

**Foucault goes to law school: using Foucault to examine
Australian legal education**

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Abstract

This paper will consider the way that Foucault's work has been utilised to examine Australian legal education, particularly in the context of understanding the construction of the legal identity. While remaining sensitive to the many potential 'uses' of Foucault's tools, as well as his problematisation of the author as an organising feature of discourse, this paper will argue that legal education scholarship overwhelmingly utilises concepts such as 'discourse' and 'power-knowledge', which, while useful, cannot provide a nuanced understanding of the construction of the legal identity. Consequently, this paper suggests that future legal education research utilise Foucault's concepts of 'ethics' and 'governmentality' to address these issues.

Introduction

Critical legal education scholars have sought to understand the effect that law schools have on the ‘legal identity’ students develop – particularly exploring why students ‘lose’ any ideals they may hold when entering law school (Allen & Baron 2004; Carroll & Brayfield 2007; Colby et al. 2003; Economides 1997; Schleef 2000; Sheldon & Krieger 2007; Stone 1997). Such research is underpinned by critical Marxist assumptions about power, and inevitably suggests that legal education involves ideological indoctrination of law students by the legal profession (see Ball 2008; 2007b; 2006).

Foucault’s tools can be used to move past these critical approaches; however, to date, legal education researchers using Foucault have not moved far beyond critical legal theorising. Primarily, these analyses employ tools such as ‘discipline’ and ‘power-knowledge’ to interrogate the construction of the legal identity. This paper will argue that using *only* these tools produces similar conclusions to those of critical theorists. It will conclude by suggesting that these limitations can be addressed in future research by using Foucault’s tools of ‘governmentality’ and ‘ethics’.

Foucault goes to law school

Legal scholars have primarily used Foucault’s ‘middle’ works – particularly *Discipline and punish* (Foucault 1991) and his interviews in *Power/knowledge* (Gordon 1980) – to understand the construction of the legal identity. In *Dissonance and distrust: women in the legal profession*, Margaret Thornton suggests ‘that law school constitutes a disciplinary regime in which the student is taught “to think like a lawyer”’ (1996, p. 80). In particular, Thornton adopts Foucault’s work on power and discipline to unpack the power relations that ‘make’ female law students lose their social ideals, and push them towards the norm provided by what she terms ‘benchmark men’ (that is, advantaged white male legal professionals). Thornton suggests that the intellectual docility of law students is important to the success of this process: ‘While law students may not be subjected to the relentless physical discipline of cadets in a military academy, there is nevertheless an expectation of intellectual docility’ (1996, p. 79).

Nickolas James has also utilised the concepts of discipline and normalisation to explain the construction of subjects, as part of his broader use of power-knowledge to examine

Australian legal education as a discursive field (James 2006; 2004a; 2004b; 2004c; 2004d; 2004e; 2004f). For example, he suggests that professionally skilled legal identities are produced because vocational discourses are *normalised*: ‘Subjects accept these truths not because they are compelled but because it is normal to do so, and to fail to do so would be abnormal’ (James 2004e, p. 164). He also suggests that observation and rewards for compliance are central in constructing the legal identity (James 2004d, pp. 604–605).

Used here, these classic Foucauldian tools produce analyses similar to those of critical theorising. For example, Thornton maintains a proprietary and repressive conception of power by arguing that male professionals have the power to define and impose the standard against which students are normalised, and do so to maintain professional privilege (1996, p. 79). Additionally, Thornton implies that students are passive to the operation of power upon them, and that many are eager ‘to be quiescent, anonymous and assimilable’ (p. 81). There is no consideration of the productive aspects of power here, nor any attempt to examine the way subjects are active in the operation of power and the construction of subjectivities.

In James’ work, Foucault’s tools are used much more effectively, but not for the specific purpose of understanding the legal identity. James still suggests that legal identities are constructed primarily through disciplinary regimes of power-knowledge, and therefore does not move far from the conclusions about power made by critical theorists. However, his analysis *does* outline the subject positions that these discourses produce for students to take up, such as the legal knower, the skilled professional, the good student or the agent of social change (see further James 2006; 2004a; 2004e; 2004f). One can extrapolate from this the targets of governance that must be acted upon to produce these subjects, such as the student’s legal knowledge, skills capabilities, learning experiences and political consciousness. This recognition that the legal identity is situated in a discursive field challenges the critical assumption that power operates on a stable and essential self. It also maintains that it is possible for students to construct numerous and potentially contradictory legal identities at once – they do not necessarily become conservative professionals. However, as James does not investigate the construction of the legal identity *per se*, these conclusions are not immediately apparent in his work.

Breaking from the critical approach

This paper argues that by only using Foucault's tools of discipline and power-knowledge, these analyses cannot fully account for the construction of legal identities within liberal societies, where governance is achieved through freedom and not solely disciplinary power (Rose 1999). It suggests that Foucault's tools of 'governmentality' (concerned with the rationalities and practices of governing people) and 'ethics' (covering the importance of the freedom and active role of subjects in constructing subjectivities) offer a useful basis for further Foucault-inspired legal education research, and prevent it from reproducing critical analyses. Initial research using these concepts (following the works of Dean (1999) and Nikolas Rose and Peter Miller (1992)) has provided some insights in this vein; however there is wide scope for further explorations (see Ball 2008; 2007a; 2007b; 2006).

For instance, governmentality can be used to analyse law schools as assemblages of practices through which governance is *rationalised* and *practised* in a range of ways – such as through graduate capabilities frameworks, legal clinics and student competitions (Ball 2008; 2007b; Dean 1999; Rose & Miller 1992). Analysing the statements of graduate attributes of Australian university law schools shows that the creation of both socially just and professionally skilled legal identities feature within the rationalities underpinning these approaches to governance. They also suggest that legal education does not solely consist of professional indoctrination. For example, some Australian universities hope to produce graduates with 'skills, knowledge and abilities' (UQ 2006a, p. 21), 'moral and ethical competenc[ies]' (QUT 2003, pp. 8, 12), and an appreciation of 'equity and social justice' (GU 2004). Furthermore, using governmentality to look at the way governance is actually practiced brings to light the way that many law classrooms are arranged as 'learning environments', where students are *responsibilised* to actively participate in their education, and teachers are to *facilitate* this learning (UQ 2006b, p. 5; QUT 2005, p. 4; GU 2005, point 1.0). Rather than suggesting legal education indoctrinates and disciplines docile students into becoming conservative legal identities, this perspective recognises that some power relations are only successful to the extent they encourage students to be active, which points to resistance within, and the 'congenitally failing' (Rose & Miller 1992, p. 190) nature of, these power relations.

Additionally, Foucault's concept of ethics, and his suggestion that one interrogate 'prescriptive texts' that provide advice about how people may govern their own conduct (Foucault 1990, p. 13), allows legal education researchers to investigate the way students are active in constructing their legal identities. Examining the advice students receive on 'surviving' law school and successfully studying the law (see for example Brogan & Spencer 2005; Corkery 2002; Smith 2002) can highlight the techniques students are encouraged to use to produce their subjectivity. For example, these texts suggest students reflect on whether they are studying law for socially just reasons (Brogan & Spencer 2005, p. 14; Corkery 2002, p. 17), and adopt particular ways of speaking, standing, and otherwise physically embodying the legal identity in order to effectively present the client's case, whilst maintaining political neutrality (Smith 2002, pp. 90–93; Corkery 2002, p. 248). Such an examination can also identify the multiple discourses students are encouraged to engage with to gain direction in this process, including not just professional discourses, but also liberal discourses that present the defence of democratic freedoms and the achievement of social justice as central to the legal identity. For example, *Starting law* (Corkery 2002, p. 17) encourages students to keep in mind that '[the l]aw and justice are the custodians of liberty' and that '[l]awyers spend much time protecting the liberty of the individual and guarding civil rights'. Demonstrating that students actively fashion their legal identities, and engage with more than professional discourses in doing so, would push legal education research beyond the suggestion that law schools are simply disciplinary regimes, and highlight that students can shape their subjectivity in ways that resist attempts to govern.

Conclusion

This paper has suggested that by utilising Foucault's 'tools' of governmentality and ethics *in conjunction with* discipline and power-knowledge, a more effective and nuanced approach to understanding the construction of the legal identity throughout legal education can be developed. Doing so would address some of the limits of the current legal education scholarship using Foucault discussed above. Such a project is urgent if these tools are to be used as Foucault suggested – to effectively 'short-circuit [and] discredit systems of power' (Foucault, cited in Mills 2003, p. 7) – and not simply to reproduce the conclusions reached by critical scholars.

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