposed on all offenders regardless of ability to pay).

THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

These legislative initiatives have been subjected to constitutional challenge. These challenges have primarily been based upon section 12 of the Canadian Charter of Rights and Freedoms, Constitution Act, 1982 (the Charter). Section 12 states: “Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.”

In Canada, if a court finds that a legislative enactment violates section 12 of the Charter, the court must issue a declaration of invalidity pursuant to section 52(1) of the Charter. Section 52(1) indicates that “any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.” However, a finding of such an inconsistency does not automatically lead to a declaration of invalidity. Canadian courts are also required to determine if the legislation can be “saved” by section 1 of the Charter. That section states: “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

Section 12 of the Charter has been the subject of significant commentary by the Supreme Court of Canada. As will be seen, the Supreme Court’s latest pronouncements may suggest that all legislation mandating the imposition of a minimum period of imprisonment will be unconstitutional.

Footnotes

1. In R. v. R. (E.R.D.), 2016 BCSC 684, 2016 CarswellBC 1053, ¶ 31 (Can. B.C.), it was held that “although the minimum one-year mandatory sentence required by s. 271(a) [sexual assault] is not grossly disproportionate for [E.R.D.], it would be grossly disproportionate for reasonably foreseeable less-serious offenders whose conduct would be captured by s. 271(a). Consequently, I find that s. 271(a) violates s. 12 of the Charter.” In R. v. Badafi, 2016 ONSC 788, 2016 CarswellOnt 1550 (Can. Ont.), it was declared that the minimum-sentence provisions in sections 212(2) and 212(4) of the Criminal Code (living off of the avails of prostitution with respect to a female under 18 years of age) violated section 12 of the Charter and were of no force and effect.

2. In R. v. Flaro, 2014 ONCJ 2, 2014 CarswellOnt 192 (Can. Ont.), it was held that the amendments made to section 737 of the Criminal Code by the Increasing Offenders’ Accountability for Victims Act violated sections 7 and 12 of the Charter and were therefore of no force or effect. It was held that the mandatory nature of the victim surcharge constituted “cruel and unusual punishment.” It has been suggested that this type of legislation “purports to rank, explicitly or implicitly, the objectives of sentencing by normative priority,” and, therefore, it is “no exaggeration to claim that the effect of the amendments is to amend or repeal, expressly or impliedly, the principles and objectives enumerated in Part XXIII that were stated by Parliament in 1995 and later developed in the jurisprudence” (Patrick Healy, Sentencing from There to Here and from Then to Now, 17 CAN. CRIM. L. REV. 291, 300 (2013)).


4. In R. v. Oakes, [1986] 1 S.C.R. 103, ¶ 70-71, the Supreme Court held that the test to be applied pursuant to section 1 of the Charter involves three elements:

   To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be “of sufficient importance to warrant overriding a constitutionally protected right or freedom.” Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves “a form of proportionality test”: R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair “as little as possible” the right or freedom in question: R. v. Big M Drug Mart Ltd., supra, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of “sufficient importance.”
Let us start with a brief review of how the Supreme Court has interpreted section 12 of the Charter, and then we will look at its most recent decision before attempting to determine the effect of the Supreme Court’s decisions on the ability of the Canadian Government to enact mandatory periods of imprisonment for specific criminal offences.

THE EARLY DECISIONS

The Supreme Court of Canada’s initial consideration of section 12 of the Charter occurred in R. v. Smith. In Smith, the Court held that a seven-year minimum-sentencing provision that applied to the offence of importing narcotics under section 5(1) of the Narcotic Control Act, R.S.C. 1970, violated section 12 of the Charter. The Court held that the protection afforded by section 12 of the Charter “governs the quality of the punishment and is concerned with the effect that the punishment may have on the person on whom it is imposed.” The Court described the test to be applied when attempting to determine if a sentencing provision violated section 12 of the Charter in the following manner:

The test for review under s. 12 of the Charter is one of gross disproportionality, because it is aimed at punishments that are more than merely excessive. We should be careful not to stigmatize every disproportionate or excessive sentence as being a constitutional violation, and should leave to the usual sentencing appeal process the task of reviewing the fitness of a sentence. Section 12 will only be infringed where the sentence is so unfit having regard to the offence and the offender as to be grossly disproportionate.

This test was subsequently affirmed and applied in R. v. Lyons, R. v. Luxton, Steele v. Mountain Institution, R. v. Goltz, R. v. Morrissey, and R. v. Latimer. In Goltz, the Court indicated that “although not in themselves decisive to a determination of gross disproportionality, other factors which may legitimately inform an assessment are whether the punishment is necessary to achieve a valid penal purpose, whether it is founded on recognized sentencing principles, whether there exist valid alternatives to the punishment imposed, and to some extent whether a comparison with punishments imposed for other crimes in the same jurisdiction reveals great disproportion.”

In Latimer, the Court held that the mandatory period of parole ineligibility (10 years) prescribed by the Criminal Code for second-degree murder did not violate section 12 of the Charter.

In Ferguson, the Court held that the imposition of the four-year mandatory minimum sentence for manslaughter with a firearm did not violate section 12 of the Charter. The Court also held that a constitutional exemption is not an appropriate remedy for a section 12 violation. The Court concluded that if a minimum sentence is found to be unconstitutional, the law imposing the sentence is inconsistent with the Charter and therefore falls under section 52 of the Constitution Act, 1982.

R. v. NUR

Last year, the Supreme Court considered section 12 of the Charter in R. v. Nur. In Nur, the accused were convicted of the offence of possession of a prohibited/restricted weapon with ammunition, contrary to section 95(1) of the Criminal Code. The minimum prescribed penalty for this offence (see section 95(2)(a)) was three years imprisonment for a first offence and five years imprisonment for a second or subsequent offence. The Court noted that it “has set a high bar for what constitutes ‘cruel and unusual . . . punishment’ under s. 12 of the Charter. A sentence attacked on this ground must be grossly disproportionate to the punishment that is appropriate, having regard to the nature of the offence and the circumstances of the offender.”

The Supreme Court held in Nur that “a challenge to a mandatory minimum sentencing provision on the ground it constitutes cruel and unusual punishment under s. 12 of the Charter involves two steps”:

In summary, when a mandatory minimum sentencing provision is challenged, two questions arise. The first is whether the provision results in a grossly disproportionate sentence on the individual before the court. If the answer is no, the second question is whether the provision’s reasonably foreseeable applications will impose grossly disproportionate sentences on others. This is consistent with the settled jurisprudence on constitutional review and rules of constitutional interpretation, which seek to determine the potential reach of a law; is workable; and provides sufficient certainty.

The Court explained that the “reasonable foreseeability test is not confined to situations that are likely to arise in the general day-to-day application of the law. Rather, it asks what situations may reasonably arise. It targets circumstances that are foreseeably captured by the minimum conduct caught by the offence. Only situations that are ‘remote’ or ‘far-fetched’ are excluded.”

In Nur, the Court held that section 95(2)(a) violated section 12 of the Charter because for certain offenders “a three-year sentence is grossly disproportionate to the sentence the conduct would otherwise merit under the sentencing provisions of the Criminal Code”:

At the far end of the range, stands the licensed and responsible gun owner who stores his unloaded firearm safely with ammunition nearby, but makes a mistake as

5. [1987] 1 S.C.R. 1045 (Can.).
6. Id. ¶ 53.
7. Id. ¶ 54.
16. Id. ¶ 39.
17. Id. ¶ 77.
18. Id. ¶ 68.
to where it can be stored. For this offender, a three-year sentence is grossly disproportionate to the sentence the conduct would otherwise merit under the sentencing provisions of the Criminal Code.19

THE SUPREME COURT OF CANADA’S MOST RECENT SECTION 12 DECISION

Earlier this year, the Supreme Court once again considered section 12 of the Charter.

In R. v. Lloyd,20 the accused was convicted in the Provincial Court of the offence of possession of a controlled substance for the purpose of trafficking. Because of a prior conviction for a similar offence, he was subject to a mandatory minimum sentence of one year of imprisonment pursuant to section 5(3)(a)(i)(D) of the Controlled Drugs and Substances Act. The sentencing judge declared this provision to be contrary to section 12 of the Charter and not justified under section 1.

THE MANDATORY MINIMUM SENTENCE RULED TO BE UNCONSTITUTIONAL

On appeal, the Supreme Court indicated:

[T]he reality is this: mandatory minimum sentences that, as here, apply to offences that can be committed in various ways, under a broad array of circumstances and by a wide range of people are vulnerable to constitutional challenge. This is because such laws will almost inevitably include an acceptable reasonable hypothetical for which the mandatory minimum will be found unconstitutional. If Parliament hopes to sustain mandatory minimum penalties for offences that cast a wide net, it should consider narrowing their reach so that they only catch offenders that merit the mandatory minimum sentences.21

The Supreme Court also suggested that another “solution would be for Parliament to build a safety valve that would allow judges to exempt outliers for whom the mandatory minimum will constitute cruel and unusual punishment. Residual judicial discretion for exceptional cases is a technique widely used to avoid injustice and constitutional infirmity in other countries.”22 The Supreme Court of Canada concluded the challenged mandatory minimum sentence of one year of imprisonment violated section 12 of the Charter on the basis that it “casts its net over a wide range of potential conduct . . . . As a result, it catches not only the serious drug trafficking that is its proper aim, but conduct that is much less blameworthy. This renders it constitutionally vulnerable.”23

This is very strong and broad language. The suggestion by the Court to as to how Parliament might wish to draft its future legislation may not bode well for future mandatory minimums being upheld.24

SECTION 1

The Supreme Court concluded that the provision was not saved by section 1 of the Charter:

Parliament’s objective—to combat the distribution of illicit drugs—is unquestionably an important objective: R. v. Oakes, [1986] 1 S.C.R. 103, at p. 141. This objective is rationally connected to the imposition of a one-year mandatory minimum sentence for the offence of possession for the purpose of trafficking of Schedule I drugs. However, the law does not minimally impair the s. 12 right. As discussed above, the law covers a wide array of situations of varying moral blameworthiness, without differentiation or exemption, save for the single exception in s. 10(5) of the CDSA. The Crown has not established that less harmful means to achieve Parliament’s objective of combating the distribution of illicit drugs, whether by narrowing the reach of the law or by providing for judicial discretion in exceptional cases, were not available. Nor has it shown that the impact of the limit on offenders deprived of their rights is proportionate to the good flowing from their inclusion in the law.25

CONSIDERATION OF NUR AND LLOYD

Lloyd was applied in R. v. Elliott,26 in which it was held that section 7(2)(b)(i) of the Controlled Drugs and Substances Act (which requires the imposition of a minimum sentence of six months’ imprisonment for the offence of production of marijuana) violated section 12 of the Charter.

Nur was recently considered by the British Columbia Court of Appeal in R. v. Dickey.27

In Dickey, the accused were charged with the offences of traf-
ficking and possession for the purpose of trafficking, contrary to section 5(3) of the Controlled Drugs and Substances Act. The offences were committed in a public place usually frequented by persons under the age of 18 years or by using the services of a person under the age of 18 years or with the involvement of such a person. Sections 5(3)(a)(ii)(A) and (C) of Controlled Drugs and Substances Act provide for a minimum two-year prison sentence when an offence is committed in or near a school, on or near school grounds, or in or near any other public place usually frequented by persons under the age of 18 years; or using the services of, or involving, such a person.

The British Columbia Court of Appeal concluded that “in some circumstances, s. 5(3)(a)(ii)(A) and (C) would constitute cruel and unusual punishment and accordingly infringe s. 12 of the Charter because a minimum two-year prison sentence would be grossly disproportionate to an appropriate sentencing disposition. They would do so in a way that cannot be demonstrably justified in a free and democratic society such that they are of no force or effect.”

The Court of Appeal concluded that in Dickey, a sentence of six months imprisonment was appropriate. They concluded that the imposition of the minimum two-year sentence would infringe section 12 of the Charter:

The imposition of a two-year prison sentence in a federal penitentiary would not only be a disproportionate punishment, but one that would be grossly so if imposed on Dickey (and more so on a younger hypothetical offender) when compared to an appropriate sentence. In determining whether a minimum sentence is grossly disproportionate, the comparison of the appropriate sentence and the statutory minimum sentence to be imposed would seem to always be the first consideration, as it was in Nur. There are contextual factors to consider that may have a bearing on the determination in any given instance, but there would appear to be none that would render a minimum two-year prison sentence for Dickey other than grossly disproportionate. As the judge concluded, it does infringe s. 12 of the Charter.

The Court of Appeal concluded that “while the section has a pressing and substantial objective, being the protection of young people from the drug trade, it cannot be said that it is proportional to that objective because, while there may be a rational connection to what are the penological objectives of denunciation and deterrence, the section does not constitute a minimal impairment of the right infringed and the deleterious and salutary effects of it are not proportional.”

CONCLUSION

The broad language utilized by the Supreme Court in Lloyd and the Court's use of hypotheticals that are not related to the actual offender and that are not likely to arise in the general day-to-day application of the law suggests that mandatory minimum periods of imprisonment will always be vulnerable to constitutional challenge. For instance, in a minority judgment authored by three of the justices in Lloyd, it was suggested that some of the hypotheticals utilized by the majority “were ‘far-fetched’ or ‘marginally imaginable’, and thus inappropriate for the s. 12 analysis.” The minority also suggested that the majority's opinion constituted “a departure from the Court's jurisprudence, which has consistently maintained that mandatory minimums are not per se unconstitutional.”

Indeed, as we have seen, Nur and Lloyd appear to have taken an approach that suggests mandatory minimum periods of imprisonment will be consistently declared to be unconstitutional in Canada.

Wayne Gorman is a judge of the Provincial Court of Newfoundland and Labrador. His blog (Keeping Up is Hard to Do: A Trial Judge's Reading Blog) can be found on the web page of the Canadian Association of Provincial Court Judges. He also writes a regular column (Of Particular Interest to Provincial Court Judges) for the Canadian Provincial Judges' Journal. Judge Gorman's work has been widely published. Comments or suggestions to Judge Gorman may be sent to wgorman@provincial.court.nl.ca.

28. Id. ¶ 11.
29. Id. ¶ 68. In Harmelin v. Michigan, 501 U. S. 957 (1991), the offender was convicted of possessing more than 650 grams of cocaine and was sentenced to a mandatory term of life in prison without possibility of parole. The Supreme Court held that imposition of the mandatory sentence of life in prison without possibility of parole did not constitute cruel and unusual punishment.
30. Id. ¶ 73.
32. In Badali, 2016 ONSC 788, ¶ 66, for instance, in declaring that the minimum-sentence provisions in sections 212(2) and 212(4) of the Criminal Code (living off the avails of prostitution with respect to a female under 18 years of age) violated section 12 of the Charter were of no force and effect, the application judge referred to the following unlikely hypothetical in support of the ruling:
33. Lloyd, 2016 SCC 13, ¶ 91.
34. Id. ¶ 106. See Don Stuart, Pragmatism and Inconsistency from the Supreme Court on Mandatory Minimums, 27 CRIM. REP. (7th) 245 (2016).
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Eight in the Eye of a Political Storm:
Civil Cases in the Supreme Court’s October 2015 Term

Todd E. Pettys

The Court's October 2015 Term was dominated by the news of Justice Antonin Scalia's unexpected death in February 2016 and by President Barack Obama's unsuccessful battle to persuade Senate Republicans to consider his nomination of Chief Judge Merrick Garland, of the D.C. Circuit, to fill the vacancy. The loss of Justice Scalia resulted in a handful of non-precedent-setting affirmances by an equally divided Court. Those splits came on the questions of whether the First Amendment bars public-sector unions from imposing mandatory fees on non-member employees; whether Texas and other states may successfully challenge the Obama Administration's decision to defer deportation of a large number of noncitizens; whether to overrule Nevada v. Hall, the 1979 case in which the Court held that a state may be sued without its consent in other states' courts; whether Indian tribal courts have jurisdiction to adjudicate tort claims against non-members; and whether spousal guarantors are “applicants” for credit within the meaning of the Equal Credit Opportunity Act and are thus statutorily authorized to sue creditors for marital discrimination.

Four-four splits were, however, the exception rather than the rule. Both while Justice Scalia remained on the Court and continuing after his saddening death, the Court handed down precedent-setting rulings on numerous issues of broad interest, including the Court's most significant ruling on abortion rights in nearly a quarter of a century.

ABORTION

In one of the Term's most closely watched cases, the justices ruled 5-3 in Whole Woman's Health v. Hellerstedt that two provisions of a 2013 Texas abortion law violated women's Fourteenth Amendment right to terminate their pregnancies before fetal viability. The first was a requirement that any doctor performing abortions have admitting privileges at a hospital within 30 miles of the abortion facility. Prior Texas law had been more lenient, requiring doctors either to have admitting privileges at a "local" hospital or to have "a working arrangement" with a physician who possessed such privileges. The second challenged provision required all abortion facilities to meet the minimal regulatory standards for ambulatory surgical centers.

Those requirements covered a broad array of matters, ranging from the size of a clinic's staff, to the square footage of the facility, to the traffic patterns between rooms, to facilities' HVAC systems, and more. Abortion clinics in Texas argued that, far from advancing women's health as Texas claimed, these two requirements worked to women's detriment by forcing many clinics to close, thereby increasing the distances that many abortion-seeking women would have to travel and increasing the wait times for services at the remaining facilities.

The Court found both provisions unconstitutional under the undue-burden standard famously adopted by a plurality of the Court in 1992's Planned Parenthood of Southeastern Pennsylvania v. Casey. Writing for the majority, Justice Breyer first rejected Texas's argument that the clinics' claims were barred by claim preclusion. (That portion of the Court's ruling is summarized below under the "Federal Jurisdiction" heading.) Turning to the merits, the Court clarified Casey's undue-burden standard in three important ways. First, when evaluating whether a law imposes an "undue" burden on women's ability to terminate pre-viability pregnancies, a court must evaluate not only "the burdens a law imposes on abortion access," but also the degree to which the law yields benefits. Second, a court must apply a more demanding standard of review than is appropriate for run-of-the-mill economic legislation. Third, rather than defer conclusively (or nearly so) to a legislature's factual findings, a court may place "considerable weight upon evidence and argument presented in judicial proceedings."

Applying those principles here, the Court concluded that both of the Texas law's challenged provisions unconstitutionally imposed undue burdens on women's right to terminate their early pregnancies. In the majority's view, the district court had reasonably concluded that the admitting-privileges requirement had not yielded any health benefits for women and had forced many of the state's clinics to close. Many doctors could not satisfy the requirement even if they wished to do so, Justice Breyer said, due to such things as their geographic distance from the nearest hospital or their inability to generate the amount of business that many hospitals require in exchange for the conferral of admitting privileges.

Footnotes
2. United States v. Texas, 136 S. Ct. 136 S. Ct. 2271 (2016). The Fifth Circuit had held that the states had standing to sue and that the Administration's actions likely violated the Administrative Procedure Act. When granting certiorari, the Supreme Court added the Take Care Clause to the mix. The Court's ultimate opinion stated only that the judgment below was "affirmed by an equally divided Court."
10. Id. at 2310.
respect to the surgical-center requirement, the Court found that it, too, would yield no notable benefits for women, yet would reduce still further the number of abortion-performing clinics in the state. Pre-viability abortion procedures are extremely safe, Justice Breyer wrote, and any complications typically arise after the woman has already left the facility.

Justice Thomas dissented, reiterating his longstanding rejection of a constitutional right to abortion and charging the majority with ratcheting up the undue-burden standard to something approaching strict scrutiny. Joined by Chief Justice Roberts and Justice Thomas, Justice Alito dissented on the procedural grounds described under this summary's “Federal Jurisdiction” heading.

**ADMINISTRATIVE LAW**

Grateful to the Court for reminding us that our car dealerships’ service advisors might be paid partially or even entirely on commission, we turn to *Encino Motorcars, LLC v. Navarro*. At issue in that case was whether those service advisors are entitled to overtime pay under the Fair Labor Standards Act. In 2011—having taken the view for more than two decades that service advisors were statutorily exempt from the FLSA’s overtime-pay benefits—the Department of Labor shifted course, issuing a rule stating that service advisors did not fall within that exemption and thus were entitled to overtime pay. Commission-paid service advisors at a Mercedes-Benz dealership sued their employer, arguing that the dealership had unlawfully failed to pay them overtime when they worked more than 40 hours per week. The Ninth Circuit ruled in favor of the service advisors, finding that the FLSA was ambiguous and that the department’s interpretation of the statute was entitled to *Chevron* deference. The Supreme Court vacated and remanded. Led by Justice Kennedy, the Court held that the department had failed to provide a reasoned explanation for changing its interpretation of the FLSA and that the Ninth Circuit thus should not defer to that interpretation when discerning the statute’s requirements. The department’s failure to explain its shift was especially troubling here, Justice Kennedy said, “because of decades of industry reliance on the [d]epartment’s prior policy.” Joined by Justice Alito in dissent, Justice Thomas agreed that deference was unwarranted but argued that remand was unnecessary because service advisors are “salesmen primarily engaged in the selling of services for automobiles” and thus fall squarely within the statutory exemption.

Those seeking an introduction to the markets through which the nation’s electric power is priced and distributed will want to read *FERC v. Electric Power Supply Association*. The chief issue in the case was whether the Federal Energy Regu-

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14. Id. at 2129 (Thomas, J., dissenting).
16. *Compare Electric Power Supply Ass’n*, 136 S. Ct. at 773 n.5 with id. at 785 (Scalia, J., dissenting).
18. Id. at 1129.
19. Id. at 1132.
20. Id. at 1133 (Thomas, J., concurring in the judgment).
The Court voted 4-3 . . . to uphold the University of Texas's efforts to increase racial diversity among its undergraduates.

In *Fisher v. University of Texas*, the Court unanimously rejected a group of Arizona voters' argument that the state's newly drawn legislative districts violated the Equal Protection Clause. Under the districting scheme adopted in the wake of the 2010 census, most of Arizona's Democrat-leaning districts were relatively underpopulated, and most of the state's Republican-leaning districts were relatively overpopulated. The population deviation between the largest and smallest districts was less than 10%, however, and so the law presented the challengers with an especially steep climb. Led by Justice Breyer, the Court concluded that the small population differences were the result of efforts by the state's redistricting commission “to achieve compliance with the federal Voting Rights Act, not to secure political advantage for one party.”

With Justice Kagan recused, the Court voted 4-3 in *Fisher v. University of Texas* to uphold the University of Texas's efforts to increase racial diversity among its undergraduates. The university fills most of its entering class each year with Texas students who were within the top 10% of their high school's graduating classes. For the balance of each entering class, the university considers applicants based upon a wide range of factors, one of which is race. Abigail Fisher—an unsuccessful applicant—challenged the latter portion of the university's admissions program, arguing that it violated her and other Caucasian applicants' equal-protection rights.

The case reached the Supreme Court the first time three years ago. On that occasion, the Court voted 7-1 to remand to the Fifth Circuit. The justices concluded that, contrary to the rigorous demands of strict scrutiny, the lower court had inappropriately deferred to the university's choice of means for achieving its goal of having a racially diverse student body. On remand, the Fifth Circuit ruled in the university's favor.

With Justice Kennedy leading the four-member majority in this second wave of the litigation, the Court affirmed in a narrowly written opinion. Emphasizing that the university's admissions program “is sui generis” and that there are little available data to illuminate the degree to which the top-10% program was itself providing the university with satisfactory racial diversity at the time Fisher applied, the Court concluded that remanding for further fact-finding would have little upside. “[A] remand,” Justice Kennedy wrote, “would do nothing more than prolong a suit that has already persisted for eight years and cost the parties on both sides significant resources.” The Court found that the university had articulated clear objectives; that there was at least some evidence that the top-10% program was not fully achieving those objectives at the time Fisher applied; and that the university had tried in good faith to identify other, less race-conscious means of achieving the degree of racial diversity that it deemed educationally desirable. The Court also made it clear, however, that the university was not forever off the hook. The Court stressed “the University's continuing obligation to satisfy the burden of strict scrutiny,” indeed, Justice Kennedy wrote that, by continually evaluating the data it had begun to gather in response to this long-running litigation, the university “has a special opportunity to learn and to teach” regarding the impact of race-conscious admissions policies in higher education. Joined by Chief Justice Roberts and Justice Thomas in dissent, Justice Alito charged the majority with failing to insist that the university carry the heavy justificatory burden that strict scrutiny imposes.

**EQUITABLE TOLLING**

In a unanimous ruling penned by Justice Alito, the Court in *Menominee Indian Tribe of Wisconsin v. United States* rejected a tribe's request for equitable tolling of the six-year statute of limitations imposed by the Contract Disputes Act of 1978. The parties and the court below had agreed that the appropriate test for evaluating the tribe's request was laid out in the Court's 2010 ruling in *Holland v. Florida*: equitable tolling is appropriate only if the claimant “establishes two elements: (1) he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.” Three features of the *Menominee Indian Tribe* ruling are likely to be of broad interest. First, the Court explained that *Holland* articulates two essential considerations, such that neither can be ignored or discounted even when the arguments for the other are particularly strong. Second, the Court said that the “extraordinary circumstances” inquiry focuses on “matters outside [the claimant's] control.” Third, Justice Alito dropped a footnote observing that *Holland* was a habeas case, that the Court has never held that *Holland* governs all equitable-tolling requests outside the habeas context, and that there was no need here to decide whether *Holland* applies in non-habeas cases because (a) the tribe could not even meet *Holland* and (b) the tribe had not argued that a more lenient test was appropriate.

22. Id. at 1307.
23. Id. 2109 (2016).
24. The Texas legislature adopted the top-10% program in the late 1990s in response to earlier Fourteenth Amendment litigation against the university. As the Court pointed out, there is no doubt that the state adopted that program—at least in part—for race-conscious purposes, but Fisher did not challenge it.
25. Id. at 2209.
26. Id. at 2209-10.
27. Id. at 2214
28. Justice Thomas also filed a one-paragraph dissent, reiterating his opposition to race-conscious admissions policies.
30. Id. at 753 (quoting Holland v. Florida, 560 U.S. 631, 649 (2010)).
31. Id. at 756 (internal quotations omitted).
ERISA
Section 502(a)(3) of the Employee Retirement Income Security Act (ERISA) states that the fiduciaries of a covered plan may sue a participant for “appropriate equitable relief . . . to enforce . . . the terms of the plan.”32 In Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan,33 a participant in a covered health-benefits plan was injured by a drunk driver, prompting the plan to pay significant medical costs. After the participant obtained a sizable settlement from the driver’s insurance company, the plan sued the participant to enforce his contractual obligation to reimburse the plan for the costs it had paid. The Court held that, to the extent the participant had already dissipated the settlement funds by spending them on nontraceable items (like food or travel), the relief that the plan sought was not “equitable” in nature and so could not be enforced under Section 502(a)(3). Examining “standard equity treatises,” the Court found that, before 1938 (when the law and equity courts merged), “a plaintiff could ordinarily enforce an equitable lien only against specifically identified funds that remain in the defendant’s possession or against traceable items that the defendant purchased with the funds (e.g., identifiable property like a car).”34 In a short dissent, Justice Ginsburg argued that the Court’s “bizarre” ruling was the outgrowth of a poorly reasoned decision that the Court handed down more than a decade earlier.35

FALSE CLAIMS ACT
In Universal Health Services, Inc. v. United States,36 a mental-health facility operated by Universal Health Services had submitted Medicaid claims for counseling services that it provided for a teenage girl. After the girl died due to complications from a medication that the facility had prescribed, the girl’s mother and stepfather learned that some of the employees who provided mental-health treatment to the girl and others were unlicensed to do so. The mother and stepfather filed a qui tam action under the False Claims Act, relying upon an “implied false certification” theory of liability. They alleged that, when seeking reimbursement from the federal government, Universal Health had represented that specific types of professionals provided specific types of services but failed to reveal its noncompliance with state licensing laws and other legal requirements. Led by Justice Thomas, the Court unanimously rejected Universal Health’s contention that the plaintiffs’ claim should be dismissed. The Court held that False Claims Act plaintiffs can rely upon the implied certification theory when both (1) the defendant’s claim for federal reimbursement “does not merely request payment, but also makes specific representations about the goods or services provided,” and (2) “the defendant’s failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths.”37

FEDERAL JURISDICTION
CLAIM PRECLUSION
As described above under the “Abortion” heading, the Court struck down two provisions of a 2013 Texas abortion law in Whole Woman’s Health v. Hellerstedt38—one concerning admitting privileges at hospitals and one concerning the sophistication of abortion clinics’ facilities. Before reaching the merits of the clinics’ claims, the Court first had to confront Texas’s argument that the claims were barred due to some of the clinics’ participation in an earlier, unsuccessful challenge to the 2013 law. Led by Justice Breyer, the five-member majority rejected Texas’s argument. The Court first concluded that the attack on the admitting-privileges requirement did not present “the very same claim” that the clinics had raised in the prior litigation.39 Particularly when “important human values” are at stake,40 the Court concluded, the emergence of new facts can change a previously presented claim to a sufficient degree to render it a new claim for claim-preclusion purposes. Here, many clinics had closed following the earlier litigation, and those closures substantially strengthened the plaintiffs’ claim by demonstrating the legislation’s consequences. With respect to the statute’s requirements concerning the sophistication of abortion clinics’ facilities, the Court found no merit in Texas’s argument that the claim was barred because the clinics could have raised—but did not raise—that claim in the earlier litigation. “The Court has never suggested,” Justice Breyer wrote, “that challenges to two different statutory provisions that serve two different functions must be brought in a single suit.”41 Justice Breyer said that treating every enacted statute “as a single transaction” that must be litigated by a challenger in one fell swoop “would encourage a kitchen-sink approach to any litigation challenging the validity of statutes,” an “outcome [that] is less than optimal—not only for litigants, but for courts.”42

Joined by Chief Justice Roberts and Justice Thomas in a lengthy dissent, Justice Alito criticized the majority’s conclusions. In these justices’ view, the majority had brazenly allowed the clinics to relitigate their attack on the admitting-privileges requirement. It is “a cardinal rule,” Justice Alito wrote, that “a plaintiff who loses in a first case cannot later bring the same

32. 29 U.S.C. § 1132(a)(3)
33. 136 S. Ct. 651 (2016).
34. Id. at 658.
35. Id. at 662 (Ginsburg, J., dissenting) (criticizing Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002)).
37. Id. at 2001.
38. 136 S. Ct. 2292 (2016).
39. Id. at 2305 (quoting New Hampshire v. Maine, 532 U.S. 742, 748 (2001)).
40. Id. (quoting The Restatement (Second) of Judgments, § 24, comment f (1980)).
41. Id. at 2308.
42. Id.
Plaintiffs . . . received a boost from the Court’s ruling in *Campbell-Ewald Co. v. Gomez,* although the boost may prove to be fleeting.

**CLASS ACTIONS**

Plaintiffs—particularly those attempting to lead class actions—received a boost from the Court’s ruling in *Campbell-Ewald Co. v. Gomez,* although the boost may prove to be fleeting. The plaintiff in that case aimed to bring a class action against a federal contractor for sending unwanted text messages in alleged violation of the Telephone Consumer Protection Act. Before the plaintiff moved for class certification, and without admitting liability, the contractor offered to pay the plaintiff all of the statutory damages to which he alleged he was personally entitled. The plaintiff rejected the offer. Did the contractor’s settlement offer moot the case? Led by Justice Ginsburg, the Court ruled that a live controversy remained and that the lawsuit could proceed. Under basic principles of contract law, Justice Ginsburg explained, the contractor’s rejected settlement offer “remained only a proposal, binding neither [party],” leaving the parties with the adversity that Article III demands. The Court also signaled, however, a strategy by which defendants might try to moot cases in the future: “We need not, and do not, now decide whether the result would be different if a defendant deposits the full amount of the plaintiff’s individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount.”

Chief Justice Roberts and Justices Scalia and Alito dissented, arguing that there was no live case or controversy because the contractor—a multimillion-dollar company—had promised to pay the plaintiff’s personal statutory damages in full, and it “would be mere pettifoggery to argue that [the contractor] might not make good on that promise.” Picking up on the question that the majority had reserved for future resolution, the dissenters stated that, in future cases, defendants could successfully get around the problem of rejected settlement offers simply by handing over a sum of money sufficient to cover all of the plaintiff’s claimed damages.

Class-action plaintiffs prevailed in *Tyson Foods, Inc. v. Bouaphakeo.* In that case, employees at a pork-processing plant sued for unpaid overtime compensation, arguing that donning and doffing protective equipment was integral to their jobs and that the time they spent on those tasks pushed their total hours worked beyond 40 per week. The amount of time that each employee spent donning and doffing the equipment varied, but—based upon observations of some employees—an expert witness for the class had calculated the average amount of time that those activities consumed. The employer resisted certification of the class, arguing that the time variances among employees rendered the plaintiffs’ claims too dissimilar to warrant class-wide resolution. In an opinion by Justice Kennedy, the Court ruled that class certification was appropriate. The Court relied heavily upon the fact that the employer had failed to keep records of the time that each employee spent donning and doffing the equipment. In light of that failure, the Court said, employees suing individually would have been entitled to rely upon the expert’s calculations when attempting to prove the amount of time that they individually had spent on those tasks. If employees could rely upon those calculations when suing individually, the Court said, then they could rely upon them when suing as a class.

**DIVERSITY JURISDICTION**

Writing for a unanimous Court in *Americold Realty Trust v. Conagra Foods, Inc.*, Justice Sotomayor reiterated the Court’s position that, for diversity-jurisdiction purposes, an unincorporated entity’s citizenship is determined by the citizenship of all of its members—including, here, the shareholders of an unincorporated real-estate investment trust. The Court rejected the suggestion that any entity that has the word “trust” in its name “possesses the citizenship of its trustees alone, not its shareholder beneficiaries as well.”

**STANDING**

In *Spokeo, Inc. v. Robins,* the Court elaborated on the “concreteness” inquiry that Article III’s case-or-controversy requirement necessitates when evaluating whether a plaintiff has standing to sue in federal court. Spokeo provides an online search engine that offers information about individuals. Thomas Robins sued Spokeo under the Fair Credit Reporting Act (FCRA), alleging that Spokeo provided inaccurate information about his marital status, his age, his employment status, and other matters, and that Spokeo was thus liable for damages under the FCRA. The Ninth Circuit held that Robins had standing, but, in an opinion by Justice Alito, the 6-2 Court remanded for further consideration of the issue. Justice Alito explained that, while the Ninth Circuit had properly asked whether Robins had alleged a “particularized”

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43. Id. at 2335.
44. Id. at 2341 (Alito, J., dissenting).
45. 136 S. Ct. 663 (2016).
46. In addition to the ruling recounted above, the Court held that, when they do work for the federal government, contractors do not share the government’s qualified immunity.
47. Id. at 670. Justice Thomas concurred in the judgment, preferring to ground the Court’s reasoning in the common-law doctrine of
48. Id. at 672.
49. Id. at 680 (Roberts, C.J., dissenting).
50. 136 S. Ct. 1036 (2016).
51. 136 S. Ct. 1012 (2016).
52. Id. at 1016.
injury—that is, an injury that he had personally suffered—it failed to ask whether Robins's alleged injury was sufficiently "concrete." To satisfy the concreteness requirement, the Court said, Robins's alleged injury "must be de facto; that is, it must actually exist." Even if Spokeo violated the FCRA when presenting inaccurate information about Robins, therefore, Robins could sue in federal court only if Spokeo's alleged statutory violation harmed him or created a "material risk of harm." It might violate the FCRA to inaccurately report a person's zip code, Justice Alito explained by way of example, but, absent other facts in such a case, "[i]t is difficult to imagine how" that error would harm the person. Joined by Justice Sotomayor, Justice Ginsburg dissented, arguing that a remand was unnecessary because Robins had already alleged facts establishing a sufficiently concrete injury in the form of damage to his efforts to secure a job.

FULL FAITH AND CREDIT

In a per curiam opinion, the Court in V.L. v. E.L. ruled that the Alabama Supreme Court had unconstitutionally failed to afford full faith and credit to a Georgia superior court's ruling. The Georgia court had entered an adoption decree allowing the non-birth partner in a lesbian couple to adopt her partner's natural child. After the family moved to Alabama, the couple's relationship ended, and the natural mother allegedly refused to allow her former partner to visit the child. Faced with a petition for visitation rights, the Alabama Supreme Court held that the Georgia superior court had lacked subject-matter jurisdiction to enter the adoption decree and that the non-birth parent thus had no legal right to visitation. The U.S. Supreme Court reversed. While it is true that a state court need not afford full faith and credit to a judgment issued by a court lacking subject-matter jurisdiction, the justices said, there is a strong presumption that the prior court did have subject-matter jurisdiction, and that presumption had not been overcome here.

In Franchise Tax Board of California v. Hyatt, the Court held that the Full Faith and Credit Clause barred Nevada from awarding damages against California agencies under Nevada law that are greater than it could award against Nevada agencies in similar circumstances. By adopting "a special rule of law applicable only in lawsuits against its sister States," Justice Breyer wrote for the majority, Nevada had evinced impermissible hostility to California and its sovereign prerogatives.

JURIES

Suppose a federal trial judge discharges a jury in a civil case and then, moments later, realizes that an error of some sort has been made in the jury's verdict. Does the court have the power to rescind its discharge order and reassemble the jury for additional work? In Dietz v. Bouldin, the Court ruled 6-2 that it does. The jury in Dietz had awarded the plaintiff no damages, even though the parties had stipulated that the defendant was liable to the plaintiff for damages exceeding $10,000. The court realized the error minutes after discharging the jury, a period of time in which one juror had already left the courthouse. The district court brought the jurors back and asked them to correct the mistake. Affirming the Ninth Circuit, the Court held that, in civil cases, district courts possess the inherent power to rescind discharge orders and recall juries to correct errors in their verdicts. Writing for the majority, Justice Sotomayor emphasized that—given the risk that jurors will be tainted by their contacts with the outside world—judges should exercise this power with caution. Among the factors that a district court ought to consider are whether jurors have spoken with non-jurors; whether jurors have overheard conversations among non-jurors about the strength of the evidence; the length of time separating the discharge and the recall; whether the verdict was met with a discernible emotional response in the courtroom; and whether jurors have accessed their smartphones or other Internet-connected devices. The Court emphasized that it was not deciding here whether district judges possess a comparable power in criminal cases. Joined by Justice Kennedy in dissent, Justice Thomas endorsed a bright-line rule barring any use of the jury once it has been discharged.

RELIGIOUS FREEDOM RESTORATION ACT

Zubik v. Burwell initially appeared likely to produce one of the most legally and politically controversial rulings of the year. The Court had been slated to decide whether the federal government violated the Religious Freedom Restoration Act of 1993 (RFRA) when it required a set of employers to provide their female employees with health-care coverage for all FDA-approved forms of birth control—including such things as intrauterine devices, which prevent a fertilized egg from implanting in the uterus—unless those employers declared their religiously grounded opposition in a form submitted to the government or to their insurers. The employers challenging the requirement claimed that, in violation of RFRA, the federal scheme substantially burdened the exercise of their religion without adequate justification. In these employers' view, the federal regulations required them to be complicit in providing women with access to birth-control methods that were equivalent to abortion.

Although those of us outside the Court cannot be certain, it is possible that Justice Scalia's death in February 2016, reduc-
ing the Court from nine members to a tie-susceptible eight, influenced the justices' disposition of the case. The attorneys presented their oral arguments on March 23, 2016. Six days later, the Court issued an order requesting additional briefing on whether a regulatory arrangement that the justices proposed—one that would not require the employers to submit a form setting the birth control-coverage process into motion—would be acceptable to the parties. After the employers and the government responded favorably to the Court's suggestion, the justices voted unanimously not to address the merits of the employers' RFRA claim. Instead, in a per curiam ruling, the Court vacated the lower courts' decisions and remanded for further proceedings, expressing its expectation that the courts of appeals would “allow the parties sufficient time to resolve any outstanding issues between them.”

Joined by Justice Ginsburg, Justice Sotomayor filed a concurring opinion, urging the lower courts not to draw any inferences from the Court's actions about the justices' assessment of the merits of the employers' RFRA claim.

SECOND AMENDMENT

In a per curiam decision, the Court in Caetano v. Massachusetts rejected the Supreme Judicial Court of Massachusetts's reasons for upholding a state ban on stun guns. Contrary to the Court's reasoning in 2008's District of Columbia v. Heller, the Massachusetts court had relied upon the fact that stun guns were not commonly used at the time of the Second Amendment's ratification and the fact that stun guns are not useful in modern military warfare. The Court remanded the case for a proper application of the law. Concurring in the judgment, Justice Alito (joined by Justice Thomas) argued that, rather than remanding, the Court simply should have ruled that the possession of stun guns is constitutionally protected because those weapons are “commonly possessed by law-abiding citizens for lawful purposes today.”

SPEECH

Suppose you work for a state or local government and your supervisor believes—contrary to fact—that you have exercised your First Amendment freedoms of speech and political association in a particular way. If your employer retaliates against you based upon its misperception, do you have a Section 1983 action against it? Under the Court's 6-2 ruling in Heffernan v. City of Paterson, you do. Jeffrey Heffernan, a police officer, alleged that he was given a less desirable work assignment because his supervisors mistakenly believed he was supporting the incumbent mayor's opponent in an upcoming election. In an opinion written by Justice Breyer, the Court held that

[w]hen an employer demotes an employee out of a desire to prevent the employee from engaging in political activity that the First Amendment protects, the employee is entitled to challenge that unlawful action under the First Amendment and 42 U.S.C. § 1983—even if, as here, the employer makes a factual mistake about the employee's behavior.

After all, Justice Breyer explained, retaliation based upon mistaken beliefs can deter employees from engaging in constitutionally protected activities just as surely as retaliation based upon accurate perceptions. Joined by Justice Alito in dissent, Justice Thomas argued that Heffernan's claim should fail because Heffernan had not actually exercised his First Amendment right to speak in favor of (or to associate with) the mayor's political opponent.

TITLE VII

Under a regulation promulgated by the Equal Employment Opportunity Commission, a federal employee wishing to sue for employment discrimination under Title VII must first consult with an Equal Employment Opportunity counselor. The regulation requires the employee to contact the counselor "within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action." Resolving a circuit split, the Court ruled in Green v. Brennan that, for a constructive-discharge claim, “the matter alleged to be discriminatory” includes the employee's resignation, with the result that the 45-day limitations period begins to run on the day the employee resigns.

Of potentially broader interest is the disagreement among the justices about whether Title VII creates a freestanding cause of action for constructive discharge. Led by Justice Sotomayor, a majority of the Court concluded that it does. Justice Thomas argued in dissent that, rather than create an independent legal claim, the doctrine of constructive discharge was designed merely to broaden the range of remedies that employees who have quit their jobs may seek when complaining of workplace discrimination. Concurring in the judgment, Justice Alito staked out a middle-ground position. In his view, the doctrine permits an independent cause of action “when an employer subjects an employee to intolerable working conditions with the specific discriminatory intent of forcing the employee to quit.” Absent such intent, Justice Alito wrote, the constructive-discharge doctrine only ensures that, when suing an employer for discriminatory acts, an employee who

63. Id. at 1560.
64. 136 S. Ct. 1027 (2016).
68. Id. at 1418.
69. 29 C.F.R. § 1614.105(a)(1).
70. 136 S. Ct. 1769 (2016).
71. Id. at 1783 (Alito, J., concurring in the judgment).
has quit his or her job “can recover, as damages for the underlying discrimination, all damages that would be available for formal discharge but which are normally unavailable to employees who voluntarily quit.”

In CRST Van Expedited, Inc. v. EEOC, the Court unanimously ruled that a Title VII defendant can qualify as a “prevailing party” within the meaning of Title VII’s fee-shifting provision even when a district court’s dismissal of the action against it is grounded in legal reasons having nothing to do with the merits of the plaintiff’s claim. The Court declined to say—and thus left for possible determination on remand—whether a Title VII defendant can be a prevailing party for fee-shifting purposes if the favorable judgment that it obtains does not preclude further proceedings.

OTHER NOTABLE RULINGS

In a terse per curiam ruling in James v. City of Boise, the justices reminded the Supreme Court of Idaho that state courts are bound by the U.S. Supreme Court’s interpretations of federal statutes, including 42 U.S.C. § 1988, the fee-shifting statute at issue here.

In Sheriff v. Gillie, the Court unanimously found no violation of the Fair Debt Collection Practices Act when, pursuant to Ohio law, special counsel retained by the state’s attorney general used the attorney general’s letterhead to communicate with debtors who owed money to the state for such things as unpaid university tuition and medical bills.

In Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning, the Court held that Section 27 of the 1934 Securities Exchange Act—a provision that gives federal district courts exclusive jurisdiction of all suits “brought to enforce any liability or duty created by [the Act] or the rules and regulations thereunder”—establishes the same jurisdictional test that courts deploy when determining whether a case “arises under” federal law within the meaning of 28 U.S.C. § 1331.

In OBB Personenverkehr AG v. Sachs, the Court held that a suit against an Austrian-owned railway was barred by the Foreign Sovereign Immunities Act. The plaintiff had purchased a Eurail pass in the United States, then was injured while trying to board a train in Austria. Rejecting the plaintiff’s contention that the statute was not an obstacle because her claim was “based upon a commercial activity carried on in the United States,” based upon the citizenship of children born abroad to American citizens; the power of federal courts to confer citizenship as a remedy for equal-protection violations, and the distinctions that Congress may and may not make when determining the citizenship of children born abroad to American citizens; the power of a federal appellate court to review a district court’s denial of class certification; the statutory preconditions for holding an executive office in an acting capacity; the power of a state to exclude churches and other religious organizations from a program aimed at installing safety flooring on playgrounds; and the kind of injury required to obtain relief under the Fair Housing Act.

LOOKING AHEAD

The fact that the Court will continue to have a tie-susceptible total of eight members when the October 2016 Term begins has not deterred the justices from placing a large number of broadly significant civil cases on its docket. In the coming Term, the Court will aim to bring clarity to numerous issues, including (among others) the permissible role of race in drawing legislative districts; the power of federal courts to confer citizenship as a remedy for equal-protection violations; and the distinctions that Congress may and may not make when determining the citizenship of children born abroad to American citizens.

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An Examination of Website Advice to Avoid Jury Duty

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The use of a jury in legal proceedings can be traced as far back as the participatory democracies that emerged in Greece in the sixth century BC, although it was not until the signing of the Magna Carta that the right to a trial by a jury of one’s peers emerged. In the United States, the Sixth and Seventh Amendments of the U.S. Constitution expressly provide this right in both criminal and civil proceedings. Furthermore, these amendments provide individuals with the right to a trial before an impartial jury. This right intends to serve as a safeguard against unfair treatment during a trial, providing a system of checks and balances to pursue the goal that justice remains at the heart of the legal system. A jury is intended to serve as a cross-section of the community, as it is drawn from and purports to represent the collective community conscience and common sense when resolving disagreements. Despite this rich constitutional history and community context, many residents of the United States actively seek to avoid jury service when they are called, for reasons we discuss further below. Some individuals search the Internet for information about how to avoid participating in jury service. As trial judges are tasked with oversight that spans the entire process of impanelment through voir dire, this study sought to provide a contextual background to assist the judiciary in easily recognizing and assessing potential jury avoidance. In the current study, the investigators examined advice offered by popular websites about how reluctant jurors may attempt to be excused from jury service.

A trial by jury represents an important aspect of democracy, offering citizens the opportunity to take an active role in the administration of justice. Although Americans seem to have deeply rooted and affirmative beliefs in the use of juries in civil and criminal trials, many find the prospect of serving on a jury to be undesirable and burdensome. Several possible explanations exist for why citizens may hold a negative view about serving on a jury. One explanation is that individuals are coerced into appearing and potentially serving on a jury. After all, failure to appear when summoned may result in legal sanctions, including fines or possibly jail time. In response, citizens may take a negative attitude toward jury service and even become oppositional or avoidant, both when summoned and during the voir dire process. Psychologists refer to this phenomenon as the “negative participant effect” or, more controversially, the “screw you” effect.

Citizens may also hold negative attitudes toward serving on a jury due to a cognitive distance between what they believe to be their responsibility toward themselves versus toward social institutions such as the judicial process. This phenomenon is similar to the “bystander effect” in which people do not offer assistance to a person in need because they suppose others will assist instead. Upon receiving a summons, some citizens may simply disregard it, assuming other community members will appear to serve. When enough people respond this way or are excused from duty, courts in some jurisdictions may have a difficult time obtaining enough community members to form a jury. For the presiding chief judge in charge of providing an adequate jury pool, improper reductions in the jury pool frustrate the scheduled trial timeline and the overall judicial process if trials must be rescheduled due to an inadequate number of jurors. Furthermore, a shallow jury pool may force the jury to be impaneled with questionable jurors. This smaller number of possible jurors places an unnecessary tension between the Sixth Amendment right to a speedy trial and a person’s right to a trial by jury.

As another potential source of negative influence, the media often portray jury service as a burdensome task and something to be avoided. Negative societal attitudes about jury duty are readily observable in popular culture. Pejorative attitudes toward jury service can be found on popular television shows, in newspaper cartoons, and online. For example, in an episode of The Simpsons, the character Apu received a jury summons, discarded it in a nearby garbage can, and stated he felt “American” after doing so. In the same episode, Homer explained to Bart that a person could easily avoid jury duty by proclaiming prejudice against all races. Another example appeared in the television show 30 Rock when main character Liz Lemon was summoned for jury duty. In her attempt to avoid jury service, she arrived dressed as Princess Leia and stated during voir dire that she had the ability to read minds.

Footnotes
2. U.S. CONST. amends. VI and VII.
3. Id.
5. Joseph Masing, Role-Related Behavior of the Subject and Psychologist and Its Effect Upon Psychological Data, in THE NEBRASKA SYM-
7. U.S. CONST. amend. VI.
9. Id.
11. Id.
While not every portrayal of jury service is negative, the media often paint jury service as undesirable or unimportant. Unless a show’s main characters are involved in jury service, juries do not get much attention on popular television shows. This is even true of procedural dramas like Law and Order in which many scenes take place in a courtroom setting. Jury members are minimally included in these scenes, serving as faceless components within the courtroom.

The media are not the only purveyors of negative attitudes toward jury service in popular culture. For example, a perennial joke pokes fun at individuals who fail in their attempts to get out of jury duty, stating that juries are composed of people not smart enough to get out of jury duty. Although intended to be humorous, these examples illustrate the common societal attitude that serving on juries is both unpleasant and avoidable. Further, the derogation of jury service in popular culture may foster the perception that evasion of jury service is normal and even encouraged.12

On the surface, it might appear that attempts to avoid jury service have no measurable consequences. Some may find enjoyment in sharing stories about clever efforts to be dismissed from service. Although it may appear harmless and entertaining, the financial costs of absent jurors are often overlooked. When an individual presents for jury service and provides an excuse to be dismissed, the courts and the public incur costs in several areas. One study suggested each juror not chosen for actual jury service costs the community between $800 and $1,000 when accounting for juror payment for appearance, administrative court fees, and lost work productivity.13 It is estimated that between $25 to $150 of these costs are incurred directly by the court for every juror that is dismissed, depending on the jurisdiction’s compensation policy.14

Before the advent of the Internet, individuals who desired to be excused from jury service either had to come up with an excuse on their own or ask a close friend or relative for advice. Now, the Internet allows information to be shared quickly and impersonally. This is a relatively new phenomenon that has not been explored in the context of efforts to avoid jury duty. To investigate relevant Internet search trends among American citizens, we conducted a Google Trends search utilizing the phrase “how to get out of jury duty” (which is, of course, one of many similar phrases a person may use).15 Google Trends, which was established in 2005, is a service provided by Google, Inc., that indicates how often a term is searched on Google across time and location.16 The Google Trends keyword analysis showed that the search volume for this phrase has remained fairly consistent between 2005 and 2015, averaging 12,100 searches per month.17 Citizens in California, New Jersey, New York, and Pennsylvania conducting this search had the highest frequency.18 When we conducted a similar analysis to compare the search volume to the search volume for “benefits of jury service,” we received a message saying there was “not enough search volume to show graphs.”19 It seems Internet users are far more concerned with forming strategies to avoid jury service than they are with exploring potential benefits of their service.

The primary data we analyzed for this study came from Google as well. We systematically analyzed Google search results to generate a list of 10 of the most popularly visited websites offering information and strategies about how to get out of jury service. The excuses offered by these sites were analyzed for themes regarding strategies for avoiding jury duty. This information may be particularly helpful for the judiciary during initial pretrial screening of the overall jury pool as well as during voir dire. Judges currently conduct questioning during voir dire in most federal courts and in an increasing number of state courts.20 In states where attorneys most often conduct voir dire, judges may still ask questions at their discretion.21 Looking to Florida as an example, pursuant to the Florida Rules of Judicial Administration sections 2.255 and 2.256, the judiciary is tasked with overseeing initial state grand-jury selection as well as juror time management, both of which can be streamlined with additional knowledge of popular jury-avoidance tactics.22 In all cases, it is the responsibility of the judge to oversee the voir dire process and maintain the integrity of the judicial system.23 Research suggests potential jurors are more candid and honest when an attorney conducts voir dire than when a judge conducts it.24 Thus, it is necessary for judges to be able to recognize avoidance strategies employed by potential jurors so that they may better understand and respond to them during voir dire. Recognizing themes in juror excuses may also aid in obtaining accurate

12. Sams et al., supra note 1, at 6.
14. Id.
16. Id.
17. Id.
18. Id.
19. Id.
information from potential jurors and in facilitating the formation of an impartial jury.

**METHOD**

**PROCEDURE**

We collected data by searching with the term “how to get out of jury duty” through the Google.com search engine utilizing computers located at various public educational institutions, in our homes, and at a public library, all with different Internet Protocol (IP) addresses. This measure was taken in an attempt to reduce the “filter bubble effect,” wherein an algorithm is used to provide relevant search results based on an individual user's location and past searches.25

The searches returned nearly 400,000 results, with well over 200 on-target sites. Once the initial searches were conducted, each investigator recorded their top 100 search results. These four sets of top 100 search terms were then compared to each other. Each website was assigned a number based on the order in which it appeared in each investigator's search. The first website to appear was assigned the number one, the second the number two, and so on. The numbers from each of the four searches were then summed, providing a “hit rate” for each website. The 10 websites with the highest hit rates—that is, the lowest sums—were included in the study. Once identified as a top-10 website, each of the sites was visited and analyzed to identify common themes.

**MATERIALS**

Websites. The following 10 webpages were identified through the method described above and served as the materials for our analysis. They are listed as follows in descending order by their popularity, beginning with the most popular:

1. “How to Get Out of Jury Duty”;26
5. “How to Get of Jury Duty (Legally)”;30
7. “How to get out of jury duty”;32
8. “Jury Duty Excuses”;33
9. “How To Get Out Of Jury Duty (Ethically)”;34 and

It should be noted that many websites that offer strategies for getting out of jury duty, including some of the websites examined in this study, are open source and may be edited at any time by various independent sources. One pertinent example is Wikihow.com, the most popular website according to our independent search results. Given the open nature of many of these websites, it is possible that some of the quotes presented in this article have changed since the article's publication. However, all quotes provided in this article were accurate at the time of publication on the websites themselves.

**RESULTS**

While the majority of the websites analyzed in this study rightly advised that not attending jury duty when called or providing false information are both unlawful and inadvisable, these same websites were overtly negative toward jury duty and promoted actions that came close to committing the violations warned against. For example, the sites described jury duty as unpleasant and use phrases such as “escape serving”36 or “wiggle out of your civic duty”37 to characterize the intent behind the excuses. Such phrases imply that it is acceptable to bend the truth to avoid serving. Many other websites endorsed making false claims or gross exaggerations of the truth. They further provided information on how to rectify potential consequences of being caught in this evasion.

Our analysis of the content of these websites yielded four major categories. These categories were: (a) legally recognized excuses; (b) expression of biases; (c) exaggeration of personal qualities; and (d) tricks and gambits. Each theme is discussed in the context of verbatim examples.

1. **Legally Recognized Excuses**

Serving on a jury can be a time-consuming, stressful process
that requires an individual to be present and attend to large amounts of information for extended periods of time. As such, certain excuses are widely accepted in most jurisdictions to prevent undue personal and financial hardship to potential jurors who meet certain criteria. The websites correctly acknowledge that most states will allow citizens to be excused from jury duty if they can demonstrate that, for physical or financial reasons, they are unable to serve. One major theme is that a potential juror will be excused from duty upon the legitimate demonstration that service will constitute an undue hardship for the individual, although states differ in how they define this condition.\textsuperscript{48} While individuals may falsely claim that one of these excuses applies to them, excuses from this category are usually directly observable or verifiable. Legally recognized excuses can be divided into two subcategories—namely, competing personal and occupational responsibilities and medical ailments.

### Competing Personal and Occupational Responsibilities

Broadly speaking, excuses in this category include characteristics of the citizens, their environment, or their occupational circumstances that would hinder them from being able to commit the time or cognitive effort necessary to fulfill duties as jurors. These excuses suggest that jury service would be a detriment to the individual or another's physical or financial well-being. Some of the personal characteristics discussed on one of the sites include being over 70 years old,\textsuperscript{39} having served on a jury within the previous two years,\textsuperscript{40} being the primary caregiver to a child or elderly person,\textsuperscript{41} or being an expectant mother.\textsuperscript{42} As noted, many of these excuses are based upon personal characteristics that are readily verifiable.

The personal-characteristics category also included excuses that the individual would be unable to appear for jury service due to logistical reasons. Common logistical excuses include a lack of transportation to the courthouse or issues with being away from one's home for a prolonged period of time. To take advantage of this excuse, one site advises potential jurors to inform judges or court clerks they will be on vacation because “they can't expect you to cut short a trip just for jury duty.”\textsuperscript{43}

Finally, excuses in this category may be related to occupation or a person's financial situation. Some websites suggested that if an individual can demonstrate that serving on a jury for an extended period of time will result in financial hardship, he or she will likely be excused from serving. These sites recommended framing this excuse as financial hardship resulting from lost wages or stating that the person's place of work will be irreparably damaged due to the person's absence. One site refers to this tactic as playing the “I might get tossed out into the street if I sit on this jury” card.\textsuperscript{44} This type of excuse is also verifiable through bank statements or letters from one's employer.\textsuperscript{45} The website Wikihow.com, the site that was returned first on all four of the investigators' searches, went as far as providing visitors with a template for drafting a letter from an employer.\textsuperscript{46}

### Medical Ailments

Excuses and strategies that fall into the medical-ailments category included disclosing physical or psychological ailments that would make it difficult or impossible for a person to sit in one place or attend to information being presented for long periods of time. Most judges and attorneys recognize that sitting for long periods of time can be uncomfortable or nearly impossible for individuals with physical conditions such as chronic lower back pain or bladder-control issues. Similarly, having a mild psychiatric illness such as attention deficit hyperactivity disorder (ADHD) or anxiety can make it difficult to pay attention for long intervals of time. As a result, the websites suggested that individuals who legitimately suffer from one of these conditions should report this information to the attorneys and the judge, though a user on one website suggested this strategy is not always successful even when accompanied by written proof of diagnosis from a mental-health professional.\textsuperscript{47} Still, other sites encouraged potential jurors to procure a letter from a physician that validates the existence of such problems, “as the note convinces those working on the trial that you can't work long hours.”\textsuperscript{48} Due to the mostly non-visible nature of these symptoms, some websites suggested that these symptoms could be falsely reported or acted out.

### 2. Expression of Biases

All 10 of the websites analyzed in this study advised that citizens may avoid jury duty by asserting that they cannot render an impartial judgment due to a pre-existing belief or bias. As such, individuals who possess biases related to the case being tried are encouraged to express these biases during voir dire. One of the sites asserted that all people have biases and that the courts are looking for individuals who are willing to set minor biases aside during their jury service.\textsuperscript{49} Unlike legally recognized excuses, excuses that are included in this category are difficult to verify due to their primarily covert nature. Juror efforts must be explored and tested by the attorneys through questioning during voir dire. As such, the websites encouraged jurors who seek to use this tactic to be firm, adamant, and confident when communicating these biases to the court. One site

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38. Sams et al., supra note 1, at 5.
40. Fields, supra note 34.
41. Id.
42. How To Get Out Of Jury Duty Summons, supra note 29.
43. Id.
44. Fields, supra note 34.
46. Id.
47. Jury Duty Excuses, supra note 33.
49. Lubin, supra note 35.
encouraged potential jurors to emphatically repeat, “I cannot be fair and impartial” until they are dismissed.30 The websites offered excuses and strategies that depict two different types of biases—namely, personal bias and bias against the legal system.

**Personal Biases**

**Race-Related Biases.** To be excused due to a personal bias, these websites recommended that potential jurors express personal values or beliefs that will hinder their ability to render an impartial opinion. The most common biases these websites discussed are biases against a particular race or ethnicity. The implication is that if potential jurors are racially or ethnically biased, they will disregard the evidence presented during trial and allow their decision making to be driven by biases. Due to overuse of the personal-bias excuse, most of the websites advised that simply claiming to be biased in this manner is now insufficient.31 As such, potential jurors are advised to claim holding such views “if and only if” they are genuinely biased in a way that would prevent them from rendering a fair decision.32 Obviously, this excuse has a host of related implications for potential jurors claiming racial or ethnic biases, as they are openly claiming to dislike a certain segment of society.

**Personal Involvement.** Focusing on a potential juror’s relationship with the legal system, some websites promoted excuses attributing personal biases to the juror’s relationship with the legal system or its actors.33 These excuses suggested that negative personal experiences with the law or involvement with an incident that is similar to the situation at hand may impair one’s ability to render a fair and impartial decision.34 Similarly, to parse out such a bias during voir dire, attorneys encourage potential jurors to disclose whether they know someone who has been arrested or convicted of a crime. For example, potential jurors are encouraged to report previous personal experiences that are similar to the case for which they have been called.35 If the case “is about car theft and your brother just happened to be arrested for the same thing last month, now is a great time to let someone know.”36 The assumption is that knowing someone who is or has been involved in the criminal-justice system may influence one’s judgment in some way. Providing an example in the criminal context, potential jurors who have family members who are lawyers or police officers are encouraged to share this information with the court because these relationships may create bias by predisposing those jurors to view legal actors in overly positive or negative ways.37

**Bias Against the Legal System**

Website excuses in this category suggested that individuals should express either overly positive or overly negative opinions about a specific entity within the legal system or for the legal system as a whole.38 These negative opinions about the legal system may be based on unfavorable personal interactions with actors within the justice system or distaste for particular laws. The websites encouraged individuals who have had unsatisfactory experiences with the legal system to share this information, particularly if the individual has ever been involved in an unresolved legal issue or in which the person was not satisfied with the resolution.39 The personal bias about the legal system or its actors may result in feelings of doubt or uncertainty about the efficacy of the legal system and result in the belief that “[t]he system doesn’t work.”40 Similarly, the websites proposed that potential jurors may choose to express negative beliefs about real or fictitious law-enforcement officials or other legal entities.41 Doing so suggests that an individual may be holding a grudge against the actors within the legal system that would manifest itself during jury service. Potential jurors may also state negative views based on the controversial outcomes of highly publicized court cases like the trials of O.J. Simpson and Casey Anthony. According to one website, a California judge was quite familiar with this type of excuse and preempted its use by saying, “I don’t want to hear any O.J. Simpson the jury system doesn’t work excuses.”42

Another common strategy suggested by many of these sites is to mention the concept of jury nullification,43 which is a process by which a jury renders a verdict of not guilty without being asked to do so. The websites suggested that potential jurors might report that the law is not fair or impartial and that it is to mention the concept of jury nullification,44 which is a process by which a jury renders a verdict of not guilty without being asked to do so. The websites suggested that potential jurors might report that the law is not fair or impartial and that it

50. Isaacs, supra note 27.
51. Id.
52. Id.
54. Id.
57. Lubin, supra note 35.
59. Id.
60. Id.
62. Id.
64. Id.
65. Wang, supra note 30.
66. Id.
neys. Attorneys always want jurors who they can persuade one way or another. As such, individuals wishing to avoid jury duty were advised to exaggerate or feign qualities that may make persuasion difficult and, as a result, make them unappealing for jury service. Potential jurors may choose to present themselves in overly positive or overly negative ways, and the websites offer strategies to assist jurors with presenting these qualities most effectively.

The jury-avoidance websites stated that portraying oneself in an overly positive manner entails demonstrating high intelligence, advanced levels of education, or critical-thinking skills. While these characteristics may be desirable in some contexts, attorneys may worry these individuals may be overly “difficult to persuade one way or the other.” One site suggested that one way to accomplish this is by appearing “for jury duty acting like you know everything before hearing the case.” Using this “play smart” strategy, individuals are advised to exaggerate the amount of knowledge they have about the case or about the law in general. With this strategy, the goal is to appear unable to render a fair and impartial verdict due to one’s obstinacy. One website posits that potential jurors who display high levels of intelligence and critical-thinking skills may be “too attached to the facts . . . dangerous for both sides.” Conversely, websites also proposed portraying oneself in an overly negative way through demonstrations of stubbornness or cognitive rigidity. Rather than “playing smart,” jurors may instead choose to “play dumb.” This strategy involves emphasizing that the person knows nothing about how the legal system works and is unable to comprehend common legal terminology. One site advises potential jurors to “try to pass yourself off as a bigger idiot than you already are.” Accordingly, potential jurors may “ask as many stupid questions as possible and ask for clarification about every single topic presented, [which will] not only annoy your potential co-juror peers, but the attorneys and judge as well.”

4. Tricks and Gambits

Tricks and gambits are the most diverse of the four categories proposed by the jury-avoidance websites, and suggestions ranged from clever circumventions of rules to bizarre behaviors meant to baffle attorneys and judges. Excuses in this category are best described as violations of legal standards or socially normative expectations. Excuses that fall into this category can be divided into two subcategories—namely, loopholes in existing practices or policies and exhibiting strange behaviors.

Loopholes in Existing Practices or Policies

Excuses that fall into the category of loopholes in existing practices or policies involve taking advantage of gaps in current practices or policies. These excuses do not necessarily involve engaging in overtly unlawful or deceitful behaviors. Rather, these excuses encourage potential jurors to capitalize on the language used in these laws and escape jury service on technicalities, while still maintaining the appearance of being willing to serve. For example, one website explained that individuals living in California can get out of jury service by claiming to have an impending obligation and offering to return for service once this obligation has passed. The website further explained, “Under state law, you will be considered to have already served,” which will render the offer to return later lip service. In other jurisdictions, the websites encouraged jurors wishing to avoid service to try to change the date of their jury service to the month of December because “there’s a far greater chance that trials will be delayed or moved. You may never actually get called in, but you’re still fulfilling your civic duty.” Another strategy was to offer to move one’s jury service forward instead of delaying to a later date, as doing so “is likely to work because the jury pool for earlier trials is likely already set, so they likely won’t be able to seat you.”

Exhibiting Strange Behaviors

To attempt an excuse based on the exhibition of strange behaviors, websites advised individuals to behave in socially non-normative ways. The most popular suggestions involve engaging in some odd or eccentric behavior in the hope of appearing unstable and unfit for jury service. Suggestions include making absurd statements as well as engaging in socially deviant behaviors. One of the websites contained over 100 excuses submitted by people from all over the United States, many of which promoted strange or deviant behaviors. Although some of these excuses are possibly valid, many of them are outlandish and obviously fabricated. These excuses entail creating a perception of the individual that suggests instability because “the court is looking for objective, normal people, not self-proclaimed radicals who might overthrow the system.” For example, the site advises potential jurors, “Shave your hair into a pink Mohawk, get some (fake?) piercings, and

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68. Id.
69. Id.
70. Id.
71. Wang, supra note 30.
72. Id.
75. Id.
78. Id.
79. Id.
80. Id.
82. Jury Duty Excuses, supra note 33.
wear your best Misfits shirt to the jury selection." 84 The idea is that individuals who exhibit these types of behaviors will not take their roles as jurors seriously. Moreover, they may be inattentive during the trial proceedings and unpredictable in deliberations. While these individuals may be “high-risk, high-reward” selections in some cases, jurors who seem overly reluctant to serve often need to be dismissed. 85

**DISCUSSION AND RECOMMENDATIONS**

The current analysis examined 10 of the most popular websites that offer strategies to help individuals avoid jury duty in order to inform the courts about the kinds of information the jury venire might uncover before arriving (or not arriving) in court after being summoned. Four recurring themes arose: legally recognized excuses; expression of biases (both personal and against the legal system); exaggeration of personal qualities; and tricks and gambits. The themes were further broken down into subcategories to provide richer details. Recognizing these themes may assist judges and other courtroom actors in assessing whether and perhaps which type of strategy a potential juror is employing to attempt to avoid serving.

**Excuse Legitimacy and Juror Characteristics**

The excuses offered may take the form of either a legitimate reason to be excused, an exaggeration of a legitimate reason, or an arguably constructed reason. We hypothesize that the legitimacy of one’s excuse to avoid jury duty provides judges and attorneys with information concerning the individual’s commitment to conventional values, which we define as views or beliefs that are shared by a majority of the members of a community. If avoiding jury duty ultimately fails, the legitimacy of a potential juror’s excuse may also provide information regarding the likelihood that he or she will invest effort in assessing the evidence presented during the trial proceedings and whether he or she will be idiosyncratic and unpredictable during jury deliberations. In the normal range of cases in which the evidence does not clearly favor one side over another, this information may assist in deciding whether or not to strike a reluctant juror. 86

Some individuals present with a genuine willingness to serve, although they have a compelling, legitimate reason to be excused. More likely than not, their excuse would fall into the category of legally recognized excuses we have described. Individuals who employ these types of excuses are hypothesized to have a high level of commitment to conventional values and to be likely to invest effort into assessing evidence. Because of this likelihood, we believe that there is a low probability of these individuals being idiosyncratic and unpredictable during deliberations if they are ultimately selected.

At the other end of the spectrum lie individuals who have clearly and consciously devised a strategy, legitimate or not, to avoid serving. Part of this strategy involves presenting excuses that are fabricated. These individuals do not hesitate to report having an attitude or belief that would be sufficient to warrant being excused or to act in such a way that suggests instability. It is most likely that the excuse these individuals offer to be dismissed will come from the “tricks and gambits” category. However, it is also possible that they will report they harbor biases, but the legitimacy of the beliefs they claim to possess will not hold up under close scrutiny. These people are hypothesized to have a low level of commitment to conventional values and little likelihood of paying attention to the evidence being presented. Accordingly, they are also likely to behave unpredictably during deliberations.

Between these two groups lies a third group composed of individuals who are adverse to jury service and may exaggerate a legitimate, though arguably minor, personal quality or reason to be excused. Many of their excuses are overstatements of personal qualities. We predict that these individuals will have a moderate commitment to conventional values, as well as a moderate likelihood of attending to evidence presented during the trial and investing effort in assessing it during deliberations. There is a low to medium likelihood that people who fall into this category will behave unpredictably in deliberations, although these considerations should be made on a case-by-case basis.

**Moral Issues**

The derogation of jury service in popular culture is consistent with the large volume of webpages in existence that offer advice for avoiding jury duty. The frequency with which this advice is being sought suggests that jury service is often viewed as an aversive obligation rather than a desirable right or privilege. However, the issue is raised of whether the existence of websites endorsing devious or unlawful behavior is moral. Before addressing this issue, it should be noted that the most popular website in the study, Wikihow, may be edited by anyone, regardless of background or area of expertise. 87 The other websites were personal blogs and advice columns featured on pop-culture websites. As such, these websites and the authors of the writings would receive protection under the First Amendment’s right to free speech. 88 Furthermore, none of the sites analyzed in this study were operated or maintained by an educational institution or governmental agency. However, the promotion of illegal or morally bankrupt behavior obviously diminishes the ethical credibility of such sources of information.

Some websites offered information regarding legally recognized excuses to avoid jury service. Juror qualifications and exemptions are available on government-run websites, such as the site operated by the U.S. federal courts. 89 Furthermore, in

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84. Id.
85. Sams et al., supra note 1, at 4.
86. Id. at +5.
88. U.S. CONST. amend. I.
most jurisdictions, legally recognized excuses also typically accompany jury summonses. In addition to these legitimate excuses, the websites also included other morally questionable tactics that encourage prospective jurors to exaggerate the truth or fabricate an excuse to avoid jury service. These exaggerations directly violate the oath potential jurors take during voir dire to provide only truthful information, bringing the moral character of an exaggerating prospective juror into question. Presenting a false excuse as some of these sites suggest would likely constitute perjury or obstruction of justice, both of which can be felonies. Therefore, these sites were offering advice about how to commit and potentially get away with potentially felonious activity.

The lighthearted tone of many of websites offering ways to avoid jury duty and the volumes of information available to interested individuals support the assertion that this offense is not taken seriously. One particularly repugnant example of this found in the sites suggested asserting a personal or ethnic bias to avoid jury duty. Whether or not there is truth in this type of bias, promoting negative biases of any group of persons serves no morally acceptable purpose and should not be encouraged. Finally, the existence and apparent popularity of these websites supports Losh, Wasserman, and Wasserman’s finding that willingness to participate in civic duties is declining in the United States.

LIMITATIONS AND FUTURE DIRECTIONS

The findings and suggestions presented should be considered in the context of the methodological limitations of this study. One potential limitation is that, due to logistical constraints, it is not known if the sites analyzed in this study would appear in similar Google searches by other people in differing locations. Efforts were made to control for this possibility, but it is plausible that searches in different regions of the country could return a different list. Similarly, it is not known if the use of a search engine other than Google would return different search results. To investigate this possibility, the researchers conducted an identical search using Dogpile.com, a metasearch engine. Metasearch engines conduct a search of the user's search terms across multiple search engines simultaneously and identify the most popular results. The Dogpile search returned 7 of the 10 websites analyzed in the study. The remaining websites were a Yahoo Answers community posting, a website affiliated with court-reporter schools, and an article written by three of this study's authors. Because of the high agreement between the results of the Google and Dogpile searches and because these websites did not differ dramatically in terms of content, it is reasonable to infer that the websites in this study are representative of what other people would find through a similar Internet search.

Future research should examine the characteristics of individuals who use different types of excuses to avoid jury service. Empirical data are necessary to confirm our hypotheses regarding posited personal characteristics and reasons to be excused. Just as individuals who seem overly eager to serve should be carefully questioned and challenged, individuals who seem overly committed to avoiding jury service may have personal agendas that compromise their willingness to carefully consider all of the facts presented in court. Furthermore, future research could be conducted in various international locations to compare differing attitudes toward the use of juries in various legal systems.

CONCLUSION

Trial by jury is an important aspect of the United States legal system. The Sixth and Seventh Amendments create a safeguard against unfair treatment by the justice system by guaranteeing all citizens the right to a trial by an impartial jury. While many Americans believe this right is important, some people may make significant efforts to avoid serving on a jury. Excuses found on various websites range from legitimate to obviously fabricated to completely dishonest. The investigators have offered four categories of excuses and have hypothesized characteristics that are common among individuals who use each type of excuse. These categories may prove helpful to judges, trial lawyers, and court clerks when addressing members of a jury pool who are seeking to avoid their service. In cases where the evidence heavily favors one side, the composition of the jury will likely not make a difference in the outcome. However, in cases in which the outcome is not readily apparent, judges have especially compelling reasons to work to facilitate the formation of a fair, unbiased jury.

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Meta-Analysis as an Aid for Judicial Decision Making

Nancy K. Steblay

Judges are the gatekeepers for courtroom evidence. A decision about scientific-evidence admissibility requires knowledge of the relevant content and a judgment about the quality of what is often an enormous and complex research literature. How are judges to learn about a highly specialized topic? One option is to immerse oneself in the scientific research. Alternatively, judges may read legal briefs for related cases, attend judicial-education seminars, or open their courtrooms to experts at pretrial hearings or at trial. In any of these ventures, one is likely to run into the research review technique called meta-analysis.

This article has two primary and parallel objectives: (1) to describe what one can expect to find within a high-quality published meta-analysis, should one choose to go directly to the research literature, and (2) to propose how the qualities of a good meta-analysis can serve as a standard for how scientific knowledge is transferred to judges and juries when scientific experts become a part of the legal process (e.g., via judicial training, pretrial hearings, or expert testimony).

EYEWITNESS SCIENCE AS AN EXAMPLE OF META-ANALYTIC REVIEW

One specific research realm—eyewitness science—can provide an illustration of how meta-analytic reviews can assist the court in its charge to make sense of a vast research literature and to render scientific information useful to triers of fact. A consideration of meta-analysis via eyewitness science is timely. In a recent Court Review article, Smalarz and Wells alerted trial judges to the fact that rapid scientific advances in eyewitness-identification evidence have created a new burden for gatekeepers to the evidence permitted in court.

Recent legal developments regarding the evaluation of eyewitness evidence have prompted changes for jury instructions and pretrial hearings. The New Jersey Supreme Court produced an expansive summary of eyewitness-memory research in a Special Master’s Report that guided its decision in State of New Jersey v. Henderson. The Oregon Supreme Court likewise took on the massive eyewitness literature to address the fundamental problem of mistaken eyewitness identification. The Oregon Court’s science-based analysis in State of Oregon v. Lawson ultimately repositioned eyewitness evidence to align with state evidence law. The Court’s decision cited the source of probative value in the original memory of the eyewitness, uncamelated by outside information. Hence, the ruling requires Oregon judges to scrutinize impending eyewitness testimony to see that it is based on the witness’s personal perception and knowledge—regardless of whether or not law enforcement used a suggestive identification procedure. Implicit in this ruling is that judges can decipher the complex findings of eyewitness science and apply them in a meaningful way.

On the heels of the Lawson and Henderson decisions, the National Academy of Sciences (NAS) was asked in 2012 to critically assess the status of eyewitness-memory research and to offer advice and recommendations where appropriate. This society of distinguished scholars, established by an Act of Congress and signed into law by President Abraham Lincoln in 1863, is charged with providing independent objective advice to the nation on matters related to science and technology. The National Research Council of the NAS found the body of eyewitness research to be rigorous, sound, and compelling in its importance to the justice system. The Council followed with a set of actionable recommendations for strengthening the integrity of eyewitness evidence collected by police and brought to court. Most relevant to this audience is the National Research Council’s position that judges hold an affirmative obligation to ensure the reliability of eyewitness evidence presented at trial. The expectation is that judges will transfer this information to a jury in the form of scientific-framework expert testimony and clear and concise jury instructions.

The problems inherent to eyewitness memory are not new to the legal system. Eyewitness reliability has been questioned repeatedly over decades, and attempts to tamp down the potential negative impact of faulty memory have been considered at all levels of courts, including the U.S. Supreme Court—most recently in Perry v. New Hampshire. What may be new to many in the legal system, however, are the specific findings of psychological scientists on eyewitness-memory issues. In part to aid legal understanding of what is now a mature social-sciences literature, eyewitness-memory scientists have produced a series of meta-analytic reviews. Meta-analysis provides a foundation for the scientific framework that experts can bring to the court. A small set of these reviews are used below to illustrate the quantitative review technique of meta-analysis.

Footnotes

3. 352 Or. 724 (Or. 2012).
THE RATIONALE FOR META-ANALYSIS

The phrase meta-analysis simply means “analysis of analyses.” Quantitative results (statistics) from a set of independent studies that have all tested the same proposition are combined into one overall statistical analysis. The purpose is to determine what the overall pattern of the data looks like—across studies, from many labs, from different participant samples, and from a variety of experimental protocols and measures. The meta-analyst does the work of reading the available studies on a topic, combining the findings, and producing a meaningful synthesis of results.

The rationale for meta-analysis begins with five basic tenets of the scientific method.8

1. No single study offers a complete or final answer. A single test of a hypothesis cannot include all possible participants, laboratory stimuli, and relevant measures. A single eyewitness study will test, for example, a defined sample (200 undergraduates), a unique portrayal of an event (a 90-second video of a carjacking), and a specific identification procedure (a six-photo lineup of Caucasian men). Each study is inherently confined to a limited version of the phenomenon of interest.

2. So, more is better. Good science is anchored in the rule that a study must be exposed to independent testing and replication by other scientists. As independent studies cumulate, we are able to see whether the research outcome that appeared in one lab can be reproduced by other scientists even as these researchers use somewhat different experimental techniques, materials, and participant samples.

3. Converging evidence is powerful. Scientific evidence becomes more persuasive as study results repeatedly point in the same direction. In applied science, convergence between laboratory and field tests is particularly compelling.

4. Study results will vary. Not surprisingly, the use of many different samples of participants, materials, and procedures will produce some variation in outcomes. This variability is expected and informative. Scientists often tinker with a phenomenon to determine the conditions under which an established scientific principle will remain stable or begin to break down.

5. Knowledge is cumulative. Every study (assuming decent-quality methodology) offers some information, a piece of a developing mosaic for our knowledge about a phenomenon.

CORE COMPONENTS OF A META-ANALYSIS

A meta-analysis offers a synthesis of scientific research on a specific topic, with three core components?—and one additional highly desirable attribute that I describe below.

A Statistical-Significance Test. This refers to the overall support for the hypothesis (the experimental treatment) across studies: Is this hypothesis supported to a level of scientific certainty? (Can we trust this outcome?) This is stated as a statistic with an attached probability-value ("p-value"), a number between 0 and 1.00 that describes the likelihood that the observed results would have occurred by chance (a fluke) if there were no true difference between the experimental conditions. A p-value smaller than .05 is the traditional level for “significant results” and noted in words such as “this difference between groups is statistically significant.”

For example, a meta-analysis of 16 published experiments involving 3,196 adult witness-participants reported that using a cautionary lineup instruction to an eyewitness (“the person you saw commit this crime may or may not be in this lineup”) can significantly reduce eyewitness misidentification errors. The likelihood is small that this comparative difference in eyewitness errors (between witnesses who heard the instruction and witnesses who did not) would have occurred in these studies if there were no real difference (p < .05). In short, we trust that this phenomenon is real within the bounds of scientific certainty. A cautionary instruction makes a difference for eyewitness identification accuracy.

An (Average) Effect Size. An effect-size statistic addresses a different and important question: What is the size of the difference between tested groups? Or, just how strong is the relationship between the measured variables? There are a number of favored statistical indicators of effect size (among them, r, d, h, and the odds-ratio, OR) and rules of thumb for interpreting each. But the basic notion is that the effect size indicates “how much?” or “how strong?” An excellent guide to the calculation of meta-analytic statistics for legal scholars is provided by Blumenthal.9

Hence, for example, a cautionary lineup instruction significantly reduces eyewitness identification errors, a good thing. But how large is the reduction? The meta-analysis of laboratory studies reported an average 27% fewer errors when witnesses-participants were given the cautionary instruction. Conversely stated, the witnesses who were not cautioned produced 27% more identification errors. This percentage difference is a direct measure of effect size, but it can also be reported as $h = .63$ or $r = .31$. In any case, the rule-of-thumb translation is that this is a medium-size effect.10

Moderators of the Effect. Studies that test the same principle will produce some variation in effect sizes. Often a meta-analysis is driven by the fact that there seems to be inconsistent outcomes among studies. That is, sometimes the hypothesis is supported, sometimes it is not supported and may even be contradicted. Moderator analyses can help resolve theoretical, method-

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10. Id.
A good meta-analysis will... place the research within a context that includes the quality of the research methodology... and the relevance of the information...ological, or practice questions by figuring out why variations in study outcomes occur.

Moderators are variables (factors) that influence the size of an effect. Often moderators are aspects of how the study was conducted—decisions made by a researcher about who the participants were and what they experienced. For example, a recent meta-analysis documented the moderating effect of eyewitness age on lineup identification accuracy: Older eyewitnesses (60+ years of age) are more than twice as likely to make an identification error than are younger eyewitnesses (18-25 years), an odds-ratio (OR) that exceeds 2.0. Also of interest, eyewitness age moderates the benefit of a cautionary lineup instruction; the instruction is often lost on older adult eyewitnesses.

The forensic relevance of a research finding can be established in part by analysis of moderators: whether the effect is persistent despite changes in sample or method, or conversely, if the effect is limited or even absent under conditions that are meaningful to real-world applications. An important benefit of meta-analysis is to examine just how far an effect extends.

So What? The Context for the Research Outcomes. The statistics of a meta-analysis will provide answers to core questions about the scientific status of a research finding: Is the outcome reliable by scientific standards? Is the effect small, medium, large? Are there significant moderators of the effect? But the follow-up question is crucial: Is this research finding important? Particularly for applied science, the interpretation of a significance test and an effect size—the “story” told by the statistics—rests with the informed judgment of the researcher as well as the policymakers or the triers of fact who must apply this research to a question at hand.

A good meta-analysis will not only report statistical results and moderator analyses but also place the research within a context that includes the quality of the research methodology (including strengths or gaps in the extent knowledge and the developmental stage of the research) and the relevance of the information to theory and practice. In short, the challenge for meta-analysis is to find and report the knowledge in all that information.

Research Quality

All tests, published and unpublished, are typically included in meta-analytic calculations so that the analyst can work with an increased amount of information and establish whether the published studies are an anomalous subset of the broader research. At the same time, however, the Daubert criteria (from Daubert v. Merrill Dow Pharmaceuticals) and other admissibility standards create a compelling reason to examine only published peer-reviewed work as a means to ensure decisions are based on high-quality vetted research.

There are various approaches to the assessment of quality in meta-analysis. Many meta-analytic projects involve a substantial effort to locate unpublished work (“file drawer” studies) by contacting researchers and combing through convention programs and Internet sites for unpublished work. The status of an article as published or unpublished can then be used as a moderator to test whether unpublished studies produce a different outcome and, if so, why that might be. However, when unpublished and published work show different outcomes, it is difficult to interpret this finding. This is because unsound methodology may have kept the unpublished work out of peer-reviewed journals. With some exceptions (newer unpublished studies may ultimately move into scientific journals), unpublished studies may involve problems of small sample size, unrefined pilot projects, lack of experimental controls, or methodological details long forgotten and thus unavailable for peer review. These shortcomings may contribute to the experimental effects, or lack thereof, obtained in unpublished work.

Many meta-analyses do not include unpublished work and instead calculate a fail-safe-N that estimates the number of non-supportive unpublished tests that must exist in the file drawers to overturn a statistically significant finding in the published work. The report of a fail-safe-N is quite straightforward (e.g., “20 non-supportive studies could negate this finding”), and the informed judgment of the researcher will help to estimate the likelihood that such a quantity of non-supportive unpublished studies could reasonably exist in the file drawers.

Methodological quality must be addressed even within published studies. To do so, each individual study can be weighted in the summary calculations by a factor of quality. The most common weight is sample size, a strategy that rests on the reasonable assumption that larger samples will better represent the population from which the sample was drawn and lead to more stable and accurate results and thus should contribute more heavily to the summary statistics. Of course, this technique would weight a weakly designed study of 1,000 participants more heavily than a well-designed study of 100. Hence, there are further quality considerations: the adequacy of experimental design and measures used, the authenticity of the experimental manipulations, the completeness of the reported data, the appropriateness and rigor of the statistical tests. Each of these methodological factors may become a criterion for including or excluding a study in the first place or may become the basis for a moderator test. Whatever the case, a competently conducted meta-analysis will clearly state up front the criteria for including/excluding studies and clear operational

12. Rachel A. Rose, Raymond R. Bull & Aldert Vrij, Non-Biased Lineup Instructions Do Matter: A Problem for Older Witnesses, 11 PSYCHOL.
15. See Rosenthal, supra note 7.
Some realms of research may require a more nuanced approach to unpublished data. There is a meaningful difference between methodologically flawed unpublished research and sound but unpublished data that could bring forth null or contradictory results. The latter are informative and require appropriate viewing and evaluation by a research community. For example, in tests of medical devices or pharmaceuticals or treatment outcomes, unpublished but high-quality test trials can contribute essential information to fully evaluate scientific claims.

**Relevance**

The usefulness of a meta-analysis is, of course, limited by the number of available individual studies on which it is based and by the depth and breadth of those research products. In the early stages of research, a simple meta-analysis can speak to the basic causal or correlational relationships between variables as revealed in a small extant literature, thereby providing a foundation and direction for future studies. A later meta-analysis on the same topic may include lab and field tests, a greater diversity of participants, and theoretical or methodological refinements that extend the research in new directions. It is not unusual to see multiple meta-analyses on the same topic that trace an increasing volume and complexity in the research findings over time.

For applied legal research, a meta-analysis may be able to empirically address questions that directly speak to police procedure, policy, or legal evidence. For example, the cautionary instruction to eyewitnesses is among a number of recommended lineup procedural reforms that try to tamp down the dangerous tendency of many eyewitnesses to make an identification even when the guilty perpetrator is not in the lineup (a “culprit-absent” lineup). The risk, of course, is to an innocent suspect when the true culprit is not even in the lineup, as has been the case with hundreds of DNA exonerees highlighted from work of The Innocence Project. The unbiased lineup instruction is useful to reduce witness choosing from a culprit-absent lineup by an average 27%. But what happens when witnesses view a lineup that does include the guilty culprit? The cautionary instruction reduces correct culprit identifications by 5% (a small effect) as well as reducing mistaken identifications.

A policy recommendation for a cautionary instruction with police lineups will weigh the costs and benefits of the procedure, including the fact that police lineups are very common, thousands are conducted each year with an unknown subset involving innocent suspects. Lineups are much more proficient at incriminating the guilty than they are at exonerating the innocent. Even a small percentage increase in errors translates to a large number of misdirected investigations and dangerous mistaken identifications. Also, failure to use a cautionary instruction may be exacerbated by other police practices that place innocent suspects at risk. A thoughtful consideration of this complex integration of research and policy considerations has recently been provided by Wells, Yang, and Smalarz.

A judge or jury will retroactively consider whether the lack of a cautionary instruction may have increased the likelihood that the defendant was erroneously chosen from a police lineup—especially in combination with a biased lineup construction, a “non-blind” lineup administrator, and other biasing lineup factors. Conversely, of course, a jury may consider the ramifications of a very sound lineup procedure with a fair lineup structure, blind administration, and proper instruction.

**AN ADDITIONAL EXAMPLE: THE POST-IDENTIFICATION FEEDBACK EFFECT**

Eyewitness identification procedures have drawn substantial attention over the past three decades as the number of DNA-exoneration cases has grown. More than 70% of these wrongful convictions have been found to involve eyewitness identification error. Garrett’s 2012 analysis of DNA-exoneration cases indicated that up to 57% of mistaken witnesses who testified confidently at trial had been quite uncertain at the initial identification: 40% did not identify the defendant on the first try, 21% admitted uncertainty, and 9% said they did not see the face. Even so, witness confidence grew over time, culminating in convincing trial testimony that helped to convict an innocent defendant.

A core concern for eyewitness evidence is that witness confidence about a lineup identification is likely to inflate as the witness learns that he or she chose the police suspect, that another witness also chose that lineup member, that the suspect has been arrested and charged, or that the case against the defendant is strong. The cumulative result is a confident witness on the stand, even if the identification was mistaken. Eyewitness researchers have studied this tendency for witness confidence to grow by examining the slice of time immediately after the lineup identification is made. Is it possible that a well-intended simple comment of confirming feedback from the lineup administrator (“Good job! You identified the suspect.”) can trigger witness confidence inflation?

The typical laboratory test for post-identification feedback...

16. The Innocence Project, 
17. Steblay, supra note 8.
This strong literature provides converging evidence for other recommendations from eyewitness scientists...
THE DETECTION OF DECEPTION:

NONVERBAL INDICATORS OF DECEPTION:

RISK ASSESSMENT:

POLICE INTERVIEW STRATEGY:

COMPETENCY TO STAND TRIAL:

JUDICIAL INSTRUCTION TO DISREGARD INADMISSIBLE EVIDENCE:

PRETRIAL PUBLICITY:

CONFESSION EVIDENCE:

JUROR AND DEFENDANT CHARACTERISTICS:

Manson v. Braithwaite test for eyewitness reliability used in many suppression hearings. The commonsense assumptions of the court—that were articulated before scientific exploration of eyewitness issues—are now challenged by eyewitness scientists. Three of the five Manson criteria (witness certainty at the time of identification, witness opportunity to view the offender, and witness degree of attention to the culprit) are all based on witness self-reports that can be easily distorted by the suggestion from confirmatory feedback.

LINKING META-ANALYSIS AND SCIENTIFIC-FRAMEWORK KNOWLEDGE: IMPLICATIONS FOR JUDGES AND THE COURTROOM
What can one expect from a meta-analysis (or from expert-provided legal training)?

Clarification: The Cut-to-the-Chase. The purpose of a meta-analysis is to clarify a body of research findings—to make it comprehensible—to say, in essence, this claim holds up, or it doesn’t, or it holds up only under certain conditions. To be

ories of the perpetrator when they see that person later. Furthermore, when participant-witnesses in the lab are asked to observe and judge the accuracy of eyewitness testimony, mistaken witnesses who have received confirmatory feedback are likely to be believed at rates equal to accurate eyewitnesses. In short, confirmatory feedback eliminates the evaluators’ ability to discriminate between accurate and mistaken eyewitness testimony. Hence, as the Oregon Supreme Court noted in State of Oregon v. Lawson, the danger of confirming feedback “lies in its potential to increase the appearance of reliability without increasing reliability itself.” The Lawson decision highlighted the elasticity of witness certainty and the problems for eyewitness evidence when witness confidence in memory is overstated. The implication is that subsequent trial testimony of the witness will portray a misleading level of certainty and distorted reports of the witness’s actual experience.

The feedback-effect meta-analysis provides a powerful statement that is relevant to law and judicial decision making. The research strikes at the heart of the U.S. Supreme Court’s 1977

25. Laura Smalarz & Gary L. Wells, Confirming Feedback Following a Mistaken Identification Impairs Memory for the Culprit, 38 LAW & HUM. BEHAV. 283 (2014).
26. Id.
27. 352 Or. 724 (Or. 2012).
A meta-analysis offers a type of prophylactic against the temptation to cherry-pick a single study to champion a position.

Scientific-Framework Perspective. The notion of “scientific-framework evidence” fittingly describes a good meta-analysis, in that the meta-analysis should provide a clear framework for organizing multiple independent studies and seemingly disparate information. It will help the reader to think about the knowledge, not simplistically, but in a more comprehensive and effective way.

A meta-analysis offers a type of prophylactic against the temptation to cherry-pick a single study to champion a position. Simply put, a reliable pattern across studies is stronger evidence than any single study. Of particular relevance to trial judges is that one should not be distracted or misled by a single study or by an expert who cites a single study as definitive. A single study—whether in support of a hypothesis or touting contradictory results—should not carry disproportionate weight.

Yet it is not uncommon for an expert to use a single study as a vivid illustration. This can make good sense: Audiences (and juries) can often better understand the story-like narrative that flows from a single study and its outcome than an unending string of statistical summary statements. But, and this point is critical, the expert’s single-study-as-example must be representative of the broader reliable research base. Hence, a qualified expert should know and be able to report extant meta-analytic results for a given topic and be able to faithfully represent that literature with an example of a study that is informative and understandable to triers of fact.

Probabilistic Evidence: Meta-Analytic (Science) Findings Are Probabilistic, Not Absolute. Many years ago, the term social framework evidence for legal decisions was coined by Monahan and Walker to describe the use of social-science research findings as a context for triers of fact as they adjudicate a specific case. Social (or science) framework evidence does not bear directly on the case facts to be decided by a jury but instead provides the psychological or social-context principles to help triers think about and evaluate claims that do bear on their ultimate decision.

Meta-analysis as scientific framework cannot offer the ultimate answer for a specific case (Did this witness make a false identification? Did this product harm the plaintiff?). Rather, it offers a statement regarding the general probability of a relevant proposition, perhaps most easily understood as a statement of risk (“Under this condition, there is a significantly increased risk for misidentification.” “Use of this drug significantly increases risk of heart attack.”). At the same time, reliable scientific findings can alert triers of fact to mistaken ideas and common myths that are better replaced with scientific knowledge. To wit: memory is not like a video-recorder; witness confidence on the stand is not a reliable indicator of accuracy.

This point extends to established legal doctrine. Smalorz and Wells cite apparent weaknesses in judicial understanding of eyewitness research. The research literature shows “a tendency for conventional legal understandings (a) to fail to appreciate the power of suggestive procedures, (b) to rely too much on eyewitness-identification certainty, (c) to have faulty views of factors that impair memory, and (d) to generally fail to create disincentives for suggestive procedures.” The National Academy of Sciences report is even more strongly worded: “The best guidance for legal regulation of eyewitness identification is not from Constitutional rulings, but from the careful use and understanding of scientific evidence to guide fact-finders and decision-makers.”

Limits to the Research Findings: What Am I Not Seeing? When studies are combined in a meta-analysis, one begins to see the gaps in the overall program of research. Thus, the meta-analyst (and expert) should be equipped to speak about strengths and weaknesses in the knowledge base. Most notably, the meta-analysis should expose moderators that dilute or extinguish an effect.

An effective scientific-framework presentation will link foundational laboratory studies with relevant field tests to address the reasonable question about how a lab-based scientific principle will play out in the complicated real world. In some research realms, this is a less pressing question; for example, lab studies can effectively establish the limits for visual perception under varying levels of distance and illumination. For other topics, the connection between lab and field tests is more pertinent. Hence, for example, increased stress of a crime event negatively impacts eyewitness lineup-identification accuracy in lab studies. It is not ethical to subject laboratory participants to high levels of stress or violence. Nevertheless, it is reasonable to speculate that the trajectory of these lab results will hold outside the lab. Field tests in fact confirm that eyewitnesses experiencing very high levels of stress in real conditions (e.g., military personnel survival training; police involved in crime simulations) show reduced identification accuracy.

The Challenge of Connecting Multiple Lines of Research. One key limitation of a meta-analysis is that it addresses one
line of research, one core topic at a time. Yet policy, practice, and courtroom-evidence decisions must entertain multiple lines of relevant research. For example, lineup-identification accuracy surely is affected by more than an instruction to a witness. Multiple meta-analyses each inform about a factor that will influence the quality of witness memory formed at the time of the crime event (stress, presence of a weapon, perpetrator disguise, and the like), the type of memory intrusions or loss between event and lineup and the lineup practice itself (lineup construction, lineup presentation format, lineup delivery). Just as a meta-analysis pulls together individual studies to clarify “the big picture,” the expert in a scientific realm—or judge or jury—has the daunting task of weaving together the knowledge from multiple lines of research to see the broader conclusions and implications of the data.

CONCLUSION
Meta-analysis is not limited to this topic of eyewitness memory. Psychological researchers have explored an array of human behaviors relevant to law. Nor is meta-analysis unique to the behavioral sciences. Medical and epidemiological testing, educational research, and other domains use this technique. Standard criteria for published meta-analyses are available as are many books and articles on the mechanics of conducting a meta-analysis.

Judges can increase the efficacy of evidence-admissibility decisions by becoming familiar with a relevant research literature. Meta-analysis offers a vehicle to become quickly apprised of content in a highly specialized area. Additionally, the basics for an effective meta-analysis can provide sound expectations for expert testimony that can impart scientific-framework evidence to triers of fact.

36. See Rosenthal, supra note 7.
President's Column, continued from page 95

NASJE, and the Conference of State Court Administrators (COSCA). The members of these and other groups (like the National Association of Court Reporters) really work hard to try to make our courts function more smoothly and help judges perform our role in the court system more efficiently and effectively. By working together with all of our justice partners, judges are better able to deliver timely and just decisions to all our citizens who depend on the judiciary to uphold their rights and enforce the rule of law. Please consider whether you do enough in your court to recognize and thank your court administrator, staff, attorneys, law clerks, minute clerks, docket clerks, court reporters, bailiffs, process servers, and the many administrative personnel who work behind the scenes to make our jobs as judges easier, safer, more effective, and more efficient.

The untimely recent deaths of the two bailiffs in St. Joseph, Michigan, are a stark reminder to all of us that we work in a stressful and sometimes dangerous profession. It is up to us as judges to adopt policies and procedures in our courts, with the help of our justice partners, to do our best to help ensure that the citizens who use our court services and the many men and women who work with us to help deliver “equal justice to all” can meet in a safe and peaceful setting in our nation’s courtrooms. Our deepest condolences to the families of the victims and our “court family” in Michigan.

Shortly after the deadline for this column, I will have traveled to visit with more of our justice partners at the joint meeting of the Conference of Chief Justices (CCJ) and COSCA. I hope to learn even more about the National Task Force on Fines, Fees, and Bail Practices. Those of you who were able to attend our Santa Fe midyear heard New Mexico Chief Justice Charles Daniels and New Mexico court administrator Artie Pepin speak on this issue. Artie is expected to participate in a discussion on the work of the task force at the CCJ/COSCA meeting. I look forward to learning more and, hopefully, will be in a position to pass some information along to you in Toronto. I would encourage a discussion of the work of the Task Force in a future issue of Court Review. Thanks to Steve Leben for his continued work as editor!

I look forward to seeing many of you in Toronto! Thanks to the executive committee, the board of governors, and all the members of our AJA committees whose hard work this past year has enriched my year and strengthened my resolve to continue to work with AJA in the judicial “arena” we all so love!
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WEBSITES OF INTEREST

Video Training Materials on Procedural Fairness
proceduralfairnessguide.org

The National Center for State Courts has produced four videos that can be used in training programs for judges and court personnel about procedural fairness. The videos explore how procedural-fairness principles may best be deployed in situations faced by judges and court staff. Four video scenarios are provided, and each one includes discussion questions and links to additional materials about the topic.

The four video scenarios are:

- **The Multitasking Judge** (5:18): A judge conducting a hearing on whether to modify a no-contact order in a pending domestic-violence case also signs a stack of routine orders during the hearing.
- **The Counter Clerk and the Upset Litigant** (2:42): A mother who has just received a court order taking away her children comes to the clerk's front counter for information. The clerk may—or may not—be able to help.
- **The Criminal First-Appearance Docket** (3:04): A judge must process more than 100 defendants making their first court appearances in criminal cases.
- **The Computerized Judge** (9:15): A judge hearing a proceeding to terminate a mother's parental rights sits in a modern courtroom where he accesses the court file on one computer, the court calendar on an iPad, and texts about emergency warrants on an iPhone. This leads to a motion for mistrial based on the judge's inattention.

These video segments can be used as part of a training program on procedural fairness. Or individual judges may want to take a look and consider the issues raised.

For judges or court staff who may be leading a training program in this area, the National Center for State Courts has also produced a guide to each scenario for discussion leaders. Those guides provide additional background about each scenario; they can be accessed with a password that can be requested.

Psychology Law Evidence Database
psychologylawevidence.com

The field of psychology and law is vast, which makes it hard to find research that's relevant when you want to check into something. Psychology professors at two universities have started a new website designed to provide access to selected current research in the field. The materials are intended for the general public, practitioners, legal professionals, researchers, and policy makers.

The website is comprehensive, continuously updated, and freely available. The team conducts monthly searches for new research in 53 different areas, including topics such as child witnesses, confessions, domestic violence, eyewitnesses, family law, juvenile offenders, predictors of violent behavior, procedural justice, risk assessment, and sexual offending. As this list indicates, a great deal of material of interest to judges can be found.

Before an article or other resource is included in the database, it is reviewed by an expert reviewer and one of the database coordinators. The database coordinators say that the goal of the project is to help those seeking knowledge in this area save time and money while “obtaining the best available research evidence on topics in psychology and law.” Each article is reviewed based on several criteria, including the strength of the methodology used, conceptual strength of the paper, and quality of the writing. A summary of information about the article is included in the database, along with a link to the article (the full text if it's available on the web or, if not, where to purchase it). The database presently covers materials from 2010 to the present.

As the site is new, there may be only a few articles in some areas. But the site team is working hard on ensuring all relevant research is posted to the database and providing updates on their progress along the way. Over time, this promises to be a valuable tool.

The project was developed and is maintained by three coordinators: Dr. Alana N. Cook, a psychologist and an adjunct faculty member at Simon Fraser University; Dr. Ron Roesch, a psychology professor at Simon Fraser University; and Dr. Patricia Zapf, a psychology professor at John Jay College of Criminal Justice. The project is supported by the Mental Health, Law, and Policy Institute at Simon Fraser University, the entity Consolidated Continuing Education & Professional Training, and the John Jay College of Criminal Justice. Development of the database was supported by a grant from the Canadian Bar Association, and ongoing support is provided by the American Psychology-Law Society.