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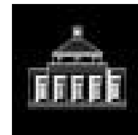

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INTRODUCTION

Virginia Journal

This publication celebrates the scholarship of the University of Virginia School of Law. Each year, the *Virginia Journal* presents in-depth intellectual profiles of three scholars, plus a survey of recent publications by the entire faculty. The tradition began in 1998, with an inaugural issue honoring Kenneth Abraham, Michael Klarman, and Elizabeth Scott. Subsequent issues have featured profiles of Lillian BeVier, Anne Coughlin, Barry Cushman, John Harrison, David Martin, John Monahan, Daniel Ortiz, James Ryan, Paul Stephan, George Triantis, G.E. White, and Ann Woolhandler, plus a symposium issue devoted to the collaborative work of Charles Goetz and Robert Scott.

These choices reflect a wide variety of interests, perspectives, and methodologies, but a consistent dedication to excellence. Our goal is to maintain an intellectual community where the broadest range of opinion and debate flourishes within a framework of common purpose. Every person honored by the *Virginia Journal* has contributed to that goal, not only by publication, but also by constructive participation in our community of scholars.

This year's *Virginia Journal* honors three additional members of our faculty:

Barbara Armacost is a scholar of the law who never loses sight of the impact of legal rules and institutions on individual lives. She is one of a small group of public-law scholars who evaluate constitutional questions with an eye toward the incentive and allocative effects produced by private enforcement of public rights. More generally, Barb's interests in law grow out of the concern for human welfare that led her to become a nurse and are informed by the search for spiritual grounding that led her to study theology. Intellectual display for its own sake is foreign to her. On the contrary, in her writing and in her teaching, Barb aims to illuminate the purposes and effects of legal rules in the practical service of justice. This goal includes recognition of the limits of law and the proper role of other institutions in alleviating human suffering. Barb's goals are the betterment of those around her, and both her life and her writing reflect the ideal of the lawyer as citizen.

Kim Forde-Mazrui is the Director of the Law School's Center for the Study of Race and Law and the inaugural Thurgood Marshall Research Professor. Kim's scholarship addresses the role of race in questions ranging from child placement and jury selection to affirmative action and reparations. Whatever the context, Kim's work is animated by values of fairness, equality, and respect for human dignity. He aims to mediate conflicting approaches and offer constructive solutions, while remaining open to claims and criticisms with which he may ultimately disagree. As one of the nation's leading young scholars of race and law, Kim brings a fresh voice to controversial questions about which constructive debate has often stalled.

Paul Mahoney's intellectual ambitions reach far beyond law. In addition to an impressive body of purely legal scholarship, Paul has also published widely in applied economics, including articles in the nation's leading finance journal, the *Journal of Financial Economics*, and in other peer-reviewed publications. Currently, Paul sits on the editorial board of the *Journal of Economic Perspectives.* His broad-ranging intellect, deep knowledge of economy theory, and sophistication in the use of quantitative methodologies combine to make Paul an exceptional scholar and a uniquely valuable intellectual resource to his colleagues at Virginia.

John C. Jeffries, Jr.
DEAN

Appreciating the Impacts and Limits of Law

Barbara Armacost's route to legal academia was unconventional. She began her professional life as a registered nurse working in thoracic-cardiovascular surgery. After five years of nursing, Armacost went back to school—but not in law. Instead, she earned a Masters Degree of Theological Studies in New Testament and Ethics at Regent College at the University of British Columbia, Canada. Two years later, and after spending eight months working at a mission hospital in Haiti, Armacost took up her law studies as a member of the Law School's class of 1989.

As a law student, Armacost did all of the things—and then some—that prospective law professors tend to do. She served as a Notes Editor of the *Virginia Law Review*, and she earned from the faculty top prizes for scholarship, professional extracurricular activities, and character. After graduation, Armacost served as law clerk to Judge J. Harvie Wilkinson III on the United States Court of Appeals for the Fourth Circuit. She then did a short stint at the U.S. Department of Justice, working for the Office of Legal Counsel. It was while Armacost was a member of the prestigious OLC staff that the Law School recruited her to return to

Charlottesville as a member of the law faculty.

Armacost's life as a nurse and theologian shaped her approach to law teaching and scholarship. As she put it, "the combination of medical practice and theological education instilled in me habits of mind in which the moral and real-world implications of legal arguments are always close to the surface." Her background in theological ethics set the stage for a view of law in which ethical and moral considerations are appropriate—indeed essential—to a full understanding of legal theory, doctrine, and practice. As for her work in nursing, Armacost explains, "In the practice of medicine, most of the people you are serving are sick and hurting. It is impossible to forget that your work affects the lives and well-being of real people."

By contrast, she points out, both the conditions of legal practice and the styles of legal scholarship can make lawyers lose sight of the practical and moral salience of their work. For example, Armacost observes, "law teachers and scholars—most of whom tend to focus on appellate opinions and abstract legal questions—may underestimate, misunderstand, or obscure the real-world effects of legal doctrine. Likewise, by putting pressure on lawyers to make any and all plausible arguments, the adversary system can foster the misimpression that lawyers are not responsible for the world that is constructed by the claims they choose to make." In her teaching and writing, Armacost has resisted these pressures by focusing on the impact of legal decisions and the design of institutions. She brings to that focus not simply her experience as a healer and a student of theology, but also her clear-eyed, rigorous, and deeply pragmatic perspective. Hence, she emphasizes, her objective is not to suggest that courts alone can or should alleviate all suffering or make all claimants whole. Rather, her aim is to identify, understand, and explain the proper limits of the rule of law, but without ignoring or minimizing the costs and burdens those limits impose in individual cases and on individual human beings.

As a law teacher, Armacost works hard to instill these same habits of mind in her students. Armacost teaches courses in Torts, Civil Rights, Legislation, Criminal Procedure, and the First Amendment religion clauses. Her pedagogical substance, strategies, and style have proved to be a spectacular success.

Students uniformly praise Armacost for her comprehensive knowledge of the doctrine; her meticulous explication of competing arguments in difficult cases; her patient, yet rigorous, attention to their developing skills as lawyers and advocates; and her steady accessibility as an instructor, both inside and outside the classroom. Her students come away from her classes with a thorough understanding of the law and of lawyering, and with their moral compasses still intact or, better still, more finely calibrated than ever before. One of Armacost's Torts students gave her this telling praise: "The best part of the class was Armacost presenting a controversial case and saying 'what do you think should happen?' This got everyone thinking about their intuitions first, before analyzing the law, and led to some interesting discussions that ultimately clarified my thinking about what the law actually was trying to achieve."

Likewise, Armacost's scholarship presents thoughtful and original rationales for some of the U.S. Supreme Court's most controversial lines of decisions. In keeping with her interests in the real-world effects of law, Armacost's work is animated by a broad interest in constitutional remedies and a specific interest in how those remedies affect governmental institutions and individuals. Armacost's thoughtful attention to the actual impact of remedial schemes brings rich rewards for the readers of her work, who inevitably come away with a better understanding and appreciation of some remedial designs that, upon first glance, might seem harsh, unjust, or simply inexplicable.

In her first major article, "Affirmative Duties, Systemic Harms, and the Due Process Clause," 94 *Mich. L. Rev.* 982 (1996), Armacost took on a series of decisions that are not merely controversial, but almost universally maligned in the legal academy. In these decisions, the federal courts have insisted that there is no liability for governmental failure to act under the Due Process Clause. The facts of the most infamous decision outlining this proposition—*DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189 (1989)—illustrate perfectly why, at first glance, these cases are so normatively unattractive. In *DeShaney*, a 6-year-old boy was killed by his father after social workers negligently failed to remove the child from the father's custody. If ever there were a case for liability for failure to protect, *DeShaney* was it. Yet,

the Court rebuffed the boy's mother's claims against the child-care workers and upheld the principle that the government has no general duty to protect us from harm.

In her account of *DeShaney*, Armacost goes right to the heart of the matter. On the one hand, *DeShaney* has been relentlessly—and, she believes, fairly—criticized for the weakness of its constitutional arguments. On the other hand, notwithstanding these criticisms, the federal courts have stubbornly adhered to the view that the government has no general duty to protect individual citizens from harm. To explain this paradox, Armacost offers a crucial insight derived from the intersection between public and private law.

As Armacost remarks, *DeShaney*'s no-duty-to-protect rule is not just a constitutional principle, but also is one that is firmly embedded in the common law of tort. In her compelling account, the rule in both contexts has its origins in the allocative effects that would be produced by liability for failure to protect. If courts were to impose on government a duty to protect, their judgments inevitably would require that additional public resources be expended to fulfill that duty. Of course, in the real world, public resources are limited, sometimes sharply, so that a decision to spend more on court-imposed protections would mean spending less on some other governmental service involving parties not before the court. In this precise sense, Armacost argues, judicial imposition of a duty to protect would raise political process questions beyond those present in other contexts where courts enforce constitutional rights. In other words, *DeShaney* and its progeny implicate complex—so-called "polycentric"—decisions about the proper allocation of public resources. To say the least, courts lack the competence and expertise to make these decisions. Hence, they wisely refuse to intervene, even though the consequences can be as tragic as they were for Joshua DeShaney and his family.

Armacost's repositioning of *DeShaney* is characteristic of her comprehensive and original approach to scholarship. She is one of a handful of public law scholars who evaluate constitutional questions with an eye towards the incentive and allocative effects produced by a system of private enforcement of public rights. In "Qualified Immunity: Ignorance Excused," 51 *Vand. L. Rev.* 583 (1998), Armacost turned once again to her private law background in order to isolate a problem that other public law commentators have not noticed clearly, and, again, she located a creative solution at the point where private and public law intersect. In this article, Armacost wrestled with knotty questions concerning the qualified immunity conferred upon most governmental officials who are sued under Section 1983.

Armacost begins her exposition by inviting readers to ponder an anomaly in the law of immunity: In most areas of private law, ignorance of the law affords no excuse whatsoever from liability. Private tortfeasors will not be heard to explain that they thought they were behaving reasonably at the time they committed their unlawful acts. By contrast, governmental officials are immune from liability if they reasonably could have believed that their actions were lawful. Why this difference in treatment?

Armacost solves the puzzle by analyzing notice requirements in the substantive criminal law and comparing them to the functions served by qualified immunity doctrine. Everyone knows that "ignorance of the law is no excuse" for criminal violations, but the criminal justice system sometimes honors this foundational proposition by its breach. When the nature of the crime itself—say, homicide or arson or robbery or rape—provides actors with notice that they are doing something wrong, accused persons are not allowed to defend themselves by arguing that they were unaware of the statutory prohibition on such activity. But for crimes that are regulatory in character, courts generally are inclined to insist that liability may fairly be imposed only where the defendant actually knew or was afforded notice of the content of the prohibition. That is, in the criminal law, notice of the law sometimes serves as a proxy for individual fault and culpability, which are the key justifications for the pain and stigma imparted by criminal convictions and punishments.

In her account of the law of qualified immunity, Armacost finds precisely the same connection between notice of wrongfulness and imposition of liability. When a governmental official engages in conduct so wrongful as to contain indicia of its own illegal character, qualified immunity tends to drop out of the case altogether, and the official will be held liable. But when the only factor that makes the governmental actor's conduct wrong-

ful is knowledge of illegality, the qualified immunity defense is available, thereby guaranteeing fairness by assuring that the defendant was on notice as to the wrongfulness of her conduct. In this way, the principles of qualified immunity ensure that Section 1983 judgments carry moral stigma.

In the final part of the article, Armacost puts pressure on her analogy between private law and public law in order to generate sensitive and insightful parallels between criminal law and constitutional law, between the familiar phenomenon known as "overcriminalization" and the potential risk of what she calls "overconstitutionalization." Many criminal law theorists have argued that imposition of criminal blame without fault "waters down" the criminal law by depriving it of the moral force it would otherwise have. Armacost argues that there is a similar risk in constitutional law: If Section 1983 violations were to be found when the defendant acted without fault, the social meaning of the violation would tend to provide little, if any, moral pressure for officials to comply with constitutional commands. This insight argues not only for insisting on a robust scope for qualified immunity, but also for eschewing enterprise liability and the trivialization of Section 1983 by transforming any and every tort committed by government into a constitutional violation.

In her next major scholarly foray, "Race and Reputation: The Real Legacy of *Paul v. Davis*," 85 *Va. L. Rev.* 569 (1999), Armacost built upon her critical exposition of the connection between the scope of constitutional rights and the remedies for their violation. At the time she began writing, Armacost's target—the Supreme Court's line of cases commencing with *Paul v. Davis*, 424 U.S. 693 (1976)—had been the subject of a vast and relentlessly critical body of legal scholarship. In *Paul* itself, the Court held that a governmental official's "mere" injury to a citizen's reputation does not constitute a deprivation of liberty or property within the meaning of the Due Process Clause. In cases following *Paul*, the Court decreed that, even where protected interests in property or liberty are involved, if state compensatory remedies are available and adequate, the plaintiff has received all the process she is due. It also decided that merely negligent conduct does not even implicate the Due Process Clause.

As Armacost observes, commentators uniformly and properly have faulted these decisions for their stingy analysis and their fast-and-loose use of constitutional precedents. She then joins the debate from a different angle of vision and provides startling new insights into the precise stakes in these cases. Rather than taking up questions posed by other scholars— which focus primarily on whether a narrow or broad interpretation of the Due Process Clause is appropriate or normatively appealing—Armacost cuts to the chase and ponders the difference to individual citizens that the *Paul* line of cases actually makes. As she bluntly puts it in her paper, "What . . . is actually lost in the way of substantive protection against particular, governmental misbehaviors by limiting the scope of Section 1983 liability for due process claims?"

Contrary to what most scholars imagine, Armacost asserts that there is less at stake in the *Paul* Court's narrowing construction of due process in Section 1983 cases. As she recognizes, of course, the claim involved in *Paul* itself, i.e., a claim for reputational harm, is lost entirely. And thus she agrees with other commentators that the Court's decision in *Paul* is indefensible not only because it flies in the face of clear precedent, but also because it obfuscates the enormous power of the government to cause reputational harms. However, what other scholars have not noticed is this: Apart from the sort of claim alleged in *Paul* itself, only a small number of due process claims are foreclosed completely by *Paul* and its progeny. Instead, as Armacost documents, the vast majority of such claims are redirected from the Due Process Clause to other constitutional "homes," such as the Fourth and Eighth Amendments.

This substitution of one constitutional "home" for another is significant for reasons that no scholar before Armacost has clearly documented. The effect of the Court's decision to exchange a due process claim for one arising under, say, the Fourth or Eighth Amendments, has imposed surprising and devastating costs. The substitution usually requires courts to replace the "subjective" inquiries of due process—which focus on whether conduct "shocks the conscience" or arises from "deliberate indifference"—with "objective" standards, such as "probable cause" or "reasonableness under the totality of the circumstances." The impact is to deny relief for claims of bad

faith, and, in particular, to reject important claims against governmental actors for racist conduct. The only remaining option for raising claims of invidious intent is the Equal Protection Clause, a prospect that most scholars agree holds out little promise of success in such cases. Armacost concludes, "given the history of racially inspired excesses in law enforcement and the racial divisions that still plague 20TH-century America, the foreclosure of intent-based arguments [for certain kinds of claims] may be the real loss attributable to the Court's due process jurisprudence."

Since the terrifying events of September 11, 2001, the domains that preoccupy Armacost have become more dangerous and more frightening, both in terms of the harms that private actors seem willing to inflict on each other and in terms of the protective measures that governmental actors are inclined to endorse. In response, Armacost's writing has become more ambitious and more pointed. In particular, she has begun to shift her focus to the interconnection between remedies and the design of governmental institutions, including police departments and other law enforcement agencies.

For example, in the new article excerpted here, "Organizational Culture and Police Misconduct," 72 *Geo. Wash. L. Rev.* 453 (2004), she demonstrates why the prevailing remedies for police misconduct are ineffective for eliminating police brutality: Reform efforts have focused too much on notorious incidents and misbehaving individuals, and too little on an overly aggressive police culture that facilitates and rewards violent conduct. Real reform, Armacost argues, requires police organizations to accept collective responsibility for these destructive institutional features. Armacost offers a number of suggestions, drawn from the literature on organizational culture, for promising remedial schemes that would target rogue departments as much as rogue officers.

In future work, Armacost aims to reframe the definition of privacy for purposes of the Fourth Amendment safeguards, with an eye towards protecting ordinary citizens from extraordinary technology in an era of extraordinary criminals, i.e., terrorists. She also is hard at work on an essay extending to the armed forces some of her insights on the powerful and inevitable connections

between organizational culture and individual misconduct.

As Armacost's scholarship moves into the area of institutional design, one can be certain that it will remain motivated by a desire to understand the impact of that design on individuals. In this sense, Armacost is simply extending the thread that weaves together her professional experiences: a desire to assist others to do what is right and good, whether as individuals acting alone or through institutions.

EXCERPT FROM:

Organizational Culture and Police Misconduct

72 *George Washington Law Review* 453 (2004)

WHAT ACCOUNTS FOR THE LACK OF SUCCESS in achieving lasting police reform? The answer I want to explore is that reform efforts have focused too much on notorious incidents and misbehaving individuals, and too little on an overly aggressive police culture that facilitates and rewards violent conduct. Real reform requires police organizations to accept collective responsibility, not only for heroism, but for police brutality and corruption as well.

Consider the way in which police departments describe and defend controversial actions by individual cops: either as well-intentioned but unfortunate responses to dangerous and ambiguous situations, or as the aberrant behavior of rogue cops. The first kind of explanation seeks to place the incident in question outside of the category of police wrongdoing. Occasional beatings or shootings of suspects whom police reasonably believed were armed and dangerous are regrettable, but not culpable. The second explanation accepts brutal police actions as unquestionably wrong, but attributes them to a small minority of police officers gone bad. Thus, these incidents tell us little or nothing about the experience or motivation of the well-behaved and well-intentioned majority.

These explanations are powerful and important because they frame the way police departments--and ultimately the legal system--respond to police brutality. This article argues that these stories police departments tell themselves (and us) about the causes of police violence are flawed because they ignore the power of the police organization in shaping conduct. Thus, it is

not surprising that judicial, administrative, and departmental responses to police violence have been notoriously unsuccessful. The explanations described above view police misconduct as resulting from factual and moral judgments made by officers functioning merely as individuals, rather than as part of a distinctive and influential organizational culture. The regrettable-accident explanation deems an officer not morally or legally culpable for a reasonable, though erroneous, decision. Thus, police departments view incidents in this category as requiring no corrective intervention, except, perhaps, an official expression of regret for harm caused. What this explanation fails to consider, however, is how the officer came to be in that particular situation in the first place and whether there is anything to be learned by examining the organizational norms and policies that framed his judgment. The officer-gone-bad explanation is flawed in a similar way. It assumes that the misbehaving cop is off on a "frolic and detour" for which he alone is accountable. This explanation allows the department to distance itself from incidents of misconduct by labeling the perpetrators "rogue cops," deviants who are wholly unlike their fellow officers. Moreover, it allows police leadership to declare to the rest of the rank and file, "this incident is not about you." All of this allows the police organization to absolve itself of any responsibility for the officer's wrongdoing.

Traditional reform strategies have had limited success in curbing police brutality, in part, because of the limits of the strategies themselves. Ex ante measures, such as psychological screening to weed out "bad apples," have not proved very useful because available personality tests are not good at predicting which potential employees will engage in violent conduct. Ex poste measures, such as civil and criminal penalties to punish repeat offenders and deter similar conduct in the future, are limited by procedural, doctrinal, and practical constraints that render them poor tools for controlling police brutality.

These strategies are also inadequate because the individual-specific model of police behavior on which they implicitly rely is woefully incomplete. The psychological testing strategy assumes that the causes of police misconduct are traceable to a set of personality traits that make some officers more prone to violence

than others. The punishment-deterrence strategies treat police officers as independent moral agents whose behavior can be changed simply by exposing them to the threat of civil or criminal penalties. While both of these theories contain significant elements of truth, they are missing an important component: the role of the police organization in shaping attitudes and influencing decision making. Individually-oriented remedies will not cure the problem if systemic features of the police organization permit, sanction, or even encourage the officer's violent behavior.

It is essential that the police organization be taken seriously, both in fixing blame and in formulating solutions to police misconduct. There are at least three reasons why this is so.

First, it is factually inaccurate to focus on individual deeds, and ignore the organization, in analyzing the causes of police conduct. Law enforcement organizations have cultures—commonly held norms, social practices, expectations, and assumptions—that encourage or discourage certain values, goals, and behaviors. Police agencies are culpable if they tolerate cultures that promote conduct that is morally or legally objectionable.

Second, it is unfair to lay the moral responsibility for police misconduct solely at the feet of individual officers. The organizational literature provides a theoretical framework for what police scholars have long known: law enforcement officers cannot be viewed as individual decision makers who function in isolation. They are embedded in an organization that makes them more likely to frame their judgments in terms of role-based obligations and expectations than according to a simple cost-benefit analysis of their potential actions. This explains why legal sanctions that assume an individual rational actor model are less than successful in curbing police misbehavior.

Finally, the impulse to isolate misbehaving officers as "rogue cops" is, essentially, a search for scapegoats. While punishing individual miscreants may satisfy society's thirst for someone to blame, it also causes us to miss important systemic and organizational causes that lie behind individual acts of brutality. This is not to say that individual officers bear no causal or moral responsibility for their own harm-causing deeds. Indeed, the fact that individuals function within an organizational framework poses special risks of unintended and inadvertent harms, and imposes corresponding obligations to guard against such harms. Focusing only on isolated actors, however, may divert attention away from needed institutional reform.

Perhaps the most obvious indication that police brutality has an organizational component is precisely the evidence that police spokesmen use to exonerate police departments when cops misbehave: the oft-noted phenomenon that police officers who brutalize citizens have often done so multiple times before. In many troubled police departments, it is a relatively small minority of police officers who account for a disproportionate number of citizen complaints and reported incidents of excessive force. Although one possible explanation is that these repeat-brutalizers have personality traits that predispose them to violence, this explanation fails to explain why their departments permitted these problem officers to repeat their violent conduct. Moreover, the identification of violent tendencies does not distinguish whether the negative personality traits were present when the police department hired the officer or resulted from the officer's training and experience on the force or, most likely, some combination of the two. One of the most obvious places to look for a richer explanation of police brutality is in the culture of the policing organization, which includes the formal and informal norms and expectations that create the environment in which the brutal acts were allowed to continue.

Investigative reports on troubled departments and the scholarly literature on policing are in agreement that police misconduct is caused in large part by systemic features of law enforcement organizations. According to these literatures, police culture is characterized by: formal and informal norms that favor a confrontational, hard-nosed style of policing; an evaluation and promotion system that functionally rewards illegal uses of force through nonenforcement of stated management policies; and a work environment that tolerates (even encourages) violent and discriminatory language and attitudes that may contribute to violent and discriminatory conduct. In sum, despite formal policies to the contrary, police culture conveys an informal message that confrontational aggressive policing will be rewarded, even if it results in repeated incidents of violence.

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One could raise several objections to the conclusion that police brutality has an organizational component. First, one could argue that a pattern of repeated incidents of police brutality by a small number of police officers does not necessarily suggest that the problem is systemic. Indeed, it could suggest the opposite: if the vast majority of police officers manage to avoid excessive uses of force, then perhaps the small minority who misbehave are "rogue cops" whose behavior the department does not condone and whose misconduct results from non-organizational factors such as personal deficiencies. A second possible objection is that the pattern of unsanctioned repeat offenders suggests sloppy or incompetent management, rather than the more serious allegation that the organizational culture actually condones and encourages police brutality.

There are a number of responses to the first objection. First, one need not choose between the systemic or organizational and the individual or psychological explanations for police brutality in departments that display a pattern of repeat offenders. Both are necessary to a satisfactory explanation of police brutality. There is reason to think, however, that the organizational factors may actually be the more important contributor to conduct. Studies by police scholars and sociologists indicate that individual personality traits provide (at best) only a very partial explanation for police misconduct. The most sensible conclusion is that whatever effect officers' personalities and beliefs have on their propensity toward violence, these factors are mediated by the characteristics of the relevant police organization. Thus, so-called rogue cops cannot be explained away by identifying their alleged violent propensities and ignoring organizational pathologies.

Second, a law enforcement organization that tolerates repeated, notorious instances of the worst kinds of brutality—even by a minority of police officers—effectively signals to its employees that a certain level of violence is acceptable despite formal policies to the contrary. The culture of an organization is made up of "shared meaning" or "shared understanding," which results in "a process of reality construction that allows [members and participants] to see and understand particular events, actions, objects, utterances, or situations in distinctive ways." These shared understandings are created not only by values and norms that are formally expressed but also by the kinds of conduct that are encouraged, rewarded, or tolerated by the organization. Behaviors that are common and accepted become part of the fabric of informal norms and values that then shape future actions. In a police department that winks at overly aggressive policing, the organizational culture will begin to tolerate, even implicitly encourage, the kinds of excesses that go along with aggressive law enforcement methods.

In response to the second objection, that repeated instances of brutality are evidence of a management rather than an organizational problem, again there is no need to choose between the two. Managers of virtually every police department have adopted formal rules and policies describing the contexts in which officers may employ various levels of force. Formal adoption of these rules, without adoption of structures for monitoring and punishing violators, however, would be ineffective in curbing illegal uses of force. We could call the failure to monitor and discipline subordinates a management failure, rather than an organizational failure. But the more numerous, egregious and notorious the incidents of brutality that remain unaddressed, the more we would deem the managers themselves culpable for failing to take action. Moreover, widespread managerial failure in the face of continued, notorious misconduct begins to look like the organization itself is dysfunctional. Repeated instances of misconduct that go unpunished is evidence that "something is rotten in Denmark." Why? Because repeated failure by higher-ups to address patterns of misconduct is viewed as a signal—by subordinates and the outside world—that such conduct is permissible. It creates a cultural climate that appears—even if by default—to actually condone the deviant behavior.

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It is well-established in the literature that organizational structures and their distinctive cultures have a significant causative effect on the decisions and behaviors of institutional actors. Moreover, both policing literature and the vast majority

of police investigative reports conclude that police departments have unique organizational cultures that powerfully influence the behavior of individual cops. What has been largely missing is a more systematic analysis of how the realities of police culture—and its effect on the conduct and judgment of individual officers—may contribute to police brutality and its seeming imperviousness to legal solutions. I turn to that task below.

One of the primary organizational features that researchers have associated with wrongdoing by institutional actors is the problem of fragmented knowledge. "Bureaucratic organizations parcel out morally significant knowledge among various individuals along the same lines as organizational tasks. The division of labor is equally a division of knowledge." For example, supervisors may be unaware of the wrongful actions of subordinates who are implementing organizational policies. Conversely, subordinates may not know where their actions fit into the overall institutional program, or the limits of their individual discretion. Under these circumstances, the conduct of multiple actors can converge to create a harm as to which none of these actors had enough information to have known—or in some cases, to have even suspected—that the harm could or would occur. If "[i]ndividuals within the organization do not know, or perhaps do not want to know, what their actions add up to," it can lead to organizational wrongdoing for which no one in the organization will accept responsibility. Of course, in any particular circumstance the claim that the actors "did not know" may or may not be believable. The point is that lack of guilty knowledge—if it is believed—can serve to mitigate moral and legal responsibility.

To push the point a bit further, information fragmentation can actually be used by organizational leaders as a way of avoiding responsibility for organizational harm. One significant feature of bureaucratic management is that "details are pushed down and credit is pushed up." Managers specify the ends that they want to accomplish without identifying in any detail the means that their subordinates are to use to accomplish those ends. This allows managers to avoid becoming enmeshed in messy particulars, but it also serves to insulate them from any harm caused by low-level decisions. When subordinates make mistakes in furtherance of a broadly framed agenda, managers may be able to claim that they

neither sanctioned, nor knew, of those harm-causing actions. Conversely, the message that managers send by broadly defined goals—"results without [any] messy complications"—creates pressure on middle-men to protect their bosses, hide their own mistakes, and convey only good news.

The phenomenon of the bureaucratic "double message" has been widely recognized as a cultural feature of many police organizations. Like all organizational cultures, police culture is defined not so much by officially-proclaimed goals and rules, but by the sometimes very different messages that circulate at the operational level. Police socialization involves a whole range of complex and conflicting messages. For example, there is the "hard-nosed" organizational message that emphasizes crime-fighting and proactivity, the message that says, "Let's go get 'em." But, there are also all kinds of "non-hard-nosed mandates" such as "observe due process," avoid excessive force, and do not discriminate on the basis of race. In practice, these mandates often conflict. And while police management may purport to keep them in balance, the official organizational messages are selectively affirmed or undermined by informal messages about what kinds of conduct are actually tolerated or rewarded.

It is these informal expectations—that officers learn from fellow officers on the street and in the locker rooms—that determine the institutional culture that ultimately governs and shapes the discretionary decisions of street level cops.

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All of this contributes to a perceived necessity for police to "take matters into their own hands" and to "cut through the 'bullshit' of legal procedures in order to provide the [level of] safety that the public desperately wants." It also gives rise to several additional characteristics of police culture that make it difficult to address police brutality. The call to do a potentially dangerous job involving conflicting demands and uncooperative or ungrateful citizens results in a sense of us versus them that develops between cops and the outside world. The bond resulting from this siege mentality—the so called "brotherhood in blue" —creates a "fierce and unquestioning loyalty to

all cops, everywhere." Along with the bond of solidarity is the sense that no one outside the ranks will really understand the realities of policing. Moreover, a code of silence serves to reinforce police bonds of solidarity. All this together makes it difficult to investigate, with any accuracy, incidents that may involve mistakes or misbehavior.

This is not to say that anyone is ordering police officers to brutalize suspects, or to engage in other unlawful conduct. Cops are never told to be silent or to keep the agency's secrets. They never see an order upholding the code of silence that guides their working lives. The fact is, though, that there is no need to be explicit. The reactions, body language, whispered asides, and other rites of initiation convey what is expected. This lack of formal instruction, however, cannot absolve the organization of responsibility for the harmful acts.

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The above discussion leads to four important conclusions. First, while the oft-repeated "bad apple" explanation for police brutality has focused attention on identifying problem officers, the real story is that organizational factors interact with individual propensities to produce police brutality. Cops do not arrive at the police department door as fully formed brutalizers; they are created, in some part, by features of organizational culture that enable (or incite) them to act on their violent propensities. Thus, police departments must supplement strategies that seek to identify violence-prone officers with measures aimed at changing features of police culture that encourage officers to misbehave.

Second, it follows that no legal strategy that ignores the power of the police organization will have any lasting success in addressing police brutality. Moreover, strategies to change the behavior of individual cops must include some way of controlling the informal, as well as the formal, messages that frame the way they view their world. While the conclusion that changing the police requires a change in police culture is well-established in the policing literature, it has not found its way into the legal regime that seeks to regulate police brutality. Of course, one possibility is that police culture is not amenable to change by legal mechanisms. Perhaps change will require administrative reform, for example, away from the "professional model" emphasizing aggressive crime control, and toward community policing or problem-oriented policing. Clearly, interventions seeking to change cop behavior must include the organization or they will ultimately fail.

A third and related conclusion is that thoroughgoing organizational change—the kind that is necessary to alter entrenched patterns of thinking and conduct—will require top-down pressure, including strong police leadership at the highest levels. The only way that individual cops will change is if the organizational culture changes, and the only way that the organization will change is if high-level officials are held accountable for the actions of their subordinates. As long as police administrators can chalk up misconduct to a few rotten apples and absolve themselves of any responsibility for the barrel out of which those rotten apples came, there will be no lasting reform. Police management "must accept responsibility for molding the organization's occupational culture. When misconduct occurs, blame must not fall exclusively on the rank and file but must be shared by managers for failing to prevent misconduct from occurring."

Finally, given the realities of police culture, in which informal norms of street level culture often contradict and undermine informal policies, reform must include strategies to obtain "buy in" from the ground up. This is where some form of professional peer review becomes essential. A key benefit of peer review is that it could mobilize street-level cops so that their energy, passion, commitment and expertise become part of the solution rather than part of the problem. Top down reform by courts and administrators will not be successful unless the rank and file also become part of the process of redefining police culture from the bottom up.

"Organizational Culture and Police Misconduct," 72 *G.W. L. Rev*. 435 (2004).
"Race and Reputation: The Real Legacy of *Paul v. Davis*," 85 *Va. L. Rev.* 569 (1999).
"Constitutional Remedies and the Morality of Governmental Action: A Comment on *Garvey*," 47 *Drake L. Rev.* 19 (1998).
"Qualified Immunity: Ignorance Excused," 51 *Vand. L. Rev.* 583 (1998).
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"Affirmative Duties, Systemic Harms, and the Due Process Clause," 94 *Mich. L. Rev.* 982 (1996).

WORKS IN PROGRESS

Scandal at Abu Ghraib: Rotten Apples or Rotten Barrel? (April, 2006)
The Importance of Anonymity in Protection of Privacy (August, 2006)
Why Do Innocent Suspects Confess? (August, 2007)
The New Neutrality in Religion Clause Jurisprudence (December, 2007)

Examining Race and Law

When Kim Forde-Mazrui was accepted onto the *Michigan Law Review* during law school, a friend asked, "So what are you going to write about, Kim?" He replied, "Whatever it is, it will not be about race." He has published several articles since then, and they are all about race. He also teaches a course on race and law, is the Director of the University of Virginia's Center for the Study of Race and Law, and is the inaugural Justice Thurgood Marshall Research Professor. Indeed, Forde-Mazrui is one of the nation's most prominent young scholars on race and law, bringing a fresh voice to controversial questions about which constructive debate has often stalled.

Forde-Mazrui's interest in race and law derives from his respect for human dignity. Born in Uganda, he moved to this country as a young boy and was inspired as he matured by the ideals of equality and fairness reflected in the American Constitution. He was also deeply troubled, however, to learn of America's failure to live up to its ideals in the institution of slavery and the century of legalized racial injustice that followed the Civil War. In Forde-Mazrui's assessment, to the extent blacks and other minorities continue disproportionately to experience social and economic deprivation, America's moral commitment to racial equality has yet to be achieved.

So why was he initially reluctant to write about race? Forde-

Mazrui reports that he was frustrated with the divisive nature of the arguments, in which opposing sides entrenched themselves in positions that oversimplified complex issues without attempting to appreciate the legitimacy of opposing concerns. "Rhetoric, hyperbole and dehumanizing personal attack," he observed, "too often substituted for candid discussion and reasoned argument within a context of mutual respect."

Forde-Mazrui came to see the source of his frustration as a strength—his capacity to empathize with and respect people, regardless of political persuasion or personal background, and a willingness to take seriously claims with which he may not ultimately agree. His approach reflects his life experience. His paternal grandfather was the Chief Islamic Judge (or Qadi) of Kenya. His father, a noted political science professor, and his mother, a talented foreign language teacher, taught him by their example to respect people of different backgrounds and stations. His father is Kenyan, black, and a Muslim. His mother is British, white, and raised a Christian. He continues to live amidst diversity. Forde-Mazrui's wife, with whom he hyphenated their last names, is a white American from Flint, Michigan. They are the proud parents of a son, who happens to be white, adopted, and gay. When Forde-Mazrui was 10 years old, he became legally blind. His older brother became nearly totally blind the following year. While Forde-Mazrui's family relations have had their share of difficulties, tensions between family members have never been based on those traits that too often divide people in larger society.

Forde-Mazrui's scholarship seeks to reveal ways in which the law's approach to racial issues causes unnecessary suffering, and to develop approaches that can more adequately safeguard the rights of people to be treated with respect and fairness. His first published work, "Black Identity and Child Placement: The Best Interests of Black and Biracial Children," 92 *Mich. L. Rev.* 925 (1994), addressed the question whether the law should discourage placing black children for adoption with white parents.

When Forde-Mazrui began his research, he was stunned to discover how controversial transracial adoption was and, more surprising still, that its most vocal opponents were black. The National Association of Black Social Workers (NABSW) advocates adamantly that black children should always be racially "matched" with black parents. The tragedy for black children is that, because there are too few black families available for the half million black children in foster care, race-matching policies deny black children permanent families rather than place them with white parents.

While other opponents of race-matching policies observed the psychological harm they cause to black children, Forde-Mazrui found that scholarly literature paid inadequate attention to the justifications for race matching advanced by the NABSW. Forde-Mazrui analyzed these claims and determined that they were inadequately substantiated to justify preventing or even discouraging white parents from adopting black children. For example, the NABSW fails to distinguish between cultural and racial identity. Although questioning the extent to which there is a "black" culture, Forde-Mazrui acknowledges that black parents may be more likely to impart such a culture to black children. However, white parents can raise a black child to value his race without having to raise the child to identify with black culture. A black child who is assimilated into mainstream culture is not necessarily a child who feels worse about his race than a child raised by black parents.

Regarding skills to cope with racism, Forde-Mazrui observes that parents routinely help their children cope with difficult circumstances, including circumstances that the parents have not directly experienced themselves. For example, Forde-Mazrui and his brother have learned, with parental guidance, to cope successfully with their blindness, notwithstanding that their parents have good vision. Forde-Mazrui also makes the plausible yet controversial point that the cultural assimilation a black child is likely to gain from white parents can serve to reduce the risk of experiencing discrimination, because a black person whose communication style and manner are similar to that of white people is more likely to be accepted by white people. Finally, Forde-Mazrui identifies a dangerous underlying motivation behind the NABSW and other race-matching proponents—an agenda of black cultural preservation. While such an agenda may well be legitimate in the political sphere, it should not displace concerns for the individual child's welfare. Although this

first article was published more than a decade ago, it continues to play a substantial role in political and scholarly debates on the role of race in adoption.

After three years of clerking and private practice following law school, Forde-Mazrui re-entered academia in 1996 when he joined Virginia's faculty. In his next scholarly project, "Jural Districting: Selecting Impartial Juries Through Community Representation," 52 *Vand. L. Rev.* 353 (1999), he weighed into the intense debate that continues among court reformers over efforts to create more diverse or representative juries than are typically achieved through current jury selection methods. The article begins by recognizing that most existing proposals, which would involve the use of quotas, are likely unconstitutional. The challenge presented by the Supreme Court's equal protection jurisprudence, then, is whether jury selection procedures can be designed that effectively enhance the representative character of juries without violating constitutional norms.

Forde-Mazrui offers a brilliantly original insight for resolving this challenge. Analogizing juries to legislatures, he applies electoral districting principles to jury selection. Striking parallels between legislatures and juries justify comparing the selection of jurors to the election of legislators. Both legislatures and juries are fundamental institutions that best serve their function when their membership is representative of their respective jurisdictions. The electoral process enhances the representative character of legislatures through single member districting. Although limiting the use of race in drawing electoral districts, the Supreme Court has endorsed designing districts around "communities of interest," communities with shared political interests identified by demographic characteristics such as residential proximity, socioeconomic class, occupation, religion, and political affiliation. Intriguingly, the Court even permits some consideration of race in drawing districts, provided it is only one among many factors.

Drawing on electoral districting experience and doctrine, Forde-Mazrui proposes a jury selection procedure he terms "jural districting." An implementing jurisdiction would divide a jury district into twelve sub-districts, designed around communities that share common interests, taking account of such indicators

as race, ethnicity, religion, political affiliation, and socioeconomic status. The courts would then require that each jury contain a juror from every sub-district. Such a procedure should satisfy constitutional objections and, moreover, would create broadly diverse juries representing a variety of communities. Jural districting would thereby create juries more broadly representative than juries selected by current procedures or even by proposals relying exclusively on race. By improving the quality of jury decision making through deliberation and consensus among a cross section of groups, jural districting would thereby restore a substantial measure of legitimacy to the jury system. Forde-Mazrui's proposal has received strong interest both inside and outside the academy. In the spring of 2005, for example, legislation titled the "Fair Jury Act," which is based on Forde-Mazrui's model, was introduced in the Illinois State Senate, and his model is also under consideration by the Bench/Bar Committee for the United States District Court for the District of Kansas.

Forde-Mazrui has also established himself as a leading expert on affirmative action. Two years ago, in *Grutter v. Bollinger* (2003), the Supreme Court declined to forbid affirmative action and thereby left the debate over its legitimacy to the American people to resolve. Underlying this debate is a dispute about the extent to which American society is responsible for present effects of past racial discrimination against black Americans. Although much has been written on the subject, the scholarship too often sheds more heat than light, and tends to be dominated by extreme positions incapable of taking opposing claims seriously.

In his recent article, "Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations," 92 *Cal L. Rev.* 683 (2004), Forde-Mazrui makes a novel and constructive contribution to this debate. He considers the case for a societal obligation to remedy past discrimination by accepting, rather than dismissing, the principles of conservatives who oppose affirmative action and reparations. Taking conservatives seriously reveals two moral principles that support a societal obligation to remedy past discrimination.

The first principle is that racial discrimination is unjust. The second principle is corrective justice, that one who wrongfully harms another is obligated to make amends. Applied to affirma-

tive action, these principles support conservative claims that a state is obligated to make amends to white victims of racial preferences. These principles, however, also support America's responsibility for past societal discrimination against blacks. To the extent society participated in wrongful discrimination, society is obligated, as a matter of corrective justice, to make amends to its black victims. A potential moral conflict thus exists between society's obligation to refrain from "reverse" racial discrimination and its obligation to remedy past discrimination. The moral case against affirmative action, that is, also supports a moral case in its favor.

The article also addresses the most serious objections to a societal obligation to remedy past discrimination. These include that America as a whole is not responsible for discrimination practiced by only some states and private actors, that it is unfair to hold current society responsible for discrimination by past society, and that blacks today ought not be viewed as victims of past discrimination given the passage of time and the extent to which black people's choices have perpetuated their own disadvantage. These objections, Forde-Mazrui concludes, are inadequate to defeat America's responsibility for the consequences of her discriminatory history. America as a nation was responsible for protecting slavery and discrimination, a responsibility that belongs to the nation as a nation and therefore continues over time despite changeover in the American citizenry. Indeed, as Forde-Mazrui ingeniously observes, originalism, as a conservative methodology of constitutional interpretation, commits conservatives to the idea that the United States has a transgenerational, continuing identity and that the current generation of Americans is bound by what previous generations did. American society is also responsible, Forde-Mazrui argues, for black people's choices that may perpetuate their disadvantage because those choices reflect a foreseeable reaction to conditions created by societal discrimination. The moral imperative to remedy past discrimination, moreover, outweighs the risk of imprecision in doing so. Ultimately, conservative opposition to remedial policies is based on principles that counsel in favor of such policies as much as and arguably more than they counsel against them.

The foregoing theoretical piece builds on an earlier project on

affirmative action that engaged more directly with Supreme Court doctrine. In "The Constitutional Implications of Race-Neutral Affirmative Action," 88 *Geo. L.J.* 2331 (2000), Forde-Mazrui explores the constitutional implications of race-neutral affirmative action, that is, governmental efforts to pursue affirmative action goals, such as remedying discrimination and promoting diversity, through non-racial means. For example, in response to anti-affirmative action initiatives, public universities are increasingly giving weight in the admission process to the economic background of applicants in order to enhance minority enrollment.

In this article, Forde-Mazrui examines the doctrinal puzzles raised by "race-neutral" affirmative action policies and develops doctrinal justifications for them. Although Forde-Mazrui is not the only scholar to consider the constitutional difficulties facing affirmative action policies that employ race-neutral means, this article represents the most detailed, informative and sophisticated analysis in the scholarly literature to date. It has also informed political and legal discussions outside the academy and, indeed, was relied on in briefs submitted to the Supreme Court in the recent affirmative action case *Gratz v. Bollinger* (2003). Given the constitutional and political trend toward replacing racial preferences with race-neutral policies, this work will continue to inform the debate over affirmative action for years to come.

Forde-Mazrui extends his insights about race to discrimination based on sexual orientation in his review of Professor Randall Kennedy's recent book, *Interracial Intimacies: Sex, Marriage, Identity and Adoption* (2003). Kennedy's book examines the historical opposition to interracial sex, marriage, and adoption, and also explores issues of blacks passing as white (and some emerging cases of whites seeking to pass as black). In "Live and Let Love: Self-Determination in Matters of Intimacy and Identity," 101 *Mich. L. Rev.* 2185 (2003), Forde-Mazrui draws a number of parallels between historic opposition to interracial relationships and contemporary opposition to same-sex relationships. He also identifies similarities between racially passing and remaining in the sexual-orientation closet. Forde-Mazrui concludes that the parallels between interracial and same-sex rela-

tionships suggests treating them as equally legitimate.

Forde-Mazrui's scholarship will continue to focus on issues at the intersection of race and law, while also branching out to address other ways in which people experience unfair discrimination on the basis of factors such as sex, religion, sexual orientation, and disability. In the short term, projects underway include an examination of police discretion in stopping motorists for investigatory purposes, the constitutional implications of Arab profiling in the War on Terror, and the role of tradition in constitutional law.

Forde-Mazrui is aided and inspired by his role as Director of the Center for the Study of Race and Law. Founded in 2003, the Center aims to promote course offerings addressed to racial issues, and to provide a range of extracurricular opportunities to study race and law, including lectures, workshops, panels, and scholarly symposia. The Center's first two years have been highly successful, due to the tremendous support received from Dean Jeffries, and from the faculty, students, administrators, staff, and alumni of the law school. Forde-Mazrui is proud to lead such an important program, which itself is a perfect compliment to his mission to aid America's transition to a nation committed to racial equality and human dignity.

EXCERPT FROM:

Jural Districting: Selecting Impartial Juries Through Community Representation

52 *Vand. L. Rev.* 353 (1999)

IV. JURAL DISTRICTING: APPLYING ELECTORAL DISTRICTING PRINCIPLES TO THE SELECTION OF JURIES

Compared to current at-large selection methods, jural districting would tend to create juries more representative of the surrounding vicinage by ensuring that each jury contains residents of different sub-districts encompassing different communities of interest. As electoral districting experience informs us, residents of different communities of interest tend to differ more from each other than would residents of the same community. Because persons of similar demographics tend to concentrate in certain areas, geographical diversity would tend to yield demographic diversity. Under current at-large jury selection, a jury may contain several jurors from the same community, where residents tend to share common backgrounds and experiences, while containing no jurors from other communities where residents have different backgrounds. Under jural districting, each juror on every jury would come from a different subdistrict and community, creating a greater likelihood that a jury would encompass a range of different experiences and perspectives.

Perhaps even more significant than counteracting the underrepresentative effect that random at-large selection inevitably has on particular jury panels, jural districting would also counteract those other features of jury selection that tend to underselect minority groups, such as underinclusive source lists, qualification standards, and the financial hardship of jury service. These features of jury selection currently result in the overall

underrepresentation of minority groups in jury service. Under jural districting, in contrast, if a disproportionately low percentage of residents from certain minority communities are selected for jury service, such communities would still be represented proportionally on juries because jural districting would require that someone from the sub-district circumscribing that community serve on each jury. The result would be that residents of "low turnout" minority communities who do serve on juries would do so more frequently than would residents from communities where a high percentage of residents serve. Jural districting would thus help to ensure the proportional representation of different communities throughout a jury district even if a lower percentage of residents of some communities perform jury service.

Turning once again to the electoral context, this effect of jural districting in compensating for the low selection rates of certain minority communities is analogous to the effect of electoral districting in compensating for low voter turnout in minority communities. As discussed previously, a minority community suffers in an at-large electoral system because the voters of that community can be outvoted by voters from other communities. A minority community with low voter turnout will be outnumbered by an even larger margin. When, through electoral districting, a minority community is made a substantial majority within a given district, then that community can control the election of a representative from that district even when voter turnout is relatively low. This consequence is largely praised as compensating for lower voter turnout in minority communities that may reflect apathy or distrust on the part of these communities whose interests have been underrepresented in the past and would, absent districting, continue to be underrepresented in the present. Similarly, jural districting would help to compensate for the lower response and qualification rates of traditionally underrepresented minority communities. The message of desired inclusion sent by jural districting, moreover, may help to reverse the sense of alienation from the criminal justice system felt in such communities. True, some residents of underrepresented communities might value enhanced political power over more frequent jury service, but the point remains that jural districting would tend to create juries that are more representative than juries selected under current at-large methods. The jury system would benefit from the enhanced decision-making and legitimacy that derives from such representation.

Consider also the potentially beneficial effect of jural districting on the peremptory challenge. The contribution of the peremptory challenge to the underrepresentation of minority groups is well documented and even more well known among court reformers concerned with jury representativeness. Jural districting could minimize the use of the peremptory challenge to exclude members of racial and ethnic groups from jury service. First, one may reasonably anticipate that a jurisdiction adopting jural districting would also limit the number of peremptory challenges. A jurisdiction willing to administer jural districting, with its attendant costs, is probably one in which current selection procedures underrepresent certain minority groups, such as racial minorities, to an intolerable degree. These same concerns over underrepresentative juries would probably motivate such a jurisdiction to seriously consider reducing or eliminating the peremptory challenge. Second, even if peremptory challenges were retained, by requiring a juror from every sub-district, jural districting could help to deter abuses and the underrepresentative effect of the peremptory challenge. A litigant with a limited number of such challenges may hesitate to employ them based on overbroad or invidious racial group stereotypes when the struck juror will likely be replaced by a juror from the same community. Thus, although jural districting is compatible with existing peremptory challenge practice, it creates a lower likelihood that the practice will be used to undermine the representative character of the jury.

EXCERPT FROM:

The Constitutional Implications of Race-Neutral Affirmative Action

88 *Geo. L.J.* 2331 (2000)

III. AVOIDING STRICT SCRUTINY BY PURSUING NONSUSPECT PURPOSES THROUGH RACE-NEUTRAL MEANS

A. Remedying Societal Discrimination, Promoting Diversity, and Other Nonsuspect Purposes

In addition to remedying societal discrimination, a non-racially discriminatory purpose associated with affirmative action is the promotion of diversity, including a diversity of viewpoints, experiences, and even of cultures commonly associated with or identified by members of racial groups. As this is not a racially discriminatory purpose, the pursuit of this interest directly through race-neutral means does not trigger strict scrutiny. The most controversial aspect of the foregoing claim is that it is not suspect to promote a diversity of cultures predominantly identified with by members of particular racial groups. The reason such diversity is not racially suspect is that people who identify with particular cultures are, like victims of societal discrimination, not a racial group, because membership in the group is not inherently connected to any race. Consider, for example, the group defined as people who identify with "black," "African-American," or "Afrocentric" culture. While most members of the group—people who identify with this culture—may be racially black, there are many blacks who are not members of

that group and, as some race theorists have observed, people can identify with African-American culture without being racially black. Accordingly, neither African-American nor Black culture is a racial category and the purpose of promoting the culture or affecting its members through race-neutral means is neither suspect nor subject to strict scrutiny.

The problem with racial classifications used to promote diversity, just as with racial classifications used for remedial purposes, is not in the ultimate purpose but in the choice of racially discriminatory means to achieve that purpose. Likewise, the use of race-neutral classifications as a proxy for racial minorities as a proxy for diversity would also involve a discriminatory purpose. If, however, race is taken out of the choice of means altogether, so that the legitimate nonsuspect purpose of promoting diversity is directly pursued through race-neutral classifications, then no racially discriminatory purpose exists and strict scrutiny is not triggered.

The following formulations illustrate the various possibilities:

Suspect racial classifications
racial minorities [*as proxy for*] *diversity*

Suspect race-neutral classifications
race-neutral criteria [*as proxy for*] *racial minorities* [*as proxy for*] *diversity*

Non-suspect race-neutral classifications
race-neutral criteria [*as proxy for*] *diversity*

Thus, states and public universities may seek to promote diversity in higher education without triggering strict scrutiny, provided that race-neutral means are used. Such diversity of a broad nonracial type may include people from different social, political, or economic backgrounds, having had different life experiences, or holding various viewpoints or perspectives. Such diversity is clearly a legitimate interest, particularly in educational contexts. The use of race-neutral means to achieve this nonracial concept of diversity is plainly unobjectionable. Moreover, as argued here, nonracial diversity may include people who identify with different cultures, including cultures typically associated with racial groups, but which are available to people of any race. As such, a public university's admission or scholar-

ship application may, without triggering strict scrutiny, consider race-neutral criteria, such as organizational membership, community service, or personal essays, to identify applicants who will likely enrich the cultural diversity of the student body.

"Learning Law Through the Lens of Race," 21 *J.L. & Pol.* 1 (2005).

"Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations," 92 *Cal L. Rev*. 683 (2004).

"Live and Let Love: Self-Determination in Matters of Intimacy and Identity," 101 *Mich. L. Rev.* 2185 (2003) (reviewing Randall Kennedy, *Interracial Intimacies: Sex, Marriage, Identity and Adoption* (2003)).

"Will Affirmative Action Survive?: *Grutter v. Bollinger* Asks the Supreme Court," *Legal Times*, Vol. XXV, No. 24, at 52 (June 17, 2002) (op-ed).

"The Constitutional Implications of Race-Neutral Affirmative Action," 88 *Geo L.J.* 2331 (2000).

"Jural Districting: Selecting Impartial Juries Through Community Representation," 52 *Vand. L. Rev.* 353 (1999).

"Black Identity and Child Placement: The Best Interests of Black and Biracial Children," 92 *Mich. L. Rev*. 925 (1994).

Looking for Proof of Law's Purpose and Effect

Paul Mahoney is a pioneer in the use of empirical methods in legal scholarship. His writings on the federal securities reforms of the 1930s challenge conventional wisdom about the nature of the securities markets of the 1920s and the effects of the statutory reforms. His combination of law and empirical finance inaugurated a new wave of corporate and securities law scholarship that has attracted scholars such as Rob Daines at Stanford and John Coates and Allen Ferrell at Harvard.

When he joined the faculty after four years in private securities practice, Mahoney was eager to re-examine the basic assumptions underlying the federal securities laws. "Financial history, like political history, is written by the winners," Mahoney notes. "The New Dealers wrote extensively on the background of the securities laws, portraying the 1920s as a Dark Age of finance and the federal reforms as necessary to save capitalism from itself. Those conclusions survived almost unchallenged until very recently." Mahoney himself has mounted some of the most important and interesting challenges.

In an early article, "Mandatory Disclosure as a Solution to Agency Problems," 62 *Chi. L. Rev.* 1047 (1995), Mahoney

advanced a novel claim about the history of the federal securities laws. Disclosure provisions are generally described as a means of enabling investors to determine the value of a security. Mahoney noted, however, that the English statutory and common law rules on which the Securities Act of 1933 is based were developed with a different purpose in mind—to uncover hidden profits that the seller might make in connection with a public offering. Early English corporate promoters sometimes claimed to be acting only as middlemen while actually owning a stake in the business being sold. Mandatory disclosure arose to force revelation of these hidden interests. Mahoney argued that these so-called agency-cost disclosures are the most important feature of disclosure statutes. The article has influenced a recent literature within economics on the purposes and effects of the regulation of securities markets.

Mahoney bridged the methodological gap between securities law and financial economics in "The Stock Pools and the Securities Exchange Act," 51 *J. Fin. Econ.* 343 (1999). The article was published in the *Journal of Financial Economics,* the top-ranked finance journal, and used empirical finance to reopen a foundational factual debate. The primary motivation for federal regulation of stock exchanges was the belief that stock-price manipulation was rampant on the New York Stock Exchange in the late 1920s. As evidence, Congress cited the so-called "stock pools," trading accounts formed by groups of market professionals. Congressional investigators concluded that pools made massive purchases in order to drive up the price of a stock, then quietly dumped the stock on unsuspecting investors at artificially high prices that inevitably collapsed once the pool exited.

Mahoney researched the congressional investigators' records in the National Archives and carefully examined the stock pools that traded in NYSE stocks in 1929. He found that, indeed, the market-adjusted price of these stocks climbed at about the time of pool formation. However, contrary to Congress's conclusion, there were no subsequent collapses—the pool stocks earned returns approximately equal to the market return after the initial run-up. Thus, Mahoney concluded, the evidence suggested that the pool traders had superior information, not that they were engaged in manipulation.

Mahoney's subsequent article with economists Guolin Jiang and Jianping Mei, "Market Manipulation: A Comprehensive Study of Stock Pools," 77 *J. Fin. Econ.* 147 (2005), brought an expanded data set and more recent theoretical and empirical techniques to bear on the stock pools. It similarly concluded that the pools' trading activities were likely motivated by information. Interestingly, then, it appears that one of the central factual claims underlying the New Deal financial reforms is incorrect. As Mahoney and his co-authors note, this conclusion has implications for the design of regulatory systems in developing markets. They argue that manipulation is likely a problem only in the smallest, most illiquid stocks.

If some of the main factual predicates for the federal securities laws prove unfounded, the question naturally arises whether the statutes were a product of misunderstanding, ideology, or interest-group politics. Securities law scholars have generally rejected the notion that the financial industry was a beneficiary, rather than a target, of the 1930s reforms. After all, they argue, the industry vigorously opposed those reforms. Mahoney, however, finds the issue more complicated. "In fact, the top-tier investment banks and brokerage houses supported the New Deal securities reforms, and certainly the big players in the market prospered under the federal securities laws."

In "The Political Economy of the Securities Act of 1933," 30 *J. Legal Stud*. 1 (2001), Mahoney analyzed the politics and effects of the first federal securities statute. He observed that although the act is famous as a disclosure statute, many of its substantive provisions forbid issuers and underwriters from communicating with the markets during the registration process. This, he concluded, was the key to understanding why high-prestige investment banks favored the statute. They used underwriting methods that were slow and involved multiple intermediaries. The most prestigious houses, such as J.P. Morgan & Co., stood at the top of the hierarchy and acted as wholesalers, selling to regional, retail-oriented houses at the bottom of the pyramid. In the late 1920s, however, new entrants such as the National City Company began to offer a rapid, integrated underwriting process in which the lead under-

writer sold directly to the public using a nationwide network of retail salesmen.

The Securities Act neutralized these new competitive methods by slowing down the offering process and banning "gun-jumping," or retail selling efforts in advance of the offering. Mahoney argues that these restrictions benefited the established, high-prestige investment banks at the expense of new entrants. Using hand-collected data on underwritten public offerings from 1925 through 1940, he demonstrates that the market share of the top underwriting firms declined steadily during the 1920s but increased after enactment of the Securities Act.

In "The Origins of the Blue Sky Laws: A Test of Competing Hypotheses," 66 *J.L. & Econ*. 229 (2003), Mahoney shows that the interests of financial intermediaries also shaped the state "blue sky" laws that preceded the federal securities laws. The paper employs hazard-rate analysis, a statistical technique that looks for patterns in the timing of events (here, various states' enactment of a blue sky law) and asks which variables can best explain that pattern. The paper explores three factors that could explain a state's adoption of a blue sky law: the amount of securities fraud in that state, the strength of progressive political sentiment, and the relative importance of the securities and banking industries in the state. Mahoney notes that banks (particularly small, local banks) competed for household savings with securities firms and stood to gain if in-state sales of securities could be curtailed.

The paper reaches an interesting conclusion: the order in which states adopted blue sky laws can be largely explained by the relative importance of progressive political parties and candidates in a given state, but the type of blue sky law adopted depended strongly on the lobbying strength of small banks in that state. States dominated by small banks tended to adopt the most restrictive type of blue sky law, a so-called "merit review" statute that gave a state administrator wide discretion to deny permission to offer securities in the state. Mahoney notes that neither the traditional public choice analysis nor a standard model of ideological politics explains the entire picture. Instead, both must be combined to understand the blue sky laws.

In addition to his securities law scholarship, Mahoney has contributed to recent literature that asks whether a country's "legal origin" (that is, whether its legal system is derived from English common law or continental civil law) effects economic outcomes. In a series of papers beginning in the late 1990s, a group of economists demonstrated that common law countries tend to have more developed financial markets, controlling for other relevant factors. It is not clear, however, why such a link exists.

In "The Common Law and Economic Growth: Hayek Might be Right," 30 *J. Legal Stud*. 503 (2001), Mahoney argues that the economically relevant difference between common and civil law countries lies not in the specifics of legal rules, but in the relative importance each system attaches to private ordering versus government intervention. Mahoney provides empirical evidence that common law countries experienced faster per-capita growth in gross domestic product over a substantial period and that a significant portion of the difference can be attributed to stronger protections against government interference in property and contract rights.

A later article written with legal historian Dan Klerman, "The Value of Judicial Independence: Evidence from Eighteenth Century England," 7 *Am. L. & Econ. Rev.* 1 (2005), explores a key feature of English law—a judiciary independent of the executive. Until the 18th century, English judges were formally servants of the crown, who could compensate and remove them as he saw fit. In a series of statutes beginning with the Act of Settlement in 1701, Parliament gave the judges life tenure and a fixed salary. Klerman and Mahoney hypothesize that if judicial independence improves the security of property and contract rights, then independence would boost the private economy and the value of traded equities. Using a database of daily prices of London Stock Exchange stocks for this period, they discovered that markets reacted favorably to legislation that increased judicial independence.

Mahoney has supplemented his empirical scholarship with theoretical work that uses game theory to understand the role of law. Recent scholarship in law and economics argues that social norms, rather than formal legal rules and sanctions, are the primary forces maintaining social order. In a pair of articles,

Mahoney and co-author Chris Sanchirico re-examine some of the key issues in the field using careful game theoretic analysis. "Competing Norms and Social Evolution: Is the Fittest Norm Efficient?," 149 *Penn. L. Rev.* 2027 (2001), challenges the notion that norms generally evolve in efficient directions, showing that whether an evolutionary process results in efficient or inefficient outcomes depends critically on the precise structure of the game. Mahoney and Sanchirico argue that many settings of interest to law are most plausibly modeled in ways that would likely generate inefficient norms absent some legal intervention.

Mahoney and Sanchirico follow up this point in "Norms, Repeated Games, and the Role of Law," 91 *Cal. L. Rev.* 1281 (2003). They first show that the norms literature's focus on the so-called "tit for tat" strategy in which players "do unto others as they do unto you" has led scholars to draw conclusions that do not hold up when the universe of all possible cooperative strategies is considered. The article goes on to show that game theory's equilibrium concepts are questionable bases on which to build a theory of social norms because so much of the observed behavior that norm theorists seek to describe could not occur in equilibrium. Mahoney and Sanchirico argue that law is essential precisely because norm violations leave rational players without a basis on which to predict other players' future behavior. Law, by contrast, is credible not because it is the equilibrium of a game but because it is backed by the state's monopoly of force.

Mahoney is currently busy continuing his examination of the history of the federal securities laws. His work with Jiang and Mei, described above, attracted the interest of the Center for Research in Security Prices (CRSP) at the University of Chicago's business school, which runs the primary research database of U.S. stock prices. Currently, CRSP's data set contains daily closing prices and trading volumes for all NYSE stocks back to 1962. Mahoney and his co-authors demonstrated the feasibility of gathering comprehensive data from earlier periods, and CRSP has accordingly decided to extend its daily data set back to 1926. Mahoney is excited by the prospect: "This will offer an extraordinary opportunity to analyze how the federal securities laws

affected the markets. I have several projects on the drawing board that await the release of the full data."

Mahoney has challenged conventional wisdom regarding the historical purpose of securities laws, offered intriguing explanations of why common law countries typically have more robust financial markets and greater economic growth, and called into question basic assumptions about the relationship between law and social norms. He has reached back into our legal past to offer new insights into old debates, and he has advanced ideas at the cutting edge of legal theory. He has done so by employing a combination of painstaking historical research, sophisticated empirical techniques, and a nose for great topics. The result is a body of work that has rightly attracted a great deal of attention and accolade, and has cemented Mahoney's reputation as not simply one of the leading scholars of securities regulation, but as one of the leading legal scholars of his generation.

EXCERPT FROM:

The Political Economy of the Securities Act of 1933

30 *J. Legal Stud.* 1 (2001)

[C]ommentators have tended to [take] at face value that the "truth in securities" act is a disclosure statute. Less well understood is that the Securities Act is equally a secrecy statute. It forbids most public disclosure of pending offerings prior to the filing of a registration statement with the Securities and Exchange Commission (SEC). The statute also mandates a minimum delay of 20 days between the filing of the registration statement and the beginning of retail selling. While traditionally described as mere pieces of the technical apparatus of "full disclosure," these provisions imposed important limitations on both retail and wholesale competition.

I try to show that these "technical" details can be best understood as means of eliminating several specific competitive techniques that low-status securities dealers used successfully against high-status dealers in the late 1920s and early 1930s.

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IV. THE CRISIS OF THE SYNDICATE METHOD

As competition increased at the retail level, sellers began to seek an advantage over their rivals by violating those provisions of syndicate agreements that specified the timing and price of the distribution. The increased speed of distributions and the focus on retail selling during the 1920s made it difficult for managing underwriters to monitor and control the behavior of hundreds, or occasionally thousands, of securities dealers participating in the sale of a new issue. By the late 1920s, investment bankers realized

that the viability of the syndicate system was threatened.

Established bankers described the phenomenon as a decline in the professionalism of the investment banking business. Like lawyers or doctors today, many investment bankers of the 1920s viewed themselves as members of a learned profession, the standards of which were being eroded by new entrants who were mere salesmen. A measure of that concern is the creation, at the [Investment Banker's Association of America (IBAA)] annual convention in the fall of 1926, of the Committee on Business Problems. The bulk of that committee's first report, delivered at the 1927 convention... addressed changes in distribution methods.

The report noted two tactics in particular: "beating the gun," or selling prior to the agreed-upon distribution period, and selling at discounted prices....

A. Beating the Gun

In the late 1920s, a practice known as "beating the gun" became common. Under the normal underwriting practice, underwriting and selling syndicate agreements contained an undertaking not to sell securities until they were "released" by the managing underwriter through a telegram or telephone call. To beat the gun was to violate the syndicate agreement by taking orders from customers before the securities had been released for sale.

Beating the gun allowed one distributor to get a head start on the others in the competition for retail customers. It was, however, inconsistent with the premise of a syndicated selling effort—that each seller complied with contractual restraints on price, timing, and (sometimes) territory. Managing underwriters were sensitive to the complaints of retailers who complied with syndicate agreements and, in so doing, lost customers to others who had not complied.

In order to prevent the practice, originating houses tried to keep the timing and price of the issue secret until the last minute. This was not always possible, however, particularly for issues of large companies. These companies were closely followed by the financial press, and newspapers or investment magazines might print the details of a coming large issue of securities before the issuing house had formally released the information to the syndicates. Thus selling group members were able to take orders

from customers with reasonable confidence that they would be able to provide the security at the time and price quoted, even though they were contractually obligated to wait.

The IBAA Subcommittee on Distribution concluded that the root of the problem was excessive preoffering publicity. . . . The chairman of the subcommittee spoke approvingly of issuing houses that kept a tight lid on information about the timing and price of offerings but recognized that this "ideal condition" was difficult to achieve. Speaking of the large houses of issue, he noted, "They are doing all they can to get the information to every one of you men at the same time, and what they want is someone to tell them a practical way, someone to also try and keep publicity out of the paper."

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V. THE REGULATORY SOLUTIONS

The Securities Act and other New Deal financial reforms addressed the specific competitive concerns outlined above. They had, in broad terms, three effects. They provided the government's aid in enforcing the syndicate system by outlawing beating the gun and discounting. They slowed down the distribution process and divided it into distinct wholesale and retail phases. Finally, they removed commercial banks as competitors for underwriting business. The consequence was to neutralize the competitive advantages of integrated firms and return to a system in which wholesale banks originated new issues and sold them through stand-alone distributors. This section shows how the technical details of the Securities Act achieved those results.

A. Beating the Gun

The Securities Act achieved precisely what the IBAA's Committee on Business Problems wanted to achieve but could not—it made it possible for a lead underwriter to provide distributing houses with detailed information about a pending issue secure in the knowledge that the latter could not agree to sell securities until the official offering date. The act also assured the absence of retail solicitation prior to the offering date by suppressing preoffering publicity.

The Securities Act requires that a registration statement be filed and become effective before any person may sell the securities.... Before the registration statement was filed, all public discussion of the issue was banned. Securities lawyers today still counsel their clients against any premature public statements relating to the offering—to make such a statement is to "jump the gun," although I doubt many securities lawyers know that the phrase antedates the Securities Act.

The statute also directly attacked newspaper and radio advertisements by defining each as a "prospectus" that, with limited exceptions, could not be published prior to effectiveness. The prohibition on newspaper publicity was broad enough to cover a story printed after interviewing a company officer about the pending offering. No longer would detailed information about pending offerings appear in the morning papers prior to the offering date, stimulating customers to call their brokers.

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VII. CONCLUSION

The Securities Act pursued socially useful goals. In particular, its disclosure requirements forced the promoters of corporations undertaking initial public offerings to disclose their financial stake in the new corporation, thus combating an abuse that had persisted in both England and the United States since the mid-1800s. Its starting point for solving the problem was the same as that developed in the Companies Act in England—mandatory disclosure of promoters' and underwriters' fees and stakes in a company.

The statute did more than this, however. It prohibited contact with potential retail buyers in advance of an offering, making it difficult for one retailer to poach another's customer. In tandem with the NIRA and the Maloney Act, it enabled the IBAA to prohibit and monitor the use of price discounts in connection with public offerings. It also effectively divided offerings into wholesale and retail periods. These features helped leading wholesale and retail firms enforce restrictions on retail competition that were central to the syndicate system of underwriting, thus protecting their market against incursions from integrated firms.

None of these things was necessary in order to achieve the simple goal of requiring full disclosure. They benefited investment banks, particularly high-prestige investment banks, and likely raised costs to issuers and investors.

The Securities Act accordingly provides a useful cautionary tale about the efficacy of economic regulation. The act is generally regarded as one of the greatest success stories of the New Deal. Unlike many regulatory statutes, it has been largely untouched by claims that it raises entry barriers or enforces cartel agreements among members of the regulated industry. Yet a closer look at the statute, in light of the competitive conditions in the underwriting market in the 1920s, shows that even the Securities Act was a likely source of rents for the firms it subjected to regulation.

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