Introduction: Legal Critique in the Age of Neoliberalism

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The papers gathered in this special issue began their lives as plenary presentations at the 2016 UK Critical Legal Conference, hosted at Kent Law School by the editors of the special issue and a committee of Kent Law School colleagues. This conference was arguably the 30th anniversary of the first CLC, also held at Kent, in 1986. The theme of the 2016 conference, 'Turning Points', was designed to provoke and accommodate a plurality of critical (legal) reflections on the specificity of the contemporary political situation. If the conference theme may now seem slightly prescient—having been decided well before June's Brexit referendum and November's US presidential election—it is worth remembering that an air of change, upheaval and crisis already prevailed. The European migrant crisis was at its peak.[2] The worsening impacts of the Global Financial Crisis and Eurozone Crisis continued to be felt. Debt, social and economic precarity, polarised public discourse and the transformative effects of new technologies were already inescapable facts. Being located in Kent, at 'the UK's European University', the 'centrality' of Europe and its legal, political and intellectual traditions—and their constitutive relations with their 'others'—were already at the front of our minds. Far from being prescient, the conference committee was as surprised as anyone by the results of that year's fateful referenda, and the 'turning points' they will forever be taken to mark. If anything, the coincidence of conference theme and political events speaks less to the novelty of 2016's referenda, and more to the continuities that they made visible: deeper questions about the political and cultural imaginaries of both the UK and USA as nations (or empires). Their familiar clusters of social, economic, political and legal problems (immigration, (ethno)nationalism, and sovereignty, to name just one) were perhaps merely given new faces in the form of post-2016 populisms, echoes of fascism, and the effects of new media technologies.

For critical legal scholarly traditions, these recent events have offered new spurs to consider the interaction of legality and legal rules with the operation of political, governmental and economic power. The nature of that interaction has always been a matter of fundamental significance for the liberal legal project, as well as its critics—from the earliest Marxist approaches, right through to today's cresting (or breaking?) neoliberal wave. Our interest was not at all in determining the new truth of the relation between law and the political, but rather in reflecting on how the present moment affects the pursuit of something like a critical legal project. Contemporary conditions are never separable from the critical impulse and the shape of its enterprise: in each moment, they provoke it, and give it its object, whilst also conditioning and constraining it, and suggesting the form it might need to take in order to react well to shifting configurations and uses of law. As understood through the Critical Legal Conference–and the so-called 'BritCrit' critical legal movement more generally–that impulse even at the best of times has been marked by a distinct lack of instructions about how to proceed; no determinate disciplinary statute or scholarly methodology. Its communities are inoperative or unavowable, its knowledges devalued in relation to the discourses they address. Critical legal work is a 'minor' enterprise (to borrow a note recently re-struck by Chris Tomlins, through Peter Goodrich and Panu Minkkinen); located partially within and partially without (or beyond) law and legal discourse, dependent upon but counter to the institutions that give it its privileged location and identity, its objects, and a large part of its conceptual vocabulary.

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[1] The substance of this introduction was partly developed in thematic discussions with Nick Piska as co-editor of this special issue. The author would like to thank Nick Piska and Maria Drakopoulou for helpful comments on an earlier draft, and Ed Mussawir.

[2] UNHCR (2015).

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How new is the present (neoliberal) moment, for critical legal thinking? For some authors, the advent of neoliberalism signals a disjuncture that has rendered the critical legal enterprise defunct. Corinne Blalock has suggested that critical legal studies fails to 'recognize[…] neoliberalism's logic' and so fails to challenge it, thereby not only becoming irrelevant but risking 'further implicating law and legal theory in neoliberalism's legitimation'.[3] This turns out to be largely a matter of definition, however. Emerging in the North American context, this view is dependent on three main elements of little relevance to the UK tradition, and they are interesting here primarily as a contrast to a broader and more plural conception of the critical project. These elements are, first, the identification of critical legal studies as scholarship that targets a narrow set of features about law and legal doctrine that are grounded in political liberalism (the indeterminacy of legal doctrine, a critique of the separation of law and politics, debunking the myth of the 'autonomous legal subject', and a focus on class relations and inequality). Second, a view of the relation between law and the political as one in which law is 'legitimated' by a specific political paradigm that should be challenged, and third, a view of neoliberalism not only as having already replaced liberalism in that legitimating function, but as discontinuous with the category of the political itself. The 'logic of neoliberalism', Blalock charges, is a 'postpolitical discourse' that has 'penetrated the legal discourse'.[4]

Conceiving of critical legal thinking, legality and neoliberalism more broadly, a different view might emerge that helps us to emphasise the continuity and relevance of the critical legal project. One of the most important elements of legal critique is the connection between its reactivity and 'negativity' (its quality as a 'dangerous supplement' to law),[5] and the use of that negative space for positive or creative articulations of values, ethics and justice. A critique of legal linguistic ontology, for example, has often found a positive correlate in plurivocity of praxis; a plurality of approaches and perspectives. Given the foundation of critical legal thinking in the *experience* of law and its institutions as well as the defence of instituted values, to enable difference amongst the voices that talk critically to, through and about law is an immediate *virtù*. For many authors, including some in this special issue, there is a sense that the reason neoliberalism has become a significant denominator is because it makes that *virtù* more difficult to exercise. Yet potentially, it thereby refreshes the task and goal of critique, recalling it to the present moment. It augurs a new object, yielding new formations and new secrets about the logics relating law and 'the political', as well as new organisations of experience. From this point of view, neoliberalism is potentially a contemporary gathering term for that which conditions the bond between law and its subjects, and shapes the demands on critical legal thinking in relation to its object.

A broader view can begin by taking up the question of neoliberalism's continuity with or replacement of liberalism; a major point of disagreement in the literature. Wendy Brown, strongly making the case for discontinuity, suggests that:

> neoliberal rationality disseminates the *model of the market* to all domains and activities—even where money is not at issue—and configures human beings exhaustively as market actors, always, only and everywhere as *homo oeconomicus*.[6]

That neoliberalism prioritizes the market over the polis is uncontroversial, but it is precisely the connection of this fact with legal problematics and institutions that provokes doubt for the discontinuity thesis where critical legal projects are concerned. As James Martel puts it, liberalism was already marked by a 'market logic that sits deep within its political vision'.[7] Extending this idea to the

[3] Blalock (2014), p 72.
[4] Blalock (2014), p 73.
[5] See Fitzpatrick (1991).
[6] Brown (2015), p 31.
[7] Martel (2019), pp 8-9.

level of legal doctrine, scholars have convincingly argued that such a shift intensifies central elements of liberal legalism. Robert Asen, for example, suggests that market logics (which threaten 'a multiple public sphere and its critical attention to … (in)equality'), should be seen as entrenching the liberal subject in the form of 'an atomistic individual who exercises economic freedom'.[8] Further, it is difficult to reconcile a view like Brown's with the enduringly liberal underpinnings of central legal institutions, for example the modern criminal trial.[9]

Clearly, other analytics are required, to complicate and move past mere continuity or discontinuity of whole-cloth 'political paradigms' (or -isms), understood as interposable legitimation devices for entire legal systems. From this point of view, where it is useful, it is necessary to work with the multiple, diverse and at times conflicting conceptions of neoliberalism in circulation. For example, Simon Springer identifies four prominent ones: neoliberalism as dominant ideology; neoliberalism as policy framework; neoliberalism as state form; and neoliberalism as mode of self-governance'.[10] Further, within these lie radically different accounts of the scale and formidability of neoliberalism—from David Harvey's all-encompassing ideology (the 'dominant paradigm of the twenty-first century'[11]) to a narrowly-defined school of economic thought, originating with the Mont Pelerin Society, which is to be carefully distinguished from a gamut of broadly similar right-wing thinking. Depending on which conception is adopted, the kind of critical legal thinking necessary to respond at the level of legal praxes and problematics can differ.

Critical legal studies is no stranger to this kind of constitutive differing. A basic tenet of UK critical legal studies has been precisely the establishment, as Costas Douzinas has put it, of a 'wider conception of legality'. Not limiting itself to showing that legality is intrinsically contingent, it has asked 'what practices, procedures and ruses make texts authoritative and coherent despite their inner inconsistencies'.[12] Armed with an ever-expanding conception of legality (which is at times also, it must be said, a significant analytical weakness), critical legal studies has been engaged much more variously with the ethical, political and aesthetic critique of law. At the broadest (and far from exhaustive) level, its projects have been threefold: to reunite law, legal power and legal practice with the ethical tradition, to call attention to the life of law in the embodied, sensory and material world, and to examine law's political preferences and ordering effects, and their implications for the texture, nature and quality of communal life—that is, life lived together with others.

With this expansive set of imperatives in mind, the plurality of conceptions of neoliberalism might be organised into four loose registers that cross through the spectrum of critical legal impulses. First, a set of economic doctrines (which Joseph Stiglitz calls 'the neoliberal experiment'), including lower taxes on the wealthiest taxpayers, deregulation of labour and product markets, financialization, free trade and globalisation. Second, a certain kind of political philosophy, state and social theory (or, bending slightly the formulation in Davide Tarizzo's contribution to this special issue, an anti-political philosophy). The state's role is minimised as regulating conflict between autonomous individual private interest holders in a market society; essentially guaranteeing order including the conditions enabling the market to do most of the heavy lifting in social organisation and the organisation of wealth. Third, the cultural and ideological register, on which Maurizio Lazzarato shows how the financialization, individualization, insecuritization, and depoliticization in the first two registers undermines practices of mutualization and redistribution via a welfare state. As he argues, they 'establish the enterprise as the dominant form' and acculturate a 'new type of individual appropriate

[8] Asen (2017), p 344.
[9] Amidst innumerable examples, see Lai (2010). For a nuanced address to the thesis of a neoliberal criminal justice apparatus, see O'Malley (2018).
[10] Asen (2017), p 337; Springer (2012), pp 136-37.
[11] See Harvey (2005).
[12] Douzinas (2014), p 191.

for' market capitalism with its relentless organising spirit of competition.[13] In this third register, then, neoliberalism acculturates a full spectrum of new norms, encompassing everything from shifting conceptions of value, to the restructuring of universities, to the beliefs and understandings of 'young/er' academics about their own behaviour (as analysed by Louise Archer),[14] right through to new modes of authority—and, correspondingly, new bases for critique that would be appropriate to them.[15] Fourth, neoliberal political rationality as a political ontology, deriving from 'Hayek's notorious neoliberal ontology of spontaneous order'[16] with a corresponding economic conception of governing and governance as the management or administration of that order.

Unsurprisingly, the broad church of critical legal thinking responds to this diffuse state of affairs in a diverse and unruly way.[17] For better or for worse, UK critical legal traditions have never been particularly interested in defining discipline, membership, methods or even subject matter; typically relying on (and borrowing from) the power and significance of legal objects, languages and institutions to configure their terms. Whilst it would be an exaggeration to regard this always and everywhere as a deliberate strategy, nor is it entirely an accident. It is perhaps an ethos, and one that becomes especially significant in the face of protean late capitalism. Such a strategy has sometimes been positively articulated, however. Writing in the wake of the Brexit referendum, Nadine El-Enany and Sarah Keenan elaborate something of a critical legal *strategy* capable of adopting *tactics* that are not only plural, but potentially contradictory. They quote Mari Matsuda in saying:

> There are times to stand outside the courtroom door and say 'this procedure is a farce, the legal system is corrupt, justice will never prevail in this land as long as privilege rules in the courtroom.' There are times to stand in the courtroom and say, 'this is a nation of laws, laws recognising fundamental values of rights, equality and personhood.' Sometimes, as Angela Davis did, there is a need to make both speeches in one day.[18]

As El-Enany and Keenan point out, a tendency 'on the Left' regarded the victories of both Brexit and Trump as heralding the 'end of neoliberalism'. So the point of this multiple-tactic strategy is clear: prioritising determinate 'political ideals and goals' might easily lead to spectacular error, or at best distraction. Instead of getting caught in identifying and defining legitimating ideologies, the authors find a different object by underlining continuities of structural violence, inequality and oppression—to which a response, and a priority, must be given. At the definitional level, critical legal studies might champion a strategic and functional approach, where any definition—of neoliberalism, for example—is at best a temporary or partial 'working definition', appropriate to the particular aims of a given enquiry. After all, as Blalock helpfully puts it, neoliberalism is also general condition that 'progressive scholars also inhabit',[19] shaping our individual subjectivities and preferences, as well as choices of objects and intellectual frameworks.

The Papers

The papers in this special issue demonstrate some key but diverse parameters for the critical legal project in responding to (and from within) these neoliberal conditions. They perform the redoubling of perennial efforts to re-ethicise legal traditions, and to pose those traditions, understood through a

[13] Lazzarato (2009).
[14] Archer (2008a), (2008b).
[15] See Davies (2016).
[16] Toscano (2011), p 130.
[17] For examples, see Butler and Crawley (2018), Golder and McLoughlin (2017).
[18] El-Enany and Keenan (2016).
[19] Blalock (2014), p 73.

critical lens, as contributors to ethical problems. They highlight the mutual relation between law and politics in the necessarily expanded sense; understanding these broadly as, on the one hand, law in the sense of legality, legal thinking and legal form, and on the other, politics as an imagination of and orientation towards the possibility and value of collectivity and mutual co-belonging. They confirm critical legal thinking's migration in search of new objects and disciplinary contiguities; away from an exclusive preoccupation with adjudication, ethics and linguistic ontology, and toward concerns with technique, traditions, the everyday, legal form, and political economy. They address elements of today's social, political and legal landscape, but also the intellectual landscape and its tools. Each thus navigates the condition and limits of legal critique in the present historical moment. Two common gestures appear across all the papers: pointing to barriers within the scholarly apparatus to thinking and practising social justice, and the search for alternative conceptions—for example of justice, of care, or of value.

Donatella Alessandrini's paper, 'Of Value, Measurement and Social Reproduction', takes up the 'present' condition of financialised cognitive labour economies. Alessandrini questions the supposed newness of the contingency and unmeasurability of value that is identified by contemporary post-Fordist scholarship, instead paying attention to older continencies of value and their hidden lines of continuity: inequalities of gender, race and class. Countering a dominant neoliberal logic, Alessandrini insists that the social, in the form of *social reproduction*, must be considered together with any question of *production*. Strongly interdisciplinary, Alessandrini's paper pursues the question of value beyond legal discourses and into core debates in political economy and social ontology. It also demonstrates the value of taking a critical distance from the mythology of neoliberalism as a new, radical, and total shift in conditions—as well as using the space that such a scepticism creates for the reassertion of positive political commitments.

In 'From Periodization to the Autoimmune Secular State', Kathleen Davis interrogates the immediately political texture of our intellectual tools and habits of thought, with particular attention on the depth of their colonial inheritance. Through the problem of periodization and the demarcation of the 'middle ages', Davis unpicks the reified notion of the middle ages that enables the Modern story of the break from religion, hierarchy and disorder, and explores the resulting entrenchment of Western Christendom's structures as universal. Davis moves beyond the historicization of sovereignty as a governmental form, its ethnocentric politics, the particularity of this conception of European history, and its link to the 'autoimmune' secular state; drawing out their co-implicated epistemological conditions. In this way, Davis speaks to the colonial politics of knowledge, and the ongoing need, today, for renewed attention to the structures and textures of our own intellectual heredity—and particularly the politics of the university.

Isabell Lorey's 'Autonomy and Precarization. (Neo)liberal Entanglements of Labour and Care in Europe' takes on the multi-valent question of care in today's neoliberal landscape of precarity. Lorey's layered analysis does not limit itself to understanding vulnerability in terms of marginalization, but addresses the vulnerability of central political processes and values (such as subjectivation, autonomy and emancipation) to a capitalistic or neoliberal inflection. Offering a narrative of the neoliberal intensification of liberal structures, Lorey highlights the stripping of the 'social' element of the individual and the deployment of individual autonomy as a technique of governance, connecting these to the production of precarity. Lorey's paper stages the connection between intellectual work and the task of inventing better political forms. It calls attention to what is excluded by the predominant governmental discourses, and responds to the new effects or intensifications of our political order and discourse's deep (neo)liberal roots. It re-claims, further, the inherence of precariousness and vulnerability, in order to make the marginalised practice of care into the centre of new modes of political life and forms of organisation.

Also directly confronting the problem neoliberalism as such, in 'Europe, Neoliberalism, and the Bankruptcy of Political Philosophy' Davide Tarizzo argues that neoliberalism is not in fact an economic doctrine or principle. Instead, he demonstrates, it is a philosophy, or more accurately an anti-'philosophy of justice'. Through a consideration of foundational texts and economic policy, Tarizzo starkly diagnoses neoliberalism as a mode or 'art' of reasoning; a sophistry or anti-philosophy in the form of a distributed set of arguments whose purpose is to reject the very idea of moral or social justice, and indeed anything that stands in the way of the idea that 'might is right'. Its core project, he suggests, is the conversion of every kind of social problem into an economic one. Presenting a specific account of neoliberalism's discontinuity, Tarizzo suggests that whereas liberal thinkers were happy to talk about social and moral justice, for Friedrich Hayek all social, moral and distributive justice is meaningless from an economic standpoint; so only 'legal justice' should be retained. Calling to view the anodyne nature of legal justice (its compatibility with neoliberal anti-justice, or more simply injustice), Tarizzo thus both vindicates the relevance of critical legal thinking's sceptical turn 'beyond' legality, and demonstrates how neoliberalism hardens conditions—including discursive and conceptual conditions—against critical projects pursued in the name of justice. He calls on philosophy, finally, to do away with abstract conceptions of justice—which, when they become 'popular', tend to take on a nationalistic inflection.

Finally, Patricia Tuitt's 'Critique of Non-Violence' glosses and updates Walter Benjamin's famous essay 'Critique of Violence', in order to interrogate the functioning of 'non-violent' 21st Century liberal legal systems. Fearing the exercise of legal right by the socially marginalised and the 'new law' they intrinsically carry, contemporary European legal systems occasion a new violence by embedding exclusion and violence within the non-violence of legal means and forms. Arguing that non-violent law aims to suppress both violent solutions *and* non-violent solutions (as exercised by the marginalised), Tuitt recounts the intensification of the citizen's subjugation to the law in the name of the preservation of the monopoly of violence. This process is directly tied to a market-driven view of what legal services the state should fund; explored, in Tuitt's account, through the UK's Legal Services Act 2007 and the Legal Aid, Sentencing and Punishment of Offenders Act 2012. These changes, affecting the already marginalised, work through a collateral racializing effect. Tuitt thus draws a clear line from market logics through liberal neutrality and non-violence, to the leveraging of the law in the occasioning of systemic racial violence.

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