

Neoliberalism, law and nature

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[a chapter to appear in Philippe Cullet and Sujith Koonan (eds.) *Research Handbook on Law, Environment and Poverty*, forthcoming from Edward Elgar.]

I. INTRODUCTION

What are *environment* and *law* today? This chapter's premise is that both have been profoundly transformed during the current neoliberal era, and that understanding these interlaced transformations is key to effective future research and other action on the issues.¹

The chapter unfolds in several sections. The first briefly outlines the growth of the neoliberal state amid the crises faced by capital since the 1970s. The second spells out a few of the specifically legal innovations that have been a part of this evolution, including new regimes of trade, property, investment, rent, environmental governance and legitimized violence. As pressures have grown to reduce state and market to the “identical flat ontology of the neoclassical model of the economy”,² the section argues, the legal landscape has been flattened too. For example, fines, fees and prices have been conflated in theory and practice and juridical traditions rooted in commons norms increasingly marginalized along with the interests of those who rely on them. New patterns of criminalization and decriminalization have also emerged, together with new understandings and legal treatments of corruption and noncorruption. Growing privatization, meanwhile, has gone hand in hand with an explosion in the volume of written law. This expansion originates in part in imperatives to centralize economic authority on a global scale and to increase the sophistication and opacity of legal trickery in an increasingly rent-based, parasitic, extractive economy, but also in incentives for scammers and reformers alike to resort to the formulation of more written rules to try to further their opposing interests. A third section attempts to make explicit how the development of neoliberal legal regimes and of neoliberal natures are of a piece. As an example, it sketches some of the ways in which neoliberal property, trade, civil and criminal law, as well as the neoliberal flattening of the legal landscape, constitute and are constituted not just by contemporary trends in “human” politics but also by a new global fire regime. A short conclusion then draws some of these threads together, suggesting that researchers and other activists need to make the alliances that will enable them to contend with the mutually-inseparable contradictions of neoliberal law and neoliberal nature together.

II. TRANSNATIONAL CAPITAL AND THE GROWTH OF THE NEOLIBERAL STATE

It is widely recognized that the neoliberal era has been marked, in many countries, by a struggle to reduce the state's role as an intermediary between classes and increase its role as a body dedicated to promoting, coordinating, facilitating and planning the activities of transnational capital. Over the past few decades, a multitude of fresh instruments – public-private partnerships, sovereign wealth funds, austerity regimes, tax regimes friendlier to business, mechanisms for selling off state enterprises, treaties allowing transnational corporations to sue governments for hypothetical future profits lost due to regulation, and many more – have come on line to provide leverage to global

capital, facilitate the collection of new rents, and disempower ordinary people. Facilitating the fifteen-fold explosion in exports of goods and services between 1977 and 2015 and the doubling of exports' share in Gross Domestic Product globally,³ meanwhile, has been the work not only of venerable Bretton Woods institutions such as the World Bank and International Monetary Fund but also of new interstate or super-state structures ranging from NAFTA to the WTO, the European Single Market and the prospective Transatlantic Trade and Investment Partnership (TTIP), as well as numerous bilateral agreements. The advent of the age of “made in the world”⁴ has meanwhile seen expansion of state investment in national and international infrastructure corridors and other projects and institutions for making societies more transparent to and navigable by transnational capital – including especially a surging financial sector – and less transparent to and navigable by commoners. Indeed, the nature of infrastructure itself has changed with the advent of public-private partnerships designed more to channel a predictable stream of subsidies to new investment vehicles such as private equity infrastructure funds or venture capital funds than to further the public good as conventionally conceived.⁵ As public and private investment decisions increasingly shift into the hands of fund managers, and austerity and structural adjustment increasingly subordinate social welfare to intensified worker exploitation and regressively redistributive financial policies, gaps between rich and poor widen both within countries and between North and South. That necessitates the rollout of a more violent “penal state”⁶ at the domestic level (in order to handle the contradictions of and “consolidate the policy gains” made under the banner of “deregulation”)⁷ while, at the international level, states such as the US have to channel more resources to war and armed intimidation. Neoliberalism, in short, turns out to be “very much a top-down project”⁸ of redistributive state-building principally in the service of a narrow, wealthy international elite, involving what is almost certainly a net increase in both the scope and the scale of state as well as inter-state and super-state activity.

With declining rates of profit and reinvestment in older industrial sectors and the growing dominance of a finance- and rent-based economy, the job of the neoliberal state has come down above all to facilitating rapid and continuous innovation in methods for seizing and cannibalizing already-created value – strategies that, as James McCarthy points out, are “ultimately redistributive towards firms rather than true strategies for capitalist accumulation.”⁹ This parasitism has taken many forms, of which two can be briefly mentioned here.

First, in addition to creating unprecedented new supplies of low-cost labor by separating people from their land in the global South (and also keeping them “behind highly-militarized national borders within which social protections could be systematically withdrawn”)¹⁰ states also increasingly began stealing from workers in the global North by separating them from the wage contracts, welfare provisions, unionization rights and other components of the Fordist and welfare-state capital-labour “deals” of the 20th century. For several decades, Northern states have competed fiercely over who can promulgate the most restrictive anti-union laws and cut real wages most steeply in both public and private sectors. Between 2009 and 2012 alone, the number of people in employment in Britain who were working for less than the legal minimum wage increased from 3.4 million to 4.8 million, with the state stepping in to provide extra payroll budget for business through tax and housing credits. Jobs are also being made more precarious through outsourcing and “zero-hour” contracts that deprive workers of benefits, pensions or recourse to the law when they are unfairly dismissed. “Workfare” and “prisonfare” programmes are also being used to supply cheap or zero-cost labour.¹¹ Another way of cutting labour costs is to steal health and unemployment benefits, using the proceeds to supplement the increasing subsidies being offered to the richest one per cent of the UK's population. Such subsidies have included a trillion-pound bailout of failed banks following the 2008 financial crisis, billions of pounds in handouts to oil, nuclear and telecoms companies, and numerous policies transferring the risks of business to taxpayers. According to the

Bank of England, so-called “quantitative easing” was essentially a subsidy for the financial sector, costing the poorest 10 per cent of Britain's people £779 each, while the richest 10 per cent enjoyed an average £322,000 leap in the value of their assets.¹² At a time of falling profits, there is an especially direct, extractive relation between the impoverishment of the lower tiers of society and the enrichment of the top, visible in the jump in Gini coefficients and other measures of inequality.¹³ These thefts from Northern workers are in many cases coextensive with the mechanisms through which health services, elderly care, and police, prison, and postal services are broken up and the goods they provide reprocessed to allow much of their accumulated value to be extracted and transferred to the rich, while the state and its taxpayers have to pay out large sums to try to make up for the shortcomings of the husks that remain. For example, privatization of railways, while allowing the private sector to purloin much of the value put into the system over a century of development, makes rail travel more expensive, while the state and its taxpayers have to step in to lay out yet more money to repair the infrastructure that private railway companies find it unprofitable to maintain. Britain's National Health Service is being debilitated in the same way as a new generation of private “health service providers” extract sedimented value from a system that is then left full of holes.¹⁴ Meanwhile, in a “neo-Keynesian” response to the problem of how the new working-class robbery victims are supposed to be able to continue buying consumer goods, the financial sector has helped engineer a vast expansion of private credit,¹⁵ in effect a colonization of future wages, setting in train another process of wealth transfer from poor to rich. In some regions, this has been supplemented by the appropriation not only by banks but also by states of private savings for purposes of financial speculation. Another form of theft from workers proceeds through the neoliberal reform of tax systems. New legislation and legal trickery have helped make tax evasion a way of life among large corporations at a time when “austerity” is imposed on the less well-off.¹⁶ In 2013, one in five large British businesses paid zero corporation tax. Today, Britain's poorest 10 per cent pay 43 per cent of their income in taxes, while the richest 10 per cent pay only 35 per cent.¹⁷

In a second, more global process, new, largely state-funded roads, bridges, hospitals, ports, railways and other infrastructure are lawfully transformed into financial assets or private rental properties guaranteeing private investors income streams at the public's expense, allowing wealth to be extracted from even the poorest regions of the world and siphoned to the global one per cent.¹⁸ The financial sector has thrown itself into the task of filling the profit gap in many other parasitic, unproductive ways as well, as testified by the post-1970s cascade of speculative bubbles, asset-strips, derivative fabrication, real estate speculation and other swindles.

To ensure that the new armies of cheap (and cheapened) workers produce as much surplus value as possible, low-investment extraction of raw materials from commons and indigenous territories is crucial. Historically, of course, exploitation of industrial labour on a global scale has always been closely tied up with finding and appropriating “ecological surpluses”¹⁹ of cheap minerals, and in particular cheap fossil fuels, which have been essential to discipline and productivity in a globalized labour force.²⁰ But in an age of declining profit rates, the state's violent underwriting of the financial and political costs of cheap minerals and land has become even more important, as witnessed by, for example, the “offshoring” of much fossil-fuelled manufacturing-labour exploitation to China²¹ accompanied by increasingly-militarized Latin American “neextractivism”.²² Northern states' efforts to transfer power from labour to the financial sector have meanwhile been successful partly because of the shift from labour-intensive coal extraction to more capital-intensive oil and gas exploitation,²³ which neoliberal states continue to promote in the form of fracking initiatives that now extend even to the English Home Counties. As will be explored further below, part and parcel of such trends is the emergence, via the neoliberal state, of ecosystem-service transactions, which rely on additional, satellite forms of extraction capable of producing exchangeable units of cheap

compliance with environmental regulations that might otherwise impose unacceptable costs on extraction.²⁴

III. THE NEOLIBERAL TRANSFORMATION OF LAW

A. Trade, Investment, Property

Intimately tied up with the transformations of the state sketched above are shifts in the role and structure of law. These developments are not confined to “classical” measures for enclosing new territories for transnational investment – such as the legal reforms entailed by World Bank projects promoting land titling, export manufacturing zones or contract farming in the global South – but also include radically-innovative regimes of trade, investment, property and criminal law.

One example consists of trade agreements and contracts that, while undercutting commoners’ rights, empower transnational corporations’ lawyers to reach more deeply into the governance systems of purportedly sovereign states in order to allow their employers to sidestep risks of market competition in unfamiliar environments, circumvent national legal systems and sue governments in parallel tribunals if laws and regulations undercut their ability to make money.²⁵ Such agreements make it possible, for instance, for firms to counter or forestall inconvenient environmental, health, or human rights legislation on the ground that it amounts to “expropriation” of hypothetical future profits; what investors claim to be their “legitimate expectations” of future profit can now be treated in law as a novel kind of private property. The legal right to a specified, predictable level of future accumulation can then be elaborated, institutionalized, and entrenched not only in the form of a right to a stable regulatory environment but also in the form of a right to pollute, or “transform and exploit general, social nature in ways that will directly harm others” or “cause ecological harm and create environmental hazards for people in a given area.”²⁶ In effect, investor-state settlement systems allow firms to “demand cash, now, from national treasuries” in compensation for the claimed counterfactual “regulatory takings”.²⁷ Host Government Agreements (HGAs), for instance, are now often required by transnational investors in countries where their claims are not protected by bilateral investment treaties in order to minimize the financial and political risks resulting from possible changes in national legislation that would affect development, construction and operation of the transnationals’ projects. Thus the Host Government Agreement drawn up in 2002 between Turkey and the BTC Consortium building the Baku-Ceyhan pipeline – which became the prevailing domestic law of Turkey governing the project – effectively abrogated Turkey’s executive and legislative powers to protect Turkish citizens from the project’s potential environmental damage or health and safety hazards, or to improve the regulatory regime governing it should changes in scientific understanding of risks require it. Under the HGA, the Turkish government granted BP exemption from the financial impacts of any new environmental, social or any other laws affecting the pipeline that Turkey might introduce over the 40-year lifetime of the agreement. Indeed, it undertook to compensate the BTC Consortium from tax revenues if new regulation adversely affected projected profits from the project. The investor-state dispute settlement system (ISDS) included in many other international agreements – as well as a somewhat modified Investment Court System proposed to replace it in the TTIP following widespread protests – also allows companies to sue governments if policy changes are deemed to undercut their ability to make money. These lawsuits bypass domestic courts in favour of an international tribunal of arbitrators – three private lawyers who are “empowered to decide whether private profits or public interests are more important” and who have a built-in incentive to encourage further investor claims that will bring them more business. Investor-state tribunals have already granted big business billions of dollars from taxpayers’ pockets worldwide, often in compensation for public interest measures.

From a total of three known investor-state claims in 1995, the number of such lawsuits had surged by January 2016 to nearly 700, challenging anti-smoking legislation, bans on toxic chemicals, anti-discrimination policies, financial stability measures, restrictions on dirty mining projects, and so on in countries on nearly every continent.²⁸ In one case, Libya was ordered to pay US\$900 million for “lost profits” from “real and certain [sic] lost opportunities” of a tourism project to a company which had only invested US\$5 million on a project on which construction had never started.²⁹ Under TTIP proposals, moreover, the number of companies allowed to pursue such lawsuits would increase from around 4,500 today to more than 47,000, opening the door to hundreds of new US investor lawsuits against EU member states. Transnational corporations could even sue their own governments via foreign shareholders or foreign subsidiaries.³⁰ Such arrangements have, in the words of McCarthy, “relocate[d] much environmental governance to international scales and into the hands of non-state judiciaries, and replace[d] the openness in environmental governance created by the modern environmental movement with new forms of secrecy and closure.”³¹

In another example of the neoliberal struggle to intertwine trade arrangements with the construction of new property rights regimes, the World Trade Organisation’s agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) expands corporate monopoly intellectual property rights “far beyond the levels of protection that the nationally negotiated laws of many of the member states would take it.”³² One objective is, again, to enable large firms to avoid the rigours of competitive markets in diverse societies and to extend the scope of crude appropriation as a “fix” for declining rates of profit.³³ Just as HGAs and ISDS empower large transnationals to enclose or privatize certain conditions of production heretofore held in common, TRIPS is used to “capture rights to intellectual property that have been in the public domain for centuries and, in some cases, millennia.”³⁴ Notorious cases include patents on basmati rice, an Indian staple for centuries, as well as other plants and animals developed through generations of human-nonhuman interactions.³⁵ Rather than inveighing against the “regulatory taking” of counterfactual future profits, corporations such as Pfizer at the forefront of the political movement for TRIPS have based their case on denunciations of “piracy” of the mental property of US firms by other countries, particularly in the global South.³⁶ Insisting on intellectual rights over “products and processes without discrimination as to subject matter”, TRIPS helps extend to a global level monopoly over pharmaceutical products animal varieties, methods of treatment, plant varieties, biological processes for producing animal or plant varieties, food products, computer programs and chemical products. By 2013, a mere seven firms had gained control of 71 per cent of the global seed market, as well as much of the market for agricultural inputs and technology, facilitating steep rises in the prices of seed and planting stock.³⁷ This brand of lawful robbery is today increasingly central to the global economy. As Slavoj Žižek points out, Bill Gates, the proprietor of perhaps the world’s largest fortune, with an income greater than that of any of dozens of poorer nations, “effectively privatized part of the general intellect and became rich by appropriating the rent that followed.”³⁸

Innovations in law are also constitutive of the new neoliberal trade-and-property regimes that make possible the ecosystem-service transactions mentioned above. These transactions, which are, as Romain Felli argues, “institutional responses to the threat to accumulation that environmental regulations pose” rather than “accumulation strategies” proper,³⁹ nevertheless depend absolutely on those regulations and legal modifications thereto. For environmental regulation to be “transformed into tradable instruments”⁴⁰ or units of cheap regulatory relief (what one legal scholar calls “regprop” or “regulatory property”)⁴¹ that corporations can own, buy and sell, there has to be regulation in the first place. For example, in the carbon markets set up by the Kyoto Protocol, the European Union Emissions Trading Scheme (EU ETS), and so forth, state-regulated “caps” and “carbon budgets” define the scarce material out of which tradable pollution rights are constructed. Unless states had first learned, from the model of 1970s pollution-control legislation in the US, how

to break down the problem of climate change action into a “nonpolitical” question of reduced flows of molecular units, the Kyoto Protocol’s “market mechanisms” – which claimed to herald a way of curbing global warming cheap enough to be compatible with continued capital accumulation⁴² – would never have become possible. Indeed, without this reductionist step, the question of how to make environmental regulation “flexible” could never even have been stated in the vocabulary of “cost savings” or “velocity through a regulatory system”.⁴³ By the same token, unless EU ETS regulation had already come into force, transnational corporations such as Arcelor Mittal could never have become capable of seeking billions of dollars in new “climate rents”⁴⁴ by demanding enormous free handouts of emissions allowances from the state.⁴⁵ The fact that the Kyoto-era project to make molecule regulation truly global eventually failed has in no way diminished the necessity of grounding ecosystem service transactions in new forms of national or international law: the 2015 Paris climate agreement merely substitutes new units based on national regulation – Internationally Transferrable Mitigation Obligations (ITMOs) – for the more conventionally-structured, international Kyoto molecular units. In all “compliance markets” for carbon, moreover, it is state-driven and state-sanctioned quantification, monitoring, reporting, verifying and insuring techniques and rules that make possible not only the creation and corporate appropriation of measurable pollution allowances, but also the fabrication and corporate acquisition of the additional class of quantifiable pollution rights known as “offsets”. If, under HGAs and ISDS, corporations are guaranteed rights to pollute to the degree that such rights are needed to safeguard projected future profits, under the EU ETS and other climate trading schemes, corporations are allowed to acquire free or low-cost rights to pollute in the form of property rights to measurable slices of whatever pollution sinks that legislation happens to stipulate are “available” at the moment. In the one case, private corporations can be compensated for “regulatory takings” of counterfactual future profits, while in the other, they can be compensated to the degree that they have been awarded property rights in a global ecosystem or have instigated incremental environmental “improvements” over a counterfactual baseline legally verified by the state. Neoliberalism’s project of promulgating novel, corporate-friendly property rights – whether to imaginary future profits or to units of regulatory relief – thus has powerfully destructive environmental effects. Nor, of course, does the role of neoliberal legal innovations end there. For example, police and military units – some of them invented for the purpose – have to take on the job of legal repression of communities whose presence interferes with the efficient manufacture of cheap “offset” tokens out of land, forests and community futures.⁴⁶ As will be discussed below, this involves new directions in criminal law as well.

B. The Flattening of the Legal Landscape

Another way in which law has been transformed under neoliberalism – and one that is, again, highly relevant to environmental struggle – is in the partial eclipse of a heterogeneous organization of law in favour of a more uniform, “economized” structure. Neoliberalism, write Philip Mirowski and Esther-Mirjam Sent, is characterized by a “transcendence of the classical liberal tension between the self-interested agent and the state by reducing both state and market to the identical flat ontology of the neoclassical model of the economy.”⁴⁷ The “good governance” cherished by neoliberalism’s ideologues tends to rely on the assumption that, as Massimo De Angelis puts it, “every problem raised by struggles can be addressed on condition that the mode of its addressing is through the market.”⁴⁸

This process of reductive flattening is also visible in the details of legislation and jurisprudence themselves. Reflecting its complex history, law has generally tended to layer, interleave or try to achieve some form of balance among elements of often quite distinct or even opposed traditions of practice in a sort of conglomerate or palimpsest. Two of the most important traditions can be

drastically abbreviated as those of capital accumulation and of what is often called the commons.⁴⁹ For example, many traces remain visible in contemporary law of the working “commons” assumption that, other things being equal, it is reasonable to do whatever it takes to ensure the survival or well-being of individual community members. One example is legislation governing universal pensions or health provision (which in Britain's case was modelled on the Tredegar Medical Aid Society, a local mutual health provision organisation set up by miners in South Wales with roots in the great self-created commons institutions of 19th-century European labour movements).⁵⁰ Such legislation embodies a vision of the human body as an instance of nature obdurately entangled with “unproductive” and difficult-to-calculate cross-subsidies in support of a relatively unconditional right to subsist endowed upon the infirm, elderly, or recalcitrant. Other very simple examples come from criminal law, where there remains widespread resistance to, for example, performing “public interest” cost-benefit analysis on, or setting fixed budgets in advance for, the practice of apprehending and prosecuting murderers, which thus remains partly “unassimilated” to economic calculation. Even the rapid proliferation of environmental regulation in the United States from the mid-1960s through the 1970s can be viewed, James McCarthy suggests, as a modern-day effort to “establish common property in particular environmental goods at national scales,”⁵¹ implying, for example, the unconditional right to exist of various species including humans, as well as traces of an ecological holism, both of which tend to be obstacles to capitalist calculation.

Not surprisingly, such conceptual elements of law have tended to become targets of neoliberal intellectual activists eager to establish the dominance of more or less capital-friendly over more or less commons-friendly legal concepts. The outcomes of this trend are visible not only in hostility to welfare and human rights legislation, but also in, for example, the tendency of HGAs and ISDS to insist that investors' rights should trump subsistence rights. They appear, too, in the shifts in the legal concept of the person that gained momentum during the Ronald Reagan regime in the US. To quote legal scholar Lisa Heinzerling, “the use of cost-benefit analysis to evaluate life-saving regulatory programs” required, in the US, “the creation of a new kind of entity ... the statistical person”, as an abstract “collection of risks” lacking the problematic, unconditional “right to be protected from physical harm caused by other people” that had previously been assumed to be a possession of the person.⁵² Similarly, 1970s-era environmental legislation in the US was swiftly denounced by its critics as giving a new lease on life to atavistic legal concepts that would, it was said, destabilize capitalist calculation: hence claims that the Clean Air Act amounted to a “growth ban”⁵³ or that other forms of regulation promoted an irrational philosophy of sacrificing “jobs” to a few exotic spotted owls. Many countries, meanwhile, have recently witnessed neoliberal legislative initiatives that attempt to flatten knowledge into “just another fungible commodity”⁵⁴ rather than a common heritage – a trend that, in the case of Brazil in 2016, was met by protests including the takeover of more than 1000 schools by the students themselves.⁵⁵

One struggle that has come to particular prominence recently stems from neoliberal pressures to flatten law's conceptual landscape by transforming as many (juridical) *fin*es for environmental harms as possible into (market) *fee*s. From the point of view of legal neoliberalism, this is a useful simplifying measure that facilitates calculation, since fees, unlike fines, have no moral or commons residue. Once you pay a fee, your obligation is discharged and the exchange complete and closed-off, facilitating planning for efficient use of resources. Paying a fine, however, is not paying a price, but carries, for example, an open-ended injunction not to repeat the offense – which of course can have indefinite, difficult-to-calculate practical consequences – and can invite inconvenient political debates about entitlements and rights.⁵⁶ Hence the US's successful 11th-hour campaign, during the 1997 Kyoto Protocol negotiations, to transform the *fin*es for exceeding emissions limits which were to be paid into a Clean Development Fund into *price*s paid for carbon emissions permits generated

by carbon offset producers under a Clean Development Mechanism.⁵⁷ Such moves, together with the rest of Kyoto's carbon market apparatus, made the costs of responding to popular concern about global warming in principle more calculable for corporations, and also cheaper to handle, while giving more political planning power to private investors and providing business with new sources of rent.⁵⁸ Significantly, the subsequent EU ETS did mandate the imposition of fines on corporations that failed to buy the tradable pollution permits they needed to comply with the law, but these fines were deliberately set at levels comparable to anticipated permit prices, encouraging the conflation of the two. Here, as elsewhere, trends in environmental law reflect more general neoliberal legal shifts. In the US, for example, the fines that are very occasionally imposed on private financial institutions for fraudulent behaviour today never exceed the sums the institution makes from the fraud itself. As anthropologist David Graeber notes, this is equivalent to the government's saying "you can commit all the fraud you like, but if we catch you, you're going to have to give us our cut."⁵⁹

C. Landscapes of Criminalization and Decriminalization

Integral to the trends outlined above are shifts in the landscape of what is considered criminal and noncriminal, and in the focus of enforcement authorities. As already noted, the early, simplistic insistence on the part of neoliberal ideologues on dismantling regulation paradoxically helped lead in the end to strident neoliberal demands for "big stick" state strategies and "new forms of regulatory roll-out, governance-making and proactive statecraft".⁶⁰ These involved not only increased "penal management and punitive regulation, both of poverty and of poor subjects",⁶¹ but many other innovations as well.

First, intensified privatization and expansion of extraction to new frontiers has been accompanied by growing criminalization of commons and commoners. As new types of private property acquire legal protection, practices hitherto normal to various kinds of commons have become criminal offenses, as when customary rights of way across newly-privatized territories are legally blocked⁶² or farmers whose fields contain plants from patented seeds that they have not paid corporations a yearly fee to grow become subject to prosecution.⁶³ In Latin America, seeds that have been used, exchanged and developed for thousands of years among small farmers have become illegal under new international-trade-related legal regimes at the same time that those who plant them have become criminals subject to violent repression.⁶⁴

Commoners' organized efforts to defend their territories have also been increasingly classified and suppressed as felonious actions across the Americas and Europe, with environmental activists subject to prosecution for offenses such as terrorism, sabotage, criminal trespass, obstruction of public space, criminal contempt of court, extortion, conspiracy to incite criminal damage, and so on.⁶⁵ The flip side of this wave of criminalization of environmental protection is a pattern of impunity granted to state authorities and others who murder, assault, coerce, defame or commit other crimes against commoners and environmental activists.⁶⁶ On a less overtly violent level, environmentalists across the world, whether poor⁶⁷ or middle-class,⁶⁸ have become subject at least since the 1990s to lawsuits expressly aimed at consuming their time and resources or intimidating them into refraining from exercising their rights to free speech.⁶⁹

The degree to which criminalization of commons and commoners shares historical roots with criminalization as a capitalist strategy for rebuilding racialized regimes of divide-and-rule should not be underestimated. The post-1960s crisis to which neoliberalism was a response stemmed in part from a series of refusals. Not only did oil producers refuse to keep prices low. Women also increasingly refused to do the unpaid reproductive work that had sustained the Fordist deal; paid

workers themselves increasingly refused the discipline of the workplace; oppressed minorities increasingly refused the structures that enforced a racist division of labour;⁷⁰ and so on. As is generally the case, these refusals were closely bound up both with attempts to defend, reclaim and construct commons and efforts to build cross-racial alliances against capitalist oppression. The neoliberal counterattack thus necessarily had to embrace, in addition to more violent efforts to scour the earth for fresh cheap labour and resources as well as more energetic and innovative attempts at rent-seeking, a project to reconstruct along new lines racial divides that had come under challenge from antiracist and anticolonialist movements. It is no coincidence that the same post-1960s neoliberal era has seen both the increased criminalization of the commons form of nature and an innovative structural use of criminal categories to enforce a global racial division of labour and divide black and white popular movements from each other. It is no coincidence, for instance, that US political leaders such as Ronald Reagan have presided over both sweeping new privatization initiatives and the institution of a system of mass incarceration that has established a “new Jim Crow” racial caste system through which millions of black men are denied economic and political rights for life.⁷¹ It is no coincidence that at the same time the Donald Trump regime embarks on programmes for aggressively redistributing more wealth from poor to rich, it also categorizes immigrants from Mexico and elsewhere (a generally more law-abiding proportion of the US population than others) as “murderers”, “rapists” and so forth.⁷² Nor is it a coincidence that the corporate-funded American Legislative Exchange Council, in addition to writing and promoting model bills that promote unrestrained fossil-fuel extraction, also helps draft laws criminalizing blacks and expanding the use of below-minimum-wage prison labour.⁷³ Thus while many observers have noted the 2010 blowout of the Deepwater Horizon oil drilling rig in the Gulf of Mexico was a predictable result both of the continuing move to riskier frontiers of petroleum extraction and a lack of investment in safety, too few have noticed that both are of a piece with BP’s practice, following the spill, of bypassing local residents in procuring low- or zero-cost black prison labour to try to clean up the devastated Louisiana coast.⁷⁴ Accordingly, BP became the target at one and the same time of – for example – a lawsuit filed by local activists in an Ecuadorian court for violations of the rights of the Gulf of Mexico using the “rights of nature” articles in Ecuador’s 2008 constitution and of criticism from the US’s National Association for the Advancement of Coloured People (NAACP) for its racially-biased practices.⁷⁵ By the same token, too few observers have recognized that the outrage in the US and elsewhere following the shooting by a white police officer of an unarmed black teenager in Ferguson, Missouri in 2014 cannot be understood as if it were isolated from a longer history of administrative and police abuses, land grabs and environmental racism in the region.⁷⁶ For example, the Ferguson area is the site of one of the world’s first nuclear waste dumps, of World War II vintage, now under threat of breach from an underground fire spreading from a nearby landfill owned by a waste-management company of which Bill Gates owns a large share.⁷⁷

As new categories of criminal have come into being, so, too, have new classes of non-criminal. The process of financialization that has been one of neoliberalism’s signature responses to post-1960s crisis has meant that an ever-increasing proportion of corporate profits come in the form of rent extraction, which customarily works through various forms of legal extortion, trickery, or enforcement of inherited privilege. Thus, for example, financial gambling practices that were once illegal have been quietly and gradually decriminalized. As Donald MacKenzie observes, while in 1970, many financial derivatives that are traded today, such as the Chicago Mercantile Exchange’s S&P 500 futures, would still have been illegal, by 2005, “financial derivatives contracts totaling \$329 trillion were outstanding worldwide, an astonishing figure that correspond[ed] to roughly \$51,000 for every human being on earth.” As Burton Rissman, the former counsel of the Chicago Board Options Exchange, explained, “whereas we were faced in the late 1960s and early 1970s with the issue of gambling,” that issue “fell away” in the wake of the advent of the Black-Scholes formula for option pricing. “It wasn’t speculation or gambling, it was efficient pricing.”⁷⁸ Similarly,

while the US's Investment Company Act of 1940 made it illegal for investment companies to short sell or use leverage,⁷⁹ restrictions have “generally eased in recent decades” at the same time many investors have simply retooled themselves so that they do not fall into the category of “investment company” – for example, by becoming “hedge funds”.⁸⁰ US bankers who employed legally-questionable practices to bankrupt hundreds of thousands of ordinary people in the leadup to the financial crisis were seldom charged, convicted or imprisoned, while in some states an assembly line of deliberately perfunctory eviction hearings helped dispossess untold numbers of homeowners.⁸¹

Another notable shift in the landscape of criminalization and decriminalization during the neoliberal age has been in what is and is not treated as corruption. As revolving doors between government and business multiply and the “flat ontology” to which Mirowski and Sent refer takes firmer hold in legal practice, what were once considered to be “conflicts of interest” are now typically regarded instead as “synergies” that promote processes of accumulation that are in the interests of all.⁸² The concept of corruption is narrowed in ways that allow it to be used against individual public officials accepting bribes but not against private corporations that pay them; league tables of global corruption issued by organizations such as the Milken Institute and Transparency International are invariably lists of countries, not lists of corporations. The “private gain at public expense” achieved by, say, US Congressional representatives who use government office supplies for campaign purposes is legally defined as corruption, but not the “private gain at public expense” integral to the operation of neoliberal initiatives such as private-public partnerships or the EU Emissions Trading Scheme, which engineer massive grants of public goods and nonhuman nature to the private sector. (In the case of the EU ETS, European governments' grants of the global good of the earth's carbon-cycling capacity to European private corporations are arguably interpretable as “bribes” paid to reward business for participating in the scheme at all). In the last 20 years or so, the concept of corruption has also been conspicuously redefined to stigmatize practices that appear procedurally or administratively “nontransparent” to transnational corporate strategists, but not practices that appear politically “nontransparent” to commoners – for example, opaque mechanisms of legal dispossession deployed by some of the same corporations that rely on the presence of their representatives within the policy-making process.⁸³ The neoliberal age has also been increasingly marked by the deployment of experts in science and technology to craft environmental policy and regulation even in cases in which they themselves benefit from the commercial exploitation of the technologies in question, with biotechnology being a prime example.⁸⁴

D. More Privatization, More Rules

As the examples discussed in this section have suggested, transformations in law have come to play a prominent role in the overt and covert appropriation and redistribution of common or public goods characteristic of the neoliberal economy. A final example of these changes is the recent explosion in the sheer volume of written law worldwide. Associated with the “rollout” of the neoliberal state, this explosion, as this subsection will argue, tends to be both a natural result of globalized neoliberal governance and a particular advantage to a private sector organized around seizures and theft of already-created value.

Giving the lie to the false cliché that the advance of “free markets” lightens the burden of clunky, archaic, ever-ramifying legal rules on a suffering society, the growth in the body of written law is hard to quantify or even conceptualize, and no systematic studies appear to have been done at a global level. But the jump has been unmistakable since the 1970s and more particularly since the 1990s, as trade treaties multiply, privatization legislation ramifies, new forms of property emerge, tax laws complexify, financial sector rulebooks swell, and market environmentalism grows. The

phenomenon, of course, is not without precedent. As David Graeber suggests, there is nothing new about the tendency of state initiatives that claim to “promote market forces” and “reduce red tape” to “have the ultimate effect of increasing the total number of regulations, the total amount of paperwork,” and even the “total number of bureaucrats the government employs” as well as the violence on which they ultimately rely. Indeed, Graeber goes so far as to call this tendency the “Iron Law of Liberalism”, noting that, historically speaking, markets themselves have generally been “either a side effect of government operations, especially military operations, or ... directly created by government policy”.⁸⁵ But the current explosion seems particularly marked. It also appears to go beyond what might be considered either “normal” processes of growth needed to govern increasingly large and complex societies or the simple retrenchment of regulation, criminal and international law and so forth needed to cope with the contradictions and excesses resulting from the early supposedly “deregulatory” zeal of neoliberal ideologues and policymakers.

The roots and consequences of the neoliberal ballooning of the mass of written law are complicated and their significance for struggles over human and nonhuman nature not easily summarizable. But several factors stand out. First is the need of various sectors of globalizing capital to be able to learn how to plan and organize their exercise of power across a diverse range of countries at the same time, using supportive national and international legal arrangements to “sequester key economic policy issues beyond the reach of explicit politicization”.⁸⁶ So-called “free trade” and “free market” policies, in the words of Graeber, have “entailed the self-conscious completion of the world’s first effective planetary-scale administrative bureaucratic system ... mainly aimed at ensuring the extraction of profits for investors”, encompassing, at the top, global policy-making “trade bureaucracies like the IMF, World Bank, WTO and the G8, along with treaty organizations like NAFTA or the EU”, with just below, “large global financial firms like Goldman Sachs, Lehman Brothers, American Insurance Group, or, for that matter, institutions like Standard & Poor”, then “transnational mega-corporations”, and finally NGOs that “provide many of the social services previously provided by government.”⁸⁷ This centralizing or unifying imperative has led to increased complexity; “although we think of the current epoch as one of ‘deregulation’ of markets, rules are proliferating.”⁸⁸ Just as what rules of English an English-learner needs varies depending on what language those rules are expressed in, so too what laws capital needs in specific contexts will differ depending on the histories of the societies in question, and the greater variety of contexts, the greater diversity of laws. As Stephen K. Vogel observes in a study of telecommunications and financial services industries as well as the broadcasting, transportation, and utility sectors during the 1980s and 1990s, the “advanced industrial countries moved toward liberalization or freer markets at the same time that they imposed reregulation or *more* rules”, with different states driving legal reforms in ways that “combined liberalization and reregulation in markedly different ways”:⁸⁹

“... a movement aimed at reducing regulation increased it; a movement propelled by global forces reinforced national differences; and a movement that purported to reduce state power was led by the state itself.”⁹⁰

By the same token, efforts to introduce markets for carbon across the world have produced so many different rules and so many different climate commodities that the original aim of using the schemes to simplify climate regulation globally is increasingly understood to be unachievable.⁹¹

In a sense, this is just how global capital works. As Karl Polanyi pointed out more than 70 years ago, the road to the “free market” has to be “opened and kept open by an enormous increase in ... interventionism” and “deliberate state action.”⁹² “An increase in state power has always been the inner logic of neoliberalism,” writes John Gray, “because, in order to inject markets into every corner of social life, a government needs to be highly invasive.”⁹³ Where circumstances vary, as they do under globalization, the nature of that intervention is bound to vary too. Similarly, when

heretofore diverse practices need to be integrated vertically or horizontally under corporate control, as they do, for example, when agribusiness companies try to amalgamate proprietary herbicides with proprietary genetically-modified seeds, or use contract farming to increase surplus extraction and offload risk, new kinds of rules and criminals are bound to proliferate. At a certain point, centralizing ambitions turn out not to lead to simple, centralized rules that work everywhere, but rather the opposite, as rules formulated in one context are revealed to be ineffective in others, or to be interpretable in unexpected, inconvenient ways, requiring further, improvised applications of violence or legislation. The same will be true of any further sets of rules that are formulated in an attempt to correct the so-called “failures” of the first. Hence the ever-complexifying cascade of revised rules, repackagings, endlessly-failing and -ramifying technical fixes, appeals to force and “mission drifts” that characterize the stories of international development, industrial agriculture, cost-benefit analysis, genetic engineering and so forth.⁹⁴ The fact that “simplification is complicated”⁹⁵ becomes paradoxical only under the idealistic assumption that global action must ultimately be the implementation of a single set of universal rules.

But the hypertrophy of the body of written law is not just a natural consequence of the globalization of the neoliberal project. It is also something that – and this is a second explanation of the phenomenon – is often actively cultivated by business in an era when an especially high premium is placed on rapid and continuous innovation of methods of appropriation by legal contract and new legislation. When rent-seeking becomes an especially prominent source of profit, capturing value through “legalized extortion”⁹⁶ and impenetrable forms of trickery can be as important to a business as creating it by finding new sources of cheap labour or investing in heavy machinery. For example, law is central in devising as many transactional “tollgates” as possible to capture flows of already-created value in the process of privatization of public goods. The more such law there is, moreover, the more difficult it becomes for ordinary people to contest or even understand it, while large corporations with the resources both to pursue specific cases and to invest in the process of crafting legislation itself enjoy huge advantages.⁹⁷ Across the world of finance, tax and privatization, it has become increasingly common over recent decades for private lawyers, consultancies and accountancies to draft their own complex, opaque laws which are then ratified by legislators who are either members of, or paid by, the wealthiest classes. Here, too, the effect is to expand the body of law rather than streamline it. Different kinds of public-private partnership, for instance, tend to require different laws.

In finance, meanwhile, the synergies between legal complexity and what I have elsewhere called the “quantist” drive to generate new financial products have contributed in other ways to the explosion in the volume of written law. For example, the original 1988 Basel treaty regulating bank capital requirements, 30 pages long, was soon seen as unable to accommodate the fine distinctions among risks that quants' new mathematical models had supposedly begun to provide. By 1996, bank lobbyists has succeeded in getting an amendment inserted that permitted banks to use their own internal models to determine (and reduce) their capital requirements. The Basel II treaty of 2004 reinforced this shift and also laid down new rules for derivative positions, enabling yet more leverage while incentivizing the development of still more supposed risk management technologies. The result was 347 pages of new law that hid even greater complexity in the form of individual banking and trading books that encompassed millions of parameters that told observers that risk was falling when in reality it was increasing. As finance expert Kevin Dowd, himself a old-school neoliberal ideologue, notes, both the denominator and the numerator in regulated risk-weighted capital ratios were being gamed:

“The move to more complicated regulation based on the banks’ own models was strongly promoted by the big banks themselves as it gave them more scope to ‘play the system’—indeed, the regulatory system itself was captured by them.”⁹⁸

Nevertheless, the post-financial crisis Basel III treaty of 2010, weighing in at 616 pages, merely added further law to the system without changing its basic orientation. As Dowd notes, a similar trajectory can be traced in other forms of neoliberal financial regulation. While the US Federal Reserve Act of 1913 was 31 pages long, the Glass-Steagall Act of 1933 37 pages, and even the Sarbanes-Oxley Act of 2002 only 66 pages, the Dodd-Frank Act of 2010 is 848 pages long and instructed bureaucrats to formulate a rulebook that was likely in the end to run to 30,000 pages.

In many countries, tax law, revised again and again in order to “stimulate the economy” and subsidize the rich, exhibits a similar pattern of growth in sheer mass. So does environmental regulation, especially where it has become subject to “flexibility-increasing” marketizing amendment. While environmental legislation in the style of the US in the 1970s was already very complex, the addition to it of market-based mechanisms results in an indefinite proliferation of means of appropriation of unprecedented baroque and opacity. For example, the clause setting up the Clean Development Mechanism (CDM) in the 1997 Kyoto Protocol was approximately one page long, but by 2016 there were 240-some separate approved methodologies in the CDM rulebook through each of which corporations could, in effect, make *sui generis* international property claims to a portion of the earth's carbon-cycling capacity in order to save themselves regulatory costs. Each of these measures for asserting property rights was grounded in a different justification. Among these justifications were such outlandish yet impossible-to-disprove propositions as that firms were saving measurable carbon emissions over a counterfactual baseline by providing solar power for domestic airline gate operations or by rolling out biomass plantations for fuel for cement manufacture. Hundreds of pages of arcane English-language documentation – impenetrable to most affected communities and climate change activists alike – were involved in establishing each of thousands of individual global property claims.⁹⁹

Reinforcing what has been described above, a third important factor involved in the neoliberal explosion in the extent of written law is a shift toward more calculated exploitation of the fact that written law is embedded in more or less unarticulated “forms of life” whose characteristics can never be completely spelled out at any point. Perhaps more than ever before, corporations and law firms are taking an interest in the promulgation of laws that facilitate the largest exploitable “gray areas”, not just laws beneficial to them whose interpretation is fairly stable. That tends to favour legal proliferation.

This Wittgensteinian point¹⁰⁰ perhaps needs a schematic introductory example to bring out its relevance. In the rulebook governing the game of baseball, it is nowhere specified that a batter cannot swing twice at the same pitch.¹⁰¹ This has never mattered, since no batter has ever been able to do so. In other words, it is a type of shared, unexpressed “common property” underlying the rules of baseball that all human beings' capabilities are limited in certain ways. Baseball players and fans are not usually aware of this common property because there is no reason to be. Yet it is essential, at least potentially, in order for the rulebook to work and for baseball to continue to be an appealing game. For example, imagine what would happen if a team suddenly fielded a bionically-enhanced player who not only could but on occasion did swing twice at the same pitch. In the ensuing uproar, the official interpreters of baseball's rulebook would have to take a decision. The bionic batter's “alegal” action of swinging twice at the same pitch would have to be fairly swiftly resolved into either a “legal” action or an “illegal” action. Strictly speaking, the basis for this resolution is not locatable in the “intentions”, “purpose” or “spirit” of baseball's original rulebook. Baseball's founders could never have had the intention of either excluding or allowing the bionic batter from exercising his or her special abilities. The need for either course of action could never have occurred to them. If it might seem plausible for today's plaintiffs to argue before baseball's “Supreme Court” that the bionic batter's actions violate the “spirit of the law,” or even the “intentions” of the

founders, and that those intentions should guide the formulation of the necessary amendment to the rulebook, that is only because the “form of life” that tacitly underlies baseball's rulebook – and includes common physical (in)abilities – remains so widely shared that the sudden advent of the bionic batter that brings those (in)abilities to legal consciousness also comes to seem an uncontroversially unfair seizure or skewing of that part of the form of life that contains them.

Now suppose not only that a particular baseball team has fielded a bionic batter as a speculative venture that may or may not pan out depending on the decision of baseball's “Supreme Court”. Suppose also that the team might be well aware that the Supreme Court is likely to find against the bionic batter in the end, but calculates that during the period that the bionic batter remains “alegal”, the team will nevertheless be able to rack up a World Series-winning string of victories without being sanctioned. In other words, suppose that the team undertakes consciously to take advantage of the tacit nature of the common, incompletely-specifiable and -systematizable shared background that does much of the work of the explicit law that floats on top of it, and has unprecedented means for doing so. Suppose, further, that this tactic is only one part of a larger strategy for continuously rolling out successive manipulations of the “forms of life” underlying baseball's rules in a way that constantly outpaces the ability of baseball's “Supreme Court” to issue new rulings that resolve “alegality” into legality or (more likely) illegality. Thus the team is able to take continual advantage of its capability of producing successive new bionic players that can run twice as fast and throw twice as hard as ordinary athletes, but without ever once actually violating baseball's rules. As the team's crafty corporate managers are well aware, no Supreme Court ruling could possibly prevent all such abuses in advance. No matter how many new explicit rules are formulated to prevent existing abuses, there will always be more “alegal” abuses on the cards as long as the team has enough inventive resources to alter the underlying forms of life, or escape various constraints in “our biological nature, our sense experience, our interactions with other people, ... our anticipation of and response to sanctions, and so on”.¹⁰² In fact, the promulgation of new explicit rules is likely to multiply opportunities for clever operators with sufficient resources to get around them. It is merely a question of making as much money as possible during the periods before each new set of explicit rules is legislated.

This is what is increasingly happening to the law under neoliberalism. Many of Enron's notorious dealings, for example, as University of San Diego law professor Frank Partnoy points out, “were not illegal; they were alegal”, as were similar operations undertaken by Bankers Trust, Cendant, Long-Term Capital Management, CS First Boston, Merrill Lynch, Global Crossing, WorldCom and California's Orange County.¹⁰³ So too was Goldman Sachs's scheme for “helping” Greece get around Maastricht rules by inventing new derivatives deals enabling the firm to lend money to the country without seeming to do so.¹⁰⁴ Elsewhere in the US financial world, private equity firms have reworked Chapter 11 of that nation's Bankruptcy Code into a financial engineering tool enabling corporations to dump pension bills onto a government-backed agency, legally depriving workers and retirees of benefits to which they would otherwise be entitled.¹⁰⁵ The Volcker Rule's 600-page rulebook has meanwhile helped generate large numbers of gameable “alegal” exemptions that render it largely ineffective. In the UK, it has become standard practice for accountancy firms such as Ernst & Young, KPMG, Deloitte and PriceWaterhouseCooper to draft tax laws for the government complete with carefully-crafted loopholes and potential “gray areas”, knowledge about which the same firms then sell to private sector companies for profit: exploitation of alegality as business model.¹⁰⁶ The innovative online transportation company Uber Technologies was able to operate for several years in a legal “gray area” it opened up by its exploitation of the incompletely-specified tacit basis for minimum wage laws, at least until an employment tribunal ruled that it did not have the right to classify its drivers as “self-employed”.¹⁰⁷ By the same token, no sooner are “green certification rules”, “green safeguards”, “green standards” and the like rolled out than capital

exploits ways of undermining the tacit background such rules require to be effective, allowing it to advance into new areas and gain new kinds of advantage over local commoners, as has happened with the Forest Stewardship Council, the Roundtable on Sustainable Palm Oil, and the incorporation of rules of free prior informed consent into international institutional practice.¹⁰⁸ This branch of business strategy is hardly new – see, for example, Partnoy's book on Ivar Kreuger's transatlantic adventures in the 1920s or William Cronon's description of how new law requiring abstract classification of grades of railroad-transportable commercial maize opened up opportunities for market corners in the US in the 19th century.¹⁰⁹ But under neoliberalism, with its relentlessly revolving doors and increasingly privatized law, Wittgenstein's point that written rules work by virtue of being part of larger forms of life articulates what has become a basis for new assaults on democracy by capital. To oversimplify drastically, it might be said that legal practice today tends to concern itself less with legislating and litigating to mediate class conflict and more with gaming the law for extractive and rent-seeking purposes.

A key strategic point to note here is that formulating more and more explicit legal rules in the “above-the-surface” mass of the iceberg of law – as is a natural impulse of well-intentioned regulators and activists – need not by itself have any countervailing effect on growing corporate dominance over the incompletely-specifiable “below-the-surface” mass of forms of life. To the extent that this tacit, subsurface mass constitutes less and less of a robust, democratically-shared and -held underpinning for the “letter” of the law, legislative reform is unlikely to move society toward the ideals suggested by the phrase “the rule of law”. Indeed, what the phrase “the rule of law” points to, but cannot express, is paradoxically more likely to be achieved in a community where there are *no* written rules whatsoever, yet a shared form of life that enables a judiciary to “know how to go on” in unexpected circumstances in ways accepted by the community – where the law really is no more than a “prediction about what a judge would do”, in Oliver Wendell Holmes's words – than in a community where there is a gigantic, Talmudic body of “enlightened” legal statutes for seemingly every contingency, yet no single, democratically-shared “form of life” underlying it. Indeed, without such a basis, writing more rules aimed at ensuring fairness may well only create new spaces for more forms of “alegal” unfairness that can only be addressed through litigation. The neoliberal age reveals perhaps better than any other what Timothy Mitchell emphasized in his study of colonial-era land law in Egypt, namely that “rather than creating a rupture with arbitrary forms of power, the rule of law rearrange[s] the arbitrariness”.¹¹⁰ Neoliberalism brings out in especially sharp relief the fetishistic nature of the belief that the more “enlightened” laws are passed, the better law will be able to keep up with developments elsewhere in society, the less violence there will be, and the more likely it will be that the ideals connoted by the phrase “rule of law” can be attained.

As Mitchell observes, such fetishes are themselves a crucial aspect of modern power. They tend to silence conflict-laden histories in a process of denial, differentiation and exclusion. As such, they must be carefully problematized by realistic social movement strategists, lest the regulatory impulse to reach for, say, “more standards”, “more safeguards”, “more legal reform” and the like fail to link itself to practical “anticapitalist” struggle in a coherent way and so wind up merely providing “air cover” for the development of a less democratic political landscape. The point is not that written law is harmful or that the ongoing increase in the mass of written law somehow “causes” an erosion in democratic power, nor that the answer is less written law or no law. To make such a claim would be merely to revert to the fetishistic binaries that, in opposing “nature, a living actuality, to a nonpresent, regulating ideality”,

“... appear to establish the universality of law by securing its difference from the actuality of ... history, the ideality of property in terms of its difference from the

materiality of land and labor, and the order of ... rule in terms of its difference from the arbitrary violence of the past”.¹¹¹

The point is, rather, that it is important to try to understand better the political processes in which such concepts of law and nature are themselves produced.

IV. NEOLIBERAL LAW, NEOLIBERAL NATURE

A. Nature as historical

This chapter has argued that one important aspect of neoliberalism has been the reorganization of law, including environmental law. However, this reorganization cannot be separated from the reorganization of nature.¹¹² Contending with the destructive tendencies of neoliberal law cannot be a matter of reforming it so that it better respects a “nature” that is conceptualized as separate and ahistorical. For example, to say that the law should be reformed on an “ecocentrist” as opposed to an “anthropocentrist” model is to fail to take account of the fact that the “eco” in “ecocentrism” changes in time and space as a part of the same processes through which the law changes in time and space, and that these processes, like the emergence of capitalist society/nature divides, must be addressed as a whole.¹¹³

For example, the *mueang faai* wet-rice irrigation system of Northern Thailand is a historically- and geographically-specific kind of nature tied to a certain type of commons of human work, as well as particular nonhuman elements including swift-flowing mountain streams, silt-permeable weirs made of degradable bamboo, community-protected forest commons and rules of respect for the spirit of the rice.¹¹⁴ Similarly, the rights of way marked on UK Ordnance Survey maps denote characteristic ecologies inextricable from a regime of overlapping and mutually-constraining commons and private property rights. The suburban US lawn is yet another kind of nature, this time closely tied to fairly strict exclusionary private property rights as well as a hugely capital-intensive global oil industry together with its enabling laws.¹¹⁵ By the same token, many of the nonhuman elements visible on a contemporary mining site are partly constituted by concession law, imperatives to externalize costs, a regime under which nature is construed as “natural resources”, and the rights of corporations to sue states or environmental protesters. In the same way, manifestations of neoliberalism such as the Paris Climate Agreement, the EU Emissions Trading Scheme, REDD+, NAFTA, collateralized debt obligations and infrastructure-as-asset-class are all built up partly out of their own characteristic natures or human-nonhuman ecologies. This is why it is of questionable use to say that the laws governing, say, ecosystem service markets should be promulgated and enforced in ways that better protect ecosystem services. The recent evolution of nature as ecosystem services is itself part of the problem.¹¹⁶ The international climate treaties that have been developed since 1992 and the late-20th-century nature of ecosystem services are mutually-constituting; their contradictions need to be addressed together.

All historical natures, whether *mueang faai* or ecosystem services, are by definition constructed on a base of prior natures with whose other descendants they may coexist uneasily. Thus the new “averaged” global natures of ecosystem service trading are built partly out of the 18th- and 19th-century nature of “natural resources” and the early-to-mid-20th-century nature of “ecosystems” as well as the 1970s US-style nature partly constituted by “molecular-unit” regulation. All of these natures share an inheritance in the society/nature binaries that have characterized capitalism for many centuries, and have been deeply entrenched in various state, legal, scientific, educational, engineering and international institutional practices as well as in the changing physical makeup of the world. But each also has its own distinctive dynamics. Struggles over and against neoliberalism

must also be struggles over and against the complex, historically-inflected ways in which environment and environmental knowledge have become constituted in the neoliberal era. Like the commodities and rents of earlier eras of capitalism, the novel commodities and rents of neoliberalism are no more transcultural than “transnatural”,¹¹⁷ dependent on newly-fashioned, richly-contradictory ecological “outsides” that are a “source of both its energies and its failures.”¹¹⁸

B. Neoliberal law, neoliberal fire

To get a deeper feel for the need to unify contemporary struggles regarding neoliberal law and neoliberal nature, it may be helpful to look at a particular case in which battles are actually being joined. The remainder of this chapter will examine the contradictions and conflicts that grow out of the neoliberal incarnation of that ancient element that is today at the core of the politics and law of climate change: fire.

As with other aspects of nature, the nature of fire has changed markedly over history. Different kinds of society in different kinds of places have tended to be associated with different kinds of fire regime, and vice versa. In South Africa, for instance, as fire historian Stephen Pyne observes, fire is as fundamental to the machinery of *fynbos* (a biotically-rich shrubland or heathland unique to the region) as “spark plugs to an automobile”:

“Like other ecosystems, however, *fynbos* is adapted not to 'fire' in the abstract but to particular local regimens of fire – to fire in certain seasons, with certain intensities, with frequencies that vary by year and decade. Randomly firing the plugs won't drive an engine; the sparks must be timed, and the timing will vary with the engine speed and flow of fuel into its combustion chambers. In *fynbos* the flow of fuel is measured by biomass and regulated by organic pumps that follow the life cycle of the plants that make it up. The profusion of plants argues for a profusion of burning regimes.”

Such fire regimes cannot be understood in abstraction from human communities and their history. In Australia, for instance,

“... aboriginal burning beginning at least 38,000 years ago ensured not only the pervasiveness of the fire which has shaped the continent's tough and unique biota, but also its permanence. Even the fabled botanical biodiversity of southern Pará in Brazil ... is perhaps 40 per cent attributable to anthropogenic disturbance, an impact not possible without fire ... The study of a 'pure' fire regime without human participation, dear to some ecologists, is a fantasy. Fire ecology has to incorporate the pathways of human institutions and knowledge as fully as biogeochemical cycles of carbon and sulphur.”¹¹⁹

Such human institutions include, of course, those governing trade and rights to territory as well as those generating various technics and forms of knowledge. The resulting fire regimes may be conceptualized at different scales and resolutions, with the global scale becoming increasingly important for the fire analysis of the neoliberal era. Thus just as specific fire regimes (say, the regime prevailing at Yellowstone National Park – one influential paradigm case of modern “nature” – between roughly 1880 and 1970) can be said to have changed at the local scale when indigenous peoples were driven out, and then changed back again after 1970, when indigenous fire practices regained scientific approval, so too the “world” fire regime may be said to have changed roughly from one where there was much more fire in the open than there is today (in agriculture, in forests, and so forth) and no fire in combustion chambers to one in which there is less fire in the open and an enormous amount within combustion chambers. This is a global shift in the overall nature of the “nature” that is denoted by the word “fire” even if the scale of the analysis prevents any conclusions being drawn about the changes in the nature that is fire at any particular granular level and even if,

as always, caution must be exercised lest the term “regime” be misunderstood as reifying shifting and contested relationships into something overly-fixed, stable or monolithic. It is a shift whose implications show up in the kind of representation that, say, Google Earth provides, but also in many others – for example, in wide-angle panoramas of cities like Los Angeles, Quito or Sydney and their outskirts. In the plantations or Mediterranean scrub on the slopes above such cities, there is, roughly speaking, too little moderating, fertilizing fire (resulting in occasional explosive, destructive outbreaks of catastrophic, property-threatening wildfire), while in the built-up areas there is too much fire in combustion chambers and boilers (resulting in other local and worldwide dangers too well-known to need enumerating).

This shift in the structure of world fire, crucially, is also visible in the history of labour and law. Changes in agricultural fire regimes in Europe associated with enclosure and early modern capitalism, for instance, contributed to ecological crises, eventually stimulating the development of various “fixes” requiring, first, brutal labor exploitation in the Peruvian guano islands (accompanying the intensified worker exploitation in European factories facilitated by fossil fuel use),¹²⁰ then continued brutal exploitation in the Atacama desert saltpetre deposits at the turn of the 20th century (leading to, among other events, the 1907 Iquique massacre), then the Haber-Bosch fertilizer-manufacturing process with all its further, complex accompaniments of which a significant contribution to accelerating climate change is only one example.

Neoliberal nature – as represented by marketable ecosystem service tokens – adds new elements to the global fire regime of fossil-enhanced industrial capitalism. The “transformation of environmental regulation into tradable instruments” noted above, together with the increasingly abstract, “averaged”, “liquid” nature¹²¹ to which it gives rise, goes “all the way down” into, for example, the way coffee farmers and their land behave in Mexico and “all the way up” into increased oil extraction, global energy prices, and so forth.

Two brief examples will serve to illustrate the point. First, neoliberal fire builds on and reinforces a certain pattern of *criminalization and noncriminalization* that is implicit in, say, the “normal” interpretation of the sort of photographs mentioned above of the burning outskirts of cities like Los Angeles, Sydney or Quito. Behind the visible flames in these pictures there is usually a story not only about an inadequately-controlled or menacing external “nature” but also, typically, about criminal activity.¹²² The flames raging inside the thousands of factories and internal combustion-engined vehicles that also frequently appear in such pictures, on the other hand, are invisible in the photos. Implicitly, these fires are not only noncriminal, but also generally seen as an example of a kind of civilization and control over humans and nonhumans that is to be encouraged. This pattern applies across the internationalized fire regime of industrial capitalism (see, for example, the ways in which, in standard development discourse, the elaborate, pejorative mythology of “slash and burn” complements the profound silence that prevails regarding fossil-fuel combustion) and is embodied in legal codes everywhere.

In part, this is a legacy stretching back at least to the long 16th century. But the basic criminalization/noncriminalization frame has been widened significantly by the market environmentalism of the neoliberal age. A good example is the Dutch-Ecuadorian FACE/Profafar project.¹²³ This was a carbon “offset” scheme structured in a way that simultaneously “decriminalized” a certain increment of fossil-fuel burning in Dutch electricity generating stations while “criminalizing” what had been long-established patterns of open-land burning in one region of the very strongly fire-dependent *páramo* ecosystems of the Ecuadorian high Andes. In the 1990s, the Otavalo Kichwa community of Mojandita de Avelino Ávila in the northern mountains of that country accepted a net US\$11,700 from NV SEP, the Dutch Electricity Generating Board, to

maintain new pine plantations on 130 ha or their formerly treeless *páramo* lands as supposed carbon sinks for Dutch fossil emissions, contributing zero-cost collective *minga* work and community funds in the process. As elsewhere, such plantations had a deleterious effect on local human-nonhuman relations, particularly those involving water. Unsurprisingly, *pachamama*¹²⁴ turned against the pine plantations and 70 hectares were consumed by fire; the rest caught fire some time afterwards, eventually resulting in the rejuvenation of local springs.

However, these biotic fires constituted a breach of contract that exposed the community to penalties of \$35,100, more than three times the cash payment they had received to host the plantations in the first place, adding to stresses in the community that could well have resulted in, for example, longer-term erosion of its detailed knowledge of fire stewardship and its fire regime itself. In this representative example of the ecosystem service transactions that have become commonplace in the neoliberal era, a type of fire that is materially responsible for the murderous effects of global warming is further shielded from being regarded as criminal (on the contrary, it actually becomes viewed as a source of funds for protection of the earth's atmosphere), while a type of fire (and, indeed, the commoning structure of indigenous *territorios* as a whole) that has no such damaging effects is criminalized in new ways in the course of being integrated into novel international circuits of investment. Moreover, at the same time that neoliberalism's nature represents an expansion of the particular pattern of criminalization of fire associated with capitalism and imperialism, it also, as elsewhere, modifies existing landscapes of corruption. Unverifiable criteria such as “additionality”¹²⁵ and sanitized concepts such as “grandfathering” help open new horizons of corruption via ecosystem service markets,¹²⁶ yet are not themselves regarded as corrupt.¹²⁷

Second, as with other natures, ecosystem services are partly constituted by specific structures of *property rights*, particularly when they are unitized into cheap, widely-tradable, financializable tokens of regulatory relief (tonnes of CO₂ equivalent, species equivalents, wetland water quality units, etc.). Ensuring that such units can function in international trade entails complex systems of ownership, measurement and standardization, requiring continuous negotiations and more or less incoherent compromises among lawmakers, lawyers, economists, scientists and technicians of many kinds, in the course of which what count as “fire”, “climate”, “air quality” and “pollution” all undergo fundamental changes. “Pollution”, for example, changes from locatable toxic discharges in particular jurisdictions into an averaged global abstraction, and is regarded under new environmental laws as having disappeared provided it is “offset”. It becomes an aspect of a new “degraded nature” that, like risk in an age of derivatives, is located in a space with fewer footholds for ordinary people. Under neoliberal climate change treaties, similarly, CO₂ pollution changes into “CO₂-equivalent” pollution: carbon dioxide becomes exchangeable with methane, nitrous oxides, chloroflourocarbons, and so forth. As ecosystem units are “propertized” as liquid assets for regional or global markets as well as financial investment, property rights regimes connected with agricultural plots, factory sites and timberland holdings must also be transformed, altering what counts as nature there as well. In a carbon offset project located partly in Chiapas, as Tracey Osborne writes, the “centralization of forest governance and decision-making into the hands of project implementers and brokers, the necessity for legible land rights and boundaries, and the technical requirements for measurement, calculation, and monitoring of carbon have reshaped forest governance,” altering what goes on among both nonhuman and human denizens of local forests and fields.¹²⁸ In rural Chhatisgarh and elsewhere in India, coal-fired sponge iron factories have been helped to keep themselves afloat through new income streams based on their ownership of notional efficiency improvements under the CDM, perpetuating ash contamination of rice fields, respiratory disease, and dropping water tables.¹²⁹ In the US, timber investment management organizations assert property claims over their land's carbon-cycling capacity in order to bundle it together with

the timber, holiday home plots and conservation easements and other assets that make up their portfolios, again changing the sets of relations constituting the associated “nature”.¹³⁰

Crucial to the evolution of the new legal property regimes is a process of flattening of the diversity of fire regimes on a worldwide scale – a flattening that transcends even that already engendered by fossil capitalism. In order to make possible the comparison and circulation of ownable, cost-saving ecosystem-service tokens, the common, international so-called “carbon-saving” aspects of activities as unrelated as photosynthesis in grasslands and counterfactual efficiency “savings” in fossil-fuelled cement factories have to be emphasized at the same time that climatological differences between carbon dioxide emissions of fossil and of biotic origin are de-emphasized, together with the structural, physical, ecological and political distinctions between fire in, say, Mojandita de Avelino Ávila and fire in, say, the Holcim cement works in Dottenhausen. It is only through this process of abstraction that it becomes possible to construct, for example, the “global cost-curves” that McKinsey & Company once produced hierarchizing carbon emissions mitigation methods. Such curves rate mitigation techniques according to how efficiently they might be able to fabricate units of climatic regulatory relief. Thus clinker substitution by fly ash is said to cost little but unfortunately also to have low “abatement potential”, while annexation of pasturelands for tree plantations supposedly has more “abatement potential” but also entails somewhat higher costs.¹³¹ In this way, just as neoliberalism tends to flatten what was previously a more complex and varied landscape of legal concepts, so too the chemistry-based conception of fire on which neoliberal climate regulation is based further flattens the landscape of fire regimes to make way for a more unitary one dominated by a radically-simplified measurement- and market-friendly molecular-global conception of fire as oxidation. To create units of “climate benefit” that corporations will regard as worth owning, livelihood relations involved in different fire regimes must be disrespected, even destroyed. The same property-related process of flattening of fire regimes also engenders systematic stupidity, as the intertwined global histories of labour, commons, thermodynamic energy, capital and global warming are obscured, along with the roots of climate change itself.¹³²

One specific entailment of the property rights system required for markets in global warming mitigation is imperialism in a strict, formal sense. As Romain Felli has emphasized, emissions allowances under arrangements such as the EU ETS amount to rentable use-rights in the carbon-cycling capacity of the earth.¹³³ Accordingly, for states to be able to grant or auction off this property to corporations, they must first annex capacities that have evolved as parts of specific fire regimes now located outside their own borders – for example, the pathways of gas exchange, with all of their nonhuman-human relations, that have been endowed into the Australian bush through thousands of years of indigenous stewardship, or into agricultural soils elsewhere through peasant or small-scale agriculture. The other type of token traded in carbon markets – offsets – meanwhile entail imperialism not only in virtue of being exchangeable for these allowances, but in additional senses as well. Owners of offsets in effect lay claim to benefits that flow from improvements they make in the atmospheric carbon budget that would not have happened otherwise. That entails measuring those improvements against a single “business-as-usual” scenario. Specifying such a scenario entails eliminating all other scenarios from the realm of reasonable possibility.¹³⁴ That imposes the methodological requirement of dismissing the possibility of any future alternative fire-world, including innumerable climate-friendly ones, other than the one imagined by offset producers and certified by state offset regulators. This reduction of the history of the unproductive “native” to a single, predetermined trajectory is, again, a classic attribute of imperialism as well as racism, pre-emptively excluding many indigenous, peasant and workers groups from a voice in the future of fire.¹³⁵ Like other aspects of the current competitive drive to mass-produce the cheapest units of regulatory relief at a time of profit crisis in the fossil economy, it also engenders

complications and contradictions of all kinds that in turn give rise to a characteristically neoliberal explosion of largely “unfollowable” laws, rules and amendments.

V. CONCLUSION: LEGAL ACTIVISM IN A NEOLIBERAL AGE

Effective research and activism in the field of environment and law requires an understanding of how profoundly both have changed under neoliberalism. The growth of the neoliberal state amid productivity crisis and the move to a more financialized, rent-based global economy has been accompanied by sweeping legal innovations relating to property, trade, investment, rent and criminality as well as an expansion in the mass of written law and in the gaming of legislation. Part and parcel of these shifts have been newly-marketized regimes of environmental regulation associated with novel types of nature (ecosystem services), whose structural differences from natures with longer histories, such as commons and resources, must also be grasped.

All of these changes – whether in the state, in the law, or in nature – are associated with systematic patterns of oppression with both familiar and unfamiliar elements. Legal scholars and other activists, whatever stance they take and whatever activities they engage in, will inevitably be locating themselves somewhere in this new terrain of oppression. Making intelligent choices about where they want to be in order to make a difference presupposes having information about what locations are available today, which in turn is likely to require contact with scholars and popular movements situated well outside the legal profession itself.

For example, while lasting and deep, the massive setbacks for popular efforts to achieve an effective, collective climate politics – setbacks represented by the divisive neoliberal innovations of the Kyoto Protocol of 1997, the EU ETS of 2005 and the Paris Agreement of 2015, together with REDD, REDD+, “climate-smart agriculture” and so forth – are not irreversible. But for legal scholars and activists to be able to lend support to the popular struggles that are currently contesting such imperialist, racist governance structures requires more than just trying to add more written rules to them to make them “fairer”, using their appeal procedures in new ways, or studying international law to find out how environmental treaties might be negotiated differently. It also demands a strategic vision that takes into account the political forces that are changing the very meaning of law and environment today, the historical dynamics through which these changes are taking place, and the movements capable of helping to move the law in different directions. Concepts such as Stephen Pyne's “fire regimen”, George Caffentzis's “work/energy” and Ecuadorian social movements’ “post-petroleum civilization” will be crucial footholds from which efforts animated by such a vision can be launched.¹³⁶

- 1 The author is most grateful to Patricia Kameri-Mbote, Lovleen Bhular, Julia Dehm, Ivonne Yanez, Nicholas Hildyard, Sujith Koonan and Philippe Cullet for comments, suggestions and discussion.
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- 7 Yves Dezalay and Bryant G. Garth, *The Internationalization of Palace Wars* (Chicago 2002) 170.
- 8 Mirowski and Sent (n 2), loc. cit.
- 9 James McCarthy, 'Privatizing Conditions of Production: Trade Agreements as Neoliberal Environmental Governance' in *Neoliberal Environments: False Promises and Unnatural Consequences* (Routledge 2007) 38-50: 48.
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- 18 Hildyard, *Licensed Larceny* (n 5). Donald Trump's infrastructure plans fall into the same category: see Robert Reich, 'Trump's \$1tn "Infrastructure Plan" is a Giveaway to the Rich' (2017) *Guardian*, 10 June.
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- 40 Pedro Moura-Costa, Bolsa Verde, Rio de Janeiro, quoted in Mark Nicholls, 'EcoSecurities Co-Founder Launches Brazilian Environmental Exchange', (2011) *Environmental Finance*, 20 December.
- 41 Richard B. Stewart, 'Privprop, Regprop, and Beyond' (1990), 13 *Harvard Journal of Law and Public Policy* 91; James E. Krier, 'Marketable Pollution Allowances' (1994) 25 *University of Toledo Law Review* 449; Larry Lohmann, *Carbon Trading: A Critical Conversation on Climate Change, Privatization and Power* (Dag Hammarskjöld Foundation 2006) 73-87; Jeanne M. Dennis, 'Smoke for Sale: Paradoxes and Problems of the Emissions Trading Program of the Clean Air Act Amendments of 1990', *UCLA Law Review* 40 (4): 1101-25.
- 42 Mackenzie, *Material Markets* (n 35).
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- 44 Felli, 'On Climate Rent' (n 39).
- 45 Damien Morris, 'Vanquish the Surplus and Rescue the ETS: The Environmental Outlook for the EU Emissions Trading Scheme' (Sandbag 2014).
- 46 See, e.g., Jutta Kill and Giulia Franchi, *Rio Tinto's Biodiversity Offset in Madagascar: Double Landgrab in the Name of Biodiversity?* (World Rainforest Movement and Re:Common 2016); Kalla Fakta, 'The Forbidden Forest' (TV4 Sweden 2015), <https://www.youtube.com/watch?v=COoPVXINbqQ&feature=youtu.be>; Mark Schapiro, 'The Carbon Hunters' (Frontline World 2010), <http://www.pbs.org/frontlineworld/stories/carbonwatch/2010/05/the-carbon-hunters.html>.
- 47 Mirowski and Sent, 'The Commercialization of Science' (n 2). This flat ontology, of course, has a long and varied academic pedigree, ranging from pre-neoliberal cost-benefit analysis and welfare economics (see Larry Lohmann, 'Toward a Different Debate in Environmental Accounting: The Cases of Carbon and Cost-Benefit' [2009] *Accounting, Organizations and Society* 34 499-534) to the public choice economics of James Buchanan and Gordon Tullock to rational choice theory and the reductionist arguments of the Chicago economist Gary Becker (*Human Capital: A Theoretical and Empirical Analysis with Special Reference to Education* [Harvard, 1964]; *A Treatise on the Family* [Harvard, 1981]) and the Chicago jurist Richard Posner and his son Eric. On the arguments by public choice economists to "homogenize the functioning of the state and the market, theoretically and practically", see Pierre Dardot and Christian Laval, *The New Way of the World: On Neoliberal Society* (Verso 2013) 258.
- 48 Massimo De Angelis, *The Beginning of History: Value Struggles and Global Capital* (Pluto 2007) 89.
- 49 For some background on commons, see, e.g., E. P. Thompson, *Customs in Common* (Free Press 1990), Peter Linebaugh, *The Magna Carta Manifesto: Liberties and Commons for All* (University of California Press 2009); Silvia Federici, *Caliban and the Witch: Women, the Body and Primitive Accumulation* (Autonomedia 2004); George Caffentzis, *In Letters of Blood and Fire: Work, Machines, and the Crisis of Capitalism* (PM Press 2013).
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- 51 McCarthy, 'Privatizing Conditions ...' (n 9) 46.
- 52 Lisa Heinzerling, 'The rights of Statistical People' (2000) *Harvard Environmental Law Review* 24, 189-207: 189-90; cf. Cass R. Sunstein, *Laws of Fear: Beyond the Precautionary Principle* (Cambridge University Press 2009); *Risk and Reason: Safety, Law and the Environment* (Cambridge University Press, 2010).
- 53 Richard Lane, 'Resources for the Future, Resources for Growth: The Making of the 1975 Growth Ban' in Benjamin Stephan and Richard Lane (eds), *The Politics of Carbon Markets* (Routledge, 2014) 27-50. See also Morgan Robertson, 'Ecosystem Services as Nature's Workfare' (forthcoming), *Annals of the Association of American Geographers*.
- 54 Mirowski and Sent, 'The Commercialization of Science ...' (n 2).
- 55 'Quando Ocupar se Torna um Ato Pedagógico', *Caros Amigos*, 24 October 2016, <http://www.carosamigos.com.br/index.php/colonistas/226-max-maciel/8220-quando-ocupar-se-torna-um-ato-pedagogico>.

- 56 Crouch, *The Strange Non-Death of Neoliberalism* (n 33) 64.
- 57 Herbert Docena, 'Guilt, Blame, and Innocence in the International Climate Change Negotiations: The (Im)moral Origins of the Global Carbon Market' (2011), unpublished paper, 47; Larry Lohmann, 'Beyond Patzers and Clients: Strategic Reflections on Climate Change and the "Green Economy"' (2012), <http://www.thecornerhouse.org.uk/resource/beyond-patzers-and-clients>. Among the implications of this shift were the replacement of the implication that an offense had been committed with an implication that an entitlement had been acquired; the entrenchment of a "polluter earns" over a "polluter pays" structure; and the recharacterization of rich nations as climate leaders rather than climate offenders or as climate benefactors rather than climate debtors. In Nigeria, the Philippines, South Africa, Guyana and many other Southern countries, meanwhile, governments were meanwhile incentivized by carbon markets not to promulgate or enforce environmental laws (which attribute responsibility for harm to their subjects) but instead to allow their societies to remain dirty in order to collect fees for cleaning up later; or to encourage deforestation so that they could later claim that they had 'reduced' it. Such forms of gaming further undermined juridical approaches to the environment. An older colonialist ideology, temporarily challenged by the global debate over climate change, had been re-hegemonized less through the relatively inefficient and superficial means of propaganda, moral reasoning, bad science, or outright threats and bribes than through the repetition and accretion of thousands of quotidian technical practices surrounding market construction and operation.
- 58 This perspective is also useful in grasping the new, colonial forms of privatized international environmental governance exemplified by green labels or certifications of "sustainability" for which customers pay a premium. See Peter Vandergeest and Anusorn Unno, 'A New Extraterritoriality? Aquaculture Certification, Sovereignty, and Empire' (2012) *Political Geography* 31: 358-367.
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- 61 Ibid.
- 62 Larry Lohmann, 'Gas, Waqf and Barclays Capital: A Decade of Struggle in Southern Thailand' (2008) *Race & Class* 50 (2) 89-100.
- 63 Liza Smith, 'Certified Seeds: Different Wars, Same Reasons', North American Congress on Latin America, <http://nacla.org/blog/2013/12/13/certified-seeds-different-wars-same-reasons>.
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- 65 See, for example, Fábio de Castro, Barbara Hogenboom and Michiel Baud (eds) *Environmental Governance in Latin America* (Palgrave Macmillan 2016); Observatorio de Conflictos Mineros en Latinoamérica, *Cuando Tiemblan los Derechos: Extractivismo y Criminalización en América Latina* (OCMAL-Acción Ecológica, 2011) and 'Mapa de Conflictos Mineros, Proyectos y Empresas Mineras en América Latina', http://basedatos.conflictosmineros.net/ocmal_db/; José M. Atilés-Osoria, 'The Criminalization of Socio-Environmental Struggles in Puerto Rico' (2014) *Oñati Socio-Legal Series* 4 (1); Manuel M., 'The Criminalisation of Environmental Activism in Europe' (2014), LeftEast, <http://www.criticatac.ro/lefteast/criminalisation-of-environmental-activism-in-europe/>; Philippa de Boissiere and Thomas McDonagh, 'Daming Dissent: How An Italian Multinational Is Persecuting Environmental Defenders In Colombia' The Democracy Center, <https://democracyctr.org/article/daming-dissent-how-an-italian-multinational-is-persecuting-environmental-defenders-in-colombia/>; Oscar Lopez, 'Why Mexico's Environmental Activists Fear for Their Lives' (2017), *Newsweek* 15 March.
- 66 Oxfam, 'The Risks of Defending Human Rights' (Oxfam International 2016); CONAIE, 'Con Violencia Desproporcionada, Militares Reprimen a Comuneros Shuar en Nankins y Detienen a Autoridades del Pueblo Shuar' (2016), Boletín de Prensa, Quito, 22 November, <https://drive.google.com/file/d/0B9xnvkmEIMEAcUVIQ2VEU2RoTVE/view>; Reid Wilson, 'State Legislators Take Steps to Criminalize Protests' (2017) *The Hill*, 24 February, <http://thehill.com/homenews/state-watch/321018-state-legislators-take-steps-to-criminalize-protests>; Spencer Woodman, 'Lawmakers in Ten States Have Proposed Legislation Criminalizing Peaceful Protest' (2017) *The Intercept*, 23 January 23, <https://theintercept.com/2017/01/23/lawmakers-in-eight-states-have-proposed-laws-criminalizing-peaceful-protest/>; Daniel A. Medina, 'Pipeline Protesters Decry North Dakota Bills That "Criminalize" Protests' (2017) NBC News, 13 January. As the 17th century English popular rhyme had it, "The law locks up the man or woman/ Who steals the common from off the goose/ But leaves the greater villain loose/ Who steals the common from off the goose."
- 67 Oranuch Phonpinyo, 'Forest Conflicts in Thailand: State vs. People' (2017) *World Rainforest Movement Bulletin* 229, 4 April, <http://wrm.org.uy/articles-from-the-wrm-bulletin/section1/forest-conflicts-in-thailand-state-vs-people/WRM>.
- 68 See 'Rights Reversed', this volume, and George W. Pring and Penelope Canan, *SLAPPS: Getting Sued for Speaking Out* (Temple University Press 1996).
- 69 Such lawsuits, widespread in the US, UK, Australia, Canada, Brazil, Japan and elsewhere, ultimately prompted resistance leading to counteracting legislation in many jurisdictions. See 'Strategic Lawsuit against Public

- Participation', https://en.wikipedia.org/wiki/Strategic_lawsuit_against_public_participation.
- 70 On the historical functions of racism, see, e.g., Immanuel Wallerstein, *Historical Capitalism* (Verso 2011) 78-80, 83-5, 103-105, 122, 153-155.
- 71 Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colourblindness* (The New Press 2010). Alexander identifies the current regime of mass incarceration of blacks as the third main system of structural racial division devised in the US. The first, slavery, became entrenched partly in response to a unified black-white movement of agricultural workers against the planter elite in the 1700s; the second, Jim Crow, in response to the abolition of slavery. Alexander's work suggests the use of the term "criminalization" may actually be misleading as a description of the motor of the current, third regime, in the sense in that the criminal justice system in the US is "no longer concerned primarily with the prevention and punishment of crime, but rather with the management and control of the dispossessed". See also James Forman, Jr., 'Racial Critiques of Mass Incarceration: Beyond the New Jim Crow' (2012), Faculty Scholarship Series, Yale Law School, Paper 3599, http://digitalcommons.law.yale.edu/fss_papers/3599; *Locking up Our Own: Crime and Punishment in Black America* (Farrar, Strous and Giroux 2017); Rania Khalek, '21st-Century Slaves: How Corporations Exploit Prison Labor' (2011), *Alternet*, 21 July; Dorothy Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty* (Vintage 2000) and Ta-Nehisi Coates, *Between the World and Me* (Text Publishing 2015). In the latter, Coates explicitly makes the connection between structural racism and the de-subjectification of nonhuman nature at the hands of the dreamers "who believe they are white": "Once, the Dream's parameters were caged by technology and by the limits of horsepower and wind. But the Dreamers have improved themselves, and the damming of seas for voltage, the extraction of coal, the transmuting of oil into food, have enabled an expansion in plunder with no known precedent. And this revolution has freed the Dreamers to plunder not just the bodies of humans but the body of the Earth itself." Compare Horacio Machado Araoz, 'Marx, (los) marxismo(s) y la ecología. Notas para un alegato ecosocialista' (2015), *GEOgraphia* 17 (34), who argues that there can be no "struggle against exploitation of workers" nor "dignification of the human being" that is "achieved at the cost of the exploitation and depredation of the Earth"; nor, to adopt another idiom, any such thing as "human rights outside or above Mother Earth": "exploitation of the Earth ... is, in itself, the exploitation of bodies", fracturing the "vital-existential connections between bodies/work and earth/territories of life". The "wealth" that "capital accumulates is the wealth of abstract value", which expands "at the cost of the phagocytosis of the expropriated, of the wretched of the earth". It follows that progressive programmes of "growth with social inclusion" and "accumulation with redistribution" are ultimately a "mirage", whether they are espoused by European welfare states or neo-extractivist Latin American governments claiming to be "leftist".
- 72 As is often noted, Trump is in this respect representative of a global phenomenon also visible in other political leaders such as Nigel Farage, Marine LePen, Rodrigo Duterte, Viktor Orbán and Narendra Modi, among many others.
- 73 Center for Media and Democracy, 'Index of PRWatch Articles About ALEC' (2017), <http://www.prwatch.org/content/index-prwatch-articles-about-alec> and 'ALEC Exposed' (2017), http://www.alecexposed.org/wiki/ALEC_Exposed; Mike Elk and Bob Sloan, 'The Hidden History of ALEC and Prison Labor' (2011), *The Nation*, 1 August; John Nichols, 'ALEC Exposed' (2011), *The Nation*, 12 July.
- 74 Abe Louise Young, 'BP Hires Prison Labor to Clean Up Spill While Coastal Residents Struggle' (2010) *The Nation*, 21 July.
- 75 Corte Provincial de Pichincha, Quito, Ecuador, Primera Sala de lo Civil, Mercantil, Inquilinato y Materias Residuales, 2013, Accion de Proteccion N. 0523-201/17111-2013-00002; Benjamin Todd Jealous, 'NAACP: What We Want to See from BP' (2010), *The Grio*, 9 July, <http://thegrio.com/2010/07/09/naACP-what-we-want-to-see-with-bp/>. For an Australian correlate, see John Pilger, *Utopia* (2013), <http://johnpilger.com/videos/utopia>.
- 76 See, for example, United States Department of Justice, Civil Rights Division, *Investigation of Ferguson Police Department*, 4 March 2015. I am indebted for information about Ferguson's history to Eliandra Williams of the Highlander Center.
- 77 Josh Peterson, 'Near Ferguson, Nuclear Waste Fears Haunt Burning Landfill and Community' (2016), *Afro*, 13 April, <http://www.afro.com/near-ferguson-nuclear-waste-fears-haunt-burning-landfill-and-community/>.
- 78 Donald MacKenzie, 'Is Economics Performative? Option Theory and the Construction of Derivatives Markets' in Donald MacKenzie, Fabian Muniesa and Lucia Siu (eds) *Do Economists Make Markets? On the Performativity of Economics* (Princeton University Press 2007) 8.
- 79 For investors to "short sell" or "short" securities is to sell securities that they do not own, for example by borrowing them in the expectation that when they have to be returned to their owners their prices will have fallen. Investors use "leverage" when they buy securities using borrowed money.
- 80 MacKenzie, *Material Markets* (n 35) 39.
- 81 Matt Taibbi, 'Invasion of the Home Snatchers' (2010) *Rolling Stone*, 10 November.
- 82 See, for example, Michael Slezak, 'Marrakech Climate Talks: Giving the Fossil Fuel Lobby a Seat at the Table' (2016) *Guardian*, 6 November.
- 83 Peter Bratsis, 'The Construction of Corruption, or Rules of Separation and Illusions of Purity in Bourgeois Societies' (2003) *Social Text* 21 (4) and 'Political Corruption in the Age of Transnational Capitalism: From the Relative Autonomy of the State to the White Man's Burden' (2014) *Historical Materialism* 22 (1) 105-128; Nicholas Hildyard, 'Corrupt but Legal: Institutionalised Corruption and Development Finance' (2016), *The Corner*

- House, <http://www.thecornerhouse.org.uk/resource/corrupt-legal>; Larry Lohmann, 'Regulation as Corruption in the Carbon Offset Markets' in Steffen Bohm and Siddhartha Dabha (eds) *Upsetting the Offset: The Political Economy of Carbon Markets* (Mayfly Books 2009); Mark E. Warren, 'The Meaning of Corruption in Democracies'. Available at: http://www.politics.ubc.ca/fileadmin/user_upload/poli_sci/Faculty/warren/Warren_-_Meaning_of_Corruption_in_Democracies_-_Corruption_Handbook_Draft_1.pdf.
- 84 See, for example, Aarti Gupta and Robert Falkner, 'The Influence of the Cartagena Protocol on Biosafety: Comparing Mexico, China and South Africa' (2006) *Global Environmental Politics* 6 (4).
- 85 Graeber, *The Utopia of Rules* (n 50). Graeber elaborates by noting that maintaining a "free market" economy "required a thousand times more paperwork than a Louis XIV-style absolutist monarchy. ... English liberalism, for instance, did not lead to a reduction of state bureaucracy, but the exact opposite: an endlessly ballooning array of legal clerks, registrars, inspectors, notaries, and police officials who made the liberal dream of a world of free contract between autonomous individuals possible."
- 86 Tickell and Peck, 'Making Global Rules ...' (n 6) 175.
- 87 Graeber, *The Utopia of Rules* (n 50).
- 88 MacKenzie, *Material Markets* (n 35) 27.
- 89 Stephen K. Vogel, *Freer Markets, More Rules: Regulatory Reform in Advanced Industrial Countries* (Cornell University Press 1996).
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- 92 Karl Polanyi, *The Great Transformation* (Beacon 2001 [1944]).
- 93 John Gray, 'The Neoliberal State' (2010) *New Statesman* 11 January.
- 94 See, for example, Larry Lohmann, 'Missing the Point of Development Talk: Reflections for Activists' (1998); 'Genetic Dialectic: The Biological Politics of Genetically Modified Trees' (with Viola Sampson, 2000), The Corner House, both available at <http://www.thecornerhouse.org.uk>; and 'Marketing and Making Carbon Dumps: Commodification, Calculation and Counterfactuals in Climate Change Mitigation' (2005) *Science as Culture* 14 (3) 203-235.
- 95 Nicholas Blomley, 'Simplification is Complicated: Property, Nature, and the Rivers of Law' (2008) *Environment and Planning A* 40 (8) 1825-1840.
- 96 Graeber, *The Utopia of Rules* (n 50).
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- 105 Elizabeth Lewis, 'A Bad Man's Guide to Private Equity and Pensions' (2015), Cambridge, MA: Edmond J. Safra Center for Ethics, Working Paper No. 68, <http://www.ethics.harvard.edu/lab>, 19 June.
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- 111 Op. cit. 79.
- 112 See, for example, Jason W. Moore, 'Wall Street Is a Way of Organizing Nature' (2012) *Upping the Anti: A Journal of Theory and Action* 12, May: 39-53. See also Moore, *Capitalism in the Web of Life: Ecology and the Accumulation of Capital* (Verso 2015).
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