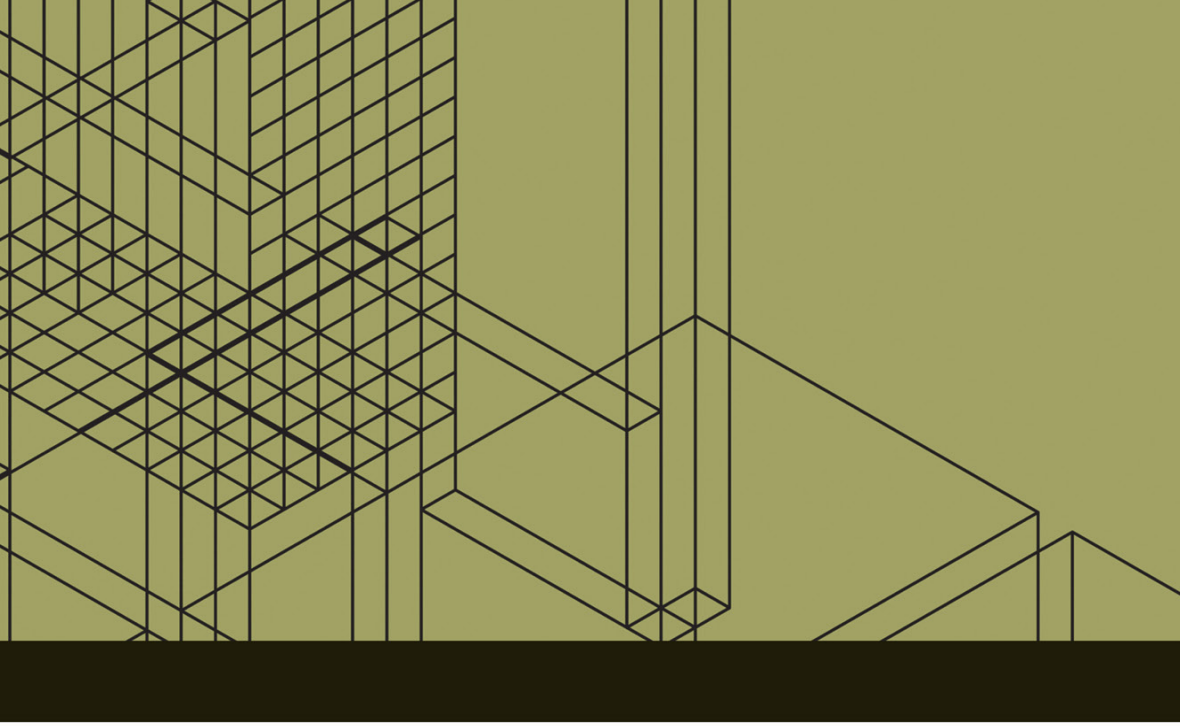
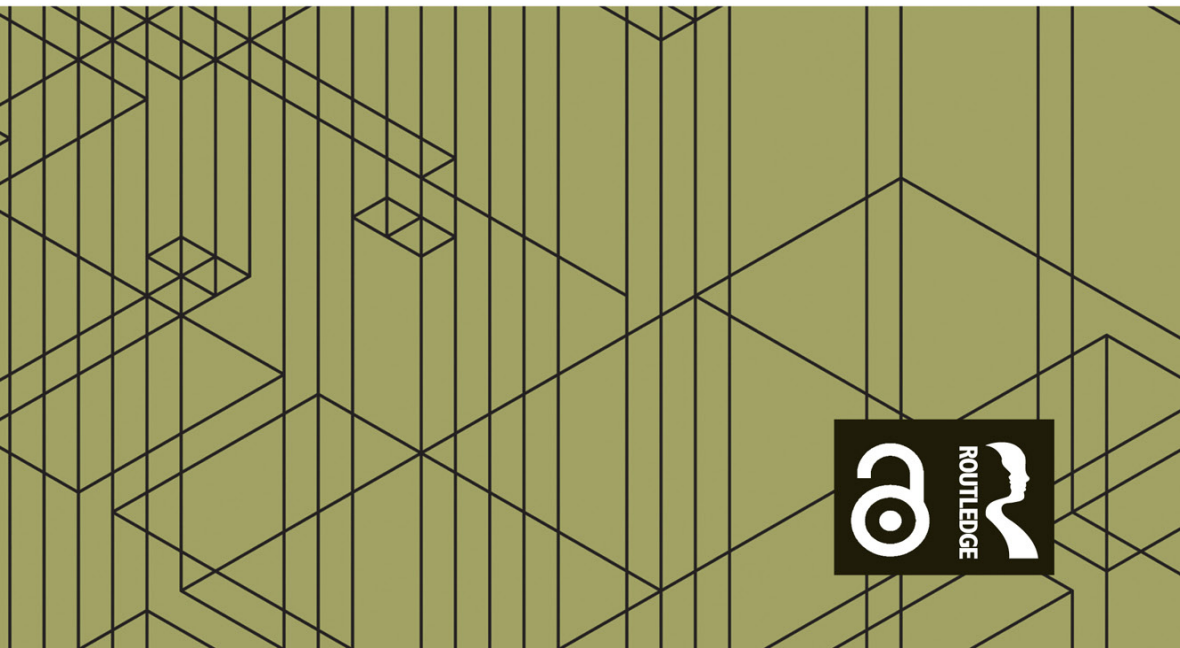


CONSTITUTIONS OF VALUE

LAW, GOVERNANCE, AND POLITICAL ECOLOGY

Edited by
Isabel Feichtner and Geoff Gordon



Constitutions of Value

Gathering an interdisciplinary range of cutting-edge scholars, this book addresses legal constitutions of value.

Global value production and transnational value practices that rely on exploitation and extraction have left us with toxic commons and a damaged planet. Against this situation, the book examines law's fundamental role in institutions of value production and valuation. Utilizing pathbreaking theoretical approaches, it problematizes mainstream efforts to redeem institutions of value production by recoupling them with progressive values. Aiming beyond radical critique, the book opens up the possibility of imagining and enacting new and different value practices.

This wide-ranging and accessible book will appeal to international lawyers, socio-legal scholars, those working at the intersections of law and economy and others, in politics, economics, environmental studies and elsewhere, who are concerned with rethinking our current ideas of what has value, what does not, and whether and how value may be revalued.

Isabel Feichtner is Professor at the University of Würzburg, Germany.

Geoff Gordon is Senior Researcher at the Asser Institute, University of Amsterdam, Netherlands.

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Constitutions of Value

Law, Governance, and Political Ecology

Edited by Isabel Feichtner and
Geoff Gordon

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Chapter 1

Constitutions of Value

An Introduction

Isabel Feichtner and Geoff Gordon

The contributions to this book are the fruits of the research project "Constitutions of Value".[1] They are based on presentations and discussions at two workshops – one that we convened at the University of Würzburg on 12 and 13 December 2019 and another that we held during the COVID pandemic online on 10 and 11 December 2020. In March 2020 we published preliminary and shortened versions of some of the contributions to the first workshop as a blog symposium.[2]

We had invited lawyers, an economist, a sociologist, a historian, a philosopher, and commons researcher and activist Silke Helfrich to think about the role of law, together with politics, economics, technology and science, in co-constituting practices of value production and valuation – or simply, in co-constituting value. In this introduction we seek to explain what we, as convenors and editors, have in mind when we propose the constitutional study of value as an avenue for scholarship that seeks to contribute to social-ecological transformation (section A) as well as our skepticism as regards prevalent calls for a greater values-orientation of policy and economics (section B). We also wish to indicate how the constitutional study of value might move beyond critique and towards a revaluation of value (section C). In order to do justice to the diversity of our authors' takes on value, this introduction in its last part distils additional themes that emerge from the chapters of this book, including the three reflections that we invited to point up paths not taken and potential pitfalls of a constitutional study of value (section D).

A. The Constitutional Study of Value

A starting point and motivation for this project's turn to value is the observation of the society- and world-(un)making effects of value. Practices of value

1 This project was funded with a grant from the state of Bavaria for the project "Democratizing Money and Credit" which was part of the research network ForDemocracy.

2 I. Feichtner and G. Gordon (eds.), 'Constitutions of Value', Verfassungsblog, March 2020, online at https://verfassungsblog.de/category/debates/constitutions-of-value-debates/.

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production and valuation shape and make worlds. They also unmake worlds, have severe destructive effects and lie at the heart of today's interlocking crises. The worlds produced by current value practices are dystopian: they are characterized by violence, extraction and destruction that have taken us to the verge of global ecological and societal collapse. A project invested in change, therefore, must address value. Against the background of an analysis of the world-making effects of value, the reconfiguration of value becomes unavoidable and key to social-ecological transformation and a democratization of society.

With the project that has led to this book, we envisaged a collaborative study of value with two aims in particular: 1) a better understanding of how value and valuation are socially and materially – and in particular *legally* – constructed, on which basis 2) to prepare the ground for proposals for institutional experimentation and re-design to reshape practices of value production and valuation, with the objective of limiting their destructive effects, of reconstituting social relations and of revaluing value. We call this endeavour the "constitutional study of value". We use the adjective "constitutional" as we seek to explore the practices and institutions at the core of value production, its hardware, its central *constitutive* elements – with a focus on law as a significant building-block. This critical inquiry shall serve as a basis for reconfiguring, redesigning and revaluing value. Yet, our project should not be mistaken for one of constitutionalization understood as a project of restraining the excesses of value production by a legal framework of a higher order, drafted and interpreted by experts and imposed in a top-down manner.[3]

The world- and society-(un)making effects of value practices have prompted not only our own study of value. While within the liberal conception of state and society there is a notable absence of an engagement with value, scholarship on value is on the rise again, frequently taking inspiration from Karl Marx.[4] With David Graeber we understand value as "the way in which actions become meaningful to the actor by being incorporated in some larger, social totality".[5] And with Marx we see value as a function of historically contingent configurations of social and economic relations, and in turn that the construction of value also shapes relations, including relations with the non- or

3 Rather the project bears similarities with societal constitutionalism which is at the centre of the work of Gunther Teubner, including his contribution to this volume; see also G. Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (2012).

4 D. Graeber, *Toward an Anthropological Theory of Value* (2001); D. Graeber, 'It is Value that Brings Universes into Being', (2013) 3 *HAU: Journal of Ethnographic Theory* 219; M. De Angelis, *The Beginning of History. Value Struggles and Global Capital* (2007); F.H. Pitts, *Value* (2020); D. Harvey, 'Value in Motion', (2020) *New Left Review* 126; see also sociological work in the rather recent field of "valuation studies": C.-F. Helgesson and F. Muniesa, 'For What It's Worth: An Introduction to Valuation Studies', (2013) 1 *Valuation Studies* 1; M. Fourcade, 'Cents and Sensibility: Economic Valuation and the Nature of "Nature"', (2011) 6 *American Journal of Sociology* 1721.

5 Graeber, *Toward an Anthropological Theory of Value*, at xii.

more-than-human world.[6] Under the configuration of a capitalist political economy, economic surplus value becomes determinative in the formation of these relations and society as a whole.

Marxian *Wertkritik*, as formulated by Robert Kurz, and introduced by Klaus Kempter in this volume, goes so far as to hold that value in our capitalist political economy has totalizing effects and structures society in its entirety. According to *Wertkritik*, the drive towards surplus value production – Marx's automatic subject – brings (a particular) society into being. From this perspective, surplus value production in the form of money determines and explains the *totality* of society and not just the structure of the economy. It is "subjecting [human beings] totally and making them mere functionaries of an anonymous process that is beyond their control".[7] According to *Wertkritik* this operation of value is responsible for the three global and interlocking crises of environmental destruction, imperial (and potentially nuclear) wars as well as economic precarity and inequality. We note, however, that where *Wertkritik* ascribes to economic surplus value a totalizing function in the formation of society, Gunther Teubner, in his chapter to this volume, sees different modes of surplus value production at work in functionally differentiated societal subsystems. As Teubner explains, surplus value can be understood as the motivating force that drives operations in each subsystem – taking the form of money in the economy, power in politics, reputation in science, judicial authority in law. While Teubner does not agree with *Wertkritik* with respect to the totalizing force of economic surplus value, he nonetheless recognizes the society-forming effects of value, as well as the destructive, exploitative and expropriating implications of the drive for surplus value production.

Despite the plausibility of Teubner's suggestion that in our current societal configuration of functional differentiation it is not just economic surplus value that has society-making effects, many of the contributions to this volume focus on economic value. The extreme discontents that are the consequence of economic surplus value production and its legal constitution and protection – such as colonial displacements of indigenous ways of life (Christine Schwöbel-Patel), climate catastrophe (Julia Dehm), exploitation and commodification of workers (Florian Hoffmann) and nature (Oliver Schlaudt) – explain this emphasis.

Even though value production is central to the economic sphere, the discipline of economics currently has little to offer on value.[8] Mainstream (neoclassical) economics largely abandoned value theories. Several contributions to this volume point out how neoclassical economic theory does not identify material anchors of the value of commodities. How, instead, it refers to individual preferences as a (purportedly) subjective measure of value (utility) that

6 K. Marx, *Das Kapital* (1867), vol. 1.

7 Kempter in this volume, at 51.

8 For a recent effort to remedy this lack of attention, see M. Mazzucato, *The Value of Everything* (2018).

preexists exchange and which, aggregated, assumes an objective role in price formation. The contributions to this volume reject this neoclassical approach that replaces value with (perceptions of) individual utility and treats profit and value as equivalent. Likewise, the constitutional study of value seeks to go beyond the problematization of the separation of a real from a financial economy – with the real economy being understood as the place of value production (which is generally socially desirable and, through policy, can and should be aligned with social values) and the financial industry as a site where socially undesirable value *extraction* is taking place that should be restricted.[9] Though we find such problematizations of value from within the field of economics to be productive, we do not hold them to be sufficient in so far as they do not question more fundamentally the role of exchange value in structuring relations of production, consumption and exchange.[10]

Instead of building on the neoclassical understanding of value, contributions to this volume understand value as anchored in particular societal and material configurations and practices, and in doing so draw on renewed relational conceptions of economic value. Such a renewed relational understanding of economic value is formulated by André Orléan:

> I refuse to accept that economic value can be identified with a property, whether utility or any other, that preexists exchange. It must be considered instead as something that is uniquely the product of market relations, through which the commercial sphere itself attains a separate existence, independent of other social activities.[11]

Value is the product of relations.[12] Thus, when we take in this project inspiration from Marx, we do not do so in search of an objective value theory; nor to make the point that labour is (or should be) the only source of surplus value.[13] Marx's as well as Graeber's works serve for us as inspirations because they clarify the social relations underlying and reproduced by value practices, as well as their social and material – their world-making – effects. Moreover, Marx and Graeber both place questions of distribution squarely at the centre of attention – who wins and who loses, who exploits and who/what is being exploited by current value practices, how is value distributed within

9 Ibid.

10 For a convincing critique of the attempts to distinguish value production in the real economy from value production in the financial sector, see D. Alessandrini, *Value Making in International Economic Law and Regulation* (2016).

11 A. Orléan, *The Empire of Value: A New Foundation for Economics* (2014), at 4.

12 For more critique and elaboration of relational theories of value, see Pitts, *supra* note 4.

13 See, however, Clair Quentin's contribution to this volume that not only reads current efforts at equity in international taxation through the lens of a classical labour theory of value, but also makes the normative point that proposals in political economy to abandon the labour theory of value in an attempt to politicize value may be detrimental to global justice concerns.

and across societies and how is this distribution being sustained and justified? The relational understanding of value that pays close attention to questions of distribution further enables us to study value as a product of collective societal organization and to understand the institutions that produce, distribute and measure value as institutions of governance. In this vein, Christine Desan, in her chapter, deconstructs the understanding of value as an expression of individual preferences that precede exchange and reveals money as a governance technology that distributes value unequally across members of society.

While we rely on value as an analytical concept to understand the structure of society, our constitutional study of value further builds on the anthropological critique of value introduced by Fabian Muniesa in this volume. This approach, which draws on the works of Michel Foucault, does not examine value as an analytical concept, but is interested in notions of value as vernacular concepts. It seeks to understand how certain terms and notions regarding value and valuation come to enjoy a common-sensical authority, how rhetorics, techniques, routines and vocabularies of value and valuation – for example "true value", "undervaluation", "overvaluation", etc. – consolidate truth regimes. By looking at value as a vernacular phenomenon supporting truth regimes that in turn make some institutional practices viable and others not, the anthropological perspective deepens our understanding of value as a governance technology. We observe how notions of value that originated in the realm of finance and investment, how the "investor's gaze" has become influential far beyond that sphere and today determines policy-making, legislation and adjudication. Muniesa not only presents the anthropological study of value, but further points to the importance of inquiring into the operations of law and lawyers in sustaining governance regimes that rest on particular notions of value, in particular those that justify privileging the investor's gaze. The vernacular approach to value figures prominently across diverse contributions to this volume, including Toni Marzal's critique of the valuation of damages in international investment disputes, Clair Quentin's observations on policy debates prompted by the Organization of Economic Cooperation and Development's proposal to allocate the tax base where value is created, Dimitri Van Den Meerssche and Geoff Gordon's account of emerging legal-technological governance regimes, and Julia Dehm's account of how the value of nature is made legible by techniques of natural capital accounting.

In sum, our constitutional study of value inquires into the practices and institutions that co-constitute value production and valuation processes as well as the accompanying rhetorics and justifications. In conducting this inquiry from a legal vantage point, we place a particular focus on the constitutive role of law in value production and valuation, while aiming to pay sufficient attention to further constitutive forces, including politics, economics, technology and science.

As concerns the *legal dimension* of this examination, we propose a shift away from the usual suspects of legal scholarship that aims at progressive change.

Legal scholarship often looks to courts as well as regulators for the application and creation of law to improve the workings of the market and to contain the destructive effects of value production. Courts are called upon to defend and protect values (think for example of strategic climate and human rights litigation); regulation is called for to curb value extraction and to "re-define value", for instance to achieve a circular economy.[14] From our elaborations so far, it should be clear that this is not what we have in mind (and we explain a related skepticism of values (in the plural) as a remedy to the excesses of value production in more detail in the next section). We are not so much interested in corrections through court intervention or regulation, but in understanding how law is co-constitutive in bringing about what courts and regulators then are called upon (often unsuccessfully) to correct.[15] In this endeavour, our project joins forces with others who seek to clarify the central place of law in political economy, including lawyers and social scientists who follow the law to dismantle the black boxes of institutions such as money, capital, the corporation, global value chains. We take inspiration from the work of Christine Desan on money (including her contribution to this book).[16] Yet, we extend the purview of our project beyond the legal design of money to further institutions as well as social and technological dynamics that are central to value production and valuation. The attention to the role of law in *value* production and *valuation* processes gives our project its transformative horizon of alternative valuations – beyond other projects that examine the role of law in political economy[17] – though admittedly these distinctions are not hard and fast. In this volume, the contributions by Christine Desan, Anna Chadwick and Jamee K. Moudud go to the institutional heart of economic value production with their examinations of the internal and external governance dimensions of money as well as the legal constitution of the firm.

A final set of questions regard the project's constructive or utopian orientation – its quest not only for less destructive but for transformative value

14 See, e.g., N. Nasr, J. Russel et al., *Re-Defining Value - The Manufacturing Revolution: Remanufacturing, Refurbishment, Repair and Direct Reuse in the Circular Economy*, (2018) Report of the International Resource Panel, UNEP.

15 Cf. G. Gordon, B. Rieder and G. Sileno, 'On Mapping Values in AI Governance' (2022) 46 *Computer Law & Security Review* 105712.

16 C. Desan, *Making Money: Coin, Currency, and the Coming of Capitalism* (2015); C. Desan, 'Decoding the Design of Money', (Feb.–Mar. 2015) *The European Financial Review*, 24; C. Desan, 'The Constitutional Approach to Money: Monetary Design and the Production of the Modern World', in N. Bandelj, F. Wherry and V.A. Zelizer (eds.), *Money Talks. Explaining How Money Really Works* (2017), 109.

17 For just two more examples, see K. Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (2019); and J. Britton-Purdy et al., 'Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis', (2020) 129 *The Yale Law Journal* 1600. The rather recent scholarship on Law in Political Economy builds on older works of legal realists such as Robert L. Hale and institutional economists such as John R. Commons.

practices and the revaluation of value. Recognizing the world- and society-making effects of processes of value production and valuation, and understanding that value is not a thing, but the product of social relations, institutions, processes and practices co-constituted by law, becomes the basis for thinking about institutional re-design and experimentation.[18] With respect to our aim for a revaluation of value, a number of questions have emerged in the course of this project that we wish to flag here as items for further study. Several contributions, in particular those by Dehm, Muniesa and Schlaudt, point to the drawbacks of attempts to "correct" economic valuations in order to adequately account, for example, for the value of nature or human labour. These drawbacks include reductionism, which Sofia Stolk meditates on in her reflection, and the risk of expanding commodification and perpetuating a world in which the value of things and beings is limited to their exchange value as assessed from an investor's gaze. A project aimed at radical critique and transformation may thus be faced with a choice between, on the one hand, doing away with value altogether (as proposed by Kempter) or, on the other hand, restraining and taming value (as proposed by Teubner). Or is there another alternative, by which value may be *revalued* so that it remains a force of motivation, societal integration[19] and abundance,[20] in ways that are not destructive but supportive of life, solidarity and care? We return to this constructive dimension of the project in section C of this introduction, where we refer to commoning as a potential path to transformation and revaluation.

B. Contrasting the Constitutional Study of Value with Calls for "Bringing Back Values"

While we further elaborate our vision for a transformative project in section C, we first use this section to distinguish our constitutional study of value from other progressive projects that aim to revisit or redeem value – especially because discourses on values (in the plural) and value (in the singular) have become such a ubiquitous, if ambivalent, part of the current moment. To mention just a few examples of debates on value and values: for several years now, debates have been ongoing in academia as well as outside on how to prevent, resist and sanction an erosion of the EU's "fundamental values". Political movements (especially on the right of the political spectrum) organize around and justify their politics with "a defense of values". EU policy documents for the Digital Decade, as pointed out by Van Den Meerssche and Gordon in their

18 As concerns institutional design and institutional experimentation in the process of social-ecological transformation, the constitutional study of value builds on the work by Roberto Unger; see e.g., R. Unger, *Democracy Realized: The Progressive Alternative* (1998).

19 Graeber, *supra* note 4.

20 B. Massumi, *99 Theses on the Revaluation of Value: A Postcapitalist Manifesto* (2018).

contribution to this volume, note the importance of European values in guiding the regulation of new technologies. The German government advocates for a values-led foreign policy. As concerns value (in the singular), the diagnosis that (economic surplus) value production is at the root of social-ecological crises, that it is a cause of extinctions, expulsions and exploitations is widely shared. Investments in fossil fuels and their assetization[21] contribute to the climate crisis and impede mitigation efforts (as explained by Dehm in this volume); value creation through financialization is responsible for financial instability, price hikes of food and housing and aggravates social inequality. The International Resource Panel, an international institution aiming at responsible production and consumption (in accordance with Sustainable Development Goal 12) puts forward proposals on "re-defining value" to make headway towards the circular economy.[22] Since the financial crisis, the discipline of economics is evidencing a renewed engagement with value in which distinctions between the finance industry and the real economy, between "value extraction" and "value creation"[23] figure prominently as alluded to above.

Given the ubiquity of value(s) discourses, we want to explain why, in this project, we deliberately sought to put the focus on value (in the singular) and not on values (in the plural) and what distinguishes our perspective from other contemporary engagements with values and value. In the following, we therefore juxtapose our proposal for a constitutional study of value with what we call here the "values-approach to value". We use this label to cover a variety of research projects within economics and the social sciences that link debates on values and value and posit that the production of value (in the singular) should be guided by values (in the plural).[24] These projects frequently diagnose a "decoupling" of the economy and politics from societal values. Such decoupling is regarded as one reason for an economy that produces value at the cost of excessive social and environmental "externalities" and a politics unable or unwilling to contain these destructive excesses of economic value production.[25] This diagnosis is then followed by a prescription for "recoupling", i.e., a call on researchers and policy-makers to help bring economic value production (back) in line with societal, moral and constitutional values. Values, under this approach, shall serve as an orientation and corrective to destructive processes

21 K. Birch and F. Muniesa (eds.), *Assetization: Turning Things into Assets in Technoscientific Capitalism* (2020).

22 N. Nasr et al, *supra* note 14.

23 Mazzucato, *supra* note 8.

24 Mazzucato, *supra* note 8; K. Raworth, *Doughnut Economics: Seven Ways to Think Like a 21st Century Economist* (2017); M. Gabriel et al, *Towards a New Enlightenment. The Case for Future-oriented Humanities* (2022); see also the research programme *Socio-Economic Transformation* directed by Dennis Snower at THE NEW INSTITUTE, online at https://thenew.institute/en/programmes/socio-economic-transformation.

25 Cf. Gabriel et al., *supra* note 24.

of value production. Steps and instruments in the process of recoupling include the identification of indicators of the common good and new measurements of social progress,[26] as well as nudges that are "tapping into underlying norms and values".[27] Values made measurable by indicators are to inform policy proposals that can then be implemented in the form of legal regulation.

In law, too, a frequent observation holds that economies based on value extraction harm social values – social values that are held to be embodied *inter alia* in constitutions and international agreements. Attempts at "recoupling" in international law scholarship, in this vein, often take the form of calls for more and more effective legal instruments for the protection of human rights and the environment as well as for the better integration of societal concerns with economic value production. Such proposals for integration (recoupling) abounded at the high point of the constitutionalization and fragmentation debates. Countless "trade and…" books put forward doctrinal arguments for the integration of international economic law with human rights and environmental protection regimes.[28] Ernst-Ulrich Petersmann even argued for a reconstruction of WTO law as a Kantian constitution of world trade that restricts power and protects human rights.[29] Geopolitical changes as well as postcolonial critiques had the effect that international lawyers today are more hesitant to reconstruct international law as a constitution that gives expression to the values of an international community. "Recoupling", however, remains a prevalent theme in international law, most apparently perhaps in the ongoing "business and human rights" debates. More "modest" proposals seek to narrow the perceived gap between the law and practice of a globalized economy, on the one hand, and non-economic normative commitments on the other, through the infusion of virtue ethics into organizations of business and government[30] and the establishment of new legitimacy narratives based on institutional ethics[31] to align value production with social values.

26 See "The Recoupling Dashboard 2020", online at www.global-solutions-initiative.org/recoupling-dashboard-homepage/recoupling-dashboard-2020/.

27 Raworth, *supra* note 24, at 125.

28 See, e.g., H. Hestermeyer, *Human Rights and the WTO* (2007); M. Böckenförde, *Grüne Gentechnik und Welthandel* (2004); J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (2009).

29 E.-U. Petersmann, 'Human Rights, International Economic Law and "Constitutional Justice"', (2008) 19 *European Journal of International Law* 769.

30 J. Klabbers, 'Controlling International Organizations: A Virtue Ethics Approach', (2011) 2 *Helsinki Review of Global Governance* 49; J. Klabbers, 'Law, Ethics and Global Governance. Accountability in Perspective', (2013) 11 *The New Zealand Journal of Public and International Law* 309.

31 R. Howse and K. Nicolaïdis, 'Toward a Global Ethics of Trade Governance: Subsidiarity Writ Large', (2016) 79 *Law and Contemporary Problems* 259.

The constitutional study of value differs in various respects from the values-approach, including the just described proposals in legal scholarship to recouple, integrate and constitutionalize. It doubts that guidance by moral and social values can contain the excesses of (economic surplus) value production. To further specify our own perspective, we focus on three points of divergence: first, the differing understandings of values as corrective versus values as accomplice; second, the envisaged pathways of change; and third, the modes of critique.

B.1 Values as Accomplice

We turn to our first discontent with the values-approach: our view that the values-approach overestimates the function that social values can play as a *corrective* to the excesses of (economic surplus) value production. The reason for this assessment lies in the complicity of values in practices of violent and destructive economic value production. The history of colonialism reveals how the professing of liberal values coincides with the establishment of capitalist value practices at the cost of displacing alternative economies and ways of life, and how these values enable and sustain such value practices. The complicity made visible by colonial practices calls into question the diagnosis that contemporary crises are prompted by a decoupling of value from values, and allows us to understand the current state not as a deterioration of a desirable status quo, but to see the ways in which values perform a facilitating and legitimating function for economic value production. Colonial history, thus, helps us to reverse the perspective on the relationship between values and value: to see it not as a relationship of a continuous frustration of social and moral values by practices of value production, but rather as a relationship in which values work to enable and sustain value production. Our point is not that the values are false or a sham, but that whatever else they may do, they actively work in a capitalist society to sustain economic value production.

The short history of German colonialism is instructive in this respect.[32] The German Empire, compared to other European states, was rather late in acquiring colonies in the Pacific, China and on the African continent, when chancellor Bismarck in the 1880s changed course and proclaimed territorial sovereignty over lands "acquired" by merchants and colonial companies in the Southwest of Africa, today's Namibia. Making the colonies "profitable" was a political concern throughout German colonization. Economic profitability gained heightened attention in legitimizing the colonial project after the colonial wars and the genocide of Herero and Nama populations had prompted

32 We draw in this section on I. Feichtner, 'Koloniales Wirtschaftsrecht und der Wert der Kolonisation', in P. Dann, I. Feichtner and J. von Bernstorff, (*Post-)Koloniale Rechtswissenschaft* (2022 - forthcoming); foundational on the implication of liberal ideas in colonization: O. Ince, *Colonial Capitalism and the Dilemmas of Liberalism* (2018).

critique of the colonial project in Germany. After the genocide, German colonial politics took a "liberal turn" which prepared the ground for the colonies' integration into a global capitalist economy, in particular through the building of thousands of kilometres of railways. Prominent liberals, among them Bernhard Dernburg who headed the Colonial Office of the Reich and his (initially) good friend and adviser, the German industrialist Walther Rathenau, criticized previous colonial policy and administrations that had aimed for domination and extinction of the Black populations of the colonies. They advocated not only for the rationalization and scientification of colonial policy, but also a turn from a mode of extinction and domination in relating to local populations to one of welfare and care (*Fürsorge*). Their progressive moral arguments were joined with progressive economic ones. The Africans, they argued, were the "most valuable economic activum" of the colonies.[33] They were thus to be cared for and not destroyed. Forced and slave labour were to be replaced by "free labour". Welfare and care were recognized as essential in putting this "activum" to work, *inter alia* in railway construction.

The point we wish to underline here is that the turn to recognizing the basic needs of the colonies' Black population, that this turn to "values" did not put an end to colonial violence. Forced displacements – primitive accumulation in Marxian terms – continued in order to enable economic value production and integrate populations, as workforce and consumers, into the global capitalist economy. They were a precondition for people to become not only wage labourers, but also tax payers and as such an important guarantee for the debts that the colonial state incurred, *inter alia* to finance the building of railways.[34] Only once the local population was no longer able to live off the abundant fruits of their land would they be willing to sell their labour in exchange for a salary that would pay for commodities required to satisfy their basic needs.[35] Before the "liberal turn", expropriations and expulsions had already done much to establish a state of scarcity. Yet, even after the denouncement of brute force, other instruments remained at the colonizers' disposal to produce and sustain scarcity and thus "gently" to force people to assume their new roles as wage labourers and consumers – among them land reforms and tax laws. During this process of establishing scarcity, alternative economies and whole cosmologies and ways of life were displaced and destroyed, and durable dependencies were created.[36] The violence behind this integration and dependency may have changed its forms over time, but it has not disappeared.

33 W. Rathenau, 'Erwägungen über die Erschließung des Deutsch-Ostafrikanischen Schutzgebietes', in Büttner et al. (eds.), *Schriften der Wilhelminischen Zeit 1885–1914* (2015), at 583

34 R. Luxemburg, *Die Akkumulation des Kapitals. Ein Beitrag zur ökonomischen Erklärung des Imperialismus* (1913); Parvus, *Die Kolonialpolitik und der Zusammenbruch* (1907).

35 For contemporary justifications of various forms of forced labour, see this dissertation in law: A. Bauer, *Der Arbeitszwang in Deutsch-Ostafrika (*1919).

36 A.G. Frank, *The Development of Underdevelopment* (1966).

Against this background, values such as freedom, provision for basic needs, and corporate social responsibility appear as part and parcel of an ongoing colonization and integration into the realm of economic value production of ever more spheres of life and geographies, including recent expansions of resource extraction into the deep sea and outer space.[37]

We have used the historical example of German colonialism to illustrate the complicity of values in value production and to criticize the framing of current crises as the outcome of a "decoupling" of value from values. Where the values-approach to value sees a "decoupling", the constitutional study of value seeks to draw out colonial continuities. In this volume, such colonial continuities and complicity are addressed in the chapters by Christine Schwöbel-Patel, Oliver Schlaudt, and Clair Quentin as well as in the reflection by Jessie Hohmann. Schlaudt complexifies our description in this introduction of colonial continuities. He points to the significant difference between violent colonial expropriations on the one hand and exchanges that follow the liberal "rules of the game" on the other. Today's rules of production and exchange invisibilize inequalities and violence. One way to make visible contemporary unequal exchanges between the Global South and Global North is to apply measures of value that differ from exchange value. Florian Hoffmann, with reference to Marx, emphasizes not only the historical, but also the conceptual interdependencies between value production and liberal rights (often posited as values).[38] Despite acknowledging the complicity of rights in the violence of capitalist value production, however, Hoffmann cautions against discarding and dismissing rights too swiftly, and stresses their emancipatory potential in resisting the commodification of human beings.

B.2 Pathways of Change

The second difference between the constitutional study of value and the values-approach that we wish to highlight, concerns pathways of change and transformation. The values-approach envisages *inter alia* the translation of societal values into indicators and policy prescriptions. Legal documents such as constitutions and international treaties are frequently invoked as the codification of these values. Here we want to question to what extent such indicators and policy prescriptions are able to change the mechanics of value production.

37 For such colonial continuities in today's human rights law and corporate social responsibility, see G. Baars, *The Corporation, Law and Capitalism* (2019).

38 It is an omission that this book does not more squarely address value in the context of racialized capitalism. We wish to thank Robert Knox for adding this perspective to our workshops. See R. Knox, 'Haiti at the League of Nations: Racialisation, Accumulation and Representation', (2021) 21 *Melbourne Journal of International Law* 245; R. Knox, 'Valuing race? Stretched Marxism and the Logic of Imperialism', (2016) 4 *London Review of International Law* 81.

Our doubts can be substantiated based on the critique of political economy as reconstructed, for example, by Kempter in his chapter. An illustration of the impotence of policy-makers to escape the demands of economic surplus value production can be found in contemporary policy documents. As Van Den Meerssche and Gordon point out in their contribution to this volume: while EU policy documents on data governance postulate that the EU data infrastructure shall be informed by European values, a closer look reveals how these "values encompass a still impressionistic and sometimes contradictory mix that prioritizes free market mechanisms, privileging competition and private property ownership by individual entities".[39]

Systems theory offers a further explanation for the limited purchase that values-informed policy prescriptions may have over value production: if different societal spheres work according to different logics and on the basis of communication in different media (money in the economic system and power in the political system), then policy and legal prescriptions will not suffice to align value and values. Neither the legal nor the political system can simply redirect the course of value production in the economic system on the basis of moral or other values. These are the reasons why the constitutional study of value concentrates on the institutions, procedures and practices – the mechanics or *hardware* – of value production. It does not place its bets for social-ecological transformation on values serving as correctives, nor on a "recoupling" of values and value as a plausible remedy to destructive value production, but rather on a rewiring of value production itself.

We also wish to draw attention to the potentially antidemocratic implications of the enlistment of values in projects of transformation. When lawyers, past and present, have interpreted constitutions and international treaties as value orders,[40] this not seldom has had the effect of stabilizing the status quo and working against efforts of democratization and redistribution of power and resources.[41] In recent decades, the tendency of lawyers to engage in the kind of antidemocratic legal analysis that aims at building a coherent system or "rule of law" on the basis of values or principles can be observed in the field of international investment law. Acting as scholars, counsellors and arbitrators, international investment lawyers have reconstructed, from a multitude of

39 Van Den Meerssche and Gordon in this volume, at 241. See also, G. Gordon, 'Digital Sovereignty's Quantum Futures' (text on file with editors).

40 See, e.g., A.v. Bogdandy, *Strukturwandel des öffentlichen Rechts: Entstehung und Demokratisierung der europäischen Gesellschaft* (2022); and the critique by F. Meinel, 'Auch keine Philosophie der europäischen Integration', (2022), *Soziopolis,* online at www.soziopolis.de/auch-keine-philosophie-der-europaeischen-integration.html.

41 R.M. Unger, *What Should Legal Analysis Become?* (1996); H. Ridder, *Die soziale Ordnung des Grundgesetzes* (1975); for an introduction to Ridder's constitutional thought, see I. Feichtner, 'Helmut Ridder´s gesellschaftskritische Rechtswissenschaft und die demokratische Gesamtverfassung', in I. Feichtner and T. Wihl (eds.), *Gesamtverfassung. Das Verfassungsdenken Helmut Ridders* (2021), 11.

diverse treaties, a multilateral system[42] – a "metaconstitution" – predicated on an expression of individual rights and rule of law (values!) that severely restricts the scope for democratic politics and sustains given distributions of power and property. In this volume, Julia Dehm points to these antidemocratic effects and Toni Marzal focuses on one particular element of this "metaconstitution" of investment protection, namely the valuation of damages. Marzal shows how a formerly diverse practice has converged around a particular method of damages calculation and how in this process arbitrators have transferred authority to economists and their valuation techniques that eschew questions of distributive justice.

The constitutional study of value, too, must come to grips with its implications for democratic self-governance. With our proposal to engage in institutional (re-)design and experimentation, we do not want to advocate social engineering. To the contrary, we hold our study to be more easily reconcilable with democracy than the values-approach. Where variants of the values-approach tend to narrow the scope for democratization – for example when constitutions are read and consolidated as "value orders" from which specific policy prescriptions can be derived – the institutional analysis and re-design proposed by the constitutional study of value may open avenues for democratization. By setting out the distributive consequences of existing institutional designs and by proposing alternative institutional experiments, it not only offers choice. More importantly, alternative institutional experiments may be steps towards the democratization of social spheres heretofore relatively insulated from democratic self-governance[43] – think, for example, of projects to democratize the institutions of money and work.[44]

B.3 Modes of Critique

Our third and final point of divergence concerns the mode of critique. It is captured by the Marxian distinction between "vulgar" and "true critique" – as explained by Christoph Menke.[45] Vulgar critique brings into position the good against the real and its social and political effects; i.e., it assesses practices (for example of value production) against an external standard of morality or values. In this sense, the values-approach can be understood as engaging in vulgar critique when it bemoans a decoupling of value from values. True critique, by contrast, addresses the internal genesis of the thing that is being critiqued. Applied to capitalist value production, it would mean to reveal the necessity of

42 S. Schill, *The Multilateralization of International Investment Law* (2010); against "multilateralization" and "constitutionalization", M. Sornarajah, *The International Law on Foreign Investment* (2021).

43 Unger, *supra* note 18.

44 I. Ferreras, J. Battilana and D. Meda, *Democratize Work. The Case for Reorganizing the Economy* (2022); A. Riles, *Financial Citizenship* (2018).

45 C. Menke, *Kritik der Rechte* (2015), 11–12.

surplus value production through an analysis of its genealogy and to confront the practice of surplus value production not with moral intentions (values) but with its genesis. From this mode of critique, then, a radical objection may be formulated against that which exists.[46] Relating back to our brief note on German colonialism, true critique would mean not to lament how the liberal colonialists failed to fully implement the values they professed, but to reveal the implication of the professed values in the value production that requires and sustains violent displacements of alternative ways of producing and provisioning.[47] Similarly, Muniesa, in his contribution to this volume, describes the critique that the anthropological study of vernacular concepts of value as political technologies engages in, as "pressuring the conditions in which concepts can or cannot make sense and thus operate".[48]

C. Towards a Revaluation of Value

In this section we reflect on possible ways ahead. As explained above, the world-making effects of value – and the destruction in the course of value production of other worlds and relations – were the motivating force for this project. While we sought to make value the subject of our critical inquiry, our aim was to go beyond the formulation of radical objections. Beyond critique, we envisaged engagements with institutional re-designs and experiments. In this respect, we remain unsatisfied with the fruits of our project. While Outi Korhonen and Juho Rantala in their chapter gesture towards a utopian alternative future enabled by blockchain technology, the utopian and constructive ambition of our project overall remains underdeveloped.

We can think of several reasons for the hesitation to engage in institutional imagination. We have hinted at one of them already – the reluctance to propose legal fixes in line with a type of legal (constitutionalist) scholarship that we critiqued for its antidemocratic implications. Anna Chadwick in her chapter spells out another one. She draws pragmatic attention to the political, economic and legal limitations as regards the redesign of money, in particular in political economies of the Global South that are highly dependent on foreign investments and the dollar as reserve currency. And in a similar vein John D. Haskell in his reflection points to the hubris of a project that is made up, in the main, by (legal) academics and aims for radical transformation. Reluctance to think about alternative value forms, institutional designs, experiments and practices, may thus be read as self-restraint whether in light of the limited agency or undue aggrandizement of lawyers and academics in general. Perhaps

46 For this mode of critique in international law, see S. Marks, 'Human Rights and Root Causes', (2011) 74 *The Modern Law Review* 57.

47 Cf. Ince, *supra* note 32.

48 Muniesa in this volume, at 172.

there is also a shared sense of a lack of political momentum for radical change in the current moment.

Looking ahead, we nonetheless want to introduce a potential way forward by linking our project to the practice-theory of commoning. We thus also wish to acknowledge Silke Helfrich and the impact that she and her work have had on our thinking on value. Engagements with commons and commoning, including the work of Helfrich and her collaborator David Bollier, have flourished outside the institutions of academia. Building on Elinor Ostrom's work on democratic practises in the collective management of common resources, they significantly expand this research.[49] Their focus is not only on the collective management of shared resources that fit the definition of common pool resource. Instead, they focus on processes of commoning, i.e., democratic practices that aim at the management of, and care for, shared resources but equally at the collective, democratic and cooperative organization of the production, administration and distribution of goods to satisfy the needs and desires of collectives and their members. The commons thus produced include knowledge, seeds, food, digital infrastructures, urban space and many more.[50]

The aim of commoning is often formulated as the reclaiming of common wealth. Movements to claim and reclaim common wealth have been manifold throughout history and are on the rise again today. In the 1970s, for example, the peoples of the former colonies claimed the seabed as a global commons. They insisted that it be recognized as the common heritage of humankind in order to prevent a neocolonial scramble for the riches of the Ocean floor. On a local level, in many cities today people organize to reclaim urban space as their common wealth. Civil society initiatives to repurpose abandoned buildings, to de-privatize and socialize housing are just a few examples. Commoning initiatives also exist in the realms of food and digital technologies.[51] Resisting appropriation and attempts at deprivatization and decommodification are necessary, but not sufficient to create a commons. The example of the deep seabed is telling: despite its designation as a common heritage, states eventually opted for a system of administration and exploitation based on the granting of private rights to competitively mine the Ocean floor.[52] More is thus needed than a

49 E. Ostrom, *Governing the Commons. The Evolution of Institutions for Collective Action* (1990). For an account of the current landscape of research on the commons and commoning, see S. Foster, Ch. Swiney, 'Introduction, Commons Research in the Twenty-First Century and Beyond' in S. Foster, Ch. Swiney (eds.), *The Cambridge Handbook of Commons Research* (2022) 1.

50 For numerous examples, see D. Bollier and S. Helfrich, *Free, Fair, and Alive: The Insurgent Power of the Commons* (2019).

51 On urban commons initiatives in Italy see Ch. Iaione, E. De Nictolis, 'The City as a Commons Reloaded: From the Urban Commons to Co-Cities Empirical Evidence on the Bologna Regulation, in S. Foster, Ch. Swiney (eds.), *supra* note 49, 124; on food as a commons see J.L. Vivero-Pol, T. Ferrando, O. De Schutter and U. Mattei (eds.), *Routledge Handbook of Food as a Commons* (2019).

52 S. Ranganathan, 'Ocean Floor Grab: International Law and the Making of an Extractive Imaginary', (2019) 30 *European Journal of International Law* 573; I. Feichtner, 'Sharing the Riches of the Sea: The

legal-constitutional fix such as the formal designation of the seabed as common heritage in order to turn a shared resource into a common. When it is recognized that commons are "self-organized social systems"[53] then the norms and institutions that are necessary to sustain these systems come into focus. Ostrom's research on the commons identified a number of design principles that characterize successful systems of collective government of the commons. Taking this work further, Silke Helfrich initiated the project of a pattern language of commoning. Inspired by architect Christopher Alexander's pattern language of design,[54] it aims at "mining" patterns from practical experiences in successful processes of commoning. The emerging pattern language makes that experiential knowledge of patterns mobile and thus available for application in comparable contexts in order to overcome recurring obstacles to commoning.[55]

The practice-theory of commoning is of particular relevance for the constructive-utopian dimension of our own project for the following reasons: first, it may give further direction to envisaged institutional design and experimentation. So far, we have formulated the democratization of society, including the economy, as an aim of transformative institutional experimentation. Commoning can help to concretize this aim. For instance, contemporary initiatives to de-privatize and reclaim housing as an urban commons work towards designing institutions that allow the inhabitants of a city collectively to decide how living and working space should be administered and distributed.[56] These projects for urban commons seek to create institutions to enhance democratic self-organization and satisfy basic needs through the fair provisioning of urban space; in this way they provide alternatives both to centralized municipal governance and the real-estate market.

Second, the project of a pattern language of commoning hints at ways to overcome colonial continuities and the antidemocratic effects of governance by experts. In its attention to successful practices of commoning, the pattern language project privileges vernacular knowledge and order[57] over abstract values and top-down prescriptions. It bears similarities with a decolonial approach to international law as proposed, for example, by Judge Weeramantry in his separate opinion in the case *Gabčíkovo-Nagymaros* before the International

Redistributive and Fiscal Dimension of Deep Seabed Exploitation', (2019) 30 *European Journal of International Law* 601.

53 *D. Bollier,* 'Reinventing Commons Governance in Modern Times', 7 October 2021, www.bollier.org/blog/reinventing-commons-governance-modern-times.

54 Ch. Alexander et al., *A Pattern Language: Towns, Buildings, Construction* (1977); see also Ch. Alexander, *The Nature of Order*, vols 1–4 (2002–2004).

55 J. Euler and S. Preissing 'Mustersprache des Commoning: Theorie, Methodik, Praxis', (2022) 45 *Zeitschrift für Gemeinwirtschaft und Gemeinwohl* 265.

56 An example is the initiative *Deutsche Wohnen & Co. Enteignen* in Berlin.

57 On vernacular order, see J. Scott, *Two Cheers for Anarchism* (2012).

Court of Justice. In this opinion, Weeramantry drew attention to precolonial practices of collective water management as a source of general principles that could specify the meaning of sustainable development.[58] Both approaches – to draw on practices that are decolonial, departing from the logics of (neo)colonial value extraction, and to aim at collective provisioning outside the realm of state and market – can be made productive for a new law of value production in current struggles for transformation. Another site that comes to mind, in addition to resource management, is food sovereignty.[59]

Finally, commoning opens possibilities for a revaluation of value. The concerns of commoning, namely deprivatization and decommodification and provisioning based on solidarity, responding to desire and need, suggest an abandonment of exchange value. Yet, surplus value (in a non-monetary form) may still play a role as motivation, integrating force and source of abundance. Christopher Alexander, one of the key figures behind the pattern language of commoning, influenced by the works of philosopher Alfred North Whitehead, was interested in what makes a good design. He referred to a "quality without a name" that designers should aim for. Attempting to specify this quality, he used terms such as alive, whole, free, egoless, eternal – not simply beauty or fitness for purpose. In German, this "quality without a name" has been translated with *Lebendigkeit* (vivacity).[60] What makes a good design or a viable institution, thus, is not determined by its correspondence to an external standard of values, but by whether it creates a surplus value of vitality and lived experience.[61] In order to achieve this aim, institutional design must draw on a wide range of experiences and expertise and employ all senses. We can see here diverse links to and possibilities in the contributions to this volume. One example is the reflection by Sofia Stolk, who demonstrates how poetry may further sensitivity and close attention to patterns and the "quality without a name". Another example is the anthropological study of value proposed by Fabian Muniesa. Commoning refocuses attention – away from vernacular concepts of exchange value originating in the realm of finance and investment and towards vernacular concepts of value and practices of valuation in spheres of collective production and provisioning guided by solidarity, needs and desires. The challenge for a constitutional study of value that aims beyond critique might then be to explore how the investor's gaze that looks for value in the form of a rate of (monetary) return on an investment may be rendered non-sensical. And how instead the commoner's gaze may be elevated to the new common sense.

58 Ch. Weeramantry, '*Separate Opinion, Gabcikovo-Nagumaros Project (Hung. v. Slovk.)*', (1997) I.C.J. 7 (September 25), 88.

59 Vivero-Pol et al. *supra* note 51; M. Fakhri, *Interim Report of the Special Rapporteur on the Right to Food*, 27 July 2021, A/76/237.

60 H. Leitner, 'Working with Patterns: An Introduction' in D. Bollier and S. Helfrich (eds.), *Patterns of Commoning* (2015), https://patternsofcommoning.org/working-with-patterns-an-introduction/.

61 Cf. Massumi, *supra* note 20.

D. The Contributions to this Volume – Additional Themes

To this point in the Introduction, we have elaborated a framework that we have developed over the course of our project. This "introductory" framework is in fact our take-away, or our conclusion based on three years of study and interaction with our contributors. Thus, this framework is not where the project started. Likewise, it does not encompass the scope of every approach to value and values brought to the project by our contributors. Rather the contrary: every contribution to this volume goes outside of the framework that we have settled on in one way or another. In part, it is in surveying this diversity of approaches to value that we have arrived at a relatively focused framework. The sheer variety of approaches to value and values has persuaded us that the place to start is a foundational one, to address the world-making properties of value, singular, and law's constitutive role in the value practices that sustain or unsettle it. Some contributions share this priority for value, but may identify the salient points of its singular character differently. Other contributions remain invested in multiple values. The plurality of perspectives and considerations has been crucial to our analysis, which remains open and unfinished. In this concluding section, we revisit the chapters in brief, to summarize some of the various themes taken up throughout this volume. We do not cover every theme in every contribution, but selectively highlight some of the diverse issues and debates that they have brought to this project. For this purpose, we have broken up this overview into subsections defined by the scale and subject of our contributors' interventions, addressing systems, institutions, techniques, technologies and ecologies.

D.1 Systems

Gunther Teubner works in the register of Luhmannian systems theory, which he has been instrumental in developing for legal studies. He focuses on the production of surplus value as the central feature of any subsystem of a functionally differentiated society – legal, economic, political, etc. In doing so, Teubner observes the driving force of capitalism at work across social systems: capitalism thus serves as an overall frame for the chapter, but the analysis into surplus value production and its discontents is decentred. In this vein, there is a key debate between Teubner and the chapter by Klaus Kempter. For both, capitalism is the frame, but for Kempter, surplus value remains centred on commodity production per se, whereas for Teubner, surplus value takes on distinct characteristics in each function system. In short, every function system must produce a surplus value central to its own operation in the medium of its communication: in politics, policy decisions must produce a surplus of political power; in law, legal decisions must produce a surplus of juridical authority. The surplus is that measure of power or authority (in the cases of politics and

law, respectively) surpassing what is necessary to give effect to the decision in question, and so can be generalized and drawn on to reproduce and grow the system into the future. Significantly, Teubner takes pains to demonstrate that function system surplus values are institutional artefacts, not matters of individual motivation. Thus, his chapter, like the others in this volume, addresses the problematics of value production as relational phenomena. But Teubner specifies his programme with a tight focus on the communication medium and no other systemic "values". Identifying the surplus value in a legal decision, for example, requires separating out that part of the decision dedicated to deciding the particular case, from that part of the decision which can be drawn on to reproduce the legal authority for decision making. Teubner suggests that the rigorous focus on system-specific practices also makes addressing and regulating them more feasible. And this is his goal. Surplus values are engines of autopoietic reproduction; as such, their productive capacities tip consistently into colonial, pathological extension. Against these constitutive tendencies, Teubner proposes constitutional limitations.

Kempter's chapter stands in contrast, and enters into an express debate with Teubner. Their fundamental disagreement over the uniformity (or not) of surplus value across social systems leads to stark disagreement over how to address its discontents. Where Teubner proposes constitutional limitations, Kempter proposes revolutionary disavowal. Kempter relies on *Wertkritik*, a variant of Marxian critique principally associated with Robert Kurz, for his analysis. Following *Wertkritik*, the constitution of value in capitalist society is always coercive at its root. Kempter's critique is at once broad and narrow, expressly totalizing in scope while singularly organized around the fetishization of commodities. In this sense, Kempter's *Wertkritik* distinguishes itself from traditional Marxism, rejecting a progressive history vested in the proletariat, observing instead a pervasive alienation. In this condition, human agency is forfeit before the thing that capitalism installs as the automatic subject of society, namely, the need for ever more surplus value. Under capitalism, people uniformly cede the capacity to determine their own values socially; instead, value is determined by the self-valorizing exigencies of the automatic subject. This systemic condition accounts, following Kempter, for the ubiquity of the term value. All of the various uses of "value" are evidence of social spheres colonized and made legible to the automatic subject of capitalism. Whereas Teubner insists on the distinctions of surplus value as it manifests in the communication media of diverse function systems, Kempter observes an invasive and homogenizing force: "the market", as the elaboration of commodity-valorizing processes. This expansive systemic perspective puts Kempter in dialogue with the chapters by Desan and Chadwick, because the homogenizing force of capitalist value has a singular measure, namely money. As with Desan and Chadwick, money is no neutral technology – but whereas Desan points to the non-neutral character of money as a provision of

credit, and Chadwick focuses on the relative constraints of floating currencies specifically in the foreign exchange market, Kempter identifies money as the essential keystone of fetishistic commodity valorization. The state occupies an important role in this context, existing in "polar complementary" relation to the market, in tension but not autonomous. Regulation, in this situation, is never merely for the market, but never independent of it, either. On this conflicted basis, Kempter observes a mounting irrationality driven by the ineluctable tension between the two poles of state and market. The totalizing nature of Kempter's critique and its radical implications raise a question in our project: what scale of transformation, and how far reaching, will be adequate to avert the worst discontents of capitalist value production?

Christine Schwöbel-Patel specifies the concern with capitalist value production differently, focusing on imperial dimensions of rentier capitalism elevated to a systemic mode of international relations. Using the example of the interest expressed by former US president Donald Trump to purchase Greenland, Schwöbel-Patel observes a transformation of the nation state into real-estate. Property value is a principal value in this context, extending to ownership of natural resources, but so are the values of branding and select services, for instance tourist-related. Across these several values, the connecting thread is the way in which nation states have become objects and instruments of rent-seeking enterprises, and, likewise, the ways in which nation states have become rent-seeking enterprises in themselves. By focusing on Greenland, Schwöbel-Patel also highlights the colonial dimension of expansive capitalist dynamics and the ongoing subjection of indigenous peoples. She highlights several international legal regimes implicated in the production and reproduction of value for rentier capitalism as a vector of international relations, such as international investment law, laws governing resource extraction, and fundamental principles of sovereignty, at least insofar as they are deployed to limit possibilities for self-determination.

D.2 Institutions

Clair Quentin's chapter addresses the milieus (theoretical, discursive, material) in which legal policy – specifically international corporate tax policy – becomes institutional common sense. Quentin tells a polemical story in which a conceptual understanding of value moves progressively farther away from a grounding in labour. Those moves had material prompts: the flight of capital away from industrial centres in the second half of the 20th century, the rise of information technologies as consumer goods at the end of the 20th and into the 21st century, and finally the rise of platform economies dominated by the likes of Facebook, Amazon, Google, etc., in the second decade of the 21st century. This timeline of material conditions informs a historicist insight, namely, that "the political pressure to extend

the boundaries of what value can do as a concept is, as already intimated, a historically contingent one".[62] The broad material conditions just listed are supplemented in Quentin's account with attention to professional networks where the material conditions would have been debated for policy purposes: namely, in Paris and London, in the social and professional circles around the Organization for Economic Cooperation and Development. Quentin observes a funny thing arguably to have happened in those circles, namely that a strand of Marxian theory, postoperaismo (and its legacy in works such as Hardt and Negri's *Empire*) became a bona fide source of knowledge to address the changed conditions of valuation encountered at the moment of financial crisis at the end of the 2000s. Quentin describes the consequences, however: that the making of a world organized around a mutable notion of value ultimately was only practically available to economic actors and policy-makers in the Global North, thereby supporting the sustained immiseration of the Global South.

Jamee K. Moudud's contribution takes aim at the legal disposition of the business firm, as a site of capitalist investment and value production. Following Moudud's analysis, the firm functions today as part of a neoclassical economic regime that generates an ever-growing condition of precarity for workers around the globe. Moudud's investigation of value production in this context is squarely directed at surplus value production, and the social, legal and economic conditions that enable it. While Moudud's chapter goes forward largely on the terrain of economic theory, it calls for methods suited to the examination of legal techniques: Moudud's analysis "requires one to recognize the sociolegal nature of the business enterprise and the fact that all income-earning capital assets have to be legally-coded".[63] Further, in line with Muniesa and Marzal (as well as Dehm), Moudud's analytical appreciation of law's constitutive role "also entails an understanding of the metrics of profitability that have driven value creation over the past several decades".[64] Moudud pushes these observations in the direction of law and political economy, an orientation which he shares with Desan and Chadwick, who focus on money and monetary policy. So is a concern for distributional effects, insofar as Moudud's "framework provides an understanding of how the legal and political foundations of the economy structure distributional struggles between capital and labor and non-labor business costs".[65] Throughout, Moudud relies on legal realism to locate value in the practical interactions of lawyers, economists and policy-makers, interactions that have served to concentrate power in the hands of a few, while multiplying precarity among many. Thus, Moudud's contribution would get

62 Quentin in this volume, at 89.
63 Moudud in this volume, at 111.
64 Ibid.
65 Ibid. at 112.

"beyond mechanical demand-stimulus policies … as taught in macroeconomics" by practically interrogating "power relations within the economy", in order to make clear "how they could be restructured".[66] This argument, it bears noting, places no small faith in the state and its potential to restructure economic relations and the distribution of powers among them, a faith not exactly shared by many of the other contributors to this volume.

Christine Desan's chapter articulates a credit theory of money, and in the process argues that exchange itself is constitutive of value, and that money creates the commensurability that enables economic exchange, thus making money a key technology in the production of value. In this sense, Desan's chapter problematizes value (singular). Her credit theory of money begins, like Moudud's analysis of the firm, with an argument against neoclassical economics, in which "a jumble of accounts inconsistently theorize money's ability to capture and compare value".[67] Instead, Desan demonstrates the relative coherence of money not as the carrier of a value determined by price and preference, but as a political technology to determine and produce value. In this sense, Desan's chapter foregrounds a temporal dimension that is at work in several chapters, but which is especially clear here, for instance when she writes that "if money creates commensurability, our preferences as expressed in the market depend on money rather than preceding it".[68] Several things follow from these observations, including the observation that the technology of money determines value in the act of distribution: "Money as a credit operates by creating capacity as a relative resource. The process of money's dissemination articulates value in that unit".[69] This makes the legal construction of money a crucial stage in the social determination of value and its distribution: "as a condition inherent to its construction, money carries value differentially to participants, those who are graced with credit and those who are not".[70] Temporal logic is also at work insofar as the parties that receive money-as-credit first are privileged with an ability to determine prices. The take-away directs considerable responsibility to the design and deployment of the technology: "according to the way money is created—definitionally we might say—individuals will not be equally situated in the process that generates prices", and so will not be equal participants in the determination and production of values, or their enjoyment.[71] The responsibility, however, is also an opportunity, because if money is never neutral and always selective by design, then it might also be redesigned to remedy value inequalities.

66 Ibid. at 133.
67 Desan in this volume, at 134.
68 Ibid. at 134.
69 Ibid. at 135.
70 Ibid. at 134.
71 Ibid. at 149.

Anna Chadwick develops on themes introduced by Desan, moving the examination of money to the level of international exchange and transnational law. She focuses on the creation of credit money denominated in the US dollar outside the US jurisdiction and the foreign exchange market to reveal the difficulties and repercussions for institutional redesign that aims at strengthening monetary sovereignty. In doing so, she deploys observations of money as a political and legal technology to problematize the focus on knowledge regimes evident in other contributions to this volume: "The corollary of the emphasis placed on the generative powers of monetary design is the implication that changing how money is conceptualised and, therefore, governed could impact on wider processes of value production".[72] Quentin also comes to mind here, for the complementary demonstration of how changing conceptualizations may ultimately be more likely to serve and sustain imperial interests rather than achieve more equitable global redistributions of value. Moreover, by examining the construction of money in the transnational context of foreign exchange and credit creation, she decentres money as a technology of value. Instead, the design of money as Chadwick describes it produces a technology in a transnational assemblage of like technologies, the capacities of any one money being relative to the capacities exercised by the others. Likewise, in this transnational context, the redesign of monetary policy will be subject to contestation or exploitation by a diverse variety of powerful private actors entangled with the system. Thus, the foreign exchange market constrains the ability of the public bodies responsible for monetary policy to determine, produce and distribute value. That constraint, however, is not evenly distributed – the US dollar is relatively less constrained than other currencies, and so US monetary policy operates as a relative constraint on other monetary policies. Likewise, by showing the constraints that the foreign exchange market imposes on the capacity of money to determine, produce and distribute value, Chadwick exposes limitations on the legal and political possibilities available for transformative change, for instance as suggested by Desan in her chapter.

D.3 Techniques

Fabian Muniesa looks at legal technique as a matter of vernacular, attending to "the form of dispositions, measures and rules that determine what should be done and how".[73] Focusing on financial valuation practices, Muniesa's chapter is "less about understanding the social logic and effects of legal opinions, and more about comprehending the instituting force of juristic artifice", which includes a combination of legal forms and techniques.[74] To comprehend that

72 Chadwick in this volume, at 152.
73 Muniesa in this volume, at 172.
74 Ibid. at 169.

instituting (or constitutive) force, Muniesa "takes up operations of the law in an anthropological register, to examine the performative properties of juristic artifice for the capacity to constitute value".[75] Notably, Muniesa does not develop an immanent critique of law's logic, nor does he measure law's effects against a given standard. Instead, he examines the world-making character of legal practices. He analyzes legal practices involved in financial valuation as "part of the internal justificatory repertoire of a capitalistic worldview".[76] For this purpose, Muniesa adopts a Foucauldian method, to observe law's participation in regimes of truth and veridiction, regimes that determine what will be recognized and recognizable as sensible participation in the discourses of the field. Struggles over value, in this context, are "controlled by a regime of representational truth", meaning that competing values will be acknowledged and ordered according to discursive conditions that make social and material phenomena knowable according to something like common sense or shared notions about how things in the world are or should be. Muniesa thus adopts an anthropological analysis of legal practice "to clarify the type of order that such a regime of representational truth serves".[77] The purpose is not to expose the shortcomings of legal practices for financial valuation according to pre-existing logics, whether legal, moral or otherwise. Muniesa aims instead at "pressuring the conditions in which concepts can or cannot make sense and thus operate".[78] In this objective, Muniesa's anthropological attention to legal techniques dovetails closely with our aim to problematize law's participation in the conditions by which value is made real.

Toni Marzal's contribution, concerning legal techniques involved in dispute settlement at the stage of quantifying damages, complements Muniesa's attention to legal vernacular, and shares the aim of interrogating the conditions in which concepts can or cannot make sense and thus operate. Focusing on the valuation of assets in Investor-State Dispute Settlement (ISDS) proceedings at the stage of determining damages, Marzal observes the ways in which what was once a hotly contested area of dispute, with political stakes organized around a fault line between the Global South and North, was transformed seemingly overnight into a matter of technical detail favouring investors suing states for breaches of investment law. Marzal's genealogical tracing of shifts in the professional vernacular demonstrates how a divisive and controversial question of law was replaced with something approaching "a principle of natural law", "truly universal", "non-ideological", and a matter of "fundamental right".[79] This switch was effected when a mainstream among practitioners began to

75 Ibid. at 169.
76 Ibid. at 170.
77 Ibid. at 171.
78 Ibid. at 172.
79 Marzal in this volume, at 184.

reformulate contests over the value of an investment as matters of economic fact, determined by popular formulas with ready acronyms like fair market value (FMV) and discounted cash flow (DCF).[80] And while valuation judgments remain central to ISDS, they are today treated as closed questions of technical complexity, rather than open controversies of law and equity. As a result, damages run to billions of euros, sometimes amounting to substantial shares of a respondent nation's domestic economic product. In this way, legal practice participates in world-making through determinations of value, but sublimates the consequential political stakes into the vernacular of specialized technique. In closing, however, Marzal optimistically supposes that the world-making achieved with technical practices in legal determinations of value also substantiates the possibility of alternatives. In other words, he supposes that the radical change in favour of investors can be reversed in favour of host states.

Florian Hoffmann's contribution shifts to a different discursive space, organized around a complex entanglement between values and "rights talk", in which human rights carry and construct values, even as there may be a relatively independent value (however ambivalent) to rights.[81] Hoffmann leaves the genealogy of the space to others, observing that human rights "occupy a privileged discursive position",[82] and focuses on the work that is possible from within this discursive situation today. Hoffmann acknowledges and affirms critiques (principally Marxian and from critical theory) directed at human rights, all of which are tied to the complex relationships between human rights and value production, but nonetheless Hoffmann also investigates the possibilities for redemptive practice afforded by human rights' privileged discursive position. The critiques circle around three main dilemmas: one, that rights are participants in the production of social harms like inequality; two, that addressing social harms with rights has the effect of suppressing political action; and three, that by participating in the production of inequalities, while suppressing political responses, rights contribute to the stabilization of a dominant system of value production – namely a liberal, capitalist one – and the social harms that are part of its organization. Hoffmann gives these critiques a sympathetic airing, but nonetheless insists that human rights can be exploited despite their entanglement with, or complicity in, capitalist relations: while rights may be "enactments of capitalist political economy, … they [nonetheless] are capable of irritating 'the system' despite and beyond their function".[83] He further points to their aspirational role in sustaining visions of a shared space of concrete utopias, thus as participants in discourses for transformative politics today.

80 Marzal in this volume, at 189.
81 Hoffmann in this volume, at 199.
82 Ibid. at 201.
83 Ibid. at 213.

D.4 Technologies

Outi Korhonen and Juho Rantala take up value production and money in a speculative register, exploring possibilities associated with blockchain innovations. They propose to do this by taking seriously the revolutionary claims sometimes associated with cryptocurrencies. The permissionless, decentralized possibilities attributed to blockchain technologies open for Korhonen and Rantala a future path away from the centripetal forces of banks and international institutions. Banks and international institutions, in their chapter, perpetuate the consolidation of power by and for narrow classes of elites. Cryptocurrencies, by contrast, support a possibility for transindividuation, a notion that Korhonen and Rantala adopt from Gilbert Simondon, meaning something like a new way of being in which individual becoming is supported by a proper social technology for value production, one predicated on decentralized relations that are not dominated under law by any centralized, hierarchically determined institution like a bank. Korhonen and Rantala recognize some of the criticisms commonly directed at cryptocurrencies, like the extreme and wasteful energy consumption that they incentivize, or a track record blemished by popular use of cryptocurrencies as investment vehicles and the collusion of powerful actors to overcome decentralization. Against these drawbacks, they point to a diversity of aspirational goals associated with various cryptocurrency initiatives, using the ecologically conscious constitution of the SEEDS cryptocurrency as an example.

Dimitri Van Den Meerssche and Geoff Gordon look at different sociotechnical systems, focusing on AI technologies in governmental ecologies. They open with an observation of ubiquitous references to democratic values in policy discourses addressing computational technologies. But they note a disjunction between these representations of democratic values and the actual use and treatment of computational technologies in governance routines. They aim, in this light, to assess ways in which AI technologies may be altering value practices in governmental contexts. They identify two vectors of change, temporal and informational, which together suggest a distinct mode of governance, which they refer to as operadiction. To explain operadiction, which they propose as an ideal-type simplification, they offer two points of comparison, with what they call a classical regime and a regime of veridiction. The classical regime operates according to a fixed goal; the veridiction regime dispenses with fixed goals, to operate instead according to truth conditions allowing for multiple possible objectives. Operadiction, in turn, dispenses with comparable truth conditions. Relying on neural network models and subsymbolic logics, operadiction works on the basis of reiterative correlation of data points for patterns immanent in the field of its operation, rather than satisfaction of any external truth conditions. Consequently, the values that operadiction puts in play are unstable things, as instantiated by data that is exploitable on a recombinant and reiterative basis, over and over. On this basis, operadiction appears

not to support or produce any one objective in practice, but is a mode of governance that works in constant suspension, constantly reconstructing a present for governmental intervention on the basis of transient correlations, according to patterns immanent in flows of information as computational technologies like AI are trained to read them. In this suspension, the operadiction regime attains to optimization rather than closure (per a classical regime) or compliance (per a veridiction regime), and optimization is arguably an extension of efficiency as associated with capitalist value practices, but now taking on arguably novel characteristics. To suppress threats to its optimization function, the operadiction regime deploys risk calculations based on the same pattern recognition processes.

D.5 Ecologies

Julia Dehm writes at an intersection of resource extraction and international investment law. Her chapter overlaps in interesting ways with several others: she overlaps with Kempter's chapter when she investigates why political processes seem uniformly incapable of addressing impending ecological disaster. But she overlaps with Teubner when she points to legal interventions that might establish a renewed constitution for sustainable values. Crucial to this project is an understanding of value as a vector for the co-articulation of individuals and social collectives. Dehm is perhaps clearest among the authors in this collection regarding the relational character of value-productive processes, which she explains by reference to a variety of past and present thinkers occupied with questions of value. Like Schwöbel-Patel, Dehm locates an architectural substrate of legally constituted value production in the ways in which law facilitates the domination of labour by capital. From that foundation, a profoundly disempowering system of value production arises. She investigates the current system with two brief studies, one focused on the so-called Green Economy, the other focused on international investment law, and the doctrinal production of so-called stranded assets. In both studies, she traces the development of legal instruments designed to make ecological disaster legible to economic actors. Notably, a key element of Dehm's analysis includes the recognition that some of these legal innovations were intended to support environmental protections, especially in the case of the Green Economy. But the legal architecture that supports environmental protection by making it legible to economic actors has meant making it legible according to the values of economic actors. For that reason, in the world constituted by such legal regimes, ecological flourishing remains secondary to values of efficiency and growth, and so while environmental catastrophe may be marginally slowed by well-meaning initiatives under law, it proceeds all the same – and hardly slowly.

Oliver Schlaudt's chapter approaches value as an economic concept through the theory of unequal exchange. Like in other chapters – by Kempter, Schwöbel-Patel, Marzal and Muniesa – the economic notion of value in

his chapter is an imperial one. Like Moudud, Chadwick, Desan and others, Schlaudt focuses specifically on the notion of value at the root of neoclassical economics, expressed in price as marginal utility. Schlaudt identifies three main critiques of the price mechanism: the critique of national accounting methods (critiqued for leaving out things relevant to well-being that are not traded on markets), the socialist calculation critique (which proposes means other than price for rational decision making applied to markets), and the critique of unequal exchange, the focus of the chapter, which homes in on structural conditions that benefit rich states at the expense of poorer states in international relations. The critique of unequal exchange has coalesced around ecological terms, which puts Schlaudt's chapter in close conversation with Dehm as well as Marzal, but there is also correspondence with Quentin's and Schwöbel-Patel's chapters, for observing the ways in which international economic relations systematically benefit powerful states. But rather than focus on overtly coercive neocolonial practices, e.g., by institutional or military interventions, the critique of unequal exchange focuses on the everyday function of the price mechanism as legally constituted in international exchange. In this sense, focusing on the consequences of everyday market practices, Schlaudt's contribution also maintains its connection with Chadwick's chapter. In everyday operation, the price mechanism recognizes only some value-productive processes in modes of production. Among other things, natural processes are not typically recognized as labour, and so states that enter the market with goods produced in part by natural processes are relatively disadvantaged by the value that their price will represent in practice. In short: "nature" does work to produce "natural" goods, but the extent of that work that is not facilitated by human application is not reflected in the price.

This creates a clear asymmetry, evident in the so-called "resource curse", whereby poorer states saddled with extractive industries are systematically disadvantaged in exchanges with richer ones. Not only are natural processes not recognized in the price mechanism, but neither are the environmental costs of consumption, doubly disadvantaging states in the Global South that produce resources for consumption in the Global North – here showing connection again with the debate taken up by Quentin. Crucially, Schlaudt makes clear the relationship of unequal exchange to a cosmology in which the market is a normative construct, legally backed by an idealistic notion of consent. So long as participants to a market are formally assumed to be able to refuse to transact, then the prices generated at market may in turn be assumed to be adequate and, indeed, fair. It is this cosmology that explains the rigged game in Schlaudt's title: the market is the phantasmic product of a belief system that privileges select values, formally supported under law (as the rules of the game), and operates to the consistent advantage of select classes and select states. After establishing the critique of market practices, he uses alternative accounting principles identified with "emergy" (a shortening of "embodied energy", based on "ratios of energy embodied in the goods [relative to] amounts of money spent for the

production of the goods") to demonstrate the deeply inequitable character of exchange according to mainstream market practices.[84] Schlaudt ends by pointing to alternative ways (including alternative cosmologies and legal constitutions) to identify value, for instance the UN's Human Development Index. In so doing, he also captures a goal for this project as a whole: not solely to explicate the shortcomings of legally constituted value practices today, but to point to the possibilities for new ones.

In addition to the chapters in this volume, we have also invited reflections, mentioned above in section A. Each "reflector" has offered brief comments on the basis of a unique selection of chapters. Jessie Hohmann's reflection thoughtfully explores the emotional potential of debates over value and value production, in evidence in the chapters and at points in our workshops. John D. Haskell reflects on the limits of academic inquiries into things like value, especially as structured by the institutions of academic production. Sofia Stolk, in a more expansive register, considers the additional role of imagination in the world-making work of value as constituted (in part) by law. We appreciate these reflections not least because they allow us to see our project from an informed outside. Here, in our introduction, we have offered our conclusions of an often-unruly project. Our conclusions are limited and foundational. To acknowledge the generative unruliness of everything and everyone that has brought us to our conclusions, and to acknowledge the importance of the multiplicity of projects and perspectives committed to unsettling the value practices that lead inexorably to violence, harm and immiseration, we close this volume with observations offered by valued colleagues and fellow travellers.

84 Schlaudt in this volume, at 281.

Chapter 2

The Constitution of Non-Monetary Surplus Values[1]

Gunther Teubner

A. Generalization and Respecification

A whole series of Karl Marx's receptions have sought analogy to the capitalist logic of the economy in law and in other areas of society. Max Weber had already attempted to identify equivalents to Marx's radical autonomy of the economy in the sphere of politics, and thus to maneuver the political system out of its superstructure position and into a co-original base position to the economy. With his influential metaphor of a new polytheism, Weber demonstrated successfully that modernity owes its characteristics not only to the formal rationality of capitalism but equally to a whole variety of analogously constructed formal rationalities, including the formal rationality of law.[2] Otto Kirchheimer picked up on this and described an analogous autonomization of the "machinery of law" while, at the same time, with his construct of juridification detailing its problematic society-wide expansion dynamics parallel to the economization of the world.[3] Niklas Luhmann generalized the expansion of the economy even more and identified processes of – simultaneous – politicization, juridification, scientification and medicalization of society.[4] Pashukanis conceived the legal form in analogy to Marx's commodity form with all its alienation phenomena.[5] With the construct of social capital, Bourdieu generalized Marx's concept of capital to apply it analogously as a resource of the actors competing for power in various social fields, albeit only metaphorically

1 For critique and inspiration, I would like to thank Isabel Feichtner, Geoff Gordon, Roman Guski, Jurit Kärtner and Vagios Karavas. My thanks go as well to the participants of the workshops on "The Constitution of Values" 2019/2020 in Würzburg.

2 M. Weber, *Economy and Society* (1978 [1921]), 61.

3 O. Kirchheimer, 'Zur Staatslehre des Sozialismus und Bolschewismus' in O. Kirchheimer (ed.), *Von der Weimarer Republik zum Faschismus: Die Auflösung der demokratischen Rechtsordnung* (1976 [1928]), 32–52, at 36.

4 E.g., N. Luhmann, *Theory of Society* Vol. 2 (2013), 95.

5 E.B. Pashukanis, *The General Theory of Law and Marxism* (1924); S. Buckel, *Subjektivierung und Kohäsion: Zur Rekonstruktion einer materialistischen Theorie des Rechts* (2007), 94.

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and without a sufficient theoretical elaboration.[6] Rudolf Wiethölter pushes these analogies further. He claims that the fundamental real contradiction (*Realwiderspruch*) of law is between productive forces and relations of production not of the economy, but of the law itself.[7]

My proposal follows these lines of thought but goes in a different direction. I suggest identifying equivalents to the driving force of capitalism in other areas of society, doing so with an analogy to *avaritia*, the worst of all deadly sins – equivalent to the economic profit principle itself.

B. Non-monetary Surplus Values?

The critique of capitalist society then, is no longer solely directed at surplus value compulsion within the economy. Nor is it only challenging the increasing economization of social worlds, i.e., the expansion, pushed by neo-liberal fanatics, of the economic profit principle into non-economic areas of society, which threatens all social activities to produce monetary profit or else be done away with completely. Rather, a more profound critique would have to deal with a different kind of society-wide expansion of the capitalist logic. My thesis is: not only the economy but also other function systems force each of their operations to generate a specific surplus value – but now explicitly non-monetary – beyond their immediate production of meaning.

In politics, non-monetary surplus value means that each policy-decision needs to generate simultaneously a surplus of political power for future use. In science, successful research in the various subject areas, which is officially oriented toward the production of knowledge, is unofficially but effectively oriented toward maximizing reputation. In education, besides the specific skills of the person to be educated, a surplus of the medium of education, i.e., success in educational selection needs always to be produced in the form of institutionalized proofs of qualification. In law, the courts are under pressure to create a normative surplus value, i.e., a specific persuasive authority that can be generalized for the future, over and above the concrete decision in a dispute. Legal acts need to reproduce, and if possible to increase juridical authority. And in this surplus of law, too, exploitation is at play – namely of those people who are actually interested merely in the success of their concrete legal dispute but who nevertheless have to muster the extra energy that generates new resources of normativity for future use that emerge from their dispute,[8] and, more generally, that enables the law to reproduce and even increase its capacity

6 P. Bourdieu, '*The Forms of Capital*', (1986), 46.

7 R. Wiethölter, 'Der Reform-Planer', in D. Hart, F. Müntefering and F.-W. Steinmeier (eds.), *Wissenschaft, Verwaltung und Politik als Beruf* (2015), 21–30, at 30.

8 N. Luhmann, 'The Unity of the Legal System', in G. Teubner (ed.), *Autopoietic Law: A New Approach to Law and Society* (1988), 12, at 25.

to create acceptance in law and society. Most drastic is Christie's formula of law as expropriation of conflict.[9] Law is systematically unable to understand social conflicts and to resolve them adequately. The reason is that law's formalizing violence via legal procedures and conceptualizations expropriates conflicts from their proper context of social and moral understandings of the parties. The new formula is: expropriate the expropriators! Give the conflict back to the people! With this suggestive slogan, Christie expresses the widespread uneasiness about the law's surplus value expansion: non-responsive, inhuman, irrational, (non-em)pathetic.

"The production of surplus-value, or the making of profits (*Plusmacherei*), is the absolute law of this (capitalist) mode of production"[10] – Karl Marx's *ipsissima verba* are no longer restricted to the economy, but also apply to law and other areas of society. It is in this specific sense that capitalist societies are surplus-driven societies, in a more universal and at the same time more particularistic sense than in the traditional critique of capitalism.

In the language of systems theory:[11] the orientation of a function system – politics, science, economy, law, art, education, religion – toward its own surplus value means that there is constant pressure on each operation to regenerate and to augment its medium of communication, which only in the case of the economy is monetary profit beyond the actual result of production. It is the surplus of the system's own communication medium – power, truth/reputation, money, normativity, style, education/selection, faith – which is produced via the reflexive application of operations to further those operations. In this reflexive process, not only are the usual follow-up operations made possible but at the same time, each one's own ability to operate is restored or even increased.[12] Moreover, if this is established as a criterion of self-regulation, then the various surplus pressures become the driving dynamics of the expansion imperatives in modern society.

9 N. Christie, 'Conflicts as Property', (1977), 17 *The British Journal of Criminology*, 1.

10 K. Marx, *Capital: A Critique of Political Economy* Vol. 1 (2004 [1867]), ch. XXIII, 1.

11 Not by chance systems theory has a certain attraction to the protagonists of critical legal theory. Rudolf Wiethölter and Emilios Christodoulidis, two prominent speakers of critical systems theory, show elective affinities to Luhmann's theory, R. Wiethölter, 'Just-ifications of a Law of Society', in O. Perez and G. Teubner (eds.), *Paradoxes and Inconsistencies in the Law* (2005), 65; E.A. Christodoulidis, *The Redress of Law: Globalisation, Constitutionalism and Market Capture* (2021); E.A. Christodoulidis, 'On the Politics of Societal Constitutionalism', (2013) 20 *Indiana Journal of Global Legal Studies* 629. In a parallel fashion Bob Jessop makes use of six central concepts of systems theory to compensate for deficiencies of contemporary Marxist theories of society, B. Jessop, 'The Relevance of Luhmann's Systems Theory and of Laclau and Mouffe's Discourse Analysis to the Elaboration Of Marx's State Theory', (2014), *ResearchGate* www.researchgate.net/publication/318543419_The_relevance_of_Luhmann%27s_systems_theory_and_of_Laclau_and_Mouffe%27s_discourse_analysis_to_the_elaboration_of_Marx%27s_state_theory.

12 This generalizes Luhmann's theses on the profit principle of the economy for other function systems, N. Luhmann, *Die Wirtschaft der Gesellschaft* (1988), 55.

It is not exactly system maintenance that surplus is directed to, nor generally strengthening all kinds of system structures, institutions, norms, programs, values, etc. The orientation of surplus production is exclusively to reproduce the capacities of the communication medium. But it is this one-sided concentration that creates the "capitalist" hyper-dynamics. In particular, the surplus of a systemic medium is by no means to be confused with increasing performance, according to the motto "Higher, further, faster". Focusing on maximizing output misses the point. Instead, focusing on each operation that needs to regenerate its own medium is required. Defining social surplus value as relating exclusively to the communication medium distinguishes a rigorous systemic concept from other attempts, which describe all kinds of byproducts of communication as social surplus value.[13] Such an inflated use of surplus value would mean to use it only metaphorically and would result in a loss of its theory potential. The decisive difference is whether economic action is oriented on production output or on monetary profit, whether political action concentrates on policy results or on power gains, whether scholarly activities look primarily to scientific results or to increasing reputation, whether education is geared toward specific skills or toward selection, and judicial decisions to conflict resolution or to regenerating juridical authority. Of course, usually, the two orientations come in pairs, but the difference between them, between increasing output and increasing surplus, is what matters.

C. Surplus and Communication Medium

But why communication media? Why is it so important to increase the surplus of the system's communication medium? It is by no means immediately obvious that communication media, in particular, should be the exclusive target for the ubiquitous surplus pressures, which are felt within various function systems. In a first approximation, communication media are nothing but a special language for different problem areas and for different professions, for lawyers, doctors, managers, technicians, scientists. And their language is regenerated in the normal course of communication, but there is no special motivational pressure for its augmentation, no particular desire for a linguistic surplus. Historically, with increasing social differentiation it has become a major problem to convey the results of specialized communication, particularly when they contradict immediate plausibility. Even refining the traditional persuasion techniques of eloquence and rhetoric has exhausted its potential. Why should you accept highly improbable assertions of learned scholars? Why obey inconvenient commands of self-proclaimed leaders? Why listen to educators

13 Usually associated with positive social policy ambitions, e.g., M.H. Moore, *Recognizing Public Value* (2013).

who want to teach you a lesson? Why accept claims to exclusive ownership? Why follow rules that are not in your self-interest?

The answer is: the special contribution of communication media in their area of application consists precisely in creating the motives(!) for accepting a communication, overcoming outright resistance. This is where the persuasive – even coercive – power of communication media comes in.[14] They have the "function of making the acceptance of a communication expectable in cases in which rejection is likely".[15] Inconvenient or bothersome communicative offers become successful as soon as a specialized communication medium drastically furthers the chances for their acceptance: seduction of money for handing over goods and services, power threats for obedience to commands, theoretical or empirical proof for implausible assertions, the pressure of credits and exams for accepting learning offers, normative persuasion for legal judgments. Communication media are success-media, in contrast to mere dissemination-media (orality, writing, printing, digitality).[16] Success-media make sure that a communicative offer is accepted. Once accepted, the offer becomes the premise of further communication without being questioned anymore. This is a case of successful absorption of uncertainty. From this moment on it is no longer the original communication, but its acceptance, that counts as information and so on and so on. In this way, whole chains of successful communications become a reality that is based on the acceptance of the former communicative offer. Insofar as success-media exert an almost irresistible motivational force, they work as the driving motor for the enormous internal dynamics of function systems.

And the turbocharger for this motor is surplus value orientation. Restoring and augmenting the motivational force of the specialized communication medium accelerates immensely the internal dynamics – this is the prominent role of surplus production in different social domains. Surplus value is responsible for uncanny pressures for internal growth and external expansion, which each of the function systems develops endogenously. More precisely, by applying reflexively a communication medium upon itself, surplus production restores and augments the motivational power to accept communication. The primary motivation, which increases the chances for acceptance, is

14 Foucault's discourse/power syndrome is not far away from Luhmann's theory of communication media and their motivating power, M. Foucault, *Discipline and Punish* (1979), 135. But Foucault conflates the concept of power to such a degree that the differences of the various communication media and their specific motivational effects get lost. Moreover, Foucault's aggregation of diverse disciplinary powers to the bio-power of the state ends up in a state-centrism that he initially wanted to avoid.

15 N. Luhmann, *Theory of Society* Vol. 1 (2012), 316.

16 D. Baecker, 'Sociology of Media', in I. Baxmann, T. Beyes and C. Pias (eds.), *Social Media – New Masses* (2016), 151–71. For historical correlations between dissemination-media and legal structures, T. Vesting, *Legal Theory and the Media of Law* (2018).

overlaid by a secondary motivation, which augments the primary motivation. When a contribution to the function of the social system is generated beyond the immediate activity and its meaning, this counts as a medial surplus value, which acts as a criterion of self-regulation, as a recursive principle of the self-legitimation of systemic operations.

D. Individual vs. Institutional Surplus Orientation

To avoid misunderstanding, it should be emphasized that the motivational power of communication media is not directed toward influencing the mental states of individuals. Instead, it forms binding social expectations in relation to social positions (persons, organizations, networks), i.e., semantic constructs of communication, that get by with the mere assumption, with the mere supposition, almost with the fiction – not the actual realization – of corresponding states of individual consciousness. Individual greed needs to be sharply distinguished from social surplus orientation. What really motivates individual people in their actions is not the primary target of socially established surplus orientation. Communicative media form social motives and have only indirect effects on individual intrapsychic processes. *Homo oeconomicus*, *politicus*, *juridicus*, *scientificus*, *educativus* – these *homunculi* are not to be identified with real people, nor are they mere constructs of the social sciences. Instead, they are social institutions, constructed by the social practices themselves.[17] This strict separation of communicative processes in society and psychic processes in individual consciousness is crucial for understanding the dynamics of surplus orientation.[18] The starting point is the strict division of psychic from social processes, both of which are accountable for the creation of meaning in their own right. This leads to a typical duplication of phenomena, which hitherto had been understood only psychologically. And the same is true for the profit motive in the economy, and for the other surplus motives in society. Social processes are oriented toward surplus value production, as cool and detached calculations of success, which measure achievement, whether or not they are accompanied by individual greed for power, money, career or reputation.

However, this does not exclude an elective affinity between psychic processes and social structures, between individual greed and social surplus pressures, rather it brings the affinity to the fore in a relation of mutual reenforcement. After all, hedge funds fascinate and attract greedy personalities. Lawyers are said to be authoritarian personalities … communication media

17 More on this argument against both psychological and economic theories of the rational actor and replacing them by a sociological reformulation, M. Hutter and G. Teubner, '*Homo Oeconomicus* and *Homo Juridicus*: Communicative Fictions?', in T. Baums, K. Hopt and N. Horn (eds.), *Corporations, Capital Markets and Business in the Law: Liber Amicorum Richard M. Buxbaum* (2000), 569.

18 For an extensive treatment of the separation of psychic and social systems and their interrelations, H.-G. Moeller, *Luhmann Explained, from Souls to Systems* (2012), 79.

produce, only indirectly, impulses for consciousness, but when they fire constantly, they force the single individual in Max Weber's "iron cage of the slavery of the future" which is understood here not only as the repressive modern bureaucracy but as the overwhelming motivational pressure to produce surplus value. The motivational force of the various communication media

> always striving for its own increase, in this view is the 'automatic subject' of society,[19] constituted by human beings by their daily actions, but at the same time subjecting them totally and making them mere functionaries of an anonymous, unconscious process that is out of their control.[20]

E. Medial Substrate, Medial Form, Medial Competence

It needs to be stressed that surplus pressures are directly oriented toward decentralized social positions (persons, organizations, or networks) within a social system – and not upon the social system as a whole. This distinction clarifies the exact focus of surplus orientation. While the economy-wide reproduction of money is a matter of the central banks' decisions, which are explicitly not profit-oriented, profit orientation is needed for the single economic enterprise to reproduce and increase its ability to pay. The enterprise must regenerate the money medium's motivational force for its own use. Since each payment reduces the amount of money attributed to singular economic actors it is a question of survival for them to focus on profitability. Similarly, when political actors realize their power threats, the power potential, which has been attributed to them, is liquidated, thus they need to regenerate and augment their positional power. In science, the strategy for individual researchers and research institutions is to augment their own reputation, otherwise, it will be fading. In education, the pedagogical authority of the educator is contingent upon the augmentation of the single person's knowledge and is reinforced by a series of educational certificates. And in law, singular courts are under pressure to regenerate juridical authority in their decisions.

If it is true that surplus production is expected from individual social positions, which capacity then is to be augmented? What is the proverbial talent one should invest to raise one's yield?[21] The answer can be found by looking

19 Marx, *supra* note 10, ch. IV, 1.

20 The quote stems from K. Kempter, in this volume, at 50–51.

21 In the biblical parable of the talents, Mt 25, 14–30 and Lk 19, 12–27, arguably an early version of a generalized surplus value theory, the transfer of meaning takes place not as usually understood from the medium of money to the manifold talents of people, but to faith as the communication medium of religion.

at the details of media theory. It is the difference in medium/form, more precisely the difference between the medial substrate and its medial forms that is at work here.[22] The general term "medium" is shorthand for circular processes taking place between three components, (1) the medial substrate, (2) the medial form, and (3) the medial competence of each social position. (1) The medial substrate is the specialized language of a function system (money, power, truth, biography, normativity) the motivational force of which is the condition for communicative success. (2) This indeterminate language is condensed by single operations in diverse but determinate medial forms (payment, command, cognition, knowledge, obligation) – the bearers of motivational force. (3) Medial competence (ability to pay, power potential, scholarly authority/reputation, knowledge and skills acquired in education, normative authority) is ascribed to a social position as its capacity to mobilize medial forms.

Here comes an important distinction: while the medial substrate is regenerating in the course of communication, medial competence is consummated in each operation of the medial form. Thus, again and again, the medial competence of a social position needs at least to be regenerated as a by-product of its operations.[23] Otherwise, the researchers' reputation will fade, the power of political parties or individual politicians will be liquidated, the courts' normative authority delegitimated, the economic actors' money spent, the personal knowledge petrified. And here is the point where surplus value comes in. Its production regenerates and augments the medial competence for single social positions. Various substantial values of operations in different social systems are calculated in terms of their surplus value and are redirected toward producing an actual surplus. *Homo oeconomicus*, *politicus*, *juridicus*, *educativus*, *scientificus* – while producing goods and services, policies, conflict resolutions, pedagogical impulses, or research results, they all are at the same time under an obligation to increase their own medial competence.

What about the politically explosive aspects of economic profit and other surplus values – exploitation and expropriation? Are they lost in this abstract conceptualization? Not at all, in many social fields, exploitation is a brutal consequence of surplus production. But it reappears now in different forms. Not exploitation of men by men is at stake, rather systemic exploitation. Social systems exploit human beings and systems exploit systems. In its various forms, systemic surplus extraction exploits human energies – bodily, psychic and social – by compelling a redirection from the diversity of their substantive values to the one, and only one, formal value of increasing the media's motivating power.

22 Introduced by the media theory of F. Heider, 'Ding und Medium', (1926), 1 *Symposium* 109–37, for perception; further elaborated by Luhmann, *Theory of Society* Vol. I, 113, for communication in general.

23 Luhmann, *Die Wissenschaft der Gesellschaft* (1990), 197.

As for expropriation, surplus pressures do not primarily aim at skimming off surplus for private use, as in the conventional understanding of economic profit as income for workers or capitalists. It is not at all about the antagonism between public production and private appropriation; on the contrary, it is precisely about a detachment from private motives in favor of the public aspects of surplus production.[24] The aspect of expropriating the surplus that somebody else has produced has been overemphasized in the discussion of economic profit.

Whether and to what degree appropriation is involved in surplus production, depends very much on the (contingently institutionalized) attribution of surplus to one or the other social position (are the managers surplus producers which would entitle them to a fair share?). Indeed, how to distribute the surplus among different social positions is a highly contested issue, which is open to political controversy and in need of political decisions, obviously so in the economy and politics, but also in science, where attribution of authorship and immaterial property rights is a perennial political question.

Indeed, exploitation of human energies and expropriation of realized surplus values do occur at any time in various social systems, which incites moral and political condemnation of surplus value as such. But this is an overhasty judgment. Massive exploitation, frequent expropriation of surplus, and a whole series of other negative aspects should not blind us to simultaneous public good qualities of surplus values. The pressure to produce a surplus of motivational force is in substance a system-immanent "taxation" of every operation for the fulfillment of the system's function: monetary surplus in the economy for securing future needs of society,[25] normative surplus of concrete dispute adjudication in law for norm production in society, power surplus of policies as generalized resources for future political decisions, surplus knowledge for the formation of theories in science, educational surplus in the form of a series of certificates, surplus medical value of individual operations for the development of the health sector.

F. Differences in Surplus Orientation: Economy, Politics, Law, Science

Obviously, there are important differences between various surplus orientations. Different social areas are not at all necessarily homologous in their surplus orientation. A comparison demonstrates the high visibility the profit principle has in the economy, in contrast to surplus values in other social domains. To understand this difference, we again use the distinction between medial

24 Luhmann, *supra* note 12, at 56, develops this argument for the profit principle of the economy.

25 N. Luhmann, 'The Economy as a Social System', in N. Luhmann, *The Differentiation of Society* (1982), 190–225, 386–90, at 192.

substrate and medial forms. The substrates of communication media consist of loosely coupled components, while they are condensed in medial forms whose components are strictly coupled to each other.[26] The point is that this coupling differs in degrees of strictness. These variations are responsible for the differences between several forms of surplus production. Money, the medial substrate of the economy is a paradigmatic case for the very strict coupling of its medial forms. Although there are many forms of the monetary medium – commodity money, fiat money, fiduciary money, commercial bank money, coinage money, as well as several currencies, and, more recently, even varieties of digital money – the unique advantage of the economic medium/form relation is its high degree of formalization, even mathematization and digitalization. This allows for improbably high precision of surplus value calculation and for easy mutual convertibility of its various medial forms. The economic value of almost everything in the world can be formalized numerically in monetary terms which is the premise for rational calculation in the name of the one, and only one, bottom line visible everywhere – monetary profit.

In contrast, surplus value calculation in politics has a much lower level of precision and reliability, because a whole variety of medial forms is inscribed into the power medium. Power is expressed in many diverse forms which are not easily convertible into each other. And they are less formalized. Indeed, the calculation of voting results, seats in parliament, majority decisions do measure accurately the amount of power, and polling techniques, as well as popularity indices, allowing for a satisficing formalization of potential power differences. But what counts equally, if not more, in the competition for power surplus, are the relevant non-formalized power gains in the day-to-day political maneuvering as well as in long-term powershifts. Thus, the amount of power surplus can be assessed only imprecisely via educated guess, in contrast to the precise calculation of economic profit.

And in law, the surplus orientation is almost invisible. Why? One needs to remember the famous parable "Return of the Twelfth Camel" to see its contours: Three heirs of a Sheikh's fortune find it impossible to divide their late father's herd of eleven camels among them. The wise khadi resolves the conflict by lending them his own camel. Now they can divide twelve camels according to the somewhat strange proportions in their father's testament and – *miracolo*! – return the twelfth camel to the khadi.[27] The return of the khadi's camel is the very point of the parable. It symbolizes the surplus value of the law. For a successful regeneration of law's medium, the khadi must formulate his decision in such a way that the twelfth camel – the juridical authority which guarantees acceptance – is not only used to resolve the concrete case. At the

26 See the references in note 22, *supra*.

27 For various interpretations of the parable see J.-P. Dupuy, 'Totalization and Misrecognition', in P. Dumouchel (ed.), *Violence and Truth* (1988), 75.

same time, the authority of the law will be reproduced when the parties to the conflict accept the decision. This is meant by the return of the camel from the people to the khadi. When courts do not only attempt to come up with a correct and fair decision but at the same time to create a juridical surplus, they make sure that the persuasive force of juridical authority is restored and augmented. This, however, happens – and this explains why the surplus orientation is almost invisible – in a great variety of medial forms: via the threat of sanctions, via the hierarchical authority of the higher courts, via doctrinal consistency, via decisions that satisfy the needs of the conflicting parties and, last but not least, via reasons that are plausible for the broader public. Thus, in law, the condensation of medium to form occurs in so many different manifestations that the overarching surplus orientation of legal acts becomes almost indiscernible.

Even more problematic is the orientation toward surplus value in science.[28] Here, it is not its low visibility, but its questionable legitimacy that creates the problem. At first sight, science looks like an easy case for surplus production. Its communication medium is "truth", here understood as compelling certainty of the "transfer" from one communicative act to the other, which make it possible that even improbable assertions, which contradict common-sense knowledge, are accepted. Now, the surplus value would be produced in principle by increasing the refinement of theories, and empirical methods which strengthen the plausibility of research results. However, there are limits to the production of the motivational force of truth, via increasing the plausibility of concrete results of research. Heightening the methodological requirements for certainty renders plausibility into a scarce good. With growing specialization within disciplines, the numbers of colleagues who are competent to judge the scientific value of research are drastically diminishing so that for the scientific community as a whole, methodological and theoretical refinements tend to lose their force to motivate acceptance. In addition, theories and methods do not possess the capacity to guide the distribution of resources and coordinate scientific cooperation.

The way out of this dilemma is to create a surrogate for the motivational force of truth via theories and methods. It is reputation that becomes the surrogate for truth. Public opinion within the scientific community determines and distributes reputation as a means to facilitate consensus about scientific quality. Reputation serves as a symptom of truth. In this quality, reputation becomes the primary medium of communication within science. It creates the motives for accepting research results, it motivates allocation of resources, it

28 For the following see U. Schimank, 'Reputation statt Wahrheit: Verdrängt der Nebencode den Code?', (2016), 16 *Soziale Systeme* 233; N. Luhmann, 'Selbststeuerung der Wissenschaft', in N. Luhmann (ed.), *Soziologische Aufklärung 1* (1970), 232.

orients recruitment decisions, in short, it serves as a self-regulating mechanism of the scientific process.

But a surrogate remains a surrogate! The original intention, which is to judge the quality of scientific research, is replaced by reputation which orients scholarly activities toward symptoms instead of the matter itself. Reputation is only credit for truth. Moreover, reputation value has become quantifiable: numbers of publications, impact factors, citation indices, and the financial volume of grants.[29] Here, all kinds of market failures come in: mainstreaming of research due to peer reviews, ossification via citation cartels, ghost-writing, exploitation of research assistants, hierarchy abuses in collaborative research projects, falsification of data, plagiarism, suboptimal research techniques, etc. Thus, the legitimacy of reputation has always been questionable. But despite all these dysfunctionalities, reputation tests are routinely used in personal career calculations, in procedures of academic recruitment, in preselecting credible information in research, in the allocation of monetary resources.

G. Excessive Ambivalence

It should be acknowledged that the precise calibration of the many surplus pressures toward one, and only one, communicative medium in their specific context has been the basis for immense productive forces to be unleashed under conditions of functional differentiation. But not unlike the monetary profit pressure in the economy, the non-monetary surplus pressures have their ugly face. The destructive and self-destructive tendencies that Marx rightly attributed to the relentless profit maximization in the economy have multiplied in the non-monetary surplus pressures of other areas of life which are working with no less force. Their endogenous growth dynamics lead to all kinds of dysfunctionalities. Within each social system, in politics, the economy, law, science, and technology, ruthless surplus maximization becomes almost a collective addiction, i.e., the repetition and multiplication of a self-damaging social behavior despite the keen knowledge of its harmful effects.[30] And in their external relations, the systems' colonizing expansion extracts surplus value from other domains of society. Processes of global economization, politicization, scientification, juridification take place, even simultaneously, with disastrous consequences for the ecology in the broadest sense, i.e., for the natural world, for society and for individuals. Again and again, it is both, internally

29 E.g., T. Flink and D. Simon, 'Erfolg in der Wissenschaft: Von der Ambivalenz klassischer Anerkennung und neuer Leistungsmessung', (2014), 42 *Leviathan* 123.

30 On collective addiction which needs to be distinguished from individual addiction, G. Teubner, 'A Constitutional Moment? The Logics of "Hit the Bottom"', in P.F. Kjaer, G. Teubner and A. Febbrajo (eds.), *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (2011), 4, 47; P. Femia, 'Desire for Text: Bridling the Divisional Strategy of Contract', (2013), 76 *Law and Contemporary Problems* 150, at 152, 161, 165.

maximizing surplus value and externally skimming of surplus from other areas of society, with which modern society commits its mortal sins.[31]

To name, blame, and shame the most conspicuous examples: the totalitarian regimes of the 20th century realized excessive increases in the surplus value of political power and in the far-reaching politicization of other social areas (*Gleichschaltung*), which siphoned off their power surplus value. Fukushima stands for the excesses of technological surplus pressures. Dr. Mengele, who sent the results of his cruel experiments on concentration camp prisoners to the Kaiser Wilhelm Institute in Heidelberg, exemplifies the perversion of surplus pressure for scientific knowledge freed from all moral constraints. New pathologies arise from excessive medicalization, which wants to branch off a medical therapy surplus for each individual case of suffering. And digitality may be transformed from a harmless distribution medium into a dangerous success medium, when its tendencies of maximizing digital communication are mutually reinforcing two surplus pressures in the fast-growing attention economy of the internet: attention maximization and profit maximization.[32]

And in law? Excessive juridification of society results in new injustices because law seeks to extract its normative surplus from conflicts in various social systems. And it does so without due regard to the danger that human conflicts are torn out of their living context and distorted by being subjected to legal formalization. "Colonialization of the life-world" – under this dramatic heading Habermas analyzed excessive juridification which is explained here as law's exploitation of conflicts. The temptation toward total juridification stems from law's desire for surplus which is projected to society as a whole. Instead of restricting itself to the equal/unequal judgments in conflict resolution as opposed to the different requirements of political distributional justice and the recognition justice in morality, the law attempts with an acute fever of righteousness to realize a just society applying the contingency formula of juridical justice. It is just to decide the problems of the world with the help of the binary code of law – this is the *summum jus summa injuria* of functional differentiation. Such an expansionist drive can be observed in other contingency formulas as well, with that of the economy describing all the problems of the world as a question of scarcity which can be solved only by economic means, with the legitimacy formula of politics and with the limitationality formula of science. All these contingency formulas promise to produce the good society, although in fact they do nothing but extract surplus for themselves from other social sectors. "Justicialization" (this neologism is different from mere juridification!) as an attempt to bring the whole of society to justice with juridical instruments

31 On the pathological pressures of repetition and multiplication (*Steigerungszwang*) in function systems, H. Rosa and W.E. Scheuerman, *High-Speed Society: Social Acceleration, Power and Modernity*, (2009); A. Nassehi, *Muster: Theorie der digitalen Gesellschaft* (2019), 178.

32 T. Wu, 'Blind Spot: The Attention Economy and the Law', (2019), 82 *Antitrust Law Journal* 771.

is disastrous: the surplus imperialism of legal rationality, parallel to economic, political, and scientific expansionism, amounts to a unidirectional growth of juridical justice which needs to be resisted politically. The imperialism of law's surplus orientation is dangerous because it meets the human desire for a non-divisible justice. Although it is well known that this desire cannot be fulfilled in modernity, juridical justice as justice for the whole society continues to offer the false promise of salvation. It produces a dangerous mixture of unanswerable questions and hypocritical answers. Human rights ideology as the ideal of a just society – the imperialism of juridical surplus production projects the limited juridical justice onto the whole society.

H. Constitutional Problematique

At this point, at last, it becomes clear that such an excessive ambivalence of surplus values creates constitutional problems of high relevance. Since function systems themselves do not generate stop-rules which would limit their expansive dynamics, it is particularly the role of constitutions to produce limits to destructive growth tendencies.[33] But when the critique of capitalism means no longer just critique of the economic profit principle but of ubiquitous surplus production, how should constitutions deal with its excessive ambivalence? Surplus restrictions? Changes to profit distribution? Collectivization of the non-monetary generation of profit? If it is true that the compulsion to siphon off surplus value is structurally rooted everywhere throughout the whole of society, albeit in different forms, then it is obviously no longer sufficient to make a constitutional decision for or against a profit-driven economy. Hopes for the abolition of private property and the elimination of the monetary profit orientation are in vain, because the destructive tendencies of non-monetary profit maximization in other systems, especially in science, technology, and, of course, politics, would remain completely unaffected.

The way constitutions deal with diverse societal surplus productions would have to be conceived more carefully than any simple prohibition strategy would do. Two constitutional strategies aim at correcting the failures of surplus pressures: replacing false commodities and re-directing surplus pressures.

H.1. False Surplus Pressures

Inspiration could come from a reformulation of Karl Polanyi's famous "double movement", from the history of economy's disembedding and its re-embedding in the broader society. Certain tendencies of re-embedding the economy have been realized, not endogenously but only when exogenous societal forces have

33 Nassehi, *supra* note 31, at 184; G. Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (2012).

exerted pressures for setting up new non-market institutions, which mediate between surplus reproduction and democratic values. Now, the most fascinating elements of Polanyi's theory are the three "false commodities" and their replacement by non-market modes of economic integration.[34] False (or fictitious) commodities – land, labor and money – are, for Polanyi, the sites where monetary surplus production runs up against the protest of collective political actors. And societal resistance against them has created new modes of economic integration (redistribution, reciprocity and householding) and has replaced markets with non-profit-oriented modes of economic organization. For Polanyi, in particular, labor unions and central banks were the new collective institutions that had the potential to counteract the economy's disembedding, precisely at the very points where false commodities had revealed the failures of the economic profit principle.[35] Labor institutions have replaced economic surplus orientation with an orientation toward reciprocity and the non-market-institution of money with an orientation toward redistribution.[36]

Now, can one identify equivalents to false commodities in social areas which are driven by non-monetary surplus orientation? *False surplus pressures* – that would be the equivalent momentum that counteracts the public interest. To identify them would reveal the sites where the agonistic relation between surplus orientation and democratic egalitarianism leads to unresolvable conflicts. False surplus pressures are the points of highest tension between the medial competencies of singular social positions who have an incentive to maximize non-monetary surplus on the one side and democratic ideals embodied in non-surplus-oriented institutions on the other. This situation creates the need for democratic channeling of collective demands of the constituencies formed around areas of false surplus pressures.[37] In clearly circumscribed areas, self-regulation of social systems via false surplus orientation would be replaced by social protection intended to preserve the ecology in its broadest sense (people, society and nature).

From this perspective, the challenge for the future would be to identify areas of false surplus pressures in the various social domains. Institutional imagination

34 K. Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (1991 [1944]). The text follows Steven Klein's interpretation of Polanyi's work, see S. Klein, 'The Power of Money: Critical Theory, Democracy, and Capitalism', (2020), 27 *Constellations* 19.

35 This implies powerful normative prescriptions, which seem not to be visible for Emilios Christodoulides' eyes: "While Polanyi's diagnosis – of the disembedding of the economy from European society – is painfully relevant, his prescription is painfully unavailable", Christodoulidis, *supra* note 11, 638. But of course, Polanyi's prescriptions are definitely more moderate than Christodoulidis would like to have them.

36 On the consequences of Polanyi's theory for law, C. Joerges, 'A New Type of Conflicts Law as the Legal Paradigm of the Postnational Constellation', in C. Joerges and J. Falke (eds.), *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets* (2011), 465, at 474.

37 These arguments transfer Polanyi's ideas on false commodities and their replacement with non-market-institutions from the economy to other social systems.

would be needed to replace them with non-surplus institutions. In politics, the great historical example has been minorities who had been repressed in a regime based on false pressures for power surplus. As a response, constitutional courts, i.e., non-majoritarian institutions which are relatively independent of power politics, have advanced constitutional rights for minority protection. For the future, in the digital world, in economic organizations, in the news media, and in other social domains, constitutional rights – when applied not only against the state but also against power constellations in society – could play a similarly decisive role when false surplus pressures violate the vulnerability of individual life or the integrity of institutional dynamics. Particularly, in science and medicine, where new biotechnological developments increase surplus pressures that threaten humans' and animals' interests, non-surplus-oriented institutions need to be created which counteract the combined surplus pressures of professional reputation and economic profit.[38] Although the spontaneous reaction to false surplus pressures is to search for political interventions of the state, alternative institutional mechanisms may be superior, which will not directly involve state power but societal non-surplus oriented forms of collective decision making. Thus, collective actors should be created who are experimenting with new democratic forms outside institutionalized politics. A promising example is ICANN which attempts to counteract the combined surplus pressures from economic, technological, scientific and political interests. After having tried in vain to copy voting procedures from the political system, ICANN does so now by transforming itself into a non-profit and non-state organization that is legitimized by a stakeholder constitution.[39]

H.2. Ecologizing Surplus Orientations

While this constitutional strategy would aim at abolishing surplus pressures in certain carefully circumscribed social areas, where these pressures create unbearable consequences, an alternative strategy would aim at influencing social surplus pressures to increase their irritability toward their social environment. Economic experiences with external societal pressures on commercial enterprises could serve as an example. Since experience shows that profit-threatening strategies are the most successful means to incite changes within the economy,[40] this could be generalized into a strategy of threatening surplus

38 For an elaboration of this argument, V. Karavas, 'Empowerment through Technology? How to Deal with Technology Options in the Liberal-Democratic State: The Example of Egg Cell Preservation', (2019), *Ancilla Iuris*, www.anci.ch/articles/Ancilla2019_101_Karavas.pdf.

39 T. Mahler, 'The Internet Corporation for Assigned Names and Numbers (ICANN) on a Path toward a Constitutional System', in T. Mahler (ed.), *Generic Top-Level Domains: A Study of Transnational Private Regulation* (2019), 40.

40 D. Krause, 'Corporate Social Responsibility: Interests and Goals', in K.J. Hopt and G. Teubner (eds.), *Corporate Governance and Directors' Liabilities: Legal, Economic and Sociological Analyses*

production in various social areas. As a consequence, surplus orientation can be seen as the most sensitive point of any social system. When the reproduction of their medial competencies is threatened, their irritability for outside impulses is at its peak. Thus, instead of broadside interventions, the external pressures could concentrate on one, and only one issue, they could calibrate on the specific surplus orientation, and push it toward a new – possibly ecological – orientation.[41] One would have to identify those "leverage points of systems": "places in the system where a small change could lead to a large shift in behavior".[42]

This would imply the following guiding principles for a constitutional strategy:

- Fight surplus excesses and reduce their parasitic use to the necessary minimum so that the motivational force is maintained.
- Reduce the distance of secondary goals from primary goals, i.e., move surplus closer to output.
- Create motives for "states(wo)manship" in all social fields, i.e., for the sacrifice of power interests in favor of the public interest.
- In other areas, create "artificial" surplus value for action in the public interest: medical research for rare diseases, economic incentives for the production of ecological goods, scientific research in areas where immediate reputation gains are not to be expected. Facilitate the framework conditions for third sector activities and for the commons.

And what about law's false surplus? In order to combat the dark side of juridification, the law would have to turn against itself. As the debate over alternatives to the legal system has rightly shown, the law is by no means particularly suited for solving disputes among people satisfactorily to all concerned.[43] Mediation, arbitration, and settlement have the potential to do more justice to the nature of some conflicts, their causes, and the needs of the people in dispute. Accordingly, one could in certain conflicts very well do without the law. Under certain conditions, law falsifies the realities of the conflict and produces decisions that are distorted by formalization. Thus, for false surplus pressures in law, a paradoxical strategy follows: juridify de-juridification.

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on Corporate Social Responsibility (1986), 95, at 108; J. Van der Heijden, 'Systems Thinking and Regulatory Governance: A Review of the International Academic Literature', (2020), *State of the Art in Regulatory Governance. SSRN:* https://ssrn.com/abstract=3531381.

41 M. Mölders, 'Irritation Expertise: Recipient Design as Instrument for Strategic Reasoning', (2014), 2 *European Journal of Futures Research* 32.

42 D.H. Meadows, *Thinking in Systems: A Primer* (2008), 145. For recent concepts of regulation, A. Bora et al. (eds.), *Society, Regulation and Governance: New Modes of Shaping Social Change?* (2017).

43 P. Fitzpatrick, 'The Impossibility of Popular Justice', (1992), 1 *Social & Legal Studies* 199.

More generally, *the role of law would be to institutionally promote a society-wide reflection on various surplus values, both their production and distribution, including the normative surplus values of law itself*. Left to their own devices, systemic surplus productions will only follow their tunnel vision, which focuses them on maximizing their own function. External pressures from civil society, from politics and law, particularly constitutional law, should induce them to become ecologically sensitive, to counteract their negative effects, and to promote their positive effects on nature, society and people.

Chapter 3

Against Value(s)

Marx, *Wertkritik* and the Illusions of State, Politics and Law

Klaus Kempter

The starting point of contemporary reflections on "value" and "values" is apparently the widespread sense of a deep crisis of the modern form of socialization, a form which, according to Karl Marx, is based on value and its movement in itself. The following contribution will try to depict this crisis as well as the role that state, politics and law play in it using Marxian concepts, further developed in the not very well-known "Wertkritik" ("critique of value") by Robert Kurz (1943–2012) and others.[1] *Wertkritik* to me seems the most appropriate of all theoretical approaches to come to terms with today's state of the world, characterized by three potentially fatal crises: the destruction of nature in times of "anthropocene"; conflicting imperial claims entailing the danger of a sudden annihilation of life on this earth through nuclear warfare; and the structural dysfunction of the global economy or – to put it more precisely – of global value production that has lasted since the 1970s and shown its face in various symptoms like stock market crashes, excessive private and sovereign indebtedness, extreme and ever-growing inequality, and the accelerating production of economically superfluous populations. These crises demonstrate the dire state of the fabric of modern global society. Of course, in 2021 anyone talking about crises has to also address the coronavirus pandemic, although compared to the aforementioned three systemic crises this one, at least at first glance, appears to be different in that it is quite random, and as a natural event, is not inherent to the process of modern socialization. Yet, this random global crisis of 2020/21 is in many ways more revealing than the structural, systemic crises, about the current state of humankind, especially with regard to mental and psychological constitutions, perceptions of the world, overall worldview, or the metaphysics of modernity. "Wertkritik" addresses these problems at the root, in the coercive constitution of values that drives their reproduction globally. But first: what is *Wertkritik* exactly?

1 Other protagonists: Roswitha Scholz, Claus-Peter Ortlieb, Norbert Trenkle, Ernst Lohoff, Anselm Jappe. See N. Larsen et al. (eds.), *Marxism and the Critique of Value* (2014). In the same period, Moishe Postone came to some similar conclusions: Postone, *Time, labor, and social domination. A reinterpretation of Marx's critical theory* (1993).

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A. The Marx of *Wertkritik*

Wertkritik is a critical theory, developed by former left-wing political activists outside academia, that claims to capture the totality of modern society in the tradition of Marxian thought – "with Marx beyond Marx" and certainly in distinction from Marxism. In doing so, it draws on what it calls the "esoteric Marx", the Marx that was concealed by Marxism. Conventional Marxism at its core conceptualized itself as a "materialistic" progressive philosophy of history, based on the Enlightenment and German Idealism, and a "scientific world-view" that asserts the validity of seemingly eternal laws of history.[2] One of these laws derived from the conventional "exoteric" Marx is the thesis that the material, i.e., economic, base of societies determines their respective religious, cultural, ideological, political, legal, etc. superstructure; another one is the assertion that history is always driven by the contradiction between forces and relations of production. The third of these ideas would be that, as the Communist Manifesto states, "all history" is the "history of class struggles" of economically determined groups of society which in the end, by the victory of the last oppressed class, the proletariat, results in the establishment of a classless society. This historical metaphysics is rejected by *Wertkritik*, as is the closely related political impulse of traditional Marxism, which concentrates on the exploitation of the proletariat by the bourgeoisie and sees revolutionary expropriation of the capitalist class as the decisive step into the socialist realm of freedom.

Turning away from the traditional Marxism of class struggle, labor movement and philosophy of history *Wertkritik*, following on heterodox neo- and post-Marxist schools of thought like the Critical Theory of Max Horkheimer, Theodor W. Adorno, Walter Benjamin et al. and the *Neue Marx-Lektüre* (*New Reading of Marx*) by Adornos' students Hans-Georg Backhaus and Helmut Reichelt,[3] emphasizes the revolutionary socio-scientific insights that Marx unfolded in his critique of political economy,[4] the concept of modernity as commodity-producing society as well as the idea of the value of commodities and its movement within itself. The value of commodities that is valorizing itself, always striving for its own increase, is seen as the "automatic subject"[5]

2 For this crucial difference between the "exoteric Marx" of orthodox "labor movement Marxism" or "class struggle Marxism", as he puts it, and the "esoteric Marx" of value form analysis and value critique see the introduction to R. Kurz, *Marx lesen. Die wichtigsten Texte von Karl Marx für das 21. Jahrhundert* (2001). Cf. K. Kempter, 'Robert Kurz, die »Wertkritik« und die radikale Gesellschaftstheorie oder: Ist Karl Marx doch noch relevant für die Geschichte?', (2016) *WerkstattGeschichte* No. 72, 65–76.

3 H.-G. Backhaus, *Dialektik der Wertform. Untersuchungen zur Marxschen Ökonomiekritik* (1997); H. Reichelt, *Zur logischen Struktur des Kapitalbegriffs bei Karl Marx* (1973). See I. Elbe, *Marx im Westen. Die neue Marx-Lektüre in der Bundesrepublik* (2008).

4 Developed mainly in the so-called *Grundrisse* (*Foundations of the Critique of Political Economy*. Rough Draft) from 1857/58, the *Contribution to the Critique of Political Economy*, and the three volumes of *Capital*.

5 K. Marx, 'Das Kapital', Vol. 1 (K. Marx and F. Engels, *Werke*, Vol. 23), first published 1867, 169.

of society, constituted through human beings by their daily actions, but at the same time subjecting them totally and making them mere functionaries of an anonymous process that is beyond their control. Marx is the thinker who has made value the central category, the fulcrum not only of his economic critique, but of his entire social analysis, and this is what *Wertkritik*, against conventional Marxism, refers to. Following on from Marx's famous section in the first chapter of *Capital* on the "fetishism of commodities and the secret thereof", *Wertkritik* speaks of the fetishist constitution of modern society in that humans do not consciously dominate their relationships, needs, etc. Instead, they operate under a veil of mystification that turns their actions and social relations into an uncontrollable and unintelligible movement of things. With respect to producers, Marx states: "their own social action takes the form of the action of objects, which rule the producers instead of being ruled by them". Modern man therefore has outsourced societal control to the self-valorizing value and thus placed himself under the rule of an automatic process that takes place "behind the backs" of the individuals, without their conscious steering: "We are not aware of this, nevertheless we do it".[6]

A derivative of this primary form of modern fetishism is the ubiquitous use of the term "value" which has lost its original meaning in the field of political economy and at the same time conquered the moral sphere of society. What used to be known as virtues and ideals now goes by "values".[7] Therefore, not only democracy, liberty, the rule of law, human rights, but also decent private behavior, family bonds and many more desirable immaterial goods bare traces of their relatedness to the blindly operating automatic subject that, while lacking any moral ideal or virtue, controls economy and society.[8]

B. Value as the Automatic Subject of Modern Society

Outside the Marxian tradition, this unconscious exogenous process, which is not controlled by humans, is not called "value" but "market". And in political economy from Adam Smith to Friedrich August von Hayek and beyond, it does not appear as a threatening "automatic subject" but as a quasi-divine "invisible hand" or as an information processor far superior to man, which ensures that scarce resources and goods are optimally distributed and thus a macroeconomic and macrosocial equilibrium prevails.

6 K. Marx, *Capital*, Vol. 1 (first published 1887), 49, 77.

7 Carl Schmitt was still very much aware of this link. See Schmitt, *Die Tyrannei der Werte* (1967).

8 Adorno speaks of "the substitute philosophy of so-called values" (T.W. Adorno, *Eingriffe. Neun kritische Modelle* (1963), 119) and of "cultural values" that "echo the language of the exchange of goods" as "abominable philosophical rationalization" (*Gesammelte Werke*, Vol. 10.1 (1977), 15) – my translation, K.K.

Since in Marx's critique of political economy value plays the role both of the central analytical category and – in the form of capital – of the primary societal actor, some characteristics of value in Marx should be mentioned:

1. The value of commodities is not simply attributed by actors on the market, it has a "substance". This substance is "abstract labor", i.e., labor which encompasses thousands of very different human activities (work), but whose "concrete" quality is irrelevant to the value-based mode of production. What is relevant is only the extent to which the respective concrete work contributes to the creation of value and surplus value that can be converted into profit.
2. In qualitative terms value is always the same. It consists of mere quantity. Therefore, its different manifestations – the whole multifarious, colorful universe of commodities – can be measured with a single yardstick. This yardstick is money.

Wertkritik thus has a clear, substantial concept of "value", in contrast to academic economics, which up to now speaks of "value" and thus still seems to be shaped by the older tradition of classical economics, but has no idea of a value substance. In contemporary academic economics there are solely subjectively measured quantitative relations.

3. The value of the commodities themselves is not a tangible thing, but an imagined relationship. According to Marx, however, it embodies itself in a tangible thing, its "essence" comes to "appearance" and must necessarily come to appearance, namely in a special commodity, money. One could therefore determine the following identities: money = value = abstract labor.

Consequently, for *Wertkritik*, money is not a neutral means of exchange, as it is for mainstream academic economics and the everyday understanding of buyers and sellers, or a means which makes it possible to change commodities from one hand to the other. It is not a mere token – even if it can be represented by such a token and this representation is taken in daily life for the thing itself. Rather, money, itself being a valuable commodity, is the embodiment of value in its self-referential quantitative expansion and thus the god of modern fetishism: the abstract, featureless thing around which everything revolves and which steers all social relations. If, for example, economic science claims that the economy is there to supply people with scarce goods, *Wertkritik* contradicts: the purpose of economic activity is to increase the value of a certain sum of money (M) by using various commodities (C) in the production process (above all the commodity "labor power") to make more money (M'). The supply of commodities is but a by-product of this movement, M – C – M', not its purpose.

This should be obvious to everyone, but remarkably it is not, not even for the science which deals with the economic process. Marx's fundamental

critique of socialization by value is off topic for economics which anyhow often seems to be a rather hermetically sealed system of thought, based on assumptions far from social reality. Sometimes, however, cracks appear in this mental building – although hardly ever with respect to the fundamental concept of economic activity itself, but for instance in recurring major discussions about the relationship between state and market, without any doubt the classic of the debates on modern economies.

C. The State and the Market

Market-versus-state debates are usually prompted by the phenomena of crisis. They take place in times when the "invisible hand" trembles, when the economic machine stutters. In the 20th century this was the case during the "Great Depression" of the early 1930s, but also during the crisis of the 1970s. Contemporary discussions are essentially the result of the stock market crash of 2008 and the subsequent (post-)crisis period, which has lasted longer than a decade and, based on various indicators (extremely low interest rates, unconventional monetary policy, weakness of investment, deflationary tendencies – at least until the disruption of global commercial chains by coronavirus restrictions in 2020/21 took place, accumulation of sovereign debt, persistent trade imbalances, divergences between relatively weak "real economic" development on the one hand and high flights on the stock markets on the other), is considered as exceptional and worrying. Without any doubt the economic repercussions of the latest crisis, induced by political reactions to the new coronavirus, will exacerbate those fatal problems, and the dominating position the state seized in 2020/21 at the expense of private actors has already revived the old debate. Be it as it may, the feeling that something fundamental no longer works seems to have been the starting point for the recurring debates about the relationship between market and state for almost 100 years.

What shape does this relationship take from the perspective of Marx's critique of political economy and of *Wertkritik*? Marx, too, does not simply see cooperation, but a kind of polar tension. For him, the state is the necessary complement to the "modern bourgeois society" (Hegel) based on the pursuit of naked private interests, i.e., the primary socialization through exchange and money relations in pursuit of individual enrichment. The state as the embodiment of the general will is necessary because a good social order, a moral community, is not possible on the basis of anarchic competitive relations between isolated individuals, the modern bourgeois war of all against all.[9] Such a sociality would have to remain asocial.

9 R. Kurz, 'Es rettet euch kein Leviathan. Thesen zu einer kritischen Staatstheorie', Erster Teil, (2011) 7 *Exit! Krise und Kritik der Warengesellschaft* 26.

But the polarity between the unleashed market and the regulating state, as it is usually discussed today, is not a fundamental contradiction for Marx and *Wertkritik*, unlike in conventional schools of thinking. In (neo-)classical economics, for instance, the unfettered free market produces the economic equilibrium – the best of all possible worlds – while the state with its regulations and interventions ultimately represents a disruptive factor or at least a permanent cause of potential disturbances. Keynesians and Post-Keynesians on the other hand, the minority faction within academic economics, do not believe a priori in the beneficial work of the "invisible hand". For them, any lack of regulation holds the constant threat of market failure in itself, whereas the state and (economic) policies open up the chance of sensible management of an otherwise crisis-prone economic process. In this view, the state can help the invisible hand, point it in the right direction and support it. The recent debates about value, as discussed in publications on the topic of value creation versus value extraction, take place within this opposition between the free market and state, political, legal control. Marx and *Wertkritik*, however, see this apparent antithesis as integrated in the overall system of the modern economy, in the totality of self-valorizing value.

D. The State According to *Wertkritik*

But what role do the state and its instruments – politics, law, etc. – play in this dual, polar system of modern, unconscious-fetishistic social control? State theory has always been a weak point of the traditional Marxist theory. Although Marx, after his early critiques of religion, quickly moved on to a critique of the state[10] and planned a fundamental depiction of the state in the overall system of bourgeois society, he never set out his ideas systematically. Later on, social democratic and communist Marxism helped itself by defining the state either as a quasi-neutral agency for the control of society, fought over between the social classes,[11] or as the executive committee of the ruling bourgeoisie. Thus, Marxists basically did not even attempt to conceptualize the state by starting from Marx's critique of political economy, his critical theory of value and his analysis of the value form.[12] The most important exception was the Soviet

10 For example, in *On the Jewish Question* and *Critique of Hegel's Philosophy of Right*.

11 In the end this also applies for the most elaborated and sophisticated heterodox Marxist theories, e.g., theories on class, hegemony and the state by Antonio Gramsci, Louis Althusser or Nicos Poulantzas.

12 And even Marx himself, in his later remarks on state and politics, as in *The Civil War in France* or *Critique of the Gotha Program*, falls short of his early insights into the nature of the state and into the form-constitution of modern political society.

jurist Evgeny Pashukanis with his "General Theory of Law and Marxism", published in 1924.[13]

For *Wertkritik*, the state is on the one hand, as mentioned, the agency of the general will holding together the diverging forces of bourgeois private interest. On the other hand, however, it is the authority that must ensure, by means of legal regulations and other precautions, that individuals can meet each other at all as owners of commodities – which is their main determination in bourgeois society.[14] Marx – and following him *Wertkritik* – assumes the safeguarding of private property as the actual primary right of bourgeois society, fundamental to political and legal regulation. Property makes man a citizen, i.e., a legal subject, and as such legal – free and equal – subjects, individuals can interact with one another on the market as well as in the state-political sphere.

The tasks of the modern state undoubtedly include guaranteeing the currency and providing the economy with the necessary means of exchange and payment. However, *Wertkritik* is based on Marx's insight that money evolves spontaneously by quasi-natural necessity out of the value-shaped exchange relationships of commodities, and that the state, which came into being at the same time, is only a secondary guarantor (secondary not in the chronological-genetic, but in the logical-systematic sense).[15] The idea that political-legal implementation of token money as a measure of value and obligatory means of exchange[16] should be the original basis of the modern market economy, which therefore would ultimately be a creation by the state, fails to recognize not only the historical context of the origin of money, but above all the logic of modern socialization.[17] So value is not constituted by the state or law. But state and law are necessary to permanently implement the rule of value, a rule which at its core follows its own "natural laws", not the commands of politics. The "state theory of money" is, of course, only one, but a highly relevant variant of the misjudgment of the nature of the state in modern society. This misjudgment is the basis or at least one of the fundamental elements of the dominant social

13 In E. Pashukanis, *Selected Writings on Marxism and Law* (1980), 37. *Wertkritik*'s reception of Pashukanis' concepts presumably took place via the German so-called "Staatsableitungsdebatte" (state derivation debate) of the 1970s.

14 *Wertkritik*'s Marxian approach therefore has much more in common with the legal-constitutive ideas put forward in several contributions to this volume than with most Marxist theories of state and law.

15 That is a very abbreviated depiction of *Wertkritik*'s idea of the genesis of modern money. See Robert Kurz's elaborated version in his last monograph: *Geld ohne Wert. Grundrisse zu einer Transformation der Kritik der politischen Ökonomie* (2012).

16 This concept of chartalism was elaborated by Georg Friedrich Knapp: G.F. Knapp, *The State Theory of Money* (1924 – German orig. 1905).

17 That also goes for its contemporary variant Modern Monetary Theory, propagated in Germany inter alia by the *Georg Friedrich Knapp Gesellschaft für Politische Ökonomie*.

thinking of modern times. Everywhere, this thinking is based on the belief of the steering competence of that central modern authority, the state.[18]

From the point of view of *Wertkritik*, which emphasizes the fetishistic character of socialization by commodity and money, the belief in the so-called primacy of politics, or more generally: the belief in the sovereignty of people in the process of their socialization, is one of the central illusions of modernity, a kind of founding myth. It is deeply rooted in the subject thinking of the Enlightenment, which, with "man's release from his self-incurred tutelage" (Kant), the shedding off of feudal ties and religion-based fetishism, believed to have left any "ideological" foreign control behind. With the establishment of the modern state and its subsequent progressive democratization by the proclamation of civil rights and the gradual expansion of the electoral base, emerged not only the belief that citizens determined their social affairs in free deliberation, but also the idea that all social affairs could be controlled sovereignly by argumentation based on reason and in accordance with transparent procedures secured by politics, law and administration. With regard to the economy, doubts about the controllability of things arose time and again in periods of deep crisis, but ultimately the political illusion emerged stronger from these phases. The Great Depression of the 1930s, with its closure of entire branches of production, mass unemployment and social misery, only temporarily plunged the idea of political control into crisis. In the end, there was the new regulatory model of state-centered capitalism,[19] which in the "Golden Age" of capitalism[20] between the Second World War and the mid-1970s seemed to provide final proof that economy and society could permanently be controlled and steered in a technocratic manner, with beneficial results for everyone.

Wertkritik contradicts the state illusion that can be found in various manifestations in the early British liberal political economy, such as Adam Smith, in the influential German philosophy of state and law, most prominently in Hegel, and above all in Keynesian economics of the mid-20th century. It holds that there are not only the unavoidable and structural economic crises that bear witness to the fact that the economy does not obey any political or social rationality outside or above its own; but also, that the usual functioning of the wealth machine related to the production of abstract value is a process that does not follow any "objective" social reason. Since it is about multiplication of money as the expression of abstract wealth and not about material wealth embodied in beneficial goods, the use of material resources – raw materials, energy, labor,

18 This applies despite the skepticism of neoliberalism towards the state's regulating power and the detachment of structural functionalism and social systems theory, which usually play no role in the political debate. Talcott Parsons' and Niklas Luhmann's theories assume autonomy of the subsystems and are skeptical with regard to steering capabilities for society as a whole. See also Teubner in this volume.

19 Postone, *Time, Labor, and Social Domination*.

20 E. Hobsbawm, *The Age of Extremes: A History of the World, 1914–1991* (1994).

etc. – for the production of useless and even harmful commodities, for which the corresponding needs have to be created by means of persuasion (advertising), is the rule. This condition alone speaks against Enlightenment's liberal image of man as the autonomous subject of his own sociality. Admittedly, these fundamental functional mechanisms of the self-valorizing value, of capital, have become so routinized over the centuries, first through coercion and then through habituation, that they are not only regarded as rational (in a business economic sense, as microeconomic profitability), but even as natural. The fact that this is a modern "second" nature usually is not reflected.

To put it less fundamentally "subject-philosophical" and more strongly politically pragmatic, the relationship between state and market from the outset is one of interrelated systems that constitute modernity as a polar totality. As such, state and market remain dependent on one another throughout the entire history of modernity. This does not imply a one-sided relationship of dependence or derivation in the sense of the Marxist thesis of (economic) base and (state-legal, etc.) superstructure. Neither does it mean that the relationship between state and market has always remained the same in modern history. But, there is no autonomy and sovereignty of the state in such a way that it could deliberately determine over a social "subsystem" called "market" or "economy".[21] To illustrate this by means of a current practical political example: the state remains dependent on mass industrial value production, because via taxation this (surplus) value production finances its existence, its public functions (education, administration, transport infrastructure, police, etc.). It is therefore illusory to assume, as does the recent popular movement against global warming, that the government of a country whose value creation is largely based on automobile production, for example Germany's, could make a turn towards social rationality and pursue a policy against private transport and the automobile – probably the most important "value" object of the last hundred years and in many respects one of the most disastrous mass commodities the world has ever seen. This government will instead do what seems obvious within the irrational rationality of value: instead of building cars with internal combustion engines it will promote the production of models that seem to be less ecologically questionable, e.g., automobiles with electric drive which not only depend on exploitation of cheap labor in countries of the Global South where the necessary raw materials – lithium, rare earths – are mined but even, all in all, do not offer any significant reduction in the consumption of fossil energy. The sovereign state and its apparatus depend on the drip of surplus value – as do its citizens, to whom it is committed as a democracy and who depend on their self-valorization in a workplace. The state as well as individuals are controlled by the automatic subject and its social natural laws – even if recently, especially in the coronavirus crisis, there are indications that

21 Hence the absurdity of the reformist demand for "economic democracy".

present-day (post-)modern individuals do not (want to) perceive this fundamental connection anymore.[22]

All this does not mean that in this polar-complementary relationship the state is the only dependent, that the relationship is static and does not undergo any historical processes of change, or that political influence in the sense of "common welfare" – for example against strong economic pressure groups, against "capital" as embodied in entrepreneurs, shareholders, etc. – would be completely excluded. But it does mean that there are principal limits to the state, politics and law: political control can never question the basis of modern socialization, i.e., the rule of value, and it has never done so in modern times, not even in the so-called "socialist" states governed by communist parties.[23] This is also to say that the state capacity of political steering strongly depends on the respective historical conditions: in times of growing wealth of value, the leeway is greater; in times of crisis it narrows.

E. The Fundamental Crisis of Value Production and the Neoliberal Revolution

The more recent political and economic-theoretical debates about reforming the neoliberal economic model suffer, among other things, from the fact that, contrary to their own claim, they do not sufficiently take this historicity into account. They still feed on the remnants and memories of the heyday of belief in politics in the three post-war decades of prosperity, when high economic growth, Fordist mass production and mass consumption, social democratic welfare policy and economic policy activism went hand in hand. The large and relatively evenly distributed material gains in that period were, and are still, regarded as a result of the superior theoretical insights of Keynesian economics and its political application. But this constellation has vanished. It has vanished not (at least not mainly) because "capital", after the revolt of 1968 and the following years, would have deliberately denounced the social democratic post-war consensus, as suggested by, for example, Wolfgang Streeck in his otherwise impressive book "Buying Time".[24] Its downfall instead came as a result of a new historical situation Robert Kurz would later diagnose in the founding essay of *Wertkritik*, "The Crisis of Exchange Value" (1986)[25]: from the late 1970s on, the "mode of production based on value" has encountered its "internal barrier". Whereas value is constituted by abstract labor and nothing else, capital, forced by all-round competition, pursues the tendency to eliminate

22 See below, the side note on the coronavirus crisis.

23 R. Kurz, *Der Kollaps der Modernisierung. Vom Zusammenbruch des Kasernensozialismus zur Krise der Weltökonomie* (1991).

24 W. Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism* (2014).

25 R. Kurz, 'The Crisis of Exchange Value: Science as Productivity, Productive Labor, and Capitalist Reproduction', in N. Larsen et al. (eds.), *Marxism and the Critique of Value* (2014), 17.

labor from the production process in order to reduce costs. Thereby a fundamental contradiction is built into the capitalist mode of production,[26] which regularly manifests itself in economic crises both large and small. Opposing tendencies have, however, repeatedly counteracted the historical tendency to melt away value. The most important of these compensatory mechanisms is the expansion of production, i.e., the drawing of additional labor into the production process, usually through the invention of new products and the opening of new branches of production.[27] The great post-war boom was largely based on mass production and mass consumption of such new labor-intensive commodities, especially automobiles and electrical household appliances. Since the late 1970s, however, due to the microelectronic revolution, these industries have incessantly experienced waves of rationalization, whose job-destroying effects can no longer be offset elsewhere. The electronics-based products that have since conquered the market – computers, programs, smartphones, etc. – and their basic technologies, make more jobs superfluous than their production generates. They are the driving forces behind today's deep economic – and societal – crises.

Whatever the diagnoses of the economic problems of the 1970s were, a new adjustment of the relationship between state and economy gradually emerged after the end of Keynesian regulation, a new paradigm of economic theory and politics, the effect of which increasingly radiated to the entire social thinking, and then also to behavior: so-called neoliberalism, whose various policies are well known and therefore need not be further elaborated. But two of its crisis strategies are not only effective to this day – this applies to all of the neoliberal restructurings – but are also misjudged in such a way that the discussion about them considerably hinders the recognition of the present economic, political and social situation of the late-modern world and should therefore be rethought – the two central political-economic developments of the past four decades: globalization and financialization.

The discussion about globalization revolves around the question of whether this is a quasi-natural, spontaneous process, laid out in the development logic of modernity, or whether the interest and political will of important actors and national and supranational legislative measures and international treaties and agreements based on these are the decisive factor. It is assumed that those measures and agreements reflect the power of more or less personified "capital", of worldwide acting "elites" who intend to occupy the global territory. Neither idea is wrong, though both fail to take into account that globalization is essentially a crisis strategy: the search for better valorizing conditions is undoubtedly inherent in the valorizing of value, but the impulse has become

26 K. Marx, *Grundrisse der Kritik der Politischen Ökonomie* [*Rohentwurf 1857–1858*], (1974), 593.

27 See, in this context, Nicolai Kondratieff's theory of "long waves", later adapted by Joseph Schumpeter.

more urgent in recent decades, not least because the exploitation conditions have deteriorated significantly in the old industrialized countries due to the tendency towards a reduction in the mass of value caused by technology and rationalization described above. The shifting of industries towards low-wage countries, the disassembly and reconstruction of production chains and the exploitation of the most favorable investment terms in each case were and are the tried and tested means of counteracting this trend.[28]

On financialization: the emergence of what is today referred to as finance capitalism dates essentially from the 1980s, following the dismantling of the Bretton Woods agreement in the early 1970s, and is connoted on the one hand by financial market deregulations first in New York and London, and on the other by the "military Keynesianism" policies of Ronald Reagan's US administration which relied massively on expanding state expenditures based on rising debt. Reagan's policies – as Yanis Varoufakis puts it – thus switched on an enormous money vacuum cleaner that sucked a large part of the world's financial surpluses into the USA and made America's double deficit (in the national budget and in the trade balance) and therefore the global deficit cycle permanent.[29] The most visible outcome of financialization was a tremendous boom on financial markets, a more or less permanent rise in stock market "values" and at the same time relative stagnation of what is now called the "real economy". After the massive collapse in the valuation of financial stocks in 2007/08, a widespread diagnosis of the crisis held that new incentives on financial markets had discouraged investment-seeking capital from productive investments in the real economy and redirected it into unproductive sectors – with consequential problems on the labor market and in income and wealth distribution. From the point of view of *Wertkritik*, this is another of the illusions that result from the concepts of infinite growth and of government control so firmly established in the experience of the post-war decades. The rise of the financial sector on the one hand, the reduction of industrial mass production on the other, or – as Mariana Mazzucato puts it:[30] the profits of unproductive value extractors at the expense of value creators, of the "takers" at the expense of the "makers" – seemed to point to an unnatural imbalance, which on the part of the state was intensified, if not deliberately caused by the neoliberal revolution, and which ultimately led to the disaster of the global financial and economic crisis. The political consequences for the camp of "Keynesian nostalgia"[31] were obvious: strict re-regulation of the financial

28 R. Kurz, *Das Weltkapital. Globalisierung und innere Schranken des modernen warenproduzierenden Systems* (2005), 85: "The export of capital has essentially become a function of business rationalization" – my translation, K.K.

29 Y. Varoufakis, *The Global Minotaur. America, Europe and the Future of the Global Economy* (2011).

30 M. Mazzucato, *The Value of Everything: Making and Taking in the Global Economy* (2018).

31 Kurz, *supra* note 28, at 411.

sector, containment of "unproductive" speculation, investment incentives in favor of "real" production, political anti-crisis programs, etc. But is the diagnosis correct?

For *Wertkritik* the abovementioned interrelations are reversed: financialization is not a parasite on the healthy body of "real economy". Quite the contrary: the real economy has not offered sufficient profitable investment opportunities for many years due to the decline in value, with the result that capital is diverted into unproductive investments, causing "capital accumulation without value accumulation".[32] This in turn has a thoroughly beneficial effect on the production of ("real") value, in that the money created on financial markets, e.g., through home loans, student loans and consumer loans, at least partially finds its way into the productive economy and stimulates production through consumer demand. Former US Treasury Secretary and economic advisor to President Obama, Larry Summers, in 2013 had an inkling of this correlation. Picking up on Alvin Hansen's theorem from the late 1930s, he spoke of "secular stagnation" and noted that a huge (financial) bubble had produced only modest real GDP growth.[33] Without the invention and implementation of financialization, without unproductive "value extractors", whose mountains of money are for the most part not extracted from productive economy, but represent self-generated "fictitious capital" (Marx), the real economy would have long since come to an end. The same applies to the anti-crisis strategy first implemented by political authorities after the crash of 2008 and later set for the long term: the low interest rate policy of the central banks, though no longer able to stimulate significant real economic growth, has at least so far succeeded in preventing the wealth machine from coming to a standstill. The (post-)Keynesian progressive demand for a state-led return to the production of value, similar to the Golden Age is, in any case, illusory. The same can be said of the latest crisis surge, the ongoing coronavirus crisis, during which the debt strategy was radicalized. This strategy no longer consists of making cheap money available for businesses but in throwing unprecedented amounts of fiat money via state expenditure into the economy, a policy that amounts to the practical experiment, on a large scale, of putting Modern Monetary Theory, still the minority's approach in academic economics, into political practice.

32 E. Lohoff, 'Kapitalakkumulation ohne Wertakkumulation', (2014) 1 *Krisis. Kritik der Warengesellschaft*: www.krisis.org/2014/kapitalakkumulation-ohne-wertakkumulation/ (last accessed on April 22, 2022).

33 L. Summers at IMF Fourteenth Annual Research Conference in Honor of Stanley Fischer (Nov. 8, 2013), see online: http://larrysummers.com/imf-fourteenth-annual-research-conference-in-honor-of-stanley-fischer/ (last accessed on April 22, 2022).

F. Side Note: The Coronavirus Crisis, the March of Folly and Authoritarian Progressivism

The political reactions to the so-called coronavirus pandemic at first glance mark a political shift that is not easy to evaluate within the framework of Marxian and value-critical thinking. In the spring of 2020 governments of the main (private as well as state) capitalist countries decided to halt the automatic subject of capital by shutting down huge parts of the value-producing machinery that drives their societies. All of a sudden economic value (or its appearances: money, production output, growth, etc.) was no longer the main concern and purpose of these societies, while the corresponding personal liberties of the liberal democratic subjects, the working-consuming monads of modernity, ceased to be of central "value". Governments not only took on exorbitant debts, but also shut down businesses and thereby risked long-term high unemployment and social misery with all the – financial and other – costs that regularly come with it. Instead of responding in a way *Wertkritik* would normally expect of the political leaders of capitalist states – that is at least safeguarding the running of the economic machinery – suddenly the life and health of the most vulnerable and a call for solidarity became the political slogans of the day, a day that by now has lasted well over one-and-a-half years. So, did this prove radical critics of capitalism and especially *Wertkritik* wrong? That might be. At least the question has to be taken seriously. Some value critics, however, responded with denial: instead of acknowledging that governments surprisingly put "health" above economic value, they concentrated their critical energy on a handful of libertarians who favored the swift reopening of the economy at the expense of the spread of a deadly virus. These value critics deemed the libertarian voices exemplary of the cynical logic of capitalism, and accused them of being morally corrupted, heartless and barbaric. But they never answered the question that should have been most pressing to radical critics of the value-based form of modern society, namely: why are capitalist governments so heavily damaging the capitalist economy on which they are dependent?[34]

Was it because the threat posed by the virus was so unprecedented that there was no other choice? The media and prominent medical scientists announced that message early in spring of 2020 and they stuck to it for the course of the year and into the following one. Right from the start, however, it was obvious for everyone who was not overwhelmed by the massive media coverage that the pandemic was a threat not for the general population but almost exclusively for the very old and for people with severe medical preconditions, groups of

34 H. Böttcher and L. Wissen, 'Zwischen Selbstbezüglichkeit und Solidarität? Corona in der Leere des Kapitalismus', published on exit-online.org (February 2021); E. Lohoff and N. Trenkle (eds.), *Shutdown. Klima, Corona und der notwendige Ausstieg aus dem Kapitalismus* (2020).

the population that according to capitalist logic are unproductive.[35] An adequate political reaction would therefore have been, on the one hand, to try to protect these vulnerable persons by targeted measures and, on the other hand, to ignore the viral spread through the rest of the population[36] – as it is usually done during waves of flu and flu-like illnesses – instead of fearmongering entire societies into a state of hysteria, hypochondria and obsessive compulsive disorder. The question any (especially, but not only, critical) theory and analyses of contemporary society has to answer is: why did governments, instead of responding in a rational way – rational in the vernacular sense of securing the mechanism of valorization of value which for better or worse is the very fabric of modern society – like they did during the Asian flu and the Hongkong flu pandemics in 1957/58 and 1968/69 and like their national pandemic plans recommended up to March 2020, decide to take a biopolitical turn and join in on a march of folly?[37] Why did they determine to fight a pathogen causing an influenza-like illness, which is survived by well over 99 percent of the infected[38] and does not cause significant excess mortality in the general population, by partial destruction of the economic foundation of their societies, of social life and the personal liberties they claim to be so proud of?

The response to that question probably has to be found not in the political sphere of power, material interests, or strategy, but in the intellectual and psycho-social constitution of the subjects of late- and post-modern societies. Those subjects seem to believe that the economy is something a powerful state can switch on and off without severe long-term consequences. This obviously also goes for politicians, even the German ones once renowned for preaching about the virtues and reason of the honorable businessman. Although governments of whatever party have, very efficiently, implemented the neoliberal program of privatization, liberalization of markets, lowering direct and indirect costs of production and dismantling the welfare state at least since the late 1990s – which among other things meant lowering the costs of health care and privatizing the sector at the expense of hospital equipment and caregiving capabilities – politicians seem to have forgotten not only their mantra of

35 Basically, the pandemic up to now (September 2021) has consisted of a worldwide spread of a new respiratory virus which in several countries and regions caused moderately increased mortality, *nota bene* in countries with or without the unprecedented extreme policy measures, like business and school lockdowns, curfews or mask mandates, imposed against the viral spread.

36 See, for example, *The Great Barrington Declaration* (October 4, 2020), authored by epidemiologists and public health scientists Sunetra Gupta, Martin Kulldorf and Jay Battacharya: https://gbdeclaration.org/ (last accessed on April 22, 2022).

37 This expression, derived from a once famous book on the irrational behavior of governments in history, seems to be the adequate label for the coronavirus madness and groupthink of 2020/21: B. Tuchman, *March of Folly. From Troy to Vietnam* (1984).

38 J.P.A. Ioannidis, 'Reconciling estimates of global spread and infection fatality rates of COVID-19: an overview of systematic evaluations', (March 26, 2021) *European Journal of Clinical Investigation*, https://doi.org/10.1111/eci.13554 (last accessed on April 22, 2022).

increasing the competitiveness of the economy but also the fact that the health care system and therefore public health in the middle and long run depends on the functioning of the economy and the tax money it provides. Apparently, there is a loss of reality by the political elites to be diagnosed.

With regard to the broad population, scare tactics seem to have worked quite well. The media win in times of public excitement and panic, and also politicians, medical experts and public intellectuals have found ways to increase – to borrow Gunther Teubner's Luhmannian words[39] – their respective "surplus value" via alarmism. Almost immediately the populace in most Western industrialized countries was in a state of existential fear that is historically known to incite all kinds of irrational beliefs and behaviors.[40]

For *Wertkritik* this post-modern hysteria and irrationality does not come as a surprise. Unlike common theories of modern society and of historical evolution it does not believe that objective rationality and reason increase through modernization. Horkheimer and Adorno already demonstrated the dialectic of Enlightenment and the frenzy of the domination of nature that comes with it, and *Wertkritik* is even more critical of the irrational rationality of Enlightenment than the Frankfurt School.[41] During the ongoing fundamental crisis of modern value-producing society that was diagnosed by Robert Kurz in the 1980s it is expected that there is a growing tendency to lose touch with reality – be it the already crazy reality of capitalist modernity.

Apart from a widespread loss of judgment, the coronavirus folly shows that modern Western liberal value subjects seem to be in a state in which most of them are eager to relinquish their liberties and already limited self-governance.[42] In the face of contemporary uncertainties and crises, of fear and pessimism they seem to be craving the safe space of a new tech-supported police and surveillance state, at best a friendly middle-of-the road "social credit" type. The tendency, at least for now, is towards authoritarian progressivism. In the course of perennial state crisis management, it remains to be seen how long authoritarian liberals and progressives will be able to set the policies and which sort of state authoritarianism will follow as soon as the societal costs

39 See Teubner in this volume.

40 Well-known examples are the fear of witches in early modern times and 'La Grande Peur' (the Great Fear) during the French Revolution, but anxiety and fear and the hysteria and terror that are caused by them pervade many historical periods. With respect to the spreading of fear during the coronavirus crisis see retired British Supreme Court justice Lord Jonathan Sumption, interviewed by Freddie Sayers: https://unherd.com/2021/03/lord-sumption-civil-disobedience-has-begun/ (last accessed on April 22, 2022).

41 R. Kurz, *Blutige Vernunft. Essays zur emanzipatorischen Kritik der kapitalistischen Moderne und ihrer westlichen Werte* (2004).

42 Of course, there are some cultural differences between, historically speaking, more liberal or anti-authoritarian nations like for instance the US, Great Britain and France on the one hand and a conformist society of traditionally loyal subjects like Germany, but they do not seem to be decisive.

of the excessive, non-evidence-based anti-coronavirus measures will become visible in full.

From the perspective of *Wertkritik* there is not much doubt that authoritarianism and a more state-centered form of capitalism might help, if only in a short-term perspective, in steering through the crises of late modernity by controlling any sort of opposition and mitigating the symptoms of decay, but there is still less doubt that it will not be able to solve the fundamental contradictions of the current state of value production.

G. The End of the World or the End of Value?

All the illusions mentioned above – of the everlasting market economy, producing useful goods for the needs of man, an economy that can be tamed and regulated by the state and be put at the service of man, and even the newest one of a state that is locking down societies obviously assuming to be capable to deal easily with all repercussions – have their origin in the belief in the naturalness and eternity of the modern form of socialization. At best, there can be varieties of capitalism, but nothing completely different. As is it often noted, today it is "easier to imagine the end of the world than the end of capitalism".[43] But capitalism is not ontology, it is a historical phenomenon with a genesis, an ascent, and an end. The public discussion suffers from the fact that the alienated consciousness of humans seems no longer to be able to free itself from its self-built mental cage. It remains arrested in fetishism. If humanity wants to have a future – this does not seem to be certain – it has to deal with the finiteness of late-modern society, with the three fundamental crises that threaten it and which have their common cause in the manner of modern socialization through value.

The first of these crises is the already mentioned fundamental crisis of the devaluation of value by rendering labor redundant, a crisis that is expected to worsen significantly with further digitization and automation ("Industry 4.0"). Its social consequences in the old industrialized countries are production shutdowns, permanently high and rising unemployment – which in the Eurozone has been exported from the German center to the periphery by means of relative wage cuts – an increase in poorly paid, precarious service and support jobs, impoverishment of ever larger parts of the population, further polarization of income and wealth, and the resulting political and cultural barbarization already manifested in increasing everyday aggression, right-wing extremism,

43 M. Fisher, *Capitalist Realism. Is There No Alternative?* (2009), at 1. Fisher was not the first one to use this saying. It is also attributed to Immanuel Wallerstein and Fredric Jameson.

xenophobia, disintegrating institutions, the spread of zones of anomie, etc.[44] On the peripheries of the world market conditions are already much worse.[45]

The second fundamental crisis caused by the modern mode of production and socialization is on everyone's mind: the market economy has not only reached its inner limit but has also largely destroyed the outside on which it depends, the natural world, and is progressing inexorably along the path of destruction, because value has to be valorized and capital must reproduce itself in an expanded form. Therefore, the earth's raw materials will continue to be exploited and burned and the globe will, at the same time, increasingly have to serve as a landfill for waste products – with widely known consequences initially for non-human life on the planet. A reversal of this path – despite the wishes of Fridays-for-future demonstrators and despite some mitigating environmental policy measures – is fundamentally out of the question in a society based on value. The modern state, be it democratic or not, must be "market conform" – an insight for which Angela Merkel was wrongly criticized. It need not and indeed cannot be "nature conform" or "earth conform".

The third crisis also emerges from the never-ending dynamism, the steady expansion of value. To the extent that modern value societies are state-organized, the state must not only guarantee the internal conditions of valorization, but, in a globally structured international environment, must also outwardly secure and militarily enforce the interests of value society. Western "wars of world order",[46] which have become more numerous since the end of state socialism, are just as much an expression of this inner compulsion as intensified conventional and nuclear armament. It is unlikely that this enormous destructive potential will be used only for smaller wars – which are already destructive and sacrificial enough. For mankind this is perhaps the most immediate existential danger. Still, the systemic compulsion to external military expansion is not yet as determined as internal devaluation and technical-industrial devastation of the earth. The opportunity for political intervention seems greatest in this field. In view of the increasing irrationality and egocentricity of the actors, it remains questionable, however, whether it will be seized.

According to *Wertkritik*, based on its theoretical prerequisites, which seem to be confirmed by empiricism in various fields, modern socialization on the basis of value has come to its end. That now also those who dissociate themselves from the results of this socialization and take a critical view of them, once

44 R. Kurz, 'Die Demokratie frisst ihre Kinder – Bemerkungen zum neuen Rechtsradikalismus', in R. Kurz et al., *Rosemaries Babies – Die Demokratie und ihre Rechtsradikalen* (1993).

45 G. Bedszent, *Zusammenbruch der Peripherie. Gescheiterte Staaten als Tummelplatz von Drogenbaronen, Warlords und Weltordnungskriegern* (2014).

46 R. Kurz, *Weltordnungskrieg. Das Ende der Souveränität und die Wandlungen des Imperialismus im Zeitalter der Globalisierung* (2003); R. Kurz, 'World Power and World Money: The Economic Function of the U.S. Military Machine within Global Capitalism and the Background of the New Financial Crisis', in N. Larsen et al. (eds.), *Marxism and the Critique of Value* (2014), 187.

again – analogous to actors in the 1930s – intend to save capitalism from itself, shows that thinking in the categories of modernity leads far astray. That the end of modernity holds enormous potential for destruction should not be a motive for saving the automatic subject of value. The task of those who have the survival of mankind in mind and want to prevent the complete devastation of the earth would be to disenchant the fetish and shake off the automatic subject. Socialization on the basis of value and its corresponding fetishistic forms and "values" – money, capital, labor, law, state, politics, democracy, human rights – has not to be reformed, but abolished. It is time for humans to regulate their affairs with consciousness and to deliver on the promise made to them by the Enlightenment: emancipation from external forces, real freedom for individuals, joint control of their common affairs.

Chapter 4

Real (E)State

Valuing a Nation under Imperial Rentier Capitalism

Christine Schwöbel-Patel

A. Introduction

Revealing the legal technologies, broadly understood, by which market value is prioritised over social value remains one of the most urgent tasks for those engaged in questions of law and political economy critique. In recent years, this critique has importantly tackled legal technologies relating to the legitimation and fortification of the neoliberal order. In this contribution, I focus on a *consequence* of neoliberalism, and yet a decided departure from what the neoliberals of the Mont Pèlerin Society had envisaged: rentier capitalism. In particular, I am interested in the relationship between international law and imperialism as key components in the transformation of the state into facilitator of rent-seeking practices. For the purposes of this chapter, I explore rentier capitalism from the perspective of the international legal transformation of the nation state into real estate. I adapt the common definitions of rentier capitalism, which focus mostly on national structures, for an *international* rentier capitalist order by highlighting the importance of understanding rentier capitalism in the context of historical and contemporary imperialism. Imperial rentier capitalism is a way of describing the global structures that enable rental extraction from the monopolistic or oligopolistic control over scarce assets (land, natural resources, property, financial assets and intellectual property), with a particular view to the state's role in enabling this extraction and transfer from the peripheries to the capitalist metropole.[1]

In 2019, then US President Donald Trump's enquiries about purchasing the territory of Greenland from Denmark as part of a "real estate deal" leaked.[2] This was largely met with a mixture of ridicule, outrage, and amusing

1 See Brett Christophers for a UK-focused analysis, B. Christophers, *Rentier Capitalism: Who Owns the Economy, and Who Pays for It?* (2020). See Samir Amin on "imperialist rent", S. Amin, *Three Essays on Marx's Value Theory*; 'The Surplus in Monopoly Capitalism and the Imperialist Rent' (2013) *Monthly Review Press* 65–76.

2 Salama, Ballhaus, Restuccia, 'President Trump Eyes a New Real-Estate Purchase: Greenland' *The Wall Street Journal*, 16 August 2019.

DOI: 10.4324/9781003221920-4

memes. The Danish Prime Minister responded that "Greenland belongs to Greenland", and Greenland's Foreign Minister responded that Greenland is "open for business, but not for sale".[3] In a slightly tongue-in-cheek manner, *The Washington Post* proceeded to use real estate and business valuation techniques to put a price on Greenland.[4] The journalists came up with a range of possible price tags. From a measly US$200 million on comparable sales (comparing a potential purchase with the 1867 US purchase of Alaska from Russia), to US$1.4 billion estimated on the basis of previous purchase attempts (the US proposed a purchase of Greenland in 1946), to US$1.7 trillion on a price-to-earnings ratio (employing Greenland's GDP as earnings minus Denmark's subsidies).[5] The latter higher estimation was based on expected returns due to global warming prompting the extraction of so far untapped natural resources of "Greenland becoming greener", as well as the movement of populations to the Arctic due to increased uninhabitability of large parts of the world. In sum, "a big bet on Greenland is a big bet that humans are not going to get climate change under control", *The Washington Post* quips.[6] In this chapter, I ask: what if we take Trump's real estate position and *The Washington Post*'s valuation seriously in order to better understand the relationship between international law, the nation state, imperialism, and value?

I argue that a web of international laws intersect that support a global stratification of rentier capitalist states and those from which it extracts value. Central to this order is the propertisation of certain territories. The relationship between the US, Denmark and Greenland exemplifies the rivalries between rentier capitalist states on the one hand as well as the exploitation of states for purposes of value extraction on the other. I emphasise that rentier capitalist states should not be misunderstood as simply preying on states with resources; these latter states also become complicit in their own propertisation. Greenland's employment of nation-branding tactics to attract both tourists and investment arguably demonstrates its complicity in value extraction. Meanwhile, Greenland's exploitation (and Indigenous peoples' oppression) by rentiers of the transnational mining industry exemplifies the more familiar means by which capital accumulates across borders.[7] International law enters the picture in a variety of ways to support the imperial rentier capitalist order.

3 'Danish PM Says Trump's Idea of Selling Greenland to U.S. Is Absurd', *Reuters*, 18 August 2019.

4 Ingraham, 'Trump Wants to Buy Greenland. How Much Would it Cost?', *The Washington Post*, 16 August 2019.

5 The authors pitched the ratio to Amazon's extraordinarily high ratio of 847 in 2016.

6 Ibid.

7 Greenland is of interest for further geopolitical reasons, such as for its shipping lanes and defence strategies – angles that are not overtly considered in this piece due to space. "The thawing of the Arctic ice not only renders accessible any resources *in* and *underneath* the ocean, but also increases accessibility *across* it". J. Bruun and I. Medby 'Theorising the Thaw: Geopolitics in a Changing Arctic' (2014) 8 *Geography Compass* 922.

For the purposes of this chapter, I highlight two legal regimes in particular: first, the international law regimes employed to recognise sovereignty and to keep self-determination movements at bay; and second, the protection of the interests of investors through investor-friendly investment law regimes, even at the expense of national peoples and the environment.

What emerges from the perspective of global political economy is a stratification along the lines of rentier power, which map onto the stratification of the metropole that is extracting value from the periphery. By employing Rosa Luxemburg's work on imperialism and primitive accumulation as a guide, important continuations are revealed that explain how the accumulation of capital in the spaces outside of the capitalist metropole has a deeply structuring effect.[8] This is complemented by a discussion of Samir Amin's work on value, in particular on centring social value.[9] Reading the episode of Greenland's purchase through the lens of value and as an instance of the propertisation of land, acts as an important barometer on contemporary forms of capitalism and the crucial questions of law, land, and climate disaster.

B. Trump on Greenland: Two Stories

After the news of his intention to purchase Greenland from Denmark made headlines, then US President Trump responded to a journalist: "Essentially it's a large real estate deal", he said, "Denmark essentially owns it […]. It's hurting Denmark very badly because they're losing almost 700 million a year to carry it. So they carry it at a great loss".[10] The White House economic adviser Larry Kudlow subsequently said on Fox News: "I don't want to predict it now. I'm just saying the president, who knows a thing or two about buying real estate, wants to take a look at a potential Greenland purchase".[11]

One way of reading this story, and the most common response at the time, is the following: Trump is the ultimate real estate mogul, who governed the USA as a real estate tycoon, and not even a very good one. He was and remains a businessman who thinks about global politics as "doing deals". The backlash of ridicule, outrage and memes was simply a response to absurdity in an absurd presidency. The memes of a vulgar gold Trump tower in the Arctic terrain of Greenland visualised this reading. Greenland, in this story, stands in for a whole row of diplomatic mishaps that are best met with quirky responses.

Another way of reading this story is to take the label of "real estate" for a territory seriously. The investigation of the propertisation of territory

8 R. Luxemburg, *The Accumulation of Capital* [1913] (2013).

9 Amin, *supra* note 1.

10 Pengelly, 'Trump Confirms he is Considering Attempt to Buy Greenland', *The Guardian*, 18 August 2019.

11 Ibid.

opens up a path to thinking about rentier capitalism, not only as a form of the accumulation of capital through rent, but more specifically as a form of contemporary imperialism that maps onto histories of imperialism. This is what I propose to do.

The contemporary analysis of rentier capitalism focuses largely on rentier capitalist states and the ways in which laws protect rentiers. Brett Christophers and Katharina Pistor, for example, have recently contributed greatly to our understanding of the protection of assets through legal regimes. Christophers focuses on the UK as rentier capitalist state and Pistor focuses on English common law and the laws of New York State as the two legal systems that dominate the world of global capital.[12] They highlight the dominance of rentierism in these places: "Every single one of the thirty companies with the largest market value traded on the London Stock Exchange earns substantial rents of some kind".[13] In rentier capitalism, the interests of the state merge with the interests of rentier capitalists as the state creates a legal, regulatory, and material infrastructure to support rentier capitalists.

Building on this important work, I suggest that it is imperative to consider the *international* laws of the protection of capital and the (super-)exploitation of labourers that enable rentier capitalist states to extract imperial rent.[14] This is necessary, not least due to the imperial histories of the corporations with the highest market value listed on the London Stock Exchange. We might pick Royal Dutch Shell and Hong Kong and Shanghai Banking Corporation (HSBC) Holdings for clarification: the British-Dutch oil and gas company Royal Dutch Shell has been involved in imperial politics, and in particular inter-imperial rivalries, to secure access to oil fields since the 19th century.[15] British-owned HSBC was founded in the wake of the Opium Wars, which forced China to open its borders to trade in opium – lucrative for the British, deadly for the Chinese.[16] For an understanding of historical and contemporary imperial rentier capitalism, we must therefore distinguish between those states that dominate and those states that are dominated for the purposes of extracting rents. Imperialism is present in Pistor's and Brett's work, but the *international* legal structures that create a global stratification of rentier capitalism are implicit

12 K. Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (2019), 8.

13 Christophers (note 1) 8, included is a table with Royal Dutch Shell, HSBC Holdings, BP, AstraZeneca and GlaxoSmithKline constituting the top five according to market value. These derive rents through the monopolisation of assets through financial rents, natural resource rents and intellectual property rents.

14 Super-exploitation is explained by John Smith as "Pushing the wage of the worker down below the value of his labour-power". J. Smith, *Imperialism in the Twenty-First Century: Globalization, Super-Exploitation, and Capitalism's Final Crisis* (2016), 237.

15 T. Mitchell, *Carbon Democracy: Political Power in the Age of Oil* (2011), Chapter 2, at 43.

16 W. Goetzmann, *Money Changes Everything: How Finance Made Civilization Possible* (2016), Chapter 24 'China's Financiers'.

rather than explicit.[17] For this, we need to switch focus from the metropole to the extraction of value from the periphery – what Amin calls "imperial rent". Indeed, important work on the concentration of capital through a metropole/periphery lens is already being undertaken. Land-grabbing – as the appropriation of large swathes of land in order to extract rent –, or vaccine patents – as the monopolisation and propertisation of knowledge about vaccine products and technologies in order to extract rent – are prominent contemporary examples.[18] Extending the view of rentier capitalism to the international legal field helps us make sense both of how rentier states such as the USA operate within a global political economy and how this is shaped by a legacy of global imperialism and neo-colonial power.[19]

Thinking with Rosa Luxemburg's theorisation of primitive accumulation in *The Accumulation of Capital* shines a light on the propertisation of land so as to make it exploitable for rentier capitalism in the context of imperialism. Imperial rentier capitalism is a condition of what Luxemburg called "the battle of capital against the social and economic ties of the natives, who are also forcibly robbed of their means of production and labour power".[20] Greenland is understood as the site of primitive accumulation through an inter-imperial rivalry between Denmark and the USA. Despite Denmark's reassurance that "Greenland belongs to Greenland", Greenland is not an independent state but part of the Kingdom of Denmark (the Realm). While generally not considered as a colony – mainly due to a Danish racialised affinity with ancient Norse tribes, who were early settlers in Greenland – it nevertheless presents many of the features of a colonised state. In particular due to its contribution to the budget of Greenland, Denmark presents itself regularly as "benevolent" towards Greenland, and therefore not as a coloniser,[21] diverting attention away from its own benefits. The rhetoric of benevolence has of course been part and parcel of violent imperialism since its very beginnings. Budget dependency has indeed been described as prompting "a dependency complex reminiscent of colonialism" for Greenlanders.[22] Nevertheless, Denmark handed over self-government powers (although not granting full independence) through the 2009 Act on

17 Pistor writes "Many countries that received their formal legal system by imposition during the era of colonization and imperialism tend to have weaker legal institutions than countries that developed their formal legal institutions internally. Under such conditions, the modules of the code will not produce lasting wealth effects". *supra* note 12, at 17.

18 U. Özsu, 'Grabbing Land Legally: A Marxist Analysis' (2019) 32 *Leiden Journal of International Law* 215.

19 J. Moreno Zacarés, 'Euphoria of the Rentier?' (2021) 129 *New Left Review* 51.

20 Luxemburg, *supra* note 8, at 350.

21 U.P. Gad, 'Greenland: A Post-Danish Sovereign Nation State in the Making', (2014) 49 *Cooperation and Conflict* 98.

22 J. Dahl, 'The Greenlandic Version of Self-government', in K. Wessendorf (ed.), *An Indigenous Parliament? Realities and Perspectives in Russia and the Circumpolar North* (IWGIA, 2005).

Greenland Self-Government.[23] Although the Government of Greenland (Naalakkersuisut) has the ability to negotiate and conclude agreements under international law with foreign states and international organisations that concern certain devolved issues, Greenland may not act independently on foreign and security policy matters, as these are according to Article 11(4) "affairs of the Realm". Greenland is denied what international lawyers refer to as (external) self-determination, i.e., full independence. In that sense, although not formally colonised, Greenland remains dominated.[24] This domination arguably has the largest impact on the Indigenous Inuit population, who have traditionally led a subsistence lifestyle, and have been incorporated into global capitalism in various ways. Greenland is a fascinating lens into the struggles that play out under a global rentier capitalist order: it is geographically, economically, and culturally located in the periphery, meaning its struggle for independence is rarely connected to other independence struggles. At the same time, Greenland is also at the very epicentre of debates about climate change and extractivism as the melting ice sheets reveal its geological riches.

Framed as an Arctic frontier, the imagination around Greenland is bound up with "territorialisation as a practice of claiming, managing and controlling places, resources and people".[25] This type of propertisation of land has a long history in the colonisation of land by colonial settlers in particular, legalised and legitimised through legal property regimes. The struggle for states to position themselves in the rentier capitalist hierarchy is illustrated by Greenland's attempts at entrepreneurialism, which can be read into its efforts to insist on shaping the terms of its adventure tourism industry, even if this means becoming complicit in the marketing, and ultimately furthering, of climate catastrophe. This is perhaps most evident in Greenland's Ministry of Foreign Affairs' tweet, intended as a response to Trump's comments: "#Greenland is rich in valuable resources such as minerals, the purest water and ice, fish stocks, seafood, renewable energy and is a new frontier for adventure tourism. We're open for business, not for sale".[26]

The Ministry of Foreign Affairs used the opportunity of a global audience, not as an opportunity to highlight its struggle for self-determination, but as an opportunity to communicate the nation brand. It has come to understand independence as tied to economic independence rather than in a political struggle

23 Act on Greenland Self-Government, Act no. 437 of 12 June 2009.

24 See the project of post-colonial comparative analysis 'Imagining Independence – Greenland's Postcolonial Politics of Comparison' at the Danish Institute for International Studies: www.diis.dk/en/projects/imagining-independence-greenlands-postcolonial-politics-of-comparison.

25 M. Nuttall, *Climate, Society and Subsurface Politics in Greenland: Under the Great Ice* (2017), 5, referencing N.L. Peluso and C. Lund, *New Frontiers of Land Control* (2013).

26 Greenland Ministry of Foreign Affairs, 'Greenland's Response to Rumours of its Purchase by Trump' (*Twitter*, 16 August 2019) <https://twitter.com/GreenlandMFA/status/1162330521155887105> accessed 16 August 2019.

for self-determination, echoing the reformism of independence struggles in the 1960s. Greenland therefore finds itself in a bind that many other states have found themselves in – to become economically independent (and integrated into the global capitalist order) so as to become politically independent. This struggle has been amplified through an aggressive mining industry. Where the tourist sector may still be angling for integration in the hope of gaining economic and political benefits, Greenlanders have become alive to the exploitation of people and environment through the rentier capitalist mining sector. In 2021, this unease with extractive industries even led to an election. This struggle against the force of capital indicates that Greenland, including in particular its Indigenous peoples, is in a process of becoming embedded in global capitalist accumulation and its value extraction. Luxemburg would have labelled this as "a battle of annihilation".[27]

C. Histories of Propertisation and the (Settler) Colony

The propertisation of land, through the legal creation of private property and its value extraction to benefit the metropole, is closely entwined with colonialism. The foregrounding of colonialism rests, in the words of Onur Ulas Ince, "on the fundamental premise that capitalism has historically emerged within the juridico-political framework of the 'colonial empire' rather than the 'nation-state'".[28] Colonialism was therefore not only about value extraction (raw materials), but also about testing new means of *valuing*: it was in the colonies that new forms of social property relations for the production of profit were first conceptualised. The 17th century Irish, 18th century North American, and 19th century Australian (settler) colonies were among the laboratories for mapping, classification, surveying and registering land. In the words of Henry Jones: "Land had to be free from customs and rights which interfered in this most productive use. Land had to become *property*".[29] Brenna Bhandar's work is instructive, not only in the historical mapping of the propertisation of land, but in the distinctly racial aspects of this task. Bhandar in particular focuses on the "culture of improvement" that was morally and juridically tied to the wrongfulness of waste. The appropriation of Indigenous lands, and its legal justification of inability to own property or cultivate land, depends on ideologies of European racial superiority.[30]

27 Luxemburg, *supra* note 8, at 349.

28 O. U. Ince, *Colonial Capitalism and the Dilemmas of Liberalism* (2018) 4.

29 H. Jones, 'Property, territory, and colonialism: an international legal history of enclosure' (2019) 39 *Legal Studies* 189.

30 B. Bhandar, *Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership* (2018).

The establishment of tradable property rights converts land and resources into commercial assets.[31] This happens under the premise of production, that things need to be "put to work". This putting of assets to work is, as Amin points out, accompanied by "the rejection of labor's central place", which in itself justifies the extraction of value without labour: "Proprietorship in and of itself is the source of proprietary incomes".[32] Legal historian William Nelson sees the historical precedent of what Ince would call "colonial primitive accumulation", in the 1669 Fundamental Constitutions of Carolina. This legal order conceptualised by Ashley Cooper, the Earl of Shaftesbury and his personal secretary John Locke (the Enlightenment philosopher) was one of the first legalised systems of imperial rentier capitalism. The Fundamental Constitution put in place a property regime that encouraged large private farms run by professional managers, laboured on by black slaves, producing surplus value for the metropole.[33]

When it comes to international relations, this aspect of territory and property has analytically been increasingly neglected. The era of 20th century globalisation brought with it a sense that imperialism was no longer bound to land – notably just as Indigenous lands were undergoing unprecedented threats. International lawyers, tending to under-theorise the state and trying to make sense of US hegemony, focused for many years on a notion of deterritorialised hegemony. This seemed to tally with a more general separation of territory and globalisation in the analysis of hegemony. Hardt and Negri famously explained this in 2000 in the following terms: "In contrast to imperialism, Empire establishes no territorial center of power and does not rely on fixed boundaries or barriers. It is a decentered and deterritorializing apparatus of rule that progressively incorporates the entire global realm within its open, expanding frontiers".[34]

Returning to Luxemburg's notion of imperialism forces a reintroduction of land into the equation. In her theorisation, capitalism must gain access to productive forces in "non-capitalist social strata" to accumulate. "The most important of these productive forces", explains Luxemburg, "is of course the land, its hidden mineral treasure, and its meadows, woods and water…".[35] Arguably, the Greenlandic Inuit who have lived on the land that is up for extraction for many centuries, fall under this conceptualisation of primitive accumulation. Ultimately, this extraction can be, and should be, viewed as a "new colonial expansion" in the form of rentier capitalism, i.e., the monopolisation of access to the extractive industries through foreign investors – whereby both

31 L. Cotula, '(Dis)integration in Global Resource Governance: Extractivism, Human Rights and Investment Treaties' (2020) 23 *Journal of International Economic Law* 431-454.

32 Amin, *supra* note 1, at 12.

33 W. E. Nelson, *The Common Law in Colonial America* (2013), 62-63.

34 M. Hardt and A. Negri, *Empire* (2000), xii.

35 Luxemburg (note 8) 350. Ince (note 27) describes this as "colonial primitive accumulation".

the tourism and mining industries qualify as extractive.[36] Luxemburg rightly observed and predicted that there is no hope of accumulation through "peaceful competition"; instead, history has taught us that expansion "is accompanied, as a matter of course, by a relentless battle of capital against the social and economic ties of the natives, who are also forcibly robbed of their means of production and labour power".[37] The racialised aspect of states from which value is extracted in an imperial rentier capitalist regime is not incidental. As Robert Knox argues, most key moments of capitalist expansion "were also steeped in racism", whether colonialism, the slave trade, 19th-century "civilisation" projects, or early experiments in limited self-determination such as the League of Nations Mandates of the UN Trust territories.[38] An important lesson about the right to self-determination emerges from this short history of propertisation and colonialism, namely that international law has stifled political movements of self-determination through legal regimes, including the *right* to self-determination. In the words of Deborah Whitehall, self-determination has "atrophied" since the early 20th century.[39] Just how much it has atrophied under imperial rentier capitalism is exemplified through Greenland's nation-branding practices, set out in the following section.

D. Nation Branding, Value, and the Atrophy of Self-Determination

The practice of branding, which began with commodities, has extended to places – cities, regions, and even nation states. Nation branding, a sub-category of place branding begins from the premise that places stand in competition with one another over scarce resources; and to attract resources (in the form of investment, tourists and trade), states, regions, and cities must create certain associations.[40] It is a practice that states have embraced to varying extents and in different contexts ever since British brand consultant Simon Anholt coined the term nation branding in 1996.[41] Annual rankings of states and places, including the annual Nation Brand Index, are a means of valuing states according to a set of metrics including tourism, richness in natural beauty, governance,

36 "New colonial expansion" is a term used by Luxemburg, *supra* note 8, at 350.

37 Ibid. at 350.

38 R. Knox, 'Valuing Race? Stretched Marxism and the Logic of Imperialism' (2016) 4 *London Review of International Law* 99.

39 D. Whitehall, 'Rival Histories of Self-Determination' (2016) 27 *European Journal of International Law* 719.

40 See e.g. M. Aronczyk, *Branding the Nation: The Global Business of National Identity*, (2013) Oxford University Press.

41 S. Anholt, 'From *nation branding* to *competitive insight* – the role of brand management as a component of national policy' in K. Dinnie, *Nation Branding: Concepts, Issues,* (2008) *Practic*, 22.

and behaving responsibly in international peace and security.[42] Corresponding to this valuation, are the nation- and place-branding practices and campaigns managed by tourist boards, business communities, and foreign ministries.

Greenland's branding campaign, launched in 2010, is "Pioneering Nation", the tag line for the tourist sector is "Visit Greenland. Be a Pioneer". Pioneering is used both as a way of describing Greenlanders ("Pioneering people"), as well as an invitation: invest in Greenland and become a pioneer. Greenland is not itself a rentier capitalist economy; however, as it is already partially integrated into a global rentier capitalist political economy, its positioning in the tourist sector is key. Not only does it approach tourism as a competitive market, but this competition is shaped through the concentration of wealth through a global rentier capitalist economy. Greenland is forced to demonstrate its entrepreneurial spirit in attracting investment and its stable governance structure in protecting it. All of this is mediated through the assimilation to Danish culture, laws and through Danish sovereignty. While associations of pioneers with adventure and being the first to discover lands is evoked through the Pioneering Nation tag line, pioneering also carries associations of settler colonialism – the assumption of "empty" lands or *terra nullius*, of lands waiting to be discovered, in ignorance of Indigenous peoples and ways of living with and on the land.

In its branding campaign, there are three overlapping emphases for attracting foreigners to Greenland: adventure tourism, foreign investment in mining, and the stable "Nordic model" of governance.[43] Greenland's place branding in order to attract tourism can be best illustrated through its tourist board site Visit Greenland that claims to be "100% owned by the Government of Greenland, who is responsible for marketing the country's adventures and opportunities for guests wishing to visit the world's largest island".[44] Closely tied up with the appeal of viewing climate disaster first hand, are the lives and ways of the Indigenous Inuit – their clothing, food, and subsistence livelihood. What one sees playing out here is the type of entrepreneurialism reserved for those states of the periphery that must resort to forms of "dark tourism" and culture commodification in order to attract visitors. This self-commodification of the culture of a place that is attached to conflict or, in the case of Greenland, to environmental destruction, is indicative of the limited means for attracting

42 'Ipsos Public Affairs. Anholt Ipsos Nation Brands Index (NBI) https://www.ipsos.com/en/nation-brand-index-2020; https://www.ipsos.com/sites/default/files/anholt-ipsos-nation-brands-index.pdf.

43 C. Ren, U.P. Gad and L.R. Bjorst, 'Branding on the Nordic Margins: Greenland Brand Configurations' in C. Cassinger, A. Lucarelli, S. Gyimóthy (eds.), *The Nordic Wave in Place Branding: Poetics, Practices, Politics* (2019), 160.

44 https://visitgreenland.com/.

investments and tourism on the terms of the oppressed state.[45] Jean and John Comaroff have observed this form of self-commodification in regard to post-colonial states in sub-Saharan Africa in particular. In this context, they observe that "culture" is one of the few things which those who have nothing or very little can sell: "Recourse to the cargo of cultural tourism, which has a long history, has become a universal panacea, an autonomic reflex almost, for those with no work and little to sell".[46] As some states resort to dark tourism of sites of ethnic cleansing, Greenland is commodifying the spectacle of the melting ice sheets and the destruction of the Indigenous lands of the Inuit.

Visit Greenland's website details the ice sheet and glacier losses under "The Guide to Climate Change in Greenland". Then, there is a swift transition from climate disaster facts to an invitation to "experience [this] for yourself": "It is quite common in Greenland to see glaciers calving before your eyes. Follow the links below to discover the best ways to see this amazing process for yourself".[47] This tension, between inviting adventure tourism and investors who extract value on the one hand, and the simultaneous self-determination struggles to prevent value extraction on the other, are part of the contradictions of a global order defined by imperial rentier capitalism. As Greenlanders' identities move towards that which is marketable, their struggle for self-determination (as a movement that can likely not be made profitable) is arguably in danger of falling by the wayside.[48] After all, the so-called "Nordic model" of governance, which is a promise of stability for investors, is directly exported from the Danish model of governance. Critically, nation branding is not only a practice that is outward facing, i.e., towards non-citizens like foreign investors or tourists; it is also a practice that highlights the commercially lucrative values of identity for those living *within* the boundaries of that place, thereby co-producing market-oriented local, regional or national identities. What appears, then, is not only a commodification of the place, but also of the people and their identity. In *Ethnicity, Inc.*, John and Jean Comaroff call the type of economy that draws on identity, the "identity economy", where "the corporeal meets the corporate, where essence becomes enterprise".[49]

45 I explain this in regard to Cambodia's positioning vis-à-vis global justice in C. Schwöbel-Patel, *Marketing Global Justice: The Political Economy of International Criminal Law* (2021).

46 J. and J. Comaroff, *Ethnicity, Inc.* (2009), 9. They reference here as a comparison G.P. Castile, 'The Commodification of Indian Identity' (1996) 98 *American Anthropologist* 743.

47 https://visitgreenland.com/about-greenland/the-guide-to-climate-change-in-greenland/.

48 Place-branding experts argue that despite not finding a direct link between the national autonomy and entrepreneurship of Greenlanders, entrepreneurship may nevertheless be an instrument for decolonization. See C.W. Wennecke, R.B. Jacobsen, C. Ren, 'Motivations for Indigenous Island Entrepreneurship: Entrepreneurs and Behavioral Economics in Greenland' (2019) 14 *Island Studies Journal* 43.

49 Comaroff, *supra* note 46, at 9.

To make sense of this process as one of valuing and de-valuing, Marx's theorisation of value in *Capital* (Volume I) is instructive: Marx begins with an analysis of value in regard to commodities. All commodities, he explains, have a use value and an exchange value. Use value relates to the question: what is the commodity good for? Exchange value is a "quantitative relation" and therefore relative.[50] The latter value is not the same as the price, but rather that which makes the commodity tradable – and therefore attain a price. In capitalism, a commodity's exchange value is prioritised over its use value in order to extract surplus value from it. Bob Jessop explains that in the neoliberal order, exchange value is prioritised over use value far beyond commodities, thereby setting out what is often dubbed privatisation through the use value and exchange value lens.[51] Even the self can be commodified, as just explained. Jessop's explanation of the commodification of land may appear a little simplistic, especially as rentier capitalism also predates neoliberalism,[52] but it is nevertheless useful: land, according to Jessop, is "a gift of nature" as well as "a monopolistic claim on revenues".[53] The latter feature is privileged over the former because neoliberalism "privileges exchange-value over use-value".[54] This occurs in capitalism in order to extract surplus value, i.e., profit or rent. Under rentier capitalism, this process leads to the concentration of wealth through control over scarce assets. International law has had a hand in *keeping assets scarce*, i.e., in preventing their redistribution. A perhaps unlikely role in the prevention of redistribution is attributed to the right of self-determination under international law, which has been interpreted so narrowly that it is mostly now considered as a right belonging to the era of decolonisation in the 1960s. In fact, Denmark's sovereignty was first confirmed by the Permanent Court of International Justice in 1933 in the *Denmark v. Norway* case on the *Legal Status of Eastern Greenland*.[55] Norway had claimed a part of Eastern Greenland as *terra nullius* and therefore capable of being acquired by occupation. The predecessor of the International Court of Justice (ICJ) held that "there was sufficient evidence to establish Denmark's title to the whole of the country".[56] The continuation of domination by Denmark has been facilitated through this recognition of foreign sovereignty in conjunction with the narrow interpretation of self-determination, which has in turn facilitated Greenland's position as a place of extraction of value in a global political economy.

50 K. Marx, *Das Kapital* [1867] (2009), 2.

51 B. Jessop, 'The Heartlands of Neoliberalism and the Rise of the Austerity State' in S. Springer, K. Birch, J. MacLeavy, *The Handbook of Neoliberalism* (2016), 410.

52 Zacarés. Nicole Graham places this in the transition from feudalism to capitalism. Land changed from being the source of power to an object of power – a commodity. N. Graham, *Lawscape* (2010).

53 Jessop, *supra* note 51.

54 Ibid.

55 *Denmark v. Norway, Legal Status of Eastern Greenland* (5 September 1933), PCIJ 26th sess.

56 Ibid.

Alice Kelly's work on conservation practices can usefully be employed for understanding value extraction through climate disaster tourism or ecotourism. She creates the link between the enclosing of land and primitive accumulation – with some land being enclosed not for resource extraction in the traditional sense, but value extraction for tourist and visitor consumption. According to Kelly, the act of designation for conservation is a new frontier of value.[57] The enclosure of spaces for value extraction is consequently akin to resources being dug up. Exploitation in "non-material" ways has material consequences. Spaces are, as Nuttall puts it in regard to Greenland and ecotourism, "transformed into commodities for consumption in the global marketplace".[58] In the tourism sector this is clear through Greenland's approach to attracting tourists: the land is made hospitable for tourism, which at the same time has a negative impact on the climate. Greenland (in particular its settlers) and foreign investors in tourism extract value from the land, jostling for monopoly power over the scarce assets. The tourist industry is one in which the Danish influence is palpable. As Finn Lynge, Expert-consultant for Greenland Affairs, explained at the ICJ in 1993 (60 years after the first dispute concerning the same area), Danish projects of improvement in the 1950s in particular concerned the entire Greenlandic social infrastructure, including housing, health, education, telecommunications, harbour engineering, traffic and law enforcement.[59] Paradoxically, self-determination was considered as dependent on becoming "more Danish":

> There is no doubt that at this point, people generally wanted more self-determination. Yet, more autonomy meant better education, which in turn presupposed a better mastery of Danish, the Greenlandic Inuit language being unsuited to handling important modern-day subject-matters such as, for example, medicine and engineering.[60]

Lynge goes on to explain that the improvements ("raising the living standard") required the settling of Danes: "A great number of Danish skilled workers, school teachers, doctors, nurses, engineers, administrators, etc. had to be sent to Greenland".[61] The case at the ICJ did not expressly concern the question of self-determination of Greenland, but rather a maritime delimitation dispute around fishing zones between the East Coast of Greenland and the Jan Mayen Norwegian islands. The dispute arose after Denmark had extended Greenland's fishery zone. It is notable that the ICJ's jurisdiction was accepted for the case

57 A. Kelly, 'Conservation Practice as Primitive Accumulation' (2011) 38 *The Journal of Peasant Studies* 683.

58 Nuttall, *supra* note 25, at 7.

59 *Denmark v. Norway, Case concerning Maritime Delimitation in the Area between Greenland and Jan Mayen* (12 January 1993) CR 93/2 at 20.

60 Ibid.

61 Ibid.

after Danish and Norwegian *bilateral* talks failed (i.e., without involvement of Greenland's officials).[62] The racialised improvement culture mentioned already, does not come in the shape of a vulgar Trump tower, but the demands of adventure tourists must be accommodated for through infrastructure, catering to foreign tastes, and ensuring their comfort. Historically, these "higher standards" have been aligned with Danish standards. Importantly, these are also carbon-intensive activities. Greenland therefore becomes complicit in making its land and culture an "asset" for rent extraction at its own expense.

Viewing a nation as a commodity or as an asset – as having an exchange value – not only reimagines it as real estate, it also depoliticises its political subjects, in particular glossing over the less marketable features like self-determination struggles. The role of international law lies in maintaining a legal tension between the market and the right to self-determination, whereby investors are protected by keeping the actualisation of the right to self-determination at bay. International law therefore acts in the name of capital. Place branding is the creation of marketisable value metrics of a place, in particular through its culture, potentially foreclosing self-determination struggles as the economic self is prioritised over the political. Under an international rentier capitalist system, entrepreneurialism is reserved only for the weaker states – those who must compete on the open market without the (legal) protections and guarantees of imperial rentier capitalist states.

E. Mining, Law and Value Extraction

Aside from tourism, a further key pillar of Greenland's nation brand – and the reason why it is attracting the attention of rentier capitalist investors – is its natural resources. As Greenland's ice sheets melt, political and economic interests focus on the geological riches (oil and minerals) that will, and have already, become accessible and extractable.[63] Historically, colonised states have created value for foreign dominators and investors through exploitation of their labour-power, their social structures, and their land. Here, the neo-colonial form of value extraction of natural resources appears in line with histories of exploitation. However, this clarity is obscured through law. Laws are often presented as colliding in these contexts: "The collision between indigenous rights and transnational business activity frequently occurs in the context of natural-resource development".[64] The tension is generally resolved in favour of (rentier) capital. International laws have historically facilitated the integration

62 'Memorial Submitted by the Government of the Kingdom of Denmark', *Denmark v. Norway*, *Case concerning Maritime Delimitation in the Area between Greenland and Jan Mayen* (31 July 1989) para. 57.

63 Nuttall, *supra* note 25.

64 J. Kleinfeld, 'The Double Life of International Law: Indigenous Peoples and Extractive Industries' (2016) 129 *Harvard Law Review* 1755.

of colonised and post-colonial states into a global capitalist economy, in particular through "the aggressive establishment of liberal investment regimes and the proliferation of risk-mitigating investment treaties".[65] Central to the risk-mitigating for investors has been an investor-state dispute system in which host states have successfully been sued for environmental or health regulations.[66] This has lowered both the costs and risks of foreign investment, enabling transnational enterprises to operate in regions that were previously beyond reach.[67] At the same time, international law is not regularly associated with this form of imperialism as it itself overemphasises the tension which comes with the collision of different regimes: while investment laws tend to protect foreign investors, including through threats of justiciable compensation for profit losses claims in the billions,[68] human rights law aims to achieve some protections, including of Indigenous peoples and small-scale producers.[69] One might here draw another link to value – in a *discursive* sense, human rights are often used as examples of what is valued in the international community. In a *material* sense, however, i.e., when we consider the distribution of resources, the protection of capital is what is valued.

Indicative of Greenland providing natural resources whose value flows to rentier capitalist metropoles are the names of the mining companies operating or investing in Greenland Minerals: China Nordic Mining and London Mining Greenland, for example.[70] One prominent actor in the establishment of mineral extraction in Greenland is the Australian company Greenland Minerals, which is developing a large-scale mining project, the so-called Kvanefjeld rare earth project, in southwest Greenland. None of the Directors or Management are from Greenland, or even Denmark, but rather from Australia and China. In September 2016, the Shanghai-listed company Shenghe Resources bought a 12.5 percent stake in the exploration company. The company can be described as what Christophers calls "natural-resource rentiers", as an "organisation involved in the commercial extraction, processing and sale of naturally occur-

65 Ibid. citing R. Cronin, 'Natural Resources and the Development-Environment Dilemma', in R. Cronin and A. Pandya (eds.), *Exploiting Natural Resources: Growth, Instability, and Conflict in the Middle East and Asia* (2009), 63.

66 M.A. Gwynn, 'Balancing the State's Right to Regulate with Foreign Investment Protection: A Perspective Considering Investment Disputes in the South American Region' (2018) 6 *Groningen Journal of International Law*.

67 Ibid.

68 This has occurred in particular in regard to the dispute settlement regime of the Energy Treaty Charter, where extractive corporations have successfully sued states for loss of expected profits after states committed to environmental policies. See Martin Dietrich Brauch, 'Should the European Union Fix, Leave or Kill the Energy Charter Treaty? *Columbia Center on Sustainable Investment*. 9 February 2021.

69 Kleinfeld, *supra* note 64, at 1778.

70 B.O.G. Mortensen, J. Su, L.W. Mouyal, 'Chinese Investment in Greenland' (2016) *Advances in Polar Science* 192.

ring mineral fuels (coal, oil and gas, uranium) and other mineral resources (metal ores, stones, sands, salts)".[71] "Rare earths", the website of Greenland Minerals states, "are essential to our non-fossil fuel, 'smart' and climate-friendly future".[72] Uranium, zinc, and fluorspar are named alongside rare earth deposits. Even though the company emphasises that mining will be for green energy purposes, uranium in particular is known for its long-term adverse effects on health and the environment where it is mined. Opposition by the affected communities to the company beginning extraction has been great, and even prompted an election in 2021.[73] Greenland Minerals continues to press ahead with its objective of attaining the necessary licences despite this opposition. One of the news items on its website is titled "International expert: Mining waste poses no risk to environment and local residents".[74] This expert is also cited in a letter to Greenland's environmental agency that threatens the reputation of Greenland as a mining destination if the Environmental Impact Assessment is not wrapped up more speedily.[75] Christophers explains that these companies go "to great lengths, and often incur great costs, … to convert naturally occurring mineral resources into exclusively controlled revenue-generating commercial assets".[76] Both Australian and Chinese companies are heavily involved in mining on foreign soil, extracting value for corporate gains. Chinese companies tend to be state companies, but for Australia the defining feature that makes it a rentier capitalist state are the ways in which the Australian state legally protects and supports mining corporations.[77] The space occupied by Denmark in mediating foreign investments in Greenland is notable through the wording of the chapter on Denmark in *The Foreign Investment Regulation Review*: "It is generally expected that foreign investments in *Denmark* will increase in the future, in particular investments in natural resources in Greenland, as well as

71 Christophers, *supra* note 1, at 95 and 97.

72 https://ggg.gl/materials/.

73 'Greenland Minerals Fails Community Test over Controversial Rare Earths and Uranium Mine Plan' (26 May 2021) *Mirage News*, available at: www.miragenews.com/greenland-minerals-fails-community-test-over-566222/.

74 https://ggg.gl/assets/GL-DK/GMLTD_News_Maj-UK.pdf.

75 The letter is filed as a letter of complaint and signed by the managing director of Greenland Minerals, John Mair. He accuses the Environmental Agency for Mineral Resource Activities (EAMRA) of being incompetent, prejudiced, scientifically ill-informed, "misguided and mischievous" for requesting additional data and analysis that is part of a "cycle of pedantry and subjectivity". He signs off stating that it is absolutely essential that the Environmental Impact Assessment process is finalised quickly and threatening that "Otherwise the damage to the Project and to Greenland's reputation as a mining destination may be irreparable". Finally, stating dramatically "Unfortunately, the world will not wait". The letter is available here: https://file.ejatlas.org/docs/4752/GML_complaint_2019-04-04.pdf.

76 Christophers, *supra* note 1, at 97.

77 Australian companies that do not pay tax in Papua New Guinea, where they extract minerals, was recently revealed: J. Nicholas and K. Lyons, 'Australian Mining Companies Have Paid Little or No Corporate Income Tax in PNG Despite Huge Profits', *The Guardian*, 8 June 2021.

in Arctic infrastructure".[78] Greenland is ultimately stuck between rivalries of rentier capitalist states, unable to assert its interests.

F. Conclusion

The backlash to President Trump's intention to purchase Greenland overlooked the importance of Trump viewing Greenland – the world's largest island – as "real estate" because it did not question the structuring function of rentier capitalism in a global order. The backlash instead operated within a marketised idea of the value of a nation state: "Open for business, but not for sale". This chimes with a moralist account of rentier capitalism, proposed by Guy Standing and Marianna Mazzucato, among others, who refer to rent as "unearned income", implying that this is a question of being a "good capitalist" by earning your income – deserving it.[79]

Thinking through this episode with the help of value theory enables an understanding of market value being prioritised over social value in a general sense, but it also allows for a more systematic analysis of how imperial rentier capitalism is shaping nation states along a stratified hierarchy. The construction of a nation's territory as real estate underlines how imperial rentier capitalism exploits those it seeks rent from. This is in part of course a moral argument, but it is mostly a historical materialist argument that diagnoses imperial rentier capitalism as the cause of the stratification of inequality, stabilised and legitimised through a network of international laws. It is this insistence on the *legality* of imperial rentier capitalism that necessitates a shift away from moralist diagnoses.

Greenland, unable to compete in the global rentier's operations, can only seek to *become the object of value extraction* under the impression it is entering into a competitive market favouring progress for all. And whilst Greenland seeks to employ this new wealth for its self-determination, "the reality of the global system", as Amin observes, "has shown that capitalism does not result in homogenization of economic conditions … but, on the contrary, produces increasing polarization".[80] This highlights the need for an emphasis on social value in which different experiences of imperialism are connected – historically, discursively and materially. And, certainly, law may have a role to play. Resistance strategies have after all mobilised the law, like in the context of human rights litigation to challenge resource projects encroaching on Indigenous peoples' lands.[81] Ultimately, however, this is about thinking about

78 Emphasis added. C.S. Goldman (ed.), *The Foreign Investment Regulation Review* (2017), 76.

79 G. Standing, *The Corruption of Capitalism: Why Rentiers Thrive and Work does not Pay* (2016); M. Mazzucato, *The Value of Everything: Making and Taking in the Global Economy* (2017).

80 Amin, *supra* note 1, at 29.

81 Cotula, *supra* note 31.

social value – which values should remain as determined by their social utility. Amin, who in his work placed particular emphasis on the exploitation of the oppressed in the Global South, helpfully highlights that "the concept of *social* value lay at the heart of his [Marx's] project".[82] The critique of capitalism is the critique of the dominance of the economic stage of history; its purpose is "an 'anti-economism'".[83] Amin goes back to the use value/exchange value distinction, arguing that social value is about "a choice of production of definite use-values based on their measure of social utility, which is to say, their usefulness for human society".[84] Whilst a "return" to use value may not be appropriate for all social relations, it certainly is a useful shorthand for thinking about disrupting capital's grip on land and ultimately imperial rent extraction.

82 Amin, *supra* note 1, at 10.
83 Ibid.
84 Ibid., at 16.

Chapter 5

Paris is Burning

A Cautionary Tale about the Politics of Value

Clair Quentin

This is a cautionary tale about value theory. It is a story the crux of which takes place in the convivial Parisian lunch spots where certain technocrats and policy wonks of international corporate tax reform had a number of informal but frequent meetings,[1] but its message is not just for people interested in international corporate tax norms. It is for anyone whose business is to theorise value. And its message is this: if you play with fire – and particularly if you do something like mixing up your matches and your fuel – you risk getting burned yourself. Before the tale is told, however, it is necessary to fill in some value-theoretical backstory. This chapter therefore falls into two parts; a discussion of certain features in the history of value theory in Part I, and then the story about corporate tax reform in Part II.

The value-theoretical backstory in Part I is concerned in large part with value in the "classical" tradition, and the exponent of that tradition who is most influential in the humanities and social sciences today (outside of formal economics where the classical tradition is primarily represented by the Sraffian school) is probably Karl Marx. That being the case Part I is largely about Marxist value theory. But it does not set that theory out in a methodical way – political economy textbooks and reading guides to *Capital* exist for that purpose, as indeed does *Capital* itself. Rather, it looks at value as classically conceived through the lens of unorthodox value-theoretical interventions made during the last half-century or so. The reasons for this are twofold. First, to do so assists in drawing a distinction between value theory that proceeds from principle and value theory that is politically motivated (which is why the story in this chapter is being told), and, second, one such unorthodox value-theoretical intervention (i.e., the one associated with "postoperaismo") is of acute relevance to the story told in Part II.

1 It is not known precisely where the meetings took place. Convivial lunch spots are inferred for the purpose of narrative colour.

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Part I

If one takes a broad historical view of value theory, the boundary around "value creation" – i.e., the boundary around the set of processes which bring into being the thing we theorise when we theorise value – seems to have a tendency to expand. The Physiocratic school theorised value as being created in the agricultural sector and modelled its onward circulation in other sectors in the form of agricultural produce.[2] The classical triumvirate of Smith, Ricardo, and Marx (as he is classically interpreted, at least[3]) extended the scope of value creation to encompass all of material production but more-or-less stopped there. Bureaucrats and barristers, sales staff and soldiers continued to be left out. The marginalist revolutionaries of the late 19th century extended the "production boundary" still further, to encompass the entire market for goods and services (i.e., including the barristers and sales staff but not the bureaucrats and soldiers),[4] and a century or so later Marxists began to follow suit, insofar as they adopted increasingly fashionable readings foregrounding the "value-form".[5]

But others went still further, extending the sphere of value creation beyond even the entire market realm. There are those who note the causal role of state spending in capitalist profitability, and so would tend to bring the bureaucrats into the fold.[6] There are those who foreground the role of unwaged labour in the sphere of social reproduction, showing that it too is implicated in the production of capitalist surplus.[7] And there are those who bring into the ambit of value creation the producers of the cultural conditions of consumption – artists, certainly, but also anyone else acting to create those conditions; consumers generally, in other words.[8]

These extensions of the concept of value creation may be understood by some as a matter of choice on the part of those who theorise value. Perhaps proceeding from a conflation of value and utility, the "production boundary" that a theory of value posits may be understood (or misunderstood) as an agential boundary around what the theorist values. The physiocrats attached value primarily to the basic necessities represented by agricultural produce, the classical school in addition attached value to the muscular proliferation of industrial processes under way around them, the marginalist school attached value to the sphere of exchange where capitalist profits are realised, and so on. And if that is what is going on, then the choice is necessarily (as all choices

2 K. Marx, *Theories of Surplus Value Part I* (1969), 44.

3 For an overview of this contested interpretation as encountered in mainstream Marxist economics see S. Mohun, 'Does All Labour Create Value', in A. Saad-Filho (ed.), *Anti-Capitalism* (2003), 42.

4 W. Smart, *An Introduction to the Theory of Value* (1891).

5 F.H. Pitts, *Critiquing Capitalism Today* (2018).

6 H. Boss, *Theories of Surplus and Transfer: Parasites and Producers in Economic Thought* (1990); M. Mazzucato, *The Value of Everything* (2018).

7 L. Fortunati, *The Arcane of Reproduction: Housework, Prostitution, Labor and Capital* (1995).

8 M. Hardt and A. Negri, *Commonwealth* (2009), 132.

are) a political one, and so it would follow that choices along these lines can be made *deliberately* political.

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Perhaps the clearest illustration of a politically motivated expansion of the production boundary would be the claim to the effect that unwaged labour in the sphere of social reproduction creates value. This claim prompted a decade or so of technical debate within Marxist feminism in the 1970s,[9] but it is inextricably linked to the "wages for housework" movement, which was a fundamentally political project to forge solidarity between waged and unwaged women, contest structural gender oppression under capitalist patriarchy, and simultaneously position that struggle as a challenge to male-dominated leftist political organising.[10]

Indeed, as a value-theoretical claim it departs from the very premises of classical political economy, rather than making something in the nature of a technical intervention, and explaining why this is the case enables us to explore an important feature of value theory in the classical mould. It is important to recall that "value" as conceived in classical political economy is the putative property that makes commodities commensurable even though they are different.[11] It seems self-evident that the cycle of using commodities to make commodities yields a surplus, but as soon as we attempt to look at it closely or precisely, that surplus apparently becomes unknowable, because of a commensurability problem. By what measure does a homogenous volume of a commodity yielded by a production process as an output (a barrel of oil, say, or 20 yards of linen) represent an excess over the heterogeneous aggregation of raw materials, machinery depreciation and worker's wage goods that constitute that process's inputs? Classical value theory is an evolving collection of attempts to answer that question, and value in the classical conception is therefore a yardstick by reference to which gross outputs, and the inputs to be netted off against them, are measured.[12] To "create" value, therefore, (and here is the crucial point) is to participate in the process that brings about *gross* output. Processes which save on the cost of capital's inputs (for example the unwaged reproduction of workers in the sphere of social reproduction) only increase the *net* surplus.

The value-theoretical departure associated with the "wages for housework" movement is therefore really a socio-political claim about how the exploitative impact of value creation is distributed. As Marxist feminist legend Silvia

9 L. Vogel, *Marxism and the Oppression of Women* (1983).

10 See L. Toupin, *Wages for Housework* (2018).

11 P. Mirowski, *More Heat Than Light* (1989).

12 D. Ricardo, 'Absolute Value and Exchangeable Value', in P. Sraffa (ed.), *The Works and Correspondence of David Ricardo*, Vol. IV (1962), 399, cited by Mirowski *supra note* 11, at 173.

Federici explained at a recent conference on social reproduction in London, reflecting on her involvement in that movement decades previously, she and her comrades took from Marxian critique of the capitalist mode of production the proposition that capital extracts surplus by means of that portion of the worker's labour power that it does not pay for, and as feminists and activists wanted to make the point that in fact capital sucks unpaid labour from the entire community.[13] The claim that domestic labour creates value is accordingly best understood as an extension of the classical concept of value which has a political rather than a value-theoretical logic.

And the political pressure to extend the boundaries of what value can do as a concept is, as already intimated, a historically contingent one. These days few Marxist feminists seem motivated to develop the debate about whether or not unwaged domestic labour creates value.[14] In the recent landmark edited volume of essays addressing the intersection of feminist and Marxian concerns today, *Social Reproduction Theory*,[15] the question is barely even hinted at. The significance of this once furiously debated issue seems to have withered away following the economic crisis of the 1970s, alongside the withering away of certain features of the so-called "golden age" of post-war economic expansion such as the breadwinner/homemaker model of domestic organisation,[16] and the political power of male union bosses.

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Alongside the expansion of the theoretical demesne of value into the domestic space, its expansion into the cultural (and consequently online) space may also be understood as something political and historically contingent, and indeed likewise rooted in the end of the post-war "golden age". As that golden age progressed, it became clear that superficially competitive markets in major consumer commodities were becoming dominated by what were effectively cartels of major players competing not on price but on the basis of features like branding and industrial design. This is the development underlying the "monopoly capitalism" analysis promulgated at the high point of the golden age in the mid-1960s: companies with oligopolistic positions were finding that investment in processes revolving around the marketing of branded commodities (as opposed to, say, improvements in product utility or process efficiency) repaid themselves handsomely in the form of excessive profits.[17]

13 Social Reproduction Theory Conference, QMUL (25 June 2019).

14 One exception is Alessandra Mezzadri, who has published extensively on this topic; see for example 'On the Value of Social Reproduction: Informal Labour, the Majority World and the Need for Inclusive Theories and Politics', (2019) 2.04 *Radical Philosophy* 33.

15 T. Bhattacharya (ed.), *Social Reproduction Theory* (2017).

16 R. Crompton, (ed.), *Restructuring Gender Relations and Employment* (1999).

17 P. Baran and P. Sweezy, *Monopoly Capitalism* (1966).

This model evolved into a model whereby the materially productive capital – machinery, factories and so on – was often not owned by those substantially profiting from it. The risks of material production were increasingly being passed upstream in what are now called "global value chains",[18] from the jurisdictions where consumption predominantly takes place to supplier companies in jurisdictions with cheaper labour, more violent repression of union activity, and so on[19] (the "lead firms" in those global value chains thereby outsourcing, to the mechanism of oligopsony within the global market, the process of minimising production costs). This development left, in the former industrial powerhouses of the economic core, a substantially reconstituted "post-industrial" working class[20] whose labour was increasingly deployed in sectors that would have been characterised by the classical political economists as "unproductive".[21] Accordingly the relation of this post-industrial working class to the production of value as classically understood became primarily that of *consumer*, rather than that of worker.

As with the response of Marxist feminists to the post-WWII model of domestic organisation, political economists working in the classical tradition did not simply ignore this development, but the response was varied. One strand of thinking already noted above i.e., the so-called "value-form" school reassessed the literature and came to the conclusion that the classical distinction between productive and unproductive sectors was invalid: value is produced by anyone performing wage labour (or equivalent) of any kind, provided there is a subsequent market exchange in respect of the labour process' output.[22] (This was a convenient sidestep in any event since the pre-eminent status of Marxism as an economics of those productive sectors, as opposed to a qualitative theory of capitalist exploitation, was being undermined by technical advances made by Piero Sraffa and his followers.[23]) Another strand of thinking, however, went further, and this is the strand of thinking that is of particular interest to the story told in this chapter. It is often referred to as postoperaismo.

Postoperaismo originated in Italian activist circles in the latter part of the 20th century. In common with the strands of Marxist feminist thinking seeking to include domestic labour within the production boundary, postoperaismo

18 G. Gereffi, M. Korzeniewicz and R.P. Korzeniewicz, 'Introduction: Global Commodity Chains' in G. Gereffi and M. Korzeniewicz, (eds.), *Commodity Chains and Global Capitalism* (1994), 1; G. Gereffi, J. Humphrey and T. Sturgeon, 'The Governance of Global Value Chains', (2006) 12 *Review of International Political Economy* 78.

19 N. Klein, *No Logo* (1999).

20 G. Esping-Andersen (ed.), *Changing Classes: Stratification and Mobility in Post-Industrial Societies* (1993).

21 E.K. Olsen, 'Productive and Unproductive Labour', in D.M. Brennan (ed.), *The Routledge Handbook of Marxian Economics* (2017), 122; Mohun, *supra* note 3.

22 Pitts, *supra* note 5, at 233.

23 D. Elson, 'The Value Theory of Labour', in D. Elson (ed.), *Value: The Representation of Labour in Capitalism* (1979), 115.

decries the exclusive focus in other branches of Marxist theory on wage labour in particular, seeking to bring to the fore the relation between value and *unwaged* activity of various kinds. It gained huge traction in the English-speaking world at the turn of the 21st century with the publication of *Empire* by Michael Hardt and Antonio Negri.[24]

For our purposes the main insight of this school is the severing it identifies between the quantitative concerns of conventional Marxist value theory and the role played by what it labels "immaterial labour" in the modern global economy. Immaterial labour is labour "that produces the informational and cultural content of the commodity".[25] Postoperaismo's core contention in this context is that there are categories of labour or categories of commodity where there is no quantitative relation between, on the one hand, the labour (waged or otherwise) that goes into making them desirable and, on the other hand, the volume of them undergoing exchange. And, in and of itself, this contention is manifestly correct. The labour that goes into digital commodities, for example, bears an arbitrary relation to the number of units of that commodity available for sale.[26]

For authors of this school this "crisis of measurability"[27] means that value theory has to be left behind altogether. Value in Hardt and Negri's analysis evaporates into an indeterminate cloud of utility and desire that permeates our cultural and informational lives and loses its distinctiveness as something measurable that emerges from the relationship between labour and capital.[28] It may be noted that a key implication of the arguments of postoperaismo around immaterial labour is that it takes place throughout culture rather than exclusively pursuant to the wage relation – all of consumer culture is implicated in the co-constitution of value as understood in this way.[29] Thinking along these lines is particularly well illustrated by the claim, popular today amongst Marxists working in this tradition, that social media use during leisure time creates value.[30]

If one wants to mobilize the working classes against capitalism in a context where the relation of a post-industrial working class to the production of

24 M. Hardt and A. Negri, *Empire* (2000).

25 M. Lazzarato, 'Immaterial Labour', in P. Verno and M. Hardt (eds.), *Radical Thought in Italy: A Potential Politics* (1996), 132 at 134.

26 There exists some debate over whether information commodities might be of a value that *tends towards* zero (as opposed to being zero), on the basis that some quantity of labour is required to produce the information, and that quantity is smaller and smaller per unit as units are replicated; the better view however is that their value is simply zero: see T. Rotta & R. Teixeira, 'The commodification of knowledge and information' in M. Vidal *et al.* (eds) *The Oxford Handbook of Karl Marx* (2019), 379.

27 C. Marazzo, *Capital and Language* (2008), 43.

28 Hardt and Negri, *supra* note 8, at 132.

29 F. Berardi, *The Uprising: On Poetry and Finance* (2012), 87.

30 C. Fuchs, *Digital Labour and Karl Marx* (2014).

value as classically understood has become primarily that of consumer rather than worker, the political utility of this perspective is clear. The extension of the production boundary to consumption was already politically desirable for the left in the global economic core in the 1990s when material production was in full flight away from wealthy countries, but it is no doubt sustained and reinforced today by the egregious penetration into most people's lives of unimaginably profitable businesses such as Amazon and Facebook. The narrative goes that we, as consumers and social media users, create the value realised in the form of those profits, by means of our interactions with websites that harvest data about us.[31] This is obviously a politically consoling message for the left, seemingly implicating us all in those profits, rather than attributing them to the Atlas-like individual genius of a handful of US-based entrepreneur-nerds.

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As a critique of traditional Marxist standpoints postoperaismo is, however, misconceived. It was explained above, in connection with Marxist feminist debates about unwaged domestic labour, that the purpose of the concept of value in the classical tradition is to address the conundrum of surplus. In that context, the point was simply that phenomena which increase net surplus by saving on capital's costs are not relevant to the question of what creates value in gross form. In this context, i.e., the value-theoretical claims of postoperaismo, there is a different and more nuanced issue in play, which requires careful elaboration.

The key point is that the conundrum of surplus only arises where inputs place quantitative constraints on outputs, in the sense that a greater quantity of output predicates a greater quantity of input. If the quantitative relation between inputs and outputs is arbitrary, the question as to where surplus comes from does not require us to impose homogeneity on heterogeneous inputs and outputs for the purposes of treating their "value" as something having a specifically *net* quantity. This means that the phenomena which give rise to value are only those which are quantitatively implicated in the quantities of output which are present. And this means that phenomena which have a merely *causal* relation to the fact that an exchange takes place are not value creating. Marx draws the distinction between phenomena which are merely causal and phenomena which are quantitatively implicated and therefore value creating, using the vivid analogy of a match lighting a fire. The fire's heat is *caused* by the match, but the *quantity* of heat generated by the fire comes from the amount of fuel thereby caused to burn.[32]

31 P. Mason, *Post-Capitalism* (2015).
32 K. Marx, *Capital* Vol. II (1978), 207.

So, for example, if a business manufactures and sells a physical commodity, the workers in the factory are fuel and the people in marketing are matches. The workers who design the features of the product that make it attractive are matches, and the workers who actually bring those features into being by making the product are fuel. This is because marketers and designers have a merely *causal* relation to the quantities of output undergoing exchange; their labour is not *quantitatively* implicated by the quantities of output. If a product has an attractive feature, you do not need to design that same feature over and over again to make more of the product. And by the same token the attractiveness of a product is not a function of the number of hours spent at the drawing board – there is an arbitrary relation to the quantity of "match"-type labour put in and the resulting causal power of the output in relation to the quantities in which it undergoes sales.

This is a crucial distinction, so it is worth dwelling on it for another paragraph, just to be certain it is understood. The labour of "match"-type workers is causal in relation to sales, and is therefore causal even in relation to quantities of sales. But that does not mean it is quantitatively implicated in the quantities of output, in the way that "fuel"-type labour is. You cannot look at a quantity of output, and the prevailing conditions of production, and extrapolate back how many hours were spent designing the product and developing the brand. That relationship is quantitatively arbitrary. But you can (in principle at least) extrapolate back how many hours were spent operating the machines at the factory, because the machines at the factory (broadly speaking at least; there are further value-theoretical nuances which do not bear on the point being addressed here) churn out product at a determinate rate. That is what is meant here by being "quantitatively implicated".

As regards the profitability of businesses which seem to be, as it were, all match and no fuel (for example a producer of high-value branded goods where the manufacture and logistics are wholly outsourced and the only asset is the brand) Marx was very clear that the theory of value he was developing was a theory of the *underlying source* of capitalist surplus, "regardless of its particular forms as profit, interest, ground rent, etc".[33] Accordingly the question of whose hands the money ends up in is a separate one from the question of where the value is created. If the "match"-type workers are in one company and the "fuel"-type workers in another, the value will all be created in the latter, but the lion's share of the profitability may well end up with the former.

It should be noted that the core claim here – that there is an arbitrary relation to the quantity of "match"-type labour put in and the causal power of the results of that labour in relation to quantity of sales – in and of itself does not run counter to the core value-theoretical claim of postoperaismo. Indeed, it is the same claim! The observation that certain forms of labour are not quantitatively

33 K. Marx and F. Engels, *Collected Works* Vol. 42 (2010), 407.

implicated in output was not some novel one, to be made in view of the communications technology advances of the 1990s, which rendered all former analysis obsolete. It is fundamentally the same claim as is to be found in traditional Marxism to the effect that some wage labour is unproductive.[34] By the same token the observation to the effect that consumer preferences, activity in the cultural sphere and so on, are causally implicated in sales, is trivially true but does not constitute a meaningful intervention in existing theory, because it is not the *causes* of sales that value theory in the classical tradition exists to quantify. It is the quantities of labour predicated by the commodities themselves as they undergo exchange.

That being the case, the postoperaist perspective has been vigorously contested from a mainstream Marxist standpoint.[35] It should therefore be understood to be a fringe value-theoretical position even within Marxism; one whose claim to novelty is a sleight-of-hand, clothing itself in an appearance of significance that it does not, in fact, possess. Which makes it all the more surprising that (for a while at least) it took centre stage at the OECD in the context of a multilateral corporate tax reform process and was being vigorously promulgated by states right at the heart of the capitalist-imperial core such as the United Kingdom. It is to the story of how that happened that we now turn. It goes like this ...

Part II

Once upon a time (i.e., following the global financial crisis of the late 2000s) there was a period of growing public uproar over the apparent scale of corporate tax abuse. The abuse was particularly, although by no means exclusively, associated with US web giants such as Google, Amazon and Facebook, and it seemingly amounted to a crisis of legitimacy for the entire international corporate tax system.[36] And then suddenly, as if from nowhere, a new international corporate tax norm emerged to defeat this threat. The global corporate tax base, so the G20 and the OECD announced, was to be allocated between jurisdictions in accordance with where "value" is "created".[37] Shortly afterwards, a substantial multilateral project was embarked upon at the OECD, the Base Erosion and Profit Shifting (BEPS) project, with the goal of aligning international corporate tax norms with this "value creation" principle.

34 Pitts, *supra* note 5, makes this point at 191.

35 G. Caffentzis, *In Letters of Blood and Fire* (2013), 95.

36 V. Barford and G. Holt, 'Google, Amazon, Starbucks: The Rise of "Tax Shaming"', (2013) BBC web.archive.org/web/20200706062638/https://www.bbc.com/news/magazine-20560359.

37 G20 Leaders' Declaration (2013), web.archive.org/web/20190127145718/http://www.g20.utoronto.ca/2013/Saint_Petersburg_Declaration_ENG.pdf; OECD, 'Action Plan on Base Erosion and Profit Shifting' (2013), www.oecd.org/ctp/BEPSActionPlan.pdf.

It should be explained at the outset that "value" in this context cannot mean what it means in modern mainstream marginalism – i.e., price – because the existing system, in which the novel "value creation" principle was established to intervene, is *already* based on market values. As things stand, the principle which serves to allocate between jurisdictions the corporate tax base insofar as it arises to multinational enterprises, enshrined in double tax treaties and domestic tax legislation the world over, is the "arm's length principle". The arm's length principle provides that the profitability of multinational enterprises (MNEs) taken as a whole is not to be taxed by any jurisdiction but, rather, the profits of the individual entities that make up the group should be (a) taxed separately in the jurisdictions in which they have a taxable presence and (b) those profits should be determined by reference to arm's-length pricing as between the group entities – deemed rather than actual if necessary. In other words, the outcome of the existing mechanism is already meant to be the same as the outcome that marginalist value theory would deliver: essentially, a market price. And that outcome is the one that, in practice, yields huge pools of untaxed offshore profitability in the hands of MNEs.[38]

That being the case, the huge pools of untaxed offshore profitability in the hands of MNEs which are a practical problem for corporate tax reform, serve as a real-world corollary to a value-theoretical question raised by marginalism, and indeed by any other theory of value which treats value creation as co-extensive with the market for goods and service such as Marxism of the "value-form" school. Those theories of value – let us call them "market theories" – take us beyond classical value theory insofar as they allow that profitability does not exclusively derive from the human labour embodied in commodities. They claim, rather, that value is an emergent property of anything undergoing exchange in a society organised around exchange for money. Which is fine so far as it goes, but we might, nonetheless, reasonably ask where the value comes from. Because if you start to break down the activities of the world's most profitable businesses into profit attributable to their actual operations, there is (so it turns out, looking at the problem of corporate tax avoidance under the arm's-length principle) a lot of residual profit unaccounted for.

And it is a variant of that question of where the value comes from that tax professionals, tax commentators, and tax academics were asking when they asked what this new "value creation" norm promulgated by the OECD meant. It became clear fairly rapidly that the answer was that "value creation" in this context did not really mean anything very much at all. As Itai Grinberg put it "[e]veryone agrees on the principle – but no one agrees what it means".[39] The idea of taxing income where value is created is, said Wolfgang Schön, a "fuzzy

38 R. Collier and R. Andrus, *The Arm's-Length Principle After BEPS* (2017), 2:26, 2.85, 3.13 and 3.39.

39 I. Grinberg, 'International Taxation in an Era of Digital Disruption: Analyzing the Current Debate', (2019) *Taxes* 85 at 89.

notion"[40] or "a mere 'mantra'",[41] "an incoherent and ill-defined notion", explained Mindy Herzfeld,[42] a "messy, political idea" said Susan Morse,[43] or as Allison Christians wrote, "not even conceptually coherent as a theory".[44] The "consensus academic view" accordingly became that "any exercise to define specific sources of value creation is entirely subjective",[45] because there was simply "no common understanding of the term 'value creation'" at all.[46]

It nonetheless became uncontroversial simply to infer (in the absence of any express statement from the OECD as to the meaning of the term[47]) that "value creation" was essentially just a synonym of the vague concept of "economic substance" or "economic activity".[48] This is because, as noted, the practical problem which the new guiding principle was intended to address was the offshore accumulation of profits. And while it was hard to come up with a positive meaning for "value creation", it had a clear negative meaning: whatever value creation *is*, what it *isn't* is artificial corporate structures routed through tax havens where no real business operations take place. In other words, "value creation" is simply the economic substance lacking in an offshore shelfco.

That being said, in order to operationalise the principle, it would nonetheless be necessary to come up with something resembling a positive meaning for "value creation", because (ideally) the reforms would be allocating the tax base away from tax havens, and therefore towards other jurisdictions, and it would consequently be necessary to determine which jurisdictions, and in what proportions.

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In 2015, after around three years of work, the OECD delivered a set of minimum standards, policy recommendations, and amendments to its corpus of

40 W. Schön, 'Ten Questions about Why and How to Tax the Digitalized Economy', (2017) 11 Working Paper of the Max Planck Institute for Tax Law and Public Finance 22.

41 Ibid at 5.

42 M. Herzfeld, 'The Case Against BEPS: Lessons for Tax Coordination', (2017) 21 *Florida Tax Review* 32.

43 S.C. Morse, 'Value Creation: A Standard in Search of a Process', (2018) 72 *Bulletin for International Taxation* 197.

44 A. Christians, 'Taxing According to Value Creation', (2018) 90 *Tax Notes International* 1379.

45 Grinberg, *supra* note 39, at 95.

46 M. Olbert and C. Spengel, 'International Taxation in the Digital Economy: Challenge Accepted?', (2017) 9 *World Tax Journal* 12.

47 See J. Hey, '"Taxation Where Value is Created" and the OECD/G20 Base Erosion and Profit Shifting Initiative', (2018) 72 *Bulletin for International Taxation* 203.

48 M.P. Devereux and J. Vella, 'Are We Heading Towards a Corporate Tax System Fit for the 21st Century?', (2014) 35 *Fiscal Studies* 449; M.P. Devereux and J. Vella, 'Implications of Digitalization for International Corporate Tax Reform', (2017) 8 *Oxford University Centre for Business Taxation Working Paper* note 14.

guidance and model agreements for the use of corporate and state actors – the BEPS "final reports"[49] – the overall effect of which was to introduce only modest interventions in the arm's-length principle. As it played out the "value creation" norm did indeed appear to have been introduced only so as to constrain abuses associated with artificial structuring rather than truly to embody a new principle.[50] The new norms were, for example, more likely to associate profitability with high-skill "people functions", inferentially in onshore jurisdictions, than with the easily relocated offshore formal ownership of intangible assets (a shift waggishly, but not unreasonably, described by Grinberg as the "Bourgeois Labour Theory of Value"[51]). But the core problem had not been addressed: the vast offshore treasure trove of untaxed profits had not been substantially reallocated to any of the jurisdictions wanting to tax it.[52]

One reason for this failure is because the problem was in great part specifically to do with the untaxed corporate profits of certain MNEs operating within the putative sectoral boundaries of something known as the "digital economy",[53] and the way that difficulty was theorised by certain actors forms the kernel of the story being told here.

An important antecedent to the OECD's own approach to this issue is to be found in a report on it, published at around the time the BEPS work started in earnest, by a French government-commissioned task force. The French report makes the following core claim (to quote from its executive summary):

> Data collection reveals the "free labour" phenomenon. [...] Users become virtual volunteer workers for the companies providing the services that they use. [...] The data that they provide makes them production auxiliaries and they create value that gives rise to profits on different sides of the business models.[54]

The report appears to have been highly influential on the authors of the BEPS Action Plan. The Action Plan describes digital economy players "capturing value from externalities generated by free products", and this echoes language in the French report about users generating "positive externalities in the form

49 OECD, 'BEPS 2015 Final Reports' (2015), www.oecd.org/tax/beps-2015-final-reports.htm.

50 M. Devereux and J. Vella, 'Value Creation as the Fundamental Principle of the International Corporate Tax System', (2018) *European Tax Policy Forum Policy Paper* 3.

51 Grinberg, *supra* note 39.

52 T. Tørsløv, L. Wier and G. Zucman, 'The Missing Profits of Nations', (2018, Revised 2020) 24701 *NBER Working Paper*, web.archive.org/web/20200820022713/https://www.nber.org/papers/w24701.pdf.

53 OECD, *supra* note 37, at 10.

54 P. Collin and N. Colin, 'Task Force on the Taxation of the Digital Economy Report' (2013), web.archive.org/web/20151020171724/http://www.hldataprotection.com/files/2013/06/Taxation_Digital_Economy.pdf, at 2.

of data, which are then put back into the production chain without any monetary consideration for the users". And indeed, the authors of the French report claim that their interactions with the BEPS team were "informal but frequent and in-depth, especially on the road to adopting the BEPS action plan".[55] Given that the OECD is based in Paris, it may be supposed that these informal but frequent interactions were easy to arrange, and perhaps took place in the convivial kinds of settings where intellectual bonds are forged and maintained.

A particularly fascinating aspect of the report is the list of antecedents to their analysis that the authors provide. There are a number of management and tech authors but buried at the bottom of the list are authors writing in the Marxist tradition including one that we have already met in our discussion of postoperaismo above, Antonio Negri.[56] The "free labour" concept is therefore expressly rooted in the effectively identical postoperaist idea discussed above that unwaged immaterial labour in culture at large is implicated in the production of value. And indeed, it is unsurprising that postoperaist ideas should emerge in this milieu – the policy elite of the 2010s are of the generation for whom some years earlier, at a more intellectually impressionable age for them as individuals, 1990s postoperaismo would have been as exciting and new as the information technology to which it manifestly spoke.

From the perspective of international corporate tax reform this "free labour" concept was a profoundly radical position, because it potentially located "value creation" (in other words, within the BEPS scheme, a phenomenon attracting an allocation of profits for tax purposes) in jurisdictions where no business activity of any kind takes place on the part of the MNE aside from giving away services for free – for example free participation in a social media environment. In practice there may well also be group operations in those jurisdictions (advertising sales for example) but not necessarily. Slightly less radically, but also in departure from the norm whereby only a taxable presence attracts an allocation of the tax base, the idea of allocating a tranche of digital economy profitability to jurisdictions in which sales take place was also alluded to as a possible route to a solution in the initial salvo of BEPS documents. Sales in a jurisdiction often arise from a taxable presence there but, again, not necessarily.

Either way, then, it is being suggested that "value creation" is taking place downstream in global value chains, in the so-called "market" jurisdiction: the jurisdiction where consumption is taking place. That expansion of the boundary of value creation into the sphere of consumption, which was as we saw effected by postoperaismo, is not merely nodded to in a footnote in a report written by people only informally connected to the OECD: it had been signalled by the OECD as a potential overall direction of departure from one of

55 P. Collin and N. Colin 'Interview' (2013) *International Tax Review*, www.internationaltaxreview.com/article/b1fbsx5c9x2vs5/pierre-collin-and-nicolas-colin and archive.is/rsrX8.

56 Collin and Colin, *supra* note 54, at note 240.

the most basic tenets of international corporate tax i.e., that only jurisdictions marked out by virtue of hosting operations on the part of the group stand to benefit from an allocation of the tax base.

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The OECD's work on the digital economy (known as BEPS Action 1) began in earnest in October 2013 with a meeting of the topic's task force, followed in November 2013 with a "Request for Input Regarding Work on Tax Challenges of the Digital Economy".[57] A compilation of responses received was published in January 2014,[58] and the idea of value being created by consumers was widely rejected by the respondents. A short while later there followed a discussion draft,[59] and the idea of users creating value through their free labour is still there, but noticeably differently characterised. It is now characterised – by reference to generalised examples corresponding to Amazon and Facebook – specifically as a network effect, arising "from users' marginal utility to each other". "[T]he more users there are", the draft goes on to explain, "the higher the value created is".

There is of course no doubt that a network effect increases the utility of sites like Amazon and Facebook to their users, but the idea that the network effect increases specifically the *marginal* utility of users to each other is nonsense. It does not, therefore, require a hugely cynical reading to infer that the OECD is simply using the language of mainstream marginalism here to draw a veil over the vertiginously heterodox nature of their value-theoretical stance. In any event the content of the discussion draft went through two further iterations, as an interim deliverable in September 2014[60] and as a final BEPS output in October 2015,[61] but the material evolved no further and (in contrast

57 OECD, 'Request for Input Regarding Work on Tax Challenges of the Digital Economy' (2013), web.archive.org/web/20140704021558/https://www.oecd.org/tax/request-for-input-regarding-work-on-tax-challenges-of-the-digital-economy.pdf.

58 OECD, 'Compilation of Comments Received in Response to Request for Input on Tax Challenges of the Digital Economy', (2014) web.archive.org/web/20140124222710/https://www.oecd.org/ctp/comments-received-tax-challenges-digital-economy.pdf.

59 OECD, 'Public Discussion Draft; BEPS Action 1: Address The Tax Challenges Of The Digital Economy' (2014), web.archive.org/web/20190118200320/https://www.oecd.org/ctp/tax-challenges-digital-economy-discussion-draft-march-2014.pdf.

60 OECD, 'Addressing The Tax Challenges of The Digital Economy; Action 1: 2014 Deliverable' (2014), web.archive.org/web/20200221072733/https://www.oecd-ilibrary.org/docserver/9789264218789-en.pdf?expires=1582270945&id=id&accname=guest&checksum=5A201748CC8D3D43055F318848F7CD39.

61 OECD, 'Addressing The Tax Challenges of The Digital Economy; Action 1: 2014 Final Report' (2015), web.archive.org/web/20200221072536/https://www.oecd-ilibrary.org/docserver/9789264241046-en.pdf?expires=1582270570&id=id&accname=guest&checksum=F805B02514699310FD8803C735B6DD45.

to most of the other BEPS actions) no substantive multilateral reforms were recommended.

Following delivery of the BEPS package there was an institutional shift whereby further policy developments were to take place under the auspices of the "Inclusive Framework", a mechanism for states which are not OECD members to collaborate with OECD members on the implementation of the BEPS reforms on a (formally at least) equal footing. In January 2017, the Inclusive Framework approved a renewed mandate for the task force which had produced the BEPS Action 1 output, and (with the blessing of the G20 and G7 expressed in subsequent months) the work began again – under the gathering clouds of what subsequently became a storm of unilateral measures intended to fill the gap left by BEPS Action 1 – with another request for public input, in September 2017.[62] In keeping with previous work in this area, the request for input invited respondents to discuss the role of digitalisation on the 'means and location of value creation', and again flagged up the possibility that user participation and data gathering might have implications for how "value creation" is analysed for the purpose of that discussion.

Most of the respondents offered resolute resistance to the idea that value is created in the sphere of consumption, with some going so far as to posit value as an objective property of commodities which is conserved in exchange, broadly in accordance with the premises of classical value theory. "We would continue to take the view that the profit attributable to a country where we make sales but have no physical presence is zero", explained publishing behemoth Informa in this vein, "as the value of an item is not changed by its mere sale".[63] "Innovation and production create value, consumption does not", explain the Digital Economy Group: a consortium of digital economy giants including Amazon, Expedia, Google, Facebook, Netflix, Microsoft, Spotify and Twitter (represented by Baker & McKenzie). "A commercial transaction between a supplier and a purchaser is an exchange of value for value (the good or the service is supplied in exchange for money or other consideration), but that transaction creates no new value".[64]

62 OECD, 'Request for Input on Work Regarding The Tax Challenges of The Digitalised Economy' (2017), web.archive.org/web/20171013091927/http://www.oecd.org/tax/tax-policy/tax-challenges-digital-economy-request-for-input.pdf.

63 OECD, 'Tax Challenges of Digitalisation, Comments Received on The Request for Input, Part II' (2017), web.archive.org/web/20200225134834/http://www.oecd.org/tax/beps/tax-challenges-digitalisation-part-2-comments-on-request-for-input-2017.pdf, 33.

64 OECD, 'Tax Challenges of Digitalisation, Comments Received on The Request for Input, Part I' (2017), web.archive.org/web/20171031095200/http://www.oecd.org/tax/beps/tax-challenges-digitalisation-part-1-comments-on-request-for-input-2017.pdf, 138.

Shortly afterwards, in November 2017, in a notable unilateral intervention, the UK hit back with a position statement[65] which firmly adopted the Parisian "free labour" analysis whereby data generated by users should be treated as reflecting value creation. In other words, the UK was not merely supportive of the broad move to allocate profitability to market jurisdictions; it was advocating for it to be done on the basis of that specific rationale. The UK did not disclose the strategic reasons behind this stance, but it is easy to speculate that the more generalised moves to allocate profitability to market jurisdictions would affect MNEs more generally, whereas doing it specifically under the "free labour" approach would disproportionately impact US digital economy players while leaving UK pharma (towards which UK corporate tax policy is particularly favourable[66]) largely untouched.

The tenets of postoperaismo – a fashionable but heterodox position even within the already wildly heterodox world of Marxist political economy – are here being promulgated by a state which is widely thought to be one of the greatest offenders in the whole rogues' gallery of contemporary economic imperialism,[67] in order to further its own interests as against other members of the capitalist-imperial core. Given that the UK had just been witnessing a flourishing of postoperaist-style thinking amongst far-left writers and commentators,[68] the irony of watching the same ideas being pedantically elaborated by officials of Her Majesty's Treasury at public corporate tax policy events was truly remarkable.

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In accordance with the renewed mandate, the OECD delivered an interim report in March 2018,[69] which did not move the discussion along a great dis-

65 HM Treasury, 'Corporate Tax and The Digital Economy: Position Paper' (2017), web.archive.org/web/20181112092935/https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/661458/corporate_tax_and_the_digital_economy_position_paper.pdf.

66 A. Chakrabortty, 'Now the Tories are Allowing Big Business to Design their Own Tax Loopholes' (2015), www.theguardian.com/commentisfree/2015/oct/13/tories-big-business-tax-loopholes.

67 T. Norfield, *The City: London and the Global Power of Finance* (2016); M.B. Mansour, 'Tax Haven Ranking Shows Countries Setting Global Tax Rules do Most to Help Firms Bend them', (2021) *Tax Justice Network* note 7, web.archive.org/web/20210316080203/https://www.taxjustice.net/press/tax-haven-ranking-shows-countries-setting-global-tax-rules-do-most-to-help-firms-bend-them/.

68 Mason, *supra* note 31; N. Srnicek and A. Williams, *Inventing the Future* (2015); B. Merchant, 'Fully Automated Luxury Communism' (2015), www.theguardian.com/sustainable-business/2015/mar/18/fully-automated-luxury-communism-robots-employment.

69 OECD, 'Tax Challenges Arising from Digitalisation – Interim Report 2018' (2018), web.archive.org/web/20200221131110/https://www.oecd-ilibrary.org/docserver/9789264293083-en.pdf?expires=1582291562&id=id&accname=guest&checksum=17CABBDA10BD42B36319446FC27A2DF0.

tance. In January 2019 a short policy note was issued explaining that work had continued following the interim report, and that discussions within the Inclusive Framework had resulted in a way forward.[70] That way forward was presented as standing on two pillars. Pillar Two is tangential to the story told in this chapter, but under Pillar One would be considered "several proposals […] that would allocate more taxing rights to market or user jurisdictions in situations where value is created by a business activity through participation in the user or market jurisdiction that is not recognised in the framework for allocating profits". Shortly afterwards, on 13 February 2019, a consultation document was published in pursuit of the agenda set out in the January policy note.[71]

The three Pillar One proposals up for consultation, we are told, "have the same over-arching objective, which is to recognise, from different perspectives, value created by a business's activity or participation in user/market jurisdictions that is not recognised in the current framework for allocating profits". The first of the three proposals, the "user participation proposal", is essentially the UK's proposal from March 2018. The other two were alternative routes in broadly the same direction – i.e., towards market jurisdictions – one based on marketing intangibles, and the other based on sales. Most consultation respondents considered that the "user participation"-based reform trajectory was impossible and continued to raise reasoned objections to its theoretical basis, along the same lines as those given in response to the 2017 request for input.[72]

These objections turned out to be the last word on the subject, at least on a theoretical level. In May 2019 the OECD followed up with a major "Programme of Work" which simply observes that the three suggestions it ventilated in the consultation document have features in common (i.e., allocation of profitability to market jurisdictions), and the next steps will involve building consensus around those common features.[73] What it does *not* do is characterise that further work as being entered into in reasoned pursuit of the theoretical principle of allocating profitability to where value is created. Work

70 OECD, 'Addressing the Tax Challenges of the Digitalisation of the Economy – Policy Note' (2019), web.archive.org/web/20190214124700/http://www.oecd.org/tax/beps/policy-note-beps-inclusive-framework-addressing-tax-challenges-digitalisation.pdf.

71 OECD, 'Base Erosion and Profit Shifting Project; Public Consultation Document; Addressing The Tax Challenges of The Digitalisation of The Economy' (2019), web.archive.org/web/20190314154014/http://www.oecd.org/tax/beps/public-consultation-document-addressing-the-tax-challenges-of-the-digitalisation-of-the-economy.pdf.

72 See for example the Digital Economy Group response to OECD consultation (2019), web.archive.org/web/20190310162103/http://www.oecd.org/tax/beps/public-comments-received-on-the-possible-solutions-to-the-tax-challenges-of-digitalisation.htm.

73 OECD, 'Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digital Economy' (2019), web.archive.org/web/20190531212946/http://www.oecd.org/tax/beps/programme-of-work-to-develop-a-consensus-solution-to-the-tax-challenges-arising-from-the-digitalisation-of-the-economy.pdf.

in this vein continues, and "value creation" is still cited as a guiding principle,[74] or even occasionally deployed in the broad vague sense critiqued by commentators since the outset of the BEPS process,[75] but the era of attaching meaning to the concept of value creation by means of international corporate tax reform was over. The outcome was to be (and at the time of writing continues to be, although the geopolitical impetus is fizzling out) the allocation of the tax base towards the sphere of consumption with or without a coherent value-theoretical basis for doing so.

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At this juncture it is worth considering the answer that would have been provided by the patriarchs of classical value theory, and more specifically the answer that would have been provided by Marx as classically interpreted, as opposed to the answer that was provided by modish postoperaists. As explained in Part I of this chapter, traditional Marxism treats value as something which is produced by labour in production and which is subsequently embodied in commodities at exchange, with the consequence that vast amounts of activity which appear to be implicated in profitability – design and advertising, for example – are not treated as value creating in this framework.[76]

On this view, an MNE being taxed where "value is created" should see its profitability allocated for tax purposes to the jurisdictions where the means of production producing the commodities to which its profitability is referable are located. Owing to the increasing prevalence of global value chains as noted in Part I of this chapter, this "means of production" principle may mean allocating the profitability for tax purposes to a jurisdiction where the MNE has no taxable presence at all. For example, a trainer brand that owns a globally recognised logo but no production facilities would nonetheless have its profits allocated to the jurisdictions where the production takes place. And this consequence would arise even where the MNE does not sell physical goods at all. If you buy a dress that was advertised to you on social media, the profitability of the social media platform in respect of the advertising fees would be allocated for tax purposes to where the dress was made (and the cotton produced, and

74 OECD, 'Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint' (2020), web .archive.org/web/20201030223413/https://www.oecd.org/tax/beps/tax-challenges-arising-from-digitalisation-report-on-pillar-one-blueprint-beba0634-en.htm, at 3.

75 Ibid, at 20.

76 For a fuller elaboration of this analysis see C. Quentin, 'Global production and the crisis of the tax state' (2022) *Environment and Planning A: Economy & Space*, https://doi.org/10.1177/0308518X221105083

the logistics effected, etc.), even though none of this took place within the social media platform's group.[77]

This outcome of allocating profitability for tax purposes to the jurisdictions where the means of production producing the commodities to which profitability is referable are located would have hugely beneficial results from the point of view of remedying global inequality. This is because those upstream production factors are disproportionately located in poorer countries, and by the same token they implicate labour which is disproportionately exploited[78] ("exploited", that is, in the technical sense of the value they produce exceeding the value of the wage goods they consume). Further, being located in poorer and therefore fiscally constrained countries, that labour is reproduced by a disproportionate burden of unwaged labour and personal risk in the sphere of social reproduction,[79] having the consequence that the reallocation of profitability for tax purposes to those countries would have a disproportionate chance of making a positive impact from the point of view of gender justice.

Needless to say, however, this outcome was never in technocratic contemplation at any stage in the BEPS process. We saw the OECD switch between postoperaismo and a kind of metaphorical deployment of the language of marginalism to non-monetary transactions, and it even (although this has not formed part of the story as told here) swerved briefly towards the ideas of management guru Michael Porter. It never entertained the possibility that Smith, Ricardo and Marx (or at least Marx as classically understood) might have been right to locate "value creation" primarily where material production takes place, even though to do so would tend to target for redistributive remedy some of the most glaring economic injustices in the world today: between capital and hyperexploited labour, between the economic core and formerly colonised states, and between the patriarchy and oppressed and marginalised genders.

It might be suggested that the reason this reallocation was not in contemplation was because it would involve allocating profits outside the firm, but that cannot be the whole story. A rupture in the principle whereby only activities within the firm are treated as generating the profits on which corporate income tax bites was in contemplation from the outset, i.e., by reference to the postoperaismo-derived "free labour" concept. That rupture, however, is only in respect of consumer markets; there can seemingly be no rupture of the boundary between the firm and the rest of the sphere of production. While allocation downstream in the global value chain is possible, allocation upstream

77 C. Quentin, 'Corporate Tax Reform and "Value Creation"', (2017) 7(1) *Accounting, Economics, and Law: A Convivium* 21.

78 J. Smith, *Imperialism in the Twenty-First Century* (2016).

79 Action Aid, *Making Tax Work for Women's Rights* (2017), www.actionaid.org.uk/sites/default/files/publications/actionaid_briefing_making_tax_work_for_womens_rights.pdf.

continues to be unthinkable. The offshore treasure trove of cash may yet be brought onshore to an extent, but only disproportionately to already wealthy states. The real reason, then, is the ideological biases of imperialism.

The distributional inequity of this outcome has not, of course, gone unnoticed. In its response to the February 2019 consultation, the World Bank observed that

> while some of the jurisdictions we work with [i.e., 'developing' economies] represent significant markets in their own right, and markets that are increasingly digital, their value by comparison to developed markets is going to be smaller because their consumers have less purchasing power. Moreover, activity at the other end of the value chain, production of raw materials and manufacture, is a proportionately more significant part of their economies.[80]

But what is not being talked about is the fact that, if we were to take seriously the question of where "value is created", a simple and distributionally equitable answer is to be found in the most unapologetically "old school" readings of Marx.[81]

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The moral of that story is therefore this: if you treat value as an inherently political concept that can be expanded to include whatever activity or sector you believe should be the focus of political attention, then you are playing with fire and you risk getting burned. This, at least, is what happened with the idea that value is created in the sphere of consumption. It was initially advanced at a time when the post-industrial working classes of the global economic core found themselves increasingly outside the spheres in which classical political economy locates the creation of value, and so putatively it served to reintroduce those post-industrial working classes into a narrative of exploitation. But, as we saw, it ended up serving the interests of those who seek to perpetuate the grotesque and disproportionate distributive injustices experienced by the working class and industrial reserve army at the global economic periphery.

Much better perhaps to treat value – the property of commodities that the social mechanism of market exchange posits as commensurable – as a politically

80 World Bank response to OECD consultation: OECD, 'Public Comments Received on the Possible Solutions to the Tax Challenges of Digitalisation' (2019), web.archive.org/web/20190310162103/http://www.oecd.org/tax/beps/public-comments-received-on-the-possible-solutions-to-the-tax-challenges-of-digitalisation.htm.

81 The story told here of the BEPS process and its follow-up is more fully elaborated in C. Quentin, 'Gently down the stream: BEPS, value theory, and the allocation of profitability along global value chains' (2021), World Tax Journal 13(2)

neutral objective starting point and (as was the approach adopted by Marx in *Capital*) work outwards to the political conclusions from there. Marx's theoretical contribution in this space was not to develop an *ad hoc* concept of value that enabled a political critique of the exploitative industrial labour processes going on around him in his historical era, consoling though it may be for some to seek to contain his critique by characterising it in those terms. His contribution was to show that the horror of actually existing capitalism – in whatever form we may encounter it, even today – necessarily unfolds from the commensurability posited by exchange of commodities under the capitalist mode of production.

Our task, if we wish to make the concept of value politically effective, is not to suppose at each turn of history that we have finally encountered a phenomenon that Marx (as the meme puts it) "failed to consider",[82] but to understand each turn of history as a fresh configuration into which the self-valorisation of value has forced itself under the strain of its own internal contradictions. And for the time being the fact is that value has configured itself to arise largely upstream in global value chains, which means that any political project which seeks to situate value creation outside the classical production boundary is doing ideological work on behalf of capitalist imperialism.

82 twitter.com/search?q=marx%20failed%20to%20consider&f=live.

Chapter 6

Capitalism, the Constitutional Theory of the Firm, and Value Production

Investment and Labor Market Precarity

Jamee K. Moudud

A. Introduction

Guy Standing's book "The Precariat" is a remarkably prescient analysis of the development over many decades of a class of workers with extremely precarious jobs and the dangers that such a condition poses for social stability.[1] The precariat is a class of workers cutting across occupational lines generally lacking solidaristic ties to other workers and to the rest of society. In Standing's words: "The precariat experiences the four A's – anger, anomie, anxiety and alienation",[2] a toxic political combination stemming from persistent insecure jobs, "passivity born of despair … listlessness associated with sustained defeat",[3] chronic anxiety about job loss and the collapse of some modicum of dignity and financial stability, and rage about "being fooled" when they are exhorted to be content for even having a job[4] however insecure it may be. Writing in 2011, the following conclusion was remarkably perceptive:

> *Many will be attracted by populist politicians and neo-fascist messages, a development clearly visible across Europe, the United States and elsewhere*. This is why the precariat is the dangerous class…[5]

While a discussion of the complex determinants of right-wing authoritarian movements is outside the scope of this paper, my goal is to critically engage with the neoclassical economic model that has, over many decades, powered the inequality and insecurity fueling the rise of the far right. Aside from

1 G. Standing, *The Precariat: The New Dangerous Class* (2011).
2 Ibid., at 19.
3 Ibid., at 20.
4 Ibid., at 21.
5 Ibid., at 25. Emphasis added.

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Standing, this connection has been made by a number of authors.[6] Far right movements are cross-class ones, however, with working class economic despair often paradoxically aligned with sections of the wealthy who are opposed to pro-labor, socially egalitarian policies.[7] The central issue explored in this paper is to understand how the near-hegemonic "free market" paradigm has conditioned business investment, the firm, and value creation to fuel precarity and inequality.

Of course, not all neoclassical economists subscribe to neoliberalism, a term which embraces the twin notions of the "free market" and *laissez faire*, assuming the separation between the public and private spheres. One may consider here the scholars associated with the group *Economists for Inclusive Prosperity*[8] for whom the foundational tools of neoclassical economics are valid. For these authors, however, state intervention to promote socially egalitarian policies is justified in the presence of "market failures". In neoclassical economics "market failures" constitute, among other things, the deviation from perfect competition and the existence of externalities or social costs. The problem, though, is that the social consequences of private actions are ubiquitous given the social and relational nature of property rights, as Morris Cohen observed.[9] Consider for example Oliver Wendell Holmes' commentary on how absolute property rights are impossible given the widespread infliction of damage on rivals in industrial competition.[10] The alternative theory of business competition discussed here is consistent with Holmes' discussion, showing how firms legally damage each other economically showing not only their socially embedded nature but also the absence of perfect competition.[11] Consider also the theme of this paper which discusses how financialization causes labor market precarity.

6 A. Rodríguez-Pose, 'The Revenge of the Places That Don't Matter (and What to Do about It)', (2018) 11 *Cambridge Journal of Regions, Economy and Society* 189; S. Monnat, 'Deaths of Despair and Support for Trump in the 2016 Presidential Election', in *Department of Agricultural Economics, Sociology, and Education Research Brief*, 2016 1; A.R. Hochschild, *Strangers in Their Own Land: Anger and Mourning on the American Right* (2016).

7 Consider, for example, recent attempts to overthrow the US November 2020 elections. *The Guardian* reports that the politicians spearheading this effort were billionaires associated with the right-wing Club for Growth (www.clubforgrowth.org/). See 'Billionaires Backed Republicans Who Sought to Reverse US Election Results', *The Guardian*, January 15, 2021(www.theguardian.com/us-news/2021/jan/15/trump-republicans-election-defeat-club-for-growth). See also 'Oil Industry Reconsiders Donations to Election Deniers – But Has its Own Big Lie', *The Intercept*, January 16, 2021 (https://theintercept.com/2021/01/16/oil-industry-election-climate-denial-stop-steal/).

8 https://econfip.org/.

9 M.R. Cohen, 'Property and Sovereignty', (1927) 13 *Cornell Law Review* 8, at 12.

10 M.J. Horwitz, *The Transformation of American Law 1870–1960: The Crisis of Legal Orthodoxy* (1992).

11 As Morton Horwitz discusses, this legal damage was justified in the 19th-century American courts by the principle of *damnum absque injuria*. M.J. Horwitz, *The Transformation of American Law 1780–1860* (1977).

In short, if externalities are ubiquitous then the notion of "market failures" is meaningless.

By building on an existing literature on the social embeddedness of firms[12] and the links between finance, inequality, and labor market precarity,[13] this chapter focuses on business investment. To do so it begins with Marx's distinction between the circuits of financial and industrial capital. This distinction is also consistent with Keynes[14] in his discussion of *enterprise* (long-term investments) and *speculation* as well as with a number of contemporary authors who have written about financialization.[15] The paper then proceeds to a critique of the theory of investment in neoclassical economics contrasting it with real-world investment behavior. This last issue is explored by integrating Marx's analysis of business competition[16] with the groundbreaking work of P.W.S. Andrews, an important contributor to the Oxford Economists' Research Group.[17] A common theme in the broad heterodox economics tradition is that investment is not determined by savings but rather by the expectation of profits.

The above discussion underscores what real-world firms *do* as opposed to what they *are*. This chapter also explores the latter issue in order to go beyond the familiar neoliberalism-creates-precarity argument and heterodox economics more generally. A key question is this: given that investment is driven by profitability, *what* is it about the nature of investment and value creation in the neoliberal moment that has generated increased labor market distress? The term "value", as deployed in this chapter, refers to the surplus approach of classical political economists such as Ricardo and Marx and its modern formulation by the distinguished Italian economist Piero Sraffa[18] at the University of Cambridge. In the Ricardo/Marx/Sraffa view the surplus arises from production and is the residual (or profit) that belongs to the "owner" of the business enterprise. This profit-on-production view is also consistent with

12 C.A. Williams and P. Zumbansen (eds.), *The Embedded Firm: Corporate Governance, Labor, and Finance Capitalism* (2011).

13 S. Jacoby, 'Labor and Finance in the United States', in C.A. Williams & P. Zumbansen (eds.), *The Embedded Firm: Corporate Governance, Labor, and Finance Capitalism* (2011), 277. See also the special issue of *Critical Perspectives on Accounting* (2014), Vol. 25 dedicated to the theme "Critical Accounts and Perspectives on Financialization".

14 See chapter 12 of J.M. Keynes, *The General Theory of Employment, Interest, and Money* (1953).

15 G.R. Krippner, *Capitalizing on Crisis: The Political Origins of the Rise of Finance* (2011); M. Mazzucato, *The Entrepreneurial State: Debunking Public vs. Private Sector Myths* (2015).

16 H. Botwinick, *Persistent Inequalities: Wage Disparity Under Capitalist Competition* (1993); J.K. Moudud et al., *Alternative Theories of Competition: Challenges to the Orthodoxy* (2012); A. Shaikh, *Capitalism: Competition, Conflict, Crises* (2016).

17 F.S. Lee and P.E. Earl, *The Economics of Competitive Enterprise: Selected Essays of P.W.S. Andrews* (1993).

18 P. Sraffa, *The Production of Commodities by Means of Commodities: Prelude to a Critique on Political Economy* (1960).

modern national income accounts in which what is called an enterprise's *gross operating surplus* is quite simply the difference between the value of the output[19] and costs of production (inclusive of employee compensation). In the classical view, political and institutional factors[20] (which, however, are not elaborated upon by contemporary authors in that tradition[21]) determine workers' bargaining power vis-à-vis employers and thus employee compensation relative to profits. In neoclassical theory on the other hand, the supply and demand for each "factor of production" automatically allocates each component of value added to capital and labor respectively.[22]

Further, in neoclassical economics, all market activities including the financial sector are productive of profits, i.e., create value. On the other hand, classical political economy does not treat the financial sector as an additional source of value but consider flows of interest and dividend payments from the real to the financial sector to be a deduction from the stream of revenues created in the former.[23] The difference between the two sectors can be seen in Marx's distinction between the circuits of industrial capital and of finance capital as discussed in section C. One implication of distinguishing between a surplus-producing and a surplus-using one is that an "excessive" growth of the latter relative to the former (say because of higher speculative rates of return) will have adverse longer-term economic consequences. It is of significance to note that a number of authors outside the classical political economy tradition, starting with Keynes and including the legal scholar Tamara Lothian,[24] have made exactly this point.[25]

The problem with the surplus approach of classical political economy is its reliance on Marx's base/superstructure model, according to which politics and law have to reflect the "underlying" economic base in which value creation takes place. But this requires one to determine property and contracts, the building blocks of the economy, independently of politics and law. For example, it would require one to believe that the corporation is a nexus of privately created contracts between the various stakeholders involved, with the law coming in to protect these agreements.[26] This is in fact the Chicago

19 Sales price multiplied by the quantity of output of the good or service sold.

20 S. Cesaratto and S. Di Bucchianico, 'From the Core to the Cores: Surplus Approach, Institutions and Economic Formations', 2020 *Centro Sraffa Working Papers* 45.

21 See, for example, D.K. Foley, *Adam's Fallacy: A Guide to Economic Theology* (2006); A. Shaikh, *Capitalism: Competition, Conflict, Crises* (2016).

22 This is called marginal productivity theory.

23 M. Mazzucato, *The Value of Everything: Making and Taking in the Global Economy* (2018); A. Shaikh and E.A. Tonak, *Measuring the Wealth of Nations* (1994).

24 T. Lothian, *Law and the Wealth of Nations: Finance, Prosperity, and Democracy* (2017).

25 *Supra* notes 14 and 15. See also D. Felix, 'Asia and the Crisis of Financial Globalization', in D. Baker, G. Epstein, and R. Pollin (eds.), *Globalization and Progressive Economic Policy* (1998), 163. Felix discusses the acceleration of global foreign exchange flows relative to GDP.

26 A.A. Singer, *The Form of the Firm: A Normative Political Theory of the Corporation* (2019).

School/Law and Economics view and is deeply problematic for two reasons. First, if the firm is nothing but a nexus of market-like contracts there can be no unequal power relations within it, profits cannot originate within the production but only in the sphere of market exchange via "buying cheap and selling dear". As the distinguished economic historian Ronald Meek discusses,[27] this "profit-on-alienation" view was a pre-Smithian notion of profits that was incapable of explaining the growth of aggregate net profits for the economic system as a whole. Smith was one of the first major classical economists who recognized the profit-on-production view in which profits arise from the value added by workers in the production process. Considering the firm as a nexus of private contracts also occludes the unequal bargaining power between employers and workers which determines the wage share, an issue of central analytical concern in Marx as well as in Hale

Second, as Abraham Singer argues,[28] while limited liability between investors, managers, and creditors could potentially be created via privately created contracts, it is impossible to do so with respect to torts affecting third parties who are not part of the corporation's contractually created stakeholders. Thus, the corporation, the main site of surplus production, cannot be pre-political.

In other words, value creation à la the surplus approach is inconsistent with the base/superstructure view and necessarily requires that politics and the law play a *constitutive* role with respect to the economy. It is of relevance to mention here that within the Marxist tradition itself a number of authors have made exactly this point.[29] A focus on law's constitutive role is key if one wishes to understand value creation and unequal relations of power. This in turn requires one to recognize the socio-legal nature of the business enterprise and the fact that all income-earning capital assets have to be legally coded. It also entails an understanding of the metrics of profitability that have driven value creation over the past several decades. Unlike Katharina Pistor's work,[30] however, the current paper focuses on the coding of balance sheets drawing on Levy[31] and Müller,[32] who have related long-term fixed investments and historical cost accounting (HCA) to the rate of return on investment (ROI) and the rate of return on equity (ROE) to fair value accounting (FVA). ROE has played a key

27 R.L. Meek, *Economics and Ideology and Other Essays: Studies in the Development of Economic Thought* ("Adam Smith and the Classical Theory of Profit") (1967).

28 *Supra* note 26, at 183.

29 E. Christodoulidis and M. Goldoni, 'Marxism and the Political Economy of Law', in E. Christodoulidis, R. Dukes, and M. Goldoni (eds.), *Research Handbook on Critical Legal Theory* (2019), 95; B. Jessop, 'Critical Theory of the State', in E. Christodoulidis, R. Dukes, and M. Goldoni (eds), *Research Handbook on Critical Legal Theory* (2019) 114; E.M. Wood, *Democracy Against Capitalism: Renewing Historical Materialism* (2016).

30 K. Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (2019).

31 J. Levy, 'Accounting for Profit and the History of Capital', (2014) 1 *Critical Historical Studies* 171.

32 J. Müller, 'An Accounting Revolution? The Financialisation of Standard Setting', (2014) 25 *Critical Perspectives on Accounting* 539.

role in financialization. On the other hand, as pioneered by General Motors and other major corporations starting in the early 20th century, ROI[33] has been the basis of long-term financial planning for production.

Where do law and politics fit into this analysis? The insights of the American Legal Realists, in particular Robert Lee Hale,[34] and of the Original Institutional Economics (OIE) tradition of John R. Commons, John Maurice Clark[35] and others are crucial here. This Law and Political Economy (LPE) framework rejects the approach of classical (or orthodox) legal thought which conceptualized the law as an apolitical technology that is needed to protect an economy "out there" to maximize efficiency. The LPE framework emphasizes the constructivist role of politics and the law with respect to the economy. LPE, *contra* Hayek with his notion of "spontaneous order" with respect to law and the economy,[36] thus conceptualizes the economy as a socio-legal creation[37] in which a wide range of rival political notions of efficiency, justice, and morality[38] creates the balance of forces that shape markets in different ways in different contexts. In short, by denaturalizing the economy and historicizing it (a key methodological feature of heterodox economics), the LPE approach is consistent with the notion that economic ideas are performative: the economy does not just arise spontaneously but its construction is of human design, usually of a deeply contested nature in political, cultural, and ideological terms.

By focusing on the social and thus political embeddedness of firms, the current paper proposes a *constitutional theory of the business enterprise*. This framework provides an understanding of how the legal and political foundations of the economy structure distributional struggles between capital and labor and non-labor business costs.[39] The focus on accounting is consistent with the Foucauldian literature which has conceptualized accounting as a technology of governance and the distribution of power relations in society.[40] The

33 J.A. Clifton, 'Administered Prices in the Context of Capitalist Development', (1983) 2 *Contributions to Political Economy* 23; D.L. Flesher and G.J. Previts, 'Donaldson Brown (1885–1965): The Power of an Individual and His Ideas over Time', (2013) 40 *Accounting Historians Journal* 51.

34 R.L. Hale, *Freedom Through Law: Public Control of Private Governing Power* (1952); W.J. Samuels, 'The Economy as a System of Power and Its Legal Bases: The Legal Economics of Robert Lee Hale', (1973) 27 *University of Miami Law Review* 261.

35 J.R. Commons, *Legal Foundations of Capitalism* (1924); J.M. Clark, *Social Control of Business* (1923).

36 F. Hayek, *Law, Legislation and Liberty: A New Statement of the Principles of Justice and Political Economy* (1982).

37 M.J. Horwitz, *The Transformation of American Law 1870–1960: The Crisis of Legal Orthodoxy* (1992), chapters 5 and 6.

38 Ibid., chapter 7.

39 D. Kennedy, 'The Stakes of Law, or Hale and Foucault!', (1991) XV *Legal Studies Forum* 327; J.K. Moudud, 'Distributional Struggles Always Operate Under the Background Laws That Determine Property, Contracts, and Torts', (2019) XXXVII *Law and Inequality: A Journal of Theory and Practice* 121.

40 A. McKinlay and E. Pezet, 'Accounting for Foucault', (2010) 21 *Critical Perspectives on Accounting* 486.

constitutional theory of the firm also helps us understand how accounting standards have increasingly become influenced by private corporations with the objective of pursuing financial investments.[41] As will be discussed, two different methods of valuating balance sheets are directly connected to the way that the corporation is characterized. In his book, Adam Winkler elaborates on US corporate history with respect to US Supreme Court decisions which hinged on a key question regarding the legal identity of the corporation.[42] Does one "pierce the veil" to reveal it to be a nexus of voluntary private contracts between flesh-and-blood people (as in a partnership) or does its legal nature make it a legally constituted independent institution? This has important implications for how "value creation" is seen. Claiming that shareholders are in fact the owners (principals) of corporations and managers as their agents is central to the shareholder value maximization (SVM) principle, at the heart of modern corporate finance. On the other hand, SVM would be fundamentally flawed if the shareholders are not treated as "owners" as David Ciepley argues.[43]

Section B of the paper discusses the constitutional theory of the firm. In section C, I investigate the links between balance sheets, circuits of capital, and different measures of profitability. Section D discusses the relationship between financialization, foreign trade, and labor precarity along with some policy implications. It will be shown that how value is seen to be created has an important implication for labor market precarity in the global economy. Finally, section E concludes.

B. The Constitutional Theory of the Business Enterprise

A team of economists at Oxford started the Oxford Economists' Research Group (OERG) in 1935 to study the impact of government policies on business investment during the Great Depression. Among its notable contributors was P.W.S Andrews. In contrast to neoclassical theory, the OERG used a survey-based methodology to ask British industrialists about their business practices. A key question focused on firms' investment decisions and their pricing policies.[44] The results of these findings caused Andrews, in particular, to dramatically change the theory of the firm as taught by neoclassical economists. Perhaps his sentiment is best captured by his observation:

41 J. Perry and A. Nölke, 'The Political Economy of International Accounting Standards', (2006) 13 *Review of International Political Economy* 559; Levy (2014) *supra* note 31; Müller (2014) *supra* note 32; S.K. Vogel, *Marketcraft: How Governments Make Markets Work* (2018).

42 A. Winkler, *We the Corporations: How American Businesses Won Their Civil Rights* (2018).

43 D. Ciepley, 'Beyond Public and Private: Toward a Political Theory of the Corporation', (2013) 107(1) *American Political Science Review* 139.

44 F.S. Lee, 'The Oxford Challenge to Marshallian Supply and Demand: The History of the Oxford Economists' Research Group', (1981) 33 *Oxford Economic Papers* 339.

> Business men in manufacture and distribution whose own thinking dwells on the continuous attempt to displace rivals forced on them under pain of themselves losing ground to competitors are often surprised if they happen to pick up economics text-books to find that in perfect competition, the hypothetical condition which is the quintessence of competition as the economist sees it, there is no mention of this, to them, major aspect of the competitive struggle. Reading on, they may be still more bewildered to discover analyses in which some of their chief competitive weapons do appear, but are then described as characteristics of 'imperfect' or 'monopolistic' competition![45]

While details of Andrews' revised theory of the business enterprise can be found elsewhere[46] there are two key aspects that are relevant for the current discussion. First, it repudiates both perfect and monopolistic competition, proposing a theory of the firm in which all firms attempt to set prices on the basis of cost-minimization, involving the goal of covering production costs and obtaining an adequate rate of return to finance future investments. This price-setting behavior has nothing to do with any putative "monopoly power" (a key index in neoclassical economics of the deviation from perfect competition in which all firms are passive price takers) since Andrews was careful to emphasize that even hegemonic firms set prices on the basis of both actual, and the threat of potential, competition.[47]

There is enormous significance to not seeing price-setting behavior as indicative of some degree of monopoly power and thus of "market failure". The monopoly power framework sees markets in terms of their deviations from the perfectly competitive ideal. This false dichotomy implicitly neglects the fact that all firms are products of particular governance structures that influence their costs via both monetary and legal subsidies.[48] This in turn implies that there could be many firms across the world in an industry such as steel with very different unit costs.[49] Such a large number of firms – one of the criteria for perfect competition – cannot, however, be consistent with perfect competition, which requires similar/same costs within the industry.

Of course as Hall and Hitch, whose work was influential to the OERG concluded, not all firms can set the price that they want.[50] At any given historical moment there will inevitably be more efficient firms with lower unit costs ("price leaders") who have the capacity to set the lowest price forc-

45 See quote by Andrews in Lee and Earl (1993) *supra* note 17, at 328.

46 J.K. Moudud, 'The Hidden History of Competition', in J.K. Moudud et al. (eds.), *Alternative Theories of Competition: Challenges to the Orthodoxy* (2012), 27.

47 Ibid.

48 See *supra* note 10.

49 The World Steel Association lists around 60 countries: https://worldsteel.org.

50 R.L. Hall and C.J. Hitch, 'Price Theory and Business Behavior', (1939) 2 *Oxford Economic Papers* 12.

ing less efficient firms ("price followers") to adjust their own prices, thereby compromising their profit margins.[51] In contrast to perfect competition where all firms in an industry have identical costs, persistent cost differentials are a normal feature of firms within an industry.[52] In short, Andrews concluded, setting the selling price and attempting to restructure costs are central to every firm's investment decision faced with ongoing competitive threats.

Second, investment decisions are regulated by actual and expected profits,[53] in the way discussed by Veblen and Keynes.[54] As with his masterpiece,[55] Andrews' joint book with Brunner exemplified the same principle,[56] which is that the cash receipts and expenditures of firms determined their capital investment decisions.

An important conclusion follows from Andrews' work. His main goal was to reconceptualize the firm as a monetary institution, or as Commons discussed,[57]a *going concern*. Following Veblen and Commons, Jonathan Levy concludes that "Capital is legal property assigned a pecuniary value in expectation of a likely future pecuniary income. Capital valuation is prospective, always occurring under conditions of uncertainty".[58] This, of course, is the central insight of Andrews. Conceptualizing capital accumulation in this way implies that firms attempt to wield their agency in setting the highest price they can get away with, minimize their costs subject to the regulatory framework in place, and legally code assets.[59] Since profits arise by deducting employee compensation from value added in production activity, price-setting over costs becomes a key policy goal of the firm. And, of course, central to such goals is the attempt to alter the prevailing governance structure, so as to enable them to cut costs and expand markets. This also implies their desire to control how accounting standards are set, an issue discussed in the next section.

51 Consider the global solar panel industry which over several decades has enabled Chinese producers to become the lowest cost ones through an extensive set of government policies. See 'Why China Is Dominating the Solar Industry' in *Scientific American*, December 19, 2016 (www.scientificamerican.com/article/why-china-is-dominating-the-solar-industry/).

52 J.K. Moudud, *Strategic Competition, Dynamics, and the Role of the State: A New Perspective* (2010), at 17–18.

53 P.W.S. Andrews and E. Brunner, *Capital Development in Steel: A Study of The United Steel Companies Ltd*. (1951), paragraph X.

54 T. Veblen, *The Theory of Business Enterprise* (1978); J. Levy, 'Capital as Process and the History of Capitalism', (2017) 91 *Business History Review* 483.

55 P.W.S. Andrews, *Manufacturing Business* (1949).

56 Andrews and Brunner (1951) *supra* note 53.

57 See Commons (1924), *supra* note 35; G. Atkinson, 'Going Concerns, Futurity and Reasonable Value', (2009) 43 *Journal of Economic Issues* 433.

58 J. Levy, 'Capital as Process and the History of Capitalism', (2017) 91 *Business History Review* 483, at 487.

59 See *supra* note 31.

Why does a theory of investment matter for an understanding of precarity? The answer is that if investment is determined by the expectation of profits on different types of assets, an increase in savings will be allocated by firms to those that generate the highest rates of return. Thus, there *could* be an expansion of speculative activity relative to enterprise or long-term production-oriented investment, with implications for the types of jobs created.[60] On the other hand, in the neoclassical view, investment and growth are fundamentally driven by savings, and no analytical distinction is made between different types of investments, since any economic activity validated by the market is seen as creating "value".[61]

Further, at the macroeconomic level the neoclassical view implies that an increase in aggregate savings, determined by the representative individual's intertemporal consumption decisions and/or a reduction of budget deficits, will lower interest rates and promote investment. This savings-driven view of economic growth[62] at the microeconomic level is correlated with the Q-theory of investment where the so-called Tobin's Q-value is the ratio of the stock market valuation of a corporation to the replacement cost of its capital stock.[63] Investment increases with the market valuation of the firm, with the causality running from a firm's Q-value to its investment decision, where the Q-value itself depends on dividend payments by the firm, capital gains, and the marginal product of capital.[64] The Q-ratio assumes perfectly competitive firms,[65] and capital markets, more broadly, are assumed to be perfectly competitive in the Q-theory of investment.[66]

It is quite remarkable how passive firms and their management are in neoclassical economics. By making investment decisions a function of the savings and consumption decisions of households, the neoclassical model occludes the institutional nature of the corporation and the active decisions of top management in making important investment decisions. The notion of the firm as a *political institution* is alien to the neoclassical tradition. With this passive view of firms and investment in hand along with the claim that all firms, including corporations, are products of voluntary contracts, the ideological character of the "free market" is quite clear, and the political power of corporations to

60 J.M. Keynes, 'The General Theory of Employment', (1937) 51 *The Quarterly Journal of Economics* 209.

61 M. Mazzucato, *The Value of Everything: Making and Taking in the Global Economy* (2018).

62 S. Cesaratto, 'Critical Survey. Savings and Economic Growth in Neoclassical Theory', (1999) 23 *Cambridge Journal of Economics* 771.

63 D. Romer, *Advanced Macroeconomics* (2012), paragraph 9.

64 L.H. Summers, 'Taxation and Corporate Investment: A q-Theory Approach', (1981) *Brookings Papers on Economic Activity* 67, at 80.

65 Ibid., at 120.

66 J.L. Bernardo et al., 'A Post Keynesian Theory for Tobin's q in a Stock-Flow Consistent Framework', (2016) 39 *Journal of Post Keynesian Economics* 256.

attempt to mold the governance ecosystem in line with their goals disappears. No conflict of interests appears between business and society, employers and workers. Unlike Marx's discussion in *Capital* Volume I of class conflict at the heart of the production process within the firm, in neoclassical theory production and distribution arise from what is called the *production function* which is a technological relationship between inputs of labor and capital and output. The production function and marginal productivity theory automatically take power struggles out of the sphere of income distribution.[67] Furthermore, since all market-driven activity creates "value", the goals of the firm are identical to those of the society and the absence of conflict seamlessly requires politics and governance to enforce the "rule of law" to promote efficiency and social welfare maximization. In the final instance, then, value creation in the neoclassical framework is a technical process and is thus intellectually incapable of analyzing the roots of precarity.

Has the institutional power of management[68] decreased since the dominance of the shareholder value maximization (SVM) paradigm from the early 1980s? Based on agency theory, SVM supposedly elevates the power of shareholders relative to managers, implicitly making the corporation a passive conduit for shareholder savings. In short, pumping up share values automatically stimulates business investment by funneling savings into the corporate sector. It suffices to say here that SVM has neither diminished the guiding role of profitability in determining investment, nor the power of corporate executives. For example, since the 1980s, bolstered by stock options and share buybacks, executive compensation has skyrocketed relative to wages,[69] deepening inequalities and power relations in society.[70]

Finally, SVM has certainly not changed the legal identity of corporations, since as Ciepley argues the institutional nature of the corporation which rests on a public charter, confers limited liability on shareholders, and creates a legal "firewall" between shareholders and corporate balance sheets which makes it impossible for shareholders to be owners of the firm such as the partners in a partnership.[71]

67 There is an established literature that has shown the logical fallacies and empirical problems with production functions. See A.J. Cohen and G.C. Harcourt, 'Whatever Happened to the Cambridge Capital Theory Controversies?', (2003) 17 *Journal of Economic Perspectives* 199; J. Felipe and J.S. McCombie, 'How Sound Are the Foundations of the Aggregate Production Function?', (2005) 31 *Eastern Economic Journal* 467.

68 A.A. Berle and G.C. Means, *The Modern Corporation and Private Property* (1991).

69 'The Productivity–Pay Gap', Economic Policy Institute, July 19 (www.epi.org/productivity-pay-gap/).

70 W. Lazonick, 'Why Executive Pay Matters to Innovation and Inequality', in C.A. Williams & P. Zumbansen (eds.), *The Embedded Firm: Corporate Governance, Labor, and Finance Capitalism* (2011), 413; see Jacoby (2011), *supra* note 13.

71 *Supra* note 44.

The discussion so far has focused on what firms *do* as opposed to what they *are*. To understand the significance of this distinction, recall that the purpose of a firm's pricing policy is to obtain the maximum rate of return that it can get away with, thereby enabling it to grow. Given the time gap between future revenues and current debt obligations, this implies that the firm has to always try to maintain an adequate stock of money. Quite logically then, this money-centered view in turn implies that if money has a legal and political foundation[72] so must the firm. This implies that, like money, all firms are products of society's governance structures. This *constitutional theory of the business enterprise* brings us to the framework of Polanyi,[73] the original institutional economists such as Hale, and the American Legal Realists such as Hohfeld, whose central concern was to denaturalize the economy by revealing the complex interwoven state-enforced laws that created it.[74] After all, it is the background laws which provide the context to capital/labor bargaining struggles.[75]

Nothing in the above discussion implies a unidirectional or mechanical relationship between politics/law and the economy. Changing social contexts, political struggles by the working class, the hegemonic power of financiers, and so on can feed back and at least partially mold the underlying legal foundations and thus the nature of the economy. For example, the free-market rhetoric promoted by business élites and conservative foundations that have financed the Law and Economics tradition[76] has been quite successful in changing the dominant discourse on what the "economy" is and how "value" creation and prosperity should be promoted. Deakin[77] observes that a society's legal system provides a skeletal framework for its *modus operandi* but it is "*partially endogenous* to economic and political change". This argument parallels those made by historical institutionalists such as Wolfgang Streeck and Kathleen Thelen,[78] who have also argued that society's institutional building blocks can undergo slow processes of change with political pressures arising from within society, say by capitalists. In other words, ontologically legal categories that are embedded

72 C. Desan, 'Money as a Legal Institution', in D. Fox and W. Ernst (eds.), *Money in the Western Legal Tradition: Middle Ages to Bretton Woods* (2016), 18.

73 K. Polanyi, *The Great Transformation: The Political and Economic Origins of Time* (1944).

74 L. Fiorito and M. Vatiero, 'Beyond Legal Relations: Wesley Newcomb Hohfeld's Influence on American Institutionalism', (2011) 45 *Journal of Economic Issues* 199; Hale (1952), *supra* note 34; Commons (1924), *supra* note 35.

75 S. Deakin and F. Wilkinson, *The Law of the Labour Market: Industrialization, Employment, and Legal Evolution* (2005); D. Kennedy, 'The Stakes of Law, or Hale and Foucault!', (1991) XV *Legal Studies Forum* 327.

76 J. Mayer, *Dark Money: The Hidden History of the Billionaires Behind the Rise of the Radical Right* (2016); S. Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (2008).

77 S. Deakin, 'Juridical Ontology: The Evolution of Legal Form', (2015) 40 *Historical Social Research / Historische Sozialforschung* 170, at 175.

78 W. Streeck and K. Thelen, *Beyond Continuity: Institutional Change in Advanced Political Economies* (2005).

in social reality, including institutions such as the firm, are both "closed" in terms of their anchoring role but are also "open" in that they are susceptible to contextual variations. Law is not a reflection of the economy as in at least a dominant version of classical political economy.[79] As the discussion in the next section shows, the "closed" and "open" nature of laws as the basis of the economy is illustrated by considering accounting rules.

C. Balance Sheets, Circuits of Capital, and Profitability

An important building block of the business enterprise is its balance sheet which determines profit-making and investment decisions. The theoretical issues discussed at the end of the previous section can be illustrated by considering the way in which global accounting rules have been increasingly constructed by private actors serving the needs of financialization.[80] From a neoclassical standpoint, this is not seen as a problem as the financial sector is also a source of value creation just like, say, manufacturing or agriculture.

Drawing on Müller[81] the issue regarding balance sheets can be understood by first considering Marx's distinction between the circuits of industrial and financial capital. In the former, investment begins with outlays of money (M) to buy inputs of raw materials, fixed investment goods, and labor power (C) which combine over a production period (P) to produce an output C' which needs to be sold for a sum of money M'. For investment to continue M' > M with the difference (M' – M) being the money form of profits. Thus, this circuit can be described as M → C…P…C' → M'. As an ongoing business,[82] an industrial firm's chief concern is with its flows of sales relative to its production costs as they have been historically incurred. On the other hand, there is no production involved in the circuit of money capital, where the sole goal of the investor is to use the initial investment M to accumulate more money M', i.e., M' → M. Both the above circuits have temporal dimensions, but it can clearly be seen that the circuit of industrial capital has a longer time frame built into it, given that fixed capital needs to depreciate, and so necessarily entails a longer-term planning horizon on the part of the firm compared to financial investments.

79 M. Milgate and S.C. Stimson, *After Adam Smith: A Century of Transformation in Politics and Political Economy* (2009). For a dissenting Marxist perspective that rejects the view that politics and the law are part of the "superstructure" see E.M. Wood, *Democracy Against Capitalism: Renewing Historical Materialism* (2016).

80 Perry and Nölke (2006), *supra* note 41; Y. Zhang and J. Andrew, 'Financialisation and the Conceptual Framework', (2014) 25 *Critical Perspectives on Accounting* 17.

81 See Müller (2014), *supra* note 32.

82 See Commons (1924), *supra* note 35.

The profitability metrics used as the basis of investment decisions in the above two circuits are quite different from each other. We begin with the circuit of industrial capital. As with P.W.S. Andrews, a number of other authors[83] have discussed the institutional context of the giant capital-intensive corporations of the early 20th century, in particular General Motors, and the invention of target pricing. Given heavy fixed capital investments, this pricing policy necessarily had a long-term focus involving a target rate of return on investment (ROI), or an economic return available, so that the set price would provide the internally generated funds to promote capital accumulation. As Clifton puts it with respect to the ROI:

> It was the average, long-run return on a long-lived asset that was measured by the economic return attainable, not the temporary highs or lows in profits associated with fluctuations in volume over the business.[84]

Such a principle was incorporated into the corporation's costing procedure. As Donaldson Brown, who invented the ROI at GM argued, the price was relatively inflexible with short-run fluctuations in demand met by changes in supply.[85] The ROI was the yardstick used to make long-run investment decisions. Crucially, the corporation's financial control and investment plans need to include its investments in long-term strategic litigation, lobbying, and even bribery of public officials, as discussed by Adam Winkler.[86] The key goal is the corporation's desire to influence the political and legal foundations of the economy to serve its own investment plans,[87] proclaim the rights of individual shareholders as owner-citizens who are promoting the general interest by creating "value", and present themselves as politically non-partisan and obscure. In other words, the corporation is a political creature.[88]

As Levy[89] discusses, the new corporate pricing policy framework had as its basis a new innovation in accounting practice, historical cost accounting (HCA). Given the intertemporal nature of production, in the HCA framework all costs are accounted for from their historical time of entry into the production process and investment planning relates them to current and future sales

83 See Clifton (1983), and Flesher and Previts (2013), *supra* note 33, and Levy (2014), *supra* note 31, and H. Thomas Johnson, 'Management Accounting in an Early Multidivisional Organization: General Motors in the 1920s', (1978) 52 *Business History Review* 490.

84 J.A. Clifton, 'Administered Prices in the Context of Capitalist Development', (1983) 2 *Contributions to Political Economy* 23, at 28.

85 Ibid. 27.

86 A. Winkler, *We the Corporations: How American Businesses Won Their Civil Rights* (2018).

87 K. Phillips-Fein and J.E. Zelizer, *What's Good for Business: Business and American Politics Since World War II* (2012).

88 *Supra* note 44.

89 Levy (2014), *supra* note 31.

revenues and costs. This is the basis of financial planning for future investment flows:

> accounting for costs involves three stages: (1) ascertaining and recording costs as incurred, appropriately classified; (2) tracing and reclassifying costs in terms of operating activity; (3) assigning [i.e. matching] costs to revenues. The third stage is crucial from the point of periodic income measurement.[90]

This is quite logical as the estimation of the ROI hinges on the original value of already-purchased fixed assets (or "sunk costs") adjusted for depreciation.

Together the above discussion suggests a particular theoretical link between a firm's profit and loss statement and its balance sheet. Logically the two are connected to each other in a stock-flow consistent framework where all monetary flows have to produce changes to net asset stocks.[91] For example, profit flows produce retained earnings (after dividend payouts) and thus add to equity (or net worth). However, clearly the inter-firm dynamics of competition puts the profit/loss account in the "driver's seat" as the latter is the outcome of pricing and costing decisions of each firm which determines its financial viability as a going concern. This is very evident when one considers the firm's investment and pricing decision.[92] Thus changes in the balance sheet occur as a *consequence* of the dynamics of pricing, costing, and competition. This point was made by Schmalenbach, another important contributor to the HCA tradition:

> If we have said that it is an important duty of a business man to ascertain the operating results of his business, it is clear that he must also be able to determine the components of these results, his revenue and his expenditure. And since these *components* are presented, not in the balance sheet but in the profit and loss account, we have the following rule: The *profit and loss account* and not the balance sheet should be assigned precedence in the annual accounts. The profit and loss account should determine the contents of the balance sheet, and not vice versa. [93]

Given the logical accounting connection between the profit and loss account (flows) and the balance sheet (stocks) profits can be obtained either from flows

90 W.A. Paton and A. Littleton, *An Introduction to Corporate Accounting Standards* (1957), at 69. Cited from Müller (2014), *supra* note 32, at 542.

91 W. Godley and M. Lavoie, *Monetary Economics: An Integrated Approach to Credit, Money, Income, Production and Wealth* (2007).

92 G.C. Means, *The Corporate Revolution in America: Economic Reality vs. Economic Theory* (1962), at 163–4.

93 E. Schmalenbach, *Dynamische Bilanz 13th Exp*. (1962), at 51. Cited from Müller (2014), 544, *supra* note 32.

or from changes in the stocks.[94] It turns out that this distinction between how profitability is determined bears centrally on shareholder value maximization, financialization, and the rise to dominance of mark-to-market or fair value accounting (FVA) principles which has become a new criterion of financial control. Eschewing the historical cost method, FVA proposes that assets or liabilities be valued at current market value.[95] This simultaneously elevated the role of return on equity (ROE) as the operational metric of profitability. As Levy[96] discusses, the ROE metric came into dominance in the 1980s with the development of principal-agent models in which managers were treated as agents of the shareholders who, in the conventional view, are considered "owners". The claim was that FVA (or mark-to-market) and ROE would enable shareholders, supposedly with perfect foresight, to discipline managers and also confer greater flexibility to the investment decisions made by the "owners" of corporations. As Levy points out,[97] the agency theory of the firm was closely connected to the efficient market hypothesis. It also simultaneously introduced "short-termism" into the criteria determining profitability and investment, though this would not be seen to be a problem in the rational expectations framework, given the rapid adjustment to general equilibrium under *laissez faire*. This "short-termism" is of course at the heart of high-frequency trading and speculative investments.

A key issue here is the way that the degree of importance of balance sheets is related to the underlying legal identity of the firm.[98] In the *proprietary theory* approach, the firm is treated as a single proprietorship with no limited liability. The *entity theory* approach treats the firm as separate from its "owners" (shareholders), i.e., the firm is a corporation with limited liability. Per conventional corporate finance theory,[99] in the proprietary view the goal of the firm is to maximize the owners' equity (or net worth) with the balance sheet, read as follows:

$$\text{Equity} = \text{Assets} - \text{Liabilities}$$

On the other hand, in the entity approach, the central focus is the profit and loss account, with the flows of profits having an impact on equity, which equals retained earnings plus shareholders' contribution of funds. Thus, corporate assets appear as the residual:

$$\text{Assets} = \text{Equity} + \text{Liabilities}$$

94 Perry and Nölke (2006), *supra* note 41; Müller (2014), *supra* note 32.
95 Levy (2014), *supra* note 31, at 203–4.
96 Ibid.
97 Ibid. 209.
98 Müller (2014), *supra* note 32, at 545.
99 https://corporatefinanceinstitute.com/resources/knowledge/finance/entity-theory/.

As Müller argues, with its focus on the profit and loss accounts (which of course include the depreciation of fixed investment) the entity approach is consistent with HCA.[100] That is HCA is consistent with the notion of a firm as a going concern. On the other hand in the balance sheet approach of FVA, which is consistent with the proprietary framework, the maximization of the owner's net worth is the main goal:[101]

> A proprietary view supports a view of income as being the net change in assets and liabilities over the period. Taken to its logical conclusion this could mean that all assets and liabilities should be measured at current value, and the profit for the year would include value changes as well as transactions and non-recurrent items.[102]

The proprietary model is problematic from a number of standpoints. First, it is misleading to apply it to joint-stock corporations whose shareholders are protected by limited liability. As David Ciepley argues[103] it is difficult to see how shareholders can be proprietors when corporate and individual shareholder balance sheets are legally shielded from each other, unlike a traditional partnership or a proprietorship where company and individual balance sheets are entangled. In fact, the proprietorship model and the FVA, when applied to joint-stock corporations, is nothing but an old legal attempt to "penetrate the corporate veil"[104] to reduce the corporation to a nexus of mutual private contracts between individuals. The problem is that an individual proprietor does not benefit from limited liability, unlike a shareholder, so the "piercing of the veil" view of corporations is misleading.

Second, the pursuit of net worth as the primary goal would not be relevant to even a proprietorship, which, like any giant corporation, faces competitive pressures from rivals to expand its market share. *It is as much a going concern*, and thus its profit and loss account is of paramount importance to its growth prospects. The claim that net worth maximization is the key goal misses the point that a firm's net worth could increase if both its assets and liabilities *fall*, with the latter falling more, as a consequence of a falling market share when it is closing plants and reducing its liabilities because of pressures by creditors. Alternatively, because of insufficient internal funds, a proprietary firm may take on more debt to finance worker training programs and invest in new technologies with the hope of increasing its future market share. That is, it would

100 On depreciation costs see W.G. Nickels et al., *Understanding Business* (2016), at 486.

101 Müller (2014), *supra* note 32.

102 C. van Mourik, 'The Equity Theories and Financial Reporting: An Analysis', (2010) 7 *Accounting in Europe* 191, at 207. Cited from Müller (2014), *supra* note 32.

103 *Supra* note 44.

104 *Supra* note 43.

actually be reducing its short-run net worth to increase its future profits (even though it may not be successful in the latter aim).

To concretize this issue, Berghoff[105] reports that German *Mittelstand* companies (small- and medium-sized family owned and –controlled firms or SMEs) have historically played an extremely dynamic and export-oriented role. At least until 1999 around 99 percent of German firms were in the SME category employing about 70 percent of the workforce. The *Mittelstand* companies constituted about 30 percent of direct exports in 1998[106] while also playing a leading role in supplying inputs to big export-oriented corporations such as Daimler-Benz.[107] In short, the primary focus of these firms is to be growing going concerns. FVA and the accompanying short-run ROE measure are clearly not relevant to these companies. It is therefore not surprising that the FVA standard has been opposed by *Mittelstand* companies.[108]

Third, as neoclassical textbooks discuss,[109] while the return on assets (ROA) is a measure of profitability it is not a guide to the performance of the firm's equity holders' investment. For the equity holders, treated as "owners" of the corporation in the conventional view, the key operational variable is the return on equity (ROE). The two measures of profitability are linked via what is called the *equity multiplier* (EM) which equals assets/equity. Given that ROA = net profits after taxes/assets and ROE = net profits after taxes/equity:

$$\text{net profits after taxes/equity} = \text{net profits after taxes/assets} \times \text{assets/equity}$$

$$\text{ROE} = \text{ROA} \times \text{EM}$$

The implication is that if two firms have the same ROA, then the one with the higher EM will also have a higher ROE. Thus, lower equity investment with higher quantities of debt-fueled loan investments will raise both the EM and the ROE. In short, ROE has an in-built mechanism to promote short-term speculative investments of the type that produced the Great Financial Crisis of 2007/08. Maximizing ROE and shareholder value involves a regulatory change that enables firms to become more leveraged with lower equity investment, leading to a toxic chain of asset purchase growth.[110] Whether deployed

105 H. Berghoff, 'The End of the Family Business? The Mittelstand and German Capitalism in Transition, 1949–2000', (2006) 80 *Business History Review* 263.

106 Ibid., 269.

107 Ibid., 275.

108 Perry and Nölke (2006), at 570–71, *supra* note 41.

109 F. Mishkin, *The Economics of Money, Banking, and Financial Markets* (2019), chapter 9.

110 J. Taub, *Other People's Houses: How Decades of Bailouts, Captive Regulators, and Toxic Bankers Made Home Mortgages a Thrilling Business* (2014).

by financial firms or non-financial ones, ROE[111] focuses on short-term profitability and speculative investments.

D. Financialization, Foreign Trade, Outsourcing, and Precarity: Towards an Alternative?

Figure 6.1 plots the growth of the finance, insurance, and real estate (FIRE) sector in relation to the manufacturing sector for the US, UK, China, and Japan. The American FIRE ratio dominates the patterns of the four countries, exploding from about 1980. The British FIRE ratio also exhibits a marked trend increase from about 1986, with the onset of what has been called the "big bang" of financial liberalization,[112] with a heightened growth rate after the Labour Party is elected in 1997. On the other hand, the FIRE ratios of both Japan and China are relatively flat, although for the former it rises somewhat in the post-1990s period when its industrial performance slowed down. But, significantly, the East Asian countries' FIRE ratios remained virtually flat during

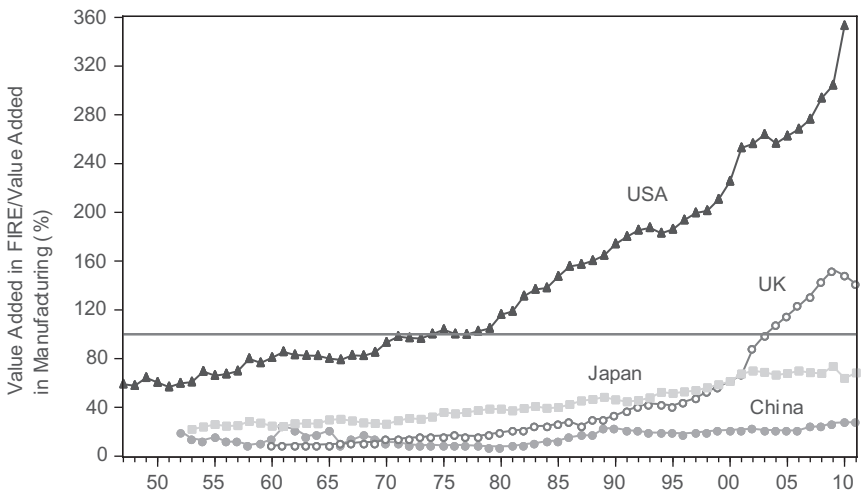

Figure 6.1 Value Added in FIRE Sector Relative to Manufacturing Value Added (1950–2011)
This table is based on data made public in connection with the chapter of M.P. Timmer et al., 'Patterns of Structural Change in Developing Countries', in J. Weiss and M. Tribe (eds.), *Routledge Handbook of Industry and Development* (2015), 65. The data can be accessed at: www.rug.nl/ggdc/structuralchange/previous-sector-database/10-sector-2014?lang=en.

111 Müller (2014), *supra* note 32.

112 C. Leys, *Market-Driven Politics: Neoliberal Democracy and the Public Interest* (2001).

their "miracle" export-led growth periods suggesting that money, finance, and markets can be politically structured in different ways.

It must be understood that ROE has not eclipsed the ROI measure of business investment. Rather, the former must be seen as an additional metric for financial investment purposes, given that in the wake of the crisis of profitability of the real sector in the 1970s many non-financial companies such as General Electric, General Motors, and Ford became increasingly reliant on financial investments to try to bolster falling rates of return in their production activities.[113] The greater focus on ROE by all firms includes a *greater relative* reliance on this metric as opposed to ROI in guiding investment decisions. For example, a firm could raise its ROE by outsourcing, which would entail cuts in labor costs. Thus, financialized capitalism has increased labor market precarity as a number of authors have argued.[114] A key benefit from the standpoint of the investor is that the short-termism built into the ROE metric allows the former to invest and disinvest relatively easily from one financial asset to another. This flexibility on the part of investors clearly does not extend to workers and the push for labor market "flexibility" has not made it possible for workers to reskill themselves and relocate from low-wage to high-wage sectors. On the other hand, the Heckscher-Ohlin model of international trade, at the heart of global free trade agreements, makes exactly this assumption regarding the temporary nature of involuntary unemployment caused by trade deficits. In short, financialized capitalism with growing labor market precarity has revealed the Orwellian nature of the notion of "freedom of contract" that undergirds many contemporary decisions of the US Supreme Court, among other institutions.[115]

Financialization can be related to poor trade performance and labor market insecurity.[116] It is therefore not surprising that American and British trade performances have been dismal for many decades compared to their two main global trade rivals in the post-World War II period, both of which have benefited from generally robust trade surpluses.[117] See Figure 6.2.

A progressive alternative to financialization has to begin with the recognition that this type of wealth accumulation is fueled by short-term and highly destabilizing investment flows that have longer adverse economic consequences including accelerating the wealth inequality/labor market precarity nexus. Simply put, it has to be understood that while finance is clearly central to capital accumulation and production it is not an independent source of value or wealth creation and its disproportionate growth relative to long-term

113 *Supra* note 15, at 28–9.

114 Williams and Zumbansen (2011), *supra* note 12.

115 M. McCluskey, "Constitutional Economic Justice: Structural Power for 'We the People'", (2017) 35 *Yale Law and Policy Review* 271–96.

116 W. Milberg and D. Winkler, *Outsourcing Economics: Global Value Chains in Capitalist Development* (2013).

117 However, the Japanese trade balance turned negative after 2010.

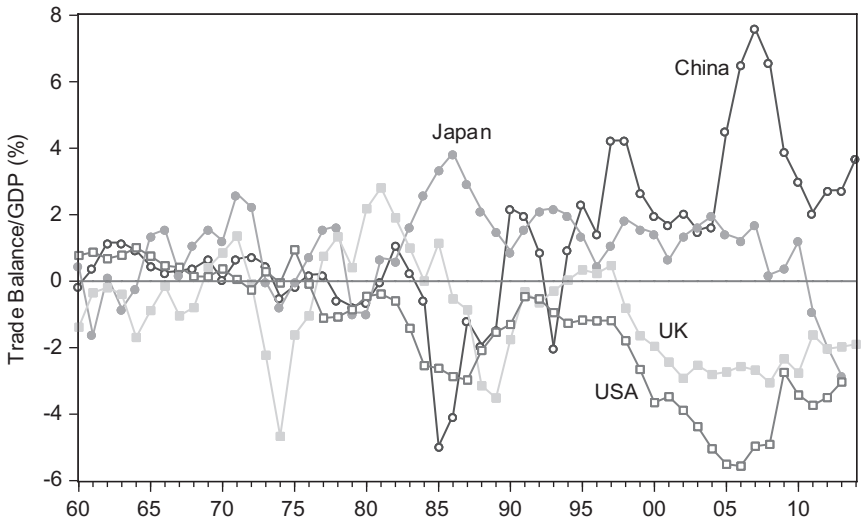

Figure 6.2 Balance of Trade/GDP (%) (1960–2014) This table was created with data made public by The World Bank, as part of its World Development Indicators project (downloaded March 11, 2016). World Bank data is available at: https://databank.worldbank.org/source/world-development-indicators.

investments can come at the cost of, say, research and development (R&D) by corporations.[118]

While one way to slow down financial wealth accumulation is through a financial transactions tax as Lenore Palladino argues,[119] a complementary method would be a wealth tax which is a proposal that is gaining popularity internationally.[120] As Glogower et al. argue,[121] in the US context such a tax potentially runs into some constitutional questions. At issue are two rival approaches to taxation in the US Constitutional tradition. One approach, the "apportionment rule", drawn from Article 1 Section 2 Clause 3 and Section 9 Clause 4, requires that taxes be apportioned on the states on the basis of their populations. On the other hand, Article I Section 8 Clause 1 authorizes Congress

118 *Supra* note 23.

119 L. Palladino, 'The Case for the Financial Transaction Tax in 2021', *The Appeal*, February 10, 2021 (https://theappeal.org/the-lab/policy/the-case-for-the-financial-transaction-tax-in-2021/).

120 B. Steverman and B. Stupples, 'The Wealth Tax Is Going Global', *Bloomberg Wealth*, January 6, 2021 (www.bloomberg.com/news/articles/2021-01-06/tax-code-changes-wealth-taxes-considered-from-california-to-germany).

121 A. Glogower, D. Gamage, and K. Richards (2021), 'Why a Federal Wealth Tax Is Constitutional', *Roosevelt Institute Issue Brief*, February 2021. Accessed online at https://rooseveltinstitute.org/wp-content/uploads/2021/02/RI_Wealth-Tax-Constitutionality-Brief-202102-2.pdf.

to implement uniform tax rates across the states, in line with the Congress' governance goals. An implication of the apportionment rule, as these authors argue, is that richer and less populated states would pay lower taxes than poorer and more populated ones.

The strict application of the apportionment rule was used in the *Pollock v. Farmers' Loan & Trust Company* cases of 1895 to strike down the 1894 income tax policy. However, it continues to be very relevant in current US debates on a wealth tax, as proposed for instance by Senator Elizabeth Warren. Consider for example Supreme Court Justice John Roberts, who in *National Federation of Independent Business v. Sebelius* (2012) evoked the apportionment rule with respect to a tax on real estate and private property.[122] Limitations of space prevent an elaboration of arguments[123] regarding the constitutionality of the wealth tax. I will limit myself to pointing out that financial wealth is spatially rootless, residing as software code in the internet, a central feature of informational capitalism.[124] Thus, with the additional fact that finance capital is globally footloose, it is quite surprising that the archaic apportionment rule continues to dominate the wealth tax policy debate. In short, both transactions and wealth taxes would restructure financial property rights and contracts, thereby potentially reducing inequality and restraining speculative investments. Such taxes could fund a long-term industrial policy with a focus on providing below-market interest rate loans to finance long-term basic R&D by smaller companies with inadequate internal cash flows. This last proposal should not reinforce the myth that government spending requires prior access to tax revenue. However, in the absence of the framework that Keynes envisaged with respect to the central bank, where the latter would be institutionally autonomous, but ready to finance economic development,[125] the above wealth tax policy can be treated as a potentially pragmatic goal in the current context.

Finally, a new regulatory framework should not reinforce the notion that government regulation should be introduced to "contain" fundamentally unregulated global financial markets. This is precisely the narrative that Anna Chadwick rejects.[126] In fact, far from existing in a self-regulating legal vacuum, global derivatives trade involves standardized contracts that are enforced in the courts in New York and London where the bulk of trading takes place.[127] High-speed speculative flows require a *prior* legal and thus political decision

122 Ibid., at 7.

123 See C.H. Johnson, 'A Wealth Tax Is Constitutional', (2019) 38 *ABA Tax Times*. Accessed online at www.americanbar.org/groups/taxation/publications/abataxtimes_home/19aug/19aug-pp-johnson-a-wealth-tax-is-constitutional/.

124 J.E. Cohen, *Between Truth and Power: The Legal Construction of Informational Capitalism* (2019).

125 J.K. Moudud, 'A Critical Legal History of French Banking and Industrialisation: An Alternative to the Law and Development Framework', (2019) 7 *London Review of International Law* 215.

126 A. Chadwick, *Law and the Political Economy of Hunger* (2019).

127 Ibid., 152–4.

to create and enforce the standardized contracts. The implication is that the legal design of global derivatives trading *could* be re-engineered politically and legally to reduce both their volatility and the enormous earnings they generate for managers and shareholders. As outcomes of private contracts, derivatives trade is no different from global trade in, say, aircraft or cars[128] and thus *could* be restructured to make them safer.

E. Conclusion: *Doublespeak* and Performativity

Ideas matter as they have real consequences.[129] The defining feature of the Law and Economics tradition is the way that it conjures away unequal power relations at the heart of the economy. The continued reliance on the marginal productivity theory and perfect competition as its baseline point of departure with deviations constituting imperfect markets and "market failure", creates the framework for conservative and liberal neoclassical economists to advocate "less" or "more" government to deal with economic problems such as labor market precarity. Such false dichotomies, premised on the separation of the economy from politics and law, continue to perpetuate inequalities of power while maintaining an almost theocratic hold on neoclassical teaching and research.

This simultaneous process of conjuring away unequal power relations while perpetuating it is reminiscent of how power is wielded in George Orwell's *1984*. The linguistic scholar William Lutz and others[130] have deployed the term *doublespeak*[131] to describe how political control is maintained via the manipulation of language and thought as in *1984*. In an insightful essay entitled "Politics and the English Language"[132] George Orwell discussed the political usage of language, emphasizing that it consists "largely of euphemism, question-begging and sheer cloudy vagueness", while providing "largely the

128 Ibid., 162–3. Global aircraft safety standards are regulated by the International Civil Aviation Organization, a UN agency. One may also consider uniform state-enforced auto emissions rules across the EU (www.forbes.com/sites/neilwinton/2019/04/04/eu-fuel-economy-rule-violations-could-cost-manufacturers-big/?sh=62b6d8727892).

129 D. MacKenzie, F. Muniesa, and Lucia Siu (eds.), *Do Economists Make Markets? On the Performativity of Economics* (2008).

130 W. Lutz, 'Language, Appearance, and Reality: Doublespeak in 1984', (1987) *ETC: A Review of General Semantics* 44(4), 382; W. Lutz (ed.), *Beyond Nineteen Eighty-Four: Doublespeak in a Post-Orwellian Age* (1989).

131 The Merriam-Webster dictionary entry on doublespeak describes it as a kind of "language used to deceive usually through concealment or misrepresentation of truth" (www.merriam-webster.com/dictionary/doublespeak).

132 In G. Orwell, *Shooting an Elephant and Other Essays* (1950).

defence of the indefensible".[133] As I have argued elsewhere[134] the notion of economic liberty that "free markets" claim to promise is exactly this type of political language. It is of course not suggested here that neoclassical economists consciously attempt to manipulate the world by the language that they use and the ideas that they implement as policies. Perhaps unwittingly, they are products of their own intellectual training that is not disconnected from larger political forces in society. Steve Teles' book[135] regarding the role of right-wing foundations such as Olin in financing the establishment of the Law and Economics movement exemplifies this last point very well.

Doublespeak is at the heart of the neoliberal order in three respects discussed in this paper. First consider perfect competition. Now if this type of market structure is a chimera, as even Friedrich Hayek[136] pointed out, then there is no meaning to the claim that real-world firms deviate from this model while at the same time celebrating the virtues of free trade – which assumes perfect competition! And yet this type of intellectual somersault is common in the neoclassical literature even in the same paper.[137] This issue is more than just an academic one since free trade policy has real consequences, being the basis of IMF-style austerity programs, persistent international trade imbalances,[138] and labor market insecurities that have been cleverly exploited by the far right with its nativist fearmongering. In other words, the promotion of a benign view of competition, which is the exact opposite of how real-world businesses compete, and thereby perpetuating inequalities is a good example of the performative nature of doublespeak.

Second, consider the nature of the corporation whose very legal structure cannot possibly make it equivalent to a partnership involving a nexus of contracts between private individuals. This is not an issue only pointed out by authors on the political left. In his lecture on *Citizens' United* and the *Hobby Lobby* case at the 2015 Ralph K. Winter Lecture at Yale Law School the Chief Justice of the Delaware Supreme Court, an ardent supporter of *laissez faire*, observed that corporations are legal entities distinct from flesh-and-blood

133 Ibid., at 96.

134 J.K. Moudud, 'Libertarian Doublespeak: Obscuring Distributional Struggles Under the Banner of "Economic Liberty", LPE Blog, https://lpeproject.org/blog/libertarian-doublespeak-obscuring-distributional-struggles-under-the-banner-of-economic-liberty/.

135 S.M Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (2008).

136 F. Hayek, 'The Meaning of Competition', in F. Hayek, *Individualism and Economic Order* (1948), 92.

137 See for example P.R. Krugman, 'Is Free Trade Passé?', (1987) 1(2) *The Journal of Economic Perspectives*, at 131.

138 J.K. Moudud, 'Free Trade for All: Market Romanticism Versus Reality', LPE Blog, https://lpeproject.org/blog/free-trade-for-all-market-romanticism-versus-reality/#:~:text=PUBLISHED%2003.26.18-,Jamee%20K.,and%20the%20Law%20(APPEAL).&text=This%20accusation%20of%20%E2%80%9Cunfairness%E2%80%9D%20when,trade%20deficits%20is%20well%20worn.

human beings. Thus "piercing of the veil" is legally a flawed principle even as it contributes to increased corporate freedoms.[139]

Third, and finally, consider more broadly the nature of the market itself. The dominance of neoclassical economics has elevated the market to an almost godlike status that can only do good so that any legal self-seeking pursuit within the context of markets invariably contributes to value creation and thus promotes social welfare. Speculative financial investments, as Anna Chadwick[140] points out quoting Berg[141] has gone from being considered "villainous to venerable", i.e., seen as destabilizing at one time it is now considered by neoclassical economists as reducing market risks. The doublespeak at the heart of the global order is that financial markets are assumed to exist, both by its supporters and many opponents, in a non-regulated "free-for-all".[142] And yet, this is exactly the opposite of reality with respect to all markets, which is surely well-known.[143] For example, it is no secret that the granting of greater legal privileges to financial market participants was the product of *political* decisions by Congress. Consider for example the Depository Institutions Deregulation and Monetary Control Act (DIDMCA) of 1980 or the Gramm-Leach-Bliley Act (GLBA) of 1999 and the Commodity Futures Modernization Act (CFMA) of 2000. It requires a stupendous reformulation of language and thinking to recast such political reconstructions of markets as reductions of the role of "big government".

The analytical framework in this chapter rejects perfect competition and its twin in neoclassical economics, imperfect competition. Politics, generally acting through the law, is constitutive of all markets, distributing power relations within contextually different ways. There are always social consequences of private actions because of the social and relational nature of property rights. Thus, there is no such thing as a "market failure". Further, in contrast to the neoclassical framework it is argued that in an attempt to be going concerns and generate adequate internal cash flow, all firms try to set prices, *with varying degrees of success* given competitive pressures from rivals and the legal foundation in place, to attain the maximum rates of return on their investments. In other words, price-setting behavior is not a deviation from passive price-taking. As going concerns firms are socio-politically embedded[144] and

139 *Supra* note 43.

140 A. Chadwick, *Law and the Political Economy of Hunger* (2019), 103.

141 A. Berg, 'The Rise of Commodity Speculation: From Villainous to Venerable', in A. Prakash (ed.), *Safeguarding Food Security in Global Markets* (2011), 242 (provided online by FAO: www.fao.org/3/i2107e/i2107e13.pdf).

142 Which is precisely why, as Chadwick argues, many critics of financialization argue that financial markets need to be "regulated" rather than proposing political changes to the foundational laws of contract that create those markets.

143 *Supra* note 146, chapter 5.

144 *Supra* note 44.

price-setting from the local mom-and-pop store to the megacorporation is shaped by that context. Given that they are political creatures, their central goal is to attempt to restructure the underlying governance framework in line with their investment priorities. One area in which they have become increasingly successful is in extending their influence over accounting standards,[145] enabling the coding of their assets so as to facilitate the growing dominance of the ROE as the metric of profitability. This has been accompanied by accelerated speculative flows as well as inequality and labor market precarity. Increased reliance on short-term financial investments and speculative activity increased in the wake of the crisis of the 1970s and became another cash-earning strategy favored by manufacturing firms given the declining rates of profit in that sector.[146]Given all the adverse consequences of financial globalization can the proverbial genie that was let out of bottle be disciplined in a new way even if it cannot be put back?

Ideas and politics are performative as the basis of all markets as John Maynard Keynes wrote in the conclusion to the *General Theory*:[147]

> the ideas of economists and political philosophers, both when they are right and when they are wrong, are more powerful than is commonly understood. Indeed the world is ruled by little else. Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist. Madmen in authority, who hear voices in the air, are distilling their frenzy from some academic scribbler of a few years back. I am sure that the power of vested interests is vastly exaggerated compared with the gradual encroachment of ideas. Not, indeed, immediately, but after a certain interval; for in the field of economic and political philosophy there are not many who are influenced by new theories after they are twenty-five or thirty years of age, so that the ideas which civil servants and politicians and even agitators apply to current events are not likely to be the newest. But, soon or late, it is ideas, not vested interests, which are dangerous for good or evil.

The distinguished historian of economic thought Warren Samuels[148] argued that *laissez faire* and the notion of the "invisible hand" are part of the mythology of economics, falsely attributed to Adam Smith by neoclassical economists. Samuels took the position that these popular notions in economics are also misleading given the economy's legal and political foundations. Thus, changing the

145 J. Perry and A. Nölke (2006), *supra* note 42.

146 *Supra* note 15.

147 *Supra* note 14, at 383–4.

148 W.J. Samuels, *Erasing the Invisible Hand: Essays on an Elusive and Misused Concept in Economics* (2011).

"rules of the game" so as to reduce economic insecurity requires rethinking the nature of both markets and of value creation. In contrast to much of contemporary heterodox economics it is argued that the surplus approach of classical political economy is incomplete without an understanding of law's constitutive role in market design and the ways in which politics and ideological factors are foundational to the economy. Politics and the law are not part of some putative "superstructure" as in one dominant strand of Marxist thinking. In a testimony before Congress in 1997 the former US Fed chair Alan Greenspan addressed the problem of persistent job insecurity during that boom, a claim hotly contested by Wall Street "experts" at the time.[149] At the end of the day, then, the key issue that this chapter raises is the question of stable and well-paid jobs and reducing inequality. This goes beyond mechanical demand-stimulus policies to lower unemployment rates as taught in macroeconomics. It requires an understanding of the power relations within the economy and how they could be restructured as Robert Hale discussed.[150]

149 L. Uchitelle, 'Job Insecurity of Workers Is a Big Factor in Fed Policy', February 27, 1997, www.nytimes.com/1997/02/27/business/job-insecurity-of-workers-is-a-big-factor-in-fed-policy.html.

150 Hale (1952), *supra* note 34.

Chapter 7

The Key to Value

The Debate over Commensurability in Neoclassical and Credit Approaches to Money

Christine Desan[1]

A. Introduction

According to neoclassical theories, value drives the exchange activity that creates the market itself. Value is both pre-existing and pre-eminent. Expressed in individual choices about preferences, it is an essential matter in every sense of the word. Money, in that approach, is a "peripheral fact" to the process. Marginalizing it as "a mere adjunct", a jumble of accounts inconsistently theorize money's ability to capture and compare value.[2] They posit money as a unit of account that antedates exchange while identifying money as a medium in the real world that follows from exchange. The result is a dodge at the heart of the neoclassical thought.

Credit theories of money take a dramatically different approach. According to them, groups restructure their internal relationships to create a unit of account – money – that can act as a comparative.[3] That argument upends the neoclassical approach to value. First, if money creates commensurability, our preferences as expressed in the market depend on money rather than preceding it. The practice of exchange produces value, at least as it exists monetarily, rather than revealing it. Second, if money creates commensurability, then the nature of money – and of money as credit – matters enormously. Credit works by representing and advancing a unit of value to some people relative to others. In that case, as a condition inherent to its construction, money carries value differentially to participants, those who are graced with credit and those who are not.

If so, we cannot assume that everyone comparing value has access to the comparative, if only as a unit of account, that will express his or her preferences.

1 This essay condenses and revises an article previously published (see C. Desan, 'The Key to Value: The Debate over Commensurability in Neoclassical and Credit Approaches to Money', (2020) 83(2) *LawContempProbl* 1). I am grateful to Isabel Feichtner and Geoff Gordon for their insights and the opportunity to revisit that work.

2 A. Orléan, *The Empire of Value: A New Foundation for Economics* (2014), 4.

3 See text at notes 39–46, *infra*.

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Money as a credit operates by creating capacity as a relative resource. The process of money's dissemination articulates value in that unit. In turn, representations of value manifested as prices are produced in the activity of deals made for the monetary unit. The results embed both the facility and disparity represented in the medium.

Models that assume money as a neutral measure, hypothetically accessible as a valuing tool if not a factor endowment, do not give us information that can be understood as a reflection of people's preferences. Recognizing money as credit locates it as both more creative and more troubling. It engenders commensurability itself, making money's own character central to the process. That character spreads access unevenly as a condition of its operation. Rather than "perfecting" markets as expressive practices, we should create markets that correct for inherent inequality.

B. The Neoclassical Approach

Most neoclassical thinkers believe that "the *choices* of the agent reflect her/his preferences, and … the *preferences* of the agent (even when s/he is not selfish), in turn, reflect the *welfare* of the agent".[4] In this formulation, value precedes commercial exchange; it is the "hidden property that is logically prior to such transactions and that gives them form".[5] André Orléan agrees that the commitment to pre-existing value is central to mainstream economics. In his view, that principle organizes economic thought. As he observes, "exchange exists because there is value — value being understood as the distinctive quality of tradable commodities".[6] That is true whether scholars attribute value to labor or to the utility of scarce resources, and whether they attempt to model the expression of choice in general equilibrium theory or in more dynamic partial equilibrium processes that sort market results by competitive selection and exclusion.[7] All are attempts to understand how recognizing underlying value, in ways that may be unknown to market actors themselves, "orders the apparent anarchy of market exchange".[8]

According to this approach, the economic process is resolutely comparative; it assumes a way of measuring the value of real things or their

4 Y.M. Madra, *Late Neoclassical Economics: The Restoration of Theoretical Humanism in Contemporary Economic Theory* (2017), 15.

5 Orléan, *supra* note 2, at 13.

6 Ibid.

7 See ibid., at 9–12 (reviewing shift from labor to utility theories of value); see also Madra, *supra* note 4, at 13, 48–60 (considering use of auction and evolutionary arguments in neoclassical theories of value).

8 Orléan, *supra* note 2, at 13. For that aspiration as a historically developed ideology, see generally J. Sheehan and D. Wahrman, *Invisible Hands: Self-Organization and the Eighteenth Century* (2015).

characteristics against each other.[9] Ideally, the exercise itself produces a measure. In Schumpeter's words, it is "the exchange ratios between the commodities that are the really important thing 'behind' money prices",[10] or, according to those in the Marshallian tradition, "the ratio of the marginal utility of the two goods exchanged".[11] The striking point is that some commensurability in value allows comparison among the wide heterogeneity of commodifiable items. Neoclassical theory has split again and again in its debates over value, from the subjectivism of Bentham's utility to the methods for comparing pairs of preferences.[12] Implicit across those debates, however, is an agreement that comparison is possible, even if in an abstract term.

In fact, abstraction may be essential for most theorists. The neoclassical market is a conceptual device, a phenomenon that registers and reflects preferences. Exchange in turn represents the fact that those preferences, once identified, can be reordered. The Walrasian auction is the most elegant representation of that process.[13] In that model, the critical moment occurs when participants recognize value and rank it. By contrast, exchange is simply the execution of those decisions. Thus, "exchangeability is considered to be directly implied", *after* the act of judgment in which individuals make their choices.[14] Actual exchange and the terms on which it occurs is a different subject, one that raises issues of application, rather than questions of the first order.[15] The truck-and-bartering individuals that Adam Smith made famous are merely carrying out the commands, we learn, of their inner ideal decision-makers.[16]

The normative stakes of the neoclassical vision are profound. Within that frame, the autonomy of individuals – the fact that they make value choices independent of any influence or mediation – ensures freedom from coercion. Those actors find sovereignty and equal voice insofar as their preferences operate to determine the relative value of goods and services. In order to respect

9 Commentators often loosely identify preferences for commodities per se, while others specify the utility of their underlying properties or characteristics. See Orléan, *supra* note 2, at 42–3 (discussing Kelvin Lancaster's work, which defined utility as an objective quality).

10 J.A. Schumpeter, *History of Economic Analysis* (1954), 277.

11 Madra, *supra* note 4, at 13.

12 Madra, *supra* note 4, at 4–6, 13, 48–60.

13 For a concise overview of the model, see Orléan *supra* note 2, at 13–14, 39–50.

14 Orléan, *supra* note 2, at 17.

15 Those working out early partial equilibrium models took a similar approach. Thus Alfred Marshall would assume a medium and give it unchanging marginal utility for his model, while only subsequently accommodating the impact of money flows in the real world by way of a money demand function. See H.W. Spiegel, *The Growth of Economic Thought* (1991), 567, 583–4.

16 In fact, we might understand neoclassical responses to "income" approaches, like that of Ralph Hawtrey, and to Keynesian theory in particular as categorizing the challenges raised there as problems of application, therefore short-term issues of transition, rather than challenges to the fundamental structure of assumptions underlying classical and neoclassical thought. See generally, R. Hawtrey, *Currency and Credit* (1919).

the choices made by individuals, we should preserve that underlying distribution so far as we can. Their decentralized action is the most democratic of expressions.[17]

This conception of the market and its normative stakes explains the neoclassical approach to money. At the level of theory, commentators preserve the integrity of the comparative exercise and all that it promises by abstracting from the definition of money, black-boxing the unit of account. In applied fields, the discipline accommodates the practical reality that a medium of exchange must exist by imputing a fictional genealogy to money, one that identifies it as the product of exchange in goods already commensurable. The combination will guard, in principle, the neutrality of the unit in which value is expressed, while acknowledging slippage in the real world.

Perhaps the most common method of abstracting the unit of account is to assume that one among the commodities traded in a market can act as the measure of other commodities in that market. The Walrasian model at the heart of general equilibrium theory cleanly and clearly imputes that unit.[18] A commodity, called a "numeraire" when used as a comparative unit, can be set equal to one – it expresses its own value after all – and then deployed to measure other goods. In neoclassical models, the numeraire is a measuring fiction; no one holds it as a store of value, an intervention that would upset the project of measuring all commodities against all others in terms of their utility for consumption or productivity.[19] James Tobin takes pains to distinguish the numeraire as a mathematical supposition from money actually used to set prices.[20] But that is precisely the point for our purposes: in their effort to hypothesize a measure, economists split money into its constituent functions. They theorize its identity as a measure separately from money as a transactional medium, store of value, or mode of payment. As Mark Blaug writes about the numeraire, "this kind of money serves only as an abstract unit of account; it may exist in a physical sense, but it need not and trade has all the characteristics of barter".[21]

That conclusion is empowering. Having assumed commensurability, the market for real things can exist independently of a medium. As Blaug describes the circumstances in which the numeraire operates, "the medium of exchange

17 M. Friedman, *Capitalism and Freedom* (1962), 15 ("[The market] is, in political terms, a system of proportional representation. Each man can vote, as it were, for the color of tie he wants."); K.J. Arrow, *Social Choice and Individual Values* (2012), 1–2 (identifying voting and "the market mechanism" as the two basic methods of making social choices).

18 Partial equilibrium models also assume commensurability, leaving aside the identity of money as unimportant. See, e.g., J. Tobin, 'Money', in S.N. Durlauf and L.E. Blume (eds.), *Monetary Economics* (2008), 232.

19 See ibid., at 224, 231; M. Blaug, *Economic Theory in Retrospect* (1996).

20 Tobin, *supra* note 18, at 232; see also Madra, *supra* note 4, at 13 (analogizing the abstract nature of utility ratios).

21 Blaug, *supra* note 19, at 144.

being an arbitrary commodity like any other — the total value of all goods demanded is always identically equal to the total value of all goods supplied".[22] We can then hypothesize the trade of commodities directly for one another by value; consumer demand thus informs the decisions of producers. As Frank Hahn summarizes this logic and its consequence, "the best developed model of the economy cannot find room for [money]" at all, given the zero-sum logic.[23]

It remains only to make sense of money's existence and role in the real world. There, the fact of exchange in lived experience, not to mention the models that operate on an imputed unit, invite the intuition that commensurability is automatic or effortless. And once we have resolved the problem of commensurability, comparison is possible but for smaller challenges, mere frictions in a system that is conceptually operational. Those challenges can be resolved by decentralized activity – barter that produces a medium, or a convention that produces an agreed upon measure – that is consistent with the normative vision of the market as an individuated matter.

As economist after economist emphasizes, exchange without money is an unwieldy affair, haunted by difficulties and delays as participants struggle to overcome obstacles of distance, information, and time that set apart what they have to exchange from what they want to gain that way.[24] Those problems – all failures of a "double coincidence of wants" – generate the need for money: economists almost uniformly explain it as a means of reducing interference with exchange.[25] In turn, they posit that money emerges from exchange. Carl Menger imagined that the "most saleable commodity" would gain stature as a medium; Karl Marx assumed that gold simply took hold as a "universal equivalent".[26]

The double coincidence of wants is an applied problem, not a theoretical one. If people had the wherewithal, they would be able to find and make the trades they wish. That is, they understand the relative values of everyone's possessions – they merely need to find the right partner at the right time with the right quantity and quality of goods they desire. Trade is a matter of degree, if you will, an image that invites commentators to posit that money emerges from existing trade to facilitate subsequent trade.

22 Ibid.

23 F. Hahn, *Money and Inflation* (1982), 1.

24 See, e.g., N.G. Mankiw, *Macroeconomics* (2003), 158; F.S. Mishkin, *The Economic of Money, Banking, and Financial Markets* (2010), 57–9; Tobin, *supra* note 18, at 224–5; R. Levine, 'Financial Development and Economic Growth: Views and Agenda', (1997) 35 *Journal of Economic Literature* 688; see also N. Wallace, 'Lawrence R. Klein Lecture 2000: Whither Monetary Economics?', (2001) 42 *Int'l Econ. Rev.* 847 (locating need for credit and monitoring in lack of double coincidence of wants).

25 Tobin, *supra* note 18, at 224.

26 C. Menger, *On the Origins of Money* (1892), 263; K. Marx, *Capital: A Critique of Political Economy* (1976), 162.

Note that the sequence reverses the logic of the conceptual models. Those models recognize that a unit of account must be postulated both before comparison takes place and in order to allow comparison to take place. Exchange takes place subsequent to those choices; it merely carries them out. By contrast, applied explanations rely on exchange to generate a unit of account.

The sleight of hand submerges the challenge of comparison: how is it possible to compare an orange to an advance of resources, or a dog to military service? What about the relationship of any of those to the possession of land or art, or to the obligation to support the public order? That question, infinitely harder than the problem of barter, is virtually non-existent in the economic literature on money.[27]

Having set the challenge of commensurability aside, we have a problem that is manageable within the terms of neoclassical thought. Decentralized activity can resolve frictions if items are comparable. In particular, that decentralized activity can produce an object – a commodity or a convention of measure – that facilitates the market if there is enough decentralized activity (that is, enough of a market) in the first place. (Never mind the circularity; assuming commensurability allows a significant amount of trade to occur without money.) Finally, the "convergence" story about money's creation tacitly reinforces the discipline's normative stake in the market's democratic character. Most evidently, a wide range of participants have vetted the medium and chosen to accept it; apparently, they could opt out if they preferred. As a medium, money is hypothetically available to all as a measuring tool, although not a factor endowment. In that important sense, it is distributively neutral – even though we will find it unevenly accumulated by individuals.

Of course, there are distortions that separate this applied world we have constructed from the conceptual one. Thus, the moneys hypothesized by economists as emerging from barter or convention do not resemble the numeraire. Either they carry value as money and therefore depart from the definition of a commodity equivalent that Hahn and Tobin imputed to the numeraire, or they have no intrinsic value and therefore provide no coherent reference for measuring that quality. In the first category are all those items selected as money because bartering agents prefer them increasingly until they emerge as a medium. The very act of bartering for a commodity preferentially because it will be used as a unit of account changes the value of the commodity. That disqualifies it from acting as a sister commodity in the Walrasian model. In the contemporary neoclassical literature, a set of models that posit moneys that are "productive" – necessary to resolve cash-in-advance requirements or

27 One could argue that the question of commensurability haunts the economic literature insofar as that work grapples with the issue of how to understand subjective value or utility. But those efforts do not articulate the problem as the reason for money's existence.

transactional frictions – fail for this reason.[28] As Neil Wallace argues, general equilibrium theory assumes complete competitive markets; it is therefore inconsistent with a money that is productive in its ability to aid transactions.[29]

Wallace in turn crafts a theory of money according to which an intrinsically worthless object is circulated as evidence of past behavior. That is, one gives money as a token to document a good or service provided; the money produces information on the behavior of contracting parties as opposed to resolving transactional frictions.[30] Wallace acknowledges that his theory is inconsistent with the assumption in general equilibrium theory that markets for credit are perfect, but argues that the departure will be worthwhile given his theory's ability to account for money's existence.[31] But there is another problem he does not recognize: his account does not explain how heterogeneous items become commensurable. Narratives that propose an empty measure provide no reference point against which comparison can proceed. Money, even if considered only as a unit of account, is nothing like an inch or a pound. Those metrics are more like denominations; they divide a matter already commensurable, like linear space or weight. By contrast, money creates a reference point for an amorphous matter: value. To this day, neither economists nor philosophers have agreed upon how to conceptualize the "value" of time, goods, services, satisfactions, or desires. Once that is done monetarily – the whole trick – no one really cares much how denominations are ordained to subdivide existing value.

The moneys constructed by economists, aimed as they are at explaining problems of transactional frictions or informational shortfalls, therefore do not satisfy the demand implied by the conceptual models for a unit that enables commensurability. But that shortfall does not suggest the inadequacy of those models for those advocating them. Recall that, given the role that economists have identified for money as a medium – its operation to mitigate the interference to the ideal market posed by real world conditions – the issue of money is understood as a second-order problem. Economists can correct for monetary dynamics while categorizing those dynamics as distortions given money's deviation in the real world from the abstract numeraire.

Those distortions may be grave. The fact that commodity moneys never behaved like the commodity they contained bedeviled the European medieval world. Gresham's law, competitive debasements, and the bewildering traps of

28 Wallace, *supra* note 24, at 847–8.

29 Ibid., at 848–9.

30 Ibid.; see also N. Wallace, 'The Mechanism-Design Approach to Monetary Theory', in B.M. Friedman and M. Woodford (eds.), *Handbook of Monetary Economics*, 4–5 (discussing the benefits of a mechanism design approach to monetary theory); M. Shubik, *The Theory of Money and Financial Institutions* (1999), 322 (arguing for an alternative approach to the price system to reconcile micro- and macroeconomics).

31 Wallace, *supra* note 30, at 4–5.

bimetallism followed from the fact that money's face value diverged from its metallic value – and would always diverge, no matter if individuals knew the metallic value down to the grain. The issues raised in the modern world are arguably more profound. Keynes' notion of liquidity preference turns on the point that people value a medium for its "moneyness", a utility it carries that affects its value and people's desire to hold it.[32] That demand interferes with the identity of savings with investment. Another problem occurs because cash, the transactional medium, has long been supplemented, one might say submerged, by a thick layer of financial assets offering different degrees of liquidity and different returns for risk. That market also complicates the flow of savings into investment, arguably obstructing it.[33] Much of macroeconomics and monetary policy might be understood as dealing with the consequences, the distortions to the ideal, that result.[34]

In short, neoclassical economics has produced a position on money dictated by the discipline's implicit theory of value. Mainstream approaches assume that value pre-exists interaction. They prioritize the choice that individuals make among valued goods as a critical act of self-determination and assume the process of exchange as the execution of that choice. In order to make the comparative process cognizable, they posit an abstract and neutral unit of account that precedes and facilitates that activity. At the same time, neoclassical approaches accommodate money in practice (that is, in the real world) as a medium constructed by individuals who, already able to compare goods, face frictions in the exchange. Those frictions are a second-order problem, one that makes trade difficult but not impossible. In fact, in the applied realm, trade – the activity that only executes choice in equilibrium analysis – produces money as a means of facilitating more exchange. The role and salience of exchange confirms the market as a decentralized phenomenon, consistent with the democratic vision of free choice as the base of neoclassical commitments. The distortions that occur in the real world will be managed by fixes that are also second order.

C. Money as a Public Credit Medium

Money is not so easily tamed; time and again it violates the neoclassical edifice constructed to house it. That is incontrovertibly true in the contemporary world, where money does not resemble the numeraire; neither is it a commodity nor a signifier empty of material value. Virtually all modern sovereign

32 John Hicks may have been the first to use the term "moneyness" in this sense. See J. Hicks, *Value and Capital: An Inquiry into some Fundamental Principles of Economic Theory* (1947), 163.

33 Tobin, *supra* note 18, at 239–40.

34 See M. Beaud and G. Dostaler, *Economic Thought since Keynes: A History and Dictionary of Major Economists* (1997), 29 (discussing the differences between economic models that assume money supply is endogenous and models that assume it is exogenous).

moneys are credit mediums that entail material value, unit by unit. They are created by governments or, as in the case of the European Union, consortia of governments. Those authorities create an official unit of account, control issue of that unit, and take it back for taxes and other public payments.[35] (If a debtor does not have money, a government will confiscate goods of an equal "monetary" value, thus providing a material anchor for its currency.) Governments further support the value of their sovereign moneys by privileging its travel between individuals: officials enforce transactions for value made in the official monetary unit. American courts, for example, default to the dollar as the medium that states and conveys the value necessary to settle contracts, to redress injuries in tort, to convey property, and to comply with myriad other requirements from jurisdictional thresholds to regulatory standards.[36]

Money issued by commercial banks – a profuse source of money since the 19th century – fits within the architecture constructed for the dollar and other sovereign moneys. Commercial banks issue credit denominated in the official unit of account in the form of private promises-to-pay one sovereign money or another. Those representations of private credit – bank deposits – are treated as money, not just credit: they hold immediate purchasing power. And they hold that purchasing power because they are embedded in national payments systems that allow banks to clear their obligations against each other, borrow from each other, and depend on the central bank for help – all in the official unit of account. In that way, public credit money systems add "elasticity" to the monetary base. That is, they include an avenue for the money supply to expand in response to the demand by individuals who want money for their own purposes.[37]

The character of modern moneys suggests a solution to the conundrum about commensurability that haunts the neoclassical approach. Communities do in fact require a unit to render value commensurable before participants set about the enterprise of comparing goods. The neoclassical theorists correctly insist on that logic. But the monetary unit is neither an abstraction, nor a commodity that costlessly distinguishes itself, nor an empty measure. Rather, communities construct a unit of account by creating a token that carries value relevant to each participant. They do that in the figure of credit that is good to satisfy political dues or, in the case of bank-issued money, credit that is good

35 For the statutory definition of the dollar along those lines, see 12 U.S.C. § 411 (2018); 31 U.S.C. § 5103 (2018).

36 See generally C. Desan, *Making Money: Coin, Currency, and the Coming of Capitalism* (2014), 58–69.

37 See generally R. Hockett and S. Omarova, 'The Finance Franchise', (2017) 102 *Cornell L. Rev.* 1143, at 1143, 1147 (arguing the modern financial system is a public-private partnership between financial institutions and sovereigns); P. Mehrling, 'Payment vs. Funding: The Law of Reflux for Today', (2020) 113 *INET Working Paper* (illustrating payments elasticity through credit creation by private banks).

to repay an advance – thus the pattern of credit money that we find pervasive across the modern world.

Once participants have a comparative unit, they use it in exchange. That practice puts a money value – a price – on goods and other commodities. The practice of exchange with a unit of comparative value therefore creates commensurability and, by that token (literally), articulates value. In other words, insofar as we consider money an expression of value, that value does not reflect pre-existing preferences.[38] Rather, the value expressed in money follows the practice of exchange in money and is a product of that exchange.

Finally, in that process, the character of money as credit matters. In particular, credit money enters circulation selectively: it is an advance (a credit) made to some people relative to others. Thus money, inherent to the way it is constructed as credit, comes into use as a resource that some participants acquire first. That character affects the practices made with money, including the establishment of prices. At a formal level, money is allocatively partial; it cannot be a neutral medium.

We can begin unpacking the process by which money is made and put into circulation where neoclassical approaches do. Like the unit hypothesized there, credit moneys can also be conceptualized at a theoretical level. The stakeholder model is one such attempt.[39] The model starts from the premise that groups are as elemental as individuals in understanding exchange. Groups survive on the basis of contributions from members. At times, however, groups facing emergencies or sudden shortfalls want to mobilize help outside the usual schedule of member contributions. In that case, a stakeholder for the community can draft contributions from some members in advance and "pay" for that advance by giving them an "I owe you" (IOU) or pledge that recognizes the advance. Each IOU confirms that the member has given a contribution early. It denominates that contribution as a credit, inviting the person holding the IOU to "redeem it" by turning in the IOU next time a member contribution is due, instead of making a new and additional contribution. The arrangement

38 Compare the Walrasian approach, which Orléan describes as identifying price as a matter "discover[ed]" by a comparison of values. See Orléan, *supra* note 2, at 46.

39 I have elaborated the stakeholder theory at length elsewhere; it captures the "constitutional" aspect of money as an important dimension of governance. See Desan, *supra* note 36, at 45–50; C. Desan, 'Decoding the Design of Money', *Eur. Fin. Rev*, 10 February 2015, www.europeanfinancialreview.com/decoding-the-design-of-money/.

There are similar and contrasting models of credit-based money. See, e.g., F. Grubb, 'Chronic Specie Scarcity and Efficient Barter: The Problem of Maintaining an Outside Money Supply in British Colonial America', NBER Working Paper No. w18099 (posted 19 May 2012, last revised 16 Jun 2022); C.W. Calomiris, 'Institutional Failure, Monetary Scarcity, and the Depreciation of the Continental', (1988) 48 *J. Econ. Hist.* 47; B.D. Smith, 'American Colonial Monetary Regimes: The Failure of the Quantity Theory and Some Evidence of an Alternate View', (1985) 18 *Canadian J. Econ.* 531; L.R. Wray, 'Alternative Approaches to Money', (2010) 11 *Theoretical Inquiries L.* 29.

explains how a unit – written in the term of one contribution – comes to entail value in a reliable way: the group has, collectively, a reference point for value – the recurring contributions made to it and anticipated in the future.[40]

A second step explains how money moves from an accounting device to a medium. That transition, routinely assumed by economists, actually draws on the issuing authority's decision to accept a public credit unit back from anyone's hand, not only the individual initially paid. The accommodation greatly increases money's capacity: it now serves not only public uses (mobilizing contributions through spending in IOUs) but private ones as well (exchange between individuals). In fact, individuals regularly want more money than the government puts into circulation for its own use. Communities routinely find ways to expand the credit money made by the public to service trade between individuals – thus the commercial bank money of the modern world.[41]

Once communities have constructed a comparative unit that has relevance for participants, they will use it in exchange. Sharing an entity that entails value has novel importance in a community populated by people who, previously, had incommensurable needs and resources. In fact, the new money is uniquely appealing because people can use it to trade for objects they need or want.[42]

That trading activity is *contiguous* with the character of the money used: participants have credit money, issued by governments and amplified by commercial banks. We must look to the nature of credit money – including the way it is introduced into a community of users – in order to understand the practice of exchange and the values that result.

Understanding money as a public credit indicates that money enters circulation selectively. That phenomenon appears constitutive to the rationale and process of money creation. If so, the medium, with all its capacity for generating growth and widespread benefits, also carries an inherent non-neutrality: the condition of allocative bias. The circumstances of making money not only produce an instrument with unparalleled relevance as a comparative unit, but they also inject it unevenly into circulation. That condition will affect the way the market prices value in that money.

To analyze the phenomenon, we need to consider the reasons that a government or a bank creates a unit of credit. Recall that, under our public credit theory, a stakeholder would invent money by issuing credit, written in the term of anticipated revenue, when it needed to draft contributions to the group in advance of the time they were due. That innovation allows a stakeholder to hire certain people and acquire specific goods. Wartime is the paradigmatic

40 For details, including the discounts that individuals may demand for advancing their labor and the premium that money carries as a transferable token, see Desan, *supra* note 39, at 45–50, 70–107.

41 See note 37 and accompanying text.

42 Credit can be figured in the unit as well. It will have to be settled in money, and therefore remains tied to the issue and existence of the unit. N.J. Mayhew, 'Population, Money Supply, and the Velocity of Circulation in England, 1300–1700', (1995) 48 *Econ. Hist. Rev.* 238, at 253–4.

example; not coincidentally, it is also a period when governments often create or redesign their moneys.[43] A government spends on the industries and people that it needs for its defense. It then taxes back as it did originally, matching its selective dispensation of resources by taking in obligations owed more broadly. (In effect, the government is paying for the contributions it took in advance by sticking to the system that gives its IOUs value.)

The strategy of issuing credit against future revenue is aimed, at bottom, at creating the capacity to spend specifically. If the government could obtain the flexibility it wanted by spending evenly (that is, hiring evenly) across the population, it could simply increase the routine contributions that everyone owes the group. In fact, pre-monetary governments and groups may frequently do or have done that – but those events would not be the instances in which they innovated money. There would be no reason to give out credit tokens to mark the advance of a contribution to the group; the whole population has given resources and each person is in the same boat relative to others. By contrast, money as a credit represents a claim by an individual *relative to* the contributions due the community from her peers. Money, by definition, represents compensation to an individual for a disparate (advance) contribution.

That character indicates that the way money enters circulation influences production, distribution, and prices. Public spending for goods and services effectively allocates to certain hands a transactional medium that offers unique benefits – cash services – to individuals. We might imagine a government paying, consistently over time, those people with the skills and strength to be soldiers. That subset of society now holds an asset that others want; they will compete to supply the soldiers' needs in particular, driving down prices for the goods that soldiers prefer. Those needing money will not make the same efforts to satisfy others, even if those people have significant amounts of wealth in other forms. Those forms do not carry the cash-quality that attaches to the credit medium. These dynamics will affect production and output in complex ways. They might increase the supply of goods demanded by the money monopolists at the expense of other goods, for example, or incentivize sellers to differentiate between segments of the market, lowering prices for the monopolists buying in bulk. In any case, the differential access to liquidity inherent in the way credit money enters circulation would affect relative prices and production in the market.

Demand for the government's money would also affect the willingness of people to sign up as soldiers or give other goods in advance. In negotiating for labor, a government might have to discount its medium, accepting less labor for full exoneration in the future or, conversely when demand for money by individuals is high, receiving a full contribution in advance. When people sell

43 Examples include early Anglo-Saxon innovation, the Bank of England, the assignats created during the French Revolution, and the Federal Reserve insofar as its mission, defined in 1913, was redefined by World War I a few years later.

their services to the government for lower prices, those selling to the money monopolists would assumedly need to lower their prices a corresponding amount. But in that case as well, the prices that those without much money face for goods would remain relatively higher.

The more consistently a government spends to one group, our soldiers for example, the more privileged that group is compared to others in society. Those others could of course adjust their skills and compete for the state's business. But that change would be particularly difficult, given that *they lack money* to facilitate their retraining and relocating – transaction costs are built into the situation, as those conceptualizing the pre-monetary world as barter would agree. The fact that private demand for money modifies the structure of production suggests again that the way money enters circulation shapes economic exchange.

In short, as the actor creating the money stock, the government is a *sui generis* party. Its approach to spending its money into circulation matters greatly. In modern polities like the United States, the government is the single largest actor in the economy – an economy written in its public credit medium, the dollar. Today, the federal government's spending comprises 21 percent of GDP.[44] Even aside from the way its balance of priorities affects health, education, welfare, infrastructure, and defense on their own terms, its allocation of money privileges certain beneficiaries with the allocation of a resource singular for its liquidity. That is the resource they will use to bid for goods and services in the market. The government's authorship irrevocably affects, then, the relative values made in the unit it produces.

But the allocative bias inherent in the character of money is more penetrating yet. The government destroys money as well as creating it. Like all credit, money has value until its moment of retirement. In the simple example here, where money holds value against an anticipated tax or public payment, that event cancels a unit of the medium.[45] That corollary to spending reminds us that a government's tax system becomes part of the allocative drama.

Imagine that a community, like the one we assumed at the outset, levied on all its members (that is, they all shared an obligation to contribute regularly to support it). Imagine also that the society converts to primarily using money. In other words, instead of taking in-kind contributions from people,

44 The White House, *Budget for a Better America* (2019), www.whitehouse.gov/wp-content/uploads/2019/03/budget-fy2020.pdf (hereinafter Budget). The US government spends about 20 percent of its budget on the military. K. Amadeo, 'US Military Budgets, Its Components, Challenges, and Growth', *The Balance*, updated 24 February 2022, www.thebalance.com/u-s-military-budget-components-challenges-growth-3306320 (identifying expected military spending at $989 billion relative to $4.746 trillion in projected total federal spending). It spends another 60 percent on entitlements. K. Amadeo, 'U.S. Federal Budget Breakdown', *The Balance*, updated 18 February 2022, www.thebalance.com/u-s-federal-budget-breakdown-3305789.

45 The American colonies ran economies based on classic tax anticipation currencies. See, e.g., Calomiris, *supra* note 39.

the government generally spends to specific parties, and then takes taxes from the broader population in money. In the United States today, federal taxation matches spending in magnitude, if not precise quantity.[46] In that case, money is no longer an optional resource for people, one that they want for reasons of their own exchange. Rather, individuals need the monetary resource to pay their public dues. Their need for money as a mode of payment means that they must deal with those who have that resource. They are tied into an economy in which people are differentiated by their access to money and the bargaining power it represents.

The modern architecture of money creation adds another twist to the drama. Most modern governments do not create money by spending it directly into circulation.[47] Governments today tax in already-existing money (money created in an earlier round of government action) and spend those funds. They also borrow previously issued money now in private hands. By contrast, governments *increase the money supply* – or create new money – when their central banks purchase public debt, the very debt that governments issue when they borrow. Central banks purchase that public debt (or other qualified assets) by issuing credit – new public credit money or fiat money – for it. In the modern world, then, money creation is conducted through a circuitous route, one mediated by central banks and public debt (and other assets).[48]

The circuitous route taken in the modern world also matters. Politically, the system came about by happenstance, improvisation, and some shrewd calculation: the strategy created an alliance between government and investors. The design offered an asset to those with money to lend the government; as an investment, a government bond was relatively safe, especially as governments learned to monetize those bonds when they needed to. At the same time, the design offered governments good lenders and political allies. Relatedly, the arrangement established a device that reinforced the government's commitment to tax in a disciplined way; there was now a group of creditors with a particular interest in that practice. No doubt the design also increased the credibility of the government by yoking investors into a set of supporting obligations, originally including the responsibility of redeeming their own notes in coin.[49]

46 Federal taxation is about 16.5 percent relative to GDP; government debt makes up the difference between federal spending and taxing. K. Amadeo, 'U.S. Federal Government Tax Revenue', *The Balance*, 21 January 2020, www.thebalance.com/current-u-s-federal-government-tax-revenue-3305762.

47 They always retain the ability to do so, however, and regularly recur to it. Civil War greenbacks, Treasury notes, early American paper money are moneys made by that method.

48 See M. Ricks, 'Money as Infrastructure', (2018) 3 *Colum. Bus. L. Rev.* 758, at 772–87 (detailing modern monetary policy in the US); C. Desan, "Money's Design Elements: Debt, Liquidity, and the Pledge of Value from Medieval Coin to Modern 'Repo', (2022) 38 *Banking and Fin. L. Rev.* 331, 334–335, 347–350.

49 Initially, national banks were privately owned. A group of investors agreed to lend to a government, taking its national debt and issuing their private promises-to-pay. The government then spent and

But independent from (or implicit in) those important innovations is that the modern architecture channels money creation through finance – the central bank's purchase of either public debt or other qualified investment assets. The system, by its very design, sorts members of the public who hold enough money to invest in financial instruments from those who do not. A flow of funds to the former is built into the way modern governments add to the money supply. Today, the government's debt channels an amount equivalent to 10 percent of GDP to investors.[50] The construction is a striking aspect, arguably definitional, of modern capitalism.[51]

The conclusion that money enters circulation selectively holds when we add commercial banks to the analysis. As we saw, those commercial entities hold a significant monopoly in the contemporary system as agents of money creation.[52] Banks claim that role according to a particular theory: they are supposed to be experts in allocating credit. Commercial lenders are entrepreneurs out to make a profit from lending money. Motivated by their own interest in getting repaid by borrowers, they use local knowledge and experience to find those people and projects most likely to generate a material return in the length of the loan period. They make loans only to those prospects.[53]

The banks' strategy maximizes the chance that the credit they extend will be returned to them with interest. By the same token, the strategy virtually advertises that banks will selectively dispense access to money, as represented by their extension of private credit. Projects that promise a profit to bankers become, literally, the occasion for money creation through the issue of deposits. By contrast, projects that cannot promise a profit will not be similarly blessed – even if they contribute to the social good in non-material ways, are productive in nonmonetary ways, are simply slow to mature in terms of monetary profit or fail to motivate bankers to lend for an arbitrary reason. In other words, commercial banks create money in accord with their priorities; their distributive rationale affects the way private credit money issues and to whom. In consequence, they also affect the way prices are set.[54]

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taxed in those promises, assimilating them to its own money. The dollar is, thus, a "Federal Reserve Note". See, generally, Desan, *supra* note 36, at 295–329.

50 Budget, *supra* note 45, at 109; see also Amadeo, *supra* note 45, (identifying expected federal debt at $479 billion relative to projected 2020 budget of $4.746 trillion).

51 For the impact on wealth and its distribution, see, for example, S.B. Hager, *Public Debt, Inequality and Power: The Making of a Modern Debt State* (2016). For a definition of capitalism based on this and related changes in money's design, see Desan, *supra* note 36, at 5–6.

52 See notes 36 to 37 and accompanying text.

53 See, e.g., A. Hamilton, *First Report on the Public Credit* (1790), https://founders.archives.gov/documents/Hamilton/01-06-02-0076-0002-0001; A. Bhidé, 'Why We Need Traditional Banking', Nat'l Aff., Winter 2018, at 78.

54 Large financial entities operating in the capital markets also expand liquidity in ways arguably analogous to depository banks. Their activity involves allocative bias like that created by traditional banks. See generally M. Ricks, *The Money Problem* (2016).

There are, in other words, no "helicopter drops" of money as in the textbook hypotheticals. Rather, the rationale for creating a monetary unit, whether the money was made by a sovereign government or the deposit issued by a bank, is to spend it selectively. The patterns by which money enters circulation bless people differentially with access to the resource of liquidity. Exchange takes place in those circumstances.

In short, recognizing why societies make money and how they do it recasts the way we approach the market and the values we observe there. First, societies create a unit of account because their members (including public officials) need a way to compare values that are otherwise not commensurable. Making money out of credit works to that end: it produces a unit of substantive value that is relevant to all or most individuals because each person can use it to satisfy their political dues or, in the case of bank money, to repay their loans. That innovation allows exchange to take place: using the unit, people will make deals for money. That process generates prices.

In that process, the character of money as credit matters: by its very structure, money only enters circulation as it is allocated by governments and banks to particular parties. That selectivity affects the exchange that follows. It means that, according to the way money is created – definitionally we might say – individuals will not be equally situated in the process that generates prices. Decisions about value are made in the wake of that fact.

D. Conclusion: Incommensurable Approaches

Considering money as a public credit generates a profoundly different approach to value than that in neoclassical formulations. For many in the latter tradition, the market is conceptualized as a forum or process in which individuals express pre-existing preferences according to a self-evident measure. By contrast, the public credit approach suggests that groups build a touchstone for value by configuring their relations – thus the credit unit they create out of political obligation. That unit allows comparison and exchange, activities that produce the market and the prices observed there.

Just as neoclassical formulations have normative implications, so also does the credit approach. Most conspicuously, the credit approach recasts the image of democracy and its possibility. Recall that the neoclassical tradition offers a vision of democracy that turns fundamentally around maximizing choice, the freedom to name value and claim it. Agents bid independently, insulated from undue influence, ideally in an auction setting. In that vision, public activity is a neutral coordinating device – the auctioneer and its abstract numeraire.

By contrast, understanding money as a public credit medium locates collective action as foundational to market regimes. Governance is catalytic in creating commensurable value for a particular community. That governance is a relational matter – it recognizes groups as composed of contributing members. Moreover, it creates its touchstone for value, the unit of account, by

reorganizing their relations when it accepts resources early from some and advances them credit relative to others. Democracy becomes a matter that starts with mutual contribution but requires much more. It entails a complex system in which a group sustains itself by structuring its growth and character through a process of soliciting and managing resources, distributing benefits, and spreading costs – all difficult matters that require discussion and deliberation.

That project is expansive. It includes making public credit – money – for public needs and goals, as well as private exchange. On the first, we can understand the tight fit between modernization and money, between political capacity and robust fiscal states, and between monetary innovation and mobilization for war, welfare, economic development, and other reasons.[55] The connection between money and society suggests that money is an infrastructural resource and collective good.[56] Recognizing money as a public credit medium thus frames political activity as a significant component of money's genealogy and purpose.

As for private exchange, we should understand the way modern communities structure credit and its allocation as elemental decisions about the market society they are creating. The determination to identify commercial banks as the conduit for money creation shapes what kind of projects and industries find funds and prosper. More generally, the financial system as a whole is an elaborately engineered dimension of governance in modern polities. Its dynamics, an operation carried out in official units of account and structured by permissions and defaults of public authority, determines the flow of material wealth, privilege, and voice.

At an elemental level, recognizing money as public credit installs a particular challenge at the heart of democratic governance in a monetary world. Rather than suggesting the priority of protecting individual autonomy, it poses as fundamental the difficulty of ensuring equality. Making money is an emancipatory innovation for communities because it allows them to create commensurability in value. But that project, by its very unfolding, orders people in disparate ways and begets differential access to money itself. Far from assuming that markets operate equally, the challenge is to make markets that engender equality.

55 See, e.g., J. Brewer, *The Sinews of Power: War, Money and the English State, 1688–1783* (1988); I.W. Martin, et al., 'The Thunder of History: The Origins and Development of the New Fiscal Sociology', in I.W. Martin et al. (eds.), *The New Fiscal Sociology: Taxation in Comparative and Historical Dimension* (2009), 1; M. Weber, 'Bureaucracy', in H.H. Gerth and C.W. Mills (eds.), *From Max Weber: Essays in Sociology* (1958).

56 See, e.g., M. Baradaran, *How the Other Half Banks: Exclusion, Exploitation, and the Threat to Democracy* (2015); Ricks, *supra* note 48.

Chapter 8

States, Markets, and Transnational Law

A Re-evaluation of the Legal "Constitution" of Money

Anna Chadwick

In recent years, a group of legal scholars has mounted a fresh challenge to the theory of value in neoclassical economics by problematising its under-theorisation of money. On the neoclassical account, money is a neutral medium of exchange through which individuals register their subjective value preferences in the price mechanism, and the prices that attach to goods and services as a result are the socially agreed measure of their economic worth – price is the measure of value. Legal theories of money explain what the neoclassical account leaves out of this equation, which is why a particular commodity comes to function as the "universal equivalent" at a given point in time, and how paper notes can possess an economic value in which the prices of other goods are measured. In common with earlier Chartalist theories of money, recent legal writing on money stresses that the value of money is not intrinsic, but is instead a function of how a community creates credit and regulates its chosen medium of exchange. However, legal approaches also advance beyond Chartalism in a number of important respects. One notable innovation is the recasting of money as a "governance project" – a dynamic process in which both public and private actors play important roles.[1] Legal scholars underline that money is not a privately developed solution to the inefficiencies of barter; rather, money is designed, generated, and regulated by coalitions of public and private actors on the basis of pre-existing political – and contestable – value judgements. The common representation of money as "neutral", and the legal mandates of particular institutions, such as central banks, to protect the economic value of money over time by preventing inflation, for example, are recast as political choices realised in particular legal and institutional designs.

Legal theorists of money underline the profound impact that monetary design has in the political economy. In a book that has inspired a renaissance in legal writing on this topic in recent years, Christine Desan demonstrates how the particular legal configurations of money in distinct historical periods changed how English society operated, and helped to install capitalism as the

1 C. Desan, *Making Money: Coin, Currency, and the Coming of Capitalism* (2015), 13.

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new political, economic and social order.[2] The corollary of the emphasis placed on the generative powers of monetary design is the implication that changing how money is conceptualised and, therefore, governed could impact on wider processes of value production. If it is the public – be it a state, or a community – that creates money, perhaps that public can work against the mechanistic "rule of value" and relentless push for profit that conditions social reality under capitalism in Marxist analysis?[3] Once the myth of money's neutrality is effectively countered through analysis of its legal nature, for example, credit could be directed to marginalised constituencies and alleviate the hyper-exploitation of labour through a universal basic income.[4] Likewise, dislodging the false notion of money as a scarce resource could upset the theoretical grounding upon which austerity measures are rationalised and imposed. The first step, Desan suggests, is to understand the legal architecture of money: "[O]nly by recapturing money's legal architecture can we understand how it operates to transfer goods, effectuate a deal, or generate stable exchange".[5]

In this chapter, I do not seek to answer the question as to whether it is possible to shift dynamics in capitalist political economy through alternative monetary design. Instead, I advance two inter-related arguments that may inform this debate going forward. The first is to argue that the legal "constitution" of money is not only domestic, but that it is transnational, and includes not only the structures of the political economy through which credit is created, but also the governance structures that determine the relative values of the different moneys in which credit is denominated.[6] Changes in the laws through which currencies are administered since the collapse of the Bretton Woods system of fixed exchange rates have produced a "dramatically new structure of monetary power and governance".[7] Sovereign fiat monies, and assets denominated in them, are now routinely issued by banks domiciled in other jurisdictions. Furthermore, sovereign monies are also traded as commodities in the enormous global forex market. When the transnational legal architecture of money is "recaptured", and when the ways in which laws shape not only credit but also the relative values of different sovereign monies are appreciated, it becomes clear that many of the legal and regulatory structures that govern money in the

2 Ibid.

3 See Quentin and Kempter in this volume for analysis of Marxian value theory.

4 Thanks to Isabel Feichtner for this important reflection.

5 C. Desan, 'Money as a Legal Institution', in D. Fox and W. Ernst, *Money in the Western Legal Tradition* (2014), 21.

6 Here I take up a line of research identified by the renowned international political economist, Susan Strange. As she writes, "The financial structure really has two inseparable aspects. It comprises not just the structures of the political economy through which credit is created but also the monetary system or systems which determine the relative values of the different moneys in which credit is denominated". S. Strange, *States and Markets* (2016), 98.

7 B. Cohen, *The Geography of Money* (1998), 7.

global economy lie without the control of any single government. The second argument is that in order to make money follow the command of a new politics – and one that follows a different scheme of value than that inhering under capitalist economic relations – projects of monetary redesign must attend more closely to the legal frameworks through which private actors can influence the value of money. The system that I describe below can be likened to an inverted panopticon: the eyes of a multitude of private actors who have been endowed by states with the capacity to discipline governments' economic and monetary policies with the threat of relocating their funds to other jurisdictions are fixed on the manoeuvres of central banks, and the doors are open. As Beggs and Cohen both suggest, it is not always clear *who* is governing money in this complex legal milieu, governments, or private actors.[8]

A. Money and Value: Legal Analysis of an Economic Norm

Neoclassical economists writing in the late 19th century helped to popularise a still prevalent view that money was developed by private actors as a solution to the inefficiencies of barter. Exemplifying this tradition, Jevons explained how the circulation of a "chosen commodity" that serves as "a common denominator or common measure of value" allowed for an easy comparison of the values of all other goods, and thereby overcame the problem of the "double coincidence" of wants.[9] Neoclassical theory *assumes* that money plays a range of functions in a market economy, including those of a medium of exchange, unit of account, and means of deferred payment – how else could transactions be effectuated? – and its theories imply the existence of credit and financial systems. However, the diverse functions of money are not taken into account in neoclassical models of how the economy works. The under-theorisation of money in neoclassical economics contrasts with the work of other economists and sociologists who have devoted considerable energies to trying to relate the tensions between the different functions that money needs to play in capitalism. For example, Keynes and Weber both developed theories based on typologies of different types of money – "commodity money", "fiat/limited money" and "administered/managed money" – that acknowledge the complexity of money in modern economic systems.[10]

Chartalist and legal theories flip the common narrative of neoclassical economists underlining that money cannot perform many of the functions in the "private" arena that economists would expect it to perform without

8 M. Beggs, 'The State as a Creature of Money', (2017) 22 *NPE* 5; Cohen, ibid, at 146.

9 W. Jevons, *Money and the Mechanism of Exchange* (1898), 17.

10 J. Keynes, *A Treatise on Money* (1930), 7–9; M. Weber, *Economy and Society: An Outline of Interpretive Sociology* (1978), 166–78.

the active, and importantly, *prior*, interventions of the state, its legal infrastructure, and its monetary and fiscal policies. Chartalism, however, has some well-acknowledged limitations. Beggs underlines that while states are clearly involved in the reproduction of money, the sense in which money is a "creature of the state" is limited.[11] The role of the state in establishing and maintaining the unit of account, and in designating some forms of money as representing the unit of account "are only a part of the relations through which money is reproduced".[12] By explicating constraints on states that are endemic within capitalist political economy, Beggs reaches an important conclusion: "To the extent that authorities are not indifferent to the results of markets' disposal, managing money requires that they orient their rules and actions strategically within that context. In this sense, money makes the state even as the state makes money".[13]

Legal scholars do not describe money as only a creature of the state but as "a governance project, one of the most penetrating that societies undertake".[14] Making money is a project of political, economic, legal, and social engineering – one that is grounded in "political determinations to represent value in a particular way".[15] Importantly, Desan's "constitutional" approach is attentive to the intersecting interests of governments and capital, as well as to the mutually reinforcing roles of public and private law in enabling money to circulate and to facilitate market exchange. As she writes, "[m]oney is neither public nor private in a categorical sense; it gains effect through the action of each on the other".[16] A growing body of legal research is demystifying the apparently private character of money by drawing attention to how the activities of commercial banks and financial institutions are impossible without the supporting infrastructure of central banks, and how processes of "private" credit generation are reliant on the willingness of the sovereign to backstop its unit of account. "[A]ccess to the flow of the ultimate financial resource, the full faith and credit of the sovereign", Hockett and Omarova underline, "remains the key driver of finance even in its 21st-century form".[17] Legal writing on money stresses that current monetary designs are not the necessary correlatives of a trans-historical universal category, but are, in many cases, institutionalised responses to erroneous understandings of money as a neutral medium of exchange. Feichtner's work on the Euro provides a thorough illustration of

11 Beggs, *supra* note 8.
12 Ibid., 464.
13 Ibid., 470.
14 Desan, *supra* note 1, at 1.
15 Ibid., 11.
16 Ibid., 8.
17 R. Hockett and S. Omarova, 'The Finance Franchise', (2017) 102 *CLR* 1143, at 1210; See also D. Gabor and J. Vestergaard, 'Towards a Theory of Shadow Money', 2016 (April) *INET Working Paper*, www.ineteconomics.org/research/research-papers/towards-a-theory-of-shadow-money.

how the narrow, neoclassical economic perspective on the nature of money has been fused with constitutional thinking on the appropriate functions of government to elevate monetary stability to the level of constitutional principle within the EU.[18]

Legal scholars convincingly demonstrate that the neoclassical treatment of money belies its actual legal nature as a public credit medium that is created and governed by a coalition of state and private actors. In doing so, they destabilise the foundations of the neoclassical theory of value, which understands value as the "hidden property" that precedes commercial exchange and is "logically prior to such transactions and that gives them form".[19] The character of money as credit matters, Desan underlines, because "credit money enters circulation selectively"; "it is an advance (a credit) made to some people relative to others. Thus money, inherent to the way it is constructed as credit, comes into use as a resource that some participants acquire first"[20] – "it is spent or loaned to certain hands".[21] The fact that central banks don't just modulate the money supply but are, on the legal account, allocating a public resource – government-backed credit – has been rendered visible in the context of both the global financial crisis and the coronavirus pandemic. Governments have utilised monetary financing to distribute funds to banks, to purchase "toxic" assets to stabilise the financial system, and to finance public spending without raising taxes. In the US, proposals have been advanced that ordinary people should also be allowed to open deposit accounts directly at the central bank, the Federal Reserve (Fed), and that the Fed should take steps to tackle climate change.[22] As central banks are already engaging in monetary financing and are funneling credit to particular constituencies, it is reasoned, a debate needs to be had about which constituencies should benefit from this process, and on what basis. As Omarova underlines, however, many of the current proposals for democratising finance elide the "potentially game-changing implications" of such a shift for the wider financial system and the allocation of money and credit.[23] In response, she has developed a proposal to overhaul the Fed's entire balance sheet so that it can operate as "the People's Ledger" – a public platform for modulating the flow of sovereign credit in order to address structural challenges in the economy.[24]

18 I. Feichtner, 'Public Law's Rationalization of the Legal Architecture of Money: What Might Legal Analysis of Money Become?', 17 *GLJ* 5.

19 C. Desan, 'The Key to Value: The Debate Over Commensurability in Neoclassical and Credit Approaches to Money', (2020) 83 *Law and Contemporary Problems* 8, at 6.

20 Ibid., 15.

21 Ibid., 5.

22 B. Eichengreen, 'Central Banks Aren't What They Used to Be – And the Better for it', *The Guardian*, 10 February 2021, www.theguardian.com/business/2021/feb/10/central-banks-arent-what-they-used-to-be-and-the-better-for-it.

23 S. Omarova, 'The People's Ledger: How to Democratize Money and Finance the Economy', (2021) 74 *Vanderbilt Law Review* 1231.

24 Ibid.

Legal theorists challenge the foundational idea that it is private actors who "make money" and create value. They have not yet developed an alternative theory of value to the neoclassical theory that they critique; nor do most of them expressly commit to the labour theory of value put forward in marxist scholarship. Nevertheless, by underscoring how the capacities of financial institutions in the economy to issue credit and administer money are furnished by the state, legal approaches suggest that governments can choose to manage money differently, and that, in doing so, they may be able to change the relationship between money and value production. Legal theorists are engaged in a diverse range of projects that seek to revise and contest current monetary designs in order to address inequalities.[25] There is a productive – though not straightforward – dialogue with Modern Monetary Theory (MMT), which maintains that the state does not have to tax (first) in order to create money to finance spending that will create jobs and promote growth.[26] Other projects are exploring the potential of complementary currencies as a means to foster more sustainable ways of producing goods and services. Considerable emphasis is placed on changing the basis upon which people and their contributions to society are valued through a conscious shift in how credit is allocated. Yet there are important limits to the capacity of the state to alter the world of money prices that regulate the lives of human beings under capitalism by redesigning money at its origin – as public credit administered by the state's legal order. As early critics of Chartalism, including Weber, Schumpter, and Keynes argued, and as contemporary critics reinforce, the state can insure the formal validity of a type of money through legislation, but "this formal power implies nothing as to the substantive validity of money; that is, the rate at which it will be accepted in exchange for commodities".[27] As Beggs underlines, "The mint prints the bills, but not the price lists".[28] States can use monetary policy, notably interest rates, to adjust the amount of money in circulation, as well as to try to influence the price level (the relative value of money to goods in the economy), however, the substantive value of money – its purchasing power in relation to a broader universe of commodities – is argued by neoclassical economists and marxist economists alike to be shaped by broader processes of commodity production and exchange.[29] Investing value in the sovereign's unit of account and the production of money prices are processes that do not depend only, or even primarily, on actions by governments, but on how those actions are interpreted and acted upon by users of money and, most significantly, by holders of private wealth. As Desan has discussed, in the 13th

25 justmoney.org/category/policy-spotlights/.

26 L. Randall-Wray, *Understanding Modern Money: The Key to Full Employment and Price Stability* (1998).

27 Beggs, *supra* note 8, at 470.

28 Ibid.

29 D. Harvey, *The Limits to Capital* (1982), 251.

century, sovereigns "competed for bullion supplies by raising the prices they offered at their mints".[30] If the price that the Royal mint offered to turn bullion into coin was not acceptable to private holders of wealth, they did not mint it, thereby depriving the state of liquidity.[31] The ability of states to operationalise a new, more egalitarian monetary design also depends, then, on the arbitrage opportunities that exist for private actors who can choose to hoard money, or to lower wages, or to raise the prices of goods.

The power that both chartalist and legal theories of money tend to present as vested in the state, which is consistently stressed as being at the apex of national monetary orders, contrasts starkly with prevalent descriptions of power in the global economy. As Rachel Harvey underlines, early analyses of globalisation "argued that massive capital flows, instantaneous financial transactions, and footloose transnational corporations engaging in regulatory arbitrage, resulted in the severe curtailment, if not death, of state authority and policy autonomy".[32] Harvey's own analysis of the global forex market demonstrates that even this ostensibly most "deregulated" and "globalized of markets" was actively constructed by states through legal design: carve-outs to existing regulations were created, and new types of standard form contract elaborated by private actors were sanctioned by national courts. Nevertheless, following the invitation of legal scholars to consider money as a governance project involving public and private legal structures in the international context suggests that a distinction needs to be drawn between the role of the state's legal order in creating and regulating money, and the attribution of power to governments to govern money differently at a particular historical juncture. In response to earlier (failed) attempts at managing money in an inter-connected global economy, in the post-Bretton Woods (BW) monetary system, governments have extended licences to private actors to further share in what are often cast as their exclusive "sovereign" privileges: financial institutions domiciled in one jurisdiction are now able to issue liabilities in the unit of another sovereign state, and different sovereign monies are now assigned a value relative to others by forex transactions and by financial flows that significantly impact on how that economy transacts with the rest of the world. As Mehrling has shown, it is still the case that one state, namely, the US, is backstopping this system.[33] Nevertheless, there are a number of significant constraints on the ability of governments to resist the rule of finance in this international, and increasingly *transnational* system.

30 Desan, *supra* note 1, at 9.

31 Ibid.

32 R. Harvey, 'The Legal Construction of the Global Foreign Exchange Market', (2013) 41 *JOCE* 2, at 343.

33 P. Mehrling, *The New Lombard Street: How the Fed Became the Dealer of Last Resort* (2010).

B. Exploring the Transnational Legal "Constitution" of Money

In the following discussion, I first offer a brief overview of some of the key features of the contemporary international monetary system, and I then move to explore developments in the "transnationalisation" of the legal architecture through which sovereign currencies are issued, valued, and regulated.

B.1 Post-Bretton Woods International Monetary "System"

The international monetary system emerged out of the breakdown of an earlier political settlement to manage money in such a way as to promote international trade while avoiding the "tyrannies" of the Gold Standard: the BW System of fixed but flexible exchange rates. In very broad terms, both of these earlier systems were characterised by an attempt to fix, or to manage, the external value of each nation's currency in order to promote international trade, and both systems collapsed due to the apparent failure of these international governance projects to balance between the competing demands of the international policy "trilemma": achieving currency stability, capital mobility, and national policy autonomy.[34] (NB: Others argue that this "failure" was triggered by the prior development of contractual mechanisms that privatised the risks associated with liberalisation.[35]) Under the post-BW monetary system, states broke with the prior convention that the external value of the currency should be fixed at determined levels and backed by an underlying commodity (gold, or the US dollar and its backing in gold), and shifted towards a system of capital mobility and "floating" exchange rates. Ostensibly, the new system involved the transition to a fully fiat monetary system. Eichengreen and Sussman argue that "The collapse of Bretton Woods loosened the exchange rate constraint and cut the last remaining link to commodity money. It removed the traditional anchor for monetary and fiscal policies".[36] In theory, this development should have empowered states to administer their fiat currencies in accordance with domestic political and social goals. In practice, however, a range of factors inhibit most, if not all, governments in this exercise.

First, the shift to "managed floating" does not accurately describe the majority of exchange rate regimes in operation today. Whereas advanced economies are able to borrow from international capital markets in their own currencies, emerging economies with weaker and more volatile currencies are unable to

34 Cohen, *supra* note 7, at 56.

35 A. Chadwick, *Law and the Political Economy of Hunger* (2019), 146–7.

36 B. Eichengreen and N. Sussman, 'The International Monetary System in the (Very) Long Run', (2000) 43 *IMF Working Paper*, at 36.

do so, meaning that their debts are denominated in advanced country currencies.[37] For a country in this position, allowing its currency to float leaves it vulnerable to financial crises and debt default; thus, in order to maintain access to foreign capital, most emerging economies sacrifice monetary policy independence in favour of a "hard peg" to one of the core-country currencies, or the use of a currency board. Relatedly, many countries cannot pursue domestic policy objectives through monetary policy as maintaining their exchange rates, purchasing imports, and servicing debt requires them to accumulate large reserves of foreign currencies.[38] Critical development economists stress that the capacity of states to govern money depends on broader structural constraints inhering in the historically conditioned relations of production and exchange in the global economy.[39] Countries dependent on foreign currency for external trade "are operating on something akin to a gold standard internationally, even if their own fiat currency is floating".[40]

Second, nor are more powerful economies that have the sufficient "financial depth" to manage the exchange rate instability that is now "an accepted part of global finance"[41] able to embrace the full potential of their fully fiat currencies. Economists who supported the transition to floating exchange rates argued that the values of national currencies would be determined "in the same way as any financial asset prices", through the informational efficiency of financial markets, that will ensure that currency prices, over the long run, reflect "fundamental values".[42] There are different theories concerning the nature of the "fundamental value" that currency prices are supposed to reflect. In the particular arena of foreign exchange, the debate centres around "purchasing power parity", a theory that holds that the monetary value of a good in one country when converted into the currency of another should be equal, meaning that persisting differences in nominal exchange rates reflect relative national costs of production.[43] More broadly, theories of fundamental value in financial markets are an extension of neoclassical value theory, which holds that financial assets will be valued according to inter-subjective valuations of their "utility", which, when one considers the function or usefulness of a financial asset, corresponds

37 M. Bordo and M. Flandreau, 'Core, Periphery, Exchange Rate Regimes, and Globalization', in M. Bordo et al. (eds.), *Globalization in Historical Perspective* (2003), 462.

38 D. Rodrik, 'The Social Cost of Foreign Exchange Reserves', (2006) 20 *International Economic Journal* 253.

39 B. Bonizzi et al., 'Monetary Sovereignty is a Spectrum: MMT and Developing Countries', (2019) 89 *Real-World Economics Review* 46.

40 F. Coppola, 'Understanding Balance of Payments Crises in a Fiat Currency System', 2016 (March) *Coppola Comment*, www.coppolacomment.com/2016/03/understanding-balance-of-payments-crises.html.

41 D. Bryan and M. Rafferty, 'Financial Derivatives: The New Gold?', (2006) 10 *Competition & Change* 3, at 267.

42 Ibid., 267.

43 Ibid., 270.

to its "income-generating capacity".[44] Asset prices and exchange rates do not, in fact, behave as these theories suggest they should: movements in financial markets diverge considerably from projections of what the "correct" values of assets should be.[45] However, arguments that financial markets can correctly price assets, including currencies, have underpinned the development of financial instruments that enable geographically dispersed but legally and electronically networked communities of investors to rank the performance of different economies, and to divert flows of capital in response to relevant "information", such as forecasts of economic performance and changing interest rates.

While there is no external commodity anchor to fix the value of money in the post-BW system, national currencies are supposed to be priced in conformity with their success in commodity production and exchange, or to reflect their potential to deliver yield to investors. In the current system in which the values of many currencies are significantly shaped by market forces ("managed" floating), capital account liberalisation is regarded as "signaling a country's commitment to good economic policies" as, in a country with an open capital account, "a perceived deterioration in its policy environment could be punished by domestic and foreign investors, who could suddenly take capital out of the country".[46] In broad terms, "deterioration" corresponds to going against the obligation of the state to refrain from overtly manipulating its exchange rate for competitive advantage, which is subject to surveillance by the International Monetary Fund, and act as the "neutral protector of money's value".[47] Rules preventing states from engaging in monetary financing and requiring them to preserve the value of money by inflation targeting have been operationalised through the promotion of central bank independence in many countries, and are built into the constitutional frameworks of the Euro. What is more, governments now collaborate extensively on *ex ante* monetary and economic policy objectives. Kreitner argues that four international bodies perform the work of cooperating to generate an international system in the absence of a monetary anchor of the type available under the gold standard: "the G7, the OECD, the Basel Committee on Banking Supervision, and the IMF",[48] – a system in which technocrats agree on such matters as interest rate targets and exchange rate goals and promote adoption of monetary rules that "in many ways echoed the functions of the gold standard convertibility rule" – ensuring that the value of money is stable and is not eroded by inflation, and

44 Ibid.

45 S. Claessens and M. Ayhan Kose, 'Asset Prices and Macroeconomic Outcomes', (2017) 8259 *World Bank Policy Research Working Paper*, at 12–14.

46 M. Ayhan Kose and E. Prasad, 'Capital Accounts: Liberalize or Not?', *International Monetary Fund,* www.imf.org/external/pubs/ft/fandd/basics/capital.htm.

47 Feichtner, *supra* note 18.

48 R. Kreitner, 'The Jurisprudence of Global Money', (2017) 11 *Theoretical Inquiries in Law* 177, at 196.

that currency prices reflect economic fundamentals.[49] States embedded within this wider monetary system still retain formal monetary sovereignty and could, therefore, seek to actively redesign their monetary systems to tackle inequalities. Nevertheless, as the next section will illustrate, the "private" legal forms and structures that governments have co-developed with financial institutions to administer money in this system appear to significantly constrain the capacity of any single government to contravene the scheme of valorisation imposed by mobile financial capital.

B.2 Remaking the State? Eurodollars, Forex, and Derivatives

In the post-BW system, the formal monopoly that monetary sovereigns have over the issuance and regulation of their own currencies is a myth: financial institutions can issue liabilities and create credit in the currency of a country other than the one in which they are domiciled. What Murau et al. term the "off-shore US dollar system" developed primarily through the initiative of private profit-oriented financial institutions,[50] although governments, notably G-10 central bankers, were active in trying to manage the market and encourage its growth in London[51] – a development that was a significant factor in leading to the breakdown of the BW system. Today, the so-called "Eurodollar market" is a "multi-trillion dollar behemoth"[52] in which bank deposits and a broader range of financial instruments are issued by banks domiciled in one jurisdiction in a range of different national currencies.[53] In these markets, Awrey underlines, "not only is the vast majority of credit money created by private institutions, but the core of the system is formed of credit money created *outside of any single state's 'monetary jurisdiction'*".[54] Significantly, it is the central banks of other countries that have to step in to backstop an insolvent institution in this market, as was demonstrated by the actions of the US Fed during the financial crisis in which it extended over 500 billion US dollars to foreign banks under the auspices of temporary swap lines.[55] These swap lines were subsequently made permanent for a group of 14 countries. The development was described as "a quantum leap in central bank cooperation",[56] and, on

49 Bordo and Flandreau, *supra* note 38, at 447.

50 S. Murau et al., 'The Evolution of the Offshore US-Dollar System: Past, Present and Four Possible Futures', (2020) 16 *JIE* 767.

51 B. Braun et al., 'Financial Globalization as Positive Integration: Monetary Technocrats and the Eurodollar Market in the 1970s', (2020) 28 *RIPE* 1.

52 D. Awrey, 'Brother, Can You Spare a Dollar? Designing an Effective Framework for Foreign Currency Liquidity Assistance', (2017) 3 *CBLR* 934, at 943.

53 Ibid.

54 Murau et al., *supra* note 50, at 3.

55 Awrey, *supra* note 52, at 938.

56 A. Tooze, *Crashed: How a Decade of Financial Crises Changed the World* (2018), 210–19.

the one hand, demonstrates that state money is not finite and can be created on demand. On the other hand, in order to ensure the stability of the global financial system, the Fed has had to offer unlimited access to its public resource through a process of credit issuance by institutions located in other countries that it does not control or directly regulate (international bodies take on some of this functionality). Murau suggests that this system is *de facto*, if not *de jure*, private, as public institutions only intervene when major crises set in and this inherently instable system has needed public balance sheets as the "deus ex machina" to prevent it from imploding.[57] What is more, the system reinforces the inequalities faced by countries lower down in the monetary hierarchy: some states benefit from a backstop with respect to their financial systems and others do not, and states who desperately need access to foreign currencies for other essential purposes, such as to service debt and pay for exports, must pay high premiums for the privilege that has been granted to the central banks of other countries for free (for the goal of ensuring financial stability).

In addition to credit being issued in sovereign currencies in other legal jurisdictions, in the post-BW monetary system, the sovereign currencies of many states are now priced and traded as commodities in an enormous global market: the global forex market. At $5.3 trillion USD per day in trading, the forex market is the largest in the world.[58] Trades can be executed as "spot" transactions, meaning that the currencies are bought and sold according to the current price and settled within two days, or via derivative instruments, such as forex futures, options, and swaps. *Contra* the theories used to support a transition to market-determined exchange rates, literature from the Social Studies of Finance suggests that the valuations of the collective of actors in financial markets – valuations enabled by particular trading technologies and enculturated choices for what information is relevant – do not reflect values that are out there in the economy. Financial actors produce values as prices through their interactions.[59] Many forex traders deploy technical analysis and trading technologies to forecast the future direction of exchange rates via data on past performance; others trade based on the "fundamentals" – a wide variety of variables that are taken to be indicative of the performance of the economy, including interest rate statements from central banks, commodity prices, and unemployment statistics. While some traders actively speculate on currencies, many forex transactions are designed to hedge financial portfolios and exchange rate risk for purposes connected to trade. In either case, movements in exchange rates that impact on a wide spectrum of actors within the econ-

57 Murau, *supra* note 50, at 6.

58 D. Ackerman, 'What is Forex and Is More Regulation Necessary?', (2016) 35 *Banking & Financial Services Policy Report* 11.

59 D. MacKenzie, *An Engine, Not a Camera: How Financial Models Shape Markets* (2006); K. Knorr-Cetina and A. Preda, *The Sociology of Financial Markets* (2005).

omy are influenced by the private trading motivations of a specific community of financial investors. Movements in the forex markets are typically very small in the short term, currencies move by "pips", however, data demonstrates that currency prices have become noticeably more volatile in the decades since the collapse of BW.[60] Moreover, market valuations of currencies in the forex market can be significant: Foreign Exchange (FX) markets have been significantly impacted by the COVID-19 pandemic, with Sterling falling to its lowest level against the US dollar for 30 years in March 2020.[61]

In contravention of neoclassical notions of money's neutrality, it is clear that money enters international exchange pre-loaded with relative value, underscoring that money is "not a 'veil', but exerts 'real' impacts in markets and on accumulation generally".[62] Central banks can and do intervene to counter market evaluations of their currencies. However, official interventions that are "viewed as not being in line with fundamentals, and therefore not credible", may be overwhelmed by the scale of private sector flows.[63] Investor George Soros infamously forced the Bank of England to take the pound out of the European Exchange Rate Mechanism in September 1992 by speculating against its value.[64] It is important to stress that exchange rates are not only determined by processes of valuation in forex markets; indeed, many currencies are not actively traded within the market. Exchange rates are also influenced by flows of capital that move in and out of countries and react to changes in monetary policy, as well as responding to perceptions that a currency is over- or under-valued, or it being manipulated. Global capital markets today contribute to "a distinct political economy",[65] in which attempts to institute policies that "run directly counter to market sentiment" can result in economic crises. Attempts to counter inflation and suppress dollarisation in Bolivia, Mexico and Peru in the 1980s all produced a flight of capital into bank accounts abroad that "undermined rather than reinforced" respect for government authority.[66] Equally, currency movements are only partially transmitted to domestic prices, with effects dissipating through the production chain due to a wide range of other factors including the composition of trade and the level of participation in global value chains.[67] Nevertheless, the rate at which a currency is set relative

60 M. Bleaney and M. Francisco, 'What Makes Currencies Volatile?', (2010) 21 *OER* 5, at 731.

61 'Coronavirus: Pound Plunges to its Lowest Level in Over 30 Years' BBC News.com, 18 March 2020, https://www.bbc.com/news/business-51921922.

62 Bryan and Rafferty, *supra* note 41, at 266.

63 Bleaney and Francisco, *supra* note 60, at 10.

64 A. Hayes, 'Dirty Float', *Investopedia*, updated 25 February 2021, www.investopedia.com/terms/d/dirtyfloat.asp.

65 S. Sassen, 'Embeddedness of Electronic Markets', in Knorr-Cetina and Preda, *supra* note 760, at 30.

66 Cohen, *supra* note 7, at 121.

67 J. Ha et al., 'Inflation and Exchange Rate Pass-Through', 2019 (March) 8780 *World Bank Policy Research Working Paper*, at 2.

to other currencies is a major factor in the determination of the price of key inputs and resources necessary for production and manufacture; the competitiveness of a country's exports; and the magnitude of a country's debt burden. Because currency policy "structures a country's economic relations with the rest of the world", it can be crucial in determining a country's developmental prospects.[68]

The elaboration of a range of financial products such as derivatives can further amplify the effect of transnational flows of capital. Derivatives are financial contracts that enable parties to take a position in the market for a range of underlying assets and variables and to exchange cash flows based on their performance over time. Market participants can quantify the risks associated with different forms of volatility and create contracts that turn them into tradable products through which "market participants can (for a price) buy certainty in financial values".[69] The use of derivatives to "lock in" a particular exchange or interest rate is seen to be critical to the operations of a liberalised global economy. Yet, derivatives play other significant roles in the global economy. By providing a means to compare the value of (commensurate) different sorts of financial assets in highly liquid markets, Bryan and Rafferty argue, derivatives "provide a measure of a value of capital against which all different forms of capital, including national currencies", can be benchmarked.[70] The result is that in a world without a commodity anchor, derivatives "act as a kind of anchor" for the value of currencies and other financial assets,[71] but, crucially, as an anchor in which the value of the currency reflects the interests of financial capital. State currencies are now "an asset class, each with its own risk and return profile".[72] Moreover, derivatives also fulfil specific economic functions that can influence the way that individual economic agents and financial markets respond to monetary policy. Analysts at the Bank for International Settlements have noted that by allowing market actors to "transform their financial exposures cheaply and quickly", and to "modify their sensitivity to interest and exchange rate changes", derivatives allow them to shirk the effects of monetary policy.[73] The economy as a whole cannot be sheltered from the effects of an interest or exchange rate change in the long term, but widespread use of derivatives can "affect the speed and the extent of the transmission of

68 Jeffry Frieden, 'Currency Politics in the Developing World', (2017) 38 *Harvard International Review* 33, scholar.harvard.edu/files/jfrieden/files/harvard_international_review.pdf.

69 D. Bryan, 'The Global Forex Market: An Interpretation of the Bank for International Settlements' Survey of Forex and Derivatives Market Activity', (2007) 22 *Global Society* 491, at 492.

70 Bryan and Rafferty, *supra* note 41, at 268.

71 Ibid.

72 Bryan, *supra* note 69, at 504.

73 'Macroeconomic and Monetary Policy Issues Raised by the Growth of Derivative Markets', (1994) *BIS Report* www.bis.org/publ/ecsc04.pdf.

monetary policy actions to the level of spending, and, in turn, inflation".[74] Thus, if a state wants to use interest rate or exchange rate targeting to alter the value of its unit of account – the equivalent of debasing a silver coin, for example – the use of its "authority to adjust the value of money when circumstances so require"[75] does not necessarily affect the value of money used in contracts between private parties. Private parties nominate the economic value of the sovereign's coin in their contract.

The capabilities of private actors in these markets are a consequence of licences and permissions granted by states, either explicitly or implicitly, but by states attempting to manage the fractious character of money in capitalist political economy. By removing controls on the free movement of capital, states enabled private actors to move capital off-shore and cemented the role of the forex market in carrying out currency valuations. Central bankers worked with financial institutions that were developing the Eurodollar market and permitted the activity to continue; regulatory carve-outs were created to enable the development of the over-the-counter derivatives market and to exempt the market from oversight by financial regulators. Other significant developments relate to the ubiquity of conflict-of-laws provisions in areas of law including property, contract, and corporate law that "have converged to a remarkable extent on the principle that the parties to a contract or the founding shareholders are free to choose the law by which they are governed",[76] and the creation of an international treaty through the Hague Conference on Private International Law that standardises conflict-of-law rules for financial assets.[77] Transactions require specific contracts and regulatory structures in order to operate, and, consequently, require backing of the state, "no matter how de-territorialised or digitized the transactions are".[78] However, the legal regimes that have enabled financial institutions to create financial assets denominated in other currencies have a "transnational" character: national legal frameworks, above all contract law, are a point of departure through and around which non-state actors develop practices, norms, and regulations to regulate their transactions and, cumulatively, to govern particular markets.[79] Standardised contractual documentation without which the global derivatives market could not operate has been developed by a private industry association, the International Swaps and Derivatives Association (ISDA), and is referred to as a piece of "private legislation".[80] These instruments typically include state-contingent contractual

74 Ibid.

75 Desan, *supra* note 1, at 13.

76 K. Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (2019), 135.

77 Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary.

78 Sassen, *supra* note 65, at 33.

79 P. Zumbansen, 'The Law of Society: Governance Through Contract', (2007) 14 *IJGLS* 191.

80 Pistor, *supra* note 76, at 146.

mechanisms designed to enable derivatives counterparties to "jump the queue" in bankruptcy proceedings and ensure that their legal claims will be converted into state money in the event of an insolvency.[81] Contracts in this context are used to prefigure crises, and to prioritise the interests of parties above other constituencies. As Pistor underlines, "netting laws" assist financial actors in "running for the exit" and removing their capital from a particular jurisdiction or market, a dynamic that poured oil on the fire during the global financial crisis.[82] In order to make their economies and sovereign bonds attractive to financial investors, the government must make credible commitments to honouring financial contracts even in conditions of crisis by tying its own hands, issuing debt under foreign legal systems, and subjecting itself to the rulings of independent adjudicators: investment arbitration tribunals, and the independent credit determination committees of ISDA.

Scholarship on transnational law that is influenced by systems theory has posited that society has become increasingly "functionally differentiated" and it being regulated through semi-autonomous legal orders that embellish on and subvert laws and regulations that originate with the state to create their own quasi-constitutional orders.[83] There has been a strong focus on the spheres of international commercial and financial transactions in this literature. Yet this process also depends on the constitutional settlement that is a defining feature of many liberal political systems – a settlement that has, at its centre, a distinction between a public arena of governance and the private domain of the market in which the legal rights that allow citizens to own property, transact in markets, and produce profits are part of a thriving sphere of civil society that serves as a bulwark against excessive government power. As Morris Cohen recognised almost a century ago, this same legal system enables private actors to exercise sovereignty and to use the legal system of the state to constrain others to live according to their needs and desires, inhibiting the possibility for democratic politics if that politics would seek to interfere with private interests.[84] Writing on the phenomenon of societal governance through contract, Zumbansen suggests that a return to Legal Realist analysis to expose the public behind the private – also a preoccupation of many legal theorists of money – may no longer be adequate once the effects of transnational lawmaking are confronted. As he writes,

> how reliable is a critique that points to the *political* underpinnings of a *formalist* approach in order to reintegrate contractual governance into a larger framework of political (legal) theory under circumstances in which

81 Ibid., 147.
82 Ibid., 150.
83 G. Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (2012).
84 M. Cohen, 'Property and Sovereignty', (1927) 13 *Cornell L. Rev.* 8.

> the sites of democratic politics have become de-centered, fragmented, and denationalized?[85]

In order to contend with the power of finance to direct monetary flows and impact on the money supply, governments increasingly transact in the market as participants and structure signals through assets and bonds purchases to control inflation and manage exchange rate volatility. Policy-makers act as "monetary technocrats" whose actions are hard to distinguish from private market participants.[86] De Castro highlights that public policies with regard to money and finance increasingly take the form of "sets of newly created 'structured portfolios' designed to attain certain projected financial results".[87] In a contrast with the BW era of government actors negotiating with the IMF, De Castro describes a world in which states have enabled market actors to develop an "institutional fabric" of overlapping networks of contracts that can result in transformation of domestic economic orders by means of cross-border monetary impacts.[88] In this world, central bankers trying to inject "public-interest monetary contents into contracts" compete with private actors who react to that information and leverage high-frequency trading technologies and speculative trading strategies to offer their competing valuations and interpretations of policy signals.[89] Central banks are furiously "transacting" with the rest of the world,[90] trying to balance their books not necessarily because their books have the hard credit limitations of a personal bank account, but because their actions are being evaluated by geographically dispersed but legally networked communities of market actors who are able to register their interests in the price mechanisms for state currencies and sovereign debt, and, thereby, to impact on the state's future fortunes.

C. Concluding Reflections

Since the collapse of Bretton Woods, modifications to the governance systems that regulate credit and that shape the relative values of different currencies cut in precisely the opposite direction to the changes that legal scholars are seeking to enact. As opposed to making money obey a rationality imposed by the public, legal reform has re-made the state in line with the logic of the market. More work needs to be done to consider how geographically dispersed but legally and electronically networked market actors will react to

85 Zumbansen, *supra* note 79, at 210.

86 Braun et al., *supra* note 51.

87 M. Faro de Castro, 'Monetary Impacts and Currency Wars: A Blind Spot in the Discourse about Transnational Legal Orders', (2017) 60 *Rev. Bras. Polít. Int.* 1, at 8.

88 Ibid., 8.

89 Ibid., 13.

90 U Bindseil, *Monetary Policy Implementation – Theory, Past and Present* (2004).

monetary redesign, and how their reactions may impact on the economic value of money and the formation of money prices. Trust in money and its capacity to settle debt and to store value in the time lag between purchase and settlement is implied by legal theories of money to be a function of faith achieved by the sovereign backing its unit of account, but, as this chapter has shown, the faith of some actors matters more than others. Valuations of currencies in the international monetary system does not just relate to questions of the proximity of a contract or deposit to state money; they are also conditioned by a hierarchy of communities – most crucially, by those whose faith in the sovereign's credit matters more because they are able to contract into and out of a particular state's monetary order. Whereas most ordinary people are geographically bound and cannot choose where their wages are taxed, where they can take out a mortgage, or where the best rate of interest for a car loan is, mobile financial actors avail themselves of opportunities in different national jurisdictions, and the flows of revenue that they generate impact on the prices through which the lives and fortunes of others are shaped. Money may *be* public credit and a governance project of the state, but money must perform particular functions if commodity production and exchange is to be carried out in a capitalist market economy. This means that the quality of a state's money and its effect on processes of valorisation is also determined by a wider range of actors – actors who have been empowered through elaborations of the same legal rights (private property, contract) that, together with developments in regulation, corporate law and tax law, are also foundational to processes of commodity production and exchange within capitalism to react to, respond to, and recondition the "systemically significant prices" through which the state exercises its monetary powers.[91] More active regulation of these prices could be a promising "hack" to explore, as Omarova and Hockett suggest, although the capacities of market actors to eschew regulated prices in the transnational arena through instruments such as derivatives must be taken into account.

91 R. Hocket and S. Omarova, 'Systemically Significant Prices', (2016) 2 *JFR* 1.

Chapter 9

Financial Value, Anthropological Critique, and the Operations of the Law

Fabian Muniesa[1]

A. Introduction

"Operations of the law" is the expression with which Oliver Wendell Holmes, the jurist and associate justice of the Supreme Court of the United States, presented the subject matter of an inquiry into the meaning of the law in a celebrated speech, proposing to move away from moral phraseology or logical declination and concentrate instead on a pragmatic examination of the habits that govern the opinions of judges, thus laying the foundations for what later became the tradition of legal realism.[2] "Operations of the law" ("*opérations du droit*" in French), though, is also the expression put forward more recently by Yan Thomas, the law scholar and historian, to refer to the performative properties of legal fiction, the point being less about understanding the social logic and effects of legal opinions, and more about comprehending the instituting force of juristic artifice.[3] This contribution takes up operations of the law in an anthropological register, to examine the performative properties of juristic artifice for the capacity to constitute value.

That "value" is the outcome of an operation of the law may sound like quite a strange idea.[4] True, we are perfectly used to situations in which dis-

1 Preliminary versions of this work were presented at the 'Les "infrastructures" juridiques de l'économie: Histoires et théories' Workshop (11 May 2018, École des Hautes Études en Sciences Sociales, Paris), at the 'Constitutions of Value' Symposium (12–13 December 2019, Julius-Maximilians-Universität Würzburg), at the 'Towards a Society of Valuation?' Workshop (12 June 2020, Humboldt-Universität zu Berlin), and at the 'Séminaire général du Centre d'études européennes' (8 March 2022, Sciences Po Paris). I thank Isabel Feichtner, Isabelle Guérin, Geoff Gordon, Kaveri Haritas, Deborah James, Gustav Kalm, Anne K. Krüger, Jeanne Lazarus, Patrick Le Galès, Benjamin Lemoine, Clément Lenoble, Mattia Luppi, Mariana Luzzi, Toni Marzal, Susana Narotzky, Federico Neiburg, Horacio Ortiz, Thorsten Peetz, Sarah Quinn, Hilmar Schäfer, Michele Spanò and Matthias Thiemann for comments and remarks.

2 O.W. Holmes, 'The Path of the Law', (1897) 10 *Harvard Law Review* 457, at 462.

3 Y. Thomas, *Les Opérations du Droit* (2011).

4 Y. Thomas, 'La valeur des choses: Le droit romain hors la religion', (2002) 57 *Annales: Histoire, Sciences Sociales* 1431.

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putes on the value of something are settled in the courts, or between lawyers.[5] But we tend to abide by the idea that value questions are to be settled principally through economic thinking: either through normative reference to doctrines of political economy or through the pragmatic interplay of accounting habits prevailing in one particular jurisdiction.[6] This idea is unsettled by the comparative and relativizing terms in which an anthropological critique may approach the subject matter. But what is this anthropological critique of value about? The conception offered here is not concerned with attempts at critically improving economic value theory from the perspective of anthropology, nor with debates on the limits and contradictions of notions of value in Marxist repertoires and in political economy at large. It rather refers, quite simply, to the idea that the notion of value is just part of the internal justificatory repertoire of a capitalistic worldview.[7] Approaching value – its rhetorical manifestation – from this vantage point requires a characterization of the particular varieties of truth ("true value") that inform valuation in particular historical configurations, and an examination of the concomitant varieties of government, decision, discipline, ordering and control that go with them, adopting a perspective inspired by Michel Foucault.[8] Which entails, in addition, particular attention to the operations of the law and the practices of juridical artifice that sustain such varieties of government, decision, discipline, ordering and control. This essay interrogates the potentials of this approach for a critical interpretation of value in contemporary finance.

B. An Anthropological Critique of Value

One first requirement for an anthropological critique of value would be to consider notions of "value" and "value creation" as vernacular concepts, not as analytical categories.[9] From such a pragmatist perspective, value would stand as a notion found at work in mundane situations in which particular states of

5 See T. Marzal as well as A. Chadwick in this volume. See also T. Marzal, 'Quantum (In)Justice: Rethinking the Calculation of Compensation and Damages in ISDS', (2021) 22 *Journal of World Investment and Trade* 249.

6 See Quentin, Moudud, and Teubner in this volume.

7 F. Muniesa, 'On the Political Vernaculars of Value Creation', (2017) 26 *Science as Culture* 445.

8 M. Foucault, 'La vérité et les formes juridiques', in M. Foucault (ed.) *Dits et Écrits Vol. II* (1994), 538; M. Foucault, *Sécurité, Territoire, Population: Cours au Collège de France, 1978–1979* (2004); M. Foucault, *Naissance de la Biopolitique: Cours au Collège de France, 1978–1979* (2004). See also D. v.d. Meerssche and G. Gordon in this volume.

9 D. Miller, 'The Uses of Value', (2008) 39 *Geoforum* 1122; H. Ortiz, 'The Limits of Financial Imagination: Free Investors, Efficient Markets, and Crisis', (2014) 116 *American Anthropologist* 38; H. Ortiz, *Valeur Financière et Vérité: Enquête d'Anthropologie Politique sur l'Évaluation des Entreprises Cotées en Bourse* (2014); F. Muniesa and L. Doganova, 'The Time that Money Requires: Use of the Future and Critique of the Present in Financial Valuation', (2020) 6 *Finance and Society* 95; See Muniesa *supra* note 7.

affairs are to be justified or criticized.[10] The concept appears to be at work, notably, in situations in which something is said to be wrong with a price (a price that is considered to be too high, as in a so-called bubble, or too low, as in a crash), the notion of a "right", "true", "fair" or "accurate" value being invoked there in order to criticize that price on the grounds that it "over-values" or "undervalues" the asset under scrutiny.[11] It also materializes quite systematically as a political resource for the determination and justification of the ways in which money is distributed globally and locally, with "value creation" standing as a yardstick against which asset management decisions are gauged and taken.[12] This "emic" perspective represents, however, a difficult reflexive move, since notions of value are well entrenched within the analytical resources of the social sciences, including anthropology.[13]

The move is even more demanding if we consider it from the perspective of a historical anthropology of economic reason, for which an emancipation from that reason would be, at least in part, an analytical prerequisite.[14] Concepts of value are indeed embedded in the scientific-normative narratives of political economy.[15] An abundant number of such narratives are about signaling contradictions between one particular economic process and what its inherent value is or should be about – or, on the contrary, about demonstrating that value is reflected perfectly within that particular economic process. The ductility and incompleteness of Karl Marx's evolving thought, caught as it was between political economy and the critique thereof, represents a landmark rather than a turning point in these narratives, as aptly summarized by Frederick Harry Pitts.[16] Foucault opens the way out and forward, observing how the struggle over the foundations of value that animates the tradition of political economy is controlled by a regime of representational truth.[17] Further genealogical forays in that direction help to clarify the type of order that such a regime of representational truth serves.[18]

10 F. Muniesa, 'A Flank Movement in the Understanding of Valuation', (2011) 59 *The Sociological Review* 24; L. Boltanski and A. Esquerre, 'Grappling with the Economy of Enrichment', (2015) 3 *Valuation Studies* 75.

11 F. Muniesa, 'Market Technologies and the Pragmatics of Prices', (2007) 36 *Economy and Society* 377.

12 H. Ortiz, 'A Political Anthropology of Finance: Studying the Distribution of Money in the Financial Industry as a Political Process', (2021) 21 *Anthropological Theory* 3.

13 D. Graeber, *Towards an Anthropological Theory of Value: The False Coin of Our Dreams* (2001).

14 F. Muniesa, 'The Problem with Economics: Naturalism, Critique and Performativity', in I. Boldyrev and E. Svetlova (eds.), *Enacting Dismal Science: New Perspectives on the Performativity of Economics* (2016), 109.

15 F.H. Pitts, *Value* (2021). See also Kempter in this volume.

16 Ibid.

17 M. Foucault, *Les Mots et les Choses* (1966).

18 G. Todeschini, '"Au ciel de la richesse": Le cœur théologique caché du rationnel économique occidental', (2019) 74 *Annales: Histoire, Sciences Sociales* 3; G. Todeschini, *Come l'Acqua e il Sangue: Le Origini Medievali del Pensiero Economico* (2021).

A second requirement for such anthropological critique of value would indeed be to consider how these vernacular concepts of value operate, in particular settings, as political technologies – that is, as techniques, methods, procedures and habits conducive to appropriate and convenient conduct, in the sense put forward by Foucault.[19] In this capacity, two related courses of analysis come into play: vernacular theories of value are vindicated in terms of truth and accuracy ("*véridiction*", in Foucault's French, or "veridiction"), while they are set to work in the form of dispositions, measures and rules that determine what should be done and how ("*gouvernementalité*", or "governmentality"). There is a critical dimension to this, but certainly not in the sense of sustaining a moral appraisal of the goods and ills (or worth) of such political technologies. Critique is here to be rather understood in the radical, philosophical sense of pressuring the conditions in which concepts can or cannot make sense and thus operate.[20]

C. Incursions in the Anthropology of Financial Valuation

This approach suits finance quite aptly, insofar as finance itself represents the emergence and consolidation of a political technology associated with a particular idea of value. Liliana Doganova offers a treatment of financial valuation methodologies from this perspective.[21] Techniques such as DCF (discounted cash flow) analysis are commonly used to justify an investment project: that is, to determine, first, the proper value of something in the terms of an investment, and, second, accordingly, the proper way to manage it.[22] The key to the operations of verification and governance that this entails is located in a discounted future.[23] The value of something in the present, the method goes, is equal to the value of investing in that thing in the present. Yet that value is only realized in the future, when the return on investment can be collected, and, since the future is said to be uncertain, valuation must take into account the risk that the investor takes by committing its money to such an uncertain endeavor. The solution to this problem (or to this way of problematizing things) is found in

19 Foucault, *supra* note 8.

20 G. Deleuze, *Foucault* (1986).

21 L. Doganova, 'Décompter le futur: La formule des flux actualisés et le manager-investisseur', (2014) 93 *Sociétés Contemporaines* 67; L. Doganova, 'Discounting and the Making of the Future: On Uncertainty in Forest Management and Drug Development', in J. Beckert and R. Bronk (eds.), *Uncertain Futures: Imaginaries, Narratives, and Calculation in the Economy* (2018), 278; L. Doganova, 'Discounting the Future: A Political Technology', in J. Andersson and S. Kemp (eds.), *Futures* (2021), 380.

22 See also J. Levy, 'Accounting for Profit and the History of Capital', (2014) 1 *Critical Historical Studies*, 171.

23 Doganova, *supra* note 21.

the act of first estimating such future value and then reducing it by applying a discount rate. All these terms – "investor", "uncertainty", "risk", "present" and "future" – form the rhetorical arrangement that turns these methodologies into the dominant instrument for justifying and organizing the value of things.[24] As discussed in the next section, these terms are constituted (at least in part) with juridical artifice. Each, for instance, is constructed out of, and in conjunction with, discrete mobilizations of liability regimes (in turn predicated on assumptions concerning contracts and torts) as they are reproduced in boardrooms and other places where lawyers, investors and bankers together debate, choose and contest deals.

In a comparable manner, Horacio Ortiz examines the moral and political content of the justifications that finance professionals put forward when it comes to making sense of their valuation methods, observing how ordinary bureaucratic practices only partially correspond to these justifications, thus opening the investigation to the identification of tensions and contradictions.[25] That the so-called "fundamental value" of a financial asset – i.e., the value that is calculated using tools such as the DCF – is presented recurrently as differing from its so-called "speculative value" – i.e., the value reflected by a market price – is part of the daily puzzles dealt with by financial analysts and asset managers.[26] Another notable contradiction stems from the fact that this so-called fundamental value needs, in order to make sense, to be compared to the value of a so-called risk-free investment – i.e., guaranteed by a sovereign state – whereas the fiscal capacity of the state, which precisely feeds this guaranteeing capacity, must be openly considered as a problem.[27] Again, the vernaculars of "investment", of "fundamental valuation", of "efficient market hypothesis", and of "risk-free rate" form the worldview within which true value ought to be determined ("veridiction") and the conduct of management should be carried out ("governmentality"). Operations of the law, though, should be considered as being an integral part of this worldview.

24 Ibid.; see also Muniesa and Doganova *supra* note 9; L. Doganova and F. Muniesa, 'Capitalization Devices: Business Models and the Renewal of Markets', in M. Kornberger, L. Justesen, A.K. Madsen and J. Mouritsen (eds.), *Making Things Valuable* (2015), 109; F. Muniesa et al., *Capitalization: A Cultural Guide* (2017); K. Birch, 'Rethinking Value in the Bio-economy: Finance, Assetization, and the Management of Value', (2017) 42 *Science, Technology, and Human Values* 460; U. Tellmann, 'Historical Ontologies of Uncertainty and Money: Rethinking the Current Critique of Finance', (2016) 9 *Journal of Cultural Economy* 63.

25 Ortiz, *supra* note 9; H. Ortiz, 'Financial Value: Economic, Moral, Political, Global', (2013) 3 *Hau: Journal of Ethnographic Theory* 64; H. Ortiz, 'Investir, une décision disséminée: Enquête de terrain sur les dérivés de crédit', (2013) 92 *Sociétés Contemporaines* 35; H. Ortiz, *The Everyday Practice of Valuation and Investment: Political Imaginaries of Shareholder Value* (2021).

26 See also D. Bryan and M. Rafferty, 'Fundamental Value: A Category in Transformation', (2013) 42 *Economy and Society* 130.

27 N. Boy, 'Sovereign Safety', (2015) 46 *Security Dialogue*, 530; See also Muniesa et al., *supra* note 24.

These aspects of financial valuation can very well be debated in the terms of diverse technicalities and partialities in the proper appraisal of value. From the viewpoint of an anthropological critique of value, though, the crucial point resides in the rhetoric apparatus (or semiotic engine, or enunciation regime) financial valuation forms. This is about the investor's gaze: in finance, the notion of value is conceived of as stemming from an investment perspective, a perspective that locates the realization of value in the investor's future.[28] The "investor" functions as the ultimate rhetoric persona from which this enunciation apparatus operates: an intuition already formulated in the idea of capital (or "capitalization") as a semiotic engine offered by Gilles Deleuze and Félix Guattari, and by Éric Alliez.[29] Embedded as it is in notions of financial analysis, corporate finance and capital budgeting, in doctrines of shareholder primacy, in policies of economic development, and in conceptions of public finance, this concept of value works as the engine for the determination of what should be done and how, and of what should exist or not.

D. Finance and the Operations of the Law

How does the nature of legal operations fit into the complex that this financial construction of reality requires? There are certainly many ways in which this question can be answered. A number of law scholars, combining their voices with those of institutionalist economists – and often with reference to John R. Commons[30] – have detected in this kind of questioning an opportunity to develop an institutionalist legal perspective on the constitutive role of the law in capitalism.[31] These kinds of perspectives have contributed, for example, to a critical appraisal of what is often called the "primacy of shareholder value" in corporate governance and company law.[32] The purpose of such type of analyses is to deconstruct and denaturalize the corporation in order to detect the arbitrary nature of the power and privilege it confers to capital owners, and also, eventually, to establish correlations between certain forms of economic violence specific to the capitalist mode of operation and these powers and

28 Doganova, *supra* note 21; Ortiz, *supra* note 9; Muniesa et al., *supra* note 24.

29 G. Deleuze and F. Guattari, *Mille Plateaux* (1980); É. Alliez, *Les Temps Capitaux, 1: Récits de la Conquête du Temps* (1991); É. Alliez, *Les Temps Capitaux, 2: L'État des Choses* (1999); see also F. Guattari, *Lignes de Fuite: Pour un Autre Monde de Possibles* (2011); F. Guattari and É. Alliez 'Le Capital en fin de compte: Systèmes, structures et processus capitalistiques', (1983) 1 *Change International* 100.

30 J.R. Commons, *Legal Foundations of Capitalism* (1924).

31 S. Deakin et al., 'Legal Institutionalism: Capitalism and the Constitutive Role of Law', (2017) 45 *Journal of Comparative Economics* 188; K. Pistor, 'The Value of Law', (2020) 49 *Theory and Society* 165.

32 S. Deakin, 'The Corporation in Legal Studies', in G. Baars and A. Spicer (eds.), *The Corporation: A Critical, Multi-Disciplinary Handbook* (2017), 47; L. Talbot, 'Corporate Governance and the Political Economy of the Company', in B. Sjåfjell and C.M. Bruner (eds.), *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (2019), 86.

privileges.[33] The intellectual grip and normative impact of this orientation is most welcome. It may be helpful to note, however, that this legal scholarship remains to a great extent internal to economic discourse and to the consideration of allocation there, not questioning at root level the terminology of value, but rather the distribution of their referents – compared to other work in which a legal concept of money (e.g., monetary value as a legal construction) may be developed more frankly.[34]

A different point of view is possible, though, that leads the movement of deconstruction and denaturalization of the financial configuration of things further. This would require, in part, an anthropological take capable of freeing itself, at least temporarily, from the concerns specific to economic thinking.[35] Economic thinking – both orthodox and heterodox – usually takes for granted the notion of value in order to discuss its production, facilitation or allocation. The viewpoint advocated for here would rather situate this notion among the instruments of a vernacular grid of intelligibility and analyze the circumstances it requires in order to make sense, as well as the forms of reality it makes possible – as being done, for example, along the lines of the research highlighted in the previous section. The financial order becomes recognizable not in what is valued or not, but in the specificity of financial valuation as a governmental technique. Foucauldian perspectives on finance and "financialization", however, often lead to a focus on the performative power of accounting metrics, methods and doctrines.[36] This is most relevant, as the characterization of the financial figuration of value (namely, a figuration according to which value is best captured when considered from the perspective of a free investor that locates value in the future, discounts it in the present in order to account for the risk surrounding the yield, and assesses the present situation in the light of this foresight) is certainly a matter of accounting operation, as the case of the DCF attests. The extent to which the financial figuration of value is (at least in part) an operation of the law remains, however, somewhat underdeveloped.

Katharina Pistor has recently provided a determinative contribution to this line of research.[37] Her metaphor of "encoding" – with legal technique considered as the method that "codes" all kinds of things into capital, and law-

33 J.-P. Robé, *Property, Power and Politics: Why We Need to Rethink the World Power System* (2020).

34 C. Desan, *Making Money: Coin, Currency, and the Coming of Capitalism* (2014); A. Rahmatian, *Credit and Creed: A Critical Legal Theory of Money* (2020); R.C. Hockett and S.T. Omarova, 'The Finance Franchise', (2017) 102 *Cornell Law Review* 1143.

35 M. Sahlins, *Culture and Practical Reason* (1976).

36 P. Miller and N. Rose, 'Governing Economic Life', (1990) 19 *Economy and Society* 1; P. Miller, 'Accounting Innovation Beyond the Enterprise: Problematizing Investment Decisions and Programming Economic Growth in the UK in the 1960s', (1991) 16 *Accounting, Organizations and Society* 733; È. Chiapello, 'Financialisation of Valuation', (2015) 38 *Human Studies* 13.

37 K. Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (2019); Pistor, *supra* note 31.

yers as the crafty "coders" of capitalism – is certainly of use for this analytical direction. It surprisingly resonated, at first sight, with the vocabulary once put forward by Deleuze and Guattari: that of capital as a semiotic "machine" and an "encoding" apparatus.[38] The metaphor carries, however, an informational connotation that is not without relation to the epistemic fabric of economics, and also with the assumption that wealth is "generated" and value "created" along that process.[39] There is also the suggestion that assets are already there, subject to proper valuation, ready to be "coded into capital", therefore escaping analysis of a wider process of "assetization" and of the role the law plays in it.[40] The examination of how capital "comes to matter" – as posited in emerging thought on "legal materiality" – by being engaged in the production of legal meaning is perhaps still to be addressed explicitly in this terrain.[41]

The material consequences of the institutive artifice of legal imagination are at the center of the perspective developed, to that effect, by Yan Thomas. Who or what asserts the value of things, and what does this assertion consist of? Discussing the performative power of Roman law, Thomas focused for instance on how things are instituted in terms of objects of valuation, trade and appropriation.[42] According to Thomas, in Roman law things are only qualified as such ("*res*" in Latin) to the extent that they are the subject of a trial, that is, a legal procedure through which their value is established and made commercially articulated. The operation of the law consists in establishing the conditions for things to be designated as "property", the Latin word "*pecunia*" referring both to money and to anything presenting itself as the object of a promise or a counterpart, and the word "*pretium*" also telescoping things and their value. Roman lawyers often called *pretium* (price) the sum established at the end of a dispute, or, in other words, the arbitral value determined on the basis of the estimate provided by the judge, grounded on common judgment. Price was presented in the legal analysis as the criterion for identifying what was in dispute.

Transformations of legal practice in recent modern times are in part characterized by a reversal of that idea, with a tendency for the legal determination of the value of things to be grounded on several forms of economic expertise. The interwar period in the United States of America, illustrated in Commons – but also, in quite comparable terms, in numerous finance

38 Deleuze and Guattari, *supra* note 29; Guattari and Alliez, *supra* note 29.

39 P. Mirowski and E. Nik-Khah, *The Knowledge We Have Lost in Information: The History of Information in Modern Economics* (2017); see also F. Muniesa, 'Société du comportement, information de la sociologie', (2017) 5 *Zilsel* 196.

40 K. Birch and F. Muniesa (eds.), *Assetization: Turning Things into Assets in Techno-Scientific Capitalism* (2020).

41 H.Y. Kang and S. Kendall, 'Legal Materiality', in S. Stern, M. Del Mar and B. Meyler (eds.), *The Oxford Handbook of Law and Humanities* (2020), 21.

42 Thomas, *supra* note 4.

textbooks of the time – is particularly instructive in this regard.[43] Business valuation stood as a crucial problem in the midst of the transformations characterizing North-American capitalism and its jurisprudence in that period, as notions of "earning power" developed in both the financial curriculum and the legal repertoire.[44] This was prompted in particular by "realist" or "naturalist" inclinations in legal thought and by early advances in the "Law and Economics" movement.[45] Notable cases in public utility valuation, such as *McCardle v. Indianapolis Water Company* (a case argued before the Supreme Court of the United States in 1926 which dealt with the determination of the present value of a water company so as to establish rates for water services), illustrate the breadth of debates about whether or not the law should or should not be established on the grounds of an economic analysis of value.[46]

Transformations of such kind have triggered a number of alarmed assessments in legal scholarship, often inspired by the work of Yan Thomas or in dialogue with it, but sometimes tinged with a rather reactionary tone in their denunciation of a threat to the "anthropological function" of the law (e.g., Pierre Legendre and Alain Supiot in France).[47] The point here, rather, is to acknowledge with Thomas how ductile and plural (and perhaps also escapable) this anthropological function of the law can be. From the perspective defended here, the task would be to interpret (or to "decode", if the code metaphor still holds) the conditions in which the dogmas of financial valuation, and in particular the prevalence of the investor gaze in the determination of things, become embedded in and entangled with the operations of the law.

E. Problematizing Investor Protection

In her examination of incipient DCF consultancy in the post-war period in the United States, Doganova points out the pivotal role played by Joel Dean, a major contributor to the theory of capital budgeting and author of an influential textbook on the subject, in the introduction of such kinds of value views in the courts.[48] The idea was not only to offer a "realistic" (read economic)

43 Commons, *supra* note 30; see also R.E. Badger, *Valuation of Industrial Securities* (1925); A.S. Dewing, *The Financial Policy of Corporations* (1920); C.E. Fraser, *Problems in Finance* (1927).

44 F. Muniesa, 'Setting the Habit of Capitalization: The Pedagogy of Earning Power at the Harvard Business School, 1920–1940', (2016) 41(2) *Historical Social Research* 196.

45 E.A. Purcell Jr., *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value* (1973).

46 J. Bauer and N. Gold, *Public Utility Valuation for Purposes of Rate Control* (1934); D.R. Richberg, 'Value—By Judicial Fiat', (1927) 40 *Harvard Law Review* 567; D.R. Richberg, 'Economic Illusions Underlying Law', (1933) 1 *The University of Chicago Law Review* 96.

47 P. Legendre, *Le Désir Politique de Dieu: Étude sur les Montages de l'État et du Droit* (1988); A. Supiot, *Homo Juridicus: Essai sur la Fonction Anthropologique du Droit* (2005); A. Supiot, *La Gouvernance par les Nombres* (2015).

48 Doganova, *supra* note 21; J. Dean, *Capital Budgeting: Top-Management Policy on Plant, Equipment and Product Development* (1951).

appraisal of the present value of assets, but also to judge the appropriateness of the management operations which the "manager" is responsible for on behalf of the investors who entrust it with their capital, prefiguring the conception later known as "principal-agent theory", popularized by Jensen and Meckling and then further disseminated through numerous and influential finance textbooks.[49] This coincides with the consolidation of "Law and Economics" in the 1970s.[50] Further transfers from the corporate finance curriculum to legal advice can be studied in the same manner from the 1980s onwards.[51] One remarkable development of this movement is perhaps the construction of "investor protection" as a legal doctrine, as examined for example by Sabine Montagne in the case of the introduction of notions of financial prudence in North-American law.[52]

The approach known as "Law and Finance" takes forward this political project. It offers a shift from an economic analysis of the law to a financial one, explicitly situating the persona of the investor as the semiotic engine that allows legal decisions to make sense. Inspired by a group of economists specialized in corporate governance and investor protection (Andrei Shleifer, Florencio Lopez-de-Silanes, Rafael La Porta, Robert W. Vishny), the approach aims at an empirical assessment of the conditions in which particular jurisdictions would offer a hospitable environment for exerting an investment gaze.[53] Pistor sees a limit in the fact that the approach stands as "a theory for good times in finance" and therefore neglects situations of "crisis" and of "systemic instability", implying, for Pistor, that the problem with the approach resides solely in a deficient financial understanding of the "risk" involved in the quandaries of financial valuation.[54] Similarly, other scholars are preoccupied with the extent to which shareholder protection and financial development are correctly appraised or not through the empirical metrics put forward in this approach.[55] Supiot, on the other hand, is rather concerned with the fact that this approach

49 M.C. Jensen and W.H. Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure', (1976) 3 *Journal of Financial Economics* 305; R. Brealey and S. Myers, *Principles of Corporate Finance* (1981).

50 R.A. Posner, *Economic Analysis of Law* (1973).

51 K. Langenbucher, *Economic Transplants: On Lawmaking for Corporations and Capital Markets* (2017).

52 S. Montagne, 'Investir avec prudence: Les usages d'un impératif juridique par les acteurs du capitalisme financiarisé', (2012) 54 *Sociologie du Travail* 92.

53 R. La Porta et al., 'Law and Finance', (1998) 106 *Journal of Political Economy* 1113; R. La Porta et al., 'Investor Protection and Corporate Governance', (2000) 58 *Journal of Financial Economics* 3; R. La Porta et al., 'The Economic Consequences of Legal Origin', (2008) 46 *Journal of Economic Literature* 285.

54 K. Pistor, 'A Legal Theory of Finance', (2013) 41 *Journal of Comparative Economics* 315; see also S. Deakin and K. Pistor (eds.), *Legal Origin Theory* (2012).

55 M. Siems, 'Legal Origins: Reconciling Law & Finance and Comparative Law', (2007) 52 *McGill Law Journal* 55; M. Siems and S. Deakin, 'Comparative Law and Finance: Past, Present, and Future Research', (2010) 166 *Journal of Institutional and Theoretical Economics* 120.

is in fact just about "numbers": that is, about quantitative metrics that allow for the establishment of comparative assessments of different jurisdictions – which may hamper, Supiot suggests, the very nature of what a jurisdiction should be about.[56]

The vernacular financial imagination embedded in this approach may however be questioned in another way, at root level. The "Law and Finance" project is designed to ensure the conformity of legal operations in their ability to generate conditions for this figuration of financial value to thrive; with fair, durable value ("veridiction") thus informing the proper disposition of things ("governmentality", to come back to Foucauldian phraseology). Observed from the perspective of an anthropological critique of value, it exemplifies the way in which the semiotic engine of financial valuation becomes an operation of the law. The problem, from this perspective, is not that the "Law and Finance" project neglects a refined appraisal of financial risk. Nor is the problem that the "Law and Finance" project facilitates comparative critique through the establishment of actionable metrics. The problem is that the "Law and Finance" program situates the performative potentials of legal imagination under the control of the moral and political language of finance.

F. Conclusion

The "Doing Business" indexes and reports of the World Bank Group granted the "Law and Finance" movement significant credentials in the domain of institutional achievement.[57] One central purpose of this initiative was to build an actionable standard out of an expert financial assessment concerning how hospitable a jurisdiction is in terms of investor protection, prompting governmental awareness of the need to safeguard this protection so as to "attract"

56 Supiot, *supra* note 47.

57 R. Michaels, 'Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law', (2009) 57 *The American Journal of Comparative Law* 765; B. Fauvarque-Cosson and A.-J. Kerhuel, 'Is Law an Economic Contest? French Reactions to the Doing Business World Bank Reports and Economic Analysis of the Law', (2009) 57 *The American Journal of Comparative Law* 811; T. Besley, 'Law, Regulation, and the Business Climate: The Nature and Influence of the World Bank Doing Business Project', (2015) 29(3) *Journal of Economic Perspectives* 99; G. McCormack, 'Why "Doing Business" with the World Bank May Be Bad for You', (2018) 19 *European Business Organization Law Review* 649; J.G. Kelley and B.A. Simmons, 'Politics by Number: Indicators as Social Pressure in International Relations', (2015) 59 *American Journal of Political Science* 55; R. Doshi, J.G. Kelley and B.A. Simmons, 'The Power of Ranking: The Ease of Doing Business Indicator and Global Regulatory Behavior', (2019) 73 *International Organization* 611; see also J.G. Kelley and B.A. Simmons (eds.), *The Power of Global Performance Indicators* (2020); S.E. Merry, K.E. Davis and B. Kingsbury (eds.), *The Quiet Power of Indicators: Measuring Governance, Corruption, and Rule of Law* (2015).

investment.[58] To comply with such an apparatus, several kinds of legislative, regulatory and institutional measures ought to identify, control and eventually cover the "risks" that would prevent investors from investing in a variety of "asset classes" – with the state serving principally to ensure the fulfilment of that task.[59] A moral discourse of "value creation", "economic development", "risk mitigation", "fundamental value", "impact", "sustainability" and "long term" accompanies such a process, in reference to the virtuous character of an investment gaze which looks into "the future" and allocates money wisely. As the doctrine of "Law and Finance" suggests, the law should be subordinated to a financial understanding of value. But this is only an artifact of that particular political technology: one that uses a particular notion of "true value" in order to determine what should be done and what should exist.

The perspective defended here aims at releasing legal inventiveness from its entanglement with this particular condition of financial realism. An anthropological critique of value, combined with a constructivist approach to the operations of the law, offers the possibility of thinking the value of things outside financial imagination and, in particular, away from the investor's gaze. It also contributes to the wider project of a reprieve from the inherently capitalistic reason of the categories of value in political economy.[60] One envisaged prospect would be for professionals of the operations of the law to circumvent the mounting imperatives of "value creation" that, in either orthodox or heterodox guise, carry the mark of finance and hamper a more generative and inventive approach to justice.

58 The World Bank Group issued a statement in September 2021 announcing that the "Doing Business" report was discontinued due to issues of data irregularities and ethical misconduct.

59 D. Gabor, 'Critical Macro-Finance: A Theoretical Lens', (2020) 6 *Finance and Society* 45; D. Gabor, 'The Wall Street Consensus', (2021) 52 *Development and Change* 429.

60 See M. Sahlins, 'On the Culture of Material Value and the Cosmography of Riches', (2013) 3 *Hau: Journal of Ethnographic Theory* 161; M. Sahlins, 'An Anthropological Manifesto: Or the Origin of the State', (2015) 31(2) *Anthropology Today* 8.

Chapter 10

Critique of Valuation in the Calculation of Damages in Investor-State Dispute Settlement

Between Law, Finance and Politics

Toni Marzal

Questions about the proper value of things are often central to legal adjudication. In tort law, the victim will claim damages for the losses sustained as a result of the tortfeasor's actions. To determine the appropriate monetary equivalent, those losses will be subject to some form of valuation. In contract law, some legal systems allow a party to a sales agreement to seek its rescission under the doctrine of *laesio enormis*, where there is a significant gap between the price agreed to and the proper value of what is being sold. In the law of expropriation (or "takings"), a decision about the value of an asset may need to be made in order to determine how much compensation the expropriated owner is entitled to receive. It may also be central to deciding whether an expropriation has taken place – as the doctrine of "indirect expropriation" holds regulatory intervention to be expropriatory where it results in a reduction of the value of the asset beyond a certain threshold. These are just some examples among many.

In all of these situations, the legal process will involve arguments about how much that thing (the losses sustained, the object of the sale, the asset expropriated) is worth in the eyes of the law, how its value should be estimated, and result in a decision by the adjudicator. The reasoning required may be of a high degree of complexity. The adjudicator may need to determine what it is that is meant by value, for instance by relying on a particular standard of value ("use value", "market value", etc.), by what means that value should be ascertained, and may have to rely on non-legal forms of expertise to conduct the valuation. Moreover, the stakes involved may be phenomenally high. To go back to the tort law example, the question of how much compensation should be paid will in practice often overshadow the preliminary question of whether any wrong was committed, even though theoretically the latter would seem more fundamental.

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In spite of this, there is very little interest in valuation within legal scholarship.[1] It is certainly the case that the relationship between law and valuation is not usually addressed as an overarching question, unlike, say, law and economics, law and development, etc. It is up to the specialists of the different branches where valuation may play a role (contract law, competition law, insurance, etc.) to take an interest in it, but even there, as we will see below, it tends to be viewed as a peripheral question, or relegated to a technical appendix, or sidelined entirely as non-legal. The experience of practitioners may prove very different, as valuation questions often occupy a central space in day-to-day litigation and consultancy. On this issue, the proverbial gap between theory and practice is particularly manifest.

The aim of this chapter is to conduct a study of valuation in a certain area of legal practice. By focusing on a particular context, we aim to show more broadly how such a study can be conducted, and offer a glimpse of the importance and rich potential of a legal study of valuation. The context chosen is that of investor-State dispute settlement (ISDS). Where an international arbitral tribunal finds that the State has expropriated the investor's assets or violated one of the investor-protection standards under international law, it will award the investor a sum of money as compensation or damages.[2] Our focus will be on the reasoning deployed by tribunals and ISDS scholars to justify these amounts – the "quantum question", to employ the term often found in arbitral practice. We will pay attention in particular to how they engage with value and valuation, which are central to their assessment. Indeed, damages will usually be based on the value of the affected investment, as ascertained through the arbitral process.[3]

How is one to reflect on valuation from a legal angle? As Fabian Muniesa explains in his chapter to this volume, value can be approached as an "analytical category" or as a "vernacular concept". Our choice of focus puts us very much into the second category, following the path set by the legal historian Yan Thomas.[4] We concentrate on the "rhetorical manifestations" of value and

1 Yan Thomas' inspiring analysis of Roman law, to which we will make further references below, is the most notable exception: 'La valeur des choses. Le droit romain hors la religion', (2002) 57 *Annales. Histoire, Sciences Sociales* 1431.

2 In the technical language of ISDS, the term "compensation" is used to describe the sum of money that the State will be obliged to pay as a condition for the legality of an expropriation, whereas "damages" is the remedy for a violation of international law (I. Marboe, 'Compensation and Damages in International Law – The Limits of "Fair Market Value"', (2006) 7 *J. World Investment & Trade* 723). In this chapter, we will however be using both terms indistinctly.

3 Our analysis here builds on our longer study on this issue: T. Marzal, 'Quantum (in)Justice: Rethinking the Calculation of Compensation and Damages in ISDS', (2021) 22 *J. World Investment & Trade* 249.

4 Yan Thomas showed (*supra* note 1) how the Roman law concept of *res* (loosely translated as "thing", but also "good", "matter" or "affair") was characterised by its "procedural" nature (in the sense that only through the intervention of a legal procedure could an object be described as a *res*) and

valuation in the idiosyncratic reasoning found in ISDS. Alternatives might include how the financial value of investments is decisively propped up by the protection offered by international investment law, including its specific regime on the quantification of damages, or how the law prevents the redistribution of value away from the hands of investors. Instead, we will address the following four questions:[5] what place does valuation occupy in the overall legal process in ISDS? What meaning do the concepts of value and valuation carry in this particular legal context? What effects do they produce? What role can a critique of valuation play in such a setting?

We will proceed by addressing the four questions in turn. In part A, we will provide the context of our enquiry, and show how valuation has come to occupy a central space in the modern practice of ISDS, where in the past it was much overshadowed by highly politically charged disputes, now evaporated, between "First World" and "Third World" countries about appropriate standards of compensation. In part B, we will explain how the approach to valuation developed by tribunals and commentators is characterised by an understanding of it as a *technical* exercise, consisting in establishing, with the help of financial expertise, the reduction in market value suffered by the investor, which is viewed as an economic fact that can be objectively ascertained. In part C, we will argue that the approach to valuation developed by tribunals has important effects within the ISDS system as a whole, not only by contributing to a general increase in the amounts awarded to investors, but perhaps more fundamentally by obliquely redefining the rights of investors and ultimately the rationale behind international investment treaties. In part D we will conclude with thoughts about the rich potential of a critique of valuation in this context, to argue that it can serve not only to challenge current practices but also to pave the way for alternative and more acceptable calculations.

A. The Centrality of Valuation in Modern ISDS

Historically, valuation did not occupy a central space in the practice of international investment law, even within "quantum" discussions. Until the early 1990s, a huge amount of attention was devoted to the question of the extent

its understanding as a "value" (in the sense that, through the intervention of a legal procedure, the object becomes equivalent to a sum of money, whose estimate will only result from the judgment of a third party, i.e., the judge).

5 We are also drawing inspiration from the work of sociologist M. Fourcade ('Cents and Sensibility: Economic Valuation and the Nature of "Nature"', (2011) 116 *Am. J. Sociol.* 1721), who has conducted a comparative sociological study of the valuation of the noncommercial losses sustained as a result of various notable oil spills, focusing on the following three questions: first the conditions allowing for a monetary estimate of things that normally lie outside the commercial realm, second the various techniques employed to reach this estimate, and finally how this process feeds back into social practices.

to which States should compensate foreign investors for acts of expropriation.[6] Even though the question concerned the existence of a legal standard under international law, the debate was framed in fundamentally political terms. As stated in 1975: "[o]n no other subject is the gulf between the two – in interests, perspectives, and position – potentially so great or so pregnant with passionate and violent conflict".[7] While capital-exporting or "First World" States would tend to argue that investors were entitled to "prompt, full and adequate compensation" (the so-called Hull formula), socialist and "Third World" States defended that no obligation to compensate existed under international law or that, depending on the circumstances, compensation could be partial and delayed. The opposition between the two seemed insoluble, and in practice, the amount actually paid as compensation would be calculated on an ad hoc basis through compromise. Most often negotiation would result in a lump sum amount being paid to investors.[8] On the rare occasions that the matter would be resolved through arbitration, the tribunal would rely on its equitable judgment to discretionally set the appropriate figure (usually a round one).[9]

By contrast, modern day ISDS practice mostly ignores the old debates around the appropriate standard of compensation, which are viewed as "obsolete and irrelevant".[10] The controversy of the past has been replaced by a solid consensus around the standard of full compensation. Some of the most important investment treaties, such as NAFTA (now replaced by USMCA)[11] or the ECT[12], expressly include the Hull formula. The customary law principle of "full reparation", according to which "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed",[13] is increasingly relied upon by tribunals and commentators. The intuitive appeal of the standard of full compensation/reparation is now so strong that it is often elevated to a principle of natural law. Authors describe it as "truly universal"[14]

6 See e.g., F. Francioni, 'Compensation for Nationalisation and Foreign Property: The Borderland Between Law and Equity', (1975) 24 *Int'l & Comp. L. Quart.* 255.

7 N. Girvan, 'Expropriating the Expropriators. Compensation Criteria from a Third World Viewpoint', in R. Lillich (ed.), *The Valuation of Nationalized Property in International Law* (1972–1987), Vol. 3, 149.

8 B.H. Weston, R.B. Lillich and D.J. Bederman, *International Claims*: *Their Settlement by Lump Sum Agreements, 1975–1995* (1999).

9 *Libyan American Oil Co. (LIAMCO) v. Gov't of the Libyan Arab Rep.*, Award (12 April 1977), 17 ILM 3 (1978), para. 317.

10 S. Hamamoto, 'Compensation Standards and Permanent Sovereignty over Natural Resources', in M. Bungenberg and S. Hobe (eds.), *Permanent Sovereignty over Natural Resources* (2015), 141 at 142.

11 United States-Mexico-Canada Agreement, Art. 14.8.

12 Energy Charter Treaty, Art. 13.1.

13 *Case Concerning the Factory at Chorzów (Germany v. Poland)*, 1928, PCIJ Rep Series A No 17, at 47.

14 *CME v. Czech Rep.*, UNCITRAL, Final Award (14 March 2003), para. 497.

and "non-ideological",[15] and speak of a "fundamental right to see [the investor's] losses redressed".[16] The effect of the disappearance of any controversy around the applicable standard of compensation means that quantum debates are now centred on the question of how much money will make the investor "whole again". This entails estimating the worth of the investment of which the investor has been entirely or partially deprived, i.e., the problem of valuation.

Several other reasons explain why valuation now occupies an increasingly central space in the overall practice of ISDS. The first is the reality of current litigation. On many occasions, quantum is the only question really at stake. Investor-protection standards have been constructed so broadly that there is often no real argument that the State committed a breach of its international obligations. On those occasions, all there is for the parties to argue, and the tribunal to decide on, is the sum of money that will make it right. In addition, tribunals have prioritised monetary compensation as the primary remedy available to investors (in contrast to the traditional position in international law, where damages are viewed as a secondary remedy and only one among several).[17] As a result, the rights of investors over their investment are increasingly viewed as rights to its monetary value, which is reminiscent of Yan Thomas' point about Roman law establishing a substantive identity between things and their commercial worth.[18]

More prosaically, but perhaps most importantly, the centrality of valuation today results from the sheer amounts involved. Over the last three decades awards have been constantly increasing,[19] and there are now numerous instances of so-called "mega-awards" of several billion dollars. For example, an ICSID arbitral tribunal recently ordered Pakistan, for refusing to grant a mining licence to the mining corporation Tethyan Copper Company, to pay the investor the colossal sum of $5.84 billion,[20] which amounts to around 2 percent of the country's GDP (and, to give a further indication of its enormity, is also close to the bailout amount that the IMF had agreed to lend the country to face a dire economic situation).[21] Other recent examples of mega-awards, amounting to similar fractions of the domestic GDP, include the 2012 *Occidental v. Ecuador*

15 H. Wöss et al., *Damages in International Arbitration under Complex Long-term Contracts* (2014), para. 2.28.

16 C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration: Substantive Principles* (2017), 425.

17 D. Desierto, 'The Outer Limits of Adequate Reparations for Breaches of Non-Expropriation Investment Treaty Provisions: Choice and Proportionality in Chorzów', (2017) 55 *Colum J. Transnat'l L.* 395.

18 Thomas, *supra* note 1.

19 J. Bonnitcha et al., *Damages and ISDS Reform: Between Procedure and Substance* (2021).

20 *Tethyan Copper Company Pty Ltd. v. Islamic Rep. of Pakistan*, ICSID Case No. ARB/12/1, Award (12 July 2019).

21 S. Masood, 'Pakistan to Accept $6 Billion Bailout from I.M.F.', *New York Times*, 12 May 2019, www.nytimes. com/2019/05/12/world/asia/pakistan-imf-bailout.html.

award ($2.3 billion for the termination of an oil concession),[22] the 2014 *Yukos v. Russia* decision ($50 billion, for the expropriation of the oil company),[23] or the more recent one rendered in *ConocoPhillips v. Venezuela* ($8.7 billion again for the nationalisation of the oil giant's Venezuelan subsidiary).[24]

Such amounts are staggering and often prove an impossibly heavy burden for the finances of the defendant countries. Given the enormous stakes, it is not surprising that the quantum question, centred on valuation, now constitutes the key battleground between States and investors in the arbitral process. All those involved in the practice of arbitration now devote a huge amount of energy to debate quantum matters, and commentaries are abundant.[25] Such is the importance of this question that it is now often litigated separately, in a separate procedural "quantum phase" that leads to a separate "quantum award", sometimes of several hundred pages. Arbitrators will justify at length their estimate of the value of the loss suffered by the investor as a result of the State's action, where in the past it would be dealt with summarily and discretionally.

B. The Understanding of Valuation as the Exclusively Technical Ascertainment of Economic Value

It is on valuation, therefore, that ISDS practice is now centred. Nevertheless, valuation is of interest only to practitioners. The specialist literature on quantum matters tends to be written exclusively by and for their own benefit. By contrast, the question of how damages are quantified, and in particular how valuation should be carried out, remains peripheral in broader debates about the legitimacy and reform of ISDS. Even though the critique of ISDS has

22 *Occidental Petroleum Corp. & Occidental Exploration and Production Co. v. Rep. of Ecuador*, ICSID Case No ARB/06/11, Award (5 October 2012).

23 *Yukos Universal Limited (Isle of Man) v. The Russian Fed.*, UNCITRAL, PCA Case No. AA 227, Award (18 July 2014).

24 *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. & ConocoPhillips Gulf of Paria B.V. v. Bolivarian Rep. of Venezuela*, ICSID Case No. ARB/07/30, Award (8 March 2019).

25 See e.g., C. Beharry (ed.), *Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration* (2018); Y. Derains and R.H. Kreindler (eds.), *Evaluation of Damages in International Arbitration* (2006); M. Kantor, *Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence* (2008); I. Marboe, *Calculation of Compensation and Damages in International Investment Law* (2017); S. Ripinsky and K. Williams, *Damages in International Investment Law* (2008); B. Sabahi, *Compensation and Restitution in Investor State Arbitration* (2011); J.A. Trenor (ed.), *Guide to Damages in International Arbitration* (2019); T. Wälde and B. Sabahi, 'Compensation, Damages, and Valuation', in P. Muchlinski, F. Ortino and C. Schreuer (eds.), *The Oxford Handbook of International Investment Law* (2008); Wöss et al., *supra* note 15.

become common[26] and has even reached the general media,[27] critical assessment tends to focus on issues that are perceived as more central, such as the legitimacy of international arbitral tribunals to adjudicate disputes between States and foreign investors, or the wisdom of granting those investors special protections that are not afforded to the local population (and sometimes prevent regulatory action in the public interest). The existence of multi-billion-dollar awards will often provoke an indignant outcry, but the enormity of those figures will be used as evidence of problems unrelated to how tribunals actually quantify damages.[28] Similarly, quantum issues have played almost no role in key debates such as the ratification of CETA (the EU-Canada free trade agreement) and, where they have begun to feature (as in the currently ongoing processes of ISDS reform),[29] there is no clear idea about what is wrong and needs reforming in how arbitral tribunals approach damages calculations. It would seem that the only worry is a certain lack of "consistency" or the risk that such calculations may sometimes be "incorrect".[30]

One of the main reasons why this is so is a certain perception of the nature of valuation. Simply put, the mainstream view, shared by both advocates and critics of ISDS, is that value is an economic or financial *fact*, which can be objectively ascertained with the help of economic or financial expertise. Thus, the perception of the quantum problem has not simply changed due the shift in attention from the question of standards of compensation to that of valuation. Crucially, it has gone from being perceived as heavily laden with legal and political considerations, to now being viewed as an exclusively technical issue.[31] The World Bank played a key role in this regard: in its influential 1992 Guidelines on the treatment of foreign investment, it argued that "the ideological approaches that have led to much of the controversy in the past" should be wiped clean, and that certain approaches to valuation (the now dominant ones) should be adopted as based on existing "consensus and best

26 See e.g., G. Van Harten, *The Trouble with Foreign Investor Protection* (2020); R. Beauchard, *L'assujettissement des nations. Controverses autour du réglement des différends entre États et investisseurs* (2017).

27 See the Buzzfeed report, 'The Court that Rules the World': www.buzzfeed.com/badge/globalsupercourt.

28 The recent $6.6 billion award against Nigeria in relation to a gas project is a case in point – talked about in the media, but only to raise suspicions about corruption, rather than to argue that there was anything wrong with the tribunal's calculation: 'The $6bn Judgment Pitting Nigeria Against a London Court', *Financial Times*, 12 July 2020.

29 The main processes where reform options have recently been considered are the modernization of the Energy Charter Treaty and UNCITRAL Working Group III.

30 See e.g., the EU text proposal for the modernisation of the ECT (24 June 2022), where the only proposed solution seems to be to clarify that "valuation criteria shall be based on internationally recognised principles and norms".

31 A recent exception is M. Paparinskis, 'A Case Against Crippling Compensation in International Law of State Responsibility', (2020) 83 *Modern L. Rev.* 1246 (where the author does not engage with valuation as such, but argues that the obligation to pay full compensation should be tempered by a rule against awards with a crippling effect on the State's finances).

practice".[32] Even if arbitrators today take quantum increasingly seriously in their reasoning and sometimes devote hundreds of pages of their decisions to its assessment, it is only out of a sense that the technical complexity of valuation requires as much (the tendency of the older generation of arbitrators to rely on their equitable judgment now being seen as unacceptably primitive and opaque). Discussions will focus on discrete technical problems that most will not view as legal at all, even less as political (e.g., at which date should the investment be valued? How should its income be projected into the future? What is the measure of risk of those projections not materialising?).

This perception certainly helps us understand why the question of how compensation should be calculated has not really made its way into the broader debate around the legitimacy of ISDS or its reform. That debate is framed in terms of the competing interests of States, or of capital and the general public, consideration for which seems so out of place in quantum. In addition, and even more importantly, the idea that value is an economic or financial fact that can be objectively ascertained also plays a crucial role in the reasoning of tribunals. This can be seen in the exclusion of equitable or moral judgment from the valuation process, and the generous deference to economic or financial expertise (both of which have contributed to the already mentioned inflation of awards).

The starting point of tribunals' reasoning is the now seemingly undisputed idea that the "full value" of an investment can only mean its fair market value (FMV), i.e., the price at which the investment would have been sold for in a hypothetical transaction immediately prior to the State's breach. Investment law practice has also shifted noticeably on this point. Prior to the early 1990s, the legal-political dispute around standards of compensation extended to the very notion of value. Some argued, and tribunals sometimes agreed,[33] that compensation for expropriation should be based on the gain obtained by the expropriating State, rather than be measured from the perspective of the investor.[34] In current practice, however, any possible discussion has disappeared: it is considered uncontroversial that value is necessarily equal to FMV, and generic references in treaties to "value" will be read as equal to FMV. This is based on the idea that "'[v]alue' is an objective concept with an economic content".[35] As stated in a leading treatise, "of many standards of 'value', [FMV] possesses the most lucid content and reflects the general meaning of 'value' as a price that an object would bring in a market".[36] Again, the World Bank 1992 Guidelines

32 World Bank, *Legal Framework for the Treatment of Foreign Direct Investment, Vol. 2: Guidelines* (1992), at 24.

33 See e.g., *Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875 (4 August 1981).

34 See e.g., Francioni, *supra* note 6.

35 E. Lauterpacht, 'Issues of Compensation and Nationality in the Taking of Energy Investments', (1990) 8 *J. Energy & Nat. Resources L.* 241, at 249.

36 Ripinsky and Williams, *supra* note 25, at 183.

played a key role in this regard, by promoting FMV as based on "consensus and best practices". Such consensus did not exist when the Guidelines were published, but it certainly seems solid today: arbitrators are so convinced of the lack of any alternative standards of value that, in the already cited *ConocoPhillips v. Venezuela* $9 billion award, the tribunal even found that the State had acted in "bad faith" simply by offering compensation that was not based on the investment's FMV.

The deference shown to economics is even more marked when determining the appropriate valuation method. This has resulted in a clear preference for the "discounted cash flows" method (DCF), which consists in estimating the worth of an asset on the basis of the cash flows it is expected to generate in the future (rather than on the amounts historically invested), discounted to present value to account for the risk of such amounts not actually materialising. It is this method that has produced the highest awards.[37] Prior to the 1990s, DCF was viewed with suspicion by international tribunals, and was even considered to be entirely inappropriate for the purposes of calculating compensation in ISDS.[38] The main reason was the uncertainty that necessarily comes with any future projections and the selection of a discount rate, as well as the ease with which both can be manipulated: it would run counter to the traditional legal principle that forbids compensation for "speculative" losses.[39] Today, however, DCF is the preferred method wherever the investment can be shown to have had prospects of future profits at the moment of the State's treaty breach. The key argument used by arbitral tribunals to justify this shift is not a legal one, but an analogy with financial practice, where the DCF method has been prevalent for some time. Simply put, arbitrators understand that because real-life investors estimate the value of investments via the DCF method, this is also how valuation should be done in ISDS. As a result, the old reluctance to embrace this valuation method is mocked as evidence of economic illiteracy – if scholars and tribunals formerly refused to rely on DCF, so goes the widely shared argument, it was simply because they "misunderstood" economics.[40] Whether DCF involves speculation is seen as irrelevant, as is legal authority more generally[41] (a similar argument has been used to justify awarding compound rather

37 J. Bonnitcha and S. Brewin, *Compensation Under Investment Treaties* (2020).

38 *Amoco International Finance Corp. v. Islamic Rep. of Iran*, Partial Award No. 310-56-3 (14 July 1987), 15 Iran-U.S. Claims Trib. Rep. 189, para. 238.

39 I. Seidl-Hohenveldern, 'L'Évaluation des dommages dans les arbitrages transnationaux', (1987) 33 *Annuaire français de droit international* 7, at 24.

40 See e.g., W.C. Lieblich, 'Determining the Economic Value of Expropriated Income-producing Property in International Arbitrations', (1991) 8 *J. Int'l Arb.* 59, at 67.

41 See e.g., *Tethyan Copper v. Pakistan*, *supra* note 20, para. 360: "the absence of investment treaty jurisprudence – affirmative or negative – does not in itself constitute a valid ground for rejecting a valuation method if the Tribunal is otherwise convinced that it is sound to apply it in the present case. As valuation practices for mineral properties develop in the industry itself, the assessment of damages may likewise evolve in investment treaty arbitration".

than simple interest, the second most important factor behind the inflation of awards: it does not make sense to award simple interest, as used to be the norm in international legal practice, since this falls short of what is expected in modern finance).[42]

It is reliance on FMV that has justified the use of the DCF method. However, the use of the latter has also justified the expansion of the former standard, to the point where there is no situation where the use of FMV is deemed inappropriate. In the past, the dominant view was that it was only possible to estimate FMV in the presence of an actual market.[43] Today, however, it is understood that it is *always* possible to calculate the investment's FMV, whether a market exists or not. The DCF method's focus on projected cash flows renders irrelevant any lack of evidence of transactions for that particular investment or even its complete unmarketability: all one needs to determine FMV is to identify the asset's prospects of future returns. Thus, the tribunal will always be able to estimate what the market price would have been had one actually existed.[44] As concluded by one author, market prices "are based upon the perceptions of potential buyers and sellers regarding the property's future prospects, and it is possible to analyze, based upon all the available relevant information, what those perceptions would be if there were a market".[45]

Ultimately, and following from the last point, it would seem that ISDS practice is committed to the idea that value, and more specifically "market value", is an intrinsic quality to an asset, regardless of any legal environment. This is particularly visible in how tribunals tend to ignore, when valuing the investment, any legal restrictions on its marketability. They will assume that a market does exist, and that, per the definition of FMV usually retained, it is necessarily "open and unrestricted". In the *Occidental v. Ecuador* case,[46] for instance, concerning the termination of an oil concession, the tribunal's valuation did not factor in the fact that participation in the concession could not legally be sold under Ecuadorian law (and per the concession agreement itself) without first obtaining the discretionary approval of the competent authorities. In other words, it chose to treat the investment as fully marketable, despite the existence of significant legal restrictions. Value is thus viewed as a pre-existing fact, one that is independent of applicable law. Again, this has the important effect of driving up the value of the investment for the purposes of calculating

42 See e.g., F.A. Mann and F. Alexander, 'Compound Interest as an Item of Damage in International Law', in F.A. Mann (ed.), *Further Studies in International Law* (1990), 377.

43 World Bank, *Legal Framework for the Treatment of Foreign Direct Investment, Vol. 1: Survey of Existing Instruments* (1992), at 145.

44 *Rumeli Telekom AS & Telsim Mobil Telekomunikasyon Hizmetleri AS v. Rep. of Kazakhstan*, ICSID Case No ARB/05/16, Award (29 July 2008), para. 802.

45 Lieblich, *supra* note 40, at 63.

46 *Occidental v. Ecuador*, *supra* note 22.

compensation: an investor will obviously pay less money for an asset whose marketability is heavily restricted than for one that can later freely be sold.

The idea that (market) value is an objective measure carries a further important consequence. Because valuation is seen as a fact-finding operation (the fact in question being the expectations of current investors of future returns and associated risk), tribunals will not allow equitable, moral or even legal considerations to play any role in the valuation process. Such a position once again contrasts with the views that were prevalent before the beginning of the investment arbitration boom in the early 1990s, where the calculation of damages was seen as inseparable from some form of equitable judgment. The need to reach a final figure that reflected a fair compromise between the interests at stake would often be underlined. Thus, "full compensation" was seen as nothing other than "equitable compensation".[47] If the valuation process produced a figure that struck the tribunal as inequitably high, it could be subject to moderation.[48] When estimating the loss of future profits, these would be calculated on the basis of a "reasonable" rate of return.[49] Such use of equitable judgment is now viewed as unacceptable, as it is thought to necessarily interfere with an objective assessment of the value lost by the investor.[50] As put by one tribunal, reliance on a reasonable rate of return necessarily "overshoots or undershoots true expected return".[51] Or as put by an author and arbitrator, there is no place for "moral considerations" in the assessment of damages, as this is not treated by arbitrators "so much as a legal problem, but as the mere exercise of their inherent power to assess any factual situation".[52]

To illustrate how the current approach to valuation operates in practice, consider the following example, taken from the *Quiborax v. Bolivia* dispute.[53] For years, a certain area known to contain rich mineral reserves had been classified as an ecological reserve that forbids any mining operations. After a change of government, the reserve was abrogated and several mining concessions were granted, without a termination date and in exchange for the payment of a minor tax, including one concession to officials from the mining ministry, who immediately sold it to foreign investors. The local population expressed its discontent and the government, after two years of protests, decided to revoke the concessions. The investor brought a successful claim against the State for

47 *Libyan American Oil Co. (LIAMCO) v. Gov't of the Libyan Arab Rep.*, Award (12 April 1977), 17 ILM 3 (1978), para. 317.

48 See e.g., *Starrett Housing Corp., Starrett Systems Inc., & Starrett Housing International Inc. v. Islamic Rep. of Iran*, Final Award (14 August 1987), 16 Iran-U.S. Claims Trib. Rep. 112.

49 See e.g., *American Independent Oil Co. (AMINOIL) v. Kuwait*, Award (24 March 1982) 21 LM 976.

50 J. Paulsson, 'The Expectation Model', in Derains and Kreindler, *supra* note 25, at 57.

51 *Walter Bau AG v. Kingdom of Thailand*, UNCITRAL, Award (1 July 2009), para. 14.10.

52 Y. Derains, 'Conclusions', in Derains and Kreindler, *supra* note 25, 225, at 226–7.

53 *Quiborax S.A., Non Metallic Minerals S.A. & Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award (16 September 2015).

unlawful expropriation and breach of fair and equitable treatment. To calculate compensation, the tribunal followed strictly the principles that we have outlined above: private investors are entitled to recover the full FMV of the lost investment, which are equal (per DCF) to the present value of the concession's projected cash flows. Given that it had been granted without a termination date, this covered the future profits expected until the exhaustion of the mineral reserves. A figure of several million dollars was reached, far in excess of the amounts invested by the investor or the price it had paid to purchase the concession two years earlier. No considerations of an equitable or political nature, or even a discussion of the interests of the investor worthy of protection, made their way into the tribunal's reasoning, thus in keeping with the notion of value as an economic fact and valuation as a fact-finding operation. The potentially crippling effect of the award on the State's finances was of no consequence. The tribunal also disregarded any policy goals behind the termination of the concession, however legitimate they may have been, such as environmental or redistributive concerns. The State's sovereignty over its natural resources likewise played no role, nor the interests of local communities, the brevity of the investment's duration, or its limited contribution to local development. None of this is surprising. On the contrary, it is perfectly consistent with how value and valuation are understood in current ISDS. To take any of these considerations into account would unacceptably interfere with the objective assessment of the only thing that counts for the purposes of valuation: the present value of the investor's expectation of future gain attached to ownership of the mining concessions, immediately prior to the State's intervention.

C. The Construction of Investors' Rights through Valuation

As we have just seen, the reasoning of ISDS tribunals is expressive of, and shaped by, a certain understanding of value and valuation. We will now consider the broader effects of the specific approach to valuation found in ISDS. In other words, to take the terminology developed in the work of Marion Fourcade,[54] we will leave the "how" question, to ask the "what then" question. We have already pointed to two key outcomes of the approach followed by arbitrators: first to cement the idea that valuation is peripheral in broader debates about ISDS, and second to contribute to the inflation of awards. We will now be focusing more profoundly on how such an approach feeds back into the very heart of the ISDS system, through the definition of the interests of investors that are the object of legal protection. Indeed, by settling on a certain approach to valuation, tribunals have come to define the full extent of

54 Fourcade, *supra* note 5.

the rights of investors (and conversely the obligations of States), and thus, ultimately, the fundamental rationale behind international investment law.

Any talk of the "rights" of investors or "obligations" of States is meaningless without consideration of how damages are calculated. Remedies precede rights, as the saying goes. Take the example of the termination of an oil exploration project, motivated by environmental concerns, and yet in breach of international investment law standards. To speak here of a right against such termination tells us very little. Is the investor protected against the loss of all future profits that the oil reserves would have generated? Or is it only entitled to some level of profitability, one that is seen as reasonable, in view of countervailing public interests or State prerogatives? Or only to the recovery of invested sums, so that it is returned to the situation that existed prior to its investment decision? Obviously, the right actually guaranteed by international investment law has a very different meaning in the three scenarios. In the first, the investor is treated as having something like an absolute property right over the oil project's expectations of future profits, an absolute right that cannot be trumped by other interests such as preoccupations around climate change. In the second, it is instead a right to profits that is protected: those expectations of future cash flows cannot be said to properly belong to the investor, among other things because it is up to the State to set the proper level of profitability via taxation and regulation, but the investor is sheltered against the risk of a loss-bearing project. In the third, there is no right to profits but the investor is nevertheless entitled to rely on the promise of international law-compliant behaviour by the State.

Thus, it is by determining how investment should be valued that tribunals are defining the rights of investors and obligations of States. In this sense, valuation can be said to perform a larger constitutive function with regards to what is being valued. As Liliana Doganova has put it, "[s]tatements about how much things are worth are statements about what things are, or what they should be".[55] Or, as pointed out elsewhere, "valuation is so revealing precisely because it is so much more than a process of monetary commensuration: it is, much more powerfully, a process of 'definition' or social construction in a substantive sense".[56] A case in point is the expansion of the DCF method, one of the most notable developments in this domain. Whereas in the past tribunals would be reluctant to award compensation for the loss of future profits, it is now routine to do so, as DCF, based as it is on the idea that the worth of an investment is equal to the present value of its future profitability, has become the preferred valuation method. The effect has been a transformation in the rights of investors: from a right to recover

55 L. Doganova, 'Discounting the Future: A Political Technology', (2018) 19 *economic sociology._the european electronic newsletter* 4, at 6.

56 Fourcade, *supra* note 5, at 1769.

the costs incurred in reliance on the promise of compliant behaviour by the State, what investment treaties now ultimately protect is the expectation of future profits that may happen to exist at the moment of the State's breach. This is what Sornarajah refers to when he points to the danger of valuation methods proving to be, in the context of international investment law, "the means by which the tail is made to wag the dog", or of introducing "standards of compensation through the back door".[57]

The expansion of DCF is not, however, the only example of how investors' rights are constructed through valuation decisions. We will offer two more, both related to the standard of FMV. This standard is key to defining the nature and extent of the rights of investors, as it establishes what the investors "had" before the State's breach and therefore the baseline to which investors must be returned through appropriate compensation. The first example concerns the very choice of FMV as standard of value. This is described as an "abstract" or "objective" standard, since it locates value in the hypothetical transaction between an ideal buyer and an ideal seller. It thus contrasts with alternative "concrete" or "subjective" bases of value from the accounting/financial world such as "investment value" or "fair value", which consider value from the perspective of a specific individual (investment value) or of two concrete parties to a transaction (fair value). The fact that, against the argument advanced by some,[58] tribunals have consistently opted for the impersonal standard of FMV, means that losses suffered by an investor will only be seen as compensable to the extent that they correspond to those that would have been sustained by hypothetical market participants. Thus, through reliance on FMV, the extent of investors' rights is ultimately determined by an impersonal entity (the market) rather than on the basis of their own subjective perceptions.

But what kind of a market is it that will decide what expectations count as legitimate? Applying the FMV standard requires identifying the conditions in which that hypothetical transaction would have taken place, and which therefore determine the situation that the investor must be restored to. The arbitral case law has tended to endorse the following definition of FMV, adopted by the American Society of Appraisers in its International Glossary of Business Valuation Terms:

> the price, expressed in terms of cash equivalents, at which property changes hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm's length in an open and unrestricted

57 M. Sornarajah, *The International Law on Foreign Investment* (2017), 450.
58 Marboe, *supra* note 2.

> market, when neither is under a compulsion to buy or sell and when both have reasonable knowledge of the relevant facts.[59]

What is notable about this definition, and particularly its reference to an "open and unrestricted market", is its largely fictional nature. In most circumstances, the "marketability" or "liquidity" of assets, i.e., the ability of the asset-holder to transform it into money, is far from unimpeded. In some cases, there is not even a market where the property could be sold, either because of its intrinsic uniqueness, or due to the applicable legal regime prohibiting its exchange on the market. As already pointed out, however, tribunals tend to ignore these restrictions on the marketability of investments. They will assume that a market does exist, and that it is "open and unrestricted", thus treating value as intrinsic to an asset and existing prior to any legal environment.

The fact that this assumption has long been discredited, that one cannot speak of value independently from law, is of no consequence here.[60] For our purposes, what matters is how the assumption shapes the rights of investors. Indeed, since FMV defines the baseline to which investors must be restored, investors are treated as having a legitimate expectation of unimpeded marketability, however ungrounded in reality this expectation may be. This is consistent with the notion, consolidated through the increasingly widespread reliance on the DCF method, that investors, as explained earlier, have a legitimate claim to maintain current expectations of future cash flows, in spite of the fact that these cash flows are largely in the hands of the State, who may for instance legitimately choose to increase taxation or regulate the investor's activities in ways that reduce profit margins. In both cases, compensation is calculated on the assumption that the legitimacy of the investor's claim over the investment is somehow autonomous from any legal grounding or interference.

D. Conclusion: The Potential of a Critique of Valuation in ISDS

To recap, our close reading of the approach to valuation taken by international investment tribunals has focused on three different aspects. The first has been the place occupied by valuation in the overall ISDS process, which we explained is increasingly central and inescapable, as arbitral practice has left behind discussions around applicable standards of compensation to focus instead on estimating the loss in financial value suffered by the investor. The second has been the specific ways in which tribunals actually perform this estimate, which we showed is decisively shaped by a view of valuation as a

59 See e.g., *CMS Gas Transmission Co. v Argentine Rep.*, ICSID Case No. ARB/01/08, Award (12 May 2005), para. 402.

60 K. Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (2019).

technical operation, driven by financial or economic expertise and indifferent to political or even legal considerations. The third has been the broader effects of such an approach, not just by inflating the actual amounts (by embracing certain valuation techniques and excluding moderating influences such as equitable judgment), but more fundamentally how such an approach has redefined the rights of investors to whose protection the ISDS system is geared (most notably by linking investors' rights to investors' expectations of future profitability).

It is obvious that the stakes involved in how compensation is quantified are massive: awards can have a huge impact on the finances of States, thus redirecting resources to private investors that could be used in the public interest, and the large amounts can contribute to the "regulatory chill" effect that is more generally associated with international investment law.[61] However, our point is not simply that we should pay more attention to the calculation of damages because of the amounts involved. Merely acquiring a better understanding of the reasoning of tribunals and ISDS commentators is not enough. As we will argue in this last concluding section, taking valuation seriously also allows for a disruptive intervention in the field of international investment arbitration to weaken the legitimacy of current practice, as well as to justify alternative approaches to valuation.

In relation to the legitimacy of current practice, it is important to emphasise that the ideas that we have described as underlying current approaches to the calculation of damages are particularly effective at rendering practice impervious to traditional forms of legal criticism. Indeed, any argument related to the injustice of hitting a developing country with a crippling multi-billion-dollar award, or the importance of the policy goals whose pursuit motivated state intervention, will simply bounce off against the view that the losses suffered by the investors are what they are, it is simply an inescapable fact.[62] Arguments based on the (lack of) formal legal basis for the standard of full compensation (for instance by pointing out that customary international law allows for more flexibility[63], or by challenging the relevance of the case law that is usually used as authority for it[64]) are equally toothless: the appeal of that standard remains too strong, as the idea of restoring to the investor less than the value of what was taken away (to leave it "undercompensated") simply seems impossible to argue. Simply put, the development of current practice has happened entirely outside traditional legal argument. Thus, the expansion of investors' rights to future profits has not been justified as a better compromise between the

61 See e.g., K. Tienhaara, 'Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement', (2018) 7 *Transnat'l Environmental L.* 229.

62 I. Marboe, *Damages in Investor-State Arbitration: Current Issues and Challenges* (2018), 4.

63 Desierto, *supra* note 17.

64 Z. Crespi Reghizzi, 'General Rules and Principles on State Responsibility and Damages in Investment Arbitration: Some Critical Issues', in A. Gattini, A. Tanzi and F. Fontanelli (eds.), *General Principles of Law and International Investment Arbitration* (2018), 58.

different interests at stake, an innovative interpretation of the relevant authorities, or on the basis of some idea about the rationale behind the investment treaty system. Instead, it has resulted from the understanding that it is objectively the case, as revealed by economic/financial expertise, that the investment's value is equal to its expectations of future returns. It is for this reason that tribunals now consider that they have *no choice* other than to resort to the DCF valuation method wherever the investment in question has prospects of continuing operations.

Ultimately, therefore, it is the widespread adherence to the assumptions that we have previously outlined, about the objectivity of value and the exclusive ability of economics or finance to govern the valuation process, that explains why the key pillars of modern arbitral practice on quantum matters (full compensation, FMV, DCF) seem so impervious to criticism (and not any treaty language or other traditional sources of international law). Challenging these assumptions, therefore, should be the focus of any critical project in the context of ISDS. Our own analysis contributes to such a challenge, by exposing the extent to which value is not an independent fact but a construction by arbitrators. Indeed, the investment value on which the final award is based does not result from some external reality that the arbitrators have no choice but to bow down to, but from a series of contingent decisions on their part, which enact an idiosyncratic understanding of both value and valuation. Notable examples, as we have shown, include the decisions to resort to market value as the only possible standard of value, to always treat investments as freely marketable, to view valuation in ISDS as fundamentally analogous to the one performed by investors, etc. If we accept that value is not an objective reality and need not be abandoned to the exclusive domain of economists or financial consultants, the basis for much of current arbitral practice disappears, and it becomes again possible to articulate an alternative approach.

That said, critique does not only serve to undermine the valuation practices of tribunals, it also points the way to alternative (and better) approaches. This is not a question of proposing new treaty standards (as others have done),[65] but to suggest how tribunals should engage with valuation under already existing arrangements in more acceptable ways. This follows from our demonstration that valuation can be claimed back as a *legal* concern. Indeed, if valuation and investors' rights are inextricably linked, should the former not be guided by the latter rather than the reverse (as currently seems to be the case)? This would mean that tribunals should begin by determining the proper extent of the protection that international investment law offers to investors. For instance, is the expectation of future profits a legally protected interest? This cannot depend on whatever methods are followed by real-life investors, but on whether the

65 E. Aisbett and J. Bonnitcha, 'A Pareto-Improving Compensation Rule for Investment Treaties', (2021) 24 *J. of Int'l Economic L.* 181.

relevant legal sources consider such expectations worthy of protection. There are, in fact, good reasons to argue, if we view this question from a legal lens, that the investors' entitlement should be interpreted more restrictively.

It is not possible here to enter into this discussion in great detail,[66] but we will point to two key considerations that tribunals should address. First, tribunals should consider whether the investor has *any* entitlement to future profits, be it under the host State's law or under international law. Such an entitlement exists where the investor has, for instance, been deprived of its property, since legally speaking the right to property usually entails the right to reap its fruits. Conversely, it is entirely lacking where the investor has simply lost, say, the *opportunity* to enter into a profitable contract, but not an actual *right to* the contract (e.g., where this depended on some discretionary act by the State).[67] Second, if the investor's expectation of future profits is found to be a legally protected interest, the tribunal should then consider the *extent* to which this is so. Here it will be necessary to take into account that the exact extent of any business' profitability is largely in the hands of the State. Indeed, international investment law poses very few restrictions on States' ability to raise taxes on corporate profits. It cannot therefore be said that the investor is *entitled* to maintain the stream of future profits that happens to be projected at any point in time. Thus, the task of the tribunal is to balance the State's right to take legitimate profit-depressing action with the investor's entitlement to some measure of profits.[68] Reconciling the two is not simply a factual enquiry, but necessarily involves some form of equitable judgment, as adjudicators must determine what measure of profits is *reasonable*.[69]

There is good reason to be concerned at the current state of affairs, and decry the excessive amounts that States are now often ordered to pay. How damages should properly be quantified is, of course, open to discussion. Ultimately, however, the first step in articulating a meaningful alternative to the currently dominant approach is to recognise that quantum matters, and particularly the determination of investment value, are neither purely "technical" nor peripheral, but should be tackled as a question of the highest legal and political significance.

66 For a more developed argument on the appropriate method of calculating damages for the loss of future profits, see Marzal, *supra* note 3, pt 4.

67 This is precisely what tribunals fail to consider, by focusing only, as a purely factual matter, on whether the investor had a chance of obtaining future profits, regardless of whether that chance is a legally protected interest. See e.g., *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. India*, PCA Case No. 2013-09, Award on Quantum (13 October 2020).

68 R.L. Hale, 'The "Fair Value" Merry-Go-Round, 1898 to 1938: A Forty-Year Journey from Rates-Based-On-Value to Value-Based-On-Rates', (1938–1939) 33 *Ill. L. Rev.* 517.

69 E. Penrose, G. Joffé and P. Stevens, 'Nationalisation of a Foreign-Owned Property for a Public Purpose: An Economic Perspective on Appropriate Compensation', (1992) 55 *Modern L. Rev.* 351.

Chapter 11

On the Value of Rights

Florian Hoffmann

A. The Value of Rights (in the Liberal Script)

Talk about human rights, or just rights, used here both in the generic sense of fundamental "subjective" rights and their specifically international embodiment, is shot through with references to value, valuation, and values. In the most colloquial sense, the "value of rights" tends to be associated with the Western liberal canon within which rights are essentially taken to articulate a set of values in the form of individual entitlements vis-à-vis public authority.[1] These entitlements are, in turn, deemed to derive from a foundational value, notably personal autonomy, which is understood as a fundamental human condition and as constitutive of human dignity. Rights function both as a metonymy for this value and as instruments for its realization and, as such, as an ancillary value themselves. That specific value of rights is deemed to consist of their nature as absolute constraints of a politics that, in the liberal script, is defined as the negotiation of public interest under conditions of pluralism and through representative democratic institutions. Indeed, only insofar as rights function as effective trumps that police the limits of politics while not themselves being subject to politics, is a democracy deemed to be properly liberal.[2]

The particular efficacy of rights as a "value police" in liberal democracy is, from the internal vantage point of the liberal script, owed to a complementary relationship between the abstract validity of the values they enshrine and the concrete facticity of their realization through law. Hence, rights become concrete facts as legally enforced claims by individuals or groups vis-à-vis the state but their validity is not deemed to derive from their factual realization but from the abstract value they represent, regardless of their realization, so that they can, in fact, be violated concretely without thereby losing their abstract (and absolute) value.

To many critics of the liberal script and its conception of rights, this construction is solipsistic and immunizes rights both from political contestation

1 On colloquiality and the vernacular see F. Muniesa's contribution to this volume.

2 See, classically, R. Dworkin, *Rights as Trumps* (1977).

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and from cultural relativization. This charge is seemingly borne out by the unease with which many human rights defenders, whether self-conscious liberals or not (and many are not!), tend to react to questions about the relative value of rights or the added value a rights optic might, or might not, bring to a particular issue. Indeed, openly querying the value of rights is often treated as nothing less than sacrilegious, for it is seen as subjecting their absolute value to a utilitarian or functional logic, thereby reducing rights to representations of particular social, political or economic interests or to specific elements of a historically contingent system or socio-cultural configuration – a proposition that, from the internal view of the liberal script, seems plainly non-sensical and deeply subversive. From the latter's perspective, the value of rights must, instead, be self-evident.

That self-evidence seems, of course, to have been borne out until relatively recently, with the domestic and international rights protection infrastructure having gradually but continuously grown since WWII and in a much accelerated fashion during the era of "rights triumphalism" in the aftermath of the Cold War.[3] That period saw parallel "right revolutions" in the international and domestic spheres, respectively, with, on the one hand, an all-encompassing "rights-based approach" mainstreamed into international organizations and transnational civil society that has become the new baseline framework for development policy planning, implementation and assessment;[4] and, on the other hand, the proliferation of rights-based litigation – especially in post-transition states – as a tool to advance social policies or safeguard against their dismantling. All of this has further reinforced the position of rights as one of the dominant self-descriptions of the late-modern world and it has produced an epistemic paradigm that has framed the world, and the world's wrongs, in terms of the foundational values enshrined by rights.[5] In the eyes of its critics (see below), rights discourse has thereby come to hegemonize transformational politics despite the disconnect between the abstract promise and the continuing concrete violation of human rights the word over.

However, this liberal standard model has never been uncontested, with both its normative assumptions and its empirical storyline having been queried

3 See S. Marks, 'The End of History – Reflections on Some International Legal Theses', (1997) 8 *European Journal of International Law* 449; see also N. Klein, *The Shock Doctrine* (2007).

4 See, for instance, D. Tsikata, 'The Rights-Based Approach to Development: Potential for Change or More of the Same?', (2004) 35 *IDS Bulletin* 130; V. Abramovich, 'The Rights-Based Approach in Development Policies and Strategies', 2006 (April) *CEPAL Review* 33; P. Dann, *The Law of Development Cooperation: A Comparative Analysis of the World Bank, the EU, and Germany* (2013); and H.O. Sano, 'Development and Human Rights: The Necessary, but Partial Integration of Human Rights and Development', (2000) 22 *Human Rights Quarterly* 734; and V. Gauri and S. Gloppen, 'Human Rights-Based Approaches to Development: Concepts, Evidence, and Policy', (2012) 44 *Polity* 485.

5 See, for instance, the seminal M.W. Mutua, 'The Ideology of Human Rights', (1996) 36 *Virginia Journal of International Law* 589.

from the beginning. Yet, up to relatively recently that contestation has, arguably, not amounted to a crisis that would place both the liberal script and its framing of human rights on the defensive, a situation that has now changed in light of the continuing crisis of "world public order" that has been rocking the (neo-)liberal paradigm for at least a decade (though may as well have its symbolic antecedents in the events of 11 September 2001).[6] Thus, the liberal script's legitimation narratives, including that of human rights, seem to work less and less as the gap between what people perceive as reality – which has, of course, itself become a highly contested concept – and its "official" image is becoming unbridgeable. Rising inequality, the precarization of labour and the immiseration of growing sections of society, especially – but increasingly not only – in the global South, have led to massive disenchantment amongst those being – or feeling – left behind. The consequent structural instability and social fragmentation has, in turn, led both to an ever more forceful policing of discontent by public authority and to a widespread (right) populist turn based on old and new irredentist narratives.[7]

The liberal script, understood as both liberal (democratic) politics and (neo-) liberal capitalist economics, is now more than ever identified with (Western) late modernity and the Western-dominated late-modern world order that emerged after WWII on the backdrop of colonial and imperialist antecedents.[8] Human rights have been singled out as one of the key ciphers of that order and have become "essentially contested concepts" that are seen as either handmaidens of the neoliberal advance or as instruments of its containment, as productive of an unrealistic sense of (welfare) entitlement or as a necessary entrenchment thereof, as overstretching the fiscal capacity of individual states, or as a privileged idiom to articulate and concretize human dignity in a post-national world.

When and why rights have come to occupy this privileged discursive position is itself subject to debate, with a new revisionist historical school around Samuel Moyn claiming that human rights as we refer to them today are no older than the 1970s, when Western elites enthralled with utopian cosmopolitanism allegedly re-appropriated an international human rights agenda that, up to then, had mostly been used by Third World liberation movements in their quest for national sovereignty.[9] Older critiques in the wake of Marx have, in turn, always maintained that rights are a central aspect of capitalism –

6 See, for instance, M.A. Graber, 'Constitutional Democracy in Crisis? The Right-Wing Populist Surge', (2018) Verfassungsblog, 26 August 2018, www.verfassungsblog.de/constitutional-democracy-in-crisis-the-right-wing-populist-surge/; and K. Kempter's chapter in this volume.

7 See W. Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (2015); and P. Alston, 'The Populist Challenge to Human Rights', (2017) 9 *Journal of Human Rights Practice* 1.

8 See, for instance, S. Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (2011), 95; and L. Eslava, *Local Space, Global Life* (2015).

9 S. Moyn, *The Last Utopia: Human Rights in History* (2010).

and capitalist expansion and its "colateral" effects such as imperialism, (neo-) colonialism, (structural) racism or genderization – and, thus, follow the latter's permutations, with the contemporary neoliberal world order (and its to-be-expected crisis) being just the latest iteration.[10]

At the core of these critiques and their counter-critiques lie, of course, questions of value, most notably regarding the role of rights in the process of social and economic value production under (liberal) capitalist conditions.[11] One aspect of that process, particularly relevant to the question of the value of rights, is that it is premised on the vertical differentiation, social stratification or, simply put, inequality of humans, a feature that seemingly flies in the face of the liberal script's egalitarian conception of "equal rights". This apparent paradox is a central theme in all critiques of rights and gives rise to three fundamental contentions they all share: first, that rights impact on inequality; second, that addressing inequality – and the system of value production that generates it – by means of rights, amounts to a devaluing of the political process that underlies both; and third, that, therefore, rights (also) always function as an ideological framework that effectively obscures that process and thereby actually stabilizes the existing configuration of inequality. As will be explored below, the different contemporary critiques of rights, therefore, target the dominant system of value production within which rights are seen to play a crucial role. Positions, of course, then starkly diverge on whether inequality is seen as a good (as on the "right") or a bad (as on the "left") and whether rights are, therefore, deemed to be "too much" in terms of fostering (undue) egalitarianism or "not enough" in terms of overcoming inequality.

10 The literature here is considerable, see, exemplarily S. Lukes, 'Can a Marxist Believe in Human Rights?', (1982) 1 *Praxis International* 334; S. Marks, 'Four Human Rights Myths', in D. Kinley, W. Sadurski, K. Walton (eds.), *Human Rights: Old Problems, New Possibilities* (2013), 217.

11 For an overview of some of the earlier critiques, see F. Mégret, 'Where Does the Critique of International Human Rights Stand? An Exploration in 18 Vignettes', in J.M. Beneyto and D. Kennedy (eds.), *New Approaches to International Law: The European and the American Experiences* (2012), 3; M. Langford, 'Critiques of Human Rights', (2018) 14 *Annual Review of Law and Social Science* 69; and J. Lacroix and J.-Y. Pranchère, *Human Rights on Trial: A Genealogy of the Critique of Human Rights* (2018); see also, amongst many more, S. Moyn, *Not Enough: Human Rights in an Unequal World* (2018); S. Marks, 'Human Rights and Root Causes', (2011) 74 *Modern Law Review* 57; S.L. Hoffmann (ed.), *Human Rights in the Twentieth Century* (2011); W. Mignolo, *The Darker Side of Western Modernity: Global Futures, Decolonial Options* (2011); A.S. Rathore and A. Cistelecan (eds.), *Wronging Rights?: Philosophical Challenges for Human Rights* (2012); R. Dickinson et al. (eds.), *Examining Critical Perspective on Human Rights* (2012); E. Balibar, 'On the Politics of Human Rights', (2013) 20 *Constellations* 18; J.-M. Barreto (ed.), *Human Rights From a Third World Perspective: Critique, History and International* Law (2013); E. Posner, *The Twilight of Human Rights Law* (2014); S. Hopgood, *The Endtimes of Human Rights* (2014); N. Maldonado-Torres, 'On the Coloniality of Human Rights', (2017) 114 *Revista Crítica de Ciências Sociais* 117; and C. Menke, *Critique of Rights* (2020); see also F. Hoffmann, 'Facing South: On the Significance of an/other Modernity in Comparative Constitutional Law', in P. Dann, M. Riegner, M. Bönnermann (eds.), *The Global South and Comparative Constitutional Law* (2020), 41.

B. Valuing (In)Equality? – The Critique of Rights (in the Liberal Script)

If the role of rights in the system of value production is put into focus, then one of the primary criteria for framing the contemporary critique of rights has to be in relation to their position on inequality and on the effect they are taken to have thereon. This criterion maps, conveniently if not entirely precisely, onto the classical "left-right" spectrum, with, broadly speaking, "left" critiques holding rights responsible for being either ineffective vis-à-vis the inequality produced by (neo-)liberal capitalism or for being, in fact, complicit in it; and with "right" critiques, conversely, charging rights with containing an egalitarian vision that either threatens traditional social stratification or distorts the production of capitalist (market) value. Importantly, both sides of this spectrum set themselves up against what they deem to be the framing of rights by the dominant "liberal script" – and in that sense are anti-liberal – though, as shall be seen, for the "left" critique that script is largely co-extensive with (Western) liberal capitalism whereas for the "right" it connotes either (multi-)cultural postmodernity or (so-called) left liberal or social democratic (welfare) reformism.[12] Likewise, all critiques share in the charge that rights discourse obscures the political nature of the social and economic arrangements at issue (aka the system of value production) and, thus, preclude these from being dealt with properly, that is, explicitly politically.

The "right" critique consists of two distinct if, by some accounts, interdependent positions that take issue with what they see as the inherent egalitarianism of the logic of rights.[13] A first, cultural critique has accompanied the "rise of rights" from the very beginning and comprises positions ranging from communitarianism, via traditionalist conservativism and to neo-fascist thought.[14] While never silent, it has more recently gained renewed prominence in the wake of the "right"-identitarian populism that has rolled over many polities as a consequence of the deepening crisis of the neoliberal world order.[15] "Right"

12 See Lacroix et al., *supra* note 11.

13 There is considerable debate about the common origins and/or functional entanglement of "right" populism and neoliberalism. Wendy Brown, for one, has forcefully argued for their inherent linkage, see Brown, *supra* note 7; for the exemplary case of contemporary Brazil, which can be seen as a laboratory of that linkage, see P. Anderson, 'Bolsonaro's Brazil', (2019) 41 (3) *London Review of Books*.

14 See Lacroix et al., *supra* note 11, at 35.

15 See, inter alia, D.J. O'Byrne, 'The Rise of Populism, the Demise of the Neoliberal and Neoconservative Globalist Projects, and the War on Human Rights', (2019) 9 *International Critical Thought* 254; as well as, specifically on human rights, G.L. Neumann (ed.), *Human Rights in a Time of Populism: Challenges and Responses* (2020); C. Rodríguez-Garavito and K. Gomez (eds.), *Rising to the Populist Challenge: A New Playbook for Human Rights Actors* (2018); and M. Alegre, 'Populism and Human Rights: Oil and Water ?', Unpublished Manuscript, Sela Annual Conference 2016, www.law.yale.edu/system/files/area/center/kamel/sela16_alegre_cv_eng.pdf.

populists have spurned rights with particular vitriol as the playthings of (liberal) elites that are seen as promoting "cultural Marxism" against traditional values, as threatening public security by protecting criminals and as impeding "can do" politics by placing limits on executive power.[16] In particular, they reject the liberal framing of rights as entitlements meant to be held by everyone equally, individually and in abstraction from any form of collective identity. Like Marx on the other side of the (political) spectrum, they charge rights with distorting the human "species being" (*Gattungswesen*) by artificially atomizing society, though unlike Marx, they do so against the backdrop of a traditionalist or organicist vision of society, the alleged values of which rights are taken to infringe.[17]

The fundamental premise of this critique is, however, that both humans and societies are inherently unequal and that some form of social stratification is the natural order of things. Indeed, the populist right draws on the fascist conceptual lexicon to shift the focus away from the social and economic base and towards culture and identity with a view to naturalize social hierarchy, inequality and exclusion "out in the open". It does so, in part, through a multi-layered value discourse in which society is defined as a given community of values, membership in which is premised on one's conformity therewith. On account of their egalitarian vision, rights are then seen as forcing the inclusion of the "wrong" humans into the community, effectively bestowing value onto those deemed to be without it.[18] Indeed, with the cynical and deliberately ambiguous slogan of "human rights for right humans" rights have been re-interpreted as signifiers of unequal value.[19] For to have rights, i.e., to have what rights promise, is here seen as a mark of value and, therefore, of membership in the community (and endowment with the social status and material resources of full citizenship), whereas to need rights in order to claim what one does not have marks one out as lacking in value.

16 See J. Jamin, 'Cultural Marxism and the Radical Right', in P. Jackson and A. Shekhovtsov (eds.), *The Post-War Anglo-American Far Right: A Special Relationship of Hate* (2014), 84; T. Mirrlees, 'The Alt-Right's Discourse of "Cultural Marxism" – A Political Instrument of Intersectional Hate', (2018) 39 *Atlantis Journal* 49; J. Knijnik, 'To Freire or Not to Freire: Educational Freedom and the Populist Right-Wing "Escola Sem Partido" Movement in Brazil', (2021) 47 *British Educational Research Journal* 355.

17 The "species being" is, of course, Marx's alternative concept of human nature, developed from Feuerbach most deeply in K. Marx, *The German Ideology* (1970).

18 See, for instance, E. Traverso and R. Meyran, *The New Faces of Fascism: Populism and the Far Right* (2019).

19 A phrase and framing adopted in the original Portuguese *direitos humanos para humanos direitos* by the Brazilian populist right around its figurehead and current president Jair Bolsonaro but likely to have emerged already during the mid-2000s as part of anti-human rights, anti-crime, pro-public security discourse; see P.R. Bodê de Moraes, 'Direitos humanos para humanos Direito(s)', (2009) *Acta Academica*, www.cdsa.aacademica.org/000-062/2225.pdf?view.

Rights holdership, hence, actually functions here as a marker of (class) distinction that divides humans into those that are part of and are regulated by the *biopolis*, the sphere of (social) life and the living (aka the community of values) and those that are criminalized and discarded into the *necropolis*, the sphere of the asocial and dispensable life, equivalent to Marx's "stagnant surplus population" that has no value for capitalist value production and can, consequently, be legally and physically eliminated.[20] The *biopolis* incorporates, of course, both the community of values and the sphere of capitalist value production, which explains why the populist "right" has not only targeted classical civil but also social and economic rights and the political militancies -such as trade unionism- associated with their cause.[21] To claim rights and force the incorporation of those "without value" (be they minorities, the "unproductive" or simply those deemed to "not belong") is, thus, always subversive of the social order.

Whereas the populist "right" rejects rights for their apparent promotion of social and cultural egalitarianism, the second strain in the "right" critique is libertarian and accordingly charges rights with fostering economic egalitarianism. This critique derives from the market libertarianism of neo-classical economics and its scepticism of any form of state intervention beyond the bare minimum guarantee of the rule of law, and it has recently acquired renewed intellectual currency through the work of Eric Posner and others in the wake of the "law and economics" movement.[22] While it recognizes a core package of civil rights as necessary protections to guarantee market freedom, it considers especially justiciable social and economic rights, including labour rights, as impediments to the efficient allocation of scarce resources through market mechanisms and, as such, as distortions to the formation of "just market value" which, to them, should also apply to the basic goods for which social rights purport to mandate minimum standards.[23] In this vein, rights are also seen as standing in the way

20 See M. McIntyre and H. Nast, 'Bio(necro)polis: Marx, Surplus Populations, and the Spatial Dialectics of Reproduction and "Race"', (2011) 42 *Antipode* 1465; besides Marx, the argument draws, inter alia, on M. Foucault, *The Birth of Biopolitics: Lectures at the College de France, 1978–1979* (2010); and A. Mbembe, 'Necropolitics', (2003) 15 *Public Culture* 11; one might also add G. Agamben, *Homo Sacer* (1998).

21 This has, of course, been Marx's point all along, namely that in capitalism rights are inequality rights, though in the (neo)liberal paradigm their function is precisely to cloak this factual inequality through a semblance of formal equality, whereas in new right populism and its proto-fascist ideology, inequality and stratification is openly espoused; see, inter alia, K. Marx and F. Engels, *On the Jewish Question*, *Collected Works*, Vol. 3 (1975); K. Marx, *Critique of the Gotha Programme* (1938).

22 See Posner, *supra* note 11.

23 See, inter alia, B. Fine, 'From One-Dimensional Man to One-Dimensions Economy and Economics', (2016) 197 *SOAS Department of Economics Working Paper Series*, www.eprints.soas.ac.uk /22618/2/file112904.pdf; and K. Birch and V. Mykhnenko (eds.), *The Rise and Fall of Neoliberalism: The Collapse of an Economic Order?* (2010).

of austerity measures required to correct (allegedly) inefficient welfare policies that purport to provide these goods through redistributive schemes.[24]

On the other, "left" side of the spectrum the critique holds rights to be either ineffective as instruments against inequality or as positively implicated in its production. The former position is associated with the revisionist human rights historiography around Samuel Moyn and others that sees as "the most troubling shortcoming of the contemporary attempt to give human rights a history [...the distortion of] the past to suit the present".[25] As an antidote, this new revisionism has contested the semantic unity of what has been called human rights and has, instead, advocated a "discontinuist" reading of the various events around which the human rights narrative has been constructed.[26] The overarching point has been that the politics surrounding the progressive legalization of (international) human rights reveals their fundamentally epiphenomenal character as ideological constructs legitimating and naturalizing (great) power politics – a perspective that does not, however, much transcend the long-held premises of classical (political) realism.

Moyn, in particular, has notoriously proposed to divide the post-WW II timeline of international human rights into two fundamentally distinct semantic phases, with an early phase ranging from their inception in the 1940s to just after the decolonization period in the 1960s and characterized by a resort to rights language in order to express claims for national sovereignty in the context of Third World emancipation; and a later phase, as of the 1970s to the contemporary period, that re-signifies rights as a simultaneously anti-nationalist and anti-communist cosmopolitan project meant to substitute (real-existing) socialism as the primary ideal for emancipatory politics.[27] This later project, however, is, to Moyn, entirely utopian, driven by (Northern) liberal elites and, therefore, "not enough" when it comes to taming the neoliberal beast.[28] For by exclusively focusing on floors of protection rather than problematizing social stratification, rights actually end up doing part of neoliberalism's dirty work of maintaining the lowest strata of society just around subsistence level while removing any cap on how far upward stratification can go. Hence, insofar as, by the liberal standard model, rights merely imply formal status and not distributive equality, they are, in this view, unsuitable as instruments against the neoliberal social fallout.

While Moyn's critique resonates with Marx's take on rights, his genealogical perspective has him stop short of a Marxian framing of the role of rights

24 See, for instance, R. O'Connell, 'Let Them Eat Cake: Socio-Economic Rights in an Age of Austerity', in A. Nolan, R. O'Connell and C. Harvey, *Human Rights and Public Finance* (2013), 59.

25 S. Moyn, *Human Rights and the Uses of History* (2014), 13.

26 See further F. Hoffmann and B. Assy, '(De)Colonizing Human Rights', in J. von Bernstorff and P. Dann (eds.), *The Battle for International Law* (2019), 198.

27 See Moyn, *supra* note 11, at 120.

28 See Moyn, *supra* note 11.

under capitalism, an endeavour pursued, in turn, by a distinct set of "left" critiques that directly build on Marx's critique of rights. Here rights are seen as a central and necessary aspect of capitalist value production and its collaterals of imperialism, (neo-)colonialism, (structural) racism and genderization.[29] More specifically, rights in this narrative first, articulate a fundamentally anti-social, atomistic and purely self-interested conception of human nature; second, they are co-constitutive – as supposedly "equal" property rights – of the commodity form and, thus, act as central elements of the capitalist reproduction regime; and, third, they serve as ideological smokescreens that cloak the inherent inequality of commodity exchange through the mirage of equal rights.[30]

While the oldest variant of this triple critique of rights is explicitly and self-consciously Marxist, a newer set of "left"-identitarian positions has transposed the Marxian baseline into different theoretical keys, so that the ideological cloaking function of rights vis-à-vis class difference in Marx is turned into one in relation to race, gender, or coloniality/subalternity.[31] The critical algorithm is, however, the same, namely that rights purportedly help paint over, and are thereby implicated in, the exclusion, exploitation, or outright elimination of certain categories of humans. This process is seen as not accidental but constitutive of modern/Western (aka capitalist, racist, gendered, or imperialist/(neo-)colonialist) societies and cannot, as the logic of rights presumes, be addressed through the very state apparatus that is itself a product of, and necessary element in, capitalist reproduction.[32]

To be sure, like Marx himself, many of these critiques acknowledge a positive role for rights in particular moments or in relation to specific issues, or at least as a tactical device to advance specific progressive causes. Yet, as social reality is, from these perspectives, structurally determined by a certain base that produces the constitutive distinctions through which societies operate, notably class or (in the eyes of the identitarian "left") its equivalents of race, gender, or coloniality, social transformation can only occur when the very structure of society is challenged. However, rights will, if anything, always only address inequality, exploitation and exclusion in a fragmentary and piecemeal fashion

29 The literature here is considerable, see initially, again, Lukes, *supra* note 10; and Marks, *supra* note 10.

30 See D.J. O'Byrne, 'Marxism and Human Rights: New Thoughts on an Old Debate', (2019) 23 *International Journal of Human Rights* 639; and J. Lacroix, J.-Y. Pranchère and S.-L. Raillard, 'Was Karl Marx Truly against Human Rights?: Individual Emancipation and Human Rights Theory', (2012) 62 *Revue française de science politique* 47.

31 For literatures still self-consciously Marxist see, for instance, G.C. Spivak, *A Critique of Postcolonial Reason: Towards a History of the Vanishing Present* (1999); and, more recently, R. Knox, 'Valuing Race? Stretched Marxism and the Logic of Imperialism', (2016) 4 *London Review of International Law* 81.

32 See, inter alia, G. Baars, *The Corporation, Law and Capitalism: A Radical Perspective on the Role of Law in the Global Political Economy* (2019); and R. Knox, 'Marxist Theories of International Law', in A. Orford and F. Hoffmann (eds.), *Oxford Handbook of the Theory of International Law* (2016), 306.

that ultimately helps maintain their causes (cumulatively "the system") intact. Insofar as human rights substitute genuinely political action – which is here often understood as involving the open struggle over (material or immaterial) distributional schemes – with a (legally) formalized and individualized approach to merely address the symptoms produced by these underlying causes, they effectively de-politicize or even naturalize the latter and thereby contribute to their continuity and reproduction.[33] Rights are, hence, seen as "part of the problem" of the neoliberal world order rather than as a remedy of its ills.[34]

While most of these Marx-derived critiques focus on inequality, exploitation and exclusion, that is, on the social relations at the base of capitalist value production, a related but slightly distinct approach also takes Marx's critique of bourgeois society as its starting point but then lays the emphasis on a critique of (bourgeois) power and the nature of (its) politics. Hence, in his widely discussed *Critique of Rights*, Christoph Menke foregrounds the constitutive role the form of subjective rights plays for the conception of power and politics in bourgeois (aka liberal) society.[35] For Menke the primacy of subjective rights produces an inherent disconnect between politics, which becomes the mere mediation of plural interests that are themselves deemed to be private and pre-political, and the general and public reason that needs to underwrite this pluralism. The formation of that public reason ought to be the object of a true politics, but the latter is subverted by the atomistic pluralism imposed by subjective rights.[36]

Menke, thus, shares with the other critiques the contention that rights have a depoliticizing effect, yet this is, to him, less problematic because it would obscure the question of who holds actual power but rather because it hides the persistence of a certain type of power itself, notably the form of power through law that underlies (bourgeois) modernity.[37] Hence, while liberalism presumes the fragility of a subject that needs law in the form of subjective rights to fragment and neutralize power, its apparent antidote, communism – or, for Menke, aspirationally also reformist welfarism –, simply inverts this logic and posits the unity of subjective will in a collective exercise of power that no

33 See W. Brown, '"The Most We Can Hope For …": Human Rights and the Politics of Fatalism', (2004) 103 *South Atlantic Quarterly* 451.

34 See, again, Baars, *supra* note 32, at 378; as well as the two consecutive critiques by D. Kennedy, 'The International Human Rights Movement: Part of the Problem?', (2001) 3 *European Human Rights Law Review* 581; and D. Kennedy, 'The International Human Rights Regime: Still Part of the Problem?', in R. Dickinson et al. (eds.), *Examining Critical Perspective on Human Rights* (2012), 19; as well as several of the rights-critical literature listed in note 11, *supra*.

35 Menke, *supra* note 11.

36 Ibid., at 116.

37 Ibid., at 71; see also E.A. Chia and D. Doods, 'Review Essay of Christoph Menke, Critique of Rights', (2021) 84 *Modern Law Review* 654.

longer needs legal rights.[38] Both conceptions remain wedded to modern (bourgeois) power insofar as they seek to dissolve the foundational tension between the particular and the universal in favour of the dominance of just one of these.[39] As an alternative, Menke, who admits to a certain anarchist impulse in his critique, proposes the incorporation of so-called counter-rights that would maintain that tension by enabling dissent from "normal politics" as well as the articulation of singularity, idiosyncrasy and non-reason.[40]

C. Re-Valuing Rights (Beyond the Liberal Script)

If the suspension of power and the enabling of a true politics is Menke's vision for counter-rights, his more orthodox "left" fellow critics would hold up social justice through equality, understood as encompassing both status and distributional equality and, concomitantly, the eventual elimination of exploitation and discrimination as the vision for a world beyond rights. Equality, the critics argue, can only be achieved politically, yet it has been largely excised from mainstream political discourse and has been replaced by a fragmented and depoliticized focus on "the poor", on vulnerable groups, and on mere survival sufficiency. Rights are alleged to being key instruments through which this replacement is realized.[41] They are, therefore, seen as part of the odds that frustrate the achievement of equality by impeding its return to the centre of political struggle.

The "right" critique's utopia seems, in turn, to be a world without redistributive welfarism and the gradualist egalitarianism associated with it, a vision that, at least for its detractors, is plainly on course to being achieved but which, for its proponents, is apparently still being challenged by the, to them, irritating recurrence of such macroeconomic challenges as financial crises, climate change, global pandemics, as well as generally all political claims for social justice underwritten by the international human rights regime and domestic social constitutionalism.[42]

38 Menke, *infra* note 40, at 245; see also L. Mattutat, 'Weder Herren noch Knechte. Christoph Menke kritisiert die Form subjektiver Rechte und plädiert für ein Recht der Gegenrechte', (2016) *Soziopolis*, 8 April 2016, www.soziopolis.de/weder-herren-noch-knechte.html#:~:text=Christoph%20Menke%20kritisiert%20die%20Form,f%C3%BCr%20ein%20Recht%20der%20Gegenrechte.&text=Titel%20mit%20doppelten%20Genitiven%20sind,objektive%20%E2%80%93%20in%20der%20Darstellung%20einzuholen.

39 See E. Deitert and T. Wieland, 'Menke, Christoph: Kritik der Rechte', (2016) 4 *Zeitschrift für Philosophische Literatur* 11.

40 See the exchange between a rather critical E. Denninger, 'Ende der ‚subjektiven Rechte? Anmerkungen zu Christoph Menke, Kritik der Rechte', (2018) 51 *Kritische Justiz* 316; and Menke's "counter-critical" replique C. Menke, 'Der Traum der Rechte: Eine Antwort auf Erhard Denninger', (2018) 51 *Kritische Justiz* 475.

41 See, again, Moyn, *supra* note 11, at 212.

42 See G. Frankenberg, *Comparative Constitutional Studies: Between Magic and Deceit* (2018), 101.

Yet can (the value of) rights really be discarded so readily? The contention made here is that a good faith exploration of the relationship of rights with value needs, first of all, to distinguish two frameworks of reference within which value questions can be asked. This distinction results from a challenge posed originally by Marx, who remains the primary theorist of value, and for whom value is initially and primarily associated with capitalism and only makes sense within the logic of capitalism so that, as he himself contended, there is no value outside of capitalism.[43] Within this (capitalist) framework of reference, value has a particular role, as do all other elements, including rights, which relate to and only have meaning in regard to the production and exchange of value. However, Marx, arguably, also mobilizes a second framework of reference, notably general political economy, within which he was not only an analyst but also a critic of capitalism and its form of value production, and he frequently used value-laden language to denounce exploitation, hinting (at least) at an alternative conception of value outside and beyond capitalism.[44] While his historical materialist ontology precluded him from specifying this alternative conception in the abstract, it can, arguably, be linked with his equally diffuse yet recurrent reference to justice, to "real" human nature (aka the "species being"), and to human dignity.

Marx, thus, simultaneously considered relations of production within capitalism – including its specific form of producing value – as "just" insofar as they were geared to "harmonize with and perform a function relative to a given mode of production" (aka capitalism aka the first framework of reference) while denouncing capitalism as essentially a system based on theft and, hence, as fundamentally unjust (in relation to the second framework of reference).[45] Indeed, the idea of emancipation from what Adorno termed the "commensurability of social labour in the form of value", which, in Adorno's reading of Marx, "denies human dignity" amounts, in Marx's own words, to "the restoration of the human world and of human relationships".[46] In capitalism, hence, value is the expression of commodification and reification and, as such, amounts to a denial of the "species being" of humans.[47] After and beyond capitalism, by contrast, this form of valuation or "law of value" has been abolished and substituted with the cooperative production of use-value as the primary form of socialization, whereby the "human" *Gattungswesen* is finally allowed

43 K. Marx, *A Contribution to the Critique of Political Economy* (1859).

44 Notoriously in K. Marx and F. Engels, *The Communist Manifesto* (1848); see also E. v. Ree, *Boundaries of Utopia – Imagining Communism From Plato to Stalin* (2015).

45 See G.A. Cohen, Self-Ownership, Freedom and Equality (1995); see also O. Schlaudt's chapter in this volume.

46 Th.W. Adorno, *Negative Dialectics* (1973); and W. Bonefeld, 'Social Form, Critique and Human Dignity', (2001) 13 *Zeitschrift für Kritische Theorie* 97.

47 See S.R. Friedman, D. Rossi and G. Ralón, 'Dignity Denial and Social Conflicts', (2015) 27 *Rethinking Marxism* 65; and, again, Kempter, *supra* note 6.

to come into her own.[48] While, again, this (second) framework of reference is comparatively diffuse in Marx – as are his ideas on the concrete paths out of capitalism –, it still seems to reach into and irritate the first framework of reference, the political economy of capitalism, in the form of class consciousness and the growing awareness of, and active resistance to, capitalist exploitation and its concrete manifestations. While this inherent tension in Marx cannot here be explored further, its existence may be relevant for the way in which rights can be framed.

Like value, rights – and rights critiques – have, therefore, to be examined in relation to each of these frameworks of reference. What is their respective function, do they fulfil that function, what is their relation to the "law of value" and how can the "value of rights" be determined? Again, this requires a much more thorough analysis than is possible here, but a few intuitions may be hinted at: in relation to the first framework of reference (capitalism), the "left" critique of rights tends to align with the framework of Marx's account of the function of (bourgeois/liberal) rights both as a necessary legal infrastructure for the "free" market exchange of commodified labour – and, hence, as an element of the system underlying the constitution and extraction of surplus value – as well as ideological configurations that obscure the inequality of the (rights-based) exchange relationship with the semblance of equal rights. Yet, like (bourgeois/liberal) law in general, not only are rights, therefore, unavoidably implicated in capitalist value production – indeed, are only meaningful in this context – but, following the logic of commodification/reification, their operation helps produce the fragmentation and atomization of society upon which capitalist exploitation is premised. In addition, part of the ideological function of rights consists of the re-signification of concrete and objective social and economic relations as abstract and subjective political ones, and thereby effectively shields the "law of value" from subversion. While Marx's original critique was premised on classical liberal "negative" civil and political rights, later Marxists have tended to extend the critique to positive "welfare" social and economic rights – alongside (Kenynesian) welfare economics – arguing that rights-based welfare entitlements either serve, again, as mere cosmetics to embellish the ugly reality of exploitation, or as instruments to fine-tune the operation of the capitalist production cycle by both smoothing the reproduction (and productivity) of labour and by shoring up market resilience in case of inevitable "failures".[49]

48 On the "law of value" see H.D. Kurz, 'Marx and the "Law of Value": A Critical Appraisal on the Occasion of His 200th Birthday', (2018) 77 *Investigación Económica* 40; and K. Nagatani, 'Capitalist Exploitation and the Law of Value', (2004) 68 *Science & Society* 57.

49 See, classically, I. Gough, *The Political Economy of the Welfare State* (1979); more recently E.J. Martin and R.D. Torres, *Savage State: Welfare Capitalism and Inequality* (2004).

However, while this base functionality of rights in/under capitalism is hard to deny, the question is whether that is all there is to rights. The "right" critique of rights, for one, would appear to see at least aspects of rights-in-practice as sand, rather than oil, in the capitalist machine and as a definite impediment to an even freer maximization of surplus value. Especially social and economic rights standards seek, to these critics, to infect the state apparatus with a virus that antagonizes it, at least partially, towards the interests of capital.[50] The "left" critics would here, of course, retort that this antagonism was, if anything, tokenistic and merely reinforced the ideological cloaking of exploitation – and the state's role in it – by making it appear containable. Yet, it remains a fact that the neoliberal phase of capitalism has seen an enormous effort on the part of capital to dismantle the welfare state and curtail or abolish social and economic rights – including and especially labour rights – an effort that at least places an empirical question mark over the contention that rights are exclusively handmaidens of capitalist value production and cannot (also) be expressions of its inner contradictions.[51]

Another problem with the Marx-based critique – as, incidentally, also with Moyn's historical revisionism – is its focus on the genealogy of rights and the derivation of their function therefrom.[52] This would seem to make the Marxist account of rights prone to deductive overinterpretation in the sense that the factual workings and effects of rights "out there" are deduced from the premises about their function in the political economy of capitalism. While this conforms with the historical materialist method, it risks an undercomplex account of the "real" life of rights (under capitalism). Indeed, when it comes to rights, Marx would seem to invert the logic he applies to value; for whereas Marx's central divergence with (neo-)classical economic theory is his insistence on value as objective, he treats rights in a similar vein as he does the subjective theory of value, notably as ideal abstractions removed from reality or, at any rate, as frozen at the moment of their inception as hermetic concepts performing only pre-determined functions.

Rights-in-practice are, however, not static but highly dynamic, involving diverse elements – people, institutions, legal frameworks – which, over time,

50 See, for instance, L. Haglund and R. Stryker, *Closing the Rights Gap: From Human Rights to Social Transformation* (2015); A.A. Dani and A. de Haan, *Inclusive States: Social Policy and Structural Inequalities. New Frontiers of Social Policy* (2008); see also, in the German domestic constitutional context, the work and legacy of H. Ridder, *Die Soziale Ordnung des Grundgesetzes* (1975).

51 See G. Oré Aguilar and I. Saiz, 'Introducing the Debate on Economic Inequality: Can Human Rights Make a Difference?', *Opendemocracy* blog, 25 October 2015, www.opendemocracy.net/en/openglobalrights-openpage/introducing-debate-on-economic-inequality-can-human-ri/; and F. Hoffmann, 'The Future of Social Rights', in N. Bhuta (ed.), *The Futures of Human Rights* (forthcoming 2022).

52 Menke thematises this directly when he combines classically Frankfurtian immanent critique with a genealogical perspective (derived from Nietzsche and Foucault); see Menke, *supra* note 11, at 4; see also, again, Deitert and Wieland, *supra* note 39, at 16.

generate effects that generate further effects and so on.[53] In the language of systems theory, which also owes some debts to Marx, rights-in-practice, produce systemic recursivity, self-reflexivity and, more often than not, non-linear consequences.[54] The state is here a test tube in which the different and decentrally generated impulses from the different uses of human rights are mixed together to produce uncertain and often unstable outcomes.[55] While some of these impulses may well be generated by corporate actors seeking value maximization – much in the way already understood by Marx – many actually come from the smallest units of agency, notably people, who nearly always resort to (legal) rights as a last resort to try to resist the concrete instantiations of an ever-advancing commodification process.[56]

To be sure, this is not a romantic story of "little people" (as in Mark Galanter's notorious "have-nots") going against the "big bad state" or "big bad corporations" (the "haves") with human rights upheld by heroic courts, because the results of the rights-driven judicialization of public policies are neither uniform nor uniformly in favour of the "have-nots".[57] Fundamentally, their repercussions over time grow less transparent as complexity augments. Yet that is the point: not that rights-in-practice may not (also) be enactments of neoliberal ideology and capitalist political economy, but that they are capable of irritating "the system" despite and beyond their function. Concretely, rights irritate Marx's "law of value" in capitalism in two ways: they produce a certain form of (legal) uncertainty against capital's requirement of a certain form of legal certainty, and they can, momentarily though, over time, cumulatively, impact on the amount of extractable surplus value in particular sectors, forcing capital to adapt in unplanned ways. This dual irritation, generated from within "the system" itself and regardless of its concrete consequences at any one point of time, produces subversive – and potentially emancipatory – dysfunctionalities. Marx himself recognized the self-subversive potential of capitalism though neither he, his followers or anyone else have so far been able to pinpoint exactly how this process unfolds: whether it is only through self-conscious "revolutionary" struggle or also through the more diffuse and complex interaction of emergent

53 See chapter by Van Den Meerssche and Gordon in this volume.

54 See, inter alia, G. Teubner, 'Counter-Rights: On the Trans-Subjective Potential of Subjective Rights', in P.F. Kjaer, *Law of Political Economy* (2019), 372; Menke, too, considers (bourgeois) law as rendering modernity self-reflexive, Menke, *supra* note 11, at 96.

55 See I. Feichtner, M. Krajewski and R. Rösch, Human Rights in the Extractive Industries: Transparency, *Participation and Resistance* (2019).

56 See chapter by Van Den Meerssche and Gordon in this volume.

57 See, classically, M. Galanter, 'Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change', (1974) 9 *Law and Society Review* 95; see also D. Lettinga and L. v. Troost, *Can Human Rights Bring Social Justice?* (2015); as well as A.E. Yamin and S. Gloppen, *Litigating Health Rights: Can Courts Bring More Justice to Health?* (2011); and O. Ferraz, 'Harming the Poor through Social Rights Litigation: Lessons from Brazil', (2010) 89 *Texas Law Review* 1643, at 1667.

properties, including – but not limited to – those that are generated by the long term and indirect consequences of rights-based activism.[58]

In the end, the reality of human rights is simply more complex and less determined than the critics are prepared to admit. Indeed, it often seems that the real target of the critique of rights is not rights themselves, but rather the deep structure of late (capitalist) modernity, a deep structure that afflicts (nearly) everyone everywhere and that determines both the immanent horizon of our knowledge and the threshold for social change. The great achievement of critical thought has not been to overcome this deep structure, but to make it explicit and to enjoin us to face up to what modernity really always was, notably a deeply ambivalent, hybrid, complex and contingent mesclage that is very different from the clichéd image enshrined in the *Western* progress narrative.[59]

This, then, is where the second framework of reference comes in, the communist utopia where value is no longer determined by the capitalist "law of value" but by emancipated human beings. As already hinted, Marx – and Marxists – have had a hard time reconciling analytical determinism with ethical judgement and utopian hope; while the former provides the basic template for the analysis of political economy, the latter have always been present as a horizon that has provided a vision for denouncing capitalism as fundamentally de-humanizing and, hence, unjust. For the reasons already outlined, rights, be it as form or substance, as discourse or practice, have not tended to play any (positive) role in this denunciation or, indeed, in the common account of class consciousness and class struggle. And no attempt will here be made to decipher the particular ways in which Marx and Marxists have sought to ground alternative forms of political agency (in and under conditions of capitalism).

It must initially suffice to point to the potential role rights can and have played in this context. For the (younger) Marx's assertion that rights imply a negative logic of antagonistic individualism and social fragmentation is, arguably, not the whole story. Despite their individualizing form, the substance of rights, from personal autonomy to socio-economic well-being, always implies a shared space, a concrete utopia in which all are meant to collectively and

58 Again, (some) Marxists have rejected arguments based, as this one, on the inherent indeterminacy of law – and rights – and on the fundamental non-transparency of its effects; and it is true that some advocates of indeterminacy have tended to use it in order to circumvent an engagement with the political – and social and economic – premises that motivate legal action; however, a deeper challenge to the existence and nature of indeterminacy leads deeply into Marxist epistemology and its discussion is, alas, far beyond the confines of the present argument; see, seminally, C. Mieville, *Between Equal Rights: A Marxist Theory of International Law* (2006); but contrarily, see again O´Byrne, *supra* note 30.

59 Historically, this argument can be seen to have unfolded between M. Horkheimer and Th.W. Adorno, *Dialectic of Enlightenment* (1947) and Michel Foucault's "governmentality" – see, for example, 'Governmentality', in G. Burchell, C. Gordon and P. Miller (eds.), *The Foucault Effect: Studies in Governmentality* (1991), 87; see also F. Hoffmann, 'Discourse', in J.D. Aspremont and S. Singh (eds.), *Concepts for International Law* (2019), 201.

conjointly enjoy what rights express, a vision that, *prima facie*, does not seem to be fundamentally different from social relations as imagined under communism.[60] Individual rights claims are, from this vantage point, claims of equality, that is, claims to be treated as an equal part of human society when that equality is felt to be denied. As this denial is the base condition under capitalism for all, rights claims are, therefore, also always solidarity claims that are not confined to the individual claimant but always imply a hypothetical *erga omnes*. Finally, rights claims are also always political claims that articulate a counterfactual and potentially subversive insistence on human dignity in the face of its systemic denial under capitalism.[61] While rights are no alternative to more fundamental ways of promoting change, neither are they just "bad politics", not least as they remain one of the most deeply embedded forms for (re-)claiming the "real" value of humans.

60 See Muniesa's chapter in this volume.

61 See K. McNeilly, *Human Rights and Radical Social Transformation* (2017); and again Balibar, *supra* note 11.

Chapter 12

Value as Potentiality

Blockchain and the Age of Institutional Challenges

Outi Korhonen and Juho Rantala

A. Introduction

Value can be understood, analyzed, and created in various ways.[1] In addition to more pragmatic modes of valorization (e.g., rent, profits or a new technical innovation), there are "ontological" processes that can be understood to increase value, which we will refer to here as ontological valorization and progressively unpack. Ontological valorization generally works as *a foundation* for pragmatic valorization. David Graeber has pointed out[2] that value rises out of a system of relations,[3] and this is *the level of ontological valorization*. In this chapter, we explore ontological valorization for possibilities of transformation at this foundational level. We do so in the register of what French philosopher Gilbert Simondon calls *transindividuation*.[4] Already for Simondon, writing in the 1950s, technology was one of the elementary ways of mediating new modes of being, doing and valorization.[5] Today, new technological innovations, for example those connected to artificial intelligence or social media, are considered keys for pragmatic valorization linked to money and ontological valorization linked to social relations. We focus here on one class of technological innovation,

1 C. Tappolet and M. Rossi, 'What is value? Where does it come from? A Philosophical Perspective', in T. Brosch and D. Sander (eds.), *Handbook of Value. Perspectives from Economics, Neuroscience, Philosophy, Psychology, and Sociology* (2016), 3–22.

2 D. Graeber, *Toward An Anthropological Theory of Value. The False Coin of Our Own Dreams* (2001).

3 See, also M. Pasquinelli, 'The Number of the Collective Beast: Value in the Age of the Algorithmic Institutions of Ranking' [Presentation at "New Industries Conference"] (2014), http://matteopasquinelli.com/number-of-the-collective-beast/: "there is never an individual production of value – value is in itself always a collective relation, a collective measure, a collective abstraction preceding any monetary technique".

4 However, it is elementary to point out that what Simondon understands as transindividuation is a more complex and wider conceptualization. Thus, we are here referring to one dimension of transindividuation.

5 G. Simondon, *On the Mode of Existence of Technical Objects* [1958] (2017). Also, for the many theories of sociotechnical change see, e.g., B.K. Sovacool and D.J. Hess, 'Ordering Theories: Typologies and Conceptual Frameworks for Sociotechnical Change', (2017) 47 *Soc. Stud. Sci.* 703.

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namely blockchains, which have occupied an important and controversial place in the landscape of digital innovations since the 2010s.

The chapter explores the possibilities represented by blockchain technologies for both ontological and pragmatic valorization. We will argue and try to show that, even with its present-day limitations and problems, the technology's innovativeness lies in its ability to create a foundation for ontological valorization, though not necessarily in certain practical applications *per se*. The chapter focuses mostly on blockchain technologies that are public and open, that is *permissionless*, as they can be seen, at least in theory, most challenging as regards traditional, global institutional structures in the domains of economics, politics, and law. As blockchain is a technology to organize information and human action in a decentralized, peer-to-peer way without succumbing to any "third parties", private (*permissioned*) chains can be thought of as watering down these ideals. Permissioned models aim primarily to boost the efficiency of private organizations or corporations, producing value in a traditional monetary sense and reinforcing, for example, automatization of global value chains. Even permissionless systems, like Bitcoin, can exacerbate profound problems of the existing global market and monetary system (e.g., accumulation of wealth) – let alone problems related to energy consumption. The computing power that mining calculations require drives their energy use. Bitcoin suffers from large energy consumption due to its "proof-of-work" method (discussed below).[6] There are other consensus mechanisms that strive to provide more energy efficient solutions, like "proof-of-stake" (PoS) and its derivatives.[7]

However, many of the same systems at least have shown that blockchain (as a technical schema) can work even in practice. Bitcoin, even with its obvious flaws, has a dimension of critical and disruptive potential that we observe in an anti-hierarchical organizational structure and ongoing interest in new ideas about money in the discourses around it. New generations of blockchains, especially Ethereum-based, add new functionality to first generation

6 C. Mora et al., 'Bitcoin Emissions Alone Could Push Global Warming Above 2°C', (2018) 8 *Nature Climate Change* 931.

7 Proof-of-stake (PoS) requires admin nodes to provide proof that they are "invested in" the system – that is, they must provide stake of system's cryptocurrency or tokens to work as a validator. The many variations – theorized or in development – of PoS still use, in the end, the PoW method to reach the final consensus, but it is reached through a smaller number of validators and, thus, requires less energy. However, many of these mechanisms have their own problems, like for example, reduced decentralization due to the fact of a select group of validator-admins. See, e.g., Y. Xiao et al., 'A Survey of Distributed Consensus Protocols for Blockchain Networks', (2020) arXiv.org; M. Belotti et al., 'A Vademecum on Blockchain Technologies: When, Which, and How', (2019) 21 *IEEE Communications Surveys & Tutorials* 3796.

architectures such as Bitcoin, smart contracts and non-fungible tokens (NFTs[8]) foremost among those innovations.[9] We hold that these technical schemes can be understood to foster freedom, neutrality, openness, redistribution, and transparency.[10] However, this possibility must be thought of as *potential*, as it only actualizes through concrete practical applications. Thus, we will argue that blockchain technology offers an innovative technical schema which houses potentiality to create new systems of relation that can lead to new valorization.

The rise of cryptofinance in the 2010s has opened a new frontier in the financial market. While many states (e.g., China) and financial institutions still prohibit their citizens or employees from engaging with the crypto economy, other states and financial institutions, such as J.P. Morgan, Morgan Stanley, PayPal, Visa, have either adopted cryptofinance instruments into their business models or have started exploiting some of the underlying technologies in their operations. Whether developments like these signify a mainstreaming of cryptofinance or subversion of its decentralizing promise, to maintain control of money in already-powerful hands, is a key dilemma.[11] While there are many who dismiss blockchain as a hyped fad, other critics note that it deserves serious attention even if its disruptive potential may never materialize.[12]

Global legal structures[13] have been strongly biased in favor of centralized authority structures. International legal regimes have excelled in centralized, exclusionary, and formal devices that operate through "proof", ledgers, and audits; we refer to this as "the archival logic".[14] Institutionalized archival logic has led to the establishment of global financial and power centers that accumulate wealth rather than share it. Through emerging technologies, however, their gatekeeping and auditing functions may be decentralized, distributed, and shared through communities and platforms, which would, in a radical scenario, slow or even reverse uneven accumulation through "the archival logic".[15]

8 NFT = non-fungible tokens display true ownership of an asset on the blockchain. NFTs can hold restricted and limited rights to an asset, allowing the owner exclusivity to a function, art piece, or audio file; they support the ability to digitally verify scarcity and originality and will be used to store and mark value of non-fungibles in music, other art, certifications, IDs, collectibles, domain names (digital "real-estate"), fashion, finance, and insurance. See, e.g., Ivan on Tech, 'Non-Fungible Tokens – Explaining NFTs, ERC-721 and ERC-1155', 2020 (5 November) *academy.ivanontech.com*.

9 J. Ehrenfeld et al., 'Legal Issues Surrounding Blockchain, Cryptocurrency, & Bitcoin', (2019) 20 *Transactions: TENN. J. Bus. L.* 1135; Belotti et al. *supra* note 7.

10 J.J. Bambara and P.R. Allen, *Blockchain. A Practical Guide to Developing Business, Law, and Technology Solutions*, (2018).

11 D.W. Perkins, 'Cryptocurrency: The Economics of Money and Selected Policy Issues', R45427, 2020 (April 09)

12 R. Herian, 'Taking Blockchain Seriously', (2018) 29 *Law Critique* 163; R. Herian, *Regulating Blockchain. Critical Perspectives in Law and Technology*, (2019); Perkins, *supra* note 11.

13 E.g., D. Kennedy, *International Legal Structures*, (1987a).

14 We are utilizing this term to represent institutional centralization of power and money. See, e.g., J. Derrida, 'Archive Fever: A Freudian Impression', (1995) 25 *Diacritics* 9.

15 Derrida, *supra* note 14.

Consider the argument of Alex Williams, who holds that, "[t]o create a new platform, businesses are exhorted to create products which solve key systemic problems, capable of facilitating as wide a variety of services as possible".[16] Especially when a new platform "acts as a foundation for other systems to be constructed upon", they "are capable of generating extraordinarily powerful business dynamics".[17] The ability to work as "a foundation" and, thus, to offer alternative platforms for the conduct of financial operations is one of the ways in which blockchain-based services impact the global economy. Blockchain technologies in general have enabled new actors and new economic logics to emerge, for instance by enrolling independent, yet co-operative node operators and stakeholders.[18]

B. What is a Blockchain – a Short Summary[19]

"Blockchain is a peer-to-peer decentralised database with a highly original system for organising information and human action".[20] The most well-known blockchain applications are Bitcoin and Ethereum.[21] In recent years, however, the number of blockchain models, their sub-chains and other technological support systems have grown rapidly. Thus, for instance, speed of transactions, electricity requirements, and security solutions multiply and vary. Bitcoin is digital money that does away with third-party intermediary institutions (e.g., banks). Bitcoin's blockchain is a vast decentralized database, a digital ledger, that continuously records network transactions and was the innovation that kicked off the blockchain-based technological era. It is constantly updated with every user, each holding identical copies of it. Bitcoin is the most well-known cryptocurrency, often characterized as the "grand-father" of the crypto economy. Its market capitalization is still above 50 percent of the entire cryptomarket.[22] Bitcoin is classified as permissible in most jurisdictions, although it remains illegal or has been criminalized in others.[23] Yet, as its blockchain technology is

16 A. Williams, 'Control Societies and Platform Logic', (2015) 84–5 *New Formations* 209, at 222.

17 Williams, *supra* note 16, at 221.

18 P. Nadimi et al., 'Practicing Blockchain Law', (2019) 34 *J. Marshall J. Info. Tech. & Privacy L.* 52.

19 The short summary is derived mostly from Bambara and Allen, *supra* note 10; P. De Filippi and A. Wright, *Blockchain and the Law*, (2018); Q. DuPont, *Cryptocurrencies and Blockchains*, (2019a); Herian (2019), *supra* note 12; M. Quiniou, *Blockchain – The Advent of Disintermediation*, (2019); also, J. Rantala, 'Blockchain as a Medium for Transindividual Collective', (2019) 60 *Culture, Theory and Critique* 250.

20 Rantala, *supra* note 19, at 250.

21 S. Nakamoto, 'Bitcoin: A Peer-to-Peer Electronic Cash System', (2008); V. Buterin, 'Ethereum White Paper', (2021).

22 It is diminishing rapidly, lately as quickly as 10 percent per month. See e.g., D. Cawrey, 'Market Wrap: Bitcoin in Neutral at $55.5K as Ether Continues Bull Run', (2021) *Coindesk.com*.

23 The legal framework is changing and evolving nationally and internationally; for a map see: www.thomsonreuters.com/en-us/posts/wp-content/uploads/sites/20/2022/04/Cryptos-Report-Compendium-2022.pdf.

older and more limited than the many new innovations that keep emerging, its future use cases appear to be growing ever more limited. Bitcoin is moving into a phase in which, due to its brand value, it becomes a value-holder rather than an instrument of exchange or, indeed, driver of innovation, and accordingly is sometimes described as "digital gold". In a sense, however, it is more limited or scarce than gold, because its maximum issue has been programmed to cap at 21 million Bitcoins. This finite quality has arguably been the most important driver of Bitcoin's monetary unit value from a few dollars to tens of thousands per unit in less than 15 years.

The original Bitcoin system and the many new cryptocurrencies require two kinds of actors: currency users, and "miners" along with other systemic support providers. The miners provide computing power for the use of the network to verify transactions. Redundant copies and computing power requirements protect the legitimacy and security of transactions. In the first years of Bitcoin, mining could be done by home computers, but as user numbers have grown and the mining algorithms have become more and more difficult, miners have begun using special equipment, and often belong to "mining pools", that is, services that combine the computational power of different users. Mining, which relies on what is called "proof-of-work" (PoW), is an example of what is called a consensus mechanism.[24] Decentralized blockchain systems do not formally include a singular authority to ensure the system's validity: consensus mechanisms are the only ways to make valid changes in the database or ledger maintained by the blockchain. The technical system itself is the mediating third-party, in place of an institution like a bank.

In some cases, decentralization seems to have a more theoretical rather than practical impact. We can take as an example the case of the bail-out of "The DAO". DAOs are Decentralized Autonomous Organizations, organizations built out of blockchain code, and "The DAO" was an early attempt to demonstrate their potential. Instead, it demonstrated the ineluctable power of the 51 percent attack. In blockchains such as Bitcoin there is a threat that if one person or a group controls more than 50 percent of the computing power provided for the network, they can control the system ("the 51 percent attack") – that is, alter the decentralized ledger or database that the blockchain is supposed to guarantee. The DAO, which was an Ethereum-based system, included code that enabled one or more individuals to siphon off one-third of the system's cryptocurrency. This led to coordination among a group of people who were in the position to stop this act by pooling 51 percent of the computing power behind the blockchain to create a replacement blockchain alongside the original Ethereum chain, thereby rewriting the ledger that the latter was supposed

24 Xiao et al., *supra* note 7.

to have validated.[25] It is estimated that the number of blockchain experts working in the crypto ecosystem does not exceed ten thousand, which inevitably brings oligarchical tenets into the ecosystem regardless of how passionately "the community" aspires for decentralization, distribution, radical democracy, genuine meritocracy, inclusivity, and anonymity/pseudonymity/privacy. Other problems with blockchains include scams and, although rare, hacks, as well as stigmatization for association with money laundering, human trafficking, the drug trade, tax evasion, and international organized crime. Despite these problems, however, giant investment banks and payment services increasingly offer cryptoassets and derivatives; and many central banks are developing digital currencies based on blockchain models.[26]

Ethereum-based blockchains are second-generation chains. Their most important innovation, in addition to offering a platform for more robust consensus mechanisms, was introducing *smart contracts* in which "users can decide (code) the rules for the contract, which are automatically enforced by the blockchain".[27] Updating the idea of the general, open-source blockchain structure of Bitcoin, Ethereum applications include everything from token systems (digital coins) to financial derivatives and stable-value currencies, identity and reputation systems, decentralized file storage or cloud computing, savings e-wallets, commodity (e.g., crop) insurances and on-chain decentralized marketplaces. Such blockchains can automate functions of organizations, by managing economic rights, distributing dividends, allocating profits or losses, and storing property rights.[28] DAO's are based on this sort of functionality, and although the DAO project mentioned above was not successful, DAOs remain vehicles for building transnational communities in cyberspace. Further, the year 2020 saw the expansion of the decentralized finance (DeFi) blockchains, mainly still based on Ethereum technology, and many new blockchains emerged to either compete with or enhance the functionality of Ethereum (e.g., Polkadot, Chainlink, Binance C-DeFi).

C-DeFi ("centralized-decentralized finance") is a kind of hybrid between centralized and decentralized finance, as its name suggests, to avoid a radical shift from central authorities (such as banks) to completely decentralized models in which users interact without any intermediary besides the technology. Binance is founded by Chinese-Canadian Changpeng Zhao (known as

25 This is called "hard fork". The event led also to the creation of Ethereum Classic, which is the original Ethereum chain. See, e.g., Q. DuPont, 'Experiments in Algorithmic Governance: A History and Ethnography of "The DAO", a Failed Decentralized Autonomous Organization', M. Campbell-Verduyn (ed.), *Bitcoin and Beyond: Blockchain, Cryptocurrencies and Global Governance* (2019b).

26 J.-P. Vergne and G. Swain, 'Bitcoin', A. Ledeneva et al. (eds.), *The Global Encyclopaedia of Informality: Understanding Social and Cultural Complexity. Vol. 2.* (2018), 148, at 149–50.

27 Buterin, *supra* note 21.

28 De Filippi and Wright, *supra* note 19. See also, applications in use/progress: www.stateofthedapps.com/rankings/platform/ethereum.

"CZ"), and it has semi-independent exchanges based all around the world, its own cryptocurrency (BNB), and many other ecosystem elements such as project incubators, accelerators, sizeable funding schemes, and C-DeFi instruments.[29] However, Binance represents the accumulation of economic power and is ultimately little different from traditional companies or private financial ecosystems.

Despite developments such as the growth of Binance, the potential of blockchain technology continues to point to financial, economic, and societal changes, even though the new elements currently manifest in a mere one or two percentiles of the global political economy when compared approximately with the turnover of the global financial industry.[30] The potential is harnessed by several projects that seek to grow and implement value, disrupt ownership structures, and broaden the span of digital global commons. For example, the SingularityNET project strives to offer a decentralized network for AI agents on an open access basis.[31] In theory, everyone who participates in SingularityNET will one day gain access to AI technology or become a stakeholder in its development: anyone can add an AI/machine learning service to SingularityNET for use by the network and receive network payment tokens in exchange.

The disruptive potential of blockchain lies in its ability to work as a platform or protocol to decentralize human organization. Hybrids such as Binance's C-DeFi invite criticism for counteracting the drive for alternative finance, but blockchains do not – in their open, public form – provide any hidden centralized system in addition to the technology itself. This, of course, can be questioned since no technology works independently from any human intervention or maintenance. Yet, at their "truest", disruptive blockchain systems go beyond distributed models which preserve the original connection to central authority as a final decision-maker.[32] At this level, we are talking

29 S. Philippe and V. Wachter, 'Decentralized Finance, What Do You Need to Know?', 2019 (December 9); also, Bambara and Allen, *supra* note 10.

30 A rough estimate (or figure) based on the comparison of the crypto-market and the traditional financial market. This is not intended as an economic calculation but a heuristic figure.

31 'SingularityNET White Paper 2.0', (2019). E.g., a text-to-speech AI and an Italian-to-English translation AI are placed on the SingularityNET (digital network), and the whole network becomes capable of using Italian text to produce English speech.

32 It seems that historically, for example, in administrative sciences and in organizational theory, "decentralized" has meant a way of distributing some central power (e.g., a state) into smaller units (like municipalities) which have enjoyed autonomy, while the central power had a final say on the decisions. This, at least partly, *might be* due to the fact of limited technical solutions available. See, e.g., R. Common et al., *Managing Public Services. Competition and Decentralization*, (1993); K. Manfred and K.W. Deutsch, *Decentralization. Sketches Toward a Rational Theory*, (1980); J. Manor, *The Political Economy of Democratic Decentralization*, (1999); P. Oxhorn, 'Unraveling the Puzzle of Decentralization', P. Oxhorn et al. (eds.), *Decentralization, Democratic Governance, and Civil Society in Comparative Perspective – Africa, Asia, and Latin America*, (2004), 3. Only at the end of the 20th

again about the possibility of ontological valorization, which can be elaborated through the theories of French philosopher Gilbert Simondon, and especially through his concept of transindividuation.

C. Blockchain and Transindividuation[33]

The term "transindividuation" is connected to Simondon's idea of individuation, which is a name for the elementary processes that form individual entities within the heterogeneous matter that we know as reality. Without going into detail, these processes start from the material or physical level and move all the way to encompass human thinking and the processes of technical objects. Transindividuation is also a form or mode of individuation, that is, one that connects an individual to psychic *and* collective domains. Humans are individuated, that is, formed through physical and biological processes, and they are also subject to individuali*z*ation, that is, *psychic-collective* individuation. However, it is worth noting that these different levels of individuation are, as it is quite evident, happening at the same time: an individual is the outcome of various individuations occurring simultaneously and interconnecting and intertwining. In general terms, all living beings, including humans, constantly continue the process of their individuation(s). According to Simondon, this means that they are *metastable*, neither stable nor unstable, products of heterogeneous forces and potentials which exist in a pre-individual domain. Simondon points out that quantum mechanics offer one way to conceptualize this pre-individual domain.[34]

Thus, an individual is always a system as a process, it is an individual-milieu couple: it is never abstracted out of its milieu and its relations. In addition, it is an open system, that is, it is always grasped only as a phase of individuation, in its becoming and not as a "whole individual" in any real terms. Living beings, especially, "carry with them" as "unstructured background" unindividuated reality, the pre-individual, that houses potentials ready to be individuated. In the light of potentials, one can say that individuation in all its forms is a way of resolving tensions created by potentiality, which can be posed, for example,

century, modern information and digital technology have provided tools to create platforms that actualize decentralization more precisely. See, even more recent examples in, e.g., Y. Hui and H. Halpin, 'Collective Individuation: The Future of the Social Web', G. Lovink and M. Rasch (eds.), *Unlike Us Reader. Social Media Monopolies and Their Alternatives*, (2013), 103.

33 The following summary is based on G. Simondon, *Individuation in Light of Notions of Form and Information*, [1958] (2020); Simondon, *supra* note 5; also, Rantala, *supra* note 19, as well as A. Bardin, *Epistemology and Political Philosophy in Gilbert Simondon. Individuation, Technics, Social Systems*, (2015); M. Combes, *Gilbert Simondon and the Philosophy of the Transindividual*, (2013); Y. Hui, *On the Existence of Digital Objects*, (2016).

34 See, e.g., Simondon, *supra* note 33, at 6 and 368.

by a milieu, other individuals, or an individual. However, individuals also face problems *that they cannot overcome by themselves*.

In transindividuation, which is a continuous ongoing process, human individuals "engaged in a transformative relation reunite the pre-individual shares in them".[35] These shares are potentials for new relations and transformations. In a sense, individuals provide their own pre-individual potentials for the use of others. But transindividual processes "are neither independent of, nor entirely determined by, individual agency".[36] In transindividuation, individuals operate as elements of a system, a transindividual collective, in which they "discover a structure and functional organization that integrates and resolves the problematic [of] exceeding of their own capacity".[37] As an example, we can think of the Internet as a complex "solution" to problems of global communication that enhance individual and collective power.[38] Simondon also differentiates "inter-individuality" from transindividuality. In short, inter-individuality is a kind of simple collectivity (e.g., rigid economic relations) which *might offer resolution to certain individual problems but does not create more general transindividuation through new resolutions* – that is, only certain individuals can achieve resolution of tensions/problematics.[39]

Simondon considers such technical objects as media (and symbols) for the transindividual. As an invention, "the technical object is crystallisation of human activity (or gesture)", and the "crystallisation" remains in the object after its construction: "The object is created through an act of thinking or invention that transfers a thinking process as an analogy from one structure to another".[40] Technical objects are key sites of transindividuality. Blockchain, in this context, is a protocol – a zone of participation – through which individuals can share their potential and continue the initial individuation.[41] In other words, transindividuality can be connected to decentralization. In transindividuation

35 Rantala, *supra* note 19, at 253.

36 Rantala, *supra* note 19, at 254.

37 Ibid; also, Simondon, *supra* note 33, at 339.

38 Simondon writes that transindividuality "supposes a veritable operation of individuation on the basis of a pre-individual reality that is associated with individuals and is able to constitute a new problematic which has its own metastability" (Simondon, *supra* note 33, at 9).

39 As Marco Deseriis summarizes, "[t]ransindividuation is nothing but a transversal concatenation or a transductive concatenation whereby group individuals activate their possible other individuations in the process of relating to others" (M. Deseriis, 'The Politics of Condividuality', (2018) 3 *Traversal Texts*).

40 Rantala, *supra* note 19, at 254; see also, Bardin, *supra* note 33, at 58; Simondon, *supra* note 5, at 252–3.

41 E.g., M. Swan, 'Digital Simondon: The Collective Individuation of Man and Machine', (2015) 6 *Platform: Journal of Media and Communication* 46, at 52–3; Rantala, *supra* note 19, at 260; Simondon, *supra* note 32, at 330. David Weinbaum and Viktoras Veitas point out that "a distributed population of interacting heterogeneous agents achieves progressively higher levels of coordination" (D. Weinbaum and V. Veitas, 'Open Ended Intelligence: The Individuation of Intelligent Agents', (2017) 29 *Journal of Experimental & Theoretical Artificial Intelligence* 371).

the field of pre-individual potentials is open, each individual with potentialities connected to others. The blockchain protocol can provide a platform for this decentralized organization and mediate human activity, information, and even affects. Differences are preserved but the collective works as something more than the sum of its parts – the different potentialities are "pooled together" providing new ways of organizing, thinking, and acting. In addition, "blockchain is a model […] that leads to further individuations by freely organising individuals through constant re-invention of new digital spaces and platforms, that is, practical blockchain applications".[42]

In the case of blockchain technology, decentralization is one of its essential potentialities. The innovation of the technology comes from overcoming the traditional idea of centralized or *semi*-decentralized systems, such as markets. For example, in the case of traditional monies (i.e., fiat monies), it is usually a central figure (e.g., central bank or a state) that has control over the currency. In the world of semi-decentralized markets business organizations are controlling the market and private banks control money flows. In both cases, there remain power centers.[43] The crypto economy, on the other hand, strives, at least theoretically, to create possibilities for peer-to-peer modes of being in which individuals themselves can create the conditions for the economy and/or markets. In addition to the DEX services, so-called initial coin offerings (ICOs), public offerings of cryptocurrency or tokens for purchase and production, provide an alternative to traditional initial public offerings (IPOs), thereby challenging power relations.

Therefore, blockchain technology can challenge, in theory and even in practice, traditional institutions. The kinds of complex social, economic, and even cultural changes that may be involved, however, are not well understood. But there are some notable possibilities. For one, it has been pointed out that the peer-to-peer payment system of blockchain could help hundreds of millions of non-banked people in the developing world.[44] For another, Claus Dierksmeier and Peter Steel point out that cryptocurrencies and other new peer-to-peer payment systems enable, especially for immigrants, easier and cheaper money

42 Rantala, *supra* note 19, at 260. Re-invention is required, otherwise transindividuality is not preserved (i.e., the collective would reach a stable phase not resuming metastability and be reduced to inter-individuality). Also, on decentralization versus atomistic group individualism (as offered by the likes of Facebook and Twitter), see e.g., Hui and Halpin, *supra* note 32.

43 See, e.g., L. Winner, 'Decentralization Clarified', *The Whale and The Reactor. A Search for Limits in an Age of High Technology*, (1986), 85.

44 D. Tapscott and A. Tapscott, *Blockchain Revolution. How the Technology Behind Bitcoin is Changing Money, Business, and the World*, (2016); M. Swan, 'Anticipating the Economic Benefits of Blockchain', (2017) 7 *Technology Innovation Management Review*, 6.; also, BBC, 'Cryptocurrencies: Why Nigeria is a Global Leader in Bitcoin Trade', (2021); S. Stonberg, 'Cryptocurrencies are Democratising the Financial World', 2021 (22 January) *The Davos Agenda*. This idea is based on thoughts of economist Hernando De Soto to whom poor people have capital, but it is just not organized properly – that is, they have not mortgaged it which could, in turn, create growth.

transfers to their home countries than Western Union.[45] These practical solutions already provide the foundation for transindividuality to rise in the form of new possibilities, potentialities, and as an alternative to traditional monetary institutions. However, it is worth noting that transindividuation, which is always an ongoing process and one that is always executed by living beings (e.g., humans) requires complex technical networks and environments.[46]

The second-generation chains, for example those based on Ethereum – especially in their open-source and permissionless/public form – generate potentiality as tools to create new platforms and interactions among them. Valorization, whether ontological or more practical, derives from blockchain's possibility *as a technical schema*, and not from a certain individual chain, to organize and secure information, provide transparent logistical chains (e.g., know-your-customer, proof of origin/authorship), empower people to engage with global markets, enable security and anonymity, produce new services like financial services for cryptos, non-fungible tokens for art and collectibles, IPFS and in general smart contracts for peer-to-peer level interaction.

D. Potential for Institutional Change

In terms of innovation, institutions are particularly problematic because their very concept is characterized through persistence, permanence, and establishment[47] – their *raison d'etre* is to immunize against radical renewal. While European states keep promoting new institutions, such as, for instance, a world environmental organization, and remain obstinately hopeful for others such as the ailing international criminal institutions,[48] many other states and constituencies are more doubtful. As the 2018 report of the International Panel of Social Progress (IPSP) finds, international institutions are increasingly problematic because:

> (A) handful of countries in the Global North dominate intergovernmental organizations (…) (I)nternational and global governance operates through

45 C. Dierksmeier and P. Seele, 'Cryptocurrencies and Business Ethics', (2016) VIII *Journal of Business Ethics*.

46 It could be pointed out that, in the end, *ontological*, *transindividual valorization* is the possibility of sustaining dynamic difference (or "disparation" to use Simondon's term) in a platform (technology) (we are following here Deseriis, *supra* note 39).

47 See e.g., www.finedictionary.com/institution.html.

48 For the many failings of the international criminal courts, see a series of blog posts by Guilfoyle ('Reforming the International Criminal Court: Is it time for Assembly of the States Parties to be the Adults in the Room?', 2019 (8 May); 'The International Criminal Court Independent Expert Review: Questions of Trust and Tenure', 2020a (20 November); 'The International Criminal Court Independent Expert Review Questions of Accountability and Culture', 2020b (7 October)) reflecting on the special reports and critiques towards the ICC and other courts.

> varieties of governance technologies (that) have few mechanisms for tapping into creativity and tacit knowledge at local levels and (…) implicitly vest expertise and normative authority in the Global North and centers of geopolitics or finance. In doing so, they mute the voices of many domestic actors.[49]

The authority of international institutions embeds a dilemma because liberal democratic legitimation would seem in conflict with the accumulation and centralization of power. Indeed, liberal democracies seem to keep such contradictions in relative balance, but when the balance fails, institutional practices seem but a machinery to accumulate authority in conservative sites and to thwart the concerns of the underprivileged. To acquire a voice in an international institution requires great resources and is subject to complicated processes of representation and institutional-administrative mechanisms that, in turn, require expertise. The accomplishments of international institutions do not leverage global justice and fairness against structural problems and systemic failures – inequality, poverty-related disease, conflict cycles, failures of development, the multiplication of environmental catastrophes.[50] Institutions – whether understood as organizations (such as the UN) or as social institutions (such as law) – are conditioned by a closed and centrally kept ledger (following the archival logic, mentioned earlier). Their authority is based on continuous accumulation of the relevant data generated on the conditions and criteria set by the powerful actors of the Global North, which supply the terms for the narratives, documentations and dates that control the episteme – including memory, expert knowledge, law, and even the avenues of relevant resistance. To reach beyond the institutions will thus seem "irrelevant" or "simply mad", as Hilary Charlesworth once put it regarding feminist resistances.[51] However, demands for systematic change are made. As the IPSP underlines in their "manifesto":

> (t)he key drivers of progress will involve reforming all institutions in all spheres in order to better distribute the resources, power, status and knowledge (…) Moreover, this will not happen by making more 'progressive' parties come to government but will involve grass-root initiatives and changes in the governance of many organizations, in particular and

49 International Panel on Social Progress [IPSP], 'Chapter 11: International Organizations and Technologies of Governance', *Rethinking Society for the 21st Century*, (2018).

50 E.g., O. Korhonen, 'Onko kansainvälinen institutionalisaatio aikansa päässä?' ['Is International Institutionalisation at the End of its Road?'], (2017) 3 *Tieteessä Tapahtuu* 4; also, D. Kennedy, 'The Move to Institutions', (1987b) 8 *Cardozo Law Review* 841; IPSP, *supra* note 49.

51 H. Charlesworth, 'Feminist Methods in International Law', (1999) 93 *The American Journal of International Law* 379.

> crucially within the key economic institutions at all levels, from the small business to the international organizations.[52]

There is good reason to avoid scenarios invoking technological development as the savior or even a radical game-changer. The emerging, allegedly disruptive, technologies including blockchain ecosystems may be seen as amenable to capture by the existing private and public powers, like any other social, economic, or technological innovation.[53] Fleurbaey et al. warn that "when the internet was introduced (…) it was greeted as an emancipatory technology which held the promise of being a strong equalizer"; however, we now see it as "hostage to bubbles [in which] people live, fake news and the celebration of hate crimes".[54] The promise of the Internet has faded, and it has left us with fragmentation and the "reinforcing [of] the polarizing tendencies that exist in society today" and "[n]ewly emergent technologies usually trigger many more choices as to who will appropriate them, how they will actually be used and by whom and which of the different possible alignments will actually shape their further trajectories".[55] Thus, "the relationship between the social and the technological [consists] of mutually interdependent and variable processes of co-production or co-evolution".[56] This hazard mirrors, at least partly, Simondon's distinction between mere inter-individuality and transindividuality. The stabilization of institutions to the point of rigidity corresponds with inter-individuality, whereas transindividuation represents emancipatory change.

As transindividuation and ontological valorization are something carried, in the end, by humans, new technologies can only have effect as a medium if they are utilized as open systems that openly house potentialities. Traditional, archival forms of institutions strive towards closed systems. However, for transindividuation to occur as an ongoing process requires openness *and* decentralization-like organization to guarantee pre-individual potentials to connect up with the community as a whole and each individual member of it. The closed or centralized form would subordinate the plurality of decentralization into a system formed out of rigid inter-individual relations and, thus, block transindividuation.

The techno-positive view of blockchain ecosystems harks to decentralized institutional solutions, Internet-facilitated co-production, and how they challenge traditional pricing, property and corporate structures of the market and financial ecosystems.[57] Liberal distinctions of profit/non-profit, public/private,

52 M. Fleurbaey et al., *A Manifesto for Social Progress, Ideas for a Better Society*, (2018), at 8.

53 Ibid.

54 Ibid, at 47–9.

55 Ibid.

56 Ibid, at 39.

57 Y. Benkler, *The Wealth of Networks. How Social Production Transforms Markets and Freedom*, (2006); S. Davidson et al., 'Blockchains and Economic Institutions of Capitalism', (2017) 14 *J. Inst. Econ.*; S.

home/work that have long been in decline are coming into new focus.[58] The blockchain enables renewed ideas about the relationship between the individual and society, production and product, value and valuation, new approaches to the protection of privacy, perceptions of the need to decentralize power, support for spontaneous organization as well as distribution of agency and power more widely.[59] Those who seek to harness the disruptive and transformative value of the sociotechnical changes made possible by blockchain, however, need to focus on what is inscribed in the technological algorithm and its authorization. Social creativity, self-correction, and a need to fully understand the global techno-economic system would have to be foregrounded. Thus, the inequality-perpetuating axioms of centralized ledgers of authority, whether public or private institutions, must be questioned. It is envisaged that "productive firms of various sorts (corporations, cooperatives, social enterprises, benefit corporations, sharing platforms…) can jointly evolve and occupy different niches in the economy and the labor market" to rupture the traditional logic of the system".[60]

E. Political Economy of the People on Blockchain? – The Case of SEEDS

For an example of the emancipatory, disruptive goals pursued in a blockchain project, we can consider the SEEDS project. The project, subtitled as a "people's economy", has its own token or currency, which is also called SEEDS. The self-stated project goal is to "overcome planetary threats and inequality".[61] The project is used here to illustrate recurring themes associated with blockchain initiatives that aspire to create an ecosystem rather than just another digital currency. Some ideological tropes that we observe in the discourse include: (1) the present global economy with its institutions, including its law, governance and the state governments, cannot be expected to solve the life-threatening problems and injustices of the global political economy or ecosystem; they are deemed minimally useful or outright harmful; (2) change must come from the bottom-up with concrete hands-on, immediately applicable solutions that do not necessitate international negotiations or agreements; (3) ecological sustainability must be prioritized; (4) dependencies on traditional monies must be radically transformed; new kinds of funds must be invented; and (5) transformation necessitates ideological, not necessarily traditionally political, change.

Sheckelford and S. Myers, 'Block-by-Block – Leveraging the Power of the Blockchain Technology to Build Trust and Promote Cyber Peace', (2017) 19 *Yale J. L. & Tech*. 334.

58 D. Kennedy, 'Stages of the Decline of the Public/Private Distinction', (1982) 130 *University Pennsylvania Law Rev*. 1349.

59 Quinou, *supra* note 19; Vergne and Swain, *supra* note 26, at 148.

60 IPSP, *supra* note 49.

61 SEEDS, *Constitution & Gameplay*, (2019).

In the following, we shall quote extensively from the SEEDS constitution – that is, the organization's "white paper" or founding document – to illustrate how the above features and tenets relating to blockchain technology, transformation of money, global economy, grassroots movements, humaneness or human ethics are speculatively knit together in a blockchain project.[62]

In the draft constitution it says that SEEDS exists to "create a healthier society by subsidizing the transition to regenerative agriculture, providing grants for regenerative projects and aligning business incentives towards regeneration", and, thus, serving "as the foundation of a frictionless more rewarding peer-to-peer local food system".[63] They continue that they aim to "reduce the cost of healthy food while increasing the nutritional density, thus enabling more people to improve their health". Finally, they strive to provide "creation of the peer-to-peer and sharing economies" by fostering "equality in our monetary system, creating a currency that rewards use and equitably distributes the benefits of money creation; facilitate more equal opportunity (freedom) with the capacity to meet their needs, by rewarding not just financial commitments, but a diversity of contributions" (*sic*). In the spirit of transindividuation they continue by underlining cooperation before "healthy competition". This leads to striving for "governance and trade that by design to benefit [*sic*] the whole of human and all life from a place of earth care, people care and fair share". Thus, we should "reclaim our roles as Stewards and caretakers of Earth".[64]

SEEDS' fundamental idea can be read as to create a better (transindividual) foundation for ontological valorization. The draft constitution approaches this by listing a number of methods for reaching such goals:

> crowd-source idea development, deployment and funding; provide communities with funding to create projects they care about and have a direct voice in how and where to direct collective wealth; finance the regeneration of Earth through direct grants for regenerative projects and interest free loans for regenerative enterprise.[65]

In this aspirational framework, the blockchain is supposed to "automate the evaluation and assignment of Rights according to the software contracts (aka smart contracts) created and entered into with mutual consent of various Members".[66] Blockchain is, thus, envisioned here to organize rights between members and preserve decentralized communities. In addition, SEEDS

62 The project has established ties with states such as Liechtenstein and Sweden over various forms of cooperation.

63 SEEDS, *supra* note 61.

64 Ibid.

65 Ibid.

66 Ibid.

underlines that the possible flaws of software development will be patched up with "processes for community governance" (e.g., arbitration, conciliation, and voting).[67]

For the SEEDS project, the code is not the law, but "the Constitution is". The constitution describes its implementation (code and design) as "game mechanics". The game is not supposed to be "played" with an "us" versus "them" mentality, instead, the game is supposed to oppose "humanity and the planet" against "the systems we've inherited".[68] This is because "[n]o human alive today designed the foundations to the game the majority of humans are born into". We must, according to SEEDS, "co-create new games for humanity to play that better serve life" and that foster "new financial, economic, and governmental […] global cooperation" for creating "regenerative culture, […] healthier local food systems, more equitably distributive value to people, give people more voice, and raise the collective quality of life, of not only humans but all life on our planet".[69]

The key element for achieving in practice this cultivation of transindividuality and, thus, ontological valorization is through concrete blockchain technology. As the project underlines openness and equality, they base their system on the EOS.IO blockchain which strives to offer fee-free transactions and rewards for completed transactions. In addition, the EOS.IO system uses the PoS mechanism, which is, as pointed out earlier, more energy efficient than PoW.[70] Freedom from transaction fees is seen by SEEDS as a way of providing "a fair share of the economic surplus from the activity people generate in their economy". The idea is that today "the surplus from the people's economic activity concentrates at the top of our economies, disproportionately rewarding a handful of people". The project "aims to make that model obsolete by better distributing the value to the people who create it". This is achieved by establishing the SEEDS token, which "is owned by the people that comprise it and members receive and direct economic surpluses as the economy grows". Thus, the system "provides direct compensation for […] contributions to the economy".[71]

We use the SEEDS constitution as an example to describe aims that would support a new *possibility of transindividuation*. This is actualized through a twofold movement of ontological valorization: as a practical technical protocol (blockchain system) SEEDS may create conditions for realizing certain ideological ideals, like equal distribution of surplus. At the same time, as a technical innovation, it may enhance those ideals by showing paths to even more

67 Ibid.
68 Ibid.
69 Ibid.
70 See also, EOSIO, White Paper v.2, (2018).
71 SEEDS, *supra* note 61.

profound change, that is, for example, towards a post-capitalist economy. The practical realization is upheld by a coded technical system, which is not controlled by one party, and that can be further updated through a voting process.

In projects like SEEDS there is a real possibility for challenging the centrality of money and government, the logic of demand and supply, and the central control of institutional activity. However – and as hinted at earlier – cryptocurrencies easily become commodities themselves, that is, financial instruments that are "ripe for speculation".[72] Thus, they might contribute to the same problems – like the accumulation of wealth – as traditional economic institutions. This is especially true when the economic activity in its full and complex real-world phenomenon is reduced to mere and rigid transactions or the execution of smart contracts (inter-individual relations)[73] – which is sometimes the case especially with those blockchain systems that have only a token or a crypto to offer, and not a complex economic environment. On the one hand, even simple systems (e.g., Bitcoin) can open a path or discussion which can lead to further realization of the possibilities of technical schematics of blockchain. This is already a form of transindividuation – or a phase of transindividuation in progress – and can lead to ontological valorization (e.g., realization of new forms of thinking and actualization of economic activity). On the other hand, these systems can easily collapse into the old institutions and their modes of action. In addition, decentralization, a key element for the foundation of transindividuality and ontological valorization, can be decreased or overcome through various ways (as for instance in the DAO case, mentioned earlier). For example, the design and coding of the system is usually done by a group of people, and not the users themselves, creating a possible bottleneck of centralization. This can be overcome by providing open-source code and, as envisioned for SEEDS, the option to update the system through user voting. Also, investing in an ICO usually requires traditional currencies, and if the process is not controlled by any party (or mechanism) those who already have money (and thus power) can have great influence on the systems. On the other hand, if it is controlled by a party, it is not "fully" decentralized – and in the case of a controlling mechanism, how would we design that mechanism? Even the open-source foundation is not without its problems: even if the code can be seen, it must also be understood as must be the functioning of the system. In blockchain systems, the possible updating, that is, for example in SEEDS, the actualization of rule and system changes voted on by the users, are usually done by a group of programmers. Of course, this can be implemented in the system by enabling the voting process to execute smart contracts that change the rules automatically. However, if more profound changes to the code are

72 B. Massumi, *99 Theses on the Revaluation of Value. A Postcapitalist Manifesto*, (2018), at 21.
73 Ibid., at 110.

required, the blockchain database must be updated by people with certain skills in programming – or at least they must code the changes which then will be voted on by the users.

F. Conclusions: Value in Institutional Renewal?

Decentralization through blockchain systems is a real, practical possibility. Bitcoin, even with its obvious flaws, is an example of a working blockchain that cultivates peer-to-peer-based decentralization globally. Bitcoin can also be seen as a point in the history of blockchain technologies that is overcome, for instance with updates from Ethereum-based blockchains, such as smart contracts and PoS. The irony of Bitcoin is that it is immutable: it is a closed system that started with a revolutionary bang and then moved to execute the same old functions of capitalism as many other systems before and after. The "true" ontological valorization of Bitcoin can probably be traced to the fact that the system was designed as an open source. This led to the beginning of the crypto economy, new systems and new technologies.

However, the emancipatory solutions of the blockchain technology and ecosystems remain occupations of a periphery[74] – as with other alternative market movements, like the Nigerian *esusu* movement[75] – while the profit of blockchain technologies is harnessed to contribute to giants and monopolies of the network society, such as Google or Facebook, Visa, PayPal, Alibaba, J.P. Morgan, or to boost the efficiency of the ledgers of the global financial and banking industry.[76] Even permissionless/public systems have created their own financial oligarchies: "[i]n Bitcoin the top 4 mining pools control over 53% of the hashing power, whereas in Ethereum the top 3 mining pools control over 61% of the hashing power".[77] This does not yet mean that they can utilize the previously mentioned 51 percent attack, which would require that all the pools *and* their users would agree on the attack. Some of the pools, however, are

74 Vergne and Swain, *supra* note 26, at 151.

75 "*Esusu* describes traditional forms of cooperation in African societies whereby groups of individuals contribute to informal savings and credit associations for their mutual benefit. These associations are found mainly in agricultural production and credit financing, and they substitute for and complement modern cooperative institutions and formal financial systems". E. Osabuohien and O. Ola-David, 'Esusu (Nigeria)', A. Ledeneva et al. (eds.), *The Global Encyclopaedia of Informality: Understanding Social and Cultural Complexity. Vol. 2.*, (2018) 66, at 66 and passim.

76 The flagship blockchain and crypto-currency company in the US, Ripple Labs, who partnered with Bank of America and Banco Santander, has been caught by the SEC for misrepresenting its token (XRP) as currency when, under US law even if not in other states, it qualifies as a security. In addition, the SEC has charged its top executives for fraud and price manipulation in late 2020, although many believe that a settlement is in the interests of all. D. Fuke and J. He, 'Causing a Ripple: SEC Files Lawsuit Alleging Unregistered Offering of XRP', (2021) *Lexology*.

77 A.R. Sai et al., 'Taxonomy of Centralization in Public Blockchain Systems: A Systematic Literature Review', (2021) 58 *Information Processing and Management* 102584.

owned and led by companies and do not have individual users, which increases the risk of malicious behavior.

The "transindividual" power of blockchain lies in its ability to work as a technical and operational schema that is a resolution to practical difficulties of decentralized organization. This enables ontological valorization as the schema can be implemented in various ways for various purposes. That is, the blockchain, as a schema, does not offer any precise application or service, but a schematic foundation which can be implemented in numerous ways. Ontological valorization *already happens at this level, as an understanding of possibility – as a potentiality*. It is a foundation for practical (e.g., economic) forms of value – and a foundation for realizing the new possibilities of value creation. To put it another way, blockchain as an operational schema for decentralized organization *already manifests ontological valorization through the fact that it opens a horizon of possibility*. The difficulty lies in the question, how best to realize this horizon? How can we individuate – and transindividuate – further and not reduce all this potentiality to mere inter-individual relations? By creating non-hierarchical organizations through which humans can organize on a peer-to-peer basis? Or by creating decentralized autonomous organizations (DAOs), which in theory could even own "themselves", alongside humans to take up all the rudimentary tasks of handling mundane tasks of organizations? The possibilities of blockchain, especially as a non-hierarchical organizational tool, stand in opposition to the traditional global institutional plane, which cultivates a centralized and rigid institutional model.

Regulatory interventions, bans or licenses by states and international institutions add their own contribution to the "mutually interdependent and variable processes of co-production or co-evolution"[78] including technology and society. It is not easy to come up with radically new imaginaries since they must transcend the archival logic of the institutions of power, including liberal law concepts and categories. It is telling that government agencies and courts in the US are still mainly relying on the 1934 Howie Test[79] when attempting to regulate new cryptoassets and associated ecosystems. The test strives to prove with four points if a certain asset is a security. To be secure, "it should involve an investment of money, operate with a profit expectation, be tied to a common enterprise, and the profits, in question, should be generated by a third party".[80] The test seems dated, tacitly subscribing to conservative forms of law and institutions. Institutional models based on "archival logics" will not overcome themselves. As much as the rise of the cryptomarket has been branded "madness" and a dangerous "folly", it draws motivation from challenging "the

78 Fleurbaey et al., *supra* note 52, at 39.

79 328 U.S. 293.

80 A. Athawasya, 'In the Era of Bitcoin, What is the Relevance of Howey Test?', (2019) *AMB Crypto*.

system".[81] As the IPSP said, "we face the paradoxical situation that a globally interconnected world which has reached the highest level of technological development in history is lagging in its institutional capacity to adequately deal with the unprecedented challenges that confront it".[82] Technologies like blockchain, especially as a technical schema for new value productions, can be one key foundation for confronting these challenges.

81 See, e.g., E. Graffeo, 'Bitcoin is in a "Massive Bubble" and Investors don't Understand how its Supply Works, says Economist David Rosenberg', (2020) *Business Insider.*

82 Fleurbaey et al., *supra* note 52, at 38–9.

Chapter 13

The Contemporary Values of Operadiction Regimes

Dimitri Van Den Meerssche and Geoff Gordon

A. Introduction

Value discourse is omnipresent in contemporary debates on the new modes of governance, surveillance and economic surplus extraction enabled by technological changes. Indicatively, the EU's White Paper on Artificial Intelligence has promised to regulate the "development and deployment of AI" in a manner that reflects "European values" – a grand proclamation that refers to fundamental rights and human dignity but largely comes down to procedural data protection standards and ethical guidelines.[1] Such invocations of "values" in discussions on the issues related to accelerating technological transformation tend to take one of two forms: as attempts at *codification* or *decoding*. In the former case, the aim is to attune new socio-technical forms of governance or market behavior with "values" presumed to be at the core of liberal legal ordering. Keats Citron and Pasquale, in this vein, argue that the "American due process tradition" can and should provide "basic safeguards" in the context of algorithmic and data-driven risk scoring.[2] In his account of how the "law of global governance" needs to respond to the "challenges of new technology", Benvenisti in turn invokes "democratic values" to demand political points of access to the big data "stored on private and public servers and utilized by private and public actors".[3] In the writings of leading scholars on law and tech, we find a reaffirmation and rearticulation of "traditional rule-of-law values" and

1 It is remarkable how this value discourse – values defined as "fundamental", "European" and "shared" – is grafted onto a pre-existing language of multilateralism and the EU's strategic positioning as a normative force: in the development of artificial intelligence, which "can be a driving force to achieve the Sustainable Development Goals", the EU will "strive to export its values across the world". European Commission, *White Paper on Artificial Intelligence – A European Approach to Excellence and Trust*, 19 February 2020, 1–3 and 9.

2 D. Keats Citron and F. Pasquale, 'The Scored Society – Due Process for Automated Predictions', (2014) 89 *Washington Law Review* 1.

3 E. Benvenisti, 'EJIL Foreword – Upholding Democracy Amid the Challenges of New Technology: What Role for the Law of Global Governance?', (2018) 29(1) *European Journal of International Law 9*, at 80–81.

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the "institutional forms that those values require".[4] This entails both a sobering observation that this cherished "rule of law" ideal was itself only afforded by a specific socio-technical environment of print and text (an argument made by Hildebrandt),[5] as well as a blossoming industry of attempts at transposing or translating these value systems to new technological settings.[6] Cohen argued in this sense that "algorithmic processes" need to be "redesigned to incorporate … rule of law criteria" – an exercise in technical "redesign" that codes the "foundational" values of "generality, stability, equality and publicness" into the conduits of new decision-making machines.[7] These projects of *codification*, in other words, display a confidence in and commitment to value systems to be extended to new practices of governance. As Kingsbury describes this sensibility:

> it was hoped [that] lawyers would cast upon the rushing gov-tech machine an enmeshing filigree of formal law … These legal rules, techniques, institutions, and values did not have to be newly concocted – for the most part the need was just to articulate and deploy them at speed and in the right ways.[8]

In the case of *decoding*, by contrast, the intention is not primarily to instill values already known and presumed present in liberal legal ordering but to reveal the – often pathological – value systems that are implicitly encoded in new, technologically mediated, decision-making tools or economic practices. In this

4 J. Cohen, *Between Truth and Power – The Legal Constructions of Informational Capitalism* (2019), 204.

5 M. Hildebrandt, *Smart Technologies and the End(s) of Law: Novel Entanglements of Law and Technology* (2015).

6 See, for example, F. Pasquale, *New Laws of Robotics – Defending Human Expertise in the Age of AI* (2020).

7 Cohen, *supra* note 4, at 247. *Cf.* M. Zalnieriute, L. Bennett Moses, G. Williams, 'The Rule of Law and Automation of Government Decision-Making', (2019) 82(3) *Modern Law Review* 425 (on how "the automation of government decision-making can both enhance and detract from rule of law values"); L. Diver, 'Digisprudence: The Design of Legitimate Code', (2020) 13(2) *Law, Innovation and Technology* (on how rule of law values can be "imported" into code design). Other authors looked beyond "traditional" rule of law criteria and identified values implicitly embedded in analogue, atomistic and court-centered evaluations: spaces of slowness and delay, interpretation and contestation, representation and authorship, uncertainty or discretion. A. Rouvroy, 'The End(s) of Critique: Data-Behaviourism vs. Due-Process', in M. Hildebrandt and E. De Vries (eds.), *Privacy, Due Process and the Computational Turn. The Philosophy of Law Meets the Philosophy of Technology* (2013); M. Hildebrandt, 'Law as Information in the Era of Data-Driven Agency', (2016) 79 *Modern Law Review*; L. Diver, 'Computational Legalism and the Affordance of Delay in Law', 2020 *Journal of Cross-disciplinary Research in Computational Law*.

8 B. Kingsbury, 'Human Rights in a Use Case World', in N. Bhuta, F. Hoffmann, S. Knuckey et al. (eds.), *The Struggle for Human Rights. Essays in Honour of Philip Alston* (2022).

sense, scholars have highlighted the patriarchal,[9] class-based,[10] and racialized hierarchies performed in and reproduced by regimes of algorithmic governmentality.[11] In a powerful account of how new technological tools are reconfiguring bordering practices, Tendayi Achiume (UN Special Rapporteur on Contemporary Forms of Racism), for example, set out to expose the "logics, principles [and] ideologies" that are implicated in "information technologies for border enforcement and administration", referring to "techno-chauvinism", "racial and religious supremacy", "ethnonationalism", "colonial and imperial projects", or "capitalist profit-making".[12] A range of responses subsequently seek to extricate the "bias" from machine learning by qualifying the design of algorithmic systems as a site of normative agency and accountability. This is expressed in Eubanks' proposal for a "Hippocratic oath for data science" and repeated calls to clean the training data of computational learning – efforts to insulate the clean correlations of the mathematical model from the problematic politics or prejudices present in its social or institutional environment.[13]

Both registers of engagement or intervention (which are of course described here in a brief and reductive form) are marked by a particular approach to the relationship between algorithmic instruments and the socio-political or ethicopolitical "values" that should either guide their operations or be extricated from them. They both work through a separation between identifiable, pre-existing value systems and the algorithmic regimes of governance under scrutiny. The "values" informing reform and critique are situated outside the regimes and technologies of governance on which they can be exerted. It is precisely this gap – this external evaluative vantage point – that provides the space for comparison and critical inquiry: "European values", "democratic values" or "rule of law values" promise a set of institutional arrangements for the good, ethical and normal not to be transgressed by algorithms always at the risk of reproducing "[s]tructural categories of discrimination and exclusion".[14] Without questioning the merit of these reformist projects and critical interven-

9 See, for example, K. Crawford, 'Artificial Intelligence's White Guy Problem', *New York Times*, 25 June 2016.

10 See, for example, C. O'Neil, *Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy* (2016); V. Eubanks, *Automating Inequality: How High-Tech Tools Profile, Police and Punish the Poor* (2018).

11 See, for example, S. Noble, *Algorithms of Oppression: How Search Engines Reinforce Racism* (2018); R. Benjamin, *Race After Technology* (2019).

12 T. Achiume, 'Race, Borders, and Digital Technologies: Call for Input' for the 2020 thematic report to the UN General Assembly, 15 May 2020.

13 In Eubanks 2018, *supra* note 10. As Amoore has similarly observed, "[t]he dominant critical perspectives on algorithmic decisions have thus argued for removing the 'bias' or the 'value judgements' of the algorithm, and for regulating harmful and damaging mathematical models" – in L. Amoore, *Cloud Ethics: Algorithms and the Attributes of Ourselves and Others* (2020), at 5.

14 C. Aradau and T. Blanke, 'Politics of Prediction: Security and the Time/Space of Governmentality in the Age of Big Data', (2017) 20(3) *European Journal of Social Theory* 385 (making the observation

tions, this chapter takes a different approach, inspired by Amoore, to investigate how "algorithms are not so much transgressing settled societal norms, as establishing new patterns of good and bad, new thresholds of normality and abnormality".[15] With Amoore, we thereby seek to understand how algorithms in AI applications present discrete "ethicopolitical arrangement[s] of values, assumptions, and propositions about the world".[16] Our reliance on Amoore also keeps our inquiry roughly in keeping with David Graeber's materialist notion of value as the importance of actions.[17] Following Graeber, value may be understood as a reiterative phenomenon "in which actions become meaningful to the actor by being incorporated in some larger, social totality".[18] That totality is constantly in flux as new actions are incorporated, as a consequence of which, "systems of categories, or knowledge, are really just one side of a system of action; [and] society is therefore in a sense always an active project or set of projects".[19] At the same time, however, "human action, or even human thought, can only take place through some kind of material medium and therefore can't be understood without taking the qualities of that medium into account".[20] Thus the social totality remains concretely grounded despite its constant flux, because while "society [arises] from creative action… creative action … can never be separated from its concrete, material medium".[21]

Our reliance on Amoore, in the spirit of Graeber, entails a shift away from a representationalist frame (where technological regimes can be perceived as enacting or deviating from value systems already existing outside their operations), to a language of performativity that seeks to register how new realities (and associated forms of temporal or informational value) are technologically enacted. In contrast to Amoore, however, who portrays these performative enactments as forms of truth-telling (*regimes of veridiction*),[22] our contribution seeks to foreground not the epistemological but the ontological tenets

that the correlational logic of "pure relationality" in predictive analytics "elude[s] the structural categories of discrimination and exclusion").

15 Amoore 2020, *supra* note 13, at 6. For this reason, Amoore argues, "[o]ne cannot sustain a search for codes of ethics that instill the good, the lawful, or the normal into the algorithm … [O]ne cannot stand outside the algorithm to judge its morality, its role in doing good or evil. Instead, one must begin from the iterative writing that is itself generative of fungible thresholds of the good and the bad". Ibid., 6 and 158.

16 Ibid.

17 D. Graeber, *Toward an Anthropological Theory of Value* (2001).

18 Ibid., 12, 254.

19 Ibid., at 254.

20 Ibid., at 83.

21 Ibid., at 54.

22 Ibid., 5–6 ("what matters is not … the identification and regulation of algorithmic wrongs [but] how algorithms are implicated in new regimes of veridiction, new forms of identifying a wrong or of truth telling in the world").

of algorithmic governmentality.[23] *Regimes of operadiction*, the analytic introduced in this chapter, are technologically mediated forms of governance that constantly produce and perform the realities through which they operate (as elaborated in Section B). We argue that the values at play in these techno-governance regimes can productively be understood as entangled with these new ontological formations, which we trace in temporal and informational terms (as elaborated in Section C). To do so, we suspend the representational perspective: before attempting to hold techno-governance regimes to account on the basis of values already represented elsewhere, we propose to investigate the values embodied in the technical systems themselves. In doing so, we do not mean to discard the valuable efforts associated with codification and decoding. Rather, we keep an artificially tight lens on (temporal and informational) values embodied in technical systems, to draw out the distinct characteristics that may productively be taken into account alongside codification and decoding programs for regulatory purposes today. Significantly, when we do this, we observe that techno-governance systems today deploy non-representational modes of regulation, reiteratively (re)generating their own governance scripts, freed from any one external paradigm or fixed reference point.[24]

Suspending (at least temporarily) the representational perspective raises particular concerns in terms of possibilities for critical evaluation and political intervention, as elaborated in Section D. Those concerns are heightened by the economic stakes of the emerging regimes of governance that we observe. The recent Franco-German proposal for a European data infrastructure, the Gaia-X project, is a case in point. Gaia-X is a major new initiative that aims to undergird the sorts of technologies relevant to our study, by developing European infrastructure for the movement and management of data. It promises an impressive feat of public policy-making, which would release the disposition of data from a small number of data chokepoints over which Europe and European entities do not have much control. "European values" are central to the project's public pitch as well as its technical elaboration:[25] the initiative

23 The regimes on which this contribution focuses can thereby be understood as "apparatuses" in Barad's use of the term – as "specific material reconfigurings through which 'objects' and 'subjects' are produced". "[A]pparatuses are the material conditions of possibility and impossibility of mattering; they enact what matters and what is excluded from mattering". For Barad, this calls for a performative perspective (a rupture from representationalist thought) that "allows matter its due as an active participant in the world's becoming". The apparatus, in this sense, enacts "agential cuts" that are both "ontic and semantic" – it is an ontological "boundary-making practice". Important for our account, Barad adds that apparatuses are "material configurations or reconfigurings of the world that re(con)figure spatiality and temporality". In K. Barad, *Meeting the Universe Halfway: Quantum Physics and the Entanglement of Matter and Meaning* (2007), 135, 146, 148, 175, 333.

24 F. Johns, 'From Planning to Prototypes: News Ways of Seeing like a State', (2019) 82(5) *Modern Law Review*.

25 Federal Ministry for Economic Affairs and Energy (BMWi), *GAIA-X: A Pitch Towards Europe* (May 2020) and *GAIA-X: Technical Architecture* (June 2020).

proposes to develop the Europe-wide architecture on the basis of European values and for the creation of European values. Despite the pervasive reference to (European) values in the various foundational documents, however, values encompass a still impressionistic and sometimes contradictory mix that prioritizes free market mechanisms, privileging competition and private property ownership by individual entities, alongside national regulatory preferences. The close interconnection of economic and societal interests is similarly manifest in the European Commission's data strategy. In the launch document for its European data strategy, the EC proposed "to seize the opportunity presented by data for social and economic good…. That potential should be put to work to address the needs of individuals and thus create value for the economy and society".[26] Equally, "Europe's data strategy relies on a thriving ecosystem of private actors to create economic and societal value from data".[27] Finally, "A European way for handling data will ensure that more data becomes available for addressing societal challenges and for use in the economy, while respecting and promoting our European shared values".[28]

Together, the European data strategy and Gaia-X raise the question whether even new modes of governance such as we describe with operadiction remain ineluctably within an economic framework for value production. If so, what is the relationship between the (governance) technology and that framework? At the heart of these questions lies a puzzle concerning the situation of the individual subject among these new modes of governance and the assorted technologies and economic logics with which they are entangled. Though that puzzle and these broad questions go beyond the scope of this chapter, we will return to these issues in the conclusion, when we consider the implications that non-representational modes of techno-governance pose today for critique.

B. Regimes of Operadiction

Regimes of operadiction simultaneously produce both their own governance scripts and the ontology of their operation, the realities in which they apply. We mean the neologism of operadiction to highlight a combination of two sorts of operation. One operation continuously recreates realities out of information, in a reiterative process of patterned construction; the other instantaneously operationalizes those realities. Both operations together are key: if the continuously reconstituted information/reality is not immediately actionable (the second operation), the output remains in the realm of something like recommendation; and if the operationalization is not predicated on the constant

26 European Commission, 'A European Strategy for Data', 2020 *Commission Work Programme* (adopted on 19 February 2020), at 4.

27 Ibid., at 15.

28 Ibid., at 25.

reproduction of a reality drawn out of immanent possibilities in the data (the first operation), the output remains in the realm of a predefined script. By surpassing recommendations and predefined scripts, the techno-governance systems that we observe are generating both the realities to which they apply and the standards to which they will be held. Sub-symbolic AI technology, relying reiteratively and recursively on signal strength in neural networks to achieve pattern recognition in constant reformulation, drives the contemporary practices that we associate with regimes of operadiction. That technology includes things like computing power, infrastructure, and data, but the practices to which we refer occur in human-machine networks, or institutional assemblages. While we focus narrowly here on technological artifacts, they should be understood in the wider contexts of managerial governance and institutions.

Let us illustrate our focus with a brief example of a particular regime of operadiction at work. For several years now, a radical change in practices of border control has been professed.[29] In the European Schengen Area this has been expressed as the need for an infrastructure of "virtual borders".[30] Krum Garkov, the Executive Director of eu-LISA (the European Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice), argued in this context that "the area of internal security is going through a major transformation, moving in part from the physical to the virtual world" – a world dependent "on data and information".[31] Aimed to guarantee smooth mobility while optimizing security, this regime of "virtual borders" relies on and operationalizes the "interoperability" of databases in the EU: the creation of an informational infrastructure that interconnects and processes personal data of third-country nationals from a variety of different sources (including visa information, biometrics and criminal records data).[32] Yet, this data deluge poses particular problems:[33] Europol's Deputy Executive Director recently lamented that the organization is "under pressure due to increasing amounts of data", and noted the need to "transform data into information".[34]

29 *Cf.* L. Amoore, *The Politics of Possibility – Risk and Security Beyond Probability* (2013); D. Broeders and H. Dijstelbloem, 'The Datafication of Mobility and Migration Management', in I. Van der Ploeg and J. Pridmore (eds.), *Digitizing Identities: Doing Identity in a Networked World* (2016); M. Longo, *The Politics of Borders: Sovereignty, Security and the Citizen after 9/11* (2017).

30 See eu-LISA, *Strategy 2014–2020* (2014), www.eulisa.europa.eu/Publications/Corporate/EL0114595ENC.pdf (consulted 22 February 2021); EU Commission, *Stronger and Smarter Information Systems for Borders and Security*, Communication from the EU Commission to the European Parliament and the Council, 2016.

31 eu-LISA, *supra* note 30, at 6.

32 Regulation (EU) 2019/817. For a critical analysis of the interoperability framework, see N. Vavoula, 'Interoperability of EU Information Systems – The Deathblow to the Rights to Privacy and Personal Data Protection of Third-Country Nationals?', (2020) 26(1) *European Public Law*.

33 *Cf.* F. Johns, 'The Deluge', (2013) 1(1) *London Review of International Law*.

34 eu-LISA, *Conference Report: The New Information Architecture as a Driver for Efficiency and Effectiveness in Internal Security*, 16 October 2019, Tallinn, at 26.

As systems of analysis and decision-making are flooded with data, he expressed, what is really required is "an accessible interface with actionable information".[35] Echoing this operational orientation towards "actionability", Olivier Onidi, EU Deputy Director-General of DG Migration and Home Affairs, equally observed that "data" should be rendered "more illustrative for border guards" in the process of daily decision-making. The "virtual border" demands visual inscriptions – actionable scores and signals.

In the conceptualization and construction of this operational system, hope is vested in artificial intelligence as technology of translation – as a way of transforming "data into information".[36] A recently published EU strategy on *Opportunities and Challenges for the Use of Artificial Intelligence in Border Control, Migration and Security* therefore sets out various techniques aimed at distilling "deeper insights from the increasing quantities of available data".[37] At the core of the strategy lies the promise of algorithmic risk assessment: the detection of "irregular patterns" not "identified as strange before" (defined as "general risk assessment") that can inform how to "cluster" and "classify" people for particular purposes ("individual risk assessment").[38] These classifications, the strategy envisages, could "trigger" different, "automated" responses – "flags" and "notifications" inducing immediate institutional action.[39] A recent pilot project funded by the EU Horizon 2020 scheme articulates this objective in clear terms: "risks are key to the performance of the system", the technical framework of iBorderCtrl states, "as they declutter the information by compressing all data into meaningful actionable risk scores".[40] This entails an algorithmic "risk–assessment routine which aggregates and correlates the risks estimations [from] the processing of the travellers' data", as well as an "advanced post-hoc analytics that will help identify new patterns".[41] This identification of "patterns" – the "correlation" and "compression" of data in meaningful associations – is aimed at providing

35 eu-LISA, *Conference Report: EU Borders – Getting Smarter Through Technology*, 17 October 2018, Tallinn, at 17.

36 While Onidi noted that "machine learning has potential" for "vetting persons who come to the EU", "screening their application files" and conducting "virtual border checks", Maria Bouligaraki, the head of eu-LISA's Test Transition Unit, argued that "deep-learning systems" are essential "to integrate large, unconnected silos of data". eu-LISA 2018, ibid., at 12, and eu-LISA 2019, *supra* note 34, at 40.

37 European Commission (DG for Migration and Home Affairs), *Opportunities and Challenges for the Use of Artificial Intelligence in Border Control, Migration and Security* (2020), 5.

38 Ibid., 10, 58, Annex B. The strategy clarifies that "classifications" (used for visa applications or border checks) "could be defined based on a risk threshold or specific indicators, or less pre-defined … based on some learned similarity".

39 Ibid., Annex B.

40 See www.iborderctrl.eu/Technical-Framework (archived by author).

41 Ibid.

indicators and inscriptions with immediate operational use.[42] This is reflected in the ambition of iBorderCtrl to distil "actionable" risk scores from multiple and heterogeneous data sources. The value of these simple numerical signals is to enable action under conditions of radical uncertainty – to produce inscriptions that render data legible and productive. Yet, these assignations, crucially, do not imply correspondence to predefined normative criteria of "risky" behavior: the associative, anticipatory rationality of data-driven risk modeling precludes any possibility of defining what is measured outside of the inferential process from which it is derived.[43] The "actionable" indicator has no representational orientation – its value derives from the reflex responses it induces and the capacity for constant adaptation it entails as new patterns are "uncovered" in data.[44]

While a full empirical exploration of the "virtual border" is far beyond the scope of this contribution,[45] this brief description allows us to draw out several salient features of governmental regimes of operadiction. Aimed at translating the current data deluge into sets of "actionable" associations, the "pairings of list and algorithm" in these practices, or the constantly reiterated parsing of constantly changing data sets, constitutes a governance mode distinct from modernist schemes of planning, placement and ordering that have traditionally occupied critical writing in international law.[46] Instead, the algorithmic tools

42 As the EU strategy further states, "[b]oth supervised and unsupervised [artificial intelligence] could be considered, respectively: triggering automated risk scoring based on observation or prediction [of] patters pre-defined as warning signals; or unsupervised uncovering of relations". European Commission 2020, *supra* note 26, Annex B, 90. Interestingly, the strategy notes that this use of AI for the detection of "irregularities" in travel patterns "is similar to fraud detection by analyzing spending behavior, or cybersecurity by analyzing network traffic patterns, both of which are prevalent AI use cases, particularly in the financial services industry".

43 European Commission, ibid., Annex B, 89 ("[t]he benefit of using AI is that it can … uncover correlations between input data and classification outcomes", producing "classifications" on the basis of "learned similarity").

44 The aim of "general risk assessment" as indicated by the EU strategy is precisely to find such "patterns". Ibid., at 10. This post-epistemological nature of data-driven governance has been described from a variety of perspectives. See, for example, A. Rouvroy and B. Stiegler, 'The Digital Regime of Truth: From the Algorithmic Governmentality to a New Rule of Law', (2016) 3 *La Deleuziana* 9 ("we feel that with big data we no longer have to produce knowledges about the world, but that we can discover knowledge directly in the world"); F. Johns, 'Data, Detection, and the Redistribution of the Sensible in International Law', (2017) 111(1) *American Journal of International Law* 57, at 98–9 (on how "accumulated human knowledge and experience" are displaced by the "fleeting associations foregrounded in data mining" – by "[p]atterns appearing momentarily in data"); D. Chandler, *Ontopolitics in the Anthropocene: An Introduction to Mapping, Sensing and Hacking* (2018).

45 For a more elaborate engagement with the development of "virtual borders" – the inequalities these engender and the political practices these disable, see D. Van Den Meerssche, 'Virtual Borders: International Law and the Elusive Inequalities of Algorithmic Association', (2022) 33(1) *European Journal of International Law*.

46 *Cf.* F. Johns, 'Global Governance through the Pairing of List and Algorithm', (2015) 33 *Environment and Planning D: Society and Space*; F. Johns, 'From Planning to Prototypes: News Ways of Seeing like a State', (2019) 82(5) *Modern Law Review*.

and routines it employs are oriented towards anticipation, sensing or simulation – towards inviting uncertain futures in a governable present.[47] The "compression" of data in "actionable" scores can then be understood, in Amoore's terms, as a particular mode of "writing the contours of [the] world" that arrays "possible futures" in a manner allowing for "imminent decisions".[48] This algorithmic governmentality, as we observed, does not aspire to construct causal claims to be tried and tested, but works through the emergent correlations and connections present within the data itself.[49] In its aspiration to govern through relations immanent in data, this regime defies both representation and epistemological evaluation – it works not with causes but with immanent patterns, not with representations but with actionable signals.[50] These are central tenets of what we describe as the regime of operadiction.

Let us delineate the analytic of operadiction (our ideal-type contribution) with two more ideal-type points of comparison: one, already referred to, we call a veridiction regime, the other we refer to as the classical regime. We distinguish the classical regime as one that aims to direct the present in a determinate way towards a closed future or end point. Maintaining the Foucauldian register, the classical regime is a relatively straightforward disciplinary regime. An example is the collective security regime that aims at the permanent suppression of militarized conflict by means of a prohibition on military force, with the exception being the valid use of collective force to maintain the prohibition: this is a closed, coercive regime. Veridiction regimes, keyed to a population rather than a particular will, do not exhibit the same fixed means and end point. Rather, they represent a way of generating knowledge for open-ended management routines capable of adapting to changing conditions.[51] The

47 Such devices have been receiving attention in critical security studies. See A. Amicelle, C. Aradau and J. Jeandesboz, 'Questioning Security Devices: Performativity, Resistance, Politics', (2015) 46(4) *Security Dialogue*; M. de Goede, 'The Chain of Security', (2018) 44(1) *Review of International Studies*. For an account of the shift from modernist modes of governance – based on causality, rationality and universality – towards governmental forms of "sensing" on the basis of "correlational sight", see Chandler 2018, *supra* note 44.

48 Amoore 2013, *supra* note 29, at 7 and 9.

49 As Amoore notes in her diagnosis of algorithmic decision-making: "all talk of cause and effect is secular history", since current forms of governance do "not seek a causal relationship between items of data, but work instead on and through the relation itself". Amoore 2013, *supra* note 29, at 59. This shift from causal to correlation, from deductive to inductive, modes of governance is also observed in Chandler 2018, *supra* note 44 ("rather than seeking to understand hidden laws of causality [sensing] relies upon … the power of correlation"); Rouvroy and Stiegler 2016, *supra* note 44, at 8 (on how algorithmic governmentality entails "the passage from a deductive logic to a purely inductive logic").

50 Chandler 2018, *supra* note 44, at 117 ("[d]ata-driven approaches … no longer rely on specialist knowledge and expertise: correlational algorithms based on mass data sets take the 'knowledge' out of knowledge production").

51 Starting with this foundational description from Foucault's lectures from 1978–79: "The regime of veridiction is, in fact, not a law of truth, (but) the set of rules enabling one to establish which

veridiction regime aims to manage the present through an open future, without any classical end point (e.g., the economic regime that aims at the maximization of market participation). The World Bank's Doing Business indicators have been an example, offering numerous statistical benchmarks to evaluate relative conformance with changing exigencies associated with best market practices. Regimes of operadiction and veridiction share aspects of open-ended and adaptive modes of governance. The veridiction regime operates as a sort of knowledge tool (and as such is appropriate to Risk Society, though not limited to it), to produce a governmental truth capable of affirming the powers appropriate to manage a population, to maximize the population's productivity under competitive conditions that constantly require more production.[52] The operadiction regime similarly works to produce a governmental truth, but, as it does so, constantly reconstitutes the reality of the population to which it applies. It does so not by modeling the health and productivity of a population identified with a relatively stable (statistical) definition, but by constantly reconstituting its vitality in real time.

The operadiction regime does not govern in the space between a source of information (such as a model or a market) and a material population, as does the veridiction regime, but by immediate access to a material population constituted out of information and governed in that same constitutive act (for instance by means of pattern recognition). While regimes of veridiction operate on an epistemological terrain, the workings of operadiction regimes are ontological. We note, however, that the technological assemblages to which we refer operate on the basis of information processing. Information might sooner be associated with the epistemological orientation than the ontological. But information is also material, and the operadiction regime exploits and operationalizes that materiality as arguably no other governance regime has

statements in a given discourse can be described as true or false. Undertaking the history of regimes of veridiction—and not the history of truth, the history of error or the history of ideology, etc.—obviously means abandoning once again that well-known critique of European rationality and its excesses … . For example, when I say that critique would consist in determining under what conditions and with what effects a veridiction is exercised … the problem would not consist in saying: Look how oppressive psychiatry is, because it is false. Nor would it consist in being a little more sophisticated and saying: Look how oppressive it is, because it is true. It would consist in saying that the problem is to bring to light the conditions that had to be met for it to be possible to hold a discourse on madness … . It is not so much the history of the true or the history of the false as the history of veridiction which has a political significance". – M. Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978–1979* (2008), at 35–7.

52 We wish to note the overlap with, but also distinction from, the use of "veridiction" by Fabian Muniesa in this volume. We share the Foucauldian core of the term, referring to the assemblage of semantic and other conditions by which governmental knowledge can be recognized as such and internally validated, but we focus on the use of that assemblage for governance purposes keyed to population, per Foucault's lectures at the Collège de France in 1977–78 and 1978–79. See Foucault, *supra* note 51; and *Security, Territory, Population: Lectures at the Collège de France 1977–1978* (2007).

before. As a result, the operadiction regime does not merely manage a population in the present by informing about its conduct relative to an open future (e.g., via indicators that use information snapshots to inform about sustainability); instead it constantly aims to recreate a population in the present, by reconstituting the patterned relations by which its population is intelligible, and selectively foreclosing material futures imminent in those patterns (e.g., with risk assessment algorithms that iteratively reconstitute a constant flow of data streams to act now on possible future conditions).[53]

C. Temporal Values and Data Values

As a descriptor of the utility of data in neural network processes, value is a function of accuracy and signal strength. Neural networks involve numerous interconnected points for information processing; information is evaluated not according to fixed standards of symbolic truth, but in terms of possible correlations among signals (hence identification with sub-symbolic AI). The data point will be legible to sub-symbolic AI on the basis of specific training histories, and the aim of accuracy and signal strength is, roughly, to maximize preferred attributes (as efficient solutions to problems defined in the code) learned in training – though the training history may sometimes be or become impenetrable to scrutiny, as in cases of deep learning. Accuracy conveys the degree to which data points conform to information learned in training. Signal strength conveys the relative prevalence of recognizable attributes for pattern recognition purposes. The value of any data point in sub-symbolic AI applications is contingent on the way it "shows up", once legible, in the neural network – its distribution, its links with other data points, etc. After data are made legible by a training history, their value depends on their relative situation in the data set, and the more or less accurate pattern recognition possibilities that arise out of their constellated situation in the neural network.

This sort of informational value has also been incorporated into neoliberal governance routines and discourses, in support of specific normative and distributive commitments associated with neoliberal principle. As famously propounded by Hayek,[54] the market has been construed as a vast information processor, a complex algorithmic machine like an artificial intelligence, with a neural network architecture capable of yielding efficient computational outputs not otherwise achievable by humans. This imaginary has privileged the rise, associated with neoliberalism, of market-based policy to direct social

53 We draw in this paragraph on one of two uses of inform: the intransitive use, which speaks about something; the other use, which we will also draw on is the transitive, which acts directly on its object. This dual character has lately been invoked in relevant studies by Rouvroy and Hildebrandt, among others.

54 F. Hayek, *Hayek on Hayek: An Autobiographical Dialogue* (2012).

governance generally. In turn, the celebration of automated information processing has elevated the application of computational neural networks and artificial intelligence as ideal socio-economic technologies, suited to market-oriented governance institutions that privilege their operation. Thus, the technical imaginary supports the policy imaginary, which, in return, privileges the technical imaginary. This mutual interrelationship can be observed in blended economic and programming vocabularies associated with the value function, the technical term for the efficient optimization of an objective (or solution to a problem) defined in code. This link to neoliberal celebration of information processing technology conforms to the veridiction regime, in which the market becomes the preferred technology to affirm policy determinations bearing on a population.[55] But the link of data processing with the market also supports a key facet of the operadiction regime, namely emergence. The value of data becomes contingent on the possibility of emergent patterns immanent in the data set. This links with the temporal value, privileging a sort of immediacy, to which we turn in a moment. It also undergirds what Karen Knorr Cetina has called the flow architecture of a global reflex system, which we will return to after considering the temporal value.

Returning to our points of comparison: the temporalities of both classical and veridiction regimes, despite their differences, link value to representation, whether in terms of a determinate goal (e.g., enforcing a tithe to enrich a monarchy) or a technology for techno-bureaucratic guidance (such as the market). Representation involves a relationship in time in which the represented object exists independently and prior to the observation of the relevant (governance) agency. The governance relationship goes forward in linear fashion: from pre-existing object, to representation, to action predicated on a causal supposition that it will produce a result favorable to the preferred disposition of the object in question. The operadiction regime, by contrast, links value to iterative techniques, or the constant reproduction of an unstable present. The linear temporal condition of the representational relationship is replaced by a recursive temporal condition, and causality is left behind. The governance routine constantly creates and recreates the reality upon which it works, and does so simply on the basis that it does work, without devotion to any predefined causal relationship; the representational and causal steps are suppressed. Relative to both the classical and veridiction regimes, operadiction collapses a distance that the others preserve between the governmental regime and the object of its governmental action. A quotidian example is the recommender system that tells its user the item that it wants to receive next, such as Amazon uses to sell product. The recommender system creates the user's desire on the basis of a unique algorithmic assignation that will change with the next click.

55 See Foucault, *supra* note 51.

Operadiction regimes valorize an unstable present by foreclosing potential futures of subject individuals (think of the AIs that sort students, determine bail, and otherwise allocate resources). The determinate but open-ended temporal condition will be familiar from analysis of Risk Society, in which advancing scientific productivity, including within itself a reflexive goal of security, produces ever more risk even as it produces ever more risk management. The operadiction regime, however, arguably dispenses with the reflexive character of the relationship to risk. The reflexive relationship to risk characteristic of Risk Society is one in which every activity entails a choice, the options of which may be measured or perceived for governance purposes in terms of relative risk. It is this constant reflexive relationship to risk-as-choice that produces the positive feedback loop associated with Risk Society: every choice for risk management only ever produces a condition with more, new choices to manage for risk. This hyperproduction of reflexive risk situates, in the genealogy of operadiction regimes, as a driver behind the ascendance in governance institutions utilizing increasingly powerful computational and probabilistic technologies. But the regime of operadiction, enabled by advances in computational power and sub-symbolic programming design, dispenses with the choice. Risk becomes a sort of auto-exercise, an immediate intervention. Borrowing from separate bodies of work by Antoinette Rouvroy and Karen Knorr Cetina, we call this a shift from reflexive to reflex.

Rouvroy differentiates expressly between reflexivity and reflex, which Knorr Cetina, writing nearly two decades ago, did not. We start with Knorr Cetina's work to build up to the distinction. Writing in the early 2000s, Knorr Cetina elaborates what she calls a global reflex system in the context of global currency exchanges. The global reflex system is a scopic technology; it projects a changing stream of information on a continuous basis. Because it projects a fluid stream of information, Knorr Cetina describes it as a flow architecture. She is clear that the notion of flow is not used as a metaphor.[56] Rather, "[t]he defining characteristic is that flow refers to the level of reality itself, which we claim has been temporalized and streamed"[57] and is characterized by "ontological fluidity and multiplicity".[58] The constant engagement that Knorr Cetina observes, of currency traders with a digitally coordinated stream of constantly changing market information, yields "the projection and reconstitution of this reality as one that is continually emerging".[59] That emergence is necessarily supported by scopic technologies, technologies that assemble and project

56 K. Knorr Cetina and A. Preda, 'The Temporalization of Financial Markets: From Network to Flow', (2007) 24 *Theory, Culture & Society*, at 129.

57 Ibid., at 129.

58 Ibid., at 132.

59 K. Knorr Cetina, 'How are Global Markets Global? The Architecture of a Flow World', in K. Knorr Cetina and A. Preda (eds.), *The Sociology of Financial Markets* (2005), at 54.

information for a coordinated global assemblage.[60] The scopic technologies that Knorr Cetina observes in the financial world play a similar role to sensory technologies incorporated into the border control regimes that we discussed briefly above. The scopic technologies lead Knorr Cetina to describe the flow architecture as a reflex system. Reflex has two connotations here, referring to the instantaneity of reflex action, but also to the technology of projected images associated with cameras and lenses. In this case, the constant projection of changing information creates an immersive world of ontological fluidity.

Rouvroy goes one step further, differentiating reflex from reflexivity. The distinction is based on the observation that the instantaneity of reflex closes off one of the central conditions of reflexivity, in which there is a distance between the agent and the object of its action. The relationship between the two, under conditions of reflexivity, is not automatic or inevitable: it is one construction among possible constructions, and entails a deliberate choice of association or action. This applies to the realm of the subject alienated from object and other subjects. But Rouvroy questions whether that (reflexive) subject can continue to exist in the realm governed by automated decision-making of algorithmic processes like artificial intelligence, operating at speed. Because in familiar governance contexts, there must be some inducement or control, coercion, etc., of the subject, to regulate its relationship with other subjects and objects. But in the algorithmic situation, the subject is entered into a flow of signals that collapses the distance between the subject and the other subjects or objects with which it might interact: all are transformed into signals; therefore there is no longer any construction by the subject of the relationship to objects and other subjects. Instead, (co)relationships are determined instantaneously, over and over again, by pattern recognition processes that simultaneously determine the physical world (e.g., via the internet of things), communication processes (e.g., via media platforms), etc. Accordingly, Rouvroy argues that this mode of governance "will affect you at the level of reflex rather than at the level of reflexivity", and so "[w]e bypass subjectivity by automatization".[61] Here Rouvroy is speaking directly to the phenomena we associate with operadiction, and in very similar terms: "We by-pass the subjectivity and we thus arrive at a kind of very objective operability – a kind of machinic objectivity".[62]

Rouvroy describes the stakes of operadiction's treatment of the subject in temporal terms:

60 K. Knorr Cetina, 'From Pipes to Scopes: The Flow Architecture of Financial Markets', (2003) 4 *Distinktion: Scandinavian Journal of Social Theory*, 7–23.

61 Rouvroy and Stiegler, *supra* note 44, at 12.

62 Ibid., at 12.

> The only 'subject' algorithmic governmentality needs is a unique, supra-individual, constantly reconfigured 'statistical body' made of the infra-individual digital traces of impersonal, disparate, heterogeneous, dividualized facets of daily life and interactions. This infra- and supra-individual statistical body carries a kind of 'memory of the future' whereas the strategy of algorithmic governmentality consists in either ensuring or preventing its actualization.[63]

In identifying the stakes with the prevention or the actualization of possible futures, Rouvroy meets concerns raised by Amoore, when Amoore warns of a modality of governance that aims "to preempt an unfolding and emergent event in relation to an array of possible projected futures".[64] Amoore describes the stakes starkly: "The tyranny of proliferating machine learning algorithms resides not in relinquishing human control but, more specifically, in reducing the multiplicity of potential futures to a single output".[65] Amoore recognizes, however, that "the neural net does not reduce multiplicity as such".[66] The AI may comprise countless possible presents, but it will disallow and foreclose specific possible futures immanent in the legible data set available in the neural network. It is to this possibility that we mean to turn critical attention – away from any representative disjuncture that an AI may or may not exhibit, towards the actual work that it does to produce presents and delimit futures on the basis of values immanent in the data made legible to it. To be clear: the values immanent in the data refer to the multiple, recombinant possibilities for pattern recognition at any given moment in the flow of information, not the values external to the information flow but imposed upon it on an ongoing basis, as with the biases called out by decoding efforts, as we flagged at the outset.

D. Critique

What sort of critique applies in this context? Let us build up again from critiques of the other two ideal-type regimes, classical and veridiction. Critique of classical regimes has been organized around the representations made by or associated with international legal regimes and instruments, seeking out the space between the representation and reality, between the guiding norm and the concrete institutional effect, to demonstrate divergence there. International criminal law's oft-stated mission to end impunity, for instance, has been subject to trenchant critique for actually preserving impunity (for patterns of global

63 A. Rouvroy, 'The End(s) of Critique', in M. Hildebrandt and E. de Vries (eds.), *Privacy, Due Process and the Computational Turn* (2013), at 11.

64 See Amoore, *supra* note 29, at 9.

65 See Amoore, *supra* note 13, at 80.

66 Ibid., at 80.

immiseration) while punishing a few (for atrocities in a geographically delimited part of the world).[67] Critique of veridiction regimes has been organized around the way the regime privileges particular arrangements of populations, and the power relations they comprise. The critique shows up the particular values privileged by (the knowledge produced by) dominant veridiction regimes, such as global markets, for instance insofar as they produce knowledge (to use a broadly anecdotal example) that makes it easier to imagine the end of the world than the end of capitalism. The truth affirmed by the veridiction regime, including the values and relations that it validates, is always also an artifact of power. It tends by definition to (seek to) enroll ever more of a population in the service of re/production, in support of the knowledge production apparatus on which the governmental position depends, whatever else the individual members of a population may strive and struggle for. The veridiction regime models power's efficacy, and critique aims to highlight or reveal the values made legible by its knowledge apparatus. The veridiction regime is not (necessarily) a straightforward coercive regime; it may be organized around maximizing some aspect of a population's vitality, in which case critique may identify divergence among or the differential effects of a specific model, the population that it would apply to and enroll, and the values identified between them. Drawing heavily on Foucault's diagnosis of knowledge/power, critique in this register leans heavily on epistemological critique.

The analytic of operadiction points to another terrain of critique, namely ontological. As governmental technologies draw closer to the real, with ever more finely grained and immediately actionable information about the populations to which they apply, they leave vanishingly little space for divergence between the governing routine and the governed. Changes in international legal practice have already been shrinking the spaces for divergence that are targeted by critique. Elsewhere, we have examined recent changes in the direction of institutional legal practices (e.g., at the World Bank), changes which appear to privilege governmental rationalities exhibiting a fluid character, relatively untethered from representational rules and paradigms, valorizing resilience on the basis of immanent conditions. These legal-governance institutions have emphasized iterative and adaptive managerial techniques that are keyed to values associated with efficiency in uncertain circumstances, rather than to determinate values meeting predefined conditions. Technological developments have accelerated these managerial changes via legal-institutional deployment of algorithmic data technologies that operate on the basis of iterative pattern recognition processes. These machine-learning processes rely on correlational possibilities rather than causal connections: they do not describe causally grounded deviation from a target value, or define causal conditions

67 T. Krever, 'International Criminal Law: An Ideology Critique', (2013) 26 *Leiden Journal of International Law*, 701–23.

for, e.g., efficiency and growth, but produce unique values on the basis of correlational possibilities in an unstable present that the technology changes and recreates with every future that it forecloses. The population becomes indistinguishable from values immanent in the data out of which the population is continuously reconfigured for governance purposes. The population and the policy applied to it are iterated and enacted, instantaneously, over and over, by these emergent institutional-technological assemblages.

Representational critique seems to offer little purchase in this particular governance context. The veridiction regime already calls for something other than critique appropriate to the classical regime, insofar as the classical regime presupposes that governance is keyed to some fixed goal, whereas what we call the veridiction regime is keyed to the changing condition of a population – whatever else may be said of the menu of privileges and powers that it supports according to legible governmental values. But the remaining distance, between the truth regime and the object to which it applies, seems equally unable to account for the work being done directly by and with information technologies today. If the veridiction regime, for instance, can be analyzed by means of genealogy, with historical examination to reveal the principles of intelligibility that inform the governmental position, the operadiction regime might collapse the genealogy-equivalent into a study of the pattern forming technology that is the algorithmic assemblage. In many cases of AI, that pattern forming technology – like the patterns that it forms – is constantly changing and adapting on the basis of ongoing learning mechanisms. The aim of critique, then, cannot solely be directed at the distance between the governance routine and the values that are already present in its goal or model, but may better address the ways in which the governmental regime correlates values in a data flow to recognize and reiteratively reconstruct patterns on an ongoing basis. Moreover, because the technology can be deployed to direct effect, shaping the information-rich environment in which it is deployed, critique might need to consider new and more immediate ways in which the governed are enrolled in the technologies of governance. Critique has consistently targeted the subject as the locus of governmental power, but in the fluid realm of operadiction, in which individuals are disaggregated into data points that are recombined into momentary patterns for risk analysis or consumer preference or traffic control, etc., it is no longer clear that the subject persists as the central or singular object of governance.[68]

Returning at last to David Graeber, we observe that templates like the operadiction regime

68 See M. Petersmann and D. Van Den Meerssche, 'On Phantom Publics, Clusters and Collectives – Be(com)ing Subject in Algorithmic Times' (on file with authors); and see E. Isin and E. Ruppert, 'The Birth of Sensory Power: How a Pandemic Made it Visible?', (2020) 7(2) *Big Data & Society*.

> tend to reappear in the dislocated spectral form of imaginary totalities, and these totalities tend to end up inscribed in a series of objects that, insofar as they become media of value, also become objects of desire—largely, by representing the value of an actor's own actions to herself.[69]

In this light, the emergence of operadiction suggests a material break from individualist imaginaries. But though the values in the institutional-technological assemblages that we have reviewed may be immanent ones, still we have suggested that they can be analyzed according to generic terms of information and temporality. These terms demonstrate that we still bring some reflexive tools to our research, that we still conduct our analysis from some point of critical distance beyond the plain of immanence, even as we attempt to comprehend the assemblage of a reflex technology, to use the language of Rouvroy and Knorr Cetina adopted in Section C. Moreover, these terms of information and temporality are also the objects of powerful economic interests. Therefore our project does not pretend entirely to overthrow prior critical programs, and will continue to confront whether, how or to what degree elements of prior critical programs still play a role here, for instance to illuminate the relationships between arguable economic determinants and the emergent programs with which they are entangled. Nonetheless, we think operadiction is a meaningful analytic necessary to understand the distinct workings of the sorts of governance regimes gestured to here.

69 D. Graeber, *supra* note 17, at 259.

Chapter 14

Legally Constituting the Value of Nature

The Green Economy and Stranded Assets

Julia Dehm

A. Introduction

It is common to hear that a shift in social values is necessary in order to promote a more ecologically just way of inhabiting the earth. The term "value" frequently appears in debates about socio-ecological transformation and transition to low-carbon futures. This chapter pays attention to the way the concept of value is deployed and the work it does in two different environmental policy arenas, first of all in attempts to make the value of nature and "ecosystem services" legible in monetary terms as part of building a "green economy" and second, in arguments that fossil fuel assets and associated infrastructures could be devalued, and thus become "stranded assets", in the face of regulatory measures to mitigate climate change. The first example draws attention to the role of law in co-constituting (capitalist) forms of value by creating new forms of property and the conditions for their exchange, and by engendering market confidence through regulatory infrastructure and perceptions of good governance. The second example draws attention to the key role played by law in stabilising future expectations, which does not just produce value but also creates the conditions for its realisation. A critical examination of these examples shows that the work of law in co-constituting and protecting value works against the ecologically just transition that is so urgently necessary: the economic valuation of nature does not prevent the capitalist exploitation of the natural world but qualitatively changes the form that exploitation takes and enables the expansion of capitalist value relations into previously uncommodified domains. Moreover, although international legal agreements to limit climate change aim to facilitate and encourage a shift in social behaviours and may therefore prompt devaluation of fossil fuel reserves and associated infrastructures, the background legal rules of property and contract simultaneously work to protect asset owners and shift the risk of devaluation from private actors to the public. These examples thus indicate that uncovering how law is engaged in the co-constitution of value is crucial for understanding these failures and why contemporary politics has been unable to respond properly to the ecological crisis. This chapter therefore suggests that thinking about value as

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the practices by which individual actions are co-articulated with social wholes, and in doing so co-produce worlds, opens important possibilities for thinking about how alternative value practices could be pursued, and how the role of law co-constitutes not just capitalist, but also other sorts of values.

B. Theorising the Relationship between Value and Law

Although the term "value" is frequently invoked in debates about the "green economy" and "stranded assets", it is almost never defined, and attempts to define value frequently produce disagreement and conflict.[1] This section outlines a number of different approaches to thinking about value and the relationship between value and law. First, to talk about value*s* in the plural is to speak about "practices, actions or relationships, the process of valu*ing*": that is, values "refers to that which people hold dear, esteem or cherish; a value system refers to the ethical framework constructed about a set of values".[2] Legal scholars are very familiar with talking about values in this sense, it is common to talk about the law as "an 'expression' of the particular values of the society or groups in whose name the law speaks", or law as "protecting" certain values or needing to "balance" competing values.[3] Values in this sense are both heterogeneous and incommensurable, and fundamentally are about "relationships amongst humans" or "modes of relating to one-another" or "way[s] of thinking and acting in the world".[4] Anthropologist David Graeber thus defines values as the "meaning people give to their action that in the end guides their action" or "the way people represent the importance of their own actions to themselves".[5] Although values are often assumed to be subjective or personal, Graeber stresses they are necessarily *relational*, because individual actions and processes only become meaningful through integration within a larger system of action or an imagined "totality" or "whole", which provides for reference and comparison.[6] Building on this, Massimo de Angelis defines value practices as "those actions and processes, as well as correspondent webs of relations, that are both predicated on a given value system and in turn (re)produce it".[7] Values or value practices are thus fundamentally about the co-articulation

1 M.M. Robertson and J.D. Wainwright, 'The Value of Nature to the State', (2013) 103 *Annals of the Association of American Geographers* 890 at 891.

2 D. Harvie and K. Milburn, 'Speaking Out: How Organizations Value and How Value Organizes', (2010) 17 *Organization* 631 at 632.

3 S. Marks, 'Value', (2016) 4 *London Review of International Law* 1 at 1.

4 Harvie and Milburn, *supra* note 2, at 633.

5 D. Graeber, *Toward an Anthropological Theory of Value: The False Coin of Our Own Dreams* (2001); M. De Angelis, *The Beginning of History: Value Struggles and Global Capital* (2007) 24.

6 Graeber, *supra* note 5, at 68; De Angelis, *supra* note 5, at 175.

7 De Angelis, *supra* note 5, at 24.

between individual actions and imagined social wholes: about how social worlds give meaning to and guide individual action as well as how cumulative individual actions co-produce social worlds. Values thus give rise to "webs of co-production": values already reflect and are conditioned by social worlds, yet simultaneously it is "by pursuing value that we reproduce wholes".[8] By thinking about values as about the "articulation between individuals and whole, parts and totality",[9] value thus becomes a means to talk about both individual agency *and* social constraints, as well as about freedom *and* disciplinary control. Value thus helps explain why things are a certain way, even as it also provides a means of talking about how things could be different.[10]

In contrast, in political economy discourses it is common to talk about value (singular), although there are a number of distinct, and often conflicting approaches, for thinking about value. One approach to thinking about the value of a commodity is to "posit a conserved substance in the commodity itself" that either inheres within the thing itself, or is a result of the labour that created that thing.[11] If value is assumed to be an inherent attribute of a thing then value exists separate to, and independent of, law: it might be recognised by law but is not generally understood as produced by law. Fredrick Harry Pitts contrasts such "substance" theories of value that situate value in the objective attributes of a thing or an "intrinsic embodied substance" that inheres in it with "field" theories of value that locate value not in things or activities but rather "in the money-mediated relationship between [things]".[12] According to "field" approaches, market values are thus simply the result of how individual preferences influence the dynamics of supply and demand under conditions of scarcity. As Philip Mirowski pithily sums it up, "things are valuable because people think they are".[13] However, "field" approaches to value have clear limitations. Because of the way in which they completely collapse value and price, they cannot address "political and philosophical questions about what things and principles are worth" or recognise the "[p]olitical questions, social pressures, material inequality and power relations" reflected in market values.[14] In particular, such approaches to value cannot explain the systemic undervaluing of certain work and things, especially the often gendered labour of

8 Ibid.
9 Ibid., at 25.
10 Ibid.
11 F.H. Pitts, *Value* (2020) at 17.
12 Ibid.
13 P. Mirowski, *More Heat than Light: Economics as Social Physics, Physics as Nature's Economics* (1991) 399.
14 Pitts, *supra* note 11, ch 3.

social reproduction,[15] but also the reproductive work of nature.[16] Rather than accepting such undervaluation of labour and things as a given, "cheapness" should be thought of as a "strategy, a practice, a violence" and ultimately a "battleground".[17] Unsurprisingly, field approaches to value also do not recognise the constitutive role of law in creating value and instead assume that market value has "an objective existence independent of, and analytically prior to, law".[18] As Susan Marks notes, while such approaches might treat market value as "a fact to be proven empirically" by or for lawyers that may inform legal decisions, they generally do not understand "value" to be a product of such legal decisions.[19]

In contrast to the "substance" and "field" approaches to value, "social" approaches to value foreground much more explicitly the role of law in constituting value.[20] Rather than treating value as "intrinsic to things or the relationships between them", the social approach to value instead focuses on the "practices and processes of commensurating different things as somehow the same" and the institutional structures that enable and stabilise such classifications and standardisations.[21] Given that it is the legal *rights* associated with a thing that make it possible for that thing to be traded as a value-bearing commodity, social approaches to value recognise that the role of law in defining, assigning and protecting property rights is crucial to the constitution of value.[22] Additionally, the law plays a key role in constituting market value by establishing the background regulatory framework that enables and secures such exchanges.[23] More recently, valuation studies have highlighted how value is a product of processes and practices of *valuation* and has paid attention to the techniques and tools of quantification that enable such practices of valuation. This approach to value has deepened understanding of *how* values are socially produced and the role of calculative devices, institutional assemblages and discursive framing in the making of value.[24] Such a focus on valuation as an active and creative process makes clear how "value depends on how valuation is

15 See S. Federici, *Revolution at Point Zero: Housework, Reproduction, and Feminist Struggle* (2012); T. Bhattacharya, *Social Reproduction Theory: Remapping Class, Recentering Oppression* (2017).

16 See O. Schlaudt this volume.

17 R. Patel and J.W. Moore, *A History of the World in Seven Cheap Things* (2017) 22.

18 Marks, *supra* note 3, at 2.

19 Ibid.

20 Pitts, *supra* note 11.

21 Ibid., at ch 4.

22 J.R. Commons, *Legal Foundations of Capitalism* (1924); see also Pitts, *supra* note 11, ch 4.

23 A. Rasulov, 'The Empty Circularity of the Indirect Expropriations Doctrine: What International Investment Law Can Learn from American Legal Realism', in U. Mattei and J. Haskell (eds.), *Research Handbook on Political Economy and Law* (2015) at 371.

24 S. Bracking et al., 'Introducing Values that Matter', in S. Bracking et al. (eds.) *Valuing Development, Environment and Conservation: Creating Values That Matter* (2018) at 5.

done, when, by whom and for what purpose".[25] As Susan Marks has argued, understanding "market value" as the outcome of "acts of valuation in and of the market", produced in particular contexts for particular purposes, makes visible how market value is a "motivated social practice enabled, structured and engaged through law".[26] While such approaches to value productively identify that value is a product of social, institutional and legal processes, and thus that conceptions of value necessarily also reflect differentials in social power, they lack a structural account of how value might be implicated in the production of power differentials and in the forms of economic compulsion evident in capitalist societies.

Finally, scholars working within the Marxist tradition have stressed value as "social form not a physical form": that is a "form of relations among people" rather than an "attribute of a commodity".[27] Marxist critiques of value show how in capitalism "individuals are dominated by the particular ways in which they relate with one another" and that although such domination is often depicted as resulting from external phenomena such as market compulsion and competitive pressures, such phenomena "are nothing other than the activities and relationships of social individuals".[28] The language of value is an essential rubric for talking about exploitation under capitalism and extraction of profits (or surplus value) from those forced to labour by those who own the means of production, despite this exploitation being "masked" by a surface appearance of formally equal rights and a veneer of mutuality.[29] Recent readings of Marx have highlighted how his discussion about the "socially necessary labour time" needed to produce commodities reflects a dynamic interplay of "substance" and "field" theories of labour.[30] Such readings focus on how "value organizes labour"[31] by imposing a regime of competition where the productivity of labour is constantly compelled to exceed the social average. Marxist approaches to value thus foreground how capitalist value relations organised around competition produce coercive economic compulsions, thereby reproducing systemic values regardless of the psyche of individuals within the system. Because value relations create abstract economic compulsions that assert a pull on human actors (both capitalists and workers) value is crucial to explaining the "[s]ystemic imperatives within capitalism [that] generate organisational pres-

25 F. Muniesa, 'A Flank Movement in the Understanding of Valuation', (2011) 59 *The Sociological Review* 24, at 28.

26 Marks, *supra* note 3, at 2.

27 R. Hunter, 'Critical Legal Studies and Marx's Critique: A Reappraisal', (2020) 31 *Yale Journal of Law & the Humanities* 389 at 402.

28 Ibid., at 397.

29 S. Marks, 'Exploitation as an International Legal Concept', in S. Marks (ed.), *International Law on the Left: Re-examining Marxist Legacies* (2008), 281 at 303–4.

30 Pitts, *supra* note 11, ch 2.

31 Harvie and Milburn, *supra* note 2.

sures for more and more exploitation".[32] However, by recognising that these economic phenomena – market compulsions, competitive pressures, imperatives to expand – are themselves socially produced, such an approach to value treats these phenomena not as fixed or inherent, but as subject to contestation and change through collective struggle.

Such an approach to value further recognises the crucial role law plays in establishing the conditions for general market exchange, but also identifies the work of law and regulatory frameworks in constructing the conditions for competition. Competition is not a given, rather "competition as an essential economic logic will only appear and produce its effects under certain conditions that have to be carefully and artificially constructed".[33] This requires both an "active governmentality" but also an "institutional" and "juridical ensemble" that generates the conditions under which competition operates.[34] Additionally, this approach to value as something that organises human activity and dominates social relationships suggests a much more complex relationship between value and law, where not only are law and social institutions co-constitutive of value, but where "the causal arrows go in both directions" so that value relations also influence the content and the form of law.[35] Treating the relationship between capital and the state as one of "reciprocal causality" does not suggest that either completely overdetermines the other: Capitalism's "astonishing flexibility" allows the "content of both [to be] radically open-ended" given that an "indefinite number of different and incompatible concrete paths are compatible with capital accumulation".[36] However, this "reciprocal causality" suggests that law is subject to structural imperatives to enable continued accumulation. It therefore highlights the impossibility of treating law as a "neutral vessel" or of assuming that technical legal changes can transform economic relations.[37] Instead the mutual co-constitution of value and law draws attention to the systemic and structural transformations necessary to drastically reorganise social relations.

This understanding of value as paradoxically something that "emerg[es] from relationships amongst people" but which "then turns around to dominate those relationships, to organize human activity",[38] brings us full circle, back to the discussion of value*s* (plural) where we started. If "value practices" are the way in which individual actions are co-articulated with social wholes

32 Marks, *supra* note 29, at 292.

33 M. Foucault, *The Birth of Biopolitics: Lectures at the College de France 1978–1979* (2008) at 120.

34 Ibid., at 121 and 166.

35 T. Smith, *Beyond Liberal Egalitarianism* (2017) at 185.

36 Ibid.

37 See also R. Knox, 'Against Law-sterity', *Salvage*, 12 December 2018, salvage.zone/in-print/against-law-sterity.

38 Harvie and Milburn, *supra* note 3, at 635.

and in doing so co-produce worlds – both capitalist and non-capitalist[39] – these practices, and how they are structured, produced and enabled by law, inevitably become a key site of struggle for constituting social relations differently. Finally, thinking about value practices in a more open way raises difficult but necessary questions about what forms of legality could support the articulation of relations between individuals and social wholes that were based not around competition, but around very different values, such as solidarity or mutual aid.

C. Making the Economic Value of Nature Legible in the "Green Economy"

The dynamic potentialities of the natural world, the food, shelter and other materials it provides and the meanings embedded in landscapes have been valued by diverse cultures in a multiplicity of heterogeneous ways. The plural ways in which variously situated communities value nature are "intimately bound" with the different ways in which they talk about or frame their world,[40] the ways in which they understand "complex webs of relations between humans and nonhumans",[41] and the obligations such relations give rise to. Such value practices reflect, but are also constitutive of, the ways in which different societies know the "nature of the natures they both utilise and with which they co-exist", and show how different value practices give rise to plural political ontologies, diverse natures, and ways of living in the world.[42]

In contrast, within the domain of monetarised market values, nature has historically been treated as essentially valueless, as a "free gift" to capital.[43] From the perspective of capital, the natural world appeared simply as an "immense resource … from which to endlessly extract the basic raw material necessary to feed the processes of commodity production" or an "immense dumping ground, on which to pour all sorts of waste from growing production processes".[44] This dominant understanding of nature was the product of a long process through which nature "[was] cheapened, yanked into processes of exchange and profit, denominated and controlled",[45] made possible by an "aggressive externalisation"[46] of nature. The devastating ecological conse-

39 De Angelis, *supra* note 5, at 24.

40 S. Sullivan, 'What's Ontology Got to Do with It? On Nature and Knowledge in a Political Ecology of the "Green Economy"', (2017) 24 *Journal of Political Ecology* 217 at 222.

41 M. Blaser, 'Notes Towards a Political Ontology of "Environmental" Conflicts', in L. Green (ed.), *Contested Ecologies: Dialogues in the South on Nature and Knowledge* (2013), 13 at 14.

42 Sullivan, *supra* note 40, at 223; N. Castree, 'Environmental Issues: Relational Ontologies and Hybrid Politics', (2003) 27 *Progress in Human Geography* 203 at 205.

43 K. Marx and F. Engels, *Collected Works*, Vol. 37, (1998), at 732–3.

44 De Angelis, *supra* note 5, at 67–8.

45 Patel and Moore, *supra* note 17, at 47.

46 N. Smith, 'Nature as Accumulation Strategy', (2007) 43 *Socialist Register* 16, at 28.

quences of treating nature as essentially valueless and the rapacious exploitation of the natural world this enabled, are becoming increasingly apparent in the devastating impacts of anthropocentric climate change, the looming extinction crisis, and the depletion of renewable and non-renewable resources.

During the 1960s and 1970s growing awareness of ecological limits led also to a reconceptualisation of how nature would be valued within economics. Two different approaches were pursued: one was a broad-reaching critique of neoclassical economics' focus on market-driven efficiency and the conceptualisation of "the economic system as an open subsystem of the ecosphere exchanging energy, materials and waste flows with the social and ecological systems with which it co-evolves".[47] Developed by ecological economics, it remained marginal. In contrast, environmental economics accepted the axiomatic framework of neoclassical economics, but expanded it to factor in environmental "externalities" and became increasingly influential in policy spaces.[48] The growing field of environmental economics adopted the idea of an "externality" from Pigou's work in the 1920s and promoted the internalisation of economic activities' impacts on the environment, based on the assumption that if the real costs of pollution and the real value of natural resources were reflected in the prices paid by industry and consumers, more sustainable outcomes would be promoted.[49] A key focus of environmental economics has been the development and proposal of policy mechanisms by which environmental externalities, including the "services" provided by nature and the ecological costs of pollutants, could be valued in monetary terms and thereby internalised in order to "maximize human well-being".[50]

It was during the 1970s that the functioning of the ecosystem was first described in terms of delivering *services* to humanity[51] and around the same time, the term "natural capital" was first deployed.[52] Although early uses of these terms were primarily pedagogical to raise awareness about how the decline of biodiversity impacts on human wellbeing,[53] the increased use of economic metaphors to describe nature does important ideological work, politically shifting how we think about the environment and how it is governed.[54] By the late 1970s growing calls to account for the benefits of nature's

47 E. Gómez-Baggethun et al., 'The History of Ecosystem Services in Economic Theory and Practice: From Early Notions to Markets and Payment Schemes', (2010) 69 *Ecological Economics* 1209 at 1212.

48 Ibid.

49 G. Bates, *Environmental Law in Australia* (9th ed, 2016), at 321–2.

50 D. Pearce, 'An Intellectual History of Environmental Economics', (2002) 27 *Annual Review of Energy and Environment* 57 at 58.

51 H.A. Mooney and P.R. Ehrlich, 'Ecosystem Services: A Fragmentary History', in G.C. Daily (ed.), *Nature's Services: Social Dependence on Natural Ecosystems* (1997), 1 at 14.

52 E.F. Schumacher, *Small Is Beautiful: A Study of Economics as If People Mattered* (2011).

53 Gómez-Baggethun et al., *supra* note 47, at 1213.

54 B. Coffey, 'Unpacking the Politics of Natural Capital and Economic Metaphors in Environmental Policy Discourse', (2016) 25 *Environmental Politics* 203.

"services" in environmental decision making,[55] dove-tailed with a critique of forms of regulation that are based on standard setting and enforcement agencies ensuring compliance. Critics labelled this "command and control" regulation and argued that it was inflexible and failed to incentivise innovation or reward those who did more than the minimum required. The idea of permit trading as a mechanism for addressing pollution was first proposed by J.H. Dales, in his 1968 book *Pollution, Property and Prices*,[56] which drew inspiration from Ronald Coase's influential essay "The Problem of Social Cost'.[57] Over the course of the 1980s and 1990s an "extraordinary range of new 'ecological commodities' came on line" in different national and sub-national contexts, alongside "entirely new markets in ecological 'goods' and (especially) 'bads'".[58] These often involve the legislative setting of a "cap", and the creation of quasi-property regulatory rights that can be traded between actors on markets such as the market for sulphur dioxide and later nitrogen oxide under the US Clean Air Act.[59] Alternatively, regimes might authorise actors to take actions that have a negative environmental impact provided they also purchase credits that "offset" or compensate for this damage, such as wetland mitigation banking.[60]

The development of improved valuation, pricing and incentive mechanisms has been a central plank of ecological sustainable development since the early 1990s. The 1989 *Blueprint for a Green Economy* report commissioned by the United Kingdom focused on developing mechanisms for valuing the environment.[61] The 1992 Rio Declaration on Environment and Development stated that "[n]ational authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments"[62] and the Rio Earth Summit sparked renewed attempts to develop techniques to account both for increases in environmental assets (i.e., the growth of renewable resources) as well as use rates.[63] However, it was the 2005 Millennium Ecosystem Assessment that "firmly placed the ecosystem services concept in the policy agenda".[64] In the aftermath of the 2007 Global Financial Crisis, a number of international institutions sought to further develop and promote the notion of a "green economy". In its 2011 report, *Towards the Green Economy:*

55 W.E. Westman, 'How Much Are Nature's Services Worth?', (1977) 197 *Science* 960.

56 J.H. Dales, *Pollution, Property and Prices: An Essay in Policy-Making and Economics* (1968).

57 R.H. Coase, 'The Problem of Social Cost', (1960) 3 *The Journal of Law and Economics* 1.

58 Smith, *supra* note 46, at 20.

59 J.M. Hirsch, 'Emissions Allowance Trading under the Clean Air Act: A Model for Future Environmental Regulations', (1999) 7 *NYU Envtl. LJ* 352.

60 P. Hough and M. Robertson, 'Mitigation under Section 404 of the Clean Water Act: Where It Comes from, What It Means', (2009) 17 *Wetlands Ecology and Management* 15.

61 D. Pearce, A Markandya and E.B. Barbier, *Blueprint for a Green Economy* (1989).

62 Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (1992), principle 16.

63 Pearce, *supra* note 50, at 63.

64 Gómez-Baggethun et al., *supra* note 47, at 1214.

Pathways to Sustainable Development and Poverty Eradication the United Nations Environment Programme described the economic valuation of nature as a key component of a "green economy", noting that "a green economy recognizes the value of, and invests in, natural capital".[65] Subsequently, a global initiative, the Economics of Ecosystems and Biodiversity (TEEB) was launched which aimed to "mak[e] nature's values visible" and "promote a better understanding of the true economic value of ecosystem services and to offer economic tools that take proper account of this value".[66] In 2010, the World Bank also launched its Wealth Accounting and the Valuation of Ecosystem Services (WAVES) partnership to support the development of natural capital accounting in developing countries.[67] The concept of the "green economy" and proposals for greater economic valuation of "nature" was a key focus of the Rio+20 Summit, although these ideas received only cautious endorsement in the summit outcome document.[68] In 2016, the Natural Capital Coalition launched its Natural Capital Protocol which sets out a "standardized framework to identify, measure, and value impacts and dependencies on natural capital".[69] In 2021, the UK Treasury released the *Dasgupta Review* on the economics of biodiversity, which advocates pricing nature in order to optimise resource management.[70]

These developments have inspired considerable scholarship especially in the field of human geography and anthropology seeking to understand how the values of "natural capital" and "ecosystem services" are constituted and how these processes of valuation can help us theorise value.[71] The shifting ways in which the value of nature has been understood and conceptualised over time clearly demonstrate the inadequacy of "substance" approaches to value: it is not anything inherent in nature, but rather how nature was socially positioned that led to it being "rendered effectively value*less*".[72] The debates about the valuation of nature also demonstrate the limitations of "field" theories of value that treat value as simply the result of subjective preferences. While the valuation of "marketed products" – resources such as fisheries, timber, energy – was not particularly difficult for environmental economics, what was challenging, and the subject of the "largest, and most controversial, research effort

65 United Nations Environment Programme, *Towards a Green Economy: Pathways to Sustainable Development and Poverty Eradication* (2011), at 6.

66 Economics of Ecosystems and Biodiversity, *Mainstreaming the Economics of Nature: A Synthesis of the Approach, Conclusions and Recommendations of TEEB* (2010).

67 Wealth Accounting and the Valuation of Ecosystem Services, wavespartnership.org.

68 The Future We Want, UN Doc. A/RES/66/288 (2012), paras 56–74.

69 Natural Capital Coalition, *Natural Capital Protocol* (2016).

70 *Final Report – The Economics of Biodiversity: The Dasgupta Review* (2021).

71 See A. Fredriksen et al., 'A Conceptual Map for the Study of Value' (LCSV Working Paper Series 2014).

72 Bracking et al., *supra* note 24, at 4.

in environment economics" was "valuing nonmarketed asset change".[73] David Pearce recalled how environmental economics developed a number of tools in order to determine or measure how individuals subjectively valued nature and thus to incorporate environmental values into appraisals. These included "revealed preference" approaches (for example based on how far people would be willing to travel to see certain natural sites) or "stated preference approaches" (for example based on how much people would be willing to pay to protect an area). However, while such techniques might reveal how individuals subjectively value nature, such individual preference cannot account for how subjective practices of valuation are able to be generalised across a whole social body or how certain valuation practices become authoritative. Given that the production of equivalence depends upon general exchangeability,[74] it is only in the context of broader markets in environmental goods and services that it became possible to refer to not just subjective value attached by individuals to nature, but to a broader sense of "market value" that is shared by and influences the behaviours of diverse actors.[75]

These processes of making the value of nature legible in economic terms thus reveal the inherently social nature of value and the critical role of law in its constitution. While environmental economics predominately treats "values" simply as "matters of fact"[76] that need to be revealed, scholars have demonstrated how nature's values "are *fabricated* rather than found".[77] Drawing on literature on the performativity of economics,[78] scholars have identified the role of calculative devices, institutional assemblages and discursive framing that make it possible for nature to be "configured as calculated and variously marketised units that can be incorporated into conventional neoliberal value orderings" in the making of value.[79] Although often backgrounded in such accounts, it is clear that the role of law in establishing property rights over previously uncommodified natures and in establishing the regulatory conditions for markets in environmental goods and services was crucial for constituting their value. In many cases, the establishment of a market in environmental "bads" will also require legal rules that impose limits and thereby create scarcity and thus generate demand for credits, as well as legal rules that

73 Pearce, *supra* note 50, at 65.

74 See Pitts, *supra* note 11, ch 2.

75 N. Castree and G. Henderson, 'The Capitalist Mode of Conservation, Neoliberalism and the Ecology of Value', (2014) 7 *New Proposals: Journal of Marxism and Interdisciplinary Inquiry* 16 at 28.

76 See T. Marzal this volume.

77 S. Sullivan, 'Bonding Nature(s)? Funds, Financiers and Values at the Impact Investing Edge in Environmental Conservation', in S Bracking et al. (eds.), *Valuing Development, Environment and Conservation* (2018) at 102.

78 D.A. MacKenzie, F. Muniesa and L. Siu, *Do Economists Make Markets?: On the Performativity of Economics* (2007).

79 Bracking et al., *supra* note 24, at 5.

establish the abstractions and standardisations that are necessary preconditions of exchange.[80] For example, the 1997 Kyoto Protocol played a critical role by establishing the conditions for the creation of international markets in greenhouse gas emissions. The detailed regulatory modalities, agreed to as part of the 2002 Marrakesh Accords,[81] made very different human-nature interactions, in different places, that produce different greenhouse gases, legible in terms of the standardised unit of one tonne of carbon dioxide equivalent ($1tCO_2e$).[82] This process of constructing $1tCO_2e$ as a tradable property right thus makes it possible to think about complex, situated metabolic interactions as standardisable, exchangeable, and commodifiable, and ultimately tradable.[83] In addition, the legal production of equivalence enables treating the avoidance of environmental "bads" (such as the emission of greenhouse gases) as substitutable with the production of environmental "good" (such as the planting of trees or protection of forests). Such substitutions were first enabled in a limited way by the inclusion of afforestation and reforestation within the Kyoto Protocol's Clean Development Mechanism, but the Reducing Emissions from Deforestation and Forest Degradation (REDD+) scheme, which proposes to create carbon "offsets" through enhancing carbon sequestration, represents a much more ambitious project of making carbon sequestration and emissions substitutable, tradable and exchangeable.[84] The Paris Agreement epitomises this logic of substitution in its aspiration to "achieve a balance between anthropocentric emissions by sources and removals by sinks of greenhouse gases in the second half of this century".[85]

The intangible nature of these environmental commodities arguably makes these values more fragile, and thus law plays a further role in securing their value, by generating confidence in the integrity of the commodity. The value of these commodities depends on faith by market participants that carbon credits are genuine, that they represent *actual* emission reductions and thus have a "proper foundation".[86] Charlotte Streck and Jolene Lin write:

> Compared to traditional commodity markets, the success of a market in carbon rights … is more dependent upon investor confidence in the robustness of the market and the regulatory framework simply because the

80 See J. Dehm, 'One Tonne of Carbon Dioxide Equivalent ($1tCO_2e$)', in J. Hohmann and D. Joyce (eds.), *International Law's Objects* (2018) at 305.

81 See Decisions UN Doc.15-18/CP.7, FCCC/CP/2001/13/Add.2 (2002).

82 J. Dehm, *supra* note 80.

83 Ibid., at 306.

84 See J. Dehm, *Reconsidering REDD+: Authority, Power and Law in the Green Economy* (2021).

85 2016 Paris Agreement, ATS 24, art 4.1.

86 See *Shift2Neutral Pty Limited v. Fairfax Media Publications Pty Limited* ([2014)] NSWSC 86, para 44 and 48.

> creation, authenticity, and *consequent value of the commodity in question* are entirely dependent on the regulatory framework.[87]

Law plays a role in co-constituting the value of these commodities by generating confidence in the integrity of the commodity, based on broader confidence in the market and the regulatory scheme that constitutes it. As Streck and Lin continue, "[t]he existence of a transparent governance structure, which ensures market oversight and fair access to all market participants, is a precondition for such confidence".[88]

This project of making nature's value legible in economic terms has been contested and controversial, with social movements and scholars critiquing how "diversities are lost" in the reductionist moves to transform the world into "(ac)countable, monetizable and potentially substitutable natural capital".[89] A number of studies have shown how the greater protection that advocates of valuation promise has not been realised, but rather that valuation may "more commonly encourage precisely its opposite: the expansion of resource-extractive activities that threaten conservation".[90] Instead, the valuation of nature has had the effect of bringing nature into "better alignment … to the norms of capital's own enlargement and reproduction"[91] and "co-opt[ing] [ecological relations] to capitalism's ethos of monetary and profit-oriented value-making".[92] Thus, the economic valuation of nature does not reduce capitalist exploitation of nature, but rather enables a qualitative shift in the form this exploitation takes. Concurrently it also results in qualitative changes in how nature is produced, with the production of nature becoming both capitalised and financialised.[93] Finally, the valuation of nature changes the way in which nature is governed and regulated, given how valuation gives rise to new mechanisations of nature management and increasingly makes decisions about environmental managements subject to imperatives of efficiency and continued accumulation.[94]

87 C. Streck and J. Lin, 'Making Markets Work: A Review of CDM Performance and the Need for Reform', (2008) 19 *The European Journal of International Law* 409 at 420 (emphasis added).

88 Ibid., at 420–1.

89 S. Sullivan, 'On "Natural Capital", "Fairy Tales" and Ideology', (2017) 48 *Development and Change* 397 at 398; see also C. Schwoebel and K. Kempter in this volume.

90 R. Fletcher et al., 'Natural Capital Must be Defended: Green Growth as Neoliberal Biopolitics', (2019) 46 *The Journal of Peasant Studies* 1068, at 1069.

91 M. O'Connor, 'On the Misadventures of Capitalist Nature', (1993) 4(3) *Capitalism Nature Socialism* 7, at 18.

92 Bracking et al., *supra* note 24, at 5.

93 Ibid., at 38.

94 See J. Dehm, 'The "Green Economy": Anthropocentric Appropriation, Environmental Management and "Natural Capital"', in U. Natarajan and J. Dehm, *Locating Nature: Making and Unmaking International Law* (2022).

D. Law and the Value of Future Expectations: Climate Change, Stranded Assets and Capitalist Dynamics[95]

The debates about how fossil fuel assets and associated infrastructures could be devalued or even become "stranded assets" in the face of regulatory measures to mitigate climate change are another productive site to investigate how law co-constitutes value. The Paris Agreement sets out clear international objectives to limit global warming to 2°C above pre-industrial levels and to "pursu[e] efforts" to limit warming to 1.5°C.[96] There is growing recognition that the transition to a low-carbon economy will require transformative changes across a number of economic sectors and that the resulting changes in market dynamic could affect the valuation of organisations' assets, and in some cases trigger write-offs, early retirement or the re-pricing of assets resulting in sudden losses of asset value. A key focus has been on the fact that achieving the Paris Agreement's temperature stabilisation targets will require that the majority of fossil fuel reserves stay below ground, unextracted and unburnt if the world is to have any chance of avoiding catastrophic climate change. Advocates and commentators have suggested that if the target to limit warming to 2°C is "rigorously applied" the vast majority of fossil fuel reserves could become "unburnable carbon" and up to $1.6 trillion dollars' worth of fossil fuel resources could be "stranded".[97] Similarly, associated fossil fuel infrastructure risks becoming stranded given that keeping the increase in temperature to 1.5°C requires the rapid decommissioning of coal-fired power stations, by 2030 in the Global North and by 2040 in the Global South.[98] Thus changes in law and regulation impact not just expectations of future profits, but the present existing value of these fossil fuel assets. Some estimates suggest that around one-third of the *current* value of the big oil and gas companies could "evaporate" if laws to enact the Paris Agreement objectives were properly implemented.[99] This has raised related concerns that if the present value of assets associated with "unburnable carbon" are rapidly devalued it could create a global "carbon bubble" and generate serious risks for investors and financial markets.[100]

The concept of "stranded assets" is broader than fossil fuel reserves, extending to investments, infrastructures, equipment, contracts and even knowledge

95 This section draws on J. Dehm, 'Law and the "Value" of Future Expectations: Climate Change, Stranded Assets and Capitalist Dynamics', *Verfassungsblog*, 6 March 2020, verfassungsblog.de/law-and-the-value-of-future-expectations-climate-change-stranded-assets-and-capitalist-dynamics/.

96 Paris Agreement, art 2.

97 Carbon Tracker Initiative, *Mind the Gap: The $1.6 Trillion Energy Transition Risk* (2018).

98 International Energy Agency, *World Energy Model Documentation, 2020 Version* (2021).

99 A. Livsey, 'Lex in Depth: The $900bn Cost of "Stranded Energy Assets"', *Financial Times*, 4 February 2020, www.ft.com/content/95efca74-4299-11ea-a43a-c4b328d9061c.

100 Carbon Tracker Initiative, *Unburnable Carbon: Are the World's Financial Markets Carrying a Carbon Bubble?* (2011).

that is losing or has lost value due to market transitions.[101] Definitions of "stranded assets" identify them as assets in which investments have been made that will no longer earn an economic return, prior to their anticipated economic end of life.[102] The example of "stranded assets" highlights the temporal nature of value or how value changes over time in response to changes in the social, discursive and legal context. It shows that value is not a static thing, but that once produced it needs to be realised through exchange: if there is a lack of "effective demand" then value is not "realised" and capital is devalued, depreciated or destroyed.[103] Such risks are inherent in the circulation of capital, especially where considerable time and space separate the production and realisation of value.[104] Marx already identified that "great upheavals and changes take place in the *market*" which might lead to significant changes in the real value of commodities.[105] He also highlighted how the failure to put certain inputs to work – whether machinery, labour, raw materials, buildings or commodities – can lead to the "destruction of capital" with the effect that their "use-value and their exchange-value go to the devil".[106] Although he suggested that such a destruction of value might "expediate" and "act favourably" on reproduction, by giving a boost to more "enterprising" actors,[107] it was economist Joseph Schumpeter who famously celebrated such processes of "creative destruction" as key to driving innovation and growth.[108] Schumpeter saw such processes as that which "incessantly revolutionizes the economic structure from within, incessantly destroying the old one, incessantly creating a new one" as an "essential fact about capitalism": it is, he writes, "what capitalism consists in and what every capitalist concern has got to live with".[109] For capitalism, therefore, the stranding of assets is "not a novel phenomenon" but "in fact occurs regularly as part and parcel of economic development".[110] Every shift from one "techno-economic paradigm" to another led to the "emergence of new sectors and stranded assets in redundant ones".[111] However, while these processes were historically imagined as driven primarily by technological change, the current concern with assets that could be stranded as part of a

101 K. Boas and J. Gupta, 'Stranded Assets and Stranded Resources: Implications for Climate Change Mitigation and Global Sustainable Development', (2019) 56 *Energy Research & Social Sciences* 101215.

102 B. Caldecott, 'Introduction to Special Issue: Stranded Assets and the Environment', (2017) 7 *Journal of Sustainable Finance & Investment* 1 at 2.

103 D. Harvey, *The Limits to Capital* (2006) at 84.

104 Ibid.

105 K. Marx, *Theories of Surplus-Value – Volume VI of Capital: Part II* (1968), at 495.

106 Ibid., at 495–6.

107 Ibid., at 496.

108 J.A. Schumpeter, *Capitalism, Socialism and Democracy* (1943) at 83.

109 Ibid.

110 Caldecott, *supra* note 102, at 2.

111 Ibid., at 3.

transition to a low-carbon economy makes evident how changes in the legal regime or regulatory environment can lead to changes in value. Generation Foundation's definition of a "stranded asset" as an "asset which loses economic value well ahead of its anticipated useful life, *whether that is a result of change in legislation, regulation,* market forces, disruptive innovation, societal norms, or environmental shocks",[112] makes explicit how changes in law and regulation can lead to changes in an asset's value.

D.1 Law and the Value of Assets

The case of stranded fossil fuel assets highlights how changes in the legal regime and the regulatory environment can lead to changes in the value of assets. However, this example also poses deeper questions about how the value of assets *already* is constituted by law. What characterises an "asset" is an expectation that future economic benefits will flow from the resource controlled.[113] In their discussion of assetisation, Kean Birch and Fabian Muniesa describe assets as both an "objective resource" but also a "subjective value (or effect of valuation practices)".[114] They recognise that assets are inherently "legal constructs, in that ownership and control rest on the state enforcement of property and control rights".[115] Similarly, Katharina Pistor has shown how forms of legal "coding" have been developed to protect value including by "extend[ing] the life span of assets and asset pools" or extending priority claims through time.[116] However, while scholars have recognised the crucial role of law in enforcing ownership and control over assets and the future economic benefits arising from them, there has been less acknowledgment of the crucial background role law also plays in shaping practices of valuation by stabilising future-orientation expectations. For example, economic sociologist Jens Beckert has foregrounded the role that imaginations and assumptions about the future play in constituting the net present value of investments "by means of the narrative staging of expected future returns on an investment, supported by calculative tools".[117] His work shows how the making of imagined futures, through calculative practices, is key to capitalist dynamics, as fictional expectations enable actors to coordinate their actions, generate shared conventions about the future that inform present behaviours and thereby, through shaping behaviour in the present, affect the future and bring certain futures into being.[118] However, he also draws attention

112 Cited in ibid., at 2 (emphasis added).

113 K. Birch and F. Muniesa, 'Introduction: Assetization and Technoscientific Capitalism', in K. Birch and F. Muniesa (eds.) *Assetization: Turning Things into Assets in Technoscientific Capitalism* (2020) at 3.

114 Ibid., at 4.

115 Ibid., at 5.

116 K. Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (2019) at 3.

117 J. Beckert, *Imagined Futures* (2016) at 140.

118 Ibid., at 11.

to the "contingent nature of expectations" and how the "fundamental uncertainty engendered by the openness of the future" can destabilise such assumed values.[119] What is omitted from this analysis is the crucial role that law plays in reducing such destabilising contingency by protecting the future-orientated expectations of investors, thereby playing a key role in constituting the value of assets.

There are numerous ways through which law "enables expectations to crystallize as expectations which are stable and give guidance" and thus direct present and future behaviours.[120] Various legal techniques have been developed to reduce the contingency of the future or make an inherently uncertain future less uncertain, or at least uncertain in a more calculable and predictable way.[121] Key amongst them is the modern law of contract, which as it evolved in the 19th century to gradually recognise expectation damages, was transformed from a mechanism for the transfer of property to an "instrument for protecting against changes in supply and price in a market economy".[122] The legal rules around "regulatory takings" that require governments to pay compensation, based on expected market returns, if regulatory action results in the expropriation of private property, is another way in which law protects and stabilises certain specific future expectations of investors. More recently, the expansion of a dense network of multilateral and bilateral investment treaties and investor-state dispute resolution mechanisms are operating to protect investor expectations, through international arbitration.[123] By protecting certain future expectations, namely of future economic growth and returns, of certain specific actors, namely investors, these legal doctrines play a key role in the constitution of value. Moreover, by stabilising expectations and making it possible for present behaviour to be guided by certain assumptions about the future, legal regimes incentivise the types of conduct in the present that will produce these imagined futures. The performative effect of future expectations thus creates an inherent circularity: the stabilisation of future expectations guides present actions, and present actions cause expected futures to come into being. Having established that law plays a critical role in constituting the value of all assets, not just "stranded assets", I turn now to consider what the legal responses to the problem of stranded assets can tell us about the relationship between law and value.

119 Ibid., at 58.
120 N. Luhmann, *Law as a Social System* (2004) at 152.
121 Ibid., at 142–3.
122 M.J. Horwitz, *The Transformation of American Law, 1780–1860* (1977) at 172.
123 See Marzal this volume.

D.2 Regulatory Responses to the Risk of "Stranded Assets"

The necessity of keeping fossil fuels in the ground unavoidably raises complex questions of equity and fairness concerning which fossil fuels should be left in the ground and how such decisions should be made.[124] At the heart of these controversies are the distributional questions of who bears the losses if the expected revenues from such assets do not materialise or if these assets are devalued. At stake in different legal and regulatory responses to the problem of "stranded assets" is not just whether and how the law protects the value of these assets, but also how the law works to distribute the gains arising from the realisation of such value or the losses incurred from destroyed values.

The dominant legal response to concerns about "stranded assets" has been the development of disclosure and reporting guidelines whose purpose is to bring the way assets are being valued more in line with expected future scenarios. Financial experts are particularly concerned about potential *systemic* risks that sudden revaluations could create for the global financial system as a whole, and have warned that sudden changes in investors' perception of the profitability of financial assets and resulting loss of market value could potentially trigger fire sales and/or a financial crisis. In 2016, Mark Carney, Governor of the Bank of England, suggested that a rapid reassessment and re-evaluation of climate risks "could destabilise markets, spark a procyclical crystallisation of losses and lead to a persistent tightening of financial conditions" and thereby create "a climate Minsky moment".[125] In 2016, the G20 Financial Stability Board established the Task Force on Climate-related Financial Disclosures, an industry-led task force that was tasked with identifying the information needed by investors to appropriately assess and price climate-related risks and opportunities. In June 2017 it released its final report with four recommendations on climate-related financial disclosures, applicable to all financial-sector organisations, including banks, insurance companies, asset managers, and asset owners, across all jurisdictions.[126] These voluntary recommendations are increasingly being adopted in corporate disclosure frameworks including stock market listing rules, in order to address concerns that inadequate information could lead to the mispricing of assets and to encourage the development of better valuation models. By seeking better alignment between the way assets are being valued and expected future climate transition scenarios, such disclosure guidelines encourage a gradual recalibration of value, and thereby aim to avoid the sort of sudden loss of value across the global economy that may potentially trigger

124 S. Caney, *Climate Change, Equity, and Stranded Assets* (2016).

125 M. Carney, 'Resolving the Climate Paradox', *BIS Central Bankers' speeches*, 22 September 2016 bis .org/review/r160926h.pdf.

126 Taskforce on Climate-related Financial Disclosure, *Final Report: Recommendations of the Task Force on Climate-related Financial Disclosure* (2017).

a financial crisis.[127] This example thus shows how such regulatory mechanisms operate to protect value in the global financial sector as a whole, by helping to re-align expectations, manage transitions and fend off de-stabilising shocks.

In response to concerns about the devaluation of assets, companies have also pursued a more aggressive legal strategy of seeking compensation from government for any potential loss of their assets' value. In 2020, a research report by the Bank of International Settlements (BIS) *The Green Swan* controversially suggested that Central Banks should intervene more actively to address climate-related financial risks, including potentially buying "assets devalued by physical or transition impacts".[128] There is also growing awareness of how the proliferating array of bilateral and multilateral investment treaties could compensate companies if climate regulations lead to assets becoming "stranded" or the deprecation of their value.[129] Kyla Tienhaara and Lorenzo Cotula highlight that even just the ability of foreign investors to access investor-state dispute settlement processes under bilateral and multilateral investment treaties "can enhance business' position in negotiations with states". Thus, even without needing to resort to arbitration processes, this may mean that "more public funds may be spent on compensating the fossil fuel sector than would otherwise be the case, making it more costly – and thus more difficult – for states to take energy transition measures".[130] Already international investment law and arbitration law are being utilised by companies to ensure that they receive compensation for assets that become "stranded" due to climate policies enacted by states. In early 2021 two German companies, Uniper and RWE, brought claims against the Dutch government under the Energy Charter Treaty, seeking compensation because the Dutch Coal Prohibition Act would prevent coal-fired power stations owned by these companies from operating after 2020.[131] Similarly, UK company Rockhopper Exploration was awarded damages of £210 million against Italy, because the Italian government imposed a ban on all oil and gas projects within 12 nautical miles of the Italian coast, thereby impacting on its 2014 licence to drill for oil off Italy's Adriatic coast.[132]

127 L.A.P. da Silva, 'Research on Climate-Related Risks and Financial Stability: An "Epistemological Break"', *BIS management speeches*, 17 April 2019, bis.org/speeches/sp190523.htm.

128 P. Bolton et al., *The Green Swan: Central Banking and Financial Stability in the Age of Climate Change* (2020).

129 K. Tienhaara and L. Cotula, *Raising the Cost of Climate Action?: Investor-State Dispute Settlement and Compensation for Stranded Fossil Fuel Assets* (2020); K. Bos and J. Gupta, *supra* note 101, at 9.

130 Tienhaara and Cotula, *supra* note 129, at 1.

131 'Uniper Seeks Judgement for the Future of Maasvlakta', Media Release, 16 April 2021, uniper.energy/news/uniper-seeks-judgement-for-the-future-of-maasvlakte; K. Tienhaara, 'We Need to Rethink Investment Treaties to Ensure a Rapid and just Energy Transition', *International Institute for Environment and Development*, 22 April 2021, iied.org/we-need-rethink-investment-treaties-ensure-rapid-just-energy-transition.

132 A. Nelson, 'Oil Firm Rockhopper Wins £210m payout After Being Banned From Drilling', *The Guardian*, 25 August 2022,https://www.theguardian.com/business/2022/aug/24/oil-firm-rockhopper-wins-210m-payout-after-being-banned-from-drilling.

International investment law is thus facilitating shifting the costs of transitioning away from fossil fuels to states and their populations, rather than to corporate investors by requiring that any depreciation of value of privately owned assets be compensated by the public.

In response to the predictable calls for compensation for stranded assets, made by some of the companies most responsible for the climate crisis, it is necessary not to accept the supposed value of these fossil fuel assets as pregiven fact, but to interrogate how the present value of such assets is already a product of legal arrangements. As Toni Marzal has shown, investor-state dispute settlement (ISDS) processes generally treat value as "a purely *factual* matter, and valuation as a purely *technical* endeavor".[133] Yet, treating the value of such assets as given, ignores precisely how the value of these assets is already a product of law: as Akbar Rasulov argues "the market value of any given property could indeed be severely diminished or even completely destroyed by altering the background regulatory framework affecting the rights of use for the respective category of assets, the conditions for its transferability, possession, judicial protection etc.".[134] Moreover, the dominant approach to valuation in ISDS that sees particular investment as "a pre-legal datum that the arbitrators were charged with ascertaining with the help of financial experts" rather than something that is legally constituted and dependant on legal determination ignores that "future profitability is also not a matter of fact, but depends directly on legal determinations".[135] The landmark May 2021 decision of The Hague District Court that found Royal Dutch Shell responsible under Dutch tort law for its contribution to climate change and ordered the company to reduce its net emissions by 45 percent by 2030 from 2019 levels, could potentially shift how the value of stranded fossil fuel assets is understood.[136] As Christina Eckes argues, "The Shell ruling, both in its reasoning and use of evidence, undermines the argument that fossil fuel companies can reasonably have any expectation that their investments will not be affected by government action".[137] Ultimately, the continued value of fossil fuel assets depends upon the willingness of courts and arbitral bodies to protect investors' expectations of future returns from these assets. If more legal decisions affirm the illegitimacy of such future expectations the background legal conditions essential for constituting the value of these assets could be drastically transformed.

133 Marzal, in this volume; T. Marzal, 'We Need to Talk about Valuation in ISDS', *Verfassungsblog*, 5 March 2020, verfassungsblog.de/we-need-to-talk-about-valuation-in-isds/.

134 Rasulov, *supra* note 23.

135 Marzal, 'We need to Talk about Valuation in ISDS', *supra* note 133.

136 *Milieudefensie v. Dutch Royal Shell Plc* (2021) C/09/571932 / HA ZA 19-379.

137 C. Eckes, 'The Courts Strike Back: The Shell Case in Light of Separation of Powers', *Verfassungsblog*, 15 June 2021, verfassungsblog.de/the-courts-strike-back/ .

E. Conclusion

At a moment when the climate crisis threatens millions of species and human societies, and indeed the future habitability of the world, the stakes of interrogating how law (co-)constitutes value creating new forms of property rights in nature by protecting future expectations have never been higher. To properly acknowledge the immeasurable value of a liveable world, it is urgently necessary to contest the way in which law has operated to protect certain "values" over others, in order to collectively create a more just and ecological future. This chapter has shown the co-constitutive role law has played in crucial changes in values as part of the transition from a "brown" to a "green" economy. In both examples the key role played by law protecting and securing property has worked against the structural transformations that are necessary for ecologically just futures. The first example demonstrated that the inclusion of nature's services within the realm of property and monetary value does not prevent the exploitation of the natural world, but qualitatively changes the form this takes, while simultaneously enabling the expansion of capitalist value relations into previously uncommodified domains. In the second example, the commitment to the protection of property, means that law continues to sustain the value of polluting activities and assets that should be decommissioned and shifts the costs of a transition from private entities with long histories of polluting activities to the public. Providing compensation to fossil fuel companies for the depreciation in the value of their assets goes against the principle that those with the greatest historical responsibility for causing the climate crisis should take leadership on mitigation action and principles of compensative justice. Given that just 90 companies are responsible for two-thirds of global emissions since the industrial revolution,[138] a just transition to a clean energy future requires these fossil fuel majors to take deep mitigation action, but also provide finance to support mitigation and adaptation measures as well as compensation to those already experiencing devastating climate impacts. It is more urgent than ever not to push for an adjustment to, or expansion of, capitalist value relations, but rather to fundamentally challenge capitalist value relations and the role of law in enabling their reproduction. By recognising the world- and society-making effects of value practices, and by treating value practices as a crucial site of political struggle, it may yet be possible to build a world where the values of ecological justice guide our actions.

138 R. Heede, 'Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854–2010', (2014) 122 *Climatic Change* 229.

Chapter 15

The Market as a "Rigged Game"

Theories of Ecologically Unequal Exchange and Their Implications for Value, Price, and Measures of Real Wealth

Oliver Schlaudt

A. Unequal Exchange in Context: Challenging Price and Value

Thinking about (economic) value is difficult today because the topic has been monopolized by the dominant economic doctrine – neoclassical economics – which made the notion of value its cornerstone and which tends to colonize our thinking not only about value, but also about values (in the plural). Value is defined within neoclassical theory as subjective marginal utility. Via the social institution of markets and money this marginal utility finds an adequate numerical expression in prices. But neoclassical economics ties value to price even more strongly. It thinks of the inner processes of the consumer as essentially those of comparison and choice between alternatives.[1] Neoclassical economics thus naturalizes prices by internalizing the market, making it a proper element of the agent's mental set-up. But neoclassical theory does not stop here. It goes on saying that there is no value except subjective utility and that all behaviour can be reduced to maximizing subjective utility. In the final analysis all values thus boil down to economic value, and the whole realm of human concern dwindles to the single dimension of subjectively evaluated utility (this is what Kenneth Boulding has called "economics imperialism"[2]). Anyone who thinks about value and values today cannot avoid addressing this theory.

Neoclassical economics of course is under fire from many sides today. A look at the contemporary literature, however, shows that many critiques, despite their vehement rhetoric, turn out to be not so radical as they first appear. They aim at most to adjust certain hypotheses, but do not question the underlying utilitarian, individualist, and market-oriented framework.[3] If we widen our focus, however, we come to recognize three critiques which stand

1 J. O'Neill, 'Socialist Calculation and Environmental Valuation: Money, Markets and Ecology', (2002) 66 *Science & Society* 137, at 140.

2 K. Boulding, 'Economics as a Moral Science', (1969) 59(1) *The American Economic Review* 1.

3 A striking example is behavioural economics, cf. J.M. Servet, *L'économie comportementale en question* (2018).

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out because they take aim at the actual heart of neoclassical economics, market price and the price formation mechanism, although each does so from a very specific point of view and centred on very specific, partly technical questions. These three critiques stem, respectively, from debates on national accounting, on socialist planning, and on unequal exchange:

- The debate about revisions of the system of national accounting results from the insight that the lens of prices and monetary accounts is not necessarily appropriate for capturing well-being. Many things which are relevant for human well-being are not traded on the market and therefore have no price and do not occur in the traditional accounts. Unpaid work (i.e., housework, care work, subsistence farming) and ecosystem services are the most prominent examples. Some authors thus suggest calculating "true prices" (or "real costs"). Others, however, have raised more fundamental questions about the price mechanism and the meaning of monetary valuation.[4]
- The socialist calculation debate of the 1920s and 30s, which flared up after the socialist revolutions in Russia and also in Western Europe (Austria and Bavaria) and which experienced a revival in the post-revolution Cuba of the 1960s, was about how rational decisions can be made in the economy when the price formation mechanism of the market is not available. To the argument of Mises and Hayek that rational decisions require market prices, certain authors such as K. William Kapp responded with a fundamental critique of market prices.[5]
- Finally, in the debate on unequal exchange, which has its origins in the 1960s, various authors raised the question whether the market price mechanism in international trade is biased and systematically works for the benefit of rich countries.

All three debates focus on structural problems of the market price mechanism (and there are interesting intersections between them, highlighted in Fig. 15.1). In all three debates, the question of the "true" expression of value, and whether it should be monetary or non-monetary, comes up: monetization of non-market goods vs. accounting in physical units (such as time use surveys for unpaid work, ecological footprint for ecological concerns) in the first debate, market prices as pure accounting variables vs. "calculation in kinds" in the second debate, and again monetary vs. physical units in the third debate. The accounting debate has not lost popularity today (think of the criticisms

4 Cf. e.g., D. Pearce, 'The Limits of Cost-Benefit Analysis As a Guide to Environmental Policy', (1976) 29(1) *Kyklos* 97.

5 F.A. Hayek, 'The Present State of the Debate', in F.A. Hayek (ed.), *Collective Economic Planning. Critical Studies on the Possibility of Socialism* (1935); F.A. Hayek, 'The Use of Knowledge in Society', (1945) 35(4) *American Economic Review* 519; K.W. Kapp, *Planwirtschaft und Aussenhandel* (1936), Engl. transl. in K.W. Kapp, *The Heterodox Theory of Social Costs* (2016).

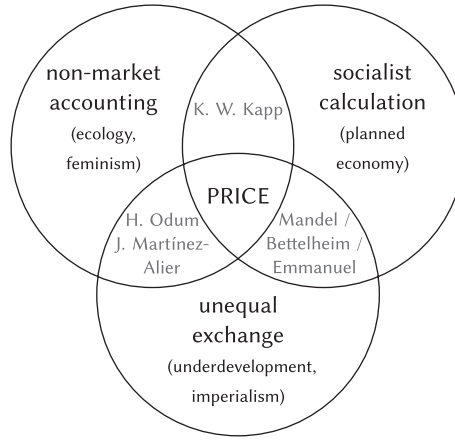

Figure 15.1 Three Attacks on the Price Formation Mechanism (and Some Interesting Approaches Located at their Intersections)

of GDP). But the other two debates live on too. The socialist calculation debate has enjoyed a revival today in connection with the discussion on "digital socialism" or "cyber-socialism".[6] The concept of unequal exchange, which has its origins in Marxist discussions of the 1960s and 70s, has recently undergone an "ecological update" and seems to be becoming a central notion in contemporary eco-Marxism (see below for details).

All three debates are important and interesting because they show that the categories of price and value are much more in need of discussion than neoclassical theory admits. These three debates can thus be used as a kind of crowbar to break the deceptive consensus that prevails in economics, and to re-open value as a topic for discussion. They question the mechanism of price formation, and thus indirectly also the concept of value, which neoclassical economics has tailored to it. In this chapter I am going to focus on the notion of unequal exchange, which has recently been further developed towards a more comprehensive theory of "ecologically unequal exchange", and which presents the most direct attack on the price mechanism. The aim of the chapter is to explore the conceptual basis of this theory and to bring to light its consequences for our thinking about price and value. In the concluding remarks, I will come back to the other two discussions – socialist planning and ecological

6 E. Morozov, 'Digital Socialism? The Calculation Debate in the Age of Big Data', (2019) 116/117 *New Left Review* 33, and O. Schlaudt, 'Lenin, Castro, Bezos? Der "Cybersozialismus" im Lichte der historischen Planungsdebatten', in T. Daum and S. Nuss (eds.), *Die unsichtbare Hand des Plans. Koordination und Kalkül im digitalen Kapitalismus* (2021).

accounting – because, in contrast to unequal exchange, they pursue positive, constructive goals and emphasise the need for alternative metrics of wealth.

B. Unequal Exchange and Ecologically Unequal Exchange

At the origin of the contemporary theory of ecologically unequal change lies what is called the "resource curse" or the "paradox of plenty", i.e., the fact "that states with abundant resource wealth perform less well than their resource-poor counterparts".[7] Extractive economies fuel the economic growth of rich industrialized countries without however having a share in the resulting economic welfare, notwithstanding promises to the contrary. Peru provides an early example. As a result of the guano and nitrates trade during the 19th century, Peru became heavily indebted primarily to British investors. Abundance of natural resources eventually lead to debt, poverty, and war. Guano turned out to be a "curse disguised as a blessing".[8]

The economic difficulties of the Global South, and in particular the resource curse, are empirically well-established phenomena. Their existence is also accepted in mainstream social sciences. As to the mechanism behind them, however, there is so far no consensus. Mainstream social scientists discuss a whole range of possible explanations.[9] Some explanations are economic – developing countries concentrating on the export of resources might simply not be a promising business model, making these countries dependent on volatile international markets or having a negative impact on other local industries through rising wages and the appreciation of the national currency ("Dutch disease"). Other explanations are political and try to account for the resource curse in terms of myopic policies, corrupt elites etc., i.e., in terms of local mismanagement and misgovernment.

What all of these approaches have in common is that they focus on local conditions and treat them as independent variables. What they ignore are large-scale patterns and the position of the extractive economies within the larger structure of the capitalist world system.[10] Critical scholars as well as activists hint at neo-colonial practices as the cause, from the activities of international institutions such as the World Bank and the International Monetary

7 M.L. Ross, 'The Political Economy of the Resource Curse', (1999) 51(2) *World Politics* 297.

8 B. Clark and J.B. Foster, 'Ecological Imperialism and the Global Metabolic Rift', *International Journal of Comparative Sociology* (2009) 50(3–4) 311, at 325.

9 Cf. Ross, *supra* note 7.

10 The 2019 Nobel prize in economics provides a good example of this type of methodological bias. The laureates indeed reduce the causes of poverty to local, individual misconduct. "The world's poor are poor because they tend to make the wrong decisions", as C. Berndt and M. Boeckler put this approach in a nutshell ('Behave, Global South! Economics, Experiments, Evidence', (2016) 70 *Geoforum* 22).

Fund to the debt mechanism to destabilization strategies in foreign policy (such as recent events in Venezuela) to direct military interventions (like in Iraq).[11]

The theory of unequal exchange offers an alternative, or at least complementary, explanation. It suggests that inequalities between countries are produced and reproduced not only through overt or hidden violence, but also "via the normal functioning of the price-formation mechanism in a competitive capitalist economy".[12] This theory claims that the poor performance of extractive economies is not (or is not only) due to local policy failure, misgovernment and mismanagement, but to a structurally fixed disadvantage. The thesis is that the symmetric exchange of equal values in monetary terms disguises an asymmetric net flow of embodied matter, energy and labour from the periphery to the core and (as we will see soon) of waste and emissions in the reverse direction.[13] Or, as Alf Hornborg once put it: "market price [is the] ideological means [by which] unequal exchange is represented as reciprocal exchange".[14]

11 H. Jauch, 'How the IMF-World Bank Structural Adjustment Program (SAP) Destroyed Africa', 26 May 2009, *NewsRescue* (https://newsrescue.com/how-the-imf-world-bank-and-structural-adjustment-programsap-destroyed-africa/); J. Roos, 'The New Debt Colonies', 1 February 2018, *Viewpoint Magazine* (https://viewpointmag.com/2018/02/01/new-debt-colonies/); G. Leech, 'Business as Usual: Washington's Regime Change Strategy in Venezuela', 23 November 2018, *Counterpunch* (https://www.counterpunch.org/2018/11/23/business-as-usual-washingtons-regime-change-strategy-in-venezuela/); T. Knapp, 'Iraq: America's Other "Longest War"', 1 January 2020, *Counterpunch,* (www.counterpunch.org/2020/01/01/iraq-americas-other-longest-war/).

12 A. Ricci, 'Unequal Exchange in the Age of Globalization', (2019) 51(2) *Review of Radical Political Economics* 225, at 229.

13 This definition is merged from: J. Martinez-Alier, 'Marxism, Social Metabolism, and Ecologically Unequal Exchange', (2004) 21 UHE/UAB working paper; Clark and Foster, *supra* note 8, at 313; A. Hornborg, 'Conceptualizing Ecologically Unequal Exchange', in *The Routledge Handbook of Political Ecology* (2015), 378; C. Dorninger and A. Hornborg, 'Can EEMRIO Analyses Establish the Occurrence of Ecologically Unequal Exchange?', (2015) 119 *Ecological Economics* 414, at 415; and L. Baker, 'Of Embodied Emissions and Inequality: Rethinking Energy Consumption', (2018) 36 *Energy Research & Social Science* 52; classical studies are A. Emmanuel, *L'échange inégal: Essais sur les antagonismes dans les rapports économiques internationaux* (1972) (First edition 1969, revised 1972. Engl. Transl.: *Unequal Exchange: A Study of the Imperialism of Trade* (1972)), A. Emmanuel, *Unequal Exchange Revisited* (1975), S. Amin, *L'échange inégal et la loi de la valeur* (1973), 2nd, revised edition (1988), S.G. Bunker, 'Modes of Extraction, Unequal Exchange, and the Progressive Underdevelopment of an Extreme Periphery: The Brazilian Amazon, 1600–1980', (1984) 89(5) *American Journal of Sociology* 1017, S.G. Bunker, *Underdeveloping the Amazon: Extraction, Unequal Exchange, and the Failure of the Modern State* (1985), H.T. Odum, 'Principles of Emergy Analysis for Public Policy'. Appendix of: H.T. Odum and J.E. Harting (eds.), *Emergy Analysis of Shrimp Mariculture in Ecuador* (1991) 89; for some recent case-studies see e.g., M.A. Pérez-Rincón, 'Colombian International Trade From a Physical Perspective: Towards an Ecological "Prebisch Thesis"', (2006) 59 *Ecological Economics* 519, P. Muñoz, R. Strohmaier and J. Roca, 'On the North-South Trade in the Americas and its Ecological Asymmetries', (2011) 70 *Ecological Economics* 1981, J. Ramos-Martín, F. Falconi and P. Cango, 'The Concept of Caloric Unequal Exchange and Its Relevance for Food System Analysis: The Ecuador Case Study', (2017) 9 *Sustainability* 2068, N. Malgalhães et al., 'The Physical Economy of France (1830–2015). The History of a Parasite?', (2019) 157 *Ecological Economics* 291; a useful historical oversight and systematic analysis is provided by Ricci 2018, *supra* note 12.

14 A. Hornborg, 'Towards an Ecological Theory of Unequal Change: Articulating World System Theory and Ecological Economics', (1998) 25 *Ecological Economics* 127, at 134.

Let us first try to better understand the mechanisms at work in unequal exchange. How can equal monetary exchanges disguise underlying unequal flows of energy, matter and labour? Or, put the other way around, how can unequal amounts of the latter translate into equal amounts of money? The reason for this can be found in the differing conditions of production in the countries at the periphery and the core. The simple answer is that one Dollar is not one Dollar. Spent in a poor country, one Dollar can mobilize more energy and more labour than in a rich country. The American ecologist and protagonist of the approach of unequal exchange Howard P. Odum suggested that we can account for this fact in terms of ratios of energy embodied in the goods ("emergy") to amounts of money spent for the production of the goods (this approach stands in a long tradition of energy theories of value[15]; more on this below). Extractive economies and rural countries draw more on Nature's "unpaid work" and are thus characterized by higher emergy/$ ratios: "Rural countries have higher EMERGY/$ ratios because more of the wealth goes directly from the environment to human consumer without being paid".[16] Claude Meillassoux once made a similar point about wages in developing countries: drawing on the unpaid work of the local communities which reproduce labour power and reabsorb worn-out workers, the industrial sector in developing countries can pay comparatively lower wages.[17] International wage and cost differentials, which, according to conventional wisdom, represent a competitive advantage, turn out to be a structural disadvantage in the light of unequal exchange: goods coming from these countries thus embody more energy, labour, resources and emissions per dollar than the goods of equal market value which these countries receive in exchange. As a consequence, fair trade in monetary terms will result in a net flow of resources from the poorer to the richer country:

> Generally, a country loses wealth if it sells environmental raw products because the EMERGY of nature's work to make them is high, whereas the money received is only for some services to process them. The luxury of developed countries is partly due to importing raw resources without paying anything but processing costs.[18]

15 On this topic cf. J. Martinez-Alier, *Ecological Economics. Energy, Environment and Society* (1987) and P. Mirowski, 'Energy and Energetics in Economic Theory', (1988) 22(3) *Journal of Economic Issues* 811.

16 Odum, *supra* note 13, at 93.

17 See C. Meillassoux, 'From Reproduction to Production: A Marxist Approach to Economic Anthropology', (1972) 1(1) *Economy and Society* 93, at 102: "The agricultural self-sustaining communities, because of their comprehensiveness and their *raison d'être* are able to fulfil functions that capitalism prefers not to assume in the underdeveloped countries: the functions of social security. The cheap cost of labour in these countries comes from the super-exploitation, not only of the labour from the wage-earner himself but also of the labour of his kin-group". A.G. Frank, *Dependent Accumulation and Underdevelopment* (1979), provides a similar account of the exploitation of the labour force in South America.

18 Odum, *supra* note 13, at 105–6.

If this view is correct, it would turn the whole picture upside down. "According to this analysis", Foster and Holleman explain, "Sub-Saharan countries paid off all international debt in emergy terms by the early 1990s (in the cases of Mauritania, Niger and Senegal, by the 1970s) […] . Indeed, in emergy terms, the Sahelian countries are shown to be net creditors, rather than debtors".[19]

The theory of unequal exchange thus shows a way to account for unequal exchange in terms of undistorted markets, embodying a rigged logic which translates asymmetric net-flows of labour, energy and resources into the exchange of equal values in monetary terms. What is important in this context is the fact that the periphery of the world system is no longer exploited in the sense which held for the epoch of colonialism. Today, the countries of the periphery and those at the centre are interconnected via the international market *instead* of being exploited through sheer violence.

The economic phenomenon of the resource curse is today complemented by a second paradox on the ecological level, sometimes referred to as the "paradox of resource consumption and environmental degradation": in international comparison, countries with high levels of resource consumption show lower levels of environmental degradation then poorer countries.[20] This does not necessarily mean that the high consuming countries managed to implement higher environmental standards and to adopt a more sustainable way of life. Critical scholars rather suggest that rich countries simply externalize their environmental impact to poor countries to which they are linked via trade relations. Thus, emissions of greenhouse gases dropped in many Western countries as a result of the relocation of energy-intensive production to poorer countries. Lucy Baker cites the example of the UK and China: "In 2004 the emissions generated in China for the production of goods consumed in the UK were higher than all the direct emissions of UK households, including gas and car fuel".[21] The extractive economies of the Global South literally "sell out" their wealth in a twofold sense: they lose their natural resources, and they spoil the local ecosystems. The industrialized countries profit from the resources and at the same time "offshore environmental externalities to poorer countries". While theories of unequal exchange initially focussed on the economic dimension, current approaches to "ecologically unequal exchange" try to integrate the ecological dimension too.

19 J.B. Foster and H. Holleman, 'The Theory of Unequal Ecological Exchange: A Marx-Odum Dialectic', (2014) 41(2) *Journal of Peasant Studies* 199, at 222.

20 A.K. Jorgenson, K. Austin and C. Dick, 'Ecologically Unequal Exchange and the Resource Consumption/Environmental Degradation Paradox. A Panel Study of Less-Developed Countries, 1970–2000', (2009) 50(3–4) *International Journal of Comparative Sociology* 263.

21 Baker, *supra* note 13, at 56.

C. Interlude: Value, Law, and World-making

Before coming to the details of the theory of unequal exchange and the conceptual problems involved therein let me spell out why, on my understanding, unequal exchange represents an interesting conceptual challenge. First of all, we can state that there is a challenge located on a conceptual level. For unequal exchange does not only challenge the classical theory of comparative costs according to which all countries should gain from trading with one another, nor can it be reduced to an attack on the classical liberal idea that trade and competition foster economic, technological, and political development. Unequal exchange goes beyond that and questions the much more fundamental notion that trade and voluntary exchange involve reciprocity and thus an ideal of freedom, equity, and justice.

Second, notions of value are inherently linked to practices of world-making and ideas of the place of law within the world. David Graeber emphasised that notions of value entail whole cosmologies, i.e., they define the boundaries of the world, its actors and the sorts of powers the latter have.[22] Criticism of value thus has an immediate importance for our world-view. One way to make this visible consists in spelling out the ideal of justice that is involved in free and voluntary exchange. A straightforward way would be to say that equal exchange is the exchange of goods of *equal value*. Yet the sociologist Aldo Haesler argues in *Hard Modernity* from 2018 that this actually does not correspond to the specific modern view of the world (and his argument resonates with David Graeber's point). According to Haesler, only in a pre-modern, "closed" universe is exchange understood as a zero-sum game in which goods of equal value change hands and in which one person can only win at the other's expense. The modern view situates itself in a completely different, open and infinite universe, and it is here that we are confronted with the world-making dimension of value practices. In the modern universe, exchange can be understood as a positive-sum game in which both parties actually become "better off". Mark Twain provides a humorous description of this in his *The Adventures of Tom Sawyer*: Tom and Huck exchange a tick for a tooth, "and the boys separated, each feeling wealthier than before".[23] Though spelled out in different terms, this remains an ideal of justice and equity which informs our notion of exchange. At the same time Haesler reminds us that the modern view of the positive-sum game is an illusion. It hinges on an invisible third

22 D. Graeber, 'It is Value that Brings Universes into Being', (2013) 3(2) *HAU: Journal of Ethnographic Theory* 219, at 231.

23 M. Twain, *The Adventures of Tom Sawyer* (1876), at 68.

party who has to "pay the price".[24] But the third party is made invisible when *consent* is made the moral or legal criterion of transactions, as Haesler explains.[25]

These considerations, and in particular the notion of consent, also build a bridge to the question of law and legislation. As Mirowski notes, neo-liberals, despite their own rhetoric, are quite aware of the fact that the market is a construct which depends also on a legal framework.[26] Nevertheless, the "imperialism" of the neoclassical concept of value does not stop at the sphere of law. It also reduces this sphere to economic value by understanding laws as the result of competition on the market of ideas.[27] The common notion that trade and exchange embody an ideal of justice and equity, and hence that the economic sphere has the capacity to *bring about* normative ideals on its own, cannot but strengthen this view. According to this notion, the market is not subject to a rule of fair exchange, but *makes sure* that goods are exchanged to mutual advantage (or, more traditionally, at equal value) in a self-organizing and self-regulating way. On the "free" market there is no need for such a rule of fair trade nor for an authority watching over the transactions, since each agent is supposed to have the freedom to refuse any transaction that seems disadvantageous to him. Unequal exchange, challenging this notion of trade and exchange, thus proves to be of great potential relevance here, because it also affects the cosmology and the notion of law accompanying the modern notion of value.

D. Unequal Exchange, Exploitation, and Power

If we take the notion of unequal exchange seriously, what exactly changed in the transition from colonialism to free trade? Is the periphery still exploited? And what is the relation between unequal exchange and power according to theories of unequal exchange? In order to tackle these questions, it is useful to understand that there is a parallel between unequal exchange and the wage contract. Marx himself vaguely pointed to such a parallel between class relations and international free trade, and Emmanuel put this quotation at the beginning of his classical monograph on unequal exchange:

> If the free-traders cannot understand how one nation can grow rich at the expense of another, we need not wonder, since these same gentlemen also

24 A. Haesler, *Hard Modernity. La perfection du capitalisme et ses limites* (2018): "Le gain s'y fait toujours aux dépens d'autrui ou de la nature, comme capture ou pillage", 347; "Dans un jeu à somme positive engageant des biens limités et riveaux, il y a toujours un tiers […] qui en fait les frais. L'invisibilisation de ce tiers est le prix à payer pour maintenir l'illusion pacificatrice de la synergie réalisée", 377.

25 Ibid. at 399.

26 P. Mirowski, 'Postface: Defining Neoliberalism', in P. Mirowski and D. Plehwe (eds.) *The Road from Mont Pèlerin. The Making of the Neoliberal Thought Collective* (2009).

27 A. Supiot, 'Democracy Laid Low by the Market', (2018) 9(3) *Jurisprudence* 449.

> refuse to understand how within one country one class can enrich itself at the expense of another.[28]

This parallel can be taken further, as has been done by Howard P. Odum, who, though not a Marxist, was a reader of *Capital*, and was thus able to recognize the strong parallel between his analysis of international trade and Marx's analysis of the wage contract.[29] Many readers of *Capital* have been struck by the fact that Marx describes the wage contract as a *fair* contract. The transaction involved in wage work "conforms to the laws of the exchange of commodities", and the labour power is sold, as Marx explicitly assumes, "at its *real* value".[30] Certainly the capitalist draws profit from it, but he does so in the way a farmer draws advantage from cultivating a leased piece of land. The capitalist pays less for the working day than the worker produces during this time – just as the farmer pays less rent for the field than what he yields from cultivating it. Key to this is the special capacity of labour power to produce surplus value: labour power can produce (within one working day) more goods than are needed to ensure its own reproduction, or, to put it the other way around, labour power is worth less than it is able to produce.[31]

Does this mean that, according to Marx, workers are not exploited in capitalism? Well, it means at least that the capitalist does not cheat in the most blunt sense of the word (and it is this analysis by which Marx distinguished himself from Proudhon and his doctrine of "property is theft"). Even if the capitalist pays "fair" prices for the workers' labour power, determined in working hours *necessary for (re)production*, this exchange of equal market values disguises an unequal exchange in terms of working hours *executed*, because the daily reproduction cost of the labour power (partly provided through unpaid work in the household) is less than one working day: "the labour which he [i.e. the labourer] gives in return is greater than the quantity of labour which he receives in the form of wages".[32] Marx thus suggested, as Hornborg put it, that

> the accumulation of capital in industrialized Britain was made possible by the "dispossession" of the worker's labor-power, disguised as an equal exchange of labor-power for wages. As workers' wages were lower than

28 K. Marx, 'Speech on the Question of Free Trade (1848)', in *Marx Engels Collected Works* Vol 6 (1976) 450, at 465, and Emmanuel, *supra* note 13, at vii.

29 H.T. Odum and D.M. Scienceman, 'An Energy Systems View of Karl Marx' Concepts of Production and Labor Value', in M.T. Brown (ed.), *Emergy Synthesis 3: Theory and Applications of the Emergy Methodology* (2005), 17; cf. also Foster and Holleman, *supra* note 19.

30 K. Marx, *Capital. A Critical Analysis of Capitalist Production* (1887), in *Marx Engels Gesamtausgabe* Vol. II.9 (1990) cf. also M. Heinrich, *Die Wissenschaft vom Wert* (2006), at 258–9.

31 Ibid., at 144–5.

32 K. Marx, *Theories of Surplus-Value*, in *Marx Engels Collected Works*, Vol. 30: *Economic Manuscripts of 1861–63* (1988), at 352.

> the capitalists' income from sales, Marx concluded [in *Capital*] that their [labor][33] contributed more to the value of the commodity than they were remunerated for. This "surplus value" drawn from labor was the source of capitalist profits as well as investments in technology.[34]

The formal exchange relation only "mystifies" the "real nature of the transaction".[35] Marx sums up:

> Hence, we may understand the decisive importance of the transformation of value and price of labour-power into the form of wages, or into the value and price of labour itself. This phenomenal form, which makes the actual relation invisible, and, indeed, shows the direct opposite of that relation, forms the basis of all the juridical notions of both labourer and capitalist, of all the mystifications of the capitalistic mode of production, of all its illusions as to liberty, of all the apologetic shifts of the vulgar economists.[36]

But in what, then, consists the "real nature" of the transaction which is "mystified" in the wage contract? First of all, it is important to note that there is not necessarily a relation of direct coercion between the capitalist and the worker. Certainly, the worker has little choice in the matter. Lacking means of production, he has to sell his labour power. But it is not the capitalist who forces him to do so, it is the circumstances. According to the standards of liberal society, however, absence of relations of direct coercion and personal dependence count as *freedom*.[37] "[T]he free exchange of commodities hides a systematic unfreedom", note Gunn and Wilding,[38] and the monetary metric hides how this asymmetry is systematically taken advantage of in the exploitation of the unfree. It is noteworthy that, according to Supiot, it has always been the intention of social law to counterbalance this notion of freedom:

33 Hornborg writes here "labor-power", what is an obvious slip. Labour power is sold as a commodity, but labour contributes to value.

34 Hornborg, *supra* note 13, at 378; I. Wallerstein, 'The Rise and Future Demise of the World Capitalist System: Concepts for Comparative Analysis', (1974) 16(4) *Comparative Studies in Society and History* 387, at 401, draws the same parallel between the exploitation of workers and of the periphery: "Thus capitalism involves not only appropriation of the surplus-value by an owner from a laborer, but an appropriation of surplus of the whole world-economy by core areas".

35 Marx, *supra* note 30, at 508.

36 Ibid. 510–1.

37 The problem of coercion, banned from economics, re-emerges in an interesting way in the discussion on the supposedly "voluntary" character of prostitution, cf. for example C. Overall, 'What is Wrong with Prostitution? Evaluating Sex Work', (1992) 17(4) *SIGNS* 705, 711.

38 R. Gunn and A. Wilding, *Revolutionary Recognition* (2021), at 33.

> Social law as a whole was built to counter the idea that the consent of the weak was sufficient to justify the domination of the strong. This mistrust remains strongly rooted in our labour law, but it is increasingly being denounced in the name of individual freedom.[39]

What then are the implications of Marx's analysis of the wage contract and the idea of the unequal exchange of international trade? Do they reveal that these relations in the last resort boil down to relations of power? This is what the sociologist Andrew Jorgenson seems to suggest when he defines unequal exchange in terms of power. According to him, unequal exchange is:

> the assertion of asymmetrical *power relationships* between more-developed and less-developed countries, wherein the former gain disproportionate advantages at the expense of the latter through patterns of trade as well as other structural relationships.[40]

Whereas it might be absolutely true that unequal change is ultimately based on asymmetrical power relations, in my opinion this definition does not do justice to the phenomenon. For no less interesting than the power relationships behind the wage contract or international trade relations is the way these power relations are made to *disappear* in these legal forms, and this aspect does not appear in Jorgenson's reductionist definition. A first lesson from Marx's analysis of the wage contract is, in my view, that exploitation is intimately tied to a conceptual framework which is used to describe it. Put in the economic terms of the capitalist society (in the present case, valuation of labour power at a production-cost basis), exploitation disappears and the wage relation reduces to a free contract.

This reading of Marx reminds me of a quotation from Raoul Peck's motion picture *The Young Marx*. In a meeting Marx explains to the workers:

> The key point is commodity. Labour, your labour, can be seen as a commodity. Your labour is sold like a commodity to your employer. Except that you're not free. You're forced to sell it to live, and to sell it at a low price. […] The truth is that under current conditions—which must change—the bourgeois is always free to use the labour, and the worker is always forced to sell the labour. The bourgeois loves talking of liberty, but that liberty is only for him, not for you, as you know. […] So the game is not a fair one. That is clear. It is rigged.[41]

39 A. Supiot, *La Gouvernance par les nombres. Cours au Collège de France (2012–2014)*, (2015), at 287 (my transl.).

40 A.K. Jorgenson, 'Environment, Development, and Ecologically Unequal Exchange', (2016) 8 *Sustainability* 227, at 227, emphasis added.

41 Raoul Peck (director): *The Young Karl Marx* (motion picture, 2016). Screenplay: Pascal Bonitzer and Raoul Peck. (From the English subtitles, slightly corrected, O.S.)

The fictitious quotation is obviously inspired by real statements from Marx. One can think of the *Speech on the Question of Free Trade* from 1848 and notably the chapter "Wages of Labour" from the *Economic and Philosophic Manuscripts* of 1844. But the metaphor of the game appears to come from the scriptwriters Pascal Bonitzer and Raoul Peck. This metaphor proves useful in at least two respects. First, it suggests that the market can be compared to a game, what is reasonable insofar as both games and the market are forms of human interaction which (at least at a certain level of analysis) have a "voluntary" and regular character ("voluntary" in the sense of absence of *personal* coercion). They are characterized by a set of rules which the agents accept. Second, the metaphor suggests – contra Proudhon – that the capitalist does not "cheat" in the most blunt sense of the word, i.e., he does not violate a rule in order to gain an advantage (at least not necessarily). The problem, the metaphor further suggests, must rather be located elsewhere, viz. in the rules themselves. The rules are fixed such that the "capitalist" will always win and the "worker" always loses, i.e., such that the existing class structure is reproduced. The relationship of coercion is externalized and reduced to "circumstances", i.e., the lack of property on the side of the worker which compels him to accept the contract. Having established these rules, all the capitalist has to do is to insist upon the rules of the game in the name of justice and the norms of free trade. According to Odum, the same happens in trade between the core and the periphery of the world system. There is no need to fall back on coercive power as in colonialist regimes which launch asymmetric fluxes of resources from the periphery to the core. Free trade can do the same.[42]

E. Unequal Exchange, Value, and Real Wealth

The idea that monetary prices disguise inequalities and asymmetries at a more fundamental level has far-reaching consequences for our notion of wealth and how to measure it. Howard P. Odum concluded from his analysis of unequal exchange that "[the market value] is largely irrelevant as a measure of wealth".[43] This statement raises the problem of an alternative standard of wealth. This problem is already implicit in the previous analysis of the market as a "rigged game". If this analysis holds, there are two standards involved, an internal one which is that of equal value in monetary terms, and an external one according to which the game can be identified as rigged. Magdalena Małecka and Jason Walsh recently hinted at the same problem in Mariana Mazzucato, who accuses neoclassical economics of masquerading as creation of value what in

42 The notion of "unequal treaties" (*traités inégaux*) which Thomas Piketty uses in his latest book in the analysis of colonial regimes might be helpful in this context (Piketty, *Capital et idéologie* (2019), at 336 and 445).

43 Odum, *supra* note 13, at 91.

reality is mere value extraction. But, Małecka and Walsh ask, does Mazzucato not need an alternative theory of value to justify such a critique?:

> Mazzucato wants to be able to say: even though these practices are defended as value-creating, in fact they are not; quite to the contrary, they impede growth and innovation, and often they benefit from public resources without sharing with the public the profits which they reap. Obviously, in order to be able to make such claims, one needs to have a view about what economic value *really* consists in, as opposed to what the stories legitimating value-extractive activity say of it.[44]

Which is this external standard in theories of unequal exchange? In which terms can "wealth" be expressed such that the rig of market valuation becomes apparent?

There is a strong temptation to understand unequal exchange as the exchange of unequal *values*, even in monetary terms. Ironically, Marx seems to do something similar when he defines the "degree of exploitation" as a ratio of monetary quantities (and the same holds for Emmanuel's classical study on unequal exchange from 1972). First, Marx defines surplus value as "the excess of the value of the product over the value of its constituent elements", i.e., the difference between price and production costs:

$$\text{surplus value} = \text{value} - \text{production costs}.$$

The "degree of exploitation" then is defined as the ratio of surplus value to variable capital (labour costs):

$$\text{degree of exploitation} = \text{surplus value} / \text{labour costs}.[45]$$

Given these formulae, can't the worker calculate the exploited surplus value down to the precise penny?

This is not an easy question. First of all, it is important to understand that Marx himself was not, at least not in the usual sense, a "proponent" of the labour theory of value that underlies his analysis of the wage contract. His position was not that value is objectively determined by (amounts of abstract) labour, but rather that this is the case *in* capitalism. The "law of value" was understood by him as a historical law which applies only to capitalism but which outside capitalism ceases to be effective. (This question was hotly discussed in the Cuban socialist calculation debate. In particular Che Guevara,

44 Magdalena Małecka and Jason Walsh, 'Mariana Mazzucato, *The Value of Everything: Making and Taking in the Global Economy*', (2020) 10(2) *Œconomia* 369. https://doi.org/10.4000/oeconomia.8108

45 K. Marx, *supra* note 30, at 184 and 187.

who as Minister of Industry and President of the Central Bank defended the "budget financing system" against the quasi-private organization of companies, stressed the historical character of the law of value.[46]) Besides, Marx's labour theory of value was not intended as an empirical theory which aims to explain the actual exchange ratios (in terms of hours of abstract work). Rather, Marx thought of the labour theory as a mere explication of the implicit structure of commodity exchange and considered the law of value as a "tautology" rather than as an empirical law.[47]

Contrary to neoclassical economics, Marx thus works with a sharp distinction between value (exchange-value) and use-value. "For Marx", Burkett explains, "*real wealth or use-value* is anything that satisfies human needs, whereas *value* is the specific social representation of use-value under capitalism".[48] Whereas the utilitarian approach merges both notions into one, Marx diagnoses a "contradiction" between value and use-value. (Crises are the times when this contradiction becomes apparent.) Burkett's reading may even prove not radical enough. According to Marx's analysis, "value" is not exactly a capitalist expression of use-value, but a capitalist chimera that obeys completely different laws than the latter. In any case, for Marx, the categories of (exchange) value and price are confined to the capitalist economy and have no meaning outside it. As a consequence, there cannot be a "true price" of labour power that would allow exploitation to be expressed in monetary terms. Quite the contrary, monetary terms constitute the metric which allows exploitation to be made invisible.

Since unequal exchange is structurally similar to the exploitation of wage labour, the problem of how to express and quantify the degree of exploitation also arises in theories of unequal exchange.[49] Indeed unequal exchange seems, like the exploitation of wage labour, to suggest a "true" value which is not matched by the market price, a suggestion which provokes the same kind of objection or qualification that has been levelled at the labour theory of value.

46 E.C. Guevara, 'Planning and Consciousness in the Transition to Socialism', in D. Deutschmann (ed.), *Che Guevara and the Cuban Revolution. Writings and Speeches of Ernesto Che Guevara* (1987), 203; cf. also A. Nelson, 'The Poverty of Money: Marxian Insights for Ecological Economists', (2001) 36 *Ecological Economics* 499.

47 P. Burkett, *Marxism and Ecological Economics. Toward a Red and Green Political Economy* (2006), 48, and M. Heinrich, *Wissenschaft vom Wert* (2006), 203–19.

48 Ibid., at 28. Marx seems not to have employed the expression "real wealth" in *Capital*, but it appears in a quite significant way in the famous "Fragment on machines", contained in *Grundrisse* from 1857/58 (K. Marx, *Grundrisse*, in *Marx Engels Collected Works*, Vol. 29: Economic Works of 1857–1858 (1987)).

49 Cf. e.g., G. Köhler, 'The Structure of Global Money and World Tables of Unequal Exchange', (1998) 4(2) *Journal of World-Systems Research* 145, https://doi.org/10.5195/jwsr.1998.149, and J. Hickel, D. Sullivan and H. Zoomkawala (2021): 'Plunder in the Post-Colonial Era: Quantifying Drain from the Global South Through Unequal Exchange, 1960–2018', (2021) 26(1) *New Political Economy* 1030, DOI: 10.1080/13563467.2021.1899153.

Charles Bettelheim objected to Arghiri Emmanuel that his (monetary) account of unequal exchange "remains confined within the representation space of the value form and the ideological figures rooted in this space".[50] This is no outdated question from Marxist discussions of the 1960s and 70s. We are dealing here with a fundamental, systematic problem. Recently it reappeared in the context of contemporary approaches in eco-Marxism. Jason W. Moore suggested a generalized notion of "ecological surplus", defined as "the ratio of the system-wide mass of capital to the system-wide appropriation of unpaid work/energy".[51] Critics objected again that this expression relies on the false language of monetization.[52] Paul Burkett warned that eco-socialists might "implicitly take an uncritical stance on capitalist valuation", i.e., valuation in the form of market prices. The "whole conception of exploitation in terms of the under- and over-pricing of natural resources", Burkett goes on, "presupposes that market prices and money can be qualitatively adequate representatives of nature's use-value". We must not "confus[e] the natural substance of real wealth with capitalist 'value'", Burkett insists.[53] Alf Hornborg argues, along similar lines, that the notion of underpayment "only makes sense as long as we remain confined within the conceptual universe of general-purpose money which assumes that everything has a correct price".[54] It seems that Jason W. Moore himself must have had these doubts, because he has added a qualifying note to his definition of ecological surplus: "This is an imperfect formulation, precisely because the condition for quantification within the commodity system (units of labor-time) is a world of unpaid work that cannot be quantified".[55] Is the definition of ecological surplus then "imperfect", or even misleading?

Whereas Moore's "ecological surplus" seems to be a monetary quantity, other authors in the field of unequal exchange have tried to establish non-monetary metrics. Odum for example (but also Bunker[56]) is quite unambiguous in this regard. He occasionally speaks of his "emergy" metric as a "scientifically based value-system".[57] Also Odum's student and follower Charles A.S. Hall explicitly suggests energy accounting ("energy return on investment" or

50 Bettelheim in Emmanuel, *supra* note 13, at 273.

51 J.W. Moore, *Capitalism in the Web of Life* (2015), at 95.

52 J.B. Foster, 'Marx, Value, and Nature', (2018) 70(3) *Monthly Review* 122; J.B. Foster and P. Burkett 'Value Isn't Everything', (2018) 160 *International Socialism* (2018) 70(6) *Monthly Review*; A. Hornborg, 'Dialectical Confusion: On Jason Moore's Posthumanist Marxism', (2020) *Historical Materialism Blog*. www.historicalmaterialism.org/blog/dialectical-confusion-jason-moores-posthumanist-marxism.

53 P. Burkett, *supra* note 47, at 46, 47, and 30.

54 A. Hornborg, 'Post-Capitalist Ecologies: Energy, "Value" and Fetishism in the Anthropocene', (2016) 27(4) *Capitalism Nature Socialism* 61.

55 Moore, *supra* note 51, at 95.

56 Cf. *supra* note 13.

57 H.T. Odum, 'Self-Organization, Transformity, and Information', (1988) 242 *Science* 1132.

EROI) as an alternative to "money as our universal measure".[58] This is all well and good, but as a measure of what? Do these physical metrics provide a feasible alternative to prices as a direct measure of wealth? Odum's energetic approach is interesting and provides useful insights. But thinking of it as a theory of value, as he seems to suggest, is problematic. The reason for this is straightforward: there is simply no direct link between energy and well-being. Indeed, the same amount of energy can be used equally well for humans' benefit or harm, as was already pointed out by Max Weber in 1909.[59] Whereas this objection also holds in an orthodox neoclassical framework, the error involved in the reduction of value to physical quantities appears even more dramatic from a Marxist point of view, for now value is no longer conceived in psychological terms (subjective marginal utility), but in historical terms (capitalistic "fetishism"). "[I]n Marx's analysis", Foster and Burkett insist, "value, or abstract labour time, is not a natural-physical substance, but rather an alienated material-social relation behind which lies society's reproductive division of labour enmeshed with nature".[60] Martinez-Alier in his classical study on the history of energetic approaches came to the following conclusion: "Human energetics is in *no way* a theory of value, but a contribution to the critique of theories of value proposed by economics".[61]

F. Conclusion: Which Metric for Real Wealth?

So far, we have come to a rather negative conclusion. We have seen that Marx's labour theory of value and modern energetic approaches are useful for criticizing and demystifying market prices. But it seems that they do not provide an alternative universal metric for measuring wealth, a sort of "true price". This is probably no surprise: "energy" (or even simply tons of CO_2 or used water) are simple physical quantities. How could they ever replace the monetary metric?[62] Marx settled for opposing "use-value" to capitalist value, and this pair of opposite notions matches with the distinction between quality and quantity. "For life, there is no single metric", the sociologists Foster and Holleman conclude quite pessimistically.[63] Hornborg goes even further and extends his criticism of money to all possible metrics: even the attempt to conceive unequal exchange

58 C.A.S. Hall, *Energy Return on Investment. A Unifying Principle for Biology, Economics, and Sustainability* (2017), at 31.

59 M. Weber, 'Energetische Kulturtheorie (1909)', in M. Weber, *Gesammelte Aufsätze zur Wissenschaftslehre* (1973) 400.

60 J.B. Foster and P. Burkett, *Marx and the Earth. An Anti-Critique* (2016), at 110.

61 Martinez-Alier, *supra* note 15, at 92.

62 See B.R. Bellamy and J. Diamanti (eds.), *Materialism and the Critique of Energy* (2018), for a materialist critique of energy.

63 Foster and Holleman, *supra* note 19, at 215.

as "underpayment of ecological use values, understood as energy, paradoxically reflect[s] a mode of thought shaped by the capitalist market, viz. the underlying assumption of an abstract equivalence among incomparable qualities".[64]

While this might be acceptable for theories of unequal exchange, insofar as their main objective is to demystify the price mechanism and mainstream economic approaches to value, the situation is unsatisfying from the point of view of approaches which have a more constructive objective – in particular the fields of non-market accounting and socialist planning which I mentioned in the introduction. So, is there a way to bring the discussion to a more positive and constructive conclusion?

As explained above, reading energetic approaches as a contemporary update of Marx's labour theory of value wouldn't be helpful, because the "value" of capitalist markets is a chimera – it is something detached from, or even opposed to, use-value or real wealth. But can these energetic accounts be read as an approach to use-value instead of value, i.e., as a measure of real wealth? This might resonate with Odum's own ideas. Indeed, he didn't accept the neoclassical notion of value as marginal utility and rejected the "individualistic human-centered concepts of economic benefits".[65] Emergy, understood as a "scientifically based value-system",[66] interpreted value rather in terms of sustainability of the ecosystem in which the economy is embedded. Admittedly, this is not use-value, but nor are questions of sustainability completely unconnected to questions of human well-being.

Put like this, the challenge becomes one of finding the right way between Scylla and Charybdis. The emergy system of accounting helps place the economy back in its ecological context. It corrects the neoclassical notion which thinks of the economy as an autonomous circular flow of commodities and an inverse circular flow of money, which proceed in perfect independence from the ecosystem and the realm of natural laws.[67] Hornborg warns, however, that reading emergy as a theory of value would end up making a complementary mistake: neoclassical economics *ignores* the objective substratum of value; energy theories *reduce* value to physical criteria like energy.[68] But does avoiding the Scylla of capitalist myth necessarily mean running into the Charybdis of physical reductionism in questions of use-value and real wealth?

It seems to me that this is not so, at least not necessarily. An interesting practical model can be seen in the United Nations' *Human Development Index* (HDI). HDI is a multi-dimensional indicator of well-being, integrating the dimensions of life-expectancy, education, and income. It is a non-monetary

64 Hornborg, *supra* note 54, at 61.

65 Odum, *supra* note 13, at 91.

66 Odum, *supra* note 57, at 1132.

67 Georgescu-Roegen, *The Entropy Law and the Economic Process* (1971), at 281. S. Baumgärtner, M. Faber, J. Schiller, *Joint Production and Responsibility in Economics* (2006) at 47–8.

68 Hornborg, *supra* note 14, at 129.

indicator (though GDP still enters as one of its components, which is problematic). In its recent mathematical form, adopted in 2010, it avoids the problem of "compensation" (or "weak sustainability") which affects all (or at least most) monetary approaches.[69] Finally, and most interestingly, HDI is based on Amartya Sen's "capability approach", i.e., it thinks of material wealth, education, etc. as *means* for human well-being rather than ends in themselves. Whereas this means-ends distinction (more precisely, objective means for individually and subjectively defined ends) might have originally been motivated by a liberal ideology, it might be exactly the right conceptual tool for avoiding the Charybdis of physical reductionism in emergy accounting. There may be no indicator that can deliver on the (failed) promise of money, namely to serve as the universal language of all human concerns. But anyone who wants to develop concrete economic alternatives, relying on concrete techniques of accounting, planning, and decision making, cannot be satisfied with this negative result.

69 J. Klugman, F. Rodríguez, and H.-J. Choi, 'The HDI 2010: New Controversies, Old Critiques', (2011) 9 *Journal of Economic Inequality* 249. For a monetary approach which claims to avoid the problem of weak sustainability see Jacques Richard and Alexandre Rambaud, *Humanitarian Ecological Economics and Accounting* (2022).

Chapter 16

Value in the Emotional Register

Jessie Hohmann

My reflection on the chapters in this volume[1] is prompted by an emotional response – or rather, a series of emotional responses. The first of these is my own emotional response to a publication by Edward Gibbon Wakefield: his "A Letter from Sydney",[2] published in 1829, which served to underpin his theory of "Systematic Colonization".[3] My response to Wakefield's arguments around the value of land prompted a wave of emotions in me, one that took me back to a second emotional moment. That second emotional moment was between contributors to the workshops which underpin this collection. I was struck, in listening to the impassioned debate between authors, how deeply they felt about value, its definition, its use, and the work it does in the world and in their scholarship. Questions about value are not only "academic" in nature, but are deeply felt. I was taken back to these fervent discussions by my own emotional response to Wakefield's discussion of the value of land.[4] This, then, made me particularly attentive to value in an emotional register, and I found myself reading the chapters contributed to this volume with an eye to emotional response, to feelings, or at least the traces of these that can be found in the chapters.

I do not subscribe to the still-dominant view that emotion and reason are "structurally opposed", with emotion pitted against reason, and with reason superior to it.[5] Thus I am not looking for traces of emotion that might belie the writer's objectivity, or point to illegitimate bias or lack of rationality. Rather, I posit that we learn from and intellectually (not just biologically) experience

1 My reflection concentrates on the chapters by Hoffmann, Kempter, Schwöbel-Patel and Teubner in this volume.

2 E.G. Wakefield, *A Letter from Sydney, the Principal Town of Australasia* (1829).

3 See, in particular, E.G. Wakefield, *Sketch of a Proposal for Colonizing Australasia, &c. &c. &c* (1829).

4 And, in revisiting the questions posed to authors in advance of the second workshop for chapters in this collection (online) in December 2020, I note that the editors were alive to the role of emotion, prompting the authors to consider "what are the affective qualities of values at work in your chapter? How do the affective qualities contribute to reproduction? Do they point up possibilities for intervention?" (on file with author).

5 R Grossi, 'Law, Emotion, and the Objectivity Debate', (2019) 28 *Griffith Law Review* 23, at 25.

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emotions: they are themselves, as Grossi writes, a valuable and equal part of our evaluative abilities.[6] Thus, reflecting on the feelings to value that emerge in this chapter is analytically important *and is to be valued*.[7]

I concentrate on emotions rather than on affect. Despite the recent "affective turn" in the humanities and social sciences, which is at least partly to be credited with a renewed scholarly interest in emotion, emotion and affect have significant differences, and affect theorists consciously set affect apart from emotion. For example, the authoritative *Affect Theory Reader* described affect as "forces insisting *beyond* emotion".[8] For the authors, affect is "the name we give to those forces—visceral forces beneath, alongside, or generally other than conscious knowing" which can drive individuals toward movement, or into states of suspension "(as if in neutral) across a barely registering accretion of force-relations".[9] Indeed, affect is about immersion in the world's "obstinacies and rhythms"[10] and this may or may not be an emotional process. Brian Massumi, translator of Deleuze and Guattari's *A Thousand Plateau's*, and thus responsible for introducing the word affect into the English language understanding of their work, explained meanwhile that neither affect nor affection "denotes a personal feeling".[11]

While there are a number of ways to understand emotion,[12] I concentrate on emotion as feelings. In this I draw on the recent *Elgar Handbook of Law and Emotion*, in which the editors write that emotions are things you feel "including anger, remorse, loyalty, empathy, compassion, moral outrage, disgust, and respect".[13] Finally, in writing this reflection I have sought to resist the urge to engage with the chapters in a more "traditional" analytical fashion: by summarising and analysing their central arguments, their form and structure, and distilling their contribution to the literature on value. This is familiar – comfortable – terrain for me (and maybe for most scholars). Instead, I wanted

6 Ibid. at 26; see also E. Kidd White, 'Images of Reach, Range, and Recognition: Thinking about Emotions in the Study of International Law', in Bandes et al. (eds.), *Research Handbook on Law and Emotion* (2021), 492; M. Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (2008).

7 Of course, the decision to take a "straight-laced" "objective" academic-style presentation may be, in itself, an emotive form of communication. With thanks to Geoff Gordon for this point.

8 M. Gregg and G.J. Seigworth (eds.), *The Affect Theory Reader* (2010), at 1.

9 Ibid.

10 Ibid.

11 B. Massumi, 'Foreword', in G. Deleuze and F. Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia* (1987), translation by B. Massumi, at XVI.

12 See Grossi, *supra* note 5, at 25; see also *Stanford Dictionary of Philosophy*, 'Emotion', online at https://plato.stanford.edu/entries/emotion/ (last accessed 29 November 2021).

13 See Bandes et al., 'Introduction', in Bandes et al., *supra* note 6, at 2; Note this is not the only understanding of emotion in the volume, and the editors stress that a monolithic definition is unhelpful, and note the importance of stating one's working definition within the context in which one is writing, at 4.

to allow emotional reactions to remain central, rather than pushing them away in favour of a more "rational", "scholarly" or "academic" response. And I want to push against the idea that a chapter's contribution to the literature on value is only in the analytical register. I wanted to allow myself to feel these chapters, and respond to the emotions present in them. In doing so, I also hope to participate in a small way with scholarship that challenges the idea that scholarly analysis is about objectivity, dichotomised from emotion.[14] Rather, in reflecting on these chapters it seems to me clear that values are emotional, and that emotions are valuable. Moreover, it seems that emotions are important (dare I say valuable?) to understanding, or perhaps more broadly *coming to terms with*, value and its all-pervasive operation, as well as to how it is contested, and critiqued.

Reading these chapters with attention to emotion reveals at least four registers of emotion. First, there is my own emotional response to the chapters as reader (and now as writer). Second, there are the emotions of the authors whose chapters I am reflecting on, as revealed (either explicitly, or implicitly) in their writing. Third, there are the emotions that the authors ascribe (again either explicitly, or implicitly) to the subjects of their chapters, both theorists or writers with whose work they engage, and other subjects who appear in their chapters from presidents to "ordinary" people. Finally, there are the emotions that authors seek to elicit from the audience to whom they write (which may map inexactly onto the first category). Value thus appears in various registers, which cannot necessarily be separated from each other.

A. To Feel the Value (and Valuelessness) of Land

Earlier this year, I stumbled upon a mention of Edward Gibbon Wakefield, the "father" of the Theory of Systematic Colonization, on which South Australia – where I was born and grew up – was colonised in the 1830s. I had never heard of Wakefield himself, though Adelaide, capital city of South Australia, is peppered with his name: Wakefield St, Wakefield Road, Port Wakefield, Wakefield House; and he is memorialised on the foundation stones of the State Parliament building. This brief mention of Wakefield, his intriguing (and problematic) personal history, and Marx's engagement with his ideas,[15] led me to his "A Letter from Sydney".[16] "A Letter from Sydney" is Wakefield's fictionalised account, written anonymously from the perspective of an Australian

14 See for e.g., Grossi, *supra* note 5, arguing that there are ways of thinking about objectivity and emotion that "render the dichotomy between objectivity and emotion redundant", at 24.

15 W.J. Lines, *Taming the Great South Land: A History of the Conquest of Nature in Australia* (1991), at 64–8.

16 Wakefield, *supra* note 2; See also J Hohmann & C Schwöbel-Patel 'A Monument to E. G. Wakefield: New and Historical Materialist Dialogues for a Posthuman International Law' in M. Arvidsson and E. Jones (eds.), *International Law and Posthuman Theory*, (forthcoming, Routledge 2023).

settler colonial land holder, of the problem of making land valuable in the colonies. Wakefield's "A Letter from Sydney" was an elaborate fiction. Indeed it was actually written from Newgate prison, where Wakefield was serving a term of imprisonment for abduction, and Wakefield never, in fact, set foot in Australia.[17] "A Letter from Sydney" served as rhetorical underpinning for Wakefield's "Theory of Systematic Colonization", set out in his "Sketch of a Proposal for Colonizing Australasia".[18] This "Theory of Systematic Colonization" sought to make Britain's colonial endeavours in Australia not the expensive propositions they were at the time, but to transform them into profitable capitalist ventures by making colonial land *valuable*. This in turn underpinned his efforts with the British Colonial Office and Westminster to see a "company colony" established on his proposed principles, which would settle and exploit the "waste land" that was to become South Australia.[19]

In his "A Letter from Sydney", Wakefield writes of the wonderful estate he buys in the colony of New South Wales. He details the generous minerals that lie beneath the surface and the impressive timber growing upon it. He describes rich grasslands, dotted with trees like an "English Park".[20] And yet, he writes:

> I was told that an estate of 10,000 acres might be obtained for a mere trifle. This was true. I have got 20,000 acres, and they did not cost me more than 2*s*. per acre. But I imagined that a domain of that extent would be very valuable. In this I was wholly mistaken. As my estate cost me next to nothing, so it is worth next to nothing.[21]

It was this passage to which I had a visceral reaction. I felt entirely unmoored by reading it. Why?

The passage seemed to contain every possible wrong in the concept of value in a capitalist vein. On what possible calculation could land so beautiful, so rich in biodiversity, culture and history be worth "next to nothing?" For Wakefield, value meant only the ability to exploit and to profit from the land: to dig up the minerals, to cut down the timber, and to make a profit from it.

17 G. Pretty, 'Wakefield: Edward Gibbon (1796–1862)', in *Australian Dictionary of Biography*, online at https://adb.anu.edu.au/biography/wakefield-edward-gibbon-2763 (accessed 1 February 2022).

18 Wakefield, *supra* note 3.

19 This "company" colony model followed the chartered trading companies established in the 1600s in North America. See e.g., M. Birchall, 'History, Sovereignty, Capital: Company Colonization in South Australia and New Zealand', (2021) 16 *Journal of Global History,* 141–57. See further on Wakefield and the role of his thought S. Chalmers, 'The Utopian Literature of Systematic Colonization', (2022) *Law and Literature* [advance], and Hohmann and Schwöbel Patel, *supra* note 16.

20 Wakefield, *supra* note 2, at 4.

21 Ibid.

Because the cost of labour in New South Wales was high and workers were scarce; because the workers to support the infrastructure to export timber, to raise stock and process the commodities they produce, or to extract minerals was limited; Wakefield could not make a profit on his land. It was, therefore in his view, valueless.[22]

In addition, the appearance of Australian landscapes as "English parks" has recently been at the forefront of a fierce debate in Australia about Aboriginal management of land.[23] Colonisers and explorers often remarked upon this managed-looking landscape, but neglected to notice, or to give credit, that this was in fact the product of generations of careful Indigenous land-management strategies. Land was, instead, consistently presented as empty, as "waste".[24]

Wakefield was concerned with how to turn land into property. This quest to make a profit by turning territory into property is still very much alive in the world. Schwöbel-Patel engages with one contemporary example in her chapter. She asks what would happen if we took then US President Donald Trump's claim to "buy Greenland" seriously, rather than respond to Trump's claim with "a mixture of ridicule, outrage and amusing memes"[25] and see it as "absurdity in an absurd presidency"?[26] Schwöbel-Patel's chapter thus begins with the emotional response of commentators to Trump's proposed deal. Unlike these commentators, however, Schwöbel-Patel does not laugh off this idea. Instead, she urges us to place the comment in a longer history of both capitalist practice, and of theory on it. In an investigation of rentier capitalism and imperialism through the lens of Rosa Luxemburg's work on primitive accumulation, Schwöbel-Patel argues that it is important to take this seemingly eccentric offer seriously. This is because "the investigation of the propertisation of territory opens up a path to thinking about rentier capitalism, not only as a form of the accumulation of capital through rent, but more specifically as a form of contemporary imperialism that maps onto histories of imperialism".[27]

Trump's proposal to buy Greenland, and Wakefield's "theory of systematic colonization" are linked. They are both efforts – from the metropole – to extract value from the periphery: imperial rent.[28] In Luxemburg's terms, this is the "battle of capital against the social and economic ties of the natives, who are also forcibly robbed of their means of production and labour power".[29]

22 Ibid.

23 B. Pascoe, *Dark Emu: Aboriginal Australia and the Birth of Agriculture* (2018).

24 P.A Clarke, 'Adelaide as an Aboriginal Landscape' (1991) 15 Aboriginal History 54 at 58-60; see also Hohmann & Schwöbel-Patel, *supra* note 16.

25 Schwöbel-Patel, 'Real (E)State: Valuing a Nation under Imperial Rentier Capitalism', in this volume at 68–69.

26 Ibid., at 70.

27 Ibid., at 70–71.

28 Ibid.

29 Luxemburg, quoted by Schwöbel-Patel in this volume, note 8, at 350.

As scholars have pointed out, Wakefield's proposal for systematic colonisation was avowedly capitalist, and rested ultimately on the characterisation of South Australia as empty and unused.[30] Moreover, Wakefield's work, as Chalmers has recently argued, was imaginative and emotive and its importance lay in these qualities as much as it did in his "practical" proposals, even while critics used Wakefield's imaginative and emotional writing to discount the worth of his ideas.[31]

The erasure of the Indigenous People – the very people who for millennia managed, cared for and belonged to the land of Wakefield's fictional estate – provided the grounding for the land's value in terms of capital. A thin value attuned only to what can be extracted for profit in money terms.

However, as Schwöbel-Patel writes, colonialism was "not only about value extraction (raw materials), but also about testing new means of *valuing*".[32] Property was important in these methods, turning "waste" land into tradable units.[33] In contemporary Greenland, these forms of valuing include nation branding, adventure tourism (twinned uneasily with Greenland's unfolding destruction through climate change) and new frontiers of resource extraction (also twinned uneasily with the "green" economy). Greenland must capitalise on the desire to witness its beauty (and its beauty in the process of destruction). In contemporary Australia, no longer itself a periphery, new forms of valuing include neo-imperial structures of rent seeking in other peripheries, such as Indonesia, Nauru, and Greenland itself.[34]

Schwöbel-Patel's chapter is not overtly emotional in tone, though it engages with emotions in at least three ways. The first of these is mentioned above: the prompt for the chapter is the emotional response – ridicule and/or amusement – to Trump's comments on buying Greenland. The second is the overall context of Schwöbel-Patel's work, which includes her authoritative writing on branding and marketing in international justice, where "marketised global justice taps into our desire for spectacle" and "we are drawn towards the visceral, the dramatic, the sensational".[35] The backdrop to Schwöbel-Patel's work is emphatically concerned with the manufacture, manipulation, and exploitation of emotion. The third is in drawing our attention, and our emotions, to those who are best placed to understand (and to experience emotionally) the

30 See Lines, *supra* note 17; Birchall, *supra* note 21; Hohmann & Schwöbel-Patel, *supra* note 16.

31 Chalmers, *supra* note 21, at 4.

32 Schwöbel-Patel in this volume, at 74.

33 Schwöbel-Patel in this volume; see also B. Bhandar, *Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership* (2018).

34 See Schwöbel-Patel in this volume, at 82. On Australia as an imperial, extractivist, power with specific attention to Nauru, see C. Storr, *International Status in the Shadow of Empire: Nauru and the Histories of International Law* (2020).

35 C. Schwöbel-Patel, *Marketing Global Justice: The Political Economy of International Criminal Law* (2021), at 250.

simultaneous value and valuelessness of land. These are those people who are displaced and denied in capitalist efforts to extract value from *their* land. In South Australia, new ways of valuing rested on erasing Indigenous peoples through the legal fiction of terra nullius, a fiction with which Australia as a whole is still reckoning.[36] Greenland was similarly characterised in international law.[37] But it is quite clear that such fictions cannot erase the deep ties between land and Indigenous peoples which are coded in Indigenous laws, and which rest on affective ties – the heart and the mind in balance – that exchange value cannot comprehend.[38] Even while global capitalism provides opportunities (or compulsion) to commodify these relationships and subjectivities, as discussed by Schwöbel-Patel in her chapter.[39]

Wakefield's efforts to see South Australia profitably colonised, and Trump's offer to buy Greenland both demonstrate the centrality of the propertisation of territory to value extraction, and in turn, the centrality of this process to colonisation and imperialism.[40] Schwöbel-Patel ends her chapter with muted hope, by turning the reader's attention to social value, which might point to ways of "disrupting capital's grip on land and ultimately imperial rent extraction". In the next section, I turn to consider other potential subversive, or disruptive, expressions of value.

B. Value Beyond Exchange: Hope and Fear in the "Spill Over" of Value and Valuing

Wakefield's explanation of value accords entirely with Marx's own conception of it.[41] As Hoffmann points out in his chapter, Marx stressed that value only makes sense within a capitalist system, where value has a particular role which relates to, and only has meaning in regard to, production and exchange.[42] But, as Hoffmann argues, Marx himself ultimately finds it difficult to think of, or mobilise, or indeed *feel* value only in this sense. Rather, there is an inherent tension in Marx's work on value, because despite his insistence that value can only be understood within capitalism, he also uses value in a second register: he uses, "value-laden language to denounce exploitation, hinting (at least) at an alternative conception of value outside and beyond capitalism"[43] and as

36 See *Mabo (no. 2) v. Queensland* [1992], High Court of Australia.

37 *Legal Status of Eastern Greenland (Denmark v. Norway),* PCIJ 26th session, 5 September 1933.

38 A. Kwaymullina and B. Kwaymullina, 'Learning to Read the Signs: Law in an Indigenous Reality', (2010) 34(2) *Journal of Australian Studies* 195–208.

39 Schwöbel-Patel in this volume, at 80.

40 Ibid., at 74–76.

41 Indeed, Marx identified Wakefield's theory of Systematic Colonization as hitting the nail on the head, as far as value within capitalism was concerned, K. Marx, *Capital* (1887), Vol. I, chapter 33.

42 Hoffmann, 'On the Value of Rights', in this volume, at 210.

43 Ibid.

"arguably […] linked with his […] diffuse yet recurrent reference to justice, to 'real' human nature (aka the 'real species being'), and to human dignity".[44] The multiple meanings of value, the more than single register within which it operates, means that feelings of disassociation and dissonance trouble Marxist conceptions of value. Kempter, who uses the theory of *Wertkritik* to understand value in his chapter, argues that what we call value has spiralled far beyond Marx's original meaning, conquering the "moral sphere of society". Thus "what used to be known as ideals and virtues now go by 'values'. Therefore democracy, liberty, the rule of law, human rights, but also decent private behaviour, family bonds, and many more desirable immaterial goods" are understood as "values".[45]

Teubner discusses the spill-over of value – specifically, of the profit maximising principle – in a capitalist system to areas beyond the economy. He argues that capitalist societies are surplus-driven societies.[46] He identifies this operation in the realms of (respectively) politics, science, education, and law: "It is the surplus of the system's own communication medium – power, truth/reputation, money, normativity, style, education/selection, faith – which is produced via the reflexive application of operations to further operations".[47] Arguably, this is the extension of value to conquer *all* registers of life, even if in some spheres, such as law, surplus value calculation is imprecise or even "almost invisible".[48] Teubner, however, focuses specifically on communication media. Using Systems Theory, he explains that the reflexive process involved – of augmenting its own medium of communication – makes possible the follow-up operations and increases the store of that medium. "Moreover, if this is established as a criterion of self-regulation, then the various surplus pressures become the driving dynamics of the expansion imperatives in modern society".[49] The result of a surplus driven system is that the surplus itself becomes the point.[50] For law, Teubner explains, conflict resolution ceases to be the orientation, rather, it is regenerating judicial authority that reigns.[51] But, he asks, what motivates the desire for this surplus, in realms beyond the economy? Teubner's answer is that "the special contribution of communication media in

44 Ibid.

45 Kempter, 'Against Value(s): Marx, Wertkritik and the Illusions of State, Politics and Law', in this volume, at 51.

46 Teubner, 'The Constitution of Non-Monetary Surplus Values', in this volume, at 33.

47 Ibid. This generalises Luhmann's theses on the profit principle of the economy for other function systems, N. Luhmann, *Die Wirtschaft der Gesellschaft* (1988), 55 ff.

48 Teubner in this volume, at 40.

49 Ibid., at 33.

50 Of course, Teubner notes, the surplus is not always a negative. In fact, surplus may have a positive social function across all these spheres. Ibid., at 39.

51 This links to Kempter's point that Wertkritik insists that it is money that is the goal, not the production of commodities, which is only the means to the end. See further discussion below part C of this chapter.

their area of application consists precisely in creating the motives (!) for accepting a communication".[52] They "exert an almost irresistible motivational force" through persuasion and coercion.[53] As Teubner notes, this force must operate in the emotional register: *desire* must be created. However, this desire is not to be equated with individual greed, rather the social construct of the desiring individual operates at a level apart from individual psychic processes, although both are mutually reinforcing: "Social processes are oriented toward surplus value production, as cool and detached calculations of success, which measure achievement, whether or not they are accompanied by individual greed for power, money, career, or reputation".[54] Coolness and detachment are, however, still emotions, even if the terms tend to suppress this character. The rationality of Systems Theory sits uneasily with emotions. That these desires are both socially constructed and operate beyond an individual's control, but also are deeply emotional on a personal level produces a dissonance that might open up new ways of understanding the surplus value production Teubner grapples with here.

While surplus value in all these realms has its socially beneficial function, the relentlessness and singlemindedness of the pursuit of surplus value is damaging, and leads to the monopolisation of other ways of being, doing, or valuing. With respect to the economy, for example, this leads to the tendency to describe everything as a problem of scarcity, solvable only by economic means. With respect to law, to juridify all disputes and offer the prospect of a "non-divisible justice" as a "false promise of salvation".[55]

Teubner here mentions "human rights ideology as the ideal of a just society" as part of the danger of the drive for surplus value in law.[56] Constitutional rights,[57] however, provide one of Teubner's examples of key opportunities to replace and constrain the impetus toward surplus value. As such, Constitutional rights are characterised as resting on the dispassionate and detached qualities of external self-limitation and control (qualities associated with communication in systems) rather than with individual or personal emotional experiences, which by implication Teubner aligns with human rights, and as problematic or undesirable.

This points back to the ambivalence that Hoffmann identifies and explores in his chapter with respect to the role human rights play. Hoffmann considers the critique of human rights, and the role they play in the current system of value production: he notes that all critiques "share in the charge

52 Teubner in this volume, at 35.

53 Ibid.

54 Ibid., at 36.

55 Ibid., at 44.

56 Ibid.

57 I am conscious that there is a long-standing debate about the virtues of *human* versus *constitutional* rights. See, for e.g., J. Bentham, 'Anarchical Fallacies', in J. Bentham, *The Works of Jeremy Bentham* (1843), Vol. 2.

that rights discourse obscures the political nature of the social and economic arrangements at issue (aka the system of value production)" and, thus, preclude these from being dealt with politically.[58] For some (the "right" critique) human rights place too much value on equality: rights, ultimately, "bestow[] value onto those deemed to be without it".[59] Of course, this connection between rights and *value as a person* has also long been pointed out by activists and thinkers who engage with rights, from Olympe de Gouges to Patricia Williams to Upendra Baxi, who have been keenly attuned to the connection between rights and personhood, and to the subversive potential of that claim.[60] The "left" critique, Hoffmann argues, on the other hand sees rights as obscuring inequalities and exploitation, and as "thereby implicated in the exclusion, exploitation, or outright elimination of certain categories of humans".[61] While rights might be useful as tactics in some situations, they are inherently implicated in maintaining the status quo and can only achieve small and piecemeal gains, never systemic transformation.[62] But, as Hoffmann notes, rights are certainly viewed "as sand, rather than oil, in the capitalist machine and as a definite impediment to an even freer maximization of surplus value".[63] These counter-points show that the value of rights cannot be so easily dismissed. That human rights are persistently a rallying cry for social movements of all types demonstrates their emotive force and appeal. Time and again, rights fail to be captured by elite or professional discourses and rules, and emerge in new guises to propel social agendas about what – and who – should be valued. Just as value itself exceeds its meaning in a capitalist system, so rights also do, and exist in tension with capitalist value production and as an "expression of its inner contradictions".[64] Rights, Hoffmann notes, irritate the system.[65] They cannot be understood merely as supportive of the current scheme of exploitative value production, but offer also subversive counter potential, exceeding efforts to deny them by critics on both the left and the right.

How else might we see – and feel – the contradictions or even the untruths of value? I now turn to consider this question.

58 Hoffmann in this volume, at 203.

59 Ibid., at 204.

60 See, for example, O. De Gouges, *Déclaration des droits de la femme et de la citoyenne* (1791); P. Williams, 'Alchemical Notes: Reconstructing Ideals from Deconstructed Rights', (1987) 22 *Harvard Civil Rights-Civil Liberties Law Review* 401; U. Baxi, *The Future of Human Rights* (2002).

61 Hoffmann in this volume, at 207.

62 Ibid.

63 Ibid.

64 Ibid., at 212.

65 Ibid., at 211.

C. Lies of Value

What role does value play in this capitalist system under which so many of us live? This is the question that is central to Kempter's chapter, which uses *Wertkritik* to analyse value and its role. Reading Kempter's chapter, I am struck by the way in which the two parts of the chapter – the chapter proper, and the sidenote, which concerns the COVID-19 pandemic, – seem to reinscribe the dominant approach to the distinction between reason and emotion. The main part of the chapter is presented in a style that is rational, analytical, objective. The sidenote, on the other hand, engages with disorder, panic, and irrationality: emotion-laden both in terms and style. This very contrast, however, opens up our ability – using emotions as part of our evaluative abilities – to better understand through Kempter's chapter how the COVID pandemic, and responses to it, illuminate understandings – and feelings – of how value operates in the world.

Kempter's chapter opens with the point that contemporary reflections on value and values are prompted by a "deep sense of crisis" about the form of modern socialisation and value's role in it.[66] In the first part of his chapter, Kempter gives us an exposition of the lies of capitalist value in a dispassionate style. *Wertkritik*, he argues, shows us that the purpose of capitalism is to make money (for capitalists). It has little to do with the needs or even desires of the population as a whole, and when abstract labour – the root of value in Marxist theory – becomes unprofitable, new sources of value will be found that appear increasingly divorced from the everyday lives of individuals. The state, and law, are fundamentally entangled in, and act as supports to, the system of capitalist wealth creation (for some). They cannot question its fundamental role in supporting capitalist value extraction. Kempter's argument is that a lie has been sold to the non-capitalist classes ("we"). We still look to the state as a structure separate from economy, in which (particularly in democracies) we have some sovereignty, and in which the good – or the will – of the people is an important factor. But this is not, in fact, how the state works. Yet Kempter remains dispassionate about this fundamental deception he shows through *Wertkritik*. In my reading, Kempter presents this analysis as incisive, but one that does not move him emotionally, even if an implicit invitation to the reader to respond emotionally is present. In this, he is perfectly in keeping with the other authors whose chapters I have engaged with, above. The style is familiar, comfortable, scholarly writing.

However, Kempter turns at the end of his chapter to a "sidenote", the coronavirus crisis, and "the march of folly and authoritarian progressivism".[67] In this section, Kempter allows emotions to sit front and centre. These are not only emotions that Kempter projects through his writing, but also those that

66 Kempter, in this volume, at 49.
67 Ibid, at 62.

he attributes to those experiencing the pandemic.[68] Kempter questions the way that capitalist states shut down "huge parts of the value producing machinery that drives their societies", as well as curtailed the "personal liberties of […] liberal democratic subjects".[69] He argues that *Wertkritik* would predict that in such a situation, states would safeguard the running of economic machinery. However, instead, most states stalled economic production across a range of sectors, to protect the health vulnerabilities of their populations. Kempter states that the fundamental question of "why are capitalist governments so heavily damaging the capitalist economy on which they are dependent?" remains to be answered.[70]

Kempter rejects that there was a compelling public health rationale for the mass shutdowns.[71] Emotions here are prominent in his writing: he speaks of "fearmonging entire societies into a state of hysteria, hypochondria and obsessive compulsive disorder".[72] The "existential fear" of the pandemic is of the type "that is historically known to incite all kinds of irrational beliefs and behaviours".[73] Governments did not, in Kempter's view, respond in a "rational way – rational in the vernacular sense of securing the mechanisms of valorization of value which for better or worse is the very fabric of modern society".[74]

Instead, however, Kempter characterises the lockdowns as states choosing to "join in on a march of folly" that, he argues, will result in a "partial destruction of the economic foundation of their societies, of social life and the personal liberties they claim to be so proud of".[75] For an answer, Kempter looks to the affective register, to the psycho-social (as well as intellectual) constitution of post-modern subjects and post-modern societies.[76] It is as though, he argues, people believe that the economy is something that can be switched on and off when in reality, the well-being of people in a state depends on tax revenue from that economic activity.[77] However, despite his statement that *Wertkritik* would forecast protecting the creation of value, he also shows that *Wertkritik*

68 I would note that the analysis and discussion is centred largely on responses to the pandemic in Western, European states with developed economies.

69 Kempter in this volume, at 62.

70 Ibid., at 67.

71 Ibid., at 62–63.

72 Ibid., at 63.

73 Ibid., at 64.

74 Ibid., at 63. Arguably these economic and personal lockdowns can also be seen to safeguard capitalist production in the longer term, by ensuring the survival of a healthy workforce and the social welfare supports (such as healthcare) that in turn protect the productivity of those workers. This explanation would answer why states were convinced to take these COVID-related measures within a frame that recognises protection of the economy as the fundamental goal.

75 Ibid., at 63.

76 Ibid.

77 Ibid.

predicts irrationality and "a growing tendency to lose touch with reality".[78] Kempter also expresses deep anxiety about the seeming willing surrender of civil liberties during the COVID pandemic, associating this with "fear", "pessimism" and the "craving" for a "safe space of a new tech-supported police and surveillance state".[79] In this sidenote, Kempter's writing foregrounds an anxiety and disorientation. Perhaps that disorientation shares some similarities with my own, experienced when reading Wakefield's *Letter from Sydney*, a disorientation brought on when the terms of value seem disconnected from one's visceral experience of value.

For example, Kempter asks in his concluding section whether we are witnessing the end of the world, or the end of value? He states that

> [a]ll the illusions mentioned above – of the everlasting market economy, producing useful goods for the needs of man, an economy that can be tamed and regulated by the state and be put at the service of man […] – have their origin in the belief in the naturalness and eternity of the modern form of socialization.[80]

We cannot, he argues, escape the "self-built mental cage" that is fetishisation of value.[81]

But what if the response to the COVID pandemic displays not irrational fear whipped up by scaremongering media, but ultimately, that people understand the structure of society and the economy to be based on fetishisation and alienation? What if the response shows not that we have an entirely alienated consciousness, but our acceptance of the economic shifts during COVID demonstrate that the economy in "normal" times bears little relationship with our well-being, whether objectively quantified or subjectively felt? Is this the disorientation and disconnect that prompts Kempter's chapter? Kempter concludes his chapter by stating that according to *Wertkritik*, "modern socialization on the basis of value has come to its end".[82] We must throw off the "fetishistic forms of 'values' – money, capital, labour, law, state, politics, democracy, human rights" and abolish them.[83] If we are already in a stage of capitalism where permanently high unemployment, precarious work, spreading impoverishment, already hollow welfare institutions, and the disastrous destruction of the natural world result from the production of value, where the fundamental protection is of money for profit's sake, then the suggestion that "we" need the economy rings hollow, and measures that

78 Ibid., at 64.
79 Ibid., at 64.
80 Ibid., at 65.
81 Ibid.
82 Ibid., at 66.
83 Ibid.

aim toward the protection of the vulnerable and toward public health seem less tragic, risky and hollow. Perhaps, though we are in a mental cage, we can see, or feel, our way out through the bars.

D. Conclusion

As the, at times hotly disputed, discussions at the workshops that gave rise to this volume show, the meaning of value is passionately contested. This is no doubt a good thing: value is the central motivating force of capitalism – and hence of our economic, political and social lives under capitalism. If we were to meet value and all the political, economic and social work that it does with ennui, this would be a cause for serious concern. In this reflection, I have sought to open myself up to value in an emotional register, and to remain attentive to how value is felt, in all its forms and facets, across the chapters. I can only tease out the threads here; the pull of the author's emotions opened by a word or phrase. The pressure on a string of feeling, as of a musical instrument, intended to resonate with the reader. The probing of the emotional traces left by scholars whose works the chapter authors engage with. I must also be open to the fact that I might misread any of these emotional signals or echoes. There are serious questions about reading emotions across time, geography, or culture.[84] But opening ourselves to the emotions, and engaging with them in this way, I suggest, will give us resources to understand, and to respond to, value in all its complexity and contradiction.

84 See Kidd White, *supra* note 6.

Chapter 17

Value Talk in Legal Academia

John D. Haskell

"Value" is one of those words so open to diverse interpretations that any choice to engage it probably reveals more about the author (and the listener) than anything else. This is especially inconvenient right now, because this essay is meant as a type of engaged reflection with a selection of chapters. In our times a text on value seems inevitably to end in questions. Did we really imagine we would drill down to the ontological heartland of value and find the foundations to erect a morally sound and theoretically unimpeachable enterprise of actionable value for our collective futures? Is such a thing even remotely possible or safe to imagine, to even think that we could identify the best tools for such a job? What sort of ambition (or desperation) would such an undertaking require? Surely this is not the task of legal intellectuals, their merit premised on cool passion and discerning mediation of facts and perspectives. In a way, to speak about the theme of value seems a phenomenon of the 20th century; for a world of rich white men in starched suits smoking pipes and writing tomes on typewriters between each other, content to speak freely about universal truths and make judgments about our past and present. We are all too aware these days that any proposition of how the world works or should work is mired in interpretative pre-dispositions, bureaucratic routines, rhetorical economies and anecdotal prejudices that script our understandings. To any claim otherwise, the easy response that offers no readily convincing answer: sez who?[1]

But this perhaps also overstates the case against bold engagement with value in our present moment. The legacies of deconstruction and post-structuralism, the cultural turn across the humanities, the retreat from collective political action to ethical individualism, the disenchantment with big causational roadmaps and scientific development of social engineering – it has left us a fragile

1 A. Leff, 'Unspeakable Ethics, Unnatural Law', (1979) 6 *Duke Law Journal* 1229, at 1249. Althusser alludes to something similar, explaining the "semblance of a problem for bourgeois ideology: to rediscover the world of history on the basis of principles (the homo economicus and his political and philosophical avatars) which, far from being principles of scientific explanation, were, on the contrary, merely a projection of its own image of the world, its own aspirations, its own ideal programme", L. Althusser, *For Marx* (2005; originally published 1965), at 126–7.

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political commons and a damaged planet ecology, and if not more pain and suffering (though quite possibly that too), then at the very least, a trail of broken promises. There is a certain wariness in the tone of the papers, at least some of them, that reflects this legacy. In Chadwick's work, for instance, the turn in scholarship to highlight the role of the state as the sovereign fiat issuer of money and its function as the base layer to market activity is a positive development from an intellectual and political standpoint, but it still does not avoid the problem that these sovereign state actors are themselves porous and distributed, platforms for multiple public and private interests in struggle and with different levels of influence. "Valuations of currencies", she explains, are not only set by states in parity, but in fact "are also conditioned by a hierarchy of communities" whereby the rich are able to contract out of jurisdictions unlike everyday people. Citing Peer Zumbansen, she suggests that getting to the "political underpinnings" of market design is a dead end, at least to the extent that the political is itself "de-centered, fragmented, de-nationalised".[2] Even as no political consensus seems yet possible, voices across social institutions (including academia) seem increasingly comfortable – even compelled – to insist that there is no longer room for being shackled to a micro/subjective understanding or deferred destinies of plenty or passive acceptance of inevitable decline.[3] The world at large is in rapid transformation that feels simultaneously chaotic and designed, surprising and wholly predictable, fragile and yet insistent in its routines and entrenched in its hierarchies.[4]

It may also be the case that addressing value is always on the table, but that it just migrates through different social locations under a variety of professional and lay vernaculars. While academics in the humanities and social sciences increasingly would prioritise discrete accounts of cultural expression and confine theory to navigating webs of textual signification, their peers in management schools and economic departments remained comfortable producing analytical tools for corporations and politicians to action in society at home and abroad. Between the 1970s and 1990s, this loose arrangement of experts and institutions even came to overtly adopt organising principles expressed in terms of value (e.g., "value added", "value at risk").[5] And perhaps there is

2 See A. Chadwick, 'States, Markets, and Transnational Law: A Re-evaluation of the Legal "Constitution" of Money', in this volume.

3 D.F. Noble, *Beyond the Promised Land: The Movement and the Myth* (2005).

4 The exception in the chapters is Chadwick, who ends on a sombre note. "More active regulation of these prices could be a promising 'hack' to explore … although the capacities of market actors eschew regulated prices in the transnational arena through instruments such as derivatives must be taken into account". See Chadwick, *supra* note 2, at 14. For an insightful historical analysis of how these dynamics arose in the mid-20th century to constrain national-level monetary policy, see A. Major, *Architects of Austerity: International Finance and the Politics of Growth* (2014).

5 For a story of how control and profits across industries were reimagined in the mid-to-late 20th century, see M. Power, *Organised Uncertainty: Designing a World of Risk Management* (2007). For an account of business schools in the struggles over management across the 20th century, see R. Khurana, *From*

an unhealthy dose of amnesia to these recollections of the last decades among our peers in academia, at least as it relates to law professors in the English-speaking world.[6] To be sure, more liberal and left-leaning academics within turn of the century law schools tended to distance themselves from any "big" ideological stances when it came to the political economy of the world, but the collapse of the Cold War and the spectre of 9/11 witnessed law academics investigating the possible spiritual depths to secular commitments and even occasionally waxing confessional. In fact, in the early 2000s, it was not uncommon to simultaneously decry any grand political ideologies, acknowledge the importance of spiritual meaning, and hold that one's sense of community and self was an ongoing process of individual and collective (re)creation – it was nothing but value talk, only it was more likely to be a conversation about saving one's soul rather than saving one's mortgage.[7] Of course, legal scholars spoke about markets and regulation, and even in systemic terms (e.g., Reagan/Thatcher era, post-Washington consensus), but the emphasis was usually on commodities, labour, production and trade, and to the extent finance entered the picture, it was usually quarantined to a specific niche of expertise or only discussed broadly in relation to the post-Bretton Woods institutions and possibly questions of how to ameliorate debt burdens in former colonial countries.[8]

What we find in the authors here feels like an altogether different moment. What most immediately marks the texts in my mind is the question of money as a key element of public governance: who has authority to allocate money, upon what justifications, through which institutional means and design features, and what outcomes do these choices have and on whom? While the "turn to capitalism" (and political economy more generally) within elite US history and political economy departments in the early 21st century mutated to become all the rage within Anglo-American legal scholarship over the last decade, the chapters follow a more narrow subgenre of academic literature that removes money as an afterthought to resource allocation of existing capital

Higher Aims to Hired Hands: The Social Transformation of American Business Schools and the Unfulfilled Promise of Management as a Profession (2007).

6 "[E]ach rotation, each repetition and tonal change within legal scholarship [is] a collapse of the scholarly voice which takes advantage of the previous strand's hidden awareness of the impossibility of its own project", D. Kennedy, 'A Rotation in Legal Scholarship', in C. Joerges and D. Trubek (eds.), *Critical Legal Thought: An American-German Debate* (1989), at 353.

7 J.D. Haskell, *Political Theology and International Law* (2018).

8 While still often relevant to contemporary debates, many studies seem simultaneously part of a different moment in (at least) academia. For examples, see A. Lang, *World Trade Law after Neoliberalism: Reimagining the Global Economic Order* (2011) and B. Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (2003). The extent to which these differences signal shifts in the doxa of the profession, or how to evaluate the weight of different logics and styles within disciplinary cadres, is rarely explored within the legal discipline. For a discussion of this point in relation to law and political economy, see J.D. Haskell and A. Rasulov, 'International Law and the Turn to Political Economy', (2018) 31(2) *Leiden Journal of International Law*, at 243.

(e.g., factories, labour, land, pre-accumulated wealth) and instead amplifies its close relationship to law in the operations of credit-debt circulation, from how price valuations are accounted for to how financial obligations are settled.[9]

The vocabularies of reform are no longer in the language of human rights or cultural tolerance, but entangled in discussions of portfolio management, global forex markets, deposit insurance, collateralisation, capitalisation models and tax calculations. In epistemological terms, one might say the move here is to demonstrate not simply that finance is an important terrain of legal governance, but that legal academics traditionally working in non-private law fields are fully legitimate to engage in market design, investment debates, and financial regulation. It is, as Christine Desan emphasises, not simply a matter of appreciating that money creates commensurability in social coordination; the important take away is that money is not the realisation of some pre-existing value, but rather, money-making is itself value-making with social consequences, and which should thereby be considered a public, democratic exercise. "[T]he system, by its very design, sorts members of the public who hold enough money to invest in financial instruments from those who do not… The conclusion that money enters circulation selectively holds[…]".[10] This observation is identified loosely with a set of general political orientations that would sit more or less comfortably with anti-neoliberal positions. With Jamee Moudud, for instance, the enemy is a conceptual neoclassical economic architecture that insulates investment and fosters entrenched inequality, something akin to "neoliberalism" which is meant to signal a set of ideas and arrangements. Where these chapters bring in new theoretical contributions rests in how they propose to go about tackling the question of how the legal academic might engage with today's pressing questions: of money, and more broadly, of social coordination and the role of law in those operations. The project is imagined as deeply political. Thus, Moudud writes: "[The] central goal [of modern firms] is to attempt to restructure the underlying governance framework in line with their investment priorities".[11] A substantial element in this political project is to enable the "coding of their assets" by "extending their influence over accounting standards".[12] While intellectual traditions such as Legal Realism are important for emphasising the political base layer of private market activity, Moudud highlights that entirely new sources and taxonomies of competency and evaluation are essential to engage with the

9 For a useful discussion about the scholarly attempt to grapple with the heuristic of "capitalism" in histories, see 'Interchange: The History of Capitalism', (2014) 101(2) *Journal of American History*, at 503.

10 Desan, 'The Key to Value: The Debate over Commensurability in Neoclassical and Credit Approaches to Money', in this volume, at 148.

11 See J.K. Moudud, 'Capitalism, the Constitutional Theory of the Firm, and Value Production: Investment and Labor Market Precarity', in this volume.

12 Ibid.

way political struggle is financialised. To fight on this terrain is simultaneously a fight to open up the struggle to academics (that concepts matter) but also to hold that the fight requires "extending [one's] influence over accounting standards".[13] While this emphasis can look outside law, it is a deeply legal project. As Antonio Marzal points out, focusing on the interpretative principle of "quantum of compensation" by tribunals under the ISDS, "questions about the proper value of things are often central to legal adjudication" with the legal process and involve

> arguments about how much that thing (the losses sustained, the object of the sale, the asset expropriated) is worth in the eyes of the law, how its value should be estimated, and result in a decision by the adjudicator … The adjudicator may need to determine what it is that is meant by value, for instance by relying on a particular standard of value ('fair value', 'market value', etc.) [and] by what means that value should be ascertained.[14]

In all these efforts to meaningfully engage complexity of what we talk about when we talk about value, there is the perennial challenge to not reduce this into some singular determinant or root phenomena.[15] This has proven an almost impossible task to date – which I find myself, dear reader, as guilty of as any peers. Imagine we are conscious of the impulse to give coherence to the wildly complex conditions of our individual experiences today in the world, and that we are equally mindful that any such effort is ultimately always, at best, only half accurate, perhaps offering a useful heuristic for one purpose or another, but equally missing crucial explanatory data. Furthermore, we know that there are no fundamental reasons why the world is the way it is, no general principles of the universe that require the political economy of contemporary life to be one way and not another – there may be reasons we can point to that help us make sense of how we got to a certain moment, but they inevitably are a truncated picture that cannot easily be scaled out to a totalising set of causal inferences.

With this said, looking at the state of political economy in law and governance today, it nevertheless seems helpful to say that in the 1970s there seemed a top-down fear among the distributed concentrations of wealth and power that the general population of working people around the world were gaining too much power and needed to be reined in through a loose but coordinated effort in every walk of life – from accounting valuations of corporation prices to the rights of collective organising to the ways states and individuals might

13 Ibid.

14 See T. Marzal, 'Critique of Valuation in the Calculation of Damages in ISDS: Between Law, Finance, and Politics', in this volume.

15 L. Althusser, *For Marx* (2005; originally published 1965), 102–16.

discharge debt and access resources.[16] Highlighting the rise of "inequality and insecurity" over the last decades, Moudud, for instance, looks through changing accounting laws to show the destructive role of "sections of the wealthy who are opposed to pro-labor, socially egalitarian policies", "neoclassical economic model[s]", and "far right movements".[17] This effort took a variety of shapes through gender, race, socio-economic conditions with disparate effects on people and was continually modified in the process to lead to the ecological, economic and socio-political degradation that haunts so much of modern life under capitalism.[18]

All this feels true to me, and yet it is also in so many respects, possibly unhelpful to understanding how we got here or where to go. In the first place, notice the tendency to sweep up all activity and life into the transcendental signifier of "capitalism", which is itself explained as a narrow set of, if not laws, then relatively fixed tendencies: the accounting practice of capitalisation, locating agency with corporate and financial elites, and so forth. While I am no admirer of Jevon's theoretical ambition to reduce all value judgments to a question of "marginal utility" defined through the template of "the market", it is not all that different in kind from claiming that value is actually grounded in "labour power", or that the "real" economy is not financial speculation but what it actually "produces", or that the rise of the far right is itself a product of economic precarity which itself may be traced back to neoclassical economic models of free market ideology, as if an elegant causal thread existed in all things just beneath the surface, if only we are of good will and wary of ideology.[19] There is a religiosity to this impulse. Not I but (if not God, or humanity, then) capitalism that lives through me.[20] If I were to reduce this to a simple guideline: *beware of metaphors standing in as facts*.[21]

Of course, this is not to say that these metaphors are simply transcendental nonsense; they may be useful. But then the questions, for whom and toward

16 For examinations of this thesis see G. Chamayou, *The Ungovernable Society: A Genealogy of Authoritarian Liberalism* (2021); J. Levy, *Ages of American Capitalism: A History of the United States* (2021); Q. Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (2018).

17 See Moudud in this volume.

18 Chamayou, *supra* note 16.

19 This is in line with Althusser's theoretical posture, which sought to resist multiple partisan inclinations to reify certain metaphors as facts that explain historical movement, "to reduce the totality, the infinite diversity, of a historically given society … to a simple internal principle", *supra* note 15, at 102. This is not only political, it is a transcendental act, which takes "the whole concrete life of a people" that acts as "an internal spiritual principle, which can never definitely be anything but the most abstract form of that epoch's consciousness of itself: its religious or philosophical consciousness, that is, its own ideology", *supra* note 15, at 103.

20 J. Sklansky, *The Soul's Economy: Market Society and Selfhood in American Thought, 1820–1920* (2002).

21 L. Fuller, 'Positivism and Fidelity to Law', (1958) 71 *Harvard Law Review* 630.

what ends?[22] The most underwhelming (and Bourdieu-esc) answer is, for law scholars that work on the peripheries of the academic establishment in order to build cross-disciplinary and cross-field alliances that might create new rhetorical economies, institutional advantages and career advancement, and in doing so, displacing other cadres of experts (such as Chicago style law and economics, the last generation of progressive law scholars).[23] If this feels too cynical, another way of saying the same thing is that any performative utterance is ultimately the product of certain rules and laws, which in turn is nothing other than the decentred economy of bureaucratic institutions and practices that undergird our professional activity and relations. The actual tactical logics of these operative dynamics – in many ways, a real driver of the knowledge economies of academia – are only tangentially related to most of our scholarship and rarely discussed openly or in any systematic way. Whereas other disciplines (e.g., sociology) include fields of professionalisation studies that will often reflect on the institutional practices enlisted in the rise and fall of disciplinary cadres, in law, reflection on the discipline tends toward intellectual histories situated within national traditions (e.g., the Americans, the Germanic traditions) or broad epochs of time (e.g., the interwar period, colonialism) or rather vague systems of legal practice (e.g., common law, positivism). There is little work unpacking the bureaucratic networks of actors and practices in their daily (often informal) operations where so much of legal activity is actually expressed.[24]

What makes this lack of organisational detail about the movement of change over time perverse is that the legal discipline is more inclined than perhaps any other academic discipline (with economists as a possible exception) toward strong normative judgment, both in terms of making claims about why a decision is justified and what future decisions should look like. At the most elemental level, legal writing is almost by its character value-laden, comfortable speaking in the parlance of "fundamental", "reasonable", "fair", "recommended", and so forth.[25] In its scholarly presentation, legal writing tends to be

22 This seems to me the spirit in which I read scholars such as Morris and Felix Cohen, Robert Hale and other legal realists of that interwar moment. Another version of this is alive in the work of scholars such as David Kennedy, in his discussions about "the world of struggle".

23 "[There exists] an almost perfect homology between the space of the stances (conceived as a space of forms, styles and modes of expression as much as of contents expressed) and the space of positions held by their authors in the field of production". P. Bourdieu, *Homo Academicus* (1988), xvii. For a discussion of this theme in relation to law, see A. Rasulov, 'What is Critique? Towards a Sociology of Disciplinary Heterodoxy in Contemporary International Law', in J. d'Aspremont et al. (eds.), *International Law as a Profession* (2017), 189.

24 Depending on one's disciplinary pedigree, there are any number of inspirations to draw from for this type of work – perhaps the most significant difficulty for academics that the actual nuts and bolts of influence and power almost necessitate its knowledge remain de facto proprietary.

25 P. Allott, 'Language, Method and the Nature of International Law', (1971) 45 *British Yearbook of International Law*, at 79.

often loosely modelled on the form of the legal brief, addressing a hypothetical judge, or when not written to the judge, designed as a practical-oriented text speaking to policy makers in the legislative and administrative agencies of government, counselling some general directions for consideration while remaining discrete enough to allow room for further privileged conversation with the client for their ultimate decision. The thing is, of course, that these texts are almost exclusively read by other law academics. In the mid-20th century, legal academics at prestigious universities and the law professionals produced through these institutions carried a significant amount of social clout in the reproduction of power within governance within the hubs of capital and abroad. The democratisation of the university and other social institutions at home, coinciding with the decolonisation of global governance, was part of a broader rearrangement of power relations among entrenched wealth and webs of expertise. I do not mean to suggest that there is a causal inference to draw between inclusion/marginalisation or scarcity/privilege, especially as so many other dynamics were equally contributing to this shifting terrain of social and professional life (e.g., computer technologies). It just reminds us that a law degree or being a law professor tends to be further removed from the levers of political influence than it once enjoyed – and which the literature tends to still entertain.[26]

Whatever differences of opinion exist, in other words, there is a remarkable degree (from at least outside the discipline) of shared identity between law academics: in terms of the terrain of bureaucratic struggle, in their normative inclinations, and more generally, in the shared ways they classify and code social phenomena, all of which tends to reproduce the subject formations and world view of the profession.[27] This is not always apparent on its face from within the field where participants get caught up in debate. For instance, we could return to our theme that money is not a quasi-natural expedient tool of individual exchange but is in fact a deeply political project at the heart of how communities are formed and maintained. From the perspective of ideational contestation, there is a wide gulf between positions in academia and policy circles and where one could imagine the stakes are quite high for determining winners and losers. While Desan's account is general enough to speak across jurisdictions, it is somehow tied to a domestic American story in that a range of more internationally situated actors and tensions, such as the global forex markets discussed by Chadwick, are by and large invisible. The result is that new reifications can emerge, such as the notion of the demos or the centrality of the state outside a broader organisational world of struggle. These debates

26 P. Schlag, 'Normativity and Nowhere to Go', (1990) 43 *Stanford Law Review* 43, 167. See also D. Kennedy, *Global Dialogue on the Future of Legal Education* (2010), available online at www.youtube.com/watch?v=eldHmK4wYcc&ab_channel=SJDHarvardTube.

27 Ibid.

have yet to be teased out. And in many respects, whatever disagreement, they remain secondary to a general disposition or ideal, an argument that goes: if only enough people would change their minds, or if only the right people would change their minds, we could then enact new policies that, if implemented with the right degree of care and sophistication with the appropriate institutional composition by the most competent and sincere experts, that this will ensure a more equitable distribution of freedom and wellbeing for the entire population – and especially those most often forgotten.

What is baked into this proposition? It is a quite technical expertise being called upon, both to acknowledge the institutional capacity to contribute to the design of markets and social life and to think that there are principles or commitments that can be identified and introduced into the practical doxa of professional cadres, that history or a particular form of ideological awareness or theoretically informed methodology offers a degree of unmediated truth, of factual-ness, and which demands a commitment. In some way, it seems as if context and interpretation are bracketed, if quietly. Thinking with interpretation, there is a curious deductive tendency at play. How does one, after all, balance between freedom and wellbeing? What form of freedom toward what type of wellbeing, and for whom and at what costs? These questions lie at the heart of the texts. With Clair Quentin, for example, left-wing progressives within academia made a tactical error with serious ideological and political consequences when they shifted away from a theory of value tied to labour power and class analysis, to an almost infinite diversity of perspectives about what might be included in "value creation".[28] They may have thought they were further democratising who might be included in value-making, but they inadvertently helped pave the way for conditions for a global tax regime that could justify extraction of corporate wealth from former colonial territories to Western populations. Unlocking value from labour, left-wing intellectuals allowed interests such as the OECD to advocate for linking tax allocations to activity related to consumption rather than production. However, exactly in Quentin's claim that the "horror of actually existing capitalism" can only "necessarily unfold" from the "exchange of commodities under the capitalist mode of production", we can see the limitation of its normative clarity.[29] Not prices but labour will again stand in as the explanatory decoder of social coordination, and which will inevitably miss out on all the non-labour dynamics so important for that commensurability to take place and maintain itself.

As such, what is being proposed is not so much an alternative way to see the world, but merely an inversion of the very same supposedly antagonistic logic: private governance entails background regulatory choices, efficiency is open to political contestation, and so forth. We have just flipped the coin,

28 C. Quentin, 'Paris is Burning: A Cautionary Tale About the Politics of Value', in this volume.
29 Ibid.

rearranged the deckchairs. In this sense, it might remind us of Marx's critique of Feuerbach, that replacing God with man merely re-legitimised the same value structure under a new guise; there might not actually be an entity existing in the heavens, but the virtue of man, as realised in the bourgeoise gentleman (of Feuerbach and his peers) was, nevertheless, the highest ideal and guidepost of human development. In our instance, something similar is at work: the immediate policies may have mutated, but the institutional arrangements, the disciplinary cohorts, the basic promises of the social order remained by and large unchanged.[30] Beneath calls for even radical reform is a sensibility that seeks what it understands as "reasonable compromise", to return to the era of the New Deal and pick up its promise anew, to expand its reach to further sections of the populous. Of course, much of what allowed for the lifestyles imagined by the New Deal required the very exclusions that are at issue, but this is largely kept off the table, hinting at a certain inbuilt liberal reformist sensibility, where one feels that the problem is simply one of redistribution rather than some more fundamental revision of how we appropriate resources within society. Whatever the case, the lines of debate are set: on the one hand, more "conservative" voices that will decry reengineering in favour of progress through "freeing up" production and resources, and on the other hand, more "progressive" voices arguing that this can only occur if we first address the fact that the current arrangement is keeping too many people from being able to share in these opportunities.[31] The established institutions are largely left in place, the legitimacy of traditional experts reasserted, the game of capital continues unabated.

There are deviations from this orientation, scholars such as those in this volume here, that attempt to develop habits of thought and professional engagement that try to exercise pragmatic progressive responsibility and consider that an important part of that effort is a sincere check-in with oneself, to ensure that one is working with some sense of moral purpose, whether expressed through the craft's lore or some ideological disposition and the resulting tensions that result. Our authors challenge many of these tendencies. Quentin conjures up an odd couple of Marxism and tax law to offer a type of ironic tragedy, of left-wing identities tempted away from their values, often unwittingly – a call for self-scrutiny not for its own sake but returning to a politically inconvenient commitment: to action class struggle. Marzal adopts a general posture of awakening the consciousness of readers as a possible source for progressive reform, but modifies this posture to not only show how international arbitration is weighted in favour of established concentrations of wealth but that the range of ideas about how to understand and react to this phenomenon requires expertise

30 Althusser, *supra* note 15.

31 C. Schmitt, 'Appropriation/Distribution/Production: Toward a Proper Formulation of Basic Questions of any Social and Economic Order', (1993; originally published 1953) 95 *Telos* 52.

in these concentrations. Desan peels open money as a legal arrangement to carve out space in these often technocratic spaces to meaningfully engage in philosophy: to meditate on "complementarity" in social design, on adopting a responsibility to owning up to the entangled interests and claims formalised and fought over, to new types of academic sensibilities permitted into the question of governance – to take back the balance sheet. Chadwick opens up a new terrain for thinking about transnational law, in the layers of foreign exchanges, and how this global story wraps up new actors according to new pressures, where states find their policy options hedged in, academics struggling for relevance and political movements looking for ways to change the tide – resisting the urge to offer some variety of normative proposals. Moudud centralises the terrain of the corporation in its accounting practices and its dance with law.

There is, however, nothing to suggest throughout these chapters exactly how any of this will take place through the spark of legal reform. If ideas are always situated within regimes of verification, and these regimes are themselves not only made up of argument and words but also organisational practices and informal techniques, any serious blueprint of reform would probably have to include such an institutional roadmap for navigating how to get from an idea to implementation.[32] But it is exactly this necessary level of struggle that is usually sidestepped. To say that money design is a question of politics, or that accounting standards should shift away from short-term market calculations,[33] or that investment disputes should give more room for state discretion over setting damages,[34] or that tax regimes should be more equitable in distribution to production in former colonial countries,[35] or that regulators need to focus more on how powerful private market actors work outside domestic channels to shape the global political economy[36] – all of this seems true in the abstract, but, remarkably, not only light on detail about how this might happen, but also, more striking, not necessarily having much to do with legal experts, at least not until after the struggle has already been decided. Of course, law will act to formalise policy decisions and lawyers will be in the wings ready to craft interpretations that meet the objectives of their clients, but what those policy decisions will entail, and how to get there, and the sources of investment that will deploy the legal capital to direct interpretation of these policies, *none of this is inherently legal in nature*. It is, as often noted, a question of politics, but a

32 M. Foucault, *The Birth of Biopolitics: Lectures at the College de France, 1978* (2008), at 35. Variations on this observation are made across a range of disciplines, such as Hayden White's demonstrations that social categories come into being through their representations rather than precede description. For a discussion of some of these intellectual trends, see V. Bonnell and L. Hunt (eds.), *Beyond the Cultural Turn: New Directions in the Study of Society and Culture* (1999).

33 Desan, *supra* note 10; see also Moudud in this volume.

34 See Marzal in this volume.

35 See Quentin in this volume.

36 See Chadwick in this volume.

politics that remains largely assumed or unnamed. Now this may be for understandable reasons, as law professors (and academics generally) are not exactly the most radical bunch in society and stand to lose too much in any fundamental reshuffling of power. The same goes for the lawyers that make up the echelons of talent that serve power and wealth in our societies. It is difficult to imagine otherwise. At the same time, this is cold comfort, because what else is a well-meaning law professor supposed to do? What added value do they offer in the struggle for a better world? One can already anticipate the accusation of nihilism or that one is being far too theoretical. Here is a possible observation: *the more one gets practical, the less likely the law looks a source of radical design*.

All this does not sit terribly well for us when speaking about value through law. But in some ways, perhaps there is some therapeutic offer on hand if we were to more fully onboard this realisation. When we so often look outside law for showing where the game is played – when redirecting our gaze to accounting calculations,[37] to reminding everyone that market design is about politics,[38] and so forth – maybe we are trying to come to terms with the limits of our vocation and where we need to stop talking and allow others room to exercise power. Maybe there is too much law talk and our value as people in societies is elsewhere. This doesn't mean we should stop writing; after all, there is tenure to secure and books to publish and conferences to attend. I think this is a claim or suggestion that often causes hesitation, which is an instance, I think, where the discipline more or less quietly suppresses the political moment, often experienced as the author being nihilistic, or too glib, or cynical, or even perhaps breaking decorum, at risk of separation from the quiet tribes and discrete institutional pressures that haunt our conversations. But more deliberate reflection about the (non)politics of writing and the lack of any existing legal science of social engineering seems a valuable opportunity to hesitate with, at least for a little while. It might at least offer something a bit less predictable.

37 See Moudud in this volume.

38 Desan, *supra* note 10.

Chapter 18

A Vague Reflection on Value, or, the (Im)possibility of Radical Imagination

Sofia Stolk

Reflecting on the five chapters by Dehm, Schlaudt, Korhonen and Rantala, Van Den Meerssche and Gordon, and Muniesa, starts for me from a place of wonder, not necessarily one of comfort. Although I am familiar with the theoretical backdrop of the book, this was the first time I looked at the issues through the lens of value production. When wandering through the chapters like some sort of Alice, details can randomly magnify or core claims suddenly shrink. I cannot say when and how many times I lost the main thread of the arguments due to the interference of my own chaotic train of thought. These moments of confusion brought me time and again back to a very basic question, what does law, or value, have to do with this? And rather than trying to figure out a theoretical statement on value – or law, or both – that binds the chapters together, I decided to try to stay with my own messy thought process for a while. Therefore, these reflections may strike you as a little vague, even a little out of place perhaps, which is, at least partly, on purpose. I will come back to that.

Let me briefly restart with a more traditional attempt to reflect. Drawing out some general thoughts and themes is both easy and hard. Amongst these chapters, I observe a shared fondness of Graeber's relational nature of value, a dislike of capitalism, and a commonly held belief in the intimate alliance between law, value and the practice of world-making. Although the kind of worlds that are (aspired to be) made – or destroyed – differ from chapter to chapter. To learn from the authors, I followed their cues on what I had to *not* learn, or unlearn. To *not* look at value through the investor's gaze[1]; to *not* buy into myths of equal exchange[2]; to *not* analyze AI-driven value production through pre-existing value-systems[3]; to *not* mistake "green" valuation of nature

1 F. Muniesa, 'Financial Value, Anthropological Critique, and the Operations of the Law', in this volume.

2 O. Schlaudt, 'The Market as a "Rigged Game". Theories of Ecologically Unequal Exchange and Their Implications for Value, Price, and Measures of Real Wealth', in this volume.

3 D. Van Den Meerssche and G Gordon, 'The Contemporary Values of Operadiction Regimes', in this volume.

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for anything but capitalist exploitation by other means[4]; to *not* underestimate the destabilizing valuation power of blockchain.[5]

In general terms, the chapters made clear that I need to worry about value production. That things are not what they seem (which made me feel a bit more comfortable already). And that law is complicit in sustaining and disguising unequal power relations through privileging, facilitating, and reproducing certain values and certain forms of value production. All chapters are, in their own way, attacking the status quo, the conventional debates, and the deceptive consensus on value as economic value.[6] They unmask fake contradictions, premises, and transactions, and reveal the role of law in doing the covering up. The chapters show how law is entangled with value production and lay out its techniques to produce, sustain or exploit inequality through or behind valuation practices. I also learned that maybe there is still hope. What I would like to add with this reflection, is a little poetry.

A side note. While reading, I realized that the order in which I was reading these chapters mattered to my own valuation of the content. The first chapter becomes the lens (or, in Graeber's terms, blinder) filtering the content of the next piece on the staple, and the next. Order as much as content affected my intertwined intellectual and emotional journey to understand valuation and my initial attempt to draw connection between the chapters. I read Dehm, Schlaudt, Korhonen and Rantala, and I see the harm done by capitalist valuation and the careful cover-up of the mess, I see the promise of critique, and a possible way out through new disruptive technology. Then I am reading Van Den Meerssche and Gordon, and much of the solid ground evaporates. I see AI regimes of "operadiction" in which valuation is constantly adapting to new circumstances, "as new patterns are 'uncovered' in data", independent of "predefined conditions".[7] And I wonder, when we are moving in this direction, whether values and law and our reflections on the world in those terms, along with any aspirations for the future we might have, still matter. Then I read Muniesa, and I'm back on more familiar terrain where anthropological critique can explain legal fictions, restoring some hope into the potential to escape, or at least better observe, our capitalist cage and its expansive reproduction of financial vocabularies.

I think of three words that reoccur in different constellations throughout the chapters: imagination, future, radicality.

I realize that my reading of, and reflection on, these chapters does not work like operadiction. My thinking is not free of "predefined conditions", I'm not

4 J. Dehm, 'Legally Constituting the Value of Nature: The Green Economy and Stranded Assets', in this volume.

5 O. Korhonen and J. Rantala, 'Value as Potentiality – Blockchain and the Age of Institutional Challenges', in this volume.

6 Schlaudt, *supra* note 2 at 278.

7 Van Den Meerssche and Gordon, *supra* note 3 at 244.

finding patterns based on the input of these chapters alone. I have my lenses, my blinders, as part of my theoretical baggage. On top of that, seemingly unrelated, sometimes trivial "datapoints" influenced my reading of the chapters in a very personal, nostalgic, affectionate way.[8] This is no news, but a reminder. Like Muniesa's work reminds me of attentiveness to gaze.[9] Reflection on others' thought processes is necessarily a reflection on one's own.

So here is a datapoint. I read a poem by Takako Arai, *When the Moon Rises*. I immediately think of the chapters. It is about labor, and automation. About humans, technology, and nature. About their inseparability. The imprints the one has on the other. The collapse of time. And the poem becomes an angle for reflection: how sometimes things make more sense when they are strange, magical.

> It is the night shift in an abandoned spinning factory
> There is only a single light bulb here
> The spools of thread turn by themselves
> Click goes the bobbins
> Changed by the machines
> It has already been a decade
> Since this place shut down
> But when the moon rises, it begins to work
> Its strange automation[10]

I read Arai as the old that is always in the new. How we can be stuck in regimes and any way out of it carries the marks of the past, surfacing unexpectedly. How deep values, routines, may run and how certain forces can re-activate or sustain them. Without wanting to put this poem into a genre, I think of magical realism, how the fantastic is seamlessly combined with the everyday. How this, too, can be a critique on capitalism, but also a critique on critique, on sensible arguments. How it urges us to leave some room for the unreal, the impossible, the accidental. I think of imagining, futures, radicality. These concepts are so real, so grounded, so manipulative in the context of these chapters. And I am intuitively drawn to magical realism to understand them differently.

A. Imagining

In one way or the other, these chapters engage with imagination. This is hardly a surprise, since the authors are moving in the company of Graeber. Capitalism

8 On value and affect, and the role of emotions when reading or writing about it, see also J. Hohmann, 'Value in the Emotional Register', in this volume.

9 Muniesa, *supra* note 1.

10 T. Arai, 'When the Moon Rises', *Soul Dance* (2008). Translation: Jeffrey Angles.

as the enemy of imagination is never far away.[11] Nor is law's role in imagining and stabilizing possible, desirable futures – and in limiting them.

The five chapters imagine and dissect imaginaries, providing us lenses of hope, pessimism, activism, or show us operations that render the very act of imagining almost obsolete. Muniesa, Schlaudt and Dehm call upon us to extend our thinking of value beyond the economical, the financial, the capitalist imaginary, the investor's gaze. Korhonen and Rantala suggest the possibility of doing economic valuation differently but the alternatives still rely, at least partly, on the semantics of economic thinking. Van Den Meerssche and Gordon move beyond individual imaginaries with exposing operation regimes that thrive on unstable immediacy to continuously imagine and directly enact possible futures. In these operations, every act of imagination will necessarily affect the possibility of its materialization; imagination collapses into reality.

Imagination is quite a popular term in current international legal debates, as something that lawyers engage in.[12] But the legal imagination appears rather restrictive instead of creative. Imagined futures or realities that are created or aspired to by lawyers (and their critics) often concern variations on the current state of affairs, either by incorporating the same concepts and materials or by presenting an explicit alternative, which unavoidably draws on a comparison with what is currently there. The old is always in the new. Still, I wonder, can imagination mean more? Beyond known limits, beyond the possible into the realm of the strange.

Another datapoint. I'm at a book launch and I listen to Rebecca Mignot-Mahdavi speaking about technology in the context of targeting and International Humanitarian Law. She talks about the fantasy that we can anticipate the future, a *simplistic* fantasy about technology.[13] It resonates and makes me think of the value chapters. I read bits and pieces of Graeber, on violent simplification.[14] Most of the authors in the discussed chapters engage with some form of simplistic fantasy, violent simplifications, for example when unraveling fake

11 See e.g., D. Graeber, 'Dead Zones of the Imagination: On Violence, Bureaucracy, and Interpretive Labor: The Malinowski Memorial Lecture, 2006', (2012) 2 *HAU: Journal of Ethnographic Theory* 105.

12 Engagement with international law's imaginative powers comes in different flavors, see for example M. Koskenniemi, *To the Uttermost Parts of the Earth: Legal Imagination and International Power 1300–1870* (2021); G. Simpson, *The Sentimental Life of International Law: Literature, Language, and Longing in World Politics* (2021). For a more classical account, see James Boyd White, *The Legal Imagination* (1985). There are also many examples of research in international law that is imaginative without explicitly engaging with the concept at length as such, see e.g., R. Parfitt, *The Process of International Legal Reproduction: Inequality, Historiography, Resistance* (2019); R. Vos, 'Europe and the Sea of Stories: Operation Sophia in Four Absences', PhD thesis, VU Amsterdam, 2021.

13 TMC Asser Institute, 'Book Launch Symposium: The Role and Impact of Technologies on Human Activities', symposium launching the book *Problem-Solving Technologies: A User-Friendly Philosophy* (Rowman & Littlefield Publishers, 2022) by S. Soltanzadeh, 11 May 2022.

14 Graeber, *supra* note 10 at 106.

claims of equality and the "false language of monetization".[15] But let us for a moment pause by the potential difference between imagination and fantasy, without moving into a deep discussion on psychoanalytic thought, desire, and excess.[16] Fantasy, perhaps, does not have to match real possibility; rather it can be something that we know will never be. Nevertheless, it can be grounds for hope, and grounds for violence. Fantasy can even be seen as a central aspect of politics and law.[17] The line between escaping and creating reality seems very thin when we speak of fantasy, as is the case when we think of law and value in terms of world-making. Is legal fantasy less restricted than legal imagination? What role does fantasy play in valuation practices? Just putting this out here as a question.

Dehm speaks of the "the crucial background role law also plays in shaping practices of valuation by stabilising future-orientation expectations".[18] Stabilizing expectations could be a form of imagining but it surely does not sound like fantasy to me. In a way, stabilizing a future means taking out the fantasy, disabling *creative* imagination, the ability to imagine otherwise, to envision non-predicted futures. Moving to future.

B. Future

Law restricts the imagination of possible realities. Entangled with value production, it sets expectations for a fictional future, with world-making effects. In Dehm's words, "the performative effect of future expectations thus creates an inherent circularity: the stabilization of future expectations guides present actions, and present actions cause expected future to come into being".[19] A running question throughout these chapters is how to disrupt this circularity on the one hand, or how it can take radical forms on the other – the latter especially in the realm of Van Den Meerssche and Gordon's operadiction, where imagining a future entails immediate action so that the circularity implodes into one performative moment.

Law can, or pretends to be able to articulate, stabilize and regulate desired futures. This is a process that affects and is affected by valuation practices. It is as effective as it is selective. In Muniesa's words "All these terms – 'investor', 'uncertainty', 'risk', 'present' and 'future' – form the rhetorical arrangement that turns these methodologies into the dominant instrument for justifying and organizing the value of things (…) these terms are constituted (at least in

15 Schlaudt, *supra* note 2 at 291.

16 For an excellent exploration of law and psychoanalysis see Maria Aristodemou, *Law, Psychoanalysis, Society: Taking the Unconscious Seriously* (2014).

17 See for example B. Aretxaga, *States of Terror: Begoña Aretxaga's Essays* (2005).

18 Dehm, *supra* note 4 at 270.

19 Dehm, *supra* note 4 at 271.

part) with juridical artifice".[20] Law is "useful" to valuation because its semantic techniques can give (to some) the comfort of making an uncertain future "at least uncertain in a more calculable and predictable way", guiding present behavior.[21] It is not an exercise of imagination, but one of limitation.

Interestingly, when looking into the future from an ecological perspective, law seems to make a different move. Climate change is irreversibly damaging the planet, there seems little inherent uncertainty about that. But law seems happily to ignore this more-than-possible future scenario, and prefers to foreground *un*certainty, if the predictable future is not of its own making, when it does not serve the interest of the powerholders in the present, when it does not suit hegemonic valuation processes.

I'm losing the thread. I don't mean to start a discussion on contingency.

Van Den Meerssche and Gordon move with Louise Amoore, in an attempt to investigate how algorithms are "establishing new patterns of good and bad, new thresholds of normality and abnormality".[22] I believe this to be a strategy for the study of practices of valuation more generally. The purpose of many of the chapters seems to be to discuss how certain thresholds come about, how they are deployed, by whom, for what reason, with what purpose, or just to show that they are drawn. With abnormality, we come back to the practice of imagining, the unthinkable, the impossible. However, if I understand operadiction correctly, abnormality does not exist within this regime, because anything is just a datapoint. Nothing can exist outside of the immediate. Nothing is abnormal. Nothing is future.

I'm thinking of time travel. How usually time travelers are warned not to interfere and not to be seen (especially not by themselves), for this will affect the course of the past or the future, which then no longer is the past or the future, and will eventually threaten their own existence. When reality can be reconstituted "in real time", by "immediate intervention", does the exercise of exploring impossible futures, fantasies, become meaningless? Van Den Meerssche and Gordon propose to see operadiction as "a shift from reflexive to reflex".[23] This thought triggers me (no pun intended). In their analysis, reflex takes out the moment of reflection, dissolving the distance between "the agent and the object of its action". Although, in operadiction, it seems that this reflex is constantly changing and adapting to new inputs, a reflex in our human body is arguably characterized by always being the same, triggered by outside information it is always the same reaction, always predictable. Law is not a reflex.

20 Muniesa, *supra* note 1 at 173.

21 Dehm, *supra* note 4 at 271.

22 L. Amoore, *Cloud Ethics: Algorithms and the Attributes of Ourselves and Others* (2020), 6, cited in Van Den Meerssche and Gordon, *supra* note 3 at 239.

23 Van Den Meerssche and Gordon, *supra* note 3 at 249.

(Is it?) Value is not a reflex. (Can it be?) Imagination is not a reflex. Let me return to Arai:

> Peculiar habits remain here
> An old lady who spun thread
> For forty-four years here
> Still licks her index finger and twists
> Even on her deathbed
> She cannot escape that gesture[24]

Reflex occurs here as that what we do despite ourselves. The old is in the new. We manipulate the machine; the machine manipulates us. The deeply entrenched habits that remain with us even after life. Radical automation. If we are thinking of valuation as reflex, what does this mean for responsibility, ethics, critique, and the possibility for change that is so cherished in the other chapters? Imagining futures entails the hope that, no matter how dire the situation and how strong the hegemony, there is room for change, for making the seemingly impossible possible. Is this fine line between impossible and possible the space for critique?

Most chapters hold the hope that critique may bring about change. That it can still "be possible to build a world where the values of ecological justice guide our actions";[25] to place "the economy back into its ecological context";[26] to release "legal inventiveness from its entanglement with this particular condition of financial realism";[27] and to challenge "traditional, global institutional structures in the domains of economics, politics, and law" through new technologies.[28] But perhaps real change, creative imagination, is not only about changing (un)certain futures but also about a careful eye for the everyday, about finding the "cracks of reality"[29] through which we can see possibility in the present. Or do we need to approach this more radically?

C. Radicality

Another datapoint. I am reading the chapters and I am listening to an old school hip-hop playlist curated by a dear colleague and friend. I hear Public Enemy, *Fight the Power,* and I think of value and destabilization, of power and

24 Arai, *supra* note 9.

25 Dehm, *supra* note 4 at 275.

26 Schlaudt, *supra* note 2 at 293.

27 Muniesa, *supra* note 1 at 180.

28 Korhonen and Rantala, *supra* note 5 at 217. Although this claim is accompanied by the small phrase "at least in theory", it strikes me as not insignificant.

29 Yael Navaro-Yashin, 'Introduction: Fantasy and the Real in the Work of Begoña Aretxaga', (2007) 7 *Anthropological Theory* 5.

resistance.[30] Of revolution and awareness. The importance of knowing the game. It is easier to fight what we know. It is harder to fight what we don't know. The chapters are, in a way, a call for awareness so that we can resist. But as Schlaudt shows, knowing the game is not enough if the game is rigged.

The chapters speak of radicality. Radical change,[31] radical uncertainty,[32] (not so) radical critique[33] and how "it is not easy to come up with radically new imaginaries since they must transcend the archival logic of the institutions of power, including liberal law concepts and categories".[34] It is not easy to shake off the old. What can "radical" mean in the context of constituting value, in chapters that show how deep certain systems run? Paradoxically, as soon as we can imagine it, it seems less radical.

Korhonen and Rantala cite the International Panel of Social Progress' manifesto. The manifesto speaks of change, of a more equal world, but draws on a familiar semantic register of "resources", "distribution", "status", "power", "progress". The old in the new. I think of Muniesa's exposure of rhetorical arrangements constituting legal fictions of financial value.[35] And I think of how Dehm describes the ideological work that economical metaphors are doing in our thinking about environmental governance.[36] And I think of another manifesto:

> I write a manifesto and I want nothing, yet I say certain things, and in principle I am against manifestoes, as I am also against principles (half-pints to measure the moral value of every phrase too too convenient; approximation was invented by the impressionists). I write this manifesto to show that people can perform contrary actions together while taking one fresh gulp of air; I am against action; for continuous contradiction, for affirmation too, I am neither for nor against and I do not explain because I hate common sense.[37]

Tristan Tzara's *Dada* manifesto is a reminder that all manifestos fight old dogma by establishing new dogma. It is also a reminder that nothing is without contradiction. That new and old co-exist. That value is always in flux.

Radical imagination can be creation. But it can also mean to think not only of possible futures, but of impossible ones too. To think beyond the

30 Public Enemy, 'Fight the Power', *It Takes a Nation of Millions to Hold Us Back* (1988).
31 Korhonen and Rantala, *supra* note 5.
32 Van Der Meerssche and Gordon, *supra* note 3 at 244.
33 Schlaudt, *supra* note 2 at 276.
34 Korhonen and Ratala, *supra* note 5 at 234.
35 Musiesa, *supra* note 1 at 173.
36 Dehm, *supra* note 4 at 262.
37 Tristan Tzara, 'Manifeste Dada', (1918) 3 *Dada*, translation by the University of Pennsylvania online at https://writing.upenn.edu/library/Tzara_Dada-Manifesto_1918.pdf.

immediate, the material, into the realm of fantasy, and dreams perhaps. This makes me wonder how we valuate the unthinkable. Or, in the reverse, how we find imaginative valuation in the ordinary. Can we also locate processes of valuation not in terms of "regimes" but in the everyday? What if the radical is in the small? The change of a barely noticeable peculiar habit can become an act of fundamental resistance.

In his conclusion, Schlaudt writes: "'For life, there is no single metric,' the sociologists Foster and Holleman conclude *quite pessimistically*".[38] I must admit, I find the thought soothing rather than pessimistic. I would like to see these chapters as pamphlets against reductionism. Reducing nature to its use for human beings, reducing human well-being to a monetary metric, reducing algorithms to their pliability into existing ethical paradigms. Reducing value to law, or law to value. The latter is something I wonder about when reading these chapters. I accept how the chapters, most clearly that of Dehm, demonstrate that law (co)constitutes value. Law (re)produces value and value (re)produces law. But when (if? how?) does the one dissolve into the other? In regimes of operadiction, it hardly seems to matter anymore. And perhaps it doesn't. For me, a pamphlet against reductionist practices of valuation includes making room for vagueness, the accidental. To embrace contradiction as part of inherent uncertainty. To rig the game back by providing confusing and unexpected datapoints that push the impossible into the realm of reality.

38 Schlaudt, *supra* note 2 at 292 (emphasis added).

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