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Money and Justice: Who Owns the Courts?

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MONEY AND JUSTICE: WHO OWNS THE COURTS? By *Lois G. Forer*. New York: W.W. Norton & Co. 1984. Pp. xi, 244. \$16.95.

In *Money and Justice*, Lois G. Forer¹ explains that she “does not purport to discuss theories of fairness, equality, or justice” (p. 223 n.24). But precisely these notions, and most particularly the idea of fairness, underlie Judge Forer’s treatment of unequal access to the courts. Whether framed in terms of due process or equal protection of the law, fairness is the issue here. As a former President noted, life isn’t fair. Some people are wealthy, many are not. Corporations have extensive resources and power, most individuals do not. The question is whether society can live with a legal system that, often with frightening accuracy, mirrors the unfairness of the social structure. Forer maintains that it cannot.

Money and Justice presents the thesis that “American courts are not equally open and available to all who have legal claims and defenses — that there is turnstile justice for the poor and lengthy trials and appeals for those who can afford to pay for lawyers, investigations, expert witnesses, and documentary and physical evidence” (p. 14). Because of this disparity in trial time and quality of representation, the author concludes that most poor people do not receive due process in either civil or criminal courts. This problem of varying standards of justice based on economic status has, of course, been discussed before.² Forer adds to the subject her perspective as a trial judge in a state court, where she witnessed, first-hand, inequities in the application of law.

Forer’s examination of unequal justice focuses on the bifurcated legal system. There is, in law, what she calls a two-track system: a fast-track composed of lawyers who are highly intelligent graduates of top law schools and who inevitably end up in large corporate firms, and a slow-track composed of lawyers who have less impressive credentials and who tend to be mediocre, even incompetent. Fast-track lawyers never see the poor; slow-track lawyers represent the poor, but often do a bad job of it (pp. 57-66). Lawyers, however, as well as their clients, are victims of “the system” (p. 73). Law schools are popping up like dandelions; deficient curricula and faculty, along with low ad-

1. Lois G. Forer is a judge of the Court of Common Pleas in Philadelphia. Before ascending the bench in 1971, she practiced law for thirty-two years; eight of those years were spent as Deputy Attorney General for Pennsylvania. She is also the author of *CRIMINALS AND VICTIMS* (1980); *THE DEATH OF THE LAW* (1975); and “No One Will Lissen”: *How Our Legal System Brutalizes the Youthful Poor* (1970).

2. See *ACCESS TO JUSTICE* (M. Cappelletti & B. Garth eds. 1978); J. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976); H. JACOB, *JUSTICE IN AMERICA: COURTS, LAWYERS, AND THE JUDICIAL PROCESS* 73-75 (4th ed. 1984).

mission standards, have caused the legal profession to be overwhelmed by the "rising tide of mediocrity" in American education (p. 65).

The two-track system is evident in the judiciary as well. The federal bench gets fast-track lawyers. Slow-track lawyers drift to the state courts, where those issues most affecting the poor (employment, marriage, property, safety, family) are at least initially decided. (pp. 74-75). The level of competence of the federal bench is high. State judges have not met this standard; while many state judges serve quietly and well, others are corrupt, incompetent, and arbitrary. "They have frequently refused to enforce the law and permitted delays, backlogs, and hasty procedures that deny litigants any semblance of due process of law" (p. 82). Forer suggests that the reasons for the disparity between federal and state judges are the selection process (usually politicized at the state level), working conditions, salaries, and prestige (p. 82). Those state judges who manage to persevere, to remain honest, and to mete out concerned justice, find their rewards predominantly in the self-satisfaction of the job well done and in the appreciation occasionally expressed by those who come before the court (p. 90).

Indigent litigants are further hampered by the expense of the trial process. Delays in hearings, court fees, and costs incurred from missed work, carfare, and child care, often force low-income individuals to forgo enforcement of their legal rights or to submit to unsatisfactory settlements. Delayed criminal hearings may prejudice an accused's defense. (pp. 111-16). Indigent defendants, unable to raise bail, cannot afford private investigators and expert witnesses. Juxtaposed against this situation is the wealthy defendant, with high-powered lawyers and litigation science firms plotting his defense, whose lengthy jury trial takes valuable court time away from victims of turnstile justice.

The two-track legal system and the disparity in resources haunt the appellate process as well. Forer views the right to seek review of trial court decisions as essential (p. 151). Because of inadequate presentation of their claims and defenses, poor litigants are subjected to a greater probability of error and unjust results at trial (p. 152). However, despite the convicted person's right to representation by counsel at public expense in taking an appeal, the trial record in a badly tried case can make it impossible to get a fair appellate hearing (p. 158). Moreover, poor defendants, considering their situations hopeless, often fail to appeal (p. 158). Indigent civil litigants cannot wait several years to collect damages for their injuries; even the threat of appeal may lead them to settle for what they can get (pp. 153-55).

The author offers several proposals to begin to whittle away the two-tiered approach to justice in the American legal system (pp. 203-17). The first step is to shorten unduly long trials. Judges should

schedule one major trial every two or three days, and defer those cases that cannot meet this schedule (p. 205). Additionally, court access fees, which only minimally reimburse the public for the costs of trials, should be abolished. Rather, costs which actually reimburse the courts should be imposed at the discretion of the judge, taking into account trial time, the frivolous or substantial nature of the claim or defense, delaying tactics, the amount in issue, and the ability of the parties to pay (p. 206).

Forer also suggests that “[f]ree counsel should . . . be provided for indigents in civil cases that involve substantial rights” (p. 206), and that litigants should be allowed to select their own counsel from a list of qualified attorneys (p. 207). “[N]ew qualifications for eligibility to take . . . bar examination[s] would eliminate the most egregiously inept lawyers,” and minimum standards of eligibility to the bench should be established by law (p. 211). Appeals could be simplified by limiting hearings to consideration of legal issues, rather than bothering with the often anomalous facts of a case (p. 212). Issues should be decided once and for all, without devising tests, classifications of rights, and varying levels of review which allow manipulation of the law in response to shifting public opinion. Finally, Forer suggests informal exchange of ideas between courts and disciplines other than law, and the establishment of a National Center for Legal Research to study problems of equal access to justice (p. 216).

Forer admits that these suggestions may result in a “leveling down” rather than a “leveling up,” but contends that substantial due process rights would not be denied any party (p. 217). She finds that modern theories of alternative dispute resolution are unsatisfactory remedies because they would deny the poor access to the courts.³ Increasing the number of judges is also inadequate because it would lower judicial prestige and lead to anarchy in decision making (pp. 191-93).

Money and Justice is most thought-provoking when it offers the reflections of an angry and disillusioned trial judge who has come to regard the progress made in individual rights in the 1960's as a cruel hoax for indigent litigants seeking the protections of due process (p. 110). Perhaps a more carefully drawn picture of this individual experience would have a more profound impact on the reader. As the book is written, however, a reader may resist the sweeping two-tiered classifications the author makes: competent and incompetent lawyers; honest and corrupt judges; ignorant, helpless poor and crafty, powerful

3. The thrust of the popular panaceas is to deny access to the courts for a wide variety of problems. Under the proposals the bulk of the cases that would be diverted from the courts involve poor people. . . . [I]n operation they would institutionalize two separate and unequal systems of justice: courts of law with rights and constitutional safeguards for the rich and speedy extralegal forums for the poor.

rich; socially and economically useless corporate law and significant claims of individuals.

Forer invites discussion of her proposed reforms (p. 217). In response to that invitation, one must question the appropriateness of allowing trial judges the discretion to decide what are significant cases, and to impose costs based on the merits of claims and defenses. And what would be the effects of deciding legal issues without the benefit of facts and of "settling" legal principles once and for all on those attributes of the common law which Forer so rigorously defends, namely its flexibility, its vitality, and its paramount concern for the individual?⁴ Finally, the author's notion of due process as essentially a principle of fairness is questionable. Can courts create an enclave of fairness, which reflects no differences in resources, education, and power, when the rest of society is in large part built upon such differences?

4. In criticizing the use of sociological studies as bases for legal opinions, the author states that "a legal system predicated upon the rights of the individual cannot operate on the basis of averages and norms. It must treat each litigant and each case individually." P. 189.

Of the common law, Forer notes that "[c]ourts in the United States fulfill another very important but often ignored function: the development and modernization of the law. . . . American judges have a long tradition of interpreting law in the light of changed needs and conditions. Good judges must continually be pouring new wine in old bottles." P. 40.