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## Book Review: Justice Triage

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## BOOK REVIEW

### JUSTICE TRIAGE

Reviewing BENJAMIN H. BARTON & STEPHANOS BIBAS, *REBOOTING JUSTICE: MORE TECHNOLOGY, FEWER LAWYERS, AND THE FUTURE OF LAW* (2017).

Milan Markovic\*

#### INTRODUCTION

By any measure, the United States is suffering from a crisis involving lack of access to justice.<sup>1</sup> Low and middle-income Americans are often forced to navigate the civil legal system on their own, including when they face serious penalties such as eviction and wage garnishment.<sup>2</sup> Indigent criminal defendants are nominally better off

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\* Professor of Law, Texas A&M University School of Law. I would like to thank Susan Fortney, Jim Greiner, and Frank Pasquale for their insights in connection with this Book Review.

<sup>1</sup> The Legal Services Corporation's meta-analysis of existing research finds that less than one in five legal needs nationwide is resolved with the help of an attorney. See LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA 1 (2009), <https://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/JusticeGaInAmerica2009.authcheckdam.pdf>. For a discussion of the methodology and implications of legal needs research, see Milan Markovic, *Juking Access to Justice to Deregulate the Legal Market*, 29 GEO. J. LEGAL ETHICS 63, 69-72 (2016) [hereinafter *Juking Access to Justice*].

<sup>2</sup> See, e.g., HELAINE M. BARNETT, TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVS. IN N.Y., REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 1-2 (2013), [http://www.nycourts.gov/accesstojusticecommission/PDF/CLS-TaskForceReport\\_2013.pdf](http://www.nycourts.gov/accesstojusticecommission/PDF/CLS-TaskForceReport_2013.pdf) (reporting that ninety-eight percent of tenants in eviction cases, ninety-nine percent of borrowers in consumer credit cases, and ninety-five percent of parents in child support cases appear *pro se*).

because of the Constitutional right to appointed counsel,<sup>3</sup> but counsel need not be competent to satisfy the Sixth Amendment standard.<sup>4</sup>

These problems are not new, and the American legal profession has sought to address them in various ways, from advocating for increased funding for civil legal aid and indigent defense, to encouraging attorneys to provide *pro bono* services.<sup>5</sup> Unfortunately, the number of Americans who lack representation continues to grow.<sup>6</sup>

In recent years, prominent scholars have advocated for fundamentally rethinking how legal services are delivered to alleviate the current lack of access to justice.<sup>7</sup> These scholars argue that the legal profession's monopoly over the legal services market has priced low and middle-income Americans out of the legal market,<sup>8</sup> and that only by deregulating the market would more Americans of modest means be able to readily access legal services.

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<sup>3</sup> See *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that the Constitution provides for a right to counsel for indigent criminal defendants).

<sup>4</sup> See, e.g., Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After Gideon v. Wainwright*, 122 YALE L.J. 2150, 2154 (2013) (claiming that post-*Gideon*, “[t]he Supreme Court has refused to require competent representation, instead adopting a standard of ‘effective counsel’ that hides and perpetuates deficient representation.”); Michael J. Mannheimer, *Gideon, Miranda, and the Downside to Incorporation*, 12 OHIO ST. J. CRIM. L. 401, 428 (2015) (“The quality of counsel under the [Supreme Court’s Sixth Amendment jurisprudence] is so spotty that many defendants would be at least as well off—and some would be better off—if *Gideon* had never been decided.”).

<sup>5</sup> See generally Deborah L. Rhode, *Whatever Happened to Access to Justice*, 42 LOY. L.A. L. REV. 869, 892-911 (2009) (identifying expanding the right to counsel and increasing *pro bono* commitments as common proposals for access to justice reform).

<sup>6</sup> See LEGAL SERVS. CORP., *supra* note 1, at 25-26.

<sup>7</sup> See, e.g., Gillian Hadfield, *RULES FOR A FLAT WORLD: WHY HUMANS INVENTED LAW AND HOW TO REINVENT IT FOR A COMPLEX GLOBAL ECONOMY* 1 (2017); Alice Woolley & Trevor Farrow, *Addressing Access to Justice through New Legal Service Providers: Opportunities and Challenges*, 3 TEX. A&M L. REV. 549, 550-51 (2016); Laurel A. Rigertas, *The Legal Profession’s Monopoly: Failing to Protect Consumers*, 82 FORDHAM L. REV. 2683, 2683-84 (2014).

<sup>8</sup> See, e.g., Gillian K. Hadfield, *The Cost of Law: Promoting Access to Justice Through the (Un)Corporate Practice of Law*, 38 INT’L REV. L. & ECON., 43, 43 (2014); George C. Harris & Derek F. Foran, *The Ethics of Middle Class Access to Legal Services and What We Can Learn from the Medical Profession’s Shift to a Corporate Paradigm*, 70 FORDHAM L. REV. 775, 775-78 (2001).

Benjamin Barton and Stephanos Bibas's new book, *Rebooting Justice: More Technology, Fewer Lawyers, and the Future of Law*, is an eloquent exemplar of the deregulation literature. What sets *Rebooting Justice* apart from other works in the genre is that Barton and Bibas do not treat deregulation as a panacea. Their starting point is that Americans are not well served by lawyers' monopoly over the legal services market, but they do not envision a world in which every legal problem is resolved ably and efficiently. Their goal is much more modest: a less complex legal system in which lawyer assistance is not as vital, and public resources are used primarily to improve the quality of felony defense.<sup>9</sup>

Part I of this Review examines *Rebooting Justice*'s unabashed call for triaging Americans' legal needs. The authors vividly illustrate that legal needs cannot be addressed by merely seeking to expand access to lawyers. Barton and Bibas question shibboleths such as that every legal need requires attorney intervention and that attorney assistance is always beneficial. Barton and Bibas conceive of different levels of service based on a legal need's complexity and significance. They contend that our legal system can be simplified and that judges should do more to assist the unrepresented.

*Rebooting Justice* is also optimistic that information technology can expand access to justice. Although technology can certainly help to mitigate the justice gap, Part II observes that just as lawyers and judges have consciously or unconsciously sought to maintain the legal system's complexity, legal technology companies and alternative legal service providers may stand in the way of simplification and common sense reforms of the legal system.

As set out in Part III, *Rebooting Justice* may also misdiagnose lack of access to justice by viewing the problem largely as a function of the high cost of legal services and overregulation. People do not seek out legal assistance for a number of reasons, and complex social and cultural barriers deter people from even considering obtaining legal assistance. There is also more variance in regulatory structures in the United States than Barton and Bibas acknowledge, and jurisdictions such as the United Kingdom that have liberalized their legal markets have thus far not seen the access gains that some commentators expected.

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<sup>9</sup> See, e.g., BARTON & BIBAS at 7-8. For a discussion of their treatment of criminal misdemeanor cases, see *infra* Part I.

*Rebooting Justice* is likely to be uncomfortable reading for anyone who believes that justice should never be rationed. But in a time when the political branches are endeavoring to eviscerate public funding for legal services,<sup>10</sup> Barton and Bibas offer a compelling blueprint to protect the rights of low and middle-income Americans. Any credible plan to expand access to justice must grapple seriously with their call for justice triage.

### I. MORE LAWYERS? MORE JUSTICE?

The legal profession's strategy to expand access to justice has been to seek to provide Americans with lawyers in more situations.<sup>11</sup> As *Rebooting Justice* recounts, this approach has predominately failed. Most Americans address their civil justice problems on their own, and *pro se* litigants are overwhelming many courts.<sup>12</sup> Criminal defendants are theoretically better off because of *Gideon*<sup>13</sup> and its progeny, but the representation that they receive is too often deficient. Courts have upheld convictions where defense counsel were, *inter alia*, asleep, drunk, or disbarred.<sup>14</sup>

Political liberals and conservatives naturally differ on whether these problems can and should be addressed by increasing public funding for legal services. However, for Barton and Bibas, this debate distracts from the sheer scale of Americans' lack of access to justice.

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<sup>10</sup> The Trump administration has proposed abolishing the Legal Services Corporation that provides the majority of funding for legal aid. See Debra C. Weiss, *Trump Budget Eliminates Legal Services Corp. Funding*, ABA J. (Mar. 16, 2017, 8:45 AM), [http://www.abajournal.com/news/article/trump\\_budget\\_eliminating\\_funding\\_for\\_legal\\_services\\_corp/](http://www.abajournal.com/news/article/trump_budget_eliminating_funding_for_legal_services_corp/).

<sup>11</sup> See Stephanos Bibas, *Shrinking Gideon & Expanding Alternatives to Lawyers*, 70 WASH. & LEE L. REV. 1287, 1288 (2013) ("The standard response of academics has been to lament [lack of access to justice] and to call for a new law or more aggressive litigation and Constitutional challenges.").

<sup>12</sup> See *supra* text accompanying note 2.

<sup>13</sup> See *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>14</sup> See BARTON & BIBAS, at 18; see also Bibas, *supra* note 11, at 1288 ("While in theory the Sixth Amendment requires that counsel be minimally effective, in practice it does not. . . any lawyer with a pulse will be deemed effective.") (citation omitted).

We cannot untie the Gordian knot by adding more strands of rope; we need to cut it, to simplify it . . . . The real world of legal problems looks like an emergency room, with too many patients and too little time and money. We need to do triage, to narrow our ambitions, to focus on cases that are the most complex, most serious, and most meritorious. Where lawyers are truly indispensable . . . we need to focus our funding, to make lawyers meaningful in practice. . . . Where the stakes are lower or the issues are simpler, Americans need simpler, cheaper alternatives to giving everyone a free lawyer.<sup>15</sup>

The notion of triage may be an anathema in a country dedicated to “equal justice under the law,” but Americans’ legal needs are already being triaged, albeit in a desultory manner.<sup>16</sup> Legal aid offices turn away over one million cases a year and are restricted from offering certain services.<sup>17</sup> Public defender offices are notoriously overworked and have been forced to use litigation to lower their caseloads so that they do not provide deficient representation.<sup>18</sup>

Barton and Bibas advance their call for triage by drawing on nascent empirical research that questions the value of lawyers in less complex proceedings.<sup>19</sup> Kritzer’s review of Wisconsin administrative proceedings finds that lawyers and nonlawyer representatives perform similarly, with the determinative factor being experience with the proceeding in question.<sup>20</sup> In addition, an oft-cited randomized

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<sup>15</sup> BARTON & BIBAS, at 7-8.

<sup>16</sup> See *id.* at 182 (“We live in a world of finite resources, so some level of triage is not only likely, but inevitable. The question is whether we want to handle triage rationally and openly, or to back into a system that spreads out resources without any plan or purpose.”).

<sup>17</sup> See Rebekah Diller & Emily Savner, *Restoring Legal Aid for the Poor: A Call to End Draconian and Wasteful Restrictions*, 36 FORDHAM URB. L.J. 687, 688 (2009).

<sup>18</sup> See Peter A. Joy, *Rationing Justice by Rationing Lawyers*, 37 WASH. U. J.L. & POL’Y 205, 220-22 (2001) (detailing efforts to remedy excessive caseloads among Missouri public defender offices).

<sup>19</sup> BARTON & BIBAS, at 104-07.

<sup>20</sup> *Id.* at 152 (“The presence or absence of legal training is less important than substantial experience with the setting.” (citing Herbert M. Kritzer, LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK 201 (1998))).

control study of unemployment appeal cases by Greiner and Pattanayak concludes that legal representation extends the duration of cases by forty percent, but fails to produce better outcomes.<sup>21</sup> Although the implications of this research remain controversial,<sup>22</sup> in few settings has the value of lawyer assistance been tested rigorously.<sup>23</sup>

Barton and Bibas do not specify which types of matters merit the involvement of attorneys aside from felony cases.<sup>24</sup> But they are skeptical that existing resources are being used optimally. Whereas most commentators have lauded the Supreme Court's expansion of the right of counsel post-*Gideon*,<sup>25</sup> Barton and Bibas posit that there is a tradeoff in a world of finite resources between providing lawyers in a greater number of settings, and the quality of representation that defendants will receive.<sup>26</sup> Extending the right to counsel to more types of criminal cases in their view has "leached resources from felony cases and generally watered down expectations for the entire sys-

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<sup>21</sup> See *id.* at 108 (citing James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118, 2154 (2012)).

<sup>22</sup> See Russell Engler, *Turner v. Rogers and the Role of the Courts in Delivering Access to Justice*, 7 HARV. L. & POL'Y REV. 31, 52 (2013) (noting that variables such as "the judge, the court's procedures, the pool of cases, the lawyering strategies, and the nature and extent of the assistance . . ." might also impact case outcomes).

<sup>23</sup> See Leslie Levin, *The Monopoly Myth and Other Tales About the Superiority of Lawyers*, 82 FORDHAM L. REV. 2611, 2617-18 (2014) (noting that claims regarding the efficacy of attorneys are based predominately on nonrandom observational studies).

<sup>24</sup> BARTON & BIBAS, at 104 (noting that felony cases are procedurally complex and entail the highest stakes).

<sup>25</sup> See, e.g., John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1, 45-46 (2013); John Gross, *The True Benefits of Counsel: Why Do-It-Yourself Lawyering Does Not Protect the Rights of the Indigent*, 43 N.M. L. REV. 1, 33 (2013) ("The Supreme Court has been conscious of the financial burden placed upon the states by their decisions to extend the right to counsel. Nevertheless, the Court felt that the presence of counsel was required . . . . Whatever the cost, it was money well spent.").

<sup>26</sup> BARTON & BIBAS, at 183-84; see also Erica Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 488 (2007) ("Over the past twenty-five years, caseloads of indigent defenders have borne the brunt of the rise in the number of cases requiring court-appointed counsel. As a result of these increases, per-lawyer caseloads in many jurisdictions now radically exceed accepted standards.").

tem.”<sup>27</sup> To forsake the rights and interests of criminal misdemeanor defendants in order to better protect those of felony defendants may strike some readers as a false dichotomy, but empirical research suggests that the right to counsel has not only been “watered down” but is at times illusory. Jurisdictions regularly fail to provide counsel when constitutionally required to do so.<sup>28</sup>

Barton and Bibas believe that this experience calls into question the utility of providing public funding for representation in civil cases (often dubbed “Civil *Gideon*”).<sup>29</sup> Rather, the goal should be to simplify civil and criminal proceedings so that legal representation is less necessary.<sup>30</sup> The authors highlight that in the early years of the United States, literate citizens would regularly represent themselves in courts without the need for legal assistance.<sup>31</sup> Their account overlooks that endeavoring to apply the law without lawyers created a whole host of societal ills during this period and hastened the development of organized state bars.<sup>32</sup> But proceedings can undoubtedly be made simpler without risking the rule of law.

Simplification can take many forms. Some courts already facilitate self-representation by providing *pro se* litigants with simplified pleading forms, resources to conduct legal research, and access to designated court staff.<sup>33</sup> Alternative dispute resolution, including online dispute resolution (ODR), allows parties to resolve key issues outside of court and on a more flexible schedule.<sup>34</sup> Large companies such as eBay and Paypal resolve thousands of small claims disputes

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<sup>27</sup> BARTON & BIBAS, at 107. The authors take particular issue with *Argersinger v. Hamlin*, 207 U.S. 25 (1972) which extended the right to counsel to misdemeanor cases that could lead to imprisonment. *Id.* at 40-41.

<sup>28</sup> See Erica Hashimoto, *Abandoning Misdemeanor Defendants*, 25 FED. SENT. R. 103, 103 (2012) (“The existing data, although incomplete, strongly suggest that significant percentages of misdemeanor defendants who have a right to counsel proceed unrepresented.”).

<sup>29</sup> BARTON & BIBAS, at 107.

<sup>30</sup> *Id.* at 140-42.

<sup>31</sup> *Id.* at 9.

<sup>32</sup> Anton-Hermann Chroust, *Legal Profession in Colonial America*, 34 NOTRE DAME L. REV. 44, 62 (1958).

<sup>33</sup> BARTON & BIBAS, at 143-45.

<sup>34</sup> *Id.* at 156-57.



between their users every year via ODR, and there is no reason that the justice system could not do the same with low-level disputes.<sup>35</sup>

*Rebooting Justice* also makes a significant contribution to the access to justice literature by focusing on the ability of judges to transform criminal and civil proceedings. It maintains that judges should not act as mere passive observers when presiding over cases involving *pro se* litigants, but should instead emulate the inquisitorial style of civil law judges.<sup>36</sup> This proposal is less radical than it may appear upon first inspection. Judges in cases ranging from small claims to disability and unemployment benefits appeals routinely relax or do away with evidentiary standards, ask questions of the parties and witnesses, and conduct the proceedings in such a way that lawyers are not needed.<sup>37</sup> These administrative proceedings have received relatively little attention from legal scholars, but participants may well perceive them as more fair than proceedings that are conducted in a more adversarial manner.

Judges and court staff already labor under significant resource constraints, and thus may resist efforts to make them more responsible for protecting the rights of *pro se* parties.<sup>38</sup> Moreover, there is also only so much that judges can do when *pro se* litigants face adversaries that are represented by highly trained and skilled opposing counsel.<sup>39</sup> But training judges to better manage proceedings with unrepresented parties, without forsaking neutrality, is far more attainable than extending *Gideon* to the civil realm.<sup>40</sup> Some states have already promulgated guidelines that encourage judges to explain the

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<sup>35</sup> *Id.* at 114-15.

<sup>36</sup> *See id.* at 150-51.

<sup>37</sup> *Id.* at 150-52.

<sup>38</sup> *Id.* at 152-54.

<sup>39</sup> *See* Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 *FORDHAM L. REV.* 969 (2004).

<sup>40</sup> *See* BARTON & BIBAS, at 71-72 (arguing that *Turner v. Rogers*, 564 U.S. 431 (2011) effectively foreclosed *Civil Gideon*); *see also* *Juking Access to Justice*, *supra* note 1, at 86 (“[A] more feasible and effective alternative than seeking to ensure that every litigant has a representative would be to more closely regulate the dealings between attorneys and unrepresented individuals and impose additional obligations on judges.”).

trial process, to clarify elements and claims, and to inquire into whether settlements are entered into voluntarily.<sup>41</sup>

The virtue of these proposals is that they are largely within the power of lawyers and judges to implement and do not depend on an infusion of public funding.<sup>42</sup> The fact that process simplification has only begun to gain traction illustrates the degree to which the legal profession has been wedded to expanding access to justice through access to lawyers without considering whether this is the most effective way to assist low and middle-income Americans.

## II. TECHNO-OPTIMISM

Although *Rebooting Justice* questions widely-held tenets concerning the value and importance of lawyer assistance,<sup>43</sup> it is far more bullish on legal technology's potential to expand access to justice.<sup>44</sup> Barton and Bibas write:

[T]echnology and new approaches to dispute resolution have led us to the threshold of a new golden age of access to justice . . . . Amazingly, it is already happening all around us. Because our statutes, regulations, and court decisions are now online, ordinary Americans have more access to the laws that govern them than ever before . . . . When LegalZoom and Rocket Lawyer sell legal documents for a fraction of the price charged by a lawyer, we all have greater access to law and legal remedies . . . . Information technology brings creative destruction to a stodgy field, offering many new ways of providing legal help cheaply and quickly.<sup>45</sup>

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<sup>41</sup> Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J. L. ETHICS & PUB. POL'Y 367, 377-79 (2008).

<sup>42</sup> BARTON & BIBAS, at 180-81.

<sup>43</sup> See, e.g., *id.* at 109 (“[I]ntroducing more lawyers has dynamic effects that reshape the entire system, making it slower, harder, and more complicated for unrepresented parties to seek justice.”).

<sup>44</sup> For an excellent discussion of the discourse of optimism pertaining to access to justice and legal technology, see David Luban, *Optimism, Skepticism, and Access to Justice*, 3 TEX. A&M L. REV. 495, 499-508 (2016).

<sup>45</sup> BARTON & BIBAS, at 195.

As the authors acknowledge, there are, of course, potential drawbacks to people managing their legal needs via information technology and without attorney assistance.<sup>46</sup> Not everyone is equally capable of leveraging technology effectively.<sup>47</sup> More generally, legal needs often do not fall into easily identifiable categories,<sup>48</sup> and clients' interests cannot always be reduced to achieving certain predetermined outputs.<sup>49</sup> For instance, legal documents created via LegalZoom or Rocket Lawyer may not have their intended effect, and these companies disclaim warranties on their products.<sup>50</sup>

Nevertheless, much of *Rebooting Justice*'s techno-optimism is warranted, even if information technology does not precipitate a "golden age of access to justice." In previous decades, the most basic of legal tasks may have required consulting with an attorney whereas now one can fill out a will, start a business, or change one's name from the comfort of one's home.<sup>51</sup> As legal technology develops, the

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<sup>46</sup> *Id.* at 195-97.

<sup>47</sup> *See id.* at 117-18. Some research suggests that this problem is not at all confined to elderly individuals. *See generally* Catrina Denvir et al., *Surfing the Web-Recreation or Resource? Exploring How Young People in the UK Use the Internet as an Advice Portal for Problems with a Legal Dimension*, 23 INTERACTING WITH COMPUTERS 96, 99-101 (2011) (reporting that eighteen to twenty-four years olds were no more likely to use the internet to address legal problems than individuals over sixty and struggled to find useful, reliable information once on the internet).

<sup>48</sup> *See* Frank Pasquale & Glyn Cashwell, *Four Futures of Legal Automation*, 63 UCLA L. REV. DISCOURSE 26, 29 (2015) (warning of a "cookie-cutter, one-size-fits-all" conception of law).

<sup>49</sup> Katherine Kruse has argued that lawyers are too often wedded to a conception of clients as "cardboard clients"—one dimensional figures interested only in maximizing their legal and financial interests." Katherine Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 GEO. J. LEGAL ETHICS 103, 103 (2010).

<sup>50</sup> *See, e.g.*, BARTON & BIBAS, at 128-29; Lisa H. Nicholson, *Access to Justice Requires Access to Attorneys: Restrictions on the Practice of Law Serve a Societal Purpose*, 82 FORDHAM L. REV. 2761, 2768, 2772 (2014); Richard Zorza, *Five Broad New Ideas to Cut through the Access to Justice-Commercialization-Deregulation Conundrum*, 29 GEO. J. LEGAL ETHICS 683, 692 (2016) (suggesting aggressive enforcement of consumer protection laws against alternative legal service providers).

<sup>51</sup> BARTON & BIBAS, at 124-25.

quality of the products developed by alternative legal service providers like LegalZoom and Rocket Lawyer will presumably improve.<sup>52</sup>

Yet *Rebooting Justice* neglects to consider the possibility that legal technology companies and alternative legal services providers might endeavor to tailor the legal system to suit their ends.<sup>53</sup> Barton and Bibas detail vividly how the legal profession has molded the legal system to its advantage, but they largely assume that for-profit corporations will work to make the legal system simpler and more accessible.

*Rebooting Justice* does not reference TurboTax, but this popular tax software is often lauded as the paradigmatic example of technology's ability to replace professional advisors such as lawyers and accountants.<sup>54</sup> There is no doubt that TurboTax has made it easier for Americans to file their taxes.<sup>55</sup> But this has come at a cost. Intuit, the maker of TurboTax, has lobbied aggressively and effectively to preserve its control over the tax preparation market.<sup>56</sup>

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<sup>52</sup> See *id.* at 129 (“LegalZoom may eventually do a volume of business that will allow it to surpass the quality of any individualized work.”); see also Benjamin A. Barton, *Some Early Thoughts on Liability Standards for Online Providers of Legal Services*, 44 HOFSTRA L. REV. 542, 555 (2015) (noting that legal documents drafted via online providers may be imperfect but that lawyers also routinely draft imperfect documents). Some commentators have also proposed regulating alternative legal services providers. See, e.g., Matthew Longobardi, Note, *Unauthorized Practice of Law and Meaningful Access to Courts: Is Law Too Important to Be Left to Lawyers*, 35 CARDOZO L. REV. 2043, 2074 (2014) (“The best option to fully utilize nonlawyers would be to stratify the current legal profession through the use of a licensing system for nonlawyers.”). Barton and Bibas do not endorse this approach and appear to prefer an alternative regime whereby consumers would have tort remedies against entities that provide flawed legal advice or documents. BARTON & BIBAS, at 174.

<sup>53</sup> BARTON & BIBAS, at 76 (“No one sat down and deliberately designed the flawed criminal or civil justice systems . . . Nevertheless, the unconscious incentives that drive the system are probably more powerful and important than the conscious ones.”).

<sup>54</sup> See, e.g., Luban, *supra* note 43, at 500-01; Raymond Brescia, *Uber for Lawyers: The Transformative Potential of a Sharing Economy Approach to the Delivery of Legal Services*, 64 BUFF. L. REV. 745, 821-22 (2106).

<sup>55</sup> Rodney P. Mock & Nancy E. Schurtz, *The TurboTax Defense*, 15 FLA. TAX REV. 443, 532 (2014) (“[L]ow-income taxpayers have also gained with the modernity of free electronic filing and an all-around more convenient, cost effective, and reliable method to calculate their taxes or refund.”).

<sup>56</sup> See *id.* at 464.

Among other actions, it has endeavored to impose onerous regulations against tax preparer competitors. It has also sought to block Americans from filing their taxes by simply reviewing a pre-filled government filing. This is how citizens in some European countries complete their taxes, and the United States could give its taxpayers the same option. After all, the government already collects earnings information from employers.<sup>57</sup>

There is nothing improper or illegal about Intuit and other companies pursuing policies that allow them to maximize profits. However, Barton and Bibas treat lawyers as somehow unique in their desire to limit competition and to engage in rent-seeking,<sup>58</sup> even though large technology companies are usually better positioned to advocate for legislation that serves their interests and to stop initiatives that challenge their business models than the more diffuse and divided legal profession.<sup>59</sup>

*Rebooting Justice*'s techno-optimism also obscures that some effective access to justice reforms can be decidedly low-tech. For example, instead of relying on LegalZoom and other companies to sell more wills to solve the problem of Americans dying intestate, states

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<sup>57</sup> See *id.* at 524; Liz Day, *How the Maker of TurboTax Fought Free, Simple Tax Filing*, PROPUBLICA (Mar. 26, 2013), <https://www.propublica.org/article/how-the-maker-of-turbotax-fought-free-simple-tax-filing>. Intuit's lobbying efforts were ultimately unsuccessful in California due in large part to the efforts of a dogged law professor. See generally Alex Mayyasi, *The Stanford Professor Who Fought the Tax Lobby*, PRICEONOMICS (Mar. 22, 2017), <https://priceconomics.com/the-stanford-professor-who-fought-the-taxlobby> (detailing efforts by Intuit to stop California's ReadyReturn program).

<sup>58</sup> In one memorable passage, Barton and Bibas warn that "vigilance is necessary" in connection with the specter of unauthorized practice of law enforcement. BARTON & BIBAS, at 137.

<sup>59</sup> As one commentator has observed in the context of the internet broadband industry: "[L]arger companies simply have more resources. They can therefore donate more money, hire more (and better) lobbyists, and spend more on marketing. Consolidation also imposes discipline and order on the lobbying process . . . . [W]ell organized and well-resourced interest groups can often secure their interests better than unorganized and leaderless majorities. Consolidation provides the top-down leadership and coordination that successful lobbying efforts require." John Blevins, *Death of the Revolution: Legal War on Competitive Broadband Technologies*, 12 YALE J. L. & TECH. 85, 125 (2010).

could adopt simplified model wills for ordinary citizens to use, as Michigan and California have done quite successfully.<sup>60</sup>

An even more ambitious alternative (with respect to wills in particular) would be to give Americans the option to fill out a testamentary schedule as part of their state tax returns.<sup>61</sup> Integrating wills into tax returns has several advantages over making them more available over the internet or via alternative legal service providers like LegalZoom. Americans would be able to complete wills in a standardized form and without the customary formalities at a time when they are actively considering their finances; they would also be able to easily update their wills year-to-year.<sup>62</sup> These schedules would be ideal for individuals of modest means who are unlikely to hold complex assets. Because these types of initiatives would lessen the need for legal services in this area, one suspects that they are likely to be opposed by both lawyers *and* alternative legal service providers.

Legal technology holds much promise, but it cannot be assumed that for-profit legal technology companies will always work towards the public good. Techno-optimism should also not deflect from the responsibility of policymakers to simplify legal processes that citizens utilize frequently.

### III. EMPIRICAL EVIDENCE ON REGULATION AND COSTS

Despite its nuanced understanding of the challenges Americans face in obtaining quality legal assistance, *Rebooting Justice* attributes lack of access to justice almost entirely to overregulation. Because of costly licensing requirements, including the high cost of legal education, Americans cannot afford legal representation, and prohibitions on the practice of law by nonlawyers prevent the proliferation of lower cost options in the legal services market.<sup>63</sup> To advance access to justice, the legal profession should “get out of the way” and allow less expensive alternatives to lawyer representation to develop.<sup>64</sup>

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<sup>60</sup> Reid Kress Weisbrod, *Wills for Everyone: Helping Individuals Opt-Out of Intestacy*, 53 B. C. L. REV. 877, 926 (2012).

<sup>61</sup> *See id.* at 880-81.

<sup>62</sup> *Id.*

<sup>63</sup> BARTON & BIBAS, at 67-68.

<sup>64</sup> *Id.* at 8.

Barton and Bibas are correct that the legal market in the United States, like that of most countries, is heavily regulated.<sup>65</sup> However, it is far from clear that it is the high cost of legal services—driven by alleged overregulation—that is preventing Americans from obtaining legal assistance. A recent study by Rebecca Sandefur found that cost explains the decision to not seek legal assistance in less than a fifth of civil justice situations.<sup>66</sup> According to Sandefur, the two most common reasons why people do not seek help with their legal problems are that they believe they can either manage them on their own, or that they believe seeking help would make no difference.<sup>67</sup> Other research has come to similar conclusions.<sup>68</sup>

Lowering the cost of legal services, as Barton and Bibas propose, would undoubtedly benefit low and middle-income people, even if there are a multitude of factors that prevent them from obtaining legal assistance. However, the authors do not fully substantiate that the cost of ordinary legal services is especially high in the current legal market or that overregulation is the cause.<sup>69</sup>

To support their claim regarding the high cost of legal services, Barton and Bibas note that the average attorney charges two hundred dollars an hour.<sup>70</sup> However, this figure by itself is not particularly meaningful. For example, the average rate may mask that most attorneys charge lower rates. Under these circumstances, it should be relatively easy to find legal help at a lower price point in most jurisdictions. Two hundred dollars an hour may also not be unaffordable if the legal service in question can be completed in short order. Moreo-

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<sup>65</sup> Nuno Garoupa, *Globalization and Deregulation of Legal Services*, 38 INT'L REV. L. & ECON. 77, 84 (2013) (“Legal markets are heavily regulated by the state in most jurisdictions.”).

<sup>66</sup> Rebecca Sandefur, *Bridging the Gap: Rethinking Outreach for Greater Access to Justice*, 37 U. ARK. LITTLE ROCK L. REV. 721, 722-23 (2015) (citations omitted).

<sup>67</sup> *Id.* at 725-26.

<sup>68</sup> See *Juking Access to Justice*, *supra* note 1, at 73 (2016) (summarizing state-level legal needs research).

<sup>69</sup> BARTON & BIBAS, at 10.

<sup>70</sup> *Id.* at 24.

ver, some lawyers offer basic legal services on a less costly, flat fee basis.<sup>71</sup>

Bibas and Barton undercut their own argument about the high cost of legal services by noting that LegalZoom and Rocket Lawyer charge prices for services such as uncontested divorces that are largely in-line with attorneys.<sup>72</sup> For other services, such as bankruptcy filings, the authors note that lawyers may be *less* expensive.<sup>73</sup>

*Rebooting Justice*'s emphasis on high costs in the current market is also difficult to reconcile with their concession that there is substantial competition in the legal market; according to Barton and Bibas, competition has been so fierce that it has shrunk earnings among solo practitioners by a third over the last few decades.<sup>74</sup> This contention, based on an analysis of sole proprietor tax filings,<sup>75</sup> begs the question of why more lawyers do not lower their fees in order to

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<sup>71</sup> See generally Latonia Haney Keith, *Poverty, the Great Unequalizer: Improving the Delivery System for Civil Legal Aid*, 66 CATH. U. L. REV. 55, 92 (2016) ("The flat-fee model offers individuals specified legal services (i.e., limited scope representation) at specific rates . . . [It] is particularly well suited for modest-means communities, making legal services generally more accessible.").

<sup>72</sup> Compare BARTON & BIBAS, at 52 (quoting from a Tennessee lawyer's website that uncontested divorces range in cost from \$150-\$1500), with BARTON & BIBAS, at 52 (noting that an uncontested divorce starts at \$299 from LegalZoom).

<sup>73</sup> *Id.* at 126 (noting that it may be cheaper to hire a lawyer for bankruptcy than using LegalZoom or Rocket Lawyer).

<sup>74</sup> *Id.* at 66-67.

<sup>75</sup> BARTON & BIBAS, at 55-56. Although beyond the scope of this Review, the IRS data is unreliable as a means to assess solo practitioners' incomes. First, the IRS data includes everyone filing as a sole proprietor who works in the legal services industry regardless of whether he or she is a lawyer. Second, many attorneys' practices are not organized as sole proprietorships, and for those that are, the attorneys are likely to claim numerous deductions to offset their income and minimize tax obligations. Third, the IRS filings would include attorneys who report no income or merely practice part-time. See also Michael Simkovic, *How Much Do Lawyers Working in Solo Practice Actually Earn*, BRIAN LEITER'S LAW SCHOOL REPORTS (July 26, 2016), <http://leiterlawschool.typepad.com/leiter/2016/07/how-much-do-lawyers-working-in-solopractice-actually-earn-michael-simkovic.html> (raising additional criticisms of use of IRS data by Professor Barton). According to information collected by the State Bar of Texas, the median full-time solo practitioner earned \$105,000 in 2015. STATE BAR OF TEXAS, DEP'T OF RESEARCH AND ANALYSIS, 2015 INCOME FACT SHEET, 2 (2016), [https://www.texasbar.com/AM/Template.cfm?Section=Demographic\\_and\\_Economic\\_Trends&Template=/CM/ContentDisplay.cfm&ContentID=34183](https://www.texasbar.com/AM/Template.cfm?Section=Demographic_and_Economic_Trends&Template=/CM/ContentDisplay.cfm&ContentID=34183).



reach the large percentage of the population that is purportedly priced out of the market?

One potential answer is that regulation inhibits lawyers from adopting such models. For example, most lawyers graduate with significant student loan debt and thus are limited in what they can invest in their legal practices. In addition, in every state other than the District of Columbia, lawyers cannot share profits with nonlawyers, ensuring that law firms cannot raise capital as easily as other businesses and making it more difficult to invest in technology or mass market advertising.<sup>76</sup>

Nevertheless, there is greater variance in regulatory structures than *Rebooting Justice* acknowledges. In several states, one can become a lawyer without attending an ABA-accredited law school; some do not require attending a brick-and-mortar law school at all.<sup>77</sup> Nonlawyers routinely practice before federal agencies, and some states now allow nonlawyer practice in limited areas.<sup>78</sup> The notion of an undifferentiated, completely lawyer-dominated national legal market that keeps the cost of legal services high is somewhat of a myth.<sup>79</sup>

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<sup>76</sup> See Edward S. Adams & John H. Matheson, *Law Firms on the Big Board? A Proposal for Nonlawyer Investment in Law Firms*, 86 CAL. L. REV. 1, 1-2 (1998); see also Renee Newman Knake, *Democratizing the Delivery of Legal Services*, 73 OHIO ST. L. J. 1, 8 (2012) (“Nonlawyer investors understand that a profit can be realized by offering [legal] services through ‘bulk legal processing capabilities’ rather than through “myriad sole practitioners and small firms across the land.”).

<sup>77</sup> Seven jurisdictions permit bar admission applicants to study in a law office in lieu of attending law school; five jurisdictions permit applicants to study law through a correspondence course; and six jurisdictions permit applicants to study law online. Timothy P. Chinaris, *We Are Who We Admit: The Need to Harmonize Law School Admission and Professionalism Processes with Bar Admission Standards*, 31 MISS. C. L. REV. 43, 47 n.10 (2012).

<sup>78</sup> See Deborah L. Rhode, *Professional Integrity and Professional Regulation: Nonlawyer Practice and Nonlawyer Investment in Law Firms*, 39 HASTINGS INT'L & COMP. L. REV. 111, 113 (2016); see also Brooks Holland, *The Washington State Limited License Legal Technician Practice Rule: A National First in Access to Justice*, 82 MISS. L.J. 75, 95 (2013) (describing Washington State’s program of licensing “limited license legal technicians” to practice in family law and other areas).

<sup>79</sup> See BARTON & BIBAS, at 179; see also Clifford Winston, *Are Law Schools and Bar Exams Necessary?*, N.Y. TIMES (Oct. 24, 2011), [http://www.nytimes.com/2011/10/25/opinion/are-law-schools-and-bar-examsnecessary.html?\\_r=1](http://www.nytimes.com/2011/10/25/opinion/are-law-schools-and-bar-examsnecessary.html?_r=1) (“For decades the legal industry has operated as a monopoly, which has been made possible by self-imposed rules and state licensing restrictions.”).

Fortunately, it is no longer necessary to merely speculate on the effects of legal market deregulation. The United Kingdom began allowing corporations, known as alternative business structures (ABS), to own law firms and offer legal services since 2007.<sup>80</sup> Scholars have claimed that well-capitalized ABS would be more innovative than traditional firms, and would also make legal services more affordable.<sup>81</sup> As Barton and Bibas note, deregulation and the rise of ABS have happily not led to the collapse of the legal system.<sup>82</sup> But these developments have also not had an appreciable effect on access to justice.<sup>83</sup> One regulator acknowledged recently that “[W]e are . . . not aware of any strong evidence that ABS provide cheaper legal services and thereby improve access to justice.”<sup>84</sup>

There are a number of possible explanations for the modest effects of liberalization in the United Kingdom, including that insuffi-

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<sup>80</sup> Myles V. Lynk, *Implications of the UK Legal Services Act 2007 for U.S. Law Practice and Legal Ethics*, 23 PROF. LAW. 26, 34 (2015) (“Alternative business structures are [business entities] that provide “reserved activities” (legal services), in which nonlawyers have an equity ownership investment in the firm and lawyers and nonlawyers can share in the management and control of the business.”).

<sup>81</sup> See, e.g., Ray Worthy Campbell, *Rethinking Regulation and Innovation in the U.S. Legal Services Market*, 9 N.Y.U. J. L. & BUS. 1, 3 (2012); BARTON & BIBAS at 199 (describing innovation by Co-op legal services). Co-op was actually formed prior to the UK’s deregulatory reforms and has consistently lost money. Neil Rose, *Co-op Legal Services Back in the Black, But Turnover Falls Again*, LEGALFUTURES (Apr. 7, 2016), <http://www.legalfutures.co.uk/latest-news/co-op-legal-services-back-black-turnoverfalls>.

<sup>82</sup> BARTON & BIBAS, at 199.

<sup>83</sup> See Nick Robinson, *When Lawyers Don’t Get All the Profits: Nonlawyer Ownership, Access, and Professionalism*, 29 GEO. J. LEGAL ETHICS 1, 15-16 (2016).

<sup>84</sup> Stephen Denyer, *Rules for a Flat World: The UK Experience*, PRAWFSBLAWG (Feb. 27, 2017), <http://prawfsblawg.blogs.com/prawfsblawg/2017/02/rules-for-a-flat-world-theuk-experience.html>. See also Lisa Webley, *Legal Profession (De)Regulation, Equality, and Inclusion, and the Contested Space of Professionalism within the Legal Market of England and Wales*, 83 FORDHAM L. REV. 2349, 2350 (2015) (“[I]t is unclear if market innovations are prompting greater equality and inclusion for marginalized would-be clients or allowing the state and the legal profession(s) to evade the fundamental rule of law precept of access to justice for all.”); Alberto Bernabe, *Justice Gap v. Core Values: The Common Themes in the Innovation Debate*, 41 J. LEGAL PROF. 1, 13 (2016) (noting gap between “academic speculation” about ABS versus actual empirical evidence of positive effects).

cient time has passed to come to any definitive conclusions. Nevertheless, one of the underappreciated aspects of lack of access to justice is that many of the legal services that people most need also happen to be quite labor-intensive.<sup>85</sup> Some matters can be dispensed with after minimal factual and legal investigation, but diligent representation—which Barton and Bibas extol in the felony context—often requires significant investigation for which some individual or entity must pay. Nor is it clear why investors and firms in a more liberalized market would seek to focus on populations that are currently underserved when doing so would likely require significant capital outlays and when they are able to invest in sectors that are already lucrative and command high margins. Unsurprisingly, in the United Kingdom, much of the non-lawyer investment has occurred in the personal injury sector.<sup>86</sup>

Lack of access to justice has proven to be a daunting problem because complex educational, cultural, and psychological barriers prevent individuals from seeking legal assistance.<sup>87</sup> While *Rebooting Justice* does not treat deregulation as a panacea, it is overly focused on the cost of legal services and regulation as the chief barriers to expanding access.

## CONCLUSION

The American legal system has long been failing many low and middle-income Americans. *Rebooting Justice* argues persuasively that this problem cannot be solved as long as access to justice is conceived of as access to lawyers. Barton and Bibas very much accept contemporary political realities, and they propose salutary reforms to benefit Americans of modest means. Some of these re-

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<sup>85</sup> The British futurist Richard Susskind describes these types of legal services as “bespoke.” Courtroom practice is the prototypical example. See RICHARD SUSSKIND, *TOMORROW’S LAWYERS* 58 (2013).

<sup>86</sup> See Judith A. McMorow, *UK Alternative Structures for Legal Practice: Emerging Models and Lessons for the US*, 47 *GEO. J. INT’L L.* 665, 699-70 (2016) (“ABS firms have had a huge impact on the personal injury market in the United Kingdom. By 2014, one-third of personal injury turnover (billings) were from ABS firms.”).

<sup>87</sup> *Juking Access to Justice*, *supra* note 1, at 73 (2016); Catherine R. Albiston & Rebecca Sandefur, *Expanding the Empirical Study of Access to Justice*, 2013 *WISC. L. REV.* L.R 101, 117 (2013) (questioning centrality of the cost of legal services to lack of access to justice).

forms—particularly with respect to reforming courts—are quite attainable and are within the legal profession’s power to implement.

Although this Review has questioned some of *Rebooting Justice*’s optimism towards information technology, as well as its assessment of the causes of lack of access to justice, the current state of affairs in which too few Americans obtain competent and diligent legal assistance is clearly unsustainable. As Barton and Bibas remind us, today’s legal market is not solely the domain of lawyers, and Americans are already using alternatives to lawyers to address legal problems. The legal profession can ignore this reality and attempt to preserve the vestiges of its monopoly, or it can endeavor to make the legal system truly responsive to the needs of low and middle-income people.