Book review

Toward Real Justice for All Rebooting Justice

by Benjamin H. Barton and Stephanos Bibas

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The common metaphor for justice – the blindfolded Lady Justice (derived from the Roman Goddess, Justia), representing objectivity, holding the scales of justice and representing fairness – may be just a wishful thinking nowadays; the aspirational dream of fairness may be slipping away. The legal system based on the stability and predictability of *stare decisis* (legal precedent) has ossified into a system that all too frequently denies justice to the poor (we already knew that) but – increasingly – to the middle class. This book presents the USA with an access-to-justice problem, the authors note. Yet, there are workable and practical solutions – at least, that is the message of the authors.

This is an ambitious book, and the authors deserve credit for the vision they advance. It is, quite simply, divided into two parts; Part 1: "The Problem"; and Part 2: "How We Fix It." In Part 1, they note that the American system is predicated on the assumption of a "contest of equals." They note that the "law and process is too much for lay people, so fairness requires access to lawyers." But this assumption misses a critical point: "Our current system privileges not just those having a lawyer, but those having a really good lawyer." Yes, access to really good lawyers (or even good ones) is expensive, really expensive. As a consequence, many people with legal issues go without lawyers. Some attempt to represent themselves *pro se* (Latin, for self) in legal proceedings. This is fraught with problems from a legal system and judges who are not welcoming (often discouraging) of *pro se* representation because it slows down the machinery of justice. Moreover, a disparity in quality of legal representation can lead the more affluent litigant to overwhelm the less affluent with legal motions, discovery and other legal procedures that lead to an inequitable negotiated settlement or (in criminal cases) a substantively unfair plea bargain that reflects the disparity in legal resources of the parties rather than the merits of the case. Others simply abandon their legal claims in frustration and anxiety.

The US Supreme Court has focused on the issue of legal representation in criminal cases. In Gideon (1963) and Argersinger (1972), the Court guaranteed the right to counsel first to all felony defendants and then to defendants facing "any" actual imprisonment. Therefore, all criminal defendants facing even a day of jail time get a free government lawyer. But, this series of well-intentioned rulings was not accompanied by a proportionate increase in financial resources by the US Congress or legislatures. As a consequence, as the authors argue, the right to counsel was made broader but shallower, with dramatically increased caseloads for public defenders who had less time to deal with their clients and little or no investigative ability to match the prosecutors or police resources. Thus, criminal defendants rarely go to trial; instead,

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plea bargains are typical. But, similar problems occur in the civil justice system: access to the justice system requires repairs.

Part 2 offers concrete ideas and solutions. Of note, contrary to a number of legal reformers, the authors are not supportive of more lawyers (at least, as the legal profession is currently constructed). They argue that adding lawyers imposes substantial costs in terms of money and complexity of legal proceedings.

The book discusses the available research that suggests that *pro se* felony defendants achieve results at least as good (if not better) than their represented counterparts. However, in this reviewer's view, these studies are tainted by selection bias (perhaps *pro se* defendants are better educated or have stronger cases than represented defendants) and small sample sizes. Thus, more research is needed in the area before firm conclusions can be inferred.

The authors are on a firmer ground in suggesting that technology can – and already does – provide solutions to the problem of competent legal representation. For example, the book provides a substantial discussion of the work of Colin Rule, a pioneer in "online dispute resolution" (ODR). Rule wrote one of the first books about ODR in 2002 and helped design and operate the ODR system at eBay and PayPal. Rule faced 40 million disputes at eBay per year (1 per cent of eBay's transactions). If humans were hired to solve these disputes, it would take (for example) 1,000 human mediators, each settling a formidable 40,000 disputes per year. Rule came up with a "staircase" approach that relied on a computer (rather than human)-driven system. This approach left only the most intractable conflicts for humans. The eBay process proved very successful, eventually handling up to 60 million disputes a year and settling approximately 90 per cent with no human input. This was achieved with high rates of satisfaction with the process (90 per cent) – even among those who "lost." It must be noted that this flies in the face of prevailing mediation research (Kressel, 2000) which states that mediation works best in person, in the same room and in real time, so the parties and mediator absorb the "rich" verbal and non-verbal communication of each other that they listen to. Colin Rule and others licensed the eBay software and launched Modria, an ODR system that shows much promise to resolve a broad array of disputes. The authors place much emphasis on the promise of technology to enhance access to justice for the deprived, and they make a compelling case for at least significant improvements, in this area, pointing to the progress made by LegalZoom, Rocket Lawyer and other disruptive legal technology companies.

More optimistically, they offer solutions to expand those delivering legal services – in ways that parallel the expansion of medical services – by encouraging the states, American Bar Association and others to liberalize the definition of "practicing law" to allow paralegals and other paraprofessionals to handle routine legal services. From this reviewer's own years as a lawyer in a large national firm, many paralegals are more valuable – and more economical for clients – than many lawyers, at least with the common and typical legal forms. Finally, they note that court clerks are typically prohibited from giving "legal advice," with the result that *pro se* litigants are further handicapped by unfamiliarity with basic instructions on how and where to file forms. They urge courts to allow clerks to answer basic questions.

It is hard to argue with most of the arguments in this book: the present legal system is predicated on the assumption of litigants with relatively equal legal representation; however, in the modern age, this is all too frequently an unmet assumption; it unintentionally limits access to the poor and, increasingly, the middle class; it favors

those with financial resources who can afford the best attorneys; but, there are potentially promising alternatives on the horizon, primarily those offered by technological innovations in the legal industry, by tweaks that allow expansion of those offering legal services and by more helpful staffing in the court clerks' office.

To some, the authors' ideas may seem unworkable, even naive. But, changes have to begin somewhere. As a patient person once said: "Big things have small beginnings."

Barry Goldman
University of Arizona Tucson, Arizona, USA

Reference

Kressel, K. (2000), "Mediation", *The Handbook of Conflict Resolution: Theory and Practice*, in Deutsch, M. and Coleman, P.T. (Eds), Chap. 25, Jossey-Bass, San Francisco, CA.