

Adam Benforado's *Unfair: The New Science of Criminal Injustice*

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When one looks back on medieval trials by ordeal—where, in a vat of cold water, guilt and innocence was decided by whether one floated or sank—it is hard to imagine them as anything but barbaric. Yet, to these men, this was procedural justice. As long as it was “true” that the baptismal waters rejected those with sin in their heart, it was ignorant—even heretical—to suggest this was unfair. A millennium later, we have abandoned the murky waters but retained this same faith in our current legal system. From the arrest to the courtroom, we submerge the accused in a process we still expect to fairly separate the innocent from the guilty even though, for as faithful as we are, “our descendants will be no less surprised by the routine and systemic unfairness we tolerate today than we are by our ancestors’ trials by ordeal” (xiii).

Contrary to what many believe, humans are incapable of unbiased decision-making, and this fact reveals every step of the way in our legal system. As the Drexel University scholar Adam Benforado documents in *Unfair: The New Science of Criminal Injustice*, subtle, unintentional cues from detectives can alter witness memory and lead to false identifications (120-121). In recorded videos, the confidence viewers place in what transpired depends as much on the camera angle as what was said or done (100). For parole boards, one’s release can hinge on not the risk assessment but whether its results are expressed as a percentage or frequency (xv); the same can be affected in the courtroom by whether one’s hearing is before or after

lunch (166). Each of these challenge our notion of fair treatment under the law, and together, they corrupt our very belief in the system’s capacity to distribute justice.

Though these problems are systemic and require legislative overhaul, this does not preclude revolution through piecemeal. Sometimes, Benforado notes, merely making individuals aware of these biases is enough to weaken their effects (as with hungry judges). Others, in contrast, require new procedures all together—such as how police are trained to conduct interrogations. For example, instead of using the widespread Reid technique, which focuses “on battering a suspect into submission and lying to him ... until he fesses up,” get rid of it (173). Forget extracting a confession and just gather as much information as possible, “pointing out inconsistencies in the suspect’s version of events” (274). In the United Kingdom, this approach has led to fewer false confessions and more information presented by guilty suspects.

One of Benforado’s most radical proposals is the elimination of the court’s adversarial system, which between prosecutors and the defense emphasizes winning over fair outcome (274). He suggests modeling our legal system after Germany’s, where a single watchman of the law is responsible for presenting evidence of both the defendant’s innocence *and* guilt (275). Of course, such a reform seems unlikely in the United States, but this could very well be the broad stroke (like dumping the vat of water) that with a

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thousand years' hindsight looks inevitable.

Because it is written for a popular audience much of *Unfair* will be familiar to those working at the intersection of science and law, and as it emphasizes the general over the particular, it is not above the conventional criticisms of popular writing. (Most problematic for me was the lack of footnoting, which made it hard to source claims I wanted to investigate further). In the end, though, criticizing a popular science book for not being a dissertation is asinine, and Benforado ought to be commended for making the literature accessible (and readable) to a wide audience. With one of the largest incarceration rates in the western world, the United States' criminal justice system is too large, its actions too consequential, to leave its study solely to the pages of an academic journal.

Thinking about how our descendants will look back upon our legal system is a necessary first-step for reform, as it forces us to distance ourselves from the world we have built around us. Otherwise, in our arrogance, it is too tempting to accept it as the capstone of, rather than just one of many data points in, mankind's long history of crime and punishment. Our legal system, as it exists, is not infallible, and while not every idea in *Unfair* will be enacted, if even a handful of them are taken seriously, it would have *real-world* implications, involving the lives of *real* human beings. Fewer individuals would be falsely identified or falsely confess, and fewer innocent people would find themselves behind bars. If we at least started here, when in a hundred years' time we are judged, we could not be judged for doing nothing.

Reference

Benforado, A. (2015). *Unfair: The new science of criminal injustice*. New York: Crown Publishing.