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Law, Social Policy, and the Neoliberal State

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Introduction

This paper explores the relationship between law and neoliberalism in the context of contemporary social policy. Among the many areas to be affected by the emergence of neoliberalism as the guiding philosophy of today's politics, welfare has been one of the most prominent and controversial. The nature of the changes within the sphere of welfare that have accompanied the shift to a neoliberal politics have been charted extensively. Increasing privatisation and marketisation of social services; the importance attached to the empowerment of those who use social services by extending their range of choices and opportunities to provide feedback on their experiences; the rise in the importance of league tables within the National Health Service in the UK – these are just some of the features characteristic of the application of neoliberalism within the spheres of welfare and social services. While these have been the subject of a voluminous critical literature in the fields of politics, sociology, social policy, and economics, academic lawyers have tended to concentrate on the implications of such developments for the law within their particular legal sub-disciplines, such as health care law and housing law. There has been comparatively little work undertaken by lawyers exploring what these types of developments in welfare and social services

might reveal more generally about the manner in which law shapes, and is shaped by, neoliberalism and the neoliberal state. This essay offers some preliminary reflections on this wider issue.

The paper has three objectives. First, it aims to identify the types of law and legal categories to be found in two areas of contemporary social policy – unemployment and health care. Secondly, it explores the form and underlying logic of those laws and legal categories and seeks to explain how these contribute, in a constitutive way, to the development and maintenance of neoliberalism and the neoliberal state. Finally, the essay aims to place the foregoing analysis in the context of literature that comprehends neoliberalism as a political project that involves a central role for the state and a range of institutional means that are devised and deployed to further the goals of neoliberalism.

'Crafting the Neoliberal State'

One of the myths surrounding neoliberalism is that it envisages a minimal role for the state. This myth, peddled by advocates and critics of neoliberalism alike, confuses the arguments about laissez-faire and the minimal state advanced by adherents of classical liberalism in the 19th century with the more nuanced views on the state propounded by theorists of neoliberalism. Of course, the goal of proponents of neoliberalism is to create a society founded upon the market – a market order – but this is not incompatible with a strong state; indeed, it demands a strong, active state to construct the necessary conditions for the establishment and maintenance of that market order. Thus, *inter alia*, the state must create markets where they do not already exist and ensure their continued operation; guarantee property rights; and ensure the absence of monopolies.

But it needs to do more than this to ensure that societies function on the basis of markets. The state must also shape social relations accordingly and construct a specific worldview that enables the market to define the manner in which societies operate in practice. As Loïc Wacquant has noted: '[W]hat is 'neo' about neoliberalism [is] the reengineering and redeployment of the state as the core agency that sets the rules and fabricates the subjectivities, social relations and collective representations suited to realising markets.'¹

Wacquant's analysis of neoliberalism is helpful for two reasons. First, in emphasising the importance of the state, he identifies neoliberalism as a political, as opposed to an economic, project. In other words, while the establishment of a market order is the goal of neoliberalism, this is accomplished through politics, rather than the product of neoclassical economics. Secondly, he points to the need to develop 'a 'thick' sociological conception' of neoliberalism that identifies both the institutional means deployed by the state to establish, maintain, and impose the market order on society, and the types of consequences this has for citizenship. For Wacquant, those institutional means are not confined to the rules of the marketplace, but also include the criminal justice system – especially the prison; the 'disciplinary' social policy of workfare; and the 'trope of individual responsibility'. Whether or not one agrees with the relevance of the particular institutional means or 'logics' he identifies, this manner of conceptualising neoliberalism and what he calls the crafting of the neoliberal state succeeds in highlighting the importance of concrete state institutional mechanisms in shaping the material (e.g. the construction of new markets) and symbolic ('the capacity that the state has to trace salient social demarcations and produce social reality through its

¹ L Wacquant 'Three Steps to a Historical Anthropology of Actually Existing Neoliberalism' (2012) 20(1) *Social Anthropology* 66-79, p. 66.

work of inculcation of efficient categories and classifications'²) components of those phenomena. If we wish to understand market societies, we need to attend to the different ways and means through which the state constructs these.

How does law fit within this analysis of neoliberalism and the crafting of the neoliberal state? While Wacquant himself includes (presumably the criminal) courts as part of the penal wing of the neoliberal state that he explores in his recent work, there is little discussion of the role that these, or law and legal categories more generally, play in neoliberalism and the construction of the neoliberal state. And yet for the pioneers of neoliberalism law was to play a foundational role in the development and implementation of the neoliberal vision. Two dimensions of this can be identified. First, for neoliberals, markets are creatures of law. Their existence demands, and depends on, the presence of a legal framework suited to this end. In Marxist terms, though contrary to traditional Marxist teachings, law, in this vision, is not a part of the superstructure determined by the economic base; rather, law is an inherent aspect of the base – law founds the market order, rather than being determined by it. This has consequences for common assumptions surrounding the nature of economic entities and their regulation. Thus, the property bought and sold on the market, the contracts through which the sale and purchase are made, and the companies involved in selling and buying the property are all, in the first instance, legal entities, rather than, as is commonly assumed, objects that exist outside of the law and are only subsequently regulated, or not, by the law. As Walter Lippmann, whose eponymous Colloquium is often cited as constituting the beginnings of neoliberalism, wrote:

Only by recognizing that legal rights are declared and enforced by the state is it possible to make a

² L Wacquant *Punishing the Poor: The Neoliberal Government of Social Insecurity* (Durham and London: Duke University Press, 2009), p. xvi.

rational examination of the value of any particular legal right. The latter-day liberals did not see this. They fell into a deep and confusing error when they failed to see that property, contracts, corporations, as well as governments, electorates, and courts, are creatures of law, and have no existence except as bundles of enforceable rights and duties.³

Secondly, law must take the form of a set of formal abstract general rules that apply equally to everyone's conduct. This is necessary because the market order is based on the idea that individuals are free to pursue their different objectives via the market. The alternative – social law – defeats this purpose as it involves the creation of rules designed to further a particular, pre-determined end such as the redistribution of wealth between classes. Here, law would prescribe individual conduct rather than respect liberty of action. The market order, then, is what Hayek refers to as a nomocracy (governed by law), as opposed to a teleocracy (governed by an end or ends). It is what he called a 'private law society' where the formal abstract general rules – the 'rules of just conduct' – that constitute the market order are synonymous with 'the essential content of all contemporary systems of private law, ["]freedom of contract, the inviolability of property, and the duty to compensate for damage due to his fault["]'.⁴ In his influential book *The Road to Serfdom*, Hayek was already setting out this vision of law in the course of his argument that competition – the defining norm of neoliberalism and what Hayek called 'the principle of social organisation' – required a rigorous legal framework for its successful and beneficial operation. It was a crucial part of what he endorsed as the state's 'planning for competition', as opposed to 'planning against competition', which involved the 'central direction of all economic activity according to

³ W Lippmann *An Enquiry into the Principles of the Good Society*, quoted in P Dardot and C Laval *The New Way of the World: On Neoliberal Society* (London: Verso, 2013), p. 59.

⁴ F A Hayek *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (London and New York: Routledge, 2013), p. 206, referring to Leon Duguit as described by J Walter Jones *Historical Introduction to the Theory of Law* (Oxford: OUP, 1940), p. 114.

a single plan, laying down how the resources of society should be “consciously directed” to serve particular ends in a definite way.⁵

The foregoing discussion identifies themes that provide a useful context for the analysis of the relationship between law, social policy, and the neoliberal state in the remainder of the essay. What types of law and legal categories do we encounter in the design and implementation of social policy in the two areas explored here – unemployment and health care? What forms and logics structure those laws and legal categories? And how do those forms and logics function both materially and symbolically to shape the neoliberal vision and help craft the neoliberal state? These are the types of questions with which the essay engages.

Unemployment and Workfare

Workfare schemes – which operate on the basis that access to welfare benefits is conditional on undertaking work or work-related activities – have become important mechanisms through which increasing numbers of governments manage unemployment and the unemployed. While the justification advanced by governments for such schemes is that engagement in work is the surest means of escaping poverty, critical commentators have identified a number of other reasons for their existence. One of these sees a transformation in the nature of social policy from one that protected those in need from the deleterious social and economic consequences of capitalism to one that is driven primarily by economic policy and the needs of capitalism.⁶ This latter characterisation describes the impact on social policy of the requirement of states to reduce their social spending in order to remain economically competitive within the

⁵ F A Hayek *The Road to Serfdom* (London: Routledge, 1944), p. 26.

⁶ See, for e.g., B. Jessop, *The Future of the Capitalist State* (Cambridge: Polity, 2002).

global economy. One way of doing this is to ensure the unemployed are ultimately removed from the welfare rolls and (re-)engage in the flexible and casualised labour market characteristic of our contemporary era. While acknowledging the link between workfare and capital, others are less willing to view economics as the determinant of this social policy. For them, workfare is as much about a shift from a protective to a disciplinary form of social policy focused on transforming the ways in which individuals behave, as it is about the economy. The unemployed must be trained to accept the low wages of the labour in which workfare recipients mostly find themselves; they must learn that they are individually responsible for their predicaments – whether these are positive or negative; and they must conceive of themselves as competitors and life as a competition. Whatever one's views of the merits of those different ways of conceptualising workfare, what is clear is that the features identified by both are indelibly characteristic of neoliberalism and the neoliberal state.

The form through which workfare operates is contract. Initially called the Jobseekers' Agreement, after the passing of the Welfare Reform Act 2012, this is now known as the 'claimant commitment'. Essentially, benefit claimants must sign a contract that details the type of work being sought and the steps to be taken in looking for work and in improving one's chances of securing work. While the philosophy of conditionality has underpinned unemployment legislation for many years,⁷ the use of contract as the form of workfare is novel.

There are a number of ways in which the use of contract in this context feeds in to, and furthers, the neoliberal project. First, while not a legal contract *per se*, the workfare contract aligns the management of the social and economic problem of unemployment

⁷ Though it was never invoked in practice in the UK in the way in which it has been since the mid-1990s. Until then, access to unemployment benefits was basically viewed as a social right.

to the type of liberal political rationality underpinning the classical private law of contract – which, as we saw earlier, neoliberal theorists such as Hayek view as a key legal institution framing the neoliberal vision. This rationality stresses notions of individual liberty, individual responsibility and fault, and the voluntary consent of the individual. The rational, self-determining agent, who makes autonomous choices about whether to enter into agreements based upon self-assessments of individual utility, underpins this rationality. As such, the workfare contract does not, in theory at least, compel welfare beneficiaries to sign up to it; rather it emphasises the importance of consent, negotiation and reciprocity in the construction of the agreement. The idea of contract as a binding agreement freely made in the marketplace between formally equal contracting parties (*pacta sunt servanda*) lies at the heart of workfare. That this liberal rationality pertains in the context of workfare is evidenced by the sanctions that flow from a breach of the contract. Failure to comply with the duties therein results in the progressive withholding of a claimant's benefits, whatever the consequences,⁸ indicating that individual fault expressed in the failure to keep one's promises lies at the root of this contract.

Secondly, this liberal construction of the workfare contract feeds into the neoliberal form of social relations and subjectivities being shaped by the state. Thus, the focus on individual responsibility and self-reliance corresponds to the idea behind the so-called social investment state in which the state invests in individuals' human capital through education and training, rather than providing them with economic benefits. Individuals actively work on themselves and create individual plans of action with a view to being in a position to compete in the labour market. They are no longer passive recipients of

⁸ For an indication of the types of consequences flowing from such a breach, see A Gentleman "No one should die penniless and alone": the victims of Britain's harsh welfare sanctions', *The Guardian*, 3rd August 2014 (<http://www.theguardian.com/society/2014/aug/03/victims-britains-harsh-welfare-sanctions>).

welfare but active entrepreneurs acting on their own initiative and able to carve out opportunities for themselves in the market.

Thirdly, related to, but beyond, the formation of subjectivities, the mechanism of contract enables the state to produce in reality powerful classifications of the unemployed. In the present context, the liberal political rationality underlying the workfare contract, with its emphasis on individual responsibility, voluntary consent, and the honouring of promises lends the politics of unemployment a moral dimension that structures the manner in which society perceives this phenomenon. This is especially clear in the context of the government's sanctions regime, which provides for the progressive withdrawal of economic benefits from claimants who fail to discharge their contractual duties. This enables the resurrection of the old classification of the poor into the 'deserving' and the 'undeserving'. Those who fail to fulfil their obligations are not only deprived of the material resources by which to live, thereby exacerbating their poverty; importantly, they are also deemed to be undeserving – a morally loaded term often synonymous with characterisations of those individuals as, *inter alia*, lazy, work-shy, and benefit fraudsters. This cleavage illustrates the symbolic dimension of the state's deployment of contract within the context of workfare, which takes the form of maintaining and deepening the social divides between morally upstanding citizens and the immoral who fail to live up to the norms associated with workfare. The state's use of contract as an institutional mechanism by which to manage unemployment therefore succeeds, in Wacquant's words, in 'produc[ing] social reality through its work of inculcation of efficient categories and classifications'.⁹

⁹ Wacquant, *op cit.*, note 2.

Finally, the foregoing symbolic effects of the workfare contract contribute to the legitimization of neoliberalism and the neoliberal state by working to obscure a number of controversial features surrounding the management of unemployment. Here are a few. First, at the level of the making of the contract itself, they divert attention from the fact that it is highly questionable whether the workfare contract is a contract at all. Peter Vincent-Jones, for instance, has argued that it is difficult to call the Jobseekers' Agreement a contract as it complies poorly with a number of common contract norms, including reciprocity (the idea that both parties benefit from the contract through the mutual exchange of acts or promises), consent (the notion that parties voluntarily enter into agreements rather than being coerced to do so), and choice or freedom of contract (that parties are free to determine the nature of their contractual obligations). He argues that the latter, for example, is largely a myth as genuine options are frequently not offered to jobseekers in practice. Similarly, consent is more theoretical than real as welfare recipients have little alternative but to accept the terms of the Agreement – at least if they wish to have access to basic material resources.¹⁰ As a result, Vincent-Jones has noted the coercive, as opposed to voluntary, nature of the so-called contracts in the field of social policy.¹¹ Their imposition by the state for concrete policy ends dilutes the component of individual autonomous choice characteristic of freedom of contract.¹² Here, we encounter one of the 'institutional logics' – *disciplinary* social policy – Wacquant identifies as being characteristic of the reengineering of the state that defines

¹⁰ See P Vincent-Jones *The New Public Contracting: Regulation, Responsiveness, Relationality* (Oxford: OUP, 2006), Ch. 9, and P Vincent-Jones 'Contractual Governance: Institutional and Organizational Analysis' (2000) 20(3) *Oxford Journal of Legal Studies* 317-51. Further sceptical analysis of the workfare 'contract' along these lines can be found in M Freedland and D King 'Contractual Governance and Illiberal Contracts: Some Problems of Contractualism as an Instrument of Behaviour Management by Agencies of Government' (2003) 27(3) *Cambridge Journal of Economics* 465-77.

¹¹ See Vincent-Jones *The New Public Contracting*, *ibid.*

¹² See D Campbell 'Relational Contract and the Nature of Private Ordering: A Comment on Vincent-Jones' (2007) 14(2) *Indiana Journal of Global Legal Studies* 279-300. In Campbell's view, this 'erosion of the individual dimension of contract', together with the fact that social policy contracts disguise 'the hierarchical coercion that is the identifying feature of state intervention', mean that these 'contracts' are not contracts at all.

neoliberalism. The precise effect of the deployment of contract here is to obscure this authoritarian dimension of the neoliberal state as its underlying liberal political rationality succeeds in directing one's focus towards the behavior of unemployed individuals and the degree to which they abide by their 'freely' made obligations.

The second, hidden issue is the trajectory of those on workfare. Empirical analyses on this point identify key structural factors – such as class, poor education, and the low-paid and precarious nature of the labour market – that impede the permanent and successful re-integration into society of many of those on workfare, but cannot be addressed via the workfare contract.¹³ What is secured through the assimilation characteristic of workfare is not necessarily an escape from poverty and the heightened possibility of de-socialisation that poverty engenders, but its entrenchment and ongoing production as a result of low-skilled and poorly paid labour. Discipline here is not confined to the signing of the workfare contract; it extends to the insertion of the unemployed into the casualised and insecure forms of labour that characterise the flexible labour markets that, as we saw earlier, are a product of neoliberal economic policies. The point here is not only that the workfare contract does not address those structural factors; the symbolic effects it produces also mean that those factors remain entirely absent from the state's politics, and policies, of unemployment.

The final, related, point revolves around this reference to the politics of unemployment. It is suggested that there is something of a paradox here. Thus, while neoliberalism is best understood as a political project, one of its concrete effects is to depoliticise issues. In the current context, this politics of depoliticisation takes the form not only of the obscuration of the types of structural factors mentioned above, but as a result of this,

¹³ See, for example, M Carpenter, B Freda and S Speeden (eds.) *Beyond the Workfare State: Labour Markets, Equality and Human Rights* (Bristol: The Policy Press, 2007).

the suppression of potential struggles and conflicts over the meaning and causes of unemployment. While in fact remaining fundamentally political insofar as they continue to structure the power relations surrounding unemployment and the fates of the unemployed, questions of political economy, class, the nature of the labour market, education, and the bureaucratic compulsion to meet targets are removed from the state's politics of unemployment via a social policy that succeeds in reducing this phenomenon to an issue of morality. Moreover, the state's power to shape the mental structures and classifications surrounding unemployment tends to naturalise our thinking about, and response to, it and removes the need to challenge the manner in which it is constructed. It is the resurrection of this agonistic dimension of politics in the sphere of welfare and social policy that must be reasserted as a means of challenging the politics of depoliticisation that characterise the neoliberal state.

Health Care

It was noted earlier that markets are creatures of law and that neoliberal theorists stress the importance of a legal framework of formal abstract general rules for the establishment and successful operation of the market order. While those theorists mainly had in mind markets in which private actors or agencies competed for market share, this section will consider the role of markets and the private sector in a sphere in which, traditionally, they have been absent. This is the publicly funded health care system in the UK – the National Health Service (NHS). Since the 1990s, social services have become subject to the market imperative, as guiding neoliberal norms – such as competition and individual choice – have spread from the private to the public sector. But what role has law played in this development? This section addresses this question by identifying some of the ways in which law is constitutive of markets and facilitates

the increasing involvement of the private sector within the NHS. Like the discussion of workfare earlier, the focus will not merely be on identifying the types of law that are involved here; it will extend to incorporate reflection on the forms and logics that structure those laws. Let us begin, though, with two examples that illustrate the expanding role of markets and the private sector within the NHS.

The Health and Social Care Act 2012 puts the norm of competition at the heart of the Coalition Government's vision for the NHS. One of the Act's key provisions is the replacement of Primary Care Trusts with clinical commissioning groups (CCGs) as the bodies responsible for commissioning (purchasing) most health care services within the NHS (a task that will involve responsibility for spending £80bn of NHS resources). By 2016, it will become possible for CCGs to outsource their commissioning work to non-public bodies – including private firms. A market will therefore effectively be created for such services and be funded from the NHS budget. The legislation also promotes the 'any qualified provider' approach to the provision of NHS health care services – meaning there will be increased scope for, *inter alia*, private health care providers to become involved in the provision of NHS health care. The opportunity for private sector involvement is also heightened by the promotion of 'fair and effective' competition and the application of competition law to the commissioning of NHS treatment for the first time. The sector-specific regulator for health care – which is called Monitor – is under a duty to promote a provision of health care services which is 'economic, efficient and effective', and to exercise its functions in a manner that will prevent anti-competitive behaviour in health care provision that is against patients' interests.¹⁴ It will also be able to tackle specific abuses and unjustifiable restrictions that demonstrably act against

¹⁴ Health and Social Care Act 2012, s.62.

patients' interests by deploying its licensing powers and, where relevant, the Competition Act 1998. The effect will be to alter the current situation, in which the bulk of NHS services are commissioned from public bodies, by creating a level playing field in which private providers of health care can compete to deliver NHS health care services. CCGs will need, in effect, to ensure that a tendering process for the provision of NHS services is in place, if they are not to fall foul of competition law.

The second example is the prominent role public-private partnerships (PPPs; formerly the Private Finance Initiative) have played as ways of funding new NHS hospital buildings. Here, private contractors raise the money to finance the construction of hospitals for the NHS and, via the PPP contract, own and manage the hospital. The NHS Primary Care Trust leases the hospital and staff, such as cleaners, from the contractors, paying what is known as a 'unitary charge' for these from their annual health care budget. Contracts last for periods ranging from 25-30 years, although once they are paid off, the NHS does not necessarily end up owning the premises. The PPP scheme has been the object of cogent critique.¹⁵ As well as being a social cost in monetary terms – that is, a mechanism by which to facilitate the accumulation of capital and profit via the redistribution of money from public funds¹⁶ – it also has potential social costs in human terms, as the often onerous contractual obligations to pay for PPP-financed buildings

¹⁵ See, for instance, A M Pollock *NHS plc: The Privatisation of Our Health Care* (London: Verso, 2004).

¹⁶ An analysis by *The Guardian* newspaper in 2012 found that the current 717 PFI contracts, while having a total capital value of £54.7bn, would have an ultimate cost of £301bn once paid off. See *The Guardian* (6 July 2012) pp. 1 & 18. As Hellowell and Pollock note, one of the reasons for this inflated cost is that 'the cost of finance on PFI schemes is higher than is the case for publicly financed schemes ...'. M Hellowell and A M Pollock 'The Private Financing of NHS Hospitals: Politics, Policy and Practice' (2009) 29 *Economic Affairs* 13. There is also evidence of a so-called Secondary Market in PFI shareholdings in hospitals, schools, roads and prisons. See BBC Radio 4's *File on 4* programme 'PFI Profits', broadcast on 19th June 2011.

can jeopardise the existence of NHS hospitals, thereby endangering the treatment of patients.¹⁷

Competition law and contract law obviously perform important constitutive functions in facilitating the role of competition, markets and the private sector within the NHS. But beyond identifying those types of law, what can be said about their form and underlying logic? To answer this question it is necessary to widen the frame of analysis.

It is worth beginning by noting the impact the emergence of the welfare state had upon the nature of the form of law. In Max Weber's analysis the formal rational law he identified as characteristic of Western modernity and that corresponded with the emergence of the capitalist economy came under attack with the development of what he called 'the modern class problem'. Unlike formal rational law, the essence of which lay in a system of formal and abstract general rules that framed private actors' conduct and ensured the formal equality of legal subjects before the law, what became known as social law was a legal instrumentalist form of law which was deployed as a means to redress the substantive inequalities between classes.¹⁸ More recently, François Ewald has argued that the concept of social law is underpinned by a distinct political rationality or logic – namely, solidarity – that differs from the classical idea of social contract, which is based on the relationship between autonomous individuals who agree to create a State the purpose of which is simply to guarantee contracts made between those individuals.¹⁹ Social law is a contractual law too, but importantly what Ewald calls solidarity contracts are structured around a logic that differs from contracts

¹⁷ The recent placing of South London Healthcare Trust into administration owing to an unsustainable deficit created by the contractual obligation to pay PFI costs is a case in point. Also, see Hellowell and Pollock, id.

¹⁸ M Weber *Economy and Society: An Outline of Interpretive Sociology* (Berkeley, CA: University of California Press, 1978), Vol. II.

¹⁹ F Ewald 'A Concept of Social Law' in G Teubner (ed.) *Dilemmas of Law in the Welfare State* (Berlin: de Gruyter, 1986), pp. 40-75.

of the private law variety. Solidarity contracts, he says, are 'founded on ideas of fair distribution or equitable allocation of social burdens and profits' and are contractual in the sense that they are based upon a contractual relationship of all with each before and beyond any element of intention; in other words, unlike the classical private law of contract it is not the exercise of the will of rational individuals that founds solidarity contracts, but the relationships of interdependence amongst all and each.

This has consequences for our understanding of welfare measures and laws. So, for example, social insurance for industrial accidents is not based on a notion of individual guilt or fault or responsibility (assigning blame to the employer or the co-workers), but on the idea of the 'socialisation of responsibility'. This takes as its focus the collective relationship between, say, employers and employees (production is a collective effort), and works on the idea of settlement of conflicting rights between the parties based on notions of fair distribution or equitable allocation of social burdens and profits. Consequently, Ewald describes social law as a law of groups; a law of inequalities, in that there is an assumption that there exist inequalities between human beings and classes and that these must be compensated or corrected – social law restores upset equilibria/balance; a law of positive discriminations; a law of 'mutual concessions' and tolerance between rich and poor, individual and social interests.

In summary, while formal rational law is consistent with the liberal legal form advocated by neoliberal theorists, social law represents a departure from this form. As Ewald's work illustrates, the arrival of the welfare state signalled a transformation in the form of law – from one focused, for example, on the freedom of individuals to set the terms of their own agreements, to one in which courts were prepared to imply terms into contracts in order to reflect policy goals such as the protection of weaker parties

against the powerful – tenants *vis-à-vis* landlords, say; or the curtailment of private property rights in the name of the public interest. This is not to say that liberal law and the liberal legal form disappeared with the emergence of social law and the welfare state; it is, however, to say that the form and underlying logic of social law differed from formal rational law and the liberal legal form with which it is associated.

In light of this exposition of the differing logics of formal rational law and social law, what can be said of the legal form underlying the types of law that have come to prominence in the context of the reforms to the NHS outlined above? On the one hand these laws are indicative of formal rational law. Thus, the possibility of applying competition law to ensure the absence of anti-competitive behaviour introduces a degree of formal equality into the NHS commissioning process; and the use of contract law as the legal mechanism upon which PPPs rest stresses the importance of the formal notion that agreements freely entered into between parties must be upheld. Possible substantive inequalities between the competing parties gain no recognition under a form of law concerned only with formal equality; nor do the concrete detrimental consequences – such as the closure of hospital wards or indeed entire hospitals – that may flow, for instance, from the need of NHS Trusts to settle the high interest payments associated with PPPs. Competition and the honouring of contractual obligations (*pacta sunt servanda*), rather than the ideas of fair distribution or equitable allocation of social burdens and profits that Ewald identifies as structuring social law and solidarity contracts, are the norms underlying the laws that constitute the markets, and entry of the private sector, being facilitated within today's NHS.

This identification of formal rational law in the context of the NHS is somewhat complicated, however, in that, despite appearances, it is not entirely devoid of any

element of collectivisation or socialisation. This is apparent, for instance, in the allocation of risk within contracts framing PPPs, which is often assumed by the government rather than the private sector. As an example, Allyson Pollock explains that NHS Trusts that wish to terminate contracts for the provision of services by private consortia on the basis of poor performance must still pay the consortia's financing costs despite their being at fault. Here, it is suggested that contract creates a legal bond between citizens and capital through which responsibility and liability for the economic risks – in the form of the financial debts and interest accrued by the private sector – and associated potential social harms, such as lack of availability of health care, of PPPs, are socialised or collectivised, not between the contracting parties, but amongst citizens themselves. Through the medium of the PPP contract, a strict liability is imposed upon a non-contracting collective body – taxpayers. It is important to note, though, that this form of socialisation could not differ more from the logic of socialisation underpinning the solidarity contracts that Ewald identifies as defining social law – one which is directed towards ameliorating the inequalities, social and economic harms, and skewed distribution of social burdens and profits produced by the operation of capitalism. Rather than pursuing such objectives, the manner in which PPP contracts are framed, and the form of socialisation that structures them, are geared towards the needs of capital rather than towards the protection of those requiring access to publicly funded health care.

As with workfare, one can witness a politics of depoliticisation at work here. For this novel form of socialisation through contract – an essential component of the practical implementation of neoliberalism and the shaping of the neoliberal state in the context of health care – is occluded by a politics of publicly funded health care that is actively

constructed around a discourse, *inter alia*, of value for money, the unsustainable costs of the NHS (both in terms of treatments and personnel), bureaucratic inflexibility and mismanagement, and patient empowerment through, amongst other things, the expansion of choice.²⁰ These forms of discourse not only demonstrate a core function of the neoliberal state – which, in Wacquant’s terms, is the fabrication of collective representations of, in this case, the NHS; in doing so, they succeed in both obscuring the structures put in place to facilitate the neoliberal vision for the NHS and suppressing potential conflicts and struggles over the very meaning and shape of the politics of publicly funded health care.

The conclusion that flows from the foregoing analysis is that, while the types of law constitutive of the neoliberal reforms taking place within the NHS are of the formal rational variety – a legal framework of abstract general rules facilitating competition and the operation of freedom of contract – they are also, at least partially, structured by a logic of socialisation or collectivisation. In its objective, however, the latter is diametrically opposed to the logic of socialisation underlying social law.

Conclusion

What preliminary conclusions might be drawn from the foregoing analysis of the relationship between law and neoliberalism in the areas of unemployment and health care?

First, if, as it has been argued here, neoliberalism is best understood as a political project involving the state’s creation and deployment of institutional mechanisms geared towards a society founded upon the market, then social policy and the law and

²⁰ Choice amongst NHS health care providers is now a legal right enshrined in the NHS Constitution. See Department of Health *The NHS Constitution: The NHS belongs to us all* (2013).

legal categories used to implement this must be taken seriously as important, constitutive, elements in this process.

Secondly, the form of law encountered in the examples discussed is of the formal rational variety that posits a legal framework of abstract general rules that emphasises formal equality and facilitates the liberty of individuals to choose their own ends rather than these being chosen for them by an omniscient state. While this form of law is materially important in providing the rules necessary to allow for the development of markets and the competition between actors within them, it is also crucial symbolically as it helps the state shape what Wacquant refers to as the 'subjectivities, social relations and collective representations suited to realising markets'.²¹ This feature of law and legal categories is especially potent in the welfare context where the deployment of contract along the lines of its classical private law form – underpinned by a liberal political rationality – allows the state to shape the politics of unemployment around a certain form of social relations and subjectivity.

Finally, the symbolic effects that law and legal categories help to produce, obscure important aspects of the neoliberal political project and curtail the possibility, or even the need for, a politics that contests the coordinates of the contemporary politics of unemployment and publicly funded health care. In exploring the types of law and underlying legal forms and logics that structure neoliberal reforms in two areas of today's social policy, the hope is to resurrect a form of agonistic politics that can challenge this politics of depoliticisation characteristic of the neoliberal state by bringing into view alternative principles upon which future social policy and related law might be founded.

²¹ Wacquant, *op cit.*, note 1.

