LAW & POLITICAL ECONOMY

Money and Property

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Money and property law are mutually constitutive. Property rights are defined and valued in terms of their relationship to monetary instruments, while whether something counts as a monetary instrument for this or that purpose is itself a result of bundling property rights a certain way. Yet property law treats money as opaque: a neutral measuring stick that happens to prove useful in the process of doing the real work of property.[1] This is partly because money is grossly under–theorized and misunderstood by property law scholars. In property law, "money provides the unit in which prices appear, supplies a medium of exchange, and acts as a store of value", but it does so as if by magic. Unlike students of economics, who are introduced to money through the self–consciously ahistorical fable that money evolved as an evolutionary response to the inefficiency and inadequacy of barter, American law students are not formally introduced to money at all. Money is taken as an idea that needs no articulation or unpacking. The result is a 'functional monetary illiteracy' that fails to conceptualize the complicated relationship between money and property law, serving to obscure the role of the state and of private power in defining each.[2]

In reality, monetary regimes are a central mechanism for structuring, ordering, and facilitating property rights and markets more broadly. The nature and scope of property rights are often defined by the monetary value of the property in question. For example, anti–commodification

1 This, despite the fact that John Locke's property parable, which provides the dominant philosophical justification and legitimation of private property, cites the emergence of money as the technological invention that catalyzed the development of economic civilization in which men, freed from the natural strictures of subsistence production, toward the superior vocation of "overplus" investment. J. Locke, Second Treatise of Government (1691), ch V, section 46.

2 We consciously borrow the term "function illiteracy" from the education in literacy literature to describe capture the fact that many people able to perform very basic decoding tasks with respect to money (i.e. outline the features listed above) but cannot engage money at a level required for understanding and influencing its broader societal function.

critiques of property essentially define "propertization" as pricing certain valued resources for market exchange; that is, making the valued resource fungible with money. Conversely, many markets exist solely to generate and trade property rights in monetary instruments or their derivatives. Hence, money often *is* the property in question, while simultaneously serving as the measuring unit by which such property is valued and compared.

Sometimes, money is the remedy for the violation of property rights. Sometimes, even, money determines whether or not property rights exist or have been violated. There is perhaps no clearer example of money as the language of value for property than the just compensation clause of the Fifth Amendment, which permits the government to acquire private property over the objection of its owner, but only if the property is taken for a public use and the owner is paid "just compensation" for the taking. What is just is the "fair market value" of the property in question, or "what a willing buyer would pay in cash to a willing seller' at the time of the taking." That is, the goal is to put the property owner "in as good a position pecuniarily as if his property had not been taken," generally ignoring—because of the difficulty of measurement—any non–money value to the property owner. This is the formalized commodification of property, built on the premise that different forms of property can be defined and made commensurable on the basis of monetary value, which is ostensibly more neutral, stable, and easy to measure than non–monetary value. It essentially says that the value of property is its money value when sold in a market.

More generally, when first year law students are taught to understand the difference between legal and equitable relief, pain is taken to explain the sociopolitical origins and significance of equity. By contrast, legal remedies are discussed in terms of "damages", the payment of which is supposed make the injured party economically "whole". Damages, in turn, invariably refer to "money", without clarifying which specific assets do or do not meet that designation.

Money and monetary institutions are also sources of new forms of property rights. In particular, determinations over the monetary classification of legal instruments and obligations have widespread implications for the settlement of interparty claims, as well as the structure of financial markets. Property claims over currency, and other financial instruments considered to have monetary properties, for example, are treated differently from regular chattel property, most notably with respect to the determination of valid claims of possession vis–a–vis a chain of prior title. Recently, the exploding popularity of cryptocurrency technologies has sparked a new regulatory debate over whether digital coin tokens should be classified as commodities, currency, securities, or something new entirely. In both instances, the definitional boundary of what constitutes "money" structures the legal relations at issue.

At a higher level of abstraction, monetary logic implicitly shapes various state–actor dynamics with respect to property rights regimes. For example, the recognition of certain welfare benefit claims

as individual property interests of the benefit claimant presumes a particular relationship between the citizens of a state and the public fisc more broadly. Similarly, the rationale for the granting of copyrights and patents under the U.S. Constitution specifically presumes the inherent superiority of a particular mode of remuneration–by–property–interest, in contrast to other modes of remuneration (i.e. by direct public subsidy), which in turn relies on particular assumptions regarding the source, availability and distribution of money and purchasing power.

Ultimately, the distribution of and meanings ascribed to both monetary and property regimes are caused by politics and ideology, not by natural or inevitable economic constraints. As Martha McCluskey notes, "[t]he collective fiscal and monetary power of the U.S. federal government is constituted by 'we the people,' and it can be used to increase opportunity and security broadly if that policy is under democratic control of citizens." Realizing the promise of that power requires a new story of property and a new story of money. Neither property nor money is a natural institution disembedded from the society in which it is deployed. Rather, they are embedded social institutions that deeply impact the social provisioning processes that are dual coin sides of law and political economy. That true story, as outlined here, makes government support for the economic and social well–being of "we the people" of the vast majority of people the foundation of property law, not an unproductive, unfair, or unjust "distortion." As Raúl Carrillo has queried, "[i]f the federal government creates money out of thin air, rather than taking it from some people to give it to others, as we have so often been told, then who owns the money? Who deserves the money? If money is not truly a commodity siphoned from the public, but a tool created and distributed by the government and its agents to the public, then who can claim ownership of the money currently wasting away in federal coffers? Deeper, still — who is entitled to the money that doesn't even exist yet? If there is no money scarcity, only real resource scarcity, then most legal and philosophical conversations about distributive justice are anachronistic and impoverished."

The collective functional monetary illiteracy of the legal profession inhibits the development of regulatory and informal mechanisms that advance the security, stability, and accessibility of property rights. Overcoming this illiteracy requires a root–and–branch reevaluation of how property law is understood and, ultimately, taught and practiced, from its foundational mythology through to our interpretation of recent case law.

Let's get to work.

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