

THE RISE OF THE CREATIVE LAW SCHOOL

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I. A THOUGHT EXPERIMENT

IN his seminal book *The Rise of the Creative Class*, Richard Florida describes the rise of a new social class—the Creative Class of innovative thinkers and doers.¹ Members of this class include musicians and engineers, writers and architects, educators and healthcare professionals, and more.² Florida posits that cities or regions that attract and retain creative professionals will prosper, thereby creating a virtuous feedback loop: greater population with discretionary income will lead to greater investment by businesses and greater development, which in turn will attract more professionals, and so on.³ Florida's work has been hugely influential in economic development and urban planning circles, and 17 years after its publication (and 14 years after the publication of a second book, *The Flight of the Creative Class*⁴), Florida's work has become a touchstone for me. I think of Florida's work often, and not simply because universities are loci for the creative class. Rather, I think of his work often because he begins his book with a thought experiment that, in my opinion, offers a powerful analogous framing of the rapid change occurring in American legal education.

Florida starts *The Rise of the Creative Class* with a thought experiment that compares two time-travelers. The first is a time-traveler from 1900 to the 1950s; the second is a time-traveler from the 1950s to the 2000s. The former would have to adjust to many new and previously unknown technological advances—such as airplanes and radios—but the general fabric of American society would be familiar and not radically different from that of 1900. By contrast, the time traveler from the 1950s to the 2000s would be less dazzled by technological advances, because many of them would consist of improved-upon (or predicted) technologies. However, this latter time-traveler would face a dramatically altered social

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1. RICHARD FLORIDA, *THE RISE OF THE CREATIVE CLASS* 8-10 (2002) [hereinafter *CREATIVE CLASS*].

2. *Id.*

3. *Id.* at 235-40. In a sense, this seems to me to be not unlike Paul Krugman's economic geography, but such a discussion is beyond the scope of this essay. See generally PAUL KRUGMAN, *GEOGRAPHY AND TRADE* (1992).

4. RICHARD FLORIDA, *THE FLIGHT OF THE CREATIVE CLASS* (2005).

landscape. In short, this latter time-traveler would be much more of a fish out of water. As stated by Florida:

Take a typical man on the street from the year 1900 and drop him into the 1950s. Then take someone from the 1950s and move him Austin Powers-style into the present day. Who would experience the greater change?

At first glance the answer seems obvious. Thrust forward into the 1950s, a person from the turn of the twentieth century would be awestruck by a world filled with baffling technological wonders [such as cars, airplanes, skyscrapers, supermarkets, televisions, and medical advances]. ... The newness of this time-traveler's physical surroundings—the speed and power of everyday machines—would be profoundly disorienting.

On the other hand, someone from the 1950s would have little trouble navigating the physical landscape of today ... [and] our second time-traveler would find himself in a world not all that different from the one he left. ... In fact, with just a few exceptions [such as computers and cell phones], ... he would be familiar with almost all current-day technology. Perhaps disappointed by the pace of progress, he might ask: "Why haven't we conquered outer space?" or "Where are all the robots?"

Someone from the early 1900s would find the social world of the 1950s remarkably similar to his own. ... Our second time-traveler, however, would be quite unnerved by the dizzying social and cultural changes that had accumulated between the 1950s and today.

Thus, although the first time-traveler had to adjust to some drastic technological changes, it is the second [time-traveler] who experiences the deeper, more pervasive transformation. It is the second who has been thrust into a time ... when the old order has broken down, when flux and uncertainty themselves seem to be part of the everyday norm.⁵

This passage resonates for me when I think of American law schools. We live in a time when the established order of the past century—the core educational and business model for American law schools—no longer functions as it once did (and not so long ago). Flux and uncertainty sometimes seem to be our only constants in legal education. Our old assumptions, our old patterns of behavior, can seem out of step. I find myself conducting my own thought experiment about two law professors: one who time-travels from the 1950s to the year 2000, and another who time-travels from the year 2000 to today.

The first time-traveling law professor would notice significant technological differences. There would be computers, projectors, and PowerPoint slides. Interactive clicker technology for instantaneous feedback would be available in many law schools. Email would be ubiquitous. He would be surprised to find female faculty members and students, and greater diversity within student, staff,

5. CREATIVE CLASS, *supra* note 1, at 1-4.

and faculty ranks.⁶ Admission to law school would have become more competitive, while student attrition rates would have plummeted.⁷ Academic scholarship would have fractured into subdisciplines (i.e., “law and” scholarship). There would be significantly more post-JD degrees offered, and many more study abroad programs. Clinical programs would have become mainstream. Tuition would have increased dramatically above the rate of inflation.

Yet in some ways, this time-traveling professor from the 1950s might feel quite at home in the year 2000. The typical mode of instruction would look very much the same: lecture in the classroom (although not always Socratic). Online education would be nascent at best, and non-existent at many law schools. Many law school classes still would have only one exam, at the end of the semester, and it often would be an essay exam that would be handwritten in class. Post-graduation employment rates would be high—often near 100%—because to get legal work done, one had to use a lawyer. While tuition would be much higher, taking out student loans to pay for law school would be seen as a solid and safe investment. The number of applicants to law schools would be strong. Most students would pay full tuition; relatively few would receive full-tuition scholarships. As a result, law schools would be profit centers for their universities (or sustainable and profitable colleges if standalone law schools).

In contrast, consider the law professor who time-travels from the year 2000 to today. Consider the changes she would see over that short time span. Methods of instruction are now far more varied. Flipped classrooms are popular. Online education is increasingly common, and some law schools have entire degree programs online. The focus in legal education is shifting toward assessment—that is, away from what is taught, and toward what is actually learned.⁸ Midterms (and other means of formative assessment) are common and strongly preferred, which increases the time spent evaluating student work. Clinics have become truly mainstream: while they had existed before at many law schools, they are now central to legal education, and student demand for clinical opportunities is high. Post-graduation employment has dropped well below 100% at most law schools—in part because firms and other employers are often hiring less, and because some work previously done by lawyers is being accomplished via artificial intelligence (AI document review, for example), or even by software products such as

6. I use the male pronoun deliberately because law school faculties (and student bodies) were overwhelmingly, if not exclusively, male in 1950.

7. No longer would a significant portion of a law school class fail out, à la Professor Kingsfield’s admonition in John Jay Osborn’s 1971 novel (and 1973 movie) *The Paper Chase*. JOHN JAY OSBORN, JR., *THE PAPER CHASE* (1971); *THE PAPER CHASE* (20th Century Fox 1973).

8. See, e.g., SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS’N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2018-2019, at 23 (2018), https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2018-2019ABASStandardsforApprovalOfLawSchools/2018-2019-aba-standards-chapter3.pdf (“The dean and the faculty of a law school shall conduct ongoing evaluation of the law school’s program of legal education, learning outcomes, and assessment methods; and shall use the results of this evaluation to determine the degree of student attainment of competency in the learning outcomes and to make appropriate changes to improve the curriculum.”).

LegalZoom⁹ and Rocket Lawyer¹⁰ that commoditize legal services. Some law students now actively seek “JD Advantage” jobs for which a law degree is not required. Law school is no longer automatically considered a safe career investment for students. (The combination of the financial crisis of 2008, bad press for law schools, and an anemic job market took care of that). The number of law school applicants has dropped significantly. A majority of law students receive at least partial scholarships, many receive full-tuition scholarships (and even stipends), and the requirements for keeping scholarships are often significantly more permissive than before. Because of these market changes, law schools are no longer guaranteed profit centers for their universities, and many are in (or at risk of being in) structural deficit. Some law schools have been forced to close.

In short, the law professor who time-travels across the very short distance from the year 2000 to today is in for a fairly jarring market shock—in many ways much more so than the law professor who time-travels from the 1950s to the year 2000.¹¹ The professor time-traveling from the 1950s to the year 2000 would have to contend with significant technological advances, but he would find law schools in the year 2000 to conform, in most respects, to his core notion of what a law school should be. For the professor moving from the year 2000 to today, however, the experience would be quite different. She would find that the very definition of legal education—for example whether, and how much, students need to be in a formal classroom—would be open to debate. She also would find that prospective students are far less sanguine about their career prospects in the law. Even more profoundly, she would witness much discussion about the role of (and need for) lawyers in society. Why hire a lawyer when machines can review documents, generate documents, and develop legal strategies for litigation and transactional work? In stark contrast to the world of 2000 (with its quaint obsession about the adverse effects of Y2K), the world of 2018 seems to be on the cusp of a legal services revolution in which human lawyers are increasingly displaced by artificial intelligence and software products. It would be a profoundly disorienting experience.

To be clear, I am not trying to be hyperbolic. When I think of the world of law teaching in 2004—when I proudly entered the legal academy—and I compare that world to today, I find the contrast stunning. Moreover, my journey is not unique: it is a journey many of us in legal education have made. While we made the journey one day and one year at a time, I nonetheless wager that to many of us it sometimes feels like an uneasily sudden shift. It often does to me.

9. LEGALZOOM, <https://www.legalzoom.com> (last visited Oct. 28, 2018).

10. ROCKET LAWYER, <https://www.rocketlawyer.com> (last visited Oct. 28, 2018).

11. It is true that the cultural changes that took place from the 1950s to the 2000s would have affected the first time-traveling professor more than the cultural changes for the second professor who time-travels from the 2000s to 2019, but my observation is focused on the structural viability of law schools.

II. DISCUSSION

A. *Angst and Worry*

In my view, the drastic contrast between just a few years ago and today helps to explain much of the angst, worry, and even fear that some people in legal education (and the legal profession generally) feel these days. We lawyers are a traditionalist bunch, as Tocqueville observed,¹² and we often prefer tradition to change. We like to reflect and move carefully. We tend to prefer precedent to innovation. Even when we innovate, we often do so in traditional ways: we start a center, or we hire new faculty. We largely do what we have always done—and in that way we eschew or avoid rapid, disruptive change. So when we have been faced by market upheaval in recent years—with various law schools attriting, detouring, merging, and closing—we tend to feel great unease, worry, and even anger. Why are things different? Why are there so many financial pressures? Why doesn't the old model for law schools work anymore? What we do is important, after all.

In fairness, our traditionalism as lawyers and law professors has served us well in many respects. The law is steeped in history and tradition, and this may have helped lawyers protect and preserve our democracy, as Tocqueville asserted.¹³ Nowhere is this truer than in law schools, because that is where American lawyers get their training. Yet if the practice of law is changing rapidly (it is), and the perspective of prospective students on the value of law school is changing (it is), and career prospects are no longer automatically seen as a safe return on investment for the cost of law school (they are not), and the market place of the future needs lawyers who have greater career flexibility and stronger soft skills (it will, and in fact already does), then law schools need to adapt to these changes, and they need to adapt *now*.

Law schools that wish to remain highly relevant in the future need to become more innovative in both the substance and delivery of their programming. There is no clear roadmap, and that is unsettling. But the alternative is to become far less relevant to American society and be far less economically viable, and thus be far less able to serve as educators, core defenders, and advocates for individual rights, economic prosperity, and democracy. All of us who have chosen to make our careers in legal education decided to do so because, on some level, we wanted to mentor and train the next generation of lawyers and leaders and advance understanding in our areas of expertise within the law. I believe we also chose

12. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 272-80 (Phillips Bradley ed., Henry Reeve trans., Alfred A. Knopf, Inc. 1999) (1835). Tocqueville's assertion was that lawyers act as a counter-balance to majoritarian democratic zeal, and thus are a stabilizing force for American democracy. He wrote of lawyers having "certain habits of order, a taste for formalities, and a kind of instinctive regard for the regular connection of ideas, which naturally render them very hostile to the revolutionary spirit and the unreflecting passions of the multitude." *Id.* at 273. My point is that, as Tocqueville observed, the legal profession is steeped in tradition and formalities, which are not conducive to rapid change.

13. *Id.* at 272 (asserting that the legal profession in America is "the most powerful existing security against the excesses of democracy.").

careers in legal education because we see the law as a keystone for democracy. We teach and research both to advance knowledge and to protect and enhance civil society. Not adapting puts the entire enterprise of legal education at risk—and thus places our democratic society and ideals at risk. And so we must innovate in the face of uncertainty.

It should be pointed out that some of the pressures that have been brought to bear on legal education have been building for years, and calls to reform legal education are not new.¹⁴ What is different this time around is that there are more direct market forces at play, and the need for change cannot be ignored or addressed halfheartedly or slowly.

B. *What to Do?*

The primary questions, therefore, are these: What is the impact of all of this change? And what can law schools do better to prepare for the future? The answers are not difficult to understand. But they are difficult to execute; they are both hard to undertake and hard to maintain. That would be true in any era, but it seems especially true in this time of rapid change—when faculty and staff may be uneasy about the future, because it is unclear what exactly the future holds.

The following are some of the steps to be taken, as I currently see them, based on my experience in the practice of law, as a faculty member, as an associate dean, and now as a dean. This is by no means a complete list, but it is a place to start. I also should note that the following overlaps with, and in some respects surely borrows from, others who have spoken and written about these issues.

- *Develop a clear sense of common mission and purpose at your law school.* That can be easy, or it can be hard. Usually it is hard.
- *Maintain this clear sense of common mission.* It is important for everyone at a law school to understand it and row in the same direction, or else progress cannot be made.
- *Always remember that legal education is not monolithic.* One law school does not have to look like another. We know this, of course—and yet too many law schools are guilty of trying to be what they are not, which leads them astray of their missions.
- *Understand that we need to change and adapt to a market for law schools and law students that looks radically different than only ten years ago, and that may look very different in the future.* Flexibility and focus on mission will be key.
- *Understand that what we are engaged in, both at the local level and nationally, is culture change.* By this I mean culture change within individual law schools, and within the legal academy as a

14. See, e.g., SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, at xi (1992), https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_legal_education_and_professional_development_macrate_report.authcheckdam.pdf (presenting “an in-depth study of the full range of skills and values necessary for a lawyer to assume full responsibility for handling a legal matter”); ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION 1-4 (2007), http://www.cleaweb.org/Resources/Documents/best_practices-full.pdf.

whole. Culture change is often both hard and slow, and therein lies a great challenge, because events are moving quickly in legal education.

C. *Achieving Consensus*

What, then, is an appropriate way to go about developing and maintaining a clear consensus regarding a law school's mission and purpose? What is the best way to do so in a way that is forward looking and does not simply continue the status quo? This is certainly not easy to do in academe, which is structured to foster differing views, not necessarily a common one. Yet it is imperative, because without the identification and constant fostering of a common mission and purpose, it is all too easy to spin off in multiple directions at once, with everyone rowing in different directions and making no real progress in any direction. Three things to keep in mind are the importance of being inclusive, of being intentional, and of being aspirational.

1. *Be Inclusive*

Addressing the points listed above will require open discussion. This, of course, raises the question of who should be included in the discussion. Law schools tend to be hierarchical places, with varying levels of faculty and staff. While the answer will vary from school to school and from question to question, the guiding principle, I believe, should be inclusivity. For example, all law schools have key non-faculty personnel who have a great deal of experience with admissions, academic affairs, student life, career services, faculty support, academic support, and human resources. Their inclusion in many of these discussions is essential and will provide for more diverse viewpoints that otherwise might be overlooked or discounted. For the same reasons, students also should be involved in some of these discussions: law schools exist for them, and not the other way around, and their perspective is informative. If faculty and staff—and students—understand each other better and have greater appreciation for the pressures and responsibilities of their respective positions, better paths forward can be identified and followed. Diverse groups make better decisions.

2. *Be Intentional*

We also need to understand and appreciate that much of what we do as law schools is already good and working well, so being forward thinking does not mean wholesale change. It does mean, however, that we should examine—if we are not doing so already—all that we do in admissions, teaching, career placement, and beyond, to ensure that all law school functions support the overall vision. As I have found in my teaching, even if you have been doing something right, doing that

very same thing with intentionality, which is to say doing it with a clear and express purpose or vision in mind, makes a good action even more successful.¹⁵

3. *Be Aspirational*

In this era of rapid change, law schools need to look to the future. On the one hand, things are uncertain. On the other hand, we have an opportunity to rethink what we do in legal education, which is exciting. A market in flux is an opportunity to move forward in an innovative way. Some important questions that a law school can ask about its future include the following:

- *Adapting to the changing practice of law.* How can your law school prepare its students for a profession and world that are rapidly changing—and changing in ways we might not easily predict? What skills, both hard and soft, do you need to teach your students? The answers to these questions will guide the development of programs and the curriculum at your law school.
- *Recruiting students for a future marketplace.* What are the best current and potential geographic growth areas for recruiting students and placing your graduates? What kind of mission for your law school will best promote this? What kind of mission and programs will be most attractive to prospective students? Student recruitment and graduate placement likely will remain extremely competitive for the foreseeable future, and effective and mission-consistent strategies will be essential.
- *Maintaining experienced faculty and staff for the law school.* What kind of professionals do you want to have working at your law school? Hiring for faculty and staff talent is sometimes the easy part; the hard part often is fit. How do you best hire diverse and inclusive faculty and staff that support the mission of your law school? And how do you mentor them once they join your law school? Having a diverse and vibrant community of professionals who understand and are committed to a common goal will foster success.
- *Remaining mission driven and outwardly focused.* How can the role of your law school within your university and the broader community expand in a mission-consistent way? How can your law school become more indispensable to your university and the broader community? For example, should there be greater cross listing of courses? Dual degree programs? Early admission programs? More joint and courtesy appointments? Shared administrative positions? Partnerships with outside organizations? Successful law schools of the future will need to be more interconnected with—and thus more important to—other parts of their universities, other colleges and universities, and outside organizations.

15. For a discussion of intentionality, see Gregory W. Bowman, *The Feng Shui of Study Abroad Programs*, 20 J. TRANSNAT'L LEGAL ISSUES 20, 27 (2012).

While all of this may seem like common sense, in practice these discussions, decisions, and actions likely will be very difficult. They involve becoming comfortable with uncertainty and a future that looks very different from the past. They are an exercise of looking in the mirror and deciding, sometimes, to be something different. They are an exercise in intentional change. It is also true that change might not be successful. But the alternative—not doing any of this—means that a law school is not steering its own course and is subject to market whims. It is, at best, a recipe for success by accident. At worst, it is a guaranty of failure.

III. FINAL THOUGHTS

As I write this essay, the West Virginia University College of Law is beginning our next phase of embracing the future—a strategic planning process that will stretch over the next year and more. Together, we will face a future that, while uncertain, also holds enormous opportunities that we should be excited about. It is my intention, and my deep hope, that we will make the most of those opportunities by achieving consensus in developing and maintaining a common mission and purpose. To do this, we must stay flexible, and we must understand that we are, as an individual law school and collectively as a legal academy, engaged in a process of necessary and beneficial culture change. We also should bear in mind that law schools have undergone continuous culture change and improvement over many decades. The pace of change will be much faster now, but we can learn from the past as we strive to move forward.

If my law school and others can achieve an inclusive consensus, maintain and improve the good parts of what we do, and add new dimensions to our existing programming—and if we can dare to be aspirational, even in an age of financial challenges—then the future of American legal education will be bright. It will be filled with law schools that are similar in some ways and quite different in others, but all of which are dedicated to training excellent lawyers and leaders for the next generation. This outcome, if we achieve it, will be beneficial to society, to our clients, and to our democracy.

I also wonder what I might write about this topic in 10 or 20 years. Would a law professor who travels through time from today to that not-so-distant future be pleased, or disappointed? The answer, I suppose, is up to us.