

Book Review

REBOOTING JUSTICE: MORE TECHNOLOGY, FEWER LAWYERS, AND THE FUTURE OF LAW*

by Benjamin H Barton & Stephanos Bibas

CHOO Han Teck

*LLB (Hons) (National University of Singapore), LLM (Cambridge);
Judge of the Supreme Court of Singapore.*

To serve the needs of the twenty-first century society, the justice system must be digital by default and design.^[1]

1 Law is associated with justice as it is with order, but justice and order are sometimes incompatible and sometimes downright contradictory with each other. Law, therefore, is by necessity the scale that keeps them balanced if not in harmony. It is now evident that laws are getting more complex because of the complexities of modern life. And so the common law system, cranking its way towards modernity from about the 19th century, now finds itself somewhat slow, somewhat cumbersome, and the entire system is under strain because the practitioners of law are struggling to keep pace.

2 *Rebooting Justice* is a study into the flagging state of justice in the American legal system, but it holds lessons and ideas for legal systems in other common law countries. In Part I of the book the authors examine the problems currently afflicting the American legal system through a study of cases from the courts.

3 The authors referred to the story of Ray Bromgard in the chapter “The Reality of Criminal Justice for Poor Defendants” to illustrate the kind of difficulties many defendants face in the American criminal legal system.² Bromgard was convicted of the rape of an eight-year-old girl. He spent 14 years in jail before he was exonerated in 2002 by DNA evidence. The victim twice failed to identify him with certainty, and at the time, there was no technology to type the DNA from the semen found on the victim’s underwear. Bromgard was tried in Montana. He was represented by a lawyer not known for diligence, and

* Encounter Books, 2017.

1 Lord Justice Ryder, “The Modernisation of Access to Justice in Times of Austerity” in *Being a Judge in the Modern World* (Jeremy Cooper ed) (Oxford University Press, 2017) at p 140.

2 Benjamin H Barton & Stephanos Bibas, *Rebooting Justice: More Technology, Fewer Lawyers, and the Future of Law* (Encounter Books, 2017) at p 17.

who was paid an annual retainer by the State no matter how many cases he did or how many hours he spent on a case. No forensic expert was engaged to challenge the claim by the Prosecution's expert that the odds that the hair found at the scene of crime was not Bromgard's, was less than 1 in 10,000. The authors note that Bromgard's case is not unique. They point to the common driving under influence ("DUI") cases to show that even simple charges are open to myriad technical and forensic issues that no lay person can possibly cope with. "Even a routine case", they say, "involves complicated moving parts and high stakes for the defendant's liberty *versus* society's safety".³

4 The catch is that engaging a lawyer is not cheap. The fees up to trial "can run into six figures".⁴ A defendant can get a court-appointed lawyer, but most middle-class defendants do not qualify for legal aid. Yet they are willing to pay high fees "because the ramifications of a DUI conviction are so weighty".⁵ From a loftier perspective, many spirited lawyers drawn by the idealism of justice and public duty volunteer to act as salaried public defenders, but, the authors sadly note, "financial pressures as well as crushing caseloads burn them out and make it hard for them to stay".⁶

5 In the chapter "How We Got Here: Criminal Defense", the authors remind us that it was only about three centuries ago when defendants were allowed representation by counsel; now, by a series of Supreme Court decisions, defendants today are entitled to be represented even in minor cases. This brings with it the problems that the authors discuss in this chapter. The American adversarial system (and most common law ones) depends on the defence counsel doing their part contesting the prosecution to ensure the accuracy and fairness of line-ups (a standard police procedure in America), police interrogations, guilty pleas and trials. To carry out his job properly, a counsel must spend time on the case and meet his client and witnesses as often as is needed, and that is usually a lot of times. As in many criminal cases, the defence lawyer is also an investigator to trace leads given by his client and engage experts to support his theory of the case.

6 The high cost of legal fees and, paradoxically, the underfunding for the public defender are serious problems. So far as underfunding is

3 Benjamin H Barton & Stephanos Bibas, *Rebooting Justice: More Technology, Fewer Lawyers, and the Future of Law* (Encounter Books, 2017) at p 20.

4 Benjamin H Barton & Stephanos Bibas, *Rebooting Justice: More Technology, Fewer Lawyers, and the Future of Law* (Encounter Books, 2017) at p 20.

5 Benjamin H Barton & Stephanos Bibas, *Rebooting Justice: More Technology, Fewer Lawyers, and the Future of Law* (Encounter Books, 2017) at p 20.

6 Benjamin H Barton & Stephanos Bibas, *Rebooting Justice: More Technology, Fewer Lawyers, and the Future of Law* (Encounter Books, 2017) at p 23.

concerned, it gives rise to overwork as lawyers have to take more and more cases to make their living. The authors found a county that had contracted half its criminal caseload to a three-person firm for US\$400,000. With that they had to manage 1,523 felonies and 3,587 misdemeanours for that year. The authors calculated that that “works out to about \$80 per case for all fees and costs”⁷

7 All that pales in comparison to the problem of ineffective lawyers. Though the authors note that overworked lawyers “grow cynical and burn out”, the problem of ineffectiveness goes beyond lack of time and overwork. There are three types of lawyers who will endure the poor working conditions, they note. First are the young idealistic ones who will burn out. The second are the ones who work for the experience and then move on to the private sector, using their experience to charge high fees for clients who can afford them. The third category is the “leftover lawyers”, lawyers at the bottom of the pile who have no choice but to work on assigned cases, and these are the ones who have neither talent nor interest in putting up a strong defence for their clients.

8 The situation is as dire in the civil courts. There is a flood of *pro se* litigation in the American courts.⁸ Many such cases bring with them complicated facts and issues as well as difficult questions of law. Yet, paradoxically, there seems to be no shortage of lawyers qualifying to enter the profession. Where then, the authors ask, have they gone? Once upon a time, only the poor could not afford lawyers, but now, the high costs of legal fees are also beyond the reach of the middle class. It is becoming seriously damaging to the American legal system when it is developing into a system for the rich. Furthermore, there are enigmas within conundrums inside a puzzle. When a person slips in a Walmart supermarket, he can get access to a host of lawyers to sue. Most of these lawyers advertise their services everywhere, but a person seeking a divorce needs to find a speedy solution or his assets will vanish into the pool of unknown depth known as lawyers’ fees.

9 All the old measures have failed but the authors believe that light is coming through. “Fortunately, the answer is staring us in the face, and has begun to take hold. Court reform, legal simplification, and technology can make headway where free and low-cost lawyers have not.”⁹ They follow studies and conclude that it cannot be conclusively claimed that lawyers make a difference in civil actions. “Advocating yet

7 Benjamin H Barton & Stephanos Bibas, *Rebooting Justice: More Technology, Fewer Lawyers, and the Future of Law* (Encounter Books, 2017) at p 27.

8 In England, *pro se* litigants are known as “litigants-in-person”.

9 Benjamin H Barton & Stephanos Bibas, *Rebooting Justice: More Technology, Fewer Lawyers, and the Future of Law* (Encounter Books, 2017) at p 73.

again for more lawyers will not result in more justice”, the authors say.¹⁰ They thus argue that the American legal system ought “to go on a diet, to make it slimmer, cheaper, and thus fairer”, and that “lawyers need to get out of the way and let cheaper alternatives flourish”.¹¹ How the problems can be solved are extensively outlined and discussed in Part II of the book.

10 Online dispute resolution (“ODR”) has been tested, at least theoretically, since 2002 when Colin Rule wrote *Online Dispute Resolution for Business*.¹² ODR is aimed at settling maximum cases quickly. Rule’s methods, adopted by businesses such as eBay and PayPal, move very quickly, often “before participants even knew they were headed for a dispute”.¹³ When a customer complains that the shipping time is slow, the system immediately informs him that the regular alternatives take about a week longer. These and other issues are discussed in “Techno-Optimism and Access to Justice”.¹⁴

11 Some of the problems for ODR litigants to overcome concern access to court forms and legal documents, but we are now in 2019, and there are many websites offering free legal documents and cases, certainly way ahead of the then astonishing publication of cases in 1872 when West Publishing was established. More importantly, ODR for profit now allows private providers to present diverse legal services at different prices, very much like having a choice of paying \$3 for a McDonald’s hamburger, \$12 for one in a casual dining restaurant or \$40 in a fine dining restaurant – and that is just skimming the surface as far as restaurants are concerned. We can have vegan or gluten-free, or just sashimi. When it comes to legal services, the authors note:¹⁵

... consumers in the market for legal services have been stuck with two different flavours of service for years: 1) pay a lawyer, often by the hour, a great deal of money to do the work, or else 2) try to do the work yourself.

ODR is the space that can be carved out as a “lawyer-free” zone whereas in-court litigation can still remain largely a lawyers’ zone of activity.

10 Benjamin H Barton & Stephanos Bibas, *Rebooting Justice: More Technology, Fewer Lawyers, and the Future of Law* (Encounter Books, 2017) at p 100.

11 Benjamin H Barton & Stephanos Bibas, *Rebooting Justice: More Technology, Fewer Lawyers, and the Future of Law* (Encounter Books, 2017) at p 8.

12 Jossey-Bass, 2002.

13 Benjamin H Barton & Stephanos Bibas, *Rebooting Justice: More Technology, Fewer Lawyers, and the Future of Law* (Encounter Books, 2017) at p 112.

14 Benjamin H Barton & Stephanos Bibas, *Rebooting Justice: More Technology, Fewer Lawyers, and the Future of Law* (Encounter Books, 2017) ch 8 at pp 110–137.

15 Benjamin H Barton & Stephanos Bibas, *Rebooting Justice: More Technology, Fewer Lawyers, and the Future of Law* (Encounter Books, 2017) at p 124.

12 But even in-court litigation can benefit from technology. The authors point out that the “biggest expense in modern litigation is not time spent in court; it is time spent on discovery”. They are confident that ODR is a boon and services such as LegalZoom, Rocket Lawyer and LawHelp Interactive are superior to nothing at all – which is what the poor and middle-income Americans have. LegalZoom charges only US\$39 for a basic will, and it explains very clearly, according to the authors, the difference between a last will, a living trust and a living will.¹⁶

13 To further help these litigants, especially litigants-in-person, the authors examine the ways that may accomplish the desired clearing of the tangled path for the lay litigants. Much can be achieved through judicious reforms in practice and procedure, and the authors provide a helpful chapter entitled “Court Reform”.¹⁷ One suggestion they make is that court clerks be granted some degree of freedom to advise litigants. Presently, they are not allowed to answer legal questions for fear of being sued. In some cases, they are simply prohibited from giving legal advice. Yet, as the authors note:¹⁸

... most clerks know a lot about their courts, including what documents to file and when, how court appearances are handled, and even what legal avenues are most likely to succeed in any particular kind of case. In fact, court clerks often know more about their court and the underlying law than many local lawyers, let alone *pro se* litigants.

14 Moving on to a scene of fewer lawyers and more paralegals, the authors consider the issue of unauthorised practice of law (“UPL”). They use the case of Ernest Chavis to illustrate “how mushy and standardless UPL is”.¹⁹ Chavis was an insurance agent who helped a 91-year-old woman draw up her will. Eventually, the beneficiaries quarrelled over the will. Nothing seemed to have come out of the action, but Chavis was charged for UPL. He was not allowed the statutory fee that he would otherwise have been allowed to charge. Secondly, he was barred from practising law (which he had no objection to since he was never a lawyer or tried to pass off as one). The third outcome was that the court found nothing wrong with the will itself and even refused to remove Chavis as

16 Benjamin H Barton & Stephanos Bibas, *Rebooting Justice: More Technology, Fewer Lawyers, and the Future of Law* (Encounter Books, 2017) at p 125.

17 Benjamin H Barton & Stephanos Bibas, *Rebooting Justice: More Technology, Fewer Lawyers, and the Future of Law* (Encounter Books, 2017) ch 9 at pp 138–158.

18 Benjamin H Barton & Stephanos Bibas, *Rebooting Justice: More Technology, Fewer Lawyers, and the Future of Law* (Encounter Books, 2017) at p 143.

19 Benjamin H Barton & Stephanos Bibas, *Rebooting Justice: More Technology, Fewer Lawyers, and the Future of Law* (Encounter Books, 2017) at p 161.

the administrator under the will.²⁰ The authors note that the UK is laxer with its rules governing UPL.

15 The problems concerning access to justice become stark when one contemplates the bizarre situation: “There is a glut of newly minted lawyers who want to be associates at large firms. But at the same time, there is a dearth of affordable divorce, housing, and criminal lawyers.”²¹ The authors examine a range of reforms that may ultimately provide greater legal aid to litigants. They have already argued elsewhere in the book that law schools can refine their curriculum to make graduates more practice-ready. They also find the three-year law course to be too long and suggest that the “market should be able to experiment with different, cheaper ways to deliver a legal education”²²

16 The problems that now haunt the American legal system are meticulously summed up by the authors, and the underlying problem they are trying to manage concerns the idea of doing justice shackled by the belief that justice must be perfect. And so, the quest for justice marches on – into the digital age.

20 Benjamin H Barton & Stephanos Bibas, *Rebooting Justice: More Technology, Fewer Lawyers, and the Future of Law* (Encounter Books, 2017) at pp 159–161.

21 Benjamin H Barton & Stephanos Bibas, *Rebooting Justice: More Technology, Fewer Lawyers, and the Future of Law* (Encounter Books, 2017) at p 167.

22 Benjamin H Barton & Stephanos Bibas, *Rebooting Justice: More Technology, Fewer Lawyers, and the Future of Law* (Encounter Books, 2017) at p 170.