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Frederick Wilmot-Smith, Equal Justice: Fair Legal Systems in an Unfair World

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Frederick Wilmot-Smith, *Equal Justice: Fair Legal Systems in an Unfair World* (Boston: Harvard University Press 2019)

IN *EQUAL JUSTICE: Fair Legal Systems in an Unfair World*, Frederick Wilmot-Smith presents a theory of a just legal system, which is not an easy task. The author makes a strong case for significant (and perhaps radical) legal reform. It is argued that the problem lies not necessarily in the law itself, but with legal procedure and institutions. In other words, even if laws are perfectly drafted, they can still lead to injustice if they are not administered properly. As someone who has also been criticized for being a radical legal thinker, I applaud Wilmot-Smith for giving us a framework for thinking outside the traditional legal box. This book provides a big picture framework for asking questions about the social characteristics (race, gender, class, wealth) of the individuals in play (such as judges, lawyers, and litigants), and the outcomes that come from unfair legal procedures. In other words, not all litigation can be equal. There are certain characteristics that will inevitably challenge the fairness of the distribution of justice. Accordingly, the author acknowledges that even the fairest legal system will still result in injustices from time to time. Yet, the author cleverly sketches out what a just legal system might look like to ensure that any injustice will stem from equality and fair procedure.

In arguing that there are various benefits and burdens of legality, Wilmot-Smith presents a compelling argument around the need for equal justice. The author points to the many problematic realities of any legal system to make a case for legal reform: the difficulty in accessing justice; (in)equality before the law; the possibility for incorrect decision-making; unequal enforcement of laws; the immense difficulty for anyone without a

legal education to understand the content of statutes; justifying spending taxpayer money on legal reform; and so on.

In practice, the author recognizes that equal justice is impossible. In order to justify the inevitable injustices that will occur in any legal system, the injustice must arise from fair procedure. What is perhaps the most compelling piece of this book is the idea of a fairness floor based on the values of liberty and the rule of law. The fairness floor, as argued by Wilmot-Smith, is necessary for a legal process to be fair. It is a basic level of legal resources that are awarded to everyone. It is possible to achieve more justice than the floor provides, but the fairness floor ensures equality and access for anyone needing to use the legal system. Under this model, the rule of law is divided into the “guidance condition” (the law cannot be secret) and the “congruence condition” (the need for resources for compliance). (78-79) This idea of congruence is a fascinating one – it is a big picture model serving as a sound configuration for positive reform. Even with a properly implemented guidance condition, it can still be extremely difficult to make sense of the content of these laws, particularly since judges interpret the laws, effectively changing their content.

As articulated by the author, “any legal system that aims to comply with the rule of law must ensure that people are able to be guided by law.” (81) Under the congruence condition, the legal system must be shaped not only around the promulgation of laws, but between the congruence of norms and application – that is, accessible legal institutions, truth-tracking, and independent judges, all of which help define a fair procedure. And what makes this model so intriguing is that the result must always be equal: the goal is to “equalise the justice benefits and burdens of legality.” (86) Failure to meet the congruence model means that

“something other than law” (79) would be guiding decision-making. While the idea of a fairness floor is fascinating, the idea that there are other factors, such as social characteristics, potentially shaping legal outcomes is not a novel one.

Donald Black, for instance, has long argued that the social positions of the individuals in a lawsuit can affect the outcome of the case. For example, a litigant who has a high social status and wealth can reduce the authority of the judge to make a fair and equal decision for all involved. Numerous other factors can help predict the outcome of a case including the social standing of each person; the social distance between the parties; the financial status of the parties; the race, religion, and lifestyle of the parties; and the social characteristics of the lawyers and third parties. Legal realists (such as John Dewey and Oliver Wendell Holmes) argued that legal processes need to be tested against experience, while legal realism generally has relied on empiricism and observable facts. While the author purports to have “empirical hypotheses,” (106) the book is deeply theoretical and lacks verifiable data. This is only problematic to the extent that the author admits that “[a] degree of realism... is baked into my approach.” (186) While it might be beyond the scope of this book, realism solicits that to know whether an idea for legal change would be successful within a given setting, it must be tested against experience or reality. It would be intriguing to see how the author’s hypotheses would measure up empirically against experience and reality.

Yet despite this relative lack of realism, the author manages to develop a well thought out realist proposal for legal reform and equal justice. The beauty in the theory for equal justice is not that we must implement an idealistic and unfeasible legal system, but rather that everyone using the legal system shares an equal

risk around possible injustices. In calling for equality, the model warrants that any injustice arises from fair procedure.

The legal system is a complex apparatus. The author does a great job breaking it down in exploring his theory of a just legal system. It is refreshing to read a proposal for real change given that we still primarily operate with dated, even ancient, norms and systems. I wholeheartedly agree with the author that legal reform is needed and find the proposal for a just justice system very compelling. Such radical thinking as presented by the author is needed if we are to make significant changes to our legal system, particularly those with common law systems. We are not generally taught to critically examine the role of judges and lawyers (who are people in a commodified world with scarce legal resources) and to challenge the correctness of a decision in relation to social characteristics and variables other than law that govern decision-making. The author promises to present a framework to structure future discussions, (7) and I believe that he achieves this in this book. Everyone benefits from a just legal system as proposed by the author and we owe it to ourselves to explore this theory further.

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Peter Linebaugh, *Red Round Globe Hot Burning: A Tale at the Crossroads of Commons and Closure, of Love and Terror, of Race and Class, and of Kate and Ned Depard* (Oakland, CA: University of California Press 2019)

THE TITLE OF Peter Linebaugh’s book is taken from William Blake’s prophetic *Visions of the Daughters of Albion* (1793), an anticipation of the author’s broadest themes – the loss of the global commons and the existential threat confronting