We can procure modest rehabilitation through diversion of funds to drug detoxification and educational and vocational counseling. But these programs serve largely to mitigate the simultaneous effects of the penalties. Indeed, as Western notes, in the age of mass incarceration, "rehabilitation" has taken on a new meaning: we no longer even pretend that prison itself rehabilitates, instead recognizing that, to be reintegrated into society, prisoners require rehabilitation from the effects of prison itself.

Conclusion

To capture the difficulty of reconciling a theory of punishment with the practice of punishment, Tonry reminds us of Hegel's cautious, flexible view of retribution as a justification for punishment: "[E]quality remains the basic measure of the criminal's essential desert, but not of the specific external shape which the retribution should take." Tonry's elegant essay ends, at the same time, with an acerbic look at theory itself: fashionable philosophers of punishment "provide coherent, articulable bases for assessing whether particular punishment policies, practices or decisions are just," even while we suffer from a deficit of moral clarity because "[p]olicies have been adopted, and people punished under them, that cannot be justified under any of the normative frameworks developed in the past two centuries."

On these questions, the democratic process has somehow passed by academic thinkers, in that the last few years have seen political movement toward putting brakes on mass incarceration. Budget problems have constrained a few legislatures to arrange quiet truces on the political demagoguery of crime, lower rates of crime have pushed law-and-order politics off the national election agenda, and some states have even reached toward reducing the infamous 1970s-era mandatory minimums on drug sentences. But these moves toward sanity are modest and fragile.

As Western shows, the United States has proved capable of reducing its incarceration rate. But the conventional view is that mass incarceration is here to stay: once incarceration reaches a critical mass, it is self-reinforcing by virtue of the criminogenic nature of the prison experience and the resilience of American criminal justice institutions in reabsorbing and recycling recidivists, and the absolute number of individuals in prison is so large that a compensatory decrease has become politically infeasible. The jurisprudes of punishment from the parallel universe will never enter majorly into real-world penal policy, but they can surely do better by making theory face reality. ■

Boden Lecture | Margaret Raymond

"The Report of My Death Was an Exaggeration"—Delaying the Postmortem on American Law Practice

Dean Joseph D. Kearney, on behalf of Marquette Law School, invited Margaret Raymond, the new Fred W. & Vi Miller Dean and Professor of Law at the University of Wisconsin, to deliver Marquette's annual Robert F. Boden Lecture this past fall. Dean Raymond's lecture focused on the future of American law practice. The following is an excerpt.

Margaret Raymond

Another phenomenon that Richard Susskind, in *The End of Lawyers,* and others believe will contribute to the end of lawyers is the prospect of alternative dispute resolution mechanisms that do not require lawyers at all. A recent news article discussed General Electric's insistence that its suppliers submit to having their simple disputes with the company resolved using an online settlement process called Cybersettle. The mechanism, a set of blind bidding opportunities that attempt to align the offers each party will make, is, of course, not free; the company providing the platform charges for its services. But the company argues that the cost and efficiency of the Cybersettle process

make it preferable to traditional litigation or alternative dispute resolution.

This is a fascinating development. It's not, however, unanimously viewed as an improvement. New York City used it for several years to settle small personal-injury and property-damage claims and recently returned to using in-house staff to manage its settlement processes. Still, a process such as Cybersettle does away with the need for a lawyer entirely for the parties using it, and may, in fact, reduce those situations in which individuals consult lawyers.

It's not, however, going to end litigation. Susskind seems to believe that individual access to legal information will lead to a significant reduction in legal disagreements; "as citizens," he writes, "we should be able to find out easily and quickly what our legal entitlements are, and in so doing, we should be able to avoid legal disputes."

I don't agree, however, that legal disputes arise primarily because individuals have a mistaken notion of their legal rights or obligations. In most circumstances, disputes arise because people disagree about facts, not about law. And if their disagreement is about the law, it may be because they don't like the answer the law provides. In any event, I am skeptical that a combination of better legal information and online dispute resolution mechanisms will obviate the need for litigation.

Nor will it mean that we need not be concerned about client protection. Many authors suggest that online ranking and ratings systems will effectively guide clients to quality legal counsel. Susskind, in particular, is rapturous about the possibilities for client satisfaction; given price competition and online rankings, he argues, "client detriment . . . [will be] a phenomenon of the past."

I am particularly skeptical of the notion that online reviewing of lawyers will lead to good information about quality practitioners. The thing that makes me skeptical is Yelp. For those of you who are not users of online tools to choose restaurants, I highly recommend Yelp, whose reviewers are extraordinarily cranky and seem to have a lot of spare time. How sad I was to learn recently that many of those reviews are invented, posted either by friends of the proprietor (to falsely generate positive "buzz" about the business) or by competitors who offer false negative information.

In a recent study, a team of researchers at Cornell devised a software product that effectively identifies fake reviews. Given the temptation to shill even where the transactions at issue are small, I would hesitate to conclude that online reviewing systems are likely to be a highly reliable source of quality information about lawyer performance.

Notwithstanding my disagreements with some of these messages about the future of the practice, there is no question that these writers are telling us something important: that change is coming. This is not entirely a bad thing.

First, the changes that these writers describe have the potential to benefit the justice system. If, in fact, we can make the delivery of legal services less expensive through the use of online tools, appropriately supervised nonlawyer assistants, and information resources, that should be very good news for previously

> Lawyers struggle constantly to stay relevant in a changing world.

underserved client populations. I am always resistant to statements that we have "too many lawyers" because I am painfully aware of the broad range of legal needs of low- and middle-income individuals in this country that go unmet. If the tools and changes that these authors identify really do make legal assistance more accessible and affordable to those prospective clients, that presents an exciting opportunity for us as lawyers to think about how to use those techniques to improve access to justice.

But there is no question that lawyers need to be responsive to change. Professor Thomas Morgan, in *The Vanishing American Lawyer*, quotes former Army Chief of Staff Eric Shinseki as saying, "If you don't like change, you're going to like irrelevance even less." To stay relevant, we must take account of change.

To some of you, this responsiveness to change may seem like business as usual. If what we are hearing is that lawyers, to keep their clients' business, will need to be intently focused on client needs, conscious of clients' desire to cut costs, prepared to direct clients to nonlawyer services that will meet their requirements, responsive to client needs on a 24/7 basis, and attentive to the need not simply to provide legal services to clients but to add value, my guess is that many of you in the practice are already single-mindedly focused on doing this. If what the authors mean is not that this is the end of law practice, but that it is the end of some wasteful, privileged, lawyer-centered practices in which some lawyers have apparently been engaged, then that's okay with me.

There's lots of advice for lawyers out there about how to respond to the difficulties of the current environment. My favorite was the recent recommendation that to make yourself attractive to clients, you need to be "beer-worthy"—a person with whom your client would like to have a drink.

But it is worth remembering that this is not the first time in history that lawyers have worried about being unequipped to deal with economic difficulty and quick and irrevocable social change. Professor Deborah Rhode once said that "[l]awyers belong to a profession permanently in decline." If we look back in time, we can find ample predictions of the end of law practice. So when Professor Morgan argues that "the concept of a lawyer we have known will become a part of history, along with the knights and mercenaries who were hired to fight the battles of others in earlier times," we should remember some history—examples I took from Professor Morgan's own book:

> "There never has been a worse time within my experience for a young man to undertake to make a beginning as a lawyer in New York. The community has been feeling poorer and poorer for a number of years. The law business and the proceeds of law business have been contracting steadily and the contraction has forced out of practice and into clerkships a great many lawyers of experience and ability, and has at the same time forced all lawyers in practice to greater economy." This was Elihu Root, talking about the state of the profession in 1878.
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> "The large number of students in the law schools presents a difficult problem of placing the young law graduates after they are admitted to practice and is symptomatic of the possible serious overcrowding of the bar in the future." This was Homer Crotty, writing about the state of the profession in 1951.

And at other times, lawyers have been utterly unprepared for the practice that a changing world required. As one commentator wrote of the law school class of 1900, its members were subsequently confronted with—and unready for—the development of workers' compensation, the income tax, labor relations, and the growth of administrative agencies.

My point is not to trivialize the concerns raised by these authors, but to recognize them as universal. Lawyers struggle constantly to stay relevant in a changing world.

In the end, clients will continue to have legal needs. The question is how lawyers can creatively and effectively meet the needs of those clients in a manner and at a cost that the clients and the system can afford. ■