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NOTE

Untangling Laundered Funds: The Tracing Requirement Under 18 U.S.C. § 1957

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Abstract. The United States criminalizes money laundering in part through 18 U.S.C. § 1957, which prohibits transactions of over $10,000 that are knowingly made using proceeds derived from specified illegal activities. The statutory requirement that transactions be more than $10,000 raises a complicated issue for courts. In many cases, potential launderers mix or "commingle" both legal and illegal funds in a single bank account. Once these funds are commingled, they become indistinguishable because money is fungible. In these cases, how can courts determine whether more than $10,000 of any particular transaction from the account in fact constituted illegal proceeds?

An enduring circuit split has emerged over this question. While the Fifth and Ninth Circuits require the government to trace the funds to a specific underlying crime, the majority of circuits simply assume that a transaction of over $10,000 from a commingled account falls within the reach of § 1957. This Note presents an original survey of the existing split, tracing how the doctrine developed in the decades following the enactment of § 1957. It then argues that courts should adopt an intermediate stance: the proportionality approach, which would apply the percentages of illegal and legal funds in an account to each targeted transaction. This approach has been used by courts in similar legal contexts, including asset-forfeiture cases. In making this argument, the Note further urges courts to consider how new financial realities—in particular, the rise of cryptocurrency and digital assets—will affect the level of tracing that should be demanded from prosecutors.

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Introduction

A local doctor runs a lucrative side business as the ringleader of an illegal gambling operation. In one month, he earns $30,000 from this scheme and deposits the money, in cash, in a bank account already containing $30,000 of savings from his legitimate salary. Later, he withdraws $20,000 to buy a motorcycle for his personal use. Next, he decides to withdraw an additional $10,000 to upgrade his new motorcycle, leaving $30,000 remaining in the account once again.

Unfortunately for the doctor, his bank alerted federal authorities to his first transaction of over $10,000 in cash, as required by federal regulations.[1] Following an investigation, he is arrested and charged with illegal gambling under state law, as well as a federal offense: money laundering under 18 U.S.C. § 1957, a statute which criminalizes "knowingly engag[ing] . . . in a monetary transaction in criminally derived property of a value greater than $10,000 and . . . derived from specified unlawful activity."[2]

At trial, however, the government cannot present enough evidence to prove beyond a reasonable doubt that the $30,000 in cash the doctor withdrew from his account was directly derived from his illegal gambling profits. Since cash is fungible—one dollar is the same as any other dollar—the money could have been derived from his $30,000 in legal savings. In other words, because the doctor has "commingled" his illegal and legal profits in a single bank account, the government faces difficulty establishing that the money he withdrew was a transaction "in criminally derived property," a required element under § 1957.[3]

Even assuming the government successfully proves all other elements of the statute, the doctor would likely be acquitted if he were charged in California.[4] If he were charged in New York, however, he would face up to ten years in federal prison, along with a substantial fine.[5] If he were charged in

1. *See* 31 C.F.R. § 1010.311 (2021) (requiring financial institutions except for casinos to report transactions of over $10,000 in "currency"); *see also id.* § 1010.100(m) (defining "currency" as including "coin and paper money of the United States").
2. 18 U.S.C. § 1957(a); *see also id.* § 1957(f)(3) (defining "specified unlawful activity" by reference to 18 U.S.C. § 1956); *id.* § 1956(c)(7) (listing predicate offenses for money-laundering statutes, including violations of 18 U.S.C. § 1961(1)); *id.* § 1961(1) (listing other predicate crimes, including gambling).
3. 18 U.S.C. § 1957(a).
4. *See infra* Part II.B; *see also* United States v. Rutgard, 116 F.3d 1270, 1292-93 (9th Cir. 1997) (finding that the government could not make out a § 1957 claim when it could not prove that the targeted withdrawals from a bank account consisted of more than $10,000 in "fraudulently-derived proceeds").
5. *See infra* Part II.A.2; *see also* United States v. Silver, 864 F.3d 102, 114-15 (2d Cir. 2017) (holding that the government need not prove that the targeted transaction consisted of more than $10,000 in illegal proceeds to show a § 1957 violation); 18 U.S.C. § 1957(b) (defining penalties); *id.* § 3571(b)(3) (imposing a maximum fine of $250,000 for felonies).

Texas, he would likely avoid conviction—but if he had withdrawn a single dollar more, he would instead potentially face prison time.[6] And what if the doctor did not store his profits in dollar bills, but in cryptocurrency, which he accesses through a digital wallet? That question would render the result even more uncertain, mapping the contradictory outcomes in the cash context onto newly emerging judicial interpretations of money laundering in the cryptocurrency context.[7]

As the above example illustrates, defendants may face sharply varying outcomes under § 1957 based on similar or even identical facts, depending on the court that presides over their case. The substantial majority of circuits do not require the government to "trace" a specific withdrawal from a commingled bank account back to the proceeds of the underlying unlawful activity.[8] Thus, in New York (which applies the majority view), the government could convict the doctor even if it could not prove that his two withdrawals contained any illegally obtained money.[9] Yet even courts that follow the majority view and dispense with a tracing requirement have differed in what they demand the government prove under § 1957 to demonstrate a connection between the illegal funds and the withdrawal.[10]

Conversely, the Ninth Circuit explicitly *does* require tracing.[11] Under the Ninth Circuit's view, the government would need to employ fact-specific accounting measures to demonstrate that the doctor's first withdrawal did in fact include more than $10,000 worth of dirty money from his gambling profits.[12]

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6. *See infra* Part II.C; *see also* United States v. Loe, 248 F.3d 449, 467 (5th Cir. 2001) ("[W]here an account contains clean funds sufficient to cover a withdrawal, the Government can not prove beyond a reasonable doubt that the withdrawal contained dirty money.").
7. *See infra* Part III.C.
8. The First, Second, Third, Fourth, Seventh, Eighth, Tenth, and Eleventh Circuits all fall into this camp; only the Fifth and Ninth Circuits require tracing. *See infra* Part II.
9. *See Silver*, 864 F.3d at 115 ("We . . . adopt the majority view of our sister Circuits—that the Government is not required to trace criminal funds that are comingled with legitimate funds to prove a violation of Section 1957.").
10. *See infra* Part II.A (outlining these circuits' different views on the tracing requirement).
11. *See* United States v. Rutgard, 116 F.3d 1270, 1290-93 (9th Cir. 1997).
12. *See id.* at 1292-93. This example is a simplification. Real prosecutors likely would not have difficulty tracing the doctor's two simple cash transactions. The process of tracing is described in Part I.B below. However, *Rutgard* itself illustrates how the tracing requirement can pose an obstacle even for relatively straightforward prosecutions against individuals. Rutgard was a doctor who engaged in insurance fraud. *Rutgard*, 116 F.3d at 1275-77. His conduct fell outside the scope of § 1957 due to the tracing requirement. *See id.* at 1292-93. The § 1957 claim against Rutgard involved only a few transactions of large amounts of cash. *See id.* at 1290.

The Fifth Circuit has adopted an intermediate "aggregation" test with respect to tracing.[13] It would conclude that the doctor's transaction was derived from his gambling proceeds only if he had withdrawn an aggregate amount across his two transactions that exceeded the total amount of clean money ($30,000) in his account.[14] Thus, if the doctor withdrew $1 to buy a water bottle in addition to the $30,000 for the motorcycle, § 1957 would apply because his *aggregate* withdrawal of $30,001 exceeded his $30,000 in clean money. The Fifth Circuit has acknowledged that such a result, at this fringe point, is an "oddit[y]" and "somewhat mechanistic."[15] It also has not explicitly held that a conviction would hinge on a single dollar, although that is the logical implication of its aggregation approach.

This circuit split—which emerged in the 1990s, shortly after the enactment of the modern money-laundering laws[16]—persists today, even as laundering techniques are becoming increasingly sophisticated.[17] The entrenched division raises two related questions. First, how should courts' disagreement over tracing be resolved in light of the statutory framework developed by Congress? Second, how should courts' analyses be affected, if at all, by an increasingly cashless global economy, which presents distinct opportunities and challenges for prosecutors pursuing money-laundering charges?

This Note seeks to answer these questions. While various aspects of money-laundering law are subject to debate, very little scholarly work has analyzed the tracing requirement in depth.[18] This lack of engagement reflects a

13. *See* United States v. Davis, 226 F.3d 346, 357 (5th Cir. 2000); *see also infra* Part II.C.

14. *See infra* Part II.C (describing the aggregation approach).

15. United States v. Loe, 248 F.3d 449, 467 n.81 (5th Cir. 2001).

16. *See infra* Part II.A.

17. *See* Bryan Richardson, Dan Williams & Daniel Mikkelsen, *Network Analytics and the Fight Against Money Laundering*, *in* MCKINSEY & CO., TRANSFORMING APPROACHES TO AML AND FINANCIAL CRIME 14, 14 (2019), https://perma.cc/VHY3-FQMU; FIN. CRIMES ENF'T NETWORK, U.S. DEP'T OF THE TREASURY, MONEY LAUNDERING PREVENTION: A MONEY SERVICES BUSINESS GUIDE 17 (n.d.), https://perma.cc/TZV8-66E9.

18. Multiple scholars have questioned the majority approach as it has developed over time. In a 1993 article, D. Randall Johnson argued that the government should be required to affirmatively prove, in a transaction involving a commingled account, that more than $10,000 in dirty funds were used; otherwise, courts would "render meaningless Congress' decision to criminalize *only* those transactions involving more than $10,000 in tainted funds." D. Randall Johnson, *The Criminally Derived Property Statute: Constitutional and Interpretive Issues Raised by 18 U.S.C. § 1957*, 34 WM. & MARY L. REV. 1291, 1329 (1993). At the time that Johnson wrote, the circuit split had not yet emerged. Another work concluded that circuit courts "have generally come to the correct conclusions on tracing," but urged courts to examine commercial analogues when approaching the tracing issue in the money-laundering context. *See* Joseph R. Miller, Note, *Federal Money Laundering Crimes—Should Direct Tracing of Funds Be Required?*, 90 KY. L.J. 441, 443, 458-61 (2001-2002); *see also* Mariano-Florentino Cuéllar, *The Tenuous Relationship Between the Fight Against Money Laundering and the Disruption of Criminal*

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decrease in scholarly and public interest in money laundering more broadly since the early 2000s.[19] This Note builds on prior work by revisiting the now-entrenched circuit split, which was not as clearly established when scholars began to raise the tracing issue.

After reviewing the legislative history and cataloging existing case law, this Note argues for a novel approach to tracing. Following the Fifth Circuit's suggestion in *United States v. Loe*, courts should employ a "proportionality" or "pro rata" test, which applies the respective percentages of clean and dirty money within an entire account to each individual transaction allegedly covered by § 1957 in order to determine whether the greater than $10,000 requirement is met.[20] Applying this test to the above example, the funds in the doctor's account consisted of 50% legal money ($30,000 in salary) and 50% illegal money ($30,000 in gambling funds). Based on this 50% proportion, neither of the doctor's withdrawals (of $20,000 and $10,000, respectively) would fulfill the minimum requirement under § 1957.

As the court noted in *Loe*, this test would create a framework that simply and straightforwardly applies the language of § 1957: "Whoever . . . knowingly engages . . . in a monetary transaction in [dirty money] of a value greater than $10,000 . . . shall be punished."[21] It avoids over-deference to the government and the distortion of statutory language produced by the blanket no-tracing rule used by a majority of circuits,[22] while reducing the technical difficulties, confusion, and discrepancies created by the Ninth Circuit's tracing requirement.[23] And although the proportionality approach is similar to the Fifth Circuit's more flexible aggregation approach,[24] it would not create an

Finance, 93 J. CRIM. L. & CRIMINOLOGY 311, 343 (2003) (observing, within the mixed results among the circuit courts, a trend "suggest[ing] some sort of pragmatic balancing requiring the government to do more tracing as the ratio of tainted to clean funds increases"); Daniel L. Snedigar, Comment, *Loose Change: The Seventh Circuit Misses an Opportunity to Clarify Money Laundering Law in* United States v. Haddad, 2 SEVENTH CIR. REV. 605, 613-18 (2007) (describing the circuit split in relation to the Seventh Circuit's decision in *Haddad*). More recently, one work has advocated for Congress to intervene and clarify the language of § 1957. *See generally* Andrew Todd, *Invention or Interpretation in 18 U.S.C.A. § 1957: Textualism & Tracing in the Money Laundering Control Act of 1986*, 57 CRIM. L. BULL. 389 (2021).

19. According to Google's Ngram Viewer, publications on money laundering peaked during the years 1988 and 1999, followed by a general decline. *Ngram Viewer*, GOOGLE BOOKS, https://perma.cc/JF9T-59AY (archived Apr. 8, 2023) (showing the results of "money laundering" in the "English (2019)" database).

20. *See* United States v. Loe, 248 F.3d 449, 467 n.81 (5th Cir. 2001) ("There is much to be said in favor of a 'proportionality' rule.").

21. 18 U.S.C. § 1957(a); *see Loe*, 248 F.3d at 467 n.81.

22. *See infra* Part II.A.

23. *See infra* Part II.B.

24. *See infra* Part II.C.

arbitrary tipping point, before which *all* funds are presumed clean and after which *all* funds are presumed dirty. Instead, it would focus on the relationship between the whole account and the specified transaction.

This Note proceeds in three parts. Part I introduces the issue of money laundering and the statutory background that has led to the tracing problem. Part II then turns to the circuit split that has emerged over the tracing requirement. It argues that this split is best conceptualized as a spectrum, with the Ninth Circuit on one end (requiring the tracing of all withdrawals) and the Second, Third, and Seventh Circuits on the other (assuming that commingled transactions are "in" illegal profits when the account contains *any* illegal money).[25] Part III argues for the proportionality approach as a workable, intermediate position on this spectrum. In doing so, it draws on a related statute: the associated civil-forfeiture law, 18 U.S.C. § 981. Courts interpreting § 981 have repeatedly adopted various accounting rules that demand some level of tracing. In the civil-forfeiture context, courts have proven more willing to substantiate the tracing requirement than in the § 1957 context, despite the lower level of proof required in civil cases.[26] Part III concludes by examining the emergence of the blockchain and the implications that new digital assets pose for courts interpreting and updating the § 1957 framework.

I. The Historical Development of the Tracing Doctrine Under § 1957

A. The Background and Purpose of § 1957

"Money laundering" is the process of disguising proceeds derived from illegal activities (or, "dirty" profits) to make them appear legal (or, "clean").[27] This process is typically divided into three stages: placement, layering, and integration.[28] The illegally-derived money is first "placed" into legitimate

25. *See infra* Part II.

26. *See infra* Part III.B.

27. *See What Is Money Laundering?*, FIN. CRIMES ENF'T NETWORK, https://perma.cc/4CXK-KLHE (archived Apr. 8, 2023); *see also History of Anti-Money Laundering Laws*, FIN. CRIMES ENF'T NETWORK, https://perma.cc/UZW5-SLPU (archived Apr. 8, 2023) (employing the terms "dirty" and "clean" in the context of money laundering).

28. The government and prominent anti–money laundering (AML) organizations have adopted these three stages as a useful framework, although not all money-laundering activities will fit precisely within the three steps. *See* FIN. CRIMES ENF'T NETWORK, *supra* note 17, at 44; *see also* FIN. ACTION TASK FORCE, PROFESSIONAL MONEY LAUNDERING 17-19 (2018), https://perma.cc/5J3D-FJZU (describing the stages in the context of professional money-laundering organizations); Stefan D. Cassella, *Toward a New Model of Money Laundering: Is the "Placement, Layering, Integration" Model Obsolete?*, 21 J. MONEY LAUNDERING CONTROL 494, 495-96 (2018) (critiquing the three-step model for not mapping onto the elements of the money-laundering statutes).

enterprises;[29] the funds are then "layered" through various transactions to hide their illegal origins;[30] finally, the launderers execute numerous transactions or other financial maneuvers until the dirty money is thoroughly disguised or "integrated" into the legal financial system.[31] As this framework suggests, detecting money laundering becomes increasingly difficult along each step in the chain, as the original illicit profits disappear into a web of legitimate transactions.[32]

Money laundering has long been seen as the "lifeblood" of organized, large-scale criminal enterprises, because it allows the profits of illegal schemes to be realized in the aboveground financial system instead of remaining trapped in a limited, underground economy.[33] Particularly in the drug trade, where transactions normally involve small bills, laundering allows actors to physically dispose of unwieldy amounts of cash.[34] Accordingly, laundering is a routine part of criminal enterprises: While the scope of the problem is inherently difficult to estimate, the United Nations

29. *See* FIN. CRIMES ENF'T NETWORK, *supra* note 17, at 44. Placement encompasses a wide variety of mechanisms, including depositing funds into a legitimate bank account. Bank deposits are typically carried out using a false name or the name of another person (such as a family member or associate in the scheme). *See, e.g.*, United States v. Rutgard, 116 F.3d 1270, 1290 (9th Cir. 1997) (noting that the defendant placed fraudulently obtained funds in a family trust and instructed his wife to make wire transfers using the money).

30. *See* FIN. ACTION TASK FORCE, *supra* note 28, at 18. Here, a common practice is to transfer money to offshore banks that maintain strict secrecy practices. *See* Teresa E. Adams, Note, *Tacking on Money Laundering Charges to White Collar Crimes: What Did Congress Intend, and What Are the Courts Doing?*, 17 GA. ST. U. L. REV. 531, 537 (2000).

31. For example, integration can include disguised transactions (such as false payments to employees or dividends to shareholders of a fictional company) or the purchase of luxury goods. *See Frequently Asked Questions*, FIN. ACTION TASK FORCE, https://perma.cc/84G4-B934 (archived Apr. 8, 2023); *What Is Money Laundering*, *supra* note 27.

32. Adams, *supra* note 30, at 535 (observing that the detection rate by law enforcement decreases at each stage in the money-laundering chain); *see also Tracing Dirty Money—An Expert on the Trail*, UNITED NATIONS OFF. ON DRUGS & CRIME (Aug. 11, 2011), https://perma.cc/3ELT-VZ8A ("[Y]ou have to identify the stream of illicit money before it joins the rivers of global financial flows.").

33. *See* PRESIDENT'S COMM'N ON ORGANIZED CRIME, THE CASH CONNECTION: ORGANIZED CRIME, FINANCIAL INSTITUTIONS, AND MONEY LAUNDERING, at viii, 3-4 (1984), https://perma.cc/LZ7V-7WT9.

34. *See* David A. Andelman, *The Drug Money Maze*, FOREIGN AFFS. (July 1, 1994), https://perma.cc/BLQ9-H6ZC (noting that cash presents a "fundamental problem" for large-scale drug cartels because it is "unwieldy" and difficult to transport); Sarah N. Welling, *Smurfs, Money Laundering, and the Federal Criminal Law: The Crime of Structuring Transactions*, 41 FLA. L. REV. 287, 291 (1989) (providing an example of a person who attempted to bring over $1,000,000 in small bills, weighing 280 pounds, to a casino).

believes that between $800 billion and $2 trillion is laundered each year, representing 2%-5% of global GDP.[35]

In the United States, both Congress and executive agencies aggressively target money laundering through ex ante regulation of financial institutions and ex post sanctions for violators.[36] Scholars have extensively analyzed the existing anti–money laundering (AML) prevention regime.[37] These works inform, but are outside the scope of, this Note, which focuses on criminal penalties. It is worth stating at the outset, however, that there is shocking empirical evidence of the inefficiency of existing regulations, despite their breadth. One 2020 study claimed that AML policy interventions have had a success rate in the range of 0.1% globally.[38] Such a drastic failure substantiates Mariano-Florentino Cuéllar's critique that the AML regulatory regime fails to

35. *Money Laundering*, UNITED NATIONS OFF. ON DRUGS & CRIME, https://perma.cc/5N94-KMB6 (archived Apr. 8, 2023).

36. For information on the preventative regime, see, for example, *Anti-Money Laundering (AML) Source Tool for Broker-Dealers*, SEC, https://perma.cc/7CA7-2ENY (last updated May 16, 2022) (detailing relevant AML regulations for broker-dealers); and RENA S. MILLER & LIANA W. ROSEN, CONG. RSCH. SERV., IF11064, U.S. EFFORTS TO COMBAT MONEY LAUNDERING, TERRORIST FINANCING, AND OTHER ILLICIT FINANCIAL THREATS: AN OVERVIEW 1-2 (2022) (describing statutory and regulatory frameworks for domestic AML efforts). For information on sanctions, see generally CHARLES DOYLE, CONG. RSCH. SERV., RL33315, MONEY LAUNDERING: AN OVERVIEW OF 18 U.S.C. § 1956 AND RELATED FEDERAL CRIMINAL LAW (2017).

37. Many have noted the practical inefficiency of the laundering laws, which must respond to clandestine and evolving efforts by sophisticated criminal actors and organizations. For example, lax corporate-registration rules have made the United States a haven for shell companies: "In every state, more personal details and proof of identity are required to get a library card than to form a company." Amy Mackinnon, *The U.S. Is a Haven for Money Laundering. That Might Be About to Change*, FOREIGN POL'Y (July 31, 2020, 10:27 AM), https://perma.cc/4B3N-N2T2. Yet corporate registration largely falls outside of the scope of federal AML laws, since incorporation requirements are a matter of state law.

    Other scholars have questioned whether the expansion of prosecutorial power and the potential threats to Americans' financial privacy invoked by the money-laundering statutes are worth such limited results. *See, e.g.*, Duncan E. Alford, *Anti-Money Laundering Regulations: A Burden on Financial Institutions*, 19 N.C. J. INT'L L. & COM. REGUL. 437, 437-38, 468 (1994) (arguing that regulatory burdens on banks and associated costs for customers outweigh AML's limited effect on drug trafficking); Lanier Saperstein, Geoffrey Sant & Michelle Ng, Practitioner Comment, *The Failure of Anti–Money Laundering Regulation: Where Is the Cost-Benefit Analysis?*, 91 NOTRE DAME L. REV. ONLINE 1, 4-10 (2015) (arguing that the government has not shown that bank reporting requirements are necessary or effective for addressing laundering).

38. Ronald F. Pol, *Anti-Money Laundering: The World's Least Effective Policy Experiment? Together, We Can Fix It*, 3 POL'Y DESIGN & PRAC., 73, 84-85 (2020); *see also* Anna Bleazard & Rahul Punjabi, *The High Costs and Low Returns of AML Compliance for Banks: Is There a Better Way?*, FTI CONSULTING (Mar. 25, 2022), https://perma.cc/35FW-ZCTE (noting that financial institutions spent more than $213 billion on AML compliance in 2020).

address the overarching infrastructure of global networks organized around financial crime and laundering.[39] Instead, according to Cuéllar, the system successfully reaches only the narrow subset of financial crime that is closely tied to existing prosecutorial priorities, such as investigating fraud and illicit drugs.[40] These significant limitations of the regulatory system heighten the importance of proper ex post oversight of money laundering.

Despite its vast scope, money laundering is a federal crime of relatively recent vintage. The two-part statutory framework in use today—18 U.S.C. §§ 1956-1957—only emerged in the 1980s, in the context of the so-called War on Drugs.[41] Prior to this, Congress addressed laundering in part through the Currency and Foreign Transactions Reporting Act of 1970 (often called the "Bank Secrecy Act" or "BSA"), which requires financial institutions to report cash transactions of over $10,000 to the federal government (thus snagging our hypothetical doctor defendant).[42] However, would-be launderers quickly learned to avoid the BSA's reporting requirement by transferring money in a series of smaller transactions that each fell under the $10,000 threshold, a practice called "structuring."[43] In addition, the President's Commission on Organized Crime critiqued the BSA's statutory penalties as "far too lenient" in 1984.[44] In 1986, Congress passed the Money Laundering Control Act (MLCA), the first statute to make money laundering an independent federal crime.[45]

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39. *See* Cuéllar, *supra* note 18, at 319.

40. *See id.*

41. Money Laundering Control Act of 1986 (MLCA), Pub. L. No. 99-570, tit. I, subtitle H, § 1352(a), 100 Stat. 3207, 3207-18 to -21 (codified as amended at 18 U.S.C. §§ 1956-1957); *see* Deborah Amos, *America's Drug War*, AM. PUB. MEDIA (May 2001), https://perma.cc/2V9V-TLFU (explaining that, by 1981, "the War on Drugs had also become the war against drug profits" as law enforcement targeted banks for AML enforcement); Anthony Amicelle, *When Finance Met Security: Back to the War on Drugs and the Problem of Dirty Money*, 3 FIN. & SOC'Y 106, 108 (2017) ("[M]oney laundering and the resulting state intervention against 'dirty' money were created and legitimized in the United States in association with only one 'problem': drug trafficking.").

42. *See The Bank Secrecy Act*, FIN. CRIMES ENF'T NETWORK, https://perma.cc/9Y56-EBFB (archived Apr. 8, 2023).

43. Jimmy Gurulé, *The Money Laundering Control Act of 1986: Creating a New Federal Offense or Merely Affording Federal Prosecutors an Alternative Means of Punishing Specified Unlawful Activity?*, 32 AM. CRIM. L. REV. 823, 825-26 (1995). 18 U.S.C. § 1956 was passed in part to target structuring. Under this provision, there is *no* minimum, a fact which courts have found highly relevant in the tracing analysis. *See infra* note 78 and accompanying text; Gurulé, *supra*, at 825 (arguing that "Congress intended the MLCA to address the so-called 'structuring' loophole problem").

44. PRESIDENT'S COMM'N ON ORGANIZED CRIME, *supra* note 33, at viii.

45. G. Richard Strafer, *Money Laundering: The Crime of the '90's*, 27 AM. CRIM. L. REV. 149, 149 (1989). Prior to the passage of the MLCA, the government had prosecuted money laundering through other doctrinal avenues, including federal conspiracy law and transaction reporting requirements. *Id.* at 150.

Politicians advocated for AML efforts as a weapon in Congress's "arsenal for the federal war on drugs," as then–New York City Mayor Edward Koch put it in the *New York Times*.[46] Koch proposed a range of additional harsh solutions to the nation's drug-dealing problem, including enacting a blanket "[f]ederal death penalty for drug wholesalers."[47] The broad MLCA fit into this aggressive "War on Drugs" framework and was passed as part of the Anti-Drug Abuse Act of 1986.[48] The MLCA introduced the two key money-laundering sections, 18 U.S.C. §§ 1956-1957, as well as ancillary provisions such as forfeiture laws.[49]

18 U.S.C. § 1956(a) targets money-laundering schemes in which a launderer conceals or uses the money "to promote the carrying on" of the underlying crime.[50] For example, if the doctor in the example above had withdrawn funds not to buy and upgrade a motorcycle for himself, but to a rent out a warehouse for his gambling ring, his actions would fall under § 1956 because the transaction would further the underlying crime. Subprongs of § 1956 target related criminal conduct, such as laundering to evade taxes,[51] conceal the source of the funds,[52] or avoid financial reporting requirements.[53]

18 U.S.C. § 1957 captures a "much broader" set of money launderers.[54] This statutory section criminalizes transactions involving more than $10,000 derived from criminal schemes, *regardless* of whether the transaction is in furtherance of the underlying scheme.[55] Notably, the statute applies not only to the person who engaged in the underlying criminal activity, but to *anyone* who "engages or attempts to engage in a monetary transaction in [the] criminally derived property," subject to the mens rea requirement that they knew they were doing

46. Edward I. Koch, Opinion, *An Arsenal for the Federal War on Drugs*, N.Y. TIMES (July 18, 1986) (capitalization altered), https://perma.cc/5TGG-7L8V.

47. *Id.*

48. *See* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended in scattered sections of the U.S. Code). Some critiques of the War on Drugs encompassed the money-laundering statutes. For example, in 1995, advocates proposed a set of ultimately unsuccessful amendments to limit the scope of the drug war by reforming the sentencing guidelines and countering racial disparities in drug-related laws. One of the key suggested changes was reducing the scope of the money-laundering regime. *See* Amendments to the Sentencing Guidelines for United States Courts, 60 Fed. Reg. 25,074, 25,076, 25,085-86 (May 10, 1995); Act of Oct. 30, 1995, Pub. L. No. 104-38, 109 Stat. 334 (rejecting the proposed amendments).

49. *See* Anti-Drug Abuse Act of 1986 §§ 1352(a), 1366(a), 100 Stat. at 3207-18 to -21, 3207-35 to -39 (codified as amended at 18 U.S.C. §§ 981-982, 1956-1957).

50. 18 U.S.C. § 1956(a)(1)(A)(i); *see* S. REP. NO. 99-433, at 9-10 (1986).

51. 18 U.S.C. § 1956(a)(1)(A)(ii).

52. *Id.* § 1956(a)(1)(B)(i).

53. *Id.* § 1956(a)(1)(B)(ii).

54. 132 CONG. REC. 33,950 (1986) (statement of Rep. William J. Hughes).

55. *See* 18 U.S.C. § 1957(a), (c).

so.[56] Congress intended for § 1957 to capture the involvement of community members, particularly businessmen, who support money laundering by knowingly accepting illegal funds.[57] As Representative E. Clay Shaw, Jr., stated: "I am sick and tired of watching people sit back and say . . . my hands are clean even though I know the money is dirty I am handling."[58] Thus, § 1957 constituted a significant legal innovation, targeting recipients who knowingly did business with criminals or accepted tainted money.

Reflecting the provision's broad scope, the sole mens rea requirement under § 1957 is that the recipient know the funds used in the transaction came from illegal activities.[59] The defendant need not know the specific crime from which the money was actually derived.[60] Similarly, the statute covers a range of financial transactions—§ 1957 effectively applies "to any transaction by a criminal *with his bank*," including simply depositing the illicit funds.[61]

Congress affirmed the money-laundering laws and established further requirements in a series of laws passed during the 1990s,[62] as well as in the USA PATRIOT Act, passed in 2001 in response to the 9/11 attacks.[63] Most recently, Congress passed the Anti-Money Laundering Act of 2020 (AMLA).[64] This

56. *Id.* § 1957(a).

57. *See* H.R. REP. NO. 99-855, at 13-15 (1986).

58. *Id.* at 13 (quoting Representative E. Clay Shaw, Jr.). This emphasis on the connection between drugs and businessmen was reflected in public reports on the statute. *See, e.g.*, *Frontline: Who Profits from Drugs?* (PBS television broadcast Feb. 21, 1989), https://perma.cc/TYB3-QPTV (describing an investigative report as "following a trail directly into the offices of otherwise respectable businessmen . . . people who would say no to drugs, but very willingly say yes to drug money.").

59. *See* 18 U.S.C. § 1957.

60. *See* U.S. Dep't of Just., Crim. Res. Manual § 2171 (2020), https://perma.cc/CT3R-EEWD; *see also* 18 U.S.C. § 1957(c), (f)(3) (providing that the government need not prove that the defendant knew that the underlying crime was one of the specified unlawful activities that are predicate crimes for § 1956 money laundering). The distinction between § 1956 and § 1957 has been somewhat elided by a broad judicial interpretation of the "concealing" prong in § 1956(a)(1)(B)(i). A defendant can be convicted under § 1956 for simply depositing illicit funds if the government can prove he did so to "conceal or disguise" the nature of the money. *See, e.g.*, United States v. Iacaboni, 221 F. Supp. 2d 104, 114-15 (D. Mass. 2002). Nevertheless, § 1956 still demands at least some evidence of concealment, unlike § 1957. *See, e.g.*, United States v. Rockelman, 49 F.3d 418, 422 (8th Cir. 1995) (holding that § 1956 should not be interpreted to criminalize ordinary spending of drug-sale proceeds without an intent to conceal).

61. United States v. Rutgard, 116 F.3d 1270, 1291 (9th Cir. 1997) (emphasis added).

62. *See History of Anti-Money Laundering Laws*, *supra* note 27.

63. *See USA Patriot Act*, FIN. CRIMES ENF'T NETWORK, https://perma.cc/V3ZJ-C4VV (archived Apr. 8, 2023) (describing the purposes of the Act relating to money laundering and financial institutions).

64. Pub. L. No. 116-283, div. F, 134 Stat. 3388, 4547-4633 (2021) (codified as amended in scattered sections of the U.S. Code).

statute has been described as the "most comprehensive" update to the laundering regime since the USA PATRIOT Act,[65] and as an "overhaul" of the regulatory framework.[66] Among other things, the Act delegates greater enforcement authority to the Financial Crimes Enforcement Network (FinCEN), a unit within the Department of the Treasury that targets money laundering through analyzing and disseminating financial data.[67] The AMLA explicitly defines entities engaged in "the exchange or transmission of 'value that substitutes for currency,'" such as cryptocurrency, as falling within the scope of the BSA.[68] In addition to these new areas of focus, the AMLA also amended the BSA "to impose new obligations on FinCEN" and "new reporting requirements" for certain institutions.[69]

Past congressional interest in addressing money laundering seems to have been related to context-specific policy concerns. For example, the MLCA was motivated by the War on Drugs, the PATRIOT Act's AML provisions were enacted in response to terrorism, and the AMLA was passed amidst concerns about Russian money laundering.[70] However, in practice, these specific

65. Gibson, Dunn & Crutcher LLP, The Top 10 Takeaways for Financial Institutions from the Anti-Money Laundering Act of 2020 1 (2021), https://perma.cc/JGU4-BRX4.

66. David Mortlock, Britt Mosman, Michael J. Gottlieb, William J. Stellmach, Samuel Hall & Nikki M. Cronin, Willkie Farr & Gallagher LLP, Anti-Money Laundering Act of 2020 Overhauls United States AML Framework 1 (2021), https://perma.cc/NJY7-AGQY.

67. *See id.* at 1-4; *What We Do*, FIN. CRIMES ENF'T NETWORK, https://perma.cc/H6XB-CCML (archived May 7, 2023); *see also* Treas. Order 180-01 (July 1, 2014) (reaffirming the authority of FinCEN under the BSA).

68. Stephen P. Wink, Todd Beauchamp, Yvette D. Valdez, Eric S. Volkman, Adam Bruce Fovent & Deric Behar, *2020 Digital Asset Regulatory Lookback (US Edition)*, LATHAM & WATKINS LLP: GLOB. FINTECH & DIGIT. ASSETS BLOG (Jan. 21, 2021) (quoting Anti-Money Laundering Act of 2020, § 6102(c), 134 Stat. at 4553 (codified at 31 U.S.C. § 5318)), https://perma.cc/ZR2B-UMHJ.

69. Mortlock et al., *supra* note 66, at 1; Press Release, Fin. Crimes Enf't Network, FinCEN Issues Proposed Rule for Beneficial Ownership Reporting to Counter Illicit Finance and Increase Transparency (Dec. 7, 2021), https://perma.cc/LXH3-U9QM (describing FinCEN's proposed rule in response to the Act's requirements).

70. *See supra* notes 45-48 and accompanying text (describing the context of the MLCA's passage); Anti-Money Laundering Program Effectiveness, 85 Fed. Reg. 58,023, 58,024 (Sept. 17, 2020); *USA PATRIOT Act*, *supra* note 63 (describing the USA PATRIOT Act as strengthening "measures to prevent, detect and prosecute international money laundering and financing of terrorism"); *see also* Kristofer Readling, *Casting a Wide Net: The Expanding Reach of Anti-Money Laundering Laws*, BIPARTISAN POL'Y CTR. (Sept. 11, 2015), https://perma.cc/8VT2-3XWS (arguing that "[i]t may be time to take a step back and ask what the right focus [of the money-laundering laws] should be"). This concern has been further heightened by the Russia-Ukraine conflict; FinCEN has expressed concern that Russia may be engaged in money laundering to avoid U.S. sanctions issued in connection with the conflict. *See* FIN. CRIMES ENF'T NETWORK, U.S. DEP'T OF THE TREASURY, FIN-2022-ALERT001, FINCEN ADVISES INCREASED VIGILANCE FOR POTENTIAL RUSSIAN SANCTIONS EVASION ATTEMPTS 1, 4 (2022), https://perma.cc/NLW7-WGR6.

concerns have *not* been the main source of money laundering; rather, money laundering is more likely to be used to cover up fraud. According to the Department of the Treasury, money laundering to cover up proceeds from fraud "dwarfs" laundering of the proceeds of other predicate crimes; other significant crimes for which proceeds are often laundered include drug trafficking, human trafficking, cybercrime, and corruption.[71]

Nor have the statutes fulfilled Congress's intent of targeting large-scale, high-level laundering. In 2001, the year the PATRIOT Act was passed, only about 20% of money-laundering convictions involved over $1 million.[72] Similarly, only 11.8% of § 1956 cases, and a negligible percentage of § 1957 cases, listed drug-related charges as the most serious predicate offense.[73] In fiscal year 2021, 831 defendants were convicted of money laundering.[74] This reality differs from Congress's lofty goals in passing the statutes to target complex drug-dealing schemes and international terrorist organizations. At worst, it suggests that Congress has viewed AML laws as an opportunity for "symbolic politics" in response to hot-button issues of the day, or that prosecutors' charging decisions have deviated from Congress's intent.[75] At a minimum, this history suggests a disconnect between Congress, regulatory agencies, and the courts in defining the appropriate scope of AML measures. This disconnect is exemplified by the persistent circuit split over tracing; courts may not have sufficient guidance from Congress in this area of law.

B. Tracing and § 1957

18 U.S.C. §§ 1956-1957 have been interpreted differently with respect to the proof required to demonstrate the relationship between the allegedly illegal transaction and the underlying illegal activity. These different interpretations hinge on two components of the statutory language. First, § 1956 encompasses transactions that "involve[]" criminal proceeds, while § 1957 only reaches transactions "in" criminal proceeds.[76] Arguably, "involve" is intended to reach a broader set of activities than "in." Courts have thus "declin[ed]" to "read

71. U.S. DEP'T OF THE TREASURY, NATIONAL MONEY LAUNDERING RISK ASSESSMENT 1 (2022), https://perma.cc/8VT2-3XWS.
72. MARK MOTIVANS, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NCJ NO. 199574, MONEY LAUNDERING OFFENDERS, 1994-2001, at 1 (2003), https://perma.cc/LQ53-X3M9.
73. *Id.* at 6 tbl.2.
74. U.S. SENT'G COMM'N, QUICK FACTS: MONEY LAUNDERING OFFENSES 1 (n.d.), https://perma.cc/6C5R-S85F.
75. *See* Cuéllar, *supra* note 18, at 380 ("Legislators want to take political credit for passing criminal statutes but they begin to run out of things to criminalize, so they look for new tropes that seem to make intuitive sense (i.e., fight the link between money and crime) and generate credit.").
76. *See* 18 U.S.C. §§ 1956(a)(1), 1957(a).

Congress's use of the word 'involve' as imposing the requirement that the government trace the origin of all funds deposited into a bank account to determine exactly which funds were used for what transaction," leading to a no-tracing rule for § 1956.[77] Second, § 1957 only applies to transactions of more than $10,000, whereas § 1956 applies to any monetary transaction of any amount.[78] This heightens the need for tracing under § 1957 because the government must demonstrate that more than $10,000 in dirty funds were exchanged.[79]

Financial tracing is the process of tracking assets over time, with the goal of determining the original source of funds.[80] In other words, tracing "is the process by which investigators 'follow the money.'"[81] This concept originated in English common law, far predating the emergence of the AML statutes themselves.[82] In the United States, asset tracing has long been an important part of white-collar criminal investigations, as it can provide evidence, corroborate witnesses testimony, and allow prosecutors to identify assets for civil seizure.[83] Tracing is also used in a variety of other legal contexts, from trusts and estates to securities law.[84]

When conducting tracing analyses, prosecutors repeatedly confront the problem of commingled funds—funds from different sources that are mixed within the same pool of assets.[85] Many areas of law require or involve the use

77. United States v. Braxtonbrown-Smith, 278 F.3d 1348, 1355 (D.C. Cir. 2002) (quoting United States v. Jackson, 935 F.2d 832, 840 (7th Cir. 1991)); *see also id.* at 1353 (collecting cases holding that tracing is not required under § 1956 in the Third, Fourth, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits).

78. *See* 18 U.S.C. §§ 1956(a)(1), 1957(a).

79. *See id.* § 1957(a); U.S. Dep't of Just., *supra* note 60 ("[T]he criminally derived property must be of a value greater than $10,000 . . . .").

80. *See Tracing*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also* Mike Wright, *Asset Tracing: A Guide*, ESA RISK (Oct. 25, 2021), https://perma.cc/H8C2-8W9R (discussing how asset-tracing investigators use tools such as digital forensics to understand a target's financial profile).

81. CTR. FOR THE ADVANCEMENT OF PUB. INTEGRITY, WHAT IS ASSET TRACING? A PRIMER ON "FOLLOWING THE MONEY" FOR INTEGRITY PRACTITIONERS AND POLICYMAKERS 1 (2016), https://perma.cc/M3E9-G5Y6.

82. F.O.B. Babafemi, *Tracing Assets: A Case for the Fusion of Common Law and Equity in English Law*, 34 MOD. L. REV. 12, 12-14 (1971) (discussing the common law roots of tracing).

83. *See* CTR. FOR THE ADVANCEMENT OF PUB. INTEGRITY, *supra* note 81, at 1. In the Supreme Court's words, courts "use tracing rules" in a variety of contexts and "have experience separating tainted assets from untainted assets." Luis v. United States, 136 S. Ct. 1083, 1095 (2016) (plurality opinion).

84. *See, e.g.*, Peter B. Oh, *Tracing*, 80 TUL. L. REV. 849, 860-75 (2006) (discussing tracing in the context of securities cases); RESTATEMENT (SECOND) OF TRUSTS § 202 cmt. o (AM. L. INST. 1959).

85. *See Commingle*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also* Melissa Davis, *Tracing Commingled Funds in Fraud Cases*, AM. BANKR. INST. (June 21, 2017, 4:42 PM), https://perma.cc/BNW2-TMQ4 (noting that commingling occurs "frequently" in
footnote continued on next page

of financial tracing,[86] and courts have developed various accounting methods to address these issues.[87] Such methods are accepted legal fictions because they apply blanket mathematical rules to financial transactions rather than claiming to identify the source of every dollar.[88] For example, the Tenth Circuit has recognized that "[t]he goal of 'tracing' is not to trace anything at all in many cases, but rather [to] serve[] as an equitable substitute for the impossibility of specific identification."[89]

While courts in other contexts have wrestled with different, specific accounting techniques to approximate actual tracing, courts interpreting § 1957 have shied away from this issue. Instead, they have fallen into three broad camps, with some variation: Most courts do not require any form of financial tracing, while the Fifth Circuit demands that the aggregated transactions charged under § 1957 exceed $10,000 in tainted funds, and the Ninth Circuit requires complete tracing of each transaction.

II. The Existing Circuit Split on Tracing Under § 1957

This Part surveys the case law that has created today's circuit split, demonstrating the ways in which courts' presumptions (both to trace and not to trace) can affect the breadth of § 1957. In summary, the Ninth Circuit has adopted a blanket requirement that the government must trace each charged transaction to criminally derived proceeds;[90] the Fifth Circuit has imposed a more flexible tracing requirement based on the proportions of clean and dirty money within the accounts at issue (the "aggregate approach");[91] the Eighth

fraud causes and "is notably common" in Ponzi schemes); Nicole Reed, *The Trustee's Guide to Commingled Assets*, RMO LLP (Mar. 29, 2021), https://perma.cc/WG29-XZK8 (describing commingling as a "common issue" in probate proceedings).

86. *See, e.g.*, David L. Gresen, *Financial Asset Tracing and Lifestyle Analysis in a Divorce Case*, KLG BUS. VALUATORS & FORENSIC ACCTS. (Nov. 2011), https://perma.cc/HZ9G-U3LB (describing uses of financial tracing in divorce proceedings); Tirben v. Signorello (*In re* Tirben), Nos. 10-29356-E-13L & 10-2299, 2011 WL 10656549, at *5 & n.2 (Bankr. E.D. Cal. Apr. 15, 2011) (applying tracing in a bankruptcy case involving embezzled funds that were allegedly used to pay life-insurance premiums).

87. *See infra* notes 266-73 and accompanying text.

88. *See, e.g.*, United States v. Sixty-One Thousand Nine Hundred Dollars and No Cents, No. 10 Civ. 1866, 2010 WL 11623206, at *5-6 (E.D.N.Y. Sept. 8, 2010) (describing the "intermediate balance" tracing rule as to some extent a "legal fiction," but nevertheless permissible).

89. United States v. Henshaw, 388 F.3d 738, 740-41 (10th Cir. 2004) (second and third alterations in original) (quoting William Stoddard, Note, *Tracing Principles in Revised Article 9 § 9-315(b)(2): A Matter of Careless Drafting, or an Invitation to Creative Lawyering?*, 3 NEV. L.J. 135, 142 (2002)).

90. *See* United States v. Rutgard, 116 F.3d 1270, 1292-93 (9th Cir. 1997).

91. *See* United States v. Davis, 226 F.3d 346, 357 (5th Cir. 2000).

and Tenth Circuits have held that the government need not "meticulously" trace every dollar, but have analyzed evidence of defendants' knowledge and accounts' contents to determine if there was sufficient evidence to support a conviction;[92] the Fourth Circuit presumes traceability for transactions from a commingled account as long as such transactions do not exceed the total amount of illegitimate funds in the account;[93] and the Second and Third Circuits have adopted the opposite rule as the Ninth, holding that the government is never required to trace transactions from commingled accounts to prove a § 1957 offense.[94] Meanwhile, the D.C., Sixth, and Eleventh Circuits have not explicitly ruled on the tracing issue. All three have suggested that they would align with the no-tracing view, however, and this approach has been adopted at the district level in the Eleventh Circuit.[95] This spectrum is summarized in Table 1:

Table 1

Spectrum of Views on § 1957 Tracing

<table>
<tr><td>Less Demanding</td><td>Second
Third
Eleventh</td><td>Never requires tracing; all transactions from a commingled account are presumptively illicit</td></tr>
<tr><td></td><td>First</td><td>Has suggested that it does not require tracing, but unclear for close cases</td></tr>
<tr><td></td><td>Tenth
Eighth
Seventh</td><td>Does not require dollar-for-dollar tracing, but tracing may be required for a closer case</td></tr>
<tr><td></td><td>Fourth</td><td>Tracing is not required if a single transaction is less than or equal to the amount of illicit funds in the account</td></tr>
<tr><td></td><td>Fifth</td><td>Requires tracing, but aggregates transactions</td></tr>
<tr><td>More Demanding</td><td>Ninth</td><td>Always requires tracing</td></tr>
</table>

92. United States v. Mooney, 401 F.3d 940, 946-47 (8th Cir.) (per curiam), *aff'd en banc*, 425 F.3d 1093 (8th Cir. 2005); United States v. Dazey, 403 F.3d 1147, 1163 (10th Cir. 2005).

93. United States v. Moore, 27 F.3d 969, 976-77 (4th Cir. 1994).

94. *See* United States v. Silver, 864 F.3d 102, 114-15 (2d Cir. 2017); United States v. Sokolow, 91 F.3d 396, 409 (3d Cir. 1996).

95. *See* United States v. Jamieson, 427 F.3d 394, 404-05 (6th Cir. 2005) (noting that the "Sixth Circuit has never ruled on what the tracing requirements are for § 1957 money laundering" and declining to rule on the issue); *infra* notes 123-25 (discussing how district courts in the Eleventh Circuit have accepted the no-tracing view); United States v. Braxtonbrown-Smith, 278 F.3d 1348, 1354-55 (D.C. Cir. 2002) (ruling that tracing is not required under § 1956, and discussing general problems with tracing and highlighting that the strict-tracing rule is a "minority view").

A. View 1: Tracing Not Required

1. Early cases: establishing a no-tracing framework

This Subpart will begin by describing in detail three foundational cases that considered whether a transaction from an account containing both clean and dirty funds qualifies as a "transaction in criminally derived property" under § 1957(a). As these cases illustrate, courts at first did not outright dismiss the concept of a tracing requirement. Rather, courts initially excused the government from tracing at the margins, a rule which was later extended. The early disagreements illustrated by these cases help to elucidate the current circuit split and reveal nuance even among those courts that have adopted the no-tracing rule.

In the 1992 case *United States v. Johnson*, the Tenth Circuit became the first court to hold that the fungibility of "tainted" and "untainted" cash within a single account rendered a strict traceability requirement unworkable.[96] Defendant Robert Johnson was indicted under both § 1956 and § 1957 for operating a fraudulent scheme in which he convinced investors that he would profitably trade for them on the conversion rate between Mexican pesos and U.S. dollars.[97] The government definitively established that at least $2.4 million of the more than $5.5 million in Johnson's account stemmed from wire fraud.[98] Additionally, testimony and Johnson's bank records at least suggested that much of the remaining money—roughly $3 million—had been obtained illegally.[99] Although the government couldn't say for certain whether a particular transaction contained dirty money, in the Tenth Circuit's view, the prosecution had proved enough. The court noted that once a defendant has deposited illegal funds into an account, the funds can no longer "be traced to any particular transaction" if they are commingled with legal funds, nor can they "be distinguished from any other funds deposited in the account."[100] Forcing the government to trace funds "would allow individuals to avoid prosecution simply by commingling legitimate funds with proceeds of crime," which "would defeat the very purpose of the money-laundering statutes."[101]

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96. *See* United States v. Johnson, 971 F.2d 562, 570 (10th Cir. 1992) (concluding that § 1957's requirement of tying funds to a specified unlawful activity "could not have been intended as a requirement that the government prove that no 'untainted' funds were deposited along with the unlawful proceeds").

97. *Id.* at 564.

98. *Id.* at 570.

99. *Id.*

100. *Id.*

101. *Id.*

This case represents a jumping-off point for the doctrine. Notably, the Tenth Circuit did not apply a blanket presumption that Johnson's transaction was "in" illegal proceeds under the language of the statute.[102] Rather, its reasoning hinged on the substantial amount of dirty money that was proven to be in the account.[103] Accordingly, the court limited its holding to the claim that, in writing § 1957, Congress almost certainly did not intend to require that prosecutors prove *zero* "'untainted' funds were deposited along with the unlawful proceeds."[104]

In the 1994 case *United States v. Moore*, the Fourth Circuit similarly held that the government was not required to trace funds in order to prove a § 1957 violation.[105] Adding a more specific gloss to the Tenth Circuit's rule, the Fourth Circuit established a blanket presumption that "the transacted funds, *at least up to the full amount originally derived from crime*, were the proceeds of the criminal activity or derived from that activity."[106] In selecting this rule, the court explicitly disapproved of "resort[ing] to accepted, but arbitrary, accounting techniques" in attempting to trace funds.[107] When applying its announced standard to the defendant's case, however, the court did note that the "overwhelming bulk" of the funds used were demonstrably obtained through bank fraud, with only a fraction coming from legitimate property sales.[108] Like the Tenth Circuit in *Johnson*, the *Moore* court did find the percentage of dirty money in the account to be a factor favoring conviction, despite its reluctance to articulate a specific "accounting" approach.[109]

Building on this emerging pattern, the Third Circuit affirmed a set of jury instructions stating that the government need not prove that the full amount at stake in a case came directly from the defendant's criminal activity, but only that most of it did.[110] The Third Circuit significantly extended the Tenth

102. *See id.*; *see also* 18 U.S.C. § 1957(a).

103. *See id.* (comparing the $2.4 million of criminally derived funds in the account to the $1.8 million withdrawal and concluding that "*[u]nder the circumstances*, the evidence was sufficient for the jury to find that the funds withdrawn were derived from the specified unlawful activity" (emphasis added)).

104. *Id.*

105. 27 F.3d 969, 976-77 (4th Cir. 1994).

106. *Id.* at 977 (emphasis added).

107. *Id.* (citing United States v. Banco Cafetero Panama, 797 F.2d 1154, 1159-60 (2d Cir. 1986)). Specifically, the court referenced the "first-in, first-out," pro rata "averaging," and "first-in, last-out" methods, which the Second Circuit had discussed in the forfeiture context. *See infra* Part III.B (describing the relationship between tracing in § 1957 cases and tracing in forfeiture cases like *Banco Cafetero*).

108. *Moore*, 27 F.3d at 977.

109. *See id.*

110. United States v. Sokolow, 91 F.3d 396, 409 (3d Cir. 1996) (affirming jury instructions that the § 1957 claim is "sufficient if the Government proves at least part of the

footnote continued on next page

Circuit's reasoning, flatly finding *no* "legal requirement that the government trace the funds constituting criminal proceeds when they are commingled with funds obtained from legitimate sources."[111] Thus, while the Tenth Circuit only excused the government from proving that the funds "could not possibly have come from" a legal source,[112] and the Fourth Circuit created a no-tracing presumption only up to the amount of funds derived from the crime,[113] the Third Circuit created a broader presumption that all money in a commingled account—no matter the actual proportions of clean and dirty money—is presumptively illicit.[114]

These three cases established the framework for the no-tracing view. Other circuits have since followed this line of reasoning.[115] But as these early cases indicate, courts within the no-tracing camp have differed in the extent of their presumptions, with some adopting a blanket no-tracing rule and others concluding that tracing can be excused when the targeted transactions are heavily slanted toward illegal funds.

2. Courts that presumptively never require tracing

As noted above, in *Sokolow*, the Third Circuit expanded existing precedent from the Tenth Circuit to establish a categorical no-tracing rule. Since then, courts in the Third Circuit have continued to adhere to this view.[116] Other courts have taken a similarly deferential view, using presumptions to relieve the government of its duty to establish that transactions are "in" illegal money.

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property represents such proceeds" (emphasis omitted) (quoting the jury instruction)). The Third Circuit did not require prosecutors to clarify any specific proportion or percentage of property that would be sufficient, illustrating the presumptive no-tracing approach. *See id.*

111. *Id.*

112. United States v. Johnson, 971 F.2d 562, 570 (10th Cir. 1992).

113. *Moore*, 27 F.3d at 977.

114. *Sokolow*, 91 F.3d at 409.

115. *See infra* Part II.A.2-.3.

116. *See, e.g.*, United States v. Jones, No. 11-261, 2012 WL 383668, at *4 (E.D. Pa. Feb. 7, 2012); United States v. Bortnick, No. 03-CR-00414, 2005 WL 1693924, at *24 (E.D. Pa. July 20, 2005) ("That the overall pool of assets might also contain funds from legitimate sources is therefore *irrelevant*." (emphasis added)). Notably, in one case, the Third Circuit actually applied a presumption that individual transactions are tainted up to the total amount of illegally derived funds in an account. This approach, which echoes the Fourth Circuit's approach, is a form of the "lowest intermediate balance rule" (LIBR). The court stated that it was "immaterial" that a bank account contained $17,000 in legitimate funds, because the $20,000 of illegal funds in the account were sufficient to cover the withdrawal. *See* United States v. Farrington, 58 F. App'x 919, 923 (3d Cir. 2003) (per curiam). Nevertheless, the Third Circuit has not expressly revisited the *Sokolow* rule, and *Farrington*, which cited *Moore*, can be viewed as a doctrinal anomaly. *See id.* Notably, Justice Alito was on the panel that decided *Farrington*.

For example, in 2017, the Second Circuit resolved an intracircuit split by holding that the government was not required to trace funds.[117] The court's brief reasoning relied on the fungibility of money and the resulting impossibility of distinguishing dirty from clean funds.[118] Subsequent cases in the Second Circuit have adhered to this reasoning.[119]

Similarly, the First Circuit appears to have adopted an expansive no-tracing rule, emphasizing that defendants can be convicted of money laundering under § 1957 even when they are acquitted of the underlying offense.[120] In such cases, the government cannot trace the funds because whether the funds were in fact dirty at all has not necessarily been proven beyond a reasonable doubt. In a 2017 case, *United States v. Rivera-Izquierdo*,[121] the First Circuit arguably adopted a more limited no-tracing rule. The court emphasized the lopsided facts before it—the defendant had offered *no* evidence showing where he obtained clean funds—but seemingly left open the

117. *See* United States v. Silver, 864 F.3d 102, 115 (2d Cir. 2017). This resolved a split between the Eastern District of New York and the Southern District of New York, which disagreed over the extent of tracing required. *Compare* United States v. Weisberg, No. 08-CR-347, 2011 WL 4345100, at *4-5 (E.D.N.Y. Sept. 15, 2011) (highlighting the differences between 18 U.S.C. § 1956 and § 1957, drawing on courts' approach to tracing in the forfeiture context, and concluding that the no-tracing rule was overly deferential to the government given the burden of proof in criminal cases), *with* United States v. Silver, 184 F. Supp. 3d 33, 51-52 (S.D.N.Y. 2016) (finding the majority no-tracing view to be "far more convincing" than the tracing requirement), *vacated on other grounds*, 864 F.3d 102 (2d Cir. 2017).

118. *See Silver*, 864 F.3d at 115 & n.54 (citing *Moore*, 27 F.3d at 976-77). The Second Circuit has adopted the loosest tracing requirement along this spectrum. The Second Circuit includes New York City, where a significant share of federal white-collar crime takes place. *See* U.S. SENT'G COMM'N, *supra* note 74, at 1 (identifying the Southern District of New York as the location with the second-highest number of convictions for money laundering in fiscal year 2020). This is not to say that the circuit split is dependent on the volume of money-laundering or white-collar crime cases a circuit faces. For example, the Ninth Circuit, which adopts the strict tracing requirement, contains parts of three of the seven "High Intensity Financial Crimes Areas" or HIFCAs. *See HIFCA Regional Map*, FIN. CRIMES ENF'T NETWORK, https://perma.cc/LE42-ASZM (archived Apr. 10, 2023). However, the volume of money-laundering offenses prosecuted in the Southern District of New York does point to another external factor that may be influencing courts' willingness to interpret the statutory language of § 1957 to account for the practical difficulties of tracing.

119. *See, e.g.*, United States v. Ahmed, No. 14-cr-00277, 2017 WL 3149336, at *9-10 (E.D.N.Y. July 25, 2017).

120. *See* United States v. Richard, 234 F.3d 763, 768-69 (1st Cir. 2000). Courts interpreting § 1956 have similarly upheld money-laundering charges when the defendant was not convicted of the predicate offense. *See* United States v. Jamieson, 427 F.3d 394, 404 (6th Cir. 2005) ("Indeed, several circuits have upheld a money-laundering conviction even when the underlying mail fraud conviction was overturned or the defendant was acquitted on the mail fraud count.").

121. 850 F.3d 38 (1st Cir. 2017).

possibility that tracing could be an obstacle if the evidence was not as strong.[122] The case again illustrates courts' sensitivity to the proportions of clean and dirty funds at issue, even when direct tracing is not required.

Finally, while the Eleventh Circuit has not explicitly ruled on how much tracing is required under § 1957, it has cited *Moore* to support its argument that § 1956 does not require tracing.[123] This suggests that the Eleventh Circuit views the tracing analysis under both statutes as analogous. Additionally, a district court in the Eleventh Circuit established a firm no-tracing rule, citing other circuits that have adopted similar views.[124] While this decision did not create circuit-level precedent, it signaled the trend throughout the judicial system: The district court accepted with little discussion that the fungibility of money defeated a possible tracing requirement, relying on other circuits' analyses.[125]

Thus, a substantial group of courts have decided that the fungibility concern renders the statutory language of § 1957 unworkable. These courts have taken a hard stance in completely rejecting the necessity of tracing, paving the way for easier prosecutions.

3. Courts that do not require dollar-for-dollar tracing

Not all courts within the no-tracing group have expressly held that tracing is never required. As discussed above, the Tenth Circuit did not adopt a categorical no-tracing rule in *Johnson*; instead, it emphasized that the government was not required to trace every single dollar in an account to make out a § 1957 violation.[126] Since *Johnson*, the Tenth Circuit has adhered to

122. *See id.* at 48 (noting that "the record overwhelmingly indicate[d]" that the funds the defendant used in the disputed purchase were fraudulent). The court distinguished *Rutgard* based only on the factual circumstances and did not critique the Ninth Circuit's reading of the statute. *See id.*

123. *See* United States v. Ward, 197 F.3d 1076, 1083 (11th Cir. 1999) (citing *Moore*, 27 F.3d at 976-77).

124. *See* United States v. Long, No. 08-CR-00043, 2009 WL 10675289, at *2 (N.D. Ga. Sept. 10, 2009) (concluding that "the law in the Eleventh Circuit does not require that the Government trace the funds in a commingled account" and finding the government's evidence to be "more than sufficient" under § 1957).

125. *See id.* The court cited both § 1957 and § 1956 cases without acknowledging the difference in statutory language. *Id.* at *2-3 (citing United States v. Mooney, 401 F.3d 940, 946 (8th Cir. 2005) (per curiam); United States v. Dazey, 403 F.3d 1147, 1163 (10th Cir. 2005); United States v. Braxtonbrown-Smith, 278 F.3d 1348, 1353-55 (D.C. Cir. 2002); and United States v. McGauley, 279 F.3d 62, 71 (1st Cir. 2002)).

126. *See* United States v. Johnson, 971 F.2d 562, 570 (10th Cir. 1992) (holding the government did not have "to show that funds withdrawn from the defendant's account could not possibly have come from any source other than the unlawful activity" and that the government need not "prove that no 'untainted' funds were deposited along with the unlawful proceeds").

an arguably more limited reading of the tracing requirement than the circuits discussed above. It has upheld § 1957 convictions where the government did not successfully trace funds, but instead provided corroborating evidence suggesting that the transactions implicated over $10,000 of illegal funds.

For example, in *United States v. Battles*, the Tenth Circuit found that it was "beyond cavil" that the government had met its burden of proof with respect to the transaction amount, due to the following factors: (1) the timing of the withdrawal, which occurred only two days after the defendant deposited over $100,000 of illegal proceeds into her account; (2) "ample evidence" that the money constituted the proceeds of the defendant's underlying wire fraud; and (3) the fact that there was less than $100 in the account prior to the illicit deposit.[127] However, the *Battles* decision could be read as limited to situations in which the amount of dirty funds in an account (there, over $100,000) clearly exceeds the amount of clean funds (less than $100).[128]

The Eighth Circuit's approach is mixed. It initially adopted a categorical no-tracing rule in 1999, flatly declaring that the "government need not trace funds to prove a violation of § 1957."[129] A subsequent case, *United States v. Hetherington*, applied this holding: Although the court did point to additional specific evidence showing that the transaction was in illicit funds, it asserted that such tracing was not required.[130] But the Eighth Circuit seemingly retreated from this rule in *United States v. Mooney*, stating only that "the government need not trace *each dollar* to a criminal source to prove a violation," rather than adhering to the blanket rule that the government need

127. 745 F.3d 436, 456 (10th Cir. 2014). In deciding the *Battles* case, the Tenth Circuit cited the Fifth Circuit's decision in *United States v. Loe*, 248 F.3d 449 (5th Cir. 2001), discussed in Part III below, and the Seventh Circuit's decision in *United States v. Haddad*, 462 F.3d 783 (7th Cir. 2006), discussed below in this Subpart. *Id.* at 456-57. Both *Loe* and *Haddad* required some level of tracing, with *Loe* even demanding that the aggregate withdrawals exceed the amount of legal funds in an account to make out a § 1957 violation. *See Loe*, 248 F.3d at 467. The references to *Loe* and *Haddad* highlight overlap between the circuits, despite their falling into different camps in the tracing debate.

128. *See* United States v. Sivigliano, 550 F. App'x 537, 541 (10th Cir. 2013) (finding the government's evidence that 87% of the funds in the account were from illegal sources to be sufficient); United States v. Dazey, 403 F.3d 1147, 1163 (10th Cir. 2005) ("[T]he government need not *meticulously* trace the funds involved in a monetary transaction offense or prove that the funds *could not* have come from a legitimate source." (emphasis added)).

129. United States v. Pennington, 168 F.3d 1060, 1066 (8th Cir. 1999).

130. 256 F.3d 788, 794 (8th Cir. 2001) (noting that (1) the defendant's orange juice production plant, which was his only legal source of revenue, had closed prior to the transaction at issue; (2) an FBI agent had testified that the transaction involved the alleged investor fraud; and (3) the defendant had made statements indicating he was aware that the funds he received were derived from fraud).

not trace funds *at all.*[131] In *Mooney*, the defendant's bank account contained both legitimate funds from his company's stock and illegitimate proceeds from insider trading.[132] The court found that a jury could have reasonably concluded that "Mooney was only able to withdraw the funds from [the] account *without going below his margin limit*" because the account contained sufficient proceeds from the insider trading.[133] Thus, the court acknowledged that the actual proportions of clean and dirty money in the account were relevant to meeting the burden of proof: The argument hinged on the fact that there was more dirty money than clean money in the account. However, subsequent cases in the Eighth Circuit have not required any tracing.[134]

The Seventh Circuit has taken an even narrower view, one which incorporates elements of the no-tracing approach and elements of the Fifth Circuit's "aggregation" rule discussed below. *United States v. Haddad* involved a fraudulent scheme in which the defendant illegally allowed shoppers to exchange federally issued food stamps for cash at his grocery store.[135] The Seventh Circuit "adopt[ed] the Fourth *and* Fifth Circuit approaches," blurring the distinction between these circuits' views and placing itself in an intermediate position.[136] The court pointed out that "*the vast majority* of funds transferred to the Haddad's business account from the food stamp reimbursements were not supported by evidence of legitimate food sales."[137] Thus, even if the court had adopted the Fifth Circuit's rule that Haddad's aggregate transactions must have exceeded $10,000 in illegal funds, the conviction would have stood because "the government proved aggregate withdrawals of far more than $10,000 above the amount of clean funds available."[138] In short, the court's reasoning rested on the high proportion of

131. 401 F.3d 940, 946 (8th Cir.) (per curiam), *aff'd en banc*, 425 F.3d 1093 (8th Cir. 2005) (emphasis added).

132. *See id.* at 942-43.

133. *Id.* at 947 (emphasis added).

134. *See, e.g.*, United States v. Pizano, 421 F.3d 707, 723 (8th Cir. 2005) (finding a § 1957 violation based on evidence establishing the defendant's close relationship with a drug dealer and lack of a sufficient source of legitimate income, without requiring tracing); United States v. Shafer, 608 F.3d 1056, 1067 (8th Cir. 2010) (upholding a § 1957 conviction based on the defendant's limited legal income as compared to his extensive criminal activity, without requiring tracing); United States v. Afremov, No. 06-196, 2007 WL 3237630, at *22 (D. Minn. Oct. 30, 2007) (rejecting the argument that the defendant's other sources of legitimate income could be a defense to a § 1957 conviction).

135. 462 F.3d 783, 786-89 (7th Cir. 2006).

136. *See id.* at 792 (emphasis added).

137. *Id.* (emphasis added).

138. *Id.*

illegal funds in the account. In a 2012 case, the Seventh Circuit seemed to reaffirm this intermediate approach.[139]

In 2011, however, the Seventh Circuit narrowed its approach and, in doing so, alluded to the problems with a strict no-tracing requirement. In *United States v. Wright*, $8,000 in funds derived from illegal drug trading was used to purchase a property, which later sold for $92,500.[140] The government claimed that the more than $10,000 minimum under § 1957 had been met due to the latter sale.[141] As the government argued, the defendant originally bought the house using illicit funds, so selling the property was also a transaction "in" those illegal proceeds.[142] The court disagreed, finding that the government's theory "put[] too much stress on § 1957."[143]

During oral argument, the court posed a hypothetical to the government: Would a person who sold a "marijuana cigarette" for $1, and then used that dollar to buy a winning one-million-dollar lottery ticket, have violated § 1957?[144] The government responded that he indeed would have violated the provision, at least once he cashed the million-dollar lottery check at a bank.[145] By rejecting this expansive reading of § 1957, *Wright* limited the *Haddad* holding to the amount of funds in an account *at the time of the initial transaction*. It thus placed an upper bound on the necessary connection between the criminal profits and the subsequent transaction. But it remains a question whether other circuit courts would extend their no-tracing rules to cover the government's argument in *Wright* or the *Wright* court's hypothetical.

In summary, the Seventh Circuit's jurisprudence reflects a pragmatic approach to § 1957 that prioritizes the prosecutorial difficulties of tracing over a strict reading of the word "in" in the statute. While circuits differ in their analyses, they are united in their concern about the fungibility of money. As the Tenth Circuit put it in *Johnson*: "Once proceeds of unlawful activity have been deposited in a financial institution and have been credited to an account, those funds *cannot be traced* to any particular transaction and cannot be

139. *See, e.g.*, United States v. Jarrett, 494 F. App'x 615, 617-18 (7th Cir. 2012) (affirming a § 1957 conviction based on testimony that the account contained money transferred from drug dealers, without requiring tracing).

140. 651 F.3d 764, 768-69 (7th Cir. 2011).

141. *Id.* at 771.

142. *See* Brief of the United States at 25-26, *Wright*, 651 F.3d 764 (Nos. 10-1249 & 10-1956), 2011 WL 2452196, ECF No. 63.

143. *Wright*, 651 F.3d at 771.

144. *Id.*

145. *Id.* Similarly, under the government's theory, a § 1957 violation would result from a defendant investing $1,000 from selling marijuana into Apple stock that later yielded more than $31,000 in profits. *Id.*

distinguished from any other funds deposited in the account."[146] However, these cases also demonstrate that even courts that have eschewed the tracing requirement as a general rule tend to analyze and emphasize the specific proportion of funds in an account.[147] This practice demonstrates both the willingness and the ability of courts to conduct more detailed analyses even when actual tracing is difficult.

B. View 2: Tracing Required for All Transactions

The Ninth Circuit is the only court of appeals to adopt a blanket requirement that the government *must* trace commingled funds to prove that more than $10,000 of a targeted transaction was derived from the predicate crime.[148] Although the Ninth Circuit's approach has been described as "all or nothing,"[149] the circuit has actually created four options for the government to prove the proceeds requirement: (1) actually tracing the funds; (2) demonstrating that the targeted transaction drained *all* of the funds from the account; (3) proving that the defendant made at least one *deposit* of $10,000 or more in criminally derived proceeds; or (4) showing that the defendant's entire practice or business was a fraud.[150]

The Ninth Circuit arrived at this standard in a 1997 case, *United States v. Rutgard*.[151] Jeffrey Rutgard was an ophthalmologist who operated a large-scale Medicare fraud scheme in which he both performed unnecessary procedures and charged Medicare for nonexistent procedures.[152] Unlike the cases discussed above, which were confronted by circuits adhering to the majority no-tracing rule, *Rutgard* involved a withdrawal from an account that mostly contained clean money: According to the government's analysis, there was about $8.5 million total in the account, only $46,000 of which was allegedly fraudulent.[153] The Ninth Circuit's categorical decision seems partially a result of the factual circumstances with which it was confronted. As noted in Part II.A above, other cases that have rejected the need for strict tracing focused in dicta on the large

146. United States v. Johnson, 971 F.2d 562, 570 (10th Cir. 1992) (emphasis added).

147. *See supra* notes 98-99, 108-16, 122, 134-42 and accompanying text.

148. *See, e.g.*, United States v. Rutgard, 116 F.3d 1270, 1292-93 (9th Cir. 1997); United States v. Hanley, 190 F.3d 1017, 1025-26 (9th Cir. 1999); *see also* Brief for the United States in Opposition at 19, Silver v. United States, 138 S. Ct. 738 (2018) (No. 17-562), 2017 WL 6399173 (noting that the Ninth Circuit is the only court to take the "strict" tracing stance).

149. United States v. Haddad, 462 F.3d 783, 792 (7th Cir. 2006).

150. *See Rutgard*, 116 F.3d at 1292; *Hanley*, 190 F.3d at 1025-26, 1026 n.3.

151. 116 F.3d at 1292-93.

152. *Id.* at 1275-76, 1284.

153. *See id.* at 1290, 1292.

percentages of confirmed illegal funds in the accounts at issue. By contrast, less than 1% of the funds in Rutgard's account were derived from his crime.[154]

The Ninth Circuit listed three principal reasons for choosing to adopt a strict tracing rule. First, it viewed § 1957 as "draconian" because of the law's ability to criminalize transactions that were not intended to further or conceal any underlying crime.[155] Thus, courts' practice of unilaterally widening the statute's reach even further by not strictly adhering to the requirement that transactions amount to more than $10,000 constituted excessive "judicial invention" and problematic "ingenuity."[156]

Second, the Ninth Circuit identified other legal routes that the prosecution could pursue in cases under § 1957 in which commingling made direct tracing difficult. It pointed out that, given the broad definition of "transaction" under § 1957,[157] any *deposit* of illicit funds would itself be a violation, as long as that deposit was over $10,000.[158] Rather than extending the ambit of § 1957 to the mixed withdrawals from Rutgard's commingled account, the prosecution could have pointed to the initial deposits of the fraudulent funds. Relatedly, § 1956 and § 1957 were intended to work in conjunction.[159] As the *Rutgard* court noted:

> [I]f the criminal intent was to hide criminal proceeds, as would presumably be the case any time criminally derived cash was deposited with innocently derived funds to hide its identity, § 1956 can kick in and the depositor of amounts under $10,000 will be guilty of a § 1956 crime.[160]

Third, the Ninth Circuit emphasized the statutory language. While acknowledging that tracing would result in some transactions falling outside the reach of § 1957, the court viewed this as a necessary and intentional component of the law: "Commingling will frustrate the statute if criminal deposits have been kept under $10,000. *But that is the way the statute is written, to catch only large transfers.*"[161]

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154. *Id.* The First Circuit's decision in *Rivera-Izquierdo* expressly acknowledged the relevance of the actual contents of the account, explaining that the circumstance presented in *Rutgard* was not present in *Rivera-Izquierdo* because the evidence "overwhelmingly indicate[d]" that the funds in the account were entirely fraudulent. United States v. Rivera-Izquierdo, 850 F.3d 38, 48 (1st Cir. 2017).

155. *See Rutgard*, 116 F.3d at 1291.

156. *See id.* at 1291-92.

157. *See* 18 U.S.C. § 1957(f)(1) (defining "monetary transaction" as "the deposit, withdrawal, transfer, or exchange . . . of funds . . . by, through or to a financial institution").

158. *Rutgard*, 116 F.3d at 1292.

159. *See id.*; *see also supra* notes 49-61 and accompanying text; DOYLE, *supra* note 36, at Summary (describing § 1957 as a "companion" to § 1956); United States v. Wilkinson, 137 F.3d 214, 222 (4th Cir. 1998) (referring to § 1957 as the "sister" statute of § 1956).

160. *Rutgard*, 116 F.3d at 1292 (emphasis added).

161. *Id.* (emphasis added).

Applying its tracing rule to the case at hand, the Ninth Circuit found insufficient evidence to convict Rutgard. The government had failed to target Rutgard's deposits, and none of his withdrawals could be shown to contain over $10,000 in illegal funds.[162]

The Central District of California case *United States v. Yagman* illustrates the Ninth Circuit's strict tracing approach in practice.[163] In *Yagman*, the defendant had deposited $150,000 in illicit proceeds into an account containing approximately $17,000 in legitimate funds.[164] The case focused on two contested transactions, a $50,000 check and a $20,000 check.[165] The government argued that the $50,000 check, which was passed first, necessarily included all of the $17,000 in clean funds.[166] The defendant contended that the government was unable to carry its burden of proof under the Ninth Circuit's tracing rule, because it was possible that more than $10,000 of the $20,000 check was clean, leaving less than $10,000 dirty.[167] The court agreed, finding that "no rational fact-finder could determine beyond mere speculation whether the check contained tainted or untainted funds."[168] The court acknowledged that *Rutgard* and *United States v. Hanley* (discussed below) left open the *types* of tracing techniques and arguments the government could use to prove a transaction of more than $10,000. But it rejected the government's implied argument that *Rutgard* "prohibit[ed] a presumption of taint but permitt[ed] a presumption of *lack of taint*" for earlier transactions as "contrary to a plain reading of the cases."[169] After rejecting this blanket clean-transaction presumption, the court delved into the specifics of the contested counts, using charts within its opinion to track each transaction along with the date and remaining balance.[170] *Yagman* thus exemplifies the strictness of the Ninth Circuit's approach and demonstrates how the government must grapple with the strict tracing requirement in practice.

Further illustrating the overlap between the circuits' positions, the Ninth Circuit has nevertheless upheld convictions for money laundering post-

162. *Id.* at 1292-93.
163. *See* 502 F. Supp. 2d 1084, 1087-93 (C.D. Cal. 2007).
164. *See id.* at 1088-89.
165. *See id.*
166. *Id.* at 1089.
167. *Id.*
168. *Id.* This approach is similar to a "drugs-in, last-out" rule in that all transactions are presumed *clean* unless otherwise demonstrated. *See infra* note 187.
169. *Yagman*, 502 F. Supp. 2d at 1089 (emphasis added).
170. *See id.* at 1088-93.

Rutgard by weighing the specific contents of accounts.[171] In *United States v. Hanley*, the Ninth Circuit clarified an exception that was suggested in *Rutgard*[172]: The government need not trace each transaction if it can establish that the transactions at issue were part of a scheme which was "a fraudulent enterprise *in its entirety*."[173] The defendant, Hanley, operated a telemarketing company that issued scam "prizes" to consumers.[174] The court noted that "the proof at trial painted a picture of a company whose *only* purpose was to sell exorbitantly overpriced products to unwitting customers through means of deceit, misrepresentations, and half-truths."[175] It then adopted a new carveout for fraudulent enterprises because, in these cases, the evidence would strongly indicate that the vast majority, if not all, of the funds in the account were illicit.[176] At the same time, the *Hanley* court extended the tracing requirement beyond situations in which an account contains only a small amount of dirty money: Unlike in *Rutgard*, the "great majority" of the funds in the account at issue in *Hanley* were derived from fraud.[177]

Finally, at the state level, a California court of appeal has also disagreed with the Ninth Circuit's tracing requirement. In a 2007 case, the state court at first applied *Rutgard* to interpret a parallel California law.[178] However, in 2019, the court reversed course in *People v. Bolding*, holding that it would not look to *Rutgard*.[179] The *Bolding* court was interpreting a section of the California Penal Code but looked to the § 1957 context as analogous.[180] Citing *Johnson* and again highlighting the fungibility of money, the court held that the government "need not trace every illegal dollar" to establish a violation of the § 1957 analogue.[181] The *Bolding* court essentially adopted the Fourth Circuit's

171. Courts within the Ninth Circuit have also limited this approach by holding that it does not apply at the indictment stage. *See, e.g.*, United States v. Ross, No. 13-cr-00638, 2014 WL 3750452, at *6 (N.D. Cal. July 29, 2014). Nor does it apply in the context of conspiracy under § 1957, given that only an agreement between conspirators is required to show the appropriate mens rea. *See* United States v. Chao Fan Xu, 706 F.3d 965, 980 (9th Cir. 2013), *abrogated on other grounds by* RJR Nabisco, Inc. v. European Community, 136 S. Ct. 2090 (2016).

172. *See* United States v. Rutgard, 116 F.3d 1270, 1290 (9th Cir. 1997).

173. United States v. Hanley, 190 F.3d 1017, 1026 (9th Cir. 1999) (emphasis added).

174. *Id.* at 1021-22.

175. *Id.* at 1026.

176. *See id.*

177. *See id.* at 1025.

178. *See* People v. Mays, 55 Cal. Rptr. 3d 356, 366-70 (Ct. App. 2007), *abrogated by* People v. Bolding, 246 Cal. Rptr. 3d 760 (Ct. App. 2019).

179. *Bolding*, 246 Cal. Rptr. 3d at 765-67.

180. *See id.*

181. *Id.* at 766-67.

presumption that transacted funds are the proceeds of criminal activity, up to the full amount originally derived from crime. Applied to the case at hand, the court affirmed the defendant's conviction because the funds in the defendant's account that were obtained through embezzlement were "greater than the amount of the monetary transactions charged in the money laundering counts."[182] The state court's decision to adopt this alternate approach highlights the real difficulties with direct tracing, difficulties which the final discrete approach—the "aggregation" rule—attempts to resolve.

C. View 3: The "Aggregation" Approach

Like the Ninth Circuit, the Fifth Circuit also requires prosecutors to trace targeted proceeds back to the underlying illegal activity, but it has established a more specific judicial formula to guide the government's efforts. In *United States v. Davis*, the Fifth Circuit held that "when the *aggregate* amount withdrawn from an account containing commingled funds *exceeds the clean funds*, individual withdrawals may be said to be of tainted money, even if a particular withdrawal was less than the amount of clean money in the account."[183] *Davis* examined a bank account initially containing $18,585.55, into which the defendant deposited $100,000 in illegal proceeds.[184] Davis then withdrew a $25,000 check from the commingled funds, which was the transaction targeted in the case.[185] The defense argued that only $6,414.45—the difference between the $25,000 check and the $18,585.55 of clean funds—should be considered tainted, thus falling below the monetary minimum under § 1957.[186] This argument made use of the "drugs-in, last-out" rule—essentially the converse of the majority rule in the § 1957 context—under which transactions are presumed *clean* until the total amount of clean funds is exhausted.[187]

The *Davis* court rejected both parties' attempts to draw on existing precedent from other circuits (with the prosecution pointing to the no-tracing rule and the defense pointing to the Ninth Circuit's strict tracing

182. *Id.* at 767.

183. 226 F.3d 346, 357 (5th Cir. 2000) (emphasis added).

184. *Id.* at 356.

185. *See id.*

186. *Id.*

187. Under the "drugs-in, last-out" rule—a name given to the lowest intermediate balance rule (LIBR) used in the trusts context—"tainted money is presumed to be the last money withdrawn from the account." United States v. Contents in Account No. 059-644190-69, 253 F. Supp. 2d 789, 792 (D. Vt. 2003) (quoting United States v. Banco Cafetero Panama, 797 F.2d 1154, 1159 (2d Cir. 1986)); *see also infra* notes 269-72 and accompanying text.

requirement).[188] Instead, the court imported its aggregation rule for tracing in the bank-fraud context, citing to its precedent in *United States v. Heath*.[189] Heath argued that because the proceeds of his fraud were commingled with more than $700,000 in clean money, and none of the transfers listed in the indictment were for more than $700,000, the government could not prove that the interstate transfers contained illegally derived funds.[190] The court disagreed, concluding that because the *series of transactions in the aggregate* exceeded the amount of untainted money, the government had met its burden of proof.[191] This was necessary, according to the court, because forcing the prosecution to trace the minimum amount for each withdrawal would encourage structuring and "defeat the purposes of the statute."[192]

The Fifth Circuit reinforced this approach in the 2001 case *United States v. Loe*.[193] The account in that case contained $2,205,000, only $470,790.22 of which was fraudulently obtained; the targeted transfer involved $776,742.[194] Since there were enough untainted funds in the account to cover the transfer, the court reversed the money-laundering convictions.[195] Under *Davis*, "[n]o reasonable juror could conclude that these money laundering convictions were warranted beyond a reasonable doubt."[196] The "reasonable doubt" was the mathematical possibility that the $776,742 transfer contained $10,000 or less in dirty funds.

It is notable that some courts in the no-tracing camp have employed or cited an analysis similar to the aggregation approach. For example, in *United States v. Dazey*, the Tenth Circuit noted that the defendant's bank account contained only about $47,000 before he made four deposits of illicit funds that collectively totalled roughly $300,000.[197] The court thus found—beyond mathematical doubt—that a later $100,000 withdrawal made by the defendant

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188. *Davis*, 226 F.3d at 357.

189. *Id.* (citing United States v. Heath, 970 F.2d 1397, 1403-04 (5th Cir. 1992)).

190. *See Heath*, 970 F.2d at 1403.

191. *See id.* at 1403-04.

192. *Id.* at 1403. The Fifth Circuit applied this approach in *United States v. Fuchs*, which upheld a § 1957 conviction because the aggregate amount withdrawn from the account ($4 million) exceeded the total amount of clean funds ($3 million), making it mathematically certain that at least some of the transactions involved dirty money. 467 F.3d 889, 907 (5th Cir. 2006).

193. 248 F.3d 449 (5th Cir. 2001).

194. *Id.* at 467.

195. *Id.*

196. *Id.*

197. 403 F.3d 1147, 1164 (10th Cir. 2005).

must have contained at least some illicit funds, since the amount withdrawn exceeded the amount of clean funds.[198]

Beyond the overlap of the analytical frameworks discussed above, courts have also cited different approaches across different legal contexts. For example, the Seventh Circuit in *Haddad* described itself as following the Fourth *and* Fifth Circuits.[199] Similarly, the Northern District of Illinois, a court in the Seventh Circuit, adopted the Fifth Circuit's aggregation rule in a wire-fraud case, holding that "where an account contains clean funds sufficient to cover a withdrawal, the Government can not prove beyond a reasonable doubt that the withdrawal contained dirty money."[200] Although the government presented sufficient evidence to demonstrate that "*the great bulk*" of the money in the account was illicit, "under *Loe*, that is not enough to establish guilt beyond a reasonable doubt."[201]

This overlap illustrates a key point: Despite the doctrinal circuit split, courts' analyses across this spectrum have shared an underlying emphasis on the actual proportions of legal and illegal funds in the particular accounts and transactions at issue. This recurring emphasis demonstrates that courts are capable of applying more nuanced accounting rules and estimations to determine whether transactions from commingled sources meet the requirements of § 1957. The following Part will explore one such mode of interpreting commingled transactions.

III. A Proposal: The Proportionality Approach

In a footnote in *United States v. Loe*, the Fifth Circuit pointed to an alternative approach to the tracing problem, which has not yet been adopted by any court.[202] The court described this as the "proportionality" approach and claimed that there was "much to be said in favor" of it.[203] Under the proportionality approach, courts would treat a specific withdrawal as containing fractions of clean and dirty money in proportion to the amounts of clean and dirty money in the account as a whole.[204] In *Loe*, approximately 21% of the funds in the account at issue were dirty funds ($470,790.22); applying this

198. *Id.*

199. *See supra* text accompanying note 136.

200. United States v. Jedynak, 45 F. Supp. 3d 812, 820-21 (N.D. Ill. 2014) (quoting *Loe*, 248 F.3d at 467).

201. *Id.* at 821 (emphasis added).

202. *See* 248 F.3d at 467 n.81.

203. *Id.*

204. *Id.*

21% proportion to the relevant withdrawal ($776,742) would yield $165,842.42 in dirty funds, a sum exceeding the monetary threshold under § 1957.[205]

The *Loe* court listed a few benefits of the proportionality approach. First, it "would avoid some of the oddities associated with the *Davis* approach" because it would not create a clear cut-off line at the point at which aggregate withdrawals exceed the amount of clean funds in the account.[206] The aggregation approach creates a tipping point—the point at which all clean funds are gone—before which all transactions are theoretically clean and after which all transactions are theoretically dirty.[207] Second, the proportionality approach "is more sensitive to the fungible nature of money" than the *Davis* rule.[208] Just like the majority approach, the *Davis* rule essentially creates a legal fiction, a "presumption that clean money is spent before dirty money."[209] By contrast, the proportionality rule attempts to more fully account for the reality of transactions involving commingled funds by recognizing "that a withdrawal *mirrors* the sources of the money in the account."[210] Finally, the proportionality approach "would be more faithful to the plain language of the statute" by attempting to determine whether *each* transaction contained more than $10,000 of illegal proceeds.[211] By aggregating across individual transactions, the *Davis* approach arguably deviates from the language of § 1957, which "imposes liability on a transaction-by-transaction basis."[212]

The Fifth Circuit has not formally revisited its approach since *Loe*, and no other circuit has explicitly adopted the proportionality rule. It is unclear why this is the case, but one reason may be that courts rarely analyze the tracing issue in detail.[213] In fact, this lack of discussion illustrates the applicability of the proportionality approach. In cases involving a very high percentage of clearly illegal funds, courts dismiss the need for tracing entirely, implicitly demonstrating that their analyses hinge on proportionality.[214]

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *See id.*

210. *Id.* (emphasis added).

211. *Id.* at 468 n.81.

212. *Id.*

213. Due to inflation, the more-than-$10,000 requirement may become increasingly easy to meet, arguably rendering tracing even more important in the rare marginal cases. *See* J.P. Koning, *Why Aren't Anti-Money-Laundering Regulations Adjusted for Inflation?*, AM. INST. FOR ECON. RSCH. (Jan. 23, 2020), https://perma.cc/6E28-26VB ("Back in 1970, $10,000 would have purchased around what $68,000 would today . . . .").

214. *See, e.g.*, United States v. Carpenter, 190 F. Supp. 3d 260, 300-01, 300 n.66 (D. Conn. 2016) (acknowledging the circuit split over tracing but concluding that there was "no need to

footnote continued on next page

Indeed, in a more recent case—*United States v. Evans*[215]—the Fifth Circuit essentially applied the proportionality standard without defining it as such. Evans was accused of operating a "pill mill" medical practice and committing § 1957 money laundering by withdrawing money from his bank account, which contained commingled funds derived from his clinic.[216] The court professed "confidence" in finding sufficient evidence on the tracing prong precisely because the amount of tainted funds the government needed to prove (roughly $50,000 since five § 1957 charges were brought, each invoking the statutory minimum) was about 5% of, and thus "tiny *relative to*," the total amount that Evans had deposited in his account (about $1.13 million).[217] Although it did not determine the exact percentages of clean and dirty money in the account as whole, the court found that "a rational juror could conclude that the percentage of Evans's money coming in from bogus prescriptions was over five percent."[218] In other words, given the size of Evans's practice and the quantity of illegal prescriptions he wrote, the proportion of dirty money in the account more than likely exceeded the statutory threshold.

The Fifth Circuit's analyses in *Loe* and *Evans* point to the proportionality approach as a feasible rule that more closely reflects the express language of § 1957. Building on the discussion in *Loe*, the following Subparts will further explore the advantages of the proportionality approach.

A. The Proportionality Approach Would Mediate Between Circuits' Views

Both sides of the circuit split point to central issues with the other's approach. The Ninth Circuit has critiqued the majority view for engaging in an "essay in judicial lawmaking" that expands the reach of the already "draconian" money-laundering laws.[219] Indeed, Part II.A above demonstrates that the blanket no-tracing rule bolsters prosecutors' power in wielding an already extraordinarily broad statute.[220] This poses substantial risks. For example, as the Supreme Court has noted, expanding the scope of the money-

decide which standard applies" because the proven illegal withdrawals were high enough relative to the total contents of the account that the government had satisfied even the "most restrictive" tracing rule).

215. 892 F.3d 692 (5th Cir. 2018).

216. *Id.* at 696, 708, 710. The money in the account was "commingled" because it included both dirty funds derived from Evans's illegal prescriptions and clean funds derived from the other legitimate medical services he provided. *Id.* at 708-09.

217. *Id.* at 710 (emphasis added).

218. *Id.*

219. United States v. Rutgard, 116 F.3d 1270, 1292-93 (9th Cir. 1997).

220. *See supra* Part II.A.

laundering laws raises the very real risk that the penalties for laundering will be harsher than those for the predicate crime, which the government can then use to secure a plea bargain for the predicate crime.[221] Prosecutors can also point to money laundering at the sentencing stage to heighten penalties for underlying crimes.[222]

In addition to these arguably overbroad applications of prosecutorial techniques, the above review of the doctrine demonstrates that the money-laundering laws have been applied beyond their initial aims—drug dealing (as envisioned by the MLCA) and terrorism (as envisioned by the USA PATRIOT Act).[223] Nor are the defendants discussed above the intended targets of the AMLA, namely "drug cartels, human traffickers, arms dealers, terrorists and kleptocrats."[224] While some defendants were charged based on their connections to drug dealers,[225] the majority were involved in fraud, such as healthcare fraud or fraud relating to the federal food stamps program;[226] none of the cases discussed above pertained to terrorism or large-scale global enterprises. An overly permissive approach to tracing contributes to the expansion of the money-laundering laws outside of their intended contexts.

The Ninth Circuit has also noted that the no-tracing rule circumvents the statutory language of § 1957 in order to address the practical difficulty of tracing.[227] This critique is exemplified by the First Circuit's stance in *United States v. Richard*, which upheld convictions under § 1957 even though the defendant was acquitted of the underlying offense.[228] As the court noted, such a

221. *See* United States v. Santos, 553 U.S. 507, 516 (2008) (plurality opinion).

222. *See* United States v. Sokolow, 91 F.3d 396, 411 (3d Cir. 1996) ("[F]unds associated with uncharged instances of money laundering can be added in to determine the offense level . . . if those acts are within the scope of relevant conduct . . . ." (first alteration in original) (quoting United States v. Johnson, 971 F.2d 562, 576 n.10 (10th Cir. 1992))).

223. *See supra* notes 48, 70 and accompanying text.

224. Press Release, Sen. Mark R. Warner, Warner, Rounds, Jones Applaud Inclusion of Bipartisan Anti-Money Laundering Legislation in NDAA (Dec. 3, 2020) (quoting Senator Mark R. Warner), https://perma.cc/8ATU-J23G; *see also* Randall Mikkelsen, *US Tightens Anti-Money Laundering Measures in Legislation Approved over Trump's Veto*, THOMSON REUTERS (Jan. 8, 2021), https://perma.cc/5ADV-CM97 (noting that the AMLA "will provide new tools to crack down on opioid and human traffickers, terrorists, weapons dealers, and . . . big banks that enable criminals" (quoting Senator Sherrod Brown)).

225. *See, e.g.*, United States v. Pizano, 421 F.3d 707, 723 (8th Cir. 2005) (finding that there was sufficient evidence to conclude that the defendant's transactions were derived from her brother's drug-dealing income).

226. *See, e.g.*, United States v. Rutgard, 116 F.3d 1270, 1275 (9th Cir. 1997) (health care fraud); United States v. Haddad, 462 F.3d 783, 786 (7th Cir. 2006) (food stamp fraud).

227. *See Rutgard*, 116 F.3d at 1292-93 (concluding that the no-tracing rule is "an essay in judicial lawmaking, not an application of the statute").

228. *See* 234 F.3d 763, 768 (1st Cir. 2000).

result is legally permissible because inconsistent verdicts do not necessarily establish that the government failed to prove a key element of its case beyond a reasonable doubt.[229] Even so, in the specific context of § 1957, this decision represents a departure from the statutory language and purpose. As noted above, one of the law's cosponsors emphasized that it was aimed at those who aid money launderers and other criminals by knowingly accepting their tainted funds.[230] Permitting § 1957 claims that are detached from underlying convictions is contrary to this purpose.

Despite its practical appeal, the majority no-tracing approach unfairly shifts the burden onto defendants to fill the gaps in the statutory language. Allowing the government to assume that any transaction from a commingled account is tainted risks disregarding the fact that the actual probability of any particular withdrawal being dirty can be very low. This is particularly problematic given that the standard of proof for § 1957 (a criminal statute) is beyond a reasonable doubt. The legal system does not quantify "beyond a reasonable doubt" as a percentage, nor could it. According to one survey of federal and state trial judges, however, the average judge would approximate this standard at roughly 90% certainty.[231] But the no-tracing rule allows for a conviction even when there is a very low probability that any particular transaction in fact contained more than $10,000 of illegal proceeds. In their pursuit of addressing the challenging issue of tracing commingled funds, the majority of circuits thus run the risk of "render[ing] meaningless Congress' decision to criminalize *only* those transactions involving more than $10,000 in tainted funds," as one scholar has suggested.[232]

This burden shifting is particularly inapposite in the money-laundering context, given the Supreme Court's 2008 decision in *United States v. Santos*.[233] *Santos* involved a dispute over the meaning of the word "proceeds" as used in § 1956(a)(1), with the defense arguing that "proceeds" should be limited to profits and the government arguing that "proceeds" should encompass gross receipts.[234] The Supreme Court rejected the government's interpretation as favoring ease of conviction over the statutory language: "The Government also argues for the 'receipts' interpretation because—quite frankly—it is easier to prosecute. . . .

229. *Id.*

230. *See supra* note 58 and accompanying text.

231. Richard Seltzer, Russell F. Canan, Molly Cannon & Heidi Hansberry, *Legal Standards by the Numbers: Quantifying Burdens of Proof or a Search for Fool's Gold?*, JUDICATURE, Spring 2016, at 56, 62.

232. Johnson, *supra* note 18, at 1329.

233. 553 U.S. 507 (2008), *superseded by statute*, Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 2(f), 123 Stat. 1617, 1618 (codified as amended at 18 U.S.C. §§ 1956-1957).

234. *See id.* at 510-11 (plurality opinion).

Essentially, the Government asks us to resolve the statutory ambiguity in light of Congress's presumptive intent to facilitate money-laundering prosecutions. That position turns the rule of lenity upside down."[235] The majority of circuits' interpretation of § 1957 suffers from the same flaw: Courts have rejected a tracing requirement purely because of the obstacles that strict tracing poses to prosecution, but the rule of lenity demands that ambigious statutory language be resolved in favor of the defense.[236] In *Santos*, the Court suggested that Congress could speak more clearly on the definition of "proceeds," and Congress responded by amending the definition to encompass "receipts."[237] The *Santos* episode highlights two arguments in favor of construing § 1957 more narrowly. First, because the commingling issue is also ambiguous, courts should interpret the ambiguity in a way that is less deferential to prosecutors. Second, if Congress disagrees with this interpretation, it can act to clarify the law.

The proportionality approach would also account for the specific language in § 1957 that differentiates it from its companion, § 1956. In interpreting § 1957, courts have repeatedly analogized to § 1956 to support the argument that tracing should not be required.[238] These comparisons have intuitive appeal because courts have declined to require tracing under § 1956, which shares the same general purpose and legislative history as § 1957.[239] But courts that conclude that the § 1956 and § 1957 tracing analyses should be the same ignore two key differences between the provisions: § 1956 criminalizes transactions that "involv[e]" criminal proceeds, and § 1957 only reaches transactions "in" criminal proceeds; and unlike § 1956, § 1957 requires a minimum transaction of more than $10,000.[240] This is consistent with the statutory purposes—§ 1956 can capture any transaction made with the intent to further crime, while § 1957 is limited to specific situations where individuals, whether the launderers or others, are attempting to simply transfer or use the illegal money.

For example, the Seventh Circuit in *United States v. Haddad* explained its rejection of the *Rutgard* tracing requirement for § 1957 by noting that it had "held in the analogous area of Section 1956 cases that the *Rutgard* 'all or nothing' approach is unworkable."[241] However, the very case that the *Haddad*

235. *Id.* at 519.

236. *See id.* at 514; Intisar A. Rabb, Response, *The Appellate Rule of Lenity*, 131 HARV. L. REV. F. 179, 179-81 (2018).

237. *See Santos*, 553 U.S. at 514; Fraud Enforcement and Recovery Act of 2009 § 2(f), 123 Stat. at 1618 (codified as amended at 18 U.S.C. §§ 1956-1957).

238. *See infra* notes 241-46 and accompanying text.

239. *See supra* notes 46-49 and accompanying text.

240. *See supra* notes 76-78 and accompanying text.

241. 462 F.3d 783, 792 (7th Cir. 2006) (citing United States v. Jackson, 935 F.2d 832, 840 (7th Cir. 1991)).

court cited—*United States v. Jackson*—rested its § 1956 analysis on Congress's use of the word "involve."[242] The *Jackson* court did "not read Congress's use of the word 'involve' as imposing the requirement that the government trace."[243] By converse implication, as the *Rutgard* court emphasized, Congress's use of the word "in" in § 1957 seems to require stricter tracing, since the transaction must not simply be "involved" with illegal proceeds but "in" illegal proceeds.[244] In relying on *Jackson*, which rejected a tracing requirement for § 1956—the broader of the two statutes—the Seventh Circuit expanded the scope of § 1957 beyond the bounds of its language.[245] Similarly, the Fourth Circuit in *United States v. Moore* cited two § 1956 cases, which had not required tracing, to support an argument that tracing also should not be required under § 1957, without acknowledging the differences in statutory language.[246] Thus, in drawing on the § 1956 analysis without considering important differences between the statutes, courts have further contributed to the overexpansion of § 1957.

On the other hand, the Ninth Circuit's approach overcorrects. The prosecution must prove a § 1957 violation beyond a reasonable doubt, not to a mathematical certainty. As courts that do not require tracing have repeatedly noted, the Ninth Circuit's approach is difficult, even "untenable," because it appears to unduly constrain the money-laundering laws whenever commingling is involved.[247] As the Seventh Circuit has noted in the context of money-laundering forfeiture, "[T]he presence of one illegal dollar in an account does not taint the rest—as if the dollar obtained from [money-laundering activity] were like a drop of ink falling into a glass of water."[248] However, an account with a small percentage of illegal funds should not necessarily be treated in the same way, or analyzed under the same framework, as an account with a high percentage of illegal funds.

The proportionality approach would not only help mitigate these critiques, but also better account for how courts are already structuring their analyses. In practice, courts claiming that tracing is not required have repeatedly highlighted the *proportion* of funds in accounts, for example: claiming that "[t]he record . . . provides ample support" for a finding that the

242. *See* 935 F.2d at 840.

243. *Id.*

244. *See* United States v. Rutgard, 116 F.3d 1270, 1291 (9th Cir. 1997) (reasoning that the removal of the term "the property involved" in § 1957 "indicate[s] that proof of violation of § 1957 may be more difficult").

245. *See Haddad*, 462 F.3d at 792.

246. *See* 27 F.3d 969, 977 (4th Cir. 1994) (citing *Jackson*, 935 F.2d at 840; and United States v. Blackman, 904 F.2d 1250, 1257 (8th Cir. 1990)).

247. *See, e.g.*, *Haddad*, 462 F.3d at 792.

248. United States v. $448,342.85, 969 F.2d 474, 476 (7th Cir. 1992).

funds were dirty;[249] pointing to a "mountain of evidence" that the money was dirty, even if the government couldn't trace particular withdrawals;[250] or noting the actual proportions of money in an account, for example, $102,430.01 in dirty funds compared to only $64.45 in clean funds.[251] The Fifth Circuit has come closest to explicitly incorporating the proportionality approach into its tracing rules by requiring the government to compare aggregate transactions to the contents of the account,[252] but cases across the spectrum reveal judicial attention to proportions. For example, although the Ninth Circuit adopted a strict tracing rule, it did so in a case with a very small amount of dirty funds, carving out an exception for cases where the defendant's entire business was fraudulent.[253] It later employed this exception in *United States v. Hanley*.[254] A comparison of the tracing analysis under § 1957 with a similar split in the context of asset forfeiture demonstrates the need for an approach that takes an intermediate stance.

B. The Proportionality Approach Would Align with Courts' Analyses in the Context of § 981 Forfeiture

The proportionality approach is already used in several legal areas.[255] Most notably, the proportionality approach meshes with the asset-forfeiture rules that accompany the money-laundering laws themselves. Asset forfeiture, which is employed in a variety of contexts,[256] allows the government to

249. United States v. Rivera-Izquierdo, 850 F.3d 38, 45 (1st Cir. 2017).

250. United States v. Battles, 745 F.3d 436, 457 (10th Cir. 2014).

251. *Id.* at 456; *see also* United States v. Sivigliano, 550 F. App'x 537, 541 (10th Cir. 2013) (highlighting evidence that roughly 87% of the funds in the accounts at issue were from illegal sources).

252. *See* United States v. Davis, 226 F.3d 346, 357 (5th Cir. 2000).

253. *See* United States v. Rutgard, 116 F.3d 1270, 1290, 1292-93 (9th Cir. 1997).

254. *See* United States v. Hanley, 190 F.3d 1017, 1026 (9th Cir. 1999); *see also* United States v. Fujinaga, Nos. 19-10222 & 21-10155, 2022 WL 671018, at *5 (9th Cir. Mar. 7, 2022) (applying the exception for purely fraudulent operations).

255. *See, e.g.*, Ashley DeCress, *Yours, Mine and Ours—Applicable Asset Tracing Methods in a Divorce Matter*, MARCUM LLP (Apr. 20, 2022), https://perma.cc/7QF7-YQPP (identifying the pro rata, or proportionality, approach as an available method for tracing commingled marital property); MICHAEL J. HOLLERAN, DONNA LARSEN HOLLERAN & JOHN B. CORR, BANKRUPTCY CODE MANUAL § 752:10 (West 2022) (noting that the bankruptcy code expressly provides for the distribution of a surplus on a pro rata basis).

256. *See Types of Federal Forfeiture*, U.S. DEP'T JUST., https://perma.cc/J33A-AJ56 (last updated Feb. 17, 2022) (describing the goals of asset forfeiture and the three main types of asset forfeiture—criminal, civil, and administrative); *see also* MONEY LAUNDERING & ASSET RECOVERY SECTION, U.S. DEP'T OF JUST., ASSET FORFEITURE & MONEY LAUNDERING STATUTES, at i-vii (2019), https://perma.cc/Y76M-C7GJ (listing federal forfeiture statutes).

recover money or property that was used in criminal activity or belongs to someone convicted of a crime.[257] Tracing is a recurring issue in asset-forfeiture cases, since a defendant can only be expected to forfeit money or property that is somehow traceable to their criminal activity.

The two key asset-forfeiture statutes in the context of money laundering—18 U.S.C. §§ 981-982—generally allow the government to recover any "property . . . involved in" the underlying laundering offenses.[258] This includes not only the laundered proceeds themselves, but sometimes any property that was purchased using the proceeds, or even property that was used to "facilitate" the offense by concealing the dirty money or otherwise assisting in the perpetration of the crime.[259] As such, the language and application of the forfeiture statutes is incredibly broad. One practitioner argues that "[o]nly the RICO and terrorism statutes are arguably as powerful as the forfeiture statutes for money laundering."[260] Tracing has emerged as a potential limitation on this significant power, just as tracing can limit the broad scope of § 1957.

As this Subpart demonstrates, courts' approach to tracing in the forfeiture context provides three additional reasons to adopt a proportionality approach for § 1957. First, the forfeiture tracing cases demonstrate courts' ability to grapple with specific accounting techniques. Second, courts have explicitly pointed to the proportionality approach as one such possible technique. Third, the fact that courts generally require some form of tracing in civil forfeiture—where the standard of proof is only a preponderance of the evidence—further calls into question courts' deference to the government in criminal prosecutions under § 1957, where the standard of proof is beyond a reasonable doubt.

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257. *See* Douglas Leff, *Money Laundering and Asset Forfeiture: Taking the Profit Out of Crime*, FBI: LAW ENF'T BULL. (Apr. 1, 2012), https://perma.cc/FR5F-R48R ("Federal asset forfeiture laws permit the government to take title to money and property belonging to criminals based on proof often developed in conjunction with an overall investigation.").

258. 18 U.S.C. §§ 981(a), 982(a); *see also id.* § 984(a).

259. *See* United States v. Miller, 295 F. Supp. 3d 690, 697, 702-03 (E.D. Va. 2018) (finding that the properties where the defendant engaged in the underlying fraud were likely forfeitable).

260. STEFAN D. CASSELLA, ASSET FORFEITURE L., LLC, THE MONEY LAUNDERING FORFEITURE STATUTES 4 (n.d.), https://perma.cc/39JE-2BB5. This breadth has led to critiques that asset forfeiture is overbroad or even unconstitutional. *See, e.g.*, RICHARD M. THOMPSON II, CONG. RSCH. SERV., R43890, ASSET FORFEITURE: SELECTED LEGAL ISSUES AND REFORMS 11 (2015) (acknowledging that some have criticized the forfeiture laws for imposing a low burden of proof on the government); Radley Balko, Opinion, *Study: Civil Asset Forfeiture Doesn't Discourage Drug Use or Help Police Solve Crimes*, WASH. POST (June 11, 2019, 9:00 AM EDT), https://perma.cc/6FGE-BPPH (attacking civil forfeiture as "contrary to a basic sense of justice and fairness"); Note, *How Crime Pays: The Unconstitutionality of Modern Civil Asset Forfeiture as a Tool of Criminal Law Enforcement*, 131 HARV. L. REV. 2387, 2395-2402 (2018) (arguing that modern forfeiture law is "overly punitive," leading to possible constitutional challenges).

18 U.S.C. § 981(a)(1)(A) permits the civil forfeiture of any real or personal property that is "involved in a transaction . . . in violation of section 1956, [or] 1957," as well as any additional property that is "traceable to" such involved property.[261] Courts have read both the "involved in" and "traceable to" language to demand some level of tracing "at a minimum."[262] Therefore, the forfeiture rules provide insight into how courts grapple with tracing when they do find that it is required. The question that has been debated in the forfeiture context is *how* the government can trace—which accounting rules can or should be applied to guide its analysis?

Furthermore, § 981 works in conjunction with § 984, the substitute-asset provision, which was specifically passed by Congress to allow for the forfeiture of fungible assets when launderers use loopholes to avoid adequate tracing of the funds.[263] Prior to 2000, some courts held that the prosecution could *only* secure the forfeiture of fungible assets through § 984 but, in 2000, Congress passed an amendment to § 984 clarifying that "[n]othing in this section may be construed to limit the ability of the Government to forfeit property under any provision of law if the property involved in the offense giving rise to the forfeiture or property traceable thereto is avilable for forfeiture."[264] Courts have held that the substitute-asset provision should be read in conjunction with § 981, not used as a workaround to fulfilling the statutory language of § 981.[265]

In *United States v. Banco Cafetero Panama*, the Second Circuit drew on the legislative history of § 881(a)(6)—a provision dealing with the forfeiture of funds involved in the purchase of controlled substances—to create tracing rules for

261. 18 U.S.C. § 981(a)(1)(A). Separately, the government can also obtain property "traceable to" property that was involved in "specified unlawful activity," including untainted funds that were used to facilitate money-laundering activity. *Id.* § 981(a)(1)(C). This is a much broader definition than that established in § 981(a)(1)(A).

262. *See, e.g.*, United States v. Any and All Ownership Int. Held in the Name, on Behalf of or for the Benefit of Joseph Taub, No. 16-9158, 2020 WL 278762, at *9 (D.N.J. Jan. 16, 2020); United States v. $448,342.85, 969 F.2d 474, 476 (7th Cir. 1992) (criticizing the government as "[s]hooting for the moon" when it argued that tracing is not required under § 981(a)(1)(A) and rejecting its argument).

263. *See* United States v. All Funds Presently on Deposit or Attempted to Be Deposited in Any Accts. Maintained at Am. Express Bank, 832 F. Supp. 542, 557-59 (E.D.N.Y. 1993).

264. *See* United States v. Contents in Acct. No. 059-644190-69, 253 F. Supp. 2d 789, 793-94 (D. Vt. 2003) (quoting 18 U.S.C. § 984(d)).

265. *See* United States v. $8,221,877.16 in U.S. Currency, 330 F.3d 141, 158-59 (3d Cir. 2003) (noting that tracing under § 981 can be "difficult" but emphasizing that difficult is "not necessarily impossible" and should not be used as a reason for jettisoning § 981 in favor of § 984).

commingled accounts.[266] The court noted that when passing the forfeiture laws, Congress had explicitly stated that illegal proceeds "commingled with other assets" or "involved in intervening legitimate transactions" would nevertheless be forfeitable.[267] However, as with § 1957, Congress did not provide further guidance on how to determine the extent of forfeitability. Therefore, the court took it upon itself to weigh various "accounting" methods.[268]

The *Banco Cafetero* court identified three possible accounting methods: the lowest intermediate balance rule (LIBR), which the court also called the "drugs-in, last-out" method;[269] the pro rata, or proportionality, approach;[270] and the "drugs-in, first-out" rule[271]—as methods for the government to complete the required tracing. Notably, although the court identified the pro rata approach as an option, the government only argued for the LIBR or "drugs-in, first-out" rules, rendering the pro rata approach irrelevant to the court's analysis.[272] Nevertheless, the fact that the court suggested the pro rata approach as a potential option indicates its viability.

Ultimately, the *Banco Cafetero* court decided that the government could demonstrate probable cause for forfeiture using either of the approaches for which it advocated and that it could choose the most appropriate method in any particular case.[273] The court specifically noted that this flexibility was appropriate because of the low burden of proof (probable cause) in forfeiture cases, an argument which is not applicable in the context of criminal money laundering.[274] This choose-your-own-method approach gave the government

266. 797 F.2d 1154, 1156, 1159 (2d Cir. 1986), *superseded by statute,* Housing and Community Development Act of 1992, Pub. L. No. 102-550, § 1522(a), 106 Stat. 3672, 4063 (codified as amended at 18 U.S.C. § 984).

267. *Id.* at 1159 (quoting 124 CONG. REC. 34,671 (1978) (Joint House-Senate Explanation of Senate Amendment), *as reprinted in* 1978 U.S.C.C.A.N. 9518, 9522).

268. *See id.* at 1159-60.

269. *Id.* at 1159. The LIBR assumes that the contested funds have not been withdrawn and are available for tracing as long as the total amount of funds in the account meets or exceeds the amount of contested funds. *See* Marylee Robinson & Jason Wright, *A Taxonomy of Tracing Rules: One Size Does Not Fit All,* STOUT (Sept. 17, 2018), https://perma.cc/FR63-JJGY.

270. *Banco Cafetero,* 797 F.2d at 1159.

271. *Id.* (defining the "drugs-in, first-out" rule as considering any particular withdrawal to include traceable proceeds up to the amount of criminal proceeds in the bank account).

272. *See id.* ("The Government contends that it is entitled to the benefit, at its option, of either the first or third approach.").

273. *See id.* at 1159-60.

274. *See id.* at 1160 (finding that Congress had "answered [the tracing] question in the Government's favor by assigning it a lenient burden of proof in obtaining forfeiture of 'traceable proceeds' of drug transactions").

explicit instructions on how to trace, but allowed it flexibility in carrying out that tracing in a particular case.

In *United States v. Voigt*, which concerned § 982, the Third Circuit took a different view.[275] In *Voigt*, the defendant purchased jewelry with funds from a commingled account, raising the question of whether the jewelry was "traceable to" the underlying illegal activity and could thus be forfeited.[276] The Third Circuit held that, in general, the government must demonstrate "*some* nexus" between the laundering and the property being forfeited, which consists of some direct link that is not precisely defined in concrete financial terms.[277] The court went on to hold that, when the government seeks the forfeiture of money in a commingled account, it should instead rely upon the substitute-asset provision.[278] The "some nexus" requirement is a relatively low bar—for example, using money to improve properties that were themselves used for illegal activities has rendered money "involved in" laundering.[279]

As the Eastern District of New York has noted, this debate over the proper method of tracing in forfeiture cases mirrors the split over tracing under § 1957.[280] The *Voigt* court pointed to Congress's intent and the plain language of the statute—the requirement that proceeds be either "involved in" the crime or "traceable" to proceeds involved in the crime—to justify its "some nexus" requirement.[281] This mirrors the Ninth Circuit's approach to § 1957, which also highlights the plain language of the statute.[282] The "drugs in, first out" approach mirrors the Fourth Circuit's § 1957 rule, which essentially adopts a presumption that transactions are dirty up to the amount of dirty funds in the account.[283]

275. 89 F.3d 1050, 1087-88 (3d Cir. 1996).

276. *Id.* at 1082.

277. *Id.* at 1087-88; *see also* United States v. Nicolo, 597 F. Supp. 2d 342, 355 (W.D.N.Y. 2009) (clarifying that the sufficient-nexus requirement, "as a general rule," mandates "*some direct financial link* between a defendant's money laundering and his real property" to allow for forfeiture (emphasis added)).

278. *See Voigt*, 89 F.3d at 1085, 1087-88.

279. *In re* 650 Fifth Ave., No. 08 Civ. 10934, 2014 WL 1284494, at *21-22 (S.D.N.Y. Mar. 28, 2014).

280. *See* United States v. Weisberg, No. 08-CR-347, 2011 WL 4345100, at *4-5 (E.D.N.Y. Sept. 15, 2011).

281. *See Voigt*, 89 F.3d at 1082, 1085, 1087-88.

282. *See* United States v. Rutgard, 116 F.3d 1270, 1291-93 (9th Cir. 1997).

283. *Compare Banco Cafetero*, 797 F.2d at 1159 (describing the "drugs in, first out" approach as holding that withdrawals from an account will be presumed tainted until the total amount withdrawn exceeds the amount of tainted funds), *with* United States v. Moore, 27 F.3d 969, 977 (4th Cir. 1994) ("[I]t may be presumed . . . as the language of section 1957 permits, that the transacted funds, at least up to the full amount originally derived from crime, were the proceeds of the criminal activity or derived from that activity.").

Meanwhile, the use of the substitute-asset provision increases the ease of prosecution, just like the majority no-tracing rule under § 1957.

Courts that have dealt with asset-forfeiture issues since *Banco Cafetero* and *Voigt* have navigated middle paths between these two polar views, demonstrating the feasibility of more specific accounting tests. Many cases have successfully applied the LIBR and substantiated the statutes' call for tracing.[284] Other courts have adopted even more nuanced tests. For example, the Fourth Circuit has applied the LIBR to allow for tracing of some transactions even when the account balance always remains higher than the total amount of contested funds.[285] Under circumstances in which a company made a deposit of disputed funds, followed by a deposit of unrelated funds, into a checking account and then transferred funds from the checking account to a savings account, the court rejected an argument that the transferred funds were not traceable to the contested deposit, even though the transfer did not completely deplete the amount of uncontested funds in the account.[286] This holding demonstrates how the LIBR can cover some transactions even when the clean funds in an account have not been *completely* exhausted. In the Seventh Circuit, a district court rejected the government's argument that allegedly fraudulent proceeds, which were deposited into a defendant's account and used shortly afterward, were dirty "because . . . the amount of 'clean' funds in the account *far exceeds*" the targeted withdrawals.[287]

As in the § 1957 context, courts adjudicating asset-forfeirture cases will informally analyze the actual proportions of clean and dirty funds in accounts, sometimes waiving their ordinary requirements in the process. In *United States v. Stewart*, which involved one $3 million deposit into an account that had previously contained only $160,000, the Third Circuit allowed for forfeiture without applying the substitute-asset provision based on the particular facts of the case.[288] Conversely, the Eleventh Circuit decided to adopt the *Voigt* rule in a case concerning a long-running Ponzi scheme.[289] The court found that "[t]he sheer volume of financial information available and required to separate tainted from untainted monies in this case" suggested that it was "far more appropriate

284. *See, e.g.*, United States v. $56,471,329.88 in Proceeds from the Sale of a Bond Belonging to Airbus SE, 466 F. Supp. 3d 63, 66 (D.D.C. 2020) ("This Court adopts LIBR as the preferred tracing method, as it is the prevailing option.").

285. *See* Sony Corp. of America v. Bank One, W. Va., Huntington NA, 85 F.3d 131, 138-39 (4th Cir. 1996).

286. *Id.*

287. United States v. Black, 526 F. Supp. 2d 870, 889 (N.D. Ill. 2007) (emphasis added).

288. 185 F.3d 112, 129-30 (3d Cir. 1999).

289. United States v. Rothstein (*In re* Rothstein, Rosenfeldt, Adler, P.A.), 717 F.3d 1205, 1213-14 (11th Cir. 2013).

to apply the Third Circuit's rule in *Voigt* than the exception to that rule it lays out in *Stewart*."[290]

Notably—despite the procedural quirk in *Banco Cafetero* that prevented the pro rata rule from entering the doctrine—courts have expanded their accepted accounting techniques beyond the LIBR and "drugs-in, first-out" approaches to accept the proportionality analysis itself. For example, one district court stated that "nothing precludes the Court from ordering each asset to be forfeited in the same percentage it determines the insider sales to be ill-gotten gains (i.e., if 40% of the insider sales are ill-gotten gains, then 40% of each asset is forfeitable)."[291] The Ninth Circuit has also made a general statement that "when tainted and untainted funds are commingled in an account, and withdrawals are subsequently made, a proportionate share of those withdrawals will be allocated to the tainted funds."[292] Regardless of the specific technique adopted, courts interpreting the forfeiture laws have been more willing to utilize accounting rules in order to fulfill the statutory language. As one district court has stated:

> If the tracing requirement in § 981 is to be given any effect—as, indeed, it must—then the government is required to demonstrate something more than the fact of commingling, even across a series of complicated transactions, to establish that legitimate money is forfeitable by virtue of its commingling with tainted funds.[293]

Thus, courts' approach to the forfeiture issue illustrates the problems with the existing circuit split under § 1957. As the Eastern District of New York pointed out in *Weisberg*, it seems strange to have a more deferential standard to the government in the criminal context than in the civil context on the exact same issue.[294] At the same time, the debate over the specific methods required to trace funds from commingled accounts in the forfeiture context—with a parallel circuit split emerging between courts that take the *Banco Cafetero* view and courts that take the *Voigt* view—illustrates the need for a workable, intermediary position like the proportionality approach. The next Subpart will describe additional context that further indicates the need for a new

290. *Id.* at 1213.

291. United States v. Hatfield, 795 F. Supp. 2d 219, 245 (E.D.N.Y. 2011).

292. United States v. Laykin, 886 F.2d 1534, 1541 (9th Cir. 1989); *see also* United States v. Dillon, No. 16-cr-00037, 2022 WL 2105974, at *5 (D. Idaho June 10, 2022) ("[T]he Ninth Circuit generally suggested that the pro rata approach from *Banco Cafetero* is an appropriate tracing methodology."). As the *Dillon* court pointed out, however, *Laykin* was not actually an asset-forfeiture case; rather it discussed possible tracing rules to resolve a case about equity skimming. *Id.*

293. United States v. Contents in Account No. 059-644190-69, 253 F. Supp. 2d 789, 799-800 (D. Vt. 2003).

294. *See* United States v. Weisberg, No. 08-CR-347, 2011 WL 4345100, at *5 (E.D.N.Y. Sept. 15, 2011) (finding the tracing requirement "more consistent with the allocation of the burden of proof in criminal cases").

approach to tracing under § 1957: the emergence of new forms of currency and money-laundering techniques, which call into question courts' existing assumptions about tracing.

C. The Proportionality Approach Would Account for New Financial Technologies

The circuit split described above developed during the 1990s in the context of a common type of transaction—a *cash* withdrawal from a bank account.[295] Exemplifying this, the President's Commission on Organized Crime issued a report prior to the passage of the MLCA titled *The Cash Connection*, which advocated for harsher AML laws to address drug dealers' attempts to launder cash proceeds.[296] Over the following decade, cash played an important role in courts' emphasis on fungibility as the primary rationale for eschewing a tracing requirement. As the Tenth Circuit explained in *Johnson*: "Once proceeds of unlawful activity have been deposited in a financial institution and have been credited to an account, those funds cannot be traced to any particular transaction and cannot be distinguished from any other funds deposited in the account."[297] The FBI has explained that "[c]ash transactions are particularly vulnerable to money laundering" because "[c]ash is anonymous, fungible, and portable; it bears no record of its source, owner, or legitimacy; it is used and held around the world; and is difficult to trace once spent."[298] Thus, the image of anonymous and indistinguishable dollar bills hangs over courts' reasoning.

However, new financial technologies are challenging these assumptions about fungibility. In particular, the development of the blockchain may allow for more accurate tracing of digital assets, which are not "fungible" in the same sense as cash. This Subpart will explore the potential of the blockchain and the risks created by cryptocurrency exchanges, both of which illustrate why courts' reliance on a strict no-tracing rule may be increasingly untenable.

At first glance, cryptocurrency and digital assets appear tailor-made for money laundering. As many noted with the rise of Bitcoin, part of cryptocurrency's appeal is its anonymity and distance from the federal

295. *See supra* Part II.

296. *See* PRESIDENT'S COMM'N ON ORGANIZED CRIME, *supra* note 33, at 58-61; *see also id.* at 7 ("Law enforcement agencies recognize that narcotics traffickers, who must conceal billions of dollars in cash from detection by the government, create by far the greatest demand for money laundering schemes.").

297. United States v. Johnson, 971 F.2d 562, 570 (10th Cir. 1992).

298. *Combating Money Laundering and Other Forms of Illicit Finance: Regulator and Law Enforcement Perspectives on Reform*: *Hearing Before the S. Comm. on Banking, Hous. & Urb. Affs.*, 115th Cong. 44 (2018) (statement of Steven M. D'Antuono, Section Chief, Crim. Investigative Div., FBI).

regulatory regime that applies to traditional financial assets.[299] Moreover, there are a variety of methods that both launderers and legal users employ to further conceal their funds using cryptocurrency.[300] Concealment is often achieved through the use of third-party "mixing" or "tumbling" services: The cryptocurrency owner transfers money to the mixing service, which then mixes or blends the currency with other users' cryptocurrencies and transfers the newly mixed currency, leaving no connection between the original and final funds.[301] This process is not itself illegal.[302] Similarly, launderers can utilize "privacy wallets" to obscure cryptocurrency transaction trails.[303]

On the other hand, as a digital asset, Bitcoin (like other cryptocurrencies) is *more* easily traceable than cash. Bitcoin has been described as "pseudonymous," because although it is a decentralized currency system and its users are only marked by de-identified public addresses, all Bitcoin transactions are recorded in the blockchain, a permanent, digital fixed ledger.[304] Thus, despite the initial belief that Bitcoin would be completely anonymous, in reality it presents a "gold mine" of information for investigators.[305] The *New York Times* has compared illegal financial maneuvers using Bitcoin to a robbery in which the

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299. *See Beyond the Silk Road: Potential Risks, Threats, and Promises of Virtual Currencies: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affs.*, 113th Cong. 65 (2013) (statement of Mythili Raman, Acting Assistant Att'y Gen., Crim. Div., U.S. Dep't of Just.), https://perma.cc/V2AC-FN7D ("Our experience has shown that some criminals have exploited virtual currency systems because of the ability of those systems to conduct transfers quickly, securely, and often with a perceived higher level of anonymity than that afforded by traditional financial services.").

300. *See* CYBER-DIGIT. TASK FORCE, U.S. DEP'T OF JUST., REPORT OF THE ATTORNEY GENERAL'S CYBER DIGITAL TASK FORCE: CRYPTOCURRENCY ENFORCEMENT FRAMEWORK 13-14, 19, 21 (2020), https://perma.cc/M3J7-F2PG (providing case studies of money-laundering activities using cryptocurrency).

301. *See* Mark Rasch, *Bitcoin Tumbling Leads to Multicount Indictment*, SEC. BOULEVARD (Feb. 27, 2020), https://perma.cc/BD38-V7FF.

302. Michael Santos, *Is Crypto Mixing Money Laundering*, PRISON PROFESSORS, https://perma.cc/U6DH-UHEY (archived Apr. 17, 2023); *see also* Usman W. Chohan, The Cryptocurrency Tumblers: Risks, Legality and Oversight 1-4 (Nov. 30, 2017) (unpublished manuscript), https://perma.cc/U7T6-UJ8G (arguing that cryptocurrency tumblers are not inherently illegal, and can help fulfill the desirable privacy functions of cryptocurrency, but pose a heightened risk of laundering or other violations).

303. Anna Irrera, *Criminals Getting Smarter in Use of Digital Currencies to Launder Money*, REUTERS (Dec. 9, 2020, 4:10 AM), https://perma.cc/585A-U2Z2 ("[P]rivacy wallets, of which there are several types, combine, mix and anonymise cryptocurrency transactions, making it complicated to follow a money trail.").

304. *See, e.g.*, *Is Bitcoin Traceable?*, CHAINALYSIS (Apr. 11, 2022), https://perma.cc/QHE8-Q5NH; Nicole Perlroth, Erin Griffith & Katie Benner, *Pipeline Investigation Upends Idea that Bitcoin Is Untraceable*, N.Y. TIMES (June 9, 2021), https://perma.cc/8WKY-SPQS; Madana Prathap, *Bitcoin Does Not Make Payments Anonymous—Just Really Hard to Trace*, BUS. INSIDER INDIA (Dec. 24, 2021, 12:16 AM IST), https://perma.cc/CM9X-QRSX.

305. *Is Bitcoin Anonymous?*, BITCOIN MAG. (Aug. 17, 2020), https://perma.cc/8H5C-MBAN.

"robber's getaway car"—the record of the transaction—is "permanently parked outside the bank, locked tight, money still inside," because transactions are publicly visible through the blockchain.[306] Thus, cryptocurrency presents a "paradox": Despite its anonymous characteristics, its "associated data create a forensic trail that can suddenly make [a user's] entire financial history public information" if those data are linked to a specific address.[307] Congress has also flagged the potential that the blockchain creates for AML regulation; in passing the AMLA, it instructed the Government Accountability Office to examine virtual currencies, assessing "to what extent immutability and *traceability* of virtual currencies can contribute to the *tracking and prosecution* of illicit funding."[308]

This paradox creates a unique opportunity for tracing commingled assets. Despite their perceived anonymity, cryptocurrencies are the "opposite of untraceable."[309] Investigators have recognized this potential for improved tracing. For example, in a civil case dealing with cryptocurrency theft, "because of the *pseudonymity* cryptocurrency transactions afford," the plaintiff did not know the identity of the thief.[310] However, the plaintiff hired a cryptocurrency consulting firm that traced the stolen assets through transactions across several major exchanges that maintained "know-your-customer information about [the defendant], including [his] name, date of birth, government identification, residence, business location, phone number, and email address."[311] Similarly, one forfeiture complaint provided detailed allegations connecting Bitcoin to cash-laundering transactions in violation of both § 1956 and § 1957, meticulously tracing these transactions.[312] In another case, prosecutors used the blockchain to connect online accounts with Bitcoin transactions and ultimately discovered a user committing § 1957 money laundering.[313] And in a related context, practitioners are warning their clients that the blockchain could have

306. Ali Watkins & Benjamin Weiser, *Inside the Bitcoin Laundering Case that Confounded the Internet*, N.Y. TIMES (Feb. 13, 2022), https://perma.cc/AE2X-TZLS.

307. John Bohannon, *Why Criminals Can't Hide Behind Bitcoin*, SCIENCE (Mar. 9, 2016), https://perma.cc/WY8E-BANN.

308. Anti-Money Laundering Act of 2020, Pub. L. No. 116-283, div. F, § 6505(c), 134 Stat. 3388, 4629-31 (2021) (emphasis added).

309. Andrew R. Chow, *'Crypto Is Anything but Private.' An Author Examines Crime on the Blockchain*, TIME (Dec. 8, 2022, 2:35 AM EST), https://perma.cc/V46R-UA4E (quoting *Wired* reporter Andy Greenberg).

310. Strivelli v. Doe, No. 22-2060, 2022 WL 1082638, at *1 (D.N.J. Apr. 11, 2022) (emphasis added).

311. *Id.*

312. *See* Complaint for Forfeiture at 13-15, United States v. Approximately 3879.16242937 Bitcoin, No. 21-cv-02103, 2022 WL 2128908 (S.D. Cal. Apr. 18, 2022), ECF No. 1.

313. *See* United States v. Kvashuk, 29 F.4th 1077, 1084 & n.5 (9th Cir. 2022).

transformative effects on the easy-to-defeat tracing requirement for claims under sections 11 and 12 of the Securities Act.[314]

Courts are also beginning to respond to the increased use of the blockchain for tracing, taking note of the differences between tracing digital assets and tracing cash. For example, the Eastern District of New York appended to its opinion in a § 1956 case the full written testimony of J. Christopher Giancarlo, then-Chairman of the Commodity Futures Trading Commission, at a hearing of the Senate Banking Committee.[315] Giancarlo defended cryptocurrency in part by extolling the benefits of the blockchain. He suggested that the blockchain could assist regulators in detecting financial manipulation, using a hypothetical scenario: "What a difference it would have made on the eve of the financial crisis in 2008 if regulators had access to the real-time trading ledgers of large Wall Street banks."[316]

In a forfeiture case, the U.S. District Court for the District of Columbia expressly detailed the differences between tracing cash and tracing cryptocurrency, describing the difficulties of tracing cash (which is anonymous, fungible, widely available, and able to be physically concealed without interacting with financial institutions) as standing "in stark contrast to cryptocurrency where *every* transaction is publicly documented from cradle to grave on the blockchain."[317] The court described the prosecution's successful tracing of the defendant's Bitcoin transactions as "yet another example that cryptocurrency—be it in hosted or unhosted wallets—is traceable *and* seizable."[318] It also noted that, "[i]ronically," despite the perceived privacy of cryptocurrency and the fact that it is specifically used by individuals on the dark web to conceal their transactions, "the public nature of the blockchain makes it exponentially easier to follow the flow of cryptocurrency over fiat funds."[319]

As these arguments indicate, cryptocurrency both maps onto the current cash regime and complicates it by posing new risks (the anonymity of the currency) and new tracing opportunities (including blockchain surveillance).

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314. *See* Bruce G. Vanyo & Jonathan Rotenberg, Katten Muchin Rosenman LLP, Blockchain Technology May Enable Tracing in Securities Act Litigation 2 (2018), https://perma.cc/M3V8-3MRW.

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

316. *Id.* app. c at 258.

317. *In re* Search of One Address in Wash., D.C., Under Rule 41, 512 F. Supp. 3d 23, 30 n.11 (D.D.C. 2021).

318. *Id.* at 25, 27, 30 n.11.

319. *See id.* at 26-27; *see also* Jacobo v. Doe, No. 22-cv-00672, 2022 WL 2079766, at *3 (E.D. Cal. June 9, 2022) (providing an example of a plaintiff using "blockchain analytics" to trace stolen assets).

However, the same issue of prosecutors adopting aggressive techniques to skirt strict tracing requirements may already be repeating itself in the cryptocurrency context. A controversial technique has emerged in cryptocurrency tracing: Investigators may seek to mark digital assets with a "taint" if they have been involved in an illegal transaction, even if they have since been used in legal transactions.[320] Moreover, in one decision, the U.S. District Court for the District of Columbia (after noting the traceability of cryptocurrency) held that all forms of cryptocurrency belonging to the target were forfeitable because "it was the pseudoanonymous *nature* of cryptocurrency—rather than the particular type used—that allowed for the commission and promotion of the crime."[321] Based on this reasoning, and echoing other courts' analyses under § 1956 and § 1957, the court held that "contraband" and "non-contraband" cryptocurrency were "intertwined."[322] In fact, the court likened its "refusal to divorce the 'tainted' from 'untainted'" funds to other legal contexts, such as property divisions and electronic media, but did not mention money laundering or trusts law.[323] Other courts have demanded tracing despite plaintiffs' assertions that the unique, emerging nature of Bitcoin as a decentralized, pseudonymous currency can make tracing difficult.[324] Given that the concerns cut both ways, accounting techniques like the proportionality approach would provide a workable middle road. The proportionality approach would allow courts to both demand a level of tracing from prosecutors—who can achieve this using the blockchain—and account for the practical difficulties created by cryptocurrency.

One indictment under § 1957 illustrates the potential applicability of the proportionality approach to cryptocurrency cases. In 2017, federal prosecutors brought § 1957 charges against Alexander Vinnik, the operator of BTC-e, a cryptocurrency exchange that encouraged anonymous and arguably illegal use.[325] The two counts under § 1957 were based on two discrete transactions of

320. Kai Sedgwick, Opinion, *There's No Such Thing as Tainted Bitcoins*, BITCOIN.COM: NEWS (Feb. 6, 2020), https://perma.cc/FS77-V7Z9; Rick Delafont, *Research Team Devises Spurious Way to Track "Tainted" Bitcoin*, NEWSBTC, https://perma.cc/Q8XX-SH3R (archived Apr. 17, 2023).

321. *In re Search of One Address*, 512 F. Supp. 3d at 30.

322. *Id.* (quoting United States v. Wernick, 148 F. Supp. 3d 271, 276 (E.D.N.Y. 2015), *aff'd*, 673 F. App'x 21 (2d Cir. 2016)).

323. *See id.*

324. *See, e.g.*, BMA LLC v. HDR Glob. Trading Ltd., No. 20-cv-03345, 2021 WL 949371, at *6 (N.D. Cal. Mar. 12, 2021) ("Even if, as plaintiffs argued at the hearing, the cryptocurrency market is uniquely opaque and may cater to greater levels of anonymity that make it harder to trace actions by price manipulators, they must allege more.").

325. *See* Superseding Indictment ¶¶ 1-2, 17, 32-34, United States v. BTC-e, No. CR 16-00227 (N.D. Cal. Jan. 17, 2017), https://perma.cc/MV5S-NPH7.

$17,040 and $11,200, which were made using a cryptocurrency exchange.[326] Under the proportionality approach, the prosecution would be required to prove, by applying the percentages from Vinnik's account as a whole, that the transfers consisted of more than $10,000 in illegal funds. This standard would likely be easy to meet here, as Vinnik's income was derived from his role as the operator of the illegal exchange.[327] This case further illustrates that the moment of conversion from cryptocurrency to fiat funds is critical in money-laundering investigations.[328] As defendants attempt to transfer money into a workable form, they will continue to utilize bank accounts and other financial tools—possibly commingled—rendering the proportionality approach applicable to these developing trends.

In sum, the traceability of cryptocurrency through the blockchain ledger directly contradicts the Tenth Circuit's reasoning in *United States v. Johnson* and its progeny that "[o]nce proceeds of unlawful activity have been deposited in a financial institution and have been credited to an account, those funds cannot be traced to any particular transaction and cannot be distinguished from any other funds deposited in the account."[329] As this Subpart illustrates, in the cryptocurrency context, investigators and courts can more precisely trace the path of transactions and the point at which dirty and clean funds intersect. This emerging issue provides further support for the adoption of a more nuanced tracing rule such as the proportionality approach.

Conclusion

This Note proposes a resolution to the ongoing circuit split over the scope of "monetary transaction[s] in criminally derived property" in 18 U.S.C. § 1957. In *Loe*, the Fifth Circuit proposed the proportionality approach but left "change

326. *See id.* at 17. This amount is in U.S. dollars converted from the value of Bitcoin at the time. *Id.*

327. *See id.* ¶¶ 54-56, 60.

328. *See id.* ¶ 56 (noting that the bitcoins were converted into fiat funds and stored in bank accounts based in Cyprus and Latvia); *see also* United States v. Guerrero, No. 21-136, 2022 WL 2079861, at *1-2 (E.D. Ky. June 9, 2022) (explaining that the defendant was charged with § 1956 money laundering after attempting to transfer drug proceeds into Bitcoin and wire transferring the funds through a cryptocurrency exchange). Regulators are attentive to the "on ramps" and "off ramps" between cryptocurrency and fiat funds as a point for detecting illegal behavior. *Demystifying Crypto: Digital Assets and the Role of Government: Hearing Before the Joint Econ. Comm.*, 117th Cong. 28 (2021) (statement of Timothy Massad, Rsch. Fellow, Harvard Kennedy Sch.) ("So as you go into the crypto market, or come out of crypto market and exchange [cryptocurrency] for dollars, that is good and I think FinCEN has done a pretty good job there.").

329. 971 F.2d 562, 570 (10th Cir. 1992).

to a case appropriately before the en banc court."[330] However, in the twenty years since *Loe* was decided, the court has not revisited the issue. Similarly, in *Ward*, the Eleventh Circuit suggested that a district court's "notion that the value of the proceeds is particularly significant to th[e] [tracing] analysis" may be "logically persuasive," but firmly rejected it because it was "without a legal basis."[331] And the Eastern District of New York has acknowledged the "intuitive appeal" of the proportionality approach.[332] Although courts have failed to adopt the proportionality approach, they have acknowledged the logic of applying accounting techniques to tracing under § 1957. The proportionality approach can create tracing rules that align § 1957 with its companion statutes § 1956 and § 981. This more nuanced approach to the language of § 1957 is better suited to the realities of how money laundering is carried out today.

330. United States v. Loe, 248 F.3d 449, 467 n.81 (5th Cir. 2001).

331. United States v. Ward, 197 F.3d 1076, 1082 (11th Cir. 1999) (making this statement in the context of § 1956).

332. United States v. Weisberg, No. 08-CR-347, 2011 WL 4345100, at *4 n.5 (E.D.N.Y. Sept. 15, 2011).