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A Reader's Guide for *Unfair: The New Science of Criminal Injustice*

BY ADAM BENFORADO

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Unfair is the result of law professor Adam Benforado's deep research into the intersection of human psychology and our legal system. In it, he weaves together historical examples, scientific studies, and compelling court cases—from the collie put on trial in Kentucky to the five teenagers who falsely confessed in the Central Park Jogger case—to show how our judicial processes fail to uphold our values and endanger society's most vulnerable members.

Laying out the scope of our system's dysfunction—where the outcomes of legal cases turn on factors as small as the facial features of the defendant or the number of photos in a mug-shot book—Benforado provides a wealth of innovative and practical reforms to help prevent future miscarriages of justice.

Eye-opening and galvanizing, *Unfair* is sure to spark dialogue in your book club. We hope this guide will enhance your discussion.

QUESTIONS AND TOPICS FOR DISCUSSION

1. Has your understanding of the legal system changed as a result of reading *Unfair*? How about your idea of what "justice" means?

2. In chapter 2, Benforado tells the story of Juan Rivera, who falsely confessed to the brutal rape and murder of an eleven-year-old girl. False confessions also played a role in the infamous Central Park Jogger case. What were your reactions to reading about this phenomenon?

3. If victims of a carjacking identified you as their assailant and you had two choices—either plead guilty and spend two years in prison, or try your luck at trial, with a potential sentence of twenty-five years to life—which would you choose if you knew you were innocent? Were you surprised to learn that nine out of ten people charged with a crime end up taking a plea bargain? Do you think our criminal justice system should rely so heavily on plea bargains?

4. What do you think of the solutions Benforado proposes to reform our laws, practices, and procedures? What solutions do you think would be most and least effective? Why?

5. In the year *Unfair* was first published, series like *The Jinx*, *Serial*, and *Making a Murderer* garnered a lot of attention and brought into question the

accuracy and effectiveness of our criminal justice system. How has reading *Unfair* shaped your understanding of these cases?

6. Benforado provides evidence that our approach to punishment fails to achieve our societal goals. Has the book changed your opinion on issues like the death penalty, three-strikes laws, or solitary confinement?

7. Which real-life story or study in the book surprised you most? Why?

8. Benforado outlines how race can dramatically affect everything from the treatment of victims to the harshness of punishment. What do you think of his argument that racial discrimination today is more about implicit bias than explicit racial hatred? What do you think can be done to address racial disparities in the justice system? Will we ever have "equal justice" for all Americans?

9. Have you ever been called for jury duty or summoned as a witness? Discuss your experience. Do Benforado's observations about the limitations of jurors and witnesses ring true for you? Why or why not?

10. Benforado explores the genetic and environmental forces that influence criminal behavior and argues against the idea that criminals are evil people who freely choose to commit greedy, lustful, or hateful acts. Do you agree with him? Why or why not?

11. Judges are meant to be impartial moderators, and yet, as Benforado shows, they are susceptible to numerous biases. How does this affect your view

of judges (including members of the Supreme Court)? Would you rather be tried by a judge or by a jury of your peers?

12. "Each of us believes that we see the world exactly as it is and that other reasonable people will see things similarly" (page 94). Discuss this statement in the context of the justice system as well as in everyday life.

13. *Unfair* challenges us to examine how our backgrounds and beliefs shape our perceptions and judgments. Which aspects of your identity might inhibit your ability to be fair during a trial? If a judge asked you to set aside your biases, would you be able to do it?

14. Has *Unfair* changed the way you would pursue justice if you were the victim of a crime? Has it changed the way you would interact with police officers and attorneys working on your case?

15. In his introduction, Benforado makes the claim that, eventually, our current justice system will be perceived in the same way that we view medieval trials by ordeal. What did you think about his prediction when you read it, and did you agree? Did your opinion change as you read more of the book?

16. What can we learn from the legal systems of other countries around the world? Did any of the differences that Benforado described between our justice system and another country's surprise you?

17. In analyzing our criminal justice system, Benforado presents numerous psychological insights

about human behavior, but many of the research studies he cites—studies of memory, tunnel vision, dishonesty, racial bias, and other issues—have broader implications. Do you think any of these studies are relevant to your job? Your relationships? The business world? Health care? National security?

18. After reading the book, do you think everyday citizens have a responsibility to change the legal system, or is reform the responsibility of lawyers, judges, lawmakers, and other professionals? What can an individual do to make a difference?

A Conversation with Adam Benforado

Q. Recent events in Baltimore and other cities have brought a lot of attention to inequities in our criminal justice system. What can we do to make it operate the way it was designed to, so that it's fair for everyone?

A. The first thing to realize is that even if we eliminated all of the problems we've identified—bigoted cops, corrupt prosecutors, foolish jurors, activist judges—we would still have terrible abuse, wrongful convictions, and unequal justice. The reason is that the design of our system itself is unfair because it's built on incorrect assumptions about human behavior. To make real progress, we need to understand the hidden forces that shape how people think and act when committing a crime, drawing a weapon on a suspect, deciding a witness is lying, or concluding that someone deserves the death penalty.

Q. How can a system based on the fact that people are rational operators guided by reason be flawed?

A. For centuries we didn't have the tools to appreciate the defects in that model. But recent groundbreaking work in psychology and neuroscience has allowed us to see our true selves: we are frequently guided by elements in our situation that we have little awareness of or control over. A judge, for instance, may feel certain that his decision in a case reflects an objective reading of the law, when in fact the outcome has been influenced by things as seemingly irrelevant as the time of day when the case was heard, the gender of his only child, or the shape of the defendant's nose.

Q. You cast doubt on the solidity of some of the cornerstones of our justice system, among them eyewitness identifications, forensic evidence, and suspect confessions. What has shaken your faith?

A. It's the data. We place great trust in eyewitness memory, charging tens of thousands of people with crimes each year after they are identified in police lineups, though research reveals that when eyewitnesses make a selection, they choose an innocent person roughly one out of three times. We assume that matching a fingerprint or DNA sample is immune to human error, but lab technicians interpret the evidence in front of them in accordance with what they already believe to be true. Likewise, it seems inconceivable to us that a person could confess to a brutal felony and be innocent, but exonerations have exposed the awful truth, and experiments have shown that the most widely used interrogation technique is largely to blame.

Q. In the book, you use some truly jaw-dropping actual cases to bring the science to life. Which story shocked you the most?

A. There were many times in the course of my research when I could hardly believe what I had come across: the formal trial and execution of a pig for murder; an innocent teenager who, under detectives' questioning, came to believe he'd actually stabbed his parents to death; an Indian woman convicted of murder based on a scan of her brain that purported to reveal her guilt. But one particular image stands out (and I've included it in the book): it's a photograph of a lineup taken in Meriwether County, Georgia, in 1979. What is startling is not just that the man in the middle was wrongly accused and spent over a decade imprisoned for a crime he didn't commit. It's that the actual rapist is standing in the same lineup just two spots to his right. By pure coincidence, he had been locked up in the jail for an unrelated offense, and detectives had pulled him in as a filler. The victim looked at the person who had brutally attacked her, whom she'd been face-to-face with, and picked out another guy. It's a powerful reminder of one of the book's core messages: good people with good intentions can produce terrible injustice.

Q. But sometimes there really are bad apples, right? Such as a prosecutor who withholds evidence that shows the defendant is innocent?

A. The theme holds, even here. For the most part, prosecutor misconduct is not about poor character; it's about lawyers being put in situations that provide

opportunity and ready justifications for bending the rules. One of the reasons prosecutors are so vulnerable is not their desire to advance their own interests; rather, it's the pressure they're under to gain a conviction for the sake of the victim, the detectives who worked the case, and the general public. When we believe we are acting for the benefit of others we are more likely to engage in dishonesty than when we are just looking out for ourselves, because it's easier for us to rationalize our actions.

Q. Inequality is a huge issue in America today. How do the flaws in our criminal justice system make things worse?

A. Although most of the public is ignorant of the psychological dynamics that determine the outcomes of cases, there are certain people who understand what is really going on—trial consultants. They use their knowledge of juror, witness, and judicial behavior to gain a crucial edge in the proceedings. The wealthy can pay consultants to make sure that trials are as biased as possible in their favor, while the poor are left to fend for themselves.

Q. With so much wrong with our system, how can it be fixed? Are there changes that could easily be implemented?

A. One of the most important things to do is reduce our reliance on faulty human capacities. If implicit racial biases lead judges to set bail higher for a black man than for a white man, then we ought to either make the bail amount automatic or eliminate it alto-

gether. If knowing the identity of the suspect leads police officers administering identification procedures unconsciously to steer witnesses, the person handling the lineup shouldn't have this information. And if jurors are poor at discerning whether someone is lying or telling the truth, we shouldn't give them the job of assessing credibility.

Q. Would video cameras in interrogation rooms, and on the police, help matters?
A. Yes and no. In the wake of recent citizen deaths at the hands of the police, a number of jurisdictions have rushed to purchase dash cams for squad cars and body cams for officers. And cameras can indeed be a great way to lessen our dependence on eyewitness memories and discourage abuse. But they can also introduce bias by offering a limited or one-sided perspective. In experiments, when people are shown a tape of an interrogation shot from behind the suspect, they are significantly more likely to find a resulting confession to be coerced than when they are offered the perspective of the detective doing the questioning.

Q. What about our approach to corrections—how do we even begin to address the problem?
A. I believe that the starting point for reform is to ask what actually motivates us to punish. A couple of years ago I received a grant from the National Science Foundation to look at whether it all comes down to a desire to make society safer, as many people believe. The results of those experiments showed that this

common perception is wrong. In fact, we are often driven by a motive for payback, even if the punishment does little to reduce future threats. And the power of our retributive instinct can help explain two of the ugliest secrets in our system: our tolerance for endemic rape within prisons and our willingness to try children as adults, even as we acknowledge that kids lack the brain development to be considered fully culpable.

Q. Are you proposing that we go soft on crime? What about personal responsibility?
A. I am a strong proponent of accountability, and I'm firmly committed to doing what it takes to eradicate crime, but I'm not going to defer to folk wisdom on either front: I want to know what the best available research says. And the evidence is clear: when society knowingly fails to protect children from heavy metals and abusive home environments that are linked to criminal behavior, when it decides to let inner-city schools crumble and neglects to provide urban youth with opportunities for advancement, it bears primary responsibility for the crimes that result. Putting our energy into blaming those who never really had a chance has gotten us nowhere. And our harsh punishments are at best ineffective and at worst leave us less secure, because the vast majority of those who experience the brutality and deprivation of prison—including those in solitary confinement—are eventually released.

Q. Are there any lessons we can take from how other countries treat prisoners?

A. Absolutely. In northern Europe, for instance, the emphasis tends to be largely on rehabilitating the prisoner, so the experience of incarceration is designed not to deliver suffering but to encourage healthy interactions and skill development that can help an offender be successful when he is released. And it works: although direct comparisons can be tricky, countries like Norway appear to have much lower recidivism rates than we do. Still, I believe that we ultimately need to go further in our reform project. We need a public-health model for dealing with crime—a model that enables us to shift from reacting after harms have already been committed to investing primarily in prevention.