

Money: A Creature of Law or a Creature of the State?

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Good afternoon,

It's an absolute pleasure to be here. My deepest thanks to Fadhel, Matt, Sayid, the Binzagr Institute, Denison University, and to everyone who has contributed to make this conference happen.

I stand before you today as a card-carrying, albeit self-invited, member of the Modern Money Movement.

But it doesn't seem like that long ago that I had no formal affiliation with MMT, and was just another 20-something law student who, in an attempt to make sense of the 2008 Crisis, accidentally fell down into the intellectual rabbit hole of debates, personality politics and flame wars known as the econo-blogsphere.

All of that changed, however, when, on a cloudy Wednesday in April of 2012, I impulsively decided to attend a Modern Money-inspired conference at the Ford Foundation in New York rather than endure yet another lazy lecture, by my lazy Torts professor, on the allegedly "profound" insights of the Law and Economics movement.

My decision to attend this conference wasn't a particularly strategic or well thought-out decision. Rather, I was simply interested in finally seeing in person some of the quasi-mythical-names whose words I had stayed up reading on so many late nights. But as luck would have it, I ended up on a lunch table next to my friend and now co-presenter Pavlina, or do I get to call you Pav now?

That lunch ultimately resulted in our first MMT-inspired and not-very-creatively titled seminar series at Columbia Law School, which, in turn, led to the birth of the Modern Money Network, and with it, a seemingly endless succession of seminars, writings, reading groups, facebook arguments, and late night conspiratorial planning sessions.

So my personal road to MMT, while not as ideologically turbulent as that of our benefactor Sayid, was similarly informal, and owes a similar debt to the information-democratizing power of new

media like Youtube and Twitter.

Today, I think I can say quite confidently that I am in this particular struggle for the duration. And although the Modern Money Network is still small, scrappy, and eternally cash-strapped, I'm optimistic about our future.

I won't go into detail about our operations – you can see what we're up to at our website, www.modernmoneynetwork.org. But to give one quick example: our YouTube channel, which at present contains only a fraction of our total video archive for cost reasons, has received over 170,000 views since it was first established.

Of course, compared to Pavlina's famous inequality chart, Scott's sectoral balances chart that Randy showed yesterday, Bill Mitchell's millions of daily blog hits, Bill Black's prolific interview calendar, or Stephanie Kelton's visibility at the Congressional Budget Office, 170,000 YouTube views is a drop in the social media ocean.

But as a volunteer-based, largely self-financed student organization that is not yet four years old, I hope I'm not being too presumptuous when I say we've managed to make a bit of headway. And we're only looking forward.

At any rate, my goal today is not to advertise the Modern Money Network.

Rather, I want to make the case, or at least, give a summary of the case, in favor of a legal approach to framing and thinking about Modern Money.

But before I go further, however, I want to make two confessions.

My first confession is that although I'm here to talk about money, I'm not an economist. I studied a bit of political economy as an undergraduate, and spent more time in law school reading and thinking about economics than I would ever admit to my professors. But as a general rule I personally don't construct or deconstruct charts, graphs, time-series or algebraic models, or do anything else that could be fairly described as "crunching the numbers."

So I have, at best, an outsider's understanding of the economist's quantitative approach to economic analysis.

The second confession is that although I'm here wearing a lawyer's hat, I *am also not yet* a lawyer.

Or to be accurate, I should say, I *am* a *not-yet* lawyer.

Which is not to say that I don't have something to say about the law - my formal education and practical experience have undoubtedly given me at least some degree of an insider's perspective about its logics and its cultures. Moreover, I am definitely more of a lawyer than an economist, which for the purposes of this conference, is probably the important distinction.

But until I gain admission to the New York Bar – i.e. in MMT language, until I finish paying my credential tax– I cannot represent myself as a proper lawyer. So, for our purposes, let’s just call me a lawyer-*ist*.

Now, this may sound like a silly semantic distinction, but it like so many silly semantic legal distinctions, it has real practical effects. In this case, being a lawyerist rather than a lawyer means that if the U.S. had another government shutdown tomorrow, and I wanted to try to bring a lawsuit against the Treasury Secretary for violating the Constitution by not Minting the Coin, I would be in exactly the same position as Rob Paranteau is in California with the Tax Anticipation Notes, that is to say, I would have to go out and hire an actual lawyer. Which is a big problem, given the level of understanding of the average lawyer about money, and I’ll get back to that in a second.

I should note at this point, that unlike me, Bob is an actual lawyer. So I trust he will not let me get away with saying anything too outrageous on behalf of our profession.

And not only is Bob a lawyer, but he is a law professor, which means he also makes lawyers. And it’s really great that we have professors like Bob who ‘get it’ at places like Cornell, because when it comes what Saeid suggested yesterday about targeting the street-level government bureaucrats in the federal government, a lot of that involves institution-, culture-, and relationship-building, which is lawyer work, and you typically don’t get your foot in the door in those spaces without elite legal credentials.

The bad news, however, is that we can’t simply use keystrokes to generate a million lawyers like Bob. We have a system that produces lawyers, but the number of them that come out like him is very small. And if you know anything about the sociology of law schools, this isn’t much of a surprise.

Bob once described himself to me as someone with a “private interest head and a public interest heart,” which to me is the legal equivalent of Minsky saying he has a Wall-Street view of money. And if you’ve ever been to a law school, you’ll understand why that’s such a fragile space to occupy. Because most of the public interest-oriented legal minds don’t want to spend much time learning about finance, even though many of them end up working, at least for a while, in BigLaw firms, and so get an implicit education in capitalism from that perspective whether they realize it or not. And most of the private interest-oriented ones who do know about finance are there to make money and/or gain power, so they aren’t going to be blowing the whistle anytime soon.

But the problem is deeper than merely the student culture. Despite the huge proliferation of law and finance professors in recent years, and the general ubiquity of economics concepts in the legal curriculum, the state of legal scholarship around money is dismal, as Roy Kreitner noted in his 2012 Paper “the Legal History of Money.”

In particular, Kreitner made the following observation:

“One might have expected that the legal history of money would be a well-developed field, with an accepted corpus of primary and derivative works and a set paradigm of problems and debates with well-defined camps. ... But in fact, the legal history of money is a field in the making.”

“... There are works but no canon; there is no accepted set of questions that a legal history of money must answer or even ask, no basic division into theoretical outlooks around which to organize a field.”

“Imagine a student comes to office hours and wants to study the legal history of contract, tort, or marriage. One barely has to think to get her started in the right direction, and there may even be encyclopedia articles from which to draw initial bibliographies.”

“Nothing of the sort exists for the legal history of money – at least, not yet.”

Now, there are some green shoots that have begun sprouting since the crisis, and it's worth noting here, in addition to Bob's work with his colleague Saule Omarova at Cornell, the work of Christine Desan at Harvard on the Money as a Legal Institution, and Katharina Pistor on the Legal Theory of Finance. But overall the intellectual landscape remains very bleak.

So that's the condition of our legal union, so to speak. And given that condition – given that the Law doesn't want to come to Modern Money, at least at the moment, I would like to suggest that what we need to do is bring Modern Money to the Law.

My basic argument, put as simply as I can for now is this: now that MMT has progressed from being ignored, to being ridiculed and now, to being treated with the cautious respect of a worthy adversary, it's time to move beyond the hierarchical morality and simplifying rhetoric of 'the state,' and towards the horizontal morality and complicating rhetoric of 'the law.' Or, to borrow my own term, it's time for us as a movement to become, if not lawyers, at least lawyerist-economists.

Let me briefly explain a little bit what I mean by that.

First, while MMT views itself as a state theory of money, it is, in fact, more broadly, a legal theory of money. This point – that money is a legal institution - was made explicitly by many early proto-developers of MMT.

John Maynard Keynes: *“The State, therefore, comes in first of all as the authority of law which enforces the payment of the thing which corresponds to the name or description in the contracts. But it comes in doubly when, in addition, it claims the right to determine and declare what corresponds to the name, and to vary its declaration from time to time – when that is to say, it claims the right to re-edit the dictionary.”*

And is important for three reasons.

G.F. Knapp: *“Money is a creature of law. A theory of money must therefore deal with legal history.”*

First, as Harvard Law Professor Christine Desan has so brilliantly demonstrated with her scholarship on the legal history of American and British money, the political dynamics and social

narratives that drive government activity vary widely depending on their legal structures, which are case-specific and dependent on historical context.

Second, as Columbia Law Professor Katharina Pistor and her project colleagues emphasize, legal power is not perfectly analogous with state power.

Indeed, law is arguably much deeper and broader than the state.

Here I want to quote a 2008 paper by Pistor et al called “Legal Institutionalism, Capitalism and the Constitutive Role of Law”:

“At this early stage of its development, legal institutionalism involves claims concerning the nature of social reality, at least in modern, developed socio-economic systems. It does not yet provide a full theoretical approach, but it does provide some tentative and limited indications concerning theory and policy.

There are two primary ontological claims. The first concerns the nature of law. It is argued that law (at least in the fullest and most developed sense) necessarily involves both the state (broadly construed to refer to a realm of public ordering) and private or customary arrangements. Reduction of law to just one of these two aspects is mistaken. Law involves an institutionalized judiciary and a legislative apparatus.

The second ontological claim is that law – understood as an outcome of both state intervention and private ordering – accounts for many of the rules and structures of modern capitalist society. Consequently, law is not simply an expression of power relations, but is also a constitutive part of the institutionalized power structure, and a major means through which power is exercised. This second claim applies primarily to modern developed capitalist economies. Underdeveloped societies, where the rule of law is compromised by a degree of arbitrary power, may depend even more on propaganda and coercion, and less on the operation of legal rules. But even in these cases, at least in the modern world, law still plays an important role.

Models of the spontaneous development of law typically rest on relatively small numbers of agents and underestimate the complexities and uncertainties in developed capitalism. The law made by organs of the state, including judges and legislatures, while it may itself reflect customary experiences, is a means of overcoming this complexity and uncertainty.

Given these claims concerning the nature and central role of law in capitalist economies, legal institutionalism upholds that an understanding of legal rules is essential for economists and other social scientists. This is not to say that law is everything. Not all social rules are laws. As an evolved but also codified system facing a complex and changing economy, the law is necessarily incomplete and sometimes self-contradictory. There are important areas of social life that rely on frequent interpersonal action rather than the anonymous generalities of law. Nevertheless, in analyzing modern capitalism an understanding of the role of law is vital.”

So by starting its story with the assumption of a fully functioning state, and conflating social action via the state with social action via the law, MMT opens up itself to criticism of theoretical under-inclusivity, and even more problematically, unwarranted guilt-by semantic association for

the sins of states and state policies that MMT in no way advocates or defends.

I say unwarranted because as people like our own Rob Parenteau have demonstrated with his Austro-MMT synthesis, it's possible to start from a highly state-skeptical perspective and nevertheless end up at MMT's progressive and socially just conclusions about employment, money, and the central role of the state in the 21st century economy.

Third, it is important that money is a legal institution because law is not just a social technology, but also a mode of social action.

So in that sense, everyone here who has chosen to make change through persuasion and education rather than violence is already engaged in lawyering in the broader sense.

And as a mode of social action, law has some special properties that distinguish it from other ways of affecting public policy. One is that law is, contrary to what many people believe, an incredibly weak mode of social control.

One of my law professors used to say there is more social control in table manners than there is in most laws. But it is in that weakness that we find both the beauty and the morality of the law as a mode of social action.

Another is that, unlike military or economic power, legal power can, in certain situations, be wielded to great effect, even under conditions of vast resource disparities, provided those wielding it are sufficiently smart in how they go about doing so. One only needs to look at class action tort lawsuits against car manufacturers or cigarette companies to get an idea of what I mean.

And the good news is that because legal systems are also social technologies, they have their own evolutionary momentum, so there are always new opportunities for creative intervention.

Yet another, and perhaps the most important, is that legal power can be wielded both in service of, and in defense against, the state. And we don't need to go back to the Magna Carta to get an idea of what how important such a defense can be.

Take, for example, the U.S. government surveillance programs that were revealed by Edward Snowden. Now, regardless of whether you think these programs are necessary to promote national security, it is undeniable that the way in which the U.S. government operated in enacting them, with its secretive FISA court and the open perjury to Congress of Director of National Security James Clapper, this way involved a fundamental breakdown in the rule of law. So even if this policy was good for the State, it was bad for the law.

So that's the basic outline of my argument: 1. A state is not always a state is not always a state, 2. The Law is bigger than The State, and 3. Revolutions based on law can avoid kinds of injustices that typically accompany revolutions based on violence or pure majoritarian populism.

Now, one response you might give to this is: that's all very well, but we are talking about economic theory, and the state is a useful shorthand term because we can't go into all of this detail

every time we talk about modern money. And I hear you, I do.

But I would like to suggest that at this phase of the conversation - as we turn our attention to the questions of framing and the practical challenges of implementation that gain salience as MMT nears the end of its 20-year marathon and enters the stadium for the last few laps of the race – at this phase, holding on to the concept of the ‘state’ as a single, unified entity is as reductive from a legal point of view as ‘representative agent’ modeling is from an economic point of view.

And we need to go beyond this reduction, because continuing to rely on the fiction of a single entity called ‘the state’ at this stage in the conversation opens MMT up to attacks and criticisms that can otherwise be avoided, and simultaneously protects space for our enemies in which to continue making counter-arguments that are facially plausible, but under the surface, completely incoherent.

So there are problems with the approach.

Second, in addition to opening up weaknesses in the argument, the other side of the coin, so to speak, is that there is a huge evidentiary benefit to grounding your case in the concrete granularities of the law. In addition to making you look very serious and knowledgeable, which is a value in itself in the court of public opinion, you can actually point to a law on the books, and force the other side to acknowledge its existence, or admit they are living in some other land than reality.

To give you one example, many conservative economists love to speculate at length about how a free market might function without taxation, and posit as both a thought experiment and modeling premise the idea of a ‘free market’ without state intervention.

But you can’t have a market without property, contract, accounting rules, or a system for creating and destroying money. The game of Monopoly doesn’t mean anything without the rulebook.

And as Warren Mosler’s debate with Austrian Bob Murphy revealed, and my subsequent post-mortem of that debate at New Economic Perspectives emphasized, only the most radical fringe of the other side are willing to go as far as to handwave away the role of centrally-enforced property rights and contracts in the maintenance of a market system.

Because when they do, they come across as foolish, and deservedly so.

So by pivoting from the fuzzy binary of ‘the market’ vs the ‘state,’ to a more concrete discussion of property titles and contractual enforcement, it’s possible to shut down that stupid line of thinking before it even gets going, or at the very least, drive a big wedge between the nightwatchman state and anarcho-capitalist or ‘market anarchist’ wings of the pro-‘free market’ guys, to the point where they are so fragmented that each wing can be, to borrow a phrase, drowned in the bathtub.

All which is to mean, that from the perspective of the lawyerist-economist, or the economist-lawyerist, saying that “money is a creature of law”, or in the modern context, money is a creature

of state law, is not the conclusion of our inquiry, but its starting premise.

Another response is that it's simply not as rhetorically persuasive to talk about law, compared to talking about the state. I also want to preemptively push back against this.

In particular, there is a stark difference in the level of intellectual and moral confidence by which the average person approaches social questions, when they are posited as questions of economics versus questions of law. At least, this is true in the US – where I come from, the average person on the street would be lucky to know the name of one High Court Justice, yet alone carry a copy of the constitution in their pocket.

But in the US, this difference is stark, and to see what I mean, one only has to compare the conversation around Hobby Lobby, or the Citizens United, or the ACA, to the conversation around the Federal Reserve's interest rate hike. Law has an undeniably technocratic element, but it also lives in our gut, and when the public writ large feels like the law on the books goes against the law in their gut, well, that's social power right there.

And it's that social power that we are going to use to defeat NAIRU, to defeat the myth of the Job-Creators. Not because it's just immoral, or because it's bad economics, but because we are a nation of laws, and it's illegal. Or, at least, it should be. And if you accept the basic MMT premise that unemployment is a function of taxation, combined with exclusion from the means of producing that which can be used to pay taxes – that is to say, if you accept the basic MMT premise that the state creates unemployment through its laws, then it's possible to stand in favor of policies like a JG from the perspective of legal justice.

I have one last point to make, but before I do I want to make two clarifications.

The first clarification is that my aim here, today, is not to criticize the heroic work of those in this room, or of earlier generations of economists that got us where we are, but rather to offer a friendly provocation; to suggest a new direction for our movement at what I consider to be a pivotal turning point in history. I am asking us to bury the state, or at least, to dethrone it, but I am not asking us bury or dethrone the core insights and claims of MMT, which I think are correct.

The second clarification is that I am not suggesting that we excise excising state power from our analysis, or that we give up on state institutions as the primary venue for political struggle.

Rather, what I am suggesting is the opposite – that we, as a collective, embrace the challenge of getting more granular, more nuanced about the role of law vs the role of the state, and that we complicate some of the conceptual binaries upon which conventional rhetoric of the state relies.

For example, instead of describing the monetary system in terms of vertical and horizontal money creation, of public and private, of top-down and bottom-up, we can start talking instead in terms of contractual formation, of constitutional and administrative principles, of regulatory design, of institutional transparency and accountability, of jurisdictional sovereignty, and most importantly, of who has, and should have, access to legal versus other kinds of power.

To give just one example: there is a large fight today taking place in the United Kingdom about whether or not we should eliminate central bank independence and absorb it into the Treasury. This is framed, in large part, as a debate over democracy. But in reality, it is a debate over the architecture of the administrative state. And there has been a lot of legal ink spilled on that question, but you'd never know it if you just focused on the Central Bank-Treasury debate because you can count the number of lawyers in the world who think seriously about central bank architecture on two hands.

Which brings me to my last point, which is this: while it would be great if the lawyers could pick up the MMT ball and run with it, and people like Bob and I are certainly doing our best to make this happen, I'm afraid that the legal cavalry is not going to come in time.

Indeed, the monetary economists have been trying to get the message to us lawyers for years, going back to Innes' publication of his two great articles on *What is Money* and *What is Credit* in the *Banking Law Journal*, and Ruml's great speech *Taxes for Revenue are Obsolete* to the American Bar Association. But we haven't been listening, and generally speaking, we seemed determined to continue not to.

So I'm sorry that we've let you down.

I'm sorry on behalf of the law students for the fact that while the crisis has inspired a global movement amongst economics students, seen clearly in organizations like the International Student Initiative for Pluralism in Economics, we remain paralyzed, even as our own typical career model crumbles around us.

I'm sorry on behalf of the legal practitioners for our apathy, timidity, and blindness in the lead up and response to the most recent crisis, and not just for our failure to enforce the law when it comes to the systemic fraud that, if not at the heart of the crisis, undoubtedly exacerbated it.

And most of all, I'm sorry on behalf of the legal academy for leaving you alone to shoulder the entire intellectual burden of telling the truth about money in public discourse. Because that's what you're doing, really: telling the truth.

You know, we used to have a course in law school called Law & Economics, which is the Gary Becker and Richard Posner-inspired neoliberal, microeconomic approach to legal regulation that underlies the Cost-Benefit-Analysis practices you heard about earlier. They used to have a specific course called Law & Economics, but they don't have to do that anymore because now the neoclassical economic ideology embedded across the entire curriculum.

Which is kind of funny, but also tragic.

And I've talked for long enough so I'll end with this: when the late and dear Bob Prasch came to Columbia Law School in 2014 for a seminar on the disparate impact of unemployment on racial, gender and age minorities, he made a comment that stuck with me, which is that the economics departments at U.S. universities actually evolved out of the law schools.

So on behalf of the law students who were left behind – of which I was one until quite recently - I'd like to say to the economics profession, and those working in the Modern Money tradition in particular: please come back. Like the Ents with the Entwives, I don't know what we did to drive you away. But whatever it was, we are sorry. We need you, we miss you, and we want you to come home.

Thanks.