LEGAL EDUCATION AND THE 'IDEALISTIC STUDENT': USING FOUCAULT TO UNPACK THE CRITICAL LEGAL NARRATIVE

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It appears that few of the students holding 'socially idealistic' goals upon entering law school actually maintain these upon graduation. The critical legal narrative, which explains and seeks to act upon this shift in the graduate's 'legal identity', posits that these ideals are repressed through power relations that create passive receptacles into which professional ideologies can be deposited, in the interests of those advantaged by the social and legal status quo.

Using the work of Michel Foucault, this paper unpacks the assumptions underpinning this narrative, particularly its arguments about ideology, power, and the subject. In doing so, it will argue this narrative provides an untenable basis for political action within legal education. By interrogating this narrative, this paper provides a new way of understanding the construction of the legal identity through legal education, and a new basis for political action within law school.

I INTRODUCTION: THE 'IDEALISTIC' LAW STUDENT

The attitudes, values, and mental health and wellbeing of law students as they progress through university legal studies are regular concerns within legal education scholarship. Much research in this area focuses on the motivations that law students have for studying law. Although many students find intellectual stimulation in the law, or are concerned with gaining full-time employment and living comfortably, some studies have identified that a number of students, upon graduation, hope to practise law in the public interest, or that they are studying law for other reasons that could be broadly defined as 'socially idealistic', such as fighting for social justice, or addressing social disadvantage.[1]

However, what is apparent from many of these studies is that legal education does not foster these social ideals. Consequently, relatively few of these 'idealistic

1 Judy Allen and Paula Baron, 'Buttercup Goes to Law School: Student Wellbeing in Stressed Law Schools' (2004) 29 *Alternative Law Journal* 285, 285–6; Tracey Booth, 'Student Pro Bono: Developing a Public Service Ethos in the Contemporary Australian Law School' (2004) 29 *Alternative Law Journal* 280, 281; Jeremy Cooper and Louise G Trubek, 'Social Values from Law School to Practice: An Introductory Essay' in Jeremy Cooper and Louise G Trubek (eds), *Educating for Justice: Social Values and Legal Education* (Ashgate Publishing, 1997) 1, 14; Debra Schleef, '"That's a Good Question!": Exploring Motivations for Law and Business School Choice' (2000) 73 *Sociology of Education* 155, 157; Julian Webb, 'Developing Ethical Lawyers: Can Legal Education Enhance Access to Justice?' (1999) 33 *The Law Teacher* 284, 285–6.

students' go on to actually pursue these aims in legal practice: as Schleef notes, 'the trend away from a social justice orientation while in law school has been widely documented'.[2] In fact, research continues to show that many students become vocationally oriented and cynical about the ability of the law to achieve social change, or experience alienation and silencing,[3] or more extreme problems with their mental and physical health (such as a decline in life satisfaction and wellbeing, or, as a recent Australian study by the *Brain and Mind Research Institute* attests, the development of depression).[4]

For some legal education scholars, the suggestion that law school results in the loss of social idealism by students has motivated them to study the effect that legal education has on the law student's 'legal identity' — that is, their political consciousness, their knowledge of the law, and the lens through which they view the role of the law in society. In this sense, a major concern of these researchers (in fact, Schleef describes it as their 'Holy Grail')[5] has been to understand why law students, upon graduation, take jobs in corporate practice despite entering legal education with 'altruistic aspirations geared toward public service'.[6] Scholars have suggested a range of explanations regarding how and why this loss of idealism occurs, and have often suggested how the situation may be altered so that students can maintain their social idealism.

This paper is concerned with unpacking and interrogating one approach to explaining this issue — that posited by critical legal scholars. Although the predominantly US-based Critical Legal Studies 'movement' (which brought this issue — and other critical debates — to the fore within the field of legal education) is generally considered to have waned, exploring this critical scholarship in the way this paper does remains an important and relevant task for two reasons.

Firstly, there exists a gap in the way legal education is theorised and conceptualised in the academic literature. Many scholars that were aligned with this critical movement have pushed their analyses of *the law* past these critical arguments, often by using the work of Michel Foucault, who provides effective tools for this task. However, this intellectual trajectory has not occurred to the same extent within legal *education* research. Only a handful of scholars have used Foucault's work to examine legal education (both in Australia and overseas), and none have explicitly

2 Schleef, above n 1, 157.

3 Ibid.

4 Kennon M Sheldon and Lawrence S Krieger, 'Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being' (2004) 22 *Behavioral Sciences and The Law* 261, cited in Allen and Baron, above n 1, 285–6. As Allen and Baron state, legal education has a 'deleterious effect' on law students. See also Norm Kelk et al, *Courting the Blues: Attitudes towards Depression in Australian Law Students and Lawyers* (2009) Brain and Mind Research Institute <http://cald.anu.edu.au/docs/Law%20Report%20Website%20version%204%20May%2009.pdf>; Ruth Ann McKinney, 'Depression and Anxiety in Law Students: Are We Part of the Problem and Can We Be Part of the Solution?' (2002) 8 *Journal of the Legal Writing Institute* 229.

5 Schleef, above n 1, 157.

6 Ibid.

done so to problematise the arguments produced by critical scholarship.[7] Therefore, this paper provides a basis for addressing this gap in research and theory.

Secondly, as suggested by recent empirical studies and the developing interest in the mental health of law students discussed above, the loss of idealism and social justice orientations in law students remains an important concern of legal educators. However, as the dominance of critical scholarship has dissipated, so too have strongly *politicised* understandings of the construction of the legal identity. The studies mentioned above focus on student mental health or the pedagogy of legal education, and offer comparatively little to those wanting to understand the power relations and discourses involved in shaping a legal identity. Thus, in some instances, the conceptual frameworks and domain assumptions of critical scholarship continue to be the only explanatory tools that inform politicised understandings of legal education. Examining critical scholarship as this paper does offers an original way of conceptualising and researching issues such as power and the shaping of the legal identity, without repeating the claims or relying on the assumptions of critical scholarship. Additionally, it can provide some of the groundwork for new forms of activism and engagement in law school for those seeking to foster student idealism.

It must be noted that the explanations that critical scholars have posited for the loss of student idealism, and as presented here, do not necessarily cohere into one overarching unified explanation. However, critical approaches often work from common assumptions, and adopt similar narrative elements in forming their explanations — in this sense, critical approaches tell a similar 'story' about legal education. This general story will be referred to here as the 'critical legal narrative'.[8]

7 Of course the work of other post-structural thinkers can be used for this task, however, given Foucault's work is directly concerned with pushing past the horizons of thought provided by Marxism, humanism, and other critical approaches, his work will constitute the focus of this paper. For a discussion of the dissipation of critical legal scholarship, see Pierre Schlag, 'U.S. CLS' (1999) 10 *Law and Critique* 199, 204–9. For an introduction to scholarship using Foucault's work to examine the law, see Alan Hunt and Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (Pluto Press, 1994); Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009); and the essays collected in Gary Wickham and George Pavlich (eds), *Rethinking Law, Society and Governance: Foucault's Bequest* (Hart Publishing, 2001). For studies into legal education using Foucault's work, see also Margaret Thornton, *Dissonance and Distrust: Women in the Legal Profession* (Oxford University Press, 1996); Nickolas James, 'Expertise as Privilege: Australian Legal Education and the Persistent Emphasis Upon Doctrine' (2004) 8 *University of Western Sydney Law Review* 1; Nickolas James, 'Liberal Legal Education: The Gap Between Rhetoric and Reality' (2004) 1 *University of New England Law Journal* 163; Nickolas James, 'Power-Knowledge in Australian Legal Education: Corporatism's Reign' (2004) 26 *Sydney Law Review* 587; Nickolas James, 'The Good Law Teacher: The Propagation of Pedagogicalism in Australian Legal Education' (2004) 27 *University of New South Wales Law Journal* 147; Nickolas James, 'Why Has Vocationalism Propagated So Successfully in Australian Law Schools?' (2004) 6 *University of Notre Dame Law Review* 41; Vanessa Munro, 'The Discipline of Law — Legal Education at the Intersection of the Juridical and the Disciplinary' (2003) 2(1) *Journal of Commonwealth Law and Legal Education* 31.

8 Importantly, this is not intended to essentialise or simplify this narrative. Critical scholarship has always been constituted by a diverse array of scholars who are generally only united by their desire to critically examine the operation of the law. See Schlag, above n 7, 202. The term 'narrative', in the singular, is used here simply to refer to the widespread and general themes and orientations underpinning these critical analyses. It is not intended to be representative of what all critical scholars argue.

Simply put, this narrative suggests that the legal profession exercises power over the law curriculum so as to ideologically indoctrinate students and desensitise them to concerns for social justice, allowing them to take up a position of power as a legal professional within the current social and political order, and subsequently not challenge the status quo. This is said to be the result of both an explicit attempt to indoctrinate students, as well as simply a consequence of the arrangement of classroom practices. The critical narrative has also informed many attempts to alter this situation, such as the introduction of a critical legal education. However, although some of these attempts are quite widespread and pervasive within legal education, they are by no means the dominant educational approach to legal education. Furthermore, where they have been implemented, these attempts have not been widely adopted, nor have they always been successful.[9] Again, unpacking the critical narrative and investigating it using new conceptual tools such as those provided by Foucault's work offers new opportunities to alter the practices of legal education.

This paper (along the lines of other Foucaultian research that examines critical scholarship) suggests that the failure of the critical legal narrative to completely alter legal education and prevent the development of cynicism within students may be related to some of the assumptions underpinning this narrative. In particular, the critical narrative relies on assumptions about knowledge and indoctrination, the operation of power, and the role of the subject within legal education that must be unpacked so that this narrative can be critically understood.[10]

As mentioned above, the work of Foucault, particularly his approaches to understanding knowledge, power, and the subject, provides effective tools with which to unpack the critical narrative and consider its base assumptions. Thus, his work will be used to do so here. It must be noted that this paper is primarily concerned with using Foucault's work *to bring to light* these assumptions, *and not to* construct an alternative explanation for the 'loss' of student idealism using these concepts. It is also not possible here to articulate how Foucault's work can be used to inform and direct future research that might build on the implications of this discussion.[11] Instead, this paper lays the groundwork for the further use of Foucault's tools and concepts (and those of others engaged in similar endeavours) as a direction for future legal education research and action that offers a different

9 See for example Schlag, above n 7, 204–9. This is also evidenced by recent studies that demonstrate that law students still experience alienation and silencing and depression. See for example, Allen and Baron, above n 1; Schleef, above n 1; Kelk et al, above n 4.

10 In addition, this narrative unquestioningly takes the 'loss' of social idealism as a phenomenon that can be objectively known and understood. This paper recognises that, instead, a student's social idealism is an object of knowledge constructed through discourses. It has been discussed here simply as a way of identifying that power relations exist within legal education and that these govern students.

11 Foucault's concept of 'governmentality' in particular can be used in this context to move beyond the critical legal narrative, however an exploration as to how this may occur is beyond the scope of this paper. For broad introductions to Foucault's thought, see generally Sara Mills, *Michel Foucault* (Routledge, 2003); Clare O'Farrell, *Michel Foucault* (Sage, 2005). For an introduction to the concept of governmentality, see generally Mitchell Dean, *Governmentality: Power and Rule in Modern Society* (Sage, 2nd ed, 2010).

way of thinking about the construction of the legal identity, and may ensure that political action in legal education remains effective.

II EXPLAINING THE LOSS OF IDEALISM: THE CRITICAL LEGAL NARRATIVE

The critical legal narrative emerged from an historical context specific to many Western nations. It developed from a broader body of legal thought, and germinated in the political ferment of the 1960s and 1970s that was seeking an end to the Vietnam War, the recognition of women's rights, racial equality, and sexual liberation. Many legal scholars (including those as diverse as radical post-Marxists and postmodern legal theorists) continue to share these aims. They generally seek to challenge the claims of the law to neutrality and objectivity, and subject the operation of the law to critical scrutiny so as to demonstrate the disadvantageous effects that it can have on minority social groups.[12] Underpinning these critical views of the legal system are notions of social justice, and the desire to develop a more just and egalitarian world.[13] According to the Critical Legal Conference:

> The central focus of the critical legal approach is to explore the manner in which legal doctrine and legal education and the practices of legal institutions work to buttress and support a pervasive system of oppressive, inegalitarian relations. Critical theory works to develop radical alternatives, and to explore and debate the role of law in the creation of social, economic and political relations that will advance human emancipation.[14]

By demonstrating the political interests enshrined and reflected in legal institutions, the ultimate purpose of critical legal theorising (in whatever form it takes) is to effect social change, political reform, and even revolution. Critical scholars hope that by providing a critical analysis of social and legal institutions (including legal education) they can open up avenues through which structures of power may be overcome.[15]

12 Hilary Charlesworth, 'Critical Legal Education' (1988–89) 5 *Australian Journal of Law and Society* 27, 32; Peter Fitzpatrick and Alan Hunt, 'Critical Legal Studies: Introduction' in Peter Fitzpatrick and Alan Hunt (eds), *Critical Legal Studies* (Basil Blackwell, 1987) 1; Alan Hunt, 'The Critique of Law: What is 'Critical' about Critical Legal Theory?' in Peter Fitzpatrick and Alan Hunt (eds), *Critical Legal Studies* (Basil Blackwell, 1987) 5; Gerry Simpson and Hilary Charlesworth, 'Objecting to Objectivity: The Radical Challenge to Legal Liberalism' in Rosemary Hunter, Richard Ingleby and Richard Johnstone (eds), *Thinking about Law: Perspectives on the History, Philosophy and Sociology of Law* (Allen & Unwin, 1995) 86; Allan Hutchinson, 'Introduction' in Allan Hutchinson (ed), *Critical Legal Studies* (Rowman & Littlefield, 1989) 1; Ian Ward, *An Introduction to Critical Legal Theory* (Cavendish Publishing, 2nd ed, 2004) 144; Jiří Příbáň, 'Sharing the Paradigms? Critical Legal Studies and the Sociology of Law' in Reza Banaker and Max Travers (eds), *An Introduction to Law and Social Theory* (Hart Publishing, 2002) 119; Schlag, above n 7, 202; Christopher Stanley, 'Training for the Hierarchy? Reflections on the British Experience of Legal Education' (1988) 22 *The Law Teacher* 2, 78.

13 Hutchinson, above n 12, 3; Příbáň, above n 12, 119.

14 Cited in Fitzpatrick and Hunt, above n 12, 1–2.

15 Příbáň, above n 12, 121, 125.

Many critical legal scholars see legal education as a central site through which students are provided messages about the law that perpetuate disadvantageous social relations. Therefore they take it as an appropriate target for research and political intervention.[16] The explanations that critical scholars have developed in their attempts to understand the loss of idealism within students are intended to 'demystify' law school, 'free' students from a 'false necessity' and 'arm or at least shield [politically] left law students from the conservatizing effects of law school training'.[17] As will be discussed below, it is generally argued that it would be politically inconvenient for those advantaged by the structure and operation of the law if law schools produced graduates who understand these structures and are motivated to change them. As a result, students entering law school with social ideals have these ideals 'repressed', or at the very least, they are not encouraged to engage with content that could foster their ideals, and therefore subsequently lose such motivations. As it forms the basis of this paper, the critical legal narrative that scholars use to explain how this occurs must be outlined in more detail.

A *The Content of the Law Degree and Ideological Indoctrination*

The major focus of critical scholars has been the content of the law curriculum and the knowledge students are taught. The assumption is that this content is central to governing the construction of the legal identity and the loss of idealism. The critical narrative suggests that it is as a corollary of the influence of the legal profession over legal education that the law curriculum overtly reflects the interests of the profession, and contributes to the loss of social idealism. Legal education is seen as overwhelmingly positivist and doctrinal (thus separating the law in students' minds from its social context and discouraging significant critique of these laws), or focused primarily on legal skills (at the expense of theoretical and critical discussions, which, again, might challenge the neutrality of the law).[18] As a result, the law is presented as relatively autonomous, and concerns for social justice seen as marginal or irrelevant.[19]

In particular, the critical narrative suggests that the units of study required for admission to practice (in Australia these include *Criminal Law and Procedure*, *Torts*, *Contracts*, *Property*, *Equity*, *Company Law*, *Administrative Law*, *Federal*

16 Hunt, above n 12, 6; Příbáň, above n 12, 126, 130; Martin Tsamenyi and Eugene Clark, 'An Overview of the Present Status and Future Prospects of Australian Legal Education' (1995) 29 *The Law Teacher* 1, 7.

17 Schlag, above n 7, 203.

18 Alan Hunt, 'The Case for Critical Legal Education' (1986) 20 *The Law Teacher* 10, 11–13; Mary Keyes and Richard Johnstone, 'Changing Legal Education: Rhetoric, Reality, and Prospects for the Future' (2004) 26 *Sydney Law Review* 537, 540; Stanley, above n 12, 82–4; Ward, above n 12, 147; James, 'Expertise as Privilege', above n 7.

19 Booth, above n 1, 281; Janet Mosher, 'Legal Education: Nemesis or Ally of Social Movements?' (1997) 35 *Osgoode Hall Law Journal* 613, 625–6; Keyes and Johnstone, above n 18, 541; Webb, above n 1, 287; Duncan Kennedy, 'Legal Education and the Reproduction of Hierarchy' (1982) 32 *Journal of Legal Education* 591; Příbáň, above n 12, 127; Peter Gabel and Duncan Kennedy, 'Roll over Beethoven: Critical Legal Studies Symposium' (1984) 36 *Stanford Law Review* 1, cited in Ward, above n 12, 147.

and State Constitutional Law, *Civil Procedure*, *Evidence*, and *Professional Conduct* [including *Trust Accounting*])[20] most clearly demonstrate this narrow scope to the curriculum, and are evidence of the power of the legal profession over legal education.[21] Critical scholars argue that these are narrow in the sense that they are firmly based on the more prestigious areas of private legal professional practice, do not include units that offer significant theoretical, critical, or contextual analyses of the social or legal structure (such as units on anti-discrimination, welfare, or family law), and imply that legal education is supposed to act as a form of professional training.[22] In addition, critical scholars suggest that the dominance of these units in the curriculum has a 'flow-on' effect, causing all units to privilege legal rules in their content, and minimise contextual, theoretical, and critical analyses, and implicitly, present students with an image of what they must know in order to become a 'real' lawyer.[23]

This narrow focus within the content of the law curriculum has led one theorist to go so far as to suggest that law school provides 'ideological training for willing service in the hierarchies of the corporate welfare state',[24] while others argue that

> legal knowledge accumulated in a manner which is ideologically founded but which is denied the expression of its ideology constitutes *educational indoctrination* in the patterns of thought operated by the personnel of the legal hierarchy.[25]

The 'false consciousness' that is reproduced within students as a result is argued to legitimate and perpetuate existing legal and political systems. Ultimately, this 'false consciousness' is said to lead to a dissociation between the human being and the lawyer,[26] because the social ideals and political consciousness of the student are first deadened, and then 'a proper professional, largely apolitical, consciousness [is imposed] in its place'.[27] The 'obsession' that the law curriculum has 'with the acontextual, the dispassionate and the analytical'[28] is presented as an essential element of turning students into useful legal practitioners, and making them 'think like a lawyer'.[29]

20 These units were developed in 1992 by the *Consultative Committee of State and Territory Law Admitting Authorities*, chaired by Justice Priestley, and constitute a nationally consistent and unified approach to the requirements for admission into legal practice throughout Australia. As they provide the basis of admission into the legal profession, they form the core of the curriculum in Australian law schools in some format or another. See Keyes and Johnstone, above n 18, 557.

21 Keyes and Johnstone, above n 18, 557; Thornton, above n 7, 77.

22 Hunt, 'The Case for Critical Legal Education', above n 18, 10; Keyes and Johnstone, above n 18, 540, 544, 557; Simpson and Charlesworth, above n 12, 106; Stanley, above n 12, 81; Margaret Thornton, 'The Idea of the University and the Contemporary Legal Academy' (2004) 26 *Sydney Law Review* 481, 495; Thornton, *Dissonance and Distrust*, above n 7, 77.

23 Keyes and Johnstone, above n 18, 555; Thornton, 'The Idea of the University', above n 22, 495; Thornton, *Dissonance and Distrust*, above n 7, 77.

24 Kennedy, above n 19, 591.

25 Stanley, above n 12, 83 (emphasis added).

26 Gabel and Kennedy, above n 19, 26.

27 Stephen C Halpern, 'On the Politics and Pathology of Legal Education (Or, Whatever Happened to that Blindfolded Lady with the Scales?)' (1982) 32 *Journal of Legal Education* 383, 387.

28 Cooper and Trubek, above n 1, 14.

29 Keyes and Johnstone, above n 18, 543; Thornton, *Dissonance and Distrust*, above n 7, 80.

B *The Location of Power and the External Pressures Governing Legal Education*

In addition to critically examining the knowledge that students are exposed to within the law degree, critical legal scholars focus on the location of power, and attempt to identify who 'holds' the power exercised within and upon legal education that shapes the curriculum (and subsequently the legal identity) in particular ways. For most critical scholars, the very fact that law school maintains and reproduces the social and legal status quo is enough to account for the power exercised within legal education — power is understood as the privilege of the legal profession and other similarly advantaged bodies.

Critical scholars often identify the strong links between the law school and the legal profession as evidence that legal education is (and always has been) responsive to a professional audience, and is geared towards *training* students for the practice of law.[30] There are also a wealth of legal scholars who suggest that 'the central aim of a legal education is the education and training of legal practitioners'.[31] Through these practices, the legal profession is represented as making the university subservient to it, exerting control over the design of the law degree, and seeking only to prepare students for legal practice (which critical scholars often read as ensuring that graduates maintain the status quo).[32] Scholars also cite the compulsory units listed above as evidence that the law school 'is expected to act as an adjunct to the practising profession by replicating known paradigms of knowledge'.[33]

Beyond the direct actions of legal professionals upon legal education, critical scholars draw attention to broader changes within the university sector that constrain curriculum content and innovation. The major change that is of concern to critical scholars is the influence of market pressures upon forms of higher education.[34] The corporatisation of universities is argued to result in students becoming consumers of educational products, and, in the minds of university administrators, appears to justify amending university curricula in line with consumer demands. Critical scholars suggest that this causes a shift away

30 Hunt, 'The Case for Critical Legal Education', above n 18, 11; Rob Guthrie and Joseph Fernandez, 'Law Schools in the 21st Century' (2004) 29 *Alternative Law Journal* 276, 276–7; Keyes and Johnstone, above n 18, 537, 542, 555; Thornton, *Dissonance and Distrust*, above n 7, 75; Tsamenyi and Clark, above n 16, 4, 8; Andrew Goldsmith, 'Standing at the Crossroads: Law Schools, Universities, Markets and the Future of Legal Scholarship' in Fiona Cownie (ed), *The Law School: Global Issues, Local Questions* (Ashgate, 1999) 62, 72.

31 Guthrie and Fernandez, above n 30, 279.

32 Keyes and Johnstone, above n 18, 542.

33 Thornton, *Dissonance and Distrust*, above n 7, 75. It is important to note that generally the term 'practising legal profession' refers to all legal practitioners, however most critical scholars usually use it to refer to the most financially rewarding forms of legal practice, which occupy the higher levels of the professional hierarchy. These include corporate or business practice, as opposed to pro bono legal work or work in community legal centres.

34 Anne Bottomley, 'Lessons From the Classroom: Some Aspects of the "Socio" in "Legal" Education' in Philip Thomas (ed), *Socio-Legal Studies* (Ashgate Dartmouth, 1997) 163, 180; Keyes and Johnstone, above n 18, 554, 548–9; Thornton, 'The Idea of the University', above n 22, 483; Ward, above n 12, 148.

from social issues in the curriculum, towards an emphasis on the doctrinal and vocational aspects of the law. These areas are synonymous with market interests, and are more likely to allow graduates to benefit from the 'investment' they have made in their education.[35] In this sense, in the case of the law curriculum, the market pressures acting upon higher education are seen to reproduce the status quo, and more successfully ensure students (and law schools, who have to act on consumer demands) do not stray far from the interests of the legal profession.[36] As such, critical scholars speculate that students are likely to see an engagement with critical, contextual, and theoretical curriculum content as a wasted educational investment, and, as a result, are likely to lose their social idealism.

C *Other Influences upon the Student*

Finally, critical scholars have focused on other aspects of the study of law that impact upon a student's loss of idealism. In many respects, these elements are seen as simply working *upon* the law student — as an external force or influence that operates on them. For example, critical scholars argue that practices such as the teaching and assessment methods utilised in law classrooms render students docile and passive objects, with lectures simply consisting of a 'knowledge dump' from the lecturer's notes into the student's mind, and assessment practices primarily requiring the uncritical regurgitation of knowledge.[37] Critical scholars suggest that such practices leave little opportunity for students to critically examine the law, and are likely to make graduates believe that only small, cosmetic changes to the legal system (as opposed to major changes in the social and legal order) are required to improve the way it functions.[38]

Critical scholars often paint the classroom experience as a negative one for law students (especially the idealistic ones) — as consisting of competition, an adversarial approach, aggressiveness, racism, classism, and sexism between them.[39] The classroom is positioned as an environment in which students experience either sniggering from others, or even blatant discrimination, if they

35 Keyes and Johnstone, above n 18, 554; Thornton, 'The Idea of the University', above n 22, 483; Thornton, *Dissonance and Distrust*, above n 7, 76.

36 Bottomley, above n 34, 180; Thornton, *Dissonance and Distrust*, above n 7, 75–6; Ward, above n 12, 148.

37 See for example Charlesworth, above n 12, 30; Simpson and Charlesworth, above n 12, 106; Richard Johnstone and Sumitra Vignaendra, 'Learning Outcomes and Curriculum Development in Law' (Report Commissioned by the Australian Universities Teaching Committee, January 2003); Thornton, *Dissonance and Distrust*, above n 7, 78; David Weisbrot, 'Taking Skills Seriously' (2004) 29 *Alternative Law Journal* 266, 267; Allen and Baron, above n 1, 288; Keyes and Johnstone, above n 18, 539.

38 Charlesworth, above n 12, 31; Simpson and Charlesworth, above n 12, 106. Furthermore, these criticisms of the 'transmission' model of teaching have been confirmed by many educational theorists. See for example Paul Ramsden, *Learning to Teach in Higher Education* (Routledge, 2nd ed, 2003).

39 Allen and Baron, above n 1, 285–6; Webb, above n 1, 287; Kevin Dolman, 'Indigenous Lawyers: Success or Sacrifice?' (1997) 4(4) *Indigenous Law Bulletin* 4; Heather Douglas, 'The Participation of Indigenous Australians in Legal Education 1991–2000' (2001) 24 *University of New South Wales Law Journal* 485; Keyes and Johnstone, above n 18, 542; Thornton, *Dissonance and Distrust*, above n 7, 93, 99.

attempt to discuss social justice issues.[40] Critical scholars often characterise law teachers as using esoteric terms and legal jargon in order to reinforce a student's lack of confidence, discourage criticism, and maintain deference to the lecturer and (by extension) the legal hierarchy.[41] In all, the arrangement of such practices is seen to maintain debate and discussion within specified, 'appropriate' boundaries, ensuring that the knowledge of the law that students are exposed to is controlled, and that the legal identity imposed upon them is one that accords with the interests of the legal profession.[42] As a result, critical scholars argue that students are implicitly discouraged from maintaining any socially idealistic goals that they possessed when they began their legal education.

This section has elucidated the critical legal narrative that seeks to explain why students that enter law school with social ideals often do not maintain such ideals upon graduation. Simply stated, this narrative suggests that the content of the law degree constitutes a form of ideological indoctrination, carried out in the interests of the legal profession who hold power over legal education (and therefore law students), and seek to produce law graduates in their own image. Other practices of legal education operate to 'ensure' that students are not exposed to discussions of social justice, or are unable to express such concerns in the classroom. Critical scholars see these practices and power relations as contributing to the loss of social idealism among students. They are discouraged from attempting to fundamentally undermine and challenge the legal and social status quo, which they may have originally sought to do, and are instead to seek only minimal improvements to the system as it exists. As Klare states, students

> learn that the only lawyer-like way to view the world is *moderately*, through the window of moderate conservatism or liberal reformism. They learn that the only lawyer-like way to think about social change is in terms of atomized, marginal, incremental reform through governmental regulation of private conduct … Finally, they learn that lawyers do not possess intellectual skills and preoccupations appropriate to discussion and analysis of fundamental issues of social and political organization and thoroughgoing social change.[43]

This narrative has been useful in bringing to light some of the power relations that are inherent within the teaching of law, and scholarly analyses adopting and building upon aspects of this narrative are widespread. The critical narrative has demonstrated the links between the legal profession and the content of the law curriculum, pointed to the effects of the increase of market values within the higher education sector on law students, and identified the range of practices in the law school that governs student behaviour and influences the content that is taught. It has also caused (some) legal educators to reconsider the effect of what

40 Thornton, *Dissonance and Distrust*, above n 7, 93–4.

41 Ibid 92.

42 Dolman, above n 39; Douglas, above n 39; Thornton, *Dissonance and Distrust*, above n 7, 91, 93, 104.

43 Karl E Klare, 'The Law–School Curriculum in the 1980s: What's Left?' (1982) 32 *Journal of Legal Education* 336, 339 (emphasis in original).

they teach on the student's identity. In this sense, the critical narrative provides a firm starting point for any further analysis of power relations in legal education.

However, political actions initiated on the basis of this narrative have not resulted in broad social or political change, nor the maintenance of social ideals by students.[44] This narrative implies that: if only the legal profession did not have such a tight grip over the content of the law curriculum; if only the teaching methodologies fostered reflection and incorporated appropriate pedagogical practice into their construction; if only law students could see through the ideological haze that clouds their vision and allow the light of the 'truth' about the law to shine forth, then their 'real' nature as socially active legal professionals would be allowed to express itself and they would actively engage in campaigning for social justice. On this basis, political actions such as the introduction of critical perspectives on the law into the curriculum, attempts to resist the corporatisation of universities, proposals to reduce the influence of the legal profession over legal education, and the introduction of pedagogically sound teaching and assessment techniques, appear appropriate and necessary.

As reasonable as some of these observations about legal education might be, this paper argues that the assumptions about power, knowledge, and the subject that underpin these observations (and subsequent proposals about how legal education might be altered) are problematic, and that this is one uninvestigated reason that this narrative has not been entirely successful in initiating change. The following section will bring Foucault's conceptual tools of knowledge, power and the subject to bear on the critical narrative, in order to think differently about this narrative, and provide a basis for more effective analyses of, and interventions into, legal education.

III LOOKING DIFFERENTLY AT THE CRITICAL LEGAL NARRATIVE

Although there are many different ways with which to organise and understand his work, Foucault states that the objective of his various studies into madness, medicine, knowledge, disciplinary power, and sexuality is to examine 'the different modes by which … human beings are made subjects' throughout history.[45] When using the term 'subject', Foucault is referring to a person being 'subject to someone else by control and dependence' as well as being 'tied to [one's] own identity by a conscience or self-knowledge'.[46] In many respects, his concern is with the way in which people are governed, and he generally examines this in three ways — by looking at relations of knowledge, relations of power,

44 See Schlag, above n 7, 204–9. As evidenced by the recent studies cited above, it appears that legal education continues to have 'deleterious effects' upon students.

45 Michel Foucault, 'The Subject and Power' in James Faubion (ed), *Power: Essential Works of Foucault 1954-84: Volume 3* (New Press, 2000) 326.

46 Ibid 331.

and relations to the self. His work on knowledge, power, and the self are the main conceptual tools that will be used here to unpack the critical narrative.

In brief, by bringing Foucault's work to bear on the critical legal narrative, this section will demonstrate a number of untenable assumptions underpinning this narrative. By arguing that legal education is a form of ideological indoctrination that operates to repress a student's 'real' interests, the critical narrative makes assumptions about the relationship between power and knowledge that Foucault suggests are not historically defensible. Additionally, by suggesting that the legal profession has the content of legal education (and thus the thoughts and actions of law students) in its grip, this narrative adopts a repressive and proprietary notion of power that differs to Foucault's emphasis on the widespread, productive, and relational aspects of power. Finally, by seeing the practices and relations of legal education as primarily operating *upon* students, the critical narrative makes very little room for the active agency of students in constructing their legal identity, which Foucault suggests leads to an incomplete picture of modern forms of power. Each of these arguments will be expanded upon below.

A *Discourse, Ideology, and the Critical Legal Narrative*

Instead of adopting the belief that one can distinguish between true and false bodies of knowledge, and that true knowledge has a firm basis in science, Foucault seeks to examine how truths, particularly those that tell humans 'who' and 'what' they are, have been historically constructed and positioned so as to have an effect on our lives. In particular, Foucault analyses bodies of knowledge — what he terms discourses — and the forms of truth that they put forward, from an historical perspective.[47] In doing so, he demonstrates that what we take as 'true' can change over time, often based on seemingly insignificant historical circumstances, and not simply because people gain a more scientifically rigorous grasp of the 'truth'. As such, Foucault is suspicious of the claim that one can achieve an objective and neutral truth.

Instead of trying to determine whether discourses are objectively valid or invalid, Foucault urges us to consider the way a particular discourse operates. Discourses are 'the group of statements that belong to a single system of formation'.[48] The statements that are grouped together within discourses are formed through unwritten rules and power relations, and offer what we generally understand to be 'truths' about the objects they relate to. As a whole, discourses provide coherent ways of understanding the world.[49] However, none can gain a purchase on a neutral truth. Ways of knowing and representing the world can only exist as a result of the claims to truth produced by competing discourses that seek to

47 Michel Foucault, *History of Madness* (Routledge, 2006); Michel Foucault, *The Birth of the Clinic: An Archaeology of Medical Perception* (Routledge, 2003); Michel Foucault, *The Order of Things* (Routledge, 2002).

48 Michel Foucault, *The Archaeology of Knowledge* (Routledge, 2002) 121.

49 Mills, above n 11, 53.

establish themselves as '*The* Truth', while dismissing other discourses, and their truth-claims, as untrue, unscientific, or less rigorous.[50]

Foucault is primarily concerned with those discourses that claim to know the truth about people (generally the human sciences of pedagogy, criminology, and psychology) because of the power that they can exercise. These discourses allow people to understand themselves, and relate to others, in particular ways. For example, discourses on madness allow people to position themselves as 'mad' or 'sane', while educational discourses do the same for 'learners' and 'teachers'.[51] In this sense, a person's understanding of, and relation to, their very self is only produced through piecemeal and contingent discourses. In addition, Foucault observes that these bodies of knowledge have a complex relationship to power — relations of power allow for bodies of knowledge to be produced, and these bodies of knowledge can form the basis of new techniques of power and methods of governing (power will be discussed further below).[52]

On the basis of this understanding of discourse, some of the assumptions of the critical narrative, and its claims that legal education constitutes a form of ideological indoctrination that represses a student's 'real' interests, can be considered differently.[53] A central assumption of this narrative is that a person's actual interests are different from what that person consciously perceives them to be, and, if repressive relations were removed, then the ideologically indoctrinated would see their interests as different to those imposed upon them.[54]

The notion of ideology employed here posits that a universal human subject exists and potentially has access to a transcendental truth about the world and what their own interests are, if only social institutions did not impose ideological constructions

50 Gavin Kendall and Gary Wickham, *Using Foucault's Methods* (Sage, 1999) 35–41; O'Farrell, above n 11, 81.

51 This even extends to the recognition of 'good' or 'bad' teachers, or 'slow', 'fast', 'active', or 'passive' learners. See Kendall and Wickham, above n 50, 27.

52 As Foucault states, 'it is not possible for power to be exercised without knowledge, [and] it is impossible for knowledge not to engender power'. See Michel Foucault, 'Prison Talk' in Colin Gordon (ed), *Power/Knowledge: Selected Interviews and Other Writings 1972–1977* (Pantheon, 1980) 37, 52. This does not imply a conspiracy on the part of power to only produce knowledge that can operate in its own interests and to further those interests. Rather, it is only through relations of power that discourses are able to produce new objects of knowledge, and that the truth about these objects can be 'known'. See Michel Foucault, 'Two Lectures' in Colin Gordon (ed), *Power/Knowledge: Selected Interviews and Other Writings 1972–1977* (Pantheon, 1980) 78, 102. People within institutions such as schools or prisons become objects that can be known through forms of observation exercised upon them, and this knowledge can then be used to implement further power relations to govern them as individual cases, or can be collated and used as the basis of entire 'disciplines' such as criminology and pedagogy, which can lead to the government of larger populations. For example, knowledge of a person's skills and attributes gained through assessment practices allows for them to be more effectively governed through targeted educational interventions, while knowledge of the skills held by a group of people can allow for standards of 'normal' development and achievement to be determined, and subsequently for 'appropriate' government to be undertaken. See Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Penguin, 1991) 251, 254.

53 It is important to note that, despite the popular confusion on this score, the notions of 'ideology' and Foucaultian 'discourse' are not equivalent.

54 David Hoy, 'Power, Repression, Progress: Foucault, Lukes, and the Frankfurt School' in David Hoy (ed), *Foucault: A Critical Reader* (Wiley–Blackwell, 1986) 123, 125.

upon them, or cause them to develop a false consciousness.[55] In this sense, the critical narrative assumes that there exists a pre-given human subject possessing a consciousness that power subsequently seizes and acts upon.[56] In addition, this narrative suggests that this pre-given human subject has 'real' interests, and if these 'real' interests are not allowed expression, they have been repressed. From this perspective, ideology is seen as a negative element through which 'the knowledge relation, is clouded, obscured, violated by conditions of existence, social relations, or the political forms imposed on the subject from the outside'.[57]

However, if, as Foucault suggests, the coherent and systematic structures of ideas with which people understand the world as well as themselves are only made available to them through discourses, then it is untenable to propose that there is a point at which a human subject can access an entirely valid and neutral understanding of the world. It is problematic to suggest that there is a point at which one may fully express their 'real' interests prior to the repression of these interests, as ideological relations subsequently blanket a person in layers of falsity. Instead, from the very outset, discourses have a role in shaping subjects — even in shaping what they take to be their true, real, or authentic selves. Political and economic conditions cannot be a veil for subjects — instead, they are central elements in the *formation* of kinds of subjectivity.[58] Indeed, the very idea of an 'identity' is itself an object of knowledge produced through discourses — it is not a concept that is historically stable enough to suggest it can be 'repressed', or even 'liberated'.[59]

Additionally, the notion of ideology underpinning this critical narrative assumes that the knowledge provided to students is false — as evidenced by terms such as 'false consciousness' — and that it is somehow possible to access a 'true consciousness'.[60] This is closely related to the idea that a person's 'real' interests are repressed, because it is assumed that only a 'false' ideological knowledge could obscure these real interests to the advantage of a group or person exerting unwarranted influence. This notion of ideology is a remnant of Marxian influences on critical legal scholarship, and refers to statements or ideas produced by or within institutions and imposed on people in some form so as to influence their thoughts and actions.[61] As Mills states, it usually describes

55 O'Farrell, above n 11, 98.

56 Michel Foucault, 'Body/Power' in Colin Gordon (ed), *Power/Knowledge: Selected Interviews and Other Writings 1972–1977* (Pantheon, 1980) 55, 58; Michel Foucault, 'Truth and Power' in Colin Gordon (ed), *Power/Knowledge: Selected Interviews and Other Writings 1972–1977* (Pantheon, 1980) 109, 118.

57 Foucault cited in O'Farrell, above n 11, 98 (translation modified).

58 Ibid; Michel Foucault, 'Technologies of the Self' in Paul Rabinow (ed), *Ethics: Subjectivity and Truth: Essential Works of Foucault 1954–1984: Volume 1* (Penguin, 2000) 223, 225.

59 This analysis of the assumptions underpinning the use of the concept of ideology within the critical legal narrative is not to suggest that students do not experience feelings like alienation and silencing, nor is it to suggest that students do not feel passionate about social justice and possess their own desires regarding what they hope to do with their legal education upon graduation. Rather, it is to point out that it is potentially dangerous to posit that these are 'real' or 'natural' interests, and that it is not easy to suggest that these interests are 'repressed'.

60 Hoy, above n 54, 131.

61 Mills, above n 11, 54.

> the means whereby oppressed people accept views of the world *which are not accurate and which are not in their interests*. Ideology… is the *imaginary* representation of the way things are in a society, and this *fictive* version of the world serves the interests of those who are dominant in society.[62]

Thus, ideology suggests the existence of 'true' and 'false' knowledge, and thereby posits that objects exist in the world independently of the ability of people to represent them through discourses.[63] In doing this, the notion of ideology also maintains that knowledge and power are mutually exclusive; that true knowledge is disinterested, can only exist removed from the distortions of power, and that relations of power can only create false knowledge — a claim that is problematic in light of the relationships between power and knowledge mentioned above.[64]

With regard to legal education, the critical narrative assumes that there is a truth and falsity about the law that students can be taught. As Foucault states, ideology 'stands in virtual opposition to something else which is supposed to count as truth', and thus the notion of ideology is inconsistent with his intention to see 'historically how effects of truth are produced within discourses which in themselves are neither true nor false' but are produced through relations of power and knowledge.[65] As such, all discourses employ relations of power to produce different 'truths' (as well as different 'falsehoods'), and therefore the knowledge about the law and society that students are provided with cannot be categorised as *inherently* true or false. Coupled with the recognition that forms of identity are not the products of a person's consciousness but produced through discourses, a person therefore has no 'real' interests to be repressed by 'false' legal ideologies.

Additionally, by recognising the links between power and knowledge, it is possible to see that any attempts to establish a regime of truth about an object (be it in the form of criminology telling the truth about crime, pedagogy telling the truth about learning, critical scholars telling the truth about power, or psychologists telling the truth about our personalities) are underpinned by power relations, and have further effects of power.[66] In this sense, those advocating change on the basis of a critical analysis of social relations are not, as is often assumed, speaking from a transcendental position, liberated from relations of power because they are able to identify them.[67] The subject position of the critical legal scholar is one created by relations of power and knowledge, and one that engenders further effects of power. Furthermore, the social idealism of students is an object of knowledge produced through critical discourses, allowing critical scholars to 'know' students and make political claims about legal education.[68] Political claims suggesting that

62 Ibid 34 (emphases added).

63 O'Farrell, above n 11, 98.

64 Hoy, above n 54, 131.

65 Foucault, 'Truth and Power', above n 56, 118.

66 Mills, above n 11, 69.

67 Hoy, above n 54, 138.

68 Again, as stated above, this is not to suggest that students do not lose their social idealism, but rather to point out that this can only be understood and 'known' as an object of knowledge constructed through critical discourses.

it is possible to 'liberate' people from their false consciousness, made by a subject claiming to speak the truth about that consciousness, are contentious, and only likely to lead to different relations of power.[69]

The idea that one can progress from a form of ideological indoctrination towards a true knowledge is implicit within attempts to institute a critical legal education. A critical legal education, in which critical, theoretical, and contextual analyses of the law become the dominant focus of the curriculum, is often suggested to be a way in which critical legal academics can 'free' students from the 'false consciousness' imposed upon them through a traditional doctrinal and vocationally focused legal education. Although those suggesting that legal education become a critical one will often say that one ideology must not be substituted for another in this process,[70] the assumption that underpins such political action is that students can be taught a 'truer' knowledge about the law and be removed from the negative power relations that impose this ideology upon them. Additionally, by engaging with different discourses through their legal education, students are simply taking up a different position in relation to different discourses. For example, they may be adopting the position of the 'socially just and responsible legal graduate' instead of that of a 'legal professional'. In both instances, the legal identity is produced through discourses and power relations — none of which is more true or false than another.

B *Foucault, Power, and the Critical Legal Narrative*

The critical legal narrative is centrally concerned with power in legal education. Many approaches to understanding power, including those underpinning the critical legal narrative, focus on it being 'held' by 'powerful' groups, such as the 'ruling class' or the legal profession, and represented in the actions of overarching structures such as the 'state', the economy, or even institutions such as legal education. In such formulations, power is seen as an essentially repressive force, acting to exclude, forbid, limit, censor, or say no. Those upon whom this power is exercised must submit to it, obey its dictates, endure repression, and often experience the imposition of a false consciousness.[71] As power is seen to be 'held', this line of thinking suggests that it therefore represents an individual or collective 'will', inevitably involving the domination of one group over another, such as by the legal profession over students in the case of legal education,[72] aimed at oppressing or dominating these groups, or denying their 'true' human nature in

69 Michel Foucault, 'Schizo-Culture: Infantile Sexuality' in Sylvère Lotringer (ed), *Foucault Live: Collected Interviews, 1961–84* (Semiotext(e), 1996) 154, 160.

70 See for example Fitzpatrick and Hunt, above n 12; Hunt, above n 12.

71 Michel Foucault, *The Will to Knowledge: The History of Sexuality Volume 1* (Penguin Books, first published 1980, 1998 ed), 82–5; Michel Foucault, 'Power Affects The Body' in Sylvère Lotringer (ed), *Foucault Live: Collected Interviews, 1961–84* (Semiotext(e), 1996) 207, 207 210; Michel Foucault, 'Questions on Geography' in Colin Gordon (ed), *Power/Knowledge: Selected Interviews and Other Writings 1972–1977* (Pantheon Books, 1980) 63, 72; Foucault, 'Two Lectures', above n 52, 90; Mitchell Dean, *Governing Societies: Political Perspectives on Domestic and International Rule* (Open University Press, 2007) 47.

72 Foucault, 'Will to Knowledge', above n 71, 92; Foucault, 'Power Affects the Body', above n 71, 210.

the interests of the powerful.[73] The corollary of this understanding of power is that political activists must 'gain' power, remove negative social relations, and progress towards total individual freedom, allowing for the full expression of human nature.

Much of Foucault's work is concerned with analysing power relations in different contexts.[74] Despite his formulation of power changing depending on the context of his analysis, each formulation maintains common elements. Overall, he finds the dominant conception of power, outlined above, inadequate for his own purposes, and suggests more effective ways of approaching power. In particular, he seeks to move away from restrictive views that see power as enshrined in the actions of the state, the economy, or as representative of class interests. He prefers to examine the mundane techniques through which power is exercised. In addition, he does not see power as a force that can be 'possessed' by some and denied to others who are repressed by it, but as a productive social relationship that is constantly modifiable. Each of these elements will be discussed in more detail below.

To begin with, when analysing power, Foucault does not focus on grand and abstract concepts, such as the state or the economy, because he believes they are too unwieldy to be effective in this task, and they fail to demonstrate the more mundane and specific practices through which power is exercised. These mundane practices include daily interactions between teachers and students within the classroom, techniques of medical practice, and those mechanisms and techniques involved in projects of self-discovery and liberation that are underpinned by psychological discourses, none of which can be said to be directed by the state or the ruling class, but nevertheless still govern conduct.[75] In addition, focusing on the state does not allow one to identify the numerous points at which power can be blocked or resisted, which may also be central to its operation.[76] A focus on the micro practices through which power is exercised — that is, 'the point where power reaches into the very grain of individuals, touches their bodies and inserts itself into their actions and attitudes, their discourses, learning processes and everyday lives…'[77] — may allow for a more nuanced and effective understanding

73 Foucault, 'Will to Knowledge', above n 71, 82–5; Foucault, 'Power Affects the Body', above n 71, 207, 210; Foucault, 'Questions on Geography', above n 71, 72; Foucault, 'Two Lectures', above n 52, 90.

74 See for example, Foucault, 'Discipline and Punish', above n 52; Foucault, 'Will to Knowledge', above n 71; Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France 1977–1978* (Macmillan, 2007); Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France 1978–1979* (Macmillan, 2008); Michel Foucault, *The Use of Pleasure: The History of Sexuality Volume 2* (Vintage Books, 1990); Michel Foucault, *The Care of the Self: The History of Sexuality Volume 3* (1988). In these studies, Foucault examines disciplinary forms of power, power as it is applied to the body, and relations of power exercised over populations.

75 Foucault, 'Power Affects the Body', above n 71, 210; Dean, above n 71, *Governing Societies*, 47; Mitchell Dean, *Critical and Effective Histories: Foucault's Methods and Historical Sociology* (Routledge, 1994) 151–2; Nikolas Rose, *Governing the Soul: The Shaping of the Private Self* (Routledge, 1990).

76 Foucault, 'Power Affects the Body', above n 71, 210.

77 Foucault, 'Prison Talk', above n 52, 39.

of power.[78] In fact, these more mundane practices may very well be essential if entities such as 'the state' are to exist and successfully govern.[79]

If power is examined by focusing on these mundane practices, then it cannot easily be seen as something that represents the interests of one group in the last instance, nor as something imposed on others. Instead, it can be recognised as a series of complex relations that can operate in an unpredictable manner. In this sense, power must be seen as *intentional*, but *nonsubjective*[80] — that is, the operation of power does not emanate from a central point, nor does it originate in a single conscious will, and it cannot be explained with reference to the intentions of various decision-makers or 'powerful' people.[81] Furthermore, there are numerous historical contingencies that may explain the existence of one particular set of power relations. Power relations do not gain their intelligibility simply by looking at whom they advantage.

The suggestions that power is 'held' by some, and the desire to ascribe some measure of conspiratorial intent to power relations in law schools, feature as part of the critical narrative. In some cases, critical scholars suggest that the legal profession and legal academics 'hold' power and exercise it upon students to repress their 'real' interests. For example, some feminist critical scholars suggest that the power to define the 'normal' law student, against which others are implicitly compared, is held by 'benchmark men', and exercised so as to maintain their own privilege.[82] While it is often the case that power relations can become relatively stable, or even 'frozen' in some instances (to the advantage of a few people or groups), it is not always the case that a group 'holds' the power to do this — it could be the result of a range of other practices. In other cases, critical scholars suggest that particular teaching or assessment practices in legal education are implemented simply because of the desire of the legal profession. For example, critical scholars have argued that teaching methods such as the law lecture or the Socratic method of teaching, and assessment techniques such as closed-book examinations, are utilised *because* they often result in students becoming passive, uncritical, and unreflective.[83] This does not recognise that other factors, such as resourcing issues, influence the decision to use a particular teaching methodology in the classroom.[84] Any cynicism and loss of idealism that students develop cannot simply be reduced to an effect of the legal profession's desire to produce legal professionals in its own image. In addition, using a traditional conception of power, the critical narrative cannot adequately account

78 Foucault, 'Discipline and Punish, above n 52, 26; Foucault, 'Two Lectures', above n 52, 96–7.

79 Foucault, 'Will to Knowledge', above n 71, 92; Foucault, 'Power Affects the Body', above n 71, 210; O'Farrell, above n 11, 99–199.

80 Foucault, 'Will to Knowledge', above n 71, 92, 94; Foucault, 'Power Affects the Body', above n 71, 210.

81 Foucault, 'Will to Knowledge', above n 71, 93–5; Foucault, 'Two Lectures', above n 52, 96–7; Joseph Rouse, 'Power/Knowledge' in Gary Gutting (ed), *The Cambridge Companion to Foucault* (Cambridge University Press, 1994) 92, 107.

82 Thornton, *Dissonance and Distrust*, above n 7, 81.

83 Ibid 78; Charlesworth, above n 12, 30; Simpson and Charlesworth, above n 12, 106.

84 See also Johnstone and Vignaendra, above n 37, 322–6; Barbara Kamler, 'Text as Body/Body as Text' (1997) 18 *Discourse: Studies in the Cultural Politics of Education* 369, 376.

for the proliferation of new teaching and assessment techniques within the law school, particularly those that seek to encourage students to be reflective. Of course, encouraging critical scholars to focus on the mundane techniques of power is not to suggest that groups such as the legal profession have *no* influence over the power relations of legal education. Rather it is to allow critical scholars to recognise the complexity to these power relations, and the multiple historical contingencies upon which their use is based, with the ultimate hope of providing a more nuanced and effective understanding of power.

If power is to be analysed at its micro level, and seen as a social relationship, then one must also account for the possibility that power relations may be modified or even reversed by those involved.[85] At any point at which power is exercised it can experience some form of agonism.[86] This agonism is not simply characterised by someone saying 'no' to power, and it may not result in a total overhaul of that relation, but it may make it less effective, or alter it in some way.[87] In contrast to common understandings of power, this approach recognises that one's freedom and autonomy are essential features in the operation of power — it is only if one has a degree of freedom that they are able to act in response to power and in fact have power operate upon them. As Foucault suggests, power is the ability 'to structure the possible field of action of others',[88] and 'is exercised only over free subjects, and only insofar as they are "free"'.[89] A person or group exercises power when it is able to *set limits upon and constrain*, or conversely *encourage* in specific ways, the conduct of another person or group, who themselves have varying degrees of freedom within these power relations to take certain courses of action.[90] If a person does not have any measure of freedom whatsoever, then Foucault suggests that they are subject to a *state of domination*, not a *power* relation. Power, then, has the potential to circulate, and operates as a relationship between people. It does not remain the privileged property of one individual or group — in fact people are not just points upon which power operates, but are also vehicles through which it is transmitted.[91]

In many respects, the critical narrative cannot account for the resistance that is exercised as part of power relations. For example, students can exercise resistance by not listening to what they are taught, or even by leaving a lecture. They can demand to be taught 'relevant' content, shift in their chairs, stop taking notes if they lose interest, or even avoid studying entire elective units. These are techniques through which students are resisting the exercise of power by

85 Michel Foucault, 'The Ethics of the Concern for the Self as a Practice of Freedom' in Paul Rabinow (ed), *Ethics: Subjectivity and Truth: Essential Works of Foucault 1954–84: Volume 1* (Penguin, first published 1997, 2000 ed) 281, 283, 292; Michel Foucault, 'Sex, Power and the Politics of Identity' in Sylvère Lotringer (ed), *Foucault Live: Collected Interviews, 1961–1984* (Semiotext(e), 1996) 382, 386; Kendall and Wickham, above n 50, 50.

86 Foucault, 'Will to Knowledge', above n 71, 96.

87 Ibid 95–6; Kendall and Wickham, above n 50, 51.

88 Foucault, 'The Subject and Power', above n 45, 341.

89 Ibid 342.

90 Foucault, 'Ethics of the Concern for the Self', above n 85, 292; Foucault, 'The Subject and Power', above n 45, 341; Foucault, 'Sex, Power and the Politics of Identity', above n 85, 386.

91 Foucault, 'Will to Knowledge', above n 71, 93; Foucault, 'Two Lectures', above n 52, 98.

academics, and often require teachers to modify their own actions. However, critical scholars do not see these as forms of resistance, particularly because these practices are not aimed at overturning power relations and liberating students. In addition, because of the existence of resistance within power relations, the strong links between the legal profession and the law school do not *determine* in any way that a professional identity is imposed upon students. Although it is not possible to remove people from power relations, it *is* possible to act within them and alter them in original ways. Power within legal education is not monolithic, and nor does it operate *upon* students — it is piecemeal, complex, modifiable, and operates *through* students.

As mentioned above, an effective way of looking at power relations is to see them as productive and not negative or repressive. Foucault believes that 'power would be a fragile thing if its only function were to repress … exercising itself in a negative way',[92] and instead suggests that power is 'bent on generating forces, making them grow, and ordering them, rather than … dedicated to impeding them, making them submit, or destroying them'.[93] This productive notion of power is related to his eschewal of the idea that a true human nature exists that can be discovered through the human sciences. As truths about human nature are historically contingent and constructed through discourse, then there can be no 'true' nature to repress and no 'false' consciousness to impose.[94] On this basis, instead of assuming that the forms of 'consciousness' provided by power are negative and imposed, it is much more effective and politically tenable to consider what forms of 'consciousness' these power relations have created, or allowed to come into being. As Foucault suggests,

> [w]e must cease once and for all to describe the effects of power in negative terms: it 'excludes', it 'represses', it 'censors', it 'abstracts', it 'masks', it 'conceals'. In fact, power produces; it produces reality; it produces domains of objects and rituals of truth. The individual and the knowledge that may be gained of him [sic] belong to this production.[95]

Techniques for accumulating knowledge, mechanisms that allow for observation, behaviours and modes of action, cultural relations, and even identities, are all produced through power relations.[96]

It is this productive aspect of power that the critical narrative does not easily recognise. As we have seen, the critical narrative suggests that teaching methods such as the Socratic method are adopted so as to exclude some forms of knowledge that students hold, minimise contextual discussions, and produce uncritical and unreflective black-letter lawyers.[97] However, if considered as a technique of power, this practice can be understood as productive, in the sense that it produces

92 Foucault, 'Body/Power', above n 56, 59.

93 Foucault, 'Will to Knowledge', above n 71, 136.

94 O'Farrell, above n 11, 98; Foucault, 'Body/Power', above n 56, 58; Foucault, 'Truth and Power', above n 56, 118.

95 Foucault, 'Discipline and Punish', above n 52, 194.

96 Mills, above n 11, 36; O'Farrell, above n 11, 100–1.

97 Thornton, *Dissonance and Distrust*, above n 7, 78.

students able to defend a particular statement despite rigorous questioning, and instantly respond to a line of argument. Through this technique, students can develop the ability to know how to argue a point of law and defend a position, producing a legal identity with the 'analytic, oral and adversarial skills [they can use] in the future'.[98] In addition, the power relations within legal education that produce professional and vocationally skilled legal identities lacking social idealism are generally characterised by critical scholars as negative, repressive, and imposed. One example is the constant criticism of professional and masculine norms that are present or implicit within the law curriculum. Although these norms may inform particular practices of power and may operate to the advantage of some, they are rarely seen as productive — in particular, they can produce useful forms of identity that are able to function within the legal system (such as skilled professionals, or lawyers who 'know' the law). Of course, this is not to suggest that they cannot or should not be altered. Rather, it is to point out that they do not simply exist or operate conspiratorially in order to repress some and advantage others.

As Foucault suggests, power is not possessed by any single individual or group, and does not represent their interests or embody their whims. Instead, power relations are complex relations that can be resisted and altered. They do not create false knowledge that 'blinds' people to the reality of the world, but produce different kinds of knowledge, and are central in the production of modalities of identity. Therefore, Foucault's alternative way of thinking about power relations is clearly central to interrogating the assumptions that underpin the critical narrative.

C *Foucault, the Subject, and the Critical Legal Narrative*

The final aspect of Foucault's thought that can be used to unpack the critical legal narrative is his work on the subject, and his investigations into the ways in which people govern themselves and construct their own identities. As mentioned earlier, Foucault uses the term 'subject' in two senses: to refer to one who is 'subject to someone else by control and dependence, and tied to [one's] own identity by a conscience or self-knowledge'.[99] Foucault's work on the subject grew out of his analyses of power relations, and the importance he places on agonism or resistance as a central element of these relations. This resistance is a result of people being relatively free to act within the constraints of power relations. Despite the constraints that power relations define, this degree of freedom means that people are not simply the *objects* upon which power relations operate, but *subjects* of those power relations as well.[100] The possibility that people can act within these power relations to resist and modify them also means that they can potentially alter the way that power operates upon them to govern their identities. The active agency and freedom of people within power relations is not something that the critical legal narrative easily recognises, or comfortably allows for.

98 Kamler, above n 84, 376–7.

99 Foucault, 'The Subject and Power', above n 45, 331.

100 Ibid.

Traditional philosophical and political thought on the subject suggests that people possess an essential and 'true' human nature, and that the individual is a pre-given, universal, transcendental, and objective reference point for all social action, knowledge, and meaning.[101] As discussed above, critical legal thought adopts this understanding of the subject by positing a human nature repressed by power. In addition, critical thought sees power operating *upon* people, and that the self is largely a reflection of the dominant patterns, relations, and interactions of a society.[102] This leaves very little room for the recognition that people play an active role in these relations, and nor does it allow for the possibility that the self may not only transmit power relations, but also be a site of their resistance and reversal.

In contrast, Foucault does not take 'the founding or constitutive subject of philosophical humanism' as objectively given.[103] He suggests that this understanding of the subject is historically untenable, and argues that we must remove the subject from its Modernist sovereignty as the originator of all social action and meaning. This particularly Western approach has only been made available to these populations because of the existence of Christianity, and the practices of pastoral guidance, spiritual discipline, and techniques of self-examination developed therein.[104] According to Foucault, our current understanding of the self 'is nothing else than the historical correlation of the technology built into our history'.[105] As such, the 'self' is not an objective reality, nor an unproblematic object of study — rather it is a historically contingent object of knowledge.[106]

Foucault demonstrates his argument by pointing to the understanding of the self that existed in Ancient Greece. According to Foucault, in Ancient Greek society, the 'self' was not something that people were to discover the truth of, renounce, or alternatively liberate. Rather, it was an end in itself — something that people were to continually work on and 'take care of', constantly constructing and reconstructing their own mode of 'being' or 'living'.[107] In the first few centuries CE, this way of understanding the self changed. Christian practices of self-examination and confession began to develop, and were initially utilised as

101 See generally Peter Callero, 'The Sociology of the Self' (2003) 29 *Annual Review of Sociology* 115, 117; Anthony Elliott, *Concepts of the Self* (Polity Press, 2008) 2; O'Farrell, above n 11, 110.

102 Patrick Hutton, 'Foucault, Freud, and the Technologies of the Self' in Luther Martin, Huck Gutman, and Patrick Hutton (eds), *Technologies of the Self: A Seminar with Michel Foucault* (University of Massachusetts Press, 1988) 121, 135.

103 Dean, 'Critical and Effective Histories', above n 75, 195.

104 Michel Foucault, 'Subjectivity and Truth' in Sylvère Lotringer and Lysa Hochroth (eds), *The Politics of Truth* (Semiotext(e), 1997) 171, 176; Ian Hunter, 'Assembling the School' in Andrew Barry, Thomas Osborne and Nikolas Rose (eds), *Foucault and Political Reason: Liberalism, Neo-Liberalism, and Rationalities of Government* (University of Chicago Press, 1996) 143, 158–9.

105 Foucault, 'Christianity and Confession', above n 46, 230.

106 Hutton, above n 102, 135.

107 This is not to say that Greek philosophers did not believe that there was an essential self as well as an objective truth. However, Foucault points out that this truth was not seen to be accessible simply through rational or scientific methods — one had to undertake a number of practices in order to give shape to a truth that was open-ended. See Michel Foucault, *The Hermeneutics of the Subject: Lectures at the Collège de France 1981–1982* (Picador, 2005) 14–19; Foucault, 'Care of the Self', above n 74; Eric Paras, *Foucault 2.0: Beyond Power and Knowledge* (University of Michigan, 2006) 138–9.

methods through which people could examine their 'desires of the flesh', with the ultimate goal being the decipherment and renunciation of these desires.[108] As it was assumed that people had a truth that they could discover through forms of introspection and self-examination, and with the spread of these practices beyond the church, the idea that people had a 'deep' or 'true' self emerged.[109] Although this latter concept of the self dominates in our culture, Foucault's point is that other relations to the self have existed, and are possible.

Although their end goal may have changed, many of the practices invented through which people were encouraged to work on themselves are still employed in a variety of fields today. These include the practices through which one maintains their physical health and body, keeps a journal of reflections, accepts forms of self-restraint or abstinence, and undertakes self-reflection to ensure one is achieving one's goals.[110] Foucault suggests that these practices are central in the exercise of power and in the construction of forms of identity, and refers to them as 'technologies of the self', in the sense that the term technology generally denotes the tools used in the construction, production, or operation of something.[111] These practices are usually suggested and held out to people by the culture, social group, or institution in which they are part and

> permit individuals to effect by their own means, or with the help of others, a certain number of operations on their own bodies and souls, thoughts, conduct, and way of being, so as to transform themselves in order to attain a certain state of happiness, purity, wisdom, perfection, or immortality.[112]

The primary purpose of these practices is to allow subjects to construct their identities in ways that will enable them to interact successfully within their culture, social group, or institution.[113]

In addition to specific techniques, a person's relationship to various truths is also a central part of the construction of forms of identity. In giving shape to the modern self, people often rely on discourses and bodies of knowledge that have the status of 'truth' and which offer people a 'true' understanding of themselves, such as psychology. These truths inevitably result in effects of power, as they are utilised by people in exercising power over themselves, or used by those exercising power over people on a broader scale. Additionally, people are often encouraged to adopt practices that allow them to grasp or access their own truth and use this self-knowledge to shape the construction of their own identity. Examples of these practices, wherein a person constructs themselves as an object of knowledge *for themselves*, include techniques of confession that encourage people to state the

108 Paras, above n 107, 139.

109 Ibid 140.

110 Elizabeth St Pierre, 'Care of the Self: The Subject and Freedom' in Bernadette Baker and Katharina Heyning (eds), *Dangerous Coagulations? The Uses of Foucault in the Study of Education* (Peter Lang Publishing, 2004) 325, 340.

111 Kendall and Wickham, above n 50, 53.

112 Foucault, 'Technologies of the Self', above n 58, 225.

113 Foucault, 'Ethics of the Concern for the Self', above n 85, 291.

'truth' about themselves (particularly the form of their own faults and desires), and change their actions on the basis of such a truth.[114]

In all, Foucault argues that the formation of identity is partly constructed through specific techniques that have been adopted and put into practice by the subject themselves, relations between the person and truth, and power relations that operate upon people. As such, the subject must not be considered a substance, but a form: it 'is never given to itself, but formed, organised, shaped, and, indeed, dislocated within diverse modalities of practice',[115] and is therefore always subject to being 'dissolved and recreated in different configurations'.[116] This perspective 'replaces the commonsense notion that our identity is the product of our conscious, self-governing self and, instead, presents individual identity as a product of discourses … and institutional practices'.[117] As such, it provides an important lens through which to examine the critical narrative.

As we have already seen, the critical legal narrative suggests that law students are indoctrinated by ideologies, and that the legal profession and legal academics exercise power over students in the construction of their legal identity. The reason that Foucault's work is useful in interrogating the critical narrative is because it does not assume a passive or docile subject upon which power operates. Critical scholars do not incorporate the active agency or notions such as the freedom of those within relations of power to any significant extent.

An example of this is the suggestion within the critical narrative that law schools are essentially disciplinary institutions that simply 'write' on the docile bodies of law students, so that they may 'think like a lawyer'.[118] The argument that power operates to indoctrinate students not only relies on the assumption that a human nature or an historically stable and unchanging human 'essence' exists to be repressed (already demonstrated to be untenable on a number of accounts), but also the assumption that power relations simply act *upon* people.

In many cases, critical legal scholars imply that law students have 'real' interests, and these interests appear to be to address social disadvantage, ensure the protection of human rights, and overturn unjust structures of power in everything that they do (in fact, critical scholars assume these are the interests of all humans in general). Failure to do so implies that one is not acting authentically, and is not being true to oneself. This is especially so if the student is socially disadvantaged — that is, a female student, an indigenous student, or one from any disadvantaged social minority. Many critical analyses imply that the socially disadvantaged

114 Dean, 'Critical and Effective Histories', above n 75, 175; Foucault, 'Will to Knowledge', above n 71, 61–2; Paras, above n 107, 112, 116; Rose, above n 75, 240. These techniques of confession have gone beyond the initial Christian context in which they developed, and have spread through a number of other social sites. Foucault states that today 'one of the main moral obligations for any subject is to know oneself, to tell the truth about oneself, and to constitute oneself as an object of knowledge both for other people and for oneself'. Incidentally, the examination of conscience, and the confession are important practices, as they can be considered the beginnings of forms of self-examination that exist today when we are encouraged to 'confess' in a variety of spheres such as medicine, education, and justice. See Foucault, 'Subjectivity and Truth', above n 104, 183.

115 Dean, 'Critical and Effective Histories', above n 75, 195.

116 O'Farrell, above n 11, 113.

117 Geoff Danaher, Tony Schirato and Jen Webb, *Understanding Foucault* (Allen & Unwin, 2000) xiv–xv.

118 Thornton, *Dissonance and Distrust*, above n 7, 80.

reluctantly take on dominant norms when constructing their identity, against their better judgment, their own humanity, or the interests of their gender, race, class, or sexuality. These people are often understood as 'sell-outs' who do not fully understand their interests, or are trying to forget their disadvantaged past. For example, in an analysis of law schools, feminist critical scholars do not discount 'the desire of some law students from diverse cultural backgrounds to be quiescent, anonymous and assimilable', who, they argue, might 'go to law school because they wish to make a successful career in law and to erase any memory of perceived disadvantage as quickly as possible'.[119] These scholars do also note that 'the process of transformation [may be] facilitated with [the student's] consent',[120] but nevertheless still imply that such choices are made reluctantly, and not entirely actively. The implicit conclusion drawn is that if such influences were removed, law students would inevitably become politically engaged.[121] This assumes a passive subject with real interests that is simply acted upon and determined by power relations.

However, it is important to recognise that, following Foucault's line of argument, politically conservative and socially apathetic legal identities are produced through *active* relations to the self. For example, female students who develop a 'masculine' professional identity have undertaken such a construction of their own selves, and have not simply been indoctrinated, nor are they necessarily doing it against their own wishes. As such, coupled with the use of terms such as repression and indoctrination, the active agency of law students in constructing their own legal identities (especially in a politically apathetic and non-idealistic manner) is difficult for the critical perspective to conceptualise and explain, let alone embrace. The active agency of subjects within power relations is central, and any examination of the way in which the law student's legal identity is constructed must account for the potential for resistant actions, and thus the production of different legal identities. Foucault's understanding of the self opens up such avenues of inquiry.

Recognising these notions of freedom, autonomy and resistance as central presents a significant development from the critical narrative. Foucault's notion of the subject — and its recognition of the positive and active role that people play in constructing their identity through specific techniques and practices, according to particular types of knowledge, and for particular ends — can account for the possibility that students from 'disadvantaged' backgrounds can construct 'conservative' legal identities and those from 'advantaged' backgrounds can construct 'socially idealistic' legal identities. It is for this reason that Foucault's approach to the subject is useful if one is to unpack the critical legal narrative, and construct political actions that do not rely on its assumptions. People *can* act within power relations, be governed by them *to some extent*, yet still not be entirely *determined* by them. It is also important to recognise that power relations can be changed by something as relatively minute as changing one's relation to their self — political action does not always need to be directed towards abstract notions such as the state or the law school as an 'institution'. Simply by encouraging

119 Ibid 81.

120 Ibid 79–80.

121 Ibid 79.

students to engage with different truths about legal education, maintain a social justice perspective in their actions, and create different, potentially viable, legal identities, the power relations of legal education can be directed by students themselves in very specific and effective ways.

IV CONCLUSION

Many legal education scholars, motivated by the desire to understand why some law students, upon graduation, take jobs in corporate practice despite entering legal education with 'altruistic aspirations geared toward public service',[122] have adopted a critical narrative to explain this process. This critical narrative suggests that law students are ideologically indoctrinated by the content of legal education. It is argued that the curriculum is composed of messages that uphold the dominance and advantage of the legal profession, and prevent a critical discussion of the social and legal status quo. The power to govern students is understood to be held by the legal profession, and to some extent legal academics, and exercised upon law students, particularly through the selection of specific teaching methods, assessment techniques, and classroom practices that render students as passive, uncritical vessels for this ideology. In the process, critical scholars argue that the law student's real interests are repressed, and as a result, students develop a cynical attitude towards the ability of the law to achieve social change, thereby losing any social idealism they held when they began their legal studies.

This paper has used Foucault's work on knowledge, power, and the subject in order to pull apart this critical narrative, examine its underpinning assumptions, and offer a different way of thinking about the way law students are governed through legal education. Its primary focus has been laying bare these assumptions, and not with developing an alternative explanation for the loss of idealism. In particular, it has outlined how the idea of repression through ideological indoctrination can be considered differently by thinking about discourses and considering these as neither true nor false, but having different effects of truth on people. It has also examined the assumption that the legal profession holds power and exercises it in a negative way over law students, by thinking about power as something that is exercised through social relations and operates in a productive manner. Finally, it has suggested that the subject ought not to be taken for granted as possessing an essential self, nor seen as a passive object that simply reflects the dictates of power, but should be understood as an agent that has a measure of freedom to act within the power relations that govern the construction of their identity.

The purpose of this paper is not to argue that the critical legal narrative has been unproductive and useless. As discussed earlier, the critical legal narrative *has* been productive in bringing to light many of the power relations in legal education, and has drawn the attention of researchers to the way in which legal education has an effect on the construction of the legal identity. However, as

122 Schleef, above n 1, 157.

this discussion has shown, the assumptions that underpin the arguments of many critical scholars in their analyses of legal education, as well as their suggestions for political action to change the situation, are often historically untenable, or prevent a much more nuanced and effective understanding of power relations that may be useful if change is to be effective. Without taking into account the different way of thinking about the construction of the legal identity that has been presented here, those hoping to alter legal education are unlikely to problematise certain techniques of power (such as the use of 'neutral' and pedagogically sound techniques), may even rely on these techniques in their political actions, or may fail to move beyond the current understandings of the subject that perpetuate existing arrangements of power. If political action continually seeks to foster the expression of the student's 'real' interests, or their own 'truth', then this political action is likely to reproduce power relations that have told us what and who we are. Instead of being liberating people, these truths about human nature restrict possibilities for new ways of relating to others, and new social forms.

As such, the use of Foucault's tools to examine the critical legal narrative has not been intended simply as a theoretical exercise of no real import to legal education. Rather, as shown here, unpacking this critical scholarship can directly contribute to ongoing debates about the construction of the legal identity, and refresh those debates in original ways. The more general absence within legal education scholarship of a direct concern with the power relations of legal education, coupled with the problems posed by the last remnants of critical approaches to power in this context, highlight the importance of considering the construction of the legal identity from a new angle. This paper provides one useful and effective perspective for doing so.

It is beyond the scope of this paper to provide a further discussion of the way in which Foucault's work (and that of others who have developed his thought) can be used in further analyses of legal education. As this paper has demonstrated, the critical legal narrative is ultimately concerned with the way in which the legal identity is governed. As such, one potential avenue for legal education scholarship would be to utilise Foucault's concept of 'governmentality' within future research.[123] This concept offers an original and nuanced way of understanding

123 There is a substantial and growing secondary literature that uses this notion of governmentality in a range of ways. See for example, Dean, *Governing Society*, above n 71; Dean, *Governmentality*, above n 11; Peter Miller and Nikolas Rose, *Governing the Present: Administering Economic, Social, and Personal Life* (Polity Press, 2008). See also the edited collections Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault Effect: Studies in Governmentality* (University of Chicago Press, 1991); Andrew Barry, Thomas Osborne and Nikolas Rose (eds), *Foucault and Political Reason: Liberalism, Neo-Liberalism and Rationalities of Government* (University of Chicago Press, 1996); Mitchell Dean and Barry Hindess (eds), *Governing Australia: Studies in Contemporary Rationalities of Government* (Cambridge University Press, 1998). Additionally, there are a number of texts that apply this concept of governmentality to education. See the work collected in Stephen J Ball (ed), *Foucault and Education: Disciplines and Knowledge* (Routledge, 1990); Andreas Fejes and Kathy Nicoll (eds), *Foucault and Lifelong Learning: Governing the Subject* (Routledge, 2008); Michael A Peters et al (eds), *Governmentality Studies in Education* (Sense Publishers, 2009); Michael A Peters and Tina Besley (eds), *Why Foucault? New Directions in Educational Research* (Peter Lang Publishing, 2007); Thomas S Popkewitz and Marie Brennan (eds), *Foucault's Challenge: Discourse, Knowledge, and Power in Education* (Teachers College Press, 1998).

how people are governed by institutions, other individuals, and themselves, which is based on Foucault's work on knowledge, power, and the subject, and can therefore build on the groundwork provided in this paper. However, this is the object of future research[124] — this paper simply seeks to open the door to such analyses within the field of legal education.

124 For some initial formulations in this vein, see Matthew Ball, 'The Construction of the Legal Identity: "Governmentality" in Australian Legal Education' (2007) 7 *Queensland University of Technology Law and Justice Journal* 444; Matthew Ball, 'Foucault Goes to Law School: Using Foucault to Examine Australian Legal Education' (Paper presented at Foucault: 25 Years On, Centre for Post-Colonial and Globalisation Studies, University of South Australia, 25 June 2009) <http://www.unisa.edu.au/hawkeinstitute/publications/foucault-25-years/ball.pdf>; Matthew Ball, 'Governmentality and the Reflection of Legal Educators: Assessment Practices as a Case Study' (2010) 44 The Law Teacher 267; Matthew Ball, 'Governing Depression in Law Students and the Shaping of Legal Personae' (Paper presented at Social Causes, Private Lives: The Australian Sociological Association Annual Conference, Macquarie University, 6 – 9 December 2010) <http://eprints.qut.edu.au/39129/3/39129.pdf>.