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A DANGEROUS CULT: RESPONSE TO 'THE EFFECT OF THE MARKET ON LEGAL EDUCATION'

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Neoliberalism has to be understood and challenged as both an economic theory and a powerful public pedagogy and cultural politics. That is, it has to be named and critically understood before it can be critiqued.

— Giroux[1]

I INTRODUCTION

This paper addresses certain aspects of the relationship between neoliberalism and university law schools. It arose out of a one-day workshop (hereafter 'the Workshop') held at the Australian National University in October 2012 to mark the publication of Professor Margaret Thornton's book, *Privatising the Public University: The Case of Law*.[2] This book examines the ways in which privatisation has impacted on law schools and legal education, particularly analysing the ways in which changes to funding and the growth of neoliberal discourse have changed, on the one hand, students and their approaches to learning; and on the other, academics and their approaches to teaching and research.

As a discussion leader in Session 2, my focus was primarily upon Chapter 2, 'The Market Comes to Law School'. In this chapter, Professor Thornton highlights trends in university law schools attributable to the ascendency and influence of neoliberalism. The specific effects discussed include the trend towards vocational education at the expense of a liberal legal education, the high level of homogeneity among law schools, the valorisation of competition, the emphasis placed upon marketing and branding (with an attendant redirection of scarce resources), the transformation of law teachers to 'service providers' and students to 'consumers', and the loss of critical scholarship. The picture Professor Thornton paints is

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1 Henry A Giroux, 'The Terror of Neoliberalism: Rethinking the Significance of Cultural Politics' (2005) 32(1) *College Literature* 14.

2 Margaret Thornton, *Privatisiing the Public University: The Case of Law* (Routledge, 2012).

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bleak. Having said that, I do not disagree with the observations and criticisms she makes. Indeed, there is little sign in Australian law schools of relief from the trends identified as the relentless quest for 'growth', 'productivity' and 'efficiency' continues. Neoliberalism is now so normalised that it has become the standard (and accordingly, invisible) university discourse. My task as discussion leader at the Workshop was to provide 'a short 10 minute burst' in response to Chapter 2 to 'crystallise the issues', give my perspective, and 'begin to formulate answers'.[3] Given the significant and complex issues raised by Professor Thornton, this was no easy task. There is some luxury, therefore, in the opportunity to expand in writing on the ideas I discussed briefly in the panel session.

My purpose in writing this response is modest: I wish to contribute to the discussion by expanding on some of the ideas in this chapter and to provide some additional insights that might help to better understand the effects of neoliberalism on law schools. In particular, I wish to further explore three themes: neoliberalism and individual well-being; the trend to standardisation; and the nature of university discourse. These themes are distinct, but their effects tend to overlap. The key points I wish to make through exploration of these themes are: firstly, that there are intriguing linkages between neoliberal values and individual distress that warrant further research into whether there is any causal relationship between neoliberalism and distress; secondly, that there is an inherent paradox within neoliberalism between the rhetoric of choice and the trend to standardisation, and that this paradox is evident in the tertiary sector; and thirdly, that theoretical insight lends support to the notion that the university is not the natural home of independence and critique. Rather, its inherent tendency is to veil and reinforce the dominant power ideology of the wider society.

Before proceeding, it is important to clarify the use of the term 'neoliberalism'. Neoliberalism has been referred to as the 'defining political economic paradigm of our time'.[4] It is said to be ubiquitous and its influence wide-ranging[5] in its project to bring all human action within the domain of the market.[6] However, despite neoliberalism's apparent prevalence, research suggests that the term 'neoliberalism' is: employed asymmetrically across ideological divides (rarely used by proponents of marketisation because it has 'come to signify a radical form of market fundamentalism with

[3] Personal invitation from the Dean of the Law School, Professor Michael Coper.

[4] Robert W McChesney, 'Introduction' in Noam Chomsky, *Profit over People: neoliberalism and the global order* (Seven Stories Press, 1999) 7.

[5] Nick Grant, 'Foreword' in Dave Hill and Ravi Kumar, eds, *Global Neoliberalism and Education and its Consequences* (Taylor and Francis, 2009) vii, x.

[6] David Harvey, *A Brief History of Neoliberalism* (OUP, 2005) 3.

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which no one wants to be associated');[7] frequently left undefined in research; and often used in different ways.[8] For the purposes of this article, I rely upon Harvey's definition of neoliberalism:

> [It is] in the first instance a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets and free trade. The role of the state is to create and preserve an institutional framework appropriate to such practices.[9]

Despite their findings that neoliberalism is often undefined and contested, Boas and Gans-Morse suggest it may be used meaningfully, *inter alia*, to 'explain how modern capitalism is fundamentally different from previous models of political economy'.[10] They identify these features as: 'the waning or disappearance of alternatives to the free market'; the integration of production chains across national borders; the emergence of knowledge-based forms of property that challenge the enforcement of traditional property rights; and the development of large service sectors in the developed world.[11]

It may be suggested that a further characteristic of modern capitalism is the rather complex role of the state. Although liberal ideologies tend to require the withdrawal of the state in a variety of areas,[12] neoliberalism demands a strong state to further its interests in certain fields of endeavour.[13] This is particularly so in education and training, where, despite neoliberal reforms intended to restructure and privatise the state sector, national education systems primarily remain part of the public sector, subject to both state ownership and control.[14] The objective of education and training in neoliberalism is to meet the demand for 'an ideologically compliant but technically and hierarchically skilled workforce'.[15] In response to this demand, higher education has thus been, and is being, subjected to the pressures of neoliberal practices, structures and policies that

[7] Taylor C Boas and Jordan Gans-Morse, 'Neoliberalism: From New Liberal Philosophy to Anti-Liberal Slogan' (2009) 44 *Studies in Comparative International Development* 137. The authors go on at 140 to point out that neoliberalism 'is not exclusively a bad word, but one rarely sees it used as a good word'.

[8] Boas and Gans-Morse, above n 7, 138–9.

[9] Harvey, above n 6, 2.

[10] Boas and Gans-Morse, above n 7, 139.

[11] Ibid, 157.

[12] 'Deregulation, privatization and withdrawal of the state from many areas of social provision have been only too common': Harvey, above n 6, 3. 'Neoliberalism values individual freedom from the state': Patricia Ventura, *Neoliberal Culture: Living with American Neoliberalism* (Ashgate, 2012) 10.

[13] Ravi Kumar and David Hill, 'Introduction: Neoliberal Capitalism and Education' in Hill and Kumar, above n 5, 3.

[14] Mark Olssen and Michael A Peters, 'Neoliberalism, higher education and the knowledge economy: from the free market to knowledge capitalism' (2005) 20(3) *Journal of Education Policy* 313, 339.

[15] Kumar and Hill, above n 13, 3.

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are reshaping both institutions and individuals.[16] These pressures reflect two assumptions: that universities should compete to sell their services to student customers in the educational market; and that they should produce 'specialized, highly trained workers with high-tech knowledge that will enable the nation and its elite workers to compete "freely" on a global economic stage'.[17] As Professor Thornton observes, law schools have been particularly susceptible to these pressures as lawyers are the 'paradigmatic new knowledge workers'.[18] Law schools have thus become key sites of what has become known as 'knowledge capitalism'[19] — a concept that entails a fundamental rethinking of the previously existing relationships among education, learning and work.[20]

I turn now to discuss the three themes outlined above: neoliberalism and individual well-being; standardization; and the nature of university discourse.

II Neoliberalism and Individual Well-Being

The deleterious impact of legal education upon student well-being is now beyond doubt. The phenomenon has been observed for over 30 years in US law schools.[21] When compared with other student cohorts (including medical students), law students are more likely to suffer from stress and anxiety, which may result in mental

16 Joyce E Canaan and Wesley Shumar, 'Higher Education in the Era of Globalization and Neoliberalism' in Joyce E Canaan, and Wesley Shumar (eds), *Structure and Agency in the Neoliberal University* (Routledge, 2008) 1, 3.

17 Ibid, 4−5.

18 Thornton, above n 2, 27.

19 Ibid.

20 See further Olssen and Peters, above n 14, 331.

21 For early work acknowledging the problem, see, for instance, Stephen B Shanfield, G Andrew and H Benjamin, 'Psychiatric Distress in Law Students' (1985) 35 *Journal of Legal Education* 65; G Andrew, H Benjamin, A Kaszniak, B Sales and S B Shanfield, 'The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers' (1986) 11(2) *Law & Social Inquiry* 225; G A Benjamin, E J Darling and B Sales, 'The Prevalence of Depression, Alcohol Abuse and Cocaine Abuse Among United States Lawyers' (1990) 13 *International Journal of Law and Psychiatry* 233; American Bar Assocation, The Report of 'At the Breaking Point, A National Conference on the Emerging Crisis in the Quality of Lawyers' Health and Lives: Its Impact on Law Firms and Client Services' (1991); Connie J A Beck, G Andrew Benjamin and Bruce D Sales, 'Lawyer Distress: Alcohol Related Problems and Other Psychological Concerns Among a Sample of Practicing Lawyers' (1995) 10(1) *Journal of Law and Health* 1; Peter G Glenn, 'Some Thoughts about Developing Constructive Approaches to Lawyer and Law Student Distress' (1995) 10(1) *Journal of Law and Health* 69; James J Aleini and Joseph N Van Vooren, 'Is there a Solution to the Problem of Lawyer Stress — the Law School Perspective' (1995) 10(1) *Journal of Law and Health* 61; Ann L Iijima, 'Lessons Learned: Legal Education and Law Student Dysfunction' (1998) 48(3) *Journal of Legal Education* 524.

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disorders. Moreover, they suffer more than other graduate students, such as those studying psychology and chemistry.[22]

Further studies have suggested that this distress does not decrease significantly as the law degree progresses or even in the first few years of legal practice. Transitioning to work in a law firm may increase the rate of the downward trajectory, particularly for students who are not adequately equipped in terms of skills and resilience to cope with legal practice,[23] and many young graduates will, as a result, leave practice after only a few years.[24]

Indeed, distress persists well into legal practice, suggesting that 'unhappy, stressed-out, depressed law students often become unhappy, stressed-out lawyers'.[25] Lawyers, as a profession in the United States, suffer a much higher level of unhappiness in their careers than members of the clergy, travel agents, architects, scientists, engineers, airline pilots, physicians, financial planners, and detectives. They are unhappier than repairpersons and housekeepers but slightly happier than roofers and gas station attendants.[26] A nationwide poll of lawyers in the United States found that less than a third of those surveyed were 'very satisfied' with their careers.[27] A survey conducted in 1990 showed that, of 104 professions, lawyers were the most likely to suffer from depression.[28] Indeed, the incidence of depression in lawyers was found to be 3.6 times higher than non-lawyers who shared the same socio-demographic traits; and the incidence of depression was almost four times higher than the profession in the number two spot.[29]

Such rates of distress have serious consequences, including a high incidence of alcohol and chemical abuse among lawyers. The American Bar Association (ABA) estimates that around 15 per cent of lawyers abuse alcohol and drugs, compared with around 10 per cent of individuals more than 16 years of age in the general population.[30] Reports also suggest that one in five lawyers has a

22 Jennifer Jolly-Ryan, 'Promoting Mental Health in Law School: What Law Schools can do for Law Students to Help them Become Happy, Mentally Healthy Lawyers' (2009) 48 *University of Louisville Law Review* 95, 97.

23 Christine Pedigo Bartholomew and Johanna Oreskovic, 'Normalizing Trepidation and Anxiety' (2010) 48 *Duquesne Law Review* 349, 382-383.

24 Ibid, 351.

25 Jolly-Ryan, above n 22, 100.

26 Nancy Levit and Douglas O Linder, 'Happy Law Students, Happy Lawyers' (2008) 58 *Syracuse Law Review* 351, 351-2, citing Tom W Smith, *Job Satisfaction in the United States* (2007).

27 Jolly-Ryan, above n 22, 100.

28 Yvette Hourigan, 'Chasing' (2011) *Bench and Bar* 16, citing William Eaton, James Anthony, Wallace Mandel and Roverta Garrison, 'Occupations and the Prevalence of Major Depressive Disorder' (1990) 32(1) *Journal of Occupational Medicine* 1079.

29 Ibid.

30 Jolly-Ryan, above n 22, citing Eric Drogin, 'Alcoholism in the Legal Profession: Psychological and Legal Perspectives and Interventions' (1991) 15 *Law & Psychology Review* 117, 127.

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problem with substance abuse.[31] Suicide ranks among the leading causes of premature death among lawyers. A 1992 annual report of the National Institute of Occupational Safety and Health reported that male lawyers were twice as likely as the general population to commit suicide.[32]

Although there was originally some question as to whether the US phenomenon of law student and lawyer distress was also present in Australia,[33] studies have shown that law student and lawyer distress is not confined to the United States. This is despite differences in pedagogy, demographics of law students and culture.[34]

The 2009 report *Courting the Blues*[35] (hereafter the BMRI Report) found that, of the 738 law students surveyed, some 40 per cent reported distress severe enough to warrant clinical or medical assessment, compared with 13 per cent of the general population. The results for law students and lawyers indicated 'a much higher level than expected of reported psychological distress and risk of depression on all measures used'.[36] Although some caution has been raised in regard to the BMRI methodology,[37] the phenomenon of high levels of law student anxiety and depression has been confirmed in Australia by studies undertaken at individual law schools, including UNSW, ANU and Melbourne. At UNSW, a study undertaken in 2005 which investigated students' attitudes to their experience and expectations of their university education across the university found unexpected differences between law students and other students.[38] Law students reported different reasons for their choice of course, seemed disproportionately concerned about their grades, less interested in teamwork, and had different ideas about employers' preferences for graduates when compared with students from other disciplines.[39] More recently at Melbourne, Larcombe et al analysed

31 Ibid.

32 Hourigan, above n 28, 17.

33 Judy Allen and Paula Baron, 'Buttercup goes to Law School' (2004) *Alternative Law Journal* 286.

34 Ibid, 286; Penelope Watson and Rachael Field, 'Promoting Student Well-being and Resilience at Law School' in Sally Kift et al (eds), *Excellence and Innovation in Legal Education* (LexisNexis, 2011) 389, 393; Molly Townes O'Brien, Stephen Tang and Kath Hall, 'Changing our Thinking: Empirical Research on Law Student Wellbeing, Thinking Styles and the Law Curriculum' (2011) 21 *Legal Education Review* 149, 149.

35 N J Kelk, G M Luscombe, S D Medlow and I B Hickie, *Courting the Blues: Attitudes Towards Depression in Australian Law Students and Legal Practitioners* (BMRI Monograph 2009-1).

36 Ibid, 37.

37 See Council of Australian Law Deans, 'Promoting Law Student Well-being: Good Practice Guidelines for Law Schools' (2013) <http://www.cald.asn.au/assets/lists/Resources/Promoting%20Law%20Student%20Well-Being%20Good%20Practice%20Guidelines%20for%20Law%20Schools.pdf>.

38 Massimilano Tani and Prue Vines, 'Law Students' Attitudes to Education: Pointers to Depression in the Legal Academy and the Profession?' (2009) 19(1) *Legal Education Review* 3.

39 Ibid.

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students from both the LLB and JD programs and found that while JD students expressed a significantly higher level of satisfaction with studying law and their course experience, there were no statistically significant differences in the levels of depression, anxiety and stress reported by each cohort.[40] At ANU, Townes O'Brien et al pursued the US finding that significant and detrimental changes to student well-being occur from the first year of legal studies, and found that such changes were accompanied by changes in thinking styles; particularly, increased rational thinking and lower experiential thinking.[41] Indeed, much Australian research has focused particularly on the first year of legal education as a site for intervention into the problem of student distress.[42]

The BRMI report also found high levels of psychological distress, alcoholism and drug abuse among the practising legal profession itself. According to the BMRI report, almost one in three solicitors (31 per cent), and one in six barristers (16.7 per cent), experienced high to very high levels of psychological distress.[43] Again, such findings are consistent with other Australian literature reporting high levels of distress, including the Beaton Consulting and *beyondblue* Annual Professions Survey of April 2007, which found that lawyers are two and a half times more likely to suffer from clinical depression than other professionals; the later (2011) report,[44] which showed that of the professions, lawyers were the most likely to have experienced symptoms of depression and anxiety; work by James;[45] and work by

[40] Wendy Larcombe, Letty Tumbaga, Ian Malkin, Pip Nicholson and Orania Tokatlidis, 'Does an improved experience of law school protect students against depression, anxiety and stress? An empirical study of wellbeing and the law school experience of LLB and JD students' (2013) 35(2) *Sydney Law Review* 407.

[41] Townes O'Brien et al, above n 34.

[42] Rachael Field and Sally Kift, 'Addressing the High Levels of Psychological Distress in Law Students through Intentional Assessment and Feedback Design in the First Year Law Curriculum' (2010) 1(1) *International Journal of the First Year in Higher Education* 65; Kate Galloway, Rachel Bradshaw, Neil Dunbar and Jamie Fellows, 'Approaches to Student Support in the First Year of Law School' (2011) 21(2) *Legal Education Review* 235; Rachael Field and James Duffy, 'Better to Light a Single Candle than to Curse the Darkness: Promoting Law Student Well-Being Through a First Year Law Subject' (2012) 12(1) *Queensland University of Technology Law and Justice Journal* 133; Wendy Larcombe and Ian Malkin, 'The JD First Year Experience: Design Issues and Strategies' (2011) 21 *Legal Education Review* 1; Anthony Lester, Lloyd England Lloyd and Natalia Antolak-Saper, 'Health and Wellbeing in the First Year: The Law School Experience' (2011) 36(1) *Alternative Law Journal* 47.

[43] Kelk et al, above, n 35, 12.

[44] Beaton Consulting and *beyondblue*, 'Mental Health in the Workplace' (2011) <http://www.beatonglobal.com/pdfs/Anxiety_and_depression_in_the_workplace.pdf>.

[45] Colin James, 'Law Student Wellbeing: Benefits of Promoting Psychological Literacy and Self-Awareness Using Mindfulness, Strengths Theory and Emotional Intelligence' (2011) 21(2) *Legal Education Review* 217.

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Britton,[46] who notes the findings that lawyers are more likely to turn to non-prescription drugs and alcohol to manage their depressive symptoms than their professional peers, and that about one in three 'self-medicate' in this way.[47] Britton also estimates that lawyer emotional distress is estimated to feature in around 30 per cent of professional disciplinary matters.

Like the US studies, the BMRI Report was unable to identify the precise causes of psychological distress amongst law students and the profession.[48] In particular, it has remained unclear whether it is the law school itself that generates distress or whether other factors are responsible. However, in relation to Professor Thornton's observations, two points are significant here and offer scope for further research. Firstly, the initial identification of law student distress appears to have taken place in the United States in the mid-to-late 1980s — significant when one considers Harvey's observation of the 'emphatic' turn towards neoliberalism that started in the late 1970s.[49] Secondly, Professor Thornton identifies a number of features that characterise the neoliberal learning experience: the 'minimalist' and stressful learning experience (caused by the fact that students must balance, for financial and career reasons, full time work with study); the valorisation of competition among students from their first day at law school; the loss of interest in knowledge for its own sake; the narrowness of student aspirations; and the growing consumerist ethos. All these correspond very closely with aspects of the study of law identified in the well-being literature as contributing to student distress.[50] Is it possible that there is a causal link between the growth of neoliberalism and the rise of distress? This would provide an explanation for the remarkable persistence of distress across time, jurisdictions and different law schools. The idea is speculative but provocative, and a fertile ground for further research.

I wish to add two particular insights into the relationship between neoliberalism and law student (and lawyer) distress. The first relates to a phenomenon that Professor Thornton alludes to when she observes

[46] John Britton, 'Lawyers, Emotional Distress and Regulation' (2009) presented at Bar Association of Queensland Conference <http://www.lsc.qld.gov.au/_data/assets/pdf_file/0006/106197/lawyers-emotional-distress-and-regulation.pdf>.

[47] Ibid 2, citing the Beaton Consulting and *beyondblue* 2007 study.

[48] Kelk et al, above n 35, 41.

[49] Harvey, above n 6, 2.

[50] Rachael Field and Sally Kift, 'Addressing the High Levels of Psychological Distress in Law Students through Intentional Assessment and Feedback Design in the First Year Law Curriculum' (2010) 1(1) *International Journal of the First Year in Higher Education* 65; KM Sheldon and L Krieger, 'Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being' (2004) 22 *Behavioural Science and Law* 261; Lawrence S Krieger, 'Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence' (2002) 52 *Journal of Legal Education* 112; MassimilanoTani and Prue Vines, 'Law Students' Attitudes to Education: Pointers to Depression in the Legal Academy and the Profession?' (2009) 19(1) *Legal Education Review* 3.

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that '[a] key message of neo-liberalism is that all individuals must take personal responsibility for their lives'.[51] Here the insight is that the structural effects of neo-liberalism are masked as matters of personal inadequacy, and remedies for such inadequacy are considered to be matters of individual responsibility. This phenomenon has been observed in related contexts: for instance, a recent study found that a failure to achieve a straightforward transition from school to tertiary education to employment is perceived by young people to be the result of personal inadequacy, rather than structural disadvantage and inequality.[52]

The focus upon inadequacy, rather than deviation, is a hallmark of late modernism[53] and neoliberalism. Neo-liberalist discourse is that of unlimited potential.[54] This discourse is readily apparent in the marketing of many schools and universities (indeed, my own institution, La Trobe University, used the phrase 'infinite possibilities' in its marketing material; and a school in Ivanhoe, Melbourne, proclaims 'all things are possible for you' on its roadside message board). Neoliberalism is also a discourse of unlimited freedom: freedom to choose, freedom to be whom or what one wishes and freedom of action. As Ventura points out, though, this individual freedom is a means of control and 'people are governed through their freedom — encouraged, educated and hounded into using their autonomy in ways that bind them to the market'.[55]

Within this discourse of infinite potential and unlimited individual freedom, failure to realise one's full potential, to achieve professional and personal excellence, is a matter of *personal inadequacy*, not attributable to those social and structural forces that create systemic disadvantage and inequalities. The focus upon personal adequacy has been described as a 'by-product of freedom, a cost that those who are ostensibly the laziest or least intelligent must bear'.[56] This focus is particularly stressful in the profession of law, which

51 Thornton, above n 2, 28.

52 Karen Nairn, Jane Higgins and Judith Sligo, *Children of Rogernomics: A Neoliberal Generation Leaves School* (University of Dunedin Press, 2012).

53 Zygmunt Bauman, *Life in Fragments* (Blackwell Publishers, 1995) 113.

54 This notion of unlimited potential is very pervasive. For a particularly interesting examination of this ideology in the context of theories of brain plasticity, see Victoria Pitts-Taylor, 'The Plastic Brain: Neoliberalism and the Neuronal Self' (2010) 14(6) *Health* 635, 639:

> 'Plasticity is deployed to encourage us to see ourselves as neuronal subjects, and is linked to the continued enhancement of learning, intelligence, and mental performance, and to the avoidance of various risks associated with the brain, including mental underperformance, memory loss, and aging. While endorsing a view of the body/self which resists biological determinism, I find that the popular discourse on plasticity firmly situates the subject in a normative, neoliberal ethic of personal self-care and responsibility linked to modifying the body.'

55 Patricia Ventura, above n 12, 3.

56 Ibid, 37.

places considerable store upon proficiency and is strongly driven by hierarchy and status.

Linked to this phenomenon, though not discussed in Professor Thornton's chapter, is the neoliberal intolerance for failure, both institutional and personal. In relation to the institutional, it has been said that 'all contemporary organisations, including universities, are risk organisations. This is because all organisations must, of necessity, focus on guarding themselves against the risk of failure'.[57] As public institutions, universities are particularly concerned about risk, as 'any notion of the public … [has become] synonymous with disrepair, danger and risk'.[58]

This fear of failure can be seen in the way universities increasingly focus upon retention and success (pass rates) as indicators of excellence. As Professor Thornton observes, the burden of learning is placed upon the 'learners', the marker of successful learning is employability, and there is a growth of a consumerist ethos whereby students seek to be 'satisfied with pre-packaged knowledge products'[59] that ward off the risk of failure. At the same time, there is greater emphasis on 'developing pedagogically informed strategies that support student learning more fully'.[60] Elaborate teaching and learning strategies and interventions have been developed for 'at risk' students; class failure rates are questioned and, in general, condemned. Institutional failure is thus warded off, attributed to the inadequacy of the individual student and/or the individual teacher. Either way, failure is something to be (heroically) overcome.

This problem assumes increased significance in the contemporary Australian tertiary education environment where the relentless pursuit of new markets under neoliberalism is leading to a widening of participation in, and access to, higher education.[61]Although the access agenda has widespread support, students gaining access to universities often come from backgrounds marked by structural disadvantage, socially and economically, and the effects of this disadvantage often mean that they are not well-prepared for university studies. Yet, the neoliberal rhetoric is that, despite these disadvantages, 'all things are possible for them'. Student failures

[57] E McWilliams and P Taylor, 'Danger and Grieving in the University' (Paper presented at the Annual Conference of the Australian Association of Research into Education (AARE), Brisbane, December 2002).

[58] Henry A Giroux, 'Neoliberalism, Corporate Culture, and the Promise of Higher Education: The University as a Democratic Public Sphere' (2009) 72(4) *Harvard Educational Review* 425, 428.

[59] Canaan and Shumar, above n 16, 8.

[60] Ibid, 8.

[61] Ibid, 15. In Australia, see D Bradley, P Noonan, H Nugent and B Scales, *Review of Australian higher education: Final report* (Canberra: Department of Education, Employment and Workplace Relations, 2008) (colloquially, the *Bradley Report*).

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are again, personal, either to them or to their lecturers, who are increasingly held accountable for student performance.[62]

This point about the accountability of lecturers raises a further issue about the well-being of law academics. Despite the fact that there has been much attention paid to the distress of law students and practising lawyers, there has been relatively little attention paid to the well-being of law academics.[63] Yet law academics are as affected (arguably, more affected) by the pressures of neoliberalism as their students, particularly in the emphasis upon personal success. Increasingly elaborate performance management schemes (with attendant surveillance and auditing processes) are intended to ensure individual professional success — and, as noted above, individuals are increasingly responsible not only for their own success, but for student success as well. In addition, the academic work profile has expanded and intensified: academics are expected not only to achieve research and teaching excellence but to produce measurable outputs, be responsive to student and societal needs,[64] and to display 'entrepreneurialism',[65] — another characteristic expectation of neoliberalism.[66] The pressure upon academics to 'perform' is thus intense, but as is the case with students, achievement is presented as personal, unaffected by the structural, such as the 'isolation, neglect and underfunding of law schools',[67] poor staff/student ratios and often unrealistic university 'growth' targets. At the same time, neoliberalism tends to stifle dissent. As Professor Thornton points out: 'Marginalisation, reprimands, disciplinary proceedings or even dismissal is the likely fate of any academic who is critical of his or her institution's captivation by market magic, regardless of the academic expertise they might possess'.[68] Or, to put it, more bluntly, 'anyone who does not believe that rapacious capitalism is the only road to freedom and the good life is dismissed as a crank'.[69]

Perhaps unsurprisingly, this intensity of the academic project, coupled with an ethos that focuses upon the individual, rather than the structural, poses a significant challenge to quality.[70] At the same time, neoliberalism is not coherent and 'it becomes tangled in its

62 Canaan and Shumar, above n 16, 17.
63 See further, Paula Baron, 'Thriving in the Legal Academy' (2007) 17(1) *Legal Education Review* 27.
64 Don Houston, Luanna H Meyer and Shelley Paewai, 'Academic Staff Workloads and Job Satisfaction: Expectations and Values in Academe' (2006) 28(1) *Journal of Higher Education Policy and Management* 1, 17.
65 Thornton, above, n 2, 31.
66 See further RW Connell, *Masculinities* (University of California Press, 2nd ed, 2005) 255 who describes the expectations of entrepreneurialism in neoliberalism as 'thrusting competitiveness, ruthlessness, focus on the bottom line'.
67 Thornton, above, n 2, 29.
68 Thornton, above, n 2, 33.
69 Giroux, above n 58, 428.
70 Craig McInnis, 'Changing Academic Work Roles: The Everyday Realities Challenging Quality in Teaching' (2000) 6 (2) *Quality in Higher Education* 143.

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own contradictions'.[71] A good example of this is the way in which the focus upon performance and the demand for success has a tendency to cause academics, particularly early-career academics, to become increasingly risk-averse, most notably in regard to teaching and learning innovations.[72] This has been attributed to a loss of control and ownership over teaching through such elements of the work environment as guidelines and processes for the production of teaching materials, and university-level decisions to support particular learning platforms or courseware tools.[73] It has also been attributed to the audit culture: trialing a teaching and learning innovation may attract negative feedback on student evaluations, so better to 'play safe' than to risk failure.

To summarise, there are interesting potential linkages between neoliberalism and a deleterious impact on individual well-being that warrant further investigation. As the values and practices of neoliberalism appear to be co-incidental with values and practices that appear to generate distress in law students and lawyers, there is scope for empirical research to test the proposition that neoliberalism itself may be implicated in the heightened distress experienced by individuals. And, although distress in law students and lawyers has become a focus of much research, relatively little research has been carried out on the well-being of law academics, another area where further research is warranted. I turn now to consider the second of the three themes addressed in this paper: the growth of standardisation.

III Standardisation: The Breakfast Cereal Phenomenon

Professor Thornton identifies the paradox between the rhetoric of student choice in the legal education market place and the spread of homogeneity among law schools. She attributes this phenomenon to the influence of admitting authorities on the curriculum; and also points to the force of student consumerism and the fact that students carry such significant tertiary education debt that they aspire to large law firms in order to pay off the debt more quickly:

> The predominant concern of students is their desire to progress through their course as quickly as possible to start earning money. This has encouraged a reversion to, or at least a hardening of the attitude that the law school experience is primarily a site of training and credentialism rather than humanistic education.[74]

[71] Kumar and Hill, above n 13, 1.

[72] Julianne Lynch, 'Promoting Innovation in University Teaching Against the Tide of Centralised Control and Institutionalised Risk Avoidance' (Paper presented at NZARE/AARE, 2003) <http://publications.aare.edu.au/03pap/lyn03383.pdf>.

[73] Ibid.

[74] Thornton, above n 2, 64.

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These factors drive the increasingly common view that learning is essentially utilitarian. Interest in knowledge for its own sake has largely been lost. Students thus tend to favour subjects that are perceived to be vocationally advantageous, such as commercial law subjects, rather than subjects that focus on issues of access to justice or which take a critical legal studies approach. In turn, law schools have become more homogeneous in their offerings as they seek to cater to student (and employer) demand. Professor Thornton also refers to the suppression of dissent in this context and expresses concern about its impact, arguing that '[c]orporate vassalage insidiously contributes to the subordination of the academy to the legal profession'.[75]

It is sobering to read the web pages of different universities and their law schools to see the same messages (often even identical wording) appearing repeatedly. We all, it seems, aspire to excellence and the preparation of our students for glittering global legal careers. But this creeping sameness is not confined to marketing rhetoric. It is reaching slowly but steadily into teaching methodologies and research: Professor Thornton points to standardisation across groups, for instance, 'when the same materials, Powerpoint presentations and forms of assessment are used by each group'.[76]

The bureaucratisation of teaching and learning is becoming all-pervasive. As noted above, centralised teaching and learning processes and university decisions as to platforms and courseware can stifle innovation.[77] They also drive homogenisation of teaching and learning, being designed to deliver those in-demand 'pre-packaged knowledge products'.[78] They reflect the neoliberal view that teaching is transmission of content and that universities have 'no social or political responsibilities beyond providing an education that is de facto vocational training'.[79] Their impact is not to promote critical enquiry but to demand certainty: no approved university subject learning guide will state that, at the conclusion of the course, 'students will have more questions than answers, doubt their previously-held convictions and reject the dominant paradigm'. This problem is increasingly exacerbated by the proliferation of teaching and learning standards which are designed to meet the marketplace demand for 'sameness' that demonstrates their workers have the same skills and aptitudes.[80]

75 Ibid, 48.
76 Ibid, 89.
77 Lynch, above n 72.
78 Canaan and Shumar, above n 16, 8.
79 Lois Weiner, 'NCLB, US Education and the World Bank: Neoliberalism Comes Home' (2005) *New Politics* <http://newpol.org/content/neoliberalism-teacher-unionism-and-future-public-education>.
80 L McNeil, *Contradictions of School Reform: Educational Costs of Standardized Testing* (Routledge, 2000).

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The loss of critical enquiry is seen by Professor Thornton as very significant, and it is discussed at some length in Chapter 3, 'Jettisoning the Critical', where she argues that the idea of a liberal legal education has largely been lost. It is something of an irony that much is made of 'critical thinking' as a skill to be developed by students given, as Professor Thornton points out, '[skills are generally associated with increased productivity'.[81] However, Giroux observes that '[a]s universities … emphasize market-based skills, students are learning neither how to think critically nor how to connect their private troubles with larger public issues'.[82] At the same time, Giroux notes that public pedagogy has declined, so that:

> [i]nstead of public spheres that promote dialogue, debate, and arguments with supportive evidence, American society offers young people a conservatizing, consumer-driven culture through entertainment spheres that infantilize almost everything they touch, while legitimating opinions that utterly disregard evidence, reason, truth and civility.[83]

This influence, of course, is not confined to America, but has extended to Australia through a variety of media.

In relation to research, the plague of sameness can be seen in the effects of the ERA (Excellence for Research in Australia) and similar research audit exercises in other countries.[84] The audit culture has required academics 'to reduce their work to a standardized language of "outputs"':[85]

[81] Thornton, above n 2, 82 (quoting Urciuoli).

[82] Henry A Giroux, 'Beyond the Limits of Neoliberal Higher Education: Global Youth Resistance and the American/British Divide' *Truthout*, Monday, 07 November 2011 <http://www.truth-out.org/opinion/item/4646:beyond-the-limits-of-neoliberal-higher-education-global-youth-resistance-and-the-americanbritish-divide>.

[83] Ibid.

[84] Periodic research assessment processes are common in a number of countries. In Australia, ERA assesses research quality in Australian higher education according to the Australian Bureau of Statistics Field of Research classification scheme. ERA replaced the earlier RQF (Research Quality Framework). ERA is administered by the Australian Research Council (ARC) and its goal is to identify and promote research excellence. ERA evaluates the quality of the research undertaken in Australian universities against national and international benchmarks. The ratings are determined and moderated by expert committees. The indicators used in ERA include a range of metrics such as citation profiles and peer review of a sample of research outputs. To date, this assessment exercise has not been linked to funding. In the UK, the Research Excellence Framework replaces the earlier Research Assessment Exercise, which assessed the quality of research undertaken by British higher education institutions. The aims of the RAE are to use the assessment outcomes to inform the selective allocation of research funding to higher education institutions; to provide accountability for public investment in research and produce evidence of the benefits of this investment; and to provide benchmarking information and establish reputational yardsticks. In New Zealand, the Performance Based Research Fund (PBRF) assesses the research performance of tertiary education organisations, funding them on the basis of their performance.

[85] Peter Roberts, 'Neoliberalism, Performativity and Research' (2007) 53 *Review of Education* 349, 358.

> The transformation of knowledge into a standardized form allows it to be traded in a competitive market, whether that is the academic market or the global economy. Knowledge that cannot be standardized in this manner has no use value in a system driven by performativity and commercial imperatives and is rendered irrelevant for funding purposes. Standardization allows cleaner, clearer distinctions to be drawn — and defended — between those who are performing and those who are not … knowledge is, in some respects, incidental to the purpose.[86]

The focus upon measurable outputs means that research becomes 'little more than a series of products'[87] and the emphasis is upon quantity, though the rhetoric emphasises quality. Quality is, of course, difficult to measure, so proxies, such as journal rankings or metrics are often used. In law, one of the ongoing legacies of the journal rankings in 2010, now abandoned, has been the pressure upon academics to publish in the same (limited) range of A and A* journals. Of course, these journals have their own expectations of scholarship, which tend to drive a certain sameness in scholarship. Research auditing has thus reinforced neoliberal principles so that 'research is a competitive, self-interested, instrumental, outputs-oriented process'.[88]

In summary, one of the inherent contradictions in regard to neoliberalism and legal education is that, despite the rhetoric of student choice and the managerialist injunction to focus on 'distinctiveness', the trend has been towards a remarkable similarity across Australian law schools that means there is, in reality, relatively little real 'choice', in the sense of differentiated law schools. I turn now to the last of the three themes: the nature of neoliberal discourse.

IV The Nature of Neoliberal Discourse

Reading 'The Market Comes to Law School' I was reminded of an article by Jeanne Schroeder, 'The Four Discourses of Law: A Lacanian Analysis of Legal Practice and Scholarship'.[89] This article applied Lacan's theory of the four discourses (that of the master, the university, the analyst and the hysteric) to the practice of law. For Lacan, a discourse is 'a social link, founded on language',[90] and though we might move from discourse to discourse, each discourse 'has its own constraints, conditions and consequences'[91] and each logically requires that each of the others will eventually be developed.[92]

[86] Ibid, 358.
[87] Ibid, 358.
[88] Ibid, 362.
[89] Jeanne Schroeder, 'The Four Discourses of Law: A Lacanian Analysis of Legal Practice and Scholarship' (2000) 79(1) *Texas Law Review* 15.
[90] Ibid, 21.
[91] Ibid, 22.
[92] Ibid, 26.

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Without wishing to delve too deeply into some fairly difficult theoretical concepts developed by Schroeder, I suggest that her analysis provides some interesting insights into the effects of neo-liberalism. First, Schroeder observes that the discourse of the university (knowledge) always tends to reinforce the discourse of the master (power):

> Lacan came close to suggesting that there was an historical relationship between the discourse of the master and that of the university, the latter being a 'sort of legitimation or rationalization of the master's will'. In other words, the discourse of the university can serve as a sophisticated way of making the master's claims to brute power more palatable through veiling.[93]

This provides an interesting insight into the relationship between the university and the dominant power relations: that is, rather than expecting universities to provide an independent, critical voice *against* neoliberalism, the Lacanian analysis would suggest we should expect the university to seek to legitimise and rationalise the exercise of power in the name of the market. Hence, so many of the characteristics Professor Thornton identifies: the need to suppress dissent, the emphasis upon vocationalism, the passion for entrepreneurialism. This insight has further implications. With specific reference to law, Schroeder argues that radical critique *cannot* arise from university discourse, which envisages a law that is whole and perfect, but from the analytic and hysterical discourses that perceive law (and the wider symbolic order) to be flawed.[94]

Secondly, claims Schroeder, the discourse of the university is radically masculine, while the discourse of critical scholarship is radically feminine. These terms are used in a specific psychoanalytic sense that I need not go into here, but one of the effects of this gendering is that the university discourse is by nature extremely obsessive. Schroeder writes: 'When the obsessive masculine subject confronts holes and slippages in the symbolic, he does not attempt the feminine response of recognizing what he sees. Rather, he obsessively tries to cover over the holes and explain the slippages'.[95]

In the context of universities, this leads to 'feverish activity', the endless plans, policies, standards and audits to ensure that there are no gaps, that there is already an answer and that the 'word will always name the thing'.[96] The university fetish for marketing and branding is a wonderful example of the 'feverish activity' aimed at concealing lack. While Professor Thornton adopts the critical stance in her book to suggest the emperor of neo-liberalism has no clothes,

[93] Ibid, 55.
[94] Ibid, 61.
[95] Ibid, 58.
[96] Ibid, 58.

huge amounts of activity and resources in universities are directed to covering up this lack, the utter emptiness at the heart of neo-liberal discourse in higher education.

Schroeder identifies the master's discourse as command, the university's discourse as lecture, the analyst's discourse as interrogation, and the hysteric's discourse as critique and accusation.[97] Professor Thornton, and those of us involved in critical scholarship, would thus be categorised under this schema as engaging in hysterical discourse. Far from being a derogatory label, the discourse of critique is also the discourse of possibility, because the hysterical discourse makes no claim to perfection.[98] It is the discourse of resistance which, in the context of law schools, gives rise to excellent clinical legal education programs based in community legal centres and individual subjects that challenge market dominance by explicitly addressing issues of disadvantage and access to justice; and which impels academics and law students to become involved in law reform and volunteer work. It is also a discourse that accepts that, at the same time that we question, we must also acknowledge, at least partially, that we share moral responsibility for the problems we see. This acknowledgement can be 'deeply depressing'.[99]

This is where questions arise for all of us in terms of our own conduct and a way forward. If legal education is to become more than an endless barrage of words, a meaningless marketing exercise and a vocational training ground, we must begin by accepting that no form of legal education will ever be complete and whole. There is no perfection; there will always be gaps, questions, uncertainty, failure and lack. There was no golden age of university education, nor will there be. We would also need to unmask, as Professor Thornton does so effectively, the notion that the university is not (as we might hope) the shrine of independence and the home of impartial and objective knowledge. Rather, its inherent tendency is to veil and reinforce dominant power relations. It can never be truly critical of the status quo because its function is to uphold the status quo.[100] Making such acknowledgements may provide a way to counter and subvert the cult of neoliberalism and the tendencies identified in *Privatising the Public University: The Case of Law*.

[97] Ibid, 72.
[98] Ibid, 76.
[99] Ibid, 79.
[100] Ibid, 79.

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