Money Norms

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Money norms present a fundamental contradiction. Norms embody the social sphere, a system of internalized values, unwritten rules, and shared expectations that informally govern human behavior. Money, on the other hand, evokes the economic sphere of markets, prices, and incentives. Existing legal scholarship keeps the two spheres distinct. Money is assumed to operate as a medium of exchange or as a tool for altering the payoffs of different actions. When used to make good behavior less costly and undesirable behavior more costly, money functions to incentivize, sanction, and deter. Although a rich literature on the expressive function of law exists, legal scholars have generally confined money to the economic sphere of sanctions and subsidies.

This Article attempts to bridge that gap. Money elicits a strong, visceral, and emotional reaction, triggering (and creating expectations of) selfishness, individualism, and self-reliance that is unaccounted for in current legal scholarship. Money norms not only insulate our moral values from market encroachment, but they also prescribe modes of behavior that encourage cooperation and counteract the impulse to act selfishly. The Article sets out a framework for understanding the interrelationship of money norms and the law in an effort to enhance the effectiveness of existing incentive structures. It suggests that legal efforts to influence money norms may be more successful in the context of morally ambiguous norms where noncompliance is both easier to rationalize and less likely to be socially condemned.

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INTRODUCTION

Money pervades nearly every aspect of the law. It appears in statutes, codes, regulations, legal judgments, contracts, and wills.[1] In commercial law, it operates as a medium of exchange; in tax law, it takes the form of penalties and subsidies; in civil and criminal law, it surfaces as damages and fines. But legal scholars have rarely focused on money as a subject of independent study. In legal theory, money takes on value as a tool to incentivize, sanction, and deter. It lowers the payoff of an undesirable act, such that cooperation becomes the optimum strategy. As a qualitative matter, it is assumed to be inert and one-dimensional, a utilitarian means to an end.

Social science research has long suggested that the model of the rational, utility-maximizing *homo economicus* fails to capture how individuals respond to monetary incentives. Money has complex, sometimes perverse effects. Individuals do not always make decisions based on the existence or size of a subsidy or fine. Rather, decisions are often shaped by attitudes, beliefs, customs, and norms.[2] Although larger amounts of money can motivate individuals to work harder, the progression is non-linear. More money does not necessarily translate into more effort.[3] Nor does increasing the cost of an activity invariably decrease the rate at which it occurs.[4]

Money changes the cost of behaviors, but not always in predictable ways. Individuals react differently to nonmonetary incentives of equal market value when they are presented in explicitly monetary terms. For instance, gifts, if explicitly priced, have been shown to have less incentive value than those that are not.[5] Studies of altruism and gift-giving have established that people engage in costly behaviors for little or no payment.[6] Moreover, many psychological studies have

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1. ARTHUR NUSSBAUM, MONEY IN THE LAW 1 (1939).
2. ADRIAN FURNHAM & MICHAEL ARGYLE, THE PSYCHOLOGY OF MONEY 34 (1998).
3. James Heyman & Dan Ariely, *Effort for Payment: A Tale of Two Markets*, 15 PSYCH. SCI. 787, 788 (2004) (discussing the relationship between payment and effort in monetary and social markets).
4. *See* Yuval Feldman & Doron Teichman, *Are All 'Legal Dollars' Created Equal?*, 102 NW. U. L. REV. 223, 224 (2008) (exploring how the timing of payment, identity of the recipient, and the probabilistic or certain nature of payment affect the way people respond to different legal schemes).
5. Heyman & Ariely, *supra* note 3, at 792.
6. *See, e.g.*, Roland Benabou & Jean Tirole, *Incentives and Prosocial Behavior*, 96 AM. ECON. REV. 1652, 1652 (2006) (developing a theory of prosocial behavior based on intrinsic, extrinsic, and reputational motivation); Herbert Gintis et al., *Explaining Altruistic Behavior in Humans*, EVOLUTION & HUM. BEHAV. 153, 153–54 (2003) (analyzing several traits, such as strong reciprocity, which motivates individuals to cooperate with others even at a personal cost).

documented how money can lead to decreased motivation.[7] In one of the most famous examples, Richard Titmuss argued that paying blood donors could actually decrease blood supply.[8] In another study, Uri Gneezy and Aldo Rustichini found that imposing a monetary fine on parents who were tardy in picking up their children from daycare resulted in more late arrivals.[9] Indeed, when a contract specifies fines or damages, individuals have been shown to be more strategic and more willing to breach their contract.[10] In some contexts, the mere mention of money triggers selfish, non-cooperative behavior.[11]

If this research is correct, it suggests that at least some incentive arrangements in existing legal structures may be suboptimal. If money generates expectations of selfishness and crowds out prosocial behavior, its function cannot simply be understood as changing the payoffs of different actions or serving as a medium of exchange. Instead, an understanding of the expressive and emotive qualities of money could more accurately predict and guide behavior. To that end, this Article studies the normative dimension of money—specifically, social and moral norms of money and how those norms interact with the law. Although a rich literature on the expressive function of law exists,[12]

7. EDWARD L. DECI & RICHARD M. RYAN, INTRINSIC MOTIVATION AND SELF-DETERMINATION IN HUMAN BEHAVIOR 1 (1985); EDWARD L. DECI, INTRINSIC MOTIVATION 1 (1975); BRUNO FREY, NOT JUST FOR MONEY, AN ECONOMIC THEORY OF PERSONAL MOTIVATION 1 (1997); Bruno S. Frey & Reto Jegen, *Motivation Crowding Theory*, 15 J. ECON. SURV. 589, 589 (2001); Bruno S. Frey & Lorenz Goette, *Does Pay Motivate Volunteers?* (Institute for Empirical Research in Economics, University of Zurich, Working Paper No. 007, 1999).

8. RICHARD TITMUSS, THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY 1 (1971).

9. Uri Gneezy & Aldo Rustichini, *A Fine is a Price*, 29 J. LEG. STUD. 1, 1 (2000) [hereinafter "Gneezy & Rustichini, *A Fine is a Price*"].

10. *See* Tess Wilkinson-Ryan, *Do Liquidated Damages Encourage Breach? A Psychological Experiment*, 108 MICH. L. REV. 633, 636 (2010) (offering experimental evidence that parties are more willing to breach contracts with liquidated damages clauses).

11. Kathleen D. Vohs et al., *The Psychological Consequences of Money*, 314 SCI. 1154, 1154 (2006) (exploring the effects of money on human behavior using mental priming techniques).

12. *See, e.g.*, Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585, 585–608 (1998) (developing an economic theory of expressive law) [hereinafter "Cooter, *Expressive Law and Economics*"]; Alex Geisinger, *A Belief Change Theory of Expressive Law*, 88 IOWA L. REV. 35, 35–74 (2002) (setting forth a theory of belief change, in which the law impacts norms by changing individuals' beliefs about the outcomes of certain activities); Lawrence Lessig, *Social Meaning and Social Norms*, 144 U. PA. L. REV. 2181, 2181–90 (1996) [hereinafter, "Lessig, *Social Meaning*"] (arguing that there are descriptive and prescriptive benefits of understanding the social meaning of actions); Jason Mazzone, *When Courts Speak: Social Capital and Law's Expressive Function*, 49 SYRACUSE L. REV. 1039, 1039–66 (1999) (illustrating how the law goes beyond just instructing certain parties how to act); Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 339–90 (2000) (arguing that the law changes behavior by expressing underlying communal attitudes); Cass Sunstein, *On the Expressive Function of Law*,

money has often been relegated to the "economic" sphere of prices, credit, interest rates, and incentives.[13] Existing legal literature touches on money indirectly in the form of whether—and in what circumstances—monetary incentives function as prices or sanctions.[14] A separate literature explores the intersection of economic exchange, intimacy, and commodification.[15] But few scholars have explored norms of money or the legal implications of money's emotive effects. Money triggers a wide array of emotions, from fear of being "suckered" to anger, indignation, selfishness, suspiciousness, individualism, and self-reliance.[16] In game theoretic terms, money can serve as a signal to "defect"—i.e., free-ride—rather than to cooperate. This Article demonstrates how money norms can counteract this tendency and coordinate expectations. By providing a framework for analyzing the relationship between law and money, it seeks to both challenge prevailing assumptions of money's utility and enhance the effectiveness of existing incentive structures.

Part I surveys existing literature challenging the conventional view of money as an impersonal, homogeneous medium of exchange. Part II discusses money norms by form and function, and Part III discusses mechanisms for the maintenance and enforcement of money norms. Part IV analyzes the interaction of law and money norms. Part V discusses normative implications, and Part VI concludes.

I. THE MEANING OF MONEY

Traditionally, money has been understood as an abstract and impersonal medium of exchange, unit of account, or store of value.[17]

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144 U. PA. L. REV. 2021, 2024 (1996) [hereinafter "Sunstein, *Expressive Function*"] (defining the expressive function of law as law's function in "making statements" as opposed to directly regulating behavior).

13. *But see* Feldman & Teichman, *supra* note 4, at 225; Sunstein, *Expressive Function*, *supra* note 12.

14. *See, e.g.*, Feldman & Teichman, *supra* note 4, at 224; Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1523–60 (1984) (developing a theory of the effect of prices and sanctions on behavior) [hereinafter "Cooter, *Prices and Sanctions*"]. The notable exception is Sunstein, *Expressive Function*, *supra* note 12.

15. VIVIANA A. ZELIZER, THE PURCHASE OF INTIMACY 1 (2005) [hereinafter "ZELIZER, INTIMACY"]; Jill E. Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491, 491–530 (2005); Margaret J. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1849–1937 (1987).

16. *See infra* Part I.B. (describing the psychological effects of money).

17. Russell W. Belk & Melanie Wallendorf, *The Sacred Meanings of Money*, 11 J. ECON. PSYCHOL. 35, 46 (1990) (citing ADRIAN FURNHAM & ALAN LEWIS, THE ECONOMIC MIND: THE SOCIAL PSYCHOLOGY OF ECONOMIC BEHAVIOR (1986)); *see* PAUL KRUGMAN & ROBIN WELLS, ECONOMICS 2 (1st ed. 2006) (describing the role of money in a system for coordinating society's productive activities on both an individual and societal level); Nobuhiro Kiyotaki & Randall Wright, *On Money as a Medium of Exchange,* 97 J. POL. ECON. 927, 928 (1989) (analyzing

Economists attribute the emergence of money to the difficulties and inefficiencies of barter, in which you "not only have to have what I want but also have to want what I have."[18] According to this view, money emerged to facilitate the trading of goods and services. Unlike barter, money does not require information on the location and trustworthiness of the other party and allows goods to be valued relative to one another.[19] Historically, various commodities—rice, barley, cattle, iron, salt, shells, dried cod, cigarettes, salt, sugar, etc.—have functioned as money.[20] This system of "commodity money" eventually gave way to "fiat money"—money established by government order or fiat.[21] Fiat money has no intrinsic value; it is ultimately a social construct whose value turns on beliefs, expectations, and social relations between its users.[22] The following sections discuss existing challenges to the conventional framework, focusing first on the social meanings of money and then on its psychological effects.

A. Social Meaning

Money represents many things—freedom, security, power, and status, among others.[23] While necessary to satisfy our most basic needs, it also can increase opportunities, elevate and signal our social status, influence others, and free us from a position of dependence.[24] For some, accumulating money is an end in itself, a social and personal form of self-expression and a metric of success and self-worth.[25] For others, money represents a corrupting force that depersonalizes and debases social interactions.[26]

The meaning of money has ranged from the sacred to the profane, defined in large part by the uses to which it has been put.[27]

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economies where individuals specialize in consumption and production and arguing that "introducing fiat currency into a commodity money economy may unambiguously improve welfare"); Raymond H. Lounsbury, *What is Money?*, 27 AM. ECON. REV. 765, 765 (1937) (arguing money should not be understood simply as a unit of account and medium of exchange).

18. WILLIAM S. JEVONS, MONEY AND THE MECHANISM OF EXCHANGE 1 (1875); *see also* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 22–23 (1784).

19. NIGEL DODD, THE SOCIOLOGY OF MONEY xxii, 42 (1994).

20. A. Mitchell Innes, *What is Money?*, 30 BANKING L.J. 377, 377 (1913).

21. N. GREGORY MANKIW, PRINCIPLES OF ECONOMICS 220 (7th ed. 2014).

22. NIGEL DODD, THE SOCIAL LIFE OF MONEY 8–9 (2014).

23. HENRY C. LINDGREN, THE PSYCHOLOGY OF MONEY 6 (1991).

24. LINDGREN, *supra* note 23, at 6.

25. *See* FURNHAM & ARGYLE, *supra* note 2, at 102.

26. *See* Russell W. Belk & Melanie Wallendorf, *The Sacred Meanings of Money*, 11 J. ECON. PSYCHOL. 35, 46 (1990) (arguing that modern money retains sacred meanings).

27. Belk & Wallendorf, *supra* note 26, at 36–37.

Anthropologists have long studied the symbolic function of primitive monies, which have served to signal social, moral, or ritual status.[28] In certain villages, multiple currencies coexisted at the same time, with different currencies having specific, designated uses.[29] For instance, certain monies could be used only for food, while others were set aside for funeral or marriage gifts, purchasing wives, or magical rites.[30] In what is now the Republic of Zaire, raffia cloth could be used for rituals and ceremonies, including paying damages for adultery. However, it could not be used to buy food, clothing, or shelter.[31] Different monies were also reserved for women or specified social classes.[32] In some remote areas of the Pacific, communal norms designated lower value coins or mussel shells for women, while reserving more valuable large stones for men.[33]

Sociologist Viviana Zelizer has shown that modern money has been subject to similar restrictions. Distinguishing between "market money" and "special monies," Zelizer demonstrated how individuals attribute different meanings and uses to different types of money.[34] For instance, in the late nineteenth and early twentieth centuries, changing cultural and social relationships between husbands, wives, parents, and children shaped domestic money.[35] Married women's money, otherwise known as "pin money," was treated as a distinct—and lesser—type of currency than the ordinary dollar.[36] Pin money could only be used for charity or certain types of household expenses and was routinely trivialized as "money for trinkets and trifles."[37] Individuals categorized, differentiated, and invented multiple currencies—from housekeeping allowances to spending money, gifts, and remittances—attributing

28. *See id.* at 45, 47–48; *see also* Viviana A. Zelizer, *The Social Meaning of Money: Special Monies*, 95 AM. J. SOC. 342, 348 (1989) [hereinafter "Zelizer, *Special Monies*"] (examining how some primitive cultures used certain monies for certain occasions).

29. *See* Zelizer, *Special Monies*, *supra* note 28, at 348 (discussing money's cultural and social significance through its symbolic meaning outside the market).

30. *Id.*; *see also* W.I. THOMAS & FLORIAN ZNANIECKI, THE POLISH PEASANT IN EUROPE AND AMERICA 164–65 (1958).

31. Belk & Wallendorf, *supra* note 26, at 48.

32. Zelizer, *Special Monies*, *supra* note 28, at 348; *see also* PAUL EINZIG, PRIMITIVE MONEY 29–31 (2nd ed. 1966).

33. Zelizer, *Special Monies*, *supra* note 28, at 342.

34. VIVIANA A. ZELIZER, THE SOCIAL MEANING OF MONEY 5 (1994) [hereinafter "ZELIZER, SOCIAL MEANING"].

35. Zelizer, *Special Monies*, *supra* note 28, at 343–44.

36. *Id.* at 344.

37. *Id.* at 369 (quoting Mary Anderson, *United States Daily*, 21 J. HOME ECON. 920 (1929)).

different meanings to different forms of exchange.[38] Zelizer debunked the classic economic view of money as a qualitatively neutral, impersonal medium of exchange. She demonstrated not only that many types of money exist, but also that each type of money is subject to distinct social and cultural rituals.[39]

While sociologists have focused on how social relations impact the way individuals differentiate and make sense of money, behavioral economists have studied the role of cognitive processes in that differentiation—in particular, the way money is earmarked once it is added to a separate account.[40] Although standard economic theory posits that dollars are fungible,[41] experimental results have shown that individuals and businesses attach different labels to different categories of money.[42] For instance, some households use separate budgets for grocery shopping, dining out, and recreational expenses.[43] Under what has become known as "mental accounting," individuals and households employ a set of cognitive processes to organize and categorize financial activities.[44] Money in one account does not substitute for money in another account.[45] Individuals allocate expenditures into budgets, group wealth into accounts, and separate income into categories.[46] For instance, many individuals use different budgets for grocery shopping, restaurants, vacations, Christmas gifts, weddings, funerals, and college tuition. When funds in one category are depleted, individuals tend to be reluctant to draw from another category, even though the funds come from the same source.[47] Rather than reacting rationally and dispassionately to money, individuals pay attention to sunk costs, buy things they don't need, and employ mental shortcuts.[48]

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38. *See* Viviana Zelizer, *Payments and Social Ties*, 11 SOC. F. 481, 484 (1996) [hereinafter "Zelizer, *Payments*"] (discussing the manner in which households differentiated and segregated monies based upon needs).

39. *See generally* ZELIZER, SOCIAL MEANING, *supra* note 34 (discussing the assignment of different meanings and uses to money).

40. *See* Nina Bandelj et al., *Advancing Money Talks*, *in* MONEY TALKS: EXPLAINING HOW MONEY REALLY WORKS 5–6 (Nina Bandelj et al. eds., 2017) [hereinafter "MONEY TALKS"]; Jonathan Morduch, *Economics and the Social Meaning of Money*, *in* MONEY TALKS at 25.

41. *See* MILTON FRIEDMAN, A THEORY OF THE CONSUMPTION FUNCTION 3 (1957).

42. *See* Richard H. Thaler, *Mental Accounting and Consumer Choice,* 4 MARKETING SCI. 199, 200 (1985) [hereinafter "Thaler, *Consumer Choice*"].

43. *Id.* at 200.

44. Richard H. Thaler, *Mental Accounting Matters*, 12 J. BEHAV. DEC. MAKING 183, 183–84 (1999) [hereinafter "Thaler, *Mental Accounting*"].

45. *Id.* at 185.

46. *Id.* at 193.

47. Thaler, *Consumer Choice, supra* note 42, at 200.

48. Thaler, *Mental Accounting, supra* note 44, at 203.

B. Psychological Effects

Money elicits a host of other irrational behaviors and emotions, from greed to selfishness, jealousy, fear, disgust, and resentment.[49] Researchers in economic psychology have set forth several theories to explain the subversive effects of monetary incentives. These include the view that money (1) crowds out intrinsic motivation, (2) dilutes the visibility of prosocial behavior (for those who act in order to *appear* prosocial), and (3) creates the expectation that the counterparty is selfish.[50] In a series of experiments, Kathleen Vohs, Nicole Mead, and Miranda Goode demonstrated how the mere mention of money prompted individuals to behave selfishly and anti-socially.[51] Participants who completed sentence-scrambling tasks related to money proved to be more self-sufficient, less willing to ask for help, and less willing to help others. They sought to spend more time alone and chose seats farther away from others.[52] The authors surmised that money, which allows people to reach goals without relying on the help of others, generates the expectation that individuals should fend for themselves.[53] They concluded that money elicits individualism and crowds out communal values and motivations.[54]

Examples abound of how extrinsic incentives, particularly in the form of money, can crowd out intrinsic motivation.[55] In his book, *The Gift Relationship*, Richard Titmuss famously argued that paying for blood donations could not only reduce the quality and quantity of blood collected, but also the intrinsic motivation of altruistic donors and others driven by a sense of civic duty.[56] In one study, support for the

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49. FURNHAM & ARGYLE, *supra* note 2, at 38.

50. *See* Lorenz Goette & Alois Stutzer, *Blood Donations and Incentives: Evidence from a Field Experiment* 7–8 (Fed. Res. Bank of Bos., Working Paper No. 08-3, 2008).

51. Vohs et al., *supra* note 11, at 1154.

52. *Id.* at 1155–56.

53. *Id.* at 1154, 1156.

54. *Id.* at 1156.

55. This is known as the motivation crowding effect. *See* Bruno S. Frey & Felix Oberholzer-Gee, *The Cost of Price Incentives: An Empirical Analysis of Motivation Crowding-Out*, 87 AM. ECON. REV. 746, 746 (1997) (presenting a theory that the introduction of price incentives can crowd out intrinsic motivation); *see generally* EDWARD L. DECI & RICHARD M. RYAN, INTRINSIC MOTIVATION AND SELF-DETERMINATION IN HUMAN BEHAVIOR (1985) (exploring the innate psychological motivating factors that drive human action).

56. TITMUSS, *supra* note 8, at 245–46 (theorizing that the commercialization of blood donations could lead to inefficiency in the system, as well as a spike in pricing and decline in quality); *see generally* KIERAN HEALEY, LAST BEST GIFTS: ALTRUISM AND THE MARKET FOR HUMAN BLOOD AND ORGANS (2006) (comparing and contrasting the blood and organ donation systems of the United States and Europe, with particular focus on the altruistic aspect of donating); Nicola Lacetera & Mario Macis, *Do All Material Incentives for Prosocial Activities Backfire? The Response to Cash and Non-Cash Incentives for Blood Donations* (Inst. for the

construction of socially desirable, but noxious facilities such as incinerators, airports, or prisons decreased when monetary compensation to local residents was offered.[57] In another study, high school students collecting charitable donations worked harder when they were not compensated than when they were offered a small sum.[58] Similarly, when the AARP asked lawyers to provide legal services to retirees for $30 per hour, they were turned down, but when the lawyers were asked to provide free services, they accepted.[59] One explanation was that when money was offered, the values of altruism and civic duty were crowded out and replaced by market pricing. The $30 per hour was found to be an inadequate—and perhaps insulting—valuation of the lawyers' time.[60]

On the penalty side, when a daycare started charging parents a small fine for late pick-ups, the number of late arrivals increased.[61] Even after the fine was later removed, parents continued to arrive late. The experimenters hypothesized that introducing the monetary fine reshaped parents' perception of the consequences of arriving late.[62] In place of an internalized sense of guilt or shame for having inconvenienced the teachers, the fine signaled that arriving late was a commodity that could be purchased at will. The fine, in other words, was the price of arriving late.[63]

These and other studies indicate that when payment is in the form of cash, individuals are more likely to interpret the reward as direct compensation, rather than as a token of gratitude.[64] In addition, for those motivated by the desire to *appear* unselfish and prosocial, external monetary incentives can frustrate the signaling value of prosocial activity.[65] By contrast, non-monetary rewards such as coupons, lottery

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Stud. of Lab. (IZA) Discussion Paper No. 4458 (2009) (suggesting that although donors do not have a general aversion to material incentives, they are averse to cash payments for their prosocial actions).

57. Frey & Oberholzer-Gee, *supra* note 55, at 753 (showing that the crowding-out effect explained the decrease in support for the construction of a noxious facility when compensation was offered).

58. Uri Gneezy & Aldo Rustichini, *Pay Enough or Don't Pay at All*, 115 Q. J. ECON. 791 (2000) [hereinafter "Gneezy & Rustichini, *Pay Enough*"]. If monetary incentives are high enough, however, larger payments result in greater effort.

59. DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS 71 (2009).

60. *Id.*

61. Gneezy & Rustichini, *A Fine is a Price*, *supra* note 9, at 1.

62. *Id.* at 3.

63. *Id.* at 14.

64. Lacetera & Macis, *supra* note 56, at 3.

65. *See* Dan Ariely et al., *Doing Good or Doing Well? Image Motivation and Monetary*

tickets, or a paid vacation day do not appear to have the same crowding-out effects.[66]

These results are consistent with other studies showing that money has powerful framing effects. Dan Ariely and James Heyman conducted a series of experiments to test the incentive effects of different forms of money.[67] They found that money caused participants to invoke market frames and norms.[68] When money was not involved—or when payment was in the form of a gift—participants invoked social norms and worked harder than in situations where they were offered only a small monetary payment.[69] In mixed markets, where payment was in the form of a gift but the cost of the gift was mentioned, the participants interpreted the relationship to be a market exchange and thus were highly sensitive to the magnitude of the payment.[70] The authors concluded that money had a negative impact on motivation because it situated individuals in a market frame rather than a social frame.[71]

Similar framing effects have been observed when the trigger is not explicitly monetary, but only evocative of money. In a famous experiment, psychologist Lee Ross and his co-authors had two different groups play the prisoner's dilemma game with identical monetary payoffs.[72] One group was told they were playing "the Community Game" while the other was told they were playing "the Wall Street Game."[73] The results were striking. Participants playing the Community Game cooperated between 67–75 percent of the time, while those playing the Wall Street Game cooperated only about 33 percent of the time.[74] The situational label had a far greater impact on whether the players cooperated or defected than the predictions of non-participants

Incentives in Behaving Prosocially, 99 AM. ECON. REV. 544, 545 (2009) (testing the potentially detrimental effects of extrinsic incentives on prosocial behavior); *see also* Benabou & Tirole, *supra* note 6, at 1653 (illustrating that individuals are motivated to act based on the desire to demonstrate their generosity and selflessness, as well as to conform their behavior to their self-image); Kristen Underhill, *When Extrinsic Incentives Displace Intrinsic Motivation: Designing Legal Carrots and Sticks to Confront the Challenge of Motivational Crowding-Out*, 33 YALE J. REG. 213, 243 (2016) (discussing how incentives may interfere with reputational motivation—i.e., the signals that individuals send to observers of their behavior).

66. *See* Goette & Stutzer, *supra* note 50, at 4.

67. Heyman & Ariely, *supra* note 3, at 787.

68. *Id.*

69. *Id.*

70. *Id.* at 792.

71. *Id.*

72. Varda Liberman et al., *The Name of the Game: Predictive Power of Reputations Versus Situational Labels in Determining Prisoner's Dilemma Game Moves*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 1175, 1175 (2004).

73. Lieberman et al., *supra* note 72, at 1176 (describing the authors' study design).

74. *Id.* at 1177.

who knew them well.[75] In the Wall Street Game, participants expected the other players to defect, whereas in the Community Game, they expected the other players to cooperate.[76] The authors reasoned that the Wall Street label produced expectations of individualism, self-interest, competitiveness, and exploitation, while the Community label produced expectations of interdependence and collective interest.[77]

Other experiments have confirmed these results. Individuals in one-shot prisoner's dilemma games cooperate more when the game is framed as an international negotiation rather than a business transaction,[78] or as a "social exchange study" rather than a "business transaction study."[79] Experimental evidence suggests that situational frames operate not so much by changing internalized norms, but by changing the expectations that individuals have of others' behavior.[80] In the absence of other contextual cues, money, business, or financial labels generally create an expectation that the counterparty will behave selfishly and defect, prompting individuals to behave in kind.[81]

This psychological research suggests that the law's treatment of money as an economic tool for incentivizing (or disincentivizing) behavior may be excessively narrow. Money is a complex and richly imbued symbol that triggers strong, sometimes irrational, emotions. When money becomes an end in itself, it can be viewed as a subversive force.[82] The mere mention of money can send a signal that the other party seeks to maximize his or her own payoffs at the expense of others. How, then, does cooperation arise in one-shot strategic interactions where the primary situational frame is monetary? Law is one answer, but as discussed in the next Part, money norms play a more significant

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75. *Id.* at 1175.

76. *Id.* at 1182.

77. *Id.* at 1176.

78. J.R. Eiser & K. Bhavnani, *The Effect of Situational Meaning on the Behavior of Subjects in the Prisoner's Dilemma Game*, 4 EUR. J. SOC. PSYCHOL. 93, 97 (1974).

79. C. Daniel Batson & Tecia Moran, *Empathy-Induced Altruism in a Prisoner's Dilemma*, 29 EUR. J. SOC. PSYCHOL. 909, 922 (1999).

80. Tore Ellingsen et al., *Social Framing Effects: Preferences or Beliefs?*, 76 GAMES & ECON. BEHAV. 117, 118 (2012).

81. That is not to say that money always creates this expectation. In some contexts, such as in the employer-employee context, money in the form of higher wages can be a positive signal, motivating employees to work harder. *See* George A. Akerlof, *Labor Contracts as Partial Gift Exchange*, 47 Q.J. ECON. 543, 543–44 (1982); Dan M. Kahan, *Trust, Collective Action, and Law*, 81 B.U. L. REV. 333, 334 (2001) [hereinafter "Kahan, *Trust, Collective Action*"] (arguing that when individuals perceive that others are acting cooperatively, they will be moved by honor and similar motivations to contribute to public goods even without incentives).

82. Belk & Wallendorf, *supra* note 26, at 46 (pointing out that money can evoke strong negative emotions, such as revulsion and disgust).

role in channeling expectations and fostering cooperation.

II. FORM AND FUNCTION

The term "norm" has numerous meanings that vary across disciplines. In its broadest sense, it encompasses rules and regularities, patterns of action, formal organizational rules, shared values, shared meanings, and informal social controls.[83] A more narrow approach limits the term to social norms, as distinct from conventions, legal norms, or moral norms.[84] As used in this Article, "money norms" are behavioral rules and expectations regarding money. They are customary monetary rules of behavior—how we are *supposed* to act when it comes to money. This Article does not limit the term to social norms—norms sustained by the approval or disapproval of others.[85] Instead, it uses the term in a broad, inclusive sense to encompass monetary conventions.

Conventions are generalized modes of behavior in which individuals desire to coordinate with others and have no incentive to deviate unilaterally.[86] Examples include driving on the right side of the road, using a particular sign language, or putting the fork on the left side of the plate.[87] Legal norms are rules of behavior that are enacted and enforced by government actors.[88] Moral norms are the rules of morality that prescribe and proscribe behavior.[89] Examples include the prohibitions against murder, rape, and incest.[90]

Social norms refer to "informal social regularities that individuals feel obligated to follow because of an internalized sense of duty, because of a fear of external non-legal sanctions, or both."[91] They are

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83. Christine Horne, *Sociological Perspectives on the Emergence of Social Norms*, *in* SOCIAL NORMS 3–4 (Michael Hechter & Karl-Dieter Opp eds., 2001).

84. JON ELSTER, THE CEMENT OF SOCIETY: A STUDY OF SOCIAL ORDER 100–01 (1989) [hereinafter "ELSTER, CEMENT OF SOCIETY"].

85. *Id.*

86. *See* Cristina Bicchieri, *Norms, Conventions, and the Power of Expectations*, *in* PHILOSOPHY OF SOCIAL SCIENCE: A NEW INTRODUCTION 208, 216 (2014) [hereinafter "Bicchieri, *Norms*"]; CRISTINA BICCHIERI, THE GRAMMAR OF SOCIETY: THE NATURE AND DYNAMICS OF SOCIAL NORMS, at x (2006) [hereinafter "BICCHIERI, GRAMMAR OF SOCIETY"]; ELSTER, CEMENT OF SOCIETY, *supra* note 84, at 12; JON ELSTER, EXPLAINING SOCIAL BEHAVIOR: MORE NUTS AND BOLTS FOR THE SOCIAL SCIENCES 315 (2007) [hereinafter "ELSTER, EXPLAINING SOCIAL BEHAVIOR"]; George J. Bowdery, *Conventions and Norms*, 8 PHIL. OF SCI. 493, 494 (1941).

87. *See* ELSTER, CEMENT OF SOCIETY, *supra* note 84, at 101–02.

88. ELSTER, EXPLAINING SOCIAL BEHAVIOR, *supra* note 86, at 357.

89. William Harms & Brian Skyrms, *Evolution of Moral Norms*, *in* THE OXFORD HANDBOOK OF PHILOSOPHY OF BIOLOGY 1 (Michael Ruse ed., 2008).

90. *Id.*

91. Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 340 (1997) [hereinafter "McAdams, *Origin of Norms*"].

"injunction[s] to act or to abstain from acting"[92] or rules and practices that specify "what is acceptable and what is not in a social group."[93] Social norms are shared by other people[94] and enforced by third parties other than the state.[95] They can be internalized and transformed by social relations[96] and are maintained by informal sanctions, such as gossip, censure, or social ostracism.[97] Examples include the norms of not cutting ahead of others in line, picking up after one's dog, or returning favors.[98] Individuals conform to social norms based on internalized preferences and expectations about other people's behavior and beliefs.[99] Unlike moral norms, which are usually unconditional, social norms are conditionally followed and may function differently in groups of different sizes.[100]

Considerable overlap exists among the different categories.[101] Many moral norms—for instance, the prohibition on murder—are enacted into laws. Similarly, the contents of many social and moral norms are virtually indistinguishable, and conventions can become social norms when they are enforced through social sanctions.[102] Rather than working within the framework of these existing typologies, this Article classifies money norms through the schema of restrictions—specifically, form, source, manner, and use restrictions.

While norms on the form of money are convention equilibria that

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92. ELSTER, EXPLAINING SOCIAL BEHAVIOR. *supra* note 86, at 354.

93. BICCHIERI, GRAMMAR OF SOCIETY, *supra* note 86, at ix.

94. Jon Elster, *Rationality and Social Norms*, 32 EUR. J. SOC. 109, 111 (1991) [hereinafter "Elster, *Rationality*"].

95. *See* Robert C. Ellickson, *The Evolution of Social Norms: A Perspective from the Legal Academy*, *in* SOCIAL NORMS 35 (Michael Hechter & Karl-Dieter Opp eds., 2001); Lior J. Strahilevitz, *'How's My Driving' for Everyone (and Everything?)*, 81 N.Y.U. L. REV. 1699, 1759–60 (2006).

96. Viviana A. Zelizer, *How I Became a Relational Economic Sociologist and What Does That Mean?*, 40 POL. & SOC'Y. 145, 161 (Fred Block ed., 2012) [hereinafter "Zelizer, *Relational Economic Sociologist*"].

97. ELSTER, EXPLAINING SOCIAL BEHAVIOR, *supra* note 86, at 354–55.

98. Sunstein, *Expressive Function*, *supra* note 12, at 2031.

99. BICCHIERI, GRAMMAR OF SOCIETY, *supra* note 86, at 8–9.

100. *Id.*; *see also* Lior J. Strahilevitz, *Social Norms from Close-Knit Groups to Loose-Knit Groups*, 70 U. CHI. L. REV. 359, 360–365 (2003) (analyzing whether and how social norms arise in loose-knit groups).

101. These typologies have been contested and others exist. *See* Benoît Dubreuil & Jean-François Grégoire, *Are Moral Norms Distinct from Social Norms? A Critical Assessment of Jon Elster and Cristina Bicchieri*, 75 THEORY & DECISION 137, 149 (2013) (arguing that rigid typologies between various types of norms should be abandoned); *see also* Geoffrey P. Miller, *Norms and Interests*, 32 HOFSTRA L. REV. 637, 640–41 (2003) (noting difficulty of drawing a sharp distinction between laws, norms, and related social practices).

102. BICCHIERI, GRAMMAR OF SOCIETY, *supra* note 86, at 41–42.

solve coordination dilemmas,[103] norms on the source, manner, and use of money operate to constrain self-interest in strategic interactions modeled as prisoner's dilemmas. Unlike the coordination dilemma, an individual in the prisoner's dilemma is better off defecting no matter what the other party does. Hence, acting simultaneously, both players defect even though they would have been better off if they had cooperated.[104] Individually rational behavior results in an outcome in which everyone is worse off.[105] Money norms provide a solution to the dilemma directly by changing the underlying payoffs, and expressively by changing expectations. By making defection costlier through formal or informal sanctions, money norms incentivize individuals to cooperate.

A. Form Restrictions

Norms on the form of money operate not by changing payoffs, but by coordinating expectations. Although they are more accurately characterized as conventions, this Article will classify them as a type of money norm. Conventions are behavioral regularities that arise in situations involving multiple equilibria where individuals wish to coordinate with others. In pure coordination dilemmas, players have common interests: they prefer to do what others are doing, so long as enough others are doing them.[106] Once everyone is cooperating, there is no incentive to defect. Because there are different ways of behaving in a mutually advantageous way,[107] the challenge is to find a way to match strategies with the other players.

Conventions are one solution to the dilemma.[108] They operate in much the same manner as focal points to align expectations and achieve coordination.[109] By focusing attention on a particular behavior, they

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103. Convention equilibria are situations where each player is playing his best response to what other players are doing. No one can improve his outcome by unilaterally deviating, and no one wants anyone else to deviate from conforming to the convention. *See* ELSTER, CEMENT OF SOCIETY, *supra* note 84, at 12; Richard H. McAdams, *Beyond the Prisoner's Dilemma: Coordination, Game Theory, and Law*, 82 S. CAL. L. REV. 209, 212 (2009) [hereinafter "McAdams, *Beyond Prisoner's Dilemma*"]; Nicholas Southwood & Lina Eriksson, *Norms and Conventions*, 14 PHIL. EXPLORATIONS 195, 195 (2011).

104. Peter Kollock, *Social Dilemmas: The Anatomy of Cooperation*, 24 ANN. REV. SOC. 183, 186 (1998).

105. *Id.* at 183, 186.

106. ELSTER, CEMENT OF SOCIETY, *supra* note 86, at x; THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 54–58 (1960); McAdams, *Beyond Prisoner's Dilemma*, *supra* note 103, at 250.

107. Southwood & Ericksson, *supra* note 103, at 197.

108. *Id.*

109. Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649,

produce self-fulfilling expectations that that behavior will occur.[110] Because coordination on *any* equilibrium is superior to defecting, individuals act in conformity with what they expect others will do.[111]

Monetary conventions are self-sustaining and often arbitrary.[112] They also do not depend on the law for their efficacy. Individuals follow the convention because they expect that others will do the same. The individual gains nothing by unilaterally defecting. This Part discusses two kinds of monetary conventions: (1) currencies and (2) payment mechanisms.

1. Currencies

a. The Dollar

With any type of currency, people wish to coordinate with others to use whatever form of currency others are using. Defection is pointless: if others are using a particular currency, the individual derives no benefit from switching to a different currency. People use the U.S. dollar not because the government orders them to do so, but because they expect that everyone else will use it.[113] Law, however, functions to facilitate the initial adoption of the convention, primarily through fiat or other proclamation. This makes the particular behavior salient and creates the expectation that other people will follow that behavior.[114] Law, in other words, creates a focal point around which individuals can coordinate their behavior.[115]

The use of the dollar is perhaps one of the most successful examples of a convention created through government proclamation. Before the Civil War, banks printed their own paper money and thousands of

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1658–59 (2000) [hereinafter "McAdams, *Focal Point*"]. Focal points are things in an environment that draw the mutual attention of the parties and make salient one form of behavior over another. For instance, in an experiment where participants from New Haven were asked to name a time and place to meet another person in New York City, a majority chose Grand Central Station, a focal point around which they coordinated. *See id.*; McAdams, *Beyond Prisoner's Dilemma*, *supra* note 103, at 231–32; SCHELLING, *supra* note 106, at 57–58 (1960).

110. McAdams, *Beyond Prisoner's Dilemma*, *supra* note 103, at 231.

111. *Id.*

112. ELSTER, EXPLAINING SOCIAL BEHAVIOR, *supra* note 86, at 357.

113. RICHARD H. MCADAMS, THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS 57 (2015) [hereinafter "MCADAMS, EXPRESSIVE POWERS"].

114. *See, e.g.*, Richard H. McAdams & Janice Nadler, *Coordinating in the Shadow of the Law: Two Contextualized Tests for the Focal Point Theory of Legal Compliance*, 42 LAW & SOC'Y REV. 865, 866 (2008) (discussing how laws can directly influence how people coordinate).

115. McAdams, *Focal Point*, *supra* note 109, at 1650 ("[I]ndividuals often act in ways that benefit themselves but prevent a large group from achieving its best outcome.").

different currencies were in circulation in the United States.[116] In 1861, in an attempt to finance the Civil War, Congress authorized the issuance of $50 million in demand notes, so-named because they were redeemable in gold coin "on demand."[117] This was followed in 1862 by the issuance of $150 million in U.S. notes, popularly known as greenbacks.[118] Greenbacks were the first fiat currency—convertible into Treasury bonds, but not backed by gold or silver.[119] It was not until the National Banking Act of 1863, however, that Congress created a national banking system and established a uniform national currency.[120] Even then, coordination around the dollar was not immediate. Congress facilitated the use of the dollar by placing a tax on bank notes issued by state banks.[121] And on May 22, 1933, Congress enacted a law declaring all coin and currencies in circulation to be legal tender.[122] This proclamation was carried through to the Coinage Act of 1965, which declares U.S. coins and currency legal tender for all debts, taxes, and dues.[123]

International coordination around the dollar resulted in large part from a carefully orchestrated campaign by then-Assistant Secretary of the Treasury Harry Dexter White at the Bretton Woods Conference.[124] In July 1944, delegates from forty-four nations met to establish an international monetary system that would contribute to exchange rate stability, prevent competitive devaluations, and promote greater

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116. GLYN DAVIES, A HISTORY OF MONEY: FROM ANCIENT TIMES TO THE PRESENT DAY 482–83 (2002).

117. JOSEPH F. JOHNSON, MONEY AND CURRENCY IN RELATION TO INDUSTRY, PRICES AND THE RATE OF INTEREST 263 (1905); HEATHER C. RICHARDSON, THE GREATEST NATION OF THE EARTH: REPUBLICAN ECONOMIC POLICIES DURING THE CIVIL WAR 69 (1997).

118. DAVIES, *supra* note 116, at 490–491.

119. *Id.*

120. Richard Sylla, *Federal Policy, Banking Market Structure, and Capital Mobilization in the United States*, 1863–1913, 29 J. ECON. HIST. 657, 659 (1969).

121. *Id.* at 662–63.

122. H.R.J. Res. 192, 73d Cong. (1933) (enacted).

123. Coinage Act of 1965 § 1(19), 31 U.S.C. § 5103 (2011). Section 5103 provides that cash is a valid and legal method of paying all debts, but does not require businesses, persons, or organizations to accept cash as payment for goods or services. *See also* U.S. Dep't of Treasury, *Legal Tender Status* (Jan. 4, 2011, 4:47 PM), https://www.treasury.gov/resource-center/faqs/Currency/Pages/legal-tender.aspx:

> [N]o Federal statute mandating that a private business, person or an organization must accept currency or coins as for payment for goods and/or services. Private businesses are free to develop their own policies on whether or not to accept cash unless there is a State law which says otherwise.

124. *See generally* BENN STEIL, THE BATTLE OF BRETTON WOODS: JOHN MAYNARD KEYNES, HARRY DEXTER WHITE, AND THE MAKING OF A NEW WORLD ORDER (2013) for a compelling narrative account of Secretary White's role in the U.S. strategy at the Bretton Woods Conference.

international trade.[125] White outmaneuvered his rival, John Maynard Keynes, who advocated for a new international currency called "bancor" to replace gold.[126] Instead, White secured agreement for the U.S. dollar to replace all references to "gold convertible currency" in the draft documents.[127] As a result, every country that was party to the agreement eventually pegged their country's currency to the dollar.[128] Under the Bretton Woods system, international balances were settled in dollars, and dollars were convertible into gold at a fixed rate of $35 per ounce.[129] The United States opportunely owned nearly 75 percent of the world's gold at the time, and the dollar took its place as the currency of international trade.[130] Although President Franklin D. Roosevelt terminated the dollar's convertibility into gold for U.S. citizens under H.J. Res. 192 on July 5, 1933, it remained convertible for foreign governments until President Richard Nixon's decree on August 15, 1971.[131] Congress officially terminated the gold value of the dollar on March 16, 1973, when the dollar formally became fiat currency.[132]

b. Alternative Currencies

Although the law helps establish coordination around a particular monetary form, it is not essential. Numerous currencies have emerged independent of the state. For instance, in Switzerland during the Great Depression, a network of Swiss businesses introduced a new currency called the Swiss WIR based on a system of mutual credit.[133] In Sardinia, Italy, a group of friends founded a local electronic currency called Sardex, another system of mutual credit and exchange through which member firms offered goods or services to others in the network.[134] And in the Berkshires in New York, more than 400

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125. Sandra K. Ghizoni, *Establishment of the Bretton Woods System*, FED. RES. HIST. (Nov. 22, 2013), http://www.federalreservehistory.org/Events/DetailView/28.

126. STEIL, *supra* note 124, at 143.

127. *Id.* at 215–16.

128. *Id.* at 251–52.

129. *Id.* at 28.

130. R.A. Mundell, *A Reconsideration of the Twentieth Century*, 90 AM. ECON. REV. 327, 333 (2000); Benn Steil, *Would a New 'Bretton Woods' Save the Global Economy?*, PBS NEWSHOUR, (May 15, 2013), http://www.pbs.org/newshour/making-sense/would-a-new-bretton-woods-save.

131. *Id.* at 334.

132. CRAIG K. ELWELL, CONGRESSIONAL RESEARCH SERVICE, R41887, BRIEF HISTORY OF THE GOLD STANDARD IN THE UNITED STATES 1, 11-13 (June 23, 2011); *Frequently Asked Questions: Gold & Silver*, FEDERAL RESERVE BANK RICHMOND, https://www.richmondfed.org/faqs/gold_silver (last visited Sept. 20, 2017).

133. Edward Posnett, *The Sardex Factor*, FIN. TIMES MAG. (Sept. 18, 2015), http://www.ft.com/cms/s/2/cf875d9a-5be6-11e5-a28b-50226830d644.html#.

134. *Id.* (describing the Sardinian-founded local electronic currency Sardex).

businesses accept a local currency called BerkShares.[135] Other local currencies include "Equal Dollars" in Philadelphia, "Ithaca Hours" in Ithaca, New York, and "Barter Bucks" in Kansas City, Missouri.[136]

Currencies also have flourished outside of the business world. In the 1970s in Washington, D.C., the Capitol Hill babysitting co-op, composed of staffers in Congress looking after one another's children, issued its own currency, called "scrip," on heavy pieces of paper.[137] Babysitters in the co-op received scrip as payment, with one scrip paying for one-half hour of babysitting time.[138] In prisons, where inmates are barred from using cash, money has taken the form of cigarettes, mackerel (or "mack"), tuna, coffee, and postage stamps, among other items.[139] When the Bureau of Prisons prohibited smoking in 2004, "mack" replaced cigarettes as the currency of choice.[140] On the streets, liquid Tide detergent has become another form of currency: one 150-ounce bottle goes for either $5 cash or $10 worth of marijuana or crack cocaine.[141]

c. Bitcoin and Other Virtual Currencies

Perhaps the best-known alternative currency is Bitcoin, a decentralized digital currency that is created, held, and transferred electronically. No central authority or government controls the currency, and no third-party financial institutions take part in the transactions.[142] Buyers and sellers transact directly with each other, though their identities are hidden and no personal information is shared.[143] "Miners," or administrators, maintain the peer-to-peer

135. Paul Kemp-Robertson, *10 Alternative Currencies, from Bitcoin to BerkShares to Sweat to Laundry Detergent*, TED BLOG (July 25, 2013), http://blog.ted.com/10-alternative-currencies-from-bitcoin-to-berkshares-to-sweat-to-laundry-detergent/.

136. *Id.*; Viviana A. Zelizer, *Circuits Within Capitalism*, *in* THE ECONOMIC SOCIOLOGY OF CAPITALISM 289, 299–305 (Victor Nee & Richard Swedberg, eds., 2005) [hereinafter "THE ECONOMIC SOCIOLOGY OF CAPITALISM"] (providing examples of local currencies in the United States).

137. Joan Sweeney & Richard J. Sweeney, *Monetary Theory and the Great Capitol Hill Baby Sitting Co-op Crisis*, 9 J. MONEY, CREDIT, & BANKING 86, 86 (1977).

138. *Id.*

139. Justin Scheck, *Mackerel Economics in Prison Leads to Appreciation for Oily Fillets*, WALL STREET J., Oct. 2, 2008, at A1.

140. *Id.*

141. Ben Paynter, *Suds for Drugs*, N.Y. MAG., Jan. 6, 2013, http://nymag.com/news/features/tide-detergent-drugs-2013-1/.

142. Stephen T. Middlebrook, *Bitcoin for Merchants: Legal Considerations for Businesses Wishing to Accept Bitcoin as a Form of Payment*, BUS. L. TODAY 1, 1 (Nov. 2014); Bill Maurer, *Blockchains Are a Diamond's Best Friend: Zelizer for the Bitcoin Moment*, *in* MONEY TALKS, *supra* note 40, at 219–20.

143. EDWARD V. MURPHY ET AL., CONG. RESEARCH SERV., R43339, BITCOIN: QUESTIONS,

network and authenticate transactions.[144] Transfers of ownership are recorded on a publicly accessible blockchain—a ledger or master database of bitcoins—and are not reversible.[145] Miners maintain the blockchain through a network of communicating nodes running Bitcoin software and receive bitcoins in return for their service.[146] The blockchain provides a "permanent, verifiable," and "public ledger maintained among nontrusted parties or peers."[147]

In large part due to its perceived anonymity, Bitcoin has emerged as the currency of choice for online criminals.[148] Although Bitcoin arose outside the bounds of the state (a factor that has contributed to its appeal), widespread adoption has been hampered by its broad use in illegal markets, as well as doubts as to its legality, security, and long-term prospects. The law can facilitate or impede coordination on the use of Bitcoin in several ways. Most obviously, if Congress were to follow the lead of China, Bangladesh, Bolivia, and Ecuador and ban or restrict its use, Bitcoin's growth would be severely curtailed.[149] Alternatively, the government can signal the legitimacy of the currency through regulation or public pronouncement. When U.S. law enforcement and regulatory officials acknowledged the benefits of Bitcoin and other virtual currencies during Congressional hearings in 2013, its price soared and many new businesses began accepting it.[150] Similarly, the Japanese government's legalization of Bitcoin as a payment mechanism

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144. Middlebrook, *supra* note 142, at 1.

145. *Id.* at 1–2.

146. *Id.* at 1.

147. Maurer, *supra* note 142, at 227 (explaining the purposes of the blockchain).

148. *See* Stephen Mihm, *Are Bitcoins the Criminal's Best Friend?*, BLOOMBERG VIEW (Nov. 18, 2013, 12:29 PM), https://www.bloomberg.com/view/articles/2013-11-18/are-bitcoins-the-criminal-s-best-friend (last visited July 11, 2017) (discussing the use of Bitcoin in criminal activity).

149. *See, e.g.*, Marcin Szczepanski, *Bitcoin: Market, Economics, and Regulation*, EUR. PARL. RES. SERV., at 9 (Nov. 4, 2014) (depicting a chart showing a significant projected decline); Anthony Cuthbertson, *Ecuador Reveals National Digital Currency Plans Following Bitcoin Ban*, INT'L BUS. TIMES (Sept. 1, 2014, 9:48 BST), http://www.ibtimes.co.uk/ecuador-reveals-national-digital-currency-plans-following-bitcoin-ban-1463397 [hereinafter "Cuthbertson, *Ecuador Following Bitcoin Ban*"] (describing Ecuador's ban on Bitcoin and its potential effects on the nation's economy); Anthony Cuthbertson, *Cryptocurrency Round-up: Bolivian Bitcoin Ban*, INT'L BUS. TIMES (June 20, 2014, 9:32 BST), http://www.ibtimes.co.uk/cryptocurrency-round-bolivian-bitcoin-ban-ios-apps-dogecoin-mcdonalds-1453453 [hereinafter "Cuthbertson, *Cryptocurrency Round-up*"] (relaying the Bolivian Central Bank's statement on the ban: "[i]t is illegal to use any kind of currency that is not issued and controlled by a government or an authorised entity").

150. Ryan Tracy, *Authorities See Worth of Bitcoin*, WALL STREET J. (Nov. 18, 2013), http://www.wsj.com/articles/SB10001424052702304439804579205740125297358.

prompted major retailers to accept Bitcoin.[151] The legal pronouncements heightened expectations that other people would use Bitcoin, further propagating its use.

2. Payment Mechanisms

Norms also exist as to the appropriate payment mechanism to be used. For instance, certain transactions are expected to be conducted in cash: payment at garage sales or to street vendors, occasional babysitting, allowances to children,[152] tips to bellhops, and the giving of alms,[153] among others. Homes are purchased by check, while businesses are purchased by wire transfer. Groceries, furniture, and other consumer goods are increasingly purchased by credit or debit card.[154] Although the law does not prohibit payment of taxes in cash,[155] a norm exists to pay by check or ACH transfer. Attempts to pay taxes in cash have been derided as childish, bitter, or petty.[156] Similarly, a norm exists against paying for goods, services, and fines in pennies or other loose change.[157]

Payment norms vary by business, nationality, or socio-economic group. For instance, many nail salons, barber shops, and small restaurants demand payment in cash. Online businesses, sharing-economy platforms, and in-flight services, however, require payment by

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151. Arjun Kharpal, *Bitcoin Value Rises Over $1 Billion as Japan, Russia Move to Legitimize Cryptocurrency* CNBC (Apr. 12, 2017), http://www.cnbc.com/2017/04/12/bitcoin-price-rises-japan-russia-regulation.html.

152. *See* Belk & Wallendorf, *supra* note 26, at 48.

153. James Hudnut-Beumier, *Why Cash Remains Sacred in American Churches*, WASH. POST (July 6, 2017), https://www.washingtonpost.com/news/acts-of-faith/wp/2017/07/06/why-cash-remains-sacred-in-american-churches/?utm_term=.ad6e306a0c71.

154. *See generally* RONALD J. MANN, PAYMENT SYSTEMS AND OTHER FINANCIAL TRANSACTIONS: CASES, MATERIALS, AND PROBLEMS (6th ed. 2016) (discussing changing payment trends).

155. *See* 31 U.S.C. § 5103 (2011) ("United States coins and currency (including Federal reserve notes and circulating notes of Federal reserve banks and national banks) are legal tender for all debts, public charges, taxes, and dues.").

156. *See, e.g.*, Kelly Phillips Erb, *Texas Man Arrested After Attempt to Pay Taxes with Dollar Bills*, FORBES (Feb. 3, 2015, 9:40 PM), https://www.forbes.com/sites/kellyphillipserb/2015/02/03/texas-man-arrested-after-attempt-to-pay-taxes-with-dollar-bills/#1e4368a58327.

157. *See, e.g.*, Alex Santoso, *Don't Mess with New Jersey: Paying with Pennies Got Man into Trouble*, NEATORAMA (Dec. 17, 2008, 3:19 AM), http://www.neatorama.com/2008/12/17/dont-mess-with-new-jersey-paying-with-pennies-got-man-into-trouble/ (describing a New Jersey municipal court that put out a warrant for a man's arrest after he paid for a $56 traffic ticket in pennies); Ed Krayewski, *Penn. Town Cites Federal Reg About Pennies as Payment That Expired 50 Years Ago*, HIT & RUN BLOG (Aug. 14, 2015), http://reason.com/blog/2015/08/14/penn-town-cites-federal-reg-about-pennie (detailing a similar story where a man was barred from paying a parking ticket in pennies).

credit or debit card. Teenagers and college-age students rely heavily on Venmo, which incorporates social media so that users can track others' payment activities.[158] In immigrant or low-income communities, where many individuals do not have bank accounts or credit cards, cash is the convention. Similarly, criminals have long conducted business exclusively in cash, though Bitcoin has become the currency of choice for online criminal transactions.[159] In certain parts of the world, including Germany, India, China, Japan, Brazil, and Spain, cash continues to be the predominant payment mechanism.[160] Forms of payment also denote different social ties and relations between employer and employee. Government workers are compensated by salary,[161] whereas individuals in the service industry are often paid by the hour.[162]

B. Source Restrictions

Certain types of money norms are restrictions on the source of money. For instance, "blood money" and "dirty money" are monies tainted by their source. Blood money can refer to money earned from death, murder, or mass human suffering,[163] money paid to the family of a person who has been killed,[164] or money earned from individual defendants, rather than liability insurance companies.[165] "Dirty money" refers to money derived from illegal activities, such as theft, forgery, or bribery. In contrast to the "honest dollar," blood money and dirty money are considered tainted by their ethically problematic roots.[166] Individuals perceive "immoral" or dirty money to have less purchasing power and feel compelled to cleanse it in various ways.[167]

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158. Maurer, *supra* note 142, at 216 (explaining the features of Venmo and its most common uses).

159. *Id.* at 220.

160. *Here are the Top Cashless Countries in the World*, BUS. TODAY (Dec. 29, 2016, 16:55 IST), http://www.businesstoday.in/current/economy-politics/here-are-the-top-cashless-countries-in-the-world/story/241430.html.

161. *See* NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1789–1940 (2013).

162. *See* Zelizer, *Payments*, *supra* note 38, at 487.

163. *Blood Money*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2017) ("[M]oney obtained at the cost of another's life.").

164. *Id.*

165. Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 LAW & SOC'Y REV. 275, 275 (2001).

166. ZELIZER, SOCIAL MEANING, *supra* note 34, at 3 (explaining how blood money is viewed as stained due to its origins).

167. *See* Nina Bandelj et al., *Morals and Emotions of Money*, *in* MONEY TALKS, *supra* note 40, at 41–42 (distinguishing religious and secular meanings of money); Jennifer E. Stellar & Robb Willer, *The Corruption of Value: Negative Moral Associations Diminish the Value of*

Source restrictions have moral, social, or legal origins. Individuals and organizations seek to maintain moral identities and view immorally obtained money as threats to that identity.[168] The Vatican, for instance, has denounced "dirty money" donations earned from exploitation and abuse, particularly of low-income workers.[169] Churches routinely return donations and tithings paid by members who obtained the money through fraud or other illicit means.[170] Prostitutes and criminals also segregate clean money from dirty money by, for instance, reserving money obtained from honest sources for paying bills or making church donations.[171] Money obtained by theft or prostitution, however, is set aside for drugs, alcohol, and recreational expenses.[172]

In tort litigation, a norm exists against collecting blood money—that is, real money from real people—rather than money from insurance companies.[173] The norm is sustained by social, rather than legal, sanctions. By contrast, the law specifically targets the practice of generating income through illegal means. Money laundering involves the process of transforming dirty money into "clean money"—i.e., money originating from a legitimate source.[174] Anti-money laundering ("AML") regulations penalize anyone who knowingly attempts to conceal or disguise financial transactions involving the "proceeds of some form of unlawful activity."[175]

The law differentiates between dirty and clean money in numerous areas. Consider source restrictions on mortgages. The Federal Housing Administration ("FHA"), for instance, requires banks to document the source and nature of mortgage down payments when the borrower pays

Money, 5 SOC. PSYCHOL. & PERSONALITY SCI. 60 (2014) (suggesting that tainted money can have immoral associations that threaten to harm the recipient's moral self-image).

168. Stellar & Willer, *supra* note 167, at 64 (reiterating that immorally obtained money threatens an individual's ability to maintain a moral identity).

169. Lydia Tomkiw, *Catholic Church Corruption: Pope Francis Says No to 'Dirty Money' Donations*, INT'L BUS. TIMES (Mar. 2, 2016, 9:02 AM), http://www.ibtimes.com/catholic-church-corruption-pope-francis-says-no-dirty-money-donations-2328719.

170. *See, e.g.*, Tad Walch, *LDS Church Will Return Tithing Donated by Man Who Defrauded 5,400 Victims,* DESERET NEWS UTAH (May 31, 2017, 11:25 PM), http://www.deseretnews.com/article/865681124/LDS-Church-will-return-tithing-donated-by-man-who-defrauded-5400-victims.html (providing an example of a church returning money donated by a man who pleaded guilty to fraud).

171. ZELIZER, SOCIAL MEANING, *supra* note 34, at 3.

172. *Id.*

173. Baker, *supra* note 165, at 314 (explaining the norm among tort litigators to collect money from insurance companies rather than "blood money" from individuals).

174. *History of Anti-Money Laundering Laws*, U.S. DEP'T OF THE TREASURY, FIN. CRIMES ENF'T NETWORK, https://www.fincen.gov/history-anti-money-laundering-laws (last visited Aug. 20, 2017).

175. *See* 18 U.S.C. § 1956 (2015) (defining the crime of money laundering).

more than 2 percent of the sales price or when any payment "appears excessive based upon the borrower's history of accumulating savings."[176] Acceptable sources of a down payment include cash from savings and checking accounts, savings bonds, IRAs and 401(k) accounts, investments, gift funds, and proceeds from the sale of personal property.[177]

C. Time, Manner, Place Restrictions

Time, manner, place restrictions are the rules of etiquette that govern socially appropriate behavior with regard to money. They function to segregate the social from the market sphere and are primarily enforced through social sanctions. Examples include norms against asking a neighbor to mow one's lawn or a colleague to clean one's office;[178] attempting to purchase someone else's place in line;[179] failing to tip; or asking about a person's salary or the cost of a gift, furnishing, or piece of clothing.[180] Money itself is a taboo conversation topic,[181] although this varies considerably among cultures.[182]

It is inappropriate to offer money in certain social contexts, such as payment for meals, favors, slights, or hurt feelings.[183] Gifts may be exchanged during courtship, but not money.[184] It is also inappropriate to put a price on things that people expect to be free or that are not considered part of the business world. Examples include the air we breathe, the enjoyment of nature,[185] and conversations with others.

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176. *FHA Loan Rules: Sources of Your Down Payment*, FHA.COM (June 4, 2017), http://www.fha.com/fha_article?id= 316 [hereinafter "*FHA Loan Rules*"].

177. *Id.* (discussing acceptable sources of a down payment).

178. *See* ELSTER, CEMENT OF SOCIETY, *supra* note 84, at 110; Sunstein, *Expressive Function*, *supra* note 12, at 2037.

179. ELSTER, EXPLAINING SOCIAL BEHAVIOR, *supra* note 86, at 365.

180. ELIZABETH L. POST, EMILY POST'S ETIQUETTE: A GUIDE TO MODERN MANNERS 225, 391–403 (14th ed. 1984).

181. *See, e.g.*, David W. Krueger, *Money, Success, and Success Phobia*, *in* THE LAST TABOO: MONEY AS SYMBOL AND REALITY IN PSYCHOTHERAPY AND PSYCHOANALYSIS 3, 3–16 (David W. Krueger ed., 1986) (exploring social norms surrounding the discussion of money).

182. *See, e.g.*, Xin Lu, *Chinese Money Habits—How My Culture Influences My Attitudes Toward Money*, WISE BREAD (Mar. 5, 2008), http://www.wisebread.com/chinese-money-habits-how-my-culture-influences-my-attitudes-toward-money (explaining that it is more socially acceptable to discuss money and salaries in China); Lisa Roolant, *We Asked People from Different Countries What They Earned. You'll Never Guess What Happened*, TRANSFERWISE (Dec. 7, 2016), https://transferwise.com/us/blog/we-asked-people-from-different-countries-what-they-earned-youll-never-guess-what-happened (offering an example of the differences between Indian and European cultures with respect to discussing salary).

183. Sunstein, *Expressive Function*, *supra* note 12, at 2037.

184. *See* ZELIZER, INTIMACY, *supra* note 15, at 115–18 (discussing the social norms around courtship).

185. However, the government may charge entrance fees to public parks.

Attempts to put a price on things that are free or that people would never think of as not being "free" are perceived as rude and offensive.

Putting a price on something results in a categorical shift that changes the nature of the relationship.[186] Among friends, neighbors, and colleagues, offering cash compensation for another's time or labor signals impersonality and social distance, as well as an improper valuation of the other person.[187] Monetary transactions may also dissipate the willingness to spontaneously help others in the community.[188] Similarly, when certain individuals or organizations start charging for things that used to be free or that we expect to be free, irreparable damage can result. The hostility of many veterans to the American Red Cross provides a case in point.[189] In 1942, upon request of the Secretary of War, the Red Cross began charging GIs for coffee and doughnuts during World War II after having previously offered them for free.[190] The intense anger, hostility, and sense of betrayal over this action are being felt by the Red Cross to this day.[191]

D. Use Restrictions

Use restrictions are another broad category of money norms. Use may be restricted due to (1) the identity of the actor, (2) the qualities of the target, or (3) the intended purpose. Consider uses of money that are restricted because of the identity of the actor or target. Public goods such as parking spaces or airwaves may be sold by the government, but not by private parties. Certain individuals may use money to buy guns, but others—including adolescents, criminals, the mentally disabled, and undocumented immigrants—may not.[192] Payments or gifts that are otherwise socially acceptable become unacceptable if the recipient is a public official, such as a politician or judge. The Emoluments Clause, for instance, bars any person holding public office from accepting gifts or payments of any kind from foreign governments.[193]

Money norms also dictate that there are certain things money should not be able to buy—for instance, children, organs, spouses, votes, public

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186. *See supra* Part I.B. (exploring the psychological effects of money).

187. ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 78 (1991).

188. ELSTER, CEMENT OF SOCIETY, *supra* note 84, at 142.

189. Chana Joffe-Walt, *The Cost of Free Doughnuts: 70 Years of Regret*, NPR PLANET MONEY (July 13, 2012, 2:49 PM), http://www.npr.org/sections/money/2012/07/13/156737801/the-cost-of-free-doughnuts-70-years-of-regret.

190. *Id.*

191. *Id.*

192. Gun Control Act of 1968, 18 U.S.C. § 922(g)(1) (2015).

193. U.S. CONST. art. I, § 9, cl. 8.

office, body parts, sexual favors, or exemption from military service.[194] These restrictions are in large part a product of the perceived corrupting and devaluing effects of money.[195] Under this view, putting a price on a good or a behavior diminishes and commodifies it, sending a signal that society does not properly value it or values it in the wrong way.[196]

Finally, the use of money may be restricted because of the intended purpose. The crime of bribery, for instance, is defined as either "corruptly giv[ing], offer[ing] or promis[ing] anything of value to any public official . . . with intent [] to influence any official act" or "being a public official" and "corruptly demand[ing], seek[ing], receiv[ing], [or] accept[ing] . . . anything of value personally . . . in return for [] being influenced in the performance of any official act."[197] Extortion, ransom, and blackmail violate norms and laws against using violence or threats to obtain money from another. Hush money, for instance, violates norms against paying money to induce silence.[198] Similarly, murder-for-hire violates norms against taking the life of another.[199] Some use restrictions are not backed by law, but are sustained by moral reprehension. Consider the controversy that surrounds cash-for-sterilization programs.[200] Regardless of any greater good, the use of money to induce drug-addicted women to relinquish their reproductive capacity has been vilified as coercive and corrupt.[201]

By contrast, money norms extol certain uses of money, such as paying for basic living expenses or saving for retirement, college tuition, and home mortgage down payments. The norm of saving is stronger in some cultures than in others. The average Chinese household, for instance, saves nearly 30 percent of its disposable

194. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 100–03 (Basic Books eds., 1983).

195. MICHAEL J. SANDEL, WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS 111 (Farrar, Straus, and Giroux eds., 2012).

196. *Id.* at 110–13 (explaining two objections to markets: the fairness argument and the corruption argument). There are other things, such as love or friendship, which money cannot buy. *See id.* at 93; *see also* Sunstein, *Expressive Function*, *supra* note 12, at 2038 (discussing the commodification of sexuality and reproductive capacity).

197. Bribery of Public Officials and Witnesses, 18 U.S.C. § 201 (2015).

198. *See* George P. Fletcher, *Blackmail: The Paradigmatic Crime*, 141 U. PA. L. REV. 1617, 1620 (1993) (defining hush money and other examples of blackmail).

199. *See* Satoshi Kanazawa & Mary C. Still, *The Emergence of Marriage Norms: An Evolutionary Psychological Perspective*, *in* SOCIAL NORMS 274, 281 (Michael Hechter & Karl-Dieter Opp eds., 2001) (discussing norms against murder, rape, and incest).

200. SANDEL, *supra* note 195, at 43–44 (detailing the origins of cash-for-sterilization programs and the subsequent pushback).

201. *Id.* at 46.

income.[202] Save too much, however, and you are a miser; save too little, and you are a spendthrift. The money norms of thrift and generosity go hand-in-hand to regulate spenders and savers at either extreme. A norm also exists against using money to flaunt one's wealth, particularly where doing so highlights inequalities.[203]

III. ENFORCEMENT

Money norms are unique in that money and norms are assumed to inhabit separate spheres. In the absence of other cues, money signals the existence of a market exchange and generates perceptions of selfishness and individualism.[204] Norms, on the other hand, are the creature of social forces. Because of their capacity to elicit powerful, often irrational emotions, behavioral rules related to money are inherently complex. This Part examines several non-legal mechanisms for sustaining and enforcing money norms: (a) mutual interests, (b) social sanctions, (c) internalized values, (d) religion, and (e) coercion.[205]

A. Mutual Interests

Some money norms are self-sustaining. Because they serve both parties' interests, no separate enforcement mechanism is necessary. Norms on the form of money do not require external enforcement because it is in the interests of everyone to conform to what others are doing. These norms are sustained by shared expectations about the appropriate solution to a given coordination dilemma.[206] If everyone uses and accepts the dollar, there is no incentive to use a separate payment form.

B. Social Sanctions

Individuals adhere to certain norms, such as the rules of etiquette, because they seek esteem—the good opinion or respect of others—and fear social sanctions.[207] In both laboratory and real-world settings,

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202. Dexter Roberts, *The Chinese Can't Kick Their Savings Habit*, BLOOMBERG BUSINESSWEEK (Apr. 30, 2015, 7:16 PM), https://www.bloomberg.com/news/articles/2015-05-01/chinese-consumers-cling-to-saving-suppressing-spending.

203. ELSTER, CEMENT OF SOCIETY, *supra* note 84, at 142-43 (discussing the norm against showcasing one's wealth, particularly in small communities).

204. *See supra* Part I.B. (exploring the psychological effects of money).

205. *See, e.g.*, Diego Gambetta, *Mafia: The Price of Distrust*, *in* TRUST: MAKING AND BREAKING COOPERATIVE RELATIONS 158, 168 (Diego Gambetta ed., 1988) (detailing the mafia's use of coercion and mutual economic interests to generate compliance).

206. H. Peyton Young, *Social Norms*, *in* NEW PALGRAVE DICTIONARY OF ECONOMICS (Steven N. Durlauf & Lawrence E. Blume, eds., 2d ed. 2008).

207. *See* McAdams, *Origin of Norms*, *supra* note 91, at 355 (explaining the "esteem" theory

individuals have shown a willingness to incur substantial costs to obtain the respect and admiration of others.[208] Social sanctions for non-compliance include gossip, ridicule, disapproval, condemnation, and ostracism. An offer to pay a coworker to clean one's office or a neighbor to mow one's lawn would be met with scorn and offended feelings. By complying with these norms, individuals seek to signal that they are a cooperative "good type"[209] with an upright character and good upbringing.

Examples abound of money norms that are followed for fear of social sanctions. Rotating savings and credit associations ("Roscas"), for instance, have proven to be a remarkably resilient and effective form of financing for ethnic communities despite the absence of legal sanctions. Examples include the Korean "kye," the African "sou-sou" or "esusu," the Mexican "tanda," or the Japanese "mujin."[210] These rotating credit groups consist of a group of people who each contribute a set amount of money at a fixed time to a common pot. Members take turns taking from the pot, with early takers essentially receiving an interest-free loan.[211] Given that these sums are dispersed without written contracts, what prevents early takers from absconding with the funds? Social connectedness and fear of ostracism are key. Roscas are usually formed among individuals who are acquainted with one another or with the organizer.[212] Members sanction defaulters socially and prevent them from further participation.[213] Ostracism is particularly effective because members are often individuals with little or no access to formal credit

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of norms).

208. McAdams, *Origin of Norms, supra* note 91 at 356 (stating that people often incur material costs to cooperate in situations where the only reward is the respect and admiration of their peers).

209. ERIC A. POSNER, LAW AND SOCIAL NORMS 18 (Harv. Univ. Press rev. ed., 2000) [hereinafter "POSNER, LAW AND SOCIAL NORMS"].

210. KEMPE RONALD HOPE, SR., DEVELOPMENT IN THE THIRD WORLD: FROM POLICY FAILURE TO POLICY REFORM 117 (1996).

211. *See* Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133, 169–70 (1996) [hereinafter "Posner, *Regulation of Groups*"] (explaining how members rotate taking from the pot, with later takers saving and earlier takers borrowing, paying little to no interest for their loans).

212. *See* Timothy Besley et al., *The Economics of Rotating Savings and Credit Associations*, 83 AM. ECON. REV. 792, 794 (1993) ("Roscas are thus typically formed among individuals whose circumstances and characteristics are well known to each other.").

213. *See id.* (explaining that individuals who default are "sanctioned socially" and prevented from Rosca participation in the future); Donald V. Kurtz & Margaret Showman, *The Tanda: A Rotating Credit Association in Mexico*, 17 ETHNOLOGY 65, 69 (1978) (explaining that when a member defaults they may suffer socially and emotionally and will likely not be invited to participate again).

markets.[214]

C. Internalized Values

Money norms may also be sustained by internalized values such as morality and perceived fairness. An example of an internalized norm is tipping when traveling out of town, where the risk of social sanction is remote.[215] Individuals follow the norm because of an internalized sense of shame or guilt, a desire to sustain their self-image of being generous and kind, and perhaps empathy for workers who work hard, but earn little.[216] Similarly, individuals adhere to the norm of not selling children, spouses, or organs not so much because of a fear of external sanctions, but because of an internalized sense of morality. Even if it were legal to sell our children, most of us would not do so because it *feels* unethical, immoral, and wrong. The public outcry that followed Richard Posner's so-called "baby selling article" is only one example.[217]

Moreover, because money serves as a cue that the other party may behave opportunistically, money norms are unlikely to be effective unless they are perceived to be fair. Experimental evidence demonstrates that individual behavior is shaped not only by the desire to maximize material payoffs, but also by fairness concerns.[218] Many people punish others at considerable personal cost when they perceive that others are behaving selfishly.[219] In numerous controlled experiments isolating the impact of fairness motives, individuals have consistently sought to reduce the payoff of those who act, or appear to act, unfairly.[220]

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214. *See* Besley, *supra* note 212, at 794 (explaining that members of a Rosca are typically not able to borrow in a formal credit market because it is presumed they would be unable to repay a loan).

215. *See* McAdams, *Origin of Norms*, *supra* note 91, at 384 (discussing the American norm of tipping in comparison with norms abroad).

216. Ofer H. Azar, *What Sustains Social Norms and How They Evolve? The Case of Tipping*, 54 J. ECON. BEHAV. & ORG. 49, 49–50 (2004).

217. Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59, 59 (1987) [hereinafter "Posner, *Adoptions*"]; Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323, 323–24 (1978).

218. Ernst Fehr & Klaus M. Schmidt, *Theories of Fairness and Reciprocity: Evidence and Economic Applications*, *in* ADVANCES IN ECONOMICS AND ECONOMETRICS 1 (Mathias Dewatripont et al. eds., 2003).

219. *Id.* at 2.

220. *Id.* at 37; *see, e.g.*, Sally Blount, *When Social Outcomes Aren't Fair: The Effect of Causal Attributions on Preferences*, 63 ORG. BEHAV. & HUM. DECISION PROCESSES 131, 131 (1995); Armin Falk et al., *Testing Theories of Fairness–Intentions Matter*, 62 GAMES & ECON. BEHAV. 287, 288 (2008); John H. Kagel et al., *Fairness in Ultimatum Games with Asymmetric Information and Asymmetric Payoffs*, 13 GAMES & ECON. BEHAV. 100, 100 (1996); Theo

Consider the demise of peer-to-peer mobile platforms such as Haystack Mobile Technologies, Monkey Parking, and Sweetch that allowed drivers to sell parking spots to other drivers.[221] The Haystack app allowed users to alert others when they were leaving a parking spot, usually for a fee of $3 to $5, $0.75 of which Haystack kept. The "Make-Me-Move" feature on the app allowed drivers to auction off their parking spots to the highest bidder.[222] The public uproar that ensued is instructive. Founder Eric Meyer was decried as a "jerk" (among other unsavory epithets), and the term "jerk tech" was coined for self-serving, "compassionless" startups "that exploit small businesses and public infrastructure to make a buck and aid the wealthy."[223] Angry politicians in Boston, Los Angeles, San Francisco, and Santa Monica introduced ordinances banning the app, spelling the demise of the company.[224]

A similar fate befell apps like ReservationHop, which made reservations at popular restaurants, then sold them to users for $5 to $10. The app provided a name to give at the door, creating the impression that the reservation had been made by the user.[225] The idea sparked an onslaught of vehement criticism, with invectives from "irresponsible" to "sleazy" leveled at the company.[226] What was it about Haystack and ReservationHop that people found so offensive? What accounted for the outpouring of anger, contempt, and hatred for these companies?

The answer lies in the violation of money norms—including norms against selling something you do not own and charging for things that

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Offerman, *Hurting Hurts More than Helping Helps: The Role of Self-Serving Bias*, 46 EUR. ECON. REV. 1423, 1423 (2002).

221. Josh Costine, *Stop the JerkTech*, TECH CRUNCH (July 3, 2014), https://www.wallstreetdailytechcrunch.com/2014/08/11/haystack-parking-app-jerktech07/03/go-disrupt-yourself/.

222. Alan F., *Why In-Street Parking App Haystack Failed*, PHONE ARENA (Jan. 25, 2015, 11:47 PM), http://www.phonearena.com/news/Why-in-street-parking-app-Haystack-failed_id65211 [hereinafter "PHONE ARENA"].

223. *See* Costine, *supra* note 221 (discussing the resulting demise of "JerkTech"); *see also* Christopher Mims, *No 'Free Parking' for an App That Tried*, WALL STREET J., (Jan. 25, 2015, 8:16 PM), http://www.wsj.com/articles/no-free-parking-for-an-app-that-tried-1422234966 (interviewing the founder of Haystack).

224. *See* PHONE ARENA, *supra* note 222 (discussing how Haystack and similar apps were banned in various large American cities).

225. Lisa Eadicicco, *People Are Freaking Out About a Startup That Snags Restaurant Reservations and Sells Them*, BUS. INSIDER (July 4, 2014, 12:15 PM), http://www.businessinsider.com/reservationhop-app-2014-7.

226. Anthony Ha, *Everyone Seems Mad at ReservationHop, Founder Admits He Was 'Taken Aback' By the Criticism*, TECH CRUNCH (July 3, 2014), https://techcrunch.com/2014/07/03/everyone-seems-mad-at-reservation-hop-founder-admits-he-was-taken-aback-by-the-criticism.

should be free—and deep-seated notions of fairness. Boston City Council member Frank Baker summed up the basis of the opposition to Haystack: "My understanding was that [the parking spot sellers] were trying to buy and sell public property that wasn't theirs to buy and sell."[227] An editorial on TechCrunch, a technology website, stated, "All of these apps are essentially tools for scalping a public good or open resource. They don't *deserve* to take something that's supposed to be free and first-come-first-serve so they can sell it."[228] Another editorial railed, "We're talking about public property here, so it's important to make sure everyone has a chance to access the scarce resource. Putting a free-market price on public parking spots could make them unaffordable for poor people, and that would be unfair."[229]

But the unfairness objection was not simply about the sale of public versus private goods, as ReservationHop and similar apps were not attempting to sell public goods. Like Haystack, ReservationHop sold something that it did not own—reservations at restaurants—but the objection ran deeper. After all, other sharing economy companies such as Airbnb and Uber also profit from things they do not own, but they did not encounter the same level of public opposition (though they encountered considerable opposition from the industries they disrupted). The crucial difference was that ReservationHop tried to sell something that people expected to be free—reservations at a restaurant—as opposed to something like lodging or cab services, which had always commanded a price. Contrast the experience of ReservationHop with Opentable, which provides a similar restaurant reservation service. Opentable, however, does not charge customers for making reservations. It instead charges restaurants fixed subscription fees each month, akin to standard brokerage arrangements or finders' fees.[230]

With parking apps such as Haystack, the offense consisted of more than simply attempting to sell something that used to be free: the apps were used for both paid and free spots. The perceived unfairness stemmed from two sources. First, Haystack's attempt to take a cut—no matter how minuscule—of a resource that belonged to the public was

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227. *See* PHONE ARENA, *supra* note 222 (explaining the city's concern that profits were being made off of city property which did not belong to the person selling the parking spot).

228. *See* Costine, *supra* note 221 (emphasis added) (detailing various criticisms of "JerkTech" apps like Haystack).

229. Curt Woodward, *The Endless Saga of Haystack, An Illegal App That Tried to Sell Public Parking*, BOSTON GLOBE (June 10, 2015), http://www.betaboston.com/news/2015/06/10/the-endless-saga-of-haystack-an-illegal-app-that-tried-to-sell-public-parking.

230. Eleanor Miller, *Opentable Explained: Here's How the Company Makes Money*, BUS. INSIDER (Oct. 26, 2011, 11:09 AM), http://www.businessinsider.com/opentable-explainer-2011-10 (last visited Jan. 4, 2017).

perceived as unfair and predatory. Even when these startups offered to share their proceeds with the cities or restaurants at issue, the hostility remained. Intentions mattered. Presumably, if the city of Boston had hired Haystack to assist it in easing parking congestion, giving Haystack a small share of the proceeds, the outcome would have been different. But the process by which Haystack undertook to profit from something that was not theirs to sell contributed to the sense that they had acted unfairly. The second objection was inequality of outcome. By putting a price on parking spaces that used to be free, Haystack made it more difficult for the poor to obtain parking. A similar objection was raised against ReservationHop, which made it harder for ordinary people to make restaurant reservations.[231]

Perhaps one of the most egregious examples of a money norm that was perceived as inherently unfair was the now-defunct norm of paying a commutation fee or providing a substitute to avoid military service. During the Civil War, the Enrollment Act of 1863 allowed two means of avoiding the draft: paying a commutation fee of $300 or providing a substitute.[232] Commutation was widely condemned as favoring the rich and penalizing the poor. During that time, $300 was equivalent to a workingman's annual wage, making commutation unfeasible for all but the rich.[233] The Civil War came to be known as a "rich man's war but a poor man's fight."[234] Central to the law's unpopularity was its intrinsic unfairness—forcing poor men to risk their lives while exempting others for a price.[235] The public's resentment reached such a point that the provision was quickly repealed the following year.[236]

D. Religion

Some money norms are sustained by fear of divine, as opposed to social, sanctions. For instance, the norm against charging usurious interest rates has roots in Christianity, Islam, Judaism, Hinduism, and Buddhism, among other religions.[237] Under canon law, the sin of usury was defined as any return on a loan beyond the principal.[238] Biblical

231. *See* Ha, *supra* note 226.

232. Peter Levine, *Draft Evasion in the North During the Civil War, 1863-1865*, 67 J. AM. HIST. 816, 816 (1981).

233. Eugene C. Murdock, *Was It a 'Poor Man's Fight'?*, 10 CIV. WAR HIST. 241, 241 (1964).

234. *Id.*

235. WALZER, *supra* note 194, at 90.

236. Murdock, *supra* note 233, at 241.

237. Wayne A.M. Visser & Alastair McIntosh, *A Short Review of the Historical Critique of Usury*, 8 ACCT., BUS., & FIN. HIST. 175, 175 (1998).

238. Mark Koyama, *Evading the 'Taint of Usury': The Usury Prohibition as a Barrier to Entry*, 47 EXPLORATIONS IN ECON. HIST. 420, 421 (2010) (quoting *Luke* 6:35 (Revised Standard

references to usury in the New Testament included Luke's teaching to "lend freely hoping for nothing in return."[239] The Hebrew prophet Ezekiel similarly condemned usury as an "abominable" sin that would receive divine punishment.[240] By the fifth century, the Catholic Church prohibited the taking of interest, and by the twelfth century, it decreed that usurers could receive neither the sacraments nor a Christian burial.[241] In 1311, Pope Clement V declared usury a heresy and abolished all secular legislation permitting usury.[242] Although the Church eventually retreated from this position and interpreted usury as the taking of "excessive" interest, religious leaders, theologians, moralists, and philosophers continued to denounce the evil of usury. St. Thomas Aquinas, for instance, condemned usury as morally wrong and unjust, an attempt to obtain "double payment" that violated the essence of money as a measure of value and medium of exchange.[243] Dante relegated usurers to the lowest rung in the seventh circle of Hell, below murderers and blasphemers.[244]

Similarly, the money norm of giving to charity has biblical roots. Although the motivation for giving can range from fear of social sanctions to the "warm glow" effect,[245] among the devout, charitable giving can be motivated by fear of divine repercussions. Tithing, or donating a tenth of one's income to charity, historically functioned as a religious obligation. In Islam, sanctions for not paying the "Zakat," or "alms," include the threat of not having one's prayers answered and facing punishment in the afterlife.[246] The Church of Jesus Christ of Latter-day Saints teaches that disobeying the law of tithing not only influences one's blessings on Earth, but also "[n]o man may hope or

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Version)).

239. *Id.*

240. *See* James M. Ackerman, *Interest Rates and the Law: A History of Usury*, 1981 ARIZ. ST. L.J. 61, 61 (1981) (citing *Ezekiel* 18:10-13 (Revised Standard Version) ("If he . . . lends at interest, and takes increase; shall he then live? He shall not live. He has done all these abominable things; he shall surely die; his blood shall be upon himself.")).

241. Conrad Henry Moehlman, *The Christianization of Interest*, 3 CHURCH HIST. 3, 6–7 (1934).

242. *Id.* at 7.

243. Thomas Aquinas, *Of Cheating, Which Is Committed in Buying and Selling*, *in* 2 THE SUMMA THEOLOGICA OF ST. THOMAS AQUINAS 450–51 (Fathers of the English Dominican Province trans., 1918).

244. DANTE, THE INFERNO 149–54 (J. Ciardi trans. 1954).

245. James Andreoni, *Impure Altruism and Donations to Public Goods: A Theory of Warm-Glow Giving*, 100 ECON. J. 464, 464 (1990).

246. *Al-Quran* 9:34-35; *see generally* ENCYCLOPEDIA OF ISLAM 406–22 (P. Bearman et al. eds., 2009) (explaining the moral and ethical obligation to pay zakat and the consequences of noncompliance).

expect to have an inheritance on this celestial globe who has failed to pay his tithing."[247] In addition, it bars those who do not pay their tithes from holding leadership roles or obtaining admission to the temples.[248] Although tithing is rarely enforced among other denominations, a majority of evangelical Christian leaders teach that tithing is important or essential to being a "good evangelical."[249]

E. Coercion

Certain money norms are enforced through physical coercion. For much of history, the norm of paying back one's debts was enforced by the threat of imprisonment.[250] Money norms may also emerge through extralegal coercion. Take, for instance, ransom and extortion. Although a norm exists against obtaining money through force or threats, in the absence or failure of law, extortion or ransom can itself become a norm. In Honduras, for instance, extortion of bus drivers has become a fabric of day-to-day life.[251] Weekly payments to gangs—routine to the point of being referred to as "rent"—purchase the privilege of not being executed that week by that particular gang.[252] In Nigeria, a similar norm has emerged around ransom payments, which have become so commonplace that businesses routinely purchase kidnapping and ransom ("K&R") insurance.[253]

When a money-related practice—however illegal—becomes the new "normal," it may be characterized as a money norm. In Honduras,

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247. *The Law of Tithing*, 119 DOCTRINE AND COVENANTS STUDENT MANUAL 5–6 (2002), https://www.lds.org/manual/doctrine-and-covenants-student-manual/section-110-121/section-119-the-law-of-tithing?lang=eng (last visited July 16, 2017).

248. *See* Howard D. Swainston, *Tithing*, 4 ENCYCLOPEDIA OF MORMONISM 1482 (1992) (detailing historical tithing practices in the Mormon Church); ANDREW JACKSON, THE MORMON FAITH OF MITT ROMNEY: WHAT LATTER-DAY SAINTS TEACH & PRACTICE 180 (2012).

249. *Global Survey of Evangelical Protestant Leaders*, PEW RES. CTR. (June 22, 2011), http://www.pewforum.org/2011/06/22/global-survey-of-evangelical-protestant-leaders/.

250. *See* Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 7 (1995) (discussing the practice of imprisonment for nonpayment of debt dating back to early English law); *see also* PETER J. COLEMAN, DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY, 1607–1900 (State Hist. Soc. of Wis. eds., 2010) (1974) (reviewing the history of debt and insolvency in America).

251. Marlon Bishop, *Hello, I'm Calling From 'La Mafia'*, NPR PLANET MONEY (Dec. 18, 2014, 1:17 PM), http://www.npr.org/sections/money/2014/12/18/371658493/hello-im-calling-from-la-mafia.

252. *Id.*

253. Gregory Warner, *Captive Market: A Consultant, His Girlfriend and the Kidnapping Business*, NPR PLANET MONEY (Mar. 5, 2015, 4:36 PM), http://www.npr.org/sections/money/2015/03/05/391036663/captive-market-a-consultant-his-girlfriend-and-the-kidnapping-business (last visited Jan. 6, 2017).

Nigeria, and other parts of the world, where extortion and ransom have become a part of the costs of daily life or of doing business, certain rules of behavior have emerged. Extorters, for instance, follow the rule of adjustable pricing.[254] Prices that are too high or too low put profits at risk. If a price is too high, individuals cannot pay, but even more importantly, too high a price impacts the willingness to pay. Too low a price, on the other hand, impacts not only the bottom line, but also legitimacy. A gang that consistently demands a much lower price than its competition may simply not be taken as seriously.

The Mafia presents a fascinating parallel. Part of the enduring success and resilience of the Mafia can be attributed to its ability to use violence to sustain behavioral regularities and a stable social structure.[255] Extortion payments have performed several functions, including providing physical protection, disposing of competitors, and deterring swindlers in business transactions.[256] In many communities, "protection money" has become woven into the fabric of the social and economic system. Violence functions as a tool of economic competition and a "regulatory norm" of the marketplace.[257]

IV. LAW AND MONEY NORMS

In addition to physical coercion, money norms may be sustained and enforced through law. Existing literature on law and norms generally relegates money to the sphere of incentives: money functions as a tool for directly changing the costs of behaviors. Norms, on the other hand, are viewed as indirect, informal, and social modes of regulating behavior outside of the legal system. Few scholars have studied norms of money or the interrelationship of money norms and the law.[258] Although theories of the expressive function of law have examined the effects of law outside of incentives, they too have kept the two

254. *Id.*

255. *See* Gambetta, *supra* note 205, at 168.

256. *Id.* at 170–71.

257. Raimondo Catanzaro, *Enforcers, Entrepreneurs, and Survivors: How the Mafia Has Adapted to Change*, 36 BRIT. J. SOC. 34, 52 (1985).

258. Notable exceptions include: Sunstein, *Expressive Function*, *supra* note 12, at 2036 (discussing social norms governing acceptable uses of money); ELSTER, CEMENT OF SOCIETY, *supra* note 84, at 110–11 (giving examples of norms regulating the use of money). *See also* Matthew A. Edwards, *The Law and Social Norms of Pay Secrecy*, 26 BERKELEY J. EMP. & LAB. L. 41 (2005) (analyzing the law and norms of pay secrecy); Luis Araujo, *Social Norms and Money*, 51 J. MONETARY ECON. 241 (2004) (arguing that although a social norm establishing gift exchange can substitute for money when a population is small, money is essential as a medium of exchange when a population grows in size).

spheres—money and norms—distinct.[259] In attempting to fill that gap, this Part analyzes (a) money's function in the law outside of incentives, and (b) law's function in defining, enforcing, and changing money norms.

A. Money's Function in the Law

Traditionally, money has been viewed as a tool for incentivizing desired behavior. In the classic rational choice model, individuals systematically gather information and choose the action that maximizes expected utility.[260] Deterrence theory posits that increasing sanctions reduces the incidence of the sanctioned behavior.[261] Subsidies, on the other hand, increase the expected utility of the behavior. A rich literature further distinguishes fines, prices, and penalties. When money functions as a price, it is viewed as payment for engaging in an activity.[262] Fines and penalties are more likely to be viewed as punishment for doing something that is forbidden.[263]

Money, however, has important emotive functions apart from its incentive effects. This Part analyzes two alternative functions of money in the law—assurance and remediation—and demonstrates how each has historic roots and is derived from, and intricately tied to, money norms.

1. Assurance

Perhaps one of the earliest functions of money in the law was as security—that is, as an assurance or demonstration of good faith. Where there is a risk of defection, money can function as a substitute for trust.[264] The Roman *arra* was a "sum of money . . . given by one of the contracting parties (usually the buyer) to the other when the bargain was struck, as a sign of its completion and also as a pledge of its fulfillment."[265] The Code of Napoleon similarly referred to the

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259. Richard McAdams devotes a few paragraphs to financial currency in his book, *The Expressive Powers of Law*. *See* MCADAMS, EXPRESSIVE POWERS, *supra* note 113, at 57–58 ("[O]ne accepts the standard currency as payment because one expects everyone else to accept the currency in future transactions.").

260. BICCHIERI, GRAMMAR OF SOCIETY, *supra* note 86, at 4.

261. *See* Gneezy & Rustichini, *A Fine is a Price*, *supra* note 9, at 2 ("The equilibrium level of crime is set by the intersection of supply and demand curves, and the effects of punishment are determined in the general equilibrium.").

262. Cooter, *Prices and Sanctions*, *supra* note 14, at 1525.

263. *See* Feldman & Teichman, *supra* note 4, at 225.

264. For an analysis of the role of trust in social commerce, see generally Julia Y. Lee, *Trust and Social Commerce*, 77 U. PITT. L. REV. 137 (2015).

265. Paul M. Hebert, *The Function of Earnest Money in the Civil Law of Sales*, 11 LOY. L.J. (NEW ORLEANS) 121, 122 (1930) (quoting MACKINTOSH, THE ROMAN LAW OF SALE 68 (2d ed.

forfeiture of *arrhes* if a contracting party reneged on its promise to sell.[266] The modern-day earnest money deposit embodies the same principle. Buyers show their good faith in arms-length transactions by handing over a deposit of money, typically in a trust or escrow account. In the event the buyer breaches the agreement, he forfeits his deposit.

The law of suretyship arose out of the ancient norm of giving hostages as a gesture of good faith.[267] Early Germanic groups used hostages as security for promised blood payments when rival clans killed clan members.[268] The norm continued in medieval Europe, where hostages were used to secure contractual promises. The immediate surrender of the hostage evolved into surrender upon default, laying the groundwork for the law of suretyship.[269]

By institutionalizing the practice of giving money, property, or hostages to secure promises, the law strengthened the norm of using money as an assurance device. Ancient Roman law, for instance, recognized the practice of taking hostages to secure debts and obligations.[270] In the event of default, creditors could enslave the hostages in satisfaction of the debt.[271] Later, Roman law allowed creditors to use chattel, rather than human hostages, as security, giving rise to the pledge.[272] Throughout the Middle Ages, English common law permitted creditors to accept pledges of personalty, or personal property, as security for loans.[273] Even so, the law continued to recognize the use of hostages as security. As late as 1625, Hugo Grotius recorded a law that allowed for the killing of treaty hostages in the event of a breach or default.[274]

Eventually, money replaced hostages as the medium of choice.

1907)).

266. *Id.* at 128.

267. OLIVER WENDELL HOLMES, THE COMMON LAW 248 (1881).

268. Raoul Berger, *From Hostage to Contract*, 35 ILL. L. REV. 154, 157 (1940).

269. *Id.* at 158.

270. George Lee Flint, Jr., *Secured Transactions History: The Fraudulent Myth*, 29 N.M. L. REV. 363, 365 (1999); *see also* H.F. JOLOWICZ, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 162, 313–17 (Cambridge Univ. Press eds., 2d ed. 1952) (1972); Roger J. Goebel, *Reconstructing the Roman Law of Real Security*, 36 TUL. L. REV. 29, 32 (1961).

271. Goebel, *supra* note 270, at 32 (explaining *fiducia cum amico*, the theory of bailment).

272. *See* JOLOWICZ, *supra* note 270, at 317–18 (discussing the shift in bailment procedure under Roman law); Goebel, *supra* note 270, at 32–34 ("There is general agreement that at least in the late republic and early empire there were two distinct types of pledge . . . where the creditor had ownership, and the other had merely possession.").

273. Flint, *supra* note 270, at 370.

274. Berger, *supra* note 268, at 158 ("Once it is discovered that payment of the blood-price may be postponed through a promise secured by the surrender of a living pawn, the mechanism is readily adapted to secure other promises as well.").

Through the pledge or security interest, lenders sought to ensure not only that the debt would be repaid, but also that the debtor would protect the lender's interests, particularly in times of financial distress.[275] In early German and English civil procedure, a defendant gave money as a way of assuring the plaintiff that the indemnity to which the plaintiff was entitled would be paid.[276] In criminal actions, defendants accused of a crime had to either give security or go to prison, a practice that later evolved into bail.[277] Bail provides some assurance that the party will appear for trial.

2. Remediation

In addition to assurance, money plays a remedial role, rectifying harms and substituting for violence. Take, for instance, the emergence of law as a substitute for private feuds between families and clans.[278] Early Germanic groups addressed the human need for vengeance in two ways: self-help and monetary payments.[279] The latter involved the kindred of the wronged victim accepting monetary payment instead of resorting to immediate physical violence.[280] "Blood payments" or "blood money," as they came to be known, have played a key substitution role. In Somalia, for instance, the money norm of making payments or *dia* to the tribal group or clan of the deceased member emerged to fend off violence between the affected groups.[281] Islamic law set the standard rate for homicide at one hundred camels for the life of a man and fifty camels for the life of a woman.[282] Other lesser offenses commanded separate compensation rates.[283] Eventually, *dia* payments took the form of cash, with elders negotiating the settlement amount.[284] The compensation level varied based on such factors as the status of the affected groups, the degree of friendship or enmity between them, the age and sex of the victim, and the circumstances surrounding

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275. Douglas Baird, *Security Interests Reconsidered*, 80 VA. L. REV. 2249, 2263 (1994).

276. HOLMES, *supra* note 267, at 249.

277. *Id.*

278. *Id.* at 248.

279. Berger, *supra* note 268, at 157 ("The vengeful clan of the victim will not rely on a bare promise, it will demand something in hand, the physical pledge of a chattel or a hostage as security for the promised payment.").

280. *Id.*

281. Paolo Contini, *The Evolution of Blood-Money for Homicide in Somalia*, 15 J. AFR. L. 77, 78 (1971).

282. *Id.* These rates were in accordance with Sharia law.

283. *Id.*

284. *Id.* at 79 (noting that prior to the use of cash, *dia* payments included livestock, household equipment, and young women).

the offense.[285]

Blood payments function not only to assuage the emotional need for vengeance, but also to address the social pressure to avenge wrongs. Norms of revenge regulate the types of affronts that must be avenged, who may act upon whom, the legitimate means of taking revenge, the obligations and liabilities of third parties, and more.[286] A failure or delay in exacting revenge results in a loss of honor, gossip, and ostracism. In Corsica, a "man who has not avenged his father, an assassinated relative or a deceived daughter *can no longer appear in public*. Nobody speaks to him; he has to remain silent."[287] A man who was too slow to exact revenge was considered "disgraced," described as "low-class," "bad," or cowardly, and often mocked and ridiculed.[288]

The norm of accepting money in lieu of physical revenge allows individuals to calm passions, preserve their honor, and avoid social condemnation. The law may strengthen or undermine this remedial function. Roman law weakened the norm by requiring an heir to avenge the death of his testator to claim the benefit of succession.[289] More commonly, however, laws have reinforced money's remedial function. Early German and Anglo-Saxon law sanctioned the payment of *wergeld* to the kinsman of the slayed victim to atone for a killing.[290] Islamic law recognized the acceptance of blood money in place of retaliation, with the blood price varying based on the sex, freedom, and religion of the victim.[291] In medieval Bologna, the criminal justice system primarily functioned to compensate victims and their families for damages. Fines and peace agreements served to expiate crimes and substitute for violent vendettas.[292] In British Somaliland, if a person who committed homicide was not apprehended and tried or was acquitted, full blood

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285. *Id.*

286. Jon Elster, *Norms of Revenge*, 100 ETHICS 862, 867, 870 (1990) [hereinafter "Elster, *Norms of Revenge*"].

287. *Id.* at 871 (quoting JACQUES BUSQUET, LE DROIT DE VENDETTA ET LES PACI CORSES 357–58 (A. Pedone ed., 1920)).

288. *Id.* at 871 (quoting MARGARET HASLUCK, THE UNWRITTEN LAW IN ALBANIA 231–32 (J.H. Hutton ed., 1954)).

289. Berger, *supra* note 268, at 157 n.26 (citing JOSEF KOHLER, SHAKESPEARE VOR DEM FORUM DER JURISPRUDENZ 260 (1919) ("A dog that bit a man was to be delivered up bound to a log.")).

290. *Id.* at 168 n.111 (citing H.F. JOLOWICZ, A HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 189 (Cambridge Univ. Press ed., 3d ed., 1932)).

291. J.N.D. Anderson, *Homicide in Islamic Law*, 13 BULL. OF SCH. OF ORIENTAL & AFR. STUD. 811, 812, 815 (1951).

292. Sarah Rubin Blanshei, *Crime and Law Enforcement in Medieval Bologna*, 16 J. SOC. HIST. 121, 121 (1982).

compensation was due to the victim's immediate kin.[293] If the accused was convicted by the court, the law provided that the offender and his immediate kin could nevertheless be sued in civil court and ordered to pay one-third of the full blood price.[294]

The substitution and remedial function of money explains not only the origin, but also the contradictory nature of certain money norms. The law, for instance, monetizes things that our social norms require us to treat in non-monetary terms. The law monetizes harms and lives in contravention of money norms that eschew the incursion of money into social spheres or that dictate that certain things, such as human lives, are non-quantifiable. Tort law prices human life, and torts and criminal law price bodily harm and injury.[295] Part of this contradiction may be explained by money's emotive role in healing and rectifying harms, as well as its functional role in substituting for violence and retribution. In this sense, the law does not conflict with money norms, but merely institutionalizes and legitimates the remedial function of money.

B. Influence of Law on Money Norms

Although considered alternative means of social control, law and norms enjoy a symbiotic, interdependent relationship. To accurately understand and predict human behavior with regard to money, an understanding of both is necessary. Although money norms guide behavior independent of the law in certain situations—i.e., the rules of etiquette—more often than not, they influence behavior collectively.[296] This section analyzes how the law influences money norms by defining, enforcing, and changing money norms.

1. Information

First, the law performs an informational function, defining money norms by prescribing and proscribing conduct. The law demarcates not only the universe of things that may be bought or sold, but also specifies the price to be paid for them.[297] Take, for instance, source and use restrictions on money. The law forbids the use of money to purchase

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293. Contini, *supra* note 281, at 80.

294. *Id.*

295. For a discussion of the commodification of life more generally, *see* VIVIANA A. ZELIZER, MORALS AND MARKETS: THE DEVELOPMENT OF LIFE INSURANCE IN THE UNITED STATES (1979) [hereinafter "ZELIZER, MORALS AND MARKETS"] (examining why life insurance, as opposed to other types of insurance, such as marine and fire insurance, took longer to take hold in the United States).

296. *See* McAdams, *Origin of Norms, supra* note 91, at 347.

297. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1111 (1972).

wives, babies, or sexual services, but allows for the payment of fees for adoption or surrogacy and damages for loss of consortium.[298] It allows for the buying and selling of artifacts, but not those sourced from Native American graves.[299] It prohibits the buying or selling of ivory or the pelt or skin of any endangered or threatened species, but allows for the sale of dogs, cats, horses, and pet birds.[300]

Laws also define money norms expressively and can signal appropriate behavior with regard to money. Particularly where the content of a norm is uncertain, laws can signal society's views on the desirability or acceptability of certain behaviors.[301] Semantics matter. The term "penalty" signifies wrongdoing more unambiguously than fines.[302] Fines may express condemnation, but they carry less of a stigma than imprisonment and are more likely to be viewed as the price of engaging in an activity.[303] The law could signal that a fine is simply the price for engaging in the activity by setting a monetary fine that is exceedingly low or by eliminating the imprisonment option altogether.[304] In tort law, punitive damages express condemnation more unambiguously than compensatory damages.[305] Reparations tend to be morally tinged and signify acknowledgment of some past wrong or injustice.[306] Examples include reparations programs for Japanese-Americans interned during World War II and for victims of the Nazi Holocaust.[307]

Consider the money norm of not selling human organs. Current law defines and codifies the norm, providing that "[i]t shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human

298. *See, e.g.*, Sunstein, *Expressive Function*, *supra* note 12.

299. Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 (2010).

300. *See* Endangered Species Act of 1973, Pub. L. No. 93-205 § 9, 87 Stat. 884, 893–895 (1973) (prior to 1976 amendment).

301. Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 340 (2000) [hereinafter "McAdams, *Attitudinal Theory*"]; *see also* Alex Geisinger, *A Belief Change Theory of Expressive Law*, 88 IOWA L. REV. 35, 70 (2002).

302. Iris Bohnet & Robert Cooter, *Expressive Law: Framing or Equilibrium Selection?* (unpublished) (Boalt Working Papers in Public Law, 2003).

303. Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 621 (1996) [hereinafter "Kahan, *Alternative Sanctions*"].

304. *Id.* at 594 (arguing that imprisonment expresses condemnation in a way that other forms of punishment do not).

305. *Id.* at 624 n.134.

306. Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 691 (2003).

307. *Id.* at 689.

transplantation."[308] The penalty—a fine of not more than $50,000 or imprisonment of not more than five years[309]—performs several functions. The first is deterrence, essentially a forward-looking function by which the law raises the costs of selling organs (or lowers the payoff of selling them). Next, the fine, combined with imprisonment, plays a retributive role. The penalty functions not only to punish violations retroactively, but also to signify condemnation. Finally, heightened reprehension may be signaled by enhanced penalties for aggravating factors, such as non-consensually removing organs from vulnerable persons, including the homeless, migrant workers, or undocumented immigrants.[310]

2. Enforcement

The law also plays a role in enforcing money norms. Many money norms are enacted into laws and enforced by government agents. Regardless of the strength of a norm, however, there are invariably individuals willing to flout it, whether for monetary gain or out of disdain or disregard for social sanctions. For instance, despite the strong moral norm against selling drugs, armaments, organs, or people, black markets in these goods have flourished.[311] A backdrop of legal rules and penalties targeted toward deterring and punishing violators is a necessary complement to any normative framework.

Laws are also instrumental where informal enforcement mechanisms are lacking or inadequate. Consider the money norm of not charging usurious interest rates.[312] When lending occurs among strangers or in geographically dispersed, loosely knit groups, in which monitoring is difficult, the temptation to defect may be high. Usury laws provide a background enforcement structure, prohibiting a lender from recovering a debt above the maximum legal interest rate and sometimes voiding the loan altogether.[313] Debtors, as well as the state, may sue creditors who

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308. Prohibition of Organ Purchase, 42 U.S.C. § 274e(a) (2010).

309. *Id.*

310. *See, e.g.*, Susan Scutti, *Organ Trafficking: An International Crime Infrequently Punished*, MED. DAILY (July 9, 2013), http://www.medicaldaily.com/organ-trafficking-international-crime-infrequently-punished-247493.

311. DONALD E. DEKIEFFER, UNDERGROUND ECONOMIES AND ILLEGAL IMPORTS 1 (Oxford Univ. Press ed. 2010).

312. *See, e.g.*, Mark Koyama, *Evading the 'Taint of Usury': The Usury Prohibition as a Barrier to Entry*, 47 EXPLORATIONS IN ECON. HIST. 420, 421 (2010) (discussing how the prohibition on lending money at interest developed through strategic behavior by religious, commercial, and political elites).

313. *See, e.g.*, WASH. REV. CODE § 19.52.030 (1989) (providing an example of a state usury law); *see generally* Christopher L. Peterson, *Usury Law, Payday Loans, and Statutory Sleight of Hand: Salience Distortion in American Credit Pricing Limits*, 92 MINN. L. REV. 1110 (2007–08)

have violated the law for damages or injunctive relief.[314] By providing both public and private remedies, the law strengthens the norm by discouraging defection, as well as by signaling that others are obeying the norm.

3. Change

Finally, laws may change money norms through incentives, by fiat, or by changing expectations. The law incentivizes desirable norms and discourages undesirable ones, both directly and expressively. It rewards certain money norms, such as home-buying, charitable donations, and saving for retirement, but imposes sin taxes on tobacco, alcohol, and gambling.[315] It taxes earned wages—that is, money earned through labor—differently from capital gains or inherited money. Programs such as the Earned Income Tax Credit specifically reward the working poor over those who do not work, strengthening the perceived moral superiority of earned income over unearned income.[316]

Laws can change both the social meaning of an action and internalized preferences for undertaking those actions.[317] For some, legal sanctions alone can be enough to internalize a norm and signal that the prohibited behavior is morally problematic.[318] However, internalization is unlikely if the sanction is perceived to be unfair. A

(analyzing U.S. states' usury laws in two time periods: 1965 and the present).

314. *See, e.g.*, Loan Interest & Protection Law, Pub. L. 13, No. 6, §§ 502, 506 (1974) (providing a cause of action under Pennsylvania state law for interest rates imposed beyond the maximum set by statute).

315. *See* Bruce G. Carruthers, *The Semantics of Sin Tax: Politics, Morality, and Fiscal Imposition*, 84 FORDHAM L. REV. 2565, 2565 (2016) (discussing how sin taxes not only raise market prices, but also function as a means of cultural expression); *see generally* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (Penguin Books rev. ed., 2008) (discussing individuals' decisionmaking biases and advocating carefully designed choice architecture as a means of improving consumer decisionmaking).

316. Nina Bandelj et al., *supra* note 40, at 41; *see also* Marjorie E. Kornhauser, *The Morality of Money: American Attitudes Toward Wealth and the Income Tax*, 70 IND. L.J. 119, 119–20 (1994).

317. *See* Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 VA. L. REV. 1577, 1590 (2000) [hereinafter "Cooter, *Good Citizens*"]; Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 1019 (1996) [hereinafter "Lessig, *Regulation of Social Meaning*"]; Lessig, *Social Meaning*, *supra* note 12, at 2186–87.

318. *See* Raymond Paternoster et al., *Perceived Risk and Social Control: Do Sanctions Really Deter?*, 17 L. & SOC'Y REV. 457, 460–61 (1983); Matthew Silberman, *Toward a Theory of Criminal Deterrence*, 41 AM. SOC. REV. 442, 453 (1976); Franklin Zimring & Gordon Hawkins, *The Legal Threat as an Instrument of Social Change*, 27 J. SOC. ISSUES 33, 35 (1971); *see also* Yuval Feldman & Janice Nadler, *The Law and Norms of File Sharing*, 43 SAN DIEGO L. REV. 577, 595–96 (2006).

sufficiently high monetary penalty could strengthen a norm, but a low monetary fine combined with a grossly disproportionate prison term could undermine a norm. For instance, to set a penalty at "a fine of not more than $100 or imprisonment of not more than twenty years" could delegitimize the law and weaken the norm. Although sentencing ultimately would be within the discretion of the judge, this could perpetuate the perception that the law is fundamentally unfair because all but the very poor would have the capacity to pay the fine.[319]

A change in substantive law can also alter money norms. One example is the money norms that have emerged around wildlife and endangered species. Prior to the Endangered Species Act of 1973 ("ESA"), zoos purchased animals from poachers and dealers who captured them in the wild.[320] Growing awareness of environmental issues following the publication of Rachel Carson's *Silent Spring* in 1962 and the burgeoning wild animal trade in furs and pelts culminated in passage of the ESA.[321] Rather than ban the buying and selling of endangered species outright, the ESA requires a permit from the U.S. Fish and Wildlife Service to sell or offer for sale endangered species in interstate or foreign commerce.[322] Permits may be obtained in certain limited circumstances, including for scientific purposes or for enhancing the propagation or survival of the species.[323] By implication, however, if endangered species are not bought or sold, a permit is not required.[324]

Zoos and aquariums responded to the restrictions placed on the buying and selling of animals in different ways. Aquariums resorted to the barter system, while zoos attempted to distance themselves even further from the moral taint of commodifying animals by establishing a private animal exchange.[325] Instead of purchasing needed animals and

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319. The delegitimizing effect would be even stronger if the law permitted the convict, rather than the judge, to choose between the fine and the jail term.

320. *See generally* NIGEL ROTHFELS, SAVAGES AND BEASTS: THE BIRTH OF THE MODERN ZOO (Johns Hopkins Univ. Press ed., 2002) (exploring the growing concerns about the marginalization of animals in zoos).

321. Shannon Petersen, *Congress and Charismatic Megafauna: A Legislative History of the Endangered Species Act*, 29 ENVTL. L. 463, 470–71 (1999).

322. *See* Determination of Endangered Species and Threatened Species, 16 U.S.C. §§ 1538–1544 *et seq.* (2011) (prohibiting specified acts with regard to any endangered species of fish or wildlife); Permits for Scientific Purposes, Enhancement of Propagation or Survival, or for Incidental Taking, 50 C.F.R. § 17.22 (2001) (authorizing the issuance of permits to allow otherwise prohibited actions to be performed for scientific purposes or propagation of the species).

323. 50 C.F.R. § 17.22.

324. *Id.*

325. *See generally The Zoo Economy*, NPR PLANET MONEY (Sept. 5, 2014,), http://www.npr.org/sections/money/2014/09/05/346105063/episode-566-the-zoo-economy [hereinafter "*Zoo Economy*"] (discussing the legal, economic, and practical implications of zoos'

selling surplus ones, zoos simply advertise what animals they are looking to acquire—and those they want to unload—on a private listserv maintained by the Association of Zoos and Aquariums.[326] The system relies primarily on reputation and norms of reciprocity. When an animal is exchanged, no money changes hands; instead, the donor zoo acquires good "karma"—namely, a positive relationship with the recipient zoo, respect from other member zoos, and a sense that it deserves an animal in return.[327]

Although the ESA effectuated a shift in the money norm of buying and selling animals, the law was in many ways reactive. Environmental concerns grew rapidly during the first few years of the 1970s as the media took up the cause of environmentalism.[328] The rise of the environmental movement in the early 1970s and public outcry over the potential loss of the bald eagle and other endangered species had already turned the tide of public opinion against the commodification of animals.[329] Arguably, the ESA simply enacted a money norm that had already begun to form, further solidifying the entrenchment of the norm.

Where expectations themselves are the problem, the law can change a suboptimal money norm by changing expectations of how others will act. By coordinating the beliefs of large numbers of people, the law has the ability to move individuals from an inferior to a superior equilibrium.[330] Consider the Brazilian government's implementation of the Plano Real in the 1990s. To combat skyrocketing hyperinflation in the 1990s, the Plano Real created a virtual currency, the Real, to replace the Brazilian cruzeiro.[331] Crucial to the success of the plan was changing people's expectations of the value of money itself. In addition to slowing the creation of money, the plan disaggregated money's two

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inability to buy and sell animals).

326. *Id.*; *see also* Amelia Josephson, *The Economics of Zoos*, SMARTASSET (Mar. 4, 2016), https://smartasset.com/taxes/the-economics-of-zoos.

327. *See id.*

328. BRIAN CZECH & PAUL R. KRAUSMAN, THE ENDANGERED SPECIES ACT: HISTORY, CONSERVATION, BIOLOGY, AND PUBLIC POLICY 23 (Johns Hopkins Univ. Press ed., 2001).

329. *See* Robert D. Brown, *The History of Wildlife Conservation and Research in the United States—and Implications for the Future*, *in* PROCEEDINGS OF THE TAIWAN WILDLIFE ASSOCIATION 1, 9, 12 (H. Li ed., 2007) (reviewing the passage of the Endangered Species Conservation Act following public outcry regarding the potential loss of the bald eagle); *see generally* Adam Rome, *'Give Earth a Chance': The Environmental Movement and the Sixties*, 90 J. AM. HIST. 525 (2003) (detailing the rise of the environmental movement in the 1960s).

330. *See* McAdams, *Focal Point*, *supra* note 109, at 1651; Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1666 (1996) [hereinafter "Cooter, *Decentralized Law*"].

331. Andre Averbug, *The Brazilian Economy in 1994–1999: From the Real Plan to Inflation Targets*, 25 THE WORLD ECON. 925, 928 (2002) [hereinafter "Averbug, *Brazilian Economy*"].

functions as a unit of payment and a unit of account.[332] The unit of account, which measures purchasing power, was represented by the unit of real value ("URV"). However, the day-to-day purchase of goods and services—the unit of payment—continued to be conducted in cruzeiros. Each day, the central bank declared the number of cruzeiros that would equal one URV, and all wages, taxes, and prices began to be listed in URVs rather than in cruzeiros.[333] Although the number of cruzeiros fluctuated, the URV remained stable. Once the public began to expect that the URV, which was indexed to the dollar, would remain stable, the government introduced a new currency, the Real, to replace the cruzeiro. The Real, which was equal to one URV, then assumed both functions as a unit of payment and a unit of account.[334]

The results were remarkable. In addition to reversing decades of hyperinflation, the Plano Real succeeded in restoring the public's confidence in the value and stability of money.[335] In effect, Brazil had been caught in a coordination dilemma. Although everyone would have been better off if they had collectively believed that the cruzeiro had value, they were trapped for decades in a suboptimal equilibrium. By shifting the focal point from cruzeiros to URVs, which were indexed to the dollar, the government was able to shift individuals' beliefs about the stability and value of the Real. Only the government had the wherewithal and ability to change and coordinate expectations on such a massive scale.

V. NORMATIVE IMPLICATIONS

Given the law's ability to define, enforce, and change money norms, what normative principles can be drawn? The legal system generally assumes that individuals are rational egoists who methodically assess the costs and benefits of different actions and choose the one with the highest expected utility.[336] There are two flaws in this analysis. First, different types of individuals exist.[337] Although some people are motivated only by their own financial payoffs, many more are

332. *Id.* at 928–29 (illustrating the 1994 transition in Brazilian currency from the cruziero to the Real).

333. *See How Four Drinking Buddies Saved Brazil*, NPR PLANET MONEY (Dec. 2, 2015), http://www.npr.org/templates/transcript/transcript.php?storyId=458222801 (discussing the implications of inflation on the citizenry).

334. *Id.*; *see also* Averbug, *Brazilian Economy*, *supra* note 331, at 929.

335. *See* Averbug, *Brazilian Economy*, *supra* note 331, at 925.

336. *See* BICCHIERI, GRAMMAR OF SOCIETY, *supra* note 86, at 4.

337. *See* Elinor Ostrom, *Collective Action and the Evolution of Social Norms*, 14 J. ECON. PERSP. 137, 138 (2000).

conditional cooperators who cooperate as long as they feel others are reciprocating.[338] Some are altruists and still others are "willing punishers"—those willing to incur substantial personal costs to sanction and reward perceived free-riders and cooperators, respectively.[339] Second, individuals cannot and do not make every decision consciously and deliberately.[340] Decisions are often made automatically and non-systematically through a complex interplay of preferences, beliefs, values, emotions, situational cues, and cognitive shortcuts.[341] An understanding of the interrelationship of law and money norms would not be complete without taking these factors into account.

Moreover, the command-and-control approach to regulating behavior through monetary incentives is costly and imperfect.[342] Incentives work, but an undue focus on sanctions and subsidies may not be the most efficient or effective way to promote cooperation. Under what conditions can the law most effectively influence and alter money norms? This Part outlines a set of normative principles by which the legal system can encourage prosocial and efficient money norms and discourage counterproductive ones. It focuses on enhancing two types of intrinsic motivation: motivation to comply and motivation to enforce. Both types of motivation may be elicited through framing of choices, publicizing conformity, enhancing fairness, and clarifying ambiguities in social meaning. This Part discusses these mechanisms in the context of money norms surrounding the nanny tax, monetary secrecy, and bribery, among others.

A. Framing

The law can impact willingness to comply with a money norm through its ability to frame conduct and choices. For instance, framing an act as illegal can convince some individuals that an act is immoral and wrong.[343] In addition, a growing body of research has shown how

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338. *Id.* at 142.

339. *Id.*

340. *See* BICCHIERI, GRAMMAR OF SOCIETY, *supra* note 86, at 4.

341. *See id.* at 4–5; *see also* Samuel Bowles & Sandra Polania-Reyes, *Economic Incentives and Social Preferences: Substitutes or Complements?*, 50 J. ECON. LITERATURE 368, 370 (2012); Ellingsen, *supra* note 80, at 118; Kahan, *Trust, Collective Action*, *supra* note 81, at 337; Robert E. Scott, *The Limit of Behavioral Theories of Law and Social Norms*, 86 VA. L. REV. 1603, 1623 (2000).

342. *See* Tom R. Tyler, *Reducing Corporate Criminality: The Role of Values*, 51 AM. CRIM. L. REV. 267, 269 (2014).

343. *See* GEORGE H. MEAD, MIND, SELF, AND SOCIETY: FROM THE STANDPOINT OF A SOCIAL BEHAVIORIST 319–20 (Univ. of Chi. Press ed. 1934) (2015); Raymond Paternoster et al., *Perceived Risk and Social Control: Do Sanctions Really Deter*, 17 L. & SOC'Y REV. 457, 457 (1983); Franklin Zimring & Gordon Hawkins, *The Legal Threat as an Instrument of Social*

simple recasting of an issue can dramatically alter the manner in which it is perceived.[344] Experimental results have shown that money, in the absence of other situational cues, can elicit individualism and selfishness.[345] Whether in legislation, rulemaking, or administrative or judicial decisions, explicit reference to monetary valuations or dollar-life tradeoffs may be counterproductive. In engaging in cost-benefit analysis or providing damages for wrongful death, agencies and courts routinely monetize human lives.[346] But monetizing incommensurable things like health, life, or the enjoyment of nature can conflict with deep-seated values and cause cognitive dissonance.[347] Just as we form negative judgments about the character of individuals who attempt to put a price on their loved ones, when the government explicitly makes those valuations or takes them too far, it could undermine individuals' respect for the law.

That is not to say that the government can avoid these valuations altogether. The compensatory and deterrent goals of the tort system, for instance, would be difficult to achieve without some form of monetary award.[348] Similarly, the focus of insurance law and regulatory policy on generating optimal levels of risk and deterrence could be frustrated by an inability to assign monetary values to statistical lives.[349] But the manner in which this is done can be critical to its reception. When monetary issues are reframed so that they do not brazenly offend our moral sensitivities, the reception can change dramatically.[350] For instance, researchers have found that although most people opposed the buying and selling of organs for medical transplants, their views changed when the issue was framed as a tragic choice. When they were

Change, 27 J. SOC. ISSUES 33, 38–39 (1971); *see also* Bohnet & Cooter, *supra* note 302, at 2.

344. *See* Philip E. Tetlock, *Thinking the Unthinkable: Sacred Values and Taboo Cognitions*, 7 TRENDS IN COGNITIVE SCI. 320, 320 (2003) [hereinafter "Tetlock, *Thinking the Unthinkable*"]; Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCI. 453, 458 (1981).

345. *See supra* Part I.B. (exploring the psychological effects of money).

346. Eric A. Posner & Cass R. Sunstein, *Dollars and Death*, 72 U. CHI. L. REV. 537, 538–39 (2005) (noting that the EPA values each human life). The value now stands at $9.1 million. *See* Binyamin Appelbaum, *As U.S. Agencies Put More Value on a Life, Businesses Fret*, N.Y. TIMES (Feb. 16, 2011), http://www.nytimes.com/2011/02/17/business/economy/17regulation.html (noting differences in how governmental agencies determine the monetary value of human life).

347. *See* Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553, 1562–63 (2002); Tetlock, *Thinking the Unthinkable*, *supra* note 344, at 320.

348. Posner & Sunstein, *supra* note 346, at 553–54.

349. *Id.* at 540.

350. *See* Tetlock, *Thinking the Unthinkable*, *supra* note 344, at 323; *see also* Kieran Healy and Kimberly D. Krawiec, *Repugnance Management and Transactions in the Body*, 107 AM. ECON. REV. 86, 87 (2017).

told that (a) buying and selling organs was the only way to save lives, and (b) financial assistance would be provided to the poor (addressing the fairness objection), 40 percent wavered in their opposition.[351] In another experiment, support for a government program to clean up waste sites stood at 72 percent when tradeoffs of dollars for lives were masked by vague, generalized statements, but plummeted to 35 percent when the decision process was spelled out in terms of $500,000 saved per human life.[352] Framing an uncomfortable dollar-life tradeoff in nonmonetary terms may at times be a more effective way of increasing the public's willingness to accept and follow a policy.[353]

B. Conformity

The law can also change individuals' willingness to follow and enforce money norms by publicizing conforming behavior. Most individuals are conditional cooperators—they conform to a norm when they perceive that enough others are abiding by the norm and believe that others expect them to conform.[354] However, if they sense that others are cheating or free-riding, they react with anger and indignation and refuse to cooperate.[355] Because the fear of being suckered underlies many breakdowns in cooperation, the law plays a key role in sanctioning defectors, coordinating expectations, providing assurance, and publicizing conformity.

Take, for instance, the money norm of paying one's taxes. The norm is stronger in the United States than in countries such as Greece or Spain, but is notably under-observed and under-enforced among certain groups and professions. Nannies and other household help, for instance, are routinely paid under the table. Rather than socially sanctioning violators, observers look the other way. In some immigrant communities, a money norm of not paying nanny taxes exists, and social sanctions run strongly in the other direction: efforts to withhold payroll and income taxes are often met with scorn and hostility. What accounts for this gap in enforcement? A sense that nanny and other household-employer taxes are unduly burdensome and unfair to families

351. *See* Tetlock, *Thinking the Unthinkable*, *supra* note 344, at 322–23.

352. Philip E. Tetlock, *Coping with Trade-offs: Psychological Constraints and Political Implications*, *in* POLITICAL REASONING AND CHOICE 239 (S. Lupia et al. eds., 2000) [hereinafter "Tetlock, *Coping with Trade-offs*"].

353. *See* Tetlock, *Thinking the Unthinkable*, *supra* note 344, at 322–23.

354. *See* BICCHIERI, GRAMMAR OF SOCIETY, *supra* note 86, at 191; Ernst Fehr & Simon Gächter, *Reciprocity and Economics: The Economic Implications of Homo Reciprocans,* 42 EUROPEAN ECON. REV. 845, 847 (1998); Kahan, *Trust, Collective Action*, *supra* note 341, at 334.

355. Kahan, *Trust, Collective Action*, *supra* note 341, at 334.

already saddled with exorbitant childcare expenses may be part of the answer. In immigrant communities, the countervailing norm may be explained by a sense of economic necessity—feeling as though one is barely getting by even without paying taxes—and deep-seated suspicion of the state.

However, studies of tax evasion suggest that the urge to conform and reciprocate may play a more significant role. When taxpayers believe that most other people are paying their taxes, they are much more likely to pay.[356] However, when they believe that others are cheating, they conclude that cheating is acceptable and not morally suspect.[357] The results are consistent with other studies showing compelling evidence of individuals' compulsion to conform their actions to those of others.[358] Particularly where conditions are uncertain, people decide how to behave by reference to how others around them behave.[359]

The problem, then, appears to be that individuals perceive (correctly) that most other people do not pay nanny or other household-employer taxes. Moreover, evasion of the nanny tax carries less of a stigma than other transgressions, such as underreporting of income or embezzlement.[360] How can the law alter this suboptimal money norm? Harsher penalties and stronger enforcement are one answer. Imagine if

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356. *See, e.g.*, Stephen Coleman, *The Minnesota Income Tax Compliance Experiment: State Tax Results* 18–19 (Minn. Dept. of Revenue (Apr., MPRA Paper No. 4827, 1996)), https://mpra.ub.uni-muenchen.de/4827/1/MPRA_paper_4827.pdf [hereinafter "Coleman, *Minnesota Income Tax*"] (finding that a message refuting the idea that many people cheat on their taxes had a positive effect on reported income and taxes paid); Michael Wenzel, *Misperceptions of Social Norms About Tax Compliance (2): A Field-Experiment* 14 (Austl. Nat'l Univ., Austl. Taxation Office, Ctr. for Tax Sys. Integrity, Working Paper No. 8, 2001) (showing the effect of misconceptions about the prevalence of tax fraud on taxpayers' behavior).

357. *See* BRUNO S. FREY, NOT JUST FOR THE MONEY: AN ECONOMIC THEORY OF PERSONAL MOTIVATION 49, 52 (1997) (contrasting the relatively "trusting" tax systems in the United States and Switzerland with systems in France and Germany where tax morale is low and tax evasion is high); Kahan, *Trust, Collective Action*, *supra* note 341, at 341 (citing FRANK A. COWELL, CHEATING THE GOVERNMENT: THE ECONOMICS OF EVASION 102–03, 110 (1990)).

358. *See* Robert B. Cialdini & Melanie R. Trost, *Social Influence: Social Norms, Conformity, and Compliance*, *in* THE HANDBOOK OF SOCIAL PSYCHOLOGY 151, 162 (Beth Kaufman ed., 1998) [hereinafter "Cialdini & Trost, *Social Influence*"].

359. *Id.*; *see also* Leandra Lederman, *The Interplay Between Norms and Enforcement in Tax Compliance*, 64 OHIO ST. L.J. 1453, 1475 (2003). In addition, as the cultural cognition project has shown, people tend to form beliefs about facts based on beliefs of their own social and cultural groups. *See, e.g.*, Dan M. Kahan et al., *Motivated Numeracy and Enlightened Self-Government*, 1 BEHAV. PUB. POL'Y 54, 54 (2017) [hereinafter "Kahan et al., *Motivated Numeracy*"]; Dan M. Kahan et al., *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 852–53 (2009) [hereinafter "Kahan et al., *Perils of Cognitive Illiberalism*"].

360. Eric A. Posner, *Law and Social Norms: The Case of Tax Compliance*, 86 VA. L. REV. 1781, 1794 (2000) [hereinafter "Posner, *Law and Social Norms*"].

the penalty for nonpayment of household-employer taxes was life imprisonment with no possibility of parole. Setting legitimacy and fairness concerns aside, at a certain point, incentives will kick in to achieve the desired outcome. But a more prudent and far less costly option is to make individuals want to comply. Yet, moral exhortations to contribute one's fair share to support education, law enforcement, public infrastructure, and other public services have proven to be of limited effectiveness.[361] The challenge is to find a way to reach a critical mass of compliant taxpayers.[362] The desire for conformity can take care of the rest. Whether this can be achieved through a generous subsidy for compliant taxpayers that can be gradually phased out over the course of several years or through some other initiative, the focus should then be on publicizing compliance with the goal of eventually shifting the norm.

C. Fairness

In addition, any attempt to create a new money norm or alter a suboptimal one has a greater likelihood of success if it appeals to the values of fairness and legitimacy. Experimental studies have shown that individuals deeply value fairness and undertake personally costly actions in pursuit of it.[363] Particularly given money's propensity to arouse strong emotions—anger, indignation, resentment, fear, envy, shame, or disgust, among others—the perception of fairness is crucial to generating voluntary compliance. Fairness can mean different things—fair division of resources, fair response to the behavior of others, fairness of process, or fairness of opportunity or outcome.[364] This Part focuses on fairness of opportunity or outcome. Not all money norms are desirable, and for those that are not, any attempt by the law to alter the norm should take a values-based approach.[365]

Consider two norms that can perpetuate inequalities—pay secrecy

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361. *See, e.g.*, Coleman, *Minnesota Income Tax*, *supra* note 356, at 5, 18.

362. *Cf.* Sushil Bikhchandani et al., *A Theory of Fads, Fashion, Custom, and Cultural Change as Informational Cascades*, 100 J. POL. ECON. 992, 1016 (1992) (arguing localized conformity can be explained by informational cascades); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 912 (1996) [hereinafter "Sunstein, *Social Norms*"] (discussing norm cascades and tipping points).

363. *See* TOM TYLER, WHY PEOPLE COOPERATE 1720 (2011) (citing Henrich et al., *Introduction*, *in* FOUNDATIONS OF HUMAN SOCIALITY: ECONOMIC EXPERIMENTS AND ETHNOGRAPHIC EVIDENCE FROM FIFTEEN SMALL-SCALE SOCIETIES (Henrich et al. eds., 2004)).

364. *See* Jon Elster, *Fairness and Norms*, 73 SOC. RES. 365, 365–66 (2006) [hereinafter "Elster, *Fairness and Norms*"].

365. *See* Posner, *Regulation of Groups*, *supra* note 211, at 174–75; Sunstein, *Social Norms*, *supra* note 362, at 924–25.

and the money taboo. In the United States, a strong social norm exists against discussing money, salaries, and related financial matters.[366] Money tops death, religion, health, sex, and politics as the most dreaded and difficult of conversation topics.[367] Fear of social sanctions—in particular, the belief that others will punish those who deviate from the accepted behavior—keeps deviations in check, even for those with no preference for secrecy. Adherence to the norm signals that one is respectable, considerate, polite, and well-brought-up. Unwitting violators are not only shamed and scolded for being rude or gauche, but also have their character and upbringing impugned.[368] Private sector employers reinforce the norm either through pay secrecy and confidentiality rules or informal expectations that employees not discuss their salaries.[369]

Why does this norm exist and what purposes does it serve? Some have surmised that the money taboo exists because money is intricately entangled with notions of self-worth and personal efficacy.[370] Conflicts over money are one of the primary causes of divorce, and money is associated with a host of psychological problems, including anxiety, depression, and paranoia.[371] Society views poverty as a sign of inadequacy, failure, and deficiency; those who suffer from it experience shame and emotional angst.[372] Because discussion of money "highlights

366. *See* Abby Ellin & Richard Trachtman, *The Money Taboo: Its Effects in Everyday Life and in the Practice of Psychotherapy*, 27 CLINICAL SOC. WORK J. 275, 276 (1999) (proposing that in order to overcome the money taboo, one must view money through a psychological lens); Abby Ellin, *PRELUDES; Want to Stop the Conversation? Just Mention Your Finances*, N.Y. TIMES, July 20, 2003, http://www.nytimes.com/2003/07/20/business/preludes-want-to-stop-the-converstation-just-mention-your-finances.html (discussing different attitudes toward the money taboo and possible geographic or socio-economic reasons for it); Laura Shin, *The Money Taboo: Why It Exists, Who It Benefits, and How to Navigate It*, FORBES (Apr. 14, 2015), https://www.forbes.com/sites/laurashin/2015/04/14/the-money-taboo-why-it-exists-who-it-benefits-and-how-to-navigate-it/#5dd8a2dd2f62 (proposing ways to deal with the money taboo); *see generally* KATHLEEN B. KINGSBURY, BREAKING MONEY SILENCE: HOW TO SHATTER MONEY TABOOS, TALK MORE OPENLY ABOUT FINANCES, AND LIVE A RICHER LIFE (2017) (discussing the detrimental effects of the money taboo).

367. *See* Chris Taylor, *The Last Taboo: Why Nobody Talks About Money,* REUTERS (Mar. 27, 2014, 1:41 PM), http://www.reuters.com/article/us-money-conversation-idUSBREA2Q1UN20140327 (assessing the difficulty and discomfort caused by discussions of money).

368. *See, e.g.*, Shin, *supra* note 366.

369. Leonard Bierman & Rafael Gely, *Love, Sex and Politics? Sure. Salary? No Way: Workplace Social Norms and the Law*, 25 BERKELEY J. EMP. & LAB. L. 167, 168 (2004).

370. Belk & Wallendorf, *supra* note 26, at 46 ("Money is considered a private matter that is threatening to discuss since it is aligned with notions of self-worth.").

371. Trachtman, *supra* note 366, at 275.

372. *See* PETER TOWNSEND, POVERTY IN THE UNITED KINGDOM: A SURVEY OF HOUSEHOLD RESOURCES AND STANDARDS OF LIVING 427–29 (1979); ROBERT WALKER ET AL., THE SHAME

inequality and conflicting fortunes,"[373] the money taboo may have emerged as a defensive mechanism to avert psychological discomfort and social conflict. The skeptic would say that the wealthy simply engineered the norm to check the resentment and envy of the masses. Comparisons invariably result in dissatisfaction and negative emotions, particularly for those who are less fortunate or whose compensation falls below their own estimations of self-worth.[374]

Nevertheless, the code of silence around money and salaries may do more harm than good. Pay secrecy, for instance, can result in individuals overestimating the pay of their coworkers and managers, leading to resentment, distrust, and lower productivity.[375] More troubling, however, are the inequities that can result. Women earn, on average, about 83 percent of men's earnings.[376] Although different factors contribute to the gender wage gap, pay secrecy can make it more difficult for women (and other disadvantaged groups) to negotiate equal pay.[377]

The existing legal framework on pay secrecy is unsettled and inconsistent. For instance, Section 7 of the National Labor Relations Act ("NLRA") provides that employees may engage in "concerted activity for the purpose of . . . mutual aid or protection."[378] Courts have interpreted "protected concerted activity" to include the right of

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OF POVERTY 1 (2014); Robert Walker et al., *Poverty in Global Perspective: Is Shame a Common Denominator?*, 42 J. SOC. POL. 215, 216–18 (2013).

373. *See* Saul Levmore, *Puzzling Stock Options and Compensation Norms*, 149 U. PA. L. REV. 1901, 1937 (2001).

374. *See* David Card et al., *Inequality at Work: The Effect of Peer Salaries on Job Satisfaction* 28–29 (NBER, Working Paper No. 16396, 2011), http://www.nber.org/papers/w16396 (noting that "workers with salaries below the median for their pay unit and occupation report lower pay and job satisfaction, while those earning above the median report no higher satisfaction"); Todd Zenger, *The Case Against Pay Transparency*, HARV. BUS. REV. (Sept. 30, 2016), https://hbr.org/2016/09/the-case-against-pay-transparency (discussing the negative effects of salary and bonus disclosure on the workplace).

375. *See* Deborah T. Eisenberg, *Money, Sex, and Sunshine: A Market-Based Approach to Pay Discrimination*, 43 ARIZ. ST. L.J. 951, 1011–12 (2011); Edward E. Lawler III, *The Mythology of Management Compensation*, 9 CAL. MGMT. REV. 11, 17–19 [hereinafter "Lawler, *Mythology*"]; Edward E. Lawler III, *Managers' Perceptions of Their Subordinates' Pay and of Their Superiors' Pay*, 18 PERSONNEL PSYCHOL. 413, 421–22 (1965) [hereinafter "Lawler, *Managers' Perceptions*"]; Liz Wolgemuth, *Why Do You Keep Your Salary Secret?*, U.S. NEWS & WORLD REP. (June 19, 2008), https://money.usnews.com/money/careers/articles/2008/06/19/why-do-you-keep-your-salary-secret.

376. *Women's Earnings 83 Percent of Men's, But Vary by Occupation*, BUREAU OF LABOR STATISTICS (Jan. 15, 2016), https://www.bls.gov/opub/ted/2016/womens-earnings-83-percent-of-mens-but-vary-by-occupation.htm.

377. *See* Eisenberg, *supra* note 375, at 958.

378. 29 U.S.C. § 157 (2003).

employees to talk with one another about their salaries.[379] Recently, however, states have legislated in the other direction, reinforcing pay secrecy norms, at least in the employer-employee context. Massachusetts, for instance, became the first state to bar employers from asking about wages earned in a previous job.[380] Although motivated primarily by an effort to close the wage gap between men and women, the law also has the effect of perpetuating the money secrecy norm.

The money taboo also facilitates discrimination in other areas of economic life. When information on money or prices is suppressed, individuals cannot compare how those similarly situated are treated.[381] Price opacity and information asymmetry open the door to discrimination against minorities and economically disadvantaged groups and impede the ability of market forces to drive out discriminatory sellers.[382] This is particularly true in markets where prices are individually bargained for, such as car dealerships.[383] The so-called "black tax" refers, among other connotations, to the premium that blacks must pay in order to obtain the same goods and services as whites.[384] If an informal money norm indeed exists among certain groups or industries to charge blacks more while paying them less, any larger efforts to shift the money taboo may benefit from publicizing its perverse effects. Furthermore, if the need for good manners is simply a pretext for acting on discriminatory impulses, the value of the money secrecy norm appears far less compelling.

D. Social Meaning

Finally, the law may enhance intrinsic motivation to follow and enforce a norm by targeting ambiguities in social meaning. Money norms can be conceptualized on a moral spectrum. Many are injunctions

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379. *See* Bierman & Gely, *supra* note 369, at 169; Jeannette Corp. v. NLRB, 532 F.2d 916, 918 (3rd Cir. 1976).

380. Stacey Cowley, *Illegal in Massachusetts: Asking Your Salary in a Job Interview*, N.Y. TIMES, at A1 (Aug. 2, 2016), https://www.nytimes.com/2016/08/03/business/dealbook/wage-gap-massachusetts-law-salary-history.html.

381. *See* IAN AYRES, PERVASIVE PREJUDICE? UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION 6 (Univ. of Chi. Press ed., 2001).

382. *Id.* at 8.

383. *Id.* at 6–7.

384. *See* JODI D. ARMOUR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA 13–14 (N.Y. Univ. Press ed., 1997) (defining the "black tax" as the price African Americans pay in their encounters with whites, absent conscious animus); *Black Tax*, HUM. DEV. PROJECT (July 7, 2016), https://medium.com/empire-south-magazine/black-tax-e1a797a21b14 (explaining the "black tax" as the economic, emotional, and psychological costs borne by African-Americans because of their race).

to act or not act in a certain way that are deeply rooted in morality.[385] We are taught from an early age not to steal, cheat, or take unfair advantage of others, particularly the vulnerable. We are taught that it is wrong to try to sell something that you do not own or to try to profit from others' misfortunes. There are variations within each moral prescription based on a number of factors, including the identity of the victim or the intended purpose. Stealing from a disabled senior citizen incurs far more wrath than stealing from a wealthy corporation. Stealing to feed one's starving children is considered less morally suspect than stealing to fund one's lavish lifestyle.

Certain money norms fall far to one extreme on the moral spectrum. Those norms tend to be unambiguous and strongly held. They are solidly internalized and universally condemned. Examples include human trafficking or murder-for-hire. Most people have no hesitation following these norms and would not think twice about reporting violators (putting aside a possible fear of reprisal from the violators). The norm of not selling endangered or rare animals or paying to have them killed is also firmly entrenched, so much so that the social sanction can at times overpower the legal remedy. Worldwide moral outrage following the killing of Cecil the lion on July 1, 2015, is instructive. Minneapolis dentist Walter Palmer reportedly paid $50,000 for the privilege of killing the lion.[386] Although it was determined that he had obtained all legally required permits, his actions generated a firestorm of international hatred, disgust, and condemnation. Palmer was forced to go into hiding amid death threats as hundreds of protesters rallied outside of his dental office.[387]

The law may have greater impact influencing money norms that are less morally stark and more ambiguous in social meaning. Unambiguous norms are more likely to be internalized and socially enforced. Ambiguous ones, however, tend to be weaker because deviations are easier to rationalize and are more likely to be socially accepted. Examples include money norms on surrogacy, organ donations, and the nanny tax. Where the meaning of an action is

385. These are known as "injunctive norms," as distinct from "descriptive norms," which refer to the perception of a behavior's prevalence. *See* Cialdini, *supra* note 358, at 157–58 (defining injunctive norms as norms that "motivate behavior by promising social rewards or punishments for [not following them]"); P. Wesley Schultz et al., *The Constructive, Destructive, and Reconstructive Power of Social Norms*, 18 PSYCHOL. SCI. 429, 429 (2007) (discussing social norm marketing campaigns as a method of producing socially desirable behavior).

386. *Cecil the Lion: Zimbabwe Hunter Bailed Over Killing*, BBC NEWS (July 29, 2015), http://www.bbc.com/news/world-us-canada-33699346.

387. Ed Payne, *Cecil the Lion Backlash: Where Is Dentist Walter Palmer?*, CNN (July 30, 2015, 10:00 PM), http://www.cnn.com/2015/07/30/us/walter-palmer-whereabouts/index.html.

ambiguous, individuals tend to choose the one that optimally serves their interests.[388]

The social meaning of a norm may be changed through regulation and legal expression.[389] In some cases, a suboptimal norm may be changed by making an action more ambiguous. For instance, flat prohibitions on dueling proved to be less effective than statutes prohibiting duelers from holding public office.[390] The latter prohibition rendered ambiguous the refusal to duel. Rather than being automatically branded a coward, the law created an alternative meaning—the desire to preserve the option of holding public office.[391]

The law can address ambiguities in social meaning by reducing excuses and rationalizations for noncompliance and appealing to moral values. Consider bribery. Although a general anti-bribery norm exists, paying bribes can be morally or socially ambiguous. In many parts of the world, bribery is not only common, but expected.[392] The most frequent justification has been economic necessity—even those who believe that bribery is wrong engage in it as a cost of doing business.[393] Under this view, the giving and taking of bribes does not incontrovertibly mean that an individual is morally bankrupt or corrupt. Rather, it could simply mean that the person or entity has reluctantly acquiesced to economic realities.

The Foreign Corrupt Practices Act of 1977 ("FCPA") spearheaded an international effort to shift bribery norms. Although the anti-bribery norm was strong in the United States even before enactment of the FCPA, bribery of foreign officials abroad remained commonplace.[394] In

388. Cristina Bicchieri & Alex Chavez, *Behaving as Expected: Public Information and Fairness Norms*, 21 J. BEHAV. DECISION MAKING 1, 6 (Dec. 13, 2012) (unpublished comment) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1082264&download=yes).

389. *See* Kenworthey Bilz & Janice Nadler, *Law, Moral Attitudes and Behavioral Change, in* THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 1, 250–53 (Eyal Zamir & Doron Teichman eds., 2014) (discussing how legal regulation can change the social meaning of behavior by, among other things, influencing moral attitudes); *see also* Lessig, *Social Meaning*, *supra* note 12, at 2185; *see, e.g.*, Lessig, *Regulation Social Meaning*, *supra* note 317, at 968–73.

390. *See* Lessig, *Social Meaning*, *supra* note 12, at 2186–87.

391. *Id.* at 2187; Lessig, *Regulation Social Meaning*, *supra* note 317, at 971–72.

392. In a global survey by corruption watchdog Transparency International, more than a quarter of people worldwide reported paying bribes. In Libya, 62 percent of respondents paid bribes, while in Liberia and Kenya, 75 percent and 70 percent reported paying bribes, respectively. *See* Carlo Davis, *Global Corruption Report 2013: World's Biggest Countries for Bribes, According to Transparency International*, THE WORLD POST (July 10, 2013, 9:52 AM), http://www.huffingtonpost.com/2013/07/09/global-corruption-report-2013_n_3568242.html.

393. *See* Philip M. Nichols, *The Good Bribe*, 49 U.C. DAVIS L. REV. 647, 666 (2015) (noting the prevalence of bribery in engaging in business with particular third world countries).

394. *See* Elizabeth K. Spahn, *Implementing Global Anti-Bribery Norms: From the Foreign Corrupt Practices Act to the OECD Anti-Bribery Convention to the U.N. Convention Against*

the mid-1970s, a series of investigations by the Securities and Exchange Commission ("SEC") revealed that hundreds of prominent American companies regularly paid bribes when doing business in foreign countries.[395] Within the United States, the resulting public outcry can be explained, at least in part, by violation of the anti-bribery norm. Congress responded with a criminal prohibition on "the payment of bribes to influence the acts or decisions of foreign officials, foreign political parties or candidates for foreign political office."[396] A push by American businesses seeking a "level playing field" against foreign bribery-based competition led to the adoption of the 1988 Amendments.[397] The 1988 Amendments directed the executive branch to seek a treaty with members of the Organization for Economic Cooperation and Development ("OECD") imposing similar requirements on foreign businesses competing with American firms.[398]

Several features of the FCPA contributed to the shifting of money norms. First, the unambiguous pronouncement of moral values had a strong expressive effect.[399] Legislators condemned the "venal effect of bribery"[400] as "unethical" and "counter to the moral expectations and values of the American public."[401] Criminalization rendered moral denunciation even more unambiguous.[402] In addition, the FCPA attempted to diffuse the primary justification for engaging in bribery—economic necessity. Recognizing that American businesses could not effectively compete abroad if other countries did not cooperate, in 1998 the OECD Anti-Bribery Convention required all signatory states to make it a crime to bribe foreign officials, effectively globalizing the anti-bribery push.[403] In addition, the FCPA provided an exception for

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Corruption, 23 IND. INT'L & COMP. L. REV. 1, 1–2 (2013) (highlighting the history and evolution of anti-corruption norms in the United States as distinguished from those abroad).

395. U.S. DEP'T OF JUSTICE & U.S. SEC. & EXCHANGE COMMISSION, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 2–3 (2012), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf [hereinafter "FCPA RESOURCE GUIDE"].

396. H.R. REP. NO. 95-640, at 4–5 (1977).

397. *See* FCPA RESOURCE GUIDE, *supra* note 395, at 2–3; Spahn, *supra* note 394, at 4–6 .

398. Spahn, *supra* note 394, at 5–6.

399. Kenneth W. Abbott & Duncan Snidal, *Values and Interests: International Legalization in the Fight Against Corruption,* 31 J. LEGAL STUD. S141, S141 (2002).

400. Aaron G. Murphy, *The Migratory Patterns of Business in the Global Village*, 2 N.Y.U. J.L. & BUS. 218, 223–24 (2005) (citing *Foreign Corrupt Practices and Domestic and Foreign Investment Disclosure, Hearing Before H. Comm. on Banking, Housing and Urban Affairs,* 95th Cong. 1 (1977) (opening statement of Chairman Proxmire)).

401. H.R. REP. NO. 95-640, at 4 (1977).

402. *See* Kevin E. Davis, *Why Does the United States Regulate Foreign Bribery: Moralism, Self-Interest, or Altruism?*, 67 N.Y.U. ANN. SURV. AM. L. 497, 500–01 (2012).

403. *See* Spahn, *supra* note 394, at 11.

"facilitating or expediting payment[s]"—that is, routine payments to minor officials "to expedite or to secure the performance of a routine governmental action."[404] Examples include ordinary payments to facilitate the obtaining of permits, licenses, or other official documents; processing of governmental papers such as visas or work orders; or provision of police protection, utilities, mail services, etc.[405] Moreover, the FCPA provided that if a payment or gift was "lawful under the written laws" of the receiving official's state, it did not fall within the definition of a bribe.[406] Despite the uncertainties created by these and other provisions, the FCPA's implicit acknowledgment of practical necessities contributed to its acceptance by other nations and facilitated international adoption of the anti-bribery norm.[407]

The FCPA provides a case study of how law can influence ambiguous or suboptimal norms. A broad, societal money norm such as anti-bribery or the obligation to pay taxes can at times be undermined by conflicting sub-norms in certain communities or groups. In addition, the aspirational behavior embodied in a norm can often deviate from how individuals behave in practice. The law, working in conjunction with, and with deference to, norms, values, and emotions, can play a crucial role in aligning these discrepancies, thereby encouraging prosocial behavior.

CONCLUSION

This Article has presented a framework for understanding money norms and has highlighted money's function in the law outside of incentives. Individuals often act in ways that are not in their best interests, relying on instinct, heuristics, and situational cues in deciding how to act.[408] In the absence of other cues, we associate money with the economic world of scarce resources and are thereby psychologically primed to act selfishly and non-cooperatively (and to expect others to behave in kind). Money norms play an important role in counteracting this tendency and achieving cooperation, bridging the social and market spheres. Yet, they also insulate our most cherished values—the incommensurability of human life, love, friendship, fairness, and community—from the taint of markets and prices. When individuals are caught in a social dilemma—whether the prisoner's dilemma or a

404. 15 U.S.C. §§ 78dd–2(b) (2015).

405. 15 U.S.C. §§ 78dd–2(h)(4)(A) (2015).

406. *See* FCPA RESOURCE GUIDE, *supra* note 395, at 23 (citing to 15 U.S.C. §§ 78dd-2(c) (2015)).

407. *See* Abbott & Snidal, *supra* note 399, at 169; Spahn, *supra* note 394, at 8–9.

408. BICCHIERI, GRAMMAR OF SOCIETY, *supra* note 86, at 209–10.

coordination dilemma—money norms provide a solution. Social sanctions change the underlying payoffs of an action, discouraging defection. In addition, money norms change expectations of how others will act, thereby encouraging cooperation.

From a functionalist perspective, the law plays an integral role in shaping money norms. Through its sanctioning, incentive, and expressive functions, it has the power to police the boundary between the social and market spheres and change undesirable or inefficient norms. Individuals often think in moral absolutes, but the universe of things that are declared non-fungible, incommensurable, or sacred is in constant flux and shifts with context.[409] We cringe at dollar valuations of life, but when a loved one dies, we honor their memory with foundations and monetary donations. We react with outrage and indignation when a member of our social community devalues life or love, but when relationships break down or life is lost, the law routinely steps in to price life, injury, and intimacy. Money resides in the sphere of markets, yet it has a powerful grip on emotions. It can crowd out prosocial behavior, but it also has the capacity to diffuse passions and right wrongs. When that power is harnessed through the instrumentality of the state, it can shed its profane character and take on a positive, healing, remedial role.

As a policy matter, efforts to shift money norms should show sensitivity to the complex psychological and emotional forces at play. Individuals do not always behave rationally when it comes to money, so the law should not assume rationality in designing incentive structures. Instead, a values-based approach that works to elicit intrinsic motivation to comply with, and enforce, money norms offers more promise. Intrinsic motivation can be elicited by framing of choices, publicizing conformity, enhancing fairness, and clarifying ambiguities in social meaning. The law may be particularly instrumental in changing norms that are morally and socially ambiguous. Money norms are a powerful constraint on behavior. As such, an understanding of the character and function of money norms can enhance the effectiveness and predictive power of legal rules and incentives.

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409. Tetlock, *Thinking the Unthinkable*, *supra* note 344, at 322.