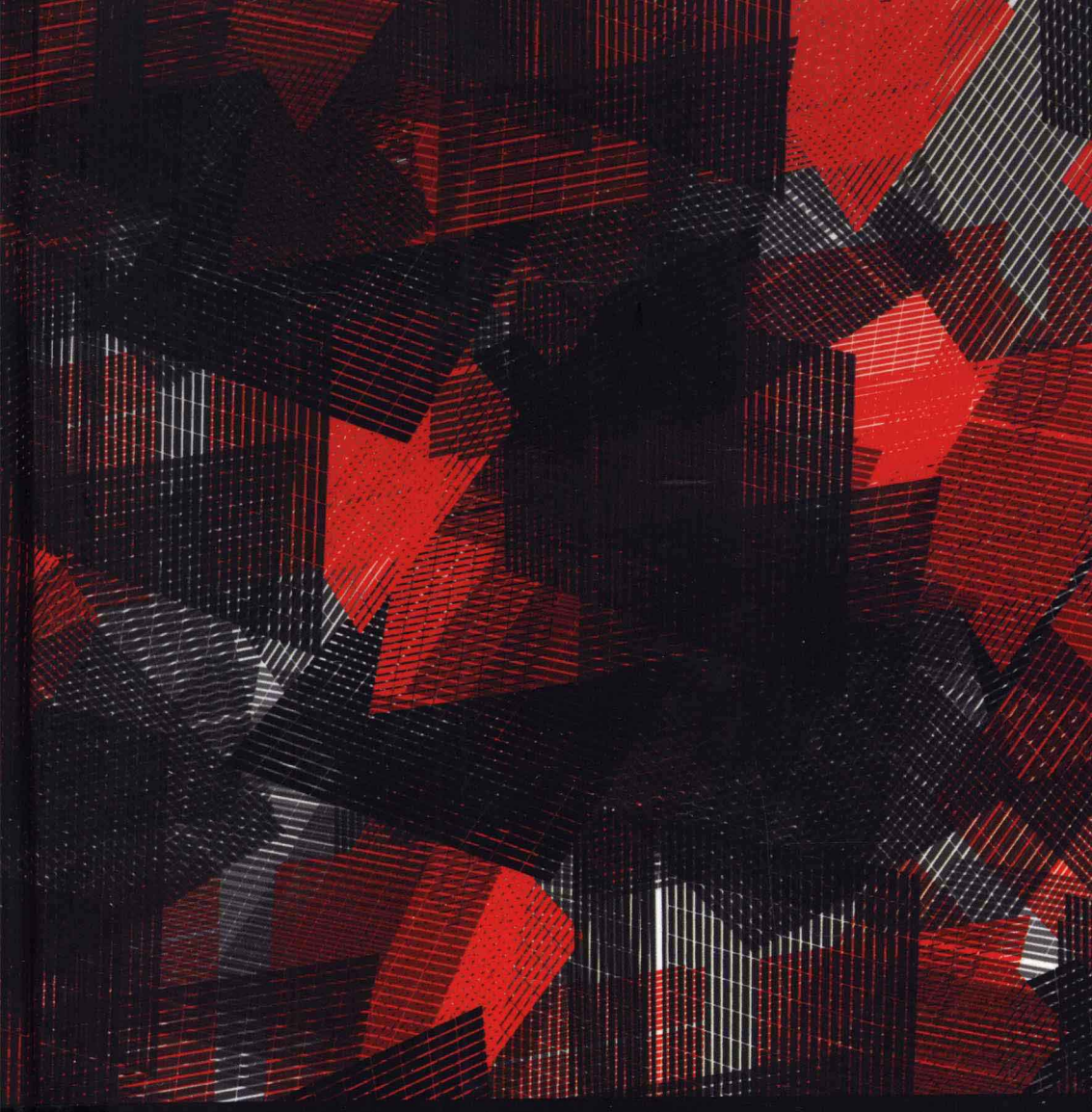

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New Critical Legal Thinking

Law and the Political

Edited by
Matthew Stone,
Illan rua Wall
and Costas Douzinas

ROUTLEDGE

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New Critical Legal Thinking

New Critical Legal Thinking articulates the emergence of a stream of critical legal theory which is directly concerned with the relation between law and the political. The early critical legal studies claim that all law is politics is displaced with a different and more nuanced theoretical arsenal. Combining grand theory with a concern for grounded political interventions, the various contributors to this book draw on political theorists and continental philosophers in order to engage with current legal problematics, such as the recent global economic crisis, the Arab Spring and the emergence of biopolitics. The contributions instantiate the fact that a new and radical political legal scholarship has come into being: one which critically interrogates and intervenes in the contemporary relationship between law and power.

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Preface

Whilst the critique of law now has an insistent presence within the wider academic landscape, what is common among critical scholars is considerably more complex than before. Today it would be factually negligent, as well as politically misguided, to make a claim of a homogenous 'movement'. Interdisciplinary critique exists as a language or method of thinking of law, transcending the body of people, publications and conferences that operate as its transient embodiment. The idea for this collection arose from the hope that a (fractious and fractured) statement of critical legal position would be useful. We intend that the statement in these pages resists reductive or disciplinary self-identification, but still suggests a series of directions around which these current discourses can be orientated.

This book is an articulation and a continuation of a conversation amongst legal academics who share a concern to think about law upon terms that breach the boundaries of traditional legal education. It is intended as a snapshot, a moment of dialogue, and an affirmation of the centrality of law to the irrepressible exigencies of acute political and economic crisis. Indeed, if there is an overarching argument to the book, it is an argument for the renewal of our understanding of legality's complicity with politics and power.

In periods of crisis, the taken for granted 'natural' or 'objective' premises of the dominant discourse and practice come to the surface and are seen for what they are: artificial, provisional, ideologically charged. But ideology is not just false consciousness. It creates subjects with specific desires, hopes and expectations and stitches the social fabric together by offering imaginary idols and ideal projections of a happy society at peace with itself. Dominant ideology must support in part the interests of working people, the poor and disenfranchised. The rule of law and human rights are such ideological constructions that seek to turn legality into legitimacy. They give limited protection to vital interests and promote formal conceptions of equality and social justice. This way they attract the approval and even devotion of ordinary people. At the same time, the rule of law and rights both formally and in substance promote a socio-economic system radically opposed to the interest in emancipation.

But the law is not just ideological. It is also a site of social conflict and political contest. Historically, property was the first right and all rights are modelled on

property. But the struggles of working people and minorities have introduced into law ideas and protections antithetical to its core socio-economic and ideological role. As a political field, law is always contested, its meaning never closed, its force questioned and confronted. Critical lawyers are both in and out of the law, deepening its limited conception of justice and importing another justice from beyond the confines of legality.

This volume is evidence of such double commitment to the many and multiform trajectories of critical scholarship and theory, and to the politics of emancipation. Nobody represented better this combination of critical theory and radical practice than our friend, colleague and comrade Vincent Keter. Vincent was a man of great talents and, like all greats, of great modesty. Erudite in many fields of scholarship, accomplished musician and brilliant artist, fervently committed to people and causes, politically active and passionate. He was part of this project and of the group of friends that animated it from the beginning. He brought to us both the radicalism and experience of the struggles in his native southern Africa and his amazing knowledge and understanding of so many cognitive fields. His untimely death brought together old and new friends and created a community in his name. This book, blessed to include Vincent's last writing before his passing away, is dedicated to his memory.

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Law, politics and the political

Matthew Stone, Illan rua Wall, Costas Douzinas

In the early days, critical legal studies (CLS) cohered around the demand that law is a form of politics. While legal reasoning perpetually mystified its own operation, law itself was directly and immediately political. Legal decisions were choices which formed part of the 'ideological struggles in society'.[1] This generation of 'Crits' looked at 'the undeniably numerous ways in which the legal system functions to screw poor people', but also 'at all the ways in which the system seems at first glance basically uncontroversial, neutral, acceptable'.[2] However, these early forays into CLS – largely associated with the major US law schools – took a narrow approach to the relation between law and politics. Typically, theorists depended on broad post-Marxist political commitments, which too often failed in their radical aspirations or petered out after the limited nature of the law school site became apparent.[3] Gathering a number of 'young' Crits, this collection revisits the relation between law and the political. However, we want to suggest that there is something distinctive about this return: it is far from a simple rehashing of the themes and tools of early CLS. It is not adequate, we suggest, to treat law as a mere instrument of political power, to reduce our outlook to the claim that law is politics by other means. Nor is it enough to claim that the mythic formality and neutrality of the law functions as an ideological mask for the machinations of politics. Times are different. That law is politics would be welcomed by many states who preside over the evacuation of any antagonistic sense of politics. Nowadays, not only does law increasingly resemble politics, but politics increasingly resembles law. In an indistinct fuzzy middle zone, what emerges are techniques of management,

1 A. Hutchinson and P. Monahan, "Law, Politics and Critical Legal Scholars: The Unfolding Drama of American Legal Thought' (1984) 36(2) *Stanford Law Review* 199, 206.

2 R. Gordon, 'New Developments in Legal Theory' in D. Kairys (ed) *The Politics of Law: A Progressive Critique* (Pantheon Books, New York, 1990) 286.

3 This was noted from within the critical community itself. Peter Goodrich explained this problem precisely in the final chapter of *Law in the Courts of Love: Literature and Other Minor Jurisprudences* (London: Routledge, 1996). See particularly 'Sleeping with the Enemy' ch 8 at 185.

security, strategy and policy. The real 'field of pain and death',[4] upon which legality is predicated, is no longer merely the courtroom, but also the planning office, the social security department, the job centre.

The contemporary situation is marked by the increasing role played by law in the political, social and economic spheres. Everywhere we see a tendency to render law at the heart of things, subjecting ever-growing domains of life to a knowledge structured by legal concepts, practices and methods. The diagnosis of juridification as an imperial process of colonising other disciplinary structures and spheres with specifically legal modes of thought has been widely noted in legal and political theory.[5] The increasing prevalence of law can be seen as a manner of inserting the state into everyday life, intertwining sovereignty, regulation and normativity with our everyday being-together. However, as with all colonial logics, the order seeking dominance is not untouched by those that it infects. What we witness is not, therefore, the sheer dominance of law, but the dissipating of the legal form in ways that allows power to assert a more pervasive grip on life. Through these new processes of juridification, law's sense of *Nomos*, *Jus* or even simply 'Law' is obscured. Law understood and appreciated as a social bond or a command to justice is increasingly lost, eclipsed by new techniques of control which have appropriated and corrupted the legal mode, emptying it of any remaining sense of right. At the same time, those increasingly juridified discourses are closed with the authority and legitimated violence of law. This phenomenon is thus profoundly different from a simple proliferation of extra laws. Rather, this is a deep juridification which intertwines life with power, and which some will term bio-politics.

Bio-politics refers to the ongoing tendency of governance to operate with reference to a normalised understanding of how humans and populations are expected to live. Power thus becomes entwined with all sorts of scientific and social knowledge. Law in a bio-political setting, far from being a supreme and singular arbiter of command, is merely one – albeit highly significant – site in a much wider matrix of power relations. Without specific deference to either the Foucauldian, Negrian or Agambenian theories, the effect of bio-politics can be understood as a practice of power in a setting where norm is blurred with fact, ought is reduced to is, and the brutality of dominance over human beings is achieved in the name of a bastardised and apolitical rationality. There are arguably few simpler examples

4 R. Cover, 'Violence and the Word' (1986) 95 *Yale Law Journal* 1601 at 1601.

5 In very different ways, each of these authors grapple with precisely this question. See G. Agamben et al *Democracy – In What State?* (New York: Colombia University Press, 2011); G. Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford: Stamford University Press, 1998), G. Agamben, *State of Exception* (Chicago: University of Chicago Press, 2005); W. Brown, *States of Injury: Power and Freedom in Late Modernity* (New Jersey: Princeton University Press, 1995); C. Douzinas, *Human Rights and Empire* (London: Routledge, 2007); C. Douzinas, *The End of Human Rights* (Oxford: Hart, 2000); C. Douzinas and A. Gearey, *Critical Jurisprudence: The Political Philosophy of Justice* (Oxford: Hart, 2005); G. Teubner, *Juridification of Social Spheres* (New York: de Gruyter, 1987); I. R. Wall, *Human Rights and Constituent Power* (Abingdon: Routledge, 2012).

of this than the multifarious juridical techniques of repressing otherness at jurisdictional borders. 'Antiterrorism' has become a new horizon by which people can be excluded, detained and stripped of their rights in the name of security, demonstrating how law's bio-political instrumentalisation has further accelerated in the last decade. These developments necessitate a renewed thinking of 'the political' that transcends the reductive assumptions of the post-1989 politics of consensus. At the heart of this collection, this question of the political is posed in its inescapable relation with law.

In the early 1980s, Jean-Luc Nancy and Philippe Lacoue-Labarthe suggested that the demand that everything is political in fact obscured that which was most political about politics. They claimed that 'the question of the political, that is the question as to its exact nature or essence, retires or withdraws into a kind of self-givenness, in which that which is political in politics is taken for granted or accorded a kind of obviousness which is universally accepted'.[6] This reduction to mere 'politics' is identifiable in the conflation of political discourse with the routine political debates of the day, and around the machinations of parties, ministers and lobbyists. This is the politics of 'political science' which turned social and economic conflict into a matter of accountancy, and ideology into calculated party manifestos. A shallow consumerism of policy was embodied in a façade that would cover over real political divisions. Nancy and Lacoue-Labarthe sought to withdraw from this clatter of 'politics', regressing back to the adjectival term 'the political' to nominate a renewed contestation of the very terms and structures of political discourse and action.

The differentiation between politics and the political is something already shared by many continental thinkers, whether or not they explicitly share its terminology. For Chantal Mouffe, for example, in a reinvigorated reading of Carl Schmitt, the political is born out of a critique of the prevailing modes of liberal politics which are predicated on an entirely false belief in the possibility of rational consensus.[7] The political transcends any adopted mode of politics, and denotes a fundamental social dissensus. Similarly, within Jacques Rancière's version of the political it is argued that authentic political action occurs not in the everyday politics of Westminster or Washington, but in those rare moments of radical democratic action that rupture the everyday view of the world.[8] For Jacques Derrida, the political holds a character of productive aporia in the radical potentiality of a Nietzchean perhaps,[9] or in the path of deferral marked by a democracy 'to come'.[10]

6 I. James, 'On Interrupted Myth' (2005) 9(4) *Journal for Cultural Research* 331, 336.
7 C. Mouffe, *On the Political* (Abingdon: Routledge, 2005) 11.
8 He renders the difference between politics and the political as 'the police' and 'politics', but the reasoning behind this terminological difference need not be investigated at this stage. J. Rancière, *Disagreement: Politics and Philosophy* (Minneapolis: University of Minnesota Press, 1999).
9 J. Derrida, *Politics of Friendship* (London; Verso, 2005).
10 J. Derrida, *Specters of Marx* (London: Routledge, 1994) 87.

Clearly, important differences exist between these thinkers, but what one can see is a recurrent concern in continental thought to engage in a political thinking that questions the very basis of politics. Thinking the political is an emphatically critical project through which it is hoped one can identify and resist the power structures whose presence have become veiled by a dubious appearance of neutrality and necessity. Therefore, it should come as no surprise that the chapters in this collection engage repeatedly, although not exclusively, with major continental thinkers such as Hegel, Marx, Arendt, Levinas, Derrida, Dussel, Foucault, Butler, Agamben and Esposito. If, for instance, the exemplary problematic of law is its relation with bio-politics, it becomes clear that traditional doctrinal legal theory is impotent owing to its incapacity to provide any meaningful thinking of resistance and critique. It is a central tenet of this collection that critical legal thinking must, by necessity, involve a thinking of the political: this is the ineluctable terrain upon which thought takes flight, laid down by the blurring of law and politics into regimes of coercive regulation. The chapters we bring together therefore signal an emergent awareness of the complicity of legality with politics, the capacity of legal structures to obfuscate political thinking, and hence the necessity of a critical interrogation of law to the critical work of the political.

In the years since the critical legal studies collections of the late 1980s and early 1990s,[11] there have been few, if any, collections on contemporary critical legal studies. The death of the movement has been announced repeatedly. Again and again, with conspicuous reduplication, CLS has been declared finished, dead, irrelevant. For instance, Brian Bix, in his jurisprudence textbook, discusses it in the past tense,[12] and Brian Tamanaha pointedly suggests that it is a 'dead horse'.[13] Many such legal theory texts include cynical passages on why CLS failed to change the landscape of legal education and practice. Yet with each official death certificate, duly registered with a major Anglo-American law journal or jurisprudence tome, the uncanny body of critique has re-emerged. In the British context, there were fewer of these definitive declarations, but nonetheless there was a sense in which the historical survival of critical legal theory was perpetually threatened. Perhaps what has confounded these opponents, to a large extent, is the refusal of critical legal theory to stick to a core set of principles. Most textbooks, monographs and review articles will emphasise outdated ideas that are closely associated with the first North American wave of critique: indeterminacy, trashing, alienation and the political nature of adjudication are apparently the acme of

11 A. Hunt and P. Fitzpatrick (eds) *Critical Legal Studies* (Oxford: Blackwell, 1987); A. Hutchinson (ed) *Critical Legal Studies* (New Jersey: Rowman & Littlefield, 1987); J. Boyle (ed) *Critical Legal Studies*, (New York: NYU Press, 1994); I. Grigg-Spall and P. Ireland (eds) *Critical Lawyers' Handbook* (London: Pluto Press, 1992); P. Ireland and P. Laleng, *Critical Lawyers' Handbook II* (London: Pluto Press, 1997).

12 B. Bix, *Jurisprudence: Theory and Context* (London: Sweet & Maxwell, 2009) 231–35.

13 B. Tamanaha, 'Conceptual Analysis, Continental Social Theory, and CLS' (2000) 32 *Rutgers Law Journal* 271, 305.

critical legal theory. This is perhaps an understandable misconception, given the early movement's predilection for catchy slogans and roughly similar arguments, which allowed mainstream scholars to regard it as a delimited and contained school in an ironic ignorance of its core values.

Admittedly, European critical legal studies developed in a relationship of both tension and alliance with American CLS, with the early years of the movement following wider cultural trends. Yet by the 1980s and early 1990s the more delimited mode of critique was already being surpassed by the so-called 'Brit-Crits,' who introduced semiotics, hermeneutics and deconstruction to the study of law, insisting on the textual organisation and aesthetic reception of legal texts.[14] They held that the injuries of law, whether racism, sexism or homophobia, should be shown on the body of its text. Opening the text of law to the law of the text thus revived the repressed link between jurisprudence and the humanities. The deconstruction of logonomocentrism was the European answer to the American CLS's 'trashing'. The return to rhetoric, semiotics and hermeneutics can be seen as a retort to and completion of the American focus upon law's 'fundamental contradiction'. Shifting away from its initial concerns, critical legal thought in the 1990s turned to emphasise the ethical dimension of legal operations.[15] Abandoning the neutrality of orthodox jurisprudence, critical scholars argued that its many moral failings were deeply related to the facile and inaccurate claim that law does not promote any particular morality or ideology. For these critics, the law promoted a self-satisfied and complacent version of sameness while marginalising and excluding the other. The many miscarriages of justice and the persistent failure of law to deliver even on its most anodynous promises of non-discrimination and equality turned critical legal thinking towards the ethics of otherness and the suffering face.

The new millennium has seen the consolidation of the earlier aesthetic and ethical directions, and their cross-fertilisation with a strengthened political strategy.

14 For notable examples see B. Jackson, *Law, Fact and Narrative Coherence* (Roby: Deborah Charles, 1988); B. Jackson, *Making Sense in Law: Linguistic, Psychological and Semiotic Perspectives* (Liverpool: Deborah Charles, 1995); P. Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks* (London: Weidenfeld & Nicolson, 1990); C. Douzinas, R. Warrington and S. McVeigh, *Postmodern Jurisprudence: The Law of Text in the Texts of Law* (London: Routledge, 1991); Peter Fitzpatrick (ed) *Dangerous Supplements: Resistance and Renewal in Jurisprudence* (London: Pluto, 1991); Drucilla Cornell et al (eds) *Deconstruction and the Possibility of Justice* (London: Routledge, 1992). The 'Brit Crits' were so-called because of their loose basis in institutions in the UK, rather than any national or nationalist association. In fact the 'Brit Crits' were overwhelmingly from other areas of Europe and, indeed, the world and there were a number of academics in American law schools who pursued similar themes in distinction to early CLS directions.

15 eg C. Douzinas and R. Warrington, *Justice Miscarried: Ethics and Aesthetics in Law* (London: Harvester Wheatsheaf, 1994) 115; C. Douzinas, P. Goodrich and Y. Hachamovitch (eds) *Politics, Postmodernity and Critical Legal Studies: The Legality of the Contingent* (London: Routledge, 1994). M. Diamantides, 'Ethics in Law: Death Marks on a "Still Life", A Vision of Judgement as Vegetating' (1995) 6(2) *Law and Critique* 6 209.

The rise and decline of the 'new world order' after the collapse of communism, the 'war on terror', the global penetration of neo-liberal capitalism and the return to brutal oppression and exclusion have led to the revival of a politics of resistance. At the same time, 'grand' theory, somewhat prematurely pronounced dead by a certain playful post-modernism, returned like the repressed. It is precisely this current wave of thought which responds to the exigent return of the political to the popular landscape, marking an emphatic restatement of the central role of critique in legal scholarship and education.

In this collection, we aim to gather a number of new critical legal scholars who, in this vein, attempt to return to theory with political effects. Whilst making no claim to represent critical legal thought exhaustively and in all its diversity, this collection offers a fractured and fractious statement of the position today. We have structured the collection in three parts, suggesting that each set of chapters engages with a particular constellation of concerns. However, there is often more in common between the sections than within them. Thus, they should not be seen as mutually exclusive or programmatic. In the first part, entitled 'Resistance, dissensus and the subject', the chapters focus on the possibilities of dissensus, the effect of law in the constitution of different modes of subjectivity, and the place of the human within the contemporary configuration of law's politics. Running through this section is a concern to refigure, rework or even think beyond the subject. This operates as a mode of critique of, resistance against, or as escape from, the law. This continues a radical challenge to traditional legal subjectivity, questioning its embodiment of rationality and rights, instead theorising a subject that is determined by its constitutive opposition to, or exclusion from, the legal order. The urgency of such questions in the light of contemporary uprisings and revolutions is tackled directly. Jess Whyte begins the section by tracing Foucault's late involvement with human rights. She draws out a possible Foucauldian 'right to intervention', while keeping an eye on the militarised humanitarianism that would later emerge. Costas Douzinas analyses the varieties of resistance against economically-driven governance, with a detailed analysis of the significance of the recent protest movement in Greece. Illan rua Wall engages with the recent events in Tunisia, developing the question of constituent power in the context of Ben Ali's bio-political regime. He puts the recent revolt in Tunisia in a productive tension with Giorgio Agamben's dismissal of the possibilities of the constituent moment. Working on Agamben with a little more fidelity, Connal Parsley looks at the 'Tranny Cops' political parody of police and sovereign power. He investigates the possibilities of a politics of a 'means without end'.

The second part, 'The state, violence and biopolitics', collects pieces that diagnose the contemporary strata of power and sovereign force. The chapters consider the shifting function of the state as a source of law and as an element within wider patterns of bio-politics, empire and the international normative order. The prevailing assumptions of liberal theory and its capacity to regulate conflict and violence are critiqued from philosophical standpoints, whilst also offering practical instantiations recognisable to us all. Ben Golder looks to the uses

of Foucault's notion of bio-politics for a critical engagement with contemporary criminal law. Through an analysis of the 'homosexual advance defence' he suggests that criminal law plays a complex role in the differential exposure of some (others) to violence and death through the opening of a biological *caesura* within the population to be governed. Brenna Bhandar, in contrast, utilises post-colonial theory and bio-ethics jurisprudence to think about the relation between property, the legal subject and discourses of racialisation. Drawing upon the work of Hegel, Tarik Kochi questions the relation of social antagonisms to the production of ethical norms and systems of law. Jason Beckett considers the failure and future of the international legal system, and the role and effect of critique within theories of public international law. Finally, Vincent Keter presents a critique of the dominant economic ideology of Western jurisdictions, which has recently led the world into financial crisis.

In the final part, we gather a number of contributions on the politics of law's relation to critique itself. These chapters are speculative and productively incongruent in their investigation of possible approaches to the theorisation and critique of law today. Elena Loizidou grapples with the matter of life in its relation to legality, offering an analysis of three evocative literary narratives of encounters at law's borderline. Matthew Stone draws attention to a perceived return to central questions of law's origin, arguing for a critical method that instead allows us to think of life outside or against the law. Oscar Guardiola Rivera's chapter challenges us to imagine a future history. He attempts to displace the hegemony of the question of the Leviathan – the state – in critical legal theory, with a meditation on the production of material scarcity. Finally, Gilbert Leung closes the collection with a reading of the possibility of a radical cosmopolitanism, in which conventional notions of international jurisprudence are displaced in favour of a global *polis* to come.

This collection thus instantiates the manner in which the question of law and the political has come to the fore in recent critical legal studies. It was once noted that there appeared to be more review articles about the core tenets of the first wave of American CLS than there were primary texts actually undertaking that analysis. This collection will not provide an easy yardstick against which to judge whether a text 'belongs' to a 'critical school'. It will not identify, categorise and worship a canon. It does not offer a programme for future research. Rather, we hope that it acts as a challenge to *think* critical legal theory, to think again about the relation between law and the political, and to think radically about a politics of transformation.