

# Keynote: Reforming Law – The Role of Theory

Margaret Davies<sup>1</sup>

## I. Introduction

The anarchist Peter Kropotkin began his 1886 pamphlet *Law and Authority* by describing the tendency of law to proliferate so that it takes over every aspect of social life:<sup>2</sup>

when ignorance reigns in society and disorder in the minds of men, laws are multiplied, legislation is expected to do everything, and each fresh law, being a fresh miscalculation, men are continually led to demand from it what can proceed only from their own education and their own morality.

Kropotkin continues by noting that, because of this demand for law to fix things, laws continue to multiply, to the point that there is ‘a law everywhere and about everything!’ As an anarchist, Kropotkin thought that the desire for law to rectify society’s problems stemmed from a learned reliance on others rather than reliance on the intrinsic resources of the self and the immediate community. He argued that law achieves its power by weaving together two elements: longstanding and useful customs which society is committed to, and mechanisms allowing the privileged classes to maintain their power. It was not an entirely simplistic view of law as an instrument of dominance. However, he saw the socially accepted parts of law as a foil, which were there to conceal the fact that law essentially operates to strengthen the power of the privileged.

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1 Matthew Flinders Distinguished Professor of Law, Flinders University.

2 Peter Kropotkin, *Law and Authority: An Anarchist Essay* (Open Socialist Publishing, 2006) 6.

If there was too much law for Kropotkin in 19<sup>th</sup> century Europe I don't like to imagine what he would have made of modern nation states and the legal effects of globalisation. (Indeed the phenomenon of 'juridification' has been much analysed in the later 20<sup>th</sup> and early 21<sup>st</sup> centuries.<sup>3</sup>) In some ways Kropotkin's underlying image of law was not completely unlike the image held by 19<sup>th</sup> and 20<sup>th</sup> century liberal thinkers. This image was of a law with its own sphere, a law with a conceptual limit beyond which people could organise their lives as they saw fit. Beyond law's sphere of regulation lay freedom and the private sphere. Kropotkin's agenda was to reduce and eventually eliminate law – he concludes his pamphlet with the words 'no more laws! No more judges!'<sup>4</sup> The more moderate concern of many other writers who also adopt the image of a limited law and an outside or non-regulated area of freedom and privacy has been and continues to be where to draw the line of legal intervention, and how to improve the limited law to make it more efficient and consistent, less obscure, and in tune with current social values.

The idea of a limited sphere of law and a non-legal sphere of freedom was tested repeatedly throughout the 20<sup>th</sup> century, often in conjunction with an appreciation of the disseminated nature of power. The image of a limited law was, for instance, revealed to be incoherent in the 1980s by feminist writers such as Frances Olsen and Katherine O'Donovan who pointed to the many ways in which law shapes the conditions for social life and structures legal subjects and their relationships.<sup>5</sup> Law is not neutral as regards social order, but rather creates, normalises and replicates social life. At the same time, by perpetuating the idea that abstract individualism is gender-neutral and race-neutral, and that the person is a natural rather than constructed feature of social life, law obscures its own role in producing social relations. As feminists argued, beyond law was not freedom but, rather, a pervasively normalised and legally inflected social and private life. As Margaret Thornton wrote in the 1990s, 'For women, neither the polity nor the market have been realms of freedom or self-realisation, but realms of hostility'.<sup>6</sup>

3 See, in particular, Jurgen Habermas, *Theory of Communicative Action* Vol 2 (Beacon Press, 1987) 356–73.

4 Kropotkin, above n 2, 34.

5 Frances Olsen, 'The Family and the Market: A Study of Ideology and Legal Reform' (1983) 96 *Harvard Law Review* 1497; Katherine O'Donovan, *Sexual Divisions in Law* (Weidenfeld and Nicholson, 1985).

6 Margaret Thornton, 'The Cartography of Public and Private' in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (Oxford University Press, 1995).

Sociolegal scholars also pointed to the unlimited nature of law. In 1990 Austin Sarat wrote an influential article about the legal experiences of welfare recipients in New England.<sup>7</sup> One of his respondents claimed that the ‘law is all over’ – in other words it is pervasive and unavoidable. This was not so much a view of formal law as having expanded uncontrollably in the way that Kropotkin envisaged – rather, it was a realistic assessment of the fact that law is a different thing for people in different social situations. The welfare recipient had a constant need to engage with law and so felt its presence immediately and materially. Such necessity leads to an experience of law which is, as Sarat says, ‘embodied in a particular set of lived conditions: ... a law of practices, not promises, of material transactions, not abstract ideals’.<sup>8</sup> Understood from the bottom up, law is everywhere and has an oppressive weight – it doesn’t liberate but sets the conditions for survival and demands constant engagement.

Legal pluralists have also challenged the limited view of law, and I would broadly divide this scholarship into two different types. One rather dominant strand of pluralism has examined forms of law outside the state, from Indigenous and religious law to semi-formalised systems of non-legal governance. Such approaches, like legal positivism, tend to view law as an objectifiable and self-contained thing. A second type of pluralism, which has grown in part out of the first, looks at law as emerging from human interactions and narratives, making it fluid and local, and often leading to hybrid forms where people combine norms from different sources in order to create a kind of social law.

Clearly the writers of recent decades did not mean (or perhaps did not only mean) that the nightmare implied by Kropotkin had come to pass – that doctrinal law has reached further and further into the interstices it creates so that no corner of life is left unlegislated and unregulated. It would perhaps be plausible to hold this view, but feminist, sociolegal and many pluralist theorists start with a different view of law, where it is always embedded in social life. Rather than think of law as an additive or an intervention which expands from a small space to occupy almost everything but which still has its own identity and autonomy, law is seen

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7 Austin Sarat, “‘The Law is All Over’: Power, Resistance, and the Legal Consciousness of the Welfare Poor” (1990) 2 *Yale Journal of Law and the Humanities* 343.

8 Ibid. 378.

as more pervasive and less cohesive, a dispersed set of practices and values, not necessarily emanating from a single place, and experienced and performed differently by different groups of people.

Where does law reform sit in an image of law which is ‘all over’, as Sarat’s respondent said, and where different groups of people have quite different views of what law is and how it operates? I’d like to address this question in three parts. First, by reference to the familiar notion that law reform is about changing doctrinal law so that it better suits the social conditions of the times. Second, by thinking about the idea that law reform can equally address a changing concept of law. Third, by looking at changes in the social and cultural conditions which underpin law.

## II. Reforming Law

First, then, to the familiar notion that law reform essentially concerns improvements to the positive law to make it more coherent, to deal with new social, economic and technological conditions, or to address social problems. In 1949,<sup>9</sup> Lord Denning compared a national society to a river and the law to the ‘conservator’ who keeps the river in good shape. He argued that once the law is stable and developed, the conservator only has to do occasional maintenance – cutting the weeds and repairing the banks, for instance. ‘The river flows peacefully and slowly’ he said.<sup>10</sup>

But in ... days of great social changes ... the law ha[s] to develop apace so as to meet the needs of the time. The greater the social revolution, the greater the need of law reform. The river is turbulent and restless and is in danger of getting out of control. The hatches have to be opened. New channels have to be cut. It requires legal statesmanship of the highest order to keep the law abreast of the social changes. If it does not do so, the rule of law itself may be engulfed and flooded out.

In this image, society usually goes along within the constraints set in place by the law. Social life is the water which flows through the form preserved by law. There is no sense in this image that the characteristics of the river as a whole have been formed by the flow of water; rather, the flow is determined by the solid surfaces maintained by the law. Law reform

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<sup>9</sup> Alfred Thomson Denning (Baron), ‘The Universities and Law Reform’ (1949) 1 *Journal of the Society of Public Teachers of Law* 258.

<sup>10</sup> *Ibid.* 258.

is about tidying up the banks and eliminating obstructions, and, in times of dangerous social upheaval, undertaking more substantial changes to the size, depth and direction of flow. It is an extremely benign view of law – law is basically fine and has a pre-given form, but needs to be tidied up from time to time.

Denning's river is a variation on the idea of a limited sphere of law outside which there is freedom. The image does imply that law provides rather total conditions and shape for social life, but it nonetheless promotes a largely contained view of law. Law provides a neutral form for social existence and, within the confines of the river banks, the individual water molecules can do largely as they please.

There was of course dispute throughout the 20<sup>th</sup> century about whether both parliament *and* judges are the appropriate agents of reform in the law. The debate has many layers which I will not go into here, but primarily it counterposes the common law tradition and the newer theory of legal realism, against the more rationalist positivism of Austin and Bentham.<sup>11</sup> The common law tradition gave judges a prime role in identifying and developing the law, and realists took the view that judges, as human actors, necessarily interpret and apply law in the light of social values. By contrast, Austin and Bentham were adamant about the need to distinguish sharply the question of what law is from what it ought to be. They saw the inquiry into what law is as a matter for those who identify and apply the law, while the question of what law ought to be is determined by parliament and law reformers. Keeping a clear view of the separation of these things was essential for law reform to operate properly and, indeed, in their view much law reform by way of clarification and, ideally, codification was needed in order to make it possible.

As foreshadowed at the beginning of my chapter, the success of the positivist view of law also poses real dilemmas for broad change. For instance, in gender relations, because the underlying idea of law is so doctrinally focused, positivism enforces a pernicious choice between engaging or not engaging with law, between standing inside or outside the law.<sup>12</sup> Because this idea of law is so invested with a view of its own

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11 John Gava, 'The Rise of the Hero Judge' (2001) 24 *UNSW Law Review* 747; J D Heydon, 'Judicial Activism and the Death of the Rule of Law' (2004) 10 *Otago Law Review* 493; Michael Kirby '“Judicial Activism”? A Riposte to the Counter-Reformation' (2005) 11 *Otago Law Review* 1.

12 See Mari Matsuda, 'When the First Quail Calls: Multiple Consciousness as Jurisprudential Method' (1988) 11 *Women's Rights Law Reporter* 7, 8.

neutrality vis-à-vis social power, engaging from a position that does not accept its neutrality has been very difficult. This has led to a good deal of caution among all critics of state law about whether and how to engage with law and law reform: What can be expected of law reform? Does engaging with law simply legitimate its exclusion of alternative knowledges? How can values of care be imported into doctrinal law? How can the experiences of marginalised others be incorporated into the assumed knowledge of law? How can legal subjects be reconstructed as relational rather than atomistic? How can entrenched biases in the operation of law be addressed? How can we even commence the ‘horizontal dialogue’ that Irene Watson has spoken of between modern Australian colonial law and the first, original, law of this country?<sup>13</sup> The very form of positivist law seems to prevent anything but ad hoc change which may, of course, accumulate into something larger over time, but it is a very slow process.

### III. Reforming Concepts of Law

It has always been extremely interesting to me to think that Austin and Bentham were themselves engaged not only in law reform but in a meta-legal reform – the reform of the concept of law. The theory of legal positivism, much criticised throughout the 20<sup>th</sup> century but also completely ingrained in legal pedagogy and ideology, was itself the product of a strategic conceptual change and emerged as part of a reformist agenda. Theory is not only about describing and understanding the world; rather, it both responds to *and makes* the world. Legal positivism is an extremely successful example of what might be termed conceptual reform.<sup>14</sup> It made, and continues to make, the concept of law as something separate from society while also purporting to describe what it has itself made. The point has been made by Wayne Morrison in relation to Austin:<sup>15</sup>

knowledge claims are part of, and not antecedent to, [Austin’s] overall project. Austin is not a simple positivist in the sense that his knowledge claim has no pretence to anything other than the ‘thing-in-itself’, for his

13 Irene Watson, ‘What is the Mainstream? The Laws of First Nations Peoples’, see Ch 18, this collection.

14 See, in particular, Frederick Schauer, ‘The Path-Dependence of Legal Positivism’ (2015) 101 *Virginia Law Review* 957, 960–69.

15 W Morrison, *Jurisprudence: From the Greeks to Post-modernism* (Cavendish, 1997) 227; see also, discussing Bentham, Schauer, above n 14, 960–69; Tom Campbell, *The Legal Theory of Ethical Positivism* (Dartmouth, 1996).

image of positive law is one element of an overall project. ... Austin's claims for jurisprudence are pragmatic in the sense that the demand for a clear jurisprudence arises to get something done, and that something is to create an image of law suitable for law to become a powerful and rational image of modernity.

HLA Hart also described Austin and Bentham's project in terms of conceptual reform – to construct a workable concept of law which would enable the doctrinal law to be improved. He described them as 'the vanguard of a movement which labored with passionate intensity and much success' and also insisted that their 'prime reason' for insisting on the separation of law and morality 'was to enable [people] to see steadily the precise issues posed by the existence of morally bad laws'.<sup>16</sup> In other words, separating is from ought was not a description of a reality, but rather an *act of theory construction* which was part of an overall agenda of rationalisation in the law. They made what they wanted to describe and it obviously resonated more broadly – in time it became true because people acted as if it were true. However, as I have indicated, the problem with the success of positivism was that it seemed to leave the only option for legal change as change in the content of law – its doctrines and procedures.

I have laboured this point, because for some years I have taken inspiration from Austin and Bentham on this issue and regarded theory to be not only about analysing and describing, but also constructing alternative concepts of law which are future-oriented. That this is possible is reinforced in social theory and critical philosophy. Drawing out aspects of the present which appear to provide direction for the future, and intensifying them theoretically, prefigures a world that is commensurable with the present and past, but which perhaps adds additional emphasis to those elements of it worth promoting. Theory can therefore be seen as an imaginative response to present circumstances, in which theorists actively choose their abstractions from a complex world. This is true of all theory, not only of theory based on an explicit normative vision.

This broader need for law reform to encompass not only reform in doctrinal law but also new concepts of law was explicitly recognised in the now disbanded Law Commission of Canada. As well as more recognisable law reform objectives, it had a statutory mandate to 'work towards the

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16 H L A Hart, 'Positivism and the Separation of Law and Morality' (1958) 71 *Harvard Law Review* 593, 596.

development of new concepts of law and new approaches to law'.<sup>17</sup> The Law Commission stated that it 'interprets this legislative purpose as directing it to examine critically even the most fundamental principles of the Canadian legal system'.<sup>18</sup>

Over the past half century there have been some efforts to develop alternative concepts of law and I think it would be correct to say that some paradigm shifting is underway. This was true when I began my career as a legal scholar, though 25 years ago I hoped things would have become more certain by now. That was a misplaced hope, and legal theory remains in an uncertain but very interesting situation. No alternative concept has at this stage reached the prominence of legal positivism which, as I have said, has attained its status because of its widespread adoption. But some themes can perhaps be observed.

First, as I indicated above, there is an appreciation of law as distributed or networked across social life as opposed to existing in its own limited sphere. Understanding law as distributed, or perhaps diffused, means several things: it means, as many scholars have observed, that law shapes and leaves imprints across all social relationships, even or especially those that were once regarded as intrinsically private;<sup>19</sup> it means that law has a spatial and material presence and not just an abstract one;<sup>20</sup> and it means that doctrinal law is a conceptually crystallised form of human normative relationships but is never self-contained or self-generating, because of its reliance on human intervention in the form of interpretations and applications of law.

These observations are connected to a second theme of the newer approaches to law, which is that law is not simply a top-down imposition, but also in many forms has to be regarded as emerging from subjective and material human experiences.<sup>21</sup> In a sense, this has involved two or possibly three shifts. First, there is an appreciation that law is not a thing in itself that can be reflected or represented in theory but, rather, is the product

17 *Law Commission of Canada Act 1996* s 3(a).

18 Records of Law Commission of Canada held on the website of the Library and Archives of Canada: [epe.lac-bac.gc.ca/100/206/301/law\\_commission\\_of\\_canada-cf/2006-12-06/www.lcc.gc.ca/about/mandate-en.asp](http://epe.lac-bac.gc.ca/100/206/301/law_commission_of_canada-cf/2006-12-06/www.lcc.gc.ca/about/mandate-en.asp).

19 O'Donovan, above n 5.

20 See, for example, David Delaney, *The Spatial, the Legal and the Pragmatics of World-Making: Nomospheric Investigations* (Routledge, 2010).

21 For further elaboration, see Margaret Davies, *Law Unlimited: Materialism, Pluralism, and Legal Theory* (Routledge, 2017).

of active knowing, active performance and active construal. Second there is an appreciation that those who ‘know’ and perform law are not just legal experts and judges, and that legal knowledge is formed also in the situated and narrative positions of a far more diverse range of identities; in other words, that knowledge of law is produced and it can be produced by people other than experts in law. Third, and increasingly, we are also seeing materialist ideas of law emerge, which place all normativity in the relationships formed between human society and our physical environments.

This is not to say that legal expert knowledge does not have its own specific role and technical purpose; rather, that the theoretical questions ‘What is law?’, ‘Where is law?’, ‘Who is law for?’ and so on cannot be answered simply by reference to this perspective. Thus feminists and pluralists have made efforts to replace the ‘embodied imagining’ of an idealised masculine subject with diverse and relational subjectivities, situated in gendered social contexts.<sup>22</sup> Legal consciousness scholars have studied the everyday knowledge about law, decentring official knowledge of law in favour of everyday knowledge.<sup>23</sup> And Robert Cover famously argued for norm-construction or jurisgenesis at the level of religious communities, an insight which has since been extended to the processes of norm construction across all cultural groups.<sup>24</sup> In all of these contributions, we see an image where the traditional view of state law is only one narrow and exclusive form distilled from the widespread circulation and construction of norms throughout society. But we also see a different image of state law emerging – instead of being a mirror image of the autonomous person with *his* boundaries and rationality, the law constructed in the image of (gender and otherwise) diverse subjects is more relational, more embedded in social practices, and less cohesive.

What does such change in the concept of law have to do with law reform? Or, to return to my original question, if law is distributed or ‘all over’, how can we conceptualise change in legal doctrine? Who is in control of it, how is change generated?

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22 On ‘embodied imagining’, see Judith Grbich ‘The Body in Legal Theory’ (1992) 11 *University of Tasmania Law Review* 26.

23 Patricia Ewick and Susan Silbey, ‘Conformity, Contestation, and Resistance: An Account of Legal Consciousness’ (1992) 26 *New England Law Review* 731.

24 Robert Cover, ‘Nomos and Narrative’ (1983) 97 *Harvard Law Review* 4; see also Robert Post, ‘Who’s Afraid of Jurispathic Courts: Violence and Public Reason in Nomos and Narrative’ (2005) 17 *Yale Law Journal of Law and the Humanities* 9.

I don't have a very clear answer to these questions, but my sense is that the more traditional attitudes to law reform have substantially changed and are now more in keeping with an expansive and even experimental view of what law is. I would make a couple of observations.

First, critical and sociolegal approaches add support to using an evidence-based approach to reform rather than an approach based on abstract rationality. Empirical sociolegal evidence is very significant in this context, as are efforts (discussed below) to read or interpret legal doctrine in ways which accommodate both diversity of values and diversity of life experiences. Second, a more disseminated image of law is perhaps more receptive to efforts to test successor legalities in and around the edges of state law. In some contexts, state law itself can become an experimental space for new ideas about law. One could cite, for example, so-called 'alternative' practices of law, such as non-court-based dispute resolution or Indigenous sentencing courts which introduce values of negotiation, accommodation, recognition of the other, and legal plurality into the practice and meaning of law. At the margins of or beyond state law, examples might include truth and reconciliation commissions and efforts to mobilise civil society in justice initiatives, such as the Women's International War Crimes Tribunal and other people's tribunals.<sup>25</sup> These instances draw on state legality but also deliberately eschew it in the interests of (in part) taking law beyond its self-defined boundaries. They are of course indicative of a two-way process or oscillation between practice and theory:<sup>26</sup> new practices help to generate new theory, which in turn widens the possibilities for further new practices.

## IV. Changing Culture

The problem with deliberately choosing or trying to shape a concept of law is that it is not possible to predict the consequences of such a change. And therefore it is also necessary to pay attention to the surrounding culture and the ways in which it informs what is even thinkable. Around the same time as Denning was speaking about the river of society with its conservator – the

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25 Ustina Dolgopol, 'Redressing Partial Justice – A Possible Role for Civil Society' in Ustina Dolgopol and Judith Gardam (eds), *The Challenge of Conflict: International Law Responds* (Martinus Nijhoff, 2006); Christine Chinkin, 'Women's International Tribunal on Japanese Military Sexual Slavery' (2001) 95 *American Journal of International Law* 335.

26 Davina Cooper, *Everyday Utopias: The Conceptual Life of Promising Spaces* (Duke University Press, 2014).

law reformer – keeping it in order, Ludwig Wittgenstein also wrote about a river in his collection of notes, subsequently published as *On Certainty*.<sup>27</sup> Wittgenstein's river differentiates between things we know to be true, and the inherited mythologies and shared cultural background which we need to support this knowledge. His writing is ambiguous, but essentially he differentiates between the riverbed on the one hand, which is the substratum of knowledge or the shared ideas we have that make knowledge possible, and on the other hand the river flow itself, which consists of everyday claims and propositions made possible by the background to our knowledge. The image is very similar to Denning's, except that in Wittgenstein's case there is no reformer to keep the river clear and flowing. It changes itself and, over time, parts of the riverbed become dislodged.<sup>28</sup>

The mythology may change back into a state of flux, the river-bed of thoughts may shift. But I distinguish between the movement of the waters on the river-bed and the shift of the bed itself; though there is not a sharp division of the one from the other.

Wittgenstein does not explicitly place law in his metaphor, but it might be supposed that everyday knowledge about law is part of the flow, while shared and presumed cultural knowledge is part of the riverbed – the presupposed cultural knowledge would include the liberal and colonial views of law as discrete, and as disconnected from social identity.

Philosopher Susan Hekman notes that philosophical theories that differentiate between an epistemological background and everyday truths are often extremely conservative, because they do not acknowledge that cultural assumptions may change, and do not offer any ideas about how to encourage such change.<sup>29</sup> They simply rely on cultural background as pre-given and immutable. She argues that Wittgenstein's image holds more potential for theorising and promoting change than most theories of the background because it acknowledges that the riverbed may shift and that it is not sharply divided from the everyday truths which it supports.

So how can cultural change be promoted? Cultural change does not occur because people are presented with a logical argument as to why something ought to be the case. It is much more incremental, and depends as much

27 Ludwig Wittgenstein, *On Certainty*, trans G E M Anscombe (Blackwell, 1969).

28 Ibid. s 97.

29 Susan Hekman, 'Backgrounds and Riverbeds: Feminist Reflections' (1999) 25 *Feminist Studies* 427. I would like to thank Sami Alrashidi for drawing my attention to this article and for his persuasive arguments as to its significance.

on what are understood to be the criteria for truth within the cultural background as it does on any new claim. As Hekman says, ‘feminist truth does not make sense in the discourse of abstract masculinity’, and ‘we must first alter the criteria of what it makes sense to say before we can proclaim another “truth” and expect it to be heard’.<sup>30</sup> To take a historical example, claims for gender and racial equality could not be heard until presupposed knowledge had shifted sufficiently for women and those of non-Caucasian heritage to be regarded as people and equal citizens. Many cultural norms still exist which make the resulting formal equality inadequate. Claims to marriage equality still do not make sense to some people who see marriage as necessarily heterosexual. There is no logic in this view but there is a foundation – the foundation provided by a heteronormative cultural background that still divides people into two sexes. In a quite different sphere, it is still almost impossible for those educated within a Eurocentric legal paradigm, with its obsessive taxonomies and entrenched distinctions, to comprehend the relationality and connectedness of First Nations’ approaches to law. It seems almost beyond impossible for us to move past human exceptionalism and separation to a view where people are seen as fully part of the physical and natural world.

Hekman argues that changes in the cultural background essentially occur by the emergence of new narratives and perspectives which decentre, defamiliarise and eventually alter accepted knowledge.<sup>31</sup> The trends I have alluded to above, in relation to bringing different perspectives into doctrinal law and understanding law itself in a more disseminated and less hierarchical way, are themselves part of such a cultural change, as is the extensive scholarship which challenges the accepted nature and limits of law.

One partial illustration of a contestation of the doctrine, concept and cultural presuppositions of law is evident in the feminist judgments projects, which have an English and Australian iteration, as well as several others to come.<sup>32</sup> The feminist judgments projects asked academic and activist writers to provide an alternative feminist judgment to a case chosen by the writer. Although all of the judgments were feminist, there are of course many varieties of feminism, and also many ways in which feminism can be brought to bear on particular issues. The objective in

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30 Ibid. 438.

31 Ibid.

32 Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart, 2010); Heather Douglas, Francesca Bartlett, Trish Luker and Rosemary Hunter (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Hart, 2014).

the English project was to leave ‘a female-gendered mark on the law’.<sup>33</sup> This was achieved not in any simplistic translation of feminist theory into practice: feminism is far too diverse for that, and what a theory requires in a practical sense is not always evident. Rather, the impact of the feminist judgments projects lies in the amassing of feminist readings of cases, which collectively illustrate a potential shift in legal consciousness. That is, the feminist judgments show how law *is* gendered and how it *could* be different, how the resources for a different understanding of law are to be found in the law itself in combination with the interpretations made by (academic or real) judges.<sup>34</sup> The judgments remained within the narrowly circumscribed horizon of mainstream colonial law.<sup>35</sup> But the academic performance of this law did bring different voices to that law and push it towards being a different thing.

In this way, changes in law may be promoted by foregrounding changes in the cultural background. Like the alternative or experimental legal forms mentioned above, feminist judgments also test the boundaries of the present with an eye on the future. As I have said elsewhere, such ‘prefigurative practices cross the divide between the legal present and our legal futures: they enact possible futures in the present and leave indelible traces of what is to come on the here and now’.<sup>36</sup>

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In this chapter I have very artificially distinguished between the law understood as substance, the law understood as concept, and the cultural presuppositions which constitute the conditions for thinking and talking about law and its concept. But of course – and as I hope will be clear by now – these are artificial distinctions. Changing the content of law over time may also change its shape and contours, and such changes are also connected to shifts in cultural presuppositions. The riverbed is not distinct from the river, and more importantly, the flow of the river is as important as the banks and bed in influencing its overall shape and form.

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33 Hunter et al, *ibid.*, 8.

34 See generally Margaret Davies, ‘The Law Becomes Us: Rediscovering Judgment’ (2012) 20 *Feminist Legal Studies* 167.

35 Irene Watson, ‘First Nations Stories, Grandmother’s Law: Too Many Stories to Tell’ in Douglas et al, above n 32.

36 Davies, above n 21, 17.

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