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Edited by Professor Michael Adams, Professor David Barker AM and Ms Samantha McGolrick  
Associate Editor Janet Fox

**ALTA Secretariat**

PO Box 222

Lindfield NSW 2070

AUSTRALIA

Tel: +61 (2) 9514 5414

Fax: +61 (2) 9514 5175

[admin@alta.edu.au](mailto:admin@alta.edu.au)

[www.alt.edu.au](http://www.alt.edu.au)

**LEGAL EDUCATION AND THE 'IDEALISTIC STUDENT':  
THE NEED FOR A 'GOVERNMENTAL' ANALYSIS**

**MATTHEW BALL\***

It has been widely argued within the legal education literature that few of the students that enter legal education with the hopes to pursue 'socially idealistic' aims (such as fighting for social justice, or addressing social disadvantage) go on to actually pursue these aims in legal practice. The narrative that seeks to explain this shift in the graduate's 'working legal identity' is the critical legal perspective. This posits that a student's ideals are repressed through ideological indoctrination and learning experiences which create passive receptacles into which legal professional ideology can be deposited.

By utilising the work of the French philosopher Michel Foucault, this paper seeks to examine some of the assumptions upon which this narrative is based, including the notions of ideology, the operation of power and the role of the subject. Doing so ought to provide a catalyst for examining the development of a law student's 'working legal identity' in a different way.

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\* PhD Candidate, School of Justice, Faculty of Law, Queensland University of Technology, Australia.

## **I INTRODUCTION: THE 'IDEALISTIC' LAW STUDENT**

A number of studies into the motivations of students undertaking law degrees indicate that upon graduation, many hope to practice law in the public interest, or for other goals that could be broadly defined as 'socially idealistic' (such as fighting for social justice, or addressing social disadvantage).<sup>1</sup> What becomes apparent, however, is that legal education does not foster these social ideals, and consequently relatively few of these idealistic students go on to actually pursue these aims in legal practice.<sup>2</sup> In fact, many students become vocationally oriented, cynical about the ability of the law to achieve social change, experience alienation and silencing,<sup>3</sup> or more extreme problems with their mental and physical health.<sup>4</sup>

The understanding that legal education can cause students to develop such cynicism has had an important effect within legal education literature. It has made the project of legal education uncertain; '[making] it lose familiarity, ...[provoking] a certain number of difficulties around it', and allowing a law student's political consciousness, their 'knowledge' of the law, and the lens through which they view the role of the law in society (referred to further as their 'working legal identity') '...to enter into the domain of thought'.<sup>5</sup> It has caused this to become an object of reflection, the focus of research, and something upon which to intervene and consequently shape in alternative ways, by academic, professional or governmental actors. In short, it has problematised the formation of the law graduate's political consciousness.

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<sup>1</sup> Judy Allen and Paula Baron, 'Buttercup goes to Law School: Student Wellbeing in Stressed Law Schools' (2004) 29 *Alternative Law Journal*, 285, 286; 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 Trubek, 'Social Values from Law School to Practice: An Introductory Essay' in Jeremy Cooper and Louise Trubek (eds), *Educating for Justice: Social Values and Legal Education* (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.

<sup>2</sup> Schleef, above n 1, 157. As Schleef states, 'the trend away from a social justice orientation while in law school has been widely documented'.

<sup>3</sup> Ibid.

<sup>4</sup> Sheldon and Krieger cited in Allen and Baron, above n 1, 285-6. These included a decline in life satisfaction and wellbeing, or the development of depression.

<sup>5</sup> Michel Foucault, 'Problematics' in Sylvère Lotringer (ed), *Foucault Live: Collected Interviews, 1961-1984* (1996) 416, 421.

As a result of this problematisation, the major concern among many legal education researchers (which Schleef describes as their 'Holy Grail'),<sup>6</sup> has become the desire to understand why law students, upon graduation, take jobs in corporate practice despite entering legal education with 'altruistic aspirations geared toward public service'. Although they will only briefly be touched on here, answers to this question from within the legal education literature focus generally on three central elements. Simply stated, it is suggested that:

- External pressures, chiefly the legal profession, narrowly constrain the content of legal education,<sup>7</sup> particularly the compulsory subjects (known colloquially as the Priestley 11)<sup>8</sup> which becomes even more apparent and pervasive as universities align themselves to market discourses, user-pays philosophies, and thus pay heed to student and employer demands;<sup>9</sup>
- As this content therefore overwhelmingly reflects the dominant (primarily corporate or pro-business) interests of the legal profession, it constitutes a form of ideological indoctrination which desensitises students to concerns for social justice,<sup>10</sup> and thus;

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<sup>6</sup> Schleef above n 1, 157.

<sup>7</sup> Alan Hunt, 'The Case for Critical Legal Education' (1986) 20 *The Law Teacher* 10, 11; Rob Guthrie and Joseph Fernandez, 'Law Schools in the 21<sup>st</sup> Century' (2004) 29 *Alternative Law Journal* 276, 277; Mary Keyes and Richard Johnstone, 'Changing Legal Education: Rhetoric, Reality, and Prospects for the Future' (2004) 26 *Sydney Law Review* 537, 555; Margaret Thornton, *Dissonance and Distrust: Women in the Legal Profession* (1996) 75; Martin Tsamenyi and Eugene Clark, 'An Overview of the Present Status and Future Prospects of Australian Legal Education' (1995) 29 *The Law Teacher* 1, 4, 8.

<sup>8</sup> Keyes and Johnstone, above n 7, 557; Thornton, above n 7, 77

<sup>9</sup> Anne Bottomley, 'Lessons From the Classroom: Some Aspects of the 'Socio' in 'Legal' Education' in Philip Thomas (ed), *Socio-Legal Studies* (1997) 163, 180; Keyes and Johnstone, above n 7, 554, 548-549; Margaret Thornton, 'The Idea of the University and the Contemporary Legal Academy' (2004) 26 *Sydney Law Review* 481, 483; Ian Ward, *Introduction to Critical Legal Theory* (2<sup>nd</sup> ed, 2004) 148.

<sup>10</sup> Kennedy (cited in Adrienne Stone, 'Women, Law School and Student Commitment to the Public Interest' in Jeremy Cooper and Louise Trubek (eds), *Educating for Justice: Social Values and Legal Education* (1997) 56, 61) argued that law school provides students with 'ideological training for willing service in the hierarchies of the corporate welfare state', Příbáň stated that legal education reproduces a 'false consciousness' within students, (Jiri 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* (2002) 119, 127) while Gabel and Kennedy (in Ward, above n 9, 147) argued that without noticing it, law students adopt an 'ideological framework', because law school trains students to be lawyers, not 'real people' (Getman, in Ward above n 9, 149).

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- This indoctrination occurs not only through the actual law curricula, but also through the ‘hidden curriculum’ that exists within the law school, consisting of teaching methodologies that create passive students,<sup>11</sup> classroom atmospheres that foster competition between students<sup>12</sup> and set implicit boundaries on debate,<sup>13</sup> social hierarchies within the law faculty to which students must defer, and messages implicit within interaction with peers that encourage students to make certain educational choices.<sup>14</sup>

This paper seeks to examine some of the foundational elements of these claims, primarily the notions of ideology, the conceptualisation of power, and the role of the subject<sup>15</sup> inherent within these arguments. Each will be unpacked further below utilising the work of the French philosopher and historian Michel Foucault. Fundamentally this paper seeks to argue that these conceptual deficiencies coalesce under what could be considered a limited notion of governance. Although due to space restrictions Foucault’s notion of ‘governmentality’ will not be discussed, this paper intends to at least lay the groundwork for this as a possible direction for legal

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<sup>11</sup> Such as lectures in which legal content is uncritically presented to passive students, and students are assessed through methods in which their legal knowledge is simply to be regurgitated. See for example Hilary Charlesworth, ‘Critical Legal Education’ (1988-89) 5 *Australian Journal of Law and Society*, 27, 30; 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* (1995) 86, 106; Richard Johnstone and Sumitra Vignaendra, *Learning Outcomes and Curriculum Development in Law: A Report Commissioned by the Australian Universities Teaching Committee* (2003) Australian Universities Teaching Committee [395, 463]

<[http://www.autc.gov.au/projects/completed/loutcomes\\_law/split\\_pdf.htm](http://www.autc.gov.au/projects/completed/loutcomes_law/split_pdf.htm)> at 15 January 2007; Thornton, above n 7, 78; David Weisbrot, ‘Taking Skills Seriously’ (2004) 29 *Alternative Law Journal* 266, 267.

<sup>12</sup> Allen and Baron, above n 1, 285-6; Webb, above n 1, 287.

<sup>13</sup> Kevin Dolman, ‘Indigenous Lawyers: Success or Sacrifice?’ (1997) 4 *Indigenous Law Bulletin* [13-17] <<http://www.austlii.edu.au/au/journals/ILB/1997/69.html>> at 22 February 2007; Heather Douglas, ‘The Participation of Indigenous Australians in Legal Education 1991-2000’ (2001) 24 *University of New South Wales Law Journal* [11]

<<http://www.austlii.edu.au/au/journals/UNSWLJ/2001/32.html>> at 22 February 2007; Thornton, above n 7, 93, 104.

<sup>14</sup> Bottomley, above n 9, 177; Thornton, above n 9, 495

<sup>15</sup> See, eg, when utilising the concept of the subject, Foucault is referring to the individual person subjected to some form of power, and not a particular unit within a law degree.

education research, one that could address the conceptual deficiencies outlined here.<sup>16</sup>

## **II LOOKING DIFFERENTLY AT THE CRITICAL NARRATIVE**

Building from the arguments of the critical legal perspective<sup>17</sup> outlined above, it is posited that the interests held by idealistic students are repressed by the legal professional ideologies deposited within them. The end result is a student that has been indoctrinated to think that the law operates rather well, and only requires tinkering at the edges every now and then in order to improve it.<sup>18</sup> The corollary of this argument is 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 reflectiveness 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, their ‘real’ nature as socially active legal professionals would be allowed to express itself and they would actively engage in campaigning for social justice.

Such conclusions, by virtue of their development from within the critical legal narrative (and their attempt to provide support for the political claims of this perspective), perhaps have more to do with propagating radical legal discourses<sup>19</sup> than reflecting a useful way of looking at how law students are governed. As such, a number of assumptions are relied upon, which Foucault’s work allows one to think differently about. It is to this different way of thinking that this paper will now turn.

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<sup>16</sup> For broad introductions to Foucault’s thought, including the notion of ‘governmentality’, see generally Sara Mills, *Michel Foucault* (2003); Clare O’Farrell, *Michel Foucault* (2005). As this paper outlines continuing research, the way that ‘governmentality’ might be used in the field of legal education will be the subject of future discussion.

<sup>17</sup> It is important to state that this discussion does not seek to essentialise the critical legal perspective; there are a number of theoretical perspectives that are referred to by the umbrella term. However in relation to theorising the development of cynicism within idealistic law students, critical analyses predominate and primarily utilise these explanatory tools.

<sup>18</sup> Charlesworth, above n 11, 31; Simpson and Charlesworth, above n 11, 107.

<sup>19</sup> See Nickolas James, *Power-Knowledge and Critique in Australian Legal Education 1987-2003* (PhD Thesis, Queensland University of Technology, 2004) 246, 249-50.

***A Repression through Ideology***

In arguing that the ideology presented to students represses their real interests via a false knowledge of the law, the critical legal perspective primarily assumes that students have ‘real’ interests, and that these interests have been repressed. The notion of ideology assumes that a universal human subject exists who would have access to knowledge of a universal and transcendental truth if social institutions had not imposed ideological constructions upon them, or caused the development of a false consciousness within them.<sup>20</sup> This view suggests that there exists a pre-given human subject that has a consciousness that power subsequently seizes upon.<sup>21</sup> From this perspective, ideology is a negative element through which ‘...the knowledge relation, is disturbed, obscured, veiled by the conditions of existence, social relations, or the political forms imposed on the subject from the outside’.<sup>22</sup> Instead, to Foucault, the body was the ‘inscribed surface of events’,<sup>23</sup> as he stated,

[t]he individual is not to be conceived as a sort of elementary nucleus...on which power comes to fasten or against which it happens to strike, and in so doing subdues or crushes individuals. In fact, it is already one of the prime effects of power that certain bodes, certain gestures, certain discourses, certain desires, come to be identified and constituted as individuals.<sup>24</sup>

Here, Foucault argues that there is no human subject that understands the world perfectly at some stage in their life and can fully express their ‘real’ interests, who, as ideological relations subsequently blankets them in layers of falsity, experiences the repression of such interests. Instead, the individual and the coherent and systematic structures of ideas with which they understand the world cannot be considered separately, as neither can be said to exist prior or external to social relationships.

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<sup>20</sup> O’Farrell, above n 16, 98.

<sup>21</sup> Michel Foucault, ‘Body/Power’ in Colin Gordon (ed), *Power/Knowledge: Selected Interviews and Other Writings 1972-1977* (1980) 55, 58; See also, Michel Foucault, ‘Truth and Power’ in Colin Gordon (ed), *Power/Knowledge: Selected Interviews and Other Writings 1972-1977* (1980) 109, 118.

<sup>22</sup> O’Farrell above n 16, 98.

<sup>23</sup> Mills, above n 16, 82, 83.

<sup>24</sup> Michel Foucault, ‘Two Lectures’ in Colin Gordon (ed), *Power/Knowledge: Selected Interviews and Other Writings 1972-1977* (1980) 78, 98.

Thus, political and economic conditions are not a veil for the subject of knowledge, but instead are central elements in the formation of such subjects.<sup>25</sup> A law student's identity is therefore not necessarily produced by that student's own consciousness, but is produced by the discourses through which they are provided an understanding of the world, and the relations of power inherent within them (the notion of discourse will be outlined below).<sup>26</sup> We therefore ought to see the individual as one of the *effects* of power.

The other primary assumption here is that the knowledge about the law provided to students is false. This is related closely to the idea that an individual's real interests are repressed, because only a false ideological knowledge could obscure 'real' interests to the advantage of a group or individual exerting unwarranted influence. The notion of ideology is primarily utilised in analyses that have intellectual and theoretical foundations within Marxism (such as the critical legal perspective) to refer to statements or ideas that are produced by or within institutions that influence the thinking and subsequent action of individuals, and which are then imposed in some form.<sup>27</sup> As Mills states, it usually describes

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.<sup>28</sup>

Thus, ideology assumes that a 'truth' and a 'falsity' exists (in this case a truth and falsity about the law) which can be taught in law school. As Foucault states, ideology 'stands in virtual opposition to something else which is supposed to count as truth',

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<sup>25</sup> Michel Foucault, 'Truth and Juridical Forms' in James Faubion (ed), *Power: Essential Works of Foucault 1954-1984: Volume 3* (2000) 1, 15.

<sup>26</sup> Michel Foucault, 'Technologies of the Self' in Paul Rabinow (ed), *Ethics: Subjectivity and Truth. Essential Works of Foucault 1954-1984: Volume 1* (2000) 223, 225.

<sup>27</sup> Mills, above n 16, 54.

<sup>28</sup> Ibid 34 [emphases added].

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’.<sup>29</sup> The concept of ideology maintains that knowledge and power are separate elements; that true knowledge is disinterested and can thus only exist externally to the distortions of power.<sup>30</sup> Conversely, it is relations of power that create false knowledge. However, by developing the concept of *power-knowledge*, Foucault could place at the centre of his analyses the power relations that are inherent in the production of *all* knowledge. (The alternative conception of power outlined by Foucault will be discussed further below.)

Foucault’s notion of discourse was a more useful concept than that of ideology, as it recognises that power and knowledge are joined. Discourses consist of either individual statements, or those grouped together, that have some sort of effect or meaning, and that are constituted by unwritten rules, structures and practices that determine and influence their content and production.<sup>31</sup> These rules, structures and practices are employed to keep certain statements in circulation, while attempting to displace other competing statements from different discourses. Power relations are inherent within the operation of these structures, and thus are important in the production of a discourse’s ‘truth’. Therefore, no single discourse has a purchase on an external and neutral truth. Instead, in their operation, discourses play a *productive* role in that they structure an individual’s thinking, such as by presenting a coherent way of looking at and understanding the world.<sup>32</sup> As an individual’s statements, thoughts and actions are influenced and regulated to a certain extent through discourses, they play an important role in the *creation* of a subject.<sup>33</sup>

As such, because all discourses employ relations of power to produce different ‘truths’ (as well as different ‘falsehoods’), a false knowledge of the law cannot be presented to a student. Coupled with the recognition that individuals are the effects of

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<sup>29</sup> Foucault ‘Truth and Power’, above n 21, 118.

<sup>30</sup> David Hoy, ‘Power, Repression, Progress: Foucault, Lukes, and the Frankfurt School’ in David Hoy (ed), *Foucault: A Critical Reader* (1986) 123, 131.

<sup>31</sup> Mills, above n 16, 53.

<sup>32</sup> Ibid 56.

<sup>33</sup> Ibid 62.

such power relations and do not exist externally removed from them, an individual can have no 'real' interests that are able to be repressed by false knowledge of the law. As mentioned above, positing that law students have 'real' interests has more to do with furthering the image of the law student and the truths about the law that are propagated through radical discourse.<sup>34</sup>

### ***B Conception of Power***

In the above discussion, passing reference has been made to Foucault's alternative conception of power. This is another important place where the critical narrative can be examined in a different way by Foucault's work. According to Foucault, the dominant way of conceiving power is as something essentially repressive, as that which excludes or forbids, whose effect on those who are subjected to it is obedience, and which is bound with the state or other apparatus simply representative of class interests.<sup>35</sup>

This 'repressive hypothesis' of power can also lead one to see power as an activity that operates from the top-down, being a property held by a group or institution (such as the ruling class, the State or the legal profession), and consisting of oppressive actions upon passive and powerless individuals (such as by the legal profession upon law students).<sup>36</sup> Foucault saw this as an inadequate way of thinking about power because it did not consider the complex array of often quite specific mechanisms that operate within the apparatus that are normally associated with power (the State, the family, the school), as well as those not traditionally so associated. Nor does it allow one to take into account the numerous points of resistance or other blockages that occur in the operation of these mechanisms.<sup>37</sup>

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<sup>34</sup> See for example James, above n 19, 246, 249-50.

<sup>35</sup> Michel Foucault, *The Will to Knowledge: The History of Sexuality Volume 1* (1998) 82-85; Michel Foucault, 'Power Affects the Body' in Sylvère Lotringer (ed), *Foucault Live: Collected Interviews, 1961-1984* (1996) 207, 207, 210; Michel Foucault, 'Questions on Geography' in Colin Gordon (ed), *Power/Knowledge: Selected Interviews and Other Writings 1972-1977* (1980) 63, 72; Foucault, 'Two Lectures', above n 24, 90.

<sup>36</sup> Mills, above n 16, 34.

<sup>37</sup> Foucault 'Power Affects the Body', above n 35, 210.

Believing that ‘...power would be a fragile thing if its only function were to repress...exercising itself in a negative way’,<sup>38</sup> Foucault saw power as essentially something more positive and productive than mere repression and prohibition. Power is ‘...bent on generating forces, making them grow, and ordering them, rather than...dedicated to impeding them, making them submit, or destroying them’.<sup>39</sup> For example, the knowledge presented to an individual as a form of productive relations of power has already been discussed. Furthermore, the exercise of power plays an important role in producing methods for accumulating knowledge, tools for observation, and methods of control, thus ‘put[ting] into circulation a knowledge, or rather apparatuses of knowledge, which are not ideological constructs’.<sup>40</sup> As O’Farrell states, power ‘generates particular types of knowledge and cultural order’, as well as the behaviour of individuals through the regulation of their activities and other disciplinary mechanisms.<sup>41</sup>

Particularly relevant to Foucault’s rethinking of traditional notions of power is his intention to move away from the idea that power is centred in and held by the ruling class or the State. This line of thinking suggests that the operation of power would therefore represent an individual or collective ‘will’.<sup>42</sup> In contrast to this view, Foucault argues that power must be conceived as operating through numerous mechanisms that cannot be reduced to operating because of a single will, or emanating from a central point,<sup>43</sup> and cannot be solely analysed from the top down.<sup>44</sup> The operation of power may be intentional (that is, it may be calculated and have particular aims and objectives), but it is non-subjective (thus these aims and objectives do not necessarily originate in an individual will, or the design of a single actor).<sup>45</sup> Thus, the cynicism of idealistic law students cannot simply be said to occur because

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<sup>38</sup> Foucault ‘Body/Power’, above n 21, 59.

<sup>39</sup> Foucault ‘The Will to Knowledge’, above n 35, 136.

<sup>40</sup> Foucault, above n 24, 102.

<sup>41</sup> O’Farrell, above n 16, 100-1; see also Mills, above n 16, 36.

<sup>42</sup> Foucault ‘The Will to Knowledge’, above n 35, 92; Foucault ‘Power Affects the Body’, above n 35, 210. In the case of legal education, this could refer to the idea that the legal profession ‘holds’ such power over law students.

<sup>43</sup> Foucault ‘The Will to Knowledge’, above n 35, 93

<sup>44</sup> Joseph Rouse, ‘Power/Knowledge’ in Gary Gutting (ed), *The Cambridge Companion to Foucault* (1994) 92, 107.

<sup>45</sup> Foucault ‘The Will to Knowledge’, above n 35, 94.

the legal profession seeks only to create legal professionals in its own image: there are multiple historical and cultural contingencies upon which the present is based.<sup>46</sup>

***C Conception of the Subject: Docile Bodies and Active Subjects***

The conception of the subject is another central area in which Foucault's work differs to the critical narrative. This is where Foucault's ideas about power lead to a rethinking about the notion of the active subject, as his conception of power sees notions such as the freedom, autonomy and resistance within power relationships as important; something that traditional methods of conceptualising power do not comfortably allow for.

Foucault's later work led him to define power as the ability '...to structure the possible field of action of others'.<sup>47</sup> An individual or group exercises power when it is able to set limits upon, or conversely encourage in specific ways, the conduct of another individual; an individual that is recognised as one who is free to act and respond in different ways to this power.<sup>48</sup> As Foucault states,

[power] incites, it induces, it seduces, it makes easier or more difficult; it releases or contrives, makes more probable or less; in the extreme, it constrains or forbids absolutely, but it is *always a way of acting upon one or more acting subjects by virtue of their acting or being capable of action*.<sup>49</sup>

Therefore, if power is the structuring of the *possible field of action* of others, this implies that an individual has a number of possible options for action from which to

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<sup>46</sup> See, eg, ,although the law lecture and the closed-book examination often result in students becoming passive, uncritical and unreflective, these techniques cannot be said to be employed within legal education *because* of this. There are numerous factors that contribute to the use of a particular teaching or assessment methodology within the law classroom, such as resourcing issues. See also Johnstone and Vignaendra, above n 11, 322-6.

<sup>47</sup> Michel Foucault, 'The Subject and Power' in James Faubion (ed), *Power: Essential Works of Foucault 1954-1984: Volume 3* (2000) 326, 341.

<sup>48</sup> Ibid 340-341.

<sup>49</sup> Ibid 341 [emphasis added].

choose, and hence a relative degree of freedom.<sup>50</sup> Foucault clarifies that '[p]ower is exercised only over free subjects, and only insofar as they are 'free''.<sup>51</sup> Similarly, this idea of power assumes that an individual has the autonomy to choose between different courses of action. If this is the case, then there is also the potential for resistance to occur, allowing for power relations to be modified. In this way, Foucault sees resistance as '*the key word*, in this dynamic' because if resistance did not exist, nor would a power relation: rather it would be a state of obedience or domination.<sup>52</sup>

The incorporation of resistance into power relations, and the idea of an active subject, do not easily fit within the critical narrative. For example, this narrative suggests that legal education constitutes a disciplinary regime that inscribes upon the docile bodies of law students how to 'think like a lawyer', despite '...the process of transformation [being] facilitated with [the student's] consent'.<sup>53</sup> It primarily considers students who acquiesce to the professional ideology they are presented with as more free than those that acquiesce only in response to external pressures. Such views still posit that external influences such as market discourses and peer influences act upon students, but nevertheless assume that such choices are imposed in some way; that they are reluctantly chosen and that students are not actively constructing their own legal identities. The implicit conclusion drawn is that if these influences were removed, law students would inevitably become politically engaged. 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 (particularly in a politically apathetic and non-idealistic manner) is difficult for the critical perspective to comprehend, let alone embrace.

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<sup>50</sup> 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 1954-1984: Volume 1* (2000) 281, 292; Foucault, above n 47, 341.

<sup>51</sup> Foucault, above n 47, 342. Here, freedom refers to the ability to behave in a resistant manner and thus exercise power differently.

<sup>52</sup> Michel Foucault, 'Sex, Power and the Politics of Identity' in Sylvère Lotringer (ed), *Foucault Live: Collected Interviews, 1961-1984* (1996) 382, 386.

<sup>53</sup> Thornton, above n 7, 79-80.

Recognising notions of freedom, autonomy, and resistance as inherent within power relations provides an individual with the potential to play a positive role in developing their own selves. As such, they actively construct their identity by employing certain practices and techniques of the self, according to different types of knowledge and for particular ends.<sup>54</sup> These techniques of the self refer to those actions which

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.<sup>55</sup>

Thus the active agency of subjects is central, and any examination of the way in which the law student's 'working legal identity' develops must account for the potential for resistant actions, and thus the production of different legal identities. Recognising these notions of freedom, autonomy and resistance as central presents a significant development from the critical narrative.

### **III CONCLUSION**

This paper has demonstrated that, in thinking about the development of the law student's 'working legal identity', the work of Foucault differs from the critical narrative on three major grounds: the notions of ideology, power and the subject. For the critical narrative, these elements coalesce under a limited conception of governance: a limited way of conceptualising the knowledge to which individuals are subject, how external influences and interpersonal relations shape the creation of a 'working legal identity', and how an individual acts upon themselves and reacts to others in this process. This paper has sought to examine the conceptual foundations of this critical perspective.

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<sup>54</sup> Although there is no room here to discuss this further, this constitutes the direction that Foucault's work took in the early 1980s. See also Michel Foucault, 'On the Genealogy of Ethics: An Overview of Work in Progress' in Paul Rabinow (ed), *Ethics: Subjectivity and Truth. Essential Works of Foucault 1954-1984: Volume 1* (2000) 253; Michel Foucault, *The Use of Pleasure: The History of Sexuality Volume 2* (1990).

<sup>55</sup> Foucault, above n 26, 225.

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**Australasian Law Teachers Association - ALTA  
2006 Refereed Conference Papers**

Although it has not been discussed here, Foucault's notion of 'governmentality' provides a different way of thinking about governance that can address the conceptual limitations discussed above. How this notion can be utilised within legal education continues to be the object of further research; this paper simply seeks to open the door to the domain of such analyses within the field of legal education.