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FOREWORD: CLASSCRITS IX SYMPOSIUM ISSUE

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FOREWORD: CLASSCRITS IX SYMPOSIUM ISSUE

MATTHEW TITOLO*

Each year since 2008, a network of scholars, practitioners and activists have held a conference to discuss socioeconomic inequality in the United States and around the world. The immediate occasion of the first meeting of the ClassCrits group was the financial meltdown and the cascading social effects of the global crisis within the neoliberal order.¹ The group's name was inspired by the various "critical" movements within legal academia of the 1990s that evolved out of Critical Legal Studies in the 1980s, when a new generation of law professors began their careers and developed radical theories of law that were in an important sense the heirs of Legal Realism.² Critical work shares space in the legal academy with many forms of scholarship, with many different political and intellectual agendas. If we count from the first Critical Legal Studies conference in Wisconsin in 1977, the critical movement within law schools is now 40 years old, and occupies an ambivalent position within the legal academy as it reaches that milestone. On the one hand, there can be no doubt that critical work is now at the margins in the law schools. Most legal scholarship is standard law reform and doctrinal work, as it has been for many decades. On the other hand, critical schools of thought have never really gone away, despite periodic announcements of their demise over the years. A general embrace of neoliberal assumptions across the legal academy keep critical work in a perpetual twilight, never taking center stage but never quite bowing out of the scene either.

This twilight position can be explained by the fact that critique

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1. For a history of the ClassCrits group, and an elaboration of themes and topics see Wendy A. Bach and Lucy Jewel, *ClassCrits VIII: New Spaces for Collaboration and Contemplation*, 45 SW. L. REV. 779 (2016); see also Tayyab Mahmud, Athena Mutua and Francisco Valde, *LatCrit Praxis@XX: Toward Equal Justice in Law, Education and Society*, 90 CHI.-KENT L. REV. 361 (2015); Athena Mutua, *Introducing ClassCrits: from Class Blindness to a Critical Legal Analysis of Economic Inequality*, 56 BUFF. L. REV. 859 (2008).

2. Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515 (1991).

entered the legal academy just as neoliberalism itself was re-making western and global societies. The critical movements and their offshoots are closely tied to the fate of the neoliberal order that they exist to critique. With the continuing hegemony of the neoliberal model and its long reach into the legal mind, it is not surprising that various critical tendencies thrive at the margins of legal academia. Ideally, critical movements share a left perspective that is skeptical of neoliberal norms and modes of reasoning, drawing on radical social theory and seeking to use historical argumentation to uncover status quo and other biases that haunt the liberal imaginary. It is a style of thought that has endeavored keep a “negative dialectic” alive in a time of centrist political complacency.³ However, while critical scholars may be in intellectual tension with many of their colleagues who work within positivist styles that accept neoliberal assumptions, by now there is a large literature in law reviews that builds on the critical movements of the 80s and 90s.⁴ There are critical offshoots in the major doctrinal areas such as contracts and tax.⁵ The loosely affiliated critical tendencies are alive and well in the legal academy, even if they sometimes lack the ideological consistency of a fully-articulated political movement. The annual ClassCrits conferences are always lively and the discussions wide ranging: racial, gender and economic inequality; hierarchy and power; the problems with market logics; privatization of public institutions and resources; concentration of power in the hands of private actors and a loss of democratic control over the political process. It is truly a diverse and vibrant community.

The 2016 ClassCrits conference “New Corporatocracy and Election 2016” was held several weeks before the 2016 presidential election. When conference planners were developing the theme for the 2016 conference from which the following papers are drawn, none of us predicted that Donald Trump would win the presidency. Indeed, at the conference itself, I do not recall much discussion of a possible Trump presidency. The Clinton campaign was terribly

3. The term “negative dialectic” is Theodor Adorno’s.

4. See generally Bach and Jewel, *supra* note 1; see also Mahmud et al. *supra* note 1.

5. See, e.g., Anthony C. Infanti and Bridget J. Crawford, eds., *CRITICAL TAX THEORY: AN INTRODUCTION* (2009); see also Danielle Kie Hart, *Contract Law Now: Reality Meets Legal Fictions*, 41 U. BALT. L. REV. 1 (2011); Danielle Kie Hart, *Contract Formation and the Entrenchment of Power*, 41 LOY. U. CHI. L.J. 175 (2009).

mismanaged, and we were not alone in missing the serious possibility of a Trump presidency. Mainstream liberals have posited many reasons for Clinton's loss, and there is a good deal of truth to them. Racial and gender animus, and yes, the emails, surely played a role in her defeat by a venal, narcissistic and incompetent with strong ties to the neo-nationalist right who was frankly barely running a campaign at all. Before we join the liberal commentariat in another round of chilled Russian conspiracy cocktails, we should keep in mind a rather less outre thought: Hillary Clinton lost the election at least in part because of concerns about the economy, an issue that she largely shrugged off with her counter-slogan: American is Already Great.⁶ Perhaps Hillary Clinton's "basket of deplorables" decided they had had enough of elites taking them for granted and ignoring their concerns. In any event, faced with an unpopular status quo candidate, millions of Democrats stayed home in 2016 and this lack of support was critical to electing Donald Trump.⁷

It is important that the left not be distracted by the theatrics surrounding Hillary Clinton's loss. Democrats have been hemorrhaging support at the state level during the Obama years.⁸ That's not Russia's fault. That's not James Comey's fault or the fault of Wikileaks. The American people are on to the Democrats as a neoliberal centrist party, and many understand that they are not the left-wing party they are depicted to be in the febrile rantings of the "alt-right." The Democrats have been counting on lesser evilism, demographics and a message of meritocracy and diversity as an electoral formula for decades. No matter how inclusive the rhetoric, though, there is only so much room in the professional-managerial class, no matter how its demographics are reconfigured. Most people will never get there. This is the central

6. See Greg Sargent, *Why Did Trump Win?: New Research by Democrats Offers a Worrisome Answer*, WASHINGTON POST (May 1, 2017), https://www.washingtonpost.com/blogs/plum-line/wp/2017/05/01/why-did-trump-win-new-research-by-democrats-offers-a-worrisome-answer/?utm_term=.fe075268f77e [<https://perma.cc/36RU-3HSW>].

7. Harry Enten, *Registered Voters Who Stayed Home Probably Cost Clinton the Election*, FIVETHIRTYEIGHT (Jan. 5, 2017, 6:30 AM), <https://fivethirtyeight.com/features/registered-voters-who-stayed-home-probably-cost-clinton-the-election/> [<https://perma.cc/Y9HR-N4J2>].

8. Reid Wilson, *Dems Hit New Low in State Legislatures*, THE HILL (Nov. 18, 2016, 11:29 AM), <http://thehill.com/homenews/campaign/306736-dems-hit-new-low-in-state-legislatures> [<https://perma.cc/CJQ6-37VF>].

insight of the sort of class analysis, after all, that was jettisoned from Democratic politics a long time ago. If the left cannot capture this disaffection and alienation, the right will be happy to oblige.

The signs of a populist revolt against neoliberalism have been evident for a number of years. They were there in the short-lived Occupy Wall Street movement. More recently, they can be witnessed in the still evolving Black Lives Matters movement.⁹ They were there in the stunning success that the self-styled socialist Senator Bernie Sanders enjoyed in the Democratic primaries.¹⁰ They were there in the electoral successes of Syriza and Podemos, however short-lived those successes may have been.¹¹ They were there in the mass protests in Europe after the crisis had made clear that Europe's periphery would continue to be held over the barrel, with austerity to be law of the land, no matter the suffering, for as long as it took.¹² And they were also there in the shocking success of Brexit, which saw right wing populists succeeding in their drive to remove Britain from the European Union.¹³ Indeed, the signs of neoliberal unraveling were there in the rise of the far right across Europe in recent years.¹⁴ It is a sign of the left's failure and the center's complacency that it has been the neonationalist right that has exploited the possibilities for mass mobilization driven by

9. Robin D. G. Kelley, *What Does Black Lives Matters Want?*, BOSTON REVIEW (Aug. 17, 2016), <http://bostonreview.net/books-ideas/robin-d-g-kelley-movement-black-lives-vision> [https://perma.cc/5QCM-RVRQ].

10. To give a sense of how rightward the American political spectrum is tilted, Bernie Sanders needs to call himself a "socialist" in order to promote fairly mainstream social democratic policies.

11. Andy Durgan, *Without Mass Mobilization, Unidos Podemos's Electoral Success Won't Match up Against the Forces of Austerity*, JACOBIN (June 13, 2016), <https://www.jacobinmag.com/2016/06/spain-unidos-podemos-iglesias-errejon-psoe-austerity-syriza/> [https://perma.cc/8MGU-EX3Q].

12. Liz Alderman and Niki Kitsantonis, *Markets Falter in Europe Amid Protests on Austerity*, N.Y. TIMES (Sept. 26, 2012), <http://www.nytimes.com/2012/09/27/world/europe/greece-faces-national-strike-to-protest-austerity.html>

13. The day before Brexit, I confidently told my students that it would never happen based on polling data I had seen. The day after the yes vote I told them: be careful of elites who live in bubbles and talk only to people like themselves. It is worth noting that there is a solid socialist case for Brexit, although I continue to have my doubts that dissolving the EU is the way to go. See, e.g., Neil Davidson, *The Socialist Case for Leave*, JACOBIN (June 22, 2016), <https://www.jacobinmag.com/2016/06/leave-european-union-brexit-ukip-corbyn-cameron/> [https://perma.cc/46H6-8VR4].

14. Audrey Sheehy, *The Rise of the Far Right*, HARVARD POLITICAL REVIEW (Feb. 11, 2017, 12:55 PM), <http://harvardpolitics.com/world/rise-of-far-right/> [https://perma.cc/7ULY-FGNM].

dissatisfaction with neoliberalism that have been effectively ignored by stagnant and ineffectual center left parties. Perhaps for many Americans, President Obama's personal popularity, competence and scandal-free tenure helped to mask the populist revolt that was brewing under the surface all along.

The papers in this Symposium issue all deal in one way or another with the problems created or exacerbated by neoliberalism or by longstanding defects of the American legal, economic and political systems: access to justice (Victoria Haneman); plutocracy (Timothy Kuhner); liberal theory and corporate ideology (James Wilson); corporate tax fairness (Daron Narotzki); and the use of arbitration to entrench corporate power (Eric George.) Victoria Haneman's piece *Bridging the Justice Gap with a (Purposeful) Restructuring of Small Claims Court*, is perhaps the most reform-oriented of the essays in this Symposium issue. The issue that Haneman addresses is one of the most serious social problems in the American legal system today: the "justice gap." As she explains: "There are simply not enough resources to fund legal services providers and assistance programs to provide the meaningful access to justice that low- and middle-income individuals need. An estimated eighty percent of low- and middle-income individuals have legal needs that are not met."¹⁵ Her essay proposes several pragmatic changes to the existing small claims court system that would better provide access to legal process: raising the cap of claims to \$20,000 for natural persons; limiting the number of claims that may be brought within a twelve-month period in order to reduce abuse of the small claims system; providing free legal advice to those who represent themselves in small claims court and advice on remedies and enforcing judgements. These are the sorts of seemingly small changes that can make a large positive impact on the access to justice for working and middle class people.

Timothy Kuhner's article *The Next American Revolution* attacks inequality in America from a different angle, showing that the political economy of American legal system has been stacked from the beginning in favor of the powerful. Kuhner argues that there is deep plutocratic rot in contemporary American democracy.

15. Victoria J. Haneman, *Bridging the Gap with a (Purposeful) Restructuring of Small Claims Courts*, 39 W. NEW ENG. L. REV. 457, 459-60 (2017).

Like those such as Zephyr Teachout¹⁶ who worry about the corruption of democracy by concentrated wealth, Kuhner reminds us of the tradition of republican anti-royalism that animated the Founder's generation and generations after them. He poses the question: given this republican history, why do Americans tolerate being governed by plutocrats?

The reason for Americans' tolerance of gross inequality today lays buried in the century it took for slavery to be abolished and the additional century that lingered on until the passage of the Voting Rights and Civil Rights acts. Indeed, universal suffrage was not obtained *and broadly protected from interference* until the early 1970s. Why is tyranny so enduring? There is only one way to move from generations of political domination by a monarchy to generations of political domination by property ownership, race, sex, and, finally, wealth. Of course there must be violent oppression, but more importantly there must also be indoctrination. Centuries of theocracy and dictatorship in other nations suggest the same answer. Tyranny is so enduring because its ideological component clouds the mind, making systematic injustice hard to detect in real time.¹⁷

The Next American Revolution reviews major campaign finance cases and shows that the Supreme Court has used neoliberal market reasoning to privatize democracy and tilt the electoral tables further and further in favor of large corporate interests. In the end, Kuhner poses a stark choice that he sees as an enduring one in the American experience: between the aristocratic logic of "royalists, slavers, racists, misogynists, and plutocrats" on the one hand and "the forces of political inclusion" on the other.¹⁸

In *A Dearth of Kindness: Using Buddhist Psychology to Evaluate Rawls, Nozick, and Contemporary Corporate Ideology*, James Wilson follows a long tradition in critical legal theory by evaluating and ultimately rejecting important assumptions upon which elite policy discourse is based. Wilson revisits a perennial theme of critical discourse: the assumption of the rational, self-seeking actor as the basis for theoretical modeling both on the libertarian right (Nozick) and on the left (Rawls): "The ideologies

16. CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO CITIZENS UNITED (2016).

17. Timothy K. Kuhner, *The Next American Revolution*, 39 W. NEW ENG. L. REV. 477, 488 (2017).

18. *Id.* at 497.

of many powerful American actors and institutions can be located on a Rawls-Nozick spectrum.”¹⁹ Wilson argues that there has been a convergence of the Nozick-Rawls perspective within neoliberalism, which is our governing corporate consensus. Wilson argues that Buddhism supplies the missing dimension in the Rawls-Nozick spectrum of overrationalized selfhood that largely excludes non-rational emotions from its models *a priori*. He writes: “Many, if not most large corporations trade in fear, greed, and delusion.”²⁰

Doron Narotzki’s essay, *Corporate Social Responsibility and Taxation: a Chance to Develop the Theory*, is a good complement to Timothy Kuhner’s and Eric George’s contributions. Writing from within the framework of Corporate Social Responsibility movement, Narotzki reviews several recent episodes where strategies of corporate tax avoidance led to negative publicity for Microsoft, Starbucks, Apple and Google. “Although creative tax planning to avoid paying taxes has become an acceptable business practice, we—as a society, as scholars, as consumers, and as citizens—cannot freely accept this ideology. The recent media trend of shining a spotlight on any corporation that works to avoid large percentages of taxes, is beginning to change the way that corporations are thinking about their tax practices. This change will not be the result of an overnight change of corporate tax plans, so the question becomes: how should individuals and corporations proceed in order to change for the betterment of society?”²¹ The result he concludes should be an inclusion of “tax fairness” in the portfolio of CSR issues taken up in the near future. Finally, Eric George tackles a similar issue of corporate avoidance of public power and oversight in *A Historical Reflection on Arbitration and the Corporation as an Object of Economic Governance*. The essay reviews the history of private arbitration, revealing its roots in libertarian theories of non-interference by the state and reminding the reader that corporate interests, not just the “business community” loosely defined, played a powerful lobbying role in the passage of the Federal Arbitration Act: “The convergence of corporate giants in the arbitration movement, and the subsequent

19. James G. Wilson, *A Dearth of Kindness: Using Buddhist Psychology to Evaluate Rawls, Nozick, and Contemporary Corporate Ideology*, 39 W. NEW ENG. L. REV. 499, 500 (2017).

20. *Id.* at 519.

21. Doron Narotzki, *Corporate Social Responsibility and Taxation: A Chance to Develop the Theory*, 39 W. NEW ENG. L. REV. 539, 552 (2017).

influence they exerted on its central institutions should cast doubt on the still widely held view that the arbitration movement was in the first instance, inspired by the values of progressivism.”²²

These are dangerous but also hopeful times for the left. The Trump years, and the years of right-wing governance that may lie in store for other countries, are not likely to be good ones for progressive policymaking. Dangers lie ahead for the European Union, and we may very well see more and more agitation for the EU’s dissolution, not only from the neo-nationalist right, but from a left economic populism that has always viewed the EU as anti-democratic. I cannot remember a time when the left has seemed more active and vocal in the United States. It is true that the left suffers from fragmentation and serious blockages within the electoral system, including gerrymandering, disenfranchisement and other strategies designed to demobilize the electorate²³ that is likely to vote left-liberal. But it is important that those who are currently outraged and energized about Trump not fall prey to nostalgia for the Clinton-Obama style of centrist governance. Hopefully that era is over. We can do better than that.

22. Eric George, *A Historical Reflection on Arbitration and the Corporation as an Object of Economic Governance*, 39 W. NEW ENG. L. REV. 557, 569 (2017).

23. See, e.g., Atiba Ellis, *Tiered Personhood and the Excluded Voter*, 90 CHI.-KENT L. REV. 463 (2015).