"Never Let a Crisis Go to Waste": The Impact of COVID-19 on Legal Education

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The COVID-19 pandemic represents the most significant rupture to universities since the advent of neoliberalism. In Australia, the economic shock was brought about primarily by a drop in international student fees, border closures, plus efforts from the Federal government to keep public universities from accessing financial support. In this article, I discuss the impacts of COVID-19 on legal education. What concerns me is the rhetoric under which massive structural changes have been justified in response to the pandemic. Most commonly, university leaders have sought to externalise the problem and adopt the language of unforeseeability, emergency and necessity. Changes to learning and teaching have also been described as an 'opportunity' to re-examine outdated pedagogical practices and forms of assessment. While not denying the unprecedented nature of the pandemic, this article argues that current changes in higher education are not a break from the past but a continuation of the neoliberal project.

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I. Introduction

Since the 1990s, Australian universities have been shaped in the image of neoliberalism. Under this ideology, the idea of the university was transformed into a vehicle for facilitating economic growth. Overseas markets need to be found or created for lucrative internal student fees. With respect to learning and teaching, students are interpellated as customers who consume a product. The curriculum in law schools has been stripped of critical content in favour of an instrumental or commercial focus.[1] Teachers have also been required to make significant adjustments to pedagogy. Scholars rarely connect teaching to political economy.[2] However, we have been required to adjust our craft to accommodate increased class sizes, changes in technology and performance measures that are known to be biased.[3] Casual staff, who labor

1 Margaret Thornton, *Privatising the Public University: The Case of Law* (New York: Routledge, 2012).

2 Peter Burdon, "Neoliberalism in Legal Education Research" in Ben Golder, Marina Nehme, Alex Steel & Prue Vines, eds, *Imperatives for Legal Education Research Then, Now and Tomorrow* (London: Routledge, 2020).

3 Colleen Flaherty, "Even 'Valid' Student Evaluations Are 'Unfair'" (27 February 2020) *InsideHigherEd*.

under conditions of precarity, also do an increasing amount of teaching and marking.[4]

The COVID-19 pandemic represents the most significant rupture to universities since the advent of neoliberalism. In Australia, the economic shock was brought about primarily by a drop in international student fees,[5] border closures and efforts from the Federal government to keep public universities[6] from accessing financial support.[7] I will discuss the specific impacts of COVID-19 on learning and teaching below. However, what concerns me in this paper is the rhetoric under which massive structural changes have been justified in response to the pandemic. Most commonly, university leaders have sought to externalise the problem and adopt the language of unforeseeability, emergency and necessity. Adjustments[8] to learning and teaching have also been described as an 'opportunity' to re-examine outdated pedagogical practices and forms of assessment. While not denying the unprecedented nature of the pandemic, this paper argues that current changes in higher education are not a radical break from the past but a continuation of neoliberalism. Crisis, from this perspective, is inherent to and constitutive of neoliberalism.

To support this argument, this paper proceeds in the following parts. In Part II, I develop the argument that the idea of the university is an empty signifier

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4 Jess Harris, Kathleen Smithers & Nerida Spina, "More Than 70% of Academics at Some Universities Are Casuals. They're Losing Work and Are Cut Out of JobKeeper" (15 May 2020) *The Conversation*.

5 Some Australian universities have seen an increase in international students since COVID-19: Jordan Baker, "Top Universities See Overseas Student Numbers Increase Despite 'Crying Poor'" (19 June 2021) *The Age* [Baker, "Top Universities"].

6 Private universities were able to access government support: Naaman Zhou, "Four Private Australian Universities Allowed to Access Jobkeeper Payments" (25 May 2020) *The Guardian*.

7 Gavin Moodie, "Why Is the Australian Government Letting Universities Suffer?" (18 May 2020) *The Conversation*.

8 I am deliberately avoiding the word 'reform' in this paper because that term connotes improvement.

that changes over time. Attention is given to the role of neoliberalism in shaping the contemporary university and learning and teaching. In Part III, I develop a theory of crisis capitalism that draws on the writing of economist Milton Friedman. Crisis, for Friedman, represented an opportunity through which unpopular reforms could be promoted under the language of necessity. While Friedman sought to influence national governments and state programs, I argue that his reflections on crisis provide an instructive lens through which to understand current changes in higher education. With this in mind, in Part IV, I critically examine five recent changes that are relevant to learning and teaching: (1) job losses and casualization; (2) cuts to programs; (3) finding new markets for international students; (4) online teaching; and (5) changes to assessment. While not denying the scale of the challenge that confronts higher education, I argue that university leaders are using the COVID-19 pandemic as a crisis to push through unpopular changes. I substantiate this argument by comparing statements prior to and during the pandemic and through a reading of how leaders have used the language of necessity. Ultimately, I conclude that Rahm Emanuel's dictum that one should "never let a good crisis go to waste"[9] is the governing mantra in universities today and will have a profound impact on learning and teaching for decades to come.

II. Neoliberalism and Legal Education

The 'idea of the university' is an empty signifier. Despite noble attempts to articulate the idea as a kind of natural law,[10] it is fundamentally indeterminate. The dominant form that pervades the Euro-Atlantic world is only one variant of an institution that has changed its shape countless times since the first university was established in Bologna in 1088. No coherent argument can be made that the idea of the university necessarily entails a commitment to training democratic citizens, critical thinking or abstract thought. Likewise, the idea of

9 The quote is often attributed to Winston Churchill but I could find no evidence for that claim; Rahm Emanuel, "Opinion: Let's Make Sure This Crisis Doesn't Go to Waste" (25 March 2020) *The Washington Post*.

10 John Henry Newman, *The Idea of a University* (London: Penguin, 2015).

the university cannot be marshalled in support of the economy or as a site for training job-ready graduates. At most, the term carries a simple image of an institution of higher learning, which is authorised to grant academic degrees. To this, we might add the pursuit of research, but given the assault on humanities, this is far from guaranteed or universal. In this respect, the idea of the university is an "unfinished principle"[11] whose structure and commitments are determined by what Professor Mari Matsuda called the "war of wills".[12] Sometimes, universities are 'acted upon' or respond to circumstances outside of their control. At other times, university leaders make active and self-serving choices intended to bolster the standing or reputation of their institution.[13]

For the purpose of this paper, the changing nature of universities is expressed as a truism. The point can easily be understood if we imagine taking a contemporary law student and dropping them into the Inns of Court in the 19th century. Even if our imaginary student had the necessary background (*i.e.* class, gender, ethnicity) for admission, they would be in a completely foreign environment. Notably, the Inns of Court were concerned with turning aristocratic boys into gentlemen and the curriculum included training on the 'moral and social' aspects of life, including the fine arts, "music and dance".[14] How many of our students would find their feet — pun intended — in this environment?

While the purpose of legal education narrowed over the centuries, the idea that universities could be sites for personal growth persisted into the 20th century. An example can be seen in Robert Menzies' speech, "The Forgotten

11 Wendy Brown, *Democracy in What State?* (New York City: Columbia University Press, 2012) at 45.

12 Mari J Matsuda, "Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice" (1986) 16:3 New Mexico Law Review 613 at 616.

13 Hannah Forsyth, *A History of the Modern Australian University* (Sydney: NewSouth Publishing, 2014) at 45.

14 David Lemmings, *Gentlemen and Barristers: The Inns of Court and the English Bar 1680-1730* (New York: Oxford University Press, 1990); T Raleigh, "Legal Education in England" (1898) 10 Juridical Review 1 at 1–5.

People",[15] delivered in 1942. While targeted at the middle class in Australia, the speech was designed to reflect the values of the Liberal Party of Australia. Menzies described universities as sites of pure learning where students might grow under "the lamp of learning".[16] Menzies noted further:

> [a]re the universities mere technical schools, or have they as one of their functions the preservation of pure learning, bringing in its train not merely riches for the imagination but a comparative sense for the mind, and leading to what we need so badly - the recognition of values which are other than pecuniary?[17]

This vision is largely consistent with the writings of Max Weber who provided the best defence of objectivity in education.[18] For Weber, universities should be sites of pure learning and not contaminated with the weapons of politics. He also warned against professors giving moral instruction or straying too far from their central mandate — to give students "the capacity to think clearly and know what one wants".[19]

Contemporary law schools have a much more vocational purpose and are largely agnostic about the inner life of students.[20] In direct contrast to Menzies and Weber, education ministers in Australia have played an increasingly interventionist role and have sought to reshape higher education to serve

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15 Robert Menzies, "The Forgotten People" (22 May 1942), online: *Liberals* <www.liberals.net/theforgottenpeople.htm>.

16 *Ibid*.

17 *Ibid*.

18 Max Weber, *Charisma and Disenchantment: The Vocation Lectures*, ed by Paul Reitter & Chad Wellmon, translated by Damion Searls (New York: New York Review of Books, 2020).

19 *Ibid* at xiii. For a broader discussion of Weber in the context of legal education, see Burdon, *supra* note 2.

20 Anthony T Kronman, *Educations End: Why Our Colleagues and Universities Have Given Up on the Meaning of Life* (Connecticut: Yale University Press, 2007).

economic goals.[21] This is not conjecture — education ministers are explicit about this project. For example, in June 2020, the then Minister for Education, Dan Tehan, issued a joint statement with the then Minister for Employment, Michaelia Cash. The purpose of the statement was to announce a policy to lower fees for students enrolled in "areas of expected employment growth and demand".[22] Tehan — who wrote his master's thesis on the Marxist philosopher Jürgen Habermas[23] — defended this intervention on the following basis:

> [t]o power our post-COVID economic recovery, Australia will need more educators, more health professionals and more engineers, and that is why we are sending a price signal to encourage people to study in areas of expected employment growth…We are facing the biggest employment challenge Australia has faced since the Great Depression and the biggest impact will be felt by young Australians. They are relying on us to give them the opportunity to succeed in the jobs of the future. Universities need a greater focus on domestic students and greater alignment with industry needs.[24]

The message was clear — study accounting, not the classics. Or, "[i]f you are going to do ancient Greek, do IT with it".[25] Alan Tudge, the current Minister for Education, is just as explicit in his attempt to marshal universities for a post-COVID-19 recovery. Commenting on research funding, he expressed his desire

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21 On the lack of intervention from the Menzies government see: Frank Bongiorno, "The Preservation of Pure Learning" (4 June 2021) *Inside Story*; Forsyth, *supra* note 13 at 52–56.

22 Dan Tehan & Michaela Cash, "Job-Ready Graduates to Power Economic Recovery" (19 June 2020), online: *Ministers' Media Centre* <ministers.dese.gov.au/tehan/job-ready-graduates-power-economic-recovery>.

23 Bongiorno, *supra* note 21.

24 Tehan & Cash, *supra* note 22.

25 Interview of Dan Tehan by Lisa Millar (22 June 2020) on *News Breakfast*, ABC Australia, Market Screener.

for "academics to become entrepreneurs"[26] and take their "ideas from the lab to the market".[27] Tudge noted further:

> [t]oo often, our research does not make it through to translation and commercialisation — it falls into the 'valley of death' between academia and industry, between theory and real-world application.…
>
> How can we strategically direct our investment to de-risk universities and businesses reaching across the valley of death, and drive a higher return on public funding?[28]

Implicit in this statement is a vision of research that is necessarily linked to commercialisation — a trend that has worrying implications for non-STEM[29] based disciplines like law.

Tudge's words were not met with outcry or an impassioned defence from vice chancellors about the virtues of pure learning. Over the past thirty years,[30] university managers have grown accustomed and actively cultivated the economisation of research and the instrumentalisation of knowledge. As Australian sociologist, Raewyn Connell, observes, "[t]he face of the modern university, as it smiles out from the television news, is a neat middle-aged man or woman in a well-cut business suit, speaking with confidence about markets, league tables and excellence".[31] The most common name for this transformation

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26 Alan Tudge, "Lifting the Impact of Universities to Strengthen Australia's Future" (26 February 2021), online: *Ministers' Media Centre* <ministers.dese.gov.au/tudge/lifting-impact-universities-strengthen-australias-future>.

27 *Ibid.*

28 *Ibid.*

29 STEM stands for Science, Technology, Engineering and Mathematics.

30 The origins of neoliberalism in Australia is best dated to the Hawke-Keating government: Elizabeth Humphrys, *How Labour Built Neoliberalism: Australia's Accord, the Labour Movement and the Neoliberal Project* (Chicago: Haymarket Books, 2019).

31 Raewyn Connell, *The Good University: What Universities Actually Do and Why It's Time for Radical Change* (London: ZED Books, 2019) at 115.

is neoliberalism. The term captures an ideological agenda that encourages "competition, privatization and individualism".[32] While the efficacy of this term is debated,[33] I consider it the dominant logic of universities today. If it is hard to identify, it is only because, like the air we breathe, it is everywhere and hegemonic.

While the dominant history of neoliberalism stresses the role of new-right governments[34] and conservative think-tanks,[35] in Australia the shift was ushered in by the Labor Party and the Dawkins reforms which started in 1987.[36] While not every aspect of these reforms was neoliberal,[37] it was during this period that fields of study were expanded in areas considered vital for economic growth and the cost burden began to shift from the state to individual students. Hannah Forsyth argues that during the 1990s, our universities entered into a "Faustian bargain",[38] which "explicitly reposition[ed] higher education as an industry,

32 *Ibid.*

33 Damien Cahill & Martijn Konings, "Neoliberalism: A Useful Concept?" (13 November 2017), online: *Progress in Political Economy* <www.ppesydney.net/neoliberalism-useful-concept/>.

34 On the Thatcher and Reagan governments see David Harvey, *A Brief History of Neoliberalism* (New York: Oxford University Press, 2007) at 39–63.

35 Philip Mirowski & Dieter Plehwe, *The Road from Mont Pèlerin: The Making of the Neoliberal Thought Collective* (Cambridge, Mass: Harvard University Press, 2009).

36 Elizabeth Humphrys, *How Labour Built Neoliberalism: Australia's Accord, the Labour Movement and the Neoliberal Project* (Chicago: Haymarket Books, 2019). See also: Elizabeth Humphrys, "Is the Term Neoliberalism Useful?" (29 September 2016), online (blog): *Progress in Political Economy* <www.ppesydney.net/term-neoliberalism-useful/> where she argues that: "the labour movement was not simply an object or victim of neoliberal change but an active constructor of it".

37 For example, a critical aspect of the Dawkins reforms involved linking funding to a set of national objectives for the economy, society and culture. This goes against the logic of a purely free market as articulated by Milton Friedman: Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 2020).

38 Forsyth, *supra* note 13 at 226.

seeing financial reward".[39] It was in this context, that Simon Marginson and Mark Considine coined their iconic phrase: "[t]he Enterprise University".[40]

Changes in funding, combined with the dominance of free-market liberalism in public policy, economised the idea of higher education and allowed it to be described in terms of "individuals exchanging goods and services at prices set by the laws of supply and demand, these prices providing the signals that allowed factors of production to be allocated with maximum efficiency".[41] In practical terms, this rendered higher education a "service to the consumer that should be bought and sold like any other commodity",[42] rather than something that could be framed in non-instrumental terms or through alternative values such as educating citizens for robust participation in a democracy.[43]

In Australia in 2012, Margaret Thornton produced the most sustained and detailed analysis of how neoliberalism has impacted law schools. I will return to elements of this discussion in Part III. Thornton theorises neoliberalism as a political theory that promotes the marketisation of public goods and the erosion of state responsibility for producing an "educated and culturally aware citizenry".[44] Marketisation, according to Thornton, is a process rather than something that has been fully accomplished. Thus, she argues that while "there

39 *Ibid.*

40 Simon Marginson & Mark Considine, *The Enterprise University: Power, Governance and Reinvention in Australia* (Cambridge: Cambridge University Press, 2000).

41 Stuart Macintyre, André Brett & Gwilym Croucher, *No End of a Lesson: Australia's Unified National System of Higher Education* (Carlton: Melbourne University Publishing, 2017) at 37 [Macintyre, Brett & Croucher].

42 *Ibid.*

43 *Ibid.*

44 Thornton captures this shift with reference to a Government report which stated: "[t]he term "public" university now refers more to the historical circumstances at the time of foundation rather than the nature of institutional financing": Thornton, *supra* note 1 at 1.

has been a notable shift away from public to private responsibility",[45] we currently operate in a hybrid public-private system.[46]

With respect to learning and teaching, Thornton argues that law schools are increasingly concerned with "what law is, with little regard for critique, reflective analysis or what the law ought to be".[47] This is a general statement, and practices vary considerably between institutions — and even between courses in a single degree. With respect to pedagogical practices, Thornton claims that law schools have returned to a "sage on the stage"[48] model of pedagogy to cope with a massive increase in student numbers without a concomitant increase in resourcing. An anonymous academic from a third-generation law school expressed the shift as follows: "[i]n the 1990s, it would have been the standard subjects taught by 2 x 2hr seminars. Then that was compressed to 1 x 3hr seminar and, just the last year or so, it's 1 x 2hr seminar, with the option of a 1hr lecture".[49] What is driving this shift is not pedagogy but economics and efficiency.

In response to this change to pedagogy it must be stated that legal educators have known for a long time that the top-down delivery of information stifles critical thinking and promotes a black-and-white interpretation of the law. It was on these grounds that in 1964, the Martin Report[50] condemned the form of legal education that developed in Australia in the post-war period:

> most of the instruction in the law provided by busy practitioners was of the dogmatic kind [which] meant little or no teacher /student contact, no

45 *Ibid*.

46 *Ibid*.

47 *Ibid* at 59.

48 *Ibid* at 85.

49 *Ibid* at 86.

50 Austl, Commonwealth, Committee on the Future of Tertiary Education in Australia, *Tertiary Education in Australia: Report of the Committee on the Future of Tertiary Education in Australia to the Australian Universities Commission: Volume II* by Chairman LH Martin et al (Canberra: Government Printer, 1964) at 57–58.

> supervised work by the student, little or no student work concerned with original materials, and, for the majority of students, a strong temptation to satisfy all requirements by cramming potted information in short periods before examinations. In brief, legal education of that kind was fairly simple and very cheap, but it had very little else to commend it.[51]

Further, it was dissatisfaction with passive pedagogy that led to the creation of law schools at UNSW[52] and Macquarie in the 1970s. The guiding vision for these schools was for teaching to focus less on lectures and more toward small interactive seminars.[53] Marlene Le Brun and Richard Johnstone documented these changes,[54] and by the 1990s it was commonplace for law schools to develop a "student-centered, interdisciplinary approach to learning, in which the undergraduate law student assume[d] an active role in the making of meaning within the discipline of law".[55] However, the turn toward student-centered learning was only brief and small-group teaching lasted only five years in some law schools.[56] At the same time, as legal education was becoming more professional and focused on pedagogy, government policy was moving toward massification to "augment the supply of new knowledge workers with the aim of ensuring that nation states are competitive within the global economy".[57]

As noted, this policy decision was not matched by funding and so law schools have been coerced into the model of the firm — finding money from the private sector and military, locating efficiencies and adopting an

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51 *Ibid* at 57.

52 UNSW stands for University of New South Wales.

53 Thornton, *supra* note 1 at 85.

54 Marlene Le Brun & Richard Johnstone, *The Quiet (R)evolution: Improving Student Learning in Law* (North Ryde: Law Book Co, 1994) 97.

55 The phrase 'making of meaning' derives from: Neil Postman & Charles Weingartner, *Teaching as a Subversive Activity* (New York: Delacorte Press, 1969) at 82–97.

56 Thornton, *supra* note 1 at 90.

57 *Ibid* at 13.

entrepreneurial posture toward the international student market.[58] Coercion is the key term here because, while university managers have done their level best to comport themselves to the market, this has occurred within an economic and ideological context. As Forsyth notes, "the system that history has forged compels us all, whether vice-chancellor or casual academic, senior accountant, librarian or student support officer, to protect ourselves, our institutions and our work with what feeble tools history has left us with".[59]

III. Crisis and Neoliberalism

Crisis inhabits multiple identities in the literature on neoliberalism. For some, crisis represents a contradiction which may lead to a crack in neoliberal capitalism or usher in its demise.[60] For others, crisis is a recognition of failure and an opportunity to take stock, evaluate and do better in the future.[61]

In this paper, I promote a third interpretation that is specific to neoliberal capitalism — capitalism is inherently built on contradictions which inevitably lead to crisis. Crisis, in this paper, is not a bug but a feature of capitalism and the mechanism through which it projects itself deeper into the fabric of economic policy and ideology. As Ben Golder has written, "we are better off understanding contemporary capital accumulation as functioning not on the brink of or in

58 Wendy Brown & Timothy Shenk, "Booked #3: What Exactly Is Neoliberalism?" (2 April 2015) *Dissent Magazine*.

59 Forsyth, *supra* note 13 at 227.

60 John Holloway, *Crack Capitalism* (London: Pluto Press, 2008); Harvey, *supra* note 34. Marx's *Grundrisse* is an early expression of the idea that crisis would lead to the collapse of capitalism: Karl Marx, *Grundrisse: Foundations of the Critique of Political Economy* (London: Penguin, 1973) at 750 [Marx, *Grundrisse*]. However, note that he later abandoned this idea: Karl Marx, *Capital: Volume 1: A Critique of Political Economy* (London: Penguin, 1992) [Marx, *Capital*].

61 Martin Wolf, "Why a Crisis is Also an Opportunity" (8 February 2008) *The Financial Times*.

spite of crisis but in and through it".[62] Golder argues further that crisis "produces particular political subjectivities and fashions objects of institutional and intellectual knowledge".[63] This can be noted by the tendency of higher education to limp from crisis to crisis and normalise a state of constant change.[64] This has had a detrimental effect on staff morale and diminished our collective sense of possibility for the idea of the university.[65]

Karl Marx provided the earliest theorisation of the relationship between crisis and capital.[66] It is not necessary, for our purpose, to unpack this analysis or engage the various debates it engendered in the 19th and 20th centuries.[67] More recently, political theorists have noted the way crisis or 'shocks' have been introduced to bring about structural economic changes.[68] An iconic example was carried out in 1979 by Paul Volcker, the then chairman of the U.S. Federal Reserve Bank. Known today as the Volcker Shock, the intervention sought to

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62 Ben Golder, "From the Crisis of Critique to the Critique of Crisis" (2021) 92:4 University of Colorado Law Review 1065 at 1076.

63 *Ibid*.

64 Connell, *supra* note 31 at 68–72.

65 *Ibid* at 69; Bronwyn Davies & Peter Bansel, "The Time of Their Lives? Academic Workers in Neoliberal Times" (2005) 14:47 *Health Sociology Review* at 80.

66 See *e.g.* Marx, *Grundrisse, supra* note 60 at 750:

> Hence the highest development of productive power together with the greatest expansion of existing wealth will coincide with depreciation of capital, degradation of labourer, and a most straightened exhaustion of his vital powers. These contradictions lead to explosions, cataclysms, crises, in which by momentaneous suspension of all labor and annihilation of a great portion of capital, the latter is violently reduced to a point where it can go on fully employing its productive powers without committing suicide. Yet, these regularly recurring catastrophes lead to their repetition on a higher scale, and finally to its violent overthrow.

References to the automatic overthrow of capitalism were removed from Marx's writing in Marx, *Capital, supra* note 60.

67 For a summary see Sasha Lilley et al, *Catastrophism: The Apocalyptic Politics of Collapse and Rebirth* (California: PM Press, 2012) at 32–33.

68 Philip Mirowski, *Never Let a Serious Crisis Go to Waste: How Neoliberalism Survived the Financial Meltdown* (Brooklyn: Verso, 2014).

lower the rate of inflation by initiating "a long deep recession that would empty factories and break unions in the US and drive debtor countries to the brink of insolvency, beginning the long era of structural adjustment".[69] Crisis, Volcker argued, was the most efficient means to introduce changes into the structure of the U.S. economy and combat stagflation.[70] Naomi Klein[71] and Antony Loewenstein[72] have documented dozens of other examples where 'shock therapy' was introduced into the economies of countries in the majority world to pave the way for free markets.[73] In presenting this analysis, Klein gives prominence to the economist Milton Friedman who argued:

> only a crisis – actual or perceived – produces real change. When that crisis occurs, the actions that are taken depend on the ideas that are lying around. That I believe is our basic function: to develop alternatives to existing policies, to keep them alive and available until the politically impossible becomes politically inevitable.[74]

Friedman applied this thinking to a variety of circumstances — not just at the level of a national economy. For example, in the aftermath of Hurricane Katrina, he wrote an article for the Wall Street Journal which opined on the future of the regions ailing school infrastructure: "Most New Orleans schools are in ruins, as are the homes of the children who have attended them. The children are now

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69 Volcker quoted in: Doug Henwood, *After the New Economy* (New York: New Press, 2003) at 208.

70 David Harvey, *A Brief History of Neoliberalism* (New York: Oxford University Press, 2007) at 23.

71 Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (London: Picador, 2007); Naomi Klein, "Naomi Klein: How Power Profits from Disaster" (6 July 2017) *The Guardian*.

72 Antony Loewenstein, *Disaster Capitalism: Making a Killing Out of Catastrophe* (New York: Verso, 2016).

73 The best-known example is Chile. See Eduardo Galeano, *Open Veins of Latin America: Five Centuries of the Pillage of a Continent* (Melbourne: Scribe Publications, 2009).

74 Friedman, *supra* note 37.

scattered all over the country. This is a tragedy. It is also an opportunity to radically reform the educational system".[75]

Friedman's proposal was not to restore public infrastructure and services. Instead, he argued that only the private schools should be rebuilt and that poorer families could be issued with vouchers. This was not pitched as a temporary measure but as a "permanent reform"[76] aimed at redistributing public wealth into private hands. Other examples could be detailed — including the 32 policies enunciated in the "Pro-Free-Market Ideas for Responding to Hurricane Katrina and High Gas Prices".[77] But the necessary point should be clear — crisis can create an opportunity through which capitalism can find space for growth and consolidation. The opportunity here is neutral and might be occupied by the social left. However, because capitalism creates crisis and is crisis-dependent those benefiting from its continuation have proven to be better placed to exploit the political moment.

Having laid out the basic thesis of crisis capitalism, I shift now to consider how its logic has played out in higher education. In doing so, I am not suggesting that disasters such as Hurricane Katrina are in any way commensurate with what is happening in higher education policy in Australia. Rather, I am arguing that the logic of crisis capitalism has applications to a range of policies and political moments. Moreover, I argue that crisis capitalism provides a better explanation for changes in higher education policy than the rhetoric of necessity that is given by university leaders.

IV. Never Let a Good Crisis Go to Waste

> In addition to making cost savings in the post-COVID19 [*sic*] world, universities could also look to see if there are opportunities that present which could be capitalised upon. There is never a better time for universities to

75 Milton Friedman, "The Promise of Vouchers" (5 December 2005) *The Wall Street Journal*.

76 *Ibid*.

77 The policies can be read here: Naomi Klein, "GOP Opportunity Zone" (23 September 2005) *The Nation*.

> explore new ways to deliver courses, improve the student experience and undertake research, whilst systematically examining the underpinning management of resources, staffing structures and costs.[78]

The COVID-19 pandemic has radically altered the landscape of higher education in Australia. As described above, it is the single most significant shock to hit the higher education sector in decades. The extent of the shock was also exacerbated by efforts from the Federal Government to keep public universities from accessing economic assistance or job protection programs.[79] In broad terms, the outcome is stark. As of June 2021, 17,000 university workers have lost their jobs and the sector has lost AUD $1.8 billion in revenue. This loss is expected to grow to AUD $2 billion in 2021.[80] On top of this, the job-ready graduate amendments to the *Higher Education Support Act* made the deepest funding cuts in a generation.[81] Furthermore, Senator Kim Carr notes, "[t]otal support for domestic student places under the Commonwealth Grants Scheme was cut, and the scheme no longer cross-subsidises research".[82]

Universities have responded to the COVID-19 pandemic in various ways, depending on their size and financial health. It is not my intention to provide a

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78 Elizabeth Baré, Janet Beard & Teresa Tija, "Does the Extent of Casualisation of the Australian Academic Workforce Provide Flexibility to Beat the COVID-19 Hit?" (27 May 2020), online: *The University of Melbourne* <melbourne-cshe.unimelb.edu.au/lh-martin-institute/fellow-voices/does-the-extent-of-casualisation-of-the-australian-academic-workforce-provide-flexibility-to-beat-the-covid-19-hit>.

79 Although Baker reported, "[u]niversities also pocketed $46 million in JobKeeper subsidies through companies they owned, despite being ineligible themselves, with the University of NSW collecting $13 million": Jordan Baker, "'Restless and Unsettled': The Pandemic is Taking its Toll on Students" (9 August 2020) *The Sydney Morning Herald* [Baker, "Restless and Unsettled"].

80 "17,000 UNI JOBS LOST TO COVID-19" (3 February 2021), online: *Universities Australia* <www.universitiesaustralia.edu.au/media-item/17000-uni-jobs-lost-to-covid-19/>.

81 Kim Carr, "Arts Courses Are Under Threat From the Chorus of Philistines" (25 July 2021) *The Australian Financial Review*.

82 *Ibid*.

comprehensive account of these changes. Instead, I focus primarily on Group of Eight Universities because of their relative size and role in shaping higher policy in Australia. Moreover, rather than focusing on the details of changes, I am specifically interested in how university managers have framed changes related to learning and teaching. Here there is near uniformity. Without exception, leaders have positioned COVID-19 as a crisis that has forced them to make 'hard choices' to secure the long-term viability and competitiveness of their institution. Rather than seeing these decisions as a continuation of current economic governance (neoliberalism), most leaders have also framed the pandemic as a radical break from the past and an opportunity to modernise university education.[83] I turn now to examples to support my argument.

A. Job Losses and Casualization

The corporatisation of higher education has become synonymous with the erosion of tenure and the casualization of academic teaching. Today, it is not uncommon for law students to go through their entire degree without having a meaningful conversation with a full-time academic staff member. By one count, 80% of undergraduate courses are being taught by casual academics.[84] Higher education is also the third-largest employer of casual workers in Australia,[85] just behind other so-called 'public goods' such as health and social care. While commonly seen as a political or economic issue, I wish to frame precarity and casualization as materially linked to learning and teaching. Implicit in this characterisation is the view that the identity and security of a teacher is relevant — for better or worse — to the learning that takes place in a classroom.

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83 Tawana Kupe & Gerald Wangenge-Ouma, "Post COVID-19: Opportunity for Universities to Have to Rethink" (15 November 2020) *The Conversation*.

84 Christopher Klopper & Bianca Power, "The Casual Approach to Teacher Education: What Effect Does Casualisation Have for Australian University Teaching?" (2014) 39:4 Australian Journal of Teacher Education 101 at 102.

85 Julia Savage & Vikki Pollard, "Taking the Long Road: A Faculty Model for Incremental Change Towards Standards-Based Support for Sessional Teachers in Higher Education" (2016) 13:5 Journal of University Teaching and Learning Practice 5 at 14.

In response to the pandemic the first lever that many universities pulled was to announce job losses. While handled with varying levels of sensitivity the overall impact has been similar. For example, the University of Adelaide announced a voluntary separation scheme, which gave eligible staff an economic incentive to leave. Staff also voted for a reduction in pay[86] to delay forced redundancies, which will take place in 2021.[87] Other universities took a more direct approach while continuing to spend discretionary money. For example, the Australian National University cut 465 jobs[88] while spending $800,000 for a new office for their Chancellor, Julie Bishop.[89] Similarly, the University of Melbourne cut 450 jobs while continuing some building works.[90] This figure does not include the 5,000 casual staff whose contracts were not renewed and who were given little notice or opportunity to find alternative work.[91] Vice-Chancellor Professor Duncan Maskell justified the cutbacks with the language of necessity: "[w]ith fewer students, the university must be smaller and we will need fewer staff".[92] Other vice-chancellors issued similar statements in response

86 Michelle Exner, "COVID-19 Jobs Protection Framework" (29 July 2020), online: *The University of Adelaide* <adelaide.edu.au/hr/news/list/2020/07/29/covid-19-jobs-protection-framework>.

87 Dean Faulkner, "Decline in International Students for Adelaide Uni to Consider Axing 130 Jobs" (8 July 2021) *ABC News*.

88 "Australian National University to Lose 465 Jobs Due to Financial Impact of COVID-19" (16 September 2020) *ABC News.*

89 Myriam Robin, "ANU Spent $800k on Julie Bishop's New Office in Perth" (1 August 2021) *The Australian Financial Review*.

90 Conor Duffy, "University of Melbourne Reveals 450 Job Losses as COVID-19 Creates Revenue Hit, Drop in International Students" (5 August 2020) *ABC News*.

91 *Ibid.*

92 *Ibid.*

to job cuts; for example, Ian Jacobs noted, "[t]his is a painful but unavoidable reality in current circumstances".[93]

There are, of course, elements of truth in this justification for cutting jobs. Universities have suffered a significant drop in income, and salaries are a non-fixed cost where managers can exercise a degree of control. It is precisely for these reasons that job cuts and casualization are commonly the first measure utilised in response to a crisis — real or imagined.[94] Michael Spence, the immediate preceding Vice-Chancellor of the University of Sydney, went so far as to claim that the job losses were good for staff morale because they demonstrated financial responsibility.[95] With this in mind, I contend that we ought to think about the latest round of job cuts as part of a trend in university management and approach claims about necessity with "cool suspicion and scepticism"[96] — especially when money continues to be spent on non-essential projects.

Against the argument of necessity, it is noteworthy most established universities made a profit[97] in the last reporting period and, in some instances, enjoyed an upturn in international student numbers. "Across the sector", reports Jordan Baker, "enrolments from China have grown from 42.6 per cent of total overseas enrolments in 2018 to 42.8 per cent in 2020, mostly due to Sydney and UNSW".[98] Tellingly, neither of these institutions have refilled lost positions or reversed structural changes made in response to the pandemic. Universities

93 Paul Karp, "University of New South Wales to Cut 493 Jobs and Merge Faculties" (15 July 2020) *The Guardian*.

94 Benjamin Presis, "Melbourne University Staff to Protest Against up to 500 Job Cuts" (3 June 2014) *The Age*.

95 Lexi Metherell, "Sydney Uni Vice-Chancellor Maintains Cuts Good for Morale" (21 February 2012) *ABC News*.

96 Golder, *supra* note 62 at 1073.

97 Damian Glass, "University Announces Preliminary Financial Results for 2020" (25 February 2021), online: *The University of Melbourne* <about.unimelb.edu.au/newsroom/news/2021/february/university-announces-preliminary-financial-results-for-2020>.

98 Baker, "Top Universities", *supra* note 5.

have also seen a steep increase in philanthropic donations and domestic student enrolments.[99] Postgraduate student numbers and short course enrolments have also increased by significant margins across the sector.[100] These gains are not limited to established (*i.e.* Group of Eight) universities. For example, Charles Darwin University in Darwin reported that postgraduate applications rose by almost 60% and enrolments in health degrees have more than doubled.[101]

The culmination of these facts has given some commentators cause to describe the recent round of job cuts as crisis capitalism. For example, Damien Cahill, Secretary of the New South Whales branch of the National Tertiary Education Union, argued:

> university management has chosen to see this crisis as an opportunity to carry out a whole lot of restructuring that they've wanted to do for a long time. We've seen a whole lot of job cuts but the total downturn was only a few per cent. Revenue decreased by six per cent, but the vice-chancellors have chosen to sack or discontinue contracts of thousands of staff.[102]

This perspective is consistent with the broader thesis of this paper. To substantiate the argument I turn now to examine other reforms initiated in response to the pandemic.

B. Cuts to Programs

While neoliberalism purports to be about choice, it has resulted in a massive reduction in programs, the prioritisation of instrumental learning and cuts to the humanities. The hollowing out of departments like English, History,

99 *Ibid*.

100 Naaman Zhou, "Huge Increase in Demand for Postgraduate Courses as Australians Look to Upskill" (9 February 2021) *The Guardian*.

101 *Ibid*.

102 Baker, "Top Universities", *supra* note 5.

Gender Studies and the Classics has been chronicled in numerous books and does not need to be recounted here.[103]

In light of this history, it was unsurprising that university leaders sought to make deeper cuts to programs in response to the pandemic. For example, the University of Western Australia plans to abolish anthropology and sociology.[104] The University of Tasmania is set to drop three-quarters of its programs.[105] Swinburne University has also announced the abolition of all language courses.[106] In each instance, university leaders evoked the language of necessity. For example, Pascale Quester, Vice Chancellor at Swinburne University, noted: "[t]he current environment requires the university to make some difficult decisions about where it invests in teaching and research in order to ensure its financial sustainability and deliver on its strategy".[107] One reason not to take this rhetoric at face value, is the record Quester has for making cuts to the humanities.[108] Quester's intentions may be better understood through an examination of her comments when she was appointed at Swinburne University:

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103 See for example, Frank Donoghue, *The Last Professors: The Corporate University and the Fate of the Humanities* (New York: Fordham University Press, 2018), Bill Readings, *The University in Ruins* (Cambridge, Mass: Harvard University Press, 1996) and Christopher Newfield, *Unmaking the Public University: The Forty-Year Assault on the Middle Class* (Cambridge, Mass: Harvard University Press, 2011).

104 Carr, *supra* note 81.

105 Alexandra Humphries, "University of Tasmania Slashes Degree Offerings in Cost Cutting Exercise to Stay 'sustainable'" (10 March 2020) *ABC News*.

106 Carr, *supra* note 81.

107 Adam Carey & Anna Prytz, "Swinburne Looks to Cut All Foreign Language Studies as Pandemic Bites" (4 December 2020) *The Age*.

108 Katherine Gale, "DVC(A) Comments on EB in On Dit" (18 March 2013), online: *National Tertiary Education Union* <www.nteu.org.au/article/DVC%28A%29-Comments-on-EB-in-On-Dit-14358>; Kylar Loukissian, "Alarm at Adelaide Court Cuts" (28 August 2013) *The Australian* at 30; Kylar Loukissian, "Staff Told to Keep Mum on Uni Cuts" (4 September 2013) *The Australian* at 30.

> I am going to pare down everything that doesn't speak to technology or science. Because, do we need to be the 10th university that teaches Chinese or Italian? No…we are the Swinburne University of Technology, we are going to be working with industry and students on creating the technology of the future.[109]

In light of this statement, one might reasonably regard the program cuts at Swinburne as an example of crisis capitalism. This point was not lost on Melissa Slee, Division Secretary of the NTEU Victoria: "[Professor Quester's] first move as vice-chancellor has been to use the cover of COVID-19 to cut jobs and undermine Swinburne".[110]

To date, law schools have been largely immune from this process since they offer few programs and are viewed as prestigious within the university and the broader community.[111] However, given that university leaders socialise pain, law schools have also felt pressure to cut courses with low enrolments. Each university defines 'low enrolments' in its own way, but at the University of Adelaide, it is classes with fewer than 50 students. This has put bespoke courses at risk. For example, legal clinic courses have low enrolments by design but serve a critical function in legal training and as a service for the community.[112]

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109 Farrin Foster, "Pascale Quester: 'It is the Innovative and the Creative Ones That Will Survive'" (3 July 2020) *The Adelaide Review*; Stephen Matchett, "Swinburne VC Does What She Says She Would" (8 December 2020) *Campus Morning Mail*.

110 Adam Carey, "Swinburne University Staff Condemn Leadership Over 'Excessive' Cuts to Courses, Jobs" (12 November 2020) *The Age*.

111 The same is not true in North America or the UK: Jessica Dickler, "Colleges Cut Academic Programs in the Face of Budget Shortfalls Due to Covid-19" (23 June 2020) *CNBC*; Jonathan Ames, "Future Lawyers Can Bypass University Degree Under Legal Reforms" (30 October 2020) *The Times*. See also Adam Carey & Anna Prytz, "Swinburne Looks to Cut All Foreign Language Studies as Pandemic Bites" (4 December 2020) *The Age*.

112 Adrian Evans et al, *Australian Clinical Legal Education: Designing and Operating a Best Practice Clinical Program in an Australian Law School* (Acton: Australian National University Press, 2017) at 11–38. Clinics are commonly threatened in times of economic downturn: Patricia Tuitt, "Law Clinics at Risk from University Funding Cuts" (28 June 2010) *The Guardian*.

Consistent with Thornton's argument about jettisoning critical material, course 'rationalisation' also tends to concentrate on subjects with a focus on theory and history. This is not because these courses are unimportant[113] or poorly taught; rather, the framing of universities in instrumental terms encourages students to approach their education as market actors.[114] Economic coercion has heightened this encouragement. For example, recent fee changes resulted in a 28% increase in the cost of law degrees.[115] In response to fee increases, it is perfectly rational for students to seek out courses that will maximise their earning capacity, emancipating them from debt as quickly as possible.

C. Finding New Markets

One notable response that has been missing from university leaders is an acceptance of responsibility. Framing the pandemic as an unforeseeable crisis enables them to by-pass their complicity in underwriting the financial health of universities on the back of international student fees. The risks were known and proclaimed loudly. For example, a few months before COVID-19 made contact with its first human carrier, the Auditor-General of New South Wales warned: "universities should assess their student market concentration risk where they

113 Karl Llewellyn provides an early statement on the importance of being able to think abstractly and flexibly about the law:

> There is yet another thing which experience long and sad has caused us disillusion. We have discovered that students who come eager to learn the rules and who do learn them, and who learn nothing more, will take away the shell and not the substance. We have discovered that rules alone, mere forms of words are worthless. We have learned that the concrete instance…is necessary in order to make any general proposition…mean anything at all. Without the concrete instances, the general proposition is baggage, impedimenta, stuff about the feet. It not only does not help, it hinders.

Karl Llewellyn, *The Bramble Bush: The Classic Lectures on the Law and the Law School* (New York: Oxford University Press, 2008).

114 In previous work I have described this in terms of neoliberal rationalisation: Burdon, *supra* note 2.

115 Conor Duffy, "University Fees to be Overhauled, Some Course Costs to Double as Domestic Student Places Boosted" (18 June 2020) *ABC News*.

rely heavily on students from a single country of origin".[116] This is one of dozens of reports that were read, filed and ignored. The pandemic burst this bubble and laid bare the "market concentration risk"[117] described by the Auditor-General. While some universities have increased their international student numbers, the broader story is one of decline — particularly amongst Indian and Nepalese students.[118]

The version of history promoted by university leaders is that they have been forced to find new income sources in response to successive cuts to government funding.[119] This material context is true but the narrative does not absolve university leaders from their participation in this process or recruitment strategies that drew predominately from a single destination — China.[120] Moreover, the dominant narrative ignores the role of greed and the logic of growth that also underpinned the turn toward international students. Andrew Norton, the higher education director for the Grattan Institute has argued that Universities have taken a "calculated risk"[121]: "[t]hey know that the China boom probably won't last forever, but that they might as well take the money while they can".[122] Adrian Piccoli, former Minister for Education of New South Wales, puts things differently. Speaking in the more sanitised language of the corporate university, he argues that university leaders have made a "business

116 Barry Underwood, "Universities 2017" (8 June 2018), online: *Audit Office of NSW* <www.audit.nsw.gov.au/our-work/reports/universities-2017>; Michael McGowan, "Universities Rely Too Much on Foreign Student Fees, Auditor Says" (9 June 2018) *The Guardian*.

117 Underwood, *ibid*.

118 Baker, "Top Universities", *supra* note 5.

119 Julia Horne, "How Universities Came to Rely on International Students" (22 May 2020) *The Conversation*.

120 "However, while the total number of overseas students has increased, and their country of origin has diversified, there is a clear concentration risk with over 54 per cent of all overseas students sourced from a single country of origin": Underwood, *supra* note 116.

121 McGowan, *supra* note 116.

122 *Ibid*.

decision".[123] Piccoli goes on to inadvertently undermine the dominant narrative that University leaders have been forced to pursue a growth strategy through international students:

> I actually don't think the growth in international students would be any different even if there was additional commonwealth funding because it's still additional revenue. They wouldn't be sitting back, they'd still be pursuing it. It's a source of revenue, it's in the national interest and it's good for the general economy.[124]

In response to the broad drop in international student numbers, universities have not re-evaluated their strategy or sought to concentrate on providing a world-class education for domestic students. Instead, their focus has been on finding new markets and securing supply for students currently in the 'pipeline'. With respect to the latter, dominant strategies have focused on offering financial discounts of up to 20%[125] and the establishment of dedicated quarantine faculties in New South Wales[126] and South Australia.[127] Such is the importance of these schemes that they are expected to go ahead despite the emergence of the Delta strain of COVID-19 in the Australian community.[128]

To date, Monash University has been the most successful in finding new international markets. Due to Commonwealth restrictions on inbound travellers, their strategy has been to establish a physical presence in Indonesia. Indonesian students have traditionally been in the second tier for the Australian

123 *Ibid*.

124 *Ibid*.

125 Naaman Zhou, "Universities Discount Fees for International Students Stuck Outside Australia" (1 February 2021) *The Guardian*.

126 Bellinda Kontominas, "NSW to Welcome Back International Students Under Pilot Quarantine Plan" (10 June 2021) *ABC News*.

127 "International Students to Return to SA After Parafield Airport Quarantine Hub Gets Approval" (18 June 2021) *ABC News*.

128 Julie Hare, "Despite Delta Variant, International Student Plans Forge Ahead" (30 June 2021) *The Financial Review*.

international student market.[129] However, new enrolments have not contracted at the same rate as other countries.[130] Moreover, because of its proximity and large population, they have long been courted by Australian universities through initiatives, such as the aptly named "Indonesia Market Action Plan".[131] Against this context, Monash University has signed an memorandum of understanding with the Indonesian Government to "forge solid and institutionalised partnerships".[132] The MOI grants an exclusive licence to Monash University to establish a campus which focuses on lucrative postgraduate students. Naaman Zhou has provided the anticipated numbers: "[w]ithin the next 10 years, the Indonesian campus aims to grow to 2,000 masters [*sic*] students, 1,000 "executive education students" and 100 PhD students every year, according to the university's own recruitment site".[133] The University of Western Australia has also signalled its intent to expand into Indonesia. For example, its strategic plan for the next decade notes that "[i]ncreasing our engagement with Indonesia is a vital part" of its vision".[134]

I have some sympathy for this work, particularly because the Commonwealth Government has not stepped up to support universities. I also

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129 20,000 in 2017 as opposed to Chinese students which numbered at 166,000 and Indian students at 70,000: Avery Poole, "Australian Universities to Benefit in Australia-Indonesia Free Trade Deal" (1 September 2018) *The Conversation*. In 2019 there were 18,091 students: Naaman Zhou, "Monash University Signs Deal with Indonesian Government as Universities Diversify from China" (8 April 2021) *The Guardian* [Zhou, "Monash"].

130 New enrolments from Indonesia fell at a rate of 0.9% compared to an overall fall of 4.9%: Zhou, "Monash", *ibid*.

131 The plan, which is from 2019, can be read online here: "Education Market Profile – Indonesia", online: *Australian Government: Australian Trade and Investment Commission* <www.austrade.gov.au/australian/education/countries/indonesia>.

132 Zhou, "Monash", *supra* note 129.

133 *Ibid*.

134 See "The Australia-Indonesia Centre", online: *UWA Public Policy Institute* <www.uwa.edu.au/institutes/public-policy/home/the-australia-indonesia-centre>.

acknowledge that large institutions cannot move away from the logic of neoliberalism overnight. However, one might also reasonably object to the eagerness with which universities have recommitted to this strategy and the opportunity cost that comes with not pursing a more sustainable and ethical[135] financial strategy. As Jeff Sparrow has noted: "[r]estoring our lives to normality after Covid is not the solution, it's the problem".[136] The attempt to reignite international student enrolments is also an instructive illustration of the theory of crisis capitalism adopted in this paper. The pandemic has elevated the need for universities to cut back their exposure and implement sound financial management. Instead, universities are going through a 'shock' with an immediate cutback in international student numbers. Rather than changing direction, decision makers can now insist that universities grow into new markets, which promise a lucrative population of students. The rhetoric of necessity masks this process and the human toll that has come during the pandemic. Moreover, creating new markets for international students is presented as the only alternative to economic hardship. Few other serious options are on the table.

D. Online Learning: Here to Stay?

The hegemony of neoliberalism in higher education has led to the idolatry of efficiency. University managers demand each year that faculties and schools find savings in teaching and administration. The mass lecture and online learning have been promoted on this basis. Thornton notes, "[t]he lecture method is driven by efficiency and the bottom line. It means that one lecturer can teach,

135 That universities profit on the back of international students can hardly be denied. I regard this as a serious form of exploitation that has no ethical justification: Chris Dite, "The Pandemic Has Exposed Australia's Mistreatment of International Students" (31 January 2021) *Jacobin Magazine*.

136 Jeff Sparrow, "Restoring Our Lives to Normality After Covid is Not the Solution, it's the Problem" (21 July 2021) *The Guardian*.

or at least purport to teach, 500 students simultaneously, and possibly many more in distant sites through online transmission and video-link".[137]

Academics have vocally opposed online teaching for efficiency,[138] and that remains true even after the pandemic.[139] There are a range of reasons for this, including demographic profile and a lack of training in new technology. However, teachers also offer profound reflections on the importance of learning in the same physical space, including the capacity for empathy and understanding and the opportunities for students to establish a learning community that continues once they leave a shared space.[140] In these accounts, traditional activities, such as lectures, are not a one-way presentation of ideas but an interactive conversation with a learning community.[141] Anybody who has taught online to a wall of black screens[142] might be sceptical about the extent to which these experiences can be replicated online — at least not without considerable resources and training.

When the pandemic first reached Australia, academic staff shifted their classes online — generally without a pause.[143] The share market value of tools,

137 Thornton, *supra* note 1 at 85.

138 *Ibid*.

139 Anna McKie, "Third of Academics 'Want Live Lectures to Stay Online' Post-Covid" (25 February 2021) *Times Higher Education*.

140 R Scott Webster, "In Defence of the Lecture" (2015) 40:10 Australian Journal of Teacher Education 88; Miya Tokumitsu, "In Defense of the Lecture" (26 February 2017) *Jacobin Magazine*.

141 For a useful summary of the debate surrounding the efficacy of lectures see: Shelley Kinash, Colin Jones & Joseph Crawford, "COVID Killed the On-Campus Lecture, but Will Unis Raise it from the Dead?" (15 February 2021) *The Conversation*.

142 This is not intended as a criticism of students who do not (or cannot) turn on their computer camera: Tabitha Moses, "5 Reasons to Let Students Keep Their Cameras Off During Zoom Classes" (17 August 2020) *The Conversation*.

143 Matthew Johnston, "Online Mass Exodus: How Australian Unis are Coping with COVID-19" (20 March 2020) *IT News*.

such as Zoom, skyrocketed overnight.[144] To say that we were providing 'online learning' would be generous and a disservice to those with the training and resources to dedicate themselves to this craft. Most of us were scrambling to provide a basic service while navigating new concepts such as 'Zoom bombing'.[145] Some of my colleagues had never taught online before the pandemic and there was a mad rush at the institutional level to make sure people had the right equipment and bandwidth to run classes. Rebecca Barrett-Fox captures something of those heady days in her advice to university teachers:

> [f]or my colleagues who are now being instructed to put some or all of the remainder of their semester online, now is a time to do a poor job of it. You are NOT building an online class. You are NOT teaching students who can be expected to be ready to learn online. And, most importantly, your class is NOT the highest priority of their OR your life right now. Release yourself from high expectations right now, because that's the best way to help your students learn.[146]

The completion of classes was due to the dedication of academic staff — both full time and casual — and the generosity of students who were willing to forgive our fumbling and a reduction in educational quality. University leaders recognised these difficulties and often praised staff for their work and dedication.[147] However, the leaders were also eager to send a message to the

144 Rupert Neate, "Zoom Booms as Demand for Video-conferencing Tech Grows" (31 March 2020) *The Guardian*.

145 Greg Elmer, Anthony Glyn Burton & Stephen J Neville, "Zoom-Bombings Disrupt Online Events With Racist and Misogynist Attacks" (10 June 2020) *The Conversation*.

146 Rebecca Barrett-Fox, "Please Do a Bad Job of Putting Your Courses Online" (March 2020), online (blog): *Any Good Thing* <anygoodthing.com/2020/03/12/please-do-a-bad-job-of-putting-your-courses-online/?fbclid=IwAR336tXzjTLfthAQI71b75z2C6D7JKcDe2MfUQ8lrBe2x90xlrCzhWdYIA>.

147 Ian Jacobs, "Transcript of UNSW Vice-Chancellor Video Message to Staff, May 2021" (May 2021), online: *UNSW Sydney* <www.inside.unsw.edu.au/vc-message/transcript-unsw-vice-chancellor-video-message-staff-may-2021>.

market about the success of 'online learning'. For some, the experiment of online learning was advancing to be permanent.[148] For example, John Domingue, director of the Open University's Knowledge Media Institute, argued that the "online genie"[149] is out of the bottle and will not go back in. Darren McKee, the chief operating officer of Murdoch University, made a similar comment, noting, "[t]he face-to-face mass lecture is all but dead".[150]

Perhaps the most robust response came in the form of a report from Optus and Cisco, which included responses from "executives across 80% of Australian higher education and Tafe institutes".[151] A leading claim in the report is that COVID-19 has accelerated changes that were already underway toward online teaching — including the use of virtual reality and augmented reality — and making teaching flexible to fit around student schedules. It also highlighted the need for universities to create "Instagram-worthy moments":[152]"[s]tudents are increasingly expecting education institutions to mimic their digital experiences in other parts of their life: interactions with technology that are intuitive, rewarding and low touch".[153]

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148 Fergus Hunter & Jordan Baker, "Uni Bosses Predict Permanent Shift to Online Learning, But Not a Full Scale Revolution" (11 April 2020) *The Sydney Morning Herald*.

149 Richard Doughty, "The Future of Online Learning: The Long-Term Trends Accelerated by Covid-19" (16 February 2021) *The Guardian*.

150 Naaman Zhou, "'Instagram-Worthy': Covid-19 Predicted to Change Design of Australian Universities" (10 February 2021) *The Guardian* [Zhou, "Instagram"].

151 The report can be read here: Vector Consulting, "The Tipping Point for Digitisation of Education Campuses" (2020), online (pdf): *Vector Consulting* <www.optus.com.au/content/dam/optus/documents/enterprise/accelerate/tipping-point-report_final_nov20.pdf>.

152 *Ibid*.

153 *Ibid* at 12. Swanson captures the thin edge of the wedge: "[h]ow long before universities get their own influencer mansions, with professors made to compete for students' attention, blending course material with sad TikTok dances?": Barrett Swanson, "The Anxiety of Influencers" (June 2021) *Harper's Magazine*.

None of this is new and the push for online learning has grown steadily over the last two decades.[154] For example, in 2012, Shirley Alexander, the then Deputy Vice-Chancellor and Vice-President (Education and Students) at University of Technology Sydney argued: "[a]t UTS we're in the middle of spending a billion dollars on our campus and as part of that we've got two new buildings going up…there's a not a single traditional lecture theatre in either of those new buildings".[155] In similar tones, Ian Young, former Vice-Chancellor at Australian National University noted, "[o]n-campus education is going to change. The large lecture theatre, if not dead now, is disappearing".[156] Young went on to opine, "[w]hy in the world would a student come along and sit in a passive lecture with 300 other students when they can access the material online themselves"?[157] But what makes this an example of crisis neoliberalism, is the way university leaders have used the pandemic as an opportunity to push through plans with a greater concentration of online learning. This includes generational decisions about campus design and infrastructure spending.[158] Academic staff have not been broadly consulted about this shift and, instead, online learning is presented as an inevitable response to the pandemic, and technological disruption as a way to offer flexibility to students.[159]

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154 A report from Studiosity in 2018 found that "19 per cent of Australian tertiary students think physical campuses will cease to exist with in [*sic*] 20 years time [*sic*]. The figure rose to 25 per cent for students in regional Queensland and 36 per cent for those in Tasmania": Robert Bolton, "Online Learning: Universities Push for Physical Classes Battles Virtual Trends" (11 February 2018) *The Australian Financial Review*.

155 Charis Palmer, "Lecture Theatres to Go the Way of the Dodo" (1 October 2012) *The Conversation*.

156 *Ibid*.

157 *Ibid*.

158 Zhou, "Instagram", *supra* note 150.

159 Most students work and study: Natalie Gil, "One in Seven Students Work Full-time While They Study" (12 August 2014) *The Guardian*; Sally Weale & Richard Adams, "'Covid Has Been a Big Catalyst': Universities Plan for Post-Pandemic Life" (13 July 2021) *The Guardian*.

Before concluding this section on online learning's viability in the future, it is important to note the several factors that have slowed down the push for online learning in Australia. The most important has been conditional government funding that was predicated on a return to in-person teaching. Alan Tudge, the current Minister for Education, offered the following justification for this decision: "[i]f we can have 50,000 people at a football match surely we can have COVID-safe face-to-face learning on campus. Our universities have to focus more on giving Australian students the best possible learning experience".[160] A second, and related factor, is domestic student demand. After a period in lockdown, students sought out opportunities to reconnect with their peers and teachers. Many students reported increased feelings of loneliness, depression and anxiety from prolonged remote learning.[161] To their credit, universities have largely listened to these concerns and are offering a blended mode of delivery, which prioritises face-to-face teaching but also offers online options in most courses.

E. Changes to Assessment

Over the last decade there have been periodic calls to abolish exams or move them online.[162] Macquarie University was the first institution to openly push for full abolition. John Simons, then Executive Dean for the Faculty of Arts,

160 Michael Koziol, "Tudge Calls for Universities to Bring All Local Students Back on Campus" (18 April 2021) *The Sydney Morning Herald*.

161 My argument is that these problems have been exacerbated by forced remote learning: *ibid*; Baker, "Restless and Unsettled", *supra* note 79. I note that these feelings are widely reported during a regular academic year: Suzanne Lischer, Netkey Safi & Cheryl Dickson, "Remote Learning and Students' Mental Health During the Covid-19 Pandemic: A Mixed-Method Enquiry" (5 January 2021), online (pdf): *Springer International Publishing* <link.springer.com/content/pdf/10.1007/s11125-020-09530-w.pdf>; Teghan Beaudette, "Nearly 70% of University Students Battle Loneliness During School Year, Survey Says" (9 September 2016) *CBC News*.

162 For an excellent overview of online exams, see Alex Steel et al, "Use of E-Exams in High Stakes Law School Examinations: Student and Staff Reactions" (2019) 29:1 Legal Education Review 1.

justified this position on the belief that exams fail to develop "questioning, self-sufficient learners".[163] Against this argument, scholars have articulated the benefits of exams which include the development of broad, higher-order thinking skills.[164] Like all areas of teaching, there is vigorous debate on this issue and no settled position. Reasonable people will disagree about the efficacy of exams. However, disciplines like law also need to navigate professional accreditation bodies, which require evidence of individual academic achievement.[165]

The pandemic brought this debate to a head as universities were forced to move all assessment online. Courses with exams were required to either change their assessment scheme, undertake a non-invigilated exam[166] or use proctoring software.[167] These changes were necessary to safeguard the health of staff and

163 John Simons, "Why We Should Abolish the University Exam" (8 July 2011) *The Conversation*.

164 Scholars have also argued that multiple choice exams can test higher order reasoning in law: Danielle Bozin, Felicity Deane & James Duffy, "Can Multiple Choice Exams Be Used to Assess Legal Reasoning? An Empirical Study of Law Student Performance and Attitudes" (2020) 30:1 Legal Education Review 1; Penny Van Bergen & Rod Lane, "Exams Might Be Stressful, but They Improve Learning" (19 December 2014) *The Conversation*; Penny Van Bergen & Rod Lane, "Should We Do Away With Exams Altogether? No, But We Need to Rethink Their Design and Purpose" (1 December 2016) *The Conversation*.

165 In South Australia that is the Legal Practitioners Education and Admission Council: "Legal Practitioners Education and Admission Council (Including Admissions)", online: *Courts Administration Authority of South Australia* <www.courts.sa.gov.au/law-practice/legal-practitioners-education-admission-council/>.

166 In law, submissions were routinely through software such as Turnitin. For a robust critique of this software see Nick Roll, "New Salvo Against Turnitin" (19 June 2017), online: *Inside Higher Education* <www.insidehighered.com/news/2017/06/19/anti-turnitin-manifesto-calls-resistance-some-technology-digital-age>.

167 The use of proctoring software has given rise to privacy concerns: Zhou, "Monash", *supra* note 129. Students at the ANU also organise a mass petition against the use of surveillance technology: "Tell ANU: Students Say NO to

students and promote a pathway for students to continue their education. However, what makes this an example of crisis capitalism, is that many universities have sought to use the pandemic as an opportunity to abolish exams once and for all.[168] This time there is no pedagogical discussion or debate about the utility of exams and, in some cases, staff were simply informed of the decision. An example of the latter is Curtin University, which, in November 2020, circulated a memo to staff that stated, "no more exams will be held after mid-next year, except in special circumstances".[169] A spokesperson from Curtin denied that the pandemic was being used as a cover for the change, but a close reading of their statement is instructive: "[t]he fact that it is happening during a year that experienced a pandemic, and so soon after the pivot to online delivery, is coincidental *but timely*".[170]

At the University of Adelaide, staff have been given a proposal and asked to send feedback to an online portal. This is an example of what Thornton calls "top-down managerialism",[171] because it denies academics the opportunity to genuinely influence the parameters of discussion. Here is the text of the proposal:

> [w]e should ensure assessment tasks are authentic to practice in the discipline and enable students to apply their knowledge and skills to real world/work problems and challenges, including through Work Integrated Learning tasks and group assessments. This means we should move decisively away from the use of low-authenticity, traditional exams. Where exams are maintained, we

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Proctorio", online: *change.org* <www.change.org/p/australian-national-university-tell-anu-students-say-no-to-proctorio>.

168 Simon Jenkins, "Let's Seize This Rare Chance to Abolish School Exams and League Tables" (2 October 2020) *The Guardian*; Sally Weale & Richard Adams, "'Covid Has Been a Big Catalyst': Universities Plan for Post-Pandemic Life" (13 July 2021) *The Guardian*.

169 Rebecca Turner, "Curtin University Plans to Ditch In-Person Lectures and Exams, Even After Coronavirus Pandemic Ends" (26 November 2020) *ABC News*.

170 *Ibid* [emphasis added].

171 Thornton, *supra* note 1 at 18.

> should adopt authentic approaches to exam-based assessment design. We should enhance the student experience, and the fairness and effectiveness, of group assessment.[172]

There is a lot to unpack in this paragraph, but the clear mandate is that assessments should prepare students for work in the economy. The word 'authentic' should be interpreted as linked to this instrumental goal and the overall trajectory is to move 'decisively' away from 'traditional' exams. We are not told what constitutes a 'traditional' exam. However, 'authentic' exams could be ones that test other qualities such as critical thinking, historical knowledge or abstract thought. These qualities were once central to the mandate of Australian universities[173] but they are barely recognised as relevant in the neoliberal university.

V. Conclusion

In this article, I have argued that the COVID-19 pandemic has not created a radical break with the past and that current changes to learning and teaching are a continuation of neoliberal governance. This argument rested on a conception of capitalism, which views crisis as constitutive of its further consolidation and growth. Further, I have also argued that university managers have used the pandemic as an opportunity to usher in changes that are unpopular by using the language of necessity. To demonstrate this argument, I have sought to identify lines of inconsistency between what university leaders argued before and during the pandemic. I supplemented this with a critical reading of the rhetoric deployed by leaders when promoting changes.

In past research, I have outlined strategies for academic resistance to neoliberalism.[174] Much of that remains relevant for how we might respond to

172 *Ibid.*

173 Forsyth, *supra* note 13 at 4.

174 Mary Heath & Peter Burdon, "Academic Resistance to the Neoliberal University" (2013) 23:2 Legal Education Review 379 at 379.

the changes initiated by COVID-19. We might also adopt Mark Fisher's[175] call to remove our labour from processes of surveillance and data gathering — the 'inspection regime'. In addition, I follow Golder in noting that: "moments of crisis, and diagnoses of crisis, clearly can be – and historically have been – generate for critique".[176] It is incumbent on us, as academics and critics, to not simply accept the rhetoric and justifications presented by university leaders. Instead, our writing should aim to open-up discussions and disclose possibilities that have been disguised by a certain curation of facts. We should also try to broaden our frame of reference so that we can see changes in context or as connected to other events. Finally, it is important that our critique of neoliberalism is framed in a language that holds out the possibility for something new and different. University managers may have co-opted terms like "flexibility", "agility", and "spontaneity" but it would be self-defeating to directly oppose those ideas. "Resistance to the new", notes Fisher, "is not a cause that the left can or should rally around."[177]

While we might feel despondent, if not defeated, by the latest round of changes, it is it is vital that we understand that crisis is not the exclusive domain of the neoliberal right. Crisis opens a gap which can be filled by whoever is better organised and able to exert influence. To return to my opening theme — indeterminacy — just because the university is currently governed by the logic of neoliberalism, does not mean that will always be the case. It is futile, I think, to resist neoliberalism by demanding that universities live up to some determined notion of the university. Instead, we ought to use whatever power and influence we have now if we are to prevail in the "war of wills"[178] and create a better institution in the future.

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175 Mark Fisher, *Capitalist Realism: Is There No Alternative?* (Winchester: Zero Books, 2009) at 59.

176 Golder, *supra* note 62 at 1069.

177 Fisher, *supra* note 175 at 28.

178 Matsuda, *supra* note 12.