Chapter 5

Paris is Burning

A Cautionary Tale about the Politics of Value

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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.