




KIM FORDE-MAZRUI 

## 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) advo-

cates 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. ❖

## 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 sub-district 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 under-representative 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 under-select 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 dis-

tricting 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:

Virginia Journal

# 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. Remediating Societal Discrimination, Promoting Diversity, and Other Nonsuspect Purposes

IN ADDITION TO REMEDIATING 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.

Kim Forde-Mazrui

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. ❖

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