

EXCLUSION AND THE IDENTITY OF LAW

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I POSITIVE AND NEGATIVE DEFINITIONS OF LAW

Law is traditionally analysed as a positive phenomenon, meaning that it is constructed and laid down by the institutions within a given society and that it has an empirical dimension. The concept of positive law, or of rules and doctrines which have an affirmative empirical existence and which are posited by a law-making institution, reflects this preoccupation with the substance and reality of law. Parliaments, courts, law firms, public offices, law libraries and the internet are packed with the positive stuff of law: it seems endlessly to reproduce and permeate all dimensions of our social existences. Law appears to be everywhere we look, as Kafka's painter, Titorelli, observes: 'There are Law Court offices in almost every attic, why should this be an exception?'¹ Everywhere, law has a material presence, an undeniable quality of being which cannot be ignored. Thus, the identity of law (by which I mean its conceptual form *and* its everyday materialisations) seems to flow from law's positivity: as an entity, law includes all existent rules, principles, institutions and decisions. The positivity of law can therefore be seen as consisting of three dimensions: first, law is a human creation; second, it has material form; and, third, its conceptual and practical identity is based upon the existing forms of legal positivity.

Without denying the value of analysing positive phenomena, the third of these dimensions, the identity of law, can also be understood by reference to negativity.²

* Professor, School of Law, Flinders University. Research for this article has been funded by an Australian Research Council Discovery Grant (DP0451107). Thanks to Reeta Randhawa for research assistance and to the anonymous referees for their useful and provocative comments.

¹ Franz Kafka, *The Trial* (trans 1953) 182. The quotation is in a sense taken out of context because, although the law is everywhere in Kafka's works, it is also invisible, incomprehensible and representative of our internal directives (such as guilt inspired by religion). It is also, unlike the ideal of an empirically present positive law, largely abstract.

² It should be noted that my argument does not turn on negation as a general logical trope, even though I have referred to exclusion as 'negativity' and as a 'negative moment' in the construction of positive entities. I agree with Iain Stewart that negation as a purely logical quality provides an insufficient basis for the analysis of exclusion. Interestingly, my discussion of the psychoanalytical notions of exclusion as repression and foreclosure (below) has parallels in Stewart's more novel discussion of absentation, and strong and weak closure. See Iain

While law certainly is essentially a concrete mass of positive acts, decisions, documents, and so forth, it can also be analysed by reference to a series of negative moments or exclusions. Law can be seen to gain its identity from processes of exclusion in areas as diverse as the delineation of national legal systems, the identification of legal subjects, the formation of legal doctrines and the analysis of the underlying concept of law. The processes of law exclude a multiplicity of people and things in a multiplicity of ways and collectively these exclusions can be seen to constitute the 'real' positive law. For example, 'exclusion' can refer to the fact that many people are, for financial and other reasons, excluded from defending legal rights which – according to the formal law – they actually possess (the problem of access to so-called 'justice').³ At another level, 'exclusion' can refer to the explicit or implicit legal exclusion of some people from a legal right or privilege, such as the exclusion of same sex partnerships from the definition of 'marriage'.⁴ At a greater level of generality, 'exclusion' can be seen as definitive of the very concept of a legal system, since 'law' is premised on the idea of difference from some excluded other, such as morality or politics. In other words, while the positive nature of law is undeniable, it is also useful to look at the idea of law from the point of view of what it excludes. In a sense, my objective is to sculpt the law in relief, looking very broadly at the ways in which negativity and exclusion impact upon the shape of the law.

Even though the rights enjoyed by legal subjects can be reformed to make them more inclusive, a question always exists as to where to draw the line of inclusion and exclusion. For instance, even after women and Indigenous people gained full voting rights in Australia – a gesture of inclusion – the right to vote under Australian Commonwealth law is still circumscribed by exclusions: of young people under the age of 18, of most non-citizens, of people of 'unsound mind', of unpardoned traitors and of people serving a full-time prison sentence.⁵ Law defines spaces of insides and outsides and in many respects is a large-scale exercise in social line-drawing. Exclusion is widespread and seemingly fundamental to law.

Stewart, 'Critical Approaches in Comparative Law' (2002) *Oxford University Comparative Law Forum* 4 <<http://ouclf.iuscomp.org/articles/stewart.shtml>>, text after note 132.

³ Such matters are normally themselves excluded from theoretical discussions about law, as though the everyday practice of law has nothing to do with its nature. As soon as we recognise, however, that law is a cultural artefact and cannot be theorised without reference to a social setting, this focus on essences begins to look rather suspect. Why should we regard (for instance) the official view of legal rights being open to all as more 'central' to law than the socio-economic conditions which contradict the official view?

⁴ *Marriage Act* 1961 (Cth) s 5(1).

⁵ These examples are drawn from the *Commonwealth Electoral Act* 1918 s 93. [At the time of writing, s 93 denied the vote to prisoners serving a sentence of three years or more for an offence against a law of the Commonwealth, a State or a Territory. Section 93 was amended by the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act* 2006 to deny the vote to all prisoners serving a full-time sentence for such an offence (Ed).] The *Crimes Act* 1914 (Cth) s 30FD also excludes from voting, for seven years, any person who is a member of the committee or executive of an 'unlawful association' as declared by a court in accordance with that act.

Taking this focus as its point of departure, this article addresses several questions. First, what is the relationship between exclusion and the identity of law? (Part II) Second, what are the traditional modes or methods of exclusion in law and legal theory and how have the contours of legal exclusion been challenged? (Part III) Third, is it possible to think of law without exclusion, and can a non-exclusive view of law begin to address concerns about legally-reinforced social exclusion? (Part IV).

II INTRODUCTORY COMMENTS ON EXCLUSION AND IDENTITY

Before considering *how* law excludes, I want to introduce in outline some thoughts about the relationships among exclusion, identity and meanings. There are undoubtedly several theoretical mechanisms for understanding exclusion: the two I sketch here are drawn from structuralist/post-structuralist theories of meaning and (perhaps counter-intuitively) from psychoanalysis. Structuralism and post-structuralism provide accounts of meaning and conceptualisation which I largely accept, while psychoanalysis is a system of thought which is suggestive and useful in parts but not something which I would endorse as a totality.⁶

According to the structuralist school of thought, difference (and therefore exclusion) is essential to identity formation. Conceptual entities do not have a positive existence, but are rather the product of a system of differences. While the physical world exists, its meaning is a cultural-linguistic construct. Such meaning does not flow positively from empirical objects, but from a linguistic structure based on a form of negativity. The founder of structuralist linguistics, Ferdinand de Saussure, argued that meaning is the effect of differences: it is the exclusion of contiguous and oppositional concepts which gives a word its significance.⁷ We get the sense of what something is, by reference to what it is not, as indicated by its place in a system of related terms.

Our pronoun grammar gives one illustration of the relationship between exclusion and identity because it provides a link between linguistic meaning and identity of a subject as an 'I': the term 'I' is different to 'you', and 'we' (you and I) is different from 'her' or 'them' or 'it'.⁸ Extending this from language to psychic identity, I form my identity (not my physical presence, but my understanding of myself) by differentiating myself from others, by excluding them from my idea of 'me'.⁹

⁶ This is possibly a heretical approach to psychoanalysis, which should be all or nothing, a choice which I also refuse. On this point I completely endorse the view of Nicola Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (1997) 211.

⁷ Ferdinand de Saussure, *Course in General Linguistics* (trans 1959) 117. See generally Jonathon Culler, *Structuralist Poetics: Structuralism, Linguistics and the Study of Literature* (1975) ch 1; Margaret Davies, *Asking the Law Question* (2nd ed 2002) 307–13.

⁸ The example is from Emile Benveniste, 'Subjectivity in Language' in Benveniste, *Problems in General Linguistics* (1971).

⁹ In Lacanian psychoanalysis, the 'mirror stage' is the developmental point at which a child realises that it is different from an other person and that, seeing itself in a mirror, the child is also an other. Prior to the mirror stage, there is only a disconnected mass of physical parts and

Recognition of the self as a totality is predicated on recognition of otherness: by appreciating difference and learning to exclude, we come to recognise ourselves as separate bodies of meaning. Thus, in these structuralist accounts, exclusion is seen to be basic to all discursive (linguistic, conceptual, historical, grammatical and psychic) identity. My identity, my ability to say 'I', and therefore my ability to enter into the social world as an independent unit, is premised on an exclusion of the other from myself – an exclusion which is not necessarily predetermined by my possession of a physically separate brain and body.

Drawing upon and strengthening this structuralist moment in philosophy, Ernesto Laclau describes the relationship between exclusion and identity like this:

antagonism and exclusion are constitutive of all identity. Without limits through which a (non-dialectical) negativity is constructed, we would have an indefinite dispersion of differences whose absence of systematic limits would make any differential identity impossible.¹⁰

Laclau's description of exclusion is more antagonistic than Saussure's, a difference reflecting the move from structuralism to post-structuralism. Nonetheless, the crucial insight is that identity does not positively pre-exist the act of exclusion in some already formed state, but is an *effect* of exclusion and the setting of limits. Conceptual enquiry does not proceed analytically by distinguishing one pre-existing identity from another, but rather by a differentiation which constitutes the identity: exclusion is prior to identity, rather than identity being prior to differentiation. In the next section of this article, I will provide some examples of the identity of law as a system being formed by the exclusion of various non-legal phenomena.

While exclusion is formative of identity, it is also subversive of identity – exclusion creates and undermines identity. In what might be identified as the post-structural moment in the articulation of the relation between exclusion and identity, Laclau says:

The system is what is required for the differential identities to be constituted, but the only thing – exclusion – which can constitute the system and thus make possible these identities, is also what subverts them. (In deconstructive terms: the conditions of possibility of the system are also its conditions of impossibility.)¹¹

As Laclau indicates, the point is common enough in writings on deconstruction¹²: essentially that, because an identity is constituted by exclusion, it is also constantly threatened by the exclusion; the exclusion does not just establish different identities,

needs which are poorly differentiated from the child's exterior. See Jacques Lacan, 'The Mirror Stage' in *Ecrits: a Selection* (1977). See generally Elizabeth Grosz, *Jacques Lacan: a Feminist Introduction* (1990) ch 2.

¹⁰ Ernesto Laclau, *Emancipation(s)* (1996) 52.

¹¹ *Ibid* 53.

¹² One now-classical exposition is Jacques Derrida, 'Différance' in *Margins of Philosophy* (1982) 13. See also Rodolphe Gasché, *The Tain of the Mirror* (1986) 128-31.

but rather the exclusion antagonises and resists identity. Because the excluded ‘other’ is actually essential (though negatively) to the concept, object or identity in question, it intrudes into any such identity and undermines it *as* an identity. The excluded thing does not just go away politely as though it never existed: it insists on being part of the definition of a thing – it is the other which that thing or identity is not. A trace of the excluded term is left, meaning that the identity is not total or complete in itself, and there is an ongoing need to deny the other, to keep it outside. Exclusion is not eradication, but more of an exercise of power or border control which is an ongoing process, not a single act.

A second way of thinking about exclusion is by analogy with the psychoanalytic distinction between foreclosure and repression.¹³ To simplify: foreclosure refers to total exile or repudiation; the foreclosed object is alien or outlawed, completely exterior and beyond the comprehension (except as totally other) of the foreclosing entity. Foreclosure is characterised by a refusal or inability to entertain something outside the limits of comprehension and is associated with an entirely internal construction of reality.¹⁴ In contrast, repression is an internal denial or act of censure: Freud used the term to refer to instincts or impulses which the subject does not want to recognise. Such instincts are quarantined in the unconscious and may resurface in dreams and other unintended psychically-driven events (such as a slip of the tongue).¹⁵ In the case of foreclosure the thing does not exist or cannot be seen, whereas a repressed entity may be recognised, perhaps tangentially, but is condemned or resisted. An absolute inside/outside distinction reflects the logic of foreclosure, whereby a thing is simply included or excluded, present or absent. The logic of repression is quite different, however. It envisages an internal exclusion, and indicates that identity is not formed only by putting something outside, but by refusing to accept that which is irretrievably inside. As I will explain, this mechanism has relevance to the ways in which law addresses its subjects as equally existing under the law, but not equally regarded or recognised in their subjectivity.

These two ways of thinking about exclusion, drawn from (post)structuralism and by analogy with psychoanalysis, are not alternatives, but neither can the one be reduced to the other. They simply provide different theoretical angles on the mechanisms of exclusion. Four points of significance emerge from this.

¹³ See Judith Butler, *The Psychic Life of Power* (1997) 23. I use the term ‘by analogy with psychoanalysis’ to indicate that (1) this is a schematic reduction of several ideas appearing in different forms in various psychoanalytical texts – it is not by any means an accurate reproduction of these concepts in all of their diversity in (especially) the texts of Freud and Lacan; and (2) to use the foreclosure/repression distinction in the way that I do is to take it out of context, since it cannot be directly transcribed out of the context of psychic identity. However, my point is not to say anything at all about psychoanalysis, but rather simply to use an interesting distinction.

¹⁴ See Sigmund Freud, ‘Neurosis and Psychosis’ in Freud, *The Essentials of Psychoanalysis* (1986). Judith Butler emphasises the constitutive role of foreclosure: ‘[a]s foreclosure, the sanction works not to prohibit existing desire but to produce certain kinds of objects and to bar other from the field of social production’ (above n 13, 25).

¹⁵ Sigmund Freud, ‘The Concept of Repression’ in Freud, *Essentials*, above n 14.

1. Identities (concepts, meanings, systems, objects of cognition) are formed by conceptual and discursive exclusions (exclusion as identity formation).
2. Such exclusion also subverts identity, but does not destroy it (the subversive consequence of 1).
3. Exclusion may take the form of a complete repudiation or outlawing of an other, in which the other's existence is never registered (exclusion as foreclosure).
4. It can also take the form of uninvited or forced cognition of an other, which is nonetheless denied or resisted (exclusion as repression).

So far, the idea of exclusion is very abstract, almost to the point of being little more than a logical relation. In the following discussion, however, I consider both the purely conceptual and the more practical manifestations of exclusion.

III MODES OF EXCLUSION: OBJECTS AND SUBJECTS

How, then, is the identity of law constituted by exclusion? I would like to look at this question from two perspectives: the first centres on methods of defining the law as an object of theoretical knowledge, while the second emphasises legal subjects, also constituted by exclusion. In relation to the first perspective, law as an object, three areas seem significant: the exclusion of 'non-legal' normative discourses in the theoretical definition of law (that is, the exclusion of politics, morality, religion, social systems of norms); the exclusion of other types of law and other legal systems in the construction of a domestic legal system (Australian as opposed to international, Indigenous, or other domestic law); and the exclusions inherent in legal reasoning (determining sameness and difference). The founding presumption of the need to exclude in this context is that law is singular and state-based: it must be possible to draw a line around law so that it is contained within a unitary 'legal' sphere which can be related to a central state. As I will explain, in relation to each dimension, identifying law as an object frequently relies upon exclusion as foreclosure: certain matters are by definition put beyond the scope of law. At the same time, in each case, the exclusion is not completely effective and the boundaries of law become suspect. The second perspective, that of the legal subject, is also a multilayered phenomenon. Subjects are defined by direct and explicit exclusion (tantamount to foreclosure), by exclusion from the symbolism of law, and by the complicity between social exclusion and the exclusive concept of law (both types of legal repression).

These modes of exclusion, in relation to law as an object of knowledge and legal subjects, should not be regarded as themselves exclusive: they are not exhaustive of the types of exclusion practised by law, nor are they separate from each other. Feminists, for example, have identified male bias or gendered assumptions at each level and, like critical legal scholars, have suggested that it is ultimately not

possible to separate the content of legal discrimination from the form of law at large.¹⁶ In other words, the exclusion of social groups from full recognition by law cannot be understood independently of the idea that law is a closed, autonomous or conceptually separate entity. Just as importantly, the (non-)relation of Indigenous law to Australian law is an example where mainstream colonial law defines itself through exclusion, manifesting as the exclusion of a group of people from law's symbolism and as the exclusion of an 'other' law from mainstream law as a system.¹⁷

All of these modes of exclusion, strongly determinative of the Western concept of law for the better part of the twentieth century and for some time previously, have been vigorously challenged in recent decades – by the changing practical conditions of global legal regulation, by various types of theoretical innovation, and by the insistent discourses of human rights and social justice. In this section of the article I sketch the modes of exclusion which have both formed (and subverted) the discipline of legal philosophy. I also outline some of the recent challenges and changes to the perimeters of law.

A Law as an Object

1 Theory

The very idea of legal philosophy is premised upon there being a singular object 'law' which can be analysed theoretically. The object, however, does not necessarily exist in and of itself, but is rather a product of its differentiation from non-law. Law's conceptual identity is a product of the exclusion of non-law from the definition of law. This is despite the fact that we frequently take for granted the positive existence of law as a thing which can be studied and understood as an independent entity.

The types of exclusions upon which positivist legal theory relies are evident in several of the foundational texts of jurisprudence. For instance, the legal positivist John Austin, whose intellectual task was the post-Benthamite construction of a science of jurisprudence, insisted that this science be premised on the separation of

¹⁶ Early feminist legal scholarship explicitly making this connection includes Catherine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (1987) and Margot Stubbs, 'Feminism and Legal Positivism' (1986) 3 *Australian Journal of Law and Society* 63; see also Carol Smart, *Feminism and the Power of Law* (1989); Nicola Lacey, 'Closure and Critique in Feminist Jurisprudence: Transcending the Dichotomy or a Foot in Both Camps' in Lacey, above n 6.

¹⁷ Sangeetha Chandra-Shekeran, 'Challenging the Fiction of the Nation in the "Reconciliation" Texts of *Mabo* and *Bringing Them Home*' (1998) 11 *Australian Feminist Law Journal* 107, 123; Irene Watson, 'Indigenous Peoples' Law-Ways: Survival Against the Colonial State' (1997) 8 *Australian Feminist Law Journal* 39; Michael Detmold, 'Law and Difference: Reflections on *Mabo's* Case' (1993) 15 *Sydney Law Review* 158.

what law is from what it ought to be.¹⁸ Questions of what law ought to be, according to Austin, are moral and not legal issues, and must be excluded from the study of positive law. Austin even described his lectures on jurisprudence by reference to a territorial metaphor, that of the 'province'. The 'purpose' of the lectures was to 'describe the boundary which severs the province of jurisprudence from the regions lying on its confines'.¹⁹ In good analytical style, Austin's project was to *determine* the province of jurisprudence, to define and distinguish its subject matter law from entities which merely resemble law, are analogous to law or (improperly) share the signifier 'law'.²⁰ All such entities, such as moral norms, divine laws and social etiquette, are excluded from the subject-matter of jurisprudence by this act of determination. The discipline of jurisprudence, its identity, is defined by the exclusion of theoretical objects not belonging to its domain.

The twentieth century legal theorist Hans Kelsen also explicitly addressed the relationship between legal theory and exclusion in his 'pure theory of law':

It is called a 'pure' theory of law, because it only describes the law and attempts to eliminate from the object of this description everything that is not strictly law: Its aim is to free the science of law from alien elements.²¹

As Iain Stewart points out, Kelsen's is a *pure theory* of law, not a theory of *pure law*.²² It is not the law which is pure, but rather the science, discipline or study of law. Purity is attained by methodological means, primarily the exclusion of alien or foreign material, such as historical, sociological or economic dimensions of our knowledge about law. Thus Kelsen's science of *positive* law, like Austin's determination of the province of jurisprudence, is defined at least in part by negative criteria – that is, by reference to what it excludes.

Stewart's observation highlights a significant issue concerning the separation of legal science from its object 'law'. Yet, as Peter Goodrich points out, in the end it is impossible to distinguish absolutely between method and object: '[h]ow we know an object is in large part constitutive of what that object is taken to be'.²³ In this way, Austin and Kelsen, despite a common emphasis on legal theory as a descriptive activity, arguably both cross over into the realm of the prescriptive. They prescribe a separation between legal science and law, but the prescription,

¹⁸ John Austin, *The Province of Jurisprudence Determined* (first published 1832, 1954). Douzinas and Warrington describe the exclusivity of jurisprudence in terms of the maintenance of the boundaries of an empire: Costas Douzinas, Ronnie Warrington and Shaun McVeigh, *Postmodern Jurisprudence: the Law of Text in the Texts of Law* (1991) 25.

¹⁹ Austin, above n 18.

²⁰ Austin, above n 18, Lecture 1.

²¹ Hans Kelsen, *Pure Theory of Law* (trans 1967) 1.

²² Iain Stewart, 'Kelsen Tomorrow' (1998) 51 *Current Legal Problems* 181, 183. See also Iain Stewart, 'The Critical Legal Science of Hans Kelsen' (1990) 17 *Journal of Law and Society* 273.

²³ Peter Goodrich, 'The Antinomies of Legal Theory: an Introductory Survey' (1983) 3 *Legal Studies* 1, 1.

definition or determination of legal theory excludes certain entities as non-legal or methodologically impure, thus also prescribing what can be seen as law. This is a point made about positivism in general by Goodrich:

There comes a point ... when divergent statements are no longer concerned with the same object. It is my contention here that positivist jurisprudence, a certain tradition of statements about what law 'is', has already arrived at this point. That is to say, that from a frequently uncontested position of academic and institutional dominance, it has come to comprehensively predefine the terrain of legal study and to exclude or marginalise opposed models and conceptions of law.²⁴

In this way positive law and the positive methodology become self-defining. The cumulative effect of the positivist approach to law is that the object 'law', whatever we might imagine it *could* be and whatever it might be understood to be in non-Western cultural contexts, is confined to a very particular type of institutionalised normative system. It is vehemently *not* mere custom, culture, religion, morality or politics. Hence the difficulty once felt in naming Indigenous normative practices as 'law'. As soon as it is recognised that such practices *can* be regarded as law²⁵ (though they may also include what Anglo-European legal philosophy would call 'culture' and 'spirituality'), the paradigm of positive law as the measure for all law becomes problematic.²⁶ Moreover, while the delineation of a province for legal theory may have the appearance of a quite legitimate (and necessary) construction of an academic discipline, the exclusions upon which it is based are far from politically innocent: we could see it equally as the appropriation of a terrain or property from which certain voices and considerations are pre-emptively exiled or even foreclosed.

As I indicated in Part II, exclusion forms and also subverts identity. Only by distinguishing law from non-law can the idea of law as a unitary concept be maintained, but exclusion also subverts the idea of law as unitary because of the manifestly inadequate means of effecting the distinction. If we accepted non-institutionalised and non-Eurocentric notions of law as law, we would have a plurality of concepts of law, rather than a single, universal concept of law.²⁷ Of course, some form of theoretical exclusion or differentiation is necessary to the formation of *an identity*. Two points arise, however: that the location of the line of exclusion is inevitably set by political and cultural considerations²⁸ (the 'rational'

²⁴ Ibid.

²⁵ Irene Watson, 'Kaldowinyeri – Munaintya – In the Beginning' (2000) 4 *Flinders Journal of Law Reform* 1.

²⁶ Goodrich makes the point that, while in the experimental sciences such contradictions lead to paradigm change – as argued by Thomas Kuhn in *The Structure of Scientific Revolutions* (1973) – in social sciences the consequence is more likely to be a political contest between competing discourses or theories. Goodrich, above n 23.

²⁷ See generally Brian Tamanaha, *A General Jurisprudence of Law and Society* (2001) 192-4; Emmanuel Melissaris, 'The More the Merrier? A New Take on Legal Pluralism' (2004) 13 *Social and Legal Studies* 57, 58.

²⁸ Iain Stewart expresses this in a slightly different way by speaking of the relationship between legal closure and ideology. See Stewart, above n 2, text after note 160.

explanation is only a cover story); and that, in the contemporary context, recognition of a plurality of laws and concepts of laws may be both normatively (ethically) preferable and empirically defensible.²⁹

2 Systems

The idea of a particular legal system as a single statist entity may also be seen as the result of several forms of exclusion. First, the legal system normally presupposes the types of exclusion already outlined, which take place at the level of legal theory: that is, of things which, according to positivist dogma, are *never* part of law's validity or identity. Typically, debate has been about 'morality' and 'natural law', both vaguely defined and generally unhelpful terms;³⁰ but, as indicated above, the excluded material extends also to religion, culture, community values and politics.

Secondly, in an effort to keep pluralism at bay and despite many areas of overlap and cross-fertilisation, legal systems exclude other recognisable legal systems at the level of identity-formation. For instance the 'Australian' legal system is not international law, other domestic legal systems or Indigenous law. As Kelsen argued, the establishment of a new legal system after a revolution or *coup d'état* rests upon its differentiation from a temporally prior legal system: specifically, a new basic norm is presupposed.³¹ At the practical level, a superseded constitution or constitutive law, like a superseded statute, is often repealed in the formulation of new basic laws.³² The legal system is therefore distinguished from other legal systems conceptually, territorially and temporally. This system of differentiation is the traditional condition for the unity, independence and sovereignty of a legal system.

Significantly, the exclusions formative of a legal system are formal and theoretical, rather than practical. It would be ludicrous to state that the Australian legal system

²⁹ See generally John Griffiths, 'What is Legal Pluralism' (1986) 24 *Journal of Legal Pluralism* 1; Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalisation, and Emancipation* (2nd ed 2002); Anne Griffiths, 'Legal Pluralism' in Raza Banakar and Max Travers (eds), *An Introduction to Law and Social Theory* (2002); Martha-Marie Kleinhans and Roderick Macdonald, 'What is a Critical Legal Pluralism?' (1997) 12 *Canadian Journal of Law and Society* 25; Desmond Manderson, 'Beyond the Provincial: Space, Aesthetics, and Modernist Legal Theory' (1996) 20 *Melbourne University Law Review* 1048.

³⁰ Even 'inclusive' or 'soft' positivists accept that there is no necessary connection between law and morality, though they argue that it is possible that the validity of law may refer to moral criteria – for instance, constitutionally entrenched rights. See W J Waluchow, 'The Weak Social Thesis' (1989) 9 *Oxford Journal of Legal Studies* 23, 25.

³¹ Hans Kelsen, *General Theory of Law and State* (1945) 118; for a judicial discussion of Kelsen see *Mitchell v Director of Public Prosecutions* [1986] LRC (Const) 35, especially the judgment of Haynes; see also Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (4th ed 2006) 28-34.

³² See for instance *Constitution of India* (1949) art 395. The *Commonwealth of Australia Constitution Act* 1900 (UK) s 7 repeals the *Federal Council of Australasia Act* 1885 (UK) which, though not a national constitution, did pre-figure some of the structures of the present constitution. The autonomy of Australian law did not occur suddenly as in situations where there has been a revolution, but arguably developed over time.

in practice completely excludes a moral approach to social order, that it does not incorporate crucial aspects of international law, or that it never recognises Indigenous law. The Australian Constitution is moreover contained in a United Kingdom statute and our governors and governors-general are technically appointed by the monarch. There is a great deal of cross-fertilisation between legal systems – perhaps especially between common law systems – despite their independent sovereignties. And a post-revolutionary legal system will also, as Kelsen indicated, frequently incorporate or expressly continue aspects of the previous legal system.³³ The point, to borrow from Hart,³⁴ is that the *understanding or definition* of a particular legal system does not depend upon these non-legal ‘others’. Any overlap is contingent, and not necessary, to the identity of law.

Several theoretical devices have been proposed in support of the closure of legal systems from their various ‘others’. One of the best known is Kelsen’s proposal that every legal norm within a ‘system’ of norms derives its validity from a *Grundnorm* or basic norm which in turn does not derive its validity from any more fundamental norm.³⁵ The basic norm ‘constitutes the unity of a multitude of norms’³⁶ and was in turn characterised by Kelsen as a ‘hypothetical foundation’, a ‘transcendental-logical presupposition’ and a ‘true fiction’.³⁷ The basic norm does not positively exist as a legal norm, even though it is the necessary and sufficient condition of a legal system: like any limit, it is ambiguous, two-faced, self-contradictory. Its purpose, like Hart’s ‘rule of recognition’, is one of differentiation or exclusion – to identify a ‘test’ as Raz called it, ‘which distinguishes what is law from what is not’.³⁸ As several commentators have noted, however, the basic norm is a test which collapses under the weight of its own contradictions.³⁹ For a theorist who believes in the possibility of theoretical consistency and coherence, the collapse would be a fatal flaw in Kelsen’s theory. For myself, it is merely the inevitable result of the logic of identity outlined above – a point of rupture, but not necessarily of self-destruction.⁴⁰ It both forms and subverts the identity of law.

³³ However, ‘It is only the contents of these norms that remain valid, not the reason of their validity’. In other words, the law may remain the same, but the *Grundnorm* unifying them into a legal order changes. Kelsen, above n 31, 117. Cp *Constitution of India* art 372.

³⁴ H L A Hart, *Law, Liberty and Morality* (1963) 2: ‘Must some reference to morality enter into an adequate definition of law or legal system? Or is it just a contingent fact that law and morals often overlap ... and that they share a common vocabulary of rights, obligations and duties?’

³⁵ See generally Kelsen, above n 21, ‘V The Dynamic Aspect of Law’. See also Hart, *The Concept of Law* (2nd ed 1992) 91–110, especially concerning the ‘rule of recognition’.

³⁶ Kelsen, above n 21, 193.

³⁷ See Hans Kelsen, *Introduction to the Problems of Legal Theory* (1992) 58; Kelsen, above n 21, 201; *General Theory of Norms* (1991) 256. See generally Stewart, ‘The Critical Legal Science of Hans Kelsen’, above n 22, 295–7.

³⁸ Joseph Raz, ‘Legal Principles and the Limits of Law’ (1972) 81 *Yale Law Journal* 823, 842.

³⁹ Julius Stone, ‘Mystery and Mystique in the Basic Norm’ (1963) 26 *Modern Law Review* 34 – though see also Kelsen’s sharp reply, ‘Professor Stone and the Pure Theory of Law’ (1965) 17 *Stanford Law Review* 1128; Graham Hughes, ‘Validity and the Basic Norm’ (1971) 59 *California Law Review* 695; Stewart, ‘The Critical Legal Science of Hans Kelsen’, above n 22.

⁴⁰ Margaret Davies, *Delimiting the Law: ‘Postmodernism’ and the Politics of Law* (1996) 81-3.

The thesis of the limits of law as drawn by positivist theorists has never been especially compelling, and has been strongly challenged on theoretical grounds. Some theorists, such as Fuller,⁴¹ have refused to countenance the prospect of a completely immoral and totalitarian legal order, while Dworkin has argued that law could not be separated from community standards at the level of interpretation.⁴² Others have regarded the alleged limits of law as a fiction: they do not reflect the characteristics of a 'real' object, they are not demanded by any pre-given concept of law, and they are basically the disciplinary effect of a network of political and discursive exclusions.⁴³ Rather than point to a difference which can once and for all be grounded either in fact or in theory, the idea of the limits of law is a cultural manifestation. This does not deny the existence or operative reality of a limited law: since the concept of a limited and exclusive law is in circulation, and affects both everyday law and academic theories about law, it is as real as any other cultural meaning. The point, however, is to indicate its contingency and instability and the fact that it is irretrievably enmeshed in the political dimensions of social existence.

Thus, the idea of an exclusive law defined by a clear inside/outside dichotomy has suffered several theoretical blows. Just as pertinently, in recent years, it has suffered a number of blows from the wayward realities of law, regulation and social normativity, which no longer fit into the centralised law-nation-state matrix of positivist thought.⁴⁴ The growing recognition of 'law without a state', or at least of legal practices which do not rely upon state boundaries, poses problems for the notion that law can be described in essentially exclusive terms.

3 *Legal Reason*

Rules, principles and decisions are the everyday material of law, the building-blocks of a system of legal doctrines. The mechanism by which law operates is essentially that of the limit, according to which material entities (events, facts, reasons, actions, etc) are defined as same or different, inside or outside a particular normative boundary. Does an action constitute a transgression of the criminal law? Is a particular asylum-seeker a 'refugee'? Is a certain agreement a legally binding contract? Does a new case fall within the scope of a precedent case? Exclusion and inclusion are paramount issues in understanding the content of the law. In the practical and everyday context, where fact-finding is often of more significance than conceptual contests, the lines and definitions of law may be less frequently

⁴¹ Lon Fuller, 'Positivism and Fidelity to Law – a Reply to Professor Hart' (1958) 71 *Harvard Law Review* 630.

⁴² Dworkin, *Law's Empire* (1986); See also Raz, 'Legal Principles and the Limits of Law' (1972) 81 *Yale Law Journal* 823. Although Dworkin's work is often regarded as promoting a non-exclusive concept of law, I would see it more as a repositioning of the limits.

⁴³ Douzinas, Warrington and McVeigh, above n 18; Valerie Kerruish, *Jurisprudence as Ideology* (1991); Davies, above n 40.

⁴⁴ See for instance Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *Modern Law Review* 317; Gunther Teubner, "'Global Bukowina": Legal Pluralism in the World Society' in Teubner (ed), *Global Law Without a State* (1997). A contrary position is put by Simon Roberts in 'After Government? Representing Law Without the State' (2005) 68 *Modern Law Review* 1.

contested and therefore appear more certain. Nonetheless, the whole point of law is to enable distinctions to be drawn at the level of facts: in particular, which facts are relevant to a legal issue and which are not. In this way, the processes of law are constituted by both large-scale and minutely specific systems of exclusion.

Most importantly, the exclusions of legal theory and legal systems are repeated in legal doctrine and legal reasoning. Legal positivism has traditionally defended the notion that law moves according to its own internal logic, which is not the logic of politics, of economics or of society at large. Certain reasons and norms in support of an outcome are 'legal', while others are not, and are therefore excluded from consideration. Fred Schauer puts the case like this:

Just as a baseball umpire is precluded from accepting otherwise good arguments that a World Series victory for the Boston Red Sox might mean more ... for its fans than a New York Yankees victory would for the Yankees and its fans, law may be a domain in which otherwise acceptable moral, political, and policy arguments are unavailable, not because they are bad arguments, but rather because they are beyond the boundaries – out of play, if you will – of the institution of law.⁴⁵

In everyday legal reasoning and decision-making, a moral or a social policy reason for a decision is no reason at all, unless it is also a legal reason. Of course, there is a great deal of overlap between legal and non-legal reasons for acting in a particular way or making a particular decision, but the point of insisting upon a specifically 'legal' reasoning is that this is basically a contingent and not a necessary relationship.⁴⁶

In this way, the distinction between law and non-law, insisted upon at the level of the entire system, is repeated at the level of legal practice. This is not to say that the boundary is firm and absolutely clear: in many respects it has been agreed that the line between legal and non-legal is often not bright but rather fuzzy. This may be due to the 'open texture' of law,⁴⁷ the conferral of discretion in decision-making, the presence of general principles, or the fact that there are genuine 'hard cases' (in which the pre-ordained legal reasons do not lead to a clear-cut result). These complexities at law's limit pose no real challenge to the basic idea that law inhabits an exclusive terrain: they simply indicate that the law/non-law frontier is a broad exclusion zone or filtration system, rather than a one-dimensional line.

A variation on the positivist thesis of the limits of law has been put forward by Ronald Dworkin. Dworkin is widely understood to have proposed a non-exclusive understanding of law, in which a variety of 'non-legal' standards can enter into legal decision-making: this is, according to Dworkin, an inevitable consequence of

⁴⁵ Fred Schauer, 'The Limited Domain of the Law' (2004) 90 *Virginia Law Review* 1909, 1915.

⁴⁶ There is debate over this point, of course. Hart's discussion of the 'minimum moral content' of law seems to suggest some necessity in the relationship between law and morals, even though the central focus of his theory argues otherwise: Hart, above n 34, 193ff.

⁴⁷ Ibid 128ff.

law's need for interpretation.⁴⁸ Dworkin's more holistic or 'integrated' view of law – law as integrity – instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author – the community personified – expressing a coherent conception of justice and fairness.⁴⁹

Without adding needlessly to the extensive scholarly discussion of Dworkin's view and whether it represents much of a departure from positivism,⁵⁰ I would simply comment that, at most, it draws the lines of exclusion in a different way – perhaps a little beyond the traditional positivist point of legal self-determination. Dworkin's totalising devices – 'best interpretation', 'community personified', Hercules the 'imaginary judge of superhuman intellectual power and patience', a law which works itself pure – might be *more* inclusive than some of the firmer positivist lines of demarcation, but that does not make them inclusive *per se*. The boundary has simply been moved, and the Dworkinian conception of law is nonetheless inherently conservative of the identity of law and exclusive of community plurality and diversity. Beyond Dworkin's rather limited version of an extension of law's limits, more radical critiques of the notion of legal interpretation have emphasised the indeterminacy, the openness to manipulation, and the social foundations of legal interpretation:⁵¹ rather than simply move the line of exclusion, such critiques suggest that there is no limit to legal reason which can be drawn with confidence. Once again, the effort to contain legal meaning within a zone of exclusion leads to some awkward questions about the nature of law.

B Legal Subjects

All of the modes of exclusion described above are mutually reinforcing and together they coalesce in the construction of law as an object of legal theoretical knowledge – coherent, reified, and above all different in some important respect from the untidy phenomena of everyday life and individual existences in a plural society. Defining law is a large-scale exercise in containment and control – deciding what is inside and what is outside, in the interests of identifying law as a theoretical object. Importantly, the exclusions conventionally practised by legal theory are not politically neutral but conspire to reinforce various social exclusions under the name of objectivity. In this section, I outline some of the ways in which law can also be understood in terms of the exclusion of subjects from the domain of law.

Much of the scholarship on the various types of exclusion is undertaken within a broad social justice framework. It identifies and critiques dimensions of law

⁴⁸ See eg Dworkin, above n 42.

⁴⁹ Dworkin, above n 42, 225.

⁵⁰ See generally W J Waluchow, 'Herculean Positivism' (1985) 5 *Oxford Journal of Legal Studies* 187.

⁵¹ Such arguments have been made by realists and by critical legal scholars in the post-realist US tradition, as well as by feminists, critical race theorists and postmodernists. See for instance Alan Freeman, 'Truth and Mystification in Legal Scholarship' (1981) 90 *Yale Law Journal* 1222; Alan Hunt, 'The Critical Legal Studies Movement' in Peter Fitzpatrick and Alan Hunt (eds), *Critical Legal Studies* (1987).

resulting in what the legal commentator regards as unfair or unjust exclusion or discrimination. Of course, many forms of exclusion are controversial – strongly defended by some and strongly challenged by others. One such area of controversy is the mechanisms which limit asylum claims in Australia and exclude refugees from the same level of protection under the law as is accorded to citizens. Other forms of exclusion are widely regarded as defensible and socially necessary: such as the minimum age and mental competency limits for exercising certain rights or privileges, for engaging in certain forms of conduct or for being held criminally responsible. There may be debate about where such limits ought to be drawn, but there is no doubt that some exclusion of very young and mentally incompetent people from exercising the full range of legal rights and social freedoms is generally reasonable.

In addition to exclusions which limit the participation of people in law on account of some given aspect of their biological or social identity (age, gender, ethnic or racial background, sexuality), law constantly practises exclusion on the basis of some breach of a person's ordinary legal obligations: exclusion of serious criminal offenders from society at large is the clearest example, but there are many others – such as the prohibition on bankrupts serving as company directors, or the disqualification of a person from holding a driver's licence on the basis of accumulated driving offences.

It is important, then, to recognise that law generally addresses all people through the mechanisms of inclusion and exclusion⁵²: differentiation between people is made essentially both on the basis of pre-given identity or status and as the consequences of legally-charged acts. To me, the more interesting issue is that relating to status – where, by virtue of directly discriminatory law or of the relationship between law and forms of social exclusion, people in identified social groups are marginalised by law. Such exclusion can take a number of different forms. First, exclusion can take the form of direct legal exclusion (or foreclosure) of a particular group of people from a privilege or right. There are many historical examples of persons being defined by their class or by some status, definitions which have now been largely eliminated from law.⁵³ However, there remain instances where law is directly and intentionally exclusive of people in a particular group, such as the (now dubious) exclusion of single women from accessing reproductive technology⁵⁴ or the

⁵² See generally Ngaire Naffine, 'Who Are Law's Persons? From Cheshire Cats to Responsible Subjects' (2003) 66 *Modern Law Review* 346. Naffine analyses three models of legal person and the ways in which natural persons are excluded from these legal definitions. In contrast to Naffine's detailed analysis of the various concepts of legal person, my focus in the following paragraphs is more broadly on the exclusive mechanisms of law as a whole.

⁵³ For instance, the history of the suffrage is a story of gradually expanding the class of people entitled to vote – it is a history of incremental inclusions of persons according to class, race and gender.

⁵⁴ The position varies in the different states. In South Australia, the *Reproductive Technology Act* still sets marriage or five years co-habitation as the basic criterion for access to services, despite a South Australian Supreme Court ruling that this is in conflict with the

definition of 'marriage' under the Marriage Act which excludes same-sex relationships from the definition of marriage.⁵⁵

Secondly, exclusion can be the result of a socio-political practice which is implicitly or explicitly endorsed by law, such as the open and prevalent discrimination against women and racial minorities prior to the enactment of the various anti-discrimination acts. This type of exclusion would normally be regarded as 'social' rather than 'legal', although law may play some role in the attempted remedy. Of course, while the discourse of legal positivism actively separates the social arena from law, it has become increasingly obvious to critical legal scholars that relationships of power in the legal and social fields are mutually constitutive and conceptually quite inseparable except, perhaps, at the level of law's self-legitimizing rhetoric. Thus, apart from the more obvious forms of 'legal' and 'social' exclusion, a number of forms of exclusion flow from the inter-relationship of these fields.

Third, then, exclusion can be reflected in the values and language accepted or enforced by law, even where formal equality is acknowledged in principle.⁵⁶ Examples include the idea of the 'reasonable person', or 'human' rights as defined by a particular (Eurocentric) political tradition.⁵⁷ Socio-political bias may also be reflected in legal doctrine, for instance in the criminal law defence of provocation which is structured around (socially constructed) masculine responses to affront or perceived threat.⁵⁸ Standards assumed to be normal, universal, even common-sensical, are often derived from specific socio-political locations where power to define and legislate for others is concentrated.⁵⁹ The result is a silencing of certain voices and certain types of narrative in the construction of law's official identity.

Commonwealth *Sex Discrimination Act* and should be read down. See *Pearce v South Australian Health Commission* (1996) 66 SASR 486.

⁵⁵ *Marriage Act* 1961 (Cth) s 5(1): 'marriage means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life'.

⁵⁶ For a recent analysis of feminist legal theory see Joanne Conaghan, 'Reassessing the Feminist Theoretical Project in Law' (2000) 27 *Journal of Law and Society* 351.

⁵⁷ Shelley Wright, *International Human Rights, Decolonisation and Globalisation: Becoming Human* (2001); Dianne Otto, 'Everything is Dangerous: Some Post-structural Tools for Rethinking the Universal Knowledge Claims of Human Rights Law' (1999) 5 *Australian Journal of Human Rights* 17; Sundya Pahuja, "'This is the World: Have Faith'" (2004) 15 *European Journal of Human Rights* 381 (review of Wright above).

⁵⁸ Jenny Morgan, 'Provocation Law and Facts' (1997) 21 *Melbourne University Law Review* 237; Jenny Morgan, 'Who Kills Whom and Why: Looking Beyond Legal Categories' (2002) *Victorian Law Reform Commission: Occasional Paper*; Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004) 27-32; Ian Leader-Elliott, 'Passion and Insurrection in the Law of Sexual Provocation' in Ngaire Naffine and Rosemary Owens (eds), *Sexing the Subject of Law* (1997).

⁵⁹ Naffine, above n 52, 354-7; Kenneth Nunn, 'Law as a Eurocentric Enterprise' (1997) 15 *Law and Inequality* 323.

Fourth, exclusion can be from a whole body of principle, such as the traditional exclusion of harms against women in international humanitarian law⁶⁰: here, an area of law has been designed to protect a group of traditionally identified victims of armed conflict from certain types of harm, leaving harms associated with another group without recognition.

Finally, legal exclusion exists where whole communities and their legal/cultural ways are foreclosed from the very being of law – such as through the doctrine of *terra nullius* – and, more insidiously, the insistence that law must be single and sovereign in a particular geo-political space. Such a mode of exclusion exiles entire cultures from law – it is formative of the boundaries of the legal system as a whole and in the process also negates the cultural contexts of Indigenous peoples.

Prior to the enactment of various anti-discrimination laws, arguments against exclusion were often framed in the strategically powerful rhetoric of liberalism which demands at least formal equality between individuals. The direct legal exclusions of Indigenous people and women from certain benefits, such as the right to vote and to have equal access to public spaces and public office, provide obvious instances where the application of liberal principles demanded a reversal by law – formal exclusion was followed by formal inclusion. However, as my non-exhaustive list of types of exclusion shows, exclusion can take much more subtle and concealed forms than legally required or legally tolerated discrimination. These indirect mechanisms of exclusion conceal the person from law's radar: it is an internal exclusion, which takes the form of silencing the subject who does not fit the predetermined legal stereotype.

In such instances, it has become clear that the remedy for exclusion is not simple inclusion. To put that another way, it is possible to be included in a category while still being excluded – one can be included formally and literally, yet still be disempowered, marginalised, silenced and in practice disenfranchised. Repression is not rectified by formal inclusion (it actually presupposes formal inclusion), since any interaction with law occurs simultaneously in several different dimensions. The event or set of facts may be unique and singular, but the discourses which operate upon it are plural and include not only the legal dimension, but also the social dimension(s) and the economic dimension. Clearly, a dualistic inside/outside model of the operation of law upon groups of people is limited in its explanatory power. As Foucault argued, juridical power is only one form of power among many: analysis of the subject in relation to law alone does not fully explain his or her subjection. Rather, it is necessary to consider 'how it is that subjects are gradually, progressively, really and materially constituted through a multiplicity of organisms,

⁶⁰ Judith Gardam and Michelle Jarvis, *Women, Armed Conflict, and International Law* (2001). See also Anne Orford, 'Feminism, Imperialism and the Mission of International Law' (2002) 71 *Nordic Journal of International Law* 275; Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: a Feminist Analysis* (2000).

forces, energies, materials, desires, thoughts'.⁶¹ Power, including the power to exclude, is not a commodity conferred upon a sovereign or legislature, but rather the effect of multiple intersecting discourses.⁶² The end result can be repressive: the person who is formally recognised as an equal legal subject, but poorly recognised in the symbolic, discursive, or representational spheres of law, is not wholly a legal outsider, but encounters resistance in their interactions with law.

IV THE RE-INVENTION OF LAW

All of the foregoing suggests that what law is, is a function of what it is not, and that who it is for is a function of who it is not for. So far, I have focused on exclusion from two angles. The first, largely the domain of legal philosophers, says that, in order for law to be a coherent entity, it must exclude. Even efforts to expand the domain of law, such as that proposed by Ronald Dworkin, do not result in a *non-exclusive* idea of law, simply a differently limited concept of law. As I noted at the outset, the identity of conceptual objects is necessarily exclusive and, insofar as the project of legal theory has been to ascertain the identity of law, it has proceeded by excluding things which are not law. That is not to say that exclusion results in a stable and well-defined concept of law: as we have seen, the very need to exclude creates trouble for the idea that law is a closed unit, allowing us to see the act of exclusion as a political or ideological action rather than the neutral delineation of a theoretical terrain.

The second angle of the analysis, that of subjection by law, is largely the sphere of feminists, critical race theorists and other critical legal scholars whose aim has been, in part, to discredit the picture of law put forward by the legal philosophers. The critical view uncovers the multitude of ways in which legal subjects are constructed by processes of inclusion and exclusion, and illustrates that exclusion is rarely a matter of simple discrimination by law but the result of the (repressive) complicity of law with mechanisms of power and social exclusion, often combined with a failure by the dominant discourse to acknowledge the depths of this complicity. By considering exclusion from the position of the legal subject, we can also see the exclusions of legal theory as exercises of power or even force which foreclose the whole question of power and the political. To paraphrase Laclau, the very thing – exclusion of the social domain, power and other cultural factors – which constitutes the identity of law also subverts that identity because of the manifest tensions or unintended exclusions produced at the level of the subject.

It is common for critical legal thinkers to argue that, in order to deal with the limitations and discriminations of current positive law, what we need is not endless law reform validating the discourse of legal closure but a 're-imagined' or

⁶¹ Michel Foucault, 'Two Lectures' in Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972-1977* (1980) 97.

⁶² Ibid, especially 95–100.

'reinvented' idea of law.⁶³ For those who have identified the concept and structure of positivist law as itself one of the obstacles to a more just and more inclusive law, simply revising the content of this law is an insufficient response to law's exclusory practices. However, it is not possible simply to construct a new concept of law from nothing – for a start, such a fabrication would have no purchase and no meaning in current discourse about law. In my view, the key to the process of re-imagining or reinventing law is the network of exclusions which constitute the law. If the conceptual identity of law is the effect of exclusionary forces, then it is only by challenging or reformulating these exclusions that law will become something other than what it currently is.

I would like to highlight two pathways for conceptual change in legal theory,⁶⁴ both of which flow from the discussion in the first three sections of this paper. The first pathway is a consequence of the insights that law as an identity is formed by exclusion and that this identity is also subverted by exclusion: this pathway is essentially that of envisaging the exclusions through which law is constructed differently. In short, different exclusions will lead to a different conceptual object – a 're-imagined' law, though based upon contemporary and historical understandings of law. The second pathway also flows from the insight that identity is based upon exclusion, but it rejects the need for identity: seeing law as a heterogeneous non-identity opens it to the possibility of thinking about law as a practice of inclusion rather than exclusion. These two pathways are not alternatives – they are not a theoretical 'either/or'. Rather, they are perspectives which can co-exist as strategic, idealistic and pluralistic responses to a perceived need for a more inclusive understanding of law.⁶⁵ Moreover, each of the pathways has a conceptual/normative angle and an empirical angle – in other words, I would argue that practical changes

⁶³ See for instance Drucilla Cornell, *Transformations: Recollective Imagination and Sexual Difference* (1993); Drucilla Cornell, *At the Heart of Freedom: Feminism, Sex, and Equality* (1998); see generally Conaghan, above n 56.

⁶⁴ Davina Cooper uses the term 'pathway' to suggest the need for repetition or 'multiple tramping of the same soil' as a means of promoting sustainable social change. Her metaphor is completely apt, since there can be no suggestion that radical change can be effected simply by making a compelling argument, by pursuing reform or by imposing a regulatory scheme. Usage embeds the pathways through which change can be pursued. See Davina Cooper, 'Against the Current: Social Pathways and the Pursuit of Enduring Change' (2001) 9 *Feminist Legal Studies* 119, especially 129. I have deliberately used Cooper's term here, since the two 'pathways' I emphasise are not simple proposals for change but rather represent a crystallisation of existing tendencies in legal thought, which I perceive to be both useful and partially embedded in the discourse.

⁶⁵ What I am proposing is not a 'middle way' or a compromise, but rather is situated firmly within the tradition of feminist strategic thinking, which embraces extremes and contradictions. The notion that as intellectual activists we can pursue pluralistic or multi-faceted practical and theoretical strategies goes by several names in different contexts: it has been called 'multiple consciousness' (Mari Matsuda, 'When the First Quail Calls: Multiple Consciousness as Jurisprudential Method' (1988) 11 *Women's Rights Law Reporter* 7); 'bifocal' (Mary Heath, 'The Public/Private Distinction as a Conceptual Boundary of the State: a Bifocal Theory of the State for Feminism' (2000) 4 *Flinders Journal of Law Reform* 19, 34); and 'polyphonic' (Wendy Brown, 'Gender in Counterpoint' (2003) 4 *Feminist Theory* 365, 367).

in how law operates ‘on the ground’ do actually reflect these two pathways for theoretical change which I have identified. The remainder of this paper briefly explores these two pathways.

A A New Legal Identity

Despite all of the tension in exclusive concepts of law, and despite calls for a more inclusive understanding of law, it does seem that, as an object, process or concept, law cannot be understood without exclusion – even if the resulting ‘identity’ of law is contingent, politically-enforced, ideological or strategic. Indeed, if we accept the structuralist idea that exclusion is prior to identity, then – if we want to have concepts of law and legal subjects – some form of exclusion is necessary to an understanding of law as a coherent entity. As I argued earlier, some efforts to challenge the law/society boundary, such as that proposed by Ronald Dworkin, do not result in a *non*-exclusive or a non-limited concept of law, but simply in a differently exclusive or differently limited concept. In Dworkin’s case, the limitation is evident in the notion of ‘integrity’ – represented in the judicial superhero Hercules – which brings together Dworkin’s view of the best of law and the best of ‘community’ ideals, values and aspirations. The inevitable silencing of diversity and the assimilation of radical social difference into an élitist ‘best’ account which is the consequence of Dworkin’s approach has been commented upon by several theorists.⁶⁶

Nonetheless, the idea that law as an institution and as a concept can be reconceptualised through a different construction of its limits and exclusions does, I think, have some merit, even if it only results in contingent and strategic legal re-definitions. Even Dworkin’s attempt to transgress the boundary between law and community does offer the potential to think of law’s closure as being drawn along lines which have the potential to recognise changing social conditions. In other words, recognising the law/culture boundary as an artificial limit to law is an important first step.⁶⁷

What then, are some of the ways in which law’s exclusion zones might be re-positioned or re-conceptualised? There are both techniques of analysis and practical engagements with law, which result in a re-thinking of law’s limits.

Critical accounts of the ways in which law is embedded in systems of social power discredit the notion that law is separable from its cultural context⁶⁸: while such

⁶⁶ See Nicola Lacey, ‘Community in Legal Theory: Idea, Ideal or Ideology?’ in Lacey, above n 6, 146–7; Kerruish, above n 43, 68–9.

⁶⁷ Clearly positivists do not distinguish between law and society insofar as they emphasise the social sources of law. However, saying that law has its sources in society but is constructed on top of that society is completely different from saying that law is thoroughly social.

⁶⁸ A related development in critical legal theory is the deconstruction of law’s limits which, due to reasons of space, I do not address here. Deconstruction does not propose a new identity for law but, like the critique of the social power embedded in law, it does provide an alternative view of the quality and meaning of exclusion and the limits of law. See Jacques Derrida,

accounts do not result in the practical dissolution of law's boundaries, which are contingent and discursively enforced means of identity control, they do to my mind alter the *quality* of the exclusions upon which the system is based. In other words, these exclusions cannot be seen to flow from the object itself, but are constructions within a particular narrative.⁶⁹ This difference between exclusion as the objective fact about the concept of law and exclusion as an act of discourse is significant as far as the general conceptualisation of law is concerned: an objective concept of law cannot be altered, while a narrative is open to re-narration. We can see such a re-narration taking place in feminist critique of law. The feminist narrative of law as masking social power with its focus on formal equality has been set against dominant legal constructions in a myriad of situations, sometimes leading to a practical re-consideration of how the exclusions operate and more generally resulting in scepticism about legal claims to autonomy. In a more direct sense, analysis of the inevitable social quality of law gives credence to judicial efforts to be more cognisant of the law-society nexus.

Contemporary practical realities in the political sphere demand that concepts of law be updated, especially insofar as the nature of law's limits are concerned. In a practical sense, it no longer makes sense to speak of law-state institutions as separate and autonomous. Normative influences in the contemporary world are more like a web of intersecting spheres than a constitutionally-imposed, closed legal system. The sovereignty of nation states is under threat⁷⁰ and in consequence so is the concept of law as a separate, centralised institution. This is due in part to the increasing significance of international law and the strengthening of multinational political and trade alliances. The fragmenting of traditional boundaries is also evident in de-centred forms of regulation⁷¹ and in other systems and concepts of law, such as Indigenous law and informal methods of dispute resolution. As a result, there are empirical pressures on the centralist and statist concept of law: not only is its central position in law-making under question, but the nature of the exclusions which have traditionally defined it must be re-considered. This does not result in a non-limited or inclusive concept of law – it would be nonsensical to imagine that the idea of law could encompass every type of binding norm. However, it does mean that law is differently limited and therefore differently identified.

'Force of Law: the "Mystical Foundations of Authority"' (1990) 11 *Cardozo Law Review* 919; see generally Drucilla Cornell, Michel Rosenfeld and David Carlson (eds), *Deconstruction and the Possibility of Justice* (1992); Margaret Davies, 'Derrida and Law: Legitimate Fictions' in Tom Cohen (ed), *Jacques Derrida and the Humanities: a Critical Reader* (2001); Drucilla Cornell, 'The Relevance of Time to the Relationship between the Philosophy of the Limit and Systems Theory: the Call to Judicial Responsibility' in her *The Philosophy of the Limit* (1992) ch 5.

⁶⁹ See generally Kerruish, above n 43.

⁷⁰ Walker, above n 44; Catherine Dauvergne, 'Sovereignty, Migration and the Rule of Law in Global Times' (2004) 67 *Modern Law Review* 588.

⁷¹ For an overview and analysis of theories of de-centred regulation, see Julia Black, 'Critical Reflections on Regulation' (2002) 27 *Australian Journal of Legal Philosophy* 1; Dimity Kingsford-Smith, 'What is Regulation? A Reply to Julia Black' (2002) 27 *Australian Journal of Legal Philosophy* 37.

For instance, the legal relationship between individual European states and 'Europe' as a politico-legal entity means that none of the individual states have the same legal identity that they had 50 years ago.⁷² British law is not what it was in a conceptual sense, because of its location within a pluralistic and multi-layered legal structure. That does not mean it is not still exclusive – but it no longer defines itself by completely excluding the law of other European states in the same way as it once did. Similarly, it might be argued that certain legal practices 'on the ground' – such as the development of Indigenous sentencing courts – undermine the traditional exclusion of community practices from the definition of law.⁷³ However, inclusive law is not the result of such changing practices: the concept of law as singular within a particular geographical space ensures the exclusion of any non-dominant law as a self-determining entity, even though certain elements of content may be incorporated. The incorporation of quasi-legal practices such as 'alternative' dispute resolution into procedural law may also subtly reposition law's limits so that it accommodates negotiated agreements, rather than emphasising only hierarchically-mandated and imposed decisions. In a variety of ways then, it is arguable that the exclusions formative of law's identity are under practical review, and that therefore the identity and concept of law is also changing.

Exclusion at the level of legal subjectivity has been challenged by proposals which would represent legal subjects differently. Such proposals range from suggestions that the model person presumed by law should be re-thought so that it incorporates more human and diverse characteristics,⁷⁴ to ideas of creating a dual legal subjectivity so that women and men can be equally represented by law,⁷⁵ and also to the suggestion that a right to self-determination ought to encompass a person's interest in defining their own sexual identity.⁷⁶ Such suggestions are not necessarily practical proposals for changing the law, and they have sometimes been strongly criticised on theoretical grounds,⁷⁷ but it is possible that they could influence the evolution of law towards a more inclusive representation of legal subjectivity.

⁷² André-Jean Arnaud, 'Legal Pluralism and the Building of Europe' in Hanne Petersen and Henrik Zahle (eds), *Legal Polycentricity: Consequences of Pluralism in Law* (1995); Walker, above n 44; Eve Darian-Smith, 'Law in Place: Legal Mediations of National Identity and State Territory in Europe' in Peter Fitzpatrick (ed), *Nationalism, Racism, and the Rule of Law* (1995).

⁷³ Elena Marchetti and Kathleen Daly, 'Indigenous Courts and Justice Practices in Australia' (May 2004) *Australian Institute of Criminology, Trends and Issues in Crime and Criminal Justice*, No 277.

⁷⁴ For an overview and critique of the 'ethic of care' debates in feminist legal theory see Maria Drakopolou, 'The Ethic of Care, Female Subjectivity, and Feminist Legal Scholarship' (2000) 8 *Feminist Legal Studies* 199.

⁷⁵ Luce Irigaray, *je, tu, nous: Toward a Culture of Difference* (1993); Luce Irigaray, *I Love to You: Sketch of a Possible Felicity in History* (1996).

⁷⁶ Drucilla Cornell, 'Preface' ix-xii in her *At the Heart of Freedom* (1998).

⁷⁷ For instance, strong objections have been expressed to Luce Irigaray's idea of dual (sexed) rights on the grounds that such a proposal not only neglects other significant differences in human identity but also reinforces an exclusive and repressive dualistic notion of sex. See Nicola Lacey, above n 6, 212–20.

B *Law Without Identity*

The second pathway for conceptual change which flows from the analysis I have undertaken in this paper is simply one of abandoning the idea that law has a single 'identity' and must therefore be defined by exclusions and limitations. As indicated above, all of the conceptual exclusions required by the concept of a limited law pose obstacles to inclusiveness at the social level. Even if we could imagine a law which 'represented' diverse identities and included aspects of community practices into decision-making, the limited and exclusive nature of law would remain: we would simply have re-drawn the boundaries in different ways. I am not suggesting that this is a pointless exercise since in some cases the re-drawn boundaries of law reflect changing political and legal realities, and in other cases they are incremental changes in law's level of responsiveness and flexibility in its relations with the social field.

Logically, though, there is another angle, one with both an idealistic and a practical expression, which I would like briefly to explore. This is simply, as indicated, the recognition that law has no firm and unique identity – that it has no 'core' concept or even 'core' institutions, and is much more dispersed and unbounded than traditional theories of law assume. Efforts to define or conceptualise law foreclose law's multiplicity, its plurality, its foundation in community practices and its subject-driven qualities.

On what basis can we imagine law as a non-identity? There are numerous dimensions to this question and I will outline only a few, most of which are drawn in some way from the socio-legal literature on legal pluralism. That body of literature is interesting in this context because pluralism, opposed to monistic and centralist concepts of law, is a variety of positions which each in their own way challenge the exclusive state-based notion of law. In its least essentialist form, pluralism is the position that there is no single concept of law, that law is multiple and heterogeneous in any community and cannot be reduced to a singular identity. This is not to say that all pluralist thought is necessarily less exclusive than legal theory based on a monistic view of law: indeed, as others have noted, pluralism has methodologically been constrained by its assumption that there is a concept of law which can be objectively identified in plural contexts.⁷⁸ It has assumed, in other words, that there is one thing, 'law', manifested many times, instead of (for instance) a multitude of different practices and ideas, all answering to the name of 'law' or similar, but not necessarily reducible to a single concept. As Brian Tamanaha has said in the process of re-conceptualising legal pluralism, '[t]he plurality I refer to involves different phenomena going by the label "law", whereas legal pluralism usually involves a multiplicity of one basic phenomenon, "law" (as defined)'.⁷⁹ Thinking of law as a non-essential term which takes a plurality of forms confronts some of the problems of exclusiveness outlined above: for instance, it

⁷⁸ Kleinmans and Macdonald, above n 29; Manderson, above n 27; Melissaris, above n 27.

⁷⁹ Tamanaha, above n 27, 315.

challenges ethnocentric definitions of law which tie it to state institutions and which assume that law is conceptually as well as practically monistic. To this extent, Tamanaha's pluralistic concepts of law refuse the conceptual foreclosure considered above, which demands that law 'properly so called' is defined by the exclusion of 'improper' and 'primitive' legal practices.

Tamanaha's work constitutes a step towards breaking down the notion that law must have *an* identity. However, while it multiplies forms of law, these arguably remain exclusive - in other words, we have a multiplicity of exclusive forms of law, but not an inclusive view of any of these types of law. This is perhaps a consequence of Tamanaha's objectivist method: although he argues that law has no essence, he nonetheless feels that it is important to be able to *identify* and categorise law - in other words, to say what is included or excluded by a particular concept of law and to establish categories for social analysis.⁸⁰

I think it is possible to go further than recognising a multitude of differently defined types of law. If we think of law as a subject-driven praxis rather than an abstract or conceptual hierarchy, then quite different legal narratives arise. Traditionally, theorists have excluded everyday, inter-subjective relationships and practices from the definition of law. This has been done in the name of a philosophical method which searches for abstractions, central cases and essences.⁸¹ However, if we look at law from the perspective of legal subjects who engage with law as a living process, the limited identity of law begins to look like a veneer over several thick layers of social and discursive practice. Instead of an exclusive pyramid of definitions and authorities, law becomes a horizontal phenomenon, extending out into the community. For example, while legal meanings are controlled and normalised by the excluding mechanisms of reasoning outlined above, they are also inevitably embedded in the pluralities of social existence and cultural conflict.⁸² Law may 'mean' only one thing at a particular time, but that meaning is based upon the interaction of legal convention with diverse social meanings. At any point, an alternative meaning may arise, and feed into the conventional legal meaning. Given this, why should we assume that law is only the formal doctrine, and not the living social environment which gives it force and significance?

To say that law is 'living',⁸³ or subject-driven, or based in community practice undermines law's identity because subjects are necessarily plural and construct plural legal narratives. To say that law is a process or everyday practice, rather than an objective thing, also undermines the identity of law, because it challenges the idea that law can be encapsulated as an entity or concept. Instead of the unity and

⁸⁰ Ibid 194-205.

⁸¹ Manderson, above n 28.

⁸² Robert Cover, 'Nomos and Narrative' (1983) 97 *Harvard Law Review* 4.

⁸³ 'The living law is the law which dominates life itself even though it has not been posited in legal propositions': Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (trans 1962) 493.

identity of law, we can construct a picture of the 'intrinsic heterogeneity' or 'inherent pluralism' of law.

Understanding law and legal practices as the living constructions of social subjects can mean several things. It can mean doing empirical investigation of the actual normative commitments of people in different social settings,⁸⁴ or seeing law as the end product of the inter-relationship between different normative worlds and an official 'state' version.⁸⁵ In addition to state law, various other forms of law subsist in any social context. In Australia in different communal settings, state law coexists with Indigenous law and laws associated with religion, such as *shari'a* law and Christian doctrines (for instance those relating to contraception, abortion, adultery and divorce). These fields of law are not separate and autonomous, but overlap and interact in the lives of those who experience these normative differences.⁸⁶ 'Law' in this context is not any one thing, but a plurality of different practices, meanings and relationships. Legal pluralism can also emphasise the discursive elements of law, dimensions of legality which can not be segregated by clear definitional lines but which reinforce and also disrupt meanings in a pluralistic 'cultural' sphere.⁸⁷ Perhaps most interestingly, it can take a 'critical' turn by scrutinising the concept of subjectivity, seeing it not merely as a positive agent of law-creation but as itself a fragmented and socially-embedded entity whose inter-relationship with the so-called 'objective' world of legal fact is mediated through the many spheres of social discourse.⁸⁸ We can only understand legal 'fact' if we understand the subjects and the various cultural processes which determine such 'facts'. As Desmond Manderson argues, law 'is only realised through the actions of human beings who exist simultaneously in *several* discourses and who are, therefore, themselves plural'.⁸⁹ In such a context, the reduction of law as a dynamic social meaning to an exclusive identity is an exercise in philosophical futility. Law is constructed in plural forms by plural subjects: seeing it as one thing with a single identity is a positivist myth.

V PARTICIPATORY LAW

Does thinking about law as having no identity in a theoretical sense lead to a less exclusive law at the level of legal praxis? By opening up the concept of law so that it is more properly a non-concept, an anti-concept, do we promote an inclusive law in other ways? On the other side of the issue, would a more open and possibly therefore more inclusive understanding of law necessarily involve a dismantling of the (albeit partial and imperfect) protections against legal arbitrariness built into the limited concept of law? These are matters I have perhaps only hinted at, without

⁸⁴ Melissaris, above n 27, 75. See also de Sousa Santos, above n 9.

⁸⁵ Cover, above n 82.

⁸⁶ For an analysis of the co-existence of *shari'a* law and common law in the UK see Qudsiya Mirza, 'Islam, Hybridity and the Laws of Marriage' (2000) 14 *Australian Feminist Law Journal* 1.

⁸⁷ Anne Griffiths, above n 29, 309.

⁸⁸ Kleinhans and Macdonald, above n 29.

⁸⁹ Manderson, above n 28, 1064.

really demonstrating either that greater theoretical inclusiveness of law as a concept could lead to greater social inclusiveness in law as a practice, or that this could be achieved without reinforcing existing structures of social power and without risking the minimal standards of equality assured under the liberal-positivist legal matrix. In my view they are questions which cannot be answered with a great degree of certainty – it is quite impossible for theorists to predict, much less determine, the actual political consequences of a particular theoretical position.⁹⁰ Empirical evidence of the changing boundaries of law – for instance in areas as diverse as the growing recognition of human rights law,⁹¹ the grassroots accommodation of Indigenous law within mainstream law⁹² or the increasing significance and uniformity of international institutions⁹³ – seem to indicate that a differently limited or non-limited understanding of law cannot be seen to have uniform political consequences but may at times disrupt and at times re-enact imperialist, ethnocentric and gendered power relationships. At the same time, as I hope to have demonstrated, re-imagining law can open up opportunities and previously unseen possibilities for change: exploration and repeated usage⁹⁴ of such possibilities is what will determine the directions that our changing legal consciousness will eventually take.

⁹⁰ Martii Koskenniemi, “‘By Their Acts You Shall Know Them ...’ (And Not by Their Legal Theories)” (2004) 15 *European Journal of International Law* 839.

⁹¹ Pahuja, above n 57.

⁹² Marchetti and Daly, above n 73.

⁹³ B S Chimini, ‘International Institutions Today: an Imperial Global State in the Making’ (2004) 15 *European Journal of International Law* 1; Ruth Buchanan and Sundya Pahuja, ‘Collaboration, Cosmopolitanism and Complicity’ (2002) 71 *Nordic Journal of International Law* 297.

⁹⁴ See discussion in Cooper, above n 64.