

Overall, the major U.S. government organs have perpetuated an unfair labor system rooted in false scarcity. To contest constraints on firms as labor market interventions is to miss the legal and economic reality. Nothing about current employment policy is “natural” or “free.” No ironclad rules prevent us from transforming the system, from ensuring public employment just as we ensure public education and other programmatic rights. In a better future, we can confidently design a Job Guarantee program whereby we provide work for everyone who wants it.<sup>184</sup> This program would be no more or no less of an “intervention” than maintaining the status quo.

### 8. Money Isn’t Scarce—It’s Infinite.

Rohan Grey

The founders of the Chicago School of Law & Economics set out to improve legal decision-making by incorporating economic ‘principles’ into the law.<sup>185</sup> From the outset, they envisaged this interdisciplinary flow of ideas to be mostly unidirectional, on the grounds that the discipline of ‘economics,’ defined narrowly around contemporary neoclassical microeconomics, had far greater insights to offer the law than vice-versa.<sup>186</sup> However, notwithstanding Law & Economics’ success in transforming much of contemporary jurisprudence in its image, it remains premised on foundational assumptions that on close inspection, are revealed to be legally incoherent.

Perhaps the most egregious premise of contemporary neoclassical microeconomics, and thus Law & Economics, is that of capital scarcity. One of the first lessons economics programs impart to their students is that “there’s no such thing as a free lunch.”<sup>187</sup> Indeed, for many, the study of “economics” is defined entirely as the study of the allocation of scarce resources.<sup>188</sup> Under such a view, the

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(1st Cir. 1981).

184. See, e.g., L. Randall Wray, et al., *Public Service Employment: A Path to Full Employment*, Levy Economics Institute of Bard College, Research Project Report, (Apr. 2018), [http://www.levyinstitute.org/pubs/rpr\\_4\\_18.pdf](http://www.levyinstitute.org/pubs/rpr_4_18.pdf).

185. See, e.g., Richard A. Posner, *Values and Consequences: An Introduction to Economic Analysis of Law*, in CHICAGO LECTURES IN LAW AND ECONOMICS 189 (Eric Posner ed., 2000).

186. *Id.* at 194 (“Practices, institutions, bodies of law that seem wholly disparate from the standpoint of orthodox legal analysis are seen to involve the identical economic issue. Whole fields of law are interchangeable when viewed through the lens of economics . . . . Economics reveals a ‘deep structure’ of law that exhibits considerable coherence.”).

187. See, e.g., N. GREGORY MANKIW, *PRINCIPLES OF ECONOMICS* 4 (6th ed. 2012).

188. See WILLIAM BOYES & MICHAEL MELVIN, *FUNDAMENTALS OF ECONOMICS* 19,

baseline “equilibrium” state of the economy is one in which such scarce resources are fully utilized, and distributional questions can be reduced to zero-sum transfers. Social problems like unemployment are defined as economic “imperfections,” mere abnormalities or deviations from an otherwise optimal baseline. The paramount question becomes: which Peter should be robbed in order to pay Paul?<sup>189</sup> At the same time, money—the medium via which economic activity is primarily conducted—is treated as little more than a veil over the value of the finite real goods and services being transacted.

On first glance, the idea of economic scarcity seems reasonable, especially when applied to the realm of real, physical things like factories, humans, and the environment. However, it falls apart when we consider property interests of economic value that are not tangible or finite, including tradeable information, intellectual property rights, and, perhaps most importantly, money itself. As any corporate lawyer can attest, such forms of ‘capital’ are legally constructed, and thus their ‘supply’ is socially determined.<sup>190</sup> Accordingly, it makes no more sense to talk about a ‘scarcity’ of data, copyrights, or dollars than it does to talk about a scarcity of the human imagination.

Nevertheless, Law & Economics practitioners continue to downplay the legal and physically unbound nature of money itself, even as they strive to extract monetary value from ever more facets of social life. Indeed, Richard Posner himself admitted to not having bothered to read Keynes’s *The General Theory of Employment, Interest, and Money* until after the 2008 global financial crisis because, in his view, “it was a work of macroeconomics,” and “[l]aw, and hence the economics of law . . . did not figure largely in the regulation of those phenomena.”<sup>191</sup> At the same time, the rest of the

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13 (5th ed. 2012) (“The study of economics begins with *scarcity*.”) (emphasis in original).

189. David Schizer, *Fiscal Policy in an Era of Austerity*, 35 HARV. J.L. & PUB. POL’Y 453, 482 (2012) (“Politicians are less likely to accommodate one interest group if they know this means offending another. As Michael Graetz has observed, “[l]egislators behave[] quite differently when to pay Peter they ha[ve] to be explicit about how they inten[d] to rob Paul.”) (alterations in original).

190. David Singh Grewal, *The Laws of Capitalism*, 128 HARV. L. REV. 626, 652 (“[W]hat the critics of the neo-classical position were suggesting was . . . that “capital” does not really exist in any determinate fashion. Rather, what exists is legally structured access to the variety of resources that people use to produce things, and the market value of this access cannot be determined without examining its distribution — which is necessarily given by politics and social conditions rather than by a purely technical process.”).

191. Richard A. Posner, *How I Became a Keynesian*, THE NEW REPUBLIC (Sept. 23, 2009), <https://newrepublic.com/article/69601/how-i-became-keynesian>.

legal academy has also had relatively little to say about money. As Roy Kreitner observed in 2012:

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.<sup>192</sup>

Such chronic neglect is particularly befuddling given the central role of financial considerations in almost every aspect of the law and legal practice. Perhaps even more significantly, the financial system is itself legally constructed.<sup>193</sup> All financial instruments, including those we consider “money,” are ultimately tradeable legal obligations, or debts. Some are created privately through the formation of contracts, while others are created by the state. At the same time, different obligations have different legal properties: debts issued by private actors are typically settled by the tendering of the obligation of a third party (i.e. government currency, or bank deposits), while public monetary instruments are extinguished when the holder tenders them in order to obtain *relief* from any legal liability incurred via fees, fines, and/or taxes.<sup>194</sup>

Whereas certain kinds of financial instruments such as coins or mortgage-backed securities may only be issued by specific legally approved entities, others, like promissory notes, can be issued by almost anyone. At the same time, instruments issued by more creditworthy or economically significant actors tend to have a higher degree of “moneyness” than instruments issued by less creditworthy or important actors.<sup>195</sup> Consequently, most personal IOU-like instruments are risky and rarely circulate beyond one’s own personal networks, while government obligations such as currency and treasury securities are considered to be the most safe and liquid kinds of monetary instruments.<sup>196</sup>

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192. Roy Kreitner, *The Legal History of Money*, 8 ANN. REV. L. & SOC. SCI. 415, 416 n.1 (2012).

193. See, e.g., Robert C. Hockett & Saule T. Omarova, *The Finance Franchise*, 102 CORNELL L. REV. 1143, 1147 (2017).

194. Christine Desan, *Money as a Legal Institution*, in MONEY IN THE WESTERN LEGAL TRADITION 18 (David Fox & Wolfgang Ernst eds., 2016).

195. Perry Merhling, *The Inherent Hierarchy of Money*, Prepared for Duncan Foley Festschrift Conference (Apr. 20-21, 2012), [http://ieor.columbia.edu/files/seasdepts/industrial-engineering-operations-research/pdf-files/Mehriling\\_P\\_FESeminar\\_Sp12-02.pdf](http://ieor.columbia.edu/files/seasdepts/industrial-engineering-operations-research/pdf-files/Mehriling_P_FESeminar_Sp12-02.pdf). (describing how fluctuations in quality, or “moneyness,” occur for various types of credits).

196. This is true especially with respect to floating, non-convertible, government liabilities. See, e.g., Stephanie Bell, *The Role of the State and the Hierarchy of Money*, 25 CAMBRIDGE J. ECON. 149 (2001); Merhling, *supra* note 195.

This vision of a hierarchy of monies, of varying qualities, with public liabilities at the top of the hierarchy, reflects the great economist Hyman Minsky's famous dictum: anyone can create money, the challenge is to get it accepted.<sup>197</sup> Or, as Alfred Mitchell-Innes observed over a century ago, money's origins lie not in the unique physical properties of gold, or any other commodity, but in large, socially-managed credit networks.<sup>198</sup> The great invisible financial scoreboard-in-the-sky keeps track of everyone's balance sheet positions, with credits and debits coming in and out of existence as new relationships are formed, and old ones extinguished. In such a world, there is no inherent scarcity of purchasing power. Rather, limits on the growth of financial activity are determined by the availability of borrowing opportunities, the perceived profitability of investments, and/or the degree of acceptance of different types of financial instruments.<sup>199</sup> In other words, in advanced economies with sophisticated legal and financial systems, monetary and financial capital is not scarce, but abundant.

The notion of 'capital abundance' has profound implications for how lawyers, economists, and policymakers view the economy. For example, it is commonplace among Law & Economics scholars to assert that governments require taxation or borrowing (paid with future taxes) in order to fund their ongoing fiscal spending commitments. Contrary to this view, however, governments in fact have access to a range of instruments they can and do issue to finance new spending *ex nihilo*, ranging from coins and physical notes, to treasury and central bank notes and securities. The fact that such instruments must definitionally be first spent into circulation before they can be taxed back out subverts the commonly held view that taxes are necessary to provide revenue for government spending. Indeed, as Federal Reserve Bank of New York President Beardsley Ruml observed in a speech to the American Bar Association in 1946:

The necessity for a government to tax in order to maintain both its independence and its solvency is true for state and local governments, but it is not true for a national government . . . . [W]hose currency, for domestic purposes, is not

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197. See HYMAN P. MINSKY, *STABILIZING AN UNSTABLE ECONOMY* 69 (2008).

198. See A. Mitchell-Innes, *What Is Money?*, 30 *BANKING L.J.* 377 (1913). See also A. Mitchell-Innes, *The Credit Theory of Money*, 31 *BANKING L.J.* 151, 154 (1914).

199. See, e.g., Marc Lavoie, *A Primer on Endogenous Credit-money*, in *MODERN THEORIES OF MONEY: THE NATURE AND ROLE OF MONEY IN CAPITALIST ECONOMIES* 506 (Louis-Philippe Rochon & Sergio Rossi eds., 2003). See also Michael McLeay et al., *Money Creation in the Modern Economy*, *BANK OF ENG. Q. BULL.* Q1 (Mar. 14, 2014), <https://www.bankofengland.co.uk/quarterly-bulletin/2014/q1/money-creation-in-the-modern-economy>.

convertible into gold or any commodity. It follows that our Federal Government has final freedom from the money market in meeting its financial requirements . . . [T]he inevitable social and economic consequences of any and all taxes have now become the prime consideration in the imposition of taxes.<sup>200</sup>

Thus, Ruml concludes, “[t]he public purpose which is served should never be obscured in a tax program under the mask of raising revenue.”<sup>201</sup>

Ruml’s point about taxation can be expanded to a more general maxim: when it comes to money, the legal profession must abandon its false naturalism.<sup>202</sup> Money is not just a “thing,” it is a malleable legal technology that can be made to serve varying interests and stakeholders, depending on its design and use.

### **9. International Trade Does Not Have to Undermine Social Protection.**

James J. Varellas III

In recent years, international trade negotiations have been at the forefront of public policy and debate in a way they have not since the collapse of World Trade Organization (WTO) talks after the protests in Seattle in 1999.<sup>203</sup> Most significantly, the U.S. and a number of its key trading partners embarked on a new strategy of negotiating, what came to be known as “Mega-regional free trade agreements” (Mega-FTAs), after more than a decade of failed attempts to restart talks on a new round of multilateral negotiations at the WTO.<sup>204</sup> The most important of these were the Trans-Pacific Partnership (TPP), a proposed twelve-country trading bloc with a combined gross domestic product (GDP) of \$27.4 trillion, comprising approximately 40% of the world economy, and the Transatlantic Trade and Investment Partnership (TTIP), a proposed agreement between the U.S. and the European Union, two regions that combined would form an even larger Mega-FTA bloc than the TPP.<sup>205</sup>

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200. Beardsley Ruml, *Taxes for Revenue Are Obsolete*, 8 AM. AFFAIRS 35, 35–36 (1946).

201. *Id.* at 36.

202. See, e.g., Roy Kreitner, *Toward a Political Economy of Money*, in RESEARCH HANDBOOK ON POLITICAL ECONOMY AND LAW, 7, 8-14 (Ugo Mattei & John D. Haskell eds., 2015) (contrasting ‘naturalist’ and ‘chartalist’ approaches to understanding money).

203. Jeffery D. Wilson, *Mega-Regional Trade Deals in the Asia-Pacific: Choosing Between the TPP and RCEP?*, 45(2) J. CONTEMPORARY ASIA 345 (2015).

204. *Id.* at 346.

205. See Peter Baker, *Trump Abandons Trans-Pacific Partnership, Obama’s Signature Trade Deal*, N.Y. TIMES (Jan. 23, 2017), <https://www.nytimes.com/2017/0>