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Beyond the Bounds of Formalism – Social Justice and Legal Education

11th January 2017

Philip Drake

INTRODUCTION & RELEVANT LITERATURE

- **FOCUS ON INTERPRETATION AND MEANING OF THE LAW**
- Lawyer/client interaction represents "law in action" more than any examination of legislation or judicial decisions (Goffman 1959: 739).
- "... law is not what judges say in the reports but what lawyers say - to one another and to clients in their offices" (Shapiro 1981: 1198).

- **HOW DO CLIENTS/LAWYERS INTERACT? (SARAT & FELSTINER 1988)**
- Explanation of the past –v- securing the legal goal.
- Clients focus on the character and personality dispositions.
- Lawyer’s prioritise analysis of rules and problem solving over emotions.
- Lawyers change the subject from one of emotions to the information necessary for considering the legal problem.
- Emotion to lawyers is a reason for the client to depend upon the lawyer for guidance.
- Lawyers’ invite client dependency.

- **PROFESSIONAL IDENTITY**

- Workplaces represent ‘crucibles of identity formation’ (Sommerlad 2007) and ‘professional socialisation’ (Francis & Sommerlad 2009: 210).
- Cultural capital in power based physical appearances & actions (symbolic violence) (Sommerlad 2007).
- The norms and values of professional fields predominantly masculine (Dryburgh 1999).
- Negative cultural capital associated with attributes related to female gender i.e. empathy (Thornton 1996; Woods 1993).

- **BUT WHAT DO CLIENTS VALUE MOST WHEN DEALING WITH A LAWYER?**

- A "clear understanding of my particular needs" (Lexis Nexis 2016: 28).
- 77% of clients agreed that “Lawyers don’t recognise that they are operating in a service industry.” (Lexis Nexis 2016; see also Menkel-Meadow 2014)

METHODOLOGY

- Ethnographic (Spradley 1979) and idiographic approach (Allport 1940)
- Rigorous iterative analysis of the data & application of Spradley's (DRSM) (1979)
- How do participants (re)negotiate knowledge at the margins of practice (Gherardi 2014)?
- 'Dilemma analysis' identifying the *issues* that arise (Winter 1982).
- Uncomfortable reflexivity approach (Youdell 2010; Pillow 2003).
- Bourdieusian theoretical framework [(habitus)(capital)] + field = practice (Bourdieu 1986).

PILOT STUDY FINDINGS

- X2 Post-interview meetings & x1 student semi-structured interview.
- **WHAT ARE THE VALUED DISPOSITIONS OF THE LAW CLINIC?**
- **Post-Interview Meeting 1 (Being reflective; Being sympathetic & empathetic; & Facilitating)**
- Reflecting upon the client's emotions & feelings when asking for information.
- Ensuring the client understood that they were not being judged.
- Reflecting upon the client's thoughts at the time of the appropriate transaction.
- Taking account of the client's feelings and emotions when providing the advice.
- Recognising the importance of providing the client with closure.
- Recognising no homology between law and justice.

WHAT ARE THE VALUED **DISPOSITIONS** OR CULTURAL CAPITAL OF THE LAW CLINIC?

- **Post-Interview Meeting 2 (Being informative; Being reflective; and Being knowledgeable)**
- Sympathetic but pragmatic approach to prioritising solving the legal problem.
- Preparing students for the rules of the game in the practice field.
- Focusing on risks & client's 'real need' (financial).
- Client's emotions not really discussed.
- Expressing admiration for the client and optimism for the future.
- Predominant approach taken by legal practitioners (Sarat & Felstiner 1988).
- Protecting the 'self' and/or representing time constraints in practice and getting to the legal point?

WHAT ARE THE VALUED **DISPOSITIONS** OR CULTURAL CAPITAL OF THE LAW CLINIC?

- **Student Interview (Being sympathetic and empathetic; Being charitable; and Wanting to help clients)**
- Helping vulnerable clients in unfair situations.
- Helping those who cannot get help elsewhere.
- Relating clients to own family and community.
- Providing a 'little bit of hope'.
- Enjoying the feeling.
- But... realism & not just taking the client's word for it.

- **Attributes of a 'good' student advisor':**
- Being organised & putting the effort in.
- Interpersonal skills.
- Letter writing skills.

SIMILARITIES/DIFFERENCES BETWEEN THE LAW DEGREE, LEGAL PRACTICE & **FIELDS**

- The Law Degree **Field**
- Not having to deal with emotions:
 - Own (sympathy);
 - Clients; and
 - Others.
- '*Doxa*' of the law degree that emotions, sensitivity and recognition of the individual's feelings are not relevant.
- Failing to perform on law degree only impacts on the student.
- Preparation for practice?

SIMILARITIES/DIFFERENCES BETWEEN THE LAW DEGREE, LEGAL PRACTICE & FIELDS

- **The Legal Practice Field**
- Educating students to the rules of the game in the legal practice field:
- Getting information as quickly as possible.
- Time and cost constraints.
- Practice is associated with money:
 - *“Well, from the drop in sessions, getting to know solicitors and working and seeing how they work, like if it wasn’t for the clinic I probably wouldn’t have met these solicitors or seen how they operate and get a different outlook on the law and look at it from our point of view, where it is about helping clients, and then looking at it from solicitors points of view where, well some solicitors, where they are a business and they have to make money.”*
- Possible injustices from association with money.
- Law clinic empowering clients v legal practice representing clients.

SIMILARITIES/DIFFERENCES BETWEEN THE LAW DEGREE, LEGAL PRACTICE & FIELDS

PRACTICE/LAW DEGREE (PATERNALISTIC APPROACH?)		LAW CLINIC (MATERNALISTIC APPROACH?)	
REPRESENTATIVE APPROACH = CHAMPIONING THE CLIENT	PRACTICE – MONEY = ASSISTANCE	EMPOWERMENT APPROACH = EDUCATING THE CLIENT	LAC – NOT HAVING MONEY = ASSISTANCE
EXTRINSIC REWARDS: PROFIT / CERTIFICATE	EMOTIONALLY DISATTACHED	INTRINSIC VALUES: BENEVOLENCE	EMOTIONALLY ATTACHED

WHAT NOW?



- **Is legal education & are lawyers manufacturing a value position?**
- Law clinic's values = 'self-transcendence' & law degree & legal practice = 'self-enhancement'?(Schwartz 2012; Schwartz 1990; Drake, Taylor & Toddington 2016).
- Considering:
 - Concepts of epistemic machineries (Knorr Cetina 1999; Jensen *et al.* 2015); and
 - Weber's models of rationality (Callahan 2007; Rutgers & Schreuers 2006; Brubaker 1984)) including:
 - Zweckrationalitaet (purposive rationality);
 - Wertrationalitaet (value rationality);
 - Affectual (particularly emotional); and
 - Traditional.
 - Analysis of the legal education field & further collected data.
- Writing up.

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