

Undermining resilience – how the modern UK university manufactures heightened vulnerability in legal academics and what is to be done

Abstract

Legal academics are vulnerable and the contemporary law school is eroding their resilience. Using vulnerability theory, as developed by Professor Martha Fineman, this article analysis the reasons for the loss of assets that could provide resilience in the modern university and the modern law school. Audit culture, the economics of resourcing higher education, the growth of mass higher education, the ideology of neo-liberalism, and managerialism as a feature of that ideology, are all factors that play a role in degrading the resilience of academics. The growth of precarious labour, overwork, attacks upon educational and disciplinary values, attacks upon academic freedom, and pressure on academic identity are all consequences of these factors. Disengagement, feelings of failure, ill health and low wellbeing are the embodiments of these consequences. Vulnerability theory is used to carry out a synthesis of materials drawn from literatures on education, legal education, higher education, health and safety at work, self-determination theory, and professional vocation. This synthesis highlights value conflicts between neo-liberal managerialism and educational values that risk undermining academic existential resources. Vulnerability theory is then used to identify potential means of resistance and potential places for resistance within and beyond the law school.

Keywords

Vulnerability, resilience, managerialism, health, neo-liberal, law school

Academics – privileged yet still (and increasingly) vulnerable

Although everyone is vulnerable, it is clearly the case some people are less able to recover from setbacks because they have fewer resources that they can call upon in a crisis. When Mathew Miller, son of Jonathan Miller, failed to perform in his A levels he could fall back upon the social networks he inherited from his famous father.¹ Mathew Miller went on to have a successful career in the creative industries. When accident broke a hand and leg of a poor man in Somaliland:²

“One child died of malnutrition. Since the [the accident] he has been handicapped, and his family depends on gifts from neighbours and relatives. He has no aspirations.”

A lack of money, medical care, and non-physical employment opportunities turned a serious but non-life threatening accident into a disabling event that pitched a family into extreme poverty. The loss of good jobs, instability of personal relationships, and ready availability of opioids in the USA have fuelled a quiet demographic crisis amongst white non-Hispanic non-graduate Americans in their mid-life years, an estimated 600,000 deaths above those that would have been expected if pre-twenty-first century trends had continued into the twenty-first century.³ A group of people in the developed world lost their way of life, had their self-respect undermined, and had a health care

¹ Aida Edemariam, *Gloucester Crescent* by William Miller review, *The Guardian* 24 August 2018; Amanda Craig, *Gloucester Crescent* by William Miller review *The Guardian* 26 August 2018.

² Deepa Narayan, Robert Chambers, Meera Kaul Shah, and Patti Petesch, *Voices of the Poor: Crying Out for Change* (Oxford University Press 2000) 99, Box 5.4.

³ Anne Case and Angus Deaton, *Deaths of Despair and the Future of Capitalism* (Princeton University Press 2020) 32.

system that sold them addictive opioids for their pain.⁴ These are all examples of the relationship between vulnerability and resilience, or its absence.

Sometimes vulnerability is wrongly seen as only present when there are some lack of resources or deficient character:⁵

“Vulnerability is perhaps best understood as a lack of key sets of assets, exposing individuals, households, and communities to increased or disproportionate risk of impoverishment. Simply put, an increased number and range of assets means less vulnerability.”

Viewed from this perspective academics in the developed world would not be considered vulnerable as they have considerable assets, including such “key assets” as high educational levels, prestigious and fulfilling jobs, access to health care, healthy living environments, and relatively high rates of pay.

However, vulnerability theory as developed by Fineman rejects this approach to vulnerability, both because of its failure to take into account the human condition and because the distinction it draws between the vulnerable and those not vulnerable (or invulnerable) is untenable. In doing this she does not discard Kirby’s important insight that it is people’s assets that distinguish between those that are typically considered more vulnerable to adverse life events and those less vulnerable. Risk may be common, but the consequences of events are differentiated as explained by Kirby:⁶

“... environmental hazards ... [and] many risks ... do not necessarily damage individual and social well-being if states, communities, households and individuals have adequate resources, both physical and human, to withstand them and are adequately protected by insurance cover and welfare systems ... natural disasters have a disproportionate impact upon the poor, because the poor have fewer of the resources necessary to survive and recover from such disasters.”

The “risk” referred to by Kirby is risk of harm, which is vulnerability and is common to all people. People’s ability to survive and respond to risk is caught by the concept of resilience. Vulnerability to harm is universal, it is part of the human condition. The ability to withstand harm is particular and determined by resources available to the person, household, institution, community, or state. Particular ability to respond to vulnerability is determined by those key assets that are available. Hence, Fineman argues vulnerability has both a universal and particular dimension and that the impact of events upon individuals and groups is determined by the degree of resilience one has, which is itself a function of available assets and life history.

These three concepts: universal vulnerability, particular positioning, and assets that provide resilience; explain why the ‘vulnerability as a deficiency’ concept is rejected whilst retaining the vital insight that assets are crucial to resilience. These three linked concepts just provide a more realistic and fuller description of human experience. However, this is only one aspect of the rejection of the vulnerability as deficiency approach. The other aspect is the usually unarticulated counterpart to vulnerability as a deficiency which is the assumption of a default state of non-deficiency whether we call this non-vulnerability or invulnerability. Invulnerability is more usually described as self-

⁴ Their somatic pain which increased as their economic and social fortunes declined, see: Anne Case and Angus Deaton, *Deaths of Despair and the Future of Capitalism* (Princeton University Press 2020) 1.

⁵ Raj Patel, Kai Schafft, Anne Rademacher, and Sarah Koch-Schulte, *Voices of the Poor: Can Anyone Hear Us?* (Oxford University Press 2000) 60-61.

⁶ Peadar Kirby, *Vulnerability and Violence: the impact of globalisation* (Pluto Press 2006) 54.

sufficiency or autonomy.⁷ If one lacks nothing one can support oneself and live the life one chooses to live. But this independent and autonomous person, household, institution, community, or state is mythical. We are all subject to risks, we are all vulnerable, and in a modern global world those risks are often novel, inherently uncontrollable and unpredictable.⁸ The invulnerable subject belongs to an unrealistic ideological world of individualism, rationality, and methodological individualism.

The state of nature imagined by John Locke and adopted by Robert Nozick is populated by pre-social individuals or households. The moral subject of Emmanuel Kant exists in a moral universe in which individual intention is everything and consequences irrelevant. The field of micro-economics is populated by economic men, rational decision makers who are resolutely driven by self-interest and are prodigies of calculative thought.⁹ All of these approaches to understanding the world rely upon creation myths (Locke and Nozick), denial of contingency (Kant), or empirically false simplifications and features (homo economicus). They are the intellectual foundations for classic liberal and neo-liberal theory. The autonomous invulnerable individual is available as a default “common-sense” contrast to those who are vulnerable because of this ideological background. Fineman rejects this modern construct as firmly as Aristotle rejected the idea of a human without a polity.¹⁰ This provides the other reason for framing vulnerability as universal and differences in resilience as explicable by available resources, acknowledging that variations in resources generate particular position in regard to the ability to respond to vulnerability. As Fineman expresses it we should substitute the “Vulnerable Subject” for the “Liberal Subject”.¹¹

Fineman has identified five types of assets that support resilience: physical (money, housing, transport, mobile phone); human (education, health, character); social (family, professional associations, social networks, trade unions, church or charity groups, local community relationships); ecological or environmental (clean water, healthy food, access to parks or woodland or rural environments, clean air); existential (systems of meaning such as religion, caring for others, culture and art, vocation).¹² For most of these resources, the state and its institutions are crucial in their production.¹³ These assets are produced by social institutions (regional or national government, markets, corporations, as well as the family). The difference between assets and institutions is analytical rather than ontological in a similar manner to the way that the categories of “institutions” and “organisations” are used in Douglass C North’s work.¹⁴ Thus, the family is a social institution at one level of analysis and a family is a social resource that can support resilience at another level of analysis. The state is pivotal because it provides the institutional structure that constitutes other institutions such as families or markets or corporations.

⁷ Martha Albertson Fineman, *The Autonomy Myth: A Theory of Dependency* (The New Press 2004).

⁸ Ulrich Beck, *Risk Society: Towards a new modernity* (Mark Ritter tr, Sage Publications 1992); Charles Perrow, *Normal Accidents: Living with High Risk Technologies* (Princeton University Press 1999); Peadar Kirby, *Vulnerability and Violence: the impact of globalisation* (Pluto Press 2006); Ulrich Beck, *World at Risk* (Polity Press 2008).

⁹ Kaushik Basu, *Prelude to Political Economy: A study of the social and political foundations of economics* (Oxford University Press 2003) 36-64, and John Kay and Mervyn King, *Radical Uncertainty: Decision making for an unknowable future* (The Bridge Street Press 2020) 106-132.

¹⁰ Aristotle, *The Politics* (T A Sinclair and Trevor J Sanders tr, Penguin Books 1992) 59-60, 1253a1-6.

¹¹ Martha Albertson Fineman, ‘Equality, Autonomy, and the Vulnerable Subject in Law and Politics’ in Martha Albertson Fineman and Anna Grear (eds), *Vulnerability: Reflections on a new ethical foundation for law and politics* (Ashgate 2013) 17, 19, and 26.

¹² Martha Albertson Fineman, ‘Vulnerability and Inevitable Inequality’ (2017) 4 Oslo Law Review 133, 146.

¹³ Ibid.

¹⁴ Douglass C North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press 1990), chapter one.

Which brings us to our academic who is vulnerable as a human being and who works in a vulnerable organisation that is constituted and regulated by the state and operates within markets. In order to understand the particular ways in which the academic is vulnerable we need to analyse the institutional forces that are undermining resilience, whilst never forgetting that there are also institutional forces that support academic resilience. Whilst the focus in this article will be on one aspect of this shifting environment, the resilience derived from the sense of calling felt by many academics, it is important to begin by quickly sketching out some of the major institutional forces at work.

State and Market Stressors – the big picture

Law Schools tend to form a part of a bigger organisation – the university.¹⁵ The past thirty to forty years have seen an expansion in the provision of higher education in the UK and internationally,¹⁶ and they have also seen significant changes in state responsibility for the provision of higher education.¹⁷ Many states have pulled back from direct funding of universities.¹⁸ Funding in England is primarily derived from state loans to students and competitively awarded research grants.¹⁹ In addition, the last forty years have seen a widespread deployment of a “neo-liberal” ideology of the market as the preferred mechanism for solving all social coordination problems.²⁰

¹⁵ Not always, in the UK one significant provider of legal education is the College of Law, which is a legal education specialist and not located in any larger university setting.

¹⁶ Trow traces the UK transformation of higher education, in Martin Trow, ‘Academic Standards and Mass Higher Education’ in Martin Trow, *Twentieth-Century Higher Education* (John Hopkins University Press 2010) and see: <http://www.oecd.org/education/higher-education-needs-to-step-up-efforts-to-prepare-students-for-the-future.htm> accessed 6 October 2019.

¹⁷ Martin Trow, ‘Academic Standards and Mass Higher Education’ in Trow (2010) (n 16); in the UK massification took place largely from the late 1980s and through the 1990s, this was not the case in the USA, which saw massification much earlier, see Martin Trow, ‘The Second Transformation of American Secondary Education’ and ‘Federalism in American Higher Education’, in Trow (2010) (n 16). However, the UK the USA and Australia saw parallel state withdrawal of direct support, and increasing conditionality of what support was maintained, over the last 30 years, see: Ruth Barcan, *Academic Life and Labour in the New University: Hope and other choices* (Routledge 2016). This international phenomenon was not therefore caused by massification per se (as it did not coincide with massification across nations) and was connected to ideologies of market desirability and managerialism which are examined below.

¹⁸ For the shifting pattern of funding in the USA see: Anne Stauffer, Phillip Oliff, Colin Foard, Rebecca Thiess, Matthew Reese, Brakeyshia Samms, Madalyn Bryant, Laura Pontari, Errol Spence and Jimmy Einsiedler, *Two Decades of Change in Federal and State Higher Education Funding* (The Pew Charitable Trusts 2019) available at: https://www.pewtrusts.org/-/media/assets/2019/10/fedstatefundinghigheredu_chartbook_v1.pdf accessed 13 July 2020.

¹⁹ Educational funding is devolved, the sources below are for England. Philip Augar, Sir Ivor Crewe, Jacqueline de Rojas, Edward Peck, Beverley Robinson, and Baroness Alison Wolf, *Independent panel report to the Review of Post-18 Education and Funding* (Department for Education 2019), Figure 3.1 which shows the decline in per student funding over the 1990s and subsequent increases from 2005-06 and 2012 to date linked to fee increases (to £3,000 in 2005 and £9,000 in 2012), as noted at 63: “Undergraduate teaching after 2012 became a profitable activity and the sector responded as it was meant to by recruiting more students, improving student support and developing facilities.” Government research funding is provided under the “dual support” mechanism, Higher Education Funding Council for England funding linked to REF performance by institutions and competitive grants awarded by the research councils. For funding per student between 1979-1996, see: Gareth Williams, ‘The market route to mass higher education: British experience 1979-1996’ (1997) 10 *Higher Education Policy* 275.

²⁰ David Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2007); Margaret Thornton, *Privatising the Public University: The Case of Law* (Routledge 2011). Belief in the neo-liberal reform of governance

These shifts in the political and cultural sphere have coincided with a loss of consensus about the function and role of the university that is linked to both greater social and student diversity and intellectual acceptance of pluralism or relativism in the value realm.²¹ The last thirty years have also seen the growth of a market based international higher education market, an explosion of information technology, and the rise of a reductionist vision of education as the building of human capital.²²

Some legal academics exist on short term contracts or zero hours contracts across multiple university sites and struggle with a shortage of physical assets.²³ In the UK a PhD requires for most people an undergraduate degree, a master's degree, before pursuing a PhD degree. That is seven or eight years of post-secondary study. To end such an extended period of study in insecure work with no guarantee of career progression makes academia, including legal academia, an extremely expensive profession to enter.²⁴ There are persistent disparities in pay and progression for those who manage to obtain full time employment that suggest discrimination against women and people of colour in the UK.²⁵ These discriminatory practices extend to other groups who do not have protected characteristics, and for whom data is not gathered.²⁶

Political demands upon the university have escalated as state financial support has wavered. In societies marked by increasing inequality, universities are exhorted to increase social mobility.²⁷ In nation states which have renounced responsibility for employment levels and social security, universities are required to serve the employment market and enhance national competitiveness.²⁸

programme transcends the two party political divide, as both new labour in the UK and the Clinton administration in the US continued the neo-liberal reform agenda.

²¹ Barnett R, *Thinking and Rethinking the University: The selected works of Ronald Barnett* (Routledge 2014). Bill Readings, *The University in Ruins* (Harvard University Press 1996). Harry Lewis, *Excellence Without a Soul: Does Liberal Education Have a Future?* (Public Affairs 2007).

²² See e.g. Harry Brighouse, *On Education* (Routledge 2006) 27 and 37. Human capital theory does not adequately address positional effects of human and cultural capital, see: Pierre Bourdieu, 'The Forms of Capital' in Halsey et al (eds) *Education Culture Economy Society* (Oxford University Press 1997), 46. See: Lee Elliot Major and Stephen Machin, *Social Mobility: And Its Enemies* (Pelican 2018).

²³ UCU, 'Precarious work in higher education: insecure contracts and how they have changed over time' (May 2020); UCU, 'Counting the costs of casualisation in higher education' (June 2019). MY Tytherleigh, C Webb, CL Cooper and C Ricketts, 'Occupational Stress in UK higher education institutions: a comparative study of all staff categories' (2005) 24 Higher Education Research and Development 41 identified job insecurity as the most important cause of academic stress. David Matthews, 'Don't casualise academics, says OECD' *THE* (London 29 June 2020).

²⁴ Primarily as a simple result of the increase in student fees and lost opportunity costs (loss of potential earning and career advancement). In the law schools, however, there is also a shift from recruiting practitioners to recruiting holders of PhDs, and this tends to increase the costs of qualification (due to higher fees and lost opportunity costs).

²⁵ UCU, 'The gender pay gap in higher education' (2015/16 data report). UCU, 'Black academic staff face double whammy in promotion and pay stakes' <https://www.ucu.org.uk/article/10360/Black-academic-staff-face-double-whammy-in-promotion-and-pay-stakes> accessed 12 June 2020.

²⁶ See: <https://workingclassacademics.com/memberspublications/> accessed 12 June 2020.

²⁷ A promise not kept see: Major & Machin (n 23) and Sommerlad H, 'The New "Professionalism" in England and Wales: talent, diversity, and a legal precariat' in Spencer Headworth, Robert L Nelson, Ronit Dinovitzer and David B Wilkins, (eds), *Diversity in Practice: Race Gender, and Class in Legal and Professional Careers* (Cambridge University Press 2016).

²⁸ See (n 20) on neo-liberalism and OECD (n 16): "It is more important than ever that young people learn the knowledge and skills needed to navigate our unpredictable and changing world," said OECD Secretary-General Angel Gurría ... Many institutions are evolving to meet changing job market demands". Stefan Collini, *What are Universities For?* (Penguin 2012).

In an ideological context of release of government control to allow market forces to allocate resources, universities are subject to ever increasing levels of audit.²⁹

Market discipline is exulted, but pseudo-market control is imposed via “new public management” and regulation through audit.³⁰ New public management is a conflation of business organisation with market mechanism, the visible hand being passed off as the invisible hand.³¹ The growth of managerialism undermines the sense of meaning many academics try to find in their work, in the words of Shattock:³²

“For many academics this marked a significant change in their relationship to their institution from being a member to being an employee, from being a partner in an enterprise to being someone whose performance could be measured by remote internal and external bureaucracies. This constituted a negation of the individual autonomy of the professional.”³³

It is important to explore the consequences of these institutional power shifts, which have been driven by government policies, on individual academics.

In short managing a university is a nightmarish prospect because externally incoherent demands are made in the name efficiency, accountability, the economy, social peace, and progress.³⁴ The vulnerable university mediates these incoherent and contradictory demands and they become the day to day stressors of academic life.

State and Market Stressors – the private life of the university

The ideological, governmental, regulatory, market, and institutional pressures outlined above impact the lived experience of legal and other academics.³⁵ These stressors generate a clash of values that itself can serve to undermine academic resilience. The impact is felt by everyone, since vulnerability is universal, but is felt more intensely and with greater damaging effects by those with fewer assets and resilience, the effect of universal vulnerability is therefore particular. The impact can lead to ill

²⁹ Marilyn Strathern (ed), *Audit Cultures: Anthropology studies in accountability, ethics and the academy* (Routledge 2000); Marilyn Strathern, 'Improving ratings': audit in the British University System (1997) 5 *European Review* 305; Michael Power, *The Audit Society: Rituals of Verification* (Oxford University Press 1999); Stefan Collini, *Speaking of Universities* (Verso 2017). An interesting side effect of the covid 19 pandemic was the tacit official recognition that research audit *impedes* actual research activity, see: Jack Grove, UK's next REF postponed 'until further notice' *THE* 24 March 2020.

³⁰ The process is described using the concept of “governance” in Simon Marginson and Mark Considine, *The Enterprise University: Power, Governance and Reinvention in Australia* (Cambridge University Press 2000).

³¹ See: Alfred D. Chandler Jr, *The Visible Hand: The Managerial Revolution in American Business* (Harvard University Press 1977). For a historical analysis of the shift in power within universities over the twentieth and twenty-first centuries, see also: Michael Shattock, 'University governance in flux. The impact of external and internal pressures on the distribution of authority within British universities: A synoptic view' (2017) 71 *Higher Education Quarterly* 384. On managerialism in higher education see: Martin Trow, 'Managerialism and the Academic Profession' in Trow (2010) (n 16). Marginson and Considine, *The Enterprise University* (n 30).

³² Shattock, 'University governance in flux' (n 33), 391.

³³ For confirmation of the deleterious loss of control see: Anna McKie, 'UK academia 'increasingly unsafe' working environment' *THE* 9 January 2020.

³⁴ See: Graham Ferris, *The Uses of Values in Legal Education* (Intersentia 2015), 6.

³⁵ Liz Morrish, *Pressure Vessels: The epidemic of poor mental health among higher education staff* (HEPI Occasional Paper 20 2019), Tim O'Brien and Dennis Guiney, *Staff Wellbeing in Higher Education* (Education Support Partnership 2018).

health and in some tragic cases, such as that of Malcolm Anderson, death.³⁶ Institutional responses are often unhelpful because institutions forged in the neo-liberal paradigm fail to recognise the deleterious effects of managerialism as a problem.³⁷ Academics should be able to resist inappropriate pressure and respond as competitive individuals: “We have to look after each other, otherwise we have managers creating a culture where everyone is out for themselves”.³⁸ The undermining of social assets is not seen as a part of the problem, as an analysis informed by assumptions around the liberal subject simply cannot “see” the nature of the problem, even though it is felt and understood at a personal level by very many within higher education.³⁹ This problem of neo-liberal blinkers means we need bridging concepts, such as “resilience” in vulnerability theory.

Another useful bridging set of concepts can be found in regulation of the workplace for safety. In the UK it provides a partial account of how modern academic life degrades resilience through “management standards” that are set out by the UK Health and Safety Executive (HSE).⁴⁰ The standards identify six proximate causes of harmful stress in the work place: ‘demands’ (workload), ‘control’ (autonomy), ‘support’ (resources including collegial culture), ‘relationships’ (avoiding oppressive behaviours by managers), ‘role’ (clarity about what a role entails), and ‘change’ (how well managed and communicated changes are). The standards can be mapped onto sources of resilience in vulnerability theory, specifically: physical (‘support’), social (‘demands’, ‘support’, ‘relationships’, and ‘role’), ecological (‘support’), and existential (‘control’, ‘role’, and ‘change’). The HSE approach is helpful because it identifies sources of resilience that lie outside the individual academic and can be used in resistance to harmful work cultures and demands.⁴¹ The standards aid us in envisaging the big picture stressors as they impact upon individual academics. However, we start our account of the private life of university law schools with an issue not within the purview of the HSE standards, the value conflicts that can arise between academics and managers.⁴² Such conflicts are bound up with existential assets in vulnerability theory.

Legal scholars no longer share consensual understandings of the mission of the discipline or of the educational mission of the university law school.⁴³ The shift in the UK from an elite higher education

³⁶ Catrin Haf Jones, ‘Lecturer’s widow hits out at Cardiff University workload’ BBC News 20 February 2020, available at: <https://www.bbc.co.uk/news/uk-wales-47296631> accessed 31 July 2020.

³⁷ Thomas Deacon, ‘Cardiff University lecturer hits out at insulting ‘suicide locks’ put on windows after tutor’s death’, Wales Online, 3 March 2019, available at: <https://www.walesonline.co.uk/news/wales-news/cardiff-university-lecturer-hits-out-15907286> accessed 31 July 2020.

³⁸ Anonymous Interviewee on the meaning of wellbeing, O’Brien and Guiney, *Staff Wellbeing* (n 36), 7.

³⁹ Colin James, Caroline Strevens, and Rachel Field, ‘Law Teachers Speak Out: What do Law Schools Need to Change?’ in Michael Legg, Prue Vines, and Janet Chan (eds), *The Impact of technology and innovation on the Wellbeing of the Legal Profession* (Intersentia 2020) 131.

⁴⁰ Health and Safety Executive, *Tackling Work-Related Stress Using The Management Standards Approach: A step by step workbook* (The Stationary Office 2017) available at: <https://www.hse.gov.uk/pubns/wbk01.pdf> accessed 22 July 2020.

⁴¹ The HSE guidance is closely tied to the enforcement of legal standards upon employers. It is noteworthy how similar the management standards categories are to the categories used by James et al, ‘Law Teachers Speak Out (n 39), there is substantial convergence in evidence.

⁴² Value conflicts apparently more apparent to academic middle managers than to executive level managers, see: V Lynn Meek and Fiona Q Wood, ‘Higher education governance and management: Australia’ (1998) 11 Higher Education Policy 165, table 2, 173-175. The remit of the HSE would preclude it from commenting upon the rectitude of organisational values or managerial culture.

⁴³ This is not a reiteration of the old tension inherent in professional higher education between liberal (or socio-legal) legal education or preparation for the profession, any consensus over the purpose of higher education that that debate assumes has been lost. Readings, *The University in Ruins* (n 21); Barnett R, *Thinking and Rethinking the University: The selected works of Ronald Barnett* (Routledge 2014). The problem is not new,

system to a mass higher education system left academics unsure of their educational function, as Scott noted in 1995:⁴⁴

“Many universities ... remain committed to a personal engagement between teachers and students, and to individualised (even charismatic) styles of scholarship ... which appear to take little account of either the values or the imperatives of a mass system.”

In 2020 fewer university management teams are committed to such “elite” educational ideals, which have been displaced by revenue maximisation, managerial norms, audit compliance, and league table competition.⁴⁵ However, many academics remain committed to these educational ideals. Rather than apparently technocratic and politically neutral, imposing these “values or the imperatives of a mass system” subjects academics to the reductionism of an ideologically informed neo-liberal system.⁴⁶ Hence the importance of challenging the assumptions of unproblematically autonomous academics, universities, and students and reframing our analysis of current pressures through a vulnerability lens.

In addition, the shift from a small relatively culturally homogenous student cohort to a large and more diverse student cohort has affected the university and the law school. A welcome increase in student diversity has aggravated the problems caused by a lack of consensus around the role of and range of values that should inform higher education.⁴⁷ In the nineteenth Newman assumed that all values were knowable and coherently arranged, so that his ideal university simply had to maintain the hierarchy of disciplines.⁴⁸ Although Newman’s values were restricted in range and unjustifiably static and backwards looking even when he wrote they gained widespread acceptance within academia.⁴⁹ Humboldt had a more expansive and forwards looking set of values, yet he also assumed a compatibility of values that would be revealed by the mutually supporting activities of teaching and research.⁵⁰ Pluralism, or relativism, denies any such value harmony and holds that there is no rational determinant of best value. Whilst value discourse can identify errors in argument, ultimately disagreements about the attributes and purposes of a worthwhile life remain that, disagreements.⁵¹ Therefore, earlier consensus within academia around values cannot be taken for granted but requires mobilisation of argument and the seeking alliances on a case by case basis.

see: Max Weber, *The Vocation Lectures: Science as a vocation; Politics as a vocation*, David Owen and Tracy B Strong (eds) (Rodney Livingstone tr, Hackett Publishing Company 2004) and Chad Wellmon, ‘The Scholar’s vocation’ at: <https://aeon.co/essays/weber-diagnosed-the-ills-of-the-modern-university-and-prescribed-the-cure> accessed 14 July 2020.

⁴⁴ Peter Scott, *The Meanings of Mass Higher Education* (Open University Press 1995) 2.

⁴⁵ In the discourse around massification the word “elite” carries different meanings in a rhetorically useful but confusing manner. Elite means small as opposed to large cohorts; elite means preparing the next generation of elite leaders (reproduction of social hierarchy) rather than educating large numbers of skilled knowledge workers; elite means institutions with high prestige and resources; and elite means concerned with the educational flourishing of the students as opposed to serving the economy through the production of human capital. It is the fourth sense of “elite” aspiration that is defended in the text.

⁴⁶ See: State and Market Stressors – the big picture above.

⁴⁷ For a discussion see: Graham Ferris, *The Uses of Values in Legal Education* (Intersentia 2015) chapter 1: The values of legal educators.

⁴⁸ John Henry Newman, *The Idea of a University* (Baronius Press Ltd 2006). This book remains an important point of reference in the UK.

⁴⁹ Ferris, *Uses of Values* (n 47) 14-25.

⁵⁰ Readings, *University in Ruins* (n 21) chapters 4 and 5. Weber noted the reality of common disconnection of research and teaching abilities, Weber, *Vocation Lectures* (n 43). The German research university is widely seen as inspiring the modern US research university in the post-bellum nineteenth century.

⁵¹ Isaiah Berlin, ‘The Pursuit of the Ideal’ in Isaiah Berlin, Henry Hardy and Roger Hausheer eds, *The Proper Study of Mankind: An Anthology of Essays* (Pimlico 1998).

Today we can no longer assume traditional educational practice in the area of value discourse is sufficient or even justifiable. This raises problems of meaning for legal academics, it threatens their social and existential resilience, and these are vital assets in the context of the modern law school.

The importance of existential assets can be illustrated by reflection upon the reported experiences of academics. Surveys of academics have found that factors associated by the HSE standards with high stress or job dissatisfaction: such as long working hours,⁵² work overload ('demands'), and lack of support ('support' and 'relationships'), did not prevent academics from reporting satisfaction with their jobs.⁵³ This is explicable according to self-determination theory, if academics feel intrinsically motivated, competent in the performance of their duties, and part of a community. Then, we can expect their wellbeing to be supported and their reported job satisfaction to be high.⁵⁴ In other words, the existential and social assets of academia can act as a counterweight to relatively discouraging physical assets (hours, relative remuneration, workload). The researcher or researcher teacher are socially recognised types of professional who find meaning in work, people with a worthwhile vocation.⁵⁵ Different academics value different aspects of the job differently, some feeling research is the central activity, while others value teaching. However, most academics believe both these activities have inherent value.⁵⁶

The belief in the value of autonomy, research, and teaching explains the decision to become a legal academic and the perseverance and dedication of established academics. Within academia one can find other people who have committed to these values. Therefore, these existential assets also produce social assets, through involvement in formal institutions, such as disciplinary societies,⁵⁷ and informal association within the workplace with colleagues. Work inspired by these values is likely to lead to success in one's career, and thus lead to physical assets. Therefore, these existential assets

⁵² MY Tytherleigh, C Webb, CL Cooper and C Ricketts, 'Occupational Stress in UK higher education institutions: a comparative study of all staff categories' (2005) 24 Higher Education research and Development 41, 50; Chris Chambers, Irina Dumitrescu, Hannah Forsyth, Alice Wickenden, Christopher H. Hendon, Andrew Moore and Diane Watt, 'Should you be working 100 hours a week?' THE, 20 February 2020. Fontinha R, Easton S, and Van Laar D, 'Overtime and quality of working life in academics and non-academics: The role of perceived work-life balance' (2019) 26 International Journal of Stress Management 173.

⁵³ Tytherleigh et al, 'Occupational Stress' (n 52), 43. See: Anthony Bradney, *Conversations, Choices and Chances: The Liberal Law School in the Twenty-First Century* (Hart Publishing 2003) 15-17. For an alternative contemplation of the issue see: David Watson, *The Question of Moral: Managing Happiness and Unhappiness in University Life* (Open University press 2009). For science PhD students see: Bethan Cornell, 'PhD students and their careers' (HEPI Policy Note 25 July 2020) available at: <https://www.hepi.ac.uk/wp-content/uploads/2020/07/HEPI-Policy-Note-25_PhD-students-careers_FINAL.pdf> accessed 16 July 2020. Identifying three of the HSE stressors listed at text between nn 41-42, demands, support, and relationships.

⁵⁴ See: Graham Ferris and Rebecca Huxley-Binns, 'What Students Care About and Why We Should Care' in Paul Maharg and Caroline Maughan (eds), *Affect and Legal Education: Emotion in Learning and Teaching the Law* (Ashgate 2011) 195; Richard M Ryan and Edward L Deci, *Self-Determination Theory: Basic Psychological Needs in Motivation, Development, and Wellness* (Guilford Press 2017). We can approximately map these aspects of wellbeing noted onto the HSE management standards noted earlier at text between nn 40-41: intrinsic motivation ('control', 'support', and 'change'), competence ('demands', 'support', 'role', and 'change'), being part of a group ('support' and 'relationships').

⁵⁵ Weber, *The Vocation Lectures* (n 43).

⁵⁶ For legal scholars in England see: Fiona Cownie, *Legal Academics – Cultures and Identities* (Hart Publishing 2004).

⁵⁷ For legal scholars in England and the UK: Association of Law Teachers, the Socio-Legal Studies Association, Society of Legal Scholars.

and the relationships and activities they lead to explain why academia remains an attractive place to work for neophytes and established practitioners.⁵⁸

However, assets that reduce vulnerability by providing resilience can also lead to new risks of harm, and this is true of the existential assets incidental to serving the educational goals of research and teaching. This is very clearly shown by a study of zookeepers in the USA which will be used to illuminate the world of legal academics.⁵⁹

Zookeepers feel a strong sense of calling, and this explains why they apply for and serve in jobs that otherwise seem demanding and poorly rewarded in economic terms. Zookeepers value their relationships with the animals in their care and their role in protecting the species from the risks of extinction through breeding programmes. These values feed a sense of calling that provides a source of great satisfaction, it is an existential asset. However, when managers of zoos do not put animal welfare or preservation first then the reaction of many zookeepers is not to leave the job, which no longer is aligned with those values that the zookeeper serves, but to redouble efforts to protect the welfare of the animals and the breeding programmes. The sense of vocation which provides an existential asset also make zookeepers liable to exploitation – as they will work for free to protect the animals even at the expense of their human and social assets (their health and families and wider social activities).⁶⁰

Legal academics find an analogous meaning in their jobs, through a commitment to research and teaching. Also, they value academic freedom or autonomy in the workplace,⁶¹ both as a thing in itself and as something that permits them to serve the ends of academia. Legal research is very difficult to do without significant freedom, and creative and responsive teaching also requires significant academic freedom. Additionally, some academics believe that they have a responsibility as public intellectuals to challenge abuses of power, in the university, in the justice system, and in society at a national level, and in the global public sphere at an international level.⁶² Speaking truth to power requires academic freedom, because power prefers the echo of its own prejudice over truth, and power can be vengeful if discomfited.⁶³ Therefore, there is serious reason to believe that freedom in the conduct of work, is an integral part of the existential asset that sustains academic commitment.

⁵⁸ Although academia in the UK is significantly less attractive as a career than it was forty years ago, see: Williams (n 20), 288-289, and Cornell (n 53).

⁵⁹ Bunderson J S and Thompson J A, 'The Call of the Wild: Zookeepers, Callings, and the Double-Edged Sword of Deeply Meaningful Work' (2009) 54 *Administrative Science Quarterly* 32. For academics see: Fontinha et al 'Overtime' (n 52).

⁶⁰ Bunderson and Thompson, 'The Call of the Wild' (n 59).

⁶¹ Control being the HSE concept closest to autonomy, and which is constructed by institutional forces, and threatened by changes in the institutional structure of higher education taking place over the last forty years and discussed above.

⁶² Robert E Calvert (ed), *To Restore American Democracy: Political education and the Modern University* (Rowman & Littlefield Publishers 2006); Bruce LR Smith, Jeremy D Meyer and A Lee Fritschler, *Closed Minds: Politics and Ideology in American Universities* (Brookings Institution Press 2008).

⁶³ John Ross, 'University staff must find their voice, says Murdoch whistleblower' *THE* (London, 1 July 2020); Philip Moriarty, 'Sorry, marketers, but I am not your brand' *THE* (6 July 2020); Scholars at Risk, *Free to Think 2019: Report of the Scholars at Risk Academic Freedom Monitoring Project* available at: <<https://www.scholarsatrisk.org/resources/free-to-think-2019/>> accessed 14 July 2020; Richard Watermeyer, *Competitive Accountability in Academic Life: the struggle of social impact and public legitimacy* (Edward Elgar 2020) 40 (Robert Buckingham). Joyce Lau, 'University of Hong Kong fires Occupy Central founder Benny Tai' *THE*, 28 July 2020.

Indeed, there is reason to believe that modern business organisations seek to encourage employees to share an intrinsic sense of devotion to institutional ends. The artist and the academic have become the model for people so motivated by the ideals of their activity they will drive themselves if free to conduct their work.⁶⁴ Academics constantly self-educate, develop new understanding, skills, and techniques in an intrinsically motivated drive to excel in those activities they value.⁶⁵ Thus, it seems the shared purpose of the university and the academic, as well as the wider society should lead to a mutually beneficial relationship. Established legal academics can continue to develop and the universities can encourage such mutual benefits by lifting insecurity from new academics, enabling them to devote themselves to the collective aims of the institution. Unfortunately, the neo-liberal law school is subject to those institutional structures, which militate against this harmonious outcome.

Educational values in teaching and research are in extreme tension with neo-liberal values. The image of the student as a consumer of a service industry distorts the educational relationship which is inevitably unequal and therefore ill-suited to an arms-length contractual analysis.⁶⁶ I have critiqued this consumer ideology elsewhere:⁶⁷ it fails to acknowledge the positional aspect of education,⁶⁸ it cannot cope with the transformative aspects of education,⁶⁹ and it is only justifiable in the context of a stable world which renders it unsuitable for our world.⁷⁰ For a teaching academic this value conflict is manifest in multiple irritations: pressure to seek “student satisfaction” (embedded in use of student surveys in staff performance appraisals) rather than student growth, attempts to enforce a corporate image in communications with potential and actual students which is seen as an aspect of marketing,⁷¹ and generally a shift from an ideal of education as a caring relationship to one of education as a regulated market relationship.⁷² The day to day impacts of the tension between educational values and a market in educational services are facilitated by audit culture and managerialism.

Research priorities can be distorted by a view of the purpose of research as a successful search for funding,⁷³ and the cultivation of proxies for impact can impede research inspired by a concern to effect lasting real world change as well as research seeking understanding and critiquing.⁷⁴ The shift

⁶⁴ Andrew Ross, *Low Pay High Profile: The Global Push for Fair Labor* (The New Press 2004) chapter seven: The Mental Labor Problem.

⁶⁵ An impulse that can become problematic in the modern university, see: Watermeyer, *Competitive Accountability* (n 63).

⁶⁶ It is an example of an inevitable inequality: Martha Albertson Fineman, ‘Vulnerability and Inevitable inequality’ (n 12).

⁶⁷ Ferris, *Uses of Values* (n 47) 44-56.

⁶⁸ David F Laboree, *Someone Has to Fail – the zero-sum game of public schooling* (Harvard University Press 2010).

⁶⁹ Peter Jarvis, *Teaching Learning and Education in Late Modernity – The selected works of Peter Jarvis* (Routledge 2012). Student transformation violates the axioms of rationality embodied by economic man.

⁷⁰ Douglass C North (n 16) chapter three.

⁷¹ *THE* (London, 1 July 2020); Philip Moriarty, ‘Sorry, marketers, but I am not your brand’ *THE* (6 July 2020).

⁷² Nel Noddings, *Caring: A Feminine Approach to Ethics and Moral Education* (University of California Press 2013).

⁷³ Thornton, *Privatising the Public University* (n 20) chapter 5.

⁷⁴ Watermeyer, *Competitive Accountability* (n 63). Cornell (n 53). Shift Learning, ‘What Researchers Think About the Research Culture They Work In’ (Wellcome 2020) available at: <https://wellcome.ac.uk/reports/what-researchers-think-about-research-culture> accessed 22 July 2020. M Joan Wilson and WR Sexson, ‘The Positive and Negative Roles of Grant Funding as Mechanisms for Societal Transformation and the Development of Community Resilience’ (2021) *The Law Teacher* infra.

from research based on curiosity and academic values to research undertaken to meet performance targets can erode researcher identity and motivation and undermine the quality of research.⁷⁵

Linked to the re-conceptualisation of the learner as a buyer of education is the individual as the embodiment of human capital. There is some overlap between the idea of human capital (education, work experience, skills) and human assets in vulnerability theory. In the internal life of UK education, and across many higher education systems internationally, human capital theory is embedded in the concept of employability.⁷⁶ In so far as employability is directed to developing the capabilities of students there has been a willingness to integrate it into the legal curriculum.⁷⁷ However, the rhetoric of employability can deceive students as to the relationship between educational goals and curriculum content and employment opportunities.⁷⁸ Human capital theory and employability do not recognise the large role played by cultural capital and institutional reputation in professional recruitment, projecting instead a strongly functional and “meritocratic” labour market.⁷⁹

Thus, the impact of employability on teaching academics is varied. At its most positive, it justifies the teaching and accessing of soft skills and the use of clinical legal education. When combined with law school recruitment of students to maximise income from tuition, it puts pressure on the honesty of the legal educational project, given the realities for many students of the professional job market.⁸⁰ Finally, when used to argue for an impoverished curriculum emphasising adaptation of the student to the market or, even worse, to what the student imagines the market to demand, it risks reducing the purpose of higher education in a similar way as does the idea of the student as

⁷⁵ Hine Jane Waitere, Jeannie Wright, Marianne Tremaine, Seth Brown and Cat Jeffrey Pausé, ‘Choosing whether to resist or reinforce the new managerialism: the impact of performance-based research funding on academic identity’ (2011) 30 Higher Education Research & Development 205. Shift Learning, ‘What Researchers Think’ (n 74).

⁷⁶ Although the concept is contested, reflecting in part the educational and the human capital approaches taken to employability. Phillip Brown, Anthony Hesketh and Sara Williams, *Employability in a Knowledge-driven Economy* (2003) 16 Journal of Education and Work 107 point out that some definitions of employability imply human capital formation can somehow generate job market opportunities, e.g.: “employability is about having the capability to gain initial employment, maintain employment and obtain new employment if required”. Contrast with: “In essence, the emphasis is on developing critical, reflective abilities, with a view to empowering and enhancing the learner. Employment is a by-product of this enabling process.” Lee Harvey 2003. *Transitions from higher education to work: A briefing paper prepared by Lee Harvey*, at: <https://www.qualityresearchinternational.com/esectools/esectpubs/harveytransitions.pdf> accessed 21 July 2020.

⁷⁷ David Rigg, ‘Embedding employability in assessment: searching for the balance between academic learning and skills development in law: a case study’ (2013) 47 *The Law Teacher* 404; Jenny Knox and Melanie Stone, ‘Embedding employability skills for the legal professionals of the future’ (2019) 53 *The Law Teacher* 90; Simon Brooman and Sarah Stirk, ‘Who Am I?: Using Reflective Practice and Self-determination to Redefine ‘Employability’ in Legal Education’ (2020) 41 *Liverpool Law Review* 79; and in an Australian context: Francina Cantatore, ‘Boosting Law Graduate Employability: Using a Pro Bono Teaching Clinic to Facilitate Experiential Learning in Commercial Law Subjects’ (2015) 25 *Legal Education Review* 147.

⁷⁸ Penny Childs, Nigel Firth and Hugo de Rijke, ‘The gap between law student career aspirations and employment opportunities’ (2014) 48 *The Law Teacher* 51. Julian Webb, Jane Ching, Paul Maharg and Avrom Sherr, *Setting Standards: The Future of Legal Services Education and Training Regulation in England and Wales* (Legal Education and Training Review 2013) 2.132-2.143.

⁷⁹ See: sources at n 23 and Lisa Webley, Jennifer Tomlinson, Daniel Muzio, Hilary Sommerlad and Liz Diff, ‘Access to a career in the legal profession in England and Wales: Race, class and the role of educational background’ and Hilary Sommerlad, ‘The New “Professionalism” in England and Wales: talent, diversity, and a legal precariat in Spencer Headworth, Robert L Nelson, Ronit Dinovitzer and David B Wilkins, (eds), *Diversity in Practice: Race Gender, and Class in Legal and Professional Careers* (Cambridge University Press 2016).

⁸⁰ Graeme Broadbent and Pamela Sellman, ‘Great expectations? Law schools, websites and “the student experience”’ (2013) 47 *The Law Teacher* 44.

consumer. It is shaped by an ideology of the student as an entity that seeks to invest in the self as an asset which is being shaped into something that will serve the market. It instrumentalises the self. This market orientation can be alienating for academics who view legal education as equipping students to serve democracy or justice rather than only serving private economic values.

Audit impacts upon the academic at innumerable points. It can be mischievous in several ways. It typically adds to workload and can undermine academic feelings of 'control'. It can generate 'role' conflicts, as it imposes administrative tasks upon either academic staff or administrative staff, and when this role uncertainty is resolved by adding tasks onto the academic role there is a failure of that 'support' for academics that should be supplied by professional services within the university. Further, the reasons for audit motivated change are often introduced through a rhetoric of teaching quality or competitive excellence that obfuscates the purpose of changes and thereby again undermines 'control' and 'change'. Audit is one of those points, noted above, at which a clash of values informing teaching and research practice manifests in the degradation of resilience.

The Research Excellence Framework (REF) is the current iteration of research audit in the UK.⁸¹ The Stern Review, the tone of which is more cheerleader for REF than critical, noted that the REF 2014 had been expensive, tended to distort research and set up dis-incentives to undertake long term or fundamental research, had negative effects on the development and careers of some academics, had discriminatory impact on women, ethnic minority or overseas researchers and disabled researchers, and may have impacted negatively on interdisciplinary research.⁸² Watermeyer has explored the perverse effects of "impact" in the REF at length: amongst the negative effects are damaged relationships with research subjects and potential users of research, hyperbolic and unsubstantiated claims, institutional focus on claimable impact rather than actual impact, and reward of narrative plausibility over reality.⁸³ If we turn to the review of the evidence submitted to Lord Stern for his review, we find that academics subjected to REF found it increased 'demands' (workload) on their time which led to working excessive hours. The process also negatively impacted their sense of 'control', and was perceived as having potentially career destroying consequences. It seems to have been disproportionately damaging to young researchers and women.⁸⁴

Audit of teaching is less well established in the UK. It impacts academics primarily through internal institutional learning and teaching bureaucracies. Audit of teaching and learning does not actually examine teaching and learning that takes place within law schools, the model is not the inspection but the regulatory audit. Regulatory audit "audits" the mechanisms of internal audit, it is a type of

⁸¹ Lord Nicholas Stern, *Building on Success and Learning from Experience: An Independent Review of the Research Excellence Framework* available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/541338/ind-16-9-ref-stern-review.pdf accessed 22 July 2020, [10] notes the pioneering nature of UK research audit with the first iteration known as the Research Selectivity Exercise RSE.

⁸² Stern (n 81) [23]-[48].

⁸³ Watermeyer, *Competitive Accountability* (n 63). M Joan Wilson and WR Sexson, 'The Positive and Negative Roles of Grant Funding as Mechanisms for Societal Transformation and the Development of Community Resilience' (2021) *The Law Teacher* infra.

⁸⁴ Erik Arnold, Paul Simmonds, Kristine Farla, Peter Kolarz, Bea Mahieu, and Kalle Nielsen, *Review of the Research Excellence Framework: Evidence report* (Technopolis Group 2018) available at: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/768162/research-excellence-framework-review-evidence-report.pdf> accessed 22 July 2020. Grove, *THE* (n 31) shows the government is aware that REF actually impedes research.

self-regulation (internal audit) that is subject to external monitoring (external audit).⁸⁵ The consequences are a proliferation of administrative tasks, a tendency to restrict delivery and assessment to recognised pro-forma types, and a managerial emphasis on the production of records for audit. These processes impact 'demands' (through task proliferation), 'control' (through bureaucratic homogenisation), 'support' (as the production of audit records and compliance with "quality" requirements tend to fall on academics), 'role' (as many of the requirements are administrative) and 'change' (as the ever changing requirements are imposed in a non-negotiable manner as a requirement of quality).

Both research and teaching audits are imposed through a performance management system which ties audit to managerialism in general and new public management in particular. Performativity demands that tasks not only be done but to be demonstrably done. "Performance" is then tied to advancement or disciplinary sanction. In this way, performance is set up as a competitive system, with academics vying to out-perform each other in order to obtain success. This audit culture intervention results in a loss of 'control' (as what constitutes performance is within managerial discretion), loss of 'support' (as it puts a strain on collegiality), impairment of 'relationships' (as managers become judges of performance rather than facilitators of colleagues' development), and leads to a constant tension in 'roles' (as managers and managed renegotiate "SMART" performance objectives annually). Finally, disagreements about values are enacted through the obfuscating language and practices of performance management.

In short it is apparent that the big picture stressors identified above are facilitated by institutional managerial processes applied to academics. Academics find their resilience undermined by their institutions in ways that we can map onto HSE standards or vulnerability theory. In the realm of value disagreements, in the way this operates requires us to use vulnerability theory alone. Vulnerability theory, self-determination theory, and HSE standards are all congruent with an emphasis on the need for workplace 'control' of responsibilities by academics, greater 'support' in the face of rising 'demands', greater clarity around 'role', more negotiation around 'changes' being introduced, and the importance of supportive relationships in the workplace. Vulnerability theory and self-determination theory agree on the importance of the internal motivation and constructed autonomy of the academic worker. Vulnerability theory identifies the vital role played by the self-identity and sense of meaning derived by academics from their work and as is elaborated below on the need for academics to look beyond the university management structures to the collegial mutual support, the legal discipline, and the union where unions exist.

How does the "Invulnerable" Academic Respond to Existential discordance?

Trow argued that:⁸⁶

"Almost everything in a university depends on the inner motivations of teachers – their sense of pride, their intellectual involvement with their subjects, their professional commitments to the role of teacher, their love of students or of learning – these and others are among the forces that lead teachers to bring their full resources to the teaching relationships. And these motivations of academics are usually quite

⁸⁵ Matt O'Leary, Vanessa Cui and Amanda French, *Understanding, recognising and rewarding teaching quality in higher education: and exploration of the impact and implications of the Teaching Excellence Framework* (UCU 2019). Power (n 29) explains how this is normal in regulation through audit, first the audited activity must make itself capable of audit, then government audit is usually of internal processes of audit.

⁸⁶ Martin Trow, 'Managerialism and the Academic Profession' in Trow (2010) (n 16), 283.

independent of unpredictable external assessments, and the remote incentives and punishments that can be attached to them.”

We have argued this finding of meaning in the academic role is an existential asset that provides a sense of meaning and can be called a sense of vocation. In this section we explore the difficulties posed by the big picture stressors mediated through university and law school managerialism to an academic with a sense of vocation.

Vulnerability theory tells us we must look to the institutional forces that are either supporting or degrading our resilience, and that we are likely to need social assets if we are to thrive. However, the default assumption of our neo-liberal world is that we should seek to overcome any difficulties independently. The liberal subject is an autonomous being and does not need support. However, she is faced by a dilemma: put to a choice between vocational values and managerial values in the modern law school and university. In thinking about this dilemma, we should bear in mind the analogous dilemma facing zookeepers explored above.

The scholars and support staff within universities risk being caught between two equally dispiriting alternatives: give up on the idealized identity of the scholar, educator, and member of the discipline and seek to serve the powers that be, the route of the apparatchik; or, sacrifice oneself in service of the ideals of scholarship and discipline and ameliorate the damage done by ignorant managers in order to serve the true purposes of the university, the route of the zookeeper. The route of the apparatchik sacrifices existential assets in the service of physical and social assets, the route of the zookeeper subordinates all other types of asset to the cause of the existential asset.

Working within a law school that is recruiting as many students as possible whilst gaming research to maximise REF results, and also systematically under-resourcing teaching, and using performance management to enact its institutional priorities, creates a dilemma for individual legal academics: become an apparatchik or a zookeeper?

Other factors exacerbate this dilemma. Academically weaker students require more teaching attention and time to develop than academically strong students, but market logic is directly contrary to the educational logic. In the UK the ability to pay is supported by government loans for home students and has become more important in decisions on admission as the diversity of applicants expands.⁸⁷ This may be a welcome outcome in principle, but to respond to it in an educationally sound manner requires considerable development of teaching materials and ideally more customised teaching to individuals or groups. However, cost methods. Diversity among entering students should compel diverse progress and time commitment options, but the costs and administrative challenges of ever rising numbers pushes towards ever greater emphasis on getting students through as quickly as possible.

To go down the apparatchik route is to risk alienation in the job, as well as a loss of existential assets. To go down the zookeeper route risks overwork, exhaustion, and a loss of human and social assets. It is hard to see alternatives to this dilemma for the academic deemed to be autonomous, independent, and self-sufficient academic bound to be committed to competitive excellence. If we instead accept that such a being and such values are not only unattainable, but undesirable and recognize vulnerability as it opens up possibilities and an exciting, productive way forward.

⁸⁷ See: *Patterns and trends in UK higher Education 2018* (Universities UK 2018) available at: <<https://www.universitiesuk.ac.uk/facts-and-stats/data-and-analysis/Documents/patterns-and-trends-in-uk-higher-education-2018.pdf>> accessed 30 July 2020. Older students are a decreasing part of the student body, as are part-time students, and deprived areas are under-represented.

How does the Vulnerable Academic Respond to Existential Discordance?

The reader of this article is likely to be an academic working in a law school, university, or college. Although some of what follows is specific to the UK, the basic principles are drawn from vulnerability theory and should be applicable *mutatis mutandis* in other jurisdictions.

Discussion at the workshop turned to what could be done to counteract developments, pervasive across institutions and jurisdictions, that are damaging to educational purposes of learning and research and degrading of sources of resilience for academics. We might start with the approach to analogous problems within schools taken by Sir Ken Robinson:⁸⁸

“You can be part of the change. To do that, you need three forms of understanding: a *critique* of the way things are, a *vision* of how they should be, and a *theory of change* for how to move from one to the other.”

Vulnerability theory can provide us with a general theoretical approach to critique and vision, and through its applications some guidance on a theory of change. We also need to remember that academics have power and that the law school is typical of education institutions in being complex and unstable.⁸⁹

“It [the educational system] is neither monolithic nor unchanging, which is why you can do something about it. It has many faces, many intersecting interests, and many potential points of innovation.”

Finally, we need to be aware of the need to seek change at various levels, because power structures operate at various levels:⁹⁰

“If you’re involved in education in any way you have three options: you can make changes within the system, you can press for changes to the system, or you can take initiatives outside the system.”

At the workshop there was some perception that these three levels or options were contradictory. However, upon reflection I think they can be seen as complementary. We can develop our research and teaching whilst opposing damaging and degrading features of managerialism and working for a fairer and more humane ideology in our societies. What enables us to do this is not serendipity but vulnerability theory’s availability as a guide on how to act coherently across different levels of action.

This article has attempted to establish links between some of these different levels and potential means of action in its analysis. A sense of vocation is an existential asset that should not be lightly relinquished. However, we are not able to withstand a loss of too many of our other sources of resilience in its defence. We are vulnerable and need to look to other sources of resilience. One reason for the use of HSE standards above was they are a resource that can be used in negotiating with managerial power in the UK. The state has bounded the power of managers through Health and Safety legislation and placed duties upon employers to safeguard the mental and physical health of

⁸⁸ Ken Robinson and Lou Aronica, *Creative Schools: Revolutionizing Education from the Ground Up* (Penguin 2016) loc 133, italics in the original.

⁸⁹ *Ibid* loc 138.

⁹⁰ *Ibid* loc 154.

employees. Violations of the standards can lead to legal liability if employee health is impaired. We should look to the law which can counter-balance private power and act as a source of resilience.

There is a recognition within academia that wellbeing needs to be protected and enhanced. Although many institutional initiatives portray resilience as an individual capacity, rather than an institutionally supported capacity, there is agreement on the value of supporting resilience. One reason to incorporate self-determination approaches with vulnerability theory is to emphasise the potential for action within institutions that show responsiveness to the needs of people. The ideas of “resilience” and of human needs taken from self-determination theory are bridging concepts to vulnerability theory. Using bridging concepts enables people to argue for responsive law schools and pushing institutions to go beyond individualised programmes of skills or counselling for academics.

Not all changes we have reviewed are wholly negative. As we saw with employability there is room for creative engagement with some neo-liberal initiatives. However, it is important to keep a theoretically informed critical eye and to reject the underlying assumptions contained in some versions of employability. It may be possible to align demands with educational values, but whenever there is discordance it is important to align the external demand to educational values and not vice versa. The workshop was held with the support of educational and disciplinary institutions and hopefully the outputs in this special edition will strengthen authors’ careers. Yet the workshop’s participants were clearly critical of many features of the contemporary law school and were reaching towards ways and means to oppose them and reassert academic values in our practice.

Educational systems and educational institutions leave significant space for academic freedom of action. For the reasons pointed out by Trow in the quotation on the inner motivations of teachers above.⁹¹ Although it is the record of research or teaching and learning that is managed so aggressively, ultimately everyone knows it is the actual research and teaching and learning that will sustain the law school as an educational endeavour and as an economic entity. This protects individual and collegial freedom and opens up routes for negotiation of the practices of the law school with managers.

Through our disciplinary and professional organisations, we have routes for collective responses to institutional and governmental arguments and actions. One noticeable feature of neo-liberal managerial action is to try to reduce the influence of disciplinary organisation upon teaching and research in the university.⁹² However, given that the disciplines are constitutive of the knowledge and skills that the university supplies and such a function is what justifies the university, there are limits to this dis-empowering ploy. Law schools have recognised for a long time the potential for professional standards to be used in institutional struggles over resource allocation.⁹³ Both disciplinary and professional organisations offer assets to legal academics engaged in resistance to anti-educational institutional pressures.

Academics in the UK can join University and College Unions, engage in collective bargaining, and push for the effective involvement of the academic staff in the governance of the university. In the

⁹¹ Robinson makes a similar point Ibid loc 152.

⁹² Martin Trow, ‘The American Academic Department as a Context for Learning’ (1976) 1 *Studies in Higher Education* 11; Marginson and Considine, *The Enterprise University* (n 30), 10, 164-174; Thornton, *Privatising the Public University* (n 20) 115-123.

⁹³ Brian Z Tamanaha, *Failing Law Schools* (University of Chicago Press 2012) chapter two.

USA surviving traditions of faculty governance can be used.,⁹⁴ even though a key factor undermining both faculty governance and union activity is the large number of staff on precarious (non-faculty) contracts.

Finally, vulnerability theory represents an attempt to displace the liberal subject. Society, the economy, and the educational system respond to the stories we tell ourselves about ourselves. The story told by vulnerability theory is more realistic and responsive to the human condition than the story told by neo-liberal theory. Asserting and reflecting upon this truth is itself an act of resistance and a source of resilience for our colleagues and ourselves.

⁹⁴ Ellen Schrecker, *The Lost Soul of Higher Education: Corporatization, the Assault on Academic Freedom, and the End of the American University* (The New Press 2010).