

Barrock Lecture | Robert Weisberg

Reality-Challenged Philosophies of Punishment

This past fall, Robert Weisberg, the Edwin E. Huddleson, Jr. Professor of Law at Stanford University and Director of the Stanford Criminal Justice Center, delivered Marquette University Law School's annual Barrock Lecture on Criminal Law. Weisberg's article based on the Barrock Lecture will be published in the summer issue of the *Marquette Law Review*; this is an abridged version of that article.

America's current criminal justice system is arguably the most punitive in our own history, as well as the most punitive among all the world's developed countries. The American ratio of incarcerated people to total population is about seven times as high as those of other industrialized democracies, and about five times higher than the historical average for the half-century ending in 1980. Our imprisonment rate has acquired a dramatic name—"mass incarceration," a term used by critics to provoke anxiety and shame about an ostensible paradox: the wealthiest and most powerful free-market democracy imprisons an anomalously high percentage of its population even at a time when crime itself is not one of the country's pressing social problems.

A related paradox has arisen within academic scholarship itself. On the one hand, a great deal of recent scholarship has directly confronted mass incarceration, with perspectives ranging from econometric causal analysis to political cultural critique. Among the notable new books are Todd R. Clear's *Imprisoning Communities: How Mass Incarceration Makes Disadvantaged Neighborhoods Worse*, Anthony C. Thompson's *Releasing Prisoners, Redeeming Communities: Reentry, Race, and Politics*, Marie Gottschalk's *The Prison and the Gallows: The Politics of Mass Incarceration in America*, and Michelle Alexander's *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. These and other new books are a great resource for both the academic and the general reader, but I will deploy one in particular, *Punishment and Inequality in America*, by sociologist Bruce Western, because it is perhaps the most eclectic and comprehensive of the new offerings.

On the other hand: Academics in a parallel universe have been continuing longstanding jurisprudential debates about the purposes of punishment (retribution, general and specific deterrence, incapacitation, and rehabilitation), debates that barely acknowledge the issue of mass incarceration. Indeed, most prominent in these ab-

stract debates has been a robust revival of retributivism, the rationale for punishment most associated with—or blamed for—the enormous increase in incarceration in recent decades. The old and new writing in this category is obviously vast, but conveniently we have a new collection of both classics in the field and illustrative new contributions: *Why Punish? How Much?*, edited by Michael Tonry. Read together, the Western book and Tonry collection might provoke a national embarrassment that our supposedly deepest body of thought about punishment seems so disconnected from the world of punishment that we have created and may indeed have been a reckless enabler of that world.

Facts of American Incarceration

Almost 1 percent of the population of the United States is currently behind bars. Another 2 percent of Americans are on parole or probation, and hence at risk of incarceration (or reincarceration) at any time. These absolute numbers have increased over 400 percent in the last 30 years, during which the American population grew about 30 percent. To be sure, the ratio of prisoners to population is too crude a measure to allow meaningful comparisons among nations, given differences in quality of statistics, crime definitions, and administrative schemes. Nevertheless, the United States is clearly an outlier not just among developed democracies (our ratio of roughly 700/100,000 is about six times higher than the average for European Union nations) but among all nations (Russia and South Africa trail slightly with about 600 and 400 per 100,000, respectively).

The composition of the U.S. prison population will surprise no one. About 33 percent of prisoners are white, less than half the proportion in the general



Robert Weisberg



population. About 21 percent of the prison population is denominated Hispanic, compared to 15 percent of the general population. About 40 percent of the prison population is African-American, more than three times the 12 percent share of the general population. From another angle, Western notes that, in



2000, 2.1 percent of all men aged 18 to 65 were incarcerated, but this imprisoned population represented 1.0 percent of white men, 3.3 percent of Hispanic men, and 7.9 percent of African-American men. The racial disparity in incarceration greatly exceeds that for unemployment, nonmarital child bearing, and infant mortality.

A plausible first intuition is that our incarceration rate is mostly a function of our crime rate. Western illustrates both the temptations and flaws of this approach. In the early 1970s, the national rate for serious and violent crimes had been about 450 per 100,000 individuals, rising by 1990 to more than 700, and for those years, the incarceration rate closely tracked the increase in crime. But since 1990, the crime rate has dropped remarkably, to about the level of the early 1970s, while the incarceration rate continued to grow along the same steep curve (although it has leveled off just in the last two years).

Now here we have the quandary of the half-full/half-empty bucket. One possible conclusion is that the continued increase in imprisonment explains the crime-rate drop. The other is that once crime started dropping, all the continued increase in imprisonment was gratuitous. Statisticians address this quandary through the usual regression techniques, comparing correlations between the two rates across time and jurisdictions to identify the key variables. Presumably, at some point more incarceration should reduce crime through deterrence or incapacitation; however, as Western shows, the research consensus is that only about one-fifth of the reduction in crime between 1993 and 2001 comes from the increase in incarceration. Indeed, new evidence shows that the most dramatically continuing crime drop among American cities after 2001 is in New York City, while the New York state prison population has actually shown a nationally anomalous *decrease* over the last 20 years.

Western's own research refines this consensus with a creative focus on juveniles. From 1980 to 2000, while adult incarceration jumped 430 percent, juvenile incarceration jumped only about 50 percent, despite a drop in juvenile crime parallel to that for adults. Western observes that juvenile crime and adult crime usually move together,

and almost all adult criminals have been juvenile offenders. So if the consistent upward trend in adult incarceration after 1980 was the result of more crime, then we should have seen a consistent rise in juvenile crime. Yet data from 1980 to 2000 show instead a drop in almost all categories of youth crime. Western infers that, absent formal changes in legal rules that would restrict juvenile prosecutions, we should have seen a rise of juveniles in incarceration. So perhaps the continuing incarceration boom has to be traced to such deliberate policies or new practices as a dramatic shift toward incarceration rather than probation sentences for certain crimes or an increase in the length of prison sentences. Western says that lawmakers did not premeditate the increase in incarceration; rather, the changes were rooted in a variety of functional and expressive motivations that ultimately reelect politicians with toleration of or indifference to an increase in the prison populations.

The standard political causal story combines white populist backlash to the civil-rights movement, capture of the white South by Republicans, Nixon's translation of working-class resentment into law-and-order propaganda, and general disenchantment with the Roosevelt-Kennedy-L.B.J. welfare state. Western affirms that the incarceration boom began in punitive legislation caused by conservative backlash against civil rights. And he goes beyond the stock-story orthodoxy to test correlations of penal policy with such ground-level factors as controlling political parties, urbanization, quantity of police officers, and budgetary investment in law enforcement. In all these regards, he finds that spikes in imprisonment are tied to political choices and administrative policies that often are neither responses to crime increases nor instruments of crime decreases.

But Western's special contribution concerns the relationship between incarceration rates and the lower-level labor market for minorities. I stress the evasive term "relation-

ship,” for here Western is very careful to acknowledge that our understanding of correlations outpaces our ability to determine causes. His goal is to alarm us about striking associations between incarceration and economic inequality, in a context in which the associations take many complex forms: we imprison the poor and the uneducated at rates that are distressing enough even without regard to race but are horrifying once race is identified; those imprisoned then suffer detriments from incarceration way beyond any officially legislated criminal penalty; and then these detriments doom great numbers of offenders to reincarceration in a continuing cycle.

Controlling for certain state-level fixed effects, Western finds that for the years 1980–2000, every increase of one-tenth of one percent in a state’s unemployed males under age 45 who have completed high school but not college is associated with a 2.4 percent increase in the incarceration rate. Looking to income, Western finds that for all black and white males, a \$100 increase in weekly pay—roughly the marginal value of a high school diploma—is associated with a 32 percent decline in incarceration. Most starkly, in 2000, regardless of race, people without high school degrees were five times as likely to be in prison as were those with high school degrees; and black men born in the 1960s who did not complete school had as much chance of being incarcerated as being employed. By age 35, for blacks without a high school degree, prison is a common denominator that exceeds the rate of union membership, high school graduation, or even marriage. As we move down the educational ladder, and with a strong racial disproportion, prison becomes a “modal life event,” a tediously predictable part of the condition of being an African-American man in the United States.

Western tempers his findings with the observation that the conventional measure of the unemployment rate fluctuates too much with macroeconomic conditions to yield any clear correlations with incarceration. But he adds the nice twist that official unemployment statistics are a poor measure of joblessness because they exclude from the denominator people who are unemployed because they are incarcerated. Western seems to want us to feel embarrassment at the economic context and consequences of the incarceration rate, for he says that the hidden masses of prison inmates “occupy a shadowy status that affects a variety of social statistics that record the economic well-being of the population,” and that the prison boom “makes a new contribution to the invisibility of the poor.”

Much of the commentary on mass incarceration alludes to the costs associated with harm to families and neighborhoods, costs that, though real, are difficult to measure. Western aims at a more measurable harm: the direct effect of incarceration on prisoners’ future employment and income. Controlling for prior personal factors that might reduce economic prospects, Western isolates the “Aggregate Earnings Penalty” (AEP), the decrease in future earnings attributable solely to past incarceration; he infers that a post-prison offender will suffer a 30–40 percent loss of income.

Western finds moreover that AEP correlates with other adverse social outcomes: increased domestic violence, increased rupture of existing domestic partnerships (partly because of increased domestic violence), and, possibly, reduced future marriageability. The disconnected, erratic personal lives of ex-prisoners makes them much more likely to fall into recidivism and to reenter prison. In short, mass incarceration produces a new and massive underclass, disproportionately made up of racial minorities.

Targeting in particular the misleading common narrative of the 1990s, Western wants to fight the naïve or disingenuous puzzlement that some have expressed about how incarceration could rise in such a time of prosperity. The imagery of widespread economic success leads Americans either to ignore the prison boom altogether or to shrug at it as beyond explanation. Western wants to challenge any national self-congratulation about the civil-rights movement, in that invisible mass incarceration is a form of residential segregation: by virtue of incarceration, “the invisibility of today’s poor remains rooted in the physical and social distance between whites and blacks.”

The Universe of Punishment Theories

Michael Tonry’s collection on punishment theory includes not only classic texts from Bentham, Kant, and Hegel but also modern contributions from retributivists Andrew Von Hirsch and Norval Morris, theories of Foucault with roots in Marxism, and defenses of restorative and therapeutic justice. To Tonry, the American criminal justice system is a mid- to late-19th-century creation built on premises unabashedly utilitarian. Late-Victorian utilitarianism remained dominant well into the 20th century, under the rubrics of rehabilitation, deterrence, and incapacitation. But the 1960s saw a huge new revival of interest in retributivism.

Let me summarize the state of the art on modern punishment theory and put it into interaction with



Western's picture of modern incarceration. I put most of my emphasis on retributivism, precisely because of its especially salient role in providing intellectual cover for the state of American criminal justice.

Retributivism. The great transition to a newly robust retributivism occurred about half a century ago, and one reason for its robustness lay in its nonpartisan or bipartisan motivations. American sentencing policy had become highly discretionary, with penal codes granting vast powers to judges at initial sentencing and later to parole officers, on the theory that efficacious punishment had to be individually tailored to curb criminal tendencies.

The result pleased no one. Liberals thought incapacitative or rehabilitation-based sentences were far too long and too much in the hands of judges unbound by clear legislative rules. Conservatives, seeing the same picture, thought that sentences had become much too lenient. Perhaps by accident the two sides agreed that clear, predetermined, and uniformly applicable sentences based on the nature of the crime were the answer.

Ever since then, from various perspectives, jurists have been promoting retributivism. Law-and-order conservatives have stressed that evil deeds merit long sentences, regardless of social efficacy, although they also argue that utilitarian projects of criminal justice have proved feckless. Liberals, led by the great scholar Norval Morris, have argued that a certain form of retributivism, which they call "limiting retributivism," can put a cap on sentences to ensure that they do not become excessively long for harsh utilitarian purposes, while also arguing that harm or culpability-based rules avoid capricious and racist disparities in outcomes. Some retributivists are tough-sounding deontologists about moral desert; others argue from the liberal side

that notions of moral desert can promote compassion and communal empathy, as reflected in various versions of the restorative justice movement.

But of course at the heart of all these forms of retributivism is some notion of a crime deserving a discernible sanction. And, overall, retributivism was the philosophical engine powering the rigidly determinate and often very harsh sentencing policies that, as Western shows, helped produce mass incarceration.

The reversal from early- and mid-20th-century utilitarianism to a new retributivism was sharp and dramatic. But Tonry cautions that fashions change and that even cycles of change are often equivocal. The real story of modern jurisprudence of punishment seems to be not the rise of any one school but a certain insularity within these schools, and here retributivism is the best example. While the social scientists and social critics lament the ills of America's vast prison complex, retributivism theorists worry mostly about their own internal coherence or their conceptual differentiation from others' theories.

Western's book calls to mind the chastening admonition to retributivism issued some years ago by the philosopher Jeffrie Murphy. Murphy focused on the strand of retributivist thought known as social contractarianism, by which retribution rests on the premise of a community of shared values and rules that benefit all concerned and thus create a debt of obedience, for which punishment is the payment for violation. Murphy lamented that if a society is riven by extreme economic inequality, to expect that this principle applies to people on the lowest rung "is to live in a world of social and political fantasy," because the retributivist "would be hard-pressed to name the benefits for which they are supposed to owe obedience."

As Western depicts mass incarceration, social inequality and economic inequality are not just the background facts of punishment—they are also salient as cause and effect. But through the lens of Western's research, retributivist theory proves irrelevant or orthogonal to the key social, political, and economic questions of mass incarceration in another way as well. One sees some retributivist scholars gesturing in the direction of concern about the costs and benefits of a retributivism-based system and the challenge to retributivism of scarce public resources. This work mostly involves borrowing abstract microeconomic models from utilitarian theories. It then operates on the assumption that the only serious empirical challenge to retributivism is the scarcity of prosecutorial and correctional resources, and in turn it conceives of a kind of commodity of punishment that must then be distributed



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among “deserving” offenders, with the goal of optimizing the overall retributive effect of the law.

But still, overall, Western’s work implicitly challenges retributivist jurisprudence for its indifference to or disrespect for social fact, because even the supposed acknowledgment of social fact in terms of scare government resources seems otherworldly. Of course, the state never has the resources to punish all offenders, so it must make choices in light of the scarcity of the tools of punishment. But the real thrust of Western’s book is that the punishment we administer is so vastly disproportionate to any possible gain from inflicting it, and huge portions of society are so helplessly vulnerable to state power, that the notion of scarcity seems more a rhetorical trope than a social fact. Put another way, even if criminal legislation could somehow be doled out in carefully measured doses to reflect a true scale of desert and culpability, we have no such system in the United States. Once we account for the true detriments imposed by incarceration, especially as depicted by Western’s account of the Aggregate Earnings Penalty and associated collateral effects, punishment seems so incommensurate with guilt and desert “earned” by offenders as to belie the jurisprudence of retributivism.

If these consequences of incarceration are so profoundly metastatic, then perhaps the matching of punishment to crime has become a hopeless exercise, and the traditional critique that retribution must account for the fallibility of the institutions of justice misses the point. In this light, the United States seems to have lost both the moral authority to impose retributive punishment and the intellectual and political authority to claim cost-benefit justification for incarceration. At the very least, Western’s argument suggests that punishment theorists have a moral obligation to reconsider theoretical commitments given these social realities.

Incapacitation. Here we have what should be the least problematic rationale for punishment, both theoretically and empirically. If we have decent information about the criminal proclivities of an offender, then we should reasonably be able to estimate the number of crimes prevented for a particular period of his life. At the same time, among utilitarian rationales, incapacitation seems especially harmonious with retributivism, given its partial alignment with what the offender has done and is likely to do.

The incapacitation justification briefly was publicly ascendant in the crime-high 1970s, championed by the late neoconservative, James Q. Wilson, under the name of “selective incapacitation.” Wilson argued that some humans’ irreducible proclivity to commit crimes was immune to efforts to ameliorate the underlying social “causes” of crime. Social science could identify the likeliest recidivists, so that isolation could be keenly parsimonious. But critics complained that reliance on conventional criteria of personality and past conduct is too unsystematic and error-prone, and not self-correcting. Others argued that the key variable affecting the number of crimes is not the number of criminally inclined people on the streets but the number of criminal opportunities (the so-called “replacement effect”).

As Franklin E. Zimring and Gordon Hawkins elaborated in their book, *Incapacitation: Penal Confinement and the Restraint of Crime*, selective incapacitation rose to prominence not because it had much intellectual or empirical foundation, but because, along with deterrence, it served a default function: For utilitarians, it was the best rationale available to fill the breach when rehabilitation faltered—indeed, its superficially intuitive logic, so consistent with the “public safety” rhetoric of politicians, enabled it to fill that role better than deterrence. More broadly, incapacitation proponents ignore the social contingencies that affect speculations about crimes prevented, paying far too little attention to modern theories of crime causation and motivation.

In that regard, the most obvious challenge that mass incarceration poses to incapacitation is, as noted earlier, that the continuing post-1990 spike in incarceration seems to have accounted for only a small fraction of the reduction in crime. And regardless of the causal link between conscious incapacitation goals and our incarceration boom, mass incarceration moots any claims of accurate predictions of recidivism, creating social conditions that put all inmates at high risk of an endless cycle of recidivism. Indeed, Western’s and others’ depiction of the inefficacy of our increased imprisonment rate in preventing crime underscores another important critique of selective incapacitation. Under any modern regime, given the uncontroversial necessity of imprisoning the most egregious criminals and the non-incarceration of the least dangerous offenders, changes in incapacitation policy work only at the margin of middle-level offenders, >>

such that the changes are unlikely significantly to affect the cost-benefit rationality of imprisonment. If this notion of diminishing marginal benefits of incapacitation is generally true, then it is egregiously true when our prison rate expands so drastically as it has in recent decades. Further, offending rates of low-level offenders who get shorter sentences under selectivity may increase because of decreased deterrence.

Moreover, regardless of the causal link between conscious incapacitation goals and our imprisonment boom, mass incarceration has mooted any claims of accurate predictions of recidivism by creating social conditions that put all inmates at very high risk of an endless return cycle, whatever individual propensity to recidivism they might have shown in a different social context.

Finally, the social reality of prisoner-on-prisoner crime raises doubt whether anyone could truly believe that incapacitation is the goal of incarceration. As Guyora Binder has argued, the promoters of selective incapacitation must assume either that crime does not occur in prison, or that prison crime simply does not count. The former assumption has never been true, and in an era of overcrowding wrought by the spike in imprisonment, the frequency of criminal-on-criminal assaults is extremely high. The prevalence of prison violence raises the question whether incapacitation theory is truly concerned with reducing the risk of violent crime, or merely *redistributing* its risk from innocents to past offenders. The position that only non-offenders deserve protection from violence would seem to be a principle of retributive desert rather than utility. Such segregation of offenders not only sets them apart from “society” physically; it also sets them apart from “society” symbolically, by implying that their welfare does not count in toting up the welfare gains and losses from incarceration.

Deterrence. Perhaps because it seems so intuitively plausible, general deterrence has received little theoretical or normative discussion. The commentary has been almost all about refinements in the technology needed to assess the deterrent effect. Law-and-economics figures such as Steven Shavell, Louis Kaplow, and A. Mitchell Polinsky have made a massive intellectual investment in modeling the marginal deterrent capacities of various



types of sanctions. But that effort faces daunting challenges in understanding human psychology.

One generally accepted empirical finding is that certainty of punishment appears to deter more than severity, presumably because it is more salient for people with higher discount rates. But efforts to come up with other robust empirical findings have failed. Many of these efforts have focused on the deterrent effect of the death penalty; limitations in the data have probably rendered unanswerable the question whether it has any deterrent effect at all. Sometimes

other natural experiments arise, as where a law changes the age for adult liability, and some have isolated the perception—from the fact—of possible punishment as a threat by comparing survey-perception data to actual punishment rules, but these produced little clear evidence of marginal effect.

If punishment had a significant marginal deterrent effect, the high visibility of harsh punishment in the form of mass incarceration should itself have been a powerful force in reducing crime. But, again, the empirical research summarized and augmented by Western—demonstrating that the post-1990 spike in incarceration can explain at most a small fraction of the simultaneous drop in the crime rate—suggests otherwise. Most likely, we have reached the point at which the baseline punishment in society (including both incarceration itself and the follow-on costs of incarceration to released prisoners) is so high that potential criminals are psychologically inured to additional deterrence.

Rehabilitation. The foregoing discussion leaves us with only the last of traditional theories of punishment: rehabilitation. This late in the day, we cannot seriously revive rehabilitation as the justification for the system we have cobbled together. Prisons often successfully incapacitate (if we ignore prisoner-on-prisoner crime), but no one still argues that these facilities offer inmates the realistic promise of rehabilitation. If some inmate is less prone to crime after his release from prison than he was before entering it, the likeliest reason is that he was incapacitated far enough into life that he has aged out of his earlier proclivity.

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.

“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. ■