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**SOME BASIC MARXIST CONCEPTS**  
**TO HELP UNDERSTAND INCOME TAX**

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Abstract

*The paper introduces readers to some basic Marxist concepts to give us the building blocks for an alternative understanding of tax and perhaps even to inspire some to use these concepts and ideas in their future research. It argues that the tax system reflects the phenomena of wealth and income and that there is a deeper reality obscured and ignored by the income tax system as an outcrop of a capitalist system which does the same. This deeper reality is that capital exploits workers and that profit, rent, interest and the like are the money form of the unpaid labour of workers, what Marx called surplus value. Tax is a deduction from that surplus value.*

I INTRODUCTION

My aim in this paper is to introduce readers with an interest in tax to some basic Marxist concepts. I argue that the missing element in any discussion of income tax, specifically in Australia but true more generally of other countries and other tax systems, is the idea and the reality that it is workers who produce the capitalist wealth of society (i.e. value). The aim of the paper is, by using economic ideas drawn from Marx, ‘... to reveal the relationship between the way

things are and the way they appear to be.’<sup>1</sup> By operating at the level of appearance the income tax system hides the way things are. It helps disguise the exploitative nature of capitalism. By this I mean that taxation is an extraction from surplus value, the wealth workers create in the process of production over and above the wage they are paid and which capital expropriates.<sup>2</sup>

The income tax system reflects the idea and the surface reality that businesses earn their income in the form of profits or rents or dividends or interest rather than extracting that surplus value from the value that workers create in the process of production which is then realised or monetised in exchange. Income tax also applies to the wages workers receive. Wages are the surface expression, the price, of the value of workers’ labour power or ability to work, not a payment for the work they do or reward for the value they create.

To help readers understand the discussion I will first introduce in Part II some basic Marxist concepts. Part III deals with the Marxist distinction between outward appearance and essence,<sup>3</sup> between appearance and reality.<sup>4</sup>

Part IV adopts these concepts in a basic way as an example of how Marxist concepts can help us understand the deeper reality of tax. It looks at the way we tax income and profits in general terms and then what ordinary income is and other matters that are at the heart of the tax system and what tax teachers teach. I argue that in both cases the appearance of things, not their essence, is what is taxed and what tax teachers— an important audience for this paper— teach. The income tax system and our teaching of it accept and reinforce the appearance of

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<sup>1</sup> Ben Fine and Alfredo Saad-Filho, *Marx’s ‘Capital’*, (2004, London, Pluto Press) 4.

<sup>2</sup> Chris Harman, *Zombie Capitalism: Global Crisis and the Relevance of Marx* (London, Bookmarks 2009) 114.

<sup>3</sup> Karl Marx, *Capital Volume III* (Progress Publisher, Moscow, 1974) 817.

<sup>4</sup> David Goldway, ‘Appearance and Reality in Marx’s Capital’ (Fall, 1967) 31 (4) *Science & Society* 428.

income earned by taxpayers and hide the reality of wealth produced by workers and expropriated by the owners of capital.

I conclude that the income tax system in its operation reflects and reinforces the appearances of income earned that arise in the market in capitalism but in doing that disguises the essence of the exploitation of workers in production that is the very essence of the capitalist system.

Let's then look at some basic Marxist ideas and concepts that help us understand the rest of the discussion.

## II MARX – SOME BASIC IDEAS AND CONCEPTS

Some of the ideas of Marx that underpin this overall analysis and which I discuss briefly here include the concept of the ruling class as a band of hostile brothers, the relative autonomy of the State, surplus value and how it is created, the labour theory of value, the tendency towards average profit rates, prices of production and the conversion of surplus value into profits.<sup>5</sup>

### A A Band of Hostile Brothers

Capitalists can be understood as a band of hostile brothers<sup>6</sup> united in exploiting workers and aiming to increase the surplus value extracted from workers. In that sense they are a band. However they also battle each other for a bigger share of

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<sup>5</sup> A good introduction to the basic economic ideas can be found in N.I. Bukharin and E. Preobrazhensky, 'The Capitalistic Social Order' in N.I. Bukharin and E. Preobrazhensky, *The ABC of Communism* (Penguin Books, 1969) <<http://www.marxists.org/archive/bukharin/works/1920/abc/01.htm>>.

<sup>6</sup> I'd use siblings but the phrase is now so entrenched in Marxist and leftwing writing that it is seemingly untouchable. Interestingly, although Marx talked about hostile brothers, he never called them a band. Later writers ascribed the phrase to him and it has become common usage. I use the phrase to describe capitalists who own the commanding heights of the economy and their state.

the surplus value workers create.<sup>7</sup> In that sense they are hostile. The band includes productive capital (that section which produces commodities for the market and in doing so extracts surplus value from its workers), commercial or retail capital, finance capital, landlords and the state. Capital or sections of it are sometimes united against the state because they see the state as a parasite on ‘their’ profit, interest, rent and so on.

## B The State and Revenue

In a famous passage Marx said: ‘Capital is dead labour, that, vampire-like, only lives by sucking living labour, and lives the more, the more labour it sucks.’<sup>8</sup> The state is a parasite on the vampires, recognising that the relationship between parasite and host is symbiotic. As Rupert Read puts it the relationship is one of ‘...’symbiotic parasitism’, an “ecological system” involving mutual benefit...<sup>9</sup>

Marx at one stage, in discussing pre-capitalist relationships in Volume III of *Capital*, calls usurer’s capital, which he describes as the antiquated form of interest-bearing capital, as a parasite on the capitalist mode of production. This is because, as he says:

Usury centralizes money wealth where the means of production are dispersed. It does not alter the mode of production, but attaches itself firmly to it like a parasite and makes it wretched. It sucks out its blood, enervates it and compels reproduction to proceed under ever more

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<sup>7</sup> Joseph Choonara, *Unravelling Capitalism: A Guide to Marxist Political Economy* (Bookmarks London 2009) 21. This battle for a bigger share of surplus value is true for capitalists. The state on the other hand may in fact reduce its share of surplus value by reducing taxes and/or spending to increase the amount of surplus value going to the other hostile brothers to increase their profits and to preserve the accumulation process.

<sup>8</sup> Karl Marx, *Capital Volume I* (Progress Publishers, Moscow, 1977) 224.

<sup>9</sup> Rupert Read, ‘Marx and Wittgenstein on Vampires and Parasites: a Critique of Capital and Metaphysics’ in Gavin Kitching and Nigel Pleasants (eds) *Marx and Wittgenstein: Knowledge, Morality and Politics* (Routledge, London, 2004) 254, 267.

pitiable conditions. Hence the popular hatred against usurers, which was most pronounced in the ancient world where ownership of means of production by the producer himself was at the same time the basis for political status, the independence of the citizen.<sup>10</sup>

Marx's description of usury as parasitic on the mode of production because it 'impoverishes the mode of production'<sup>11</sup> also describes the state in its revenue raising capacity since tax is a deduction from profit<sup>12</sup> and hence reduces the amount of money directly available to capital for future wages, reinvestment and the like.<sup>13</sup> However the state also enriches capital and reinforces its rule. Thus the capitalist state has the monopoly on armed force and dominates its ruling institutions such as parliament and the judiciary. It uses that monopoly to protect capital in various ways, from controlling and if necessary repressing any protests and uprisings by workers and others all the way through to manufacturing consent<sup>14</sup> through its ideological and institutional tools. The state also uses its monopoly tax power (bifurcated in the case of Australia between the Commonwealth and the States and Territories) to levy a variety of taxes. In Australia income tax is in practice a tax monopoly that the Commonwealth exercises.<sup>15</sup>

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<sup>10</sup> Karl Marx, above n 3, 596.

<sup>11</sup> Ibid.

<sup>12</sup> For example Marx says that '...the fall of the rate of profit can further be delayed by the omission of existing deductions from profit, e.g. by a lowering of taxes, reduction of ground rent etc...for these are themselves portions of the profit under another name, and are appropriated by persons other than the capitalists themselves.' Karl Marx, *The Grundrisse* (Penguin Books, London, 1977) 751. However note that Marx is talking about profit, not surplus value, i.e. the specific appearance not the essence.

<sup>13</sup> This role certainly helps to explain the hostility of some sections of capital and their thinkers to the State.

<sup>14</sup> Edward S. Herman and Noam Chomsky, *Manufacturing Consent: The Political Economy of the Mass Media* (New York: Pantheon Books, 1988).

<sup>15</sup> See for example *South Australia v Commonwealth* (1942) 65 CLR 373, also known as 'the First Uniform Tax case'.

Whether enrichment of capital occurs as a result of the expenditure of tax revenue depends on the nature of the state spending and the level of class struggle. Some at least of that state deduction from surplus value becomes expenditure productive of current and future surplus value, either directly through for example subsidies to particular capital or infrastructure expenditure on its behalf, or indirectly, and at times performing a dual function with expenditure on and for capital, as part of the social wage. State expenditure on public health, public education and public transport performs this dual function of social wage and state expenditure assisting the production of surplus value.<sup>16</sup>

Using its monopoly of force and institutions and, depending upon which country we are talking about, relying on the consent of its population through the democratic process, the capitalist state imposes taxes, which while they appear on the surface to fall on the earnings of taxpayers are in fact part of the divvying up among the band of hostile brothers of the surplus value created by workers. The state is thus another of the groups fighting for a share of surplus value. It sits at the table with productive capital, commodity capital, finance capital and landlords. The state, far from being independent or fully autonomous, is in fact dependent on the accumulation process outlined above and the creation of surplus value arising from the exploitation of labour by capital.<sup>17</sup> This fact limits

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<sup>16</sup> Some left wing writers, such as Paul Baran and Paul Sweezy in *Monopoly Capital: An Essay on the American Economic and Social Order* (Monthly Review Press, 1966, New York) go so far as to argue that the State adds to 'the surplus' through its activities. However, as Paul Mattick points out, that is because Baran and Sweezy misunderstand surplus value and, whatever the nature of their analysis is, it isn't Marxist. Paul Mattick, 'Monopoly Capital' in *Anti-Bolshevik Communism* (Merlin Press, 1978) <<http://www.marxists.org/archive/mattick-paul/1966/monopoly-capital.htm>>. Having said that, the merger of state and capital in the Stalinist regimes saw and sees the state as the collective embodiment of capital.

<sup>17</sup> Paul Cockshott and Dave Zachariah, 'Credit Crunch: Origins and Orientation' (2010) 74(3) *Science & Society* 343, 358.

its scope for action, or as Harman puts it, ‘...the different sections of capital cannot escape their mutual interdependence more than temporarily.’<sup>18</sup>

One thing appears clear, that in terms of symbiotic parasitism the state, like interest bearing capital, is dependent on the production of surplus value. This means the state is structurally dependent<sup>19</sup> on the production of surplus value and hence on productive capital and capital more generally. These are structural limitations, not idealistic ones. The limitations are not straitjackets however and the state can manoeuvre within the overall limitation, and in some cases, such as radical populism, left wing social democracy and Nazism, can seriously attack sections of the capitalist class but cannot overthrow the capital accumulation process itself.<sup>20</sup> The state can have a fair degree of autonomy.<sup>21</sup> But it cannot challenge capitalism itself since it is part of it and dependent on the creation of surplus value for its revenue and hence existence. If it devours the heart of the beast in which it lives, it too will die.

Let’s look at the concept of surplus value in a little more detail. What is surplus value? How do workers create it?

### C Surplus Value

Surplus value comes from workers’ labour, or to be more specific the labour of productive workers, those workers who produce commodities for the market.<sup>22</sup> Surplus value is the difference between what workers are paid and the value they

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<sup>18</sup> Chris Harman, above n 2, 114.

<sup>19</sup> Adam Przeworski and Michael Wallerstein, ‘Structural Dependence of the State on Capital’ (Mar., 1988) 82(1) *The American Political Science Review* 11; Chris Harman, above n 2, 112-114.

<sup>20</sup> Chris Harman, above n 2, 111.

<sup>21</sup> Ibid.

<sup>22</sup> Karl Marx, above n 8, 149, 201; Alex Callinicos, *The Revolutionary Ideas of Karl Marx* (Bookmarks, London, 1996) 219; Chris Harman, above n 2, 31.

create.<sup>23</sup> For example say workers toil for 8 hours per day but in working for 5 hours they are paid enough to cover their living and other essential costs, and to provide for the next generation of workers. The other 3 hours – the unpaid labour or surplus value<sup>24</sup> - goes to the owner of capital. Here is how Marx puts it in *The Grundrisse*:

The worker needs to work only e.g. half a working day in order to live a whole one; and hence to be able to begin the same process again the next day. Only half a day's work is objectified in his labouring capacity—to the extent that it exists in him as someone alive, or as a living instrument of labour. The worker's entire living day (day of life) is the static result, the objectification of half a day's work. By appropriating the entire day's work and then consuming it in the production process with the materials of which his capital consists, but by giving in exchange only the labour objectified in the worker—i.e. half a day's work—the capitalist creates the surplus value of his capital; in this case, half a day of objectified labour.<sup>25</sup>

It is in production that the creation of goods and services for the market occurs. This is the site where surplus value is created.<sup>26</sup> This surplus value finds expression, is realised, in the market as revenues which are then distributed as profit to those capitalists who own the means of production,<sup>27</sup> as interest to

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<sup>23</sup> Chris Harman, above n 2, 32. See also Ernest Mandel, 'Marx's Theory of Surplus Value' *International Socialist Group*, <<http://www.isg-fi.org.uk/spip.php?article138>>.

<sup>24</sup> Karl Marx, above n 8, 500. Marx there says "All surplus value ...is in substance the materialisation of unpaid labour." See also Fred Moseley 'The rate of surplus value in the post-war US economy; a critique of Weisskopf's estimates' (1985) 9 (1) *Cambridge Journal of Economics* 57, 58.

<sup>25</sup> Karl Marx, *The Grundrisse* (Penguin 1977) 333-4.

<sup>26</sup> Chris Harman, above n 2, 122.

<sup>27</sup> These are the raw materials, machinery, the buildings and surroundings or environment in which production occurs such as, factories, mines, offices and the like. The circumstances are more complicated than that because productive capital often sells its goods to retailers who pay



finance capital, as commercial profits to the retailers, as rent to landlords and as taxes to the state.<sup>28</sup> It is in the market that the distribution and redistribution of surplus value into profit (industrial, commercial etc), interest, rent and then finally tax occurs.<sup>29</sup>

For Marx surplus value was a general category, over and above its specific surface forms such as profits, interest, rent and tax. He said: 'All economists share the error of examining surplus-value not as such, in its pure form, but in the particular forms of profit and rent.'<sup>30</sup> The income tax system too shares this error. It taxes particular income such as profit, interest etc and further imagines that it is capital creating this profit, interest and the like, not labour.

This particularisation of surplus value is what tax systems and business taxpayers do too, since the surplus value becomes a specific form of money in hand during the process of the circulation of capital from money to commodities to more money, or M-C- M' as Marx describes it. M represents money, C is commodities in the form of labour power and means of production like raw materials, land, buildings and machinery and M' is the initial money plus extra money, that extra money being profit. The existence of surplus value in particular forms becomes real when exchange occurs but exchange does not necessarily or indeed often correspond to the value of the commodity. Rather it oscillates around it, often because of supply and demand or in some cases because of monopoly or similar situations.

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them out of past surplus value or in anticipation of future commercial profits on the goods purchased, often tided over by borrowing from finance capital.

<sup>28</sup> Chris Harman, above n 2, 114.

<sup>29</sup> Fred Moseley, 'Hostile Brothers: Marx's Theory of the Distribution of Surplus-Value in Volume 3 of Capital' in G.Reuten (ed), *The Culmination of Capital: Essays on Volume 3 of Capital*, (Palgrave 2002) 65, 65.

<sup>30</sup> Karl Marx, *Theories of Surplus Value, Volume 1*, (1963, Moscow: Progress Publishers) 40.

Indeed what the tax system does is, like the rest of capitalism, block out or ignore C in the M-C- M' process, especially the purchase of labour power and the magical characteristics it contains of adding  $\Delta M$ , or what becomes profit, interest, rent and tax in the realm of circulation, to create M'. What looks to capital as M- M' not unsurprisingly looks to the tax functionaries of capital as exactly the same process.

Workers too particularise the form of their payment. Both the capitalist and the worker believe that she is being paid for the labour expended over the full working day, not part of it. In fact the reality is very different. The capitalist exchanges money for the labour power of the worker and the worker exchanges their capacity to work for money to survive.

What is missing from the analysis of many economists and lawyers, of politicians and business people, and almost all workers, is that it is labour which creates value. To understand that, we need to look not just at the concept of surplus value but also at the labour theory of value.

#### D The Labour Theory of Value

For Marx (and indeed for Ricardo and sometimes Adam Smith) it is labour which produces wealth or surplus value. This idea of surplus value flows from the labour theory of value. This is the idea that value is determined by the labour embodied in goods and services sold on the market or as Callinicos puts it '...commodities – products sold in the market place – exchange in proportion to the socially necessary labour time required for their production.'<sup>31</sup>

The idea itself is fairly simple, if controversial. Kuhn and O'Lincoln put it this way: '... human labour is the only element in the production process which

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<sup>31</sup> Alex Callinicos, *The Revolutionary Ideas Of Karl Marx* (Bookmarks, London, 1996) 122.  
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creates new value (as opposed to simply passing on the labour it embodies to the final product).<sup>32</sup> What is it that commodities have in common, what characteristic is it that is in all goods and services which allows them to be exchanged for money, the universal equivalent,<sup>33</sup> and in comparison to each other? For Marx the answer was labour.<sup>34</sup> He says: 'If then we leave out of consideration the use value of commodities, they have only one common property left, that of being products of labour.'<sup>35</sup> Marx argued it is labour which creates value, not machines, raw materials or other capital.<sup>36</sup> Someone has to dig the coal out of the ground. Plant and machinery and so on – constant capital<sup>37</sup> – transfer the labour embodied in them to the new goods,<sup>38</sup> the wear and tear component of depreciation being an estimate of that transfer.<sup>39</sup>

If it is human labour which creates new value that does not mean the longer it takes to produce something the more value it contains that can be realised. Competition between capitals makes sure it is only the socially necessary labour time embodied in commodities which will exchange in the market place.<sup>40</sup> Why socially necessary labour time? In a competitive world the labour time has to be the socially necessary labour time, otherwise the value of a good made by someone not as skilled in the task as others would be higher, but of course wouldn't sell compared to the cheaper and perhaps better made products of competitors.<sup>41</sup> Competition forces each capitalist to operate at this socially

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<sup>32</sup> Rick Kuhn and Tom O'Lincoln, 'Profitability and Crisis' (1989) 25 *Journal of Australian Political Economy* 44, 46.

<sup>33</sup> Karl Marx above n 8, 90.

<sup>34</sup> Ibid 46.

<sup>35</sup> Ibid.

<sup>36</sup> Harman, above n 2, 37.

<sup>37</sup> Ibid 38.

<sup>38</sup> Ibid.

<sup>39</sup> Andrew Kliman, *The failure of capitalist production: underlying causes of the great recession* (Pluto Press, 2011) 139.

<sup>40</sup> Karl Marx, above n 8, 46-47.

<sup>41</sup> Andrew Kliman, above n 39, 127.

necessary labour level and look for ways to reduce that and improve their competitive position vis-à-vis other capitalists.

The law of value is the regulating force of capitalist society. This law of value is not just the idea that ‘the exchange of commodities [is] in proportion to the socially necessary labour time involved in their production,’<sup>42</sup> or more prosaically that labor produces value,<sup>43</sup> or more accurately, that it is ‘the whole panorama of forces exposed in the metamorphosis of value, in which the equation of labor with value is the underlying assumption.’<sup>44</sup> The creation and then transformation of value into profits, rent, interest and taxes are part of the dynamic of this law.

For the law to operate labour, or more correctly labour power as a commodity that is bought and sold, must have its own value. What is that value?

#### E The Value of Labour Power

A key part of Marx’s analysis, flowing from his version of the labour theory of value, is his view that labour power is a commodity with both a use value (to create surplus value or undertake other activities for the boss or the State aiding that end) and an exchange value, reflected in the market by its price or wage. When the employer hires an employee they do not hire their labour but their ‘capacity for labour’.<sup>45</sup> The distinction is important because it enabled Marx to solve the problem of where surplus value— hence profit and the other sub-categories—comes from. Continuing this theme, Marx says that ‘wages are not what they appear to be, namely, the value, or price, of labour, but only a masked

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<sup>42</sup> Alex Callinicos above n 31, 138-139.

<sup>43</sup> Bertell Ollman, *Alienation: Marx’s Conception of Man in Capitalist Society* (Cambridge University Press, Cambridge, 1976) 194.

<sup>44</sup> Ibid.

<sup>45</sup> Karl Marx, above n 8, 164

form for the value, or price, of labour power<sup>46</sup> and calls the system of wage labour a system of slavery<sup>47</sup> because a worker must work ‘for a certain time gratis for the capitalist (and hence also for the latter's co-consumers of surplus value)...’<sup>48</sup> Indeed, for Marx this means that ‘...the whole capitalist system of production turns on the increase of this gratis labour by extending the working day or by developing the productivity, increasing the intensity of labour power, etc...’<sup>49</sup>

Like all commodities labour power – the ability to work - has its own value. Capital buys the labour power of the worker. This is her ability to work, at the appropriate value or thereabouts, with the thereabouts depending on supply and demand and the intensity and level of class struggle. The exchange value of labour power – wages are its price reflection – is the socially necessary labour time required to regenerate the worker for the next day and into the future<sup>50</sup> and includes immediate costs such as food, clothing, heating, transport and housing but also more long term costs like the support of children - the next generation of workers - education, skills, health, and other less immediate requirements for capital. It also includes a historical and moral element. The use value of labour power is the actual labour performed, and in relation to productive labour the surplus value this creates for productive capital. Let me quote a long passage from Marx to make the point:

The value of labour-power is determined, as in the case of every other commodity, by the labour-time necessary for the production, and consequently also the reproduction, of this special article. So far as it has

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<sup>46</sup> Karl Marx, *Critique of the Gotha Programme* (Foreign Languages Press, Peking, 1972) 23.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> Karl Marx, above n 8, 167-170.

value, it represents no more than a definite quantity of the average labour of society incorporated in it. Labour-power exists only as a capacity, or power of the living individual. Its production consequently pre-supposes his existence. Given the individual, the production of labour-power consists in his reproduction of himself or his maintenance. For his maintenance he requires a given quantity of the means of subsistence. Therefore the labour-time requisite for the production of labour-power reduces itself to that necessary for the production of those means of subsistence; in other words, the value of labour-power is the value of the means of subsistence necessary for the maintenance of the labourer. Labour-power, however, becomes a reality only by its exercise; it sets itself in action only by working. But thereby a definite quantity of human muscle, nerve, brain, &c., is wasted, and these require to be restored. This increased expenditure demands a larger income. If the owner of labour-power works to-day, to-morrow he must again be able to repeat the same process in the same conditions as regards health and strength. His means of subsistence must therefore be sufficient to maintain him in his normal state as a labouring individual. His natural wants, such as food, clothing, fuel, and housing, vary according to the climatic and other physical conditions of his country. On the other hand, the number and extent of his so-called necessary wants, as also the modes of satisfying them, are themselves the product of historical development, and depend therefore to a great extent on the degree of civilisation of a country, more particularly on the conditions under which, and consequently on the habits and degree of comfort in which, the class of free labourers has been formed. In contradistinction therefore to the case of other commodities, there enters into the determination of the value of labour-power a historical and moral element. Nevertheless, in a given country, at

a given period, the average quantity of the means of subsistence necessary for the labourer is practically known. [Footnotes omitted.]<sup>51</sup>

The price of labour power, the wage, like the price of all commodities, can and does fluctuate around its value. It does so not only because of supply and demand but also due to class struggle. Unlike other commodities the possessor of labour power can think. Thus workers through industrial action may be able to win wages above the value of their labour power. Similarly capitalists and the state can try to and sometimes do drive wages below their value.

As we shall see, wages come out of past surplus value. It is in the circulation of capital and its varying forms that surplus value is realised and becomes apparent, not in the form of surplus value but in its surface appearance as profit, rent, interest, dividends, wages and taxes.

#### F Capitalism as a process

Surplus value is created in the process of production. The market brings that value to life. During the course of its life capital goes through different forms. Money buys constant capital (raw materials, machines, buildings etc) and variable capital (labour power). These are combined to produce commodities which are sold for more money. That new money is used to buy constant and variable capital to make more commodities for more money for more constant and variable capital for more commodities for even more money. As Marx put it, 'M-C-M'' is therefore in reality the general formula of capital as it appears *prima facie* within the sphere of circulation.<sup>52</sup> What then happens to this M? It is reinvested to make more money, i.e. M''. The whole process starts again with the aim being to make more money to make more money. The dynamic of the

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<sup>51</sup> Ibid, 167-168.

<sup>52</sup> Ibid, 153.

system is ‘accumulation for the sake of accumulation, production for production’s sake.’<sup>53</sup>

So while the site of production is of utmost importance, so too is the circulation process in which the surplus value inhered in commodities becomes money in the market place through competition. Capitalism is a process of circulation. As Kincaid puts it in discussing his own approach:

The central line of argument is organised, as it is in Marx, round the circuit of productive capital. Money capital is converted into wages, machinery and other means of production. In the phase of production, value is created and surplus-value extracted from unpaid hours of labour-time. Capital is reconverted back into the money-form, as the value and surplus-value embodied in the commodities are realised by sale of the commodities in competitive markets.<sup>54</sup>

Marx captures this in discussing the various stages in the circuit of money capital, where as well as M being Money and C being commodities, P is capital in the process of production.<sup>55</sup> He says:

The circular movement of capital takes place in three stages, which, according to the presentation in Volume I, form the following series:

*First stage:* The capitalist appears as a buyer on the commodity- and the labour-market; his money is transformed into commodities, or it goes through the circulation act M — C.

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<sup>53</sup> Ibid, 558.

<sup>54</sup> Jim Kincaid, ‘Production vs. Realisation: A Critique of Fine and Saad-Filho on Value Theory’ (2007) 15 *Historical Materialism* 137, 139.

<sup>55</sup> Christopher J Arthur, *The New Dialectic and Marx’s Capital* (Brill, Leiden, 2004) 22-23.



*Second Stage:* Productive consumption of the purchased commodities by the capitalist. He acts as a capitalist producer of commodities; his capital passes through the process of production. The result is a commodity of more value than that of the elements entering into its production.

*Third Stage:* The capitalist returns to the market as a seller; his commodities are turned into money; or they pass through the circulation act C — M.

Hence the formula for the circuit of money-capital is: M — C ... P ... C' — M', the dots indicating that the process of circulation is interrupted, and C' and M' designating C and M increased by surplus-value.<sup>56</sup> [Footnote omitted.]

However, it is not just a single rolling process; it is multidimensional. The circulation process is even more complicated because ‘capital is best conceived as “*capital circulatant*” in the sense of “value-in-process”.’<sup>57</sup> Marx puts it this way:

Capital is now posited, however, as not merely sustaining itself formally, but as *realizing itself as value*, as value relating to itself as value in every one of the moments of its metamorphosis, in which it appears at one time as money, at another time as commodity, then again as exchange value, then again as use value. The passage from one moment to the other appears as a particular process, but each of these processes is the transition to the other. Capital is thus posited as value-in-process, which is capital in every moment. It is thus posited as *circulating capital*; in every moment capital, and circulating from one form into the next. The point of return is at the

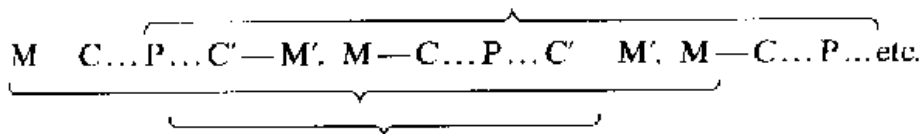
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<sup>56</sup> Karl Marx, *Capital Volume II* (Progress Publishers Moscow 1977) 25.

<sup>57</sup> Samuel Hollander, *The Economics of Karl Marx: Analysis and Application* (Cambridge University Press, 2008) 271.

same time the point of departure and vice versa -- namely the *capitalist*. All capital is originally circulating capital, product of circulation, as well as producing circulation, tracing in this way its own course. From the present standpoint, money circulation now appears as itself merely a moment of the circulation of capital, and its independence is posited as a mere *semblance*. It appears as determined on all sides by the circulation of capital, to which we shall return. In so far as it forms an independent motion alongside that of capital, this independence is posited only by the *continuity* of the circulation of capital, so that this one moment may be held constant and regarded for itself.<sup>58</sup>

Marx also warns that  $M — C \dots P \dots C' — M'$  is illusory.<sup>59</sup> It is real, but illusory. This is because it is viewed statically, imagined as occurring only once. It is also illusory because it ignores the role of labour in the production process, or as Marx argues, it 'assumes therefore that the process of labour and self-expansion, the process of production, is a function of capital.'<sup>60</sup> The reality is that it is the use of money to buy labour power that enables that power to be put to work to produce surplus value, which is then realised in the process of exchange. It is also illusory because it assumes a linear process, whereas Marx goes on to describe it thus:



Beginning with the second repetition of the circuit, the circuit  $P \dots C' — M'. M — C \dots P$  appears before the second circuit of  $M$  is completed, and

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<sup>58</sup> Karl Marx, above n 25, 536-537.

<sup>59</sup> Karl Marx, above n 56, 63.

<sup>60</sup> Ibid.

all subsequent circuits may thus be considered under the form of P ... C' — M — C ... P, so that M — C, being the first phase of the first circuit, is merely the passing preparation for the constantly repeated circuit of the productive capital. And this indeed is so in the case of industrial capital invested for the first time in the form of money-capital.

On the other hand before the second circuit of P is completed, the first circuit, that of commodity-capital, C' — M'.M — C ... P ... C' (abridged C' ... C') has already been made. Thus the first form already contains the other two, and the money-form thus disappears, so far as it is not merely an expression of value but an expression of value in the equivalent form, in money.<sup>61</sup>

P is where labour power is purchased and put to work to produce surplus value. Yet until that surplus value is then given form, is turned into money in the competitive market, it is a hidden reality. The unity of production and realisation<sup>62</sup> means that in the complex interactions that Marx identifies surplus value is created in production and then realised in circulation, on the market. For capitalists it takes form as profit, interest, rent, dividends and the like as part of the distribution of surplus value created in the production process but realised in the competitive market.<sup>63</sup> It takes that form in the hands of the particular

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<sup>61</sup> Karl Marx, Ibid.

<sup>62</sup> Karl Marx, above n 25, 401-402.

<sup>63</sup> Marx says in *The Grundrisse*: 'We have now seen how, in the *realization process*, capital has (1) maintained its value by means of exchange itself (exchange that is, with living labour); (2) increased, created a surplus value. There now appears, as the result of this unity of the process of production and the process of realization, the product of the process, i.e. capital itself, emerging as product from the process whose presupposition it was -- as a product which is a value, or, *value* itself appears as the product of the process, and specifically a *higher value*, because it contains more objectified labour than the value which formed the point of departure. This value as such is *money*. However, this is the case only *in itself*; it is not posited as such; that which is *posited* at the outset, which is on hand, is a commodity with a certain (ideal) price, i.e. which exists only ideally [*ideell*] as a certain sum of money, and which first has to *realize* itself [*sich*

capitalist and their role in the circulation of capital, as productive capital, retail capital, finance capital, landlords and parasite like on the exploiters, the state. Thus when taxes are imposed we can add the state to the band of hostile brothers. But the state is only able to levy income tax once the profit or interest or rent has crystallised in the hands of the particular capitalist. In other words the state appears to capital to be a parasite on the process of parasitism that capital itself exists upon.

Let's look briefly at how surplus value is converted into profit and its other specific forms.

#### G The Prices of Production

In discussing the conversion of surplus value into money, into profit for example, Marx talked about the prices of production – costs plus the average profit rate.<sup>64</sup> Goods and services are sold at their prices of production, understood as a dynamic process. Average profit is not fixed but an ongoing process always striving towards but never reaching the equalisation of profit rates, i.e. a tendency towards an average profit rate.<sup>65</sup> It is competition which drives this tendency to the equalisation of profit rates.<sup>66</sup> The ongoing move and recalibration towards average profit rates works well in a fully competitive society where there are for example no barriers to entry. In that case, where an industry is making above average profits, investment will flow in to establish competitors, driving down the profit rate in that industry. Multiply that across an economy and you have this endless journey towards the equalisation of profit rates around an ever changing average profit rate. As Moseley puts it:

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*realisieren*] as such in the exchange process, hence has to re-enter the process of simple circulation in order to be posited as *money*.' See *Karl Marx, above n 25, 401-02*.

<sup>64</sup> Karl Marx, above n 3,157. The costs are constant and variable capital discussed above.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

Some industries have a higher “value” rate of profit (the rate of profit that would occur if individual prices were equal to their values) than other industries, because the former industries have a higher proportion of labor for a given amount of capital (i.e. a lower composition of capital). If a given amount of capital is redistributed from industries with relatively more labor to industries with relative less labor, then, because there is now less labor in the aggregate, there is also less surplus-value produced in the aggregate, and hence a lower general rate of profit.<sup>67</sup>

In fully competitive economies the distribution of surplus value among the hostile brothers is proportional to the total value invested, despite the fact that only variable capital produces surplus value.<sup>68</sup> But what happens when there are for example barriers to entry or monopoly or oligopoly situations? In effect these monopolists and oligopolists ‘purloin’ some of the surplus value that would have gone to the other hostile brothers. In terms of the value/prices of production analysis it means that some prices of production can be above and some below their value and this differential produces more or less distribution of surplus value based on the capital invested. The question then becomes does the process of the equalisation of profit rates break down this ‘aberration’. Where the barriers themselves, for example land ownership, are integral to capitalism then the tax system might become some imperfect substitute for the impact of competition. That appears to be the case for resource rent taxes.<sup>69</sup>

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<sup>67</sup> Fred Moseley, ‘Hostile Brothers: Marx’s Theory of the Distribution of Surplus-Value in Volume 3 of Capital’ in G.Reuten (ed), *The Culmination of Capital: Essays on Volume 3 of Capital*, (Palgrave 2002) <<http://www.mtholyoke.edu/~fmoseley/working%20papers/VOL3.pdf>>.

<sup>68</sup> Karl Marx, above n 3, 157; Alex Callinicos, *The Revolutionary Ideas of Karl Marx* (Bookmarks, 1996) 142.

<sup>69</sup> John Passant, ‘A basic guide to taxing economic rent in Australia’ (2012) 11(2) *Canberra Law Review* 100, 102; John Passant, ‘Neoliberalism in Australia and the Henry Tax Review’ (2013) 8(1) *Journal of the Australasian Tax Teachers Association* 117, 128; John Passant, ‘The minerals resource’ (2015) *J. Juris.* 283

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Company and other business entity income taxes are not a tax on surplus value. Company tax is a tax on profits, i.e. the company's assessable income less allowable deductions. Leaving aside nuances not necessary for our discussion that is essentially what the prices of production and their realisation on the market produce. Cost plus an average profit rate determine the prices of production and if the commodities then sell on the market they are the assessable income component of what becomes taxed as company or other business income. In other words what is taxed is the reality of surplus value realised in the market place, hidden, disguised but one of the driving forces behind the whole system. Cuts to corporate taxes during times of economic decline, and as part of the ongoing globalisation of capitalism and the tax competition that produces,<sup>70</sup> therefore become a major consideration of the ruling class and its politicians because they allow '... the capitalists to retain a greater proportion of surplus...'<sup>71</sup> Economic crises or long term declines in profit rates might also see politicians make further cuts to public spending<sup>72</sup> or seek new sources of taxation such as workers' consumption spending which they mistakenly view as falling on workers rather than being at least possibly further extractions from surplus value, depending on the level of class struggle.<sup>73</sup>

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rent tax: the Australian Labor Party and the continuity of change' (2014) 27 (1) *Accounting Research Journal* 19, 31-32.

<sup>70</sup> John O'Connor, 'Marxism and the Three Movements of Neo-liberalism' (2010) 36 (5) *Critical Sociology* 691.

<sup>71</sup> Nick Dempsey, 'Marxism and the Economic Crisis' *Socialist Action* 27 April 2011 <<http://www.socialistaction.net/Economics/Marxism-and-the-Economic-Crisis.html>>. See also Stephen A Resnick, *Knowledge and Class: A Marxian Critique of Political Economy* (University of Chicago Press, Chicago, 1987) 323 footnote 35. Resnick says in relation to the shift from public to private sites for the provision of public goods that 'The decreased role of the state in society was to be coupled with tax cuts, especially on corporate profits, (a reduction of the share of surplus value directed to the state).'

<sup>72</sup> Nick Dempsey, above n 71.

<sup>73</sup> Thus the Howard Government introduced a Goods and Services Tax in 2000 and business has been pushing to increase its rate from its current 10% and broaden the base by abolishing exemptions for fresh food, health and education spending. Although the GST was not part of its

The response of workers might be to strike to increase their wages to retain their real wage, e.g. the price of labour at its pre-GST level before the imposition of the tax, and this would mean a reduction in surplus value going to the boss. As Harman puts it:

State revenues are raised by taxing individuals. But individuals will attempt to recoup their loss of purchasing power by struggles at the point of production – the capitalists by attempting to enforce a higher rate of exploitation, the workers by attempting to get wage increases.<sup>74</sup>

Class struggle or its absence is one important consideration in the amount of surplus value going to capital.

One key theoretical point in any discussion of the political economy of taxation has to be the difference between appearance and essence. Let's have a look at what Marxists mean by this.

### III FROM APPEARANCE TO ESSENCE

Marx famously noted that 'all science would be superfluous if the outward appearance and the essence of things directly coincided.'<sup>75</sup> This is as true of social sciences (including law) as of the hard sciences. Thus in the tax field, while

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remit, the Henry Tax Review notes that a key direction of taxation reform should be '...private consumption, through broad, simple taxes.' Ken Henry et al, Ken Henry et al, *Australia's Future Tax System Report to the Treasurer* (AGPS, 2010) Part Two Detailed Analysis Volume One, xvii. The recent Tax Reform Discussion Paper Re:think asked: To what extent are the tax settings (that is, the rate, base and administration) for the GST appropriate? What changes, if any, could be made to these settings to make a better tax system to deliver taxes that are lower, simpler, fairer? Re:think, (Canberra, 2015) 141. Given the emphasis in the paper (see page 132 for example) on the fact that Australia's GST rate is very low by international standards and its base taxes only 47% of consumption, compared to up to 96% in New Zealand, the answer seem pretty obvious, at least to the authors of the report, and to the Abbott Government. Politics does not yet allow them to spell this out clearly let alone argue for it openly.

<sup>74</sup> Chris Harman, above n 2, 113-114.

<sup>75</sup> Karl Marx, above n 3, 817.

capitalism appears to be about commodity exchange and the money that flows from that, it is in the process of production - the exploitation of wage labour and from that the creation of surplus value for reinvestment - that the basis for revenue in the exchange process arises. We need to go beyond the superficial to the essence, and that is as true of income tax as any other expression of capitalist society. Lucaks puts it this way:

If the facts are to be understood, this distinction between their real existence and their inner core must be grasped clearly and precisely. This distinction is the first premise of a truly scientific study which, in Marx's words, "would be superfluous if the outward appearance of things coincided with their essence." Thus we must detach the phenomena from the form in which they are immediately given and discover the intervening links which connect them to their core, their essence...This twofold character, the simultaneous recognition and transcendence of immediate appearances, is precisely the dialectical nexus.<sup>76</sup>

This paper is about the first steps on the journey from appearance to reality to understand income tax in Australia.

Taxing profits, wages, dividends, rent and interest in the hands of those companies who 'earn' it is part of the reification and fetishism that hides the reality of exploitation of labour by capital. The obfuscation is not some deliberate ploy. It arises from the very nature of capitalism's reality – the hidden exploitation of workers. Exchange and the realisation of surplus value in the market disguise the deeper truth that it is in the process of production that workers create surplus value. Our income tax system and tax teaching hide this deeper reality.

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<sup>76</sup> Georg Lukács, *History and Class Consciousness*, (Merlin Press, London 1971) 86-87.



In short, the income tax system is based on what Marx describes as the (apparent) trinity formula of capital-profit, labour-wages and land-rent.<sup>77</sup> The income tax system is an outgrowth of an economic system that fetishises commodities and sees relationships between people as relationships between things. It not only hides the exploitation of workers, it mislocates the creation of profit, interest, rent and dividends – specific examples of the general category of surplus value<sup>78</sup> - in the hands of capital rather than labour. It views workers as being rewarded for their labour rather than the reality of the reward being for their ability to labour and taxes them accordingly.

What the tax system deals with is the phenomena arising in the distribution of surplus value, not its production. As Paul Mattick puts it '[t]axes are a part of realised income through market transactions...'<sup>79</sup> While production and circulation 'intertwine and intermingle continually'<sup>80</sup> such that they 'adulterate their typical distinctive features,'<sup>81</sup> profit, a specific form of the more general category of surplus value, appears to the capitalist and indeed to the rest of society, as the real value and to arise in circulation, rather than production.<sup>82</sup> Further, profit appears to arise from total capital invested (that is from the cost of machinery, factories, land as well as labour) rather than from workers, or what Marx calls variable capital.<sup>83</sup> These surface realities, these appearances, find expression in the tax system.

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<sup>77</sup> Karl Marx, above n 3, 814.

<sup>78</sup> For example Marx says: 'Surplus-value and rate of surplus-value are, relatively, the invisible and unknown essence that wants investigating, while rate of profit and therefore the appearance of surplus-value in the form of profit are revealed on the surface of the phenomenon.' Karl Marx, above n 3, 43.

<sup>79</sup> Paul Mattick, 'Monopoly Capital' in *Anti-Bolshevik Communism* (Merlin Press, 1978) <<http://www.marxists.org/archive/mattick-paul/1966/monopoly-capital.htm>>.

<sup>80</sup> Karl Marx, above n 3, 44.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid, 41.

<sup>83</sup> Ibid, 42.

The income tax system involves itself with the money that arises from the exchange of commodities and the money value of labour, in other words the price received for the sale of goods and services in the market place and of labour power in the job market, not recognising the social relations that these represent. In this way the income tax system reflects capitalism and reinforces the mystique of capitalism. As Marx says: ‘The mystification here arises from the fact that a social relation appears in the form of a thing.’<sup>84</sup> The ‘thing’ here appears on the one hand as the commodities produced and on the other as the money form of capital or labour, in turn profit, interest, rent etc or wages. The social relations are reified in both production and exchange which although viewed as separate are actually a unity or processes that describe capitalism. Marx again:

A commodity is therefore a mysterious thing, simply because in it the social character of men’s labour appears to them as an objective character stamped upon the product of that labour; because the relation of the producers to the sum total of their own labour is presented to them as a social relation existing not between themselves, but between the products of their labour. This is the reason the products of labour become commodities, social things whose qualities are at the same time perceptible and imperceptible by the senses ... It is only a definite social relation between men that assumes, in their eyes, the fantastic form of a relation between things.<sup>85</sup>

Further, it is not just that social relations between humans are viewed as relations between things. As Lukács points out the worker’s ‘own labour becomes something objective and independent of him, something that controls him by

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<sup>84</sup> Karl Marx, *Theories of Surplus Value* (Progress Publishers, Moscow, 1978) 313.

<sup>85</sup> Karl Marx, above n 8, 77.

virtue of an autonomy alien to man.<sup>86</sup> A world of commodities that the working class created confronts the working class as alien to them and alienated from them. The ability to perform work itself becomes a commodity in the reality that is capitalism and hence in the mind of the worker. As Marx says: ‘What is characteristic of the capitalist age is that in the eyes of the labourer himself labour-power assumes the form of a commodity belonging to him.’<sup>87</sup>

It is not just that this process of reification is going on. It is also that in being paid wages, the worker and capitalist both imagine that what is being paid for is the labour of the worker, rather than her labour power. This further form of mystification Marx captures when he says:

We see, further: The value of 3s. by which a part only of the working-day – i.e., 6 hours’ labour-is paid for, appears as the value or price of the whole working-day of 12 hours, which thus includes 6 hours unpaid for. The wage form thus extinguishes every trace of the division of the working-day into necessary labour and surplus-labour, into paid and unpaid labour. All labour appears as paid labour. In the *corvée*, the labour of the worker for himself, and his compulsory labour for his lord, differ in space and time in the clearest possible way. In slave labour, even that part of the working-day in which the slave is only replacing the value of his own means of existence, in which, therefore, in fact, he works for himself alone, appears as labour for his master. All the slave’s labour appears as unpaid labour. In wage labour, on the contrary, even surplus-labour, or unpaid labour, appears as paid. There the property-relation conceals the labour of the slave for himself; here the money-relation conceals the unrequited labour of the wage labourer.

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<sup>86</sup> Georg Lukács, above n 76, 87.

<sup>87</sup> Karl Marx, above n 8, 167, footnote 1.

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.<sup>88</sup>

In other words, the appearance makes the actual invisible. Yet this doesn't make the appearance less real to those who experience it. As god is the creation of humanity, she not only appears to exist, she exists. It is precisely because the idea of god or the illusion of wages being paid for labour performed come from the social relations of society that makes them real. As Marx says in relation to religion: 'But man is no abstract being squatting outside the world. Man is the world of man – state, society. This state and this society produce religion, which is an inverted consciousness of the world, because they are an inverted world.'<sup>89</sup> So too with the capitalist mode of production – our current society - and the relations of production which see workers selling their labour power in the job market to capital. Labour is free in two senses, free from any means of subsistence and free to sell itself for subsistence,<sup>90</sup> disguised as a wage seemingly paid for the actual labour performed.

Money is the universal equivalent. This means it becomes the mechanism for exchange by embodying the value that is then reflected in prices. Money

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<sup>88</sup> Ibid, 505.

<sup>89</sup> Karl Marx, *Introduction to a Contribution to the Critique of Hegel's Philosophy of Right* <[http://www.marxists.org/archive/marx/works/download/Marx\\_Critique\\_of\\_Hegels\\_Philosophy\\_of\\_Right.pdf](http://www.marxists.org/archive/marx/works/download/Marx_Critique_of_Hegels_Philosophy_of_Right.pdf)>.

<sup>90</sup> Karl Marx, above n 8, 166.

performs many roles in capitalism. It is the ultimate reification in one sense, obscuring what is ultimately an abstract, unstable and shifting notion that is the relations of production within enterprises, exchange between enterprises, and the complex of political and state activities that operate to enforce its power as a physical fact. What is behind money is not a thing called money but the whole of the social relations of capitalism, or, the complex of actions of real people that (re)produce the power of money as an external force. Money is an ideological proxy for the real power of real capitalists, politicians and bureaucrats.

It is money – in exchange, paid for wages, in capital, indeed in all its forms – that the tax system, including the income tax system, is concerned with.

The tax system is about real appearances, but buries the essence. Tax mystification is as to the source of surplus value and hence of profit, the exploitative relationship between capital and labour and the categories of taxpayers, categories which attribute income earning to different bodies (for example businesses earning profit).

What the tax system deals with is the end result of the market exchange process and hides the reality of the productive process, the process in which surplus value is created and how it is created. That reality, the reality of value, is obscured by the market and exchange. So the appearance is that workers are paid for all their labour and that capital creates profit. The reality is that it is the unpaid labour of workers which creates profit.<sup>91</sup>

The tax system operates in the realm of appearances. It reflects the appearance which itself is a surface reality but obscures the essence of things.<sup>92</sup> Marx

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<sup>91</sup> Joan Robinson, 'Marx on Unemployment' (Jun-Sep 1941) 51 (202/203) *The Economic Journal* 234, 234.

<sup>92</sup> This article aims to bring to the surface the essence of income tax. For a more general discussion of the commodity-exchange theory of law, (a theory I hope to utilise in a future (2015) *J. Juris.* 291

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describes this dealing with appearances which arises as a consequence of exchange on the market ‘the fetishism of commodities’ or ‘commodity fetishism.’<sup>93</sup> So in the tax field the monetised form of value in exchange disguises the reality of all the human relations. Further, in terms of income tax the creation and distribution of the money form of that value becomes the basis for taxation by the capitalist state, not in the hands of the producers of the surplus value, or unpaid labour, but in the hands of those who expropriate the unpaid labour and to whom it is distributed in the process of circulation. This non-essence reality of companies earning profit, or banks interest, or landlords rent, is reification, that is just means that by ‘attributing an independent life to the various forms of value, people succeed in transferring to them certain powers for regulating their own existence.’<sup>94</sup>

To paraphrase Marx, the sphere of exchange is the realm of equivalence and equivalents. Buyers and sellers exchange as free agents. They are exchanging ‘their’ property and receiving ‘their’ rewards. They look only to themselves and their private interests.<sup>95</sup>

These principles apply in the tax field too. The free market is the basis for income tax, a tax applying to the profit, interest and rent that arises in exchange and to wages paid. The result is that this fetishism expresses itself in the income tax field with an attempt to tax ‘ordinary income’ of companies and individuals. It doesn’t distinguish between individuals on the basis of their class but on the basis of their income, an incomplete guide to class. It does distinguish between individuals and companies but hides the reality of exploitation and the creation

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examination of judicial approaches to tax avoidance in Australia.) See Evgeny Pashukanis, *The General Theory of Law and Marxism* (Transaction Publishers, New Jersey, 2007).

<sup>93</sup> Karl Marx, above n 8, 76-87.

<sup>94</sup> Bertell Ollman, above n 43, 194.

<sup>95</sup> Karl Marx, above n 8, 172.

of surplus value. It reifies the relationship by taxing companies as if they had created the surplus value when profit, that surface reflection of the surplus value, arises in the course of production and is realised in the process of circulation.<sup>96</sup> It arises from the labour used in producing commodities for the market. Thus the real human relationships are doubly hidden – in the labour process in production and in the realisation process in circulation.

Commodities replace humans and corporations make profit, with the human agency and human interactions hidden, except for the wise Board and CEO and other leaders. Company tax applies to the surplus value expropriated by an artificial entity whose existence is the humanisation of the inhuman.

It all seems so clear. We work 8, 9 or ten hours a day and are paid for our labour. Yet this is merely an appearance, an illusion.<sup>97</sup> We are paid for our ability to work, our labour power.<sup>98</sup>

We have already been introduced, briefly, to the labour theory of value and the creation of surplus value in the production process. Marx summarises this well when he says:

In order to be able to extract value from the consumption of a commodity, our friend, Moneybags, must be so lucky as to find, within the sphere of circulation, in the market, a commodity, whose use-value possesses the peculiar property of being a source of value, whose actual consumption, therefore, is itself an embodiment of labour, and, consequently, a creation of value. The possessor of money does find on

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<sup>96</sup> Bertell Ollman, above n 43, 194.

<sup>97</sup> Karl Marx, 'Wages Labour and Capital', in *Wages Labour and Capital plus Wages, Price and Profit* (Bookmarks, London, 1996) 23.

<sup>98</sup> Ibid; Karl Marx, above n 8, 164.

the market such a special commodity in capacity for labour or labour-power.<sup>99</sup>

The capitalist buys labour power around its value, ‘the value of the means of subsistence.’<sup>100</sup> As Marx puts it: ‘The value of labour-power is determined, as in the case of every other commodity, by the labour-time necessary for the production, and consequently the reproduction, of this special article.’<sup>101</sup> It is special because, although capital purchases labour power, it is in the process of production that this labour power is set to work. It is in putting labour power to work that surplus value is created.<sup>102</sup>

What is missing from bourgeois economics and bourgeois law, including tax law, and tax teaching, is the idea that it is labour which creates value and what tax law for example does is reflect the illusory appearance of capitalism and thus reinforce, by doing so, the system’s deeper reality.

The classic income tax formula of taxable income being assessable income less allowable deductions disguises the reality of the creation of surplus value in the productive process, and its realisation on the market and redistribution in the circulation process. It disguises the fact that profit and interest and rent arise from the exploitation of labour and wages from the sale of labour power.<sup>103</sup>

Let’s look very briefly at two basic building blocks of the income tax system in Australia, income and the taxpayers who earn it to see if the ideas of Marx are

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<sup>99</sup> Karl Marx, above n 8, 164.

<sup>100</sup> Ibid, 167.

<sup>101</sup> Ibid. Because needs and wants are also historically determined, ‘there enters into the determination of the value of labour-power a historical and moral element. Karl Marx, above n 3, 168.

<sup>102</sup> Karl Marx, above n 3, 167.

<sup>103</sup> Ibid, 165.



able to help us understand those concepts in more depth and to serve as a template for further research for those inspired by a deepening insight in tax .

#### IV INCOME AND THE TAXPAYERS WHO 'EARN' IT

The Australian Government relies heavily on income tax to fund its activities and to fund grants to the States and Territories and local government to help fund their activities. Thus of the \$317 billion the Commonwealth collected in 2011-12, almost \$231 billion was from taxes on income.<sup>104</sup> Two complementary statutes impose income tax in Australia - *the Income Tax Assessment Act 1936* and *the Income Tax Assessment Act 1997*.

The general income tax sections are found in the *Income Tax Assessment Act 1997* (ITAA 97). Thus section 4-10 of ITAA 97<sup>105</sup> in effect says that income tax is worked out for each financial year for a taxpayer by applying the tax rate to taxable income and then taking away tax offsets (or rebates). Under section 4-15 taxable income equals assessable income less allowable deductions. Assessable income is the key concept in determining what income is included in taxable income and thus subject to income tax after costs in earning income are deducted. There is no statutory definition of assessable income.

Section 6-1(1) tells us that assessable income is ordinary income and statutory income. 'Statutory income is those amounts the legislature has stipulated are assessable.'<sup>106</sup> For example statutory income includes capital gains. Thus Part 3-1 sets out in hundreds of pages the rules for determining capital gains and losses and their inclusion in assessable income.

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<sup>104</sup> Australian Bureau of Statistics *5506.0 - Taxation Revenue, Australia, 2011-12* (Canberra, AGPS, 30 April 2014) <<http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/5506.0Main%20Features22011-12?opendocument&tabname=Summary&prodno=5506.0&issue=2011-12&num=&view=>>.

<sup>105</sup> All future section references are to the *ITAA 97* unless otherwise indicated.

<sup>106</sup> Cynthia Coleman et al, *Principles of Taxation Law 2011* (Thomson Reuters 2011) 62.

Most income is ordinary income and it is that to which I now turn. Under section 995-1 ordinary income has the meaning given by section 6-5. Subsection 6-5(1) says that your assessable income includes income according to ordinary concepts, which is called ordinary income. This is income which ‘essentially refers to amounts which have been held to be assessable by the courts because they demonstrate certain characteristics.’<sup>107</sup>

First, income ‘... must be determined in accordance with the ordinary concepts and usages of mankind...’<sup>108</sup> What ‘mankind’ thinks is income and what judges think mankind thinks is income may well be two<sup>109</sup> different matters, since judges are part of the capitalist system and its institutional superstructure while most of ‘mankind’, in Australia at least, are working class women and men. Further the salaries senior judges receive of more than \$400,000 per annum remove them from the ordinary day to day struggles of and pressures on workers on the average wage of around \$76000 yearly in 2014.

That this different class world view exists is at least partially supported by the reference to mankind, a reflection of the time when men alone were capitalists and women wives and mothers. The acceptance of a broad concept of income, or even ordinary income, without questioning its source in any detail, is another indicator of a capitalist world view. Income is a given. It is also a category of generalisation arising from the process of circulating capital, of the intricacies contained in M-C- M’.

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<sup>107</sup> Ibid.

<sup>108</sup> Jordan CJ in *Scott v Commissioner of Taxation* (1935) 35 SR (NSW) 215 at 219.

<sup>109</sup> A more nuanced approach might say there could be a multitude of views but that judges as representatives of the ruling class are more likely to view what mankind thinks income is through the prism of their ruling class Weltanschauung. That might help explain why the judges did not and do not consider capital gains (growth in capital) as ordinary income.

As explained above, C is actually the purchase of commodities, not just constant capital but labour power. The purchase of that labour power is an exchange between seeming equals in the labour market, between those who own the means of production and those whose freedom is to sell their ability to work just to survive. Workers are free to sell their labour power because they have been freed from the means of production. That C comes from the M that arises in the circulation of capital. As Marx puts it: 'Wages are, therefore, not the worker's share in the commodity produced by him. Wages are the part of already existing commodities with which the capitalist buys for himself a definite amount of productive labour power.'<sup>110</sup>

So wages come out of existing capital/money, capital/money their labour has previously produced. But they are also a draft or draw down on future labour and consumption. As Marx puts it:

This money [for wages- JP] is not only the money-form of past labour of the labourers but at the same time a draft on simultaneous and future labour which is just being realised or should be realised in the future. The labourer may buy with his wages a coat which will not be made until the following week. This applies especially to the vast number of necessary means of subsistence which must be consumed almost as soon as they have been produced to prevent spoilage. Thus the labourer receives, in the money which is paid to him in wages, the converted form of his own future labour or that of other labourers. By giving the labourer a part of his past labour, the capitalist gives him a draft on his own future labour.

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<sup>110</sup> Karl Marx, 'Wage Labour and Capital' in *Wage labour and capital & Wages, price and profit* (Bookmarks, London, 1996) 25.

It is the labourer's own simultaneous or future labour that constitutes the not yet existing supply out of which he will be paid for his past labour.<sup>111</sup>

To put it at its simplest, all wages come out of surplus value. This is as true for unproductive workers (public servants, bank employees, retail employees) as it is for productive workers. Unproductive workers are part of the process of the circulation of capital which sees surplus value realised in the market.

#### A Taxing Wages

Irrespective of whether workers are productive of surplus value or not, they are paid for their labour power at its value or variations around that. A competitive labour market imposes the law of value on all workers, productive and unproductive. What this means, as we saw before, is that the value of labour power is, like all commodities, the socially necessary labour time required for its production and reproduction. This is not bare subsistence but will vary for example because of the length of training of the individuals involved, the market demands for their skills and so on. But the means of production and reproduction, plus the moral and historical element Marx refers to, mean that it is akin in price terms to the average wage in the particular country. Of course this wage is the phenomenal form of the essence and disguises the essence, namely that payment of wages is for the capacity to labour, not the labour itself. Marx makes this idea of the average wage being the price form of the value of labour power clear in *The Economic Manuscript of 1861-1863* when he says:

An increase in surplus value achieved by reducing wages below their average level (without increasing the productivity of labour) is an increase in profit achieved by forcing the worker below the level of his normal conditions of life. On the other hand, an increase in wages over their

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<sup>111</sup> Karl Marx above n 8, 73-74.

normal average level is, on the part of the worker, a sharing in, an appropriation of, a part of his own surplus labour (similarly assuming the productive power of labour remains constant). In the first case the capitalist encroaches upon the vital conditions of the workman, and upon the times of labour necessary for its own sustenance. In the second case the workman expropriates part of his own surplus labour. In both cases the one loses what the other gains, but the workman loses in life, what the capitalist gains in money, and in the other case the workman gains in enjoyment of life, what the capitalist loses in the rate of appropriating other people's labour.<sup>112</sup>

It is the wage payment, seemingly for the labour done but actually for the labour power of the worker, that itself hides this reality. By taxing a worker's wage the income tax system both accepts the reality of the surface phenomena of wages and hides the reality of their essence. But it is more than that. The income tax system, in taxing wages, cannot, at least in normal economic circumstances, fundamentally undermine the price expression of the value that is inherent in the labour power of the worker. Income tax on workers' wages is drawn, not out of the paid labour of the worker, but out of their unpaid labour, i.e. out of the labour that is surplus value and whose ultimate form is realised in the markets as profit, interest, rent and the like.

In other words, in taxing workers' wages, the state is actually taking a share of the surplus value from capitalists, who of course have expropriated it from workers themselves. This however is a tentative statement because the relationship between capital and labour, a social relation, and the wage or money expressions of that relationship depend on other factors such as supply and demand as well as class struggle. An example, a very simple abstract example, may help.

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<sup>112</sup> Karl Marx, *Economic Manuscript of 1861-63* (Progress Publishers, Moscow, 1988) 234-235.  
(2015) J. Juris. 299

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Suppose a worker is paid \$1000 a week and produces \$2750 worth of goods. Assume too that the non-labour costs to produce this are \$1250 a week. There is no tax. Assume too for the purposes of exposition that these prices reflect the underlying value contained in them. So by the purchase of commodities worth \$2250 a week the capitalist increases their wealth to \$2750, an increase or gain of \$500. In terms of the general formula of capitalism,<sup>113</sup> M-C- , money of \$2250 is transformed into commodities of the same value which magically yield goods or services in the market with a value and sale price of \$2750. This magical extra \$500 comes from the worker.<sup>114</sup>

And that magic M' arises because the worker is paid for their labour power not the value of what their labour produces. In other words this surplus value in money-price form, this \$500, is the unpaid labour of the worker. The \$1000 paid to the worker is enough to replenish her to come to work the next day and be productive (for example food, clothing, housing, transport, entertainment, rest) and to provide for her kids, (the next generation of workers.) It also contains a moral and historical element. Some workers' needs such as food, water and rest come from being human. Other needs are socially determined. A few drinks comes to mind. I on the other hand must watch the cricket, and even worse, must watch St George Illawarra (Rugby League) and Collingwood (Australian football) win game after game and premiership after premiership. To do this, and to keep abreast of the latest news too (a lesser priority compared to St George and Collingwood premierships) my needs include not just the spiritual ones of sport but the physical ones of a television and computer. This historically and societally created need when satisfied replenishes the soul.

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<sup>113</sup> Karl Marx, above n 8, 153.

<sup>114</sup> Ibid, 164.

So when tax is imposed, assuming that her physical and emotional needs remain the same, the tax on the worker's wage will initially, if current real wages are protected legally or industrially, come out of the unpaid labour, that is the \$500, of the worker which is then expropriated by capital. In other words taxes on wages reduce the amount of surplus value and hence of profit flowing to capital.

This is a static view and as we have seen above capitalism is capital in motion. Capital will attempt to recoup any lessening of its return on investment and the surplus value that will be transformed into profit etc. Labour may attempt to increase wages to retain current living standards.

There are a number of ways capital will attempt to recoup any loss in profit arising from taxes on wages that aren't accompanied by reduced real or relative wages. It may try to increase prices and whether it can do so or not will depend in part on the nature of the market it operates in – local markets and local competitors with the same tax burden or local but with international competitors or international with international competitors. It may accelerate investment in industries that reduce the cost of labour power (e.g. cheaper food, transport etc). It may push to have great big new taxes abolished, or reduced, or as in the case of the Minerals Resource Rent Tax, redrafted to become a shadow of its former proposed self.<sup>115</sup> A concomitant of this might also be a push to reduce the social wage going to labour in order to fund the reduction in surplus value which the imposition of an income tax on wages may produce and in the long term reduce taxes on capital. Over time too, capital will attempt to reduce the price of labour power and that could involve, combined with tax increases on wages, lower real or nominal wages, or relative wages.

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<sup>115</sup> John Passant, 'Lessons from the Recent Resource Rent Tax Experience in Australia' (2011) 10 (2) *Canberra Law Review* 159,170

To recap, and the quote Harman again, ‘individuals will attempt to recoup their loss of purchasing power by struggles at the point of production – the capitalists by attempting to enforce a higher rate of exploitation, the workers by attempting to get wage increases.’<sup>116</sup>

Let’s see where taxes on profit are extracted from.

## B Taxing Profit

It is axiomatic that taxes on profits come out of profits. However the economic incidence may be different to the legal incidence. Capital in motion and the level of class struggle would determine where that economic incidence falls. However we need to look deeper than just profits being the profits of capital.

We discussed above the prices of production and the equalisation of profit rates within and across industries as a never ending and ongoing process of movement towards a holy grail of an average profit rate. For business income, the specific form of income is an eternal dance around the prices of production or costs plus the average profit rate.<sup>117</sup>

Company and other business entity taxes are not a tax on surplus value. Company tax is a tax on profits, i.e. the company’s assessable income less allowable deductions. Leaving aside nuances not necessary for our discussion that is essentially what the prices of production and their realisation on the market produce. Cost plus an average profit rate determine the prices of production and if the commodities then sell on the market they are the assessable income component of what becomes taxed as company or other business taxable income. In other words what is taxed is the reality of surplus value realised in the market place, hidden, disguised but the driving force behind the whole system.

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<sup>116</sup> Chris Harman, above n 2, 113-114.

<sup>117</sup> Karl Marx, above n 3, 157.



The fact that workers create that surplus value and it is expropriated by the owners of capital, the owners of the means of production, is hidden by the system itself and hidden too by an integral part of it, the income tax system. By positing companies as earning profits or other income and taxing them on what appears to be theirs, but what is in reality the unpaid labour they have taken from workers, the tax system reifies companies, reflects the appearance of equality and payment for labour and disguises the reality of exploitation.

M-C-M' 'corresponds directly to the income, or profit and loss statement, of a capitalist firm.'<sup>118</sup> Money arises in every step but we shouldn't see it as a linear process. In the circumstances of modern capitalism and the capitalist state, tax follows money like a bloodhound. Tax impacts on all sections of this process. Thus income taxes tax the after event revenue gained by the various hostile brothers in all of the M — C ... P ... C' — M' stages. Clearly that revenue is not surplus value but rather an expression of it, its embodiment, in disguised form both as to its nature - profits, interest, rent, wages - and for the hostile brothers as to the so-called earning entity. For workers (and indeed for bosses) the mystification is as to the nature of wages and who creates surplus value and its market forms such as profits and future wages.

This idea that capital earns profit is an example of reification, which just means that by 'attributing an independent life to the various forms of value, people succeed in transferring to them certain powers for regulating their own existence.'<sup>119</sup> Capital is one of those forms of value and capital in the form of companies is the reification of reified relations. We attribute to companies all sort of powers (including in the US, according to the US Supreme Court,

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<sup>118</sup> Duncan K Foley, *Understanding Capital: Marx's Economic Theory* (Harvard University Press, 1986) 33.

<sup>119</sup> Bertell Ollman, above n 43, 199.

personhood<sup>120</sup>) and one of those is that it earns income rather than exploits workers and expropriates their unpaid labour or is part of the food chain of distribution which sees surplus value in price form delivered it to it.

Money performs different functions. It is and becomes capital. It is the universal equivalent, i.e. it facilitates exchange. It expresses the value of labour in products to enable that exchange to occur in the context of market conditions. In the hands of capital it buys labour power and means of production. It is what the income tax system taxes when it arises as a form of income in the market or is paid to workers as wages.

Money, income tax, capital earning profit – all hide the reality that productive labour creates surplus value and it is ultimately from this pool, realised through the market and distributed as profit, interest, rent, wages and the like, that tax is drawn

Finally, Marx argued that inbuilt into capitalism is a tendency for the rate of profit to fall. This is because competition drives investment in capital to increase at a greater rate than investment in the one element that produces surplus value, namely labour. All other things being equal this means a falling rate of profit. Of course, not all things are equal and one of the countervailing tendencies is pressure from capital to reduce taxes, especially those they perceive borne by

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<sup>120</sup> 'In the Montana case, the Supreme Court had the chance to revisit its deeply flawed 2010 decision in *Citizens United*. But despite the urgings of members of the Court itself and a public shell-shocked by the recent torrent of unregulated corporate expenditures, the Court chose instead to double down and reaffirm the conclusion of *Citizens United* that corporations are people -- at least as far as the First Amendment is concerned.' Rep. Adam Schiff, 'The Supreme Court Still Thinks Corporations Are People' *The Atlantic* 18 July 2012 <<http://www.theatlantic.com/politics/archive/2012/07/the-supreme-court-still-thinks-corporations-are-people/259995/>>.

them. This in a nutshell is what the Henry Tax Review was and is about<sup>121</sup> and what I suspect the Coalition government's Tax White paper will have at its core.

To summarise, income tax is all about surplus value. Yet there is no mention or understanding of this in the Tax Acts or our teaching. The income tax system reflects the blindness of capitalism to its essence.

Having talked at a certain level of abstraction, let's now look at the nitty gritty of some aspects of income tax teaching in Australia.

### C Income as Flow and Taxpayers as Income Earners

Many tax teachers will, as part of teaching introductory tax, give the standard spiel about income as flow, the idea that income flows from something else. As Gilders et al put it:

Generally income is understood as arising from 3 pursuits:

1. as remuneration for personal services;
2. as the rewards from carrying on a business;
3. as a return on investments.<sup>122</sup>

This income as flow approach is often attributed to the development of trusts and the trust law distinction between income gains and capital gains.<sup>123</sup> Of course trusts began their life as a tax avoidance mechanism at around the time of the birth of capitalism in England and a fruitful area for future examination might be the relationship between income as flow and the rise of capitalism, in particular the capital accumulation process and the difference then developing between

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<sup>121</sup> John Passant, above n 69.

<sup>122</sup> Frank Gilders, John Taylor, Michael Walpole, Mark Burton, Tony Ciro, *Understanding Tax Law 2010; An interactive approach* (Lexis Nexis 2010 4<sup>th</sup> edition) 51.

<sup>123</sup> See for example Coleman et al above n 106, 103; Gilders et al, above n 122, 50.

constant capital and variable capital<sup>124</sup> and between productive capital and unproductive capital (e.g. investment capital).

While the position is not without controversy, income as flow is the approach judges, many tax experts and teachers in Australia adopt.<sup>125</sup> Flynn notes:

The second principle for distinguishing between income and capital receipts is that income is a detached flow. This principle is much maligned and often not acknowledged. Despite the reluctance to acknowledge it or to fully explain its reach, the influence of the flow concept is persistent and familiarity with its manifestations essential for an understanding of the income/capital distinction.<sup>126</sup>

The concept of income as flow is appropriate in relation to passive income such as rent, interest, royalties and dividends flowing from underlying passive investments. As Flynn notes ...' the concept is sometimes said to also apply to salary and wage income and income from operating a business.<sup>127</sup> It is easy to see why. Salary and wages appear to flow from the labour we workers do. Under capitalism our labour power, but in the common view our labour, is an asset to be sold in exchange for regular and periodic payments as work is done. Profit appears to flow from business, a combination of capital and labour or, in Marxist terms, of constant and variable capital.

We might even mention tree and fruit analogies, drawing on the old US case of *Eisner v Macomber* and the famous comment of Pitney J that:

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<sup>124</sup> Karl Marx, above n 8, 193.

<sup>125</sup> Gilders et al, above n 122, 42.

<sup>126</sup> Michael Flynn, 'Distinguishing Between Income and Capital Receipts - A Search for Principle' (May/June 1999) 2(3) *Journal of Australian Taxation* 155, 162-163. Ross Parsons for example makes no specific reference to income as flow in his 15 principles of income tax. RW Parsons, *Income Taxation in Australia* (1985) para 2.7

<sup>127</sup> Michael Flynn, above n 126,160.

The fundamental relation of 'capital' to 'income' has been much discussed by economists, the former being likened to the tree or the land, the latter to the fruit or the crop; the former depicted as a reservoir supplied from springs, the latter as the outlet stream, to be measured by its flow during a period of time.<sup>128</sup>

Let's stick with tree and fruit. This analogy doesn't hold up because it imagines one aspect as something out of which the other grows – fruit out of the tree rather than say as the fruit creating the tree which creates the fruit. Of course if we begin to imagine capital as something constantly in motion and recreating and propelling itself through the continual purchase of labour power and the exercise of that power in production, then the missing element in the static analogy of tree and fruit is the earth feeding the tree. That earth is labour.

The flow analysis and tree and fruit analogy are superficial. We only have to ask the question 'how does the specific income arise?' to see the problems.

How does profit flow from business and, if it does depend even in part on someone's labour, whose? How can this magic entity capital create income, whether it be profits or rent or dividends or interest? Similarly, what are wages? It is these deeper questions which are hidden both in and by our teaching but more importantly, since our teaching is about the tax system itself, in and by the tax system. The income tax system assumes a priori that wages, profits, rent, dividends and interest exist as separate categories, earned or created by different entities. The system's structure and approach reflect and reinforce this 'reality'. Yet what if, as Smith sometimes argued and Ricardo did argue,<sup>129</sup> and Marx

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<sup>128</sup> (1919) 252 US 189, 206.

<sup>129</sup> John Passant, 'A basic guide to taxing economic rent in Australia' (2012) 11(2) *Canberra Law Review* 100, 104 <<http://www.canberra.edu.au/faculties/busgovlaw/attachments/pdf/CLR-2012-Version-8d-Final.pdf>>.

refined, it is labour which is the source of surplus value and hence of profits and rent and interest and dividends, and the sale of labour power the source of wages, with wages themselves a payment out of previous accumulated surplus value?

If, as I argue, that is in fact the case then the income tax system is built on and builds the system of exploitation and slavery that is capitalism. It is predicated on the division between living labour and dead labour and the sale of labour power and the redistribution of surplus value through the market to different factions of capital, all of which then enables the whole process of capital in motion for the purchase of labour power and capital for the process to begin again and to continue.

Ordinary income then becomes a cover all, not for describing the general concept of surplus value but for giving the appearance of similarity and equality between labour earning income in the form of wages and capital earning it in the form of profit, interest, rent and so on. It is a cover all that becomes a cover up.

Even when the exchange system particularises income into profit, wages, rent, interest, dividends and so on the nature of the source of that flow, from labour, is hidden. Instead variations on the trinity formula – capital-profit; land-rent; labour-wages<sup>130</sup> – is the prism through which income being derived is viewed and taxed.

The other tax appearance that disguises a very different reality, in fact a reality that turns the appearance on its head, is the idea that taxpayers derive income. ‘Taxpayers’ is another catch all. We are here in the realm of commodities and their exchange not that of production so that the bland term taxpayer disguises

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<sup>130</sup> Karl Marx, above n 3, 814.

the reality of the class divisions in circulation but crucially in production and with that disguises where wealth is created and by whom.

Terms like taxpayer serve another purpose. The general term taxpayers and its use in phrases like 'taxpayers are paying for this' gives the impression we are all taxpayers. The reality is rather different. Between 2005 and 2008 40 percent of big business paid no income tax.<sup>131</sup> They were not taxpayers, a fact many working class taxpayers might grasp intuitively although the large number of big businesses not paying tax might astonish them. But even if every business paid tax at an effective rate of tax of 30 percent, the current company tax rate in Australia, it would be a tax not on the wealth they have created but on the surplus value realised in money form in the market but which is created by labour. Although the appearance is that this is the profit of capital, the reality is that such profit is no more that of capital than is the moon.

Taxpayers derive income and can only be taxed on income that they have derived.<sup>132</sup> Derived is not defined and takes its ordinary meaning, influenced by accounting and legal concepts.<sup>133</sup> While it is not limited to receipt, it is not necessary to go into the nuances but to say that income is derived when the property relations and laws that reflect those relations result in an amount of surplus value finding its way into the hands and thus under the control of the owner of that property. As Judges have said income is what comes in.<sup>134</sup> Income comes in to the hands of capital because it owns both the labourer and their product and the means of production. It owns the labourer through the contract

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<sup>131</sup> Jim Killaly, Examining Compliance, ATO Governance & Tax Risk Management <<http://www.ato.gov.au/Media-centre/Speeches/Examining-Compliance,-ATO-Governance---Tax-Risk-Management/>>.

<sup>132</sup> Section 6-5 of ITAA 97 in its various fact situations says that assessable income includes the ordinary income you derived directly or indirectly ...

<sup>133</sup> Gilders et al above n 122, 168.

<sup>134</sup> Lowe J in Re Income Tax Acts (No 2) [1930] VLR 211 at 233

of work, a contract between equal buyers and sellers, in which capital buys from the worker her labour power and puts it to work to produce commodities which are the property of the capitalist. This commodity is then exchanged on the market for M', money. Then begins again the process of the creation of surplus value in production and its realisation in exchange.

Because tax on business arises in the exchange process it deals with money. Money as mentioned before is the universal equivalent. This means that among other things it embodies the value of labour in the commodities bought and sold. Paper can only have such a role if we give it that role. We give money the status of universal equivalent because we believe it is the universal equivalent, i.e. we believe it has some value and worth.

This explains why one of the characteristics of income is that it must be money or money's worth.<sup>135</sup> Because the tax system reflects the primacy of circulation, of the market, and that market is a market in which goods exchange around their value for a universal equivalent of value, namely money, tax can only be applied to the results of that exchange process, namely money, or money's worth to overcome avoidance.

So when a company works out its taxable income what we are mapping is the process of M-C- M'. The state then taxes M' in money form before it goes back into the next round of M-C-. This formula M-C- M' disguises the role of labour power and labour in creating surplus value. The key is the purchase of labour power and the payment of wages for that occurs to in money as representing the socially necessary labour time for the production and reproduction of that labour power. It is only in paying wage as money that the full freedom of being a worker

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<sup>135</sup> *Tennant v Smith* [1892] AC 150.



under capitalism is realised – not just as a producer or facilitator of surplus value but also in its other main guise for capital, as consumer.

One of the other indicia of income (but not determinative) is that income is regular or periodic. This arises for two reasons. Workers receive regular pay periodically (normally weekly, fortnightly or monthly) after they have performed work because capital wants to ensure they have forced an adequate amount of commodities out of them after the event and judged regularly as part of the process of exploitation. The receipt of profit is an ongoing process in the market as commodities are sold. But not only that. The never ending process of capital accumulation requires that the profit re-enter the system to buy more labour power and means of production to produce more money to produce more capital. This is the logic of capitalism and so the repetition and regularity of profit receipts are key parts of the income tax system and the judicial analysis of what is income.

## V CONCLUSION

This paper has introduced readers to some basic Marxist concepts and applied them briefly to the income and earning appearances in the tax system to hopefully reveal the essence of the system. This reality is that the tax system applies to money receipts of business in the market where commodities are exchanged and surplus value is converted into a money form. The state through its tax system is a parasite on the vampire of capital, living off the blood the vampire has extracted from workers.

The income tax system in its operation reflects and reinforces the appearances of income earned that arises in the market, in the exchange of commodities in capitalism but in doing that disguises the reality of the exploitation of workers in production that is the essence of the capitalist system.

The ideas canvassed in this paper may give readers and researchers building blocks for an alternative understanding of tax. They are not new ideas, but they deserve re-examination in a new context, and may perhaps inspire future research by others.

**STUDIES IN JURISPRUDENCE\***

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*The following analysis of Legal Orders, and of Legalism in particular, derive from my study of jurisprudence and history, and from the three fields in which I worked as a lawyer – barrister; government lawyer and adviser, and as Head of the Papua New Guinea Office in the movement of Papua New Guinea to self-government and Independence.*

Legalism is the central legal order of the western legal tradition, which itself is composed of two great legal systems – the English common law and the European civil law.

Historically, Legalism comprises two elements: (a) autonomy – that is, the legal system operating largely independently of the executive, whether King, Emperor or State bureaucracy and (b) the capacity of the independent system to develop and change the law through processes internal to it that are, or purport to be, logical and scientific.

The law-making element of Legalism is thus not characterised as legislative, because it is at all times thought to be constrained by the objectivity of legal science.

Legalism arose in Republican Rome and remained the predominant legal order in the last centuries of the Republic (450 BC – 27 BC) and the early Principate (27 BC – 284 AD).

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The element of autonomy was not formalised in the time of the Republic, but was conceded by the State to the responsa of the jurists, and to the edicts of the praetors.

In much the same way, the Judges of England, although deriving their authority from the Crown, were conceded independent authority to develop the common law through the doctrine of precedent.

The Scholars of the Universities on the Continent played a similarly creative role in transforming the Roman law of the Digest into the Ius Commune of Europe.

Legalism may be contrasted with two other legal orders.

‘Self-redress – Mediation’: This applies particularly in pre-state societies, in which, loosely described rules are based on custom.

The idea of retaliatory violence had a tenacious hold on pre-state societies consisting of kinship groups, such as those in pre-contact Papua New Guinea. It was the Group which required ‘payback’, because it was the Group which suffered loss through the death or injury of one of its members. Compensation, revenge and justice all merge in ‘payback’. Mediation, often very imperfectly, was the only alternative to retaliatory group violence.

The third legal order is the ‘Regulatory Legal Order’:

Unlike Legalism, law, where the regulatory legal order prevails, is essentially public and bureaucratic. It was the legal order governing the law in the ancient Middle Eastern Empires -- and, in China and India, before European contact. In those societies, law comprises a series of commands dictated by the State; sometimes embodied in a code,

statute or other decree, and sometimes modified by custom. These commands were discrete in the sense that there is no logical, as distinct from possible administrative connection between the various commands.

Although, particularly during the colonial period, Legalism was transported all over the Globe and is present in many non-European countries, its origins are European. This substantially accurate statement needs qualification. Both Islam and Judaism relied upon legal science. Each faced the difficulty of relating a sacred text to new circumstances or to existing circumstances not specifically covered by the text. And each faced the difficulty of reconciling the reverence to be accorded the sacred text with adoption of legal science in its interpretation or exegesis, in order to deal with new or omitted circumstances.<sup>1</sup>

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<sup>1</sup> From the Abbasid Caliphate (750 AD), authority in Islamic law devolved upon the jurists who replaced the Qadis or appointed Judges. Influenced by the newly discovered Greek logic, the jurists introduced the use of reason in the interpretation of both the Koran and the Sunna, and permitted, within limits, Ra'y, or, personal reasoning, in the development of doctrine. Qiyas or the use of analogies to ascertain a rule became permitted.

The liberality of interpretation which this entailed was opposed – sometimes vehemently – by the Imams, as a departure from the Holy Word of God. The Jurists became divided into four schools. Eventually, in the 10<sup>th</sup> century, these schools reached a compromise which had as its purpose the putting of an end to the further development of Islamic law by juristic processes. The ‘gates of Ijtihad’ were, as it was said, finally closed.

Jewish law may be said to have begun with the canonisation of the Torah in 445 BC by Ezra and Nehemiah. From the oral explanations of the Midrash in the synagogues a process of interpretation inevitably began but remained oral to distinguish it from scripture. The oral law was gradually committed to writing. The recording of the oral law in the Mishnah was unsuccessfully opposed by the Sadducees as desecrating the Torah. In the 2<sup>nd</sup> century, Judah Hanasi sought to canonise the Mishnah but his attempt to do this failed. In the 6<sup>th</sup> century, scholars were entrusted with writing down the Mishnah and Gemarra and these evolved into the Talmud, which governed Jewish law for centuries. Finally, in the 12<sup>th</sup> century the Rabbis closed further evolution of the Babylonian Talmud.

We see in this oversimplified description the continuing tension between text and interpretation, exegesis and the deployment of legal science.

Church law in Europe was heavily influenced by legalism. It did not however face the same difficulty as Judaism and Islam, in reconciling use of legal science with the sacred character of the text. Christianity never intended to override secular law. From the outset the separate spheres of God and Caesar were

The Jurists and Praetors introduced Legalism into Rome. But Legalism gradually gave way, under the Dominate, to regulatory tendencies and eventually became replaced by a Regulatory Legal Order. To some extent, if for different reasons, this transformation has been paralleled in the case of European Legalism during the 20<sup>th</sup> century.

Roman Law occupied a central role in the introduction of Legalism into continental Europe and in the struggle, ultimately successful, of subduing custom. And, Roman law played an important part on the Continent in the 19<sup>th</sup> century movement for Codification. But, on the Continent, Legalism faced difficulties with the supremacy claimed by natural law reason, on the one hand, and the claims of nationalism, on the other.

An initial question of some importance arises – why was it, that Legalism penetrated public law in England but failed to do so in Rome?

This is important because of the part Legalism was to play in England in the emerging concept of the Rule of Law.

Legalism did not originate that concept. The concept -- the idea, that law could control Kings and executive power generally, was Germanic in origin. It was based on the significance, and indeed, the supremacy of custom among the German Tribes.

The fusion of the idea of the Supremacy of Law with Legalism was the work of the common law.

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recognized, see, David and Brierley, *Major Legal Systems in the World Today*, 2<sup>nd</sup> edit.p.429. In the 12<sup>th</sup> century Gratian, a Bolognese monk collected all the laws of the Church into a single work, *A Concordance of Discordant Canons*. It was the first comprehensive and systematic legal treatise in the West since Rome. The method was thoroughly legalistic. It was ‘systematic’ in the sense of breaking up the law into interrelated categories -- divine Law, natural law, the law of the church, the law of Princes, custom etc. It was, without question, one of the major works in European legalism.

The common law courts exercised their control of executive power in the first instance through the issuing of writs or commands, which were not directed against the Crown – the Executive—but against the Crown official personally.

The writ of habeas corpus enabled any man, who claimed he was being unlawfully detained, to be brought before the court so that the legality of his detention might be established. Thus, the writ was not confined to state officials, but could be issued and enforced against private individuals. It was the writ of habeas corpus which was used to free the slave Somersett from the hulk in the Thames; Lord Mansfield, in setting him free -- saying, ‘the air of England is too pure for any slave to breathe. Let the Black go free ...’.<sup>2</sup> Hence, through the writ against a private individual, slavery became unlawful in England.

What is important is that in determining whether the writ should be issued, the courts were able to define the principles of personal freedom in English law.

In the same way, the ordinary actions of trespass and false imprisonment enabled the powers of arrest by constables and other persons to be defined. It was, in the course of these cases, that the Courts rejected State necessity as a defence to justify arbitrary arrest or seizure. And it was the Courts, in England, which defined the principles restricting the powers of police interrogation and which rejected torture, notably and initially in *Felton’s* case.<sup>3</sup>

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<sup>2</sup> Somersett 20 St. Tr. 1

<sup>3</sup> Felton 3. St. Tr. 371; Ibrahim v R (1914) A.C.599. “And with respect to the argument from state necessity, on a distinction being made aimed between state offences and others, the common law does not understand that kind of reasoning, nor do our books understand that distinction.” Lord Camden, Erskine v Carrington, 19 St. Tr. 1153.

The Magistrates, in Roman Law, played no part in controlling executive power. Executive authority in Rome was embodied in the Consular Imperium. It was unlimited during the Consul's year of office, extending to all areas of government, and to leadership of the Army.

When the Praetorship was created in 367 BC, the jurisdiction assigned to the Praetor formed part of the Consular Imperium – the jurisdiction, to decide civil disputes. Unlike the Judges of the Royal Courts of England, the Praetors never detached themselves from the Executive and never claimed independent authority to exercise the executive power of the Consuls – each Praetor's period of office was limited to one year.

The real problem of abuse of executive power in Rome lay in the Provinces, as evident in Cicero's famous prosecution of Verres, the Governor of Sicily.<sup>4</sup>

At the risk of some over-simplification, it may be said that, 'to Roman law we owe the origins of Legalism; to the common law we owe the fusion of Legalism with the rule of law'.

Legalism involves some degree of separation of those who administer the legal system from the executive organs of government. It will also be apparent that this separation was at all times relative because the autonomy of the Roman juriconsults, the English barristers and continental scholars to develop the law, represented a concession by the state. But the degree of institutional independence allowed to them, was nonetheless vital to the future development of the European ideal of the rule of law. This was so because it meant a body of rules -- the law -- (upon which such an ideal was dependent), could be developed separately from official decrees and regulations.

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<sup>4</sup> *Cicero Against Verres*, Penguin, *Cicero—Selected Works*, Grant, p.41.



Legalism enabled formal law to subdue feudal law and custom largely by formalising the customary rule, and then, by incorporating it.

This was so, for example, with maritime law. Thus, in Roman law, the customs known as the Maritime Law of Rhodes were adopted into law. This was the same in the common law. “The law merchant ... is ... neither more nor less than the usages of merchants and traders ... ratified by the decisions of the Courts of Law”, as stated, in 1875, by the House of Lords.<sup>5</sup> On the Continent, France attempted the codification of the coutumes.

One particular problem faced by Legalism, was how a legal order of this kind would cope with statutes and codes. On the one hand, these legal instruments are imposed externally to the autonomously created law which is the essential characteristic of Legalism but, on the other hand, they have acknowledged paramountcy.

Statutes may be, but are not necessarily inconsistent with the autonomous system presupposed by Legalism. In the case of the common law, we find early statutes on the law of property integrated into the law and principles of tenure and estates upon which that law was based. Medieval statutes such as the *Statute of Quia Emptores* (1290) forbidding subinfeudation, and the *Statute de Donis Conditionalibus* (1285), by which a donee could alienate land to bar the right of nominated issue to take, were indeed very important to the law of property and had to be fitted into the medieval law of property by judges and property lawyers. The only medieval attempt to alter the system radically by statute was that introduced by Henry VIII in 1535, when, in need of revenue, he sought to extinguish trusts by the *Statute of Uses* (1534). Within a century, the system

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<sup>5</sup> Adoption of the Maritime Law of Rhodes; House of Lords [1875] *Goodwin v Robarts* (1875) L.R. 10 Ex.337, *affd.* 1 H.L. 476.

rebelled, so to speak, and by the device of a Use upon a Use, restored Trusts, in *Sambach v Dalston* (1634).<sup>6</sup>

The *Settled Lands Act* 1882 was a much later example of a major change in the law of property without a change in the system. Land was tied up in settlements. The life tenant in possession had all the appearance of ownership, but he could not dispose of any interest in the land, at least beyond his own death. The *Settled Lands Act* met this problem by allowing the life tenant to sell, but ensured that, in substance, the fund resulting from any sale was held upon the interests set out in the settlement. In short, all the incidents of the law of property were preserved. Only, a power of sale was conferred by statute.

We see the same integration in other fields of law. Thus the *Wrongs Act* (1846), in effect, overruled *Baker v Bolton*, so as to confer limited protection for dependants on the death of a near relative.<sup>7</sup> Such legislation merely corrected an anomaly in the law of torts.

And, in the law of contract, there was the statutory abolition of the rule that, where a contract was discharged by reason of ‘frustration’, ‘the loss lay where it fell’.

None of these involved a change in the juristically developed common law.

This does not mean the Statutes were unimportant – the abolition of the doctrine of common employment had very significant implications for industry – but in terms of the judicially created common law system, they were mere correctives.

The rise of the democratic principle in the 17<sup>th</sup> and 18<sup>th</sup> centuries seemed, though, to accentuate greatly the apparent tension between the paramountcy of statute, and the

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<sup>6</sup> *Sambach v Dalston* [1634] 3 Tothill 188

<sup>7</sup> *Wrongs Act* (1846) overruled *Baker v Bolton* (1808) 1 Camp.p.493.

systematic evolution of the common law and of the civil law. Lex emanating from democratically elected Legislatures had a superior legitimacy – a legitimacy which judicially evolved law or law deriving from doctrine, could not rival.

But this did not, in the event, lead to the Judiciary in Europe being relegated to subordination. Concurrently, with the rise of the democratic principle was the new doctrine of the Separation of Powers, as reflected in the Act of Settlement of the United Kingdom, the United States Constitution and the French Declaration of the Rights of Man, guaranteeing the Courts independence and exclusive authority in the exercise of the judicial function.

Theoretically, it may have been supposed that this development would allow the courts plenary authority in the strictly judicial field, to apply the ‘law’ and decide controversies, but at the same time forbidding any development of the law by juristic processes. Law creation would, on this hypothesis, have belonged solely to the legislator, and the Judiciary would have been confined to the interpretation and application of laws made by the Legislature.

On the Continent, an attempt was made in the 18<sup>th</sup> century Prussian Code and in the French Revolutionary statutes, to give effect to this idea of strict demarcation of function, by specifically curtailing the powers of the Judiciary. But these attempts were abandoned quite early, as it became apparent that a division between the legislative and judicial function could never be clear-cut. Within limits, law-making was inherent and inescapable in the very process of expounding and applying the law.

In England, the common law system continued to develop and the nineteenth century was to be a period of great judicial creativity.

But there was never to be any repetition of Coke's 17<sup>th</sup> century dicta that the common law could 'control' statutes.<sup>8</sup>

The common law at all times thereafter conceded it was subject to statutes, but held that the Judges were vested with exclusive authority to interpret them. In that task, they would not permit anything extrinsic to the statute which the Government might express or declare in an attempt to influence its interpretation. The Courts would interpret the statute, as it stood, and as enacted by Parliament, although in their interpretation they would rely upon certain presumptions.

One presumption was that, in the absence of clear language to the contrary, Parliament did not intend to overthrow the common law, and statutes creating criminal offences were interpreted to harmonise with common law principles, such as that of mens rea.

Parliament and the common law Judges shared similar values and, until the presuppositions upon which these were based, were shaken as the Victorian era proceeded, few Statutes sought to revolutionise the common law. At most, statutes were supplementarily corrective or, like the *Goods Act* (1893), formed a codification of the common law in a particular area. In either event, the system was allowed to continue with juristic development by the Judges.

We turn to consider the next Legal Order which we have touched on, and described, briefly above – Regulatory Law.

Regulatory Law may be described, generally and, only somewhat inexactly, as 'official law', law made by officials. The purpose of regulatory law is to give effect to policy of a

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<sup>8</sup> Coke – 17<sup>th</sup> cent. Dicta in *Bonham's case*, 8 Co. Rep 118, but see his later contrary comment in *Case of Prohibitions*, 12 Rep.65.

public character. The law will have no necessary – that is, logical, connection with any other law, although, it may, of course, be prudent to link laws administratively so that there is uniformity and consistency in administration.

The content of a regulatory law will typically be related to some public question. That is, it will not be concerned with a definition of private rights or obligations *inter se*. Thus, a penal element may be introduced into a law relating to disputes between individuals which, under Legalism, would be resolved by civil remedies.

It may be useful to consider, by way of contrast, the way in which Legalism and a Regulatory Legal Order, would treat a particular case.

First, let us consider the approach of Legalism:

At common law, the tort of nuisance gives rise to rights and obligations between occupiers of land; thus, for example, if an occupier wrongfully allows the escape of a deleterious thing from the land occupied into the land of an adjacent occupier. The tort of nuisance did not derive from statute but evolved judicially from precedent. It is directed only to private rights and obligations between occupiers.

Second, the Regulatory approach: This approach reflects a public interest criterion. Thus, a Town Planning Scheme is directed to the public interest as to the way the land should be used – and this, quite independently of harms to individual occupiers by the manner of use. It does so by zoning the land and enforcing the prescribed public action.

We see analogous extensions of regulatory legislation in environment law, product liability, consumer protection and competition law.

Ancient China represents a classic example of a predominantly Regulatory Legal Order.

The great Codes of Imperial China merely represented a convenient way of consolidating administrative instructions and identifying punishments for their disobedience. The Chinese Codes did not specify the rights and obligations of citizens between themselves. They embodied Instructions to Magistrates and specified penalties for any infraction of the Code's commands. There was no logical interrelationship between the rules of the Codes. Legal science was starkly absent.

The Regulatory law of Imperial China and of the centralised States of Asia, such as the Mughal Empire, extended legal control to the outer reaches of their vast empires for public works and for military and revenue purposes. Nevertheless, they were quite relaxed in the control of private law, unless it was feared that private disputes might lead to disorder.

It would be a mistake, though, to assume from this, that the problem of the interaction between policy-forming and executive action did not exist in ancient China or was concealed by absolute imperial control.

The potential for conflict in this, led to a remarkable institution, the Censorate, which continued and evolved until Ming times to deal with complaints and petitions by citizens into administrative abuse and also into criticisms of policy. At one level, the Censorate was administrative, at another quasi-judicial – a kind of ombudsman-like institution.<sup>9</sup>

The third Legal Order identified and, briefly described at the outset, is '*Self-redress—Mediatory*'.

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<sup>9</sup> See *The Legacy of China*, Raymond Dawson (1964), *The Chinese Art of Government*, E.A. Kracke, pp. 319-320.

Self-redress -- Payback -- or, more precisely, the threat of it -- which was the only means of enforcing order in the absence of the State. Its imperfect operation was evident in such societies, as those of pre-independence Papua New Guinea.

To a European observer, Payback appears to represent anarchic violence. But the unspoken object was to maintain the peace by fear of reprisal through fear of payback revenge.

It would seem societies, such as these, sensed the dilemma of trying to keep the peace by the threat of revenge and devised certain means of side-stepping the blood feud whilst attempting to maintain its coercive effect.

Thus, the magarada, among the Australian Aborigines of Arnhem Land, -- in which the blood feud is carried out theatrically and concluded with minimal violence: another, was the 'shouting matches' carried out by the Siane people in Papua New Guinea: and then the Tagba boz, in which the opposing sides lined up with hands clasped behind their backs, kicked each others' shins until the other side withdrew.

Other means were adopted, before the advent of the State.

In Anglo-Saxon society, Tribes were based on kinship -- the maegth, was the basic descent group -- and it was sought to do away with the blood feud by the payment and acceptance of compensation.

And so, Ethelbert, King of Kent, in the 6<sup>th</sup> century, specified, in his laws, the customary wergild, and the nature of the wrong for which its payment was to be made.

Another step designed to prevent self-help, was to delay it. Thus, Alfred [871-899] forbade a complainant from attacking an opponent in his home, until he had besieged him for 30 days and sought justice from the King.

But the main substitute for self-help in Anglo-Saxon England was to encourage settlement by mediation and arbitration.

Kentish laws in the seventh century set out the procedures for arbitration before folk moots. There was no attempt in these folk moots to sift the evidence. The aim was to achieve a settlement.

A major problem was to ensure disputants would arbitrate. They were forced to do so. Athelstan [895-939] decreed that if anyone failed to answer a summons by a plaintiff to three successive Borough courts, it was for the leading men of the borough to ride to him and ‘take all that he owned and put him under surety’.

What we are seeing is the gradual movement from kinship to ‘state’ enforcement, but as yet, the ‘state’ was far from strong enough to superimpose its authority on the kin. For many wrongs, there came to be a double payment – the wer for the kindred, and the wite for the King.

These gradual modifications in self-help came slowly with the evolution of the State and Justice provided by the King.

Historically, there may be a social change from one of these three Legal Orders into another of them, as, for example, Legalism into a Regulatory Legal Order, or either of them superseding Self-Redress and Mediation.



In such a case, there is no mere change in the law or in the political system of the kind, which may result from conquest, war or revolution.

A Legal Order may change as a result of these, but that is not necessarily the case.

Colonial conquest of pre-state societies will almost inevitably result in a changed Legal Order because of the introduction into those societies of the State in a fully developed form. At its most extreme, the colonial power may claim to supplant totally, any existing 'native' tribal law or custom: in the case of Australia, this involved Cook treating the whole of the East coast as terra nullius, as if it were uninhabited, with the result that prior to European conquest, no law of any kind would have existed.<sup>10</sup> In 1994, the High Court of Australia rejected this and held that the pre-existing rights in the land held by the Aboriginal people, continued.<sup>11</sup>

But colonial conquest can also involve an attempt to introduce a Legal Order such as Legalism, but to modify it, by accepting the pre-existing pre-state modes of dispute settlement and, at the same time attempting to 'legalise' them, by incorporating them into the introduced colonial or post-colonial legal system.

This was the case with self-governing Papua New Guinea.

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<sup>10</sup> Terra nullius – See Henry Reynolds, *The Law of the Land*, 1987, Penguin, pp.12-13. See also *The Life and Voyages of Captain James Cook*, C.G. Cash, Blackie & Son, pp 60-61:

“As I was about to quit the eastern coast of New Holland ... to which I am sure no European had ever seen before, I once more hoisted English colours, and though I had already taken possession of several particulars, I now took possession of the whole of the eastern coast from latitude 38 degrees to this place, 10½ degrees south, in right of His Majesty King George the Third, by the name of New South Wales, with all bays, harbours, rivers and islands. We then fired three volleys of small-arms, which were answered by the same number from the ship. Having performed this ceremony upon the island, which we called Possession Island, we re-embarked in our boat and returned to the vessel.”

<sup>11</sup> *Mabo v Queensland (No. 2)* (1992) 175 C.L.R.

It was evident that customary modes of dispute settlement, in which rules may be extended, restricted or not applied so long as the dispute is ‘patched up’ to clan satisfaction, were unsuited to a decolonised ‘nation state’, which Papua New Guinea was destined to become. Such a State would inevitably consist of large aggregations of unrelated people living in cities, like Port Moresby, who would engage in non-personal contractual arrangements -- lending, borrowing, investments and the like.

Nevertheless, many people would continue to live in villages and their kin group would continue to be the basic social unit, to which they attached loyalty and, in the event of a wrong, would look to that group for revenge or satisfaction.

Accordingly, it was necessary for the Law not only to meet national needs with a national law but if, law and order, were to be preserved, disputes at village level had to be resolved in a way leading to peace and, hopefully, harmony. Indeed, that also was a national need.

It was thus proposed, at Independence, to introduce a system of ‘Village Courts’ to deal with minor non-criminal disputes – mostly over minor acts of violence -- digging up gardens, fights over infidelity etc.

Village Courts have been operating very extensively in Papua New Guinea since 1975.<sup>12</sup>

There have been other interactions between Legal Orders arising out of Colonialism of a benign nature, such as Macaulay’s Code, based on Legalism introduced into British India,

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<sup>12</sup> *Village Courts Act* 1975

and establishing legal equality where previously a Brahman could not have been convicted on the word of a Sudra, nor a Muslim on that of an unbeliever.<sup>13</sup>

But even without the imposition of Colonialism -- in the era of westernisation, Legalism has been introduced and adopted voluntarily; thus, in Japan, following the Meiji restoration, the adoption of a Code based on the French Code of Napoleon.

A Legal order, even one that has existed for a long time, may change.

Thus, a legal system in which Legalism is dominant will become displaced by a Regulatory Legal Order when the autonomy of the system, inherent in Legalism, and its capacity for internal development have become replaced by legislation or other externally imposed laws.

In the case of Rome, regulatory transformation happened gradually with the steady accretion of authority in the Emperor and increasing imperial legislation – it also developed with the formation of a permanent imperial civil service.

The first step was the conferral of the right to give a response *auctoritate principis* by Augustus on the opinions of certain favoured Jurists, as a result of which, these opinions were given highly persuasive authority. It would have been generally recognized that this higher authority could only have derived from the Emperor. It was thus Regulatory, insofar as the additional authority given to these jurists was introduced into the system from without. But, it is equally true, that, on the face of it, it was designed to preserve the underlying system and authority of the Jurisconsults and Praetors.

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<sup>13</sup> Macaulay's Code "established the great principle of equality of all before the law" in India, K.M. Pannikar, *A Survey of Indian History*, Asia Publishing House, p.206.

In the Republic, *Leges* had become law through their adoption by the Assemblies—the *Comitia* or the *Concilium Plebis*, whose *plebiscita* bound not just the plebs, but, after the *Lex Hortensia* [287 B.C.], the whole community.

In form, Augustus never sought to legislate directly, but the *Lex de Imperio* opened the way for increased imperial legislative power by recognizing that the *imperium* of superior magistrates permitted them to issue *Edicta*. It followed that the Emperor, as supreme Magistrate, could do the same. Thereafter, there was a period, when legislative power passed to the Senate whose members were substantially nominated by the Emperor.

Finally, by the third century, the Emperor was untrammelled by any competing authority. He was the sole legislator.

There had been a gradual but fundamental change. The ‘jurists’, or ‘jurisconsults’, had, by Augustus’s reign, ceased to have their dominant role in Roman Law.

At the time of the Republic, they had not been legal practitioners, as we would describe them, nor did they appear in court. They were authoritative advisers. They belonged to the patrician class. They exercised their role voluntarily. They might give a written opinion, or advice in the course of a walk in the Forum.

What had been basic, during the Republic, was that the Jurists were independent. They were not public officials.

Civil proceedings in Rome, during the Republic, were more akin to what we would think of as Arbitration and, at all stages, the parties, the Magistrate and the *Iudex* were dependent for legal advice and for the decisions on the law, upon the legal advice of the Jurists. The office of Praetor was created in 367 BC when the administration of justice

was separated from the office of Consul. In time, with the great influx of non-citizens into the Roman world, the Praetor initiated a new procedure, the formulary system, which enabled non-citizens to seek justice without relying upon the strict Civil law.

But there was a significant change as Roman law became regulatory. During the Principate and especially the later Principate – and even more so during the Dominate – the Jurists not only received salaries but became public officials in the Concilium of the Emperor. *Note: The Republic 510 BC; The Principate, established by Augustus, 27 BC; The Dominate, established by Domitian, 284 AD and lasted until the collapse of the Empire 476 A.D.*

The Republic lacked any organized body of civil servants but, during the Principate, a trained and permanent service responsible to the Princeps was formed. The tendency of a bureaucracy is to concentrate development of the law within government offices and to codify the law.

This is what finally happened in Rome from the accession of Hadrian (117 AD). Hadrian codified the Edict and employed the leading Jurists as members of his Concilium.

The gradual transformation of Legalism into a Regulatory Legal Order in common law countries:

The common law was based upon certain principles – in civil law, liability based upon fraud, intent or fault and breach of contract and invasion of the right of private property; in the criminal law, proof of guilt requiring intent and personal responsibility; in the criminal process, protection of the individual against the power of the state; and in matrimonial law, upholding the sanctity of marriage, especially in relation to divorce.

A legal system underpinned by these values and committed to the principles deriving from them, would be concerned with disputes between individuals or between individuals and the State. It would not recognize an injury to a section of the public. Accordingly, there was no way consumers, as such, -- as a separate group -- or the environment, as such, could be recognized by the common law.

During the 19<sup>th</sup> century, and especially in its latter half, very significant legislation was enacted, but it was not designed to supersede the system but to 'fit' into it. Sometimes, this was quite ingenious, as with the introduction of the Torrens system of Land Title. And, also, the modern stock company: Existing concepts, in common law and equity -- trust and agency -- could not meet the need of industrialised economies for an entity, which permitted capital to be aggregated and individual liability to be limited to the amount of capital contributed. And so, the joint stock company, a legal person, separate from its members, was the statutory answer to this need. The *Companies Act* 1862 and its successors, allowed for extended juristic development of the new concept.

It is important to examine in greater detail, why the common law could no longer, as it had in the past, cope with this contemporary social change.

The common law had evolved by judicial precedent through a process of applying to the facts of the case in hand, a rule deduced from an earlier decision or course of decisions, each of which had been decided in a similar way.

The first step in that process was to decide whether the case before the court was *analogous* to the decision or course of decisions previously decided.

A decision made by a superior court in the hierarchy that is in point, will be imperatively binding. But the general task before a Court is to determine whether a previous decision is sufficiently *analogous* to be binding or is *distinguishable*.

But what decision was *analogous* and what was *distinguishable*, depended upon the *material* facts in the earlier decision and those of the case at hand?

That was the gap in the dyke through which the common law was able to adapt to social change. Adjustment of the law could be made in this way, within the limits of analogical logic as controlled by the doctrine of precedent, without jeopardising the predictability and certainty, which that doctrine was intended to achieve.

The question depended not on some vague similarity in the case to be decided and the facts of the earlier decisions but on the similarity or differences in the *material* facts.

This question -- what facts were or were not *material* flowed from the application of the principles which underpinned the common law.

These were:

- Each person was expected to bear his own misfortunes but if an injury was caused by another's fault, that was a different matter. Under the common law we have to bear our own misfortunes but not injuries inflicted by the fault of others.
- Persons enter into contracts – make promises – at their peril. They would be bound by them and it was immaterial that subjectively there was no true consent or that bargaining power was unequal.
- The common law assumed freedom of will and therefore placed a value on individual responsibility. Neither, congenital defect, nor economic hardship would affect legal guilt or substantially mitigate punishment. But, consistently

with that, the common law insisted upon intent as a condition of criminal liability.

- The common law recognized, almost without qualification, the right of private property. In 1895, the House of Lords held an owner not liable for intentionally intercepting by means of excavations on his own land the underground water that would otherwise have flowed into the adjoining reservoir of his neighbour's land, even though his only motive in doing this, was to cause his neighbour to buy his land, at his price.

But once values had changed so radically that it was not the individual, as such, but a section of the public, such as consumers, which society thought should be protected; or the environment generally; or that liability should, in some circumstances, arise independently of fault, it was clear that the common law could not cope.

Legislation was necessary. Legislation which did not necessarily draw upon the common law, but stood alone. It was increasingly, backed up by regulations and administrative guidelines. It could and did supersede the common law by virtue of parliamentary supremacy.

Legalism, as reflected in the common law and the autonomous development of the law, thus became increasingly replaced by a Regulatory Legal Order.



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Today, the university in the United Kingdom (UK) appears to be being led far from its educational, egalitarian roots. It appears to be a corporate beast, increasingly marketised, commodified and commercialised. In recent years, many words have been written on this matter.<sup>1</sup> In this article, I wish to consider how these perceived changes could affect a cherished notion for academics – academic freedom. I connect the marketisation of UK higher education to the (comparatively) recent economic changes in the structure of capitalism, and the rise of neoliberal economic theory.

This article contends that the modern shift to commercialisation and bureaucratisation in the university is not a new trend. Going back several hundred years' State and market control in rationalising learning has been constant. The university should be seen as the precursor to the modern corporation, rather than its antithesis. The historically marketised elements of the university have simply been accentuated in modernity. Changes in the nature of capitalism have led to a change in the structure of corporations, which now operate in a system of competition rather than exchange. The effects of this change have made their mark in higher education. In this system, the work of the

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<sup>1</sup> See, for example, Mike Molesworth, Richard Scullion and Elizabeth Nixon (eds.), *The Marketisation of Higher Education and the Student as Consumer* (London: Routledge, 2011),

academic, and the widely touted idea of ‘academic freedom’, serves the ends of the university as a corporation.

Academic freedom is a term with a very nebulous and catholic meaning. It has often been synonymous with an idea of a university as a space for learning, inquiry and critical discussion. However, I do not take this view. Much of our discourse surrounding the university centres on an idealised view of academic freedom. Countering discourse which reads academic freedom as an expansive, empowering notion, I follow Stanley Fish in taking a deflationary reading of the term. Fish reads academic freedom as nothing more than the freedom to do one’s job.

I advance several arguments in support of this position. I first introduce the idea of academic freedom, and its legal position in relation to the UK academy. I then introduce Fish’s definition of academic freedom as freedom to academicise, contending that this view is one which would have great import in UK higher education. Next, I turn to the recent funding reforms to UK universities, including the introduction of £9,000 annual fees for UK undergraduates, and place them in their historical context in relation to state involvement in higher education over the past century. I place them within a broader history of governmental intervention in universities. I contend that the resistance to perceived marketisation and administrative meddling in academic matters is misplaced. The institution’s history illustrates that the university is the model for corporations, not vice versa.

In support of this view, I draw upon the writing of Maurizio Lazzarato, and his idea of ‘immaterial labour’. Engaging with Lazzarato’s thought, I argue that today, within a neoliberal economic system, Fish’s deflationary account of academic freedom is one which is both realistic, and will enable scholars within the university to better challenge the commercialisation they oppose. Academic freedom must be understood as nothing

more than the freedom to do one's job as a good corporate worker. In such a view, it can help offer us an alternative to immaterial labour, which can end up as an exploitative and paradigmatic form of immaterial labour.

What this indicates is that far from being the hotbed of revolt and revolution, the university is an embodiment of what many academics in their politics aim to overthrow. I conclude that it is only by understanding the intrinsically corporate nature of the university that it is possible to better the university.

## **I. Academic Freedom**

In 1988, tenure was removed from academics at UK universities, through the Education Reform Act.<sup>2</sup> The 1988 Act introduced a vast new machinery designed to make universities more accountable for the public money which they received.<sup>3</sup> It created the role of University Commissioners, who were given the power to remove academic staff from their positions. Tenure was understood as protection from dismissal in the absence of good cause. Unlike tenure in the United States of America (USA), it could not be usurped by universities closing down whole departments to effect dismissals.<sup>4</sup> Despite this limitation, section 202 (2) (a) makes it clear that Commissioners should:

[E]nsure that academic staff have freedom within the law to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing their jobs or privileges they may have at their institutions.<sup>5</sup>

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<sup>2</sup> Education Reform Act 1988 c 40, ss. 203-204.

<sup>3</sup> Conrad Russell, *Academic Freedom* (London and New York: Routledge, 1993), p.7.

<sup>4</sup> Barbara A. Lee and Mark Davies, "No More "Business as Usual" in Higher Education: Implications for U.S. and U.K. Faculty," *The Journal of College and University Law* 40 (2014): pp.499-542, 504.

<sup>5</sup> Education Reform Act 1988, s 202 (2)(a).

This section, introduced as an amendment to the original Bill, built upon the provisions of the Education (No. 2) Act 1986 which placed a duty on higher education establishments to secure freedom of speech “within the law” for their members.<sup>6</sup> These statutes reflect the general position within the UK, which is that academic freedom is not an absolute value, but rather something that has to be taken into account by a variety of decision-makers.<sup>7</sup> This important place for academic freedom is also reflected in the Charter of Fundamental Rights of the European Union, which declares that academic freedom is to be “respected”,<sup>8</sup> but the Charter does not go further and define the term. Despite the protections in EU law, the protection of academic freedom in UK law is feeble.<sup>9</sup> Stanley Fish is doubtless correct in claiming that academic freedom is “rhetorically strong but legally weak”.<sup>10</sup>

In the USA courts, including the Supreme Court, have been more forward in dealing with issues, and the definitions, of academic freedom and the boundaries and limits of the term. Justice Frankfurter in *Sweezy v New Hampshire* saw that there were four essential freedoms in the university: the freedoms to determine who may teach, what may be taught, how it shall be taught, and who shall be taught.<sup>11</sup> More recently, potentially limiting the term, in *Garcetti v Ceballos* the Supreme Court ruled by a 5-4 majority that the First Amendment did not apply to statements made as part of an employee’s job duties.<sup>12</sup> The ambiguity surrounding how this case applies to universities and academic freedom

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<sup>6</sup> Education (No. 2) Act 1986 c 61, s 43.

<sup>7</sup> See also Higher Education Act 2004 s.32 (2).

<sup>8</sup> Charter of Fundamental Rights of the European Union, Article 13 (2000/C 364/01) (18 December 2000).

<sup>9</sup> Dennis Farrington and David Palfreyman, *The Law of Higher Education* (Oxford: Oxford University Press, 2006), pp.371-385.

<sup>10</sup> Stanley Fish, *Versions of Academic Freedoms: From Professionalism to Revolution* (Chicago: University of Chicago Press, 2014), p.x.

<sup>11</sup> *Sweezy v New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter J).

<sup>12</sup> *Garcetti v Ceballos* 547 U.S. 410 (2006).

has led to lower courts using *Garvetti* to uphold the dismissals of faculty who claimed that they were exercising protected speech.<sup>13</sup>

Despite these judicial interventions and attempts at defining and placing limits on this nebulous ‘freedom’, what Michel Foucault declared about sex in the modern world is equally true of academic freedom. This is namely that we have not consigned academic freedom to a shadow existence, but rather we have spoken of it *ad infinitum*, whilst exploiting it as *the* secret.<sup>14</sup> In so doing, we fail to reveal its core with precision. It is for this reason that a plethora of views of what academic freedom is, and what it allows, has proliferated. These views range from viewing academic freedom as a claim to a universal ideal,<sup>15</sup> to decrying the lack of collegial public defence of this universal ideal,<sup>16</sup> to a view that it is no more than freedom for professionals to do their jobs and *just* their jobs.<sup>17</sup> These divergent views have led to a muddy and inchoate view of what academic freedom means.<sup>18</sup>

In particular, attention can be drawn to the nature of the term itself: academic *freedom*. But freedom to do what? And whose freedom?<sup>19</sup> Why should academics enjoy exemptions and privileges not enjoyed by other citizens?<sup>20</sup> Academic freedom comes from a medieval tradition which pre-dates current meanings of the word ‘freedom’.<sup>21</sup> Universities can ultimately (albeit in a fractured manner) trace their existence back to

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<sup>13</sup> See *Renken v Gregory* 541 F.3d 769 (7<sup>th</sup> Cir 2008).

<sup>14</sup> Michel Foucault, *History of Sexuality, volume 1* (London: Penguin Books, 1979), p.35.

<sup>15</sup> Terrence Karran, “Academic Freedom: In Justification of a Universal Ideal,” *Studies in Higher Education* 34 (2009): pp. 263-268.

<sup>16</sup> Neil W Hamilton, “Buttressing the neglected traditional of academic freedom,” *William Mitchell Law Review* 22 (1996): pp.549-571.

<sup>17</sup> Stanley Fish, *Versions of Academic Freedoms: From Professionalism to Revolution* (Chicago: University of Chicago Press, 2014), p.10.

<sup>18</sup> James K Miller, “Book Review,” *Canadian Historical Review* 70 (1989): pp.117-118, 117.

<sup>19</sup> Anthony Arblaster, *Academic Freedom* (Harmondsworth: Penguin Education, 1974), p.10.

<sup>20</sup> Fish, *Versions of Academic Freedoms*, p.1; Frederick Schauer, “Is There a Right to Academic Freedom,” *University of Colorado Law Review* 77 (2006): pp.907-927, 913.

<sup>21</sup> Russell, *Academic Freedom*, p.1.

ecclesiastical origins, and are rooted in an intellectual tradition created to defend the autonomy of the Church.<sup>22</sup> The privileges of academics, which now pass under the name of academic freedom, were originally ecclesiastical and guaranteed by the Pope.<sup>23</sup>

Separate from this tradition, what Williams has called an ‘idea discourse’ has grown up around the university and academic freedom.<sup>24</sup> The history of the *idea* of the university is different from the history of the actual institution. It is wrong to think that the university ever had a discrete idea grounding it. The university has never existed in a pure state from which it veered off course. Idea discourse treats the history of the university as a history of ideas (or Ideas) rather than a history of institutions.<sup>25</sup> It takes the perspective and represents the interests of those who issue it, defining the university through their eyes.<sup>26</sup>

This can be seen in a wide variety of thinkers who have written on the university. Jacques Derrida’s ‘idea of the university’ conceives of the university as something that should be without condition, and have the humanities at its heart.<sup>27</sup> Cardinal Newman wrote of the idea of the university in the nineteenth century, referring to a community of thinkers, engaged in a free sphere of thinking, not for any specific end, but rather, as an end in itself.<sup>28</sup> Thomas Jefferson wrote that the purpose of a university was a civic one, and the students at such a school of learning would form the statesmen, legislators and

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<sup>22</sup> Russell, *Academic Freedom*, p.1.

<sup>23</sup> Russell, *Academic Freedom*, p.2.

<sup>24</sup> Jeffrey J Williams, “History as a Challenge to the Idea of the University,” *JAC: A Journal of Rhetoric, Culture, & Politics* 25 (2005): pp.55-74, 55-56.

<sup>25</sup> Williams, “History as a Challenge,” p.57.

<sup>26</sup> Williams, “History as a Challenge,” p.58.

<sup>27</sup> Jacques Derrida, “The future of the profession or the university without condition (thanks to the ‘Humanities’, what could take place tomorrow),” in: Tom Cohen (ed.), *Jacques Derrida and the Humanities: A Critical Reader* (Cambridge: Cambridge University Press, 2002), pp.24-57.

<sup>28</sup> John Henry Newman, *The Idea of a University*, Frank M Turner (ed.) (New Haven: Yale University Press, 1996).

judges of the future.<sup>29</sup> Writing in 1970, E P Thompson placed emphasis upon subversion in order to resurrect a better idea of a university, arguing that it should be transformed “into a centre of free discussion and action, tolerating and even encouraging “subversive” thought and activity, for a dynamic renewal of the whole society”.<sup>30</sup>

All of these individuals have different and varied ‘expectations’ of what the university should be.<sup>31</sup> How we view the university as an institution directly impacts upon the freedoms which are exercised by its members. Stanley Fish, in engaging with the question of what academics should do as part of their profession, draws versions of academic freedom into five separate schools, each of which has a differing perspective on the university and the role of academic freedom within it. Fish contends that this taxonomy broadly represents the spectrum of views and interpretations on the subject, from the most deflationary to the most radical.<sup>32</sup> The examples Fish cite have been criticised as containing a lack of specificity, a concern for the academic freedom of staff and not students and a defensive proclamation of the rights of academics.<sup>33</sup> However, whilst there are disadvantages in any taxonomical approach, Fish’s study allows an insight into the spectrum of views which exist surrounding exactly what academics are allowed to do. In particular, his own approach to the field has the potential to be very valuable in the face of current marketisation in UK higher education.

The two most extreme schools in Fish’s taxonomy he reads as not being in line with the university’s aims to disseminate knowledge through teaching and research, nicely illustrating how our expectations of the university’s role impacts upon what freedoms its

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<sup>29</sup> Thomas Jefferson, “Report of the Commissioners for the University of Virginia, 1818,” in: Thomas Jefferson, *Writings* (New York: Library of America, 1984), pp.457-476, 459-460.

<sup>30</sup> E P Thompson, *Warwick University Ltd: Industry, Management and the Universities* (Nottingham: Spokesman Books, 2013), p.166.

<sup>31</sup> Williams, “History as a Challenge,” p.58.

<sup>32</sup> Fish, *Versions of Academic Freedoms*, p.1.

<sup>33</sup> Ronald Barnett, *The idea of higher education* (Buckingham: Open University Press, 1990), p.134.

members can exercise.<sup>34</sup> The most extreme Fish terms the ‘academic freedom as revolution’ school. This school sees education demanding positive political action (rather than pedagogic action) on the part of those who practice it. When the university’s obligations clash with social justice, social justice always triumphs. The University therefore becomes a vehicle for social change, with academic freedom the driving force. The impacts both the research undertaken by the academic, and the teaching they carry out. In Henry Giroux’s words, teaching comes with responsibilities including fighting for:

An inclusive and radical democracy by recognising that education [is] ... about providing the conditions for assuming the responsibilities we have as citizens to expose human misery and to eliminate the conditions that produce it.<sup>35</sup>

Next, the ‘academic freedom as critique’ school sees critique of the dominant ideology and power structures as the academic’s vocation. Characterised by scholars such as Judith Butler, this school sees dissent not as confirming to accepted professional norms, but as taking aim at those norms that are already accepted.<sup>36</sup> In this way, academic freedom becomes another engine (albeit more indirect) of social progress. For Derrida, this university claims an unconditional freedom to question and to assert, and the right to say publicly all that is required by research, knowledge and thought concerning the truth.<sup>37</sup> It is the university, for Derrida, which professes the truth. He thinks a university that is self-determining and self-thinking, with the humanities at its centre. Without being granted the freedom to critique the dominant forms of power operating in society, academia will only serve those interests, rather than challenge them.

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<sup>34</sup> Fish, *Versions of Academic Freedoms*, p.13.

<sup>35</sup> Henry A Giroux, *Against the Terror of Neoliberalism: Politics Beyond the Age of Greed* (Boulder, CO: University of British Columbia Press, 2008), p.128.

<sup>36</sup> Judith Butler, “Israel/Palestine and the Paradoxes of Academic Freedom,” *Radical Philosophy* 135 (2006): pp.8-17; Judith Butler, “Critique, Dissent, Disciplinarity,” *Critical Inquiry* 35 (2009): pp.773-795.

<sup>37</sup> Derrida, “The future of the profession or the university without condition,” p.24.



The third school Fish denotes as ‘academic exceptionalism or uncommon beings’. This school sees academics as intellectually and morally uncommon, over and above the population at large. As such, they require and deserve special privileges which the general public would not receive, namely academic freedom. This is reflected in the thought of Roger Brown, who has argued that academics have an ‘intellectual curiosity’ which needs to be protected from unnecessary interference and control.<sup>38</sup> It is clear that Fish does not think that academics have such a role. Bill Readings saw this pragmatism as glorying in the university’s lack of external reference.<sup>39</sup> In contrast, Readings saw education as a radical form of dialogue,<sup>40</sup> with academics holding a special role in teaching, which belongs to “justice rather than truth”.<sup>41</sup>

The fourth school Fish terms ‘for the common good’. This school sees the academic task as distinctive. The task of advancing knowledge involves following the evidence wherever it leads, and as such the academic requires complete and unlimited freedom to pursue inquiry and publish its results. This school connects academic freedom to democracy, and the democratic values of free and open inquiry.<sup>42</sup> This can be seen in Arthur Lovejoy’s 1937 definition of academic freedom as:

[T]he freedom of the teacher or research worker in higher institutions of learning to investigate and discuss the problems of his science and to express his conclusions ... without interference ... unless his methods are found by qualified bodies of his own profession to be clearly incompetent or contrary to professional ethics.<sup>43</sup>

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<sup>38</sup> Roger Brown, “The governance of the new universities: Do we need to think again?” *Perspectives* 5 (2001): pp.42-47.

<sup>39</sup> Bill Readings, *The University in Ruins* (Cambridge, MA: Harvard University Press, 1996), p.107.

<sup>40</sup> Readings, *The University in Ruins*, p.154.

<sup>41</sup> Readings, *The University in Ruins*, p.161; Maurice Blanchot, *The Unavowable Community*, Pierre Joris (tr.) (Barrytown, NY: Station Hill Press, 1988).

<sup>42</sup> Fish, *Versions of Academic Freedoms*, p.11.

<sup>43</sup> Arthur O Lovejoy, “Academic Freedom”, in *Encyclopaedia of the Social Sciences* (London: Macmillan Publishers, 1930), p.384.

This common good school is also reflected in what can be read as a foundational document for academic freedom in the USA, the American Association of University Professors' (AAUP) 1915 *Declaration of Principles on Academic Freedom and Academic Tenure*.<sup>44</sup> The Declaration makes clear that the academic's responsibility is to the wider public to whom the institution itself is morally amenable. Nevertheless, this right to academic freedom comes with a correlative duty – it can be asserted only by those who carry out their work “in the temper of the scientific inquirer” and should not be used for uncritical partisanship.<sup>45</sup> The common good school has famous adherents. Ronald Dworkin argued that academic freedom insulated scholars from the university administrators, and prevented them being dictated to about what will be taught.<sup>46</sup> Such a view has crossed the Atlantic. Anthony Arblaster argued that academic freedom must involve openness in education, engaging with a diversity of views, encouraging flexibility and experimentation, with students having a major share in the process.<sup>47</sup>

The final school represents Fish's own deflationary view of higher education. Academic freedom becomes equivalent simply with the university's mission to impart knowledge.<sup>48</sup> Fish argues that the university's mission is to produce and disseminate academic knowledge and to train those who take up this task in the future.<sup>49</sup> This knowledge is produced through disinterested academic inquiry. Academic morality for Fish does not rest upon a normative basis, or an ideal, but is merely being conscientious in the pursuit

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<sup>44</sup> “1915 Declaration of Principles on Academic Freedom and Academic Tenure” In: *American Association of University Professors, Policy Documents & Reports* (Baltimore, MD: Johns Hopkins University Press, 2008), p.298; Fish, *Versions of Academic Freedoms*, p.11.

<sup>45</sup> “1915 Declaration,” p.298.

<sup>46</sup> Ronald Dworkin, “We need a new interpretation of academic freedom,” In: Louis Menand (ed.), *The future of academic freedom* (Chicago, University of Chicago Press, 1996), pp.181-198, 183.

<sup>47</sup> Arblaster, *Academic Freedom*, pp.13-14.

<sup>48</sup> Fish, *Versions of Academic Freedoms*, p.9.

<sup>49</sup> Stanley Fish, *Save the World on Your Own Time* (New York: Columbia University Press, 2008), p.99.

of truth.<sup>50</sup> Fish's conception of academic freedom can be summarised as a direction for academics to "just do your job".<sup>51</sup> Academic freedom is freedom to *academicise*, a necessary condition for academics to carry out the university's mission of producing and disseminating knowledge.<sup>52</sup> Academicising involves introducing students to bodies of knowledge and the tradition of inquiry, and equipping students with analytical skills, enabling them to engage with those traditions in their thinking.<sup>53</sup>

In this reading, academic freedom has corresponding duties,<sup>54</sup> and Fish is sharply critical of academics that see academic freedom as freedom from the "everyday obligations of the workplace".<sup>55</sup> There is no room in this vision for politicising actions in academia, and no room to include wider societal values within teaching, except in introducing them in ways that are appropriate to the academic enterprise. Politics must be treated as a topic of interrogation, not proselytising, in teaching;<sup>56</sup> proper academic debate involves discussions surrounding curriculum development, research direction and teaching materials.<sup>57</sup>

This is a minimalist view to the freedom within the academy, to be sure. To treat academic practice as just being a job abandons lofty pretences of acting for the common good or seeking wider political change in society. Fish is quite clear that universities should therefore not strive to reach beyond the students they are seeking to teach into the wider community as civic institutions. These are political goals, and in following them universities "are guilty both of practicing without a license and of defaulting on our

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<sup>50</sup> Fish, *Save the World on Your Own Time*, p.102.

<sup>51</sup> Fish, *Save the World on Your Own Time*, pp. 16, 153, 178.

<sup>52</sup> Fish, *Save the World on Your Own Time*, p.82.

<sup>53</sup> Fish, *Save the World on Your Own Time*, pp.12-13.

<sup>54</sup> Russell, *Academic Freedom*, p.41.

<sup>55</sup> Fish, *Save the World on Your Own Time*, p.113.

<sup>56</sup> Fish, *Save the World on Your Own Time*, p.30; Fish, *Versions of Academic Freedom*, pp.34-35.

<sup>57</sup> Fish, *Save the World on Your Own Time*, p.20.

professional responsibilities”.<sup>58</sup> Yet these political goals which Fish sees as inappropriate for the academic mission also include requiring research having to show social or economic benefits and impacts, which ends up instrumentalising the academic process. Instead, Fish indicates that academics are part of a profession, like doctors and lawyers, which has its own internal practices. This justification for academic practice is entirely internal to the academy, which can only do this if it is left to regulate itself, within the limits of that profession. This does not mean that the academic process is impartial and completely neutral. Rather, the profession would regulate itself, having in mind the goals and limits of the university’s mission.

Unlike doctors and lawyers however, academics do not have the same types of professional bodies regulating their practice, representing their views and lobbying for change.<sup>59</sup> As Lee and Davies argue, a view which I am inclined to agree with, it may be time for academics to take the step in the twenty-first century that doctors and lawyers took in the nineteenth and twentieth centuries, and institute a professional body and code of practice to regulate ethics and standards.<sup>60</sup> Such a move will help ensure that academics can still ‘academicise’ in the future. This deflationary account of academic freedom, properly defended, would have great import in UK higher education. This is not least because the changes in the twenty-first and the twentieth century to higher education, and the longer history of the university, illustrate that academic freedom, and the university, has never been a revolutionary force in this country.

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<sup>58</sup> Fish, *Save the World on Your Own Time*, p.67.

<sup>59</sup> Lee and Davies, “No More “Business as Usual”,” pp.540-542.

<sup>60</sup> Lee and Davies, “No More “Business as Usual”,” p.542.

## II. Higher Education in the UK after the Browne Report

The higher education landscape in the UK has been marked in recent years by a debate over how universities are to be funded, and how they are to best contribute to the country's economy.<sup>61</sup> However, whilst such debates may appear novel and not in step with the history of the university, the opposite is the case. There has, since the end of the Second World War, been an almost constant discussion (albeit at varying levels of volume) about how universities can contribute to the national good, understood in economic terms.

The background to the recent discussions has been a rapid expansion in the higher education sector. In the mid 1980's there were fewer than 60 universities, and participation rates were around six per cent. Fast forward twenty years and 140 universities and university colleges provide undergraduate degree programmes, and 42 per cent of all 18 year-olds enter higher education.<sup>62</sup> This does not take into account the fact that the higher education system quadrupled in size between 1946 and 1980.<sup>63</sup> This expansion of the universities can be read as the natural culmination of the educational revolution which led to free public elementary schools in the 1870's and free public secondary schools in 1944.<sup>64</sup> The progress of this educational revolution was allied with the development of a liberal democratic society. Universities became a key element of the economic profile of the UK throughout the twentieth century. Illustrative of this, Winston Churchill saw egalitarianism in education as necessary to establish:

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<sup>61</sup> See, for example, Stefan Collini, *What are Universities For?* (London: Penguin Books, 2012).

<sup>62</sup> Nick Foskett, "Markets, government, funding and the marketization of UK higher education," In: *The Marketisation of Higher Education*, pp.25-38, 25.

<sup>63</sup> Peter Scott, *The Crisis of the University* (London & Sydney: Croom Helm, 1984), p.57.

<sup>64</sup> Scott, *The Crisis of the University*, p.124.

[A] state of society where the advantages and privileges which hitherto have been enjoyed only by the few, shall be far more widely shared by the men and youth of the nation as a whole.<sup>65</sup>

British universities were of diverse origins and types, formed in different ways, but converged over time towards a single model.<sup>66</sup> The modern university system was shaped in the nineteenth century, with the establishment of the “redbrick” institutions, serving local communities, and the removal of religious tests for entrance.<sup>67</sup> The civic universities established from 1825 were built on commercial and industrial wealth and the demands of a rapidly growing economy and the commitment to culture, science, the arts and philanthropy of the elite communities in those cities. These universities were established by government who recognised the economic and social importance of those institutions, and underwritten by endowment and privilege.<sup>68</sup> From 1889, universities in England and Wales were given annual grants from the State. In order to qualify for these, and for the royal charters which gave rights to confer degrees, common standards had to be observed.<sup>69</sup> By the start of World War One, all universities except for Oxford and Cambridge relied on the state for up to one third of their funding, in a domesticated market environment.<sup>70</sup>

In 1919, the University Grants Committee (UGC) was created to distribute state grants whilst respecting the autonomy of universities, and promoting the importance of

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<sup>65</sup> The Taylor Report, *A New Partnership for Our Schools: Report of the Committee of Enquiry appointed jointly by the Secretary of State for Education and Science and the Secretary of State for Wales under the chairmanship of Mr Tom Taylor CBE*, (London: HMSO, 1977), p.158.

<sup>66</sup> Robert Anderson, *British Universities Past and Present* (London, Continuum, 2006).

<sup>67</sup> Universities Tests Act 1871 c 26 (34 & 35 Vict).

<sup>68</sup> Foskett, “Markets, government, funding and the marketization of UK higher education,” p.27.

<sup>69</sup> Robert Anderson, “British universities past, present and future: convergence and divergence,” in Louis Coiffait (ed.), *Blue skies: new thinking about the future of higher education* (London, Pearson, 2011), pp.57-60, 57.

<sup>70</sup> Anderson, “British universities past, present and future,” p.57.

teaching and research in a university.<sup>71</sup> We can see at an early stage the importance of ‘autonomy’, or academic freedom, for the university’s mission of educating the future wealth creators of the society. The UGC was underwritten by government, allowing for a growth in the number of universities through the creation of new institutions.

However, this was very much an elite business. In 1950 only 3.4% of the population entered higher education.<sup>72</sup> In a post-war expansion, university education was made a pillar of the welfare state, and demand for universities outstripped supply. Following the Robbins Report of 1963, new campus-based universities were founded,<sup>73</sup> and maintenance grants were introduced for students in 1962.<sup>74</sup> The Robbins expansion was driven by a belief that all young persons qualified by ability should have the opportunity to enter higher education.<sup>75</sup> This led to an effective nationalisation and central control of universities, enabling students to attend universities well away from where they grew up.<sup>76</sup> University education was seen as a public good accessible to all citizens on equal terms.<sup>77</sup>

By the 1970’s, and the start of the collapse of the post-war political settlement, successive UK governments needed to grow higher education to produce larger numbers of better educated graduates to ensure that the UK economy would be competitive in global markets.<sup>78</sup> This was bolstered by creating universities from former polytechnics,

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<sup>71</sup> Michael Shattock and Robert Berdahl, “The British University Grants Committee 1919-83: Changing Relationships with Government and the Universities,” *Higher Education* 13 (1984): pp.471-499.

<sup>72</sup> National Committee of Inquiry into Higher Education, *Report 6: Widening participation in higher education for students from lower socio-economic groups and students with disabilities* (1997), available at <https://bei.leeds.ac.uk/Partners/NCIHE/>.

<sup>73</sup> Committee on Higher Education, *Higher Education*, Cmnd 2154, 1962-63.

<sup>74</sup> Anderson Report on *Grants to Students*, Cmnd 1051, 1959/60; Education Act 1962 c 12 (10 & 11 Eliz 2).

<sup>75</sup> Committee on Higher Education, *Higher Education*, p.49.

<sup>76</sup> House of Commons Library, *Student grants, loans and tuition fees*, Research Paper No 97/119 (13 November 1997).

<sup>77</sup> Anderson, “British universities past, present and future,” p.58.

<sup>78</sup> Foskett, “Markets, government, funding and the marketization of UK higher education,” p.29.

which transferred them from local authority control into independent corporations.<sup>79</sup> The concept of the ‘market’ thus began to seriously enter the lexicon as an effective mechanism to manage the education sector. Crucial here is the idea that markets are driven by consumer choice, and choice means competition between providers. Market mechanisms would enhance choice, and competition would drive down unit costs, enabling the education sector as a whole to grow without a proportional increase in public expenditure.<sup>80</sup> This is the ideology underpinning reforms in UK higher education over the past thirty years.

The current university funding regime in the UK is governed by the implications of the *Independent Review of Higher Education Funding and Student Finance*, the ‘Browne Report’, published in 2010.<sup>81</sup> The current model is a ‘quasi-market’, which directly involves the government in many areas, as the judgment was made that a completely free open market in higher education was too great a risk.<sup>82</sup> The Browne Report concluded that everyone who had the potential should have the opportunity to benefit from higher education, which would have the indirect impact of benefitting the British economy.<sup>83</sup> However, in balancing this noble aim, and invoking the language of sustainability, the Report recommended raising tuition fees, with students receiving a loan from the Government to cover fees, and an additional loan to cover cost of living, which would be repaid when the student was earning a sufficient amount after graduating.<sup>84</sup> As a result, the cap on tuition fees was raised to £9,000 in 2010.<sup>85</sup>

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<sup>79</sup> Further and Higher Education Act 1992 c 13.

<sup>80</sup> Foskett, “Markets, government, funding and the marketization of UK higher education,” p.29.

<sup>81</sup> Browne Report, 2010 *"Securing a Sustainable Future for Higher Education: An Independent Review of Higher Education Funding and Student Finance."* Independent Review of Higher Education Funding and Student Finance London. Available at: <http://www.independent.gov.uk/browne-report>, 21 August 2011.

<sup>82</sup> Foskett, “Markets, government, funding and the marketization of UK higher education,” p.30.

<sup>83</sup> R (*on the application of Hurley and Moore*) v *Secretary of State for Business, Innovation & Skills* [2012] EWHC 201 (Admin) [19] (Elias LJ).

<sup>84</sup> *Hurley* [20]-[21].

<sup>85</sup> Higher Education (Basic Amount) Regulations 2010 (SI 2010/3021); Higher Education (Higher Amount) Regulations 2010 (SI 2010/3020). This is not UK-wide. Institutions in Northern Ireland can



Coupled with the rise in fees, universities were not exempted from the cuts in public expenditure carried out by the UK Government (in line with similar moves worldwide in the face of the 2008 financial crisis). The central funds available for higher education have been markedly cut by over 50%, which amounts to a more than £4bn annual reduction in funding.<sup>86</sup> The reduction in public money is made up for through a government loan which is paid to universities via its students. The student, rather than the State, is therefore responsible for the cost of their education. When the higher fees regime was challenged in court, it was made clear that setting up a system where individuals would have to take on a debt in order to pursue the study of a degree neither restricts nor restricts the right of education, guaranteed under European human rights laws.<sup>87</sup> The High Court could not have been clearer: the fact that some persons would be “temperamentally or psychologically disinclined” to attend university due to the fees charged is ultimately irrelevant.<sup>88</sup>

What this means for universities is that more students equates to more money. For many years, successive governments capped the number of students universities could accept every year. From the 2015-16 academic year, this cap will be removed.<sup>89</sup> This means that universities can recruit as many students as they wish to their courses. This may see more and more students being recruited from outside of the UK. Universities, pushed into the market and impacted by globalisation, have taken a global view of higher education. In the 2012-13 academic year, student numbers fell by over 4,000, the first decline in thirty

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charge home student fees of up to £3,685 per year, and Scottish students studying in Scotland have their cost of fees covered by a subsidy from the Student Awards Agency for Scotland. Welsh students pay £3,685 per year for tuition in the UK, as the rest is covered by the Welsh Assembly.

<sup>86</sup> Higher Education Funding Council for England, “HEFCE allocates £3.88 billion to universities and colleges in England for 2014-15” (26 March 2014) available at <http://www.hefce.ac.uk/news/newsarchive/2014/news86801.html>; Higher Education Funding Council for England, “2009-10 funding allocations” available at <http://www.hefce.ac.uk/whatwedo/invest/instituts/annalocns/archive/2009-10/>.

<sup>87</sup> Article 2, Protocol 1, European Convention of Human Rights 1950; *Hurley* [42].

<sup>88</sup> *Hurley* [42].

<sup>89</sup> HM Treasury, *Autumn Statement 2013*, Cm 8747 (London: HMSO, 2013).

years. In the past thirty years, international and EU student recruitment at UK universities has increased from 50,000 to over 300,000.<sup>90</sup> The 2010-2015 Conservative – Liberal Democrat Coalition Government introduced stricter visa regulations for students in April 2012. In part driven by this, many UK universities have opened up campuses overseas, bringing a UK university experience to the student.<sup>91</sup>

This is what Nick Foskett has called a ‘wild environment’. This is one where groups of similar institutions, with different missions and strategies, differentiated on quality through entry grades and research reputation, serve different sorts of markets.<sup>92</sup> Here, each university designs and implements its own strategy and competes with other institutions, and their survival depends upon market accountability.<sup>93</sup> What has been created is a legally endorsed, human rights compliant, highly regulated market. The recent reforms view higher education as a service industry and students are viewed as consumers of a product.<sup>94</sup> Education is no longer seen as identical with the goal of man.<sup>95</sup>

Universities will compete for students, and efficiencies will be encouraged. As part of this marketization, private universities have been established, designed to increase

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<sup>90</sup> HEFCE, *Global demand for English higher education: An analysis of international student entry to English higher education courses*, No. 2014/o8a (April 2014), available at [http://www.hefce.ac.uk/media/hefce/content/heimengland/HEFCE2014\\_08a.pdf](http://www.hefce.ac.uk/media/hefce/content/heimengland/HEFCE2014_08a.pdf).

<sup>91</sup> Eddie Blassa, Anne Jasmana and Steve Shelley, “Visioning 2035: The future of the higher education sector in the UK,” *Futures* 42: (2010) pp. 445-453; John Fielden, *Global Horizons for UK universities* (London: The Council for Industry and Higher Education, 2007).

<sup>92</sup> Foskett, “Markets, government, funding and the marketization of UK higher education,” p.35.

<sup>93</sup> Foskett, “Markets, government, funding and the marketization of UK higher education,” pp.36-39.

<sup>94</sup> Department for Business, Innovation & Skills, *Higher Education: Students at the Heart of the System*, Cm 8122 (London: HMSO, 2011); Mike Molesworth, Richard Scullion and Elizabeth Nixon (eds.), *The Marketisation of Higher Education and the Student as Consumer*, (Abingdon: Routledge, 2010).

<sup>95</sup> Aristotle, *Nicomachean Ethics, Book II* in Aristotle, *Complete Works of Aristotle, Volume I* (Princeton: Princeton University Press, 1984), 1, 1103 a 14-19.

competition and diversity in the higher education sector.<sup>96</sup> Despite this, the upfront public cost of universities remains high. Government is underwriting a significant outlay upon students, who will pay back their loans in later life. Such a move is not without risk. More than £10bn is loaned to students each year. The amount loaned to students will top £100bn in 2018, and will reach £330bn in current prices by the middle of the century.<sup>97</sup>

This picture is complicated further by the repayment structure. Graduates would not repay their loans until they started earning more than £21,000 per year, and the loan will be repaid at a rate of 9% of income above this threshold. Until an individual is in repayment, they will be charged an interest rate of 3% plus inflation on their loan. A tapered interest rate will be charged when income is above the earnings threshold, rising to 3% above inflation when an individual is earning £41,000 per year. The loan's term is thirty years. After this point, any outstanding loan amount will be written off. Despite the rise in fees, there is an inherent risk for successive governments – if enough individuals fail to repay enough money, the student loan industry will become a huge liability. At the end of 2013/14, 58% of all student loans to date were eligible for repayment. 9% had been repaid in full, and 36% were not liable for repayment.<sup>98</sup> In March 2014, the UK Government estimated that 45% of university graduates would not earn enough to repay their student loans in full, after being criticised that they had been underestimating this number.<sup>99</sup> This is close to the 48.6% figure which has been calculated as being the 'cut-off' point for savings under the new regime. If more than this

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<sup>96</sup> Andrew McGettigan, "University Status, Fees, and Funding" *Council for the Defence of British Universities* (15 August 2013) available at <http://cdbu.org.uk/university-status-fees-and-funding/>.

<sup>97</sup> House of Commons Library, "Student Loan Statistics," *Briefing Paper SN/SG/1079* (28 October 2014), p.1.

<sup>98</sup> House of Commons Library, "Student Loan Statistics," pp.6-7.

<sup>99</sup> House of Commons Committee of Public Accounts, *Student Loan Repayments: Forty-fourth Report of session 2013-14* (10 February 2014) HC 886.

percentage of students fail to repay their loans in full, then the new fees system will cost the Government more than the previous regime.<sup>100</sup>

In response to the Browne Report, a huge literature has grown up surrounding the ‘marketization’, ‘corporatisation’ and privatisation of the university sector.<sup>101</sup> Typical of this response is Terry Eagleton, who saw the humanities as about to disappear from universities, as they did not fit into the government’s plans to produce economically active graduates.<sup>102</sup> Yet, as Andrew Wernick has argued, the university as an institution for advancing knowledge and for training the high professions has always been enmeshed in material interests and ideology.<sup>103</sup> The university in the UK has always been part of the State’s interests. The university’s scholars, and the freedom they exercise in this role, should not be conceived as resistant to these processes. Our present difficulties with the university have been built into the system right from the beginning.<sup>104</sup>

### III. The University as a Corporation

The predominant target of recent criticism has been the corporate university.<sup>105</sup> Academic freedom may seem anathema to this corporate world, but it was actually a constituent element of the development of the modern research university. Bureaucracy and markets have controlled and moulded academic freedom, and rationalised academic

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<sup>100</sup> London Economics, *The Higher Education fees and funding reforms in England: What is the value of the RAB charge on student loans for the Treasury to break even?* (March 2014) available at <http://londoneconomics.co.uk/wp-content/uploads/2014/03/Whats-the-breakeven-associated-with-the-reforms-of-Higher-Education-Final-Version-docx.pdf>.

<sup>101</sup> For example, Andrew McGettigan, *The Great University Gamble: Money, Markets and the Future of Higher Education* (London: Pluto Press, 2013).

<sup>102</sup> Terry Eagleton, “The death of universities,” *The Guardian* (17 December 2010), available at <http://www.theguardian.com/commentisfree/2010/dec/17/death-universities-malaise-tuition-fees>.

<sup>103</sup> Andrew Wernick, “Will There Be Universities After the Revolution?” (9 November 2011) available at <http://publicuniversity.org.uk/2011/11/09/will-there-still-be-universities-after-the-revolution/>.

<sup>104</sup> Olaf Pedersen, *The First Universities: Studium Generale and the Origins of University Education in Europe*, Richard North (tr.) (Cambridge: Cambridge University Press, 1968), p.ix.

<sup>105</sup> Williams, “History as a Challenge,” p.64.

life.<sup>106</sup> The university is the legal and historical model for corporations, and academic freedom is a crucial part of the development of the university as corporation.

The legal standing of corporations is inseparable from the history of the American university. In an early case, the Supreme Court defined corporations as having the legal standing of an individual. The corporation claiming those rights in this case was Dartmouth College, established in 1767 as a public corporation.<sup>107</sup> Chief Justice Marshall noted the characteristics of a corporation, it being an artificial being, intangible and being a creature of law. Most important of all, the corporation is immortal and individual, it comprising of a perpetual succession of many persons. Just as a church might continue over time as ‘one body’ without state interference, so too could Dartmouth, and so too could a corporate business.

The university-as-corporation was not an American invention. The university as a self-governing academic institution appeared in the Middle Ages as a corporation. The medieval university was an ecclesiastical corporation – the earliest universities were part of the Church. This is why a medieval lecturer sat in a *cathedra*, a chair. The notion of a professorial chair stems from this.<sup>108</sup> The *cathedra* had been, at first, where a bishop sat to teach. The church where his chair resided became by synecdoche a ‘cathedral’. From these high officials the chairs passed to professors – the funding of professorships originated in medieval canonries.<sup>109</sup> The conception of the imaginative personality of a corporation appeared for the first time in the ecclesiastical writings of Pope Innocent IV.<sup>110</sup> Innocent announced that when an ecclesiastical corporation of the type called a

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<sup>106</sup> William Clark, *Academic Charisma and the Origins of the Research University* (Chicago: University of Chicago Press, 2007), p.417.

<sup>107</sup> *The Trustees of Dartmouth College v Woodward*, 17 U.S. 518 (1819).

<sup>108</sup> Clark, *Academic Charisma*, p.4.

<sup>109</sup> Clark, *Academic Charisma*, p.5.

<sup>110</sup> Maximilian Koessler, “The Person in Imagination of Persona Ficta of the Corporation,” *Louisiana Law Review* 9 (1949): pp.435-449, 437.

*collegium* was supposed to deliver an oath, they could have the oath sworn by a single person representing the college, rather than having oaths sworn by each of the members individually, as the *collegium* in corporate matters figured as a person.<sup>111</sup>

The independence which the university established from the State and the Church in the Middle Ages can be connected to their incorporation. A university in the Middle Ages meant an institution of learning recognised by the Church or the State where the teachers or students were united in guilds enjoying a certain privilege or autonomy, where a 'superior' study such as Law, Medicine or Theology was taught in addition to the Seven Arts and Philosophy, and where definite curricula led to specific degrees.<sup>112</sup> These degree giving schools were known as *studium generale*, denoting that they were open to all students of all Christian nations or all provinces of monastic orders.<sup>113</sup>

The role academic freedom played in the university can be traced to this corporate structure in the High Middle Ages.<sup>114</sup> In 1158, the Holy Roman Emperor Frederick Barbarossa issued the *Authentica Habita* edict protecting scholars.<sup>115</sup> Academic freedom began as a feudal privilege of the professors to authoritatively teach and interpret the scholastic doctrines.<sup>116</sup> Two prototypes of university autonomy emerged, in Paris and Bologna. It was the Parisian model that spread around Europe.<sup>117</sup> In Paris autonomy was

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<sup>111</sup> Koessler, "The Person in Imagination," p.437.

<sup>112</sup> Samuel Eliot Morison, "The universities of the middle ages and the renaissance," *The Rice Institute Pamphlet* 23 (1936): pp.211-245, 213.

<sup>113</sup> Ludwig Huber, "Towards a New *Studium Generale*: some conclusions," *European Journal of Education* 27 (1992): pp.285-301, 286.

<sup>114</sup> Justin Thorens, "Liberties, freedom and autonomy: A few reflections on academia's estate," *Higher Education Policy* 19 (2006): pp.87-110, 92.

<sup>115</sup> Walter Metzger, "Academic tenure in America: A historical essay," In: William R Keast and John W Macy (eds), *Faculty tenure: A report and recommendations* (San Francisco: Jossey-Bass Publishers, 1973), pp.93-159, 94.

<sup>116</sup> Gero Lenhardt, "Europe and higher education between universalisation and materialist particularism," *European Educational Research Journal* 1 (2002): pp.274-289, 275.

<sup>117</sup> M A Stewart, "Academic freedom: Origins of an Idea," *Bulletin of the Australian Society of Legal Philosophy* 16 (1991): pp.1-31.

considered in terms of the freedom to teach, and applied to the professors, not the students. In Bologna, autonomy was vested in the student body, which hired the academics and reigned supreme in every area except for matters relating to the examination of candidates for degrees.<sup>118</sup> Both institutions were subjected to external attempts at control, and academics responded by migrating to other towns. The Great Dispersion of 1229 is an example of this. This interference led to scholarly liberty being acknowledged as a university right, exemplified in Pope Gregory's Papal Bull of 1231.<sup>119</sup>

Despite this French influence, academic freedom as it is commonly understood (especially by many of the views explored by Fish) is largely derived from the nineteenth century German research university. It was the German research university that transformed the functioning of learning and higher education in nineteenth-century Europe.<sup>120</sup> The German model included the developments of graded written examination for undergraduates, seminar papers for graduate and postgraduate students, doctoral dissertations as the rite of passage into professional academic life, the notion of 'publish or perish' for a professorial appointment and the constitution of the library catalogues recording and referencing such publications.<sup>121</sup>

The rationalisation of academia took place within a bureaucratised framework, typified by police science, *Policy-Wissenschaft*.<sup>122</sup> Good policing aimed to see that useful arts,

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<sup>118</sup> Guy Neave, "On being economical with university autonomy: Being an account of the retrospective joys of a written constitution," In: Malcolm Tight (ed.), *Academic freedom and responsibility* (Buckingham: Open University Press, 1988), pp.31-48.

<sup>119</sup> A G Traver, "Rewriting History? The Parisian Secular Masters' Apologia of 1254," In: Peter Denley (ed.), *History of Universities, Volume XV* (Oxford: Oxford University Press, 1997), pp. 9-45, 16.

<sup>120</sup> H S Jones, *Intellect and character in Victorian England: Mark Pattison and the invention of the don* (Cambridge: Cambridge University Press, 2007), p.5; James Turner and Paul Bernard. "The German Model and the Graduate School: The University of Michigan and the Myth of the American University." In: Roger L. Geiger (ed.), *The American College in the Nineteenth Century* (Nashville, TN: Vanderbilt University Press, 2000) pp.221-241; Thomas Albert Howard, *Protestant theology and the making of the modern German university* (New York: Oxford University Press, 2006), p.4.

<sup>121</sup> Clark, *Academic Charisma*, pp.29-30.

<sup>122</sup> Clark, *Academic Charisma*, p.11.

sciences, and crafts were learned, that resources were not wasted, and to make sure that productivity was maximised.<sup>123</sup> Universities, just like in the UK during the last hundred years, were treated like any other form of economic production – students were to be made useful in the future for the State, and moulded into upright citizens.<sup>124</sup> Within a structure policed by government ministers, and regulated by the burgeoning capitalist market, German universities developed an infrastructure of entrepreneurial activity.

Academic freedom was to be harnessed and developed by state supervision and the market to aid productivity.<sup>125</sup> Academic fame would aid student recruitment, which in turn necessitated the production of further academic fame. Academia was thus inserted in the market in the Germanies; ministries recognised academic fame, which was left to the market in forms of expert and peer review.<sup>126</sup> Academic freedom was shaped by the concepts of *Lehrfreiheit* and *Lernfreiheit*, associated with the reforms of Wilhelm von Humboldt.<sup>127</sup> In reality, Humboldt's reforms were synthesised with Enlightenment traditions at the end of the nineteenth century, rather than being influential from their writing a hundred years previously.<sup>128</sup> Once they were accepted, German universities embraced three interrelated principles: *Lehrfreiheit*, *Lernfreiheit* and *Freiheit der Wissenschaft*.<sup>129</sup> Importantly, all these elements supported the university's mission to help develop the State's economy.

By *Lehrfreiheit* the German educator meant two things. Firstly, the university professor was free to examine bodies of evidence and had to report his findings in lectures or

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<sup>123</sup> Clark, *Academic Charisma*, p.12.

<sup>124</sup> Clark, *Academic Charisma*, pp.12-13.

<sup>125</sup> Joseph Ben-David, *The Scientist's Role in Society* (Chicago: University of Chicago Press, 1984).

<sup>126</sup> Clark, *Academic Charisma*, pp.13-14.

<sup>127</sup> Stephen R Goldstein, "The asserted constitutional right of public school teachers to determine what they teach," *University of Pennsylvania Law Review* 124 (1976): pp.1293-1357, 1293.

<sup>128</sup> Robert Anderson, "Before and after Humboldt: European universities between the eighteenth and nineteenth centuries," *History of Higher Education Annual* 20 (2000): pp.5-14, 12.

<sup>129</sup> Walter Metzger, "Profession and constitution: Two definitions of academic freedom in America," *Texas Law Review* 66 (1987): pp.1265-1322, 1269.



publications; he enjoyed freedom of teaching and inquiry as a member of the academic profession. Secondly, it denoted the paucity of administrative rules within the teaching system, to enable the academic to design their own syllabus, and not require prior approval.<sup>130</sup> Academic freedom was the atmosphere of consent that surrounded the whole process of research and the institution which it occurred within.<sup>131</sup> This led to academics working together to improve their academic credit and reputation by mutually citing each other's work.<sup>132</sup> Techniques of academic self-registration and self-promotion flourished, and fame became important to attract students.<sup>133</sup> This aspect had antecedents in the Parisian model of universities.<sup>134</sup>

*Lernfreiheit*, or 'learning freedom', represents a disclaimer of any university control over the students' course save for that needed to prepare them for their examinations.<sup>135</sup> This had antecedents in the Bolognese model of universities.<sup>136</sup> The final aspect, *Freiheit der Wissenschaft*, reflected the right of academic self-governance and institutional autonomy of the university.<sup>137</sup> The Humboldtian model was a unity of teaching and research, accepting the need for academic freedom to be enjoyed by academics and students, coupled with institutional autonomy from the state, exercising internal self-governance.<sup>138</sup> We can therefore read academic freedom as part and parcel of the development of the university within modern capitalism. Academic freedom reinforced the aims and objectives of the university-as-corporation. Academic freedom was the freedom to do one's job as an academic, within an institution which aimed to bolster the State's economic development.

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<sup>130</sup> Richard Hofstadter and Walter Metzger, *The development of academic freedom in the United States* (New York, Columbia University Press, 1955), p.368.

<sup>131</sup> Hofstadter and Metzger, *The development of academic freedom*, p.386.

<sup>132</sup> Clark, *Academic Charisma*, p.373.

<sup>133</sup> Clark, *Academic Charisma*, pp.377, 379.

<sup>134</sup> Karran, "Academic Freedom," p.267.

<sup>135</sup> Metzger, "Profession and constitution," p.1270.

<sup>136</sup> Karran, "Academic Freedom," p.267.

<sup>137</sup> Metzger, "Profession and constitution," p.1270.

<sup>138</sup> Karran, "Academic Freedom," p.268.

Today however, the nature of capitalism has shifted; neoliberalism is now the dominant economic ideology. In *The Birth of Biopolitics* Michel Foucault analysed the passage from the liberalism of the eighteenth century to the German ordoliberalism of the early twentieth century to American neoliberalism which developed in the late twentieth century.<sup>139</sup> In so doing he revealed the mechanisms and principles that underlie contemporary capitalist society. These mechanisms, or apparatuses, have promoted insecurity, inequality and individualisation as part of ensuring the conditions of power to exercise a hold over conduct.<sup>140</sup> Neoliberalism intervenes to promote multiplicity, differentiation and competition of enterprises and to incite and constrain each individual to become an entrepreneur of him or herself and become 'human capital'.<sup>141</sup> The shift from liberalism to ordoliberalism was defined by the shift from exchange to competition; the logic of competition is generalised in neoliberalism to apply to the workings of all apparatuses of the state as well as subject considered as autonomous individuals. The market makes economic activity the general matrix of social and political relations, but it focuses not on exchange, but competition.<sup>142</sup> Whereas exchange related to equality, competition relates to inequality.

What this means is that corporations (including universities) no longer create products to sell to passive consumers, but they shape and create the social world in which they exist.<sup>143</sup> One must start from consumption rather than production; the capture of consumer markets (seen in the positioning of students as 'consumers' that need

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<sup>139</sup> Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978-1979*, David Macey (tr.) (Basingstoke: Palgrave Macmillan, 2010).

<sup>140</sup> Maurizio Lazzarato, "Neoliberalism in Action: Inequality, Insecurity and the Reconstitution of the Social," *Theory, Culture & Society* 26 (2009): pp.109-133, 110.

<sup>141</sup> Foucault, *The Birth of Biopolitics*, p.226.

<sup>142</sup> Foucault, *The Birth of Biopolitics*, p.12.

<sup>143</sup> Maurizio Lazzarato, *Les révolutions du capitalisme* (Paris: Les Empêcheurs du Penser du Rond/Le Seuil, 2004), pp.93-151.

capturing through recruitment) is now the main business of corporations.<sup>144</sup> This in turn has changed the nature and quality of work, forcing us to question the classic definition of work and workforce. The worker's productivity and subjectivity have to be made susceptible to organisation and command.<sup>145</sup> Workers become 'active subjects' in the coordination of the functions of production.<sup>146</sup> This leads to the distinction between work and leisure time being blurred, with work-time expanding to fill "the entire time of life".<sup>147</sup> Living and producing therefore become indistinguishable.<sup>148</sup> We are all empowered to take charge of our careers and become entrepreneurs within our delimited fields of production.

This new conception of work has been termed by Maurizio Lazzarato 'immaterial labour'. Traditionally, labour tended to "produce the means of interaction, communication and cooperation for production directly".<sup>149</sup> Contrarily, immaterial labour creates immaterial products,<sup>150</sup> and produces "the informational and cultural content of the commodity".<sup>151</sup> Immaterial labour, as a result, involves a series of activities not normally recognised as 'work'. These activities involve defining and fixing cultural and artistic standards, fashions, tastes, consumer norms, and public opinion, and includes linguistic and intellectual activity.<sup>152</sup> All these activities are, in Lazzarato's terms,

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<sup>144</sup> James Muldoon, "Lazzarato and the Micro-Politics of Invention," *Theory, Culture & Society* 31 (2014): pp.57-76, 68.

<sup>145</sup> Maurizio Lazzarato, "Immaterial Labor," in: Paolo Virno and Michael Hardt, *Radical Thought in Italy: A Potential Politics* (Minneapolis, MN: University of Minnesota Press, 1996), pp.133-147, 147.

<sup>146</sup> Lazzarato, "Immaterial Labor," p.135.

<sup>147</sup> Michael Hardt and Antonio Negri, *Multitude: War and Democracy in the Age of Empire* (London: Penguin Books, 2005), p.111.

<sup>148</sup> Hardt and Negri, *Multitude*, p.146.

<sup>149</sup> Lazzarato, "Immaterial Labor," p.147.

<sup>150</sup> Hardt and Negri, *Multitude*, pp.108-109.

<sup>151</sup> Lazzarato, "Immaterial Labor," p.133; Ben Trott, "Immaterial Labour and World Order: An Evaluation of a Thesis," *ephemera: theory & politics in organization* 7 (2007):pp.203-232, 221.

<sup>152</sup> Hardt and Negri, *Multitude*, p.108; Michael Hardt, "Affective Labor," *boundary 2* 26 (1999): pp.89-100, 97-98.

“mass intellectuality”.<sup>153</sup> They have modified the role and function of intellectuals and their activities within society. Mass intellectuality has been created out of the demands of capitalist production and the forms of ‘self-valorisation’ that the struggle against work has produced.<sup>154</sup>

Lazzarato’s analysis of capital and labour can be utilised here to illustrate the role of academic freedom today within this neoliberal arena. For Lazzarato, capitalism has no inherent logic. There is no independent and autonomous law driving capital forward. Its historical existence must be understood through the continual construction and rearticulation of its basic conditions of possibility through discursive and non-discursive apparatuses of power.<sup>155</sup> Discursive apparatuses relate to control over statements, enunciations and what a subject may say. Contrarily, non-discursive apparatuses refer to the mechanisms that define, shape and intervene in what a subject may do.<sup>156</sup> Lazzarato sees discursive apparatuses as defining what is important, striking or interesting, and determine and construct the problems of a society at a particular time. Lazzarato, who includes universities specifically as producers of discursive statements, argues that such apparatuses delimit what is possible.<sup>157</sup>

In this manner, I contend that what is claimed as academic freedom consists of discursive practices (mass intellectuality) that produce commodities that can be packaged and marketised, be they ideas (in the form of publications as academic currency), or courses (which are used to recruit students). Discursive views of what constitute the rights of academics are co-opted and transformed into economically productive forms of behaviour and practice. The defence of academic freedom as necessary for the economic

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<sup>153</sup> Lazzarato, “Immaterial Labor,” p.133.

<sup>154</sup> Lazzarato, “Immaterial Labor,” p.133.

<sup>155</sup> Lazzarato, *Les revolutions du capitalisme*, p.114.

<sup>156</sup> Lazzarato, *Les revolutions du capitalisme*, p.82.

<sup>157</sup> Lazzarato, “Neoliberalism in Action,” pp.112-113.

development of the State through higher education is being extended in modernity and neoliberal economics. Work produced by academics (including this article), no matter how ‘radical’ in the sense meant by Butler and Giroux, becomes part of capital’s mode of operation. Academics are part of a corporation which has production at its heart; academic freedom becomes part of the process of production at universities.

In this sense, Stanley Fish is correct to claim that academic freedom should be understood as nothing more than the freedom to do one’s job. We have, as members of staff of a corporation, the power and freedom to fulfil our job description, which is today (and has been for centuries) designed to feed into the university’s corporate aims. Just because our corporation produces immaterial commodities, in the form of ideas, rather than cars, foodstuffs or computers, does not mean that the freedom for the worker is any different, or that academics should have special privileges over and above the population at large. This is in line with what Foucault himself wrote – that universities are a form of mass media which should not provide a reserve for scholars threatened by modern capital and information flows.<sup>158</sup>

#### **IV. Concluding Remarks**

Where then does this leave us today? My point in defending Fish’s deflationary account is not to dismiss all existing opposition to the university’s corporatisation. Nor is it to suggest that no resistance or opposition to managerial and corporate strategies is possible. My aim here is to refocus the debate surrounding academic freedom. Too much of the debate ignores, or effaces, the intrinsically corporate nature of the university. It is not possible to think of the university as a completely free place of enquiry because this has always been enmeshed in strategic interests.

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<sup>158</sup> Michel Foucault, “The Masked Philosopher,” in Michel Foucault, *The Essential Works of Foucault, Volume 1: Ethics, Subjectivity and Truth*, Paul Rabinow (ed.) (New York, NY: The New Press, 1997), pp.321-328, 326.

What I suggest here is a modest proposal. By accepting the inherently corporate, politicised nature of the university, it may be possible to protect the academic's freedom to academicise. Idealised notions of academic freedom, and of education, ignore not just the reality of the university today, but also the reality of the history of the university. They are based in a history and tradition which has never existed. As such, a dose of realism is needed. This realism is not pessimism. It is a pragmatic political reaction to the reality of today. A professional body for academics, with the possibility to regulate standards and ethics, has the potential to operate as a counter-weight to the pressures of marketization in higher education. The very existence of such a body accepts the various political and economic pressures that academia is subject to; it is not possible for academics to exist in an idealised, atomised world of teaching and research. Such a body also has the potential to provide its members a voice, which can be used as a political mechanism to oppose or moderate reforms of the university which members deem injurious to their interests.

However, even more important than this is the question of what interests such a body would represent. Instituting such an organisation would necessitate academics to confront key questions: what do *we* understand academic freedom to be, what are the limits to our *academic* practices, and what exactly is the point and purpose of a university, given its corporate background and history. Such a discussion is necessary, in order to stop us (in Foucault's terms) from treating academic freedom as an imprecise, secretive notion, something we all rely upon instinctively but never define precisely. This debate is crucial, now more than ever.