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## Examining the Case for Socialized Law

### *Equal Justice: Fair Legal Systems in an Unfair World*

BY FREDERICK WILMOT-SMITH

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**ABSTRACT.** Most people would agree with Frederick Wilmot-Smith that the rich have no greater claim to justice than the poor. And yet, as Wilmot-Smith points out in his provocative book, *Equal Justice: Fair Legal Systems in an Unfair World*, our laissez-faire legal-services markets ensure sharply unequal justice for rich and poor. The prescription at the heart of *Equal Justice* is the deprivatization of markets for legal services. To realize the ideal of equal justice, Wilmot-Smith would equalize the legal talent available to all and replace the market system with a centralized regime loosely analogous to socialized medicine.

Wilmot-Smith's bold ideas lend much-needed urgency to the discussion of legal reform. The moral grotesquerie of the free market—where wrongful conviction and other risks are effectively reserved for those unable to buy high-quality counsel—demands nothing less. The bold rethink offered by *Equal Justice*, and its potential to drive debate, should be cheered by classic liberals, whose own incremental prescriptions for reform have (perhaps predictably) failed to ignite political action.

And yet, classic liberals will reject the core thesis of *Equal Justice*. American liberalism is suspicious of zero-sum assumptions, where providing *more* resources for the poor entails *limiting* the resources available to the rich. The challenge for Wilmot-Smith is to make the case that *inequality itself* is attended by negative externalities separate and apart from the insufficiency of legal resources available to the poor. And Wilmot-Smith accepts this challenge, proffering several reasons to support his equalization imperative. Whether those grounds are persuasive is the primary focus of this Review.

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## INTRODUCTION

Socialism is all the rage nowadays. And small wonder: we live in an era marked both by the greatest wealth and the greatest wealth inequality the nation has ever known.<sup>1</sup> Income disparities are only projected to grow – as, no doubt, will collective frustration that our legal and political institutions have failed to protect us from the pernicious effects of economic polarization. It is unsurprising in this socioeconomic landscape to encounter activist policies consciously aimed at equalization. While relatively few may endorse the “democratic socialist” moniker – although there are more and more every day, including famous politicians like Bernie Sanders and Alexandria Ocasio-Cortez – there is widespread enthusiasm for robust social-welfare policies supported by increased taxation falling mostly on the wealthy. Indeed, as we began writing this Review in early 2020, ideas that just four years ago “were considered radical or fringe” had become part of the mainstream political discourse.<sup>2</sup> Medicare for All, universal child care, paid parental leave, tuition-free college, wealth taxes and other policy proposals (many of them championed by 2020 Democratic presidential candidates) “represent a sea change in American politics.”<sup>3</sup> And, as this Review goes to print, the nation is gripped by a pandemic that exposes the life-or-death stakes of our searing inequalities.<sup>4</sup> We just may, it seems, be of a mind to experiment with real change.

Enter Frederick Wilmot-Smith’s *Equal Justice: Fair Legal Systems in an Unfair World*, offering a self-described “radical proposal” to fully socialize our most

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1. See Jacob S. Hacker & Paul Pierson, *Winner-Take-All Politics: Public Policy, Political Organization, and the Precipitous Rise of Top Incomes in the United States*, 38 POL. & SOC’Y 152, 155–58, 163–64 (2010) (showing that the wealthiest one percent of U.S. households possess more wealth than the bottom ninety percent).
  2. Jorge G. Castañeda, Opinion, *Of Course Americans Are Turning to Social Democracy*, N.Y. TIMES (Aug. 1, 2019) <https://www.nytimes.com/2019/08/01/opinion/social-democracy.html> [<https://perma.cc/34KQ-C5Y6>]; see also Olga Khazan, *The Stunning Rise of Single-Payer Health Care*, ATLANTIC (Nov. 21, 2019), <https://www.theatlantic.com/health/archive/2019/11/why-people-support-medicare-all/602413> [<https://perma.cc/MX2N-BZEA>] (“Medicare for All – otherwise known as single-payer health care – has taken on an astonishing popularity among Democrats and independents in recent years, rising from a fringe, socialist hobbyhorse to a policy seriously and frequently considered during the Democratic primary debates.”).
  3. Castañeda, *supra* note 2.
  4. See, e.g., Editorial, *The America We Need*, N.Y. TIMES (Apr. 9, 2020) <https://www.nytimes.com/2020/04/09/opinion/coronavirus-inequality-america.html> [<https://perma.cc/3TLU-C8SM>] (describing the profound economic, racial, and political inequality laid bare by the COVID-19 pandemic).

foundational institution: the legal system.<sup>5</sup> Wilmot-Smith starts from the premise that a just legal system requires that legal resources be distributed equitably across all citizens. The guiding principle—whether arrived at as a product of Rawlsian reasoning or just a basic moral intuition—is that the rich have no greater claim to justice than the poor.<sup>6</sup> Wealth, Wilmot-Smith argues, ought not determine the ability of the individual to insulate himself from the risk of wrongful conviction (for example).<sup>7</sup> The “benefits and burdens of legality” should be shared equally<sup>8</sup>—or at least, the burdens should not be allocated based on the “arbitrary” factor of antecedent wealth.<sup>9</sup>

The reforms Wilmot-Smith proposes—familiar in the health-care field—present as shockingly provocative in the context of the legal system. Rights equality, of course, is hardly a radical concept. But “it is not enough that *rights* be equal,” Wilmot-Smith argues; the market for the delivery of legal services must also be equalized lest “those with more power . . . distort the law . . . in their favor.”<sup>10</sup> The present system does no such thing. The services of lawyers—and nowadays, given the proliferation of arbitration, even judges—are traded on a free market. Market signals determine what lawyers do, whom they serve, and, therefore, how justice is dispensed. And laissez-faire, Wilmot-Smith argues, is a singularly terrible strategy for “prevent[ing] . . . arbitrary characteristics”—specifically, wealth—from governing the distribution of scarce resources.<sup>11</sup> Indeed,

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5. FREDERICK WILMOT-SMITH, *EQUAL JUSTICE: FAIR LEGAL SYSTEMS IN AN UNFAIR WORLD* 75 (2019).
  6. For lack of better terms—and to save the reader from a pointless shuffle of synonyms and euphemisms—we will use the words “poor” and “rich” throughout this Review. By this shorthand, we do not mean to foreclose the possibility that working-class or even middle-class people may fall within the set of intended beneficiaries of reform.
  7. WILMOT-SMITH, *supra* note 5, at 9 (“If the rich are able to use the legal system to gain advantages simply because they are rich, that is unjust; if the poor stand an increased risk of wrongful conviction or heightened punishment simply because they are poor, that is unjust.”).
  8. *Id.* at 28.
  9. *Id.* at 8; *see also id.* at 14 (explaining that legal resources include “courts, judges and lawyers,” whose time and services are scarce: “There is not enough court time for all to have their day in court; there are not enough lawyers for everyone to have one for every legal problem”).
  10. *Id.* at 34–35 (emphasis added); *see also id.* at 64 (“[T]he problem arises when powerful groups—those the law should aim to constrain—control the institutions (or access to the institutions) designed to hold them to account. When those groups are not able to mould the law to their whim, they can control its enforcement. They are able to renege on their legal obligations without risk of sanction, rendering any general rights that are granted a dead letter.”).
  11. *Id.* at 58–59 (arguing that markets inevitably lead to “arbitrariness in the distribution of the benefits and burdens of legality”); *see also id.* at 69 (“[A] market in legal resources is a bad

markets are structured for the precise purpose of ensuring that “goods end up in the hands of those who value them most *and* who are willing and able to pay for them.”<sup>12</sup> Here, letting the market decide means the “best lawyers become accessible only to those who are able to pay the lawyers’ fees. . . . [I]t also means that the rich will get justice and the poor will suffer injustice.”<sup>13</sup>

Under Wilmot-Smith’s proposed “radical interventions in the legal industry,” “everyone should have the same amount of legal resources,” as adjusted to account for “certain circumstances.”<sup>14</sup> He would, in short, deprivatize the provision of legal services, prohibiting lawyers from offering their services in the private market and banning litigants from “contracting out of the public option” altogether.<sup>15</sup> On his model, lawyers’ rates would be capped in “compliance with the best principles of distributive justice,” rather than the maximization of profit,<sup>16</sup> and individuals would be prohibited from contracting privately with counsel to avoid these price controls.<sup>17</sup> The private market for judges—arbitration—would be abolished, as well.<sup>18</sup> Eschewing the partial interventions and feeble regulations that have long characterized law reform, Wilmot-Smith presents a moral case for completely overhauling the system for the delivery of legal services.<sup>19</sup>

Consciously or not, Wilmot-Smith writes in a venerable tradition of progressive legal intellectuals. Starting in the 1920s, progressives began advocating for

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way of distributing legal resources. It fails even to approximate to the ideal of equal justice, making outcomes turn on antecedent wealth rather than the merits of the claim.”).

12. *Id.* at 61; *see also id.* at 64 (“[T]he use of a market in legal resources enables those who are supposed to be governed by law to capture the means of that regulation.”).

13. *Id.* at 61; *see also id.* at 60 (noting that “a market in legal resources enables rich individuals to control outcomes indirectly by stacking the procedural deck”); *id.* at 52 (arguing that “distributions of legal resources through a market lead to inequalitarian consequences”); *id.* at 69 (asserting that a market in legal services ensures that “outcomes turn on antecedent wealth rather than the merits of the claim,” and “the process it instantiates is unfair . . . [because] the wealthy will ultimately gain control of the legal institutions . . . [and] can then proceed with impunity”).

14. *Id.* at 86, 90.

15. *Id.* at 10; *see also id.* at 73 (arguing that “the distribution of lawyers must be regulated” because “inequality in legal resources will reinstitute relations of domination via the law’s coercive institutions”).

16. *Id.* at 174.

17. *Id.* at 94–95.

18. *Id.* at 98–103.

19. *See, e.g., id.* at 10; *see also id.* at 68–69 (“The market in legal resources has long been subject to regulation and intervention. Most modern legal systems have legal aid schemes . . . and court fee waivers . . .”).

government-funded legal services as critical to the fair operation of the modern welfare state. Early proposals by the National Lawyers Guild for “socialized law” were vilified as “Communist,” and plans to subsidize legal services were attacked as enabling frivolous lawsuits.<sup>20</sup> But by the 1940s, these ideas began to gain currency. The United Kingdom became the first nation to provide government-funded civil legal services, offering free divorce lawyers to soldiers returning from World War II<sup>21</sup> and then broadening the program substantially from there.<sup>22</sup> The Netherlands, Canada, France, Sweden, and Australia soon followed course to varying degrees.<sup>23</sup>

In the United States, legal services were traditionally delivered to indigents in civil cases, if at all, via pro bono or reduced-fee services organized by private volunteers and charity organizations.<sup>24</sup> But by the mid-1960s, with the Civil Rights Movement and the war on poverty shining unprecedented light on the plight of the disadvantaged, calls for government-funded civil legal assistance

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20. Deborah M. Weissman, *Law as Largess: Shifting Paradigms of Law for the Poor*, 44 WM. & MARY L. REV. 737, 753 & n.80 (2002) (citing MARK KESSLER, LEGAL SERVICES FOR THE POOR 5-6 (1987) (describing how “the National Lawyers’ Guild’s demand in the mid-1930s for a federally-subsidized legal services program” was disparaged as “Communist”)); see also James E. Moliterno, *Politically Motivated Bar Discipline*, 83 WASH. U. L.Q. 725, 745 (2005) (“When the National Lawyers Guild proposed government-funded legal services for the poor in the 1950s, the proposal was roundly criticized by leaders of the organized bar, perceiving it to be a step toward socialism which at the time could only serve to further identify the Guild with the communist threat.”).
  21. Noam Scheiber, *The Case for Socialized Law*, NEW REPUBLIC (Feb. 3, 2014), <https://newrepublic.com/article/116424/socialized-law-radical-solution-inequality> [https://perma.cc/JME7-Q82F].
  22. Legal Aid and Advice Act 1949, 12, 13 & 14 Geo. 6 c. 51 (adopting a broader program for the provision of legal services wherein nearly eighty percent of the population became eligible for free or subsidized legal services).
  23. See, e.g., Earl Johnson, Jr., *The Right to Counsel in Civil Cases: An International Perspective*, 19 LOY. L.A. L. REV. 341 (1985). Notably, proposals to socialize law sometimes emanate from a very different political place: Gaddafi’s Libya, for example, nationalized lawyers in the 1980s. See Jessica Carlisle, *Libya: Lawyers Between Ideology and the Market*, in 1 LAWYERS IN 21ST-CENTURY SOCIETIES 629 (Richard L. Abel et al. eds., 2020) (describing the establishment of the Libyan Department of People’s Legal Defence in 1981, which “effectively nationalised the profession by requiring all lawyers to stop practising or join the ‘Directorate of People’s Legal Defence’ (popularly known in 2014 as the people’s lawyers), working on a fee scale fixed by the state”).
  24. See generally Sara Mayeux, *What Gideon Did*, 116 COLUM. L. REV. 15 (2016) (describing the “charity model” of indigent defense that predominated before *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963)).

grew stronger, leading Congress to establish an independent agency.<sup>25</sup> In 1974, the Legal Services Corporation (LSC) was chartered to provide civil legal aid to those “otherwise unable to afford adequate legal counsel.”<sup>26</sup> But LSC has been severely resource constrained from its earliest days.<sup>27</sup> The Trump Administration now seeks to eliminate the program in its entirety,<sup>28</sup> but even President Obama never made an annual budget request of over \$475 million for LSC<sup>29</sup> — as compared with hundreds of billions of dollars spent on civil litigation annually in the private market.<sup>30</sup> Indeed, in 2017, the top one hundred private law firms each reported revenues that exceeded the entire LSC budget of \$410 million.<sup>31</sup> This underfunding has predictably resulted in the radical underservicing of the civil legal needs of indigent and even working-class people.

As frustrations with the availability and quality of government-funded legal-assistance plans grew, some progressive thinkers began arguing for sweeping

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25. Initially, government-subsidized legal aid fell under the Office of Economic Opportunity (OEO), established in the mid-1960s as part of President Johnson’s War on Poverty. See EARL JOHNSON, JR., JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE OEO LEGAL SERVICES PROGRAM 37-70 (1974).
  26. Legal Services Corporation Act of 1974 § 2, 42 U.S.C. § 2996(2) (2018). LSC is funded by Congress, and its directors are appointed by the President and confirmed by the Senate. The agency does not provide direct legal services but instead funds local legal aid programs. See *Who We Are*, LEGAL SERVS. CORP., <https://www.lsc.gov/about-lsc/who-we-are> [https://perma.cc/G2JJ-XJ3A].
  27. See, e.g., Roger C. Cramton, *Crisis in Legal Services for the Poor*, 26 VILL. L. REV. 521 (1981) (describing efforts by the Reagan Administration, the Heritage Foundation, the Conservative Caucus, and other right-leaning groups to eliminate LSC).
  28. RJ Vogt, *Legal Aid Funder Faces Existential Crisis Under Trump*, LAW360 (Oct. 28, 2018, 8:02 PM), <https://www.law360.com/articles/1094693/legal-aid-funder-faces-existential-crisis-under-trump> [https://perma.cc/XF4T-KQF2] (“[F]or the first time since President Ronald Reagan left office, the executive branch has repeatedly called for LSC’s elimination.”).
  29. See John Levi, *President Obama’s Legal Aid Legacy*, HARV. L. & POL’Y REV. (Nov. 16, 2016), <https://harvardlpr.com/2016/11/16/chairman-john-levi-president-obamas-legal-aid-legacy> [https://perma.cc/6PV3-NR9Y].
  30. Vogt, *supra* note 28. See generally Lawyers for Civil Justice et al., *Litigation Cost Survey of Major Companies*, DUKE L. SCH. CONF. ON CIV. LITIG. 4-5 (May 2010) [https://www.uscourts.gov/sites/default/files/litigation\\_cost\\_survey\\_of\\_major\\_companies\\_o.pdf](https://www.uscourts.gov/sites/default/files/litigation_cost_survey_of_major_companies_o.pdf) [https://perma.cc/HH4W-G3QH] (estimating that U.S. companies spend billions each year on civil litigation).
  31. Ben Seal, *The 2018 Global 100 Ranked by Revenue*, AM. LAW. (Sept. 24, 2018), <https://www.law.com/americanlawyer/2018/09/24/the-2018-global-100-ranked-by-revenue> [https://perma.cc/68NK-9GGP]; Press Release, Legal Services Corporation, LSC Receives \$25 Million Spending Boost from Congress (Mar. 23, 2018), <https://www.lsc.gov/media-center/press-releases/2018/lsc-receives-25-million-spending-boost-congress> [https://perma.cc/4F6P-QPCT].

changes to the legal system's structure. For example, in 1979, Richard Abel presented an argument for socialized legal services.<sup>32</sup> Asserting that “the constant tendency th[r]oughout the last century has been for the distribution of lawyers to grow more unequal,” Abel proposed a Marxist rethinking of the private market in legal services.<sup>33</sup> (However, Abel later dismissed the idea as “politically unfeasible and ideologically unimaginable.”<sup>34</sup>) More recently, in an article for *The New Republic*, Noam Scheiber argued for “socializ[ing] the legal profession,” declaring that “[t]he only way to bring about the ideal of equal protection under the law is to boost spending on lawyers for the poor and middle class, and to prevent the affluent from spending freely.”<sup>35</sup>

So the moment appears ripe for a thoughtful and full-throated presentation of the case for socialized legal services – or better yet, a tract on inequality in the delivery of legal services that can stand comfortably on a shelf with such significant explorations of inequality as Daniel Markovits's *The Meritocracy Trap*,<sup>36</sup> which focuses on the role of higher education in furthering pernicious cultural and economic polarization, or Thomas Piketty's *Capital in the Twenty-First Century*,<sup>37</sup> which takes on nothing less than explaining the phenomenon of rising inequality itself. Might Frederick Wilmot-Smith's *Equal Justice* join this company?

Wilmot-Smith's core claim is that inequality in the level of legal services available to rich and poor is *itself* an evil to be combated. This normative claim – Wilmot-Smith's “equalization imperative” – is both inherent and derivative. On the inherent side stands the moral ugliness of a marketplace where the rich are able to escape liability on account of their wealth, while the poor bear the risks of wrongful conviction and other terrible legal consequences, owing to the infe-

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32. Richard L. Abel, *Socializing the Legal Profession: Can Redistributing Lawyers' Services Achieve Social Justice?*, 1 L. & POL'Y Q. 5 (1979).

33. *Id.* at 24.

34. Richard Abel, *Big Lies and Small Steps: A Critique of Deborah Rhode's Too Much Law, Too Little Justice: Too Much Rhetoric, Too Little Reform*, 11 GEO. J. LEGAL ETHICS 1019, 1025 (1998); see also Abel, *supra* note 32, at 12 (“I am not making any assumption that socialization of the [legal] profession is politically feasible within any conceivable American future.”). Later, Abel would quip that his idea of legal socialization “sank from sight even faster than most.” Abel, *supra*, at 1025.

35. Scheiber, *supra* note 21.

36. DANIEL MARKOVITS, *THE MERITOCRACY TRAP: HOW AMERICA'S FOUNDATIONAL MYTH FEEDS INEQUALITY, DISMANTLES THE MIDDLE CLASS, AND DEVOURS THE ELITE* (2019).

37. THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (Arthur Goldhammer trans., Harvard Univ. Press 2014) (2013).

rior legal services available to them. It is an imbalance that is all the more grotesque when one considers (as Wilmot-Smith does at length) that justice itself is a fundament upon which all other social goods depend.<sup>38</sup>

The derivative side is more complex. Wilmot-Smith offers several bases to support the instrumental claim that *equalizing* the resources available to rich and poor will benefit poor people in a way that simply *increasing* the resources available to them would not. First, he takes aim at classic liberal incrementalism, arguing that any attempt to provide legal services to the poor within the current market structure is beset by so many challenges that socialization of the legal-services market is the best solution for delivering legal services in a just justice system.<sup>39</sup> Second, because litigation is inherently adversarial, he reasons that limiting the power of wealthy litigants is as important as upgrading the legal resources available to the poor.<sup>40</sup> And third, he argues that the current laissez-faire regime allows wealthy economic actors to hoard legal talent, leaving the less fortunate with relatively slim pickings in the legal talent pool.<sup>41</sup>

It is hard not to be impressed by the verve and ambition of Wilmot-Smith's work, as well as the passion that underlies it—a passion born, we imagine, of frustration with the terrible failure of incrementalist liberal policies to date. We share those frustrations. But we—admitted defenders of the classic and flawed strain of liberalism that Wilmot-Smith rejects—do not buy what he is selling. Classically, American liberalism is concerned with raising the floor of the poor. Ceilings are another matter. We (American liberals in general, and the authors

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38. See WILMOT-SMITH, *supra* note 5, at 4 (“If legal institutions are unjust, that injustice will infect all the domains that the law regulates.”); *id.* at 9 (“If the rich are able to use the legal system to gain advantages simply because they are rich, that is unjust.”); see also *infra* text accompanying notes 88–93 (critiquing Wilmot-Smith’s “Institution-Wide Inequality Affront”).

39. *Id.* at 90 (explaining that if “the proposal must be that everyone should have the same amount of legal resources *given certain circumstances* . . . [t]he question becomes: which circumstances are relevant (or irrelevant) to the distribution?”); see also *id.* at 193–97 (describing the “numerous distinctions” that must be drawn in structuring a fair system for the delivery of legal services and acknowledging that “there is no easy answer” to how or where to draw such distinctions).

40. *Id.* at 73–75 (“If Meidias can purchase the finest lawyers in town and I can afford none, the creation of the legal system puts me in an even worse position: inequality in legal resources will reinstitute relations of domination via the law’s coercive institutions. . . . If you have an army of lawyers and I am left to prepare my case on my own, my level of legal resources is insufficient for fairness. . . . [F]airness makes quite stringent demands on legal procedures, ones that are rarely fulfilled in practice.”).

41. *Id.* at 101–05 (describing “the way the private option sucks the public option’s resources” by creating “a brain drain” and suggesting that a “proscription on contracting out” of the legal system would result in more equal justice because “[t]he rich would no longer be able to siphon off the good lawyers for their disputes”).

of this Review, as well) do not lightly indulge zero-sum assumptions, under which more for the poor *requires* less for the rich. We require persuasion. And, when it comes to proposals for radical social change, we instinctively place the burden of proof on the proponent of the reform. Here, Wilmot-Smith's burden is to show that there are negative externalities attending inequality sufficient to warrant the massive costs of equalization. To his credit, Wilmot-Smith recognizes this burden and makes several concrete arguments for his equalization imperative. But to our minds, these arguments do not add up.

Our primary objection is not grounded in a libertarian concern for the right of lawyers to ply their craft freely or even for clients to select the counsel of their choosing.<sup>42</sup> Nor is our concern with political viability or the ability to administratively implement his proposed regime – although there are certainly unanswered questions on those scores.<sup>43</sup>

Rather, we think, Wilmot-Smith misconceives the legal-services markets that he would reengineer. He fails to identify – and, indeed, despairs of identifying – the specific legal services that people have a fundamental right to receive at public expense. And as we show in Part I, this failure to appreciate the heterogeneity and breadth of all the activities that comprise legal services has dire consequences for any claimed equalization imperative. In Part II, we examine a corollary to Wilmot-Smith's plan to socialize law – namely, his universal ban on agreements to arbitrate and mediate disputes. Here again, we find the justifications for eliminating private dispute resolution “in all cases” unconvincing.<sup>44</sup>

## I. THE EQUALIZATION IMPERATIVE

Inevitably, the launching-off point for any consideration of a socialized market for legal services is socialized medicine.<sup>45</sup> Most industrialized nations – and

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42. Wilmot-Smith anticipates these liberty-based objections with cogent arguments. *See id.* at 107–17. For example, in response to what he terms “the mere liberty objection” – that socializing legal services would eliminate our freedom to contract with whomever we wish – Wilmot-Smith reminds us that the “refusal to recognize and enforce contracts is not an interference with anyone's freedom.” *Id.* at 110. In fact, he writes, “[i]t is much more natural to regard the creation of a contract as an interference with liberty: that is what makes it the case that people come under obligations that can be enforced coercively by the state.” *Id.*

43. *See id.* at 190–92 (responding to claims that socializing legal systems is politically or economically infeasible).

44. *Id.* at 94.

45. Wilmot-Smith refers frequently to health care, specifically the U.K.'s National Health Service (NHS), as a partial model for his proposal to socialize legal services. *See, e.g., id.* at 91 (offering by “analogy” NHS's provision of “a basic level of healthcare to everyone”); *see also id.* at 67 (“There is a very close analogy between the markets for healthcare and the markets for legal

most Americans too<sup>46</sup>—support a more-or-less socialized system for the delivery of health-care services.<sup>47</sup> Underlying this support is a moral belief that the rich have no greater claim to basic health than the poor. The typical phrasing one hears is that health care is a “fundamental right.”<sup>48</sup>

Somewhere on the opposite end of the spectrum from health care is business. Few would argue that services incidental to wealth-creating activity—such as strategic consulting, financing, and investment banking services—are a fundamental right. It would be extremely controversial to assert that all people should enjoy the same levels of business advisory services, irrespective of antecedent wealth. This is not to say that such ideas are absurd; just that they appear confined to political philosophies—orthodox Marxism, mainly—that are now largely out of favor.

So where on this spectrum do legal services fall? For Wilmot-Smith, the system for the delivery of legal services should be roughly similar to health care. In both cases, it is unfair that the wealthy have greater access than the poor.<sup>49</sup> But are legal services truly analogous to health care? Probably, if we viewed the extremely broad panoply of legal services in a disaggregated fashion, most people would agree that *some* legal services implicate fundamental rights, such that the state should ensure some level of distribution, and others do not. Or, to put it another way: some markets for legal services map neatly onto the health-care

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services.”); *id.* at 74 n.16 (“The most illuminating analogy is with a national health service, where medical treatment is allocated according to need rather than wealth.”).

46. See, e.g., *Public Opinion on Single-Payer, National Health Plans, and Expanding Access to Medicare Coverage*, KAISER FAM. FOUND. (Jan. 30, 2020), <https://www.kff.org/slideshow/public-opinion-on-single-payer-national-health-plans-and-expanding-access-to-medicare-coverage> [https://perma.cc/3CG5-9NZA] (finding that fifty-six percent of Americans support Medicare for All).

47. WILMOT-SMITH, *supra* note 5, at 70 (“There are now few societies, for example, that do not provide a basic level of education and healthcare.”).

48. See Constitution of the World Health Organization pmbl., July 22, 1946, 62 Stat. 2679, 2680 (declaring that health care “is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition”); see also International Covenant on Economic, Social and Cultural Rights art. 12, Dec. 16, 1966, 993 U.N.T.S. 3, <https://www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf> [https://perma.cc/JQ8K-6NF5]; Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 25 (Dec. 10, 1948), [https://www.ohchr.org/EN/UDHR/Documents/UDHR\\_Translations/eng.pdf](https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf) [https://perma.cc/ZMZ4-S5JN] (“Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including . . . medical care.”).

49. WILMOT-SMITH, *supra* note 5, at 69 (describing how markets are bad for distributing legal resources because they “mak[e] outcomes turn on antecedent wealth rather than the merits of the claim”).

model, while others do not. Some present a moral case for equal access based on the perception that a fundamental right hangs in the balance. Others do not.

Criminal defense services, where the less affluent historically suffer from inadequate resources, present an obvious example of services that map onto the health-care-fundamental-rights model. Industrialized nations around the world guarantee the right of indigent defendants to state-provided criminal representation,<sup>50</sup> as does the United States under *Gideon v. Wainwright*.<sup>51</sup> And indeed, many people—including us and Wilmot-Smith—believe the fundamental right of criminal defense is so powerful that the services guaranteed by *Gideon*, as understood by American courts, are woefully insufficient.<sup>52</sup> Legal-aid offices are almost universally underresourced. The services of an energetic and knowledgeable defense attorney with time to spend on the client's case are often out of financial reach. Meanwhile, wealthy individuals are attended to by creative and well-resourced counsel, whose efforts plainly translate into vastly superior outcomes.<sup>53</sup> All of these considerations militate for market interventions.

Other realms of legal services strike us as similarly implicating rights that warrant public protection and resources. Under the inexact banner of “civil *Gideon*,”<sup>54</sup> liberal advocates have long lobbied for publicly provided, qualified representation for hearings that implicate parental rights, child custody, public assistance benefits, housing and employment rights, wage garnishments, civil confinement, orders of protection, asset forfeiture, immigration status, and many other things.<sup>55</sup> Wilmot-Smith also questions the logic for holding (as federal law does) that “the risk of a two-year jail sentence is so weighty that a right

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50. Joan Grace Ritchie, *Limits on Justice: The United States' Failure to Recognize a Right to Counsel in Civil Litigation*, 79 WASH. U. L.Q. 317, 331-32 (2001).

51. 372 U.S. 335, 344 (1963) (“The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”).

52. See, e.g., Cara H. Drinan, *Getting Real About Gideon: The Next Fifty Years of Enforcing the Right to Counsel*, 70 WASH. & LEE L. REV. 1309, 1336 (2013) (“Budget constraints and excessive case-loads have made triage an essential component of modern public defense.”); Mayeux, *supra* note 24, at 19-20 (asserting that “*Gideon* remains an ‘unfulfilled promise,’” as “public defenders nationwide are underfunded and overworked” and “even relatively well-funded public defenders have little leverage in advocating for their clients”).

53. See, e.g., Scheiber, *supra* note 21 (providing examples of differential treatment of poor litigants in the civil-justice system and concluding that “the very poor fare worst of all in civil cases” because “[t]hey struggle to land legal representation of any kind, and, if they do, their lawyers tend to be massively overworked”).

54. See generally John Pollock & Michael C. Greco, *It's Not Triage if the Patient Bleeds Out*, 161 U. PA. L. REV. ONLINE 40 (2012) (reviewing numerous proposals for implementing civil *Gideon*).

55. While *Gideon* guarantees a right to counsel in criminal cases, there is no such right in civil cases, and no court has located such a right within the U.S. Constitution. Nonetheless, some

to counsel should be provided, whereas the risk of losing one's livelihood in a civil case is not."<sup>56</sup>

But other broad swaths of the legal-services landscape do not implicate these sorts of fundamental rights. Few would claim, for example, that there is a fundamental right to government-financed merger-and-acquisition counsel, or antitrust-litigation services, or for lawyers in a commercial contract dispute. The legal services in these and other areas implicate "justice" — every legal case implicates notions of justice or fairness. But it would be odd to claim that these legal services implicate fundamental rights warranting public funding and distribution.<sup>57</sup>

At the very end of his book, in a chapter where he stands like a tennis player at the net swatting at incoming projectiles, Wilmot-Smith anticipates this critique (and others).<sup>58</sup> He notes, for example, that "few will be tempted by the thought that the government should supply [tax] lawyers."<sup>59</sup> But he offers no satisfying principle for distinguishing among the legal services a just system would supply and those it would leave to the private market, arguing only that it "does not seem unfair to let individuals order their own tax affairs" because the tax system is a "matter of welfare," and there is a "distinction between justice and welfare benefits."<sup>60</sup> If the welfare/justice distinction provides a coherent basis for defining the scope of what should and should not be privatized or socialized, Wilmot-Smith does not explain how it would actually work. Moreover, even on its own terms, the tax example appears to us misdirected, as tax lawyers — like

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state constitutions provide a limited right to counsel in civil cases, and some states have enacted statutes requiring appointment of counsel in some of these areas, under certain circumstances. See, e.g., CONN. SUPER. CT. FAM. MATTERS P. § 25-68(a) (2020) (guaranteeing right to counsel for putative father in a state-initiated paternity action); N.Y. FAM. CT. ACT § 262(a) (McKinney 2019) (guaranteeing right to counsel for parents in a child custody proceeding); OR. REV. STAT. § 107.425(6) (2019) (guaranteeing right to counsel for children who request it in a custody proceeding); TEX. FAM. CODE ANN. § 107.013 (West 2019) (requiring appointment of counsel for certain respondents to a governmental entity's petition for termination of parental rights).

56. WILMOT-SMITH, *supra* note 5, at 193.

57. See Abel, *supra* note 32, at 15-16 ("[I]t is inconceivable that we would ever subsidize lawyers to perform . . . all the roles they presently perform . . . [a]nd when we come to negotiation, planning, counseling, and drafting, the impossibility of equalizing access to legal representation hardly requires argument.").

58. WILMOT-SMITH, *supra* note 5, at 194-97.

59. *Id.* at 194.

60. *Id.*

civil-rights lawyers—often make policy-based arguments implicating “justice” concerns.<sup>61</sup>

In sum, Wilmot-Smith never sufficiently identifies *which* legal services implicate the sort of fundamental rights that warrant deprivatization. We examine the consequences of this failure below.

#### A. *Taxonomic Fatalism*

One instrumental reason offered by Wilmot-Smith for socializing the legal-services market stems from his view that incremental reforms cannot possibly address the legal-services needs of the poor. He argues that, to identify and prioritize the cases in which the poor should receive publicly funded legal representation, we would “need to be able to explain in virtue of what one claim is more important than another. We need, again, some kind of principle to structure and weight possible claims.”<sup>62</sup> But Wilmot-Smith despairs of developing such a taxonomy that classifies the harms that publicly provided counsel might redress.

The “sharp lines a practical regime will have to draw” to perform this sort of triage, Wilmot-Smith observes, cannot be traced along the dictates of any available theory of justice: “The universe is not carved into perfect joints by moral principles.”<sup>63</sup> To be sure, he acknowledges, “some rights violations are worse than others.”<sup>64</sup> But the project of identifying them is fraught. Wilmot-Smith cautions that lower-level harms, for example, might be sufficiently common that challenging the malfeasance causing them is more important than redressing high-impact injuries.<sup>65</sup> And we would add that the prospects of setting binding precedent in a common-law legal system—for instance, through “impact litigation”—only amplify the difficulty of evaluating possible distributions of public-lawyer resources on a categorical *ex ante* basis.<sup>66</sup>

So, what is the upshot of this taxonomic despair? Having failed to offer sufficiently “sharp lines” for prioritizing the legal claims of the poor, Wilmot-Smith

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61. See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574, 593 (1983) (denying a nonprofit private school tax-exempt status under Section 501(c)(3) of the Internal Revenue Code because its racially discriminatory policies “violate[] a most fundamental national public policy”).

62. WILMOT-SMITH, *supra* note 5, at 194.

63. *Id.* at 195.

64. *Id.* at 196.

65. *Id.* at 197 (“[S]ome number of lower-level injustices . . . can outweigh one worse injustice.”).

66. See, e.g., Scott L. Cummings & Ingrid V. Eagly, *After Public Interest Law*, 100 NW. U. L. REV. 1251, 1268 (2006) (“In the classic legal aid model, law is used to achieve individual client goals through case-by-case representation. In the public interest law reform model, law is used to advance a lawyer-defined reform agenda using impact lawsuits to build legal precedent.”).

seems to send the message that legal-services triage is doomed. If so, then the only safe bet is to provide those legal services across the board, by socializing the market.

And yet we wonder: would not administrators of legal-services agencies, if asked, present a laundry list of actual and imagined projects and programs which, if only they could be fully funded, would produce spectacular real-world results in delivering legal services to the poor? Before committing to socialization, with all the expense and dislocation that entails,<sup>67</sup> we would at least want to see studies detailing the cost and efficacy of more traditional reform proposals. If the LSC budget is a little over \$400 million today, what could be achieved if \$4 billion were committed? Or \$40 billion? And while a critic might question whether it is realistic to obtain congressional funding on that order, Wilmot-Smith is fairly estopped from that line of argument, given the cost that would likely attend his proposals.

### B. *The Adversarial Fallacy*

In further support of his equalization imperative, Wilmot-Smith invokes the adversarial nature of the justice system: where one party is made relatively stronger, that *implies* its adversary is relatively weaker.<sup>68</sup> The more firepower a litigant has, all else being equal, the poorer the prospects of their counterparty. Thus, it is not enough for Wilmot-Smith to *improve* the legal resources of the poor; rather, he places independent value on *equalization* and advocates limiting the resources of the rich.<sup>69</sup>

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67. Elsewhere, we noted (or rather trumpeted) the fact that we are not basing our critique on libertarian concerns with freedom to contract. See *supra* Introduction (“Our primary objection is not grounded in a libertarian concern for the right of lawyers to ply their craft freely or even for clients to select the counsel of their choosing.”). But we certainly recognize the disruption of settled expectations as a cost to be weighed. Some 1.3 million U.S. lawyers (per the ABA) have invested untold money and time in the expectation that a private market exists for their services. See *Law by the Numbers: New ABA Profile of the Legal Profession*, AM. B. ASS’N (Aug. 2019), <https://www.americanbar.org/news/abanews/aba-news-archives/2019/08/profile-of-the-profession-report> [<https://perma.cc/T2D7-CSKV>]. The cost of disrupting those expectations is an unavoidable part of any policy calculus.

68. WILMOT-SMITH, *supra* note 5, at 75 (“In the adversarial context, the effectiveness of my lawyer depends on the effectiveness of yours. So long as your lawyer is not much better or more resourced than mine, the process of adjudication may be fair: there is no risk of domination at the hands of another, because the other does not have greater powers.”).

69. *Id.* at 74 (arguing that in a hypothetical case between McDonald’s and a homeless person, the built-in inequality between the parties “can be cured by levelling McDonald’s resources down, to ensure they get no better representation than the homeless person, or the homeless individual’s up, to ensure that they get the same quality of representation as McDonald’s”); *id.* at

But this particular basis for Wilmot-Smith's equalization imperative only holds water if limiting the rich in fact helps the poor. It only works if, in the cases where we are concerned with helping the poor, the rich are their litigation adversaries. As it turns out, however, in many of the cases affecting important interests of the poor—including custodial rights, liberty interests, welfare benefits, and so forth—the adversary is the *state*. And if the state is the opposing party, then the argument that we need to equalize the legal-services resources of rich and poor begins to fall apart.

For one, Wilmot-Smith does not argue for curtailing the *state's* access to legal services. Moreover, even if socialized legal services means that regulators will set uniform rates for all lawyers, or will distribute lawyers to clients on some more-or-less randomized basis, the quality of legal services available to government actors will likely not be diminished at all.<sup>70</sup> After all (at least in our experience), it is not elite law firms or prominent trial lawyers that are engaged for the quotidian, mass-scale work of facing off against the poor in courtrooms and administrative proceedings; it is workaday lawyers who presumably exist quite near the middle of the talent pool that Wilmot-Smith seeks to reallocate. The advantage the state enjoys stems mainly from the raw number of lawyers employed to represent the state's interests, from the fact that most poor people have no representation outside the criminal realm, and from the state's unique powers to gather information and deprive litigants of liberty and property. Wilmot-Smith's proposal does not engage these structural asymmetries.

The same holds true for the private institutional actors who, like the state, are often adversaries of the poor in litigation. Insurance companies, utilities, property-management companies, debt-collection firms, and other large institutions all draw (in our estimation) from a similar swath of the legal-talent spectrum as the state.<sup>71</sup> Like the state, these actors derive their position of power over poor litigants not from the superior quality of their lawyers, but from the fact that the poor are typically not represented at all, whereas these companies are not only represented but are also repeat players. Accordingly, if there is an equalization imperative, it does not flow from the adversarial nature of litigation in which the poor are involved.

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77 (arguing that the creation of a system permitting rich individuals to contract out makes the poor individuals worse off than they would be under some alternative arrangement).

70. *Id.* at 125 (“[T]here is no way to implement a just justice system without centralized control.”).

71. Moreover, we would expect that the quality level of the lawyers doing all the routine eviction, collection, and other cases for large players would likely not change under Wilmot-Smith's system. Indeed, if legal talent were equally distributed across the market for all clients, it is possible that the quality of the lawyers accessible to these litigation adversaries of the poor would increase.

### C. *The Talent-Hoarding Fallacy*

Wilmot-Smith offers another basis for his equalization imperative: the wealthy's ability to hire all the best lawyers drains the legal-resource pool of their talents and bids up the price of legal services.<sup>72</sup> The greater the inequality in the distribution of wealth, in a free market, the slimmer the pickings for the poor in the legal-talent pool. Thus, Wilmot-Smith writes, "[t]hose who, in the civil sphere, had the finest lawyers in the land before might have to make do with the lawyers most others use."<sup>73</sup> This means they would "get a worse service," upon the elimination of the private market, because "their ability to purchase lawyers would be curtailed."<sup>74</sup>

At the outset, we need to specify what Wilmot-Smith's "proposed approach" is. We understand him to call for centrally mandated (and presumably quite low) rates across the legal-services landscape.<sup>75</sup> While individual clients might still be allowed to choose individual lawyers if they wish, all engagements would be subject to the centralized rate structure. Thus, the current system of market signals would give way to a system that, one way or another, depends on central planning.<sup>76</sup> In the current laissez-faire regime, market signals determine what lawyers do — which sectors and clients they service, the specialties they pursue, and the cases they take. If all legal fees are flatly capped at a low rate, those market signals disappear. Efficient allocation of lawyers' services, then, will no longer be determined by market signals, but must be replaced by something else. Some form of central planning must step into the breach to create a distribution of skill sets and to determine, in the interests of maximizing equal justice, what lawyers shall do.<sup>77</sup>

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72. *Id.* at 74 ("[T]here is undoubtedly inequality across a legal system where one person can purchase an army of lawyers and others are left with a very rudimentary defense counsel (or none at all)."); *id.* at 75 ("[A] process can be unfair if one party can buy the best lawyers in the world and the other can afford none: such a situation threatens to reinstitute the domination a legal system is supposed to escape."); *id.* at 77 (concluding that the ability to "contract for private lawyers affects the supply of lawyers available to those unable to afford the best . . . [and] may render the system of lawyering unfair.").

73. *Id.* at 116.

74. *Id.* at 115.

75. *Id.* at 94-95 (likening his proposal to "the regulation of lawyers' fees," coupled with "the proscription of contracting out over fee regulations").

76. *Id.* at 125 ("Central control is necessary not to displace an individual's preferences but as the only mechanism by which individuals' preferences can be satisfied . . . [T]here is no way to implement a just justice system without centralized control.").

77. *Id.* at 112 ("People would be allowed to work in certain roles, such as lawyers and judges, only on certain conditions. To secure compliance with equal justice, rights to work as a lawyer

Wilmot-Smith would allow no contracting out of this system.<sup>78</sup> Drawing on the health-care paradigm, he warns that if providers are allowed to contract out of the state-sponsored system, then the top providers will sell their services in a private concierge-care market, which will create a brain-drain effect and undermine the quality and equity of the public health-care or legal-services system.<sup>79</sup>

Upon inspection, however, the differences between socialized health care and socialized legal services are vaster than Wilmot-Smith allows, and these differences spell trouble for his model. In a free-market health-care system, the distribution of practitioners among various specialties will be based largely on market signals. There will be as many nephrologists, as many orthopedists, and so forth, as the market needs (with the potential assistance of some regulatory interventions). In a *socialized* health-care system, by contrast, the distribution of specialists will be determined by central planners. But the distribution itself will be much the same.<sup>80</sup> Perhaps, in a free market, there will be relatively more cosmetic surgeons because people with discretionary income will support them in a quantity that centralized planners would not allocate based on public-health needs; and, perhaps, in a socialized state, there may be relatively more doctors who specialize in type-2 diabetes and other disorders related to health characteristics that correlate with low-income populations. But, the health-care needs of rich and poor are fundamentally similar. Our bodies are the same. They operate and break down in largely the same way.<sup>81</sup>

On the other hand, the *legal-services* needs of rich and poor are radically different. Lawyers for the wealthy do fundamentally different things for their clients than lawyers for the poor. They engage in qualitatively different activities.<sup>82</sup>

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could be made conditional upon each individual fitting into a scheme of labour that is most likely to comply with the best principles of justice.”).

78. *Id.* at 96.

79. *Id.* at 101 (“[T]he choice to contract out generates an incentive on any service provider to sell their products in the private market . . . [, resulting in] a brain drain.”).

80. *Id.* at 112 (“Experience indicates that systems of socialised medicine are able to find enough people willing to be doctors . . .”). To his credit, Wilmot-Smith admits that this “is a controversial and difficult topic.” *Id.*

81. *Id.* at 26 (quoting Bernard Williams that “the proper ground of distribution of medical care is ill health”). *But see* Heather Murphy, *Rich People Don’t Just Live Longer. They Also Get More Healthy Years.*, N.Y. TIMES (Jan. 16, 2020), <https://www.nytimes.com/2020/01/16/science/rich-people-longer-life-study.html> [<https://perma.cc/3HL2-4JJC>] (reporting on a study finding that income levels largely dictate health outcomes).

82. Other advocates for socializing law have observed that, given the range of activities that lawyers for the wealthy undertake, it would be difficult to enforce a prohibition on hiring counsel. *See* Abel, *supra* note 32, at 23 (observing that, for advantaged groups, “lawyers are merely an expression of the[ir] power and influence” because “[o]ther instruments are readily available,

The distribution of legal practitioners among various specialties and skill sets, as determined by the free market, is very different from what the distribution would be if determined by central planners acting to promote the value of equal justice.

Deprivatization, therefore, has very different ramifications in the health-care and legal-services contexts. In the health-care field, the transition from a market-based to a socialized system largely entails a change in business model—in the way things are paid for and administered as a business matter. Given the largely similar health needs of rich and poor, the transition to socialized health care does not require the wholesale retooling of cadres of practicing physicians or overhauling the traditional system of medical education (despite its additional years of specialized training). In the context of legal services, by contrast, deprivatization would presumably entail (in the short run) large-scale retraining of practicing lawyers and (in the longer run) a ground-up redesign of the legal-education system. The immensity of these costs, we think, demands some acknowledgment.

Start with the short run. Say we take a corporate lawyer today and ask her to retool as a salaried indigent-services provider; what will she do? Her skill set is far more interchangeable with that of the investment bankers with whom she works cheek-by-jowl than it is with that of lawyers handling criminal arraignments, deportations, or child custody matters. So, it seems unreasonable to expect that she will retool in the first instance; it is far more likely that she joins the client or the investment bank. The real problem here is the implicit assumption of lawyer fungibility. By any measure, there are multiple markets in our modern economy that revolve around or draw upon the services of people we call lawyers. Their relation to one another is tenuous. Criminal defendants and corporate boards both depend heavily on lawyers. But the connection between the two sets of lawyers is remote. The corporate lawyers providing input to business strategists have the same professional degree as the attorney standing up in the local criminal court. But they are by no means interchangeable. They perform utterly different roles and actions; they provide unrelated services.

Wilmot-Smith appears unfazed that his “proscription of private contracting for lawyers might lead to many people quitting the legal industry,” and thereby “drain some of the best resources from the legal system.”<sup>83</sup> But he fails even to acknowledge the human cost that his program would entail. And over a longer

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and may execute the[ir] intentions . . . with fewer scruples”); Scheiber, *supra* note 21 (“You can prevent the rich from hiring lawyers to represent them in an official legal capacity. But you can’t prevent them from hiring people with legal knowledge who simply offer informal advice, or from consulting with lawyer-friends.”).

83. WILMOT-SMITH, *supra* note 5, at 192.

term, it is not plausible that law schools, as we know them, could survive a transition to becoming vocational institutes that pump out lower-waged lawyers for whom it would be economically irrational to invest in tuition (at anything like today's prices) or contribute to endowments.<sup>84</sup> One can certainly argue that the entire current law-school ecosystem should be swapped out for something completely different. But Wilmot-Smith's failure to appreciate the cost of this institutional displacement and to acknowledge and grapple with its real-world ramifications is hard to explain.

Furthermore, all of these costs may represent only the tip of the negative-externality iceberg. Even if the transition from a market system were otherwise feasible, the evaporation of a specialized bar providing the services desired by corporate clients in particular would presumably have devastating effects for economic activity and innovation. Just think of the legal inputs necessary for valued innovations in such fields as online services, finance, transportation, or pharmaceuticals.<sup>85</sup> Corporate managers paying top dollar for the finest engineering, executive, and other talents would be barred, on Wilmot-Smith's model, from likewise hiring the "finest lawyers in the land." It is implausible to think that the consuming public would not suffer.<sup>86</sup> Ultimately, the implications of heterogeneous legal-services markets for Wilmot-Smith's model are profound and unaddressed.<sup>87</sup> And the interventions required to bring the system about are

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84. The business model for most law schools is already under tremendous pressure due to declining enrollments, sky-high tuition, and oppressive student debt. See *Law School Costs*, LAW SCH. TRANSPARENCY DATA DASHBOARD, <https://data.lawschooltransparency.com/costs/tuition> [<https://perma.cc/U97N-D9Y8>] (reporting that, since 2010, law-school enrollment has declined by more than a fourth, while tuition at private law schools is 2.76 times as expensive in 2019 as it was in 1985, and tuition at public schools is 5.92 times as expensive; these figures account for inflation). Our prediction is that, if Wilmot-Smith's proposal were implemented and the salaries of law school graduates were significantly reduced, many, if not most, law schools would simply fold.

85. Wilmot-Smith acknowledges this problem. See WILMOT-SMITH, *supra* note 5, at 98 ("Proscribing a market in legal resources may stifle innovation and thus reduce the amount and quality, overall, of legal services available to everyone.").

86. See, e.g., Charles Silver & Frank B. Cross, *What's Not to Like About Being a Lawyer?*, 109 YALE L.J. 1443, 1479 (2000) ("[P]rivate-sector lawyering makes an enormous economic contribution to social welfare, including the welfare of the poor. By negotiating and arranging efficient, wealth-creating transactions, lawyers help our economy grow, producing jobs and making people's lives better.").

87. Wilmot-Smith warns that "claims of economic infeasibility can be used as an excuse by those unwilling to incur the (affordable) costs of realising justice. This excuse can be occluded by the fact that normative judgements are often concealed beneath apparently factual claims." WILMOT-SMITH, *supra* note 5, at 191. But despite his admonishment, our view remains that it is for Wilmot-Smith to address and justify the likely economic consequences of equalization — even where he questions the motives of those who might challenge him on these grounds.

more radical and dislocating than the analogy to socialized medicine might suggest.

*D. The Systemic Inequality Affront*

Another potential argument to support deprivatization, in principle, would be that the private market is simply an affront to our morality because of its institution-wide effects on the legal system. Not only are rich people advantaged vis-à-vis the poor in the context of individual cases, but their superior legal firepower means that they win in situations where poor people would lose. It is a separate and distinct institutional failing that rich people obtain acquittals in situations where the poor would suffer incarceration.<sup>88</sup> Wilmot-Smith regards it as morally intolerable that access to unlimited legal services on the private market allows the rich to get away with homicide and avoid taxes, while the poor (and others) are exposed to wrongful convictions, harsh punishment, and full taxation, to name but a few dimensions of this brutal inequality.<sup>89</sup>

As a general matter, it is difficult to engage this kind of moral judgment in a policy debate because “intolerable” is in the eye of the tolerator. The argument leverages something like David Hume’s dictum that “[m]orality . . . is more properly felt than judg’d of.”<sup>90</sup> If something is truly intolerable, well, that is that, then. The irreducible moral judgment is a conversation-ender.

To his credit, Wilmot-Smith does not purport to be trafficking in irreducible moral or aesthetic judgments. He does not simply pronounce the laissez-faire market unseemly and Dickensian and then throw down the mic. Instead, we, as readers, are left to consider the real-world consequences of the unjust marketplace and the case they present for equalization.

And here, we see two potential responses to outrageous inequality in the justice system that might support Wilmot-Smith’s equalization proposal. First is

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88. *Id.* at 85-86.

89. See, e.g., *id.* at 9 (“If the rich are able to use the legal system to gain advantages simply because they are rich, that is unjust; if the poor stand an increased risk of wrongful conviction or heightened punishment simply because they are poor, that is unjust.”); *id.* at 77 (“The success of rich individuals in some criminal cases under a private system of lawyers’ services will indirectly lead to the wrongful conviction of poor individuals: the creation of a system permitting rich individuals to contract out makes the poor individuals worse off than they would be under some alternative arrangement.”); *id.* at 146-47 (“If certain groups – such as wealthy corporations – are able to agree [to] private ‘sweetheart’ deals with the government on the payment of their taxes, that undermines assurance [in the legal system].”).

90. DAVID HUME, A TREATISE OF HUMAN NATURE 470 (P.H. Nidditch ed., Oxford Univ. Press 2d ed. 1978) (1739-1740).

social unrest. The more radical any looming unrest is, as a result of inequality, the more radical an equalizing solution is apt to be. And whether the unrest looms in the streets or as an electoral issue, the resentment spawned by inequality itself is surely a warrant for addressing that inequality itself, as opposed to merely bettering the lot of the poor. Wilmot-Smith recognizes as much,<sup>91</sup> but specifically abjures this line of argument: “[R]elatively little political activism seems to be motivated by inequality in legal services . . . . Most people do not care that much about it, compared at least to their objections to the injustice of substantive laws.”<sup>92</sup>

The second pragmatic implication of the moral affront—of gross inequality in access to legal services—is the dent it leaves in the rule of law. Under a free-market system, this argument goes, the availability of unlimited legal resources will at some point render the wealthy ungovernable, and the law will be left only to regulate the poor. In support of this concern, one might point to any number of regimes around the world where elites are largely above the law, and the system of justice is broken or nonexistent.<sup>93</sup>

But if unlimited legal resources allow the rich (at least in the United States and Britain) to game the system and avoid paying their taxes while ordinary citizens must pay in full, it is an odd prescription to strip the rich of their fancy lawyers rather than addressing the tax policies that allow their dodges. Likewise, if dream-team lawyering places rich criminal defendants beyond the reach of local prosecutors’ offices—given their resource constraints—then would not the obvious first answer be to endow the prosecutors with better resources?

And last, if the complaint here is that the rich are able to use the law to promote their own welfare in ways that the poor are not, recall the point we made earlier about how the legal-services needs of rich and poor (unlike their health-care needs) are very different. If we want to limit the ability of the rich to deploy cadres of lawyers to do their bidding, then that is a conversation we can have (at least in theory). But it is not a conversation about *equalization*. You might limit

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91. WILMOT-SMITH, *supra* note 5, at 7 (quoting Lyman Abbott and Reginald Heber Smith expressing concern that barring equal access to justice will lead to revolt).

92. *Id.* at 8; *see also id.* at 7–8 (“Talk of the risk of revolution moves from the normative to the empirical, requiring us to ask how people will respond to injustice in the legal system. There does not seem to be much evidence that they respond through revolution. There is, in fact, quite some evidence to the contrary. . . . [T]he prospect of a Communist revolution seems remote.”).

93. *See, e.g.,* MICHAEL JOHNSTON, SYNDROMES OF CORRUPTION: WEALTH, POWER, AND DEMOCRACY 45 (2005) (examining the use by elites of wealth and status to avoid being subjected to the rule of law, and describing political elites in thirty countries—including Colombia, Ghana, Turkey, Russia, and the Philippines—as “ill-equipped to resist . . . abuses”).

the ability of a rich individual to engage teams of corporate lawyers to create layers of shell companies to conduct his affairs. But it is not feasible to redirect those corporate transactional and advisory legal services to the poor in a way that improves anyone's life.

## II. SIPHONING OFF PUBLIC RESOURCES

A corollary to Wilmot-Smith's "radical proposal" to socialize legal services is his claim that litigants should be prohibited from using "an alternative and private system of dispute resolution, instead of the state-supplied court."<sup>94</sup> Wilmot-Smith focuses this claim on arbitration – a regime "of privatised dispute resolution where individuals must pay, not only for the lawyers they use, but also for the judges."<sup>95</sup> It is not enough, he argues, that elites be barred from contracting for private lawyers; so, too, must they be prohibited from contracting for private judges. Accordingly, Wilmot-Smith proposes to ban agreements to privately arbitrate or mediate disputes "in all cases."<sup>96</sup>

Wilmot-Smith makes two related arguments in support of this comprehensive ban. First is the instrumentalist claim that the existence of a private system impoverishes the public system, by creating financial incentives for experienced jurists to leave the bench for the greener pastures of arbitration. Second, Wilmot-Smith makes the moral case that allowing parties to exit the public system creates a pernicious two-tiered system of justice – one for the wealthy and one for the poor.

Both claims warrant serious attention. But both, in our estimation, are undone by real-world evidence and experience.

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94. WILMOT-SMITH, *supra* note 5, at 92. The prohibition against contracting out is critical to the project of equalizing legal services, Wilmot-Smith argues, because it is only possible to distribute legal resources equitably when all relevant actors (parties, lawyers, judges) inhabit a single, inescapable forum. *Id.* at 92-93.

95. *Id.* at 65; *see id.* at 93, 102 (describing arbitration as allowing parties to contract "out of the public system" into a private dispute-resolution regime, which "is a quite different beast from public adjudication"); *see also id.* at 93 (providing the example of an employment contract which "require[s] all disputes between employer and employee to be submitted to an arbitral panel," with a hearing held in the privacy of the employer's "own offices" rather than a public tribunal).

96. *Id.* at 94.

### A. *Losing Judges*

Wilmot-Smith starts from an uncontroversial premise: “Those who sell their services privately will often be remunerated more than they would be in the public sector.”<sup>97</sup> His concern, in the first instance, is that the private market for arbitration lures judges away from their public calling. Moreover, Wilmot-Smith implies that the lucre of the private market will be directed to the most sought-after judges, amplifying the impoverishment of the public pool. After all, parties in arbitration are permitted “to pay more for a better judge”; thus, if we assume the “market works with any efficiency,” then it stands to reason the best judges are being poached.<sup>98</sup>

Wilmot-Smith is hardly alone in fretting that arbitration dilutes the judicial pool by creating employment opportunities for jurists wishing to leave the public sector in search of higher wages. One judge in California recalled that, when arbitration took off in the 1980s, every judge “thought they’d go to JAMS [one of the preeminent arbitration providers] and get rich.”<sup>99</sup> This is not altogether surprising, given that state judicial salaries in that era hovered around \$136,000, while arbitrators were reportedly charging up to \$7,000 per day for roughly similar services.<sup>100</sup> So worried were legislators in California that jurists would desert the bench in droves for the lucrative world of private dispute resolution that, in 2002, they introduced a bill to make it harder for judges to leave.<sup>101</sup>

But we are skeptical. The readily available evidence suggests to us that the supposedly “greener pastures” of arbitration do not meaningfully drain the public judging pool of talent. The true greener pasture, we would argue, is private law-firm practice – and not so much because judges *leave* the bench for private lawyering but because the vast compensation disparity between law-firm practice and government service dissuades many desirable candidates from pursuing

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97. *Id.* at 101. Wilmot-Smith acknowledges that factors other than higher compensation may make the private system more attractive, such as higher “quality of life” and better working conditions. *Id.* at 102. See generally RICHARD POSNER, *HOW JUDGES THINK* (2008) (discussing the many factors that motivate judicial behavior).

98. WILMOT-SMITH, *supra* note 5, at 55; see also *id.* at 92-93 (“Arbitrators trade their services on the open market [where] better arbitrators cost more. This means that the quality of justice individuals get in arbitration is partly a function of their wealth.”).

99. Stephanie Francis Cahill, *Judge-to-Arbitrator Route Is Targeted*, 1 No. 12 ABA J. E-REPORT 4 (2002).

100. *Id.*

101. The bill created a “waiting period between the time a judge leaves the bench and goes to a private dispute resolution service” and prohibited these services from “soliciting sitting judges.” *Id.*

a path to the bench in the first place.<sup>102</sup> Further, it appears that arbitration largely draws judges who have already retired – or who at least are eligible for full-pay judicial retirement benefits.<sup>103</sup> We surveyed an arbitral provider touting ex-judges and found that, on average, federal judges left the bench at 63.87 years of age, after a little over seventeen years of judicial service.<sup>104</sup>

By contrast, private law practice has historically tended to draw a younger cadre of judges. In an excellent study of judicial departures, Emily Field Van Tassel found that among the 128 federal judges who left the bench for alternative employment between 1789 to 1992,<sup>105</sup> nearly half did so because of dissatisfaction with the low public salary.<sup>106</sup> Van Tassel calculated that the average age of judges departing for other employment opportunities was 52.7 – in other words, far too young to retire and still young enough to enjoy many years of gainful employment in the private sector.<sup>107</sup> Nearly twenty years later, Stephen Burbank, Jay Plager, and Greg Ablavsky updated Van Tassel's research and found similar trends at work.<sup>108</sup> From 1970 to 2009, eighty federal judges resigned from the

102. See, e.g., Stephen J. Choi et al., *Are Judges Overpaid?: A Skeptical Response to the Judicial Salary Debate*, 1 J. LEGAL ANALYSIS 47, 55-56 (2009) (examining whether increasing judicial salaries will attract candidates to “give up lucrative jobs elsewhere if the wages of being a judge are higher”).

103. See, e.g., Thomas J. Stipanowich, *In Quest of the Arbitration Trifecta, or Closed Door Litigation?: The Delaware Arbitration Program*, 6 J. BUS. ENTREPRENEURSHIP & L. 349, 350 (2013) (describing “a post-judicial career as an arbitrator and mediator” as “the retirement plan *du jour* for American judges”).

104. To collect this data, we used the public roster of judges provided by FedArb, which advertises that it has assembled “the largest group of former [A]rticle III judges of any ADR provider.” See *Judges*, FEDARB, <https://www.fedarb.com/federal-judges> [<https://perma.cc/8PBE-XJKV>]. We counted forty-five ex-Article III judges in all. We then consulted the Federal Judicial Center's database to determine biographical data, such as years of service and age. See *Biographical Director of Judges*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/search/glossary-search> [<https://perma.cc/Q7KJ-MQPD>]. The Appendix collecting the assembled data is available on the *Yale Law Journal* website at <https://www.yalelawjournal.org/review/examining-the-case-for-socialized-law>.

105. Emily Field Van Tassel, *Resignations and Removals: A History of Federal Judicial Service – and Disservice – 1789-1992*, 142 U. PA. L. REV. 333, 364 (1993).

106. While fifty-six judges left the bench during this period for appointments to other offices and campaigns for elected office, twenty-one federal judges left the bench because of inadequate salary, and thirty-seven left to return to private practice (which is arguably the same as leaving because of inadequate salary). *Id.* at 351 fig.3, n.64.

107. *Id.* at 357. We have come to 52.7 years because the average age at appointment was 45.7 years, with the average length of service as seven years.

108. Stephen B. Burbank et al., *Leaving the Bench, 1970-2009: The Choices Federal Judges Make, What Influences Those Choices, and Their Consequences*, 161 U. PA. L. REV. 1 (2012).

bench; twenty-two of those returned to private practice.<sup>109</sup> Like Van Tassel, these authors found that judges who resigned to enter private practice or to seek other employment were generally in their forties and fifties – that is, the prime of their professional lives.<sup>110</sup>

The most striking finding of these studies is how few federal judges have departed for the higher salaries of the private sector.<sup>111</sup> In the earlier period that Van Tassel studied, fewer than 5% of federal judges resigned to take non-public-sector jobs,<sup>112</sup> and between 2000 and 2009, only 2.8% resigned for any reason.<sup>113</sup> Indeed, a 2005 study found that since 1984, 80% of federal judges “eligible for retirement at full pay chose instead to take senior status and keep working.”<sup>114</sup> As Van Tassel concluded, if low public salaries were having “an adverse impact” on the federal judiciary, “the negative effects of these circumstances have yet to be reflected by large-scale resignations.”<sup>115</sup>

It appears, then, that private arbitration largely draws judges who are (or might be) retiring anyway, while private practice entices relatively few jurists to leave the bench.<sup>116</sup> Put differently, the existence of a private market for judges does not have obvious adverse effects on the public talent pool, nor does the

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109. *Id.* at 13 fig.1.

110. *Id.* at 18-19, 18 fig.2.

111. Notably, these studies examined only the federal bench. State courts, whose budgets may be smaller and less secure, likely face different retention challenges. *See, e.g.,* William Glaberson, *Pay Frozen, More New York Judges Leave Bench*, N.Y. TIMES (July 4, 2011), <https://www.nytimes.com/2011/07/05/nyregion/with-salary-freeze-more-new-york-judges-are-leaving-the-bench.html> [<https://perma.cc/EVL9-C82C>] (reporting on a judge serving in New York State’s Appellate Division whose judicial salary was \$144,000 and who resigned from his position to become a partner at a law firm where the average partner’s salary was \$1.4 million).

112. Van Tassel, *supra* note 105, at 357.

113. Burbank et al., *supra* note 108, at 16.

114. Choi et al., *supra* note 102, at 57-58 (citing Albert Yoon, *As You Like It: Senior Federal Judges and the Political Economy of Judicial Tenure*, 2 J. EMPIRICAL LEGAL STUD. 495 (2005)).

115. Van Tassel, *supra* note 105, at 349.

116. Other, nonpecuniary forces are clearly at work. *See, e.g.,* Roy A. Schotland, *Judges’ Pay: A Chasm Far Worse Than Realized, and Worsening*, 82 IND. L.J. 1273, 1274 (2007) (observing that while “judges earn less than they would in private practice . . . [they] enjoy ‘rewards’ other than salaries”); John Roberts, *2016 Year-End Report on the Federal Judiciary*, SUP. CT. 8 (2016), <https://www.supremecourt.gov/publicinfo/year-end/2016year-endreport.pdf> [<https://perma.cc/77NC-DMXR>] (describing district judges as driven by a “sense of civic duty” and a belief that their work on the bench leaves “a lasting legacy by making our society more fair and just”).

ability of judges to leave the bench and reap the benefits of private legal practice.<sup>117</sup>

Still, there surely is one sense in which the existence of the free market for legal services adversely affects the composition of the judiciary. As Chief Justice Roberts observed, when the “substantial difference in pay between successful government and private sector lawyers” grows to be “too large—as it is today,” then “the judiciary will over time cease to be made up of a diverse group of the Nation’s very best lawyers.”<sup>118</sup> Chief Justice Roberts warned that the inequality in public and private compensation ensures that the judicial ranks will come to rely overwhelmingly on the “independently wealthy.”<sup>119</sup>

Chief Justice Roberts and Wilmot-Smith make strange bedfellows, but they share the concern that wealth inequality is having a powerful adverse effect on the judicial talent pool.<sup>120</sup> The federal bench has become a milieu accessible mainly to the wealthy and well-connected, an exclusive club stocked with the privileged few whose “elite schooling, clerkship connections, and financial resources” enable them to select status over salary.<sup>121</sup> For example, studies show

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117. Choi et al., *supra* note 102, at 58 n.8 (surveying studies on judicial salaries and retirements, and concluding that “judges value the non-pecuniary aspects of their jobs enough that lower salaries don’t induce them to quit,” and even fairly strong “monetary incentives are not enough to induce them to give up their jobs”). Wilmot-Smith obliquely acknowledges this point. WILMOT-SMITH, *supra* note 5, at 198 (“Who is willing to become a judge depends on push and pull factors. Quite how attractive the job is depends partly upon factors such as judicial pensions, the nature of the work, and so on. Another important factor affecting whether enough people—and enough of the best people—want to be judges is the character of private practice.”).

118. John Roberts, *2005 Year-End Report on the Federal Judiciary*, SUP. CT. 4 (2006), <https://www.supremecourt.gov/publicinfo/year-end/2005year-endreport.pdf> [<https://perma.cc/KV3P-C2C8>].

119. *Id.* (“Instead, [the federal bench] will come to be staffed by a combination of the independently wealthy and those following a career path before becoming a judge different from the practicing bar at large. Such a development would dramatically alter the nature of the federal judiciary.”). Chief Justice Roberts is not alone among the Justices who have voiced this concern over low judicial salaries. See Choi et al., *supra* note 102, at 47-48 (quoting Justices Kennedy, Alito, and Breyer saying that judicial compensation is too low; and observing that Chief Justices Rehnquist and Burger made similar complaints in their day).

120. WILMOT-SMITH, *supra* note 5, at 160-62 (discussing proposals to reform the judicial appointments process as grounded in the belief that “all in society should have an equal opportunity to become good judges”).

121. Brian Fallon & Christopher Kang, *No More Corporate Lawyers on the Federal Bench*, ATLANTIC (Aug. 21, 2019), <https://www.theatlantic.com/ideas/archive/2019/08/no-more-corporate-judges/596383> [<https://perma.cc/5VXA-7E8U>]; see also Edward M. Chen, *The Judiciary, Diversity, and Justice for All*, 91 CALIF. L. REV. 1109, 1115 (2003) (observing that Article III judges

that more than a quarter of federal circuit-court judges and more than a third of district-court judges were in private practice when appointed to the bench.<sup>122</sup> As a point of comparison: in 2019, the salary of a circuit-court judge was \$223,700,<sup>123</sup> while the per-equity-partner profits at the most profitable twenty law firms in the country ranged from about \$3 million (Willkie Farr) to about \$6.5 million (Wachtell).<sup>124</sup> If circuit-court judges are being recruited from the ranks of millionaire partners—rather than public-interest firms, academia, or government practice<sup>125</sup>—then it is no wonder that they are not tempted by the marketing pitch of private arbitration outfits.

The upshot, for present purposes, is simply that the elimination of the market for private judging is not well calibrated to democratize, or diversify, the judiciary. Nor is preventing judges from going into private practice. Rather, the

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are appointed through a political process in which a “number of other factors may have significant bearing . . . , not the least of which are financial, social, and political ties to those in power”); Dara Lind, *There Hasn’t Been a Criminal Defense Lawyer on the Supreme Court in 25 Years. That’s a Problem*, VOX, (Mar. 22, 2017), <https://www.vox.com/2016/3/28/11306422/supreme-court-prosecutors-career> [<https://perma.cc/GQV2-2RJ5>] (“Only people from elite backgrounds are likely to know at a young age that there’s a fairly established career path for the federal judiciary: ‘Go to a prestigious law school, work at some big white-collar firm, go to the US attorney’s office, put in my time there, and then get nominated to the bench.’”); *U.S. Judges Earn Considerably More Than Salary*, N.Y. TIMES (June 5, 1989), <https://www.nytimes.com/1989/06/05/us/us-judges-earn-considerably-more-than-salary.html> [<https://perma.cc/BL6A-HKCU>] (reporting that, in the late 1980s, a majority of federal judges had “six-figure investment portfolios” and assets from “family money or substantial incomes” earned before and after appointment to the bench; many were millionaires).

122. BARRY J. McMILLION, CONG. RESEARCH SERV., R43426, U.S. CIRCUIT AND DISTRICT COURT JUDGES: PROFILE OF SELECT CHARACTERISTICS (2017), <https://fas.org/sgp/crs/misc/R43426.pdf> [<https://perma.cc/H5AE-RZ3W>] (reporting that more than 26% of federal circuit-court judges and 35% of district-court judges worked in private law firms immediately prior to being appointed to the bench); Russell Wheeler, *Changing Backgrounds of U.S. District Judges: Likely Causes and Possible Implications*, 93 JUDICATURE 140, 143-44 (2010) (“[M]ost district judges appointed from the judiciary had private practice-dominated careers before becoming judges.”); *Broadening the Bench: Professional Diversity and Judicial Nominations*, ALLIANCE FOR JUST. 6 (Feb. 6, 2014), <http://big.assets.huffingtonpost.com/AFJreport.pdf> [<https://perma.cc/D2YB-SK4D>] (finding that roughly 85% of judicial nominees under the Obama Administration had worked as corporate attorneys, prosecutors, or both).

123. *Judicial Salaries: U.S. Court of Appeals Judges*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/judicial-salaries-us-court-appeals-judges> [<https://perma.cc/L5VN-FZTX>].

124. Ben Seal, *The 2019 Am Law 100: Profits Per Equity Partner*, AM. LAW. (Apr. 23, 2019), <https://www.law.com/americanlawyer/2019/04/23/the-2019-am-law-100-profits-per-equity-partner> [<https://perma.cc/7RJE-PNWY>].

125. See ALLIANCE FOR JUST., *supra* note 122, at 6 (reporting that less than four percent of President Obama’s judicial nominees (through February 2014) previously worked at public-interest organizations).

private market in lawyers' services has already worked its dark magic by influencing who becomes a judge in the first instance. Thus, in theory, one way to improve the representative demographics of the judiciary would be to eliminate the entire market for private legal services. But, for that matter, so too would the elimination of private industry, or full-scale equalization of private wealth. So here again, as with the civil-*Gideon* measures discussed above, liberals (joined here by the Chief Justice) are left to wonder why less intrusive measures should not be considered. Raising judicial salaries would be a sensible first step. Another idea is providing means-based bonuses for new judges. And while it may be difficult to persuade Congress to substantially increase judicial compensation, it is surely a less daunting project than scrapping the market for legal services altogether.

### B. A Two-Tiered Legal System

Wilmot-Smith further contends that, as the wealthy and well-connected opt out of the public legal system and have their disputes resolved privately, less-advantaged litigants are left stranded in an increasingly ghettoized system.<sup>126</sup> The flight of elite litigants and lawyers for the tonier forum of private arbitration, on Wilmot-Smith's view, impoverishes the public system. Drawing on economist Albert Hirschman's famous construct of "exit and voice," Wilmot-Smith contends that as elites depart the public realm, their clout—their "voice"—is lost.<sup>127</sup> When opting out, or "exit," is proscribed, these elites will use their voice to improve the system, whether by getting more funding or by obtaining valuable procedural changes.<sup>128</sup>

But this view ill describes the systems that we see, at least here in America. Most liberal or nonpartisan observers of our courts would be taken aback to hear that corporate interests have *insufficient* voice in the operation of our public legal systems. After all, big companies rely heavily on the public litigation system to resolve disputes,<sup>129</sup> and they spend heavily to lobby for legal changes that would

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126. WILMOT-SMITH, *supra* note 5, at 143-44 (describing a "two-tier justice system" in which low-quality, "cheaper fora" exist for litigants most "likely to have low-value claims").

127. *Id.* at 99-100 ("Those able to exit have less incentive to exercise their voice: if the quality of the public option falls below what they deem acceptable, they can go private. . . . The availability of exit deprives the polity of these rich individuals' voice.").

128. *Id.*; see also *id.* at 101 (observing that when "powerful" people leave, "[t]his can make things worse for those left behind: the powerful voices, who might otherwise have worked for reform, fall silent").

129. See Stipanowich, *supra* note 103, at 351 ("More than \$21 billion is spent annually on litigation here in the United States, and . . . the number of U.S.-based companies spending more than

further their parochial interests.<sup>130</sup> Further, the various committees that superintend the courts and their rules of procedure are amply stocked with the big-firm elites that Wilmot-Smith imagines have abandoned the public system.<sup>131</sup> It may be true that many state court systems are down at the heels and underfunded. But there is no basis to believe that any sort of flight to private arbitration is the culprit.

In fact, if the institution of arbitration is causing any flight from the public courts, it is the involuntary exodus of consumers and employees, driven out by the mandatory arbitration clauses that have become ubiquitous in standard form agreements.<sup>132</sup> Over the past decade or so, the Supreme Court has repeatedly held that companies may use mandatory arbitration clauses to ban class actions

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a million dollars per year on litigation is above fifty percent, and growing.”); *id.* at 353 (describing a survey of Fortune 1000 corporation counsel where “fully half of those responding said that their company was disinclined to use arbitration in the future” instead of litigation, citing “limitations on judicial review of arbitration awards, the concern that arbitrators may not follow the law, the perception that arbitrators tend to compromise, and lack of confidence in neutrals”).

130. See, e.g., Rob O'Dell & Nick Penzenstadler, *You Elected Them to Write New Laws. They're Letting Corporations Do It Instead.*, CTR. FOR PUB. INTEGRITY (Apr. 4, 2019), <https://publicintegrity.org/politics/state-politics/copy-paste-legislate/you-elected-them-to-write-new-laws-theyre-letting-corporations-do-it-instead> [<https://perma.cc/6HA3-AZ56>] (describing the massive corporate lobbying efforts focused on obtaining “[c]hanges to civil court rules to shield companies from lawsuits,” such as bills that would “limit the public’s ability to sue corporations, including limiting class-action lawsuits, a plaintiff’s ability to offer expert testimony, and cap punitive damages for corporate wrongdoing”).
131. See, e.g., STEPHEN B. BURBANK & SEAN FARHANG, *RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION* 77-82 (2017) (providing an empirical analysis of membership on the Advisory Committee); Patricia W. Hatamyar Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees*, 83 U. CIN. L. REV. 1083, 1127, 1146 (2015) (noting that “almost all the [Advisory] Committee members formerly practiced or currently practice at huge, well-known law firms that undoubtedly maintain reams of forms for use by their attorneys,” and of the judges chairing the different federal rules advisory committees at the time the article was written, “five of six [had] practiced law with large law firms that represent mostly corporations and mostly, in litigation, are on the defense side”).
132. See *Arbitration Study*, CONSUMER FIN. PROTECTION BUREAU § 2.3, at 8 (Mar. 2015), [http://files.consumerfinance.gov/f/201503\\_cfpb\\_arbitration-study-report-to-congress-2015.pdf](http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf) [<https://perma.cc/6EGM-73GP>] (finding that 99.9% of the cell-phone market, 53.0% of the credit-card market, and 98.5% of the storefront-payday-loan market were subject to arbitration clauses); Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL’Y INST. (Apr. 6, 2018), <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers> [<https://perma.cc/2C78-QTXM>] (estimating that over half of nonunion, private-sector employees in the United States — over sixty million American workers — are subject to forced arbitration clauses).

and compel consumers and workers to bring any disputes in one-on-one arbitration—even where it would be cost-prohibitive to do so.<sup>133</sup> These clauses do not drive would-be litigants into arbitration; they effectively quash claims altogether, by requiring that small-dollar disputes only be resolved in costly one-on-one proceedings, rather than a single, large, and powerful class-action suit.<sup>134</sup> But the effect on the court system is the same. Entire gigantic categories of cases are now absent from the public courts, and these are invariably cases brought by ordinary consumers and employees, not well-heeled companies or individuals.<sup>135</sup>

While Wilmot-Smith may join us in decrying these developments, it is unclear—here, as elsewhere—why deprivatization of the entire legal-services business is the answer. In this instance, the obvious and unexamined remedy would be to prohibit class-banning arbitration clauses in standard form contracts, which we and others have long championed (and which the U.S. House of Representatives has recently passed<sup>136</sup>).

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133. See generally Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T v. Concepcion*, 79 U. CHI. L. REV. 623, 633-39 (2012) (reviewing Supreme Court decisions upholding class-banning arbitration clauses).

134. See, e.g., *Arbitration Study*, *supra* note 132, § 5.2.2., at 13, § 8.1, at 5 (finding that, between 2008 and 2012, thirty-four million consumers were entitled to recovery from class actions brought on their behalf; by contrast, of the consumer affirmative claims of one thousand dollars or less filed between 2010 and 2011, only four individuals won affirmative relief before the American Arbitration Association); Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Nov. 1, 2015), <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html> [https://perma.cc/GFC6-RHWC] (“Once blocked from going to court as a group, most people dropped their claims entirely.”); see also Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2804 (2015) (“Although hundreds of millions of consumers and employees are obliged to use arbitration as their remedy, almost none do so—rendering arbitration not a vindication but an unconstitutional evisceration of statutory and common law rights.”). To Wilmot-Smith’s credit, he does discuss the problem of arbitration clauses, but he does so by focusing on how the absence from public courts makes it hard to establish consumers’ rights—not the larger problem of how arbitration is a way for the wealthier, more powerful counterparty to set the rules of adjudication. WILMOT-SMITH, *supra* note 5, at 164.

135. See, e.g., Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371, 377 (“For the entire categories of cases that are ushered into this vault [of arbitration]—from consumer law, to employment law, to much of antitrust law—common law doctrinal development will cease.”).

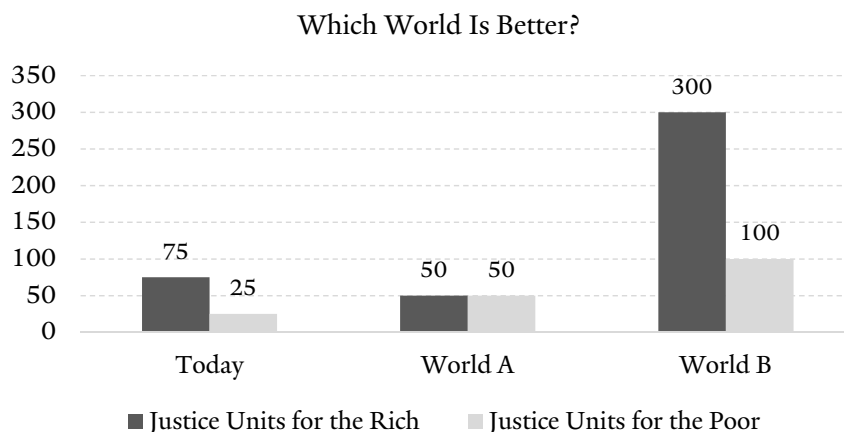
136. As of this writing, the Forced Arbitration Injustice Repeal Act (“FAIR” Act) has passed the House of Representatives but is unlikely to gain traction in the Senate. See FAIR Act, H.R. 1423, 116th Cong. (2019) (prohibiting predispute agreements to arbitrate employment, consumer, antitrust, and civil-rights claims, including ones that “interfere with the right of individuals, workers, and small businesses to participate in a joint, class, or collective action”).

## CONCLUSION

In his engaging and provocative book, Wilmot-Smith considers what the foundational principles of justice might require of the legal-services industry itself. Other work has considered the case for deprivatization of legal-services markets but never with the resolute philosophical grounding that Wilmot-Smith brings to bear. His ambitious project is unwavering in its dedication to working from first principles, like an artist dedicated to working only with raw materials.

And yet, Wilmot-Smith fails to convince us of an independent value in equalizing access to legal services as between rich and poor. The American liberal tradition privileges improving the lot of the poor, in absolute terms, over equalizing the lots of rich and poor. There has to be an instrumental reason to care about inequality in any given instance; otherwise, the liberal concern remains with increasing the resources of the poor, and not with pursuing equality for its own sake.<sup>137</sup> Put graphically, the American liberal tradition would favor World B over World A in Figure 1.

FIGURE 1.



If Wilmot-Smith wants to argue for World A, our baseline liberalism places the burden on him to explain what independent value is served – or what negative externalities are eliminated – by equalization. For instance, one might argue

137. See, e.g., Scheiber, *supra* note 21 (“The average liberal, myself included, believes government should provide everyone with a minimum level of essential services like health care or education. We liberals would prefer that this minimum bar be quite high, but we have no problem with the wealthy buying more health care or fancier schooling.”).

that the in-your-face inequality of World *B* fosters resentment and social unrest. But, as we have seen, Wilmot-Smith himself eschews this line of argument. And, as we have argued, the independent values for equalization that he *does* proffer – the see-saw model of adversarial justice where a rise on one side implies a drop on the other, and the distribution of fungible legal talent that equalization would supposedly unleash – misconceive the markets for legal services.

Still, putting aside our stylized graphic, one can certainly argue that equalization represents the best *path* to improving legal services for the poor in matters implicating fundamental rights. But Wilmot-Smith has not made that comparative case, and there is nothing in his book *Equal Justice* to dissuade classic American liberalism from pursuing more traditional reforms, such as civil-*Gideon* or pro se reform. Indeed, one can imagine any number of other ways to skin this cat. The state could enact mandatory and monitored pro bono service requirements for lawyers, or even a pro bono service corps with deployments determined by an agency in accordance with agreed-upon priorities.<sup>138</sup> It could let lawyers buy their way out of these obligations, generating valuable resources to finance indigent legal services.<sup>139</sup> It could broadly permit paraprofessionals to perform most services that are currently the province of lawyers – a tactic other countries have found effective.<sup>140</sup> And so on.

Finally, as lawyers, we wish to add a defensive note. Our critique here is not born (we do not think) of guild protectionism. It is not the economic or freedom-to-contract interests of lawyers that drive our analysis. But the enormous dislocation that Wilmot-Smith's model implies is hardly ignorable. And that dislocation represents a cost – one that is only worth bearing in exchange for a discrete value. Another nonignorable cost is clients' economic liberty interests. Here

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138. Some observers have proposed a “draft” wherein law graduates would be required to serve in government for a limited amount of time before entering private practice. See, e.g., BURTON A. WEISBROD ET AL., PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS 537 (1978) (“One form that such a draft could take would be a ‘bar-sponsored internship program in the area of public service – similar to a medical internship. Each law graduate could be assigned for a year to a public service program . . .’”).

139. It seems unlikely that Wilmot-Smith would support a pro bono buyout program – an idea that both privileges wealth and relies on a completely free market in legal services. But public-interest lawyers often complain that the pro bono resources that are most widely available (i.e., the time of lawyers working in corporate firms) are a poor match to the needs of their clients. This mismatch between the inexperience of the pro bono lawyer and the needs of the client may warrant exploring market solutions. See Atinuke O. Adediran, *Solving the Pro Bono Mismatch*, 91 U. COLO. L. REV. 1033, 1069–72 (2020).

140. See, e.g., Catherine R. Albiston & Rebecca L. Sandefur, *Expanding the Empirical Study of Access to Justice*, 2013 U. WIS. L. REV. 101, 118–19 (reporting that in the United Kingdom “people appear quite happy to use . . . nonlawyer services instead of lawyers, even where lawyers are free”).

again, such interests are not immutable: the argument here is not against socialism per se; it is not an allergy to radical interventions designed to replace laissez-faire markets with publicly administered systems for the delivery of services or goods. But the corresponding benefit of such costly equalization efforts must be patent. And the problem we have with Wilmot-Smith's vision is that its socialism is gratuitous. It promises no marginal benefit that we can see over liberal proposals for raising the fairness floor.

And yet, all that said, there is one plain benefit. The very provocativeness of Wilmot-Smith's proposal to deprivatize the markets for legal services draws richly deserved attention to the abject failures of laissez-faire in serving the legal needs of the less advantaged. After all, no one asked us to review a milquetoast liberal policy book advocating civil-*Gideon* reforms.