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To cite this article: Doug Morrison & Jessica Guth (2021) Rethinking the neoliberal university: embracing vulnerability in English law schools?, The Law Teacher, 55:1, 42-56, DOI: [10.1080/03069400.2021.1872867](https://doi.org/10.1080/03069400.2021.1872867)

To link to this article: <https://doi.org/10.1080/03069400.2021.1872867>



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Published online: 04 Feb 2021.



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Rethinking the neoliberal university: embracing vulnerability in English law schools?

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ABSTRACT

This paper draws on our continuing work on the neoliberal and marketised law school and seeks to understand how we might apply vulnerability theory to address some of the problems resulting from current higher education and law school contexts. After outlining our understanding of vulnerability theory and summarising what we believe are some of the ills of a neoliberal law school, this paper argues that vulnerability theory allows us to reframe our thinking about academic labour and law schools on a theoretical level. As such it is useful for a longer-term project which seeks to challenge existing structures. For more immediate concerns however, the paper suggests, vulnerability theory is less useful because it does not yet provide tools which can be easily operationalised to make a significant difference in our everyday academic lives.

KEYWORDS Vulnerability; Legal Education; Neoliberalism; Law School

Introduction

Before commencing it needs to be clear that it is beyond the scope of this paper to analyse or even highlight the increasing literature around the marketisation of universities globally. However, what we will argue is that many of the problems universities currently face can be and are linked to the impact of this marketisation process, which in turn is driven by the influence of neoliberalism. In our analysis our focus will inevitably fall upon university law schools and in turn the legal sector, which is where our lived experience is based. In doing so we accept that this analysis captures the debate at a micro rather than the macro level and as such does not seek to address the wider socio-economic and political issues raised by the impact and influence of neoliberalism. Caveats aside, we submit that higher education (HE) in England and Wales and perhaps the world overall is broken.¹ Universities are in (financial) trouble, academics and students are in the middle of a mental health crisis, exacerbated by Covid-19, workloads are unsustainable and students are pitched against each other in an ever more competitive

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¹See Frank Furedi, *Wasted: Why Education Isn't Educating* (Continuum 2009); Henry A Giroux, *Neoliberalism's War on Higher Education* (Haymarket Books 2014); Stefan Collini, *Speaking of Universities* (Verso 2017); Bryan Alexander, *Academia Next: The Futures of Higher Education* (John Hopkins University Press 2020). Importantly, such views are not limited to academic publications, and resonate at least anecdotally, with the lived experiences of those involved in higher education, for example social media comments on Twitter, stories published in the *Times Higher* or on platforms such as WonkHE. Moreover literature focused on the UK and US provides further insight into some of the issues raised by these stories even where they also point to strengths and possible solutions.

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environment.² Law schools exemplify and perhaps even amplify the ills of the marketised neoliberal university³ linked inextricably to a changing (legal services) labour market kept afloat by increasing numbers of (paralegal) workers carrying out mostly routine tasks and offering little job satisfaction or financial reward.⁴ In the UK research with the legal professions,⁵ students⁶ and to some extent also academics⁷ paints a bleak picture pointing to mental health and wellbeing as an important issue that needs to be addressed urgently. Research from other jurisdictions, Australia and the US tells a similar story.⁸ In parallel, literature on the neoliberal university,⁹ the marketisation of education¹⁰ and changes in the legal services sector¹¹ can help us explain some of the reasons why things are at this apparent breaking point.

However, understanding the context in which we find ourselves and even understanding how we got here merely provides the foundations for us to think constructively about how we might make things better, how we might reconceptualise HE generally and legal education specifically. This paper seeks to explore vulnerability theory as one specific example of how we can seek to think differently about our roles as legal academics within law schools and broader institutions. It questions the extent to which vulnerability theory can help us in a reframing of academic work that focuses our minds on collegiality, collaboration and support, and on our mutual dependencies and consider the evolving structures that shape them and therefore might help us produce more meaningful research, scholarship and teaching. We consider how we might embrace these ideas on a theoretical and a practical level and argue that vulnerability theory is theoretically interesting but practically problematic.¹²

²Mike Molesworth, Richard Scullion and Elizabeth Nixon (eds), *The Marketisation of Higher Education and the Student as a Consumer* (Routledge 2011).

³Margaret Thornton, *Privatising the Public University: The Case of Law* (Routledge 2012); Brian Z Tamanaha, *Failing Law Schools* (University of Chicago Press 2012).

⁴Andrew Francis, *At the Edge of Law* (Ashgate 2011); Richard Susskind, *Tomorrow's Lawyers* (2nd edn, OUP 2017); Jessica Guth and Kathryn Dutton, "SQE-ezed Out: SRA, Status and Stasis" (2018) 52 *The Law Teacher* 425; Hilary Sommerlad and others, "England and Wales: A Legal Profession in the Vanguard of Professional Transformation?" in Richard L Abel and others (eds), *Lawyers in 21st-Century Societies Vol 1: National Reports* (Hart Publishing 2020).

⁵Richard Collier, "'Love Law, Love Life': Neoliberalism, Wellbeing and Gender in the Legal Profession – The Case of Law School" (2014) 17 *Legal Ethics* 202; Richard Collier, "Wellbeing in the Legal Profession: Reflections on Recent Developments (or, What Do We Talk About When We Talk About Wellbeing?)" (2016) 23 *International Journal of the Legal Profession* 41; Emma Jones, Rajvinder Samra and Mathijs Lucassen, "The World at Their Fingertips? The Mental Wellbeing of Online Distance-Based Law Students" (2019) 53 *The Law Teacher* 49.

⁶Caroline Strevens and Clare Wilson, "Law Student Wellbeing in the UK: A Call for Curriculum Intervention" (2016) 11(1) *Journal of Commonwealth Law and Legal Education* 44; Lydia Bleasdale and Sarah Humphreys, "Undergraduate Resilience Research Project" (Leeds Institute for Teaching Excellence 2018) <https://teachinexcellence.leeds.ac.uk/wp-content/uploads/sites/89/2018/01/LITEbleasdalehumphreys_fullreport_online.pdf> accessed 26 May 2020.

⁷J Clare Wilson and Caroline Strevens, "Perceptions of Psychological Well-being in UK Law Academics" (2018) 42 *The Law Teacher* 335.

⁸Rachel Field, James Duffy and Colin James (eds), *Promoting Law Student and Lawyer Well-Being in Australia and Beyond* (Routledge 2016); Kathryn M Young, *How to Be Sort of Happy in Law School* (Stanford University Press 2018).

⁹See for example Giroux (n 1); Dorothy Bottrell and Catherine Manathunga (eds), *Resisting Neoliberalism in Higher Education Volume 1* (Palgrave 2019); Catherine Manathunga and Dorothy Bottrell (eds), *Resisting Neoliberalism in Higher Education Volume 2* (Palgrave 2019).

¹⁰See for example David Palfreyman and Ted Tapper, *Reshaping the University: The Rise of the Regulated Market in Higher Education* (Oxford University Press 2014); David Palfreyman and Ted Tapper, "The Marketization of English Higher Education and the Financing of Tuition Fees" (2016) 14(1) *London Review of Education* 47.

¹¹See for example Susskind (n 4); Francis (n 4); Catherine Shephard, "Strategies for Managing Change and the Use of Paraprofessionals: A Cross-Sector Study for the Benefit of post-LETR Providers of Legal Services. Part Two: The Legal Services Sector and the Shared Management Agenda" (2016) 67 *Northern Ireland Legal Quarterly* 241.

¹²The authors are aware that other theoretical frameworks exist and could be used to address some, or perhaps all, of the issues we raise. However, this paper fits within a special issue the focus of which is vulnerability theory. As such our approach is to examine and evaluate the role of vulnerability theory in addressing the ills, as we see them, of the neoliberal university.

We begin by outlining our understanding and interpretation of vulnerability theory and how we have thought about it in the context of academic work and the organisation of labour.¹³ We then sketch some of the issues raised by marketised, neoliberal universities and law schools as we see and experience them, before considering how thinking about vulnerability and resilience can help reframe some of the issues shaping our academic lives.

Vulnerability theory and academic work

Vulnerability theory offers an attractive framework in which to think about contexts which appear to be causing us harm. Fineman notes that

Vulnerability theory provides a template with which to refocus critical attention, raising new questions and challenging established assumptions about individual and state responsibility and the role of law, as well as allowing us to address social relationships of inevitable inequality.¹⁴

As well as thinking about state level responsibility to set up and regulate systems such as healthcare systems, financial systems and education systems in ways which take account of our vulnerability as human beings, we argue that the theory can also prove useful in contexts which are not directly about state responsibility per se but about the responsibility of organisations which have control and responsibility towards us as human beings in general or in specific areas of our lives.¹⁵

Fineman further suggests;

A vulnerability approach argues that the state must be responsive to the realities of human vulnerability and its corollary, social dependency, as well as to situations reflecting inherent or necessary inequality, when it initially establishes or sets up mechanisms to monitor these relationships and institutions.¹⁶

This can easily and almost seamlessly be applied to our context in which the university (taken to mean individual institutions as well as the sector overall depending on context) must be responsive to the vulnerabilities of its academics (and other staff and of course students) as well as the relationships, interdependencies and power structures within which we all work. Universities must do this, we argue, in terms of their formal structures and mechanisms, policies and procedures or what we might call their public life, as well as through their culture, values and behaviours in what we might be termed the private life of universities.

Because “social problems need social or collective, not just individual, solutions”¹⁷ a key effort in utilising vulnerability theory to help address the ills of a neoliberal university must be focused on collegiality and support of each other, paying particular attention to how the formal structures shape these interactions and either support or hinder positive interdependencies and how individuals within law schools experience

¹³This section is necessarily brief and should be read in the context of this special issue as a whole through which vulnerability theory is discussed in much greater detail.

¹⁴Martha Albertson Fineman, “Vulnerability and Inevitable Inequality” (2017) 4 Oslo Law Review 133, 134.

¹⁵See in general Sean Coyle, “Vulnerability and the Liberal Order” in Martha Albertson Fineman and Anna Grear, *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013).

¹⁶Fineman, “Vulnerability and Inevitable Inequality” (n 14) 134.

¹⁷Fineman, “Vulnerability and Inevitable Inequality” (n 14) 141.

the interactions. This is important, because it serves to remind us that vulnerability is not only organisational, but situational and as such is “an embodied experience and not exclusively a structural one”.¹⁸ For us then, vulnerability theory offers a different way of thinking about universities and in particular university law schools, the work carried out within them and the impact that university structures, workloads and culture have. It allows us to shift our focus away from discourse about autonomy and individual responsibility and on to relationships, structures and social responsibility. It allows us to think of university law schools not simply as a collection of (competing) individuals but as institutions built on relationships and interdependencies. This organic rather than solely structural view reminds us not only of our interdependencies and shared goals, but also of our shared resilience.¹⁹ It is the latter realisation that, we argue, might prove a useful first step to reframing the neoliberal university for long enough to allow us to think creatively about alternative approaches to the organisation of academic labour which are less harmful to those inhabiting the academic space.

The neoliberal law school: what’s wrong with academia?

Having set out our interpretation of vulnerability theory in the previous section, we now turn our attention to the neoliberal law school in order to outline briefly some of the issues which we think vulnerability theory must help address. In order to do so we draw briefly on the work of others as a means of identifying common themes, different conceptualisations vis-à-vis the issues, as well as a means of demonstrating that ideas as well as terms are, to some extent at least, contested.²⁰

As indicated earlier, many of the problems universities face can be linked to the intensification of the neoliberal agenda. As Giroux suggests,

Four decades of neoliberal policies have resulted in an economic Darwinism that promotes privatization, commodification, free trade, and deregulation. It privileges personal responsibility over larger social forces, reinforces the gap between the rich and the poor ... it fosters a mode of public pedagogy that privileges the entrepreneurial subject while encouraging a value system that promotes self-interest, if not unchecked selfishness.²¹

For education this means,

... high stakes testing, skill-based teaching, traditional curriculum, and memorization drills. Ideologically, the pedagogical emphasis is the antithesis of a critical approach to teaching and learning, emphasizing a pedagogy of conformity, and a curriculum marked by vulgar “vocationalist instrumentality”.²²

And, though writing in the US context, Giroux also captures much of what is happening to HE across many western countries including the UK,

¹⁸Coyle (n 15) 70.

¹⁹Martha Albertson Fineman, “Vulnerability and Social Justice” (2019) 53 Valparasio University Law Review 341, 357 at 368.

²⁰See for example Taylor C Boas and Jordan Gans-Morse, “Neoliberalism: From New Liberal Philosophy to Anti-Liberal Slogan” (2009) 44 St Comp Int 137; the various contributions by Bottrell and Manathunga (n 9). Many of the pieces cited, while outlining the problems, also point to the strengths and continuing reputation of Western HE as well as the resistance to neoliberal ideas. This is of course true and important but does not take away from the day-to-day experience on which these points are based.

²¹Giroux (n 1) 1.

²²Giroux (n 1) 29, citing Graeme Turner, *What’s Become of Cultural Studies* (Sage 2011) 183; Henry A Giroux, *Education and the Crisis of Public Values*(Paradigm Publishers 2012).

Universities are being defunded, tuition fees are skyrocketing, faculty salaries are shrinking as workloads are increasing, and faculty are being reduced to a subaltern class of migrant laborers. Corporate management schemes are being put in place underpinned by market-like principles, based on metrics, control, and display of performance. The latter reinforcing an audit culture that mimics organizational structures of a market economy. In addition class sizes are ballooning, curriculum is stripped of liberal values, research is largely assessed for its ability to produce profits, administrative staffs are being cut back, governance has been handed over to paragons of corporate culture, and valuable services are being either outsourced or curtailed.²³

The issues raised by Giroux are unfortunately all too familiar for many of us. The consequences for universities are captured well by Darder who highlights our institutions as,

... the university industrial complex, which has unfolded a wretched instrumentalizing nightmare of marketization and accountability schemes meant to ensure that higher education fulfill its role as a roaring economic engine and military aegis of the capitalist class.²⁴

This has consequences, sometimes dire, for academic staff who,

... risk madness to succeed. [...] Some become nervous wrecks, worn down by hyper-competitiveness and its adjunct administrivia, while others play possum, default into zombification, passing as undead to survive, desensitised by audit, surveillance, workload, workforce and acquiescence of academic leadership.²⁵

The negative impact of marketisation has affected not just staff, but also students. The idea of education as a social good²⁶ has been stripped away, and combined with the siren call of the market and the arrival of metrics, has been rebranded using the language of student autonomy, freedom of choice and control. Ironically, it is proposed that what is being sold is perceived rather than actual control, and misses the fact that students always had a voice, there was always accountability, but what was relational has now become atomising. Viewed in this way, HE, via the language of the market, has exploited staff and students' shared humanity and vulnerabilities, and in doing so reduced itself as a means to an end rather than an end in itself.

Law schools, clearly successful in neoliberal terms with good student numbers and employability rates, are not immune from the negative impacts outlined above and may even amplify them.²⁷ In the context of law schools, the impact of neoliberal market forces is stark. The battle for market dominance is reflected via increasingly glitzy open days, real or virtual,²⁸ the use of law school league tables, coupled with the further increase in marketisation and implied threat to staff of redundancies if Higher Education Funding Council for England (HEFCE) Teaching Excellence Framework (TEF) scores are not Silver or Gold,²⁹ and the instrumentalisation of the HEFCE's Research Excellence

²³Giroux (n 1) 30, citing Joelle Fanghanel, *Being an Academic* (Routledge 2012).

²⁴Angela Darder, "Foreword" in Bottrell and Manathunga (eds) (n 9) v.

²⁵Martin Andrew, "Double Negative: When the Neoliberal Meets the Toxic" in Bottrell and Manathunga (eds) (n 9) 59, 71.

²⁶The view that education is a social or public good is held by various academics; see for example Jandhyala BG Tilak, "Higher Education: A Public Good or a Commodity Trade?" (2009) 38 *Prospects* 449.

²⁷Anthony Bradney, "The Success of University Law Schools in England and Wales: Or How to Fail" (2018) 52 *The Law Teacher* 490.

²⁸This reflects the current approach to recruitment as a result of the Covid-19 pandemic, and reinforces the marketisation and instrumentalisation of education as an income source.

²⁹See for example Mark Leach, "TEF Results – Do the Prizes Still Glitter?" (*WonkHE*, 22 June 2017) <https://wonkhe.com/blogs/tef-results-do-the-prizes-still-glitter/which> accessed 21 September 2020 points to the reduction in fees income which might arise from Bronze TEF or more recently Matt O'Leary, Dr Vanessa Cui and Dr

Framework (REF) which dictates the type of research seen as valuable (or impactful). Furthermore, and perhaps with some irony, our experience suggests that the legal practitioners leaving a culturally demanding and hierarchical profession for a university life have brought with them the very thing they sought to evade: managerial and hierarchical structures. Whilst such cultural appropriation could be viewed as seeking comfort in a strange new world, the reality is less prosaic. The imposition of hierarchical structures and process mimics the firm, serving to concentrate the drivers of neoliberalism. In a misplaced attempt to bring order to what is perceived as chaos, what is revealed is a deep cultural dissonance, between education as a legal product, something to be sold and commodified where staff and students are metrics and education as a social good, where staff and students are intertwined relationally. The idea of instrumentalism implied in the commodification argument is lent further credence by university management's often unquestioning acceptance of change driven by the legal profession. Arguably the most recent example of this is the introduction of the Solicitors Qualifying Exam (SQE)³⁰ by the Solicitors Regulation Authority (SRA) for England and Wales, along with its impact, the rise of multiple-choice questions (MCQs) into what we would argue is a liberal arts degree.

The impact of the market has served to sever, at least for the moment, the connection between education as a social good and education simply as a means to an end. In the process, this revealed the corrosive impact of the market not only on HE and law schools generally, but also on university staff, and students. To use the language of the market, if their autonomy, choice and voice are to be realised, as well as ours, we need to embrace vulnerability theory. Its adoption would facilitate an open discussion of shared aims and values, by reminding us to ask the fundamental question of what it means to be human.³¹ Not only do such discussions serve to remind the organisation and the law school of their responsibilities, e.g., by asking what are "law schools for", but they also remind staff and students of our interdependency, and the shared resilience that such interdependency reveals.³² Certainly, a liberal law degree, which is in essence what we propose a law degree should be, can (along with vulnerability theory) remind us to ask the question, what does it mean to be human and in doing so provide the means by which our humanity can be cultivated.³³ A discussion we will return to later.

The incorporation of professional drivers reveals the juxtaposition of a market that sells itself as the guardian of student autonomy and choice, and law schools seeking to market themselves as the access point to an increasingly exclusive profession,³⁴ where choice is really not there for the majority.³⁵ This view finds traction in figures published by the Law Society of England and Wales, which reveal that undergraduate law students outstrip available training contracts alone by 3:1, whilst overall students entering

Amanda French, "Understanding, Recognising and Rewarding Teaching Quality in Higher Education: An Exploration of the Impact and Implications of the Teaching Excellence Framework" (UCU 2019) <www.ucu.org.uk/media/10092/Impact-of-TEF-report-Feb-2019/pdf/ImpactofTEFreportFeb2019> accessed 21 September 2020.

³⁰Kathleen Lynch, "Neo-liberalism and Marketisation: The Implications for Higher Education" (2006) 5 European Educational Research Journal 1, 2.

³¹Fineman (n 19) 357.

³²*ibid* 368.

³³See Martha C Nussbaum, *Cultivating Humanity: A Classical Defense of Reform in Liberal Education* (Harvard University Press 2003).

³⁴Guth and Dutton (n 4).

³⁵*ibid*.

practice are in the region of 20–25%.³⁶ The reality for staff and students is the abrogation by the HE sector in general, and law schools in particular, of their responsibilities to engender structures and processes that recognise our shared vulnerabilities, acknowledge our interdependency and our need for resilience, in favour of “profits over people”.³⁷

Vulnerability in the neoliberal law school: let’s rethink

As we suggest above, the neoliberal university presents a series of problems, all linked in complex ways, which highlight our vulnerability and the inadequacies of responses to tackle the impacts of those problems. This section focuses on the extent to which vulnerability theory can help us to reframe some of these issues to allow us to begin thinking about alternative ways of organising academic labour in law schools. It does so on two levels. First it addresses some of the conceptual issues that go to the heart of the neoliberal and marketised law school. Second, and given that it seems highly unlikely that we will be able to halt and reverse the marketisation process,³⁸ it addresses some of the outcomes or symptoms that result from the current state of higher education generally and law schools specifically.

Reframing the neoliberal law school

The neoliberal and marketised law school is about individual success, defined as highest test scores, highest paying internship or job secured, highest teaching evaluation scores and/or most research money secured. In addition these are seen to be dependent entirely on the individual’s ability, on merit and on the individual’s actions or inactions. Structures that may disadvantage certain groups of students³⁹ or staff can be ignored, and inherent inequalities brushed under the carpet, whilst the “absurd hyper-individualism”⁴⁰ underpinning much of academia results in students being pitched against each other in a competitive environment. This is often the antithesis to an effective learning environment and encourages staff to focus on short-term, box-ticking and metric-appeasing goals without much reference to the impact that may have on students or colleagues. It is not about them it is about individual success. When staff and students are not able to succeed the failing is theirs. This logic is applied at institutional level in England, playing out in the Russell Group versus New University or academic versus vocationally focused law degrees rhetoric,⁴¹ as well as at an individual level pitching the star researcher against the mere teacher. Vulnerability theory offers a way out of this thinking,

³⁶See Steven Vaughan, “The Lies We Tell Ourselves: Problematising the (S)hallow Foundations of the Core of Legal Education” (Society of Legal Scholars Annual Conference, UCLAN, Preston, September 2019).

³⁷Noam Chomsky, *Profit Over People: Neoliberalism and Global Order* (Seven Stories Press 1999).

³⁸Kathryn Telling, “Different Universities, Different Temporalities: Placing the Acceleration of Academic Life in Context” (2019) 23 *Perspectives Policy and Practice in Higher Education* 132, 133.

³⁹Louise Archer, Merryn Hutchings and Alistair Ross, *Higher Education and Social Class: Issues of Exclusion and Inclusion* (Routledge 2003); Diane Reay, Gill Crozier and John Clayton, “‘Fitting In’ or ‘Standing Out’: Working-Class Students in UK Higher Education” (2010) 36 *British Educational Research Journal* 107; Hilary Sommerlad and others, “The Futures of Legal Education and the Legal Profession” in Hilary Sommerlad and others (eds), *The Futures of Legal Education and the Legal Profession* (Hart 2015). Guth and Dutton (n 4).

⁴⁰Telling (n 38) 133.

⁴¹Setting these debates out here is beyond the scope of this paper but a search through *The Law Teacher* archives will reveal a wide variety of articles dealing with this issue.

In a vulnerability analysis, the basis for distinguishing some individuals from better positioned but equally vulnerable individuals in the first instance would revolve around questions of access to sufficient resources, with a deficit indicating they lacked the resilience that is necessary to address human vulnerability. Significantly, the initial emphasis here is on the distribution or allocation of resources and the structures within which they are produced. This suggests that the first question to be considered is whether institutional, not individual, functioning is inadequate.⁴²

A vulnerability analysis therefore means that the different contexts in which law schools operate and their different missions give rise to different interdependencies and expose their inhabitants to different vulnerabilities. It is not that some are more or less vulnerable in a sense that suggests better or worse but simply that they are differently vulnerable and susceptible to change in different ways – being affected more or less by different factors and changes in context and environment. The current legal education reforms in England and Wales provides a useful example. While the changes proposed by the SRA in the form of the SQE are not likely to have an impact on the structures, workload or general running of those law schools thought of as elite, the impact is likely to be significant for those law schools traditionally focused on a more vocational approach to legal education.⁴³

A vulnerability analysis here suggests that in order to take account of the vulnerabilities of the students and academics at those institutions these differences and differential interdependencies need to be recognised. We should call for a different allocation of resources depending on how those interdependencies between the law school and its students, the law school and its staff, the law school and the legal services sector and the law school and the general employment market as well as between staff and students play out in those different contexts. This is not, to be absolutely clear, an argument for teaching-only institutions or positions or for funded research to be concentrated in only so-called elite institutions or research centres. Instead it is a recognition that in order for all university law schools to offer their particular flavour of legal education in a positive way, there has to be space within the regulation, resourcing and structuring of law schools to support those differences and to reduce so far as is possible any disadvantage suffered because students study at or staff work for a particular institution or type of institution. These issues are structural and require a structural and collective rather than managerial solution. It is not the functioning of the individual but the functioning of the institution, both in the sense of the sector overall and individual law schools, that is inadequate and thus preventing all law students and all legal academics from surviving and thriving. Applying vulnerability theory at this conceptual level then would suggest that collectively we should be arguing for law schools which are structured in such a way which allows for the allocation and distribution of resources that empower staff to create effective learning environments⁴⁴ which are inclusive and support staff and students in their development, recognising their differing vulnerabilities and staff and students' dependencies on each other. We should therefore be arguing that law schools, and their structures and processes,

⁴²Fineman, "Vulnerability and Inevitable Inequality" (n 14) 147.

⁴³See for example the responses to the SRA's application to the Legal Services Board from the Learned Subject Associations <<http://lawteacher.ac.uk/alt-policy/letr-and-sqe/>> accessed 20 September 2020.

⁴⁴This cooperation is most needed at the time of writing as universities shift to online learning in response to the Covid-19 pandemic. However, the reality is that academics are being told to "simply shift stuff online", with no thought for the pedagogical drivers or how much work is actually needed. Rather than pedagogy, money (or more importantly the potential loss of money) is the driver.

recognise staff as vulnerable and therefore support staff to carry out their roles in a way which means something to them and which aligns their values to those of the institution.⁴⁵ If we accept that “Vulnerability theory is more focused on establishing the parameters of state responsibility for societal intuitions and relationships than it is on setting the limits of state intervention”⁴⁶ then the parameters in which the organisation and structure of law schools and legal education take place must account for differences between the purpose and mission of different law schools and ensure that any disadvantages resulting from those differences are minimised. This approach might not seem that radical but it runs counter to the culture of ranking, metrics and audit. Vulnerability theory lets us rethink the use of metrics and excellence rhetoric and focus on relationships and interdependencies. Instead of asking about overall satisfaction with courses, or value of research grants for example, vulnerability analysis encourages us to look at the human interactions that sit behind those metrics. What becomes important is the way staff can become a source of resilience for students and for each other, the way all students can be supported to achieve their potential through the provision of materials, guidance and learning opportunities best suited to their needs, the way academics can draw on materials, time and space provided by institutions in order to develop their teaching, scholarship and research and the way in which institutions acknowledge and react to these interdependencies and vulnerabilities.⁴⁷

Moving away from metrics though is difficult. The metrics feed the league tables which are so inextricably linked with student recruitment which, as mentioned, appears to be linked to the survival of departments and in some cases institutions highlighting the vulnerability of universities as institutions. This has been exacerbated by the introduction of significant tuition fees and the, often unrealistic or ill-founded, student expectations that go with that. In the context of England and Wales tuition fees have increased since the introduction of modest fees in 1998 to a level which now saddles graduates with significant debt, and which opens the door to possible financial regulation or at least incentives as to which subjects are studied by students and therefore offered by universities. Law schools do well in this model.⁴⁸ The marketisation of HE has witnessed the commodification of the degree and law degrees remain a valuable and sought-after commodity. Students are told they are consumers, they pay for their degrees (rather than the opportunity to study), they have rights and expect certain outcomes.⁴⁹ In the context of law schools, expectations of what happens throughout the degree, which topics are studied and which are not and significantly, what has to be “done” in order to achieve the highest grade, are often linked to expectations of access to high paying jobs in a narrowly defined legal sector. This is something which remains out of reach for most.⁵⁰ A vulnerability analysis again allows us to challenge the narrative of metrics and consider the situation of students and their recruitment differently.

⁴⁵Recognising here also that this may not be possible but that a vulnerability analysis would suggest that the institution needs to respond and either change or support staff in being able to find alternative roles within the institution or the sector more widely leading to a more responsive sector overall.

⁴⁶Martha Albertson Fineman, “Beyond Equality and Discrimination” (2020) 73 *SMU L Rev F* 51, 61.

⁴⁷The use of metrics is contested by various academics, but for a more recent example see Matt O’Leary and Phil Wood, “Reimagining Teaching Excellence: Why Collaboration, Rather than Competition, Holds the Key to Improving Teaching and Learning in Higher Education” (2019) 71 *Educational Review* 122.

⁴⁸Bradney (n 27).

⁴⁹Lynch (n 30); Collini (n 1).

⁵⁰Guth and Dutton (n 4).

Importantly, the use of such metrics tells us something about what is valued in the current system and it is not difficult to draw lines between the metrics, increasing student expectations and increasing staff workloads induced by demands of increased contact time, quicker marking turnarounds and more tightly controlled and standardised interactions. The introduction of higher student fees, the removal of the student cap, the maximisation of student recruitment, the metrics examining student satisfaction, continuation and employment outcomes⁵¹ alongside the REF pressure to produce impactful research, win grant income, publish world-leading outputs as well as disseminate knowledge outside the academy and give back to the community place ever-increasing pressure on academic staff. These pressures vary greatly depending on type of institution, role and seniority but across the sector academics are seen as human resources, as an expense in the production and delivery of products which consumers can then choose to purchase or engage with. With staff being seen as a resource only, the casualisation of the academic workforce is evidenced through the normalisation of non-standard contracts, their seemingly gendered use, and the commodification of academics, as exemplified by the use of management language, such as “units of cost”.⁵² The use of such language serves to dehumanise and further pitches academic staff against each other in competition for secure jobs, promotions or roles which better align with their ambitions or values. The result for the individual is increased workload, a fear of saying no which is matched only by the fear of failure defined as poor evaluation scores, publication rejections or not getting a grant, and risking being a jack of all trades but master of none.

Vulnerability theory can help rethink these problems too. Academics are vulnerable, susceptible to the changing demands of students, and the often unrealistic expectations of the law schools within which they work (which in turn are also vulnerable and dependent on the overall institution). If we accept this, then we must require the law schools, individually, through their institutions and as a sector to provide access to resources for staff to allow us to cope with the demands. This means rethinking structures, including dealing with questions around what proportion of income should be spent on staffing and what that staff body should look like in terms of permanent versus casual staff, in terms of seniority and in terms of skills and expertise. It would ask us to think carefully about staff/student ratios, organisation of work, time allocated for tasks on workload planning/allocation models. Looking at academic work and how it is organised from a vulnerability perspective is likely to, implicitly perhaps, suggest that more focus must be given to increasing staff numbers. Resources and structures which favour building projects and marketing brochures over ensuring sufficient members of staff to allow all work to be carried out without doing harm to staff are ill-founded and unjustifiable. Vulnerability theory leads us to think more about how a law school and its success are dependent on the individuals which make up the law school and therefore the law school as an institution must be structured in a way which allows those individuals to thrive, individually and

⁵¹Office for Students, “TEF Data” <<http://www.officeforstudents.org.uk/advice-and-guidance/teaching/tef-data/>> accessed 26 September 2019.

⁵²UCU (University and College Union), “Precarious Work in Higher Education: A Snapshot of Insecure Contracts and Institutional Attitudes” (April 2016) <https://www.ucu.org.uk/media/7995/Precarious-work-in-higher-education-a-snapshot-of-insecure-contracts-and-institutional-attitudes-Apr-16/pdf/ucu_precariouscontract_here_port_apr16.pdf> accessed 27 May 2020; Stefan Collini, “Covid-19 Shows up UK Universities’ Shameful Employment Practices” *The Guardian* (London, 28 April 2020) <www.theguardian.com/education/2020/apr/28/covid-19-shows-up-uk-universities-shameful-employment-practices> accessed 27 May 2020.

collectively. As Fineman notes, “Just as no individual can successfully stand apart from the state and its institutions, the destiny of the state ultimately relies on the actions of the individuals who constitute it.”⁵³ Exactly the same can be said for law schools.

Using vulnerability theory now

We have made some suggestions as to how vulnerability theory can help us rethink and address some of the issues raised by the marketisation of law schools. However, while this reframing and rethinking is a useful exercise at a theoretical level and can help move us towards advocating policy change at individual law school and university level as well as more broadly for the sector, it is not of much help for legal academics, like us, who are caught up in the day-to-day of academia, firefighting competing demands in an increasingly stretched system. Building on this we will now consider the extent to which vulnerability theory can help us with thinking about addressing some of the outcomes or symptoms of the neoliberal law school. Telling has noted that “whilst the problems may be structural, any workable response will be at the level of individual (self) management”⁵⁴ and this is an attractive suggestion. Of course something which is going to make our lives as legal academics better and more meaningful will have to happen at the individual level. However, “vulnerability theory has the power to disrupt the logic of personal responsibility and individual liberty built on the liberal stereotype of an independent and autonomous individual”⁵⁵ and this section tries to do that in two areas. We deal first with the question of overwork and burnout and then with questions of job satisfaction.

We have already outlined issues of increasing staff workload and student demand and this has, not surprisingly, led to a mental health crisis in law schools. An almost universal vulnerability among legal academics is overwork, burnout and mental ill health manifesting in depression and/or anxiety.⁵⁶ Law schools are not unaware of this and respond, at departmental or faculty level as well as tapping into university responses. It can be argued that universities provide the resources to inculcate resilience and to build meaningful relationships by offering wellness courses, mental health training, lunchtime yoga and walks or mindfulness sessions alongside, in some cases, conference, workshops, seminar series and occasionally more social get-togethers. However, these sessions reflect not organisational concern for employees, but an organisation obsessed with ticking boxes and placing responsibility on individuals. As Morrish writes, “universities have sought to mitigate their legal liability by offering employees enhanced access to ‘wellness solutions’”.⁵⁷

Resilience for law schools is more Cartesian, a way to sidestep responsibility and a means of placing the locus of responsibility back on to the individual staff member and to tightly control the sort of supportive relationships we seek to build. The following is a familiar feeling for many colleagues: in spite of all of the resources you have access too, the lunchtime yoga, the mindfulness sessions and subsidised gym memberships, you

⁵³Fineman (n 46) 62.

⁵⁴Telling (n 38) 132.

⁵⁵Fineman (n 46) 54.

⁵⁶Liz Morrish, “Pressure Vessels” (HEPI Occasional Paper 20, 2019).

⁵⁷Morrish (n 56) 39. See also David Webster and Nicola Rivers, “Critiquing Discourses of Resilience in Education” (*Fruits of the Pedagogic Life*, 14 May 2017) <<https://davewebster.org/2017/05/14/a-contrary-view-critiquing-discourses-of-resilience-in-education/>> accessed 20 September 2020.

are not resilient enough and the fact that the networks we force you into do not sustain you intellectually or emotionally is of course also your fault. The provision of wellbeing services, perhaps despite best efforts, serves further to atomise; failure is individual and personal, whilst solutions are individual rather than organisational and relational. Viewed in this way vulnerability is ignored and wellbeing services and their staff become an adjunct of the organisation, the aim being to ensure the “smooth running of the organisation”.⁵⁸ In other words, the institutional response to vulnerability is neoliberal and market driven and focused on individuals taking responsibility for failure or failing to cope rather than on changing structures which initially created the environment where our vulnerability has a negative impact.

Vulnerability can help us to understand that it is the structures that are the problem and can help us think about how different structures might better address the issue of overwork and burnout but it cannot help us to actually reduce our workload. Some of us might be in positions where we can access more resources and be more resilient to the pressures of work, we might be better able to say no, better able to align our work with law school goals, research in areas which currently attract funding or teach courses students like and do well in. However that does not mean that even those in the least vulnerable positions are not susceptible to the threat of not getting a promotion, losing a job or having to do work, perhaps even the majority of our work, which gives us little satisfaction, nor does it stop us from having to spend too much of our time having to do the work we are expected, some might say contracted to do. Expecting a legal academic teaching 14 hours a week across 4 subjects, looking after 50 personal tutees, supervising several postgraduate students and maintaining a research and/or scholarship workload to spend significant time and energies challenging the overall structures at play in a department, university or the sector is not realistic.⁵⁹ Most of us are too caught up in surviving the day-to-day. Therefore on an individual and practical level, vulnerability theory does not help us get through the day.⁶⁰

The second area in which we wish to think about the practical application of vulnerability theory is job satisfaction. There are many factors which shape job satisfaction: the meaning the work carries for us, the amount of control we have over our own work and structuring our time, the benefit of our work to others, the salary and other benefits, the security and perhaps the intellectual challenge it brings. Academics, while perhaps not badly paid, are not highly paid compared to those with similar qualifications in the private sector and other benefits such as pensions have been under sustained attack. There are few perks, at least in financial terms, to being an academic. The impact of neoliberalism has witnessed the rise of managerialism and the decrease in collective and collegiate decision-making, in essence localised atomism over shared decision-making, law school autonomy, at least relationally, is no more. The amount of control academics have over their working lives has been reduced along with the amount of freedom we have to research and to teach in ways which follows our

⁵⁸Telling (n 38) 133.

⁵⁹While this is a hypothetical based on our own experience and the experience of colleagues at a variety of institutions, there is evidence of workloads changing and increasing. See for example O’Leary and others (n 29). See <<http://www.timeshighereducation.com/features/paid-research-time-vanishing-privilege-modern-academics>>accessed 18 September 2020.

⁶⁰It must be noted that in UK universities there is the opportunity for a collective response for example via engagement with the University College Union (UCU), professional groups or of course codes of ethics. The issue here is that this is time consuming for someone who may not have such time for the reasons discussed. However, they remain an option.

interests. The marketised law school also places increasing emphasis on an employability agenda which privileges so-called graduate jobs and high paying professions⁶¹ and focuses student expectations on employment and salaries rather than on learning as the primary goal. With students focused on what they need to do to pass in order to get a job and law schools and the institutions they sit within focused on meeting their key performance indicators the values of both students and institutions often seem ill aligned with the values and expectations of academics who tend to be more focused on education for education's sake and who may want to pursue research which does not fit the current impact agenda, does not bring in research money and does not lend itself to being featured in a glossy magazine or on a flashy blog. The adoption of market principles and the language of the student consumer ignores that universities are at least in part a public service, with public service values,⁶² whilst the language has ushered in not simply a competing value system, but one which is in some respects diametrically opposed to academic values. Job satisfaction and wellbeing are directly linked to the extent to which our values align with those of our employers and the work that we do. It is therefore perhaps not surprising that job satisfaction for academics is dropping and that there is significant mental ill health and a general lack of wellbeing among academics in law schools.⁶³

Given that, how does or can vulnerability theory help? On the one level vulnerability theory can help us to articulate a clear message to the HE sector, and therefore law schools, that they must recognise and respond to our vulnerabilities and our shared humanity, and provide the structures and processes through which our resilience can be enhanced. However, vulnerability theory does not, on a practical level, provide us with tools to help us deal with misaligned values and differing expectations. It cannot deal with the cultural dissonance or with the frustration many feel because the theory as it stands has not been able to move beyond the theoretical challenge to the practical one that is posed by current law schools, HE structures and values. Thinking differently about issues might be the starting point to but it is very different from actually instituting change. At this point, the value of vulnerability theory comes from its theoretical power to reframe rather than from any practical application that can be harnessed to make a tangible difference in how we live our academic lives and give them meaning right now.⁶⁴

Concluding thoughts

Vulnerability theory allows us to think differently about the ills of the neoliberal university by shifting the focus away from academics as individuals trying to

⁶¹For this argument in the context of skills teaching see Jessica Guth, "The Past and Future of Legal Skills Teaching" in Emma Jones and Fiona Cownie (eds), *Key Directions in Legal Education: National and International Perspectives* (Routledge 2020).

⁶²David Kernohan, "Who Decides the Future of Universities?" (*WonkHE*, Comment, 22 May 2020) <[wonkhe.com](https://www.wonkhe.com)> accessed 27 May 2020.

⁶³See Wilson and Strevens (n 7).

⁶⁴While vulnerability theory cannot help us make a practical difference to our academic lives in the overall everyday, it can of course be utilised to help make a difference in some aspects of our academic lives. We see examples of the theory being drawn on to set up projects in different and more responsive ways across a variety of legal and educational arenas and the Vulnerability and the Human Condition Initiative website provides a plethora of published examples at <<https://web.gs.emory.edu/vulnerability/resources/publications.html>> accessed 28 May 2020.

survive in the system either by assimilating and embracing marketisation or by resisting and pushing back in defence of education and academic freedom. Instead it invites us to think about the failings of the state overall and universities more specifically to engage with the vulnerabilities, the susceptibility to change to use Fineman's basic definition,⁶⁵ we all have. Vulnerability theory allows us to examine the empirical reality of academic lives and argue that the structures which influence and shape our experiences are inadequate. Our collective experience clearly demonstrates that current ways of doing legal education – as academics or students – do damage and reinforce rather than reduce inequalities. Vulnerability makes us stop and challenge the assumptions that this is the fault of those individuals struggling within the system. Instead we can focus on structures, rules, regulations and cultures which stop us from accessing what we require in order to organise our academic labour in ways which are both healthier and more equal. However, the structural barriers which are arguably so problematic and which are brought into focus by focusing on vulnerability are arguably also the structures which make it so difficult to utilise vulnerability to mobilise solutions. The marketisation of the university sector means that universities are often not providing “assets or resources that enable us to survive, and even thrive, within society”⁶⁶ because collaboration, collegiality and support stand in sometimes stark contrast to competition, individualism and perceived excellence. The structures within which we work no longer encourage or sometimes even allow meaningful relationships and positive interdependencies which would help us support each other and produce meaningful work. Vulnerability is sometimes used, Fineman warns, “to stigmatise”,⁶⁷ and vulnerable people or in this instance vulnerable academic staff are simply “suffering the just results of their own individual failures”.⁶⁸ This atomisation of vulnerability results in the law school's focus on the individual, rather than on the organisational and structural issues which may have facilitated or exacerbated this. In other words, unsurprisingly the neoliberal law school's response to challenge from vulnerability theory is neoliberal in essence. In order to utilise vulnerability theory at a practical level, significant reclaiming of both vulnerability as something inherent and constant as well as resilience as something predominantly dependent on access to resources and empowering structures is necessary. Viewed from this perspective, vulnerability theory is aspirational and struggles to move away from an, albeit important, reframing and towards providing tools which can be operationalised now to make a difference in our lives and create space to allow us to advocate more structural and overall change in the longer term. Paradoxically this might mean that those with vulnerabilities which must most urgently be addressed, those on limited time or hourly contracts, those suffering mental ill health because of workload issues or pressures to demonstrate excellence or those overwhelmed with students requiring support for their complex vulnerabilities will never be in positions where they are able to make their voices heard and where their

⁶⁵Fineman (n 14).

⁶⁶Fineman (n 14) 146.

⁶⁷Martha Albertson Fineman, “The Vulnerable Subject and the Responsive State” (2010) 60 *Emory Law Journal* 251, 266.

⁶⁸Martha Albertson Fineman, “The Vulnerable Subject: Anchoring Equality in the Human Condition” (2008) 20 *Yale Journal of Law and Feminism* 1, 18.

vulnerabilities will be taken into account. While a vulnerability analysis suggests that those of us who can, should consider those vulnerabilities and work to understand and react to those interdependencies and address them, our lived experience shows how unlikely this is for most people most of the time. The problem with Fineman's theory is not in its aspiration or in its usefulness in challenging dominant and harmful ways of thinking about academic labour in neoliberal law schools, but in its application to our everyday work here and now before any of the structural changes needed can be brought about, if they ever can.⁶⁹ If we are to achieve more meaningful academic lives collectively, we need more.

Disclosure statement

No potential conflict of interest was reported by the authors.

⁶⁹See Morgan Cloud, "More than Utopia" in Martha Albertson Fineman and Anna Gear, *Vulnerability Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013) 70.