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Margaret Thornton

The Law School, the Market and the New Knowledge Economy

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THE LAW SCHOOL, THE MARKET AND THE NEW KNOWLEDGE ECONOMY

Abstract: This paper considers how recent changes in higher education are impacting on the discipline of law, causing the critical scholarly space to contract in favour of that which is market-based and applied. The charging of high fees has transformed the delicate relationship between student and teacher into one of ‘customer’ and ‘service provider’. Changes in pedagogy, modes of delivery and assessment have all contributed to the narrowing of the curriculum in a way that supports the market. The paper will briefly illustrate the way the transformation has occurred and consider its effect on legal education and the legal academy.

Keywords: Legal education, Knowledge economy, Neoliberal legal knowledge

JEL classification: K10, K40

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The Law School, the Market and the New Knowledge Economy*

Margaret Thornton**

A. Introduction

Until recently, Australia was firmly committed to the idea of higher education as a public good. The swing from social liberalism to neoliberalism has seen a rejection of this basic principle in favor of values associated with the market. Knowledge, education and credentialism have become highly desirable in the information age, but treating them as tradable commodities has profound repercussions for what is taught and how it is taught. Most significantly, we have moved to a mass education system where the focus is on applied and vocational knowledge.¹ Within this new paradigm, law, business, information technology, hospitality and tourism courses have proliferated.

This paper considers how changes in higher education are impacting on the discipline of law, causing the critical scholarly space to contract in favor of that which is market-based and applied. The charging of high fees has transformed the delicate relationship between

*This paper is part of a larger study of the impact of neoliberalism on the legal academy. It was formerly published in the *Legal Education Review Journal* in 2007. I acknowledge the financial support of the Australian Research Council, which enabled interviews to be conducted with a range of academics in all Australian and New Zealand public university law schools, together with selected law schools in the UK and Canada. Warm thanks are extended to Dr. Jan Doust for assisting with the conduct of interviews and Dr. Chris Atmore for research assistance. See, Margaret Thornton, *Among the Ruins: Law in the Neo-Liberal Academy*, 20 *WINDSOR YEARBOOK OF ACCESS TO JUSTICE* 3 (2001); Margaret Thornton, *The Demise of Diversity in Legal Education: Globalisation and the New Knowledge Economy*, 8 *INTERNATIONAL JOURNAL OF THE LEGAL PROFESSION* 37 (2001); Margaret Thornton, *Corrosive Leadership (Or Bullying by Another Name): A Corollary of the Corporatised Academy?*, *AUSTRALIAN JOURNAL OF LABOUR LAW* 161 (2004); Margaret Thornton, *Neo-liberal Melancholia: The Case of Feminist Legal Scholarship*, 20 *AUSTRALIAN FEMINIST LAW JOURNAL* 7 (2004); Margaret Thornton, *The Idea of the University and the Contemporary Legal Academy* 26 *SYDNEY LAW REVIEW* 481 (2004); Margaret Thornton, *Gothic Horror in the Legal Academy* 14 *SOCIAL & LEGAL STUDIES* 267 (2005).

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¹ Robin Usher, *Imposing Structure, Enabling Play: New Knowledge Production and the "Real World" University* in *WORKING KNOWLEDGE: THE NEW VOCATIONALISM AND HIGHER EDUCATION*, 99 (Colin Symes and John McIntyre eds., 2000). The greater prestige of vocational courses is by no means new. Dunbabin states that this was also the case as far back as the 13th Century. See Jean Dunbabin, *Universities c. 1150 - c. 1350* in *THE IDEA OF A UNIVERSITY*, 34 (David Smith and Anne Karin Langslow eds., 1999).

student and teacher into one of 'customer' and 'service provider'.² Changes in pedagogy, modes of delivery and assessment have all contributed to a narrowing of the curriculum in a way that supports the market. I will briefly illustrate the way the transformation has occurred and consider its effect on legal education.

This study is based on interviews with academics in Australian public university law schools. Interviews were conducted with up to six academics from each school.³ Participants included both senior and junior, and male and female academics, as well as the dean or head of the school. They were asked to comment on their perception of change within the legal academy since the Dawkins reforms in 1988 with respect to curriculum, pedagogy and research, as well as the student body and their own lives as academics. Participants are referred to generically by position, and law schools by classification, in order to maintain confidentiality. The typology of schools includes four classifications according to age. They are the Sandstones (the original State university law schools); the Redbricks (that emerged post-World War II); the 3rd Generations (that emerged in the period of economic growth 1970s to 1990s); and the News (that generally emerged from the Dawkins reforms in 1988).⁴

B. The New Knowledge Economy

Under neoliberalism, increasingly equated with its extreme form of market fundamentalism,⁵ higher education has been reconceptualized as a private good for which users pay.⁶ Students choose their educational 'product' according to the brand name of a

² The ramifications of consumerism in higher education are explored in Patty Kamvounias and Sally Varnham, *Getting what they paid for: Consumer Rights of Students in Higher Education* 15 GRIFFITH LAW REVIEW 306 (2006).

³ Interviews were not conducted at La Trobe University, where I was employed at the time.

⁴ I have adapted the typology of Simon Marginson and Mark Considine, *The Enterprise University: Power, Governance and Reinvention in Australia* (2000) 15-16. While they include five classifications: the 'Sandstones', the 'Redbricks', the 'Gumtrees', the 'Unitechs' and the 'New Universities', I have reduced this to four, as I felt that participants in the two Unitechs with law schools could be too easily identified. Also, the Unitech law schools are older than the News but the Unitechs did not become universities until the Dawkins reforms, so I have included them with the News. There is therefore some slippage between categories. Law schools were also introduced into some Redbrick and 3rd Generation institutions at the same time as the New Universities were established post-1988. Research was conducted in the following Australian law schools: *Sandstones* – Universities of Adelaide, Melbourne, Queensland, Sydney, Tasmania and Western Australia; *Redbricks* – ANU, Monash, New England, UNSW; *3rd Generation* – James Cook, Deakin, Flinders, Griffith, Macquarie, Murdoch, Newcastle, Wollongong; *News* – Charles Darwin, QUT, Southern Cross, University of Canberra, UTS, UWS and Victoria University. Comparative research was also undertaken in the UK, Canada and New Zealand, which is not included in this article.

⁵ Kevin Rudd, *Child of Hayek*, THE AUSTRALIAN 20 October 2006, 12.

⁶ The Australian Government currently provides around AUD\$1,600 pa per capita towards a law place, the lowest on a 10-point disciplinary scale (See Australia, Department of Education, Science and Technology

university, rather than according to the excellence of the education. It is believed that the brand name associated with credentialism will enable the graduate to compete for high rewards within a volatile labor market. The high cost of a university education, whether in the form of HECS (Higher Education Contribution Scheme) or full fees, also has the effect of encouraging students to pursue highly remunerative careers on the corporate track in order to repay their education debt.⁷ A user-pays philosophy discourages students from pursuing public interest employment, because such work is normally not sufficiently well paid to service a substantial education debt.⁸

I emphasize that the central role now being played by the market in higher education emanates from government policy; there is no invisible hand at work here. The vastly increased percentage of students undergoing a university education is expected to augment the supply of new knowledge workers to ensure that Australia remains globally competitive.⁹ The country can no longer rely on primary production for its prosperity.¹⁰ The reforms associated with the ending of the binary divide in higher education in 1988 were one prong of the new strategy.¹¹ The former colleges of advanced education (teaching institutions that did not conduct research) were declared to be universities overnight. Despite the dramatic expansion in the higher education sector that resulted, government

<<http://www.goingtouni.gov.au>> at 8 December 2007. This means that most law students have to pay more than AUD\$8,000 pa themselves for what purports to be a government-funded place, and three times or more than that for a full-fee place (There is currently no cap on what a university can charge).

⁷ In Australia, a government-initiated loans scheme covers both government-funded (FEE-HECS) and full-fee places (FEE-HELP). The loans scheme enables students to begin repayment only when their income reaches a certain threshold, currently approximately AUD\$36,000. The money is then recovered through the taxation system. This loans system (euphemistically termed a 'contribution') has softened the impact of the shift from free higher education (1972-89) to a user-pays system, even though there has been a gradual increase in fees over time.

⁸ A United States study has shown that the rising cost of law school tuition narrows graduate options. See Equal Justice Works, National Association for Law Placement (NALP), Partnership for Public Service, *From Paper Chase to Money Chase: Law School Debt Diverts Road to Public Service* (2002). The findings for this study were based on responses received from 1,622 graduating law students from 117 law schools. For a useful Canadian study on the impact of the rising cost of tuition fees, see Faculty of Law, University of British Columbia, *Legal Education Project* (2005) available at: <<http://www.law.ubc.ca/files/pdf/news/2005/feb/LeapReport.pdf>>.

⁹ The impact of and response to the market has been similar in other Western countries. See Dietmar Braun and François-Xavier Merrien (eds.), *TOWARDS A NEW MODEL OF GOVERNANCE FOR UNIVERSITIES? A COMPARATIVE VIEW* (1999). Despite a long tradition of private universities, tertiary education in the United States has not been immune from the chill winds of neoliberalism either. See, e.g., Henry A Giroux, *Pedagogy of the Depressed: Beyond the New Politics of Cynicism*, 2000, available at: <<http://www.gseis.ucla.edu/courses/ed253a/GirouxDepressed02.htm>>.

¹⁰ Catherine Casey, *A Knowledge Economy and a Learning Society: A Comparative Analysis of New Zealand and Australian Experiences*, 36 COMPARE 343 (2006).

¹¹ Hon. John S. Dawkins, *Higher Education: A Policy Statement*, (White Paper, Australia, 1988)

funding was not proportionately increased. In fact, it actually began to decrease.¹² Starved of basic infrastructural funding, all universities, not just the News, were compelled to enter the market, replicating the imperatives confronting public sector institutions generally.

In addition to financial pressures, increasing numbers of students and perennial changes of policy direction, universities now face competition from non-traditional producers and purveyors of knowledge. The shift from state responsibility to the market includes the opening up of higher education to for-profit providers.¹³ Far from feeling the need to continue to safeguard the idea of 'the public' in the public university, neoliberal governments have no compunction in exposing universities to the full force of the market by fostering competition within the sector. In this regard, the federal Government has followed the recommendations of the Hilmer Report on competition policy.¹⁴ The introduction of for-profit providers of higher education is a dramatic development for, until recently, Australian universities were exclusively *not*-for-profit institutions.¹⁵ That is, they represented the mainstay of the public good. The new for-profit institutions may come from anywhere in the world, which points to the linkage between globalization and neoliberalism. In this regard, Australia is emulating the 'Washington Consensus,' whereby the United States has actively promoted two powerful international agencies in Washington – the World Bank and the International Monetary Fund – in respect of national economic policy.¹⁶ The introduction of the market to public education has turned universities upside-down.

The licensing and franchising of courses foreshadows the establishment of multinational for-profit universities, in the hope that substantial profits might be made by selling mass-produced education globally. If offered electronically, the infrastructural costs of delivery

¹² Over a period of approximately 20 years from the early 1980s to the early 2000s, government expenditure on higher education in Australia fell from approximately 90 per cent to 38 per cent. See AVCC, *Key Data on Higher Education* (2004).

¹³ Department of Education, Science and Training, Australia, *Building University Diversity: Future Approval and Accreditation Processes for Australian Higher Education*, (2005) available at: http://www.dest.gov.au/NR/rdonlyres/72F201EE-4D84-442F-9E92-C6968A27C818/2548/building_diversity.pdf.

¹⁴ Independent Committee of Inquiry into Competition Policy in Australia, *National Competition Policy* (Hilmer Report) (1993). The recommendations were incorporated into legislation soon afterwards. See *Competition Policy Reform Act 1995* (Cth). For a thoroughgoing critique of competition policy in the context of the contemporary university, see Kathryn McMahon, *Universities and Market Discourse* 27 *MONASH UNIVERSITY LAW REVIEW* 105 (2001).

¹⁵ While formally conceptualized as for-profit, Melbourne University Private was a disaster in that respect, costing Melbourne University (Public) millions of dollars. For an analysis of this university's dalliance with the market, see JOHN CAIN AND JOHN HEWITT, *OFF COURSE: FROM PUBLIC PLACE TO MARKETPLACE AT MELBOURNE UNIVERSITY* (2004).

¹⁶ Harry Arthurs, *The State We're In: Legal Education in Canada's New Political Economy*, 20 *WINDSOR YEARBOOK OF ACCESS TO JUSTICE* 35 (2001).

would be minimal. If torts, McDonalds style, could be franchised throughout the common law world, there would need to be only one provider – preferably from a North American Ivy League university. Whether courses are offered electronically or not, higher education has become a major export industry for Australia, amounting to billions of dollars per annum, thereby precluding a return to the way things were.

Globalization of culture has brought with it a homogenization of commodities and a similar propensity to standardize is occurring within the academy.¹⁷ The no-frills McDonalds torts package (substitute any core subject) could be expected to concentrate on communicating basic information in preference to critique and reflexivity. Paradoxically, competition policy emphasizes the distinctiveness of a brand name, while encouraging the standardization of the generic product – as with hamburgers or breakfast foods. This propensity in favor of standardization, aphoristically referred to as ‘McDonaldisation’,¹⁸ induces a lowest common denominator approach, while marketing hype emphasizes a specious distinctiveness that is designed to appeal to prospective customers.

C. Neoliberal Legal Knowledge

While considerable attention has been directed to the transformative impact of the market on the humanities and the sciences,¹⁹ comparatively little attention has been paid to the discipline of law.²⁰ Along with what are perceived to be its cognate disciplines – business and informatics – law appears to be thriving because of the virtually unstoppable demand for student places. The legal labor market has expanded because lawyers typify the new

¹⁷ SHEILA SLAUGHTER AND LARRY L. LESLIE, *ACADEMIC CAPITALISM, POLITICS, POLICIES AND THE ENTREPRENEURIAL UNIVERSITY* (1997).

¹⁸ GEORGE RITZER, *THE McDONALDIZATION OF SOCIETY: AN INVESTIGATION INTO THE CHANGING NATURE OF CONTEMPORARY SOCIETY* (2000).

¹⁹ See *e.g.*, BILL READINGS, *THE UNIVERSITY IN RUINS* (1996); Tony Coady (ed.), *WHY UNIVERSITIES MATTER: A CONVERSATION ABOUT VALUES, MEANS AND DIRECTIONS* (2000); Simon Cooper, John Hinkson and Geoff Sharp (eds.), *SCHOLARS AND ENTREPRENEURS* (2002).

²⁰ Exceptions include, Vivienne Brand, *Decline in the Reform of Law Teaching?: The Impact of Policy Reforms in Tertiary Education*, 10 *Legal Education Review* 109 (1999); Richard Collier, “We’re All Socio-Legal Now?” *Legal Education, Scholarship and the “Global Knowledge Economy” – Reflections on the UK Experience*, 26 *SYDNEY LAW REVIEW* 503(2004); Nickolas J James, *Power-Knowledge in Australian Legal Education: Corporatism’s Reign*, 26 *SYDNEY LAW REVIEW* 587(2004); Andrew Goldsmith, *Why should Law matter? Towards a Clinical Model of Legal Education*, 25 *UNIVERSITY OF NEW SOUTH WALES LAW JOURNAL* 721(2002); Richard Collier, *The Changing University and the (Legal) Academic Career – Rethinking the Relationship between Women, Men and the ‘Private Life’ of the Law School*, 22 *LEGAL STUDIES* 1(2002); See, *supra*, 18; Harry Arthurs, *The World turned upside down: Are Changes in Political Economy and Legal Practice transforming Legal Education and Scholarship, or Vice Versa?*, 8 *INTERNATIONAL JOURNAL OF THE LEGAL PROFESSION* 11(2001); W. Wesley Pue, *Globalization and Legal Education: Views from the Outside-in*, 8 *INTERNATIONAL JOURNAL OF THE LEGAL PROFESSION* 87(2001).

knowledge workers needed to facilitate the global economy. They are essential to devise innovative contracts and ways of circumventing regulatory obstacles at both the national and the international levels. Maureen Cain's description of lawyers as the *'par excellence'* institutional inventors²¹ captures their centrality to a dynamic global market economy.

The demand for law places is dramatically illustrated by the fact that in less than two decades – since the creation of the unified system of higher education – the number of law schools in Australia has increased from twelve to thirty two, with more waiting in the wings.²² In terms of numbers of students, there were 11,254 enrolled in law in 1984,²³ compared with 36,331 in law and legal studies in 2000.²⁴ In terms of degree completions, there were 1,932 in 1984 and 7,112 in 1999.²⁵

Despite the dramatic expansion of law, it is my contention that not all facets of the discipline are uniformly privileged. The legal academy is divided in the same way as other parts of the contemporary university. On the one hand, those branches of law thought to facilitate business are privileged. In contrast, those aspects associated with social justice, theory and critique are perceived as having little use value within the market paradigm, thereby rendering them dispensable. In addition, broad interdisciplinary and theoretical understandings of legal studies that encompass a critical component, such as legal philosophy, jurisprudence or sociology of law, have become increasingly marginalized. Critique entails a refusal to accept the objects of knowledge as unproblematic; it

²¹ Maureen Cain, *The Symbol Traders* in *LAWYERS IN A POSTMODERN WORLD: TRANSLATION AND TRANSGRESSION* 31 (Maureen Cain and Christine B. Harrington eds., 1994).

²² The University of South Australia is the most recent to announce the establishment of a law school. Other jurisdictions have also experienced a notable increase. The UK, which ended its binary system in 1992, had 85 law schools in 2000, compared with 48 in 1975. See Anthony Bradney and Fiona Cowrie, *British University Law Schools in the Twenty-first Century* in *LAW'S FUTURE(S): BRITISH LEGAL DEVELOPMENTS IN THE 21ST CENTURY* 1-2 (David Hayton ed., 2000). In contrast, both New Zealand and Canada have remained static, with five and 21 schools respectively.

²³ DENNIS PEARCE, ENID CAMPBELL AND DON HARDING, *AUSTRALIAN LAW SCHOOLS: A DISCIPLINE ASSESSMENT FOR THE COMMONWEALTH TERTIARY EDUCATION COMMISSION*, vol. 2 447 (1987).

²⁴ Department of Education, Training and Youth Affairs, Australia, *Higher Education Students Time Series Tables: Selected Higher Education Statistics 2000*, available at: <<http://www.dest.gov.au/NR/rdonlyres/AE11F01D-E517-4BF7-8ECA-8553C31EF206/2481/timeseries00.pdf>>.

²⁵ *Id.* These figures do not include students enrolled in the Legal Practitioners Admission Board course which is offered in association with the Law Extension Committee of the University of Sydney and awards a Diploma of Law that is recognized for the purposes of admission. In 2006, there were 2,594 students enrolled, <[http://www.lawlink.nsw.gov.au/lawlink/lpab/ll_lpab.nsf/vwFiles/Pass%20Fail%20stats%20Sept%202006.pdf/\\$file/Pass%20Fail%20stats%20Sept%202006.pdf](http://www.lawlink.nsw.gov.au/lawlink/lpab/ll_lpab.nsf/vwFiles/Pass%20Fail%20stats%20Sept%202006.pdf/$file/Pass%20Fail%20stats%20Sept%202006.pdf)> at 8 December 2007.

recognizes that doubts always exist.²⁶ Critique can be discomfiting because it has the potential to illuminate the dark underside of laws that sustain global capitalism, for example.²⁷ The shift in favor of offerings concerned primarily with the market and vocationalism²⁸ means that the liberal facets of the law school, which the legal academy has been keen to assert in order to enhance the standing of the discipline within the university community,²⁹ is once again under a cloud.³⁰ While I agree with Nicholas James that radical discourses have generally been marginalized within Australian law schools,³¹ I suggest that the love affair with the market has affected mainstream jurisprudence, legal history and liberal law reform also. It might be noted that universities, particularly the newer ones, are promoting the relationship between law and business, as though it were natural, as may be seen by the propensity to amalgamate schools of law with business and management in restructured mega-faculties. I interpolate here that not all law graduates go into traditional legal practice, and certainly not corporate law, despite the pervasiveness of the business rhetoric.³²

Social liberalism, in conjunction with the modernization of legal education, encouraged students to pay heed to context and question doctrine. As a result, law schools from the 1970s began to transcend a narrow technocratic approach with the aim of developing well-rounded lawyers, shaped by the insights of the humanities and social sciences. However, the reality is a little more complex, as Anthony Bradney notes in his study of the liberal law school in Britain.³³ Although the 'liberal' descriptor is not normally used in the Australian

²⁶ Duncanson explored the discomfiting role of critique in legal education some years ago, a discomfort that has been exacerbated since by the increasing corporatization of universities. See Ian Duncanson, *Legal Education and the Possibility of Critique: An Australian Perspective*, 8 CANADIAN JOURNAL OF LAW AND SOCIETY 59(1993).

²⁷ I have written elsewhere about the process of desensitization to which law students are subjected. Margaret Thornton: *Technocentrism in the Law School: Why the Gender and Colour of Law Remain the Same*, 36 OSGOOD HALL LAW JOURNAL 369 (1998).

²⁸ Nickolas James identifies six discourses, or ideologies, underpinning Australian legal education, namely, doctrinalism, vocationalism, corporatism, liberalism, pedagogicalism and radicalism. Each discourse is an expression of power in perpetual competition with the others for dominance. See Nickolas J. James, *Australian Legal Education and the Instability of Critique*, (2004) 28 MELBOURNE UNIVERSITY LAW REVIEW 375.

²⁹ Charles Sampford and Sophie Blencowe, *Context and Challenges of Australian Legal Education* in, NEW FOUNDATIONS IN LEGAL EDUCATION 8 (John Goldring, Charles Sampford and Ralph Simmonds eds., 1998).

³⁰ This contradiction is addressed by Brand, *supra*, note 20.

³¹ Nickolas J. James, *The Marginalisation of Radical Discourses in Australian Legal Education*, 16 LEGAL EDUCATION REVIEW 55 (2006).

³² The figure is difficult to compute precisely in Australia because a practising certificate is unnecessary for many positions, such as in-house corporate counsel. A study by Karras and Roper in 2000 found that approximately 80 per cent of Australian graduates were in law-related employment. See MARIA KARRAS AND CHRISTOPHER ROPER, *THE CAREER DESTINATION OF AUSTRALIAN LAW GRADUATES* (2000).

³³ ANTHONY BRADNEY, *CONVERSATIONS, CHOICES AND CHANCES: THE LIBERAL LAW SCHOOL IN THE TWENTY-FIRST CENTURY* (2003).

context, the phenomenon described by Bradney approximates the broader approach that began to emerge in various forms in the 1970s. Nevertheless, the role of the admitting authorities always constrains what is taught because admission to practice involves certification as to knowledge of doctrine, not knowledge of jurisprudence, radical critique or the social context in which law is located. The optional nature of these discourses reduces them to the status of dispensable 'frills' that a lecturer may include or discard at will. The role of admitting authorities has ensured that doctrinalism remains a constant in legal education although the *power* of doctrinal discourses are not constant, as James shows.³⁴ They wax and wane according to the times.

More academic and diverse approaches to legal scholarship began to emerge in Australia at the peak of social liberalism in the 1970s. This diversity was not peculiar to a particular school or schools, although UNSW, Monash and Macquarie were in the vanguard.³⁵ By the time of the Pearce Report in 1987,³⁶ a watershed in Australian legal education, we see acceptance of the view that law should at least be taught in its social context and that a critical pedagogy was desirable. This represented a sharp reaction against the sterile doctrinalism of the past,³⁷ although there was confusion as to just what ought to be included in the curriculum.³⁸ An increased interest in identity politics, diversity and social theory, including feminist, postmodern and postcolonial perspectives, caused a new cluster of subjects to appear.³⁹ These understandings of law sometimes moved from margin to mainstream in the form of perspectives on law in a foundational course. The aim was to sensitize students to new ways of thinking about social justice, power and 'the other' in society. There was also a consciousness that students should be educated rather than merely trained. Indeed, the Pearce Report engendered the idea that the law degree was to be the 'new Arts degree', but the sway of the professional underpinnings of the degree may have been underestimated.⁴⁰

³⁴ Nickolas James, *Australian Legal Education and the Instability of Critique*, 2, 375 MELBOURNE UNIVERSITY LAW REVIEW (2004). See also the essays in Goldring, Sampford and Simmonds, *supra* note 29.

³⁵ Webber presents an account of the changes that occurred, with particular reference to the University of Sydney Law School. See Jeremy Webber, *Legal Research, the Law Schools and the Profession* 26 SYDNEY LAW REVIEW 565 (2004).

³⁶ Pearce, *supra* note 23.

³⁷ Nickolas J James, *A Brief History of Critique in Australian Legal Education*, 24 MELBOURNE UNIVERSITY LAW REVIEW 965(2000); James, *supra* note 31.

³⁸ Charles Sampford and David Wood, *Theoretical Dimensions of Legal Education*, in Goldring, Sampford and Simmonds, *supra* note 29, 102.

³⁹ Thornton, *The Demise of Diversity in Legal Education*, *supra* note *.

⁴⁰ Brand, *supra*, note 20, 128.

In light of law's responsiveness to contemporary socio-political trends, it is perhaps unsurprising to find that there has been something of a resiling from social justice and critique to accommodate the market turn. In fact, the critical space began to contract at the very moment the practices of the market became more insistent.⁴¹ As neoliberalism established itself as the dominant political philosophy, a constellation of subjects believed to facilitate the market, including advanced contract, corporations, trade practices, competition policy, intellectual property and taxation law, taught from a doctrinal rather than a critical perspective, were favored. Sandra Rodgers notes in regard to Canadian legal education how social liberal discourse was similarly replaced with the 'vocabulary of business'.⁴² Of course, a market economy has always privileged subjects oriented towards commerce and property, a leaning that received a boost with the expansion of legal practice in the 1970s and 80s,⁴³ but the neoliberal turn of the 1990s and the 2000s has clinched its supremacy and the marginalization of alternative discourses. The teaching of market-based knowledge by law schools satisfies the needs of the labor market and is believed to secure the approbation of law firms. It is also deemed advantageous for students facing uncertain futures:

There's been a lot of discussion in the school about how we can make our students more marketable to the profession, particularly the big law firms, and just yesterday there was an agreement to change our course structure to include more compulsory commercial law units...So that's a pressure, not so much for the purpose of getting funding but for the purpose of getting our students more jobs in the big firms (Acting Head of School, fem, New).

The substantial education debts confronting students also serve to hasten the sloughing off of a social justice and a critical orientation.⁴⁴ The high cost of a legal education induces a narrow instrumental view of law and occludes its imaginative and reformist potential. The need for students to work while studying,⁴⁵ with one eye to managing debt, has

⁴¹ *Id.* Brand similarly observes that the recommendations of the Pearce Report become irrelevant almost immediately. For a follow-up on the impact of the Pearce Report in the face of the Dawkins reforms and declining resources, see Craig McInnis and Simon Marginson, *Australian Law Schools after the 1987 Pearce Report* (1994).

⁴² Sandra Rodgers, *Legal Education: Is it in Crisis?* (Paper presented at Workshop on the Future of Canadian Legal Education, University of Manitoba, 3-4 May, 1999) available at: <http://www.umanitoba.ca/Law/LRI/Legal_education/rogers.htm>.

⁴³ Michael Chesterman, *Professional Responses to New Law Schools* in Goldring, Sampford and Simmonds, *supra*, note 29, 204.

⁴⁴ See also Equal Justice Works, *supra*, note 8.

⁴⁵ Australian undergraduates enrolled in full-time courses now undertake an average of 15 hours paid work per week. See CRAIG MCINNIS AND ROBIN HARTLEY, COMMONWEALTH OF AUSTRALIA, *MANAGING STUDY AND WORK: THE IMPACT OF FULL-TIME STUDY AND PAID WORK ON THE UNDERGRADUATE EXPERIENCE IN AUSTRALIAN UNIVERSITIES* (2002)

encouraged a minimalist approach to credentialism so that two-year law degrees may now be offered instead of three, four or five-year programmes.⁴⁶ Truncated courses inevitably focus on basic doctrine. When a choice has to be made, the social is deemed to be dispensable because its inclusion is not specified by the admitting authorities. Separating law from its socio-political context reifies the positivistic myth that law is autonomous and disconnected from the social forces that animate it. A depoliticized rules-oriented approach belies the play of power beneath the surface.⁴⁷ Thus, in the case of *Individual A versus Corporation B*, B appears to win because of application of the rule, rather than because it had a monopoly over the evidence, in addition to having access to unlimited legal resources. A renewed emphasis on doctrine with its façade of neutrality therefore comports very well with market liberalism. The ambivalence surrounding the theoretical and the critical allows them to be shed relatively easily when convenient – despite the best endeavors of committed legal scholars. Feminist legal theory is an example of an area of critical scholarship that experienced a brief flowering and is now claimed to have had little effect on the law curriculum as a whole.⁴⁸ Intellectual diversity encouraged tentative moves in favor of interdisciplinary scholarship, but the intractability of the belief that authenticity in law requires a lawyer's point of view has served to confine such approaches to the periphery of the law curriculum.⁴⁹

<http://www.dest.gov.au/sectors/higher_education/publications_resources/profiles/managing_study_and_work.htm>

⁴⁶ See e.g., Melbourne University's JD is a 2-year full-fee degree for graduates. Monash University Law School similarly has a two-year LLM, and Deakin University Law School a 2-year LLB. The University of Melbourne has restructured its law degree to make it a graduate degree for all students in 2008. In other law schools, a trend away from the typical combined degree back to a standalone law degree is discernible. See Richard Johnstone and Sumitra Vignaendra, *Learning Outcomes and Curriculum Development in Law: A Report commissioned by the Australian Universities Teaching Committee (AUTC)* (2003) 67-69.

⁴⁷ The work of Galanter has become a classic in the way it exposes the role of corporate power within a formally equal adversarial system. See Marc Galanter, *Why the "Haves" come out ahead: Speculations on the Limits of Legal Change* LAW & SOCIETY REVIEW 4 (1974-75). A primary aim of the Critical Legal Studies movement generally has been to expose the seeming invisibility of power within law. See, for example, the essays in David Kairys ed., *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (1982). CLS paved the way for a plethora of other critical and deconstructive movements in law which were keen to show that justice was not blind. See, for example, NGAIRE NAFFINE, *LAW & THE SEXES: EXPLORATIONS IN FEMINIST JURISPRUDENCE* (1990).

⁴⁸ Johnstone and Vignaendra, *supra*, note 46. Nickolas James analyses the reasons for the marginalisation of radical scholarship in Australian legal education. See James, *supra*, note 30.

⁴⁹ Ian Duncanson, *Interdisciplinarity in the Law Discipline*, 5 GRIFFITH LAW REVIEW 77, 80 (1996); Ian Duncanson, *The Ends of Legal Studies*, 3 WEB JOURNAL OF CURRENT LEGAL ISSUES (1997), available at: <<http://webjcli.ncl.ac.uk/1997/issue3/duncan3.html>>. See also, John Wade, *Legal Education in Australia – Anomie, Angst, and Excellence*, 39 JOURNAL OF LEGAL EDUCATION 189, 192 (1989).

Law's renaissance as an intellectual discipline has not been eviscerated overnight, but the savagery of government cuts has meant that few law schools have been able to maintain their traditional range of optional offerings, as well as a commitment to small group teaching. Taking in more students was the typical response to budget shortfalls, but it simply exacerbated staff/student ratios and compelled changes in the range of offerings and modes of delivery. Charles Sampford recounts how he and Christine Parker contacted all law schools in 1993 to ascertain estimates of the number of law students they proposed to enroll in the next five years.⁵⁰ Very few planned to increase their intakes, and some were even proposing to reduce their numbers. A change of government and the slashing of university operating grants induced a completely different scenario, with some of the newer schools exponentially increasing their student intake over the ensuing decade.

From what was once a remarkably flat system, the introduction of competition policy has brought about clear divisions between institutions. Most of the Sandstones and the Redbricks are doing quite well in the new regime because they are able to trade on their positional goods (augmented through public funding in the past) and metropolitan locations to attract full-fee payers, although there is little evidence of distinctiveness in their legal education. 'McDonaldization', in conjunction with the uniform admission rules, has induced a remarkable greyness among law schools.⁵¹ Rob McQueen has epigrammatically referred to the phenomenon of replication that typifies law schools as 'the culture of the copy'.⁵² Rather than developing curricular distinctiveness, the elite schools have been more concerned to enhance their research standing, with an eye to league table rankings.⁵³ Research not only augments positional goods that attracts high quality students, but is a valuable source of competitive funding. In this way, it serves to widen the gap between the Sandstones and the rest.

⁵⁰ Charles Sampford, *The Panic over Numbers*, in Goldring, Sampford and Simmonds, *supra*, note 29, 70.

⁵¹ Curricular uniformity is a characteristic of common law jurisdictions. See, e.g., William Twining, *Rethinking Law Schools*, 21 *LAW & SOCIAL INQUIRY* 1007 (1996). Rodgers notes that the twenty-one Canadian law schools all offer more or less the same things. See Rodgers, *supra* note 42.

⁵² Rob McQueen, *The Nike Law School (or) Branding and its Discontents in Legal Education*, (Paper presented at the W G Hart Legal Education Workshop, London, 26-28 June 2001).

⁵³ Despite strong criticism of crudity as a measurement of quality and their anti-diversity propensity, league tables have quickly established themselves as an inevitable dimension of the modern university landscape. See, e.g., Gavin Moodie, *The Research Race*, 2 *JOURNAL OF THE PUBLIC UNIVERSITY* 3 (2005), available at: <http://www.publicuni.org/jrn/volume/2/journal_2_race.html>. Law school rankings have also been subject to trenchant critique; Margot E Young, *Making and breaking Rank: Some Thoughts on recent Canadian Law School Surveys*, 20 *WINDSOR YEARBOOK OF ACCESS TO JUSTICE* 311(2001); D A Thomas, *The Law School Rankings are harmful Deceptions: A Response to those who praise the Rankings and Suggestions for a better Approach to evaluating Law Schools*, 40 *HOUSTON LAW REVIEW* 419 (2003).

The 3rd Generations are caught in the middle. They are struggling to be accepted as research-active institutions but, without the advantage of brand name and capital reserves to fall back on, they have had to take in large numbers of students, which jeopardizes their research efforts. At least one Australian law school has abandoned its critical and social justice strengths in favor of business law, in the belief that this would attract more students.⁵⁴

The position of the News is generally invidious. On becoming universities, they expended considerable energy in enhancing their research capability, but research has had to take second place to teaching as they struggled to make ends meet because student places are a more reliable source of income for them. Nevertheless, they are left with the weaker domestic students after the pool has been cherry-picked by those further up the status ladder because they frequently lack both the positional goods and the geographical location to be competitive. While they might choose to rely on overseas students as a source of full-fee income, the English language skills of many of these students are academically unsophisticated, a factor that is contributing to the technocratic and rule-based approach to legal education.⁵⁵ While the News had the greatest potential for diversity and innovation, this has been curtailed, as predicted by McInnes and Marginson, by the fact that they have the least potential for market share.⁵⁶

D. Pedagogical Practices

1. *Prepackaged Knowledge*

As for the humanities and social sciences generally, effective teaching in law requires interrogation and discussion of the subject matter. The idea of the 'sage on the stage' presenting a turgid monologue to students who passively ingest what is said without any opportunity for question or debate has long been rejected by educationists as an effective form of pedagogy.⁵⁷ In the 1970s, 80s and 90s, as a result of attempts to modernize and liberalize legal education, a conscious endeavor was made to reject the passive pedagogy and the transmission of frozen knowledge. Rather than the 'sage on the stage', the law

⁵⁴ For a case study of the trajectory of change in the School of Law and Legal Studies at La Trobe University, see Margaret Thornton, *The Dissolution of the Social in the Legal Academy*, 25 AUSTRALIAN FEMINIST LAW JOURNAL 3 (2006).

⁵⁵ Thornton, *supra*, note 27.

⁵⁶ McInnis and Marginson, *supra*, note 41.

⁵⁷ See e.g., M J Dunkin, *A Review of Research on Lecturing* 2 HIGHER EDUCATION RESEARCH AND DEVELOPMENT 63 (1983); GEORGE BROWN AND MADELEINE ATKINS, *EFFECTIVE TEACHING IN HIGHER EDUCATION* (1988); NIRA HATIVA, *TEACHING FOR EFFECTIVE LEARNING IN HIGHER EDUCATION* (2000). See also, Mary Keyes and Richard Johnstone, *Changing Legal Education: Rhetoric, Reality and Prospects for the Future*, 26 SYDNEY LAW REVIEW 537 (2004).

teacher began to see him or herself as a facilitator of discussion. Students were obliged to think through the issues for themselves by (commonly) reading set materials for class and being assessed on their oral performance in class. As a result of what James refers to as 'pedagogicalism',⁵⁸ the focus shifted from the substance of the knowledge to the form in which it was purveyed. These new pedagogies encouraged a variety of flexible methods which were employed to encourage a dialogic approach to stimulate debate and discourage the belief that law provided 'right' answers.

'Massification' and under-funding have caused a reversion to an unedifying chalk and talk pedagogy in most institutions, albeit that the chalk has been replaced with Powerpoint. Some academics held out as long as they could against the return of lectures with their propensity to stifle the questioning voice, but were forced to capitulate with the unmanageable expansion in numbers:

About five years ago – and this is what got us into financial trouble – we introduced small group teaching...Instead of a large lecture and the odd tutorial, classes would be taught in seminars of 30-35. It was far more labor intensive to teach people in those small groups and, ultimately, I think we discovered we were soon bankrupt because there was no extra money coming from the university to us for doing that. We had this problem of having these extra people on the payroll and not enough money to pay everyone...We've ended up instituting small group teaching in the first two units. Even though the master plan was that it was going to flow right throughout the whole law school, it became clear that was impossible...What happens in the later years in the compulsory units is that they go back to that big lecture plus tutorial (AsPro, male, Sandstone).

Effective learning is marginalized in the swing back to lectures, despite the contemporary focus on teaching 'quality'.⁵⁹ Two and even three-hour lectures are highly questionable in an era where students are accustomed to 90-second media sound-bites. Indeed, it is unimaginable that lecturers themselves would tolerate their peers presenting two or three-hour papers at conferences. Lectures mean that one academic can 'teach' 500 students simultaneously, and possibly many more in distant sites through on-line transmission and video-link. There appears to be wide acceptance of the return to a lecture-based pedagogy in the name of efficiency. The focus of these face-to-face marathons is on coverage and endurance:

⁵⁸ James, *supra*, note 20.

⁵⁹ Universities are subject to audit on a five-year cycle by the Australian Universities Quality Agency (AUQA): <<http://www.auqa.edu.au/aboutauqa>>.

They're exhausting and by the end of yesterday, I had covered too much material but I felt I had to get this material covered for the purposes of the course. I'm not the only person teaching the course so you know you've got to keep in step with the other teachers. By the end of it, there's no doubt that nothing was going in, but there I was up the front going through the motions to get through the material, and it's a 3pm-5pm time slot, so looking at almost glazed eyes by the last half hour (Snr Lecturer, male, Redbrick).

The concept of 'coverage', fostered by the admitting authorities in respect of specified areas of knowledge, underpins the justification for lectures. This style of pedagogy encourages the transmission of prepackaged knowledge for recording, memorizing and regurgitation. The one-way flow of knowledge necessarily stifles critical and independent thought:

The first thing I noticed when I came here was being dictated a case note...I sat and dutifully took notes in the lecture, went away and read the case and thought, well, I must be missing something because everything they've said is in here and everything I got out of that is in my notes. What's going on here because I wasn't used to that? I mean no one sat down and said, 'Jane Austen is about this' (Assoc Lecturer, male, New).

They don't want to read cases because the lecturing style gives you a perfect case. Why would you? (Lecturer, fem, New).

Well, I've yet to teach legal theory here. It is a compulsory course, so I've heard that there can be quite a lot of resistance by law students because it doesn't seem relevant...and the other thing is I'm used to teaching legal theory in a seminar context. Here, the class is going to be 300 and there's going to be two lecture groups – two lectures a week and one tutorial and I'm quite alarmed about teaching legal theory by pontificating from the front (Sen Lecturer, male, Redbrick).

The movement away from small group teaching to large lectures also subtly favors a doctrinal approach over questioning and reflection. Students believe they are getting value for money if their teachers provide them with information; they are not interested in hearing the views of other students in class discussion.⁶⁰ Not only is interaction difficult in a large lecture theatre, but there is a tendency to go for the lowest common denominator approach because the lecturer is uncertain about the level of understanding within a heterogeneous group, particularly if there are substantial numbers of non-English speaking

⁶⁰ Johnstone and Vignaendra, *supra*, note 46, 271.

background (NESB) students. It usually means focusing on the transmission of information, not active learning. A lecturing pedagogy has become normalized because discussion of the values associated with legal education has largely disappeared in the face of market discourse.⁶¹ Hence, law schools become complicit in reifying the values of the market as students are prepared for life as good technocratic lawyers on the corporate track. While the majority of students will not be employed by the corporate firms, this sector nevertheless remains a powerful, albeit tacit, driver of the law curriculum because of its status in the legal labor market.

I do not wish to diminish the efforts of those committed academics and law schools that have endeavored to hold on to a critical pedagogy. Indeed, quite a few law schools include critical thinking in their mission statements, as summarized by Johnstone and Vignaendra in their AUTC report in 2003.⁶² The report sought to document a 'best practice' approach to law school pedagogy in the face of contemporary constraints. Individual academics have also written about innovative teaching strategies they have devised.⁶³ Ultimately, however, most have acceded to the pressures and capitulated. Sometimes, changed practices, such as moving from small group teaching to lectures has been imposed upon them from above.

II. Flexible Delivery

The 'flexible delivery' of courses suits the customers of legal education. I have already referred to electronic delivery, with its ability to beam anything anywhere at any time. The shift to intensive or 'block' mode, in which an entire subject is taught full-time in one or two weeks, or over two weekends, has become increasingly popular – with staff as well as students:

It enables people to manage their teaching load flexibly; it allows students to manage their educational loads flexibly; it also allows students to get out faster, which is a big motive (AsPro, fem, 3rd Generation).

This mode of delivery had its genesis in coursework masters programmes and was designed to appeal to students in full-time work who found it difficult to attend campus regularly. When the numbers began to drop off, viability of the subjects was retained by

⁶¹ Goldsmith, *supra*, note 20, 726. But see Johnstone and Vignaendra, *supra*, note 46.

⁶² Johnstone and Vignaendra, *supra*, note 46, ch 4.

⁶³ See *e.g.*, Elizabeth Handsley, Gary Davis and Mark Israel, *Law School Lemonade: Or can you turn External Pressures into Educational Advantages?*, 14 GRIFFITH LAW REVIEW 108 (2005). While the negative dimensions of the current climate suggest the sourness of lemons, the input of academic creativity is the sugar that produces lemonade. While the authors' course in constitutional law was contracted, they developed a valuable alternate pedagogy through the formation of student teams that fostered collaborative and oral skills.

making them available to undergraduate students in the winter or summer breaks. Such courses are generally offered on a full-fee basis as a way of boosting ailing coffers.

Unsurprisingly, there is a well founded perception among students that intensives are easier. How could it be otherwise? They invariably involve less time in which serious critical work can be undertaken. It is impossible to imagine how a deep approach to learning,⁶⁴ involving reflection and critique, could be achieved in a week, compared with three months in a conventional semester unit. Clearly, there is little opportunity in which to read, let alone reflect on the significance of the knowledge being taught. The popularity of such courses, together with the money they make, deflects attention away from their negative aspects.

III. Assessment

The traditional means of assessing law students is by final examination, a mode that is peculiarly suited to the cramming and regurgitation of doctrine, the paradigm of passive learning. Continuous assessment, including class participation and research essays, was a corollary of social liberalism and the development of a student-oriented, active learning approach in which the student took responsibility for acquiring knowledge, interrogating it, assimilating it and applying it. As with the curriculum and pedagogy, commodification has induced an economically rationalist approach towards assessment. Even reflective essays are now deemed to take too long for students to research and write up; they cannot be subsumed into the neat portfolio of orthodox legal knowledge that the 'customers' prefer. Even the word 'essay' carries such a weight of baggage that some participants said that they no longer used it. Nevertheless, as Martha Nussbaum points out, it is through writing essays, not examinations, that students acquire the skill of mounting careful arguments.⁶⁵ 'Massification' and the increased staff/student ratio have compelled a reversion to examinations as the primary form of assessment. The increase in plagiarism⁶⁶ may be raised as a justification:

⁶⁴ The best in-depth study of learning in law is MARLENE LE BRUN AND RICHARD JOHNSTONE, *THE QUIET (R)EVOLUTION: IMPROVING STUDENT LEARNING IN LAW* 59-61 (1994).

⁶⁵ Martha C Nussbaum, *Cultivating Humanity in Legal Education*, 70 *UNIVERSITY OF CHICAGO LAW REVIEW* 265, 273 (2003).

⁶⁶ See e.g., Justin Zobel, "*Uni Cheats Racket*": *A Case Study in Plagiarism Investigation*, (Paper presented at the Sixth Australasian Computing Education Conference, Dunedin, 2004) 30 *CONFERENCES IN RESEARCH AND PRACTICE IN INFORMATION TECHNOLOGY* (2004). So widespread and sophisticated has plagiarism become that there is now a journal dedicated to it. See *Plagiary: Cross-Disciplinary Studies in Plagiarism, Fabrication and Falsification*, available at: <<http://www.plagiary.org>>.

There is less emphasis, I would have to say, on research assignments, that is, the written assignments are more likely to be problem-based and are more likely to be a synthesis of available material rather than research. That is very much a matter of reduced library resources, reduced student time commitment and our inability to supervise, and a lot of it has to do with plagiarism...Students come out with less research skills – you know that thing of going out and doing something on your own, but also getting some supervision, is lost. It was only available to a few anyway, but it's available to fewer (AsPro, fem, 3rd Generation).

Perhaps most significant from the perspective of academics is the intractability of the workloads issue that has caused even the most dedicated academics to question whether they should persevere with research essays:

Because I have 120 students that I am dealing with by myself, I changed the assessment from examination *or* research essay to three 2,000 word pieces...This means that I have spent a large number of Sundays marking the continuous assessment essays...Yesterday, we discussed whether it was possible to deliver options within each subject and whether we should move to exams (Snr Lecturer, fem, Sandstone).

Instead of 60 pieces of work to mark, we've now got 100...We might have a theoretical piece in the first session of property, but I'm going to have to do away with that now. I'm marking them all and there will just have to be a problem that I can mark quickly rather than a theoretical piece that takes a lot longer to mark (Lecturer, male, 3rd Generation).

Even if a research essay is offered as an option in lieu of an examination, students generally prefer not to do it:

Essays are optional for the students. Not many take them up, probably a dozen a year out of 250 students – a very low percentage. When we made assignments optional, we were criticized for doing so because they claimed they wanted more experience with legal writing, though we don't actually see evidence of them taking up that option. However, in response to the criticism, we've introduced compulsory assignments into five units across the years so that they do get experience (Acting Head of School, fem, 3rd Generation).

It is clear that the writing of critical essays is no longer perceived to be a non-negotiable element of law school culture. A focus on doctrinalism, known knowledge and 'right answers' has replaced the questioning voice. If an essay is required, students struggle with it because it runs counter to the pervasive culture of technocentrism:

I give students a piece of research and I ask them to write a critical review and then I ask them to write an essay about issues to do with research. For instance, I have an essay question where I say, is there, can there be a feminist methodology, or what does this entail, or whatever...The book review stresses students because they have never been asked to assess, to critically think about a piece of work. Usually they just regurgitate. They perform marvelously on it, but we always have complaints, very stressed students. Then, I have an assignment where I really ask them to think. I give them the option of coming back to me with essay topics and usually they come back and say, I am interested in this topic, can you come up with a question for me to answer. They struggle, and most of my students already have degrees and I have the top students...but they still find it very stressful to actually deal with a broader theoretical essay topic (Research Fellow, fem, 3rd Generation).

As a result of abolishing essays altogether or making them optional, it is now possible for a student to go through law school without having done a single research paper. Snapshots of knowledge – short opinions, hypothetical problems and tests – are the order of the day, all of which favor the acquisition of information, which accords with the applied focus in the ascendancy. Generally speaking, these modes of assessment test memory of orthodox knowledge that delimits students' horizons and discourages critical thinking. Usually, it is only the 'is' of law that is of interest, not what 'ought to be'. Challenging questions of a philosophical and ethical nature tend to be neglected because 'they are not in the exam'. What is more, they are not specified by the admitting authorities. It can therefore be seen how pedagogical as well as curricular sites induce depoliticization in accordance with the neoliberal agenda.

E. Declining Standards

There has been a decline in faith in the institutions of civil society in the West, which includes universities.⁶⁷ This is manifest in the popular discourse of anti-elitism,⁶⁸ which has become more overt with the ascendancy of neoliberalism, with its conservative as well as its applied philosophy. These socio-political factors have undoubtedly contributed to the fact that the preponderance of law students are less engaged with their study as an

⁶⁷ See e.g., Raymond Gaita, *Breach of Trust: Truth, Morality and Politics*, 16 QUARTERLY ESSAY 1(2004); Onora O'Neill, *A Question of Trust* (BBC Reith Lectures, 2002); Henry A Giroux, *Neoliberalism, Corporate Culture, and the Promise of Higher Education: The University as a Democratic Public Sphere*, 72 HARVARD EDUCATIONAL REVIEW 425(2002); RICHARD SENNETT, *THE CORROSION OF CHARACTER: THE PERSONAL CONSEQUENCES OF WORK IN THE NEW CAPITALISM* (1999); Readings, *supra*, note 19.

⁶⁸ Marian Sawer and Barry Hindess (eds.), *US AND THEM: ANTI-ELITISM IN AUSTRALIA* (2004).

intellectual experience than they once were. They are cynical about the fact that they themselves are valued by universities primarily for the money they bring with them. Their experience is also shaped by the fact that most are working, they are accruing substantial debts and they want a well paid job as soon as possible. The university has become less a site of education and intellectual growth for them than a place of training and credentialism, justifying whatever shortcuts are available.

As neoliberal governments have forced universities to become market players, they have been compelled to respond to the power of the consumers. The twin variables of 'massification' and under-funding have inevitably affected not just the content and pedagogy of legal education, but also the caliber of the student body:

I was coordinating a first year subject when the university decided to go from a couple of hundred students to somewhere between 500 and 700...There's an inevitable drag which comes, not from individual markers consciously dumbing down, but from the gravitational pull of adding more numbers from the lower end (Prof, male, New).

There's a desperate attempt by our colleagues to maintain content and standard, but a growing realization that it can't be done and, more in sorrow than anger, we ditch things. Mooting electives are just so time-consuming...The tail is getting longer, that's my feeling. Whereas you'd have maybe four or five students in a group of 25 that were marginal, that's now creeping up to maybe 10 or 15, so you have this disjointed group where one section is operating at a high level, taking the most advantage of their legal education and the rest who just want a certificate (Snr Lecturer, male, Sandstone).

'Massification' is a vexed issue in the context of standards, as it merges with the more positive concept of 'democratization', which has undeniably accorded opportunities to many who would have been denied access in the past. The result is a much more diverse student body.⁶⁹ However, diversity is not simply a question of gender, race and class, but also goes to ability and how well prepared students are for university study. Sheer numbers preclude academics from devoting the time to pastoral care that they once could. Instead of offering remedial assistance to those who might need it, the favored course has been for law schools to adapt their teaching. The lowering of standards has affected the Sandstones, the Redbricks and the 3rd Generations, as well as the News. Once students appreciate the extent of their consumer power, they recognize that they are able to influence what is taught and how it is taught:

⁶⁹ For valuable research on the relationship between New universities and diversity within the student body in the UK, see Hilary Sommerlad, *Researching and Theorizing the Processes of Professional Identity Formation*, 34 JOURNAL OF LAW AND SOCIETY 190 (2007).

Because they are putting out money and their parents are putting out money, they have high expectations as to what they are going to get and I think it's also been a policy generally within university that they want to keep the students happy. They are the customers and I think the standard of our teaching is not as high and intense as it was ten or fifteen years ago, which was on a completely different level. We now have to reduce those lectures to much simpler material; the concrete stuff is being left out of the course because it's hard. The students don't want to do anything that is too hard...They want it all handed to them; they want a summary of the cases; they want a summary of the lecture notes; they want a very easy textbook to read. They have stopped reading cases so I do case notes (Snr Lecturer, fem, Sandstone).

If the pedagogy moves away from small groups to large lectures; if the time of a course is reduced from a semester to a week; and if the assessment changes from reflective research-based essays to the regurgitation of known knowledge in exams, or even computer-based multiple choice tests, law lecturers aver that it is not their fault, for the explanation lies elsewhere. The general public evinces concern about the deliberate manipulation of entry scores and pass marks if it appears that access is arbitrary and inequitable, but there is little concern for the systemic inequities arising from the structural effects of the market on the curriculum and pedagogy. The former is understood as corruption, while the latter is accepted as evidence of the normal workings of the market. It may be hard to tell the difference; the market has a habit of skewing good ethical practice.

Some participants adverted to being pressured by their university international offices to accept potential full-fee students whom the school had rejected. There were also accounts of pressure to lower the tertiary entry scores for domestic students and subsequent complaints when university failure rates were too high. The lowering of entry scores has been effected to attract full-fee students, who are otherwise unable to meet competitive entry requirements.⁷⁰ Courses involving full-fee paying students have generated tales of preferential treatment, marking scams and 'dumbing down' for some years.⁷¹

⁷⁰ One law school is quoted as having a TER of 97.05 for a HECS-based Commerce/Law place, compared with 81.45 for a full-fee place. See Adam Morton, *Uni Entry System "undermined" by Late Transfers: Union Concern over Queue-jumping*, THE AGE, 29 January 2007, 5.

⁷¹ The dismissal of Associate Professor Ted Steele by the University of Wollongong following allegations of 'soft marking' has become something of a *cause celebre*. See Patrick Lawnham, *Strike at Steele Stalls*, THE AUSTRALIAN, 15 May 2002, 43; Brian Martin, *Justice Ignited: The Dynamics of Backfire* (2006). See also, Senate Employment, Workplace Relations, Small Business and Education References Committee, Australia, *Universities in Crisis* (2001) 150-60.

Also questionable is the fact that students admitted on a full-fee basis may be able to transfer to a government-funded place after a year or so, thereby circumventing the high entry requirements for law. While the extension of the income-contingent FEE-HELP system⁷² carries an aura of egalitarianism with it, in that it is designed to ensure full-fee programmes are not available exclusively to the rich, it has resulted in increasing numbers of less prepared students straining the quality of legal education because the ability to pay rather than academic excellence has become the significant criterion for entry. Regulatory agencies and internal measures for auditing quality control of teaching have been established specifically to assuage public concern about the falling standards.⁷³ However, if students are now customers who pay substantial fees for a 'product', is it ethical to fail them?

Rather than embarking on an intellectual journey of discovery, students now see themselves as the passive recipients of a course of pre-digested information, which will guarantee passing grades and receipt of a *testamur*. It is no longer the norm that they should go off and research a topic, form an opinion and then come along to class and defend a position. Despite the increased rhetoric pertaining to quality teaching and student-focused learning, 'there is the idea that a good teacher will give an answer, whereas a bad teacher will make you do your own work' (Lecturer, fem, New). The idea of the student-customer purchasing a product with minimum effort has replaced the understanding of a degree having to be earned. Unsurprisingly, black letter law is all the students want to hear,⁷⁴ because that is all that is necessary to satisfy the admitting authorities.

Paradoxically, quality assessment exercises may actually hasten the imperative in favor of diluted, pre-packaged knowledge, as expecting students to think for themselves can lead to low teaching evaluations:

I have no doubt that the best way to get better student assessments, which then feeds into your promotion capacities, is to prepackage your material. I try and challenge them and I know that probably compromises the popularity approach to student teaching and learning assessments, but I try to resist the prepackage thing, although I know some of my colleagues don't. It's easy to put your lecture notes up on the web under the guise that when they come to the seminar, they've read everything and there will be this exciting dynamic exchange. Well, that doesn't happen; they

⁷² See *supra*, note 7.

⁷³ MICHAEL POWER, *THE AUDIT SOCIETY: RITUALS OF VERIFICATION* (1997).

⁷⁴ Brand, *supra*, note 20, 139.

don't even read your summaries of cases, let alone the cases themselves
(Snr Lecturer, male, Sandstone).

The market has also induced grade inflation. Students expect top grades in exchange for the high price they are paying, and they will harass their lecturers for more marks, even when the work is mediocre. They are also much more likely to pursue formal avenues of appeal as a corollary of their consumer rights. Participants everywhere adverted to the way complaints had proliferated within a rights-driven framework. If students have not received a high grade, the inference is that they have been badly taught. Law schools may capitulate because they cannot afford to have their brand name tarnished by aggrieved students going public with their complaints. A culture of complaint has been fostered by a consumerist society and it is inevitable that it would infect the academy once higher education had been commodified:

Most of the students are sitting in jobs where their customers are cranky and complaining. They might be working in call centers, stores, or the tax office where they are constantly dealing with complaints from people with expectations of prompt service and they are constantly being told that the customer is right. They are constantly being told by the university, they are consumers... 'Well, I spend all day in a call centre having customers ring up. I'm a customer of the university and I'm going to exercise my rights' (AsPro, male, New).

For the most part, the lowest common denominator approach to credentialism not only suits today's undergraduates because it entails comparatively little effort on their part, but it also suits the prevailing market mentality. Ticking a box, or pressing a computer button in response to multiple choice questions can provide slick and superficial answers, but it cannot grapple with the multifaceted and conflictual ethical problems that inhere within the market. The technocratic approach comports with the vacuous notion of excellence, described by Bill Readings as having been disconnected from reason and culture, which formerly gave it meaning in the context of the university.⁷⁵ Not only does the teaching of technocratic law induce conformity according to the market ethos,⁷⁶ it suppresses the questioning voice regarding law's role in facilitating dubious practices within the market. The technocratic or applied approach thereby induces a kind of intellectual myopia that desensitizes students to the ramifications of social justice.⁷⁷

⁷⁵ Readings, *supra*, note 19.

⁷⁶ Thornton, *supra*, n *.

⁷⁷ W. Bachman, *Law v. Life: What Lawyers are afraid to say about the legal profession* (1995).

Universities and academics are complicit in the new regime. The paradox of more students and less funding translates into everyone having to do more with less. Workloads have increased – in terms of number of hours of face-to-face teaching, class sizes and pieces of work to be assessed. Academics also face pressure to be entrepreneurs and active researchers, as well as the need to deal with endless administrivia and changing modes of audit and accountability:

Something I have noticed, particularly over the last two years, has been an increased bureaucratization of teaching and learning so, in the name of accountability, staff are increasingly being asked to teach in the same way, with the same structure, so that universities' quality assurance concerns are taken care of. At this university, they have just started to go down the path of outcome-based learning which our secondary schools have done for a while (AsPro, fem, Sandstone).

Law generates comparatively little research money via industry linkages compared with, say, science and engineering. However, the discipline seeks to make up for its deficient entrepreneurialism by training ever increasing numbers of legal technocrats to serve the new knowledge economy. Law is attractive to universities because it is known to bring in good quality students and, most significantly, it is widely believed that it can be offered 'on the cheap'.⁷⁸ The fiction purveyed by university managers is that all that is needed is a few lecturers, who can transmit orthodox legal knowledge *en masse*, and a few law books, although even those are becoming optional with reliance on electronic data bases. Thus, apart from its ideological role in supporting the new knowledge economy, the law discipline is viewed as a useful mulch cow by universities because it can help sustain research-intensive disciplines, such as medical technology, science and engineering, which require expensive infrastructure.⁷⁹

Auditing mechanisms emphasize teaching quality, but there is far more attention paid to research as substantial financial benefits flow to institutions from its production. More particularly, the primary focus is on securing 'inputs', that is, competitive grant income, rather than 'outputs' from the research, unless valuable patents are likely to eventuate. Cutting corners in teaching is therefore a corollary of the increasing emphasis on research.

⁷⁸ No precise data is available to support the contention that it is cheaper to teach law students than social science students. Indeed a study conducted in Melbourne in 1989 found to the contrary. See the reference to a study by R A Williams, *Relative Teaching Costs in Higher Education: Selected Victorian Institutions* (1989) and discussed by Goldsmith, above n 20, 732.

⁷⁹ The underfunding of law schools *vis-à-vis* other university disciplines has been a constant refrain. The Pearce Committee Report, above n 23, ch 16, addressed this issue in detail. As a result, law schools were able to improve their position. The publication of the Pearce Report, however, only just preceded the Dawkins reforms so that the improved conditions were shortlived for some institutions. See, for example, Council of Australian Law Deans (CALD), *The Funding of Law Schools: Resource Document for Deans* (2000).

Despite law's averred weakness in attracting research funds – and securing patents – the discipline is anxious not to be relegated to 'teaching only' status, an image it has sought valiantly to avoid. Consequently, the desire to be research active and attract research funding is another driver of contemporary teaching practice.

Managerialism is the new site of governmentality, a concept identified by Foucault as a form of disciplinary power involving systems of expertise and technology for the purpose of political control.⁸⁰ What is significant about the concept of governmentality is that it includes disciplining the self, not just others. That is, the managed (academics) soon internalize the behavior of those who are watching them so that they become their own guardians.⁸¹ Similarly, the watchers (the managers) are thoroughly imbued with the institutional ordering and new disciplinary regimes.

Managerialism is the central mechanism for ensuring that new knowledge is mediated and harnessed by the state.⁸² Bureaucratic knowledge rather than legal scholarship now occupies the dominant position within the corporate university. Reflecting this crucial change, senior line managers have quickly become the élite within universities, replacing professors.⁸³ The task of line managers in the new corporatized university is to appraise academics regularly in order to ensure that they are 'productive'. This is evaluated in terms of what Lyotard terms 'performativity'; a practice he defines as the process of 'optimization of the relationship between input and output'.⁸⁴ However, everything that academics do is not equally valued. Quantifiable outputs that are easily measured, such as numbers of research grants, publications, PhD completions and classes taught are likely to be rated more highly than intangible goods, such as thinking, which is deemed to be unproductive within a performative environment.⁸⁵ Pastoral care, which is also not

⁸⁰ Michel Foucault, 'Governmentality' in Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault Effect: Studies in Governmentality, with Two Lectures by and an Interview with Michel Foucault* (1991).

⁸¹ MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 207 (Alan Sheridan trans., 1991)

⁸² The new approaches to the governance of universities emerges from New Public Administration (NPM), a constellation of ideas associated with reform of public administration in the UK, but borrowed from the private sector, and now accepted by neoliberal governments everywhere as rational, non-partisan and pragmatic. See e.g., PETER SELF, *GOVERNMENT BY THE MARKET? THE POLITICS OF PUBLIC CHOICE* (1993); Kathleen D Hall, *Science, Globalization, and Educational Governance: The Political Rationalities of the New Managerialism* 12 *Indiana Journal of Global Legal Studies* 158(2005).

⁸³ Alfonso Borrero B Cabal, *The University as an Institution Today* (1993). The Higher Education section of *The Australian* frequently has articles adverting to the widening salary disparity between academics and those at the senior executive level. See e.g., Dorothy Illing and Milanda Rout, *Survey finds big Rewards for VCs*, *THE AUSTRALIAN*, 4 July 2007, 21.

⁸⁴ JEAN L LYOTARD, *THE POST MODERN CONDITION: A REPORT ON KNOWLEDGE* (1984) 11.

⁸⁵ Readings, *supra*, note 19, 175.

calculable and which is conventionally assigned to women in the private sphere, is deemed to lack value as it does not fit into a performative box.⁸⁶

Academics that resist the new performative imperatives are quickly sidelined. Codes of conduct allow formal disciplinary proceedings to be commenced against those alleged to have committed such infractions as raising questions about the propriety of altering grades on non-academic grounds, or exposing other examples of systemic and petty corruption that thrive behind the closed doors of the 'enterprise university'.⁸⁷ The scapegoating of dissidents and whistleblowers sends a powerful message to colleagues who might be wavering. They know that everyone is dispensable – in favor of someone younger and cheaper. The trend in favor of casualization illustrates the point. It not only means cost-savings, but also the employment of staff with little loyalty or commitment. Casual staff are employed to fill teaching gaps, not to be critical. They may be postgraduate students aspiring to academic careers, in which case their future is contingent on the good graces of managers (sometime senior academics).⁸⁸ Like docile workers on the assembly line, they are expected to serve the corporate mission without question if they wish to keep their jobs. The threat of redundancy, which hangs like a Damoclean sword over academic workers in the prevailing culture of insecurity, is a very effective weapon in ensuring compliance with the values of the neoliberal legal academy, but it does not guarantee loyalty to the institution:

When a senior academic today talked about sacking people...I didn't see [my job] as being permanent any more. I like the job and I would like to stay here but I don't necessarily see it as the kind of place where I'd like to work (Snr Lect, fem, 3rd Generation).

F. Conclusion

Through higher education policies, the state is reshaping legal education in Australia. While 'massification' has resulted in many more lawyers being produced, they are being trained to serve the new knowledge economy and make Australia competitive on the world stage. The blunting of law students' critical sensibilities through the contraction of theoretical and social justice subjects is designed to maximize profits. The move to a user-pays

⁸⁶ For an insightful consideration of the way the corporatized academy is effecting a remasculinisation of the legal academy, see Richard Collier, *The Changing University and the (Legal) Academic Career – Rethinking the Relationship between Women, Men and the 'Private Life' of the Law School* 22 *LEGAL STUDIES* 1 (2002).

⁸⁷ Marginson and Considine, *supra*, note 4.

⁸⁸ Gilliam Cowlshaw presents a frank account of what happens to a postgraduate student who is not deemed to be sufficiently docile. See Gilliam Cowlshaw, 'On being awarded an Australian Professorial Fellowship' (2007) 22 *AUSTRALIAN FEMINIST STUDIES* 15.

philosophy of higher education ensures that cash-strapped law schools, as well as students, have a vested interest in the instantiation of the new regime. Competition between law schools, institutionalized through league tables discourages collaboration, even though it would be economically rational for them to collaborate. The focus tends to be on what is going to enhance a school's competitive advantage in the market and its position on league tables, not what is best for the discipline as a whole. Academic freedom, the *leitmotif* of the *idea* of the university, can no longer be relied upon as a source of resistance and critique. In the transformed university, it has been replaced with new forms of managerialism and audit that operate to ensure compliance and conformity on the part of academics.

I agree with Andrew Goldsmith that legal education is 'in crisis',⁸⁹ but can it be resuscitated? As the market has insidiously entered the soul of contemporary society, it is impossible to hold any one individual or entity responsible for the state of things. I have shown how the market discourse operates in various sites, which renders resistance difficult, if not impossible. The ideology of the market has so quickly normalized itself that a revolution would be required to supplant it. The multiple individual and institutional financial benefits that flow from the market effectively smother any objections about the current impoverishment of legal education.

Nietzsche's notion of *ressentiment*, which refers to the desire by the powerless to retaliate by inflicting pain,⁹⁰ may offer a way forward, despite its negative overtones. Wendy Brown invokes the concept of *ressentiment* to explain the paradoxes of liberalism.⁹¹ When social liberalism, with its commitment to collective good, equality and social welfare, is in the ascendancy, it engenders *ressentiment* on the part of the rich and powerful who feel that their power is attenuated. They then attack and demean social liberalism as a sanctuary for the slothful and the indolent until neoliberal discourse with its central market values of entrepreneurialism and promotion of the self take over. Conversely, when neoliberalism is in the ascendancy, it breeds *ressentiment* on the part of those committed to social justice, equality and collective good.

The metaphor of the pendulum may appear somewhat simplistic in light of the complexities of globalization and the inequality of the power relations between the two poles, but it also provides a ray of hope. If the *ressentiment* of the opponents of neoliberalism is great enough, there could be a reversion to some form of social liberalism, which includes the idea of the university as a public good. The trouble is that, at this stage, the pendulum shows no sign of swinging unaided, despite the damage that is being

⁸⁹ Goldsmith, *supra*, note 20, 721.

⁹⁰ Friedrich Nietzsche, *On the Genealogy of Morals* (Walter Kaufmann and R J Hollingdale trans, 1967 ed).

⁹¹ Wendy Brown, *States of Injury: Power and Freedom in late Modernity* (1995) 66-67.

wrought. Rather than meekly averting our gaze, I suggest that academics need to stand up and start pushing before even more depredations occur. Otherwise, we will be complicit in producing a generation of lawyers who fit rather too well the avaricious and amoral caricature.

