

# POWER IN LEGAL EDUCATION: A (NEW) CRITICAL AND ANALYTICAL APPROACH

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*This article explores power within legal education scholarship. It suggests that power relations are not effectively reflected on within this scholarship, and it provokes legal educators to consider power more explicitly and effectively. It then outlines in-depth a conceptual and methodological approach based on Michel Foucault's concept of 'governmentality' to assist in such an analysis. By detailing the conceptual moves required in order to research power in legal education more effectively, this article seeks to stimulate new reflection and thought about the practice and scholarship of legal education, and allow for political interventions to become more ethically sensitive and potentially more effective.*

## I INTRODUCTION

This article explores power within legal education. Power relations pervade the regime of practices that constitute legal education, operating in subtle but nevertheless concrete ways to shape the actions of students, teachers, professionals and administrators. Yet, despite their pervasiveness, legal education scholarship does not effectively grasp or explore power relations – they do not feature as objects of research in an explicit manner, and when they are considered, they are understood in problematic ways. This article seeks to provoke legal education scholars to consider and debate power more explicitly and more effectively. It offers a conceptual and methodological analytical approach, based on Michel Foucault's concept of 'governmentality' (and drawing from Nikolas Rose and Mitchell Dean's work extending this notion), that is ultimately concerned with bringing power relations to light, and allows them to be reflected upon and potentially changed in an original and more nuanced way than is common within legal education scholarship.

The present study contributes to an ongoing project using Foucault's work to explore specific problems in legal education, such as idealism within students,<sup>1</sup> assessment practices,<sup>2</sup> or depression among law students<sup>3</sup> (adding to a wider

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<sup>1</sup> Matthew Ball, 'Legal Education and the "Idealistic Student": Using Foucault to Unpack the Critical Legal Narrative' (Forthcoming) *Monash University Law Review*; Matthew Ball, 'Becoming a "Bastion Against Tyranny": Australian Legal Education and the Government of the Self' (Forthcoming) *Law and Critique*.

<sup>2</sup> Matthew Ball, 'Governmentality and the Reflection of Legal Educators: Assessment Practices as a Case Study' (2010) 44 *Law Teacher*, 267.

emerging body of Foucaultian-informed legal education scholarship). It focuses largely on the analytical approach and theoretical concepts underpinning those studies, and presents these in an extended manner, primarily so that others may apply their insights in a diverse range of legal education contexts. By elaborating on this approach and detailing the conceptual moves required in order to research power in legal education effectively, this article seeks to stimulate new reflection and thought about the practice and scholarship of legal education.

While this article is concerned with current legal education scholarship, it does not participate directly within the debates that characterise the field. Instead, it offers a new way of making legal education intelligible and opens up new avenues of research for legal educators. The analytical approach it outlines will allow for overtly political interventions into legal education to become more effective, for pedagogical interventions to be positioned as political, and for legal educators to adopt new ethical sensibilities when making such interventions by recognising the possible dangers inherent in what they do.

## II POWER AND LEGAL EDUCATION SCHOLARSHIP: A TALE OF TWO DISCOURSES

As mentioned above, this article suggests that legal education scholarship does not effectively analyse power relations – they are not conceptualized in a nuanced manner, nor are the power effects of legal education practices clearly articulated within analyses that otherwise examine and evaluate these practices. This is evinced by considering two discourses within legal education scholarship – critical legal scholarship, where a concern for power is present and even foregrounded in scholarship on legal education, and pedagogical legal scholarship, where the exercise of power is not clearly identified and nor is it explicitly discussed.<sup>4</sup>

To argue that legal education scholarship does not adequately grasp power is not to suggest that legal educators do not seek to ensure that they and their colleagues act ethically as educators – such as by minimising domination over students in the teaching practices they design, reflect on, and report on. However, it is suggested here that to think of power as present only where domination exists, or where negative outcomes are produced, is an incomplete and restrictive perspective to take. Instead, what is necessary is for power to be understood as a social relation through which students, teachers, and administrators are formed – a relation that is not always necessary. It is this view of power that is largely absent. This absence is, however, not altogether surprising. A number of factors, relating specifically to these critical and pedagogical legal education discourses, may have impacted on the largely problematic way in which power is understood.

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<sup>3</sup> Matthew Ball, 'Governing Depression in Australian Legal Education: Power, Psychology, and Advanced Liberal Government' (2011) 21 *Legal Education Review*, 277-301; Matthew Ball, 'Self-Government and the Fashioning of Resilient Personae: Legal Education, Criminal Justice, and the Government of Mental Health' (2011) 23 *Current Issues in Criminal Justice*, 97.

<sup>4</sup> For examples of recent scholarship that continues this trend, see below n 20, n 21, and n 22.

## A Critical Scholarship

Critical legal education scholarship is the first discourse considered here. Throughout much of the 1980s and early 1990s, critical theory was pervasive throughout legal education scholarship. In their engagement with legal education, critical theorists suggested that legal education acts as an institution that perpetuates social injustice, as it produces graduates that are more willing to become financially successful legal professionals than participate in radical social reform or work in community legal centres.<sup>5</sup> When analysing legal education, these scholars pointed to the practices that act upon students and shape them as conservative legal professionals as opposed to politically active graduates. They highlighted the attempts made by the legal profession and other bodies to govern the law curriculum in accordance with the profession's own self-interest. And they interrogated the effect of teaching and assessment methods on law students, designing and implementing political strategies to 'liberate' students from these power relations and any unwarranted government of their personae – both 'personal' and 'professional'.<sup>6</sup>

Clearly, critical theorists of legal education were centrally concerned with the existence of power relations within law schools. Their concern, however, was largely evaluative – the exercise of power was a bad thing. It was understood as a possession that was held by some – primarily the legal profession – and exercised *over* others – namely law students – in order to achieve the ends of those wielding it. The exercise of power was positioned as negative and repressive – as stifling or denying the 'real' interests of law students and leading to ideological indoctrination. It was implied that good could only come from the total removal of power relations. And finally, this power was assumed to operate upon an inert and passive material, with ideologies being *deposited* into the empty receptacle

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<sup>5</sup> Hilary Charlesworth, 'Critical Legal Education' (1988-89) 5 *Australian Journal of Law and Society* 27, 32; Peter Fitzpatrick and Alan Hunt, 'Critical Legal Studies: An Introduction' in Peter Fitzpatrick and Alan Hunt (eds), *Critical Legal Studies* (Blackwell, 1987); Alan Hunt, 'The Critique of Law: What is 'Critical' about Critical Legal Theory?' in Peter Fitzpatrick and Alan Hunt (eds), *Critical Legal Studies* (Blackwell, 1987); Ian Ward, *An Introduction to Critical Legal Theory* (Cavendish Publishing, 2<sup>nd</sup> ed, 2004); 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); Judy Allen and Paula Baron, 'Buttercup Goes to Law School: Student Wellbeing in Stressed Law Schools' (2004) 29 *Alternative Law Journal*, 285; Debra Schleef, "'That's A Good Question!': Exploring Motivations for Law and Business School Choice' (2000) 73 *Sociology of Education* 155, 157; Margaret Thornton, *Dissonance and Distrust: Women in the Legal Profession* (Oxford University Press, 1996), 75-77; Mary Keyes and Richard Johnstone, 'Changing Legal Education: Rhetoric, Reality, and Prospects for the Future' (2004) 26 *Sydney Law Review* 537.

<sup>6</sup> Ward, above n 5, 145; Simpson and Charlesworth, above n 5, 106; Thornton, above n 5, 77-78; Charlesworth, above n 5, 30; Allen and Baron, above n 5, 288; Keyes and Johnstone, above n 5, 540-544, 555; Alan Hunt, 'The Case for Critical Legal Education' (1986) 20 *Law Teacher* 10, 11-13. Importantly, a Foucaultian-informed analysis troubles the clear distinctions between personal and professional personae, as it does not posit a 'truer' self but rather understands all forms of subjectivity as produced through power relations.

that is the student, and teaching and assessment practices working to *determine* the shape of the legal graduate.<sup>7</sup>

It is little wonder that for many legal educators, these claims caused a degree of discomfort, leading to at times blatant denunciations of the critical enterprise.<sup>8</sup> This was not so much caused by the issues that critical scholars were writing about, their ethical outlooks, or even (as may be posited by critical scholars) due to the investment of mainstream legal educators in these oppressive power relations. It may simply be due to the explanations that critical scholars offered. As a description of what occurred in legal education, the claims that legal educators repressed students, turned them into conservative legal professionals, and acted in the interests of the legal profession appeared overstated (and could easily be denied by legal educators who did not have links to the profession, attempted to mitigate the influence of any 'external' pressures upon students, or sought to foster student independence and critique). There was little recognition of the specificity with which various techniques actually operate to produce effects of power; these techniques were not accounted for historically; there was no positive articulation of what power relations actually produced; discussions of the power that students could exercise or the multiple ways they could react to the exercise of power upon them were largely absent; and there appeared to be an orthodox view of the political actions that were acceptable and necessary if these forms of oppression were to be removed. In summary, the view of many legal educators was that grand claims were made, and they were made bluntly.<sup>9</sup> It is this somewhat troubled relationship between critical legal education scholarship and other, more mainstream, strands of legal education scholarship, which may have impacted in some way upon the apparent absence of a concern for power in legal education scholarship today.

### *B Pedagogical Scholarship*

Since the late 1990s, this critical scholarship has dissipated, and its pervasiveness in debates over legal education waned,<sup>10</sup> with its conceptual tools considered blunt, and the claims produced characterised as simplistic. Pedagogically informed legal education scholarship now, perhaps more than ever, pervades this field of research and reflection,<sup>11</sup> with recent surveys of the field attesting to the fact that pedagogical knowledge provides the common frame of reference for research and discussion. For example, Johnstone and Vignaendra's 'stocktake' of Australian legal education demonstrates the extent to which pedagogical scholarship has infused legal education, presenting many educational practices based on this knowledge as examples of 'best practice'.<sup>12</sup> Keyes and Johnstone

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<sup>7</sup> These assumptions have been unpacked in Ball, 'Legal Education and the "Idealistic Student"', above n 1.

<sup>8</sup> Pierre Schlag, 'U.S. CLS' (1999) 10 *Law and Critique*, 199, 204.

<sup>9</sup> See further Ball, 'Legal Education and the "Idealistic Student"', above n 1.

<sup>10</sup> See, for example, Schlag, above n 8, 204-209.

<sup>11</sup> This is not to suggest that critical legal scholarship has completely disappeared, or that pedagogical scholarship was previously absent from legal education research. Pedagogical scholarship has simply become prominent within the field.

<sup>12</sup> 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  
<[http://www.autc.gov.au/projects/completed/loutcomes\\_law/split\\_pdf.htm](http://www.autc.gov.au/projects/completed/loutcomes_law/split_pdf.htm)>.

also explicitly argue that law schools must utilise pedagogical theory to develop and implement teaching and learning activities and move away from the traditional model of legal education, which, when seen through the lens of such scholarship, does not provide an effective learning environment.<sup>13</sup> Furthermore, ‘defensible pedagogy’ (such as fostering active learning, or constructing authentic learning environments) provides the basis for Kift’s environmental scan of legal education, and her discussion about the importance of providing both skills development and a liberal education throughout the law degree.<sup>14</sup> A recent edited collection of innovation in legal education also takes pedagogical scholarship as its point of reference.<sup>15</sup> And even when arguing that the implementation of pedagogically appropriate teaching methods has been eroded due to neoliberal reforms within legal education, Thornton still takes this scholarship of teaching and learning for granted as the most appropriate standard for evaluating legal education practices.<sup>16</sup>

While pedagogical scholarship is often concerned with similar issues to critical scholarship – the effect of legal education practices (such as doctrinal classrooms, closed book exams, and uncritical or unreflective curricula) on the student, and the negative experience of many law students throughout their degrees, for instance<sup>17</sup> – no other understanding of power has been articulated to replace the critical understanding. This is not to suggest that legal education scholarship is no longer concerned with power. Scholars primarily report on the details and specifics of a particular kind of legal education practice – a teaching method, mode of assessment, class activity – and evaluate its effectiveness, pointing to the conditions under which it can successfully be implemented, and highlighting the barriers that may prevent its success, hoping to make the experience of law students a positive one. However, in the analyses undertaken, power as a specific and explicit object of reflection is absent – it is not overtly reflected upon, nor is it considered to be a significant aspect of these practices.<sup>18</sup>

While scholars may reflect on the impact of these practices on the student, and question whether the effects of that practice are appropriate, power itself – its material effects, the modes of its exercise, the points of resistance to it, and its unintended consequences – are not highlighted. Despite the significant power

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<sup>13</sup> Keyes and Johnston, above n 5, 538, 545-547, 551-554.

<sup>14</sup> Sally Kift, ‘21<sup>st</sup> Century Climate for Change: Curriculum Design for Quality Learning Engagement in Law’ (2008) 18 *Legal Education Review* 1, 6.

<sup>15</sup> Sally Kift, Michelle Sanson, Jill Cowley, and Penelope Watson (eds), *Excellence and Innovation in Legal Education* (LexisNexis Butterworths, 2011).

<sup>16</sup> Margaret Thornton, ‘The Idea of the University and the Contemporary Legal Academy’ (2004) 26 *Sydney Law Review* 481, 486-487. For a further discussion of the spread of pedagogical discourses through legal education, see Nickolas James, ‘The Good Law Teacher: The Propagation of Pedagogicalism in Australian Legal Education’ (2004) 27 *University of New South Wales Law Journal* 147.

<sup>17</sup> See the extensive documentation of this in Johnstone and Vignaendra, above n 12. Also see Kift, above n 14, 21-26. Another example is the increasing concern of Australian legal educators over the issue of student depression. See Norm Kelk, Georgina Luscombe, Sharon Medlow and Ian Hickie, *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>>.

<sup>18</sup> See below for a discussion of the assumptions about power and legal education that suggest how the issue of power becomes sidelined in legal education scholarship.

effects that these practices might have, they are seen as somehow neutral and absent of power. While this may be because they do not appear to be imposing anything upon the student overtly – they represent themselves as simply technical practices designed to effectively teach students, or address problems like depression, and nothing more – this is a restricted view of power. Thus, while large, blunt claims about power are no longer really made within this body of scholarship, small, sharp claims appear to be attempted only rarely.<sup>19</sup>

It is possible to identify three assumptions that could be said to underpin pedagogical scholarship, and which effectively render power invisible in many pedagogically-informed analyses. Identifying these assumptions offers a possible way of thinking about pedagogical scholarship. The first is that of *neutrality and beneficence*. The reflections on, and evaluation of, legal education practices often assume that these interventions are not invested with power relations primarily because they are underpinned by pedagogical discourses. There is therefore no ulterior motive to their existence or implementation beyond doing *good* for students – improving their experience of legal education, for example.<sup>20</sup> The second assumption is that of *progression*. It appears to be implied that legal education practices and scholarship are progressing inexorably towards a point at which ‘best practice’ will have been achieved. It is held that ongoing research, the continued use of these tools, and the reliance on pedagogical discourses, will inevitably lead to the best way of knowing how students learn and study, and how they engage with their education. The knowledge bank, so to speak, offering the most accurate or apparently scientific knowledge about learning and teaching, is progressively built upon, and then drawn from when implementing new approaches.<sup>21</sup> The final assumption relates to the *technical and evaluative* nature of these discourses, already alluded to above, where legal education scholars detail the design, implementation, and evaluation of teaching methods. This is underpinned by the apparent suggestion that it is somewhat *necessary* for students to be governed in particular ways – for their mental health, generic professional skills, or moral values to be legitimate concerns of legal educators, for example – and that it is the role of the legal educator to participate in the development and deployment of these forms of government.<sup>22</sup>

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<sup>19</sup> For some examples, see Thornton, above n5; James, above n16; Nickolas James, ‘Power-Knowledge in Australian Legal Education: Corporatism’s Reign’ (2004) 40 *Sydney Law Review* 587.

<sup>20</sup> For recent examples of this in a variety of contexts within legal education scholarship – such as utilising online exams and other technologies to assist with student learning, enhancing student reflection and their deep and experiential learning for professional practice, strengthening the emotional resilience and independence of students, addressing attrition and disengagement, and teaching values and ethics to students – see Andrew Hemming, ‘Online Tests and Exams: Lower Standards or Improved Learning?’ (2010) 44 *Law Teacher*, 283; Mihail Danov, ‘Teaching International Commercial Arbitration at Postgraduate Level: Techniques for Enhancing Students’ Learning’ (2011) 45 *Law Teacher*, 101; Mary-Rose Russell, ‘Reflections on Learning: Students’ Insights on Their Learning in a Legal Research Skills Course in the Core Curriculum’ (2011) 45 *Law Teacher*, 45; Fiona Martin, Kate Collier and Shirley Carlon, ‘Mentoring First-Year Distance Education Students in Taxation Studies’ (2009) 19 *Legal Education Review*, 217; Kelley Burton and Judith McNamara, ‘Assessing Reflection Skills in Law Using Criterion Referenced Assessment’ (2009) 19 *Legal Education Review*, 172; Bobette Wolski, ‘Beyond Mooting: Designing an Advocacy, Ethics and Values Matrix for the Law School Curriculum’ (2009) 19 *Legal Education Review*, 41; Sarah Field and Lucy Jones, ‘Innovations in Assessment: An Investigation Into the Role of Blended Learning as a Support

If power is to be more fully conceptualised in legal education, these assumptions must be confronted. Assuming that a particular approach to teaching law is always beneficial and neutral can hide any potential dangers that it might entail; the idea of progress cannot necessarily be used to characterise the story of legal education scholarship or act as a tool with which to evaluate it; and a technical and evaluative approach for legal education scholarship puts to the side an examination of the significant investment that these practices have within regimes of power, thereby sacrificing for the legal education scholar (in many cases) some extensive ethical reflection for a technical role in the administration of legal education. Unpacking these assumptions brings to light the necessity of a new

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Mechanism for Assessment' (2010) 44 *Law Teacher*, 378; Lisa Claydon, 'Engaging and Motivating Students: Assessment to Aid Student Learning on a First Year Core Module' (2009) 43 *Law Teacher*, 269; Edward Phillips, Sandra Clarke, Sarah Crofts and Angela Laycock, 'Exceeding the Boundaries of Formulaic Assessment: Innovation and Creativity in the Law School' (2010) 44 *Law Teacher*, 334; Dawn Watkins, 'The Role of Narratives in Legal Education' (2011) 32 *Liverpool Law Review*, 113; Sandra Clarke, 'Peer Interaction and Engagement Through Online Discussion Forums: A Cautionary Tale' (2011) 32 *Liverpool Law Review*, 149; Cherry James, 'A New Programme for a New LLB: An Initial Evaluation' (2011) 32 *Liverpool Law Review*, 165; Tom Serby, 'Learning Through Simulation, and Its Potential for Deeper Learning in Higher Education' (2011) 32 *Liverpool Law Review*, 181. Many of these authors articulate the links between pedagogical and psychological knowledges and the practices that they are discussing. Of course, this is not to suggest that all instances of legal education scholarship engage with pedagogy or psychology in the same manner, or even in the most effective manner, but their evocation of these knowledges is important to note.

- <sup>21</sup> The assumption of progression is apparent in many recent articles, given that many such articles position one particular practice or approach as problematic and then outline solutions drawn from what is argued to be a deeper engagement with pedagogical or psychological discourses. Note this occurring in the discussions of: online exams and other technologies to assist learning (Hemming, above n 20; Field and Jones, above n 20); producing reflective practitioners (Russell, above n 20); fostering deep learning (Paula Baron, 'Deep and Surface Learning: Can Teachers Really Control Student Approaches to Learning in Law?' (2002) 45 *Law Teacher*, 123); and implementing experiential learning (Phillips, Clarke, Crofts and Laycock, above n 20).
- <sup>22</sup> Recent legal education scholarship is replete with technical and evaluative discussions about: teaching and assessment methods used to achieve a variety of goals (Danov, above n 20; Burton and McNamara, above n 20; Baron, above n 21; Sarah Mercer, Christopher Rogers and Clare Sandford-Couch, 'Teaching Dissent in the Law School: Have Students Learned to Disagree?' (2011) 32 *Liverpool Law Review*, 135; Elspeth Berry, 'Group Work and Assessment: Benefit or Burden?' (2007) 41 *Law Teacher*, 19); the use of virtual technologies for a variety of teaching tasks (Hemming, above n 20; Jennifer Yule, Judith McNamara and Mark Thomas, 'Mooting and Technology: To What Extent Does Using Technology Improve the Mooting Experience for Students?' (2010) 20 *Legal Education Review*, 137); the management of transitions into and out of the degree, first year initiatives, and authentic assessment (James, above n 20; Amanda Sticklely, 'Providing a Law Degree for the "Real World": Perspective of an Australian Law School' (2011) 45 *The Law Teacher*, 63); raising student performance and responding to external demands (Phillips, Clarke, Crofts and Laycock, above n 20); ensuring the development of emotional engagement (Serby, above n 20); addressing the attrition and non-engagement of students (Clarke, above n 20); and developing student skills (Clair Hughes, 'The Modification of Assessment Task Dimensions in Support of Student Progression in Legal Skills Development' (2009) 19 *Legal Education Review*, 133). The assumption that government in these contexts is necessary is also suggested in the way these articles often present methods for overcoming competing interests likely to be encountered (Clarke, above n 20; Martin, Collier and Carlon, above n 20), and the rubrics, tables and diagrams that are scattered throughout, as these seek to assist legal educators in their translation of these designs into other contexts (discussed further below). These descriptions of the activities of those acting within legal education can serve as useful sources of information about how these actors govern.

way of thinking about this, which, it is suggested, is what the concept of governmentality offers.

## 1 *Challenging Assumptions*

First, to rethink the assumption that legal education interventions are neutral and beneficent, two important points must be made – that governmental interventions do not *express* the values that they suggest underpin them, and that pointing out the existence of power relations in these contexts does not constitute a value judgment of these activities, but nor does this mean adopting a neutral stance on them. While many attempts to reform and reshape legal education are justified by those proposing them because they will offer students greater freedom of choice in a job market, will respect students' inherent skills or capabilities as individual learners, or will help strengthen their emotional resilience and enhance their wellbeing, it is important to examine how these values (freedom, choice, rights, wellbeing) function *within the rhetoric* of government.<sup>23</sup> Allying a particular program or reform to one of these values has the effect of producing greater support for them. Thus, one must be careful not to suggest that these governmental practices actually *express* the particular values that are said to underpin them.<sup>24</sup> Such values are embroiled within the discourses that rationalise particular types of government, and thus, how these values *function within* these forms of rationalisation must be understood. While these values might inform the way that relations of power are arranged and organized, they should not be relied upon to shed light on the 'origin' or basis of forms of government, nor be used to evaluate that government.<sup>25</sup>

Furthermore, legal education interventions should not be understood as neutral and beneficent – if they are thoroughly invested in power, they are potentially dangerous. This is not to suggest that this is necessarily always a bad thing – in fact, it is to suggest that we are unable to determine whether a practice is inherently good or bad. We ought to eschew *critique*, aimed at opposing and denouncing power and suggesting 'more appropriate' forms of government (as both critical and pedagogical scholars have previously done), and instead opt for a practice of *criticism*,<sup>26</sup> which can be useful and empowering in itself, as it brings to light the costs of governing in a particular way, disturbs the taken-for-granted, promotes considered and ethical reflection on government, allows for new and creative solutions to develop, encourages people to take responsibility for their role within relations of government, and allows them to see social arrangements as more contingent than they previously saw them.<sup>27</sup> Understanding legal

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<sup>23</sup> See for example Ball, above n 2; Ball, above n 3; Matthew Ball, 'The Construction of the Legal Identity: "Governmentality" in Australian Legal Education' (2007) 7 *QUT Law and Justice Journal*, 444.

<sup>24</sup> Mitchell Dean, *Governmentality: Power and Rule in Modern Society* (Sage, 2010, 2<sup>nd</sup> edition), 45-46.

<sup>25</sup> *Ibid.*

<sup>26</sup> Dean defines the activity of criticism (as undertaken within an analytics of government) as a 'restive interrogation of what is taken as given, natural, necessary and neutral', and contrasts this with the activity of critique (generally undertaken within critical scholarship), which is an analysis 'conducted under universal norms and truths and pointing towards a necessary end'. See further Dean, above n 24, 3-4.

<sup>27</sup> Michel Foucault, 'Questions of Method' in James Faubion (ed), *Power: Essential Works of Foucault 1954-1984: Volume 3* (Penguin Books, 2000) 223, 234-235; Dean, above n 24, 48;



education interventions as simply beneficent and neutral can result in one glossing over the various impacts of power here.

Second, the assumption that legal education is progressive must be questioned. While it is not completely necessary to reject the idea of progression out of hand, it is necessary, in line with Foucault's work at least, to suspend judgment on such normative issues. Progression implies a moral evaluation that particular practices are preferable and more developed, and others less preferable and less developed. That which is seen as 'progressive' is granted a powerful position, while those positioned in opposition to this are automatically less privileged. Further, it is assumed that this process of development is easily identifiable, and it ultimately becomes a method for judging other practices. In the case of pedagogical scholarship, this would suggest that by increasing the use of pedagogical discourses in the development and design of various legal education interventions, we are moving from bad to good.<sup>28</sup> It also assumes that a particular discourse offers the neutral tools with which to evaluate practices. However, as discourses are inevitably bound with power, and numerous historical contingencies have led to their being positioned as true,<sup>29</sup> there is no historical basis for the idea that any discourse can offer the neutral reference point from which to evaluate government and suggest that some are negative and less developed while others are positive and more developed. These moral evaluations are a common feature of both critical and pedagogical discussions about legal education. For example, critical legal analyses usually imply that some relations are negative and ought to be altered to become 'good' – they are often aimed at liberating a human nature that has somehow been repressed.<sup>30</sup> Within pedagogical analyses, relations of government are not judged using overtly moral criteria, but these judgments are couched in a more neutral manner. That is, they are evaluated on the basis of whether or not they contribute in appropriate ways to a student's educational development as a learner and person. In either case, assumptions are made about what constitute 'good' changes to practices with 'negative' effects, and these must be analysed as forms of power, which, to be effective, necessitates a suspension of normative assumptions.

Finally, the technical and evaluative nature of legal education, and the concomitant assumption that government is necessary, must also be questioned. As Dean suggests, to understand government and power, we must 'eschew any position that claims that all the activity of governing is bad or good, necessary or unnecessary', and nor should we seek to understand how people may 'be liberated from or, indeed, by government.'<sup>31</sup> We must also refuse to suggest what practices of government are right and wrong, or which ones ought to be fought against or altered. These technical and evaluative debates about legal education are inextricably bound with power relations and, if power is to be fully understood, should not be thought about from the same positions of, or using the same tools

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Nikolas Rose, *Powers of Freedom: Reframing Political Thought* (Cambridge University Press, 1999), 59.

<sup>28</sup> See Ball, above n 2, 268.

<sup>29</sup> See James, above n 16.

<sup>30</sup> Dean, above n 24, 47.

<sup>31</sup> *Ibid* at 46 [emphases added].

as, critical or pedagogical scholars. No analysis informed by the concept of governmentality can spell out in detail which practices to alter.

To summarise these ideas in two points, one could suggest that within legal education scholarship, power is understood as a negative thing to be critiqued and which finds its expression in repression, and that power is considered as absent from ‘beneficial’ knowledges – pedagogical discourses, for example, appear as objective and, in their quasi-scientific objectivity, are largely removed from the exercise of power. If power is to be considered in a different way, then it is a necessary conceptual move to think about power as involving the productive shaping of conduct, and to understand knowledge and power as interrelated. On these two points, more must be said.

One of the biggest contributions of Foucault’s work, and one which directly feeds into an analytics of government, is the shift away from an understanding of power that focuses on it as *necessarily* and *inherently* bad. Foucault suggested that power can be understood as a productive social relationship. In Foucault’s formulation, it refers to the ‘conduct of conducts’, which need not imply something negative or repressive.<sup>32</sup> While all forms of power may be potentially dangerous, they can also be positive – they produce ways of acting, knowing, and, importantly, being. Power is not held by some and denied to others. Instead, it is a social relationship that produces particular kinds of personae amongst those through whom it circulates.<sup>33</sup> Of course, this is not to laud power relations, but rather to acknowledge that power relations are more complex than often assumed.

Related to this is the move away from seeing any connection between power and knowledge as negative. It is often assumed that if the production of knowledge appears to be too closely related to power relations, then that knowledge is tainted or partial – if it is to be accurate, knowledge has to be free of any ‘interests’.<sup>34</sup> It is the close connection between the political ‘interests’ of critical scholars and the outcomes of their analyses that contribute perhaps to a wider discomfort with their analyses. In contrast, it is the apparent disinterest and the quasi-scientific nature of the analyses of pedagogical scholars that may justify their wide uptake. Moreover, in many critical analyses the achievement or maintenance of the privileged state of the ‘powerful’ is understood as relying on the control over knowledge – critical scholars pointing to the indoctrination of populations through ideologies are expressing this idea.<sup>35</sup> However, power and knowledge can be thought about more effectively if they are understood as linked in positive (and again productive) ways. Power functions *through* particular knowledges – pedagogical knowledge being a clear example, as it is used to design and implement strategies to ‘conduct the conduct’ of students in a class, for instance –

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<sup>32</sup> Michel Foucault, ‘The Subject and Power’ in James Faubion (ed), *Power: Essential Works of Foucault 1954-1984: Volume 3* (Penguin Books, 2000) 326, 341.

<sup>33</sup> Michel Foucault, *The Will to Knowledge: The History of Sexuality Volume 1* (Penguin Books, 1998), 82-85, 136; Michel Foucault, ‘Power Affects the Body’ in Sylvère Lotringer (ed), *Foucault Live: Collected Interviews, 1961-1984* (Semiotext[e], 1996) 207, 207-210.

<sup>34</sup> Michel Foucault, ‘Truth and Power’ in Colin Gordon (ed), *Power/Knowledge: Selected Interviews and Other Writings 1972-1977* (Pantheon Books, 1980) 109, 131.

<sup>35</sup> See, for example, Duncan Kennedy, ‘Legal Education and the Reproduction of Hierarchy’ (1982) 32 *Journal of Legal Education* 591; Hunt, above n 6, 11-13; Keyes and Johnstone, above n 5, 540.

and the exercise of power produces new forms of knowledge – evaluations of a particular practice allow one to make alterations to that practice that inevitably effect the ways that power operates.<sup>36</sup> Both of these points are fundamental to the analytical approach outlined below, and essential if power is to be more effectively understood in legal education.

### III GOVERNMENTALITY AND AN ANALYTICS OF GOVERNMENT

The analytical approach outlined here, termed an ‘analytics of government’, has developed from Michel Foucault’s work on ‘governmentality’. Foucault developed this term to refer to primarily historical studies into the design and implementation of forms of government in a variety of contexts.<sup>37</sup> The term joins the notions of *government* and *rationality*, and was used by Foucault to bring together his work on power and knowledge and use them to analyse power relations. Drawing from his work on the interaction between power and knowledge (or power-knowledge as he occasionally termed it), the concept of governmentality recognises that some form of *rationality* or body of knowledge underpins the act of governing – government is never simply arbitrary or uninformed – and that there is a systematic manner of thinking about, knowing, arranging, establishing relations between, and designing methods to intervene upon that which is to be governed.<sup>38</sup> The term rationality here is used in the ‘instrumental’ sense of *rationale*, and not in the sense of a universal or transcendental rationality.<sup>39</sup> Using Foucault’s work on power relations more generally, the concept of governmentality also considers the *practices* that are utilised in achieving the government of conduct, including both those practices that act on people, and those that people employ to shape their own conduct.<sup>40</sup> Legal education is one such site where government is rationalised and practised in specific ways. These concepts of rationalities and practices form useful lines of inquiry with which to analyse legal education and, ultimately, to analyse power more effectively so that the above assumptions may be pushed past.<sup>41</sup>

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<sup>36</sup> See generally, Foucault, above n 34; Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Penguin Books, 1991), 251, 254; Michel Foucault, ‘Prison Talk’ in Colin Gordon (ed), *Power/Knowledge: Selected Interviews and Other Writings 1972–1977* (Pantheon Books, 1980) 37, 52.

<sup>37</sup> Foucault, above n 32, 341; Dean, above n 24, 24–28; Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France 1977–1978* (Palgrave Macmillan, 2007), 87–114; 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 I* (Penguin Books, 2000) 281, 300.

<sup>38</sup> Peter Miller and Nikolas Rose, *Governing the Present: Administering Economic, Social, and Personal Life* (Polity Press, 2008), 15–16; Nikolas Rose and Peter Miller, ‘Political Power Beyond the State: Problematics of Government’ (1992) 43 *British Journal of Sociology* 173, 175; Dean, above n 24, 42–43.

<sup>39</sup> Foucault, above n 27, 229.

<sup>40</sup> Michel Foucault, ‘Technologies of the Self’ in Paul Rabinow (ed), *Ethics: Subjectivity and Truth: Essential Works of Foucault 1954–1984: Volume I* (Penguin Books, 2000) 223, 225; Rose and Miller, above n 38, 173.

<sup>41</sup> It must be noted that the following section canvasses the general approach of scholars using the concept of governmentality, and can only serve as an introduction to this field of research. There is no ‘template’ for such an analytics of government, and so this work can only offer concepts that can be used as guides for inquiry, allowing one to get a general direction within the field. While Foucault considered these concepts historically, they can also be used to

## A Governmental Rationalities

The first such line of inquiry in an analytics of government involves unearthing the governmental rationalities that offer a coherent thought process forming the basis of attempts to govern. Governmental rationalities in this context refer to:

the changing discursive fields within which the exercise of power is conceptualised, the moral justifications for particular ways of exercising power by diverse authorities, notions of the appropriate forms, objects and limits of politics, and conceptions of the proper distribution of such tasks among secular, spiritual, military and familial sectors.<sup>42</sup>

Unearthing these rationalities allows one to: identify how particular concepts are problematised as objects requiring government; examine the forms of knowledge that establish the basis for governmental activity; articulate the moral justifications that are established to underpin government; and elucidate the boundaries that these rationalities place upon governing authorities (in terms of their legitimate powers, the restrictions imposed upon them, and the appropriate methods through which government can be effected).<sup>43</sup> Rationalities not only *define* the objects to be governed, but also outline the *way* they might be governed – that is, the appropriate methods to be used, the limits that must be respected, and the way different activities can be linked. In this process, these rationalities ‘make up’ various ‘governable spaces’ (such as the population, the economy, the law classroom, or individual law students).<sup>44</sup>

An example can serve to illustrate this. Consider the strong push within diverse educational endeavours to construct ‘learning environments’ for students. These attempts rely on particular ways of rationalising government – that is, of understanding the appropriate ways in which practices can be arranged, tasks distributed, and responsibilities defined. In this case, practices are arranged in order to provide ‘*learning* environments’ (as opposed to *teaching* environments), teachers are to ‘facilitate’ student learning, and students are to become active and responsible in this process.<sup>45</sup> Or, as another example, initiatives to ensure that students become skilled and ethical graduates rely on the identification (through governmental rationalities) of certain objects – in this case the student’s skills capabilities and ethical frameworks – as targets of government.<sup>46</sup> Whether seeking to create a skilled lawyer, ‘desirable’ graduate, or an agent of social and legal change, law schools rationalise government in various ways so as to define the appropriate targets that may be governed, the limits that constrain government, and the appropriate forms of that rule. In this sense, the way that students are governed is directed, planned, and coordinated in numerous ways and to a range of ends, which do not originate exclusively in the most prestigious law firms, nor solely in the heads of pedagogically informed scholars, because they depend on

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analyse our present moment. Those seeking to take up these concepts further are encouraged to engage more deeply with the work of Foucault and others who have developed these ideas.

<sup>42</sup> Rose and Miller, above n 38, 175.

<sup>43</sup> Mitchell Dean, *Critical and Effective Histories: Foucault’s Methods and Historical Sociology* (Routledge, 1994), 187; Miller and Rose, above n 38, 15-16.

<sup>44</sup> Rose, above n 27, 31-33; see also Miller and Rose, above n 38, 15.

<sup>45</sup> See for example, Kift, above n 14, 21-26; Johnstone and Vignaendra, above n 12, 291-319.

<sup>46</sup> Ball, above n 23, 451-456; Kift, above n 14, 10-16, 26-30; Johnstone and Vignaendra, above n 12, 117-123, 133-166.

the circulation of a variety of discourses. Looking at rationalities in this manner allows power to be understood as consisting partly of a regime of thought in which the activity of governing is calculated in specific and mundane ways.

With regard to legal education, governmental rationalities can be identified perhaps most clearly within the texts that circulate in this context – journal articles, theoretical expositions, evaluations, strategic documents, unit outlines, graduate capabilities frameworks, and policies seeking to direct teaching and assessment practices, to name a few. What makes their identification more than simply a description of the way that government is designed and arranged is the important point that the truths through which we understand the world and how we are to act within and upon it (such as pedagogy, psychology, sociology, or criminology), as well as the objects of our knowledge (such as aspects of our world like the ‘economy’ or ‘society’, or aspects of our self such as our ‘sexuality’) are historically constructed. These knowledges, Foucault urges throughout his work, induce effects of power by offering apparently authoritative ways of understanding human beings. Because of their historical construction, no single body of knowledge can claim to represent ‘The Truth’.<sup>47</sup> This means that all of the texts examined in this context must be placed ‘at the same level’ – none should be privileged as offering a deeper or more accurate understanding of legal education – because all are formed by the variety of discourses drawn from the same discursive field, and none have privileged access to the truth.<sup>48</sup> Once we recognize these points, it is possible to conceive of these rationalities as bound with power relations and *producing effects* in the real, as opposed to simply *reflecting* the real.

Rationalities of government draw from these bodies of knowledge, as it is through them that one can identify the way that a field of objects is rendered ‘visible’ and made ‘intelligible’. It is on the basis of these forms of visibility and intelligibility that government proceeds.<sup>49</sup> As Foucault recognises, these knowledges and their vocabularies are ‘an element of government itself’, in that they function ‘as a “politics of truth”, producing new forms of knowledge, inventing new notions and concepts that contribute to the “government” of new domains of regulation and intervention’ – they are not neutral representations of reality.<sup>50</sup> How law students

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<sup>47</sup> See generally Michel Foucault, *History of Madness* (Routledge, 2006); Michel Foucault, *The Birth of the Clinic: An Archaeology of Medical Perception* (Routledge, 2003); Michel Foucault, *The Archaeology of Knowledge* (Routledge, 2002); Michel Foucault, *The Order of Things* (Routledge, 2002).

<sup>48</sup> Of course, this applies to the discourses presented here, and the truth claims that this article makes. However, this article is simply suggesting one possible way of understanding legal education and legal education scholarship.

<sup>49</sup> Rose, above n 27, 28; see also Miller and Rose, above n 38, 15-16.

<sup>50</sup> Thomas Lemke, *Foucault, Governmentality, and Critique* (2000), [8] <<http://www.thomaslemkeweb.de/publikationen/Foucault.%20Governmentality.%20and%20Critique%20IV-2.pdf>>. Consider some terms that circulate within this scholarship – ‘whole of curriculum design’, ‘graduate attributes’, ‘transition pedagogy’, ‘first-year experience’, ‘engagement’, ‘blended environments’, ‘resilience’, or ‘standards’. None is simply a descriptive term. Rather, each calls to mind an attitude towards the design of practices, a disposition within educators regarding how they ought to act on and interact with students in a classroom, and a specific idiom through which these practices and dispositions can be articulated. This becomes most apparent if one listens to those on university or faculty committees when speaking of curriculum matters.

are represented or ‘pictured’ in the minds of administrators, course designers, and teachers is therefore always partial, and has an effect on the techniques selected to govern, how these techniques will be arranged, what problems government is to solve, and the ends to which government is turned.<sup>51</sup> For example, if students are made visible as customers, then law schools may understand their role as providing an educational product, and attempt to create ‘authentic’ learning environments from which students can gain a direct benefit when moving into legal practice.<sup>52</sup> Again, these are not ‘real’ or ‘inherent’ properties of students, but rather ways of visualising and constructing the realms and relations to be governed.

These representations of students also have effects on the aspects of legal education that are called into question by teachers, law school administrators, or even students – that is, on what is problematised.<sup>53</sup> For example, when law schools seek to focus on ‘what lawyers need to be able to do’ instead of ‘what lawyers need to know’,<sup>54</sup> the skills of law students are being problematised so as to become a target of government. Or, when it is suggested ‘[t]hat law schools examine the adequacy of their attention to theoretical and critical perspectives’,<sup>55</sup> the multidisciplinary knowledge that students hold is being problematised, subsequently becoming a target of government. These new ‘problems’ to be governed spawn the development or reformulation of numerous mechanisms through which this government is achieved, such as techniques to assess a student’s competencies in these areas, as well as new research reflecting on and suggesting how this might be achieved.<sup>56</sup> By considering that which has been problematised, one can identify the points at which various attempts to govern have been designed, and these can subsequently be understood as attempts to *govern*, and not overlooked as apparently objective or neutral attempts to simply *teach* or to address ‘gaps’ in legal education that need filling.

Rationalities of government themselves do not govern people, and nor are they ever *directly* transferred into practice. Rather, they are *translated* into technical and practical plans and programs that may then be implemented to shape the conduct of an individual or group. The design of these programs requires the incorporation of various kinds of intellectual machinery (such as pedagogical theories of teaching and learning).<sup>57</sup> Existing practices are rearranged in new assemblages, oriented towards achieving new ends – that is, the various ‘intellectual, social, and material’ resources available at hand are turned to different ends according to these programs, primarily because these already ‘do

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<sup>51</sup> Dean, above n 24, 41.

<sup>52</sup> Examples of such techniques and practices can include e-Portfolios, Work Integrated Learning, Clinical Legal Education, or the embedding of mooted activities in law school curricula.

<sup>53</sup> Dean, above n 24, 38.

<sup>54</sup> Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System (2009)*. <<http://www.austlii.edu.au/au/other/alrc/publications/reports/89/>>.

<sup>55</sup> Dennis Pearce, Enid Campbell, & Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission (A Summary)* (1987) Australian Government Publishing Service, 12.

<sup>56</sup> Dean, above n 24, 38.

<sup>57</sup> Foucault, above n 27, 231-232; Miller and Rose, above n 38, 15-16; Rose and Miller, above n 38, 181-182; Dean, above n 24, 32.

the job' of achieving specific tasks.<sup>58</sup> In the context of legal education, consider programs such as student mooting competitions, graduate capabilities frameworks, legal clinics, assessment design and attempts at constructive alignment, and even 'first-year experience' initiatives, all of which seek to arrange and rearrange the practices of legal education so as to achieve particular goals and shape conduct in desirable ways. Despite subtle nuances between them and the ends they seek to achieve – whether competently skilled professionals, graduates with a social conscience, or even good students – they are similar in that they work on a limited range of targets (such as legal skills, ethical viewpoints, or legal knowledge), hope to utilise a certain range of techniques, harness bodies of knowledge in governing, and attempt to arrange practices so as to shape the forms of legal personae produced through legal education.<sup>59</sup>

It is important to note the translation required in these activities. Programs rarely, if at all, involve the introduction of entirely new practices into legal education. In fact, they primarily seek to rearrange the multitude of existing practices of legal education and reprogram them to achieve new ends. They cannot act as though they were coherent and fully functioning designs, and certainly cannot implement the will of their 'designers' unproblematically within law schools (as critical scholars might suggest when they chart a direct line from the designs of particular groups to the operation of power). Interventions based on pedagogical scholarship, for example, can only be successful to the extent that the programs designed can effectively harness the limited and often competing resources made available to educators. Even then, they are only successful insofar as other contingencies – such as the extent to which students are invested within a program – will also allow. Actors must be enrolled in these programs by aligning their own goals with what these programs seek to achieve. The basis of these programs in pedagogical scholarship does not guarantee their successful implementation in and of itself – the investment of others and the harnessing of diverse actors and practices is always necessary.

### B Governmental Practices

While rationalities are concerned with the discursive regimes in which questions of government are posed and explicit attempts to shape conduct designed, it is also necessary to examine the actual practices and technical machinery used to achieve this government and shape conduct. The practices utilised to govern form the second possible line of inquiry for an analytics of government. These practices include the 'means, mechanisms, procedures, instruments, tactics, techniques, technologies and vocabularies' through which government is achieved.<sup>60</sup> In undertaking such an analysis, we must be conscious of the impacts

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<sup>58</sup> Pat O'Malley, 'Genealogy, Systematisation, and Resistance in "Advanced Liberalism"' in Gary Wickham and George Pavlich (eds) *Rethinking Law, Society, and Governance: Foucault's Bequest* (Hart Publishing, 2001) 13, 14.

<sup>59</sup> Ball, above n 23, 451-456.

<sup>60</sup> Dean, above n 24, 42; Miller and Rose, above n 38, 15-16. Dean warns that rationalities and technologies of government (that is the bodies of 'know-how' used to govern) must not be considered as 'mental' and 'manual' elements of government. Technologies of government are central to representing a field so as to make it amenable to governing, and thus rationalities and technologies are mutually conditioning. See Dean, above n 43, 188.

that these practices have on shaping the conduct of persons, and also point to the ‘congenitally failing’ nature of their operation.<sup>61</sup>

The variety of different programs operating within legal education, and the numerous rationalities that underpin these programs, might imply that there is similar diversity in the techniques through which they are implemented. However, this is not necessarily the case. Whether it is within general classroom teaching, mooted competitions, or legal clinics, and whether they intend to offer students specific forms of professional training or produce reflective, critical, or socially just lawyers, these programs rely on the assemblage of a number of similar techniques – in many cases, forms of classroom instruction and training, assessment tasks, and practices in which self-reflection and self-government are encouraged. Furthermore, the design and implementation of these techniques is almost always underpinned by similar bodies of technical ‘know-how’ that are used to exercise power – pedagogical knowledges and corporatist or ‘market’ discourses are the most prominent ones assembled here. They provide ‘true’ representations of students (as *active learners* and as *customers* of legal education), on the basis of which programs can be designed (to provide *learning environments* that are *authentic* and equip students for later employment) and appropriate techniques of government selected (that allow them to *actively learn* by ‘*doing*’ what would be required of them in the employment context).<sup>62</sup> Their technical character positions them as somewhat distinct from rationalities of government, though they can overlap (pedagogical discourses, for example, can be drawn from in the shaping of governmental rationalities, while they can also provide the technical know-how to govern).

Beyond the classroom, techniques such as ‘systems of accounting, methods of the organisation of work, forms of surveillance, [and] methods of timing and spacing of activities in particular locales’ are further relied on to administer legal education.<sup>63</sup> In other contexts, this ‘know-how’ can include ‘types of schooling and medical practice, systems of income support, forms of administration and “corporate management”, systems of intervention into various organisations, and bodies of expertise’, and can take the form of reports, graphs, statistics, charts, and diagrams – anything that allows the objects, persons, and relations that are to be governed to be represented and known.<sup>64</sup>

These various techniques are also adopted within the management of law schools. Corporatist discourses offer law school administrators many of the intellectual tools through which government within the law school may be administered. These intellectual tools include the language and practices of budgeting, accounting, and performance measurement. They also define the appropriate standards against which the operation of programs and activities of staff members can be assessed, and their successes or failures determined.<sup>65</sup>

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<sup>61</sup> Rose and Miller, above n 38, 190.

<sup>62</sup> See, generally, Ball, above n 23; James, above n 16; Kift, above n 14; Johnstone and Vignaendra, above n 12.

<sup>63</sup> Dean, above n 43, 187-188.

<sup>64</sup> Ibid. See also: Rose, above n 27, 28; Rose and Miller, above n 38, 185-186.

<sup>65</sup> See, generally, James, ‘Power-Knowledge in Australian Legal Education’, above n 19.



It is necessary, when analysing this technical machinery of power, to simply adopt the ‘flat and empirical’<sup>66</sup> task of asking ‘how’ questions about power (‘how do we govern?’), and not ‘why’ questions (‘why do those in power seek to shape people’s actions in this way?’, or ‘why do students become cynical about the ability of the law to achieve social change?’).<sup>67</sup> Doing so not only avoids the determinism of traditional proprietary and conspiratorial accounts of power (where power is held by one group and exercised in a negative way over another), but also produces a much more extensive view of power relations.<sup>68</sup> It avoids importing moral evaluations into the analysis – by not asking ‘why’ or ‘in whose interest’ a state of affairs exists, the impulse to say whether that state is good or bad is to some extent mitigated. Such description and documentation also allows one to focus on the detail of power and look at what it *produces* – what kinds of self, what kinds of knowledge, what kinds of order – as opposed to simply trying to identify what it *represses*.<sup>69</sup> Detailing the ‘what’ rather than the ‘why’ also helps one to avoid the temptation to see some techniques as neutral tools positioned outside of power and utilised simply to teach students or to ensure that law students can learn effectively. Rather, they can be understood as part of a technical assemblage of power relations. The way in which these practices operate and the representations that these bodies of ‘know-how’ provide cannot be understood as more enlightened, more appropriate, or more progressive than other practices or discourses – nor any less governmental – simply because they claim to be scientific, neutral, or apolitical.

Despite their apparent coherence, the fact that these practices have existed over time and have been used within a variety of different programs, giving effect to diverse rationalities, suggests that these practices and knowledges cannot be understood or analysed as a unified bloc directed *en masse* by abstract bodies. Instead, they should be understood as an *assemblage*<sup>70</sup> of practices that cannot reflect the will of one individual or group. Hence why critical perspectives perhaps overstated the point when suggesting that these practices were part of a wider exercise of power by one group, and also why this is an easy claim to criticise. Each practice may be implemented to achieve a particular outcome, but result in very different effects than intended.<sup>71</sup> For example, teaching and assessment methods, such as the lecture or examination, which may produce uncritical or unreflective legal graduates, are not implemented simply because the legal profession intends to produce graduates in its own image, unable to challenge the social and legal status quo (as often suggested by critical legal

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<sup>66</sup> Foucault, above n 32, 337.

<sup>67</sup> Ibid, 336-337; Dean, above n 24, 39-40; Foucault, ‘Will to Knowledge’, above n 33, 94-95; Foucault, above n 27, 224.

<sup>68</sup> For Foucault’s extended discussions on the concept of power, see especially Foucault, ‘Will to Knowledge’, above n 33, 93-5, 136; Foucault, ‘Discipline and Punish’, above n 36, at 194. Also see generally Michel Foucault, ‘Two Lectures’ in Colin Gordon (ed), *Power/Knowledge: Selected Interviews and Other Writings 1972–1977* (Pantheon, 1980), 96-97.

<sup>69</sup> Clare O’Farrell, *Michel Foucault* (2005), 100-101.

<sup>70</sup> Dean, above n 24, 40-41. Dean defines an assemblage as ‘an ensemble of heterogeneous discursive and non-discursive practices, and regimes of truth and conduct, which possesses an overall coherence without answering to any determinative principle or underlying logic’. See Dean, above n 43, 223.

<sup>71</sup> Foucault, ‘Power Affects the Body’, above n 33, 210.

scholars).<sup>72</sup> They may be used because of resourcing issues, or because they are effective techniques for teaching and assessing a large number of students at once.<sup>73</sup>

This leads to an important insight into power – it always encounters resistance. As Rose and Miller state, ‘government is a congenitally failing operation.’<sup>74</sup> Cataloguing these mundane techniques of power allows one to identify the variety of blockages, resistances, and hurdles that are encountered within these assemblages, and which stand in the way of programs of government being implemented and operating in the manner originally intended. At each point at which power is exercised – that is, when techniques are designed, debated, redesigned, deployed, and used in unintended and unforeseen ways – or at each moment that a party interacts with a technique – those responsible for its design, the members of the committee that debates its use and alters it to align with university policy, the unit coordinators that work to embed that technique in a specific component of the course, and the lecturers and tutors that actually employ a technique in a classroom – it is amenable to some modification.<sup>75</sup> This is why this process is referred to as a *translation* of programs into practice, because they are altered in their passage from ideal design to implementation (and even during the implementation) – those involved have competing goals, insufficient resources, time, or will, or the designs produced simply cannot work effectively in practice.<sup>76</sup>

A clear example of this resistance can be seen in assessment regimes, which may not be implemented as intended because of resourcing constraints or unanticipated problems – academics may not have time to provide extensive feedback to students, or students may not be able to adopt that feedback because of a large assessment workload, work commitments, or simply because they lack interest.<sup>77</sup> This resistance does not necessarily result in the hope of critical scholars that power is reversed or ‘overthrown’, but it is important to recognise that such resistance exists, as it provides a way of empirically accounting for complexity within power relations, and highlights the potential hurdles that those seeking to govern may encounter in that process, as well as the points at which power relations may be reversed or modified, even in seemingly insignificant ways. This resistance produces further relations of power, such as modifications to the way programs are designed, techniques employed, and the ‘conduct of conduct’ achieved. In fact, Foucault points to this when he speaks of power as productive and focuses on it at the mundane level, in contrast to other approaches. It is this

<sup>72</sup> See for example Thornton, above n 5, 78; Charlesworth, above n 5, 30; Simpson and Charlesworth, above n 5, 106.

<sup>73</sup> See for example Johnstone and Vignaendra, above n 12, 395, 463.

<sup>74</sup> Rose and Miller, above n 38, 190-191.

<sup>75</sup> Ibid, 191.

<sup>76</sup> Ibid, 181-182; see also Bruno Latour, *Reassembling the Social: An Introduction to Actor-Network Theory* (Oxford University Press, 2005), 106-109 for a discussion of the way that actors (or actants, as Latour prefers) in these relations ought to be understood as *mediators* (which transform actions), and not simply *intermediaries* (which only transmit actions), thereby foregrounding the importance of the notion of translation.

<sup>77</sup> See, for example, Johnstone and Vignaendra, above n 12, 367, 379. The interviews collected within this ‘stocktake’ of Australian legal education are replete with examples of the failure of various forms of government.

very possibility of resistance that, according to Foucault, signifies power, and not domination.<sup>78</sup>

Thus, focusing on the practices of power in this manner allows for different approaches to examining legal education scholarship. Instead of suggesting, as critical scholars have previously, that legal education consists of indoctrinating and repressive power relations exercised over passive students, and instead of assuming, as many pedagogical scholars appear to, that legal education is a neutral and benign set of practices, intended to improve and fine-tune the way that students learn, an analytics of government foregrounds these activities and practices as forms of power. By pointing to the regimes of practices that are assembled in this context – all of the mundane techniques that include not only teaching practices, but also forms of evaluation, accounting, professional development, assessment, discipline, and self-reflection undertaken by teachers, students, and administrators – and considering the manner in which power circulates through these practices and how they are assembled and disassembled in a variety of ways to achieve numerous, sometimes competing, goals, a picture of power is painted that is altogether more complex, less attached to negative connotations, and cognisant of the potential dangers of power relations. It is these actors, practices, technologies, and identities that must be mobilised and assembled in order to govern.

### C *The Relations Between Rationalities and Practices*

The two lines of inquiry outlined here must not be collapsed – the way that government is *rationalised and designed*, and the *techniques and practices* that are relied on to achieve government, must be considered separately. While they are closely related, neither is an expression of the other. The rationalities underpinning government guide the operation of practices, but these practices are not utilised *because of* that rationality. Nor are the programs designed to give expression to these rationalities put into practice unproblematically, as we have seen.<sup>79</sup> Analysing rationalities and practices separately makes it possible to account for the large gap that can exist between the intentions of governing agencies and the actual practice of government. It also avoids the suggestion that the practice of government directly reflects the rationalities underpinning it – that the ‘designs’ of powerful groups are achieved (as per critical analyses), or that pedagogically-informed interventions are implemented because of their basis in this body of ‘know-how’ (as per pedagogical analyses).

## IV POWER AND LEGAL EDUCATION SCHOLARSHIP AFTER GOVERNMENTALITY

It is useful, now, to return to the three assumptions of legal education scholarship discussed earlier, and reflect more directly on what the approach presented above offers. Clearly it can serve to push past these assumptions.

Identifying the rationalities and practices of government allows us to consider the first assumption – that legal education is neutral and beneficent – differently.

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<sup>78</sup> Foucault, above n 32, 341-342; Foucault, ‘Ethics of the Concern for the Self’, above n 37, 292.

<sup>79</sup> Foucault, above n 40, 230; Miller and Rose, above n 38, 15-16.

Examining the rationalities of government allows us to see that the discourses relied on when governing are not objective and detached, but very directly shape attempts to govern, and that rationalities themselves are linked to addressing problems and conducting conduct. Given Foucault's work on the notion of truth, we cannot easily claim that some practices are inherently good and others are bad. For example, there is no essential self here to liberate or respect, nor is there a truthful and objective knowledge that can be discovered and used to guide forms of governing. As highlighted earlier, we can therefore only explore how values function *within* rationalities.

Considering the rationalities of government also allows for the second assumption – that legal education is progressive – to be troubled. Charting any changes to the rationalities of government, and looking at these rationalities as constituting the field to be governed in thought (as opposed to assuming there is an accurate representation 'out there' that needs to be respected and which can serve as the end point of this progression) allows one to note that any appearance of progression is the result of shifting attempts to govern specific problems in new ways. These shifts in government are always drawn from authorised discourses, rendered as problems by other governing bodies (the State, professional organisations, pedagogical experts, sociologists, political activists), and always thwarted in the grubby world of praxis. Practices, too, cannot necessarily be labelled progressive or otherwise as already noted – such normative evaluations must be suspended if power is to be analysed effectively. They are selected from the limited range available to educators and simply taken up and reprogrammed to achieve new ends. Very rarely are practices discarded completely, because in themselves they cannot be considered either good or bad.

Finally, the third assumption – that there is a necessity to government and that it is simply taken-for-granted that legal educators would adopt a technical role in this government – is also one that can be questioned. An analytics of government can show that, indeed, things need not be as they are. Forms of government develop in response to a variety of problems that are posed *as problems to be governed*. These problems need not be accepted, and it is not inevitable that they would be identified as, or become, a 'problem'. Recognising rationalities of government can bring these to light. Rationalities are contingent and partial, the programs developed from them equally so, and the practices mobilised do not operate in intended ways. However, legal education scholarship apparently operates as if this government is possible and as if it were always beneficial. But this eternal optimism, coupled with the congenital failure of government, only produces the conditions for further government.<sup>80</sup>

Of course, this is not to suggest that the reporting and discussion of legal education scholarship should completely avoid the evaluation of these practices. However, it could be argued that reporting and discussion should also reflect on power in the manner suggested here. If legal education scholars are to reflect on power effectively, they could place power in the foreground and recognise that their eternal optimism is a component of this power – that is, that their evaluations of legal education simply add to the intellectual technologies and 'know-how'

<sup>80</sup> See further Gavin Kendall and Gary Wickham, *Using Foucault's Methods* (Sage, 1999), 51; Dean, above n 24, 21-23.

mobilised in the activity of governing. To provide a more useful analysis, they could also elucidate the representations of students that their interventions rely on, and characterise the problems encountered in their implementation as resistance inevitably produced as a part of power relations, and not simply as unexpected problems that can be 'designed out'. In all, it would be useful to be explicit about the fact that these are practices of power, and to jettison the assumption that they can be reformed and reformulated to a point at which their implementation can be achieved untroubled and with all the necessary actors successfully enrolled – with everyone 'on board', so to speak.

## V CONCLUSION

The ultimate task of this article has been to articulate a potential avenue of further research into power and government in the context of legal education that moves away from some of the assumptions about these concepts that, it is argued, characterise legal education scholarship. It has also sought to encourage new approaches to understanding power in legal education and ensure that this constitutes a focus for future research. It is contended that an analytics of government offers a more complex, tenable, and ultimately empirically demonstrable account of the tangible techniques of power directly operating within this particular regime of practices. Diagrams of power relations drawn with the tools outlined here constitute one fruitful way of producing such an account. If nothing else, this article has sought to provide an impetus for legal education scholars to explore the literature surrounding the concept of governmentality, and consider how it might be utilised within legal education research.

An analytics of government allows for a suspension of the taken-for-granted assumptions about legal education currently held by many legal scholars, and can also prevent researchers, as well as others intent on intervening in these power relations, from thinking about power in a reductionist or determinist manner. For example, through this approach, it is possible to see law schools as not simply tools for negative social control in the interests of the legal profession. The legal profession need not be characterised as an all-powerful controlling body, nor must the analyses provided by critical legal scholars be held up as offering a 'way out' of power relations. Furthermore, 'pedagogically appropriate' teaching methods need not be seen in an unproblematic light, and the solutions suggested by pedagogical scholars held up as offering objective approaches positioned outside of power relations. As an analytics of government suggests, both critical and pedagogical scholarship (and interventions utilising that scholarship) seek to implement forms of government and reformulate the regime of practices of legal education in specific ways. Disturbing the taken-for-granted assumptions of legal education – primarily by positioning legal education as a form of government, and by highlighting the contingency and power effects of the rationalities and practices assembled in order to govern – can contribute to new forms of reflection regarding how it is possible for legal educators to proceed with their task.