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Cryptocurrency Concerns, Crimes, and Legal Consequences

Madeline Connolly

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CRYPTOCURRENCY CONCERNS, CRIMES, AND LEGAL CONSEQUENCES

*Madeline Connolly**

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I. CRIMES WITH CRYPTO

Al “Scarface” Capone, “the most infamous gangster in American history,” was not arrested for allegedly “order[ing] the assassination of

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seven rivals,” nor was he “indicted for his racketeering.”¹ After years of involvement in the Colosimo mob, Capone was convicted of a crime people would never have anticipated to be the downfall of the Chicago gangster with a reputation for violence—tax evasion.²

Capone joined the Colosimo mob around 1920 through the invitation of street gang leader Johnny Torrio. He later took over for Torrio as the gang leader.³ In 1926, Capone ordered his men to gun down two of his enemies. Unknown to Capone, William McSwiggin, “who had tried to prosecute [Capone] for a previous murder, was with the two marked men and all three were killed.”⁴ These murders launched police investigation, but “[t]he police had no evidence for the murders, so instead they raided Capone’s businesses, where they gathered documentation that would later be used to bolster charges against him of income tax evasion.”⁵ Finally, in 1931, the Federal Bureau of Investigation and the Department of the Treasury arrested Capone for tax evasion; he was sentenced to eleven years in prison.⁶ Along with Capone, at least four other mobsters of his gang were arrested and charged with tax evasion, including his brother.⁷

Criminals have always moved and hidden their ill-gotten gains. It took law enforcement five years to arrest Capone after they started looking into his businesses.⁸ Imagine if Capone, instead of using his businesses to fund and front his criminal activities, had done it virtually, using cryptocurrencies through an unregulated, ungoverned site that tracks no personally identifiable information and where transactions are irreversible.⁹ If that were the case, how long would it have taken law enforcement to bring an end to Capone’s reign? Would they ever have caught him? Would the United States even have had the personal jurisdiction to prosecute Capone and his fellow gang members?

1. *Al Capone*, HISTORY.COM (Oct. 23, 2019), <https://www.history.com/topics/crime/al-capone> [<https://perma.cc/MF9M-QM9N>] [hereinafter *Al Capone*]. The assassination of the seven rivals is commonly known as the “St. Valentine’s Day Massacre,” as it occurred on February 14, 1929. “The St. Valentine’s Day Massacre . . . might be regarded as the culminating violence of the Chicago gang era, as seven members or associates of the ‘Bugs’ Moran mob were machine-gunned against a garage wall by rivals posing as police. The massacre was generally ascribed to the Capone mob, although Al himself was in Florida.” *Al Capone*, FBI.gov, <https://www.fbi.gov/history/famous-cases/al-capone> [<https://perma.cc/DQ58-4GSM>] [hereinafter FBI].

2. FBI, *supra* note 1.

3. *Id.*

4. *Al Capone*, *supra* note 1.

5. *Al Capone*, *supra* note 1.

6. FBI, *supra* note 1.

7. *Id.*

8. *Al Capone*, *supra* note 1.

9. Matthew Kien-Meng Ly, *Coining Bitcoin’s “Legal Bits:” Examining the Regulatory Framework for Bitcoin and Virtual Currencies*, 27 HARV. J.L. & TECH. 587, 590 (2014).

The ability to transact with cryptocurrencies through an ungoverned and seemingly unregulated site, with nothing to identify either transactor, provides another way for criminals to operate while making it harder for law enforcement to track them. Cryptocurrencies are a form of payment and thus fall under the general definition of money.¹⁰ In one way or another, most crimes involve money or a transfer of some form of payment; a payment for drugs or illegal weapons, a bribe, and murder for hire all involve some transfer of payment.

Imagine how much harder it would be to catch a criminal when their transactions can be completely anonymous online¹¹; when they can transfer money to and from people without anyone or any institution, like a bank, knowing (including the person they are transacting with)¹²; or when they steal over \$30,000 from a journalist in the United Kingdom who was just trying to invest some money, and now does not know if he will ever get the money back because there is no set governing authority, no safety protections, and no identifiable information anywhere.¹³

Part I of this note will address the current issues with the law and digital currencies, federal agencies' current classifications of cryptocurrencies, problems with those classifications, and solutions to better regulate, classify, and prosecute virtual-currency crimes. Part II will discuss the history of digital currencies, the history of criminal activity involving money, and how the creation and widespread use of cryptocurrencies has allowed criminals to find new ways to hide money that make it difficult for law enforcement to catch. Part III will discuss current and past cases involving different courts' interpretations and prosecution of cryptocurrencies. Finally, Part IV will discuss solutions to the potential issues of the current "solutions" to crypto crimes and why those solutions seem problematic.

10. Money is "something generally accepted as a medium of exchange, a measure of value, or a means of payment." *Money*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/money> [<https://perma.cc/ZANX-NJZL>]

11. Kien-Meng Ly, *supra* note 9.

12. Rain Xie, *Why China Had to "Ban" Cryptocurrency but the U.S. Did Not: A Comparative Analysis of Regulations on Crypto-Markets Between the U.S. and China*, 18 WASH. UNIV. GLOB. STUD. L. REV. 457 (2019).

13. Monty Munford, *How I Lost £25,000 When My Cryptocurrency Was Stolen*, BBC NEWS (Aug. 16, 2019), <https://www.bbc.com/news/business-49177705> [<https://perma.cc/DB9A-KD3H>]. See discussion Part II *infra*.

II. WHAT IS CRYPTOCURRENCY AND WHY DO CRIMINALS LIKE IT?

A. *The “Coining” of Cryptocurrencies*

In early 2009, a new type of “currency” was created: Bitcoin. Even the founding of cryptocurrencies seems to highlight its forefront feature of anonymity. The “creator’s” name, Satoshi Nakamoto, is an alias, and no one has yet determined who that actually is.¹⁴ “Theories have abounded as to the gender, age, and nationality of the person behind the screen name. Some have even postulated that Satoshi Nakamoto is actually the product of a conglomerate of individuals.”¹⁵ Despite time, effort, and investigations, the mystery of Satoshi Nakamoto still remains.¹⁶ Hopefully, what will not remain a mystery is the nature of Bitcoin and how governments can prevent its illicit use.

Bitcoin was the first of a vast market of new, paperless, online money known generally as cryptocurrency. Despite being in existence since 2009, countries worldwide are just now addressing some of the issues presented with virtual currencies, as shown by the question regarding virtual currencies added on to tax returns for just the past two years.¹⁷ “As our society and economy rapidly evolve into a digital format, the law must come to grip with how to account for things that did not previously exist. The advent of the internet spawned new ways to communicate, do business, and commit crimes.”¹⁸

14. Doug Fredrick, *Down the Rabbit Hole: Cryptocurrency & Blockchain*, 92 WIS. LAW. 22, 23 (March 2019).

15. *Id.* at 24 (citing L.S., *Who Is Satoshi Nakamoto?*, ECONOMIST (Nov. 2, 2015), <https://www.economist.com/blogs/economist-explains/2015/11/economist-explains-1> [<https://perma.cc/6BGY-7W4B>]).

16. See Rakesh Sharma, *Three People Who Were Supposedly Bitcoin Founder Satoshi Nakamoto*, INVESTOPEDIA (Jun. 25, 2019), <https://www.investopedia.com/tech/three-people-who-were-supposedly-bitcoin-founder-satoshi-nakamoto/> [<https://perma.cc/VBP2-C2G7>]. There have been at least three people who have been in the public eye that have each been alleged to be the infamous “Satoshi Nakamoto.” The most famous being Dorian Nakamoto where an article identified him as the creator of bitcoins in 2014. Dorian has continuously denied being the creator of bitcoins. Australian scientist Craig Wright was also suspected of being Satoshi Nakamoto, and unlike Dorian Nakamoto, Craig Wright did not deny the claim, but his story of “running bitcoin since 2009” was later disproven. Finally, Nick Szabo, a computer engineer and legal scholar, who came up with a similar concept as bitcoins around the year of its creation, was suspected of being Satoshi.

17. See discussion *supra*, Part III.

18. Fredrick, *supra* note 14.

B. Why Decentralization Is Both a Unique Factor of Cryptocurrencies and One of Its Biggest Problems

Cryptocurrencies allow people to transact with anyone in the world, and because cryptocurrency is generally decentralized, it “operat[es] as a peer-to-peer transactional network that does not rely on any central government authority or established financial institution.”¹⁹ Decentralized essentially means that no government controls the flow of the money or determines its value. An “exchange of a ‘thing of value’ would not require banks or trust in another party. Instead, it would rely on an unregulated, uncontrolled, independent, non-hackable verification system. Since bitcoin by its very nature was not being supported by any government or entity, it was not subject to established laws.”²⁰

Because no government determines the value of cryptocurrencies or indirectly controls inflation of the cryptocurrencies, the values can fluctuate heavily.²¹ One feature “of cryptocurrencies that challenge the traditional notions of monetary value [is] the absence of a centrally controlled ledger and an entity that controls all of the data.”²² Another feature that challenges the traditional valuing of money is “the lack of an entity that will replace or refund your money if it is stolen or if the entity that holds your money collapses.”²³

“The value of fiat money²⁴ is derived from the relationship between supply and demand and the stability of the issuing government.”²⁵ Like any economic transaction, a significant factor in determining cryptocurrencies’ value is supply and demand.²⁶ While cryptocurrencies are decentralized, we determine their value using the similar factors we

19. Xie, *supra* note 12.

20. Evan Strassberg & Brad Jacobsen, *Regulation of the Unregulated: How Bitcoin and Cryptocurrencies Show that the Government Can Regulate Anything*, 2018 WL 2631625.

21. Chrisjan Pauw, *How Cryptocurrency Prices Work, Explained*, Cointelegraph (July 24, 2018), <https://cointelegraph.com/explained/how-cryptocurrency-prices-work-explained> [https://perma.cc/45DR-D6DF].

22. Fredrick, *supra* note 14.

23. *Id.*

24. “Fiat money is government-issued currency that is not backed by a physical commodity, such as gold or silver, but rather by the government that issued it.” James Chen, *Fiat Money*, INVESTOPEDIA (Apr. 23, 2020), <https://www.investopedia.com/terms/f/fiatmoney.asp> [https://perma.cc/Z28R-A5ED].

25. *Id.*

26. Pauw, *supra* note 21.

use for fiat money, such as regulations governing their sale and internal governance.²⁷

The billionaire and Chief Executive Officer of Berkshire Hathaway, Warren Buffett, refuses to participate in the cryptocurrency markets because of the decentralization of cryptocurrencies.²⁸ Similarly, the billionaire co-founder of Microsoft, Bill Gates, stated that cryptocurrencies' decentralization essentially gives it little to no intrinsic value, and thus it is essentially not an "investment."²⁹ Despite this, Gates has stated that the technology behind blockchains is interesting and could be beneficial in other areas. He has also previously given grants and partnered with blockchain and cryptocurrency companies, issuing one company a grant of \$100,000 as a part of the Bill & Melinda Gates Foundation.³⁰

In opposition to Gates's and Buffett's point, some explain that paper money has value only because people believe it does.³¹ Some believe that "[t]he reason fiat currencies such as the U.S. dollar have been successful is because governments have convinced a critical mass of people that a rectangular piece of paper is worth the amount printed on the bill."³² "We have been living in a digital economy for quite a while now; in that sense, cryptocurrencies do not require a very large leap of faith."³³

C. The Key to Understanding Cryptocurrency Transactions and the Anonymity that Follows

Owners of cryptocurrency possess two digital keys: one public and one private.³⁴ The two keys are "cryptographically linked" together.³⁵

27. Andrew Bloomenthal, *What Determines the Price of 1 Bitcoin?*, INVESTOPEDIA (June 16, 2020), <https://www.investopedia.com/tech/what-determines-value-1-bitcoin/> [https://perma.cc/M3WH-5VRQ].

28. Theron Mohamed, *Warren Buffett Blasts Bitcoin as Worthless and Vows He Will Never Own a Cryptocurrency*, MARKETS INSIDER (Feb. 24, 2020), <https://markets.businessinsider.com/currencies/news/warren-buffett-blasts-bitcoin-worthless-vows-never-own-crypto-value-2020-2-1028932272> [https://perma.cc/6VJD-T3EB].

29. *Id.*; see also Ali Montag, *Billionaire Bill Gates Once Got Bitcoin as a Birthday Present—Here's What He Did with It*, CNBC (Dec. 16, 2020), <https://www.nbcconnecticut.com/news/business/money-report/billionaire-bill-gates-once-got-bitcoin-as-a-birthday-present-heres-what-he-did-with-it/2385274/> [https://perma.cc/RZ4G-9VLS].

30. Montag, *supra* note 29.

31. Fredrick, *supra* note 14.

32. *Id.*

33. *Id.*

34. Lisa Miller, *Getting Paid in Bitcoin*, 41 L.A. LAW 18 (Dec. 2018).

35. *Id.* (citing Rich Apodaca, *Six Things Bitcoin Users Should Know about Private Keys*, BITZUMA, <https://bitzuma.com/posts/six-things-bitcoin-users-should-know-about-private-keys> [https://perma.cc/AY3G-WGQW], and Sudhir Khatwani, *Bitcoin Private Keys: Everything You Need*

“Private keys are always kept secret, for they are how cryptocurrency transactions are mathematically ‘signed’ and transferred. Tracking these keys is cumbersome, so cryptocurrency owners use software (a ‘wallet’) to manage their public and private keys. These programs exist on personal computers, smartphones, or in the cloud.”³⁶

When a cryptocurrency transaction is finalized, the transaction is posted and stored on a “blockchain.” The transactions are “‘identified by the unique, individual public key and recorded on the blockchain.”³⁷ “[T]ransactions sent through a blockchain enable one person or entity to send cryptocurrency directly to another person or entity without the use of a third-party intermediary.”³⁸

Similar to a public Venmo³⁹ transaction, people can see these transactions in the blockchain. A blockchain works like an online public ledger; a list of transactions is posted onto the ledger, and those who have access can see the list. “The ledger that records the transactions is public and available to all computers connected to that particular blockchain network.”⁴⁰ As an online public ledger, the blockchain allows all users to see the transactions by the transactors’ public keys.⁴¹

“A useful way to picture the blockchain is as a giant book, with each new block a page added to the top. Each new page contains all the transactions in the network that have been completed since the last page was added.”⁴² Essentially then, “[f]or a bad actor to falsify the blockchain, they would have to write all the old pages of the ‘book’ as well as new false counterfeit pages at a speed faster than all the honest users in the network.”⁴³

Even though the transactions are posted to the blockchain publicly, the blockchain itself does not record any personal information of the

To Know, COINSUTRA, <https://coinsutra.com/bitcoin-private-key/comment-page-1> [https://perma.cc/U95K-SLLF]).

36. Miller, *supra* note 34.

37. *Id.*

38. Fredrick, *supra* note 14.

39. Venmo is an online system where a user can pay or request payment from another user. If the payment is not made private by the payer, then the transaction is posted on the app where others can see it.

40. Fredrick, *supra* note 14.

41. *Id.*

42. Misha Tsukerman, *The Block Is Hot: A Survey of the State of Bitcoin Regulation and Suggestions for the Future*, 30 BERKELEY TECH. L.J. 1127, 1134 (2015) citing Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System*, BITCOIN.ORG (Nov. 8 2008), <https://bitcoin.org/bitcoin.pdf>.

43. *Id.*

transactors.⁴⁴ Therefore, while the transaction is public to the members that are part of the blockchain, both the transacting parties in a cryptocurrency-related exchange and any of their personally identifiable information remain completely anonymous.⁴⁵ This anonymity is a concern to both law enforcement; governing officials; and billionaire, Microsoft co-founder, and investor, Bill Gates.⁴⁶

Additionally, “[o]nce written to the blockchain, the transaction cannot be reversed.”⁴⁷ “Since there is no intermediary that controls the ledger, transactions cannot be reversed or changed in any way, because doing so would require undoing all of the blocks that came before the block being altered.”⁴⁸ This feature of virtual currency transactions supposedly “prevents the same cryptocurrency from being fraudulently transferred,”⁴⁹ but instead plays a more significant role when someone’s cryptocurrency is stolen. The inability to reverse the hacker’s transactions makes it difficult for owners to get their stolen cryptocurrency back and for law enforcement agencies to track them.

The aforementioned journalist from the United Kingdom who lost his cryptocurrency to hackers is unable to reverse whatever transaction the hackers used because of this feature of the blockchain, which provides no safety net for users from hackers.⁵⁰ The journalist invested in bitcoin in the middle of 2017 after being very skeptical of losing money while investing in cryptocurrencies.⁵¹ As a part of the purchasing transaction, the journalist received two keys, a public key, and a private key.⁵² While the journalist printed his private key, he also kept it stored in his Gmail drafts so he “could copy and paste it when [he] needed to make a transaction rather than laboriously typing it out each time.”⁵³ Unfortunately, when he attempted to take some bitcoin out of his account in late 2018, he noticed that his wallet was empty.⁵⁴ Multiple investigations have taken place, yet as of August 2019, the journalist’s cryptocurrency has yet to be recovered.⁵⁵

44. Kien-Meng Ly, *supra* note 9.

45. REGULATION OF CRYPTOCURRENCIES AROUND THE WORLD 2, L. LIBR. CONG. (June 2018).

46. Montag, *supra* note 29.

47. Miller, *supra* note 34.

48. Fredrick, *supra* note 14.

49. *Id.*

50. Munford, *supra* note 13.

51. *Id.*

52. *Id.* See discussion *infra* for an explanation of cryptocurrency keys.

53. *Id.*

54. *Id.*

55. *Id.*

As this journalist's story shows, the anonymity of cryptocurrency transactions and the lack of regulations or tracking ability give cryptocurrency a certain appeal to criminals. The ability to transact with people worldwide gives an additional incentive to criminals. There is no way of knowing where the hackers who stole the journalist's cryptocurrency are located in the world. "Like cash, there is nothing inherently nefarious about Bitcoins, but the digital nature of Bitcoin introduces a new wrinkle as it can be sent electronically, rather than requiring a physical meeting to exchange."⁵⁶

"As a result of its inherently amorphous nature, cryptocurrency has spurred transactions for illegal substances on the 'dark web,' and brought into question the efficacy of criminal law."⁵⁷ In a proposed statute change, lawmakers stated that cryptocurrencies "are used in illicit financial activity that presents substantial national security concerns."⁵⁸ The anonymity makes it easier for "malign actors to engage in illicit financial activity without detection or traceability. Specifically, illicit finance risks involving [cryptocurrencies] are enhanced by the capacity of users to engage with the [cryptocurrencies] through unhosted wallets or wallets hosted by a foreign financial institution not subject to effective anti-money laundering regulation."⁵⁹

Warren Buffett has also pointed out the persistent use of virtual currency to fund illegal activities.⁶⁰ "The logical move from the introduction of bitcoin is to go short suitcases,' [Buffett] quipped, as criminals increasingly move money online instead of stuffing cash into duffel bags."⁶¹

Buffett is not wrong. Littered throughout cryptocurrencies decade-long are many instances of criminal conduct, as cryptocurrencies are often

56. Tsukerman, *supra* note 16 (citing Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System*, BITCOIN.ORG (Nov. 8, 2008), <https://bitcoin.org/bitcoin.pdf> [<https://perma.cc/K8N7-HRWK>]).

57. Chelsea Pieroni, *La Crypto Nostra: How Organized Crime Thrives in the Era of Cryptocurrency*, 20 N.C. J.L. & TECH. ONLINE 111, 116 (2018) (citing Zachary Sonenblum, *Some Background on Legal Issues Surrounding Bitcoin and Other Cryptocurrencies*, HEITNER LEGAL (July 18, 2017), <https://heitnerlegal.com/2017/07/18/some-background-on-legal-issues-surrounding-bitcoin-and-other-cryptocurrencies/> [<https://perma.cc/W2EZ-KTJR>]).

58. Requirements for Certain Transactions Involving Convertible Virtual Currency or Digital Assets, 85 Fed. Reg. 83840-01 (proposed Dec. 23, 2020) (to be codified at 31 CFR 1010) (citing "Report of the Attorney General's Cyber-Digital Task Force, Cryptocurrency: An Enforcement Framework," DEP'T OF JUST. (Oct. 2020) <https://www.justice.gov/ag/page/file/1326061/download>. [<https://perma.cc/3CPL-953X>]).

59. *Id.*

60. Mohamed, *supra* note 28.

61. *Id.*

“used as tools to support criminal activity such as money laundering and buying illegal goods.”⁶² Because of the anonymity of this new and decentralized currency, “[r]egulations often fail to affect such virtual currencies due to lack of foresight by the regulation writers, creating a legal gray area. Thus, criminals can continue to capitalize on technological innovation to bolster their illegal activities.”⁶³ “[W]hy is cryptocurrency so appealing? The answer is security and anonymity. It is nearly impossible to scam the ledger since altering any single block on the chain will corrupt the entire chain, not to mention the cost of the computing power needed to break into the chain.”⁶⁴ As the next section will discuss in further detail, one of the first big criminal takedowns involving cryptocurrency was the takedown of the Silk Road in 2013.⁶⁵

D. Money Hiding is Nothing New, but Now There is a New Way to Do It

Anti-money laundering statutes have existed ever since the enactment of the Bank Secrecy Act in 1970.⁶⁶ The first significant act was the Money Laundering Control Act of 1986, which officially defined money laundering as a federal crime.⁶⁷ This act was followed by the Annunzio-Wyile Anti-Money Laundering Act of 1992, which inaugurated the Bank Secrecy Act Advisory Group to support the Treasury Department of the United States to strengthen money-laundering laws.⁶⁸

Next came the Money Laundering Suppression Act of 1994, which required banks to follow additional standards for reporting.⁶⁹ The Money Laundering Suppression Act was followed by the Money Laundering and Financial Crimes Strategy Act of 1998, which “identified non-focused efforts at the federal, state and local levels as major problems in the fight against money laundering activities.”⁷⁰ The Money Laundering and

62. Kien-Meng Ly, *supra* note 10, at 594 citing Kashmir Hill, *The FBI’s Plan for the Millions Worth of Bitcoins Seized from Silk Road*, FORBES (Oct. 4, 2013), <http://www.forbes.com/sites/kashmirhill/2013/10/04/fbi-silk-road-bitcoin-seizure> [<https://perma.cc/LV3N-7S8D>].

63. Danton Bryans, *Bitcoin and Money Laundering: Mining for an Effective Solution*, 89 IND. L.J. 441 (2014).

64. Ashley Ward, *Monopoly Money Without the Monopoly*, 52 MD. BAR. J. 30, Winter 2019, at 30, 30.

65. Kien-Meng Ly, *supra* note 10, at 603.

66. Michael J. Anderson & Tracey A. Anderson, *Anti-Money Laundering: History and Current Developments*, 10 J. INT’L BANKING L. & REG. 521 (2015).

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

Financial Crimes Strategy Act thus required the combined efforts of the United States Department of the Treasury and other governmental agencies to create a national plan to target money laundering activities.⁷¹

As mentioned earlier, one of the first big criminal takedowns of a cryptocurrency-related crime hub website was the destruction of the Silk Road and the arrest of its leader.⁷² The Silk Road was “a hidden website designed to enable its users to buy and sell illegal drugs and other unlawful goods and services anonymously and beyond the reach of law enforcement.”⁷³ While in operation, the “Silk Road was used by several thousand drug dealers and other unlawful vendors to distribute hundreds of kilograms of illegal drugs and other unlawful goods and services to well over a hundred thousand buyers and to launder hundreds of millions of dollars derived from these unlawful transactions.”⁷⁴ The owner and operator of the Silk Road, Ross William Ulbricht or “Dread Pirate Roberts,” ran the Silk Road through bitcoin transactions since 2011.⁷⁵ In October 2013, the Drug Enforcement Agency and the Internal Revenue Service seized over 170,000 Bitcoins connected to the Silk Road, valued at over \$33.6 million.⁷⁶

The Silk Road was just the first of many criminal operations that primarily ran through cryptocurrency exchanges. Since its creation, criminals have used bitcoins for many illegal activities, ranging from money laundering to funding the spread of drugs. In 2019, three men were arrested for attempting to defraud investors of \$772 million in cryptocurrency.⁷⁷ In 2018 and 2019, the United States government seized twenty-four cryptocurrency accounts connected to a child pornography website that law enforcement officials found by tracing bitcoin accounts.⁷⁸ Additionally, “[t]he spread of fentanyl, which is blamed for

71. *Id.*

72. *Manhattan U.S. Attorney Announces Seizure of Additional \$28 Million Worth of Bitcoins Belonging to Ross William Ulbricht, Alleged Owner and Operator of “Silk Road” Website*, FBI (Oct. 25, 2013), <http://www.fbi.gov/newyork/press-releases/2013/manhattan-u.s.-attorney-announces-seizure-of-additional-28-million-worth-of-bitcoins-belonging-to-ross-william-ulbricht-alleged-owner-and-operator-of-silk-road-website> [<https://perma.cc/73FB-KY8Z>].

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Three Men Arrested in \$772 Million Cryptocurrency Fraud Scheme*, DEP’T. OF JUST., (Dec. 10, 2019), <https://www.justice.gov/usao-nj/pr/three-men-arrested-722-million-cryptocurrency-fraud-scheme> [<https://perma.cc/E6ZV-5HSU>].

78. *United States. v. Twenty-Four Cryptocurrency Accounts*, 473 F. Supp. 3d 1 (D.D.C. 2020).

the opioid crisis in the United States, was made possible, law enforcement has said, by Chinese labs selling the drug online for Bitcoin.”⁷⁹

More recently, in August 2020, the United States seized over 300 different cryptocurrency accounts related to funding three different terrorist groups, the United States government’s largest seizure of cryptocurrencies related to terrorism.⁸⁰ And in March of 2020, two people were charged for laundering over \$100 million of cryptocurrency to fund North Korea’s attempt to bypass sanctions imposed by the United States and the United Nations.⁸¹ A United Nations expert report estimates that North Korea has stolen over \$316 million worth of cryptocurrencies to fund the nation’s nuclear weapons program.⁸²

III. THE CURRENT APPROACH

A. *The Regulation of Cryptocurrency—Or Lack Thereof*

Despite existing for over eleven years, the world of cryptocurrencies is still unknown and unregulated by the United States. This has posed a problem for courts when dealing with cases involving cryptocurrencies, especially those involving criminal charges and cryptocurrencies:

The law must continually evolve to account for new things, and it takes time for the corpus of jurisprudence to make sense of something that did not previously exist. As our society continues to transform into a digital format, it is reasonably foreseeable that cryptocurrencies will become more commonplace in the courtroom.⁸³

“Due to the difficulty in classifying [cryptocurrencies], opportunistic individuals may engage in activities that swindle unsuspecting people of their bitcoins while skirting the law.”⁸⁴

79. Nathaniel Popper, *Bitcoin Has Lost Steam. But Criminals Still Love It.*, N.Y. TIMES, (Jan. 28, 2020), <https://www.nytimes.com/2020/01/28/technology/bitcoin-black-market.html> [<https://perma.cc/XG74-52FF>].

80. U.S. DEP’T. OF JUST., GLOBAL DISRUPTION OF THREE TERROR FINANCE CYBER-ENABLED CAMPAIGNS (Aug. 13, 2020), <https://www.justice.gov/opa/pr/global-disruption-three-terror-finance-cyber-enabled-campaigns> [<https://perma.cc/P2JV-AJRB>].

81. U.S. DEP’T. OF JUST., TWO CHINESE NATIONALS CHARGED WITH LAUNDERING OVER \$100 MILLION IN CRYPTOCURRENCY FROM EXCHANGE HACK (Mar. 2, 2020), <https://www.justice.gov/opa/pr/two-chinese-nationals-charged-laundering-over-100-million-cryptocurrency-exchange-hack> [<https://perma.cc/8D3Q-GSD3>].

82. *UN Experts: North Korea Using Cyber Attacks to Update Nukes*, U.S. NEWS, (Feb. 9, 2021), <https://www.usnews.com/news/us/articles/2021-02-08/un-experts-say-north-korea-still-modernizing-nuclear-arsenal>, [<https://perma.cc/S5AE-PYY9>].

83. Fredrick, *supra* note 14.

84. Kien-Meng Ly, *supra* note 9 at 596.

Currently, there is a split between United States federal courts on how to regulate cryptocurrencies and what area of the law governs the courts' decisions on cryptocurrency-related crimes, including criminals hiding their ill-gotten cryptocurrency gains.⁸⁵ The Eastern District of New York has provided a short list of different ways the courts could address cryptocurrency cases until Congress enacts governing legislation. But the court determined, like so many other courts, that there was not a definitive answer.⁸⁶

These alternatives to regulating virtual currencies until Congress enacts or adjusts laws suggested by the Eastern District of New York include: no regulation; partial regulation by the Department of Justice; regulation by the Commodity Futures Trading Commission (CFTC), Securities and Exchange Commission (SEC), the Treasury Department's Financial Enforcement Network, or the IRS; regulation by each state; regulation by private exchange operators; or a combination of the alternatives.⁸⁷

The IRS, SEC, and a few other government agencies have attempted to regulate cryptocurrencies but have not addressed every issue related to the regulation of cryptocurrency, especially those regarding ill-gotten cryptocurrency gains.⁸⁸ Even though these agencies have attempted to regulate cryptocurrencies, their attempted regulations are confusing and still leave the courts split, as the agencies all define "cryptocurrency" differently.⁸⁹ The confusion, making it difficult for people to understand which agency governs, gives the agencies the ability to extend their arm to cover any sort of cryptocurrency transaction the agency believes falls within its definition. It also gives courts the ability to uphold this extension.

The IRS defines cryptocurrencies as property, the CFTC defines cryptocurrencies as commodities, and the SEC defines certain cryptocurrencies as securities.⁹⁰ While some cryptocurrencies act in a versatile manner, the lack of a consistent definition is not only confusing, but also allows for courts to stretch their definition of cryptocurrencies to

85. Noah Cherry, *VI. CFTC v. My Big Coin Pay: The CFTC's Jurisdiction over Cryptocurrency*, 38 REV. BANKING & FIN. L. 525 (2019).

86. *Commodity Futures Trading Comm'n. v. McDonnell*, 287 F. Supp. 3d 213 (E.D.N.Y. 2018).

87. *Id.*; see also discussion Section III.

88. Lydia O'Neal, *Crypto Question on Income Tax Form May Not Be Easy to Answer*, BLOOMBERG TAX, (Aug. 24, 2020) <https://news.bloombergtax.com/daily-tax-report/crypto-question-on-income-tax-form-may-not-be-easy-to-answer> [<https://perma.cc/QZZ7-W85P>].

89. Xie, *supra* note 12.

90. *Id.*; see also discussion *infra* Section III.

fit however it works best, or leaves room for courts to determine that certain crypto-crimes do not fall under the statutes of those crimes as committed with fiat money, property, securities, or commodities because Congress has not defined cryptocurrencies as one single classification in general and the United States refuses to recognize cryptocurrency as a “currency” itself.

B. Other Countries’ Approaches to Cryptocurrency Regulation or Nonregulation

While United States agencies and courts do not agree on how to regulate cryptocurrencies properly, neither do other countries. Different countries vary in their regulation of cryptocurrencies.⁹¹ Some countries regulate cryptocurrencies using tax laws.⁹² Others apply either anti-money laundering or anti-terrorism financing laws.⁹³ And still, others use both tax laws and anti-money laundering or anti-terrorism financing laws to regulate cryptocurrencies.⁹⁴ Some countries, like the United States, have left cryptocurrencies generally unregulated.⁹⁵

Some countries have noted that virtual currencies are not regulated in that country, and they have no plans to regulate or supervise cryptocurrency trading. This includes Portugal, where “the activity of issuing and trading virtual currencies is neither regulated nor supervised by the Federal Reserve Bank of Portugal or any other authority of the financial system.”⁹⁶ However, the Federal Reserve Bank of Portugal has stated that “[t]he absence of regulations on operations with virtual currencies does not make these activities illegal or prohibited.”⁹⁷ In 2017, the acting President of the Bank of Guatemala, Sergio Recinos, stated that Guatemala has no regulations on cryptocurrencies but does not recognize them as legal tender, so “they do not constitute a means of legal payment” but are not illegal or expressly prohibited.⁹⁸ Recinos “added that due to their anonymous origin, cryptocurrencies can easily be used for illicit activities, such as money laundering, terrorism, drug purchases, and tax

91. REGULATION OF CRYPTOCURRENCIES, *supra* note 45, at 2.

92. *Id.* at 5.

93. *Id.*

94. *Id.*

95. *Id.* at 31.

96. *Id.* at 53 (citing 303 Moedas Virtuais, BANCO DE PORTUGAL, <https://www.bportugal.pt/page/moedas-virtuais> [<https://perma.cc/YR5Q-9DWV>]).

97. REGULATION OF CRYPTOCURRENCIES, *supra* note 45, at 53.

98. *Id.* at 15.

evasion, among others, to a degree that could be higher than with cash.”⁹⁹ The Dominican Republic has also stated that cryptocurrencies are not legal tender, but it imposes no limitations on individuals transacting with cryptocurrency.¹⁰⁰

A group of countries has signed on to implement its own cryptocurrency system.¹⁰¹ This new system of currency will be created through the Eastern Caribbean Central Bank, “which is the monetary authority for eight island economies in the Eastern Caribbean Currency Union.”¹⁰² The Eastern Caribbean Central Bank has signed an agreement with tech company Bitt Inc., “agreeing to participate in a pilot program that will enable it to issue a digital currency.”¹⁰³

A small minority of countries have even outright banned the use of digital currencies altogether. These countries include Bolivia, Algeria, Iran, Qatar, and the United Arab Emirates (UAE).¹⁰⁴ In a notice to all of its banks, the country of Qatar “described bitcoin as illegal and unsupported by any central bank or government” and “prohibited all banks operating in Qatar from dealing with cryptocurrencies, subject to penalties for violators.”¹⁰⁵ In October 2017, the governor of the UAE’s Central Bank, Mubarak Rashid Al-Mansouri, “issued a warning pertaining to cryptocurrencies, which said that such currencies were susceptible to use in money laundering or terrorism funding.”¹⁰⁶

In September of 2017, China joined the list of countries that banned citizens from trading cryptocurrencies.¹⁰⁷ China essentially stated that cryptocurrencies “could not function like a currency in the absence of

99. *Id.* (citing Rosa María Bolaños, *Banguat Refiere que Criptomonedas no Son un Medio de Pago Legal*, PRENSA LIBRE (Dec. 19, 2017), <http://www.prensalibre.com/economia/banguat-refiere-que-criptomonedas-no-son-un-medio-de-pagolegal> [<https://perma.cc/5TWQ-8Q7B>]).

100. REGULATION OF CRYPTOCURRENCIES, *supra* note 45, at 25.

101. *Id.* at 2.

102. *Id.* at 6.

103. *Id.* at 19. Countries in this program include Antigua and Barbuda, Barbados, Dominica, and Saint Lucia.

104. *Id.* at 9, 82–83, 85, 88.

105. REGULATION OF CRYPTOCURRENCIES, *supra* note 45, at 85 (citing Circular No. 6/2018, CENTRAL BANK OF QATAR (Feb. 2, 2018), <http://www.qcb.gov.qa/sitelists/CircularsToBanks/Lists/Circulars/Attachments/173/Circular%20no.%206-2018.pdf> [<https://perma.cc/AKG5-TJLF>]).

106. REGULATION OF CRYPTOCURRENCIES, *supra* note 45, at 85 (citing Sarah Diaa, UAE Central Bank Warns against Cryptocurrencies Again, GULF NEWS (Feb. 10, 2018), <http://gulfnnews.com/business/sectors/markets/uae-central-bank-warns-against-cryptocurrencies-again-1.2171259> [<https://perma.cc/7M44-9YXX>]).

107. Foley, et al., *Sex, Drugs, and Bitcoin: How Much Illegal Activity is Financed through Cryptocurrencies?*, 32 REV. FIN. STUD. 1798 (2019).

legal tender.”¹⁰⁸ Because of “the potential challenges from cryptocurrency on current monetary regulation,” many have speculated that China banned cryptocurrencies because of the government’s lack of control over the transactions.¹⁰⁹ The United States is not likely to outright ban cryptocurrencies like China did because “the U.S. is more tolerant of technological uncertainty.”¹¹⁰

Some countries, like the United States, are currently developing legislation or regulation on virtual currencies.¹¹¹ Another example is Bermuda, which “does not have legislation or regulations that specifically govern cryptocurrencies. The government is, however, in the early stages of crafting legislation and regulations that aim to establish Bermuda as an international destination for digital currencies, similar to its position in the insurance and reinsurance sectors.”¹¹²

Anguilla has also introduced legislation to regulate virtual currencies, which it announced in 2017.¹¹³ “The government has noted that some types of tokens are considered to be securities, and thus are already regulated under the existing securities framework.”¹¹⁴ However, the government of Anguilla also stated that “there remained a large swath of non-security tokens with no clear guidance as to where they would fit in the emerging blockchain economy. Therefore, we focused our efforts on creating a safe and effective regulatory framework for non-security token offerings.”¹¹⁵

108. Xie, *supra* note 12.

109. *Id.*

110. *Id.*

111. REGULATION OF CRYPTOCURRENCIES, *supra* note 45, at 2.

112. *Id.* at 8 (citing Scott Neil, *Island Spells Out Blockchain Ambitions*, THE ROYAL GAZETTE (Jan. 26, 2018), <http://www.royal.govt.tz/international-business/article/20180126/island-spells-out-blockchain-ambitions>, [<https://perma.cc/9BYN-LK5N>]).

113. *Id.* at 20 (citing Lonnie Hobson, *The Government of Anguilla Announces World’s First Cryptocurrency Registration Process for “Utility Token Offerings”*, LINKEDIN (Nov. 15, 2017), <https://www.linkedin.com/pulse/government-anguillaannounces-worlds-first-process-utility-hobson/>).

114. *Id.* (citing Securities Act, cap. S13, REVISED STATUTES OF ANGUILLA at 3, <http://www.gov.ai/laws/S013-00-Securities%20Act/>). Note that Anguilla has also signed on to participate in the ECCB development of its own cryptocurrency system. *Id.* at 21.

115. *Id.* (citing *Government of Anguilla Announces Regulatory Framework for Non-Security Token Offerings*, ECONOTIMES (Nov. 14, 2017), <https://www.econotimes.com/Government-of-Anguilla-announces-regulatory-framework-for-non-security-token-offerings-1005960> [<https://perma.cc/P87S-AC86>]).

C. The IRS's Recent Attempt to Tax Cryptocurrencies

Filing income taxes is a part of being a citizen of the United States and has been since the Civil War.¹¹⁶ As former Justice of the United States Supreme Court Oliver Wendell Holmes said, “Taxes are what we pay for a civilized society.”¹¹⁷ But in 2019 and 2020, a new income to report arose—cryptocurrencies.¹¹⁸

“We are currently experiencing the beginning of the next evolutionary step of our economy as blockchain technology weaves its way into the fabric of our financial and business transactions.”¹¹⁹ A virtual currency question first appeared on the 2019 tax return:¹²⁰ “At any time during 2019, did you receive, sell, send, exchange, or otherwise acquire any financial interest in any virtual currency?”¹²¹

For 2020, this question is front and center on the first page of the IRS Form 1040.¹²² In fact, this question is located right under a taxpayer’s name and address—taxpayers do not even get to fill out their dependents before they are asked whether they have any interest in virtual currencies.¹²³

Why does the IRS seem to care more about whether the taxpayer has any interest in virtual currencies than whether the taxpayer has any children or dependents? This could be because of the growing concern that criminals are hiding ill-gotten gains from these virtual currencies, and there is not enough policy or regulation to stop it. Or it could show the panic and confusion that U.S. regulatory agencies might have right now surrounding virtual currencies as more and more U.S. citizens invest in them. Agencies such as the IRS appear to be becoming genuinely concerned about virtual currencies now, after waiting years to take significant action on regulation. With the growing use of

116. In response to the Civil War and the lack of funding, President Abraham Lincoln signed a revenue measure into law on July 1, 1862, that provided for the first income tax system, which collected over \$39 million in one year (1863). *IRS History Timeline*, IRS, <https://www.irs.gov/irs-history-timeline> (Feb. 25, 2020).

117. *Resource Center: History of Taxes*, U.S. DEP’T. OF TREASURY, https://www.treasury.gov/resource-center/faqs/Taxes/Pages/edu_faq_taxes_history.aspx (Dec. 5, 2010).

118. 2020 Form 1040, IRS, <https://www.irs.gov/pub/irs-prior/f1040-2020.pdf> [<https://perma.cc/A9ZG-UHX2>].

119. Fredrick, *supra* note 14.

120. 2019 Form 1040, INTERNAL REVENUE SERVICE, <https://www.irs.gov/pub/irs-prior/f1040-2019.pdf> [<https://perma.cc/NQ7R-8YP7>].

121. 2019 Form 1040, *supra* note 120.

122. 2020 Form 1040, *supra* note 118.

123. *Id.*

cryptocurrencies, it is becoming readily apparent that the United States needs to determine, clearly, how virtual currencies will be regulated.

Under the Form 1040 instructions, it states in the “Virtual Currency” section, “[s]ome virtual currencies are convertible, which means that they have an equivalent value in real currency or act as a substitute for real currency.”¹²⁴ Under the IRS’s definition, “virtual currency” means the “various types of convertible virtual currency that are used as a medium of exchange, such as digital currency and cryptocurrency.”¹²⁵ The instructions continue, stating “[r]egardless of the label applied, if a particular asset has the characteristics of virtual currency, it will be treated as virtual currency for Federal income tax purposes.”¹²⁶ The IRS essentially defines virtual currencies as a currency, but yet still refuses to recognize it as a currency.

IV. NEW TYPES OF “MONEY” MEANS NEW TYPES OF CHANGE

A. Why the Current Approach to Defining Cryptocurrency Needs to Change

Why is it a problem that the U.S. refuses to recognize cryptocurrency as a form of currency? If the United States wants to regulate virtual currencies, then it might never be able to do so to the full extent that it would like to unless it does recognize it as a currency. While the current solution of different definitions is not completely deficient, courts lack guidance from U.S. agencies on how to apply their rules in certain situations. The growing market of different cryptocurrencies provides a significant need for the formal regulation of digital currencies. This would benefit law-abiding citizens who own digital currencies, so they know how to report their income without fear of unknowingly committing income tax evasion. It would also benefit the regulatory agencies and law enforcement, so they know how to prosecute cryptocurrency crimes or “crypto-crimes.”

Additionally, while it might be easier to understand that some cryptocurrencies could fall under the SEC’s definition of “securities,” there is some debate as to whether all different types of cryptocurrency would fall under this definition.¹²⁷ Some argue that cryptocurrencies like

124. 2020 Form 1040 Instructions, INTERNAL REVENUE SERVICE, <https://www.irs.gov/pub/irs-prior/i1040gi—2020.pdf> [<https://perma.cc/H95L-TYZV>].

125. *Id.*

126. *Id.*

127. Kevin V. Tu, *Crypto-Collateral*, 21 SMU SCI. & TECH. L. REV. 205 (2018.)

bitcoin cannot be governed under the SEC because they do not fall under the definition of “securities” for three reasons. First, cryptocurrency like bitcoin does “not have note-like characteristics, as it is not an instrument for which the maker promises to pay a sum of money to another party.”¹²⁸ Second, most cryptocurrencies do not give rights to the owners,¹²⁹ so they cannot be classified as stock.¹³⁰ Third, because a person buys most cryptocurrencies without investing in them, it would be unprecedented to consider cryptocurrencies as “investment contracts.”¹³¹

Further, the IRS classifies cryptocurrency as “property,” making cryptocurrency transactions “barter arrangements” under the IRS.¹³² Some sources believe that this is a significant problem. This classification causes an issue because it requires cryptocurrency users to “maintain burdensome records to calculate tax due on the gain from the sale or exchange of the cryptocurrency—even for insignificant purchases.”¹³³

Under the IRS’s definition, any transaction involving cryptocurrency is treated like a capital gain—like a stock transaction—and will be taxed as such. Some people treat cryptocurrencies as such investments. But as they become more common, it is possible cryptocurrencies will become a form of payment for a job or an item. Say your friend pays you using Dogecoins, a form of virtual currency, to buy a computer from you, which you later convert to U.S. dollars. That transaction is not an investing transaction, but it was a transaction where you received ordinary income in exchange for the computer, so why not tax it as ordinary income instead of capital gains? This is the problem with the United States refusing to recognize digital currencies as currencies: no agency recognizes this computer sale as a simple transaction between two people in exchange for money.

Even courts have stated that virtual currencies can be used in this manner, but to regard.¹³⁴ “It is clear that Bitcoin can be used as money. It can be used to purchase goods or services, and . . . used to pay for individual living expenses . . . it can also be exchanged for conventional

128. Kien-Meng Ly, *supra* note 9.

129. For example, the right to vote, receive dividends, or buy stocks.

130. Kien-Meng Ly, *supra* note 9.

131. *Id.*

132. Deidre A. Liedel, *The Taxation of Bitcoin: How the IRS Views Cryptocurrencies*, 66 DRAKE L. REV. 107 (2018).

133. David McNeely, *Blame the IRS: A Look at Cryptocurrency and the IRS’s Lackluster Response to Its Rising Popularity*, 14 CHARLESTON L. REV. 513, 533 (2020); see Josh Ungerman, *IRS Approach to Taxation of Bitcoin*, FORBES (Dec. 4, 2014, 1:02 AM), <https://www.forbes.com/sites/irswatch/2014/12/04/irs-approach-to-taxation-of-bitcoin/#20392d38182b> [<https://perma.cc/W3AG-38PT>].

134. See SEC v. Shavers, No. 4:13-CV-416, 2013 WL 4028182, at *2 (E.D. Tex. Aug. 6, 2013).

currencies, such as the U.S. dollar, Euro, Yen, and Yuan.”¹³⁵ “Bitcoins carry value—that is their purpose and function—and act as a medium of exchange. Bitcoins may be exchanged for legal tender, be it U.S. dollars, Euros, or some other currency.”¹³⁶

B. Deterrence of Illicit Activities

The benefits offered to criminals by cryptocurrency transactions can attract criminals to commit crimes they otherwise would not have committed with ordinary paper money:

[I]n the absence of a regulatory response, a simple utility model predicts that the introduction of cryptocurrencies would increase the level of criminal activity, because more individuals would engage in it. Governments’ most obvious response would be to impose a stricter sanction in cases of illicit activity denominated in cryptocurrencies.¹³⁷

Imposing a sanction on criminals who use cryptocurrencies to fund their illicit activities “could theoretically equate the utility of using cryptocurrencies with the utility of using fiat currencies in criminal activity.”¹³⁸ This, in turn, should make the choice to participate in a crime with cryptocurrencies equal to the choice to participate in a crime with fiat money.¹³⁹

The question then becomes: How does the government impose a sanction on these decentralized, anonymously transacted, online-only currencies? Cryptocurrencies in the United States are not regulated by only one agency,¹⁴⁰ so imposing a sanction on crypto-crimes cannot be done easily because crypto-crimes could be under the jurisdiction of one agency, multiple agencies, or no agency.

One way to impose sanctions or set a standard of punishment on cryptocurrency-related crimes is to address the crimes the same way the U.S. legal system would address the crimes if they had been committed using fiat currency. Some of the biggest fiat currency crimes that have

135. *Id.*

136. *United States v. Ulbricht*, 31 F. Supp. 3d 540, 548 (S.D.N.Y. 2014).

137. Omri Marian, *A Conceptual Framework for the Regulation of Cryptocurrencies*, 82 U. CHI. L. REV. DIALOGUE 53, 60–61 (2015).

138. *Id.*

139. *Id.*

140. *See discussion supra.*

translated to crypto-crimes are money laundering¹⁴¹ and tax evasion.¹⁴² One significant issue with catching criminals who engage in money laundering and tax evasion through cryptocurrencies is that cryptocurrencies have no “paper trail” like ordinary fiat money.¹⁴³ Given the anonymity of cryptocurrency transactions,¹⁴⁴ it is even more difficult for the IRS or any governmental agency investigating crypto-crimes to trace crimes or cryptocurrency back to the original transactors.¹⁴⁵ Recently, the Department of Justice announced the collaboration between its National Cryptocurrency Enforcement Team and the FBI’s newly formed Virtual Asset Exploitation Unit to investigate and prosecute crypto-crimes.¹⁴⁶

Because of the generalized qualification of bitcoins as money by U.S. federal courts, the judicial system has consistently held that a defendant using bitcoins and other digital currencies can be charged and prosecuted under the current money laundering statute.¹⁴⁷ However, defendants have argued, and rightfully so, that because the IRS treats cryptocurrencies as property, transactions involving digital currencies do not fall within the meaning of a money-laundering claim.¹⁴⁸

In *United States v. Ulbricht*, “[t]he defendant argue[d] that virtual currencies have some but not all of the attributes of currencies of national governments and that virtual currencies do not have legal tender status.”¹⁴⁹ Even the court in *Ulbricht* stated that “[i]n fact, neither the IRS nor FinCEN purport to amend the money laundering statute (nor could they). In any event, neither the IRS nor FinCEN has addressed the

141. “Money laundering is the process of disguising criminal proceeds and may include the movement of clean money through the United States with the intent to commit a crime in the future (e.g., terrorism). Common methods include disguising the source of the proceeds; changing the form of the proceeds; or moving the proceeds to a place where the proceeds are less likely to attract attention. The object of money laundering is ultimately to get the proceeds back to the individual who generated them. Money laundering is a necessary consequence of almost all profit generating crimes and can occur almost anywhere in the world.” IRM 9.5.5 (Sept. 3, 2020).

142. A person commits tax evasion if they “willfully attempt[] in any manner to evade or defeat tax imposed by” the Internal Revenue Code. I.R.C. § 7201.

143. Edgar G. Sánchez, *Crypto-Currencies: The 21st Century’s Money Laundering and Tax Havens*, 28 U. FLA. J.L. & PUB. POL’Y 167, 189 (2017).

144. See discussion *supra*.

145. Sánchez, *supra* note 143.

146. Deputy Attorney General Lisa O. Monaco Delivers Remarks at Annual Munich Cyber Security Conference, DEP’T. OF JUST., (Feb. 17, 2022) <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-annual-munich-cyber-security> [<https://perma.cc/U7KW-WHMN>].

147. See *United States v. Ulbricht*, 31 F. Supp. 3d 540 (S.D.N.Y. 2014).

148. *Id.* at 569.

149. *Id.*

question of whether a ‘financial transaction’ can occur with Bitcoins.” Thus, the court had to refer to case law interpretation and the legislative intent behind the money laundering statute.¹⁵⁰ The court went on to hold, in a decision that is consistent with all other United States federal courts, that “[t]he money laundering statute is broad enough to encompass use of Bitcoins in financial transactions. . . . One can money launder using Bitcoins.”¹⁵¹

C. Why Cryptocurrency is Most Definitely a Currency

Those opposed to regulating cryptocurrencies as currencies list certain factors that contribute to virtual currencies, such as bitcoin’s “inability” to be treated as a currency: “While the functions of Bitcoin and traditional currency often overlap, it is inappropriate to treat Bitcoin as a currency because of the definition of currency.”¹⁵² The definition of currency under the Federal Code of Regulations is “[t]he coin and paper money of the United States or of any other country that is designated as legal tender and that circulates and is customarily used and accepted as a medium of exchange in the country of issuance.”¹⁵³

Another factor that opponents of treating cryptocurrencies as currency point to is its “inherent instability.”¹⁵⁴ While cryptocurrencies are not yet designated legal tender, they are used as a medium of exchange and are becoming increasingly popular as such in the United States and other countries.¹⁵⁵ Additionally, there are other designated legal tenders or currencies, such as the Venezuelan bolivar, that are unstable,¹⁵⁶ yet still meet the definition of currency under the Federal Code of Regulations.¹⁵⁷ “Bitcoin is accepted as payment on the internet by thousands upon thousands of merchants and is used for payment between individuals; a

150. *Id.*

151. *Id.* at 570.

152. Mitchell Prentis, *Digital Metal: Regulating Bitcoin As A Commodity*, 66 CASE W. RES. L. REV. 609, 621 (2015) (citing Kelsey L. Penrose, *Banking on Bitcoin: Applying Anti-Money Laundering and Money Transmitter Laws*, 18 N.C. BANKING INST. 543 (2014)).

153. 31 C.F.R. § 1010.100 (2014).

154. Prentis, *supra* note 152 at 622 (citing Nicholas Godlove, *Regulatory Overview of Virtual Currency*, 10 OKLA. J.L. & TECH. 71, *9 (2014)).

155. See discussion *supra*.

156. *Exchange Rate in Venezuela*, FOCUS ECONOMICS <https://www.focus-economics.com/country-indicator/venezuela/exchange-rate> [https://perma.cc/ZT2G-KTC2].

157. 31 C.F.R. § 1010.100 (2014).

simple fact that makes it a ‘common article for bartering’ and a ‘medium of exchange.’ It is, literally by definition, a currency.”¹⁵⁸

As discussed previously, virtual currencies do not always clearly fall under any definition, as they have multiple uses and act differently in every transaction. Virtual currencies are not necessarily always securities, are most likely not an “investment contract,” and do not easily fall under the definition of securities in the United States Code.¹⁵⁹ Even the head of the Division of Corporation Finance at the SEC, William Hinman, has stated that virtual currencies, like bitcoins, used normally, are not securities.¹⁶⁰ “Hinman specifically said that bitcoin is **not a security** because it is decentralized: there is no central party whose efforts are a key determining factor in the enterprise.”¹⁶¹

To properly regulate and deter criminals’ use of cryptocurrency, the United States needs to treat cryptocurrencies exactly how it would treat paper money. There is no doubt there are some significant differences between cryptocurrencies and paper money. Very clearly, the most significant difference is the decentralization of cryptocurrencies.¹⁶² But citizens of the United States and many other countries, whether they are law abiding or not, treat cryptocurrencies the way they would treat paper money. People use cryptocurrencies to pay for living expenses or exchange them for other currency, as one would do with paper money.¹⁶³

As with traditional fiat money, investing in bitcoin or cryptocurrency is a security under the SEC’s regulatory guidelines.¹⁶⁴ The real classification then is not that bitcoin is “sometimes a security,” but that bitcoin and other similar cryptocurrencies act as paper money and should thus be treated as such. When paper money is invested, it becomes a security; and so should cryptocurrencies. If paper money is treated as income by the IRS, then so should cryptocurrencies.

Additionally, cryptocurrencies should not be viewed as commodities because cryptocurrencies are generally viewed as having no intrinsic

158. Martin Tillier, *Accept That Bitcoin Is a Currency and Stop Blaming the Victims of Crime*, NASDAQ (Feb. 10, 2015, 9:49 AM), <http://www.nasdaq.com/article/accept-that-bitcoin-is-a-currency-and-stopblaming-the-victims-of-crime-cm442726> [https://perma.cc/58HC-82B5].

159. Kien-Meng Ly, *supra* note 9.

160. Bob Pisani, *Bitcoin and Ether Are Not Securities, But Some Initial Coin Offerings may Be*, *SEC Official Says*, CNBC (Jun. 14, 2018), <https://www.cnbc.com/2018/06/14/bitcoin-and-ethereum-are-not-securities-but-some-cryptocurrencies-may-be-sec-official-says.html> [https://perma.cc/U27Z-T5NC] (Note that initial coin offerings may possibly be a security, but that initial coin offerings and the cryptocurrencies discussed in this note are not the same).

161. *Id.* (emphasis added).

162. *See* discussion *supra* Part II.

163. SEC v. Shavers, No. 4:13-CV-416, 2013 WL 4028182, at *2 (E.D. Tex. Aug. 6, 2013).

164. SEC v. Shavers, No. 4:13-CV-416, 2013 WL 4028182, at *2 (E.D. Tex. Aug. 6, 2013).

value.¹⁶⁵ “Commodity money has intrinsic value but risks large price fluctuations based on changing commodity prices.”¹⁶⁶ But a bitcoin, or any version of a virtual currency, does not have intrinsic value. Cryptocurrency is not a physical object like cotton, rice, or gold.¹⁶⁷ Instead, cryptocurrency is an online, virtual currency and thus should be treated for exactly what it is—currency.

Other proponents of defining cryptocurrencies as commodities state that “[t]he question of whether a cryptocurrency is a commodity will always depend on the specific underlying facts and circumstances.”¹⁶⁸ But if that is truly the case—if a court will truly have to look at every fact to determine whether a cryptocurrency-related crime falls under the definition of a commodity—then this leads to even more confusion and loopholes.

As cryptocurrency “is being adopted on a global scale, over-regulation in the United States could entail economic consequences for the country in relation to the rest of the world. . . . other countries with fewer regulations could take the lead with virtual currency technology and innovation, leaving the United States behind.”¹⁶⁹ “Although there is a need for regulators to get ahead of the virtual currency phenomenon, they should be cautious about over-regulation. Excessive regulation can stifle the development and innovation of this technology within U.S. borders.”¹⁷⁰

D. The Extent of Personal Jurisdiction over Cryptocurrency Cases

As the common usage of cryptocurrency continues to grow, so does the prospect of increasing litigation. While it is not always clear that a cryptocurrency transaction falls under the governing body of one agency or another, Congress has allowed these agencies to “liberally construe” the statutes, thus allowing them to extend their reach to any claim the agency believes is within its reach.¹⁷¹

Along with extending the [x’s] definition, there should also be a concern for extending personal jurisdiction laws. For decades, the

165. Mohamed, *supra* note 28.

166. Adam Heyes, *Fiat Money vs. Commodity Money: Which Is More Prone to Inflation?*, INVESTOPEDIA (July, 15, 2020), <https://www.investopedia.com/ask/answers/041515/fiat-money-more-prone-inflation-commodity-money.asp> [https://perma.cc/3EAK-HQFC].

167. 7 U.S.C. § 1a.

168. Strassberg & Jacobsen, *supra* note 20.

169. Kien-Meng Ly, *supra* note 9 at 608.

170. *Id.*

171. See *Commodity Futures Trading Comm’n. v. McDonnell*, 287 F. Supp. 3d 213 (E.D.N.Y. 2018).

standard of personal jurisdiction has remained the same, yet some U.S. courts have already seen issues with personal jurisdiction and cryptocurrencies. In a 2021 case out of the Southern District of Florida, one of the main issues two of the defendants raised, one of which was the cryptocurrency wallet holder company, was a lack of personal jurisdiction.¹⁷² Instead of addressing personal jurisdiction, the court decided to dismiss the case for another reason and rendered the personal jurisdiction issue moot.¹⁷³

However, in 2020, the Northern District of California decided to address the issue with cryptocurrency mining companies and personal jurisdiction.¹⁷⁴ In this case, plaintiff was paid to support defendant's English-speaking customers.¹⁷⁵ In exchange for his effort, plaintiff was compensated in defendant's own cryptocurrency, Binance coin.¹⁷⁶ When issues arose between the two parties, defendant removed the coins from plaintiff's wallet; plaintiff sued, and defendant moved to dismiss for a lack of personal jurisdiction.¹⁷⁷ The Northern District of California held that because defendant had no "principal place of business" as an online cryptocurrency mining/wallet company, the court could not extend jurisdictional reach over defendant under the current personal jurisdiction precedent.¹⁷⁸ Plaintiff attempted to argue that there was "no other suitable place" for the lawsuit because defendant had no principal place of business and transacted with plaintiff in California, but the court dismissed that argument, saying that it still did not meet the jurisdictional precedent.¹⁷⁹

As digital currency transactions increase, will the extent of jurisdiction increase as well? Will courts extend personal jurisdiction over cases that they should not really have personal jurisdiction over, or will the U.S. be unable to prosecute or hear any cryptocurrency-related cases because of a lack of personal jurisdiction? Will the U.S. be required to change the standard for personal jurisdiction that has been precedent for so long? Will the U.S. have to say that just if a company transacts with someone in that state, there is personal jurisdiction? Perhaps another solution is to establish a separate court system, like bankruptcy courts, or one of the six United States Courts of Special Jurisdiction, such as the

172. *United Am. Corp. v. Bitmain, Inc.*, 530 F. Supp. 3d 1241, 1275 (S.D. Fla. 2021).

173. *Id.*

174. *Reynolds v. Binance Holdings, Ltd.*, 481 F.Supp. 3d 997 (N.D. Cal. 2020).

175. *Id.* at 1001.

176. *Id.*

177. *Id.* at 1002.

178. *Id.* at 1003.

179. *Id.*

U.S. Court of International Trade, which extends its jurisdictional reach to the entire United States and can hear cases outside of the U.S. as well.¹⁸⁰

If the United States is serious about regulating virtual currencies and addressing criminals who hide behind them, then the United States will need to find a way to address jurisdictional issues and the definitional issues with cryptocurrencies. To regulate them as much as the U.S. seems to desire, the U.S. will need to treat cryptocurrencies as what they are increasingly becoming—a form of currency.

180. *Court Rules Research Guide: U.S. Courts of Special Jurisdiction*, MARQUETTE L. SCHOOL (Sept. 26, 2017), <https://libraryguides.law.marquette.edu/c.php?g=318621&p=2127210> [<https://perma.cc/Q4GS-DMGS>].